Upper Tribunal
(Immigration and Asylum Chamber)

Al – Sirri (Asylum – Exclusion – Article 1F(c)) [2016] UKUT 00448 (IAC)

THE IMMIGRATION ACTS

Heard at Field House, London	**Decision Promulgated**
On 04 and 25 July 2016	**On 17 August 2016**

Before

THE HON. MR JUSTICE McCLOSKEY, PRESIDENT
UPPER TRIBUNAL JUDