Neutral Citation Number: [2009] EWCA Civ 226
Case No: C5/2008/0942, 0942(A), 1378 and 1394

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
(AA/06912/2006 and AA/07062/2007)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/03/2009

Before :

LORD JUSTICE WARD
LORD JUSTICE RICHARDS
and
LORD JUSTICE JACKSON

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Between :

MH (Syria)	**Appellant**
- and -	
Secretary of State for the Home Department	**Respondent**
And between	
DS (Afghanistan)	**Respondent**
- and -	
Secretary of State for the Home Department	**Appellant**

- -
- -

Mark Muller QC and Edward Grieves (instructed by Trott & Gentry) for **MH**
Edward Grieves (instructed by **Trott & Gentry**) for **DS**
Neil Sheldon (instructed by **The Treasury Solicitor**) for the **Secretary of State**

Hearing dates : 15-16 December 2008

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Judgment

Lord Justice Richards :

1. These appeals were listed for hearing together because they both give rise to issues under Article 1F of the 1951 Convention relating to the Status of Refugees ("the Refugee Convention"). In terms of detailed analysis, however, the two cases have little in common, and it is convenient to deal with them sequentially.

MH (Syria)

2. MH is a 29 year old female Syrian Kurd who claimed asylum in the United Kingdom in March 2006. Her claim was refused by the Secretary of State and an appeal on asylum and human rights grounds was dismissed by an immigration judge in September 2006. Reconsideration was then ordered and it was found at the first stage of reconsideration that the first immigration judge had made a material error of law in relation to risk on return, in particular the immediate risk at the airport. At the second stage of reconsideration a panel consisting of Designated Immigration Judge Billingham and Immigration Judge Entwistle dismissed MH's asylum appeal, on the ground that she was excluded by Article 1F(c) from the scope of the Refugee Convention, but allowed her human rights appeal under Article 3 ECHR.

3. MH now appeals against the dismissal of her asylum appeal, whilst the Secretary of State cross-appeals against the decision to allow her human rights appeal.

The facts

4. The main facts, which were not in dispute, were set out at some length in the tribunal's decision. To summarise:

   i) MH was born on 1 March 1980 in Derik in Syria, into a Kurdish family. Her parents were stripped of their Syrian nationality and became stateless Kurds. The family suffered constant harassment from the Syrian authorities.

   ii) When MH was 12 years old, she travelled to meet Abdullah Ocalan in his camp in Lebanon, and returned home feeling much more patriotic and supportive of the PKK. In 1993 she attended a ceremony at which two of her cousins who had been killed as guerrillas were declared national heroes. It was then that she decided to join the PKK. On joining she was given the name "Jiyan" by the party. She remained in Derik, living not with her parents but with other Kurdish families. In late autumn 1993 she was elected to carry a banner in support of El-Assad and to march in front of the crowd. This was her first political act on behalf of the PKK. It resulted in her being beaten by the security forces and going into hiding. She was transferred after 10 days to a village near the border with Iraq, where she stayed for around one month.

   iii) She was then transferred in a group of about 50 people into Iraq. She volunteered to be armed, although until then she had not even touched a gun. They crossed the border into Iraq and were taken to a PKK camp, but she was taken on from there to a camp called Haftanin which was populated by Kurdish families who had fled Turkey. It was situated in the Perakh valley near a PKK training camp. She became a member of the refugee community

in the camp, and her duty was to resolve disputes between the refugees in the camp on behalf of the PKK.

iv) Towards the end of 1995, the Turkish army started conducting raids into Iraq, so a new camp was formed at Etrush, where she remained until 1999. The PKK decided she would not be a fighter but would contribute to the PKK in other ways. In 1996, she was given 3 months training in first aid and became an assistant nurse in a hospital in the camp.

v) In November 1997 she was one of a delegation taken to visit the PKK's camps in the mountains. The aim was to strengthen the links between her camp's residents and the PKK and to make them more informed about the guerrillas' situation. They went to the Qandil Mountains and then to Dola Koke, a training camp for guerrillas, where they visited the hospital. They then visited the Shehid Ayhan camp, staying there for a week, before moving on to the Shehid Harun camp. While at Shehid Harun, they became caught up in a clash between the PKK and the Turkish security forces. In attempting to get away MH stepped on a mine and was severely injured. She was eventually taken to Suleymaniye, where she had her leg amputated in a makeshift hospital. Altogether she spent 5 months in hospital. She was then transferred to a humanitarian organisation which fitted her with an artificial leg.

vi) After this she returned to her nursing duties, first at the Etrush camp and then at the Makhmoor camp. In 2000 and again in 2002 she had to have further operations on her leg.

vii) She said that after she lost her leg she also lost her will to struggle along with the PKK. In autumn 2000, when asked by PKK executives what she wished to do in the future, she said she wanted to get away from the political aspect. At her suggestion, which was accepted, she became a Kurdish language teacher to primary school children.

viii) In 2003 she sought permission to leave the PKK but this was refused. It was only in 2004 that she was allowed to leave the party, though remaining in the Makhmoor camp.

ix) In the meantime she had received news of her family. In February 2003 she heard that her sister, who had joined the PKK in 1997, had been killed in an avalanche in Iraq. She was also told that her father, who had remained in Syria, had been detained, and that her brother had left Syria to go to Lebanon, leaving only her mother at home.

x) Then, towards the end of 2005, one of her uncles visited her and said that the security forces in Syria continued to make enquiries about her and that they suspected she had joined the PKK. He said that her father was always being harassed because of his two PKK daughters and that her mother had been detained for questioning a number of times. MH considered that it was not safe to remain in the camp or to return to Syria; and, with her uncle's assistance, she made arrangements to travel to Istanbul and from there to the United Kingdom.

The tribunal's reasoning on the asylum appeal

5. Although some of the points are covered in greater detail earlier in its analysis, the tribunal's essential reasons for finding that MH came within Article 1F(c) are set out in para 31 of its decision:

> "… [W]e find that there are serious reasons for considering that the appellant has been guilty of acts contrary to the purposes and principles of the United Nations (Article 1(F)(c)). The appellant had voluntarily become a member of the PKK in 1993 and this is an organisation whose main aim is to set up an independent Kurdish state in southeast Turkey. The PKK is involved in illegal military operations and is proscribed by the UK as a terrorist group by Schedule 2 of the Terrorism Act 2000. The appellant left school when she was 12 years old but after meeting Abdullah Ocalan, she decided to join the PKK after attending a ceremony when two of her cousins who had been killed as guerrillas were declared as national heroes. Although the appellant was still young at the time, she was elected to carry a banner in a large demonstration in support of El-Assad who in turn was supported by the PKK. During this demonstration the appellant was beaten by security officers after which she had left with the PKK. The PKK wanted them to be armed and she volunteered for this. She passed over into Iraq at the beginning of 1994. The appellant had a duty of resolving disputes on behalf of the PKK and in 1996 after three months training in first aid, she became an assistant/nurse in the hospital in the camp. She found she was suitable for this particular duty as she was not afraid of handling injured people. The appellant then visited PKK camps in the mountains to make them more informed about the guerrillas' situation in the mountains. She visited a hospital there, which was particularly educational for her. We found that although the appellant did not have a high level role in the PKK, she was fully aware at the time of the activities of the PKK and from her SEF statement, there is no indication that she was unhappy about her role with the PKK and supporting it through her duties. It was during a visit to the Shehid Ayhan camp, that she got caught up in a clash between the Turkish security forces and the PKK after which she received severe injuries from a mine in November 1997. Until this point the appellant was a voluntary member of the PKK and had personal knowledge of their activities which involved illegal military operations and she supported their infrastructure for this by her nursing the wounded and other duties. The appellant did not ask to resign from the PKK until 2003. Although it had been decided in 1996 that she would not be a fighter she contributed to the PKK by other means. The burden of proof is on the respondent to show that there are serious reasons for considering that the appellant has been guilty of acts contrary to the purposes and

> principles of the United Nations and we find that by her involvement with the PKK, that she is therefore excluded by Article 1(F)(c) from benefiting from the 1951 Convention for refugees."

Article 1F of the Refugee Convention

6. Article 1F states:

> "The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
>
> (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
>
> (c) he has been guilty of acts contrary to the purposes and principles of the United Nations."

7. The treatment of those exclusion clauses was the subject of detailed consideration by the Immigration Appeal Tribunal in the starred decision of *Gurung (Exclusion – Risk – Maoist) Nepal* [2002] UKIAT 04870, in particular at paras 92 ff. One of the points made was that there was no accepted international definition of terrorism and that Article 1F was not to be equated with a simple anti-terrorism clause. Another point was that in many cases raising Article 1F an adjudicator (now an immigration judge) will be faced with evidence that an individual is a member of an organisation committed to armed struggle or the use of violence as a means to achieve its political goals: the PKK was cited as an example. The tribunal referred to the line of tribunal case-law to the effect that mere membership of such organisations is not enough, and it then highlighted two further principles.

8. One principle was that "it would be wrong to say that an appellant only came within the Exclusion Clauses if the evidence established that he has personally participated in acts contrary to the provisions of Art 1F" (para 105). The tribunal expressed agreement with the formulation in an UNHCR document that where there is sufficient proof that an asylum-seeker belongs to an extremist international terrorist group such as those involved in the 11 September attack, "voluntary membership could be presumed to amount to personal and knowing participation, or at least acquiescence amounting to complicity in the crimes in question". The tribunal observed that it was necessary, in order adequately to reflect the realities of modern-day terrorism, that complicity in this type of case should be sufficient to bring an appellant within the exclusions: the terrorist acts of key operatives are often possible only by virtue of the infrastructure of support provided by other members who themselves undertake no violent actions.

9. The second principle was that "whilst complicity may arise indirectly, it remains essential in all cases to establish that the appellant has been a voluntary member of such an organisation who fully understands its aims, methods and activities, including any plans it has made to carry out acts contrary to Art 1F" (para 108). By way of illustration, the tribunal drew a contrast between the provision of a safe house for LTTE combatants and the transporting of explosives for them in circumstances where it must have been known what they were to be used for.

10. The tribunal further observed that "international criminal law and international humanitarian law, which in our view should be the principal sources of reference in dealing with such issues as complicity, adopt similar although more detailed criteria in respect of those who for the purpose of facilitating an international crime aid, abet or otherwise assist in its commission or its attempted commission, including providing the means for its commission" (para 109). It went on to state, however, that even when complicity is established, the assessment under Article 1F must take into account not only the evidence about the status and level of the person in the organisation and factors such as duress and self-defence against superior orders as well as the availability of a moral choice; it must also encompass evidence about the nature of the organisation and the nature of the society in which it operates.

11. The tribunal also thought it useful to think of cases along a continuum. At one end it postulated an organisation which had very significant support amongst the population and had developed political aims and objectives covering political, social, economic and cultural issues, and with long-term aims embracing a parliamentary, democratic mode of government and safeguarding of basic human rights, but which had in a limited way or for a limited period created an armed struggle wing in response to atrocities committed by a dictatorial government. In such a case "an adjudicator should be extremely slow to conclude that an appellant's mere membership of such an organisation raises any real issue under Art 1F, unless there is evidence that the armed actions of this organisation are not in fact proportionate acts which qualify as 'non-political crimes' within Art 1F(b) and, if they are not, that he has played a leading or actively facilitative role in the commission of acts or crimes undertaken by the armed struggle wing" (para 112). At the other end of the continuum it postulated an organisation which had little or no political agenda or which had increasingly come to focus on terrorism as a modus operandi; whose recruitment policy, structure and strategy had become almost entirely devoted to the execution of terrorist acts which were seen as a way of winning the war against the enemy, even if the chosen targets were primarily civilian; and which promoted a type of government that was authoritarian in character and abhorred the identification of certain fundamental human rights. In such a case, "any individual who has knowingly joined such an organisation will have difficulty in establishing he or she is not complicit in the acts of such an organisation" (para 113).

12. In para 114 the tribunal referred to guidance given in Canadian cases, in particular *Ramirez v Canada* [1992] FC 306. What the tribunal said about the effect of *Ramirez* has since been qualified in the decision of a tribunal presided over by Hodge J (Appeal no. AS/00192/2007, unreported decision promulgated on 28 July 2008). But this issue was not ventilated before us and it is unnecessary to go into it for the purposes of the present case.

13. Since *Gurung* there has also been specific legislative provision relating to Article 1F(c). Section 54 of the Immigration, Asylum and Nationality Act 2006 provides:

> "54.(1) In the construction and application of Article 1(F)(c) of the Refugee Convention the reference to acts contrary to the purposes and principles of the United Nations shall be taken as including, in particular –
>
> (a) acts of committing, preparing or instigating terrorism (whether or not the acts amount to an actual or inchoate offence), and
>
> (b) acts of encouraging or inducing others to commit, prepare or instigate terrorism (whether or not the acts amount to an actual or inchoate offence).
>
> (2) In this section –
>
> …
>
> 'terrorism' has the meaning given by section 1 of the Terrorism Act 2000 …."

14. As to the meaning of "terrorism" in s.1 of the Terrorism Act 2000, it is sufficient to quote subsections (1) and (2) of that section, which by subsection (4) relate to actions and effects outside as well as within the United Kingdom:

> "1.(1) In this Act 'terrorism' means the use or threat of action where –
>
> (a) the action falls within subsection (2),
> (b) the use or threat is designed to influence the government or to intimidate the public or a section of the public, and
> (c) the use or threat is made for the purpose of advancing a political, religious or ideological cause.
>
> (2) Action falls within this subsection if it –
>
> (a) involves serious violence against a person,
> (b) involves serious damage to property,
> (c) endangers a person's life, other than that of the person committing the action,
> (d) creates a serious risk to the health or safety of the public or a section of the public, or
> (e) is designed seriously to interfere with or seriously to disrupt an electronic system."

15. The enactment of s.54 of the Immigration, Asylum and Nationality Act 2006 coincided with the introduction, by s.1 of the Terrorism Act 2006, of the offence of encouragement of terrorism. In summary, and so far as material, s.1 applies by subs.(1) to a statement that is likely to be understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement or other

inducement to them to the commission, preparation or instigation of acts of terrorism. By subs.(2), a person commits an offence if (a) he publishes a statement to which the section applies or causes another to publish such a statement, and (b) at the time he publishes it or causes it to be published he (i) intends members of the public to be directly or indirectly encouraged or otherwise induced by the statement to commit, prepare or instigate acts of terrorism, or (ii) is reckless as to whether members of the public will be directly or indirectly encouraged or otherwise induced by the statement to commit, prepare or instigate such acts.

16. Finally, it is relevant to note that ss.11 and 12 of the Terrorism Act 2000 introduced offences relating to membership of, and support for, a "proscribed organisation" as defined in s.3 of the Act. The PKK was on the list of organisations so proscribed.

The case for MS on Article 1F(c)

17. Mr Mark Muller QC submitted on behalf of MH that the issues in the appeal were (i) whether the tribunal erred in ruling that the provision of humanitarian nursing assistance to members of a liberation movement involved in an armed conflict constituted a criminal/terrorist excludable act for the purposes of Article 1F(c); (ii) whether the tribunal erred in ruling that such assistance (whether per se or given in support of a proscribed organisation) was sufficiently grave to constitute such an excludable act; (iii) whether the tribunal failed to apply ordinary criminal and humanitarian law principles concerning complicity when assessing MH's acts for the purposes of Article 1F(c), in particular (a) by improperly placing too much reliance on proscription and failing sufficiently to consider the nature of the PKK as an organisation, and (b) by failing to consider the materiality of issues of minority, lack of status, duress of circumstances, defence of another and the non-proscription of the PKK at the material time when assessing MH's complicity.

18. In relation to issues (i) and (ii), Mr Muller submitted that the tribunal's finding against MH was based on her activities as a nurse but that such activities could not engage the exclusion under Article 1F(c). He referred to the 1949 Geneva Conventions and a range of other materials to show the non-combatant status and special protection afforded to medical personnel under international humanitarian law: see, for example, Articles 24 and 28 of the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, of 12 August 1949; Article 16 of the Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977; and Article 10 of the Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977. He submitted that this special status and protection applied in the context of internal armed conflict as well as international armed conflict. It followed that nursing could not be criminalised or treated as an act of terrorism or as supporting terrorism; alternatively, the humanitarian nature of the activity meant that it fell below the threshold of gravity required by Article 1F(c).

19. In relation to issue (iii), Mr Muller's general submission was that in order to be guilty of terrorist acts falling within Article 1F(c) a person must be shown to have participated in such acts either as a principal or as a secondary party on the normal principles of criminal law (i.e. aiding and abetting, with the requisite intention and knowledge). There was no suggestion in this case that MH had participated as a

principal, so the question was whether secondary liability could be ascribed to her. The fact that she was a member of a proscribed organisation, the PKK, could not be sufficient for that purpose (and in any event the PKK was proscribed only in 2000). Nor could anything that she had done while a member of the PKK provide a basis for a finding of participation as a secondary party in acts of terrorism.

20. As to the application of s.54 of the Immigration, Asylum and Nationality Act 2006, Mr Muller's submissions ranged from the proposition that the section did not apply at all, because it post-dated MH's involvement in the PKK, to submissions that nothing done by MH was capable of bringing her within the section. He also submitted that s.54 was to be interpreted in the light of the offence of encouragement of terrorism contained in s.1 of the Terrorism Act 2006. A further submission was that Article 1F, as part of an international instrument, has an autonomous meaning, though it was conceded that any difference between the definition of terrorism incorporated in s.54 and the internationally accepted meanings of terrorism relevant to the interpretation of Article 1F was not material for present purposes.

21. More specific submissions in relation to issue (iii) were that the tribunal (a) placed undue reliance on the fact that the PKK had been proscribed, and did not give adequate consideration to the nature of the organisation, the society in which it operated and the type of conflict in which it was engaged, so as to assess where it fell on the continuum described in *Gurung*; and (b) failed to give proper consideration to whether, having regard to MH's age at the time, her cultural background and her individual circumstances, she was able to make a sufficiently informed decision to join the PKK, so that she could properly be regarded as "a voluntary member of [the] organisation who fully understands its aims, methods and activities, including any plans it has made to carry out acts contrary to Art 1F" (*Gurung*, para 108).

22. Mr Muller's position was that the tribunal's errors should not lead to the case being remitted to the tribunal for a fresh determination on the application of Article 1F(c): this court could and should conclude on the material before it that Article 1F(c) was not engaged. Remittal was put forward by Mr Muller only as a fall-back position.

The case for the Secretary of State on Article 1F(c)

23. For the Secretary of State, Mr Neil Sheldon accepted that the tribunal had erred in relation to issue (iii)(b), in that the finding that MH "had voluntarily become a member of the PKK in 1993" did not deal adequately with the question whether she knew what she was getting into. There was nothing to show that the tribunal understood that this point was being relied on, but it had arguably been raised in the written submissions. Mr Sheldon referred *inter alia* to a UNHCR advisory opinion dated 12 September 2005 as showing the need for great care in undertaking an exclusion analysis regarding the acts of children. He submitted that the required assessment was one of fact for the tribunal and it was not possible for this court to say that only one conclusion could reasonably be reached on it. The case therefore needed to be remitted to the tribunal for the required assessment to be made.

24. In relation to the generality of the case advanced on behalf of MH, however, Mr Sheldon submitted that there was no error in the tribunal's reasoning. The tribunal followed the approach in *Gurung* and considered where on the continuum this case fell. As regards the PKK, the tribunal did not rely simply on the fact that the PKK

was an illegal organisation but took into account its involvement in acts of terrorism. The fact of proscription was a relevant consideration: in the absence of any suggestion that there had been a material shift in the PKK's activities since the 1990s, the proscription of the PKK in 2000 shed light on the nature of the organisation. Further, the tribunal did not approach the matter on the basis that MH's membership of a proscribed organisation led automatically to her exclusion under Article 1F (nor was this the Secretary of State's case). The tribunal looked beyond mere membership, taking into account all the activities engaged in by MH during the period of her membership, nursing being just one of those activities.

25. As to Mr Muller's contention that the tribunal failed to take into account the special status and protection afforded to nursing under international humanitarian law, Mr Sheldon submitted that the point was not raised in any significant way in argument before the tribunal and the relevant materials were not drawn to the tribunal's attention. The point was not obvious in the *Robinson* sense (*R v Secretary of State for the Home Department, ex p. Robinson* [1998] QB 929), such that the tribunal ought to have taken the point for itself. It was therefore not open to MH to rely on the point in this court. It would, however, be possible for MH to raise it on a remittal provided that proper notice was given.

26. As to Mr Muller's contention that it was necessary to establish participation in terrorist acts either as a principal or on the basis of secondary liability, Mr Sheldon submitted that it was clear from *Gurung* that criminal complicity was not required. The tribunal in *Gurung* specifically rejected the notion that personal participation in acts contrary to the provisions of Article 1F was necessary. It recognised that acts of terrorism depend upon a support network and that the provision of support was capable of bringing a person within the exclusion, and indeed that mere membership might be sufficient in the case of an extremist terrorist organisation at the far end of the continuum: thus everything depends on the activities of the individual set against the activities of the organisation. Mr Sheldon also referred to the language of UNSCR 1373 of 28 September 2001 and other Security Council resolutions as indicating a broader approach than one dependent on the establishment of participation on the basis of principles of criminal liability. He relied too on the language of s.54(1)(b) of the Immigration, Asylum and Nationality Act 2006 as supporting such an approach.

27. On that basis it was submitted for the Secretary of State that, subject to the error conceded in relation to issue (iii)(b), the tribunal approached the matter correctly; and, whilst there might be room for argument about where the PKK fell on the continuum or as to the seriousness of MH's activities, those matters fell for assessment by the tribunal and this court should not interfere with the tribunal's conclusion in the absence of error of law or perversity.

Article 1F(c): discussion and conclusion

28. The question under Article 1F(c) is whether there are serious reasons for considering that the person claiming asylum has been guilty of acts contrary to the purposes and principles of the United Nations. Neither party has disputed, at least directly, that in answering that question a tribunal should follow the guidance given in *Gurung*.

29. In addition to that guidance, however, regard must now be had to s.54 of the Immigration, Asylum and Nationality Act 2006, whereby the reference in Article 1F(c) to acts contrary to the purposes and principles of the United Nations shall be taken to include, in particular, the acts specified in the section. Two points concerning s.54 should be noted, though neither of them affects the present case. First, the section is not an exhaustive statement of acts capable of falling within Article 1F(c). Secondly, it incorporates by reference a definition of "terrorism" (as contained in s.1 of the Terrorism Act 2000) which may need to be read down so as to bring it in line with article 12(2)(c) of Council Directive 2004/83/EC on minimum standards relating to the qualification, status and protection of refugees: see *Yasser Al-Sirri v Secretary of State for the Home Department* [2009] EWCA Civ 222, paras 16, 28-32.

30. I do not accept Mr Muller's argument that principles of criminal liability are to be applied for the purpose of determining whether a person is guilty of acts falling within Article 1F(c), so that he or she must be shown to have participated in those acts either as a principal or on the basis of secondary liability in criminal law. *Gurung* shows that to be too narrow an approach. The tribunal said in that case that international criminal law and international humanitarian law should be the principal sources of reference when dealing with such issues as complicity, but it plainly regarded the assessment as going wider than a determination of criminal liability. For example, what was said about complicity arising out of membership of a terrorist organisation, or out of the provision of support by members, went beyond the criminal law of aiding and abetting. Further, s.54 itself provides that Article 1F(c) is to be taken as including acts of committing terrorism, and acts of encouraging or inducing others to commit terrorism, *whether or not* the acts amount to an actual or inchoate offence. In other words, the acts do not have to be crimes; and if that is so, there is no evident reason why the determination of a person's responsibility for them should be dependent upon principles of criminal liability. See also *Yasser Al-Sirri v Secretary of State for the Home Department* (cited above) at paras 33-35, where it is held that Article 1F does not import the criminal standard of proof. Similarly, I see no reason for interpreting s.54 in the light of the offence of encouragement of terrorism contained in s.1 of the Terrorism Act 2006 or as if it formed part of a criminal statute.

31. It is not in dispute that nurses and other medical personnel enjoy a special status and protection under international humanitarian law. In my view that does not take them automatically outside the scope of the exclusion in Article 1F(c): for example, a medically qualified member of a terrorist organisation who treated an injured suicide bomber with the intention that he or she should carry out a further bombing mission would have grave difficulty in resisting the application of the exclusion. The point is plainly relevant, however, to an assessment of whether the exclusion applies. In the ordinary course I would not expect the provision of medical or nursing services to bring a person within Article 1F(c) on the basis that they form part of the infrastructure of support for a terrorist organisation; but in each case the point will have to be taken into account with other relevant factors in reaching an overall assessment as to the application of Article 1F(c).

32. That is all I propose to say about the general submissions advanced by Mr Muller, which in my opinion pitched the case for MH too high and went substantially further

than was necessary for success in her appeal. I turn to consider the actual decision of the tribunal in the present case.

33. The tribunal referred to the guidance in *Gurung* but made no reference to s.54, which was not drawn to its attention by the parties. I doubt whether the failure to refer to the statutory provision can be said in those circumstances to have been an error of law, but for the reasons given below it is unnecessary to decide the issue.

34. The tribunal had no regard to the special position of nursing in international humanitarian law. Again, however, the point was not drawn to its attention (beyond the briefest of references which was in my view insufficient for the purpose) and the relevant materials were not cited. Here, too, I doubt whether the failure to take the point into account can be said to have been an error of law, but it is unnecessary to decide the issue.

35. The tribunal erred in law, as is accepted by the Secretary of State, in failing to deal sufficiently with the question of "voluntary" membership of the PKK.

36. More fundamentally, however, I am satisfied that the ultimate conclusion reached by the tribunal was simply unreasonable on the facts. In my judgment, the evidence could not reasonably be said to disclose serious reasons for considering that MH had been guilty of acts contrary to the purposes and principles of the United Nations. This case falls well short of engaging Article 1F(c). In reaching that view, I have had particular regard to the following considerations:

    i) MH became a member of the PKK when she was only 13 years old, and everything that happened up to the time when she lost her leg took place during the years of her minority. Her youth is a highly relevant consideration even though it is not possible, in the absence of adequate factual investigation by the tribunal, to reach a conclusion on the question whether she acted "voluntarily".

    ii) Although the nature of the PKK was not investigated in detail by the tribunal, beyond its being proscribed in 2000 and having been involved in illegal military operations and acts of terrorism, there was no suggestion that it fell at the extreme end of the continuum where mere membership may be sufficient to establish complicity in the acts of an organisation.

    iii) What MH actually did for the PKK was relatively minor in nature. She carried a banner at a demonstration while still in Syria. She carried a gun when being taken from Syria to Iraq. She lived and worked in a refugee camp. At first her duty was to resolve disputes between the refugees in the camp. She was then given training in first aid and became an assistant nurse, still at the refugee camp, albeit some of those treated were injured combatants. This was the role she was performing when she was included in a group taken on an information visit to the PKK's camps in the mountains. It was during that visit, as a non-combatant, that she received the injury that resulted in the amputation of her leg. After that her support for the PKK waned, even though it was not for some years that she asked to resign and it was later still that she was allowed to give up her membership. In the meantime, when sufficiently recovered, she became a language teacher to primary school children at the refugee camp to

> which she had moved. I should also note, since the tribunal appears to have attached weight to it, that she used to wear military fatigues when she was in the camps.

37. In my view those matters do not add up to a sufficient case to bring MH within Article 1F(c), even if one leaves out of account, as the tribunal did, the effect of s.54 and the special position of nurses under international humanitarian law.

38. If s.54 is taken into account, it serves only to confirm that view. I think it clear that MH's membership of the PKK and what she did while a member of the PKK did not amount to (a) acts of committing, preparing or instigating terrorism, or (b) acts of encouraging or inducing others to commit, prepare or instigate terrorism, and that they were insufficient to make her responsible for the commission of such acts by others.

39. My view is reinforced if regard is had to the special position of nursing under international humanitarian law. MH's role as an assistant nurse in the refugee camp is in one sense the most significant of her activities, since it included the care of injured guerrillas; but it seems to me that the humanitarian nature of the work she was doing, and the context in which she was doing it, weigh against rather than in favour of a finding of complicity in the terrorist acts of the PKK.

40. By reaching a conclusion on the application of Article 1F(c) that was not reasonably open to it, the tribunal erred materially in law. That error, taken by itself, is sufficient for success in MH's appeal against the tribunal's dismissal of her asylum appeal. It is therefore unnecessary to decide whether the failure to have regard to s.54 or to the special position of nursing also amounted to material errors of law.

41. Before considering further what order should follow from my conclusion in relation to Article 1F(c), I shall examine the Secretary of State's cross-appeal in respect of Article 3 ECHR.

The Secretary of State's cross-appeal: Article 3 ECHR

42. Having found MH to be excluded by Article 1F(c) from the possibility of protection under the Refugee Convention, the tribunal went on to consider the human rights appeal, finding that MH's removal to Syria would be in breach of Article 3 ECHR. Its reasons related to the period after she had left Syria for Iraq:

> "32. … However we are concerned that the authorities in Syria would know about her activities with the PKK in Iraq. The appellant was visited in Iraq by businessman [*sic*] and her uncle from Syria. She heard about her father being detained, her brother fleeing to Lebanon and her mother interrogated by the authorities over the activities of her and her sister. The appellant's sister was treated as a martyr after she was killed and it is likely that the Syrian authorities would have known about the activities of the appellant and her sister being active supporters of the PKK in Iraq. Dr George referred to the Syrian intelligence records.

33. If the appellant were returned to Syria, she would undoubtedly be interrogated as a failed asylum seeker because she had been out of the country for at least 13 years and did not have any form of identity. Also the appellant having lost a leg will be questioned about how this occurred and what she had been doing in Iraq for all this time. Although there are now around 300,000 Kurds who are not entitled to Syrian nationality and are effectively stateless like the appellant and that there have been recent moves to grant citizenship to them, this has not yet occurred …. Although the case of *AR* [2006] UKAIT 00048 CG concludes that the deprivations experienced by Syrian Kurds are not such as to amount to persecution or breach of their human rights if returned to Syria and that a Syrian Kurd with no political history does not face a risk of persecution or breach of his human rights on return, we find in this case that the appellant does have a political history which is likely to be known to the Syrian authorities on her return. Although the appellant's activities in supporting the PKK were outside Syria in Iraq, we find the Syrian authorities would be concerned about this support for the PKK and she would suffer ill treatment and persecution by the state authorities for which she would be unable to obtain protection from those authorities. The appellant would be seen as being part of an organisation that was in opposition to the government in Syria because of her particular activities, which they are aware took place in Iraq. Although it is only hearsay evidence, [Ms] Akay confirmed that the appellant's mother complained of being harassed by the authorities and that her father was still in detention and her brother in Lebanon due to the activities of the appellant and her sister with the PKK. The appellant would only be issued with a one way emergency travel document which would increase her likelihood of being interrogated by the security services on return. There is an effective computer database system in place which would recall whether or not the appellant was being looked for in Syria and whether she left Syria illegally or not. The appellant will have her travel document checked against the computer records and as all returned asylum seekers are interrogated, her profile will be checked. Besides an amputated leg, the appellant has shrapnel injuries to her head which if investigated could be a further embarrassment to her. The appellant was also unmarried. Her injuries were consistent with being involved in a military operation and suffering injuries as a result of a landmine. The appellant could well be charged and sentenced for illegally exiting Syria. The USSD–HR Report 2005, refers to numerous cases of security forces torturing prisoners and that torture of political detainees was common …. There is a real risk that the appellant would be tortured during her interrogation and she faces a real risk [of] inhuman and degrading treatment, persecuted treatment or serious harm."

43. Mr Sheldon submitted that that assessment was wholly inadequate and that the conclusion was perverse. The issue of determinative importance was whether MH would have a political profile in Syria since, as the tribunal acknowledged, it was found in the country guidance case of *AR Syria* [2006] UKAIT 00048 that a Syrian Kurd with no political history did not face a risk of persecution or breach of his human rights on return to Syria. The only evidence of MH having such a profile was (i) what she was told by Syrian Kurdish businessmen who came to the camp in 2003 and said that her father had been detained and that her brother had gone to Lebanon because it was no longer safe for him in Syria; (ii) what she was told by an uncle who came to the camp towards the end of 2005 and said that the security forces in Syria continued to make enquiries about her and suspected her of having joined the PKK, that when her father was detained he was ordered to hand in his two PKK daughters, and that her mother had also been detained for questioning a number of times; and (iii) the evidence of Ms Akay that she had visited MH's uncle and mother in May 2007 and had been told that MH's father was in detention, her brother had left for Lebanon for his own safety, and her mother had been harassed from time to time and had been questioned by the security forces a number of times. All this was hearsay evidence which the tribunal accepted uncritically and without addressing the submissions made on behalf of the Secretary of State.

44. The submissions which the tribunal is said to have failed to address were summarised at length in an earlier part of the tribunal's determination. They included a submission that the PKK profile of MH's family was not as extensive as she claimed and that the Syrian authorities were not aware of it: her mother and uncle continued to live in Syria in the same accommodation; the detention of her father had occurred a long time after she had left, and it might be that other members of the family were detained because of the father and not because of MH's activities; the authorities were not necessarily aware of the death of her sister or of any link to MH, since the sister had a different surname and MH had not had contact with her for some time; and the rest of her family, apart from her sister and uncle, were sympathisers rather than members of the PKK. It was pointed out that MH's early activities for the PKK in Syria were in a different name and a long time ago, she had joined the PKK at a young age in a non-combatant role and had tried to leave the PKK, and she was at a low level in the organisation. She had not been politically active in Syria since 1993, and the only evidence of her opposing the government was a small bit of television coverage in March 2007 when part of a speech made by her at a demonstration outside the Syrian Embassy was shown on a Kurdish television channel (but she was using a different name and there was nothing to link it with her). The authorities were not aware of her profile outside Syria, which was at a low level and far away. It was also submitted that she would not be on the computer database system in Syria.

45. Mr Sheldon also suggested that, since certain of Dr George's views had been described in *AR Syria* as speculative, the tribunal was wrong to accept his evidence without more detailed analysis. All this was based, however, on a brief summary of *AR Syria* in a Home Office operational guidance note rather than on an examination of the decision in *AR Syria* itself.

46. In my judgment, there was no error of law in the tribunal's decision in respect of Article 3. Although the evidence concerning the problems encountered by MH's family and the interest of the Syrian authorities in MH herself was hearsay, some of it

double hearsay, the tribunal was entitled to accept it and to place weight on it. The tribunal did so after hearing oral evidence from MH herself and from Ms Akay about the circumstances in which the information was received as well as the content of the information. The evidence provided a sustainable basis for the finding that the Syrian authorities knew of MH's political profile; and that finding, taken with the further findings as to the questioning that MH would be liable to face on return, especially in the light of her physical injuries, provided an equally sustainable basis for the conclusion that she would be at risk of treatment contrary to Article 3. The conclusion was supported by the expert evidence of Dr George, on which the tribunal was also entitled to place weight notwithstanding that certain of his views had been described as speculative in an earlier case. The tribunal's reasoning could no doubt have been better expressed, but it was adequate to show why the tribunal decided the case as it did. It is clear from the decision as a whole that the tribunal took into account the submissions made on behalf of the Secretary of State. There was nothing in those submissions that required further and more specific reasoning than that given by the tribunal. It may be surprising that MH's low level involvement in the PKK could give rise to such interest on the part of the Syrian authorities and expose her to such a risk on return, but the tribunal's conclusion to that effect cannot in my view be said to have been perverse. Thus I see no basis for interfering with the tribunal's decision on Article 3 and I would dismiss the Secretary of State's cross-appeal in relation to it.

Conclusions on MH (Syria)

47. For the reasons given, I would allow MH's appeal against the tribunal's decision that she was excluded from the Refugee Convention by Article 1F(c) and would dismiss the Secretary of State's appeal against the tribunal's decision on Article 3 ECHR.

48. If the case were remitted to the tribunal for substantive consideration of MH's asylum appeal in accordance with this judgment and on the basis of the findings of fact previously made, I am inclined to the view that the only result reasonably open to the tribunal would be to allow the asylum appeal. If that is right, then the sensible course would be for this court, having quashed the tribunal's decision in respect of MH's asylum appeal, to exercise its power under s.103B(4)(b) of the Nationality, Immigration and Asylum Act 2002 to substitute a decision allowing that asylum appeal. The parties should, however, be given the opportunity to make further submissions as to the appropriate form of order.

DS (Afghanistan)

49. DS is a 47 year old national of Afghanistan who claimed asylum on arrival in the United Kingdom in October 2002. His claim was refused by the Secretary of State. The refusal letter stated that there were serious reasons for considering that DS had committed a crime against peace, a war crime, or a crime against humanity, within Article 1F(a) of the Refugee Convention, on which basis the Secretary of State certified under s.55 of the Immigration, Asylum and Nationality Act 2006 that he was not entitled to the protection of the convention. For the same reasons the letter stated that he was ineligible for humanitarian protection under paras 339C-339D of the Immigration Rules. The letter also gave reasons why he would not in any event meet the threshold for a successful claim to asylum or to humanitarian protection. Finally, it stated that his removal would not be in breach of article 3 or article 8 ECHR.

50. On 29 May 2007 the Secretary of State notified DS of the decision to remove him from the United Kingdom. DS appealed that decision to the AIT. In a determination dated 16 November 2007, Immigration Judge Astle found that DS was not excluded by Article 1F from the protection of the Refugee Convention and that there was a real risk that DS would face persecution and treatment contrary to article 3 ECHR upon return to Afghanistan. She therefore allowed the appeal.

51. The Secretary of State sought and obtained an order for reconsideration. In a determination dated 25 April 2008, however, Senior Immigration Judge Martin held on the reconsideration that there was no material error of law in the first immigration judge's decision and that her decision should therefore stand.

52. The Secretary of State now appeals against the decision reached on the reconsideration.

The facts

53. There was no material dispute about DS's account of his life in Afghanistan, the main features of which were as follows:

    i) He was an ethnic Tajik, born in the Panjsher district of Parwan Province. The family moved to Kabul to escape the fighting between the Mujahideen and the communist government forces, and he graduated there in 1983.

    ii) After his graduation he was recruited into the Intelligence Service (KhAD) and began to work in the Panjsher district. At this time there was a truce between the Soviet troops and the Mujahideen. Three months later he was sent to Uzbekistan, then part of the Soviet Union, to attend an intelligence course. He returned in 1984. The fighting had started again while he was away, and the Soviet and government troops were taking the region back from the Mujahideen for a second time.

    iii) He was posted to the central headquarters of the Intelligence Service of Panjsher district, where he headed a team of three men responsible for the appointment of agents and the analysis of their reports. Towards the end of 1985 he became Deputy Director for Panjsher district, and in 1986 he was appointed Director.

    iv) In 1987 he was appointed Deputy Director of the Intelligence Service of Parwan province.

    v) In 1988 he became Director of Operations of the South Salang Intelligence Service. He said that this was an important region because it had tunnels and smuggling through them was common. He was responsible for searching vehicles coming through the tunnels. Sixty agents worked under his command. There was severe fighting around the area, and only the tunnels and roads were controlled by the government and the Soviet forces: other parts were in the hands of the Mujahideen.

    vi) In November or December 1988 he was transferred to Kabul and was assigned to the Technical Services Department of the Intelligence Service, effectively a

transfer from operational to administrative duties. Until 1990 he held the top position in that office. He was then appointed head of the Vazir Abad depot in Kabul, which was responsible for the distribution to the Afghan army of Russian weaponry coming secretly into the country. In 1992 he was promoted to the rank of colonel. In April 1992 the communist regime fell and he surrendered his barracks.

vii) In 1994 DS was arrested in connection with his alleged involvement in a failed coup attempt. He was interrogated and beaten while in detention, but his release was secured by a Mujahideen commander who was a friend of his brother. He escaped to Mazar-e Sharif and lived safely, keeping a low profile, until 2001.

viii) The reason why DS claimed to be at risk in Afghanistan arose out of events while he was in charge of the Intelligence Service of Panjsher district in the 1980s. A number of families had been forcibly repatriated there from Kabul and one of them, the family of Amir Muhammad, was abducted and killed en route. In 2001 General Ikramadin, a nephew of Amir Muhammad, was a senior commander and very close associate of General Fahim, the Commander General of the Northern Alliance. DS said that he had previously received direct threats from General Ikramadin but that he was specifically targeted on this account when the troops of the Northern Alliance entered Mazar-e Sharif in November 2001. He left the town and went to Pakistan, returning briefly to Afghanistan for arrangements to be made for him to get to the United Kingdom.

The first immigration judge's decision

54. The focus of the case before the first immigration judge was on the Secretary of State's certificate that Article 1F(a) applied by reason of DS's involvement in KhAD. The evidence relevant to that issue included a number of reports: (i) a report entitled "Afghanistan – Security Services in Communist Afghanistan (1978-1992)", published in 2001 by the Council of the European Union and referred to as "the Netherlands report" because it was the report of the Netherlands delegation; (ii) a War Crimes Unit report dated 16 March 2006 which used the Netherlands report as its main source and made the recommendation on which the Secretary of State's decision was based; (iii) an expert report dated 16 September 2007 by Dr Antonio Giustozzi which was submitted on behalf of DS; (iv) a commentary by the War Crimes Unit on Dr Giustozzi's report; (v) a letter by Dr Giustozzi replying to that commentary; and (vi) a Country of Origin Information Report on Afghanistan, dated September 2007, which referred in turn to various other sources.

55. The material itself is lengthy, as indeed is the immigration judge's summary of it. But the flavour of it is given succinctly in Mr Sheldon's skeleton argument:

> "From the IJ's summary of the various reports it is clear that it was common ground between the various sources of objective evidence that:
>
> (i) KhAD committed human rights violations on a large scale (the Netherlands report estimated that of the estimated

> 200,000 citizens arrested by KhAD, 50,000 died as a result of torture …, whereas Dr Giustozzi refers to 37,000 having been killed by KhAD in 1985 dropping to 12,000 in 1986 …);
>
> (ii) there was no doubt that recourse to torture by KhAD was extensive (particularly in the early 1980s); and
>
> (iii) DS would have provided information which led to the killing or arresting of opposition members.
>
> Where the reports differed was in relation to their assessment of how prevalent KhAD's use of torture was in the late 1980s and who KhAD targeted: the Netherlands report and [the Country of Origin Information Report] concluded that KhAD was a brutal organisation which used torture in a systemic manner against anyone suspected of not supporting the government, whereas Dr Giustozzi, whilst accepting that torture had been used extensively by KhAD in the early 1980s, suggested that it use had diminished in the late 1980s and that it was unclear whether the persons targeted by KhAD could properly be described as civilians or insurgents."

56. The immigration judge proceeded on the basis of the definition of "crime against humanity" in Article 7 of the Rome Statute of the International Criminal Court 1998, namely "any of the following acts when committed as part of a widespread or systematic attack directed at any civilian population, with knowledge of the attack: (a) murder … (f) torture … (k) other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or to mental or physical health". She found that there was no satisfactory evidence that DS was personally involved in any acts that could be considered to be crimes against humanity, and that the question therefore was whether KhAD was involved in crimes against humanity during the period when DS served with them and, if so, whether there were serious reasons for considering that he was complicit in those acts.

57. The immigration judge referred to Dr Giustozzi's criticisms of the Netherlands report and to the fact that Dr Giustozzi was criticised in turn by the (anonymous) representative of the War Crimes Unit. She said that Dr Giustozzi was well known to the tribunal and that his evidence had in the past been found to be independent and reliable. He was a frequent and recent visitor to Afghanistan, had written many papers and reports during his career, had given evidence and advised many courts and international bodies, and had interviewed large numbers of people in Afghanistan. His views on the reliability of the Netherlands report were also supported by a decision of the District Court of Arnhem. In consequence of those matters the immigration judge preferred the evidence given by Dr Giustozzi.

58. After making further reference to Dr Giustozzi's report and to other material, the immigration judge found as follows:

> "71. I remind myself that the Exclusion Clauses should be interpreted narrowly and I conclude from all of this that, whilst

> KhAD undertook acts of the type described in Article 7 of the Rome Statute and that these could be described as widespread and systematic, particularly during the early 1980s, they were not primarily directed against the civilian population. The targeted population was not predominantly civilian in nature. The attacks carried out by KhAD were primarily directed at insurgents and … they do not therefore fall within the definition of 'crimes against humanity'. As such it is not necessary for me to consider any 'complicity' of the Appellant although I will state that I do not accept that he was ignorant of the abuses as claimed by him at the hearing. This evidence was in contradiction of his answers at interview, for example when he referred to sleep deprivation. His denial that he mentioned this … damages his credibility in this regard. Further, if the abuses were as wide as Dr Giustozzi's report indicates, even taking into account their decrease after the early 1980s, I consider that the Appellant would have had to be purposely blind not to have been aware of the acts carried out by others in his organisation. I do not accept that he only heard of such abuses from press reports when he was in Pakistan.
>
> 72. I therefore find that the Appellant is not excluded by Article 1(F) from the protection of the Refugee Convention and I do not therefore uphold the Secretary of State's certificate."

59. She went on to deal with the issue of risk on return. She found no reason to disbelieve DS's account concerning the threats made to him by reason of his perceived link with the death of a family that was forcibly repatriated. The fact that the Secretary of State had been unable to trace any objective material on General Ikramadin did not mean that he did not exist and did not have influence: if DS had wished to fabricate a name it would have been easy for him to select a well-known name, and the fact that he did not do so lent credence to his account. Although the Secretary of State said that General Fahim had been sidelined, Dr Giustozzi's evidence was that the law enforcement agencies were largely dominated by this man's group and its allies. Where a person had conflicts with people who were now in power, this might well place them at risk. In conclusion:

> "77. Given the threats made to the Appellant before he left Afghanistan and given the position of authority that this man holds, I find that there is a real risk that the Appellant will face persecution or treatment contrary to Article 3 upon return and, given the position of those threatening the Appellant in Afghanistan at present, I find that there is not a sufficiency of protection for the Appellant."

60. The immigration judge's decision was simply to "allow the appeal".

61. I need not set out here the senior immigration judge's reasons for concluding that the immigration judge made no material error of law. I will refer to them as necessary when considering the arguments on this appeal.

The issues

62. In his skeleton argument, Mr Sheldon advanced four grounds of appeal in relation to the immigration judge's decision, namely that she (1) failed to reach a reasoned conclusion as to whether DS was entitled to refugee status, and in particular failed to consider whether (a) any risk arose for a Convention reason and (b) such risk amounted to persecution rather than prosecution; (2) failed to consider categories of exclusion under Article 1F other than "crimes against humanity"; (3) failed to apply the correct burden and standard of proof when making the findings she did under Article 1F; and (4) made irrational and/or inadequately reasoned findings under Article 1F. On this basis he contended that the senior immigration judge, on the reconsideration, was wrong to find that the immigration judge had made no error of law. He also advanced other, more specific criticisms of the senior immigration judge's determination.

63. In the course of oral argument, however, it became clear that the issues separating the parties were narrower than had appeared. Mr Sheldon confirmed that the Secretary of State was not appealing in respect of the immigration judge's decision on Article 3. Mr Grieves, for his part, made clear that DS was not seeking to support the immigration judge's decision on the asylum appeal. His recollection was that the asylum appeal was not pursued before the immigration judge or at least that it was not contended that the risk of harm feared on return was for a Convention reason. In any event he did not seek to argue before us that a Convention reason existed. Remarkably, the Secretary of State's grounds for reconsideration in the tribunal did not raise this point, but the absence of a Convention reason was an obvious error in the immigration judge's decision and ought to have been identified by the senior immigration judge of his own motion. The full extent to which the Secretary of State is entitled to rely on the principle in *R v Secretary of State for the Home Department, ex p. Robinson* [1998] QB 928, 946C, has not yet been decided (see *GF (Afghanistan) v Secretary of State for the Home Department* [2005] EWCA Civ 1603, paras 14-17). But in this case, where DS accepts the error and does not seek a finding in his favour in respect of his asylum claim, I do not think that the Secretary of State should be precluded from raising the point in this court. It follows that the Secretary of State's appeal in respect of the immigration judge's decision on the asylum appeal must succeed on ground (1).

64. Since DS's success in relation to Article 3 is not in issue and it is accepted that he must fail in his asylum claim, it might be thought that there was nothing left to argue about. Mr Grieves explained, however, that DS had a continuing concern about his claim for humanitarian protection under para 339C of the Immigration Rules. That claim was refused by the Secretary of State under para 339D. The immigration judge referred to those provisions in an early section of her determination, on the relevant law; and, although her findings did not deal in terms with the claim to humanitarian protection, her decision to allow the appeal must be taken to have encompassed the claim. The Article 1F criteria for exclusion from the protection of the Refugee Convention are the same as the para 339D criteria for exclusion from a grant of humanitarian protection. The points advanced by the Secretary of State in relation to Article 1F in the context of asylum are therefore equally relevant to the claim for humanitarian protection. This is a matter of importance for DS, since the grant of humanitarian protection gives a status and advantages beyond those afforded by the

ability to rely on Article 3 to resist removal from the United Kingdom. It follows that the substance of the Secretary of State's appeal in respect of Article 1F, although moot in so far as it relates to the asylum claim, has a continuing significance for the claim to humanitarian protection and is not something that DS is prepared to concede. For that reason I think it right to entertain the relevant grounds of appeal despite the unsatisfactory way in which the matter has come before the court and the oddity of addressing arguments directed to Article 1F in a case where an asylum claim is no longer advanced.

The challenge to the decision under Article 1F(a)

65. I shall deal first with the Secretary of State's challenge to the immigration judge's actual decision under Article 1F(a), that is to say grounds (3) and (4) of the appeal, before turning to the contention in ground (2) that the immigration judge fell into error by failing to consider Article 1F(b) or (c).

66. Although ground (3) is expressed in terms of failure to apply the correct burden and standard of proof, it is in substance a perversity challenge. It is common ground that there was an evidential burden on the Secretary of State to establish serious reasons for considering that DS had committed a crime against humanity or other crime within Article 1F(a) (see *Gurung* paras 92-95). It was not suggested on the reconsideration, nor by Mr Sheldon in his submissions to us, that the immigration judge misdirected herself as to this. The case advanced by Mr Sheldon was that the only reasonable conclusion open to the immigration judge was that there were serious reasons for considering that KhAD had targeted civilians and that DS, through his role in KhAD, had therefore been complicit in crimes against humanity. He submitted that even if one proceeded on the basis of Dr Giustozzi's report, rather than considering all the available evidence in the round, there was no evidence to support the conclusion that KhAD did not target the civilian population. In support of that submission he took us to various passages in the report and in Dr Giustozzi's reply to the War Crimes Unit's commentary on his report, submitting that Dr Giustozzi nowhere stated that KhAD targeted insurgents rather than civilians.

67. This ground was covered extensively at the reconsideration hearing before the senior immigration judge, albeit the Secretary of State's case was packaged at that time as an argument that the first immigration judge's decision was inadequately reasoned. The senior immigration judge found, however, that the immigration judge's decision was unimpeachable: she was entitled to prefer the evidence of Dr Giustozzi and to conclude on the evidence as a whole that those targeted by KhAD were not civilians. In reaching that conclusion the senior immigration judge had the benefit of Mr Grieves's skeleton argument for the hearing before the immigration judge as well as his skeleton argument for the reconsideration hearing. It is clear from those skeleton arguments that the insurgent/civilian issue was explored in some depth at both hearings.

68. I do not think that the absence of a specific statement by Dr Giustozzi that KhAD was targeting insurgents rather than civilians is sufficient to undermine the immigration judge's conclusion on the issue. On the basis of his evidence as a whole, which she was entitled to accept, it was reasonably open to her to find that the Secretary of State had failed to establish serious grounds for considering that KhAD committed acts of torture or killings "as part of a widespread or systematic attack directed at any civilian

population", so as to come within the definition of "crime against humanity" in Article 7 of the Rome Statute (there being no issue as to the applicability of that definition to the expression "crime against humanity" in Article 1F(a)). In my judgment, therefore, the senior immigration judge was correct to find on this point that there had been no material error in the immigration judge's decision.

69. Ground (4) challenges the immigration judge's finding that there was no satisfactory evidence that DS was personally involved in any acts that could be considered to be crimes against humanity. It is submitted that the finding was irrational or contrary to the weight of the evidence or inadequately reasoned. Given DS's prolonged involvement in KhAD, his rising status in the organisation, his responsibility for the Parwan province and the strategically important Salang region, and the evidence that KhAD systematically used torture to extract information from those arrested, an unexplained finding of this sort could not stand. An additional reason for concern about the finding was the immigration judge's later rejection of DS's assertion that he was ignorant of the abuses committed.

70. It is clear that the finding here in question related to direct personal participation in relevant acts, as opposed to complicity in acts committed by others within KhAD. No challenge to that finding appears to have been raised in the reconsideration before the senior immigration judge. But in any event there is, in my view, no substance to the challenge. The general matters referred to by Mr Sheldon are insufficient to establish a case of personal participation, and he did not point to any specific evidence of personal participation that could undermine the immigration judge's finding or require more elaborate reasoning in support of it. The immigration judge's rejection of DS's assertion that he was ignorant of the abuses does not touch on the question whether he personally committed such abuses.

71. Accordingly, I would reject the Secretary of State's various attempts to impugn the immigration judge's conclusion that the "crimes against humanity" exclusion in Article 1F(a) was not engaged on the facts of this case.

The attempted reliance on Article 1F(b) and (c)

72. That brings me to the Secretary of State's ground (2), which is that the immigration judge erred by failing to consider categories of exclusion under Article 1F other than crimes against humanity. In practice that amounts to a contention that the immigration judge ought to have considered whether Article 1F(b) or (c) was engaged, since it has not been suggested that any other category of crime within Article 1F(a) was relevant.

73. This issue was raised on the reconsideration before the senior immigration judge, who dealt with it robustly in these terms (at para 27 of her determination):

> "The assertion that the Immigration Judge should have gone on to consider the other matters in Article 1F has no merit given that it is quite clear from the file and from the papers that [at a] preliminary hearing prior to the hearing before the Immigration Judge it had been established by the Respondent that the only exclusion relied upon was that the Appellant had committed a crime against humanity. That having been established, there

> was no requirement for the Immigration Judge to consider any other matters in relation to Article 1F. Mr Walker [the Home Office Presenting Officer] did not dispute this."

74. Despite the position taken by the Home Office Presenting Officer before the senior immigration judge, Mr Sheldon pursued the point before us. He submitted that the immigration judge was under a duty to consider, in the light of her findings, whether the case fell within Article 1F(b) or (c). Where Article 1F issues are obvious in the *Robinson* sense they must be taken by the tribunal even if not raised by the parties: see *Gurung* paras 38, 47 and 92; *Secretary of State for the Home Department v A (Iraq)* [2005] EWCA Civ 1438, paras 27-30; and *GH (Afghanistan) v Secretary of State for the Home Department* [2005] EWCA Civ 1603, para 16. What made the existence of an issue under Article 1F(b) or (c) obvious in this case was that DS was a member of an organisation engaged in large-scale torture and that he was found to have known about the abuses. The immigration judge was under an obligation to consider the issue even though the Secretary of State's case had been limited to Article 1F(a) and therefore, on the immigration judge's findings, pitched too high. Had she considered it, she must have concluded that the exclusion under Article 1F(c), at least, was engaged. Her failure to take the point of her own motion was an error of law, and the senior immigration judge was wrong to find otherwise.

75. I readily accept that the Secretary of State might have had a case against DS under Article 1F(b) or (c) had the evidence and argument been presented in that way. But that was not the case advanced. The case was put squarely on participation in crimes against humanity, within Article 1F(a). That was the basis of the Secretary of State's original decision and of her case before the immigration judge. That was the issue to which the evidence and submissions on behalf of DS were addressed. In order to pursue a case under Article 1F(b) or (c), the Secretary of State would have had to give notice of the precise way in which the case was put, and DS would have had to be given an opportunity to obtain additional expert evidence and make further submissions. That was not done. The issues arising under Article 1F are potentially complex and the immigration judge could not sensibly reach a view on the application of Article 1F(b) or (c) simply on the basis of evidence and submissions directed to Article 1F(a). If, despite the way in which the Secretary of State's case was put, the immigration judge considered that Article 1F(b) or (c) ought to be considered, it would have been open to her to invite the parties to deal with the issues, granting an appropriate adjournment for the purpose. But it cannot be said that she was required to go down that line, let alone that she was required to determine the case under Article 1F(b) or (c) on the basis of the existing material. Even if the Secretary of State is entitled to rely on the *Robinson* principle in relation to an issue such as this, which it is unnecessary to decide, the applicability of Article 1F(b) and (c) was not an obvious point (one with a strong prospect of success) such as to engage the principle and to require the immigration judge to take the point for herself.

76. Accordingly, the immigration judge did not fall into legal error by failing to take the point.

Conclusions on DS (Afghanistan)

77. Giving effect to the agreed position in relation to DS's asylum claim, I would allow the Secretary of State's appeal on ground (1), set aside the immigration judge's

decision in so far as it allowed DS's appeal on asylum grounds, and substitute a decision dismissing the asylum appeal (see para 48 above as to the court's power under s.103B(4)(b) of the Nationality, Immigration and Asylum Act 2002 to make any decision which the tribunal could have made on the reconsideration). Subject to that, I would dismiss the Secretary of State's appeal and thus leave in place the immigration judge's decision in so far as it allowed DS's appeal on non-asylum grounds. As in the case of MH, however, the parties should have the opportunity to make submissions as to the appropriate form of order.

Lord Justice Jackson :

78. I agree.

Lord Justice Ward :

79. I also agree.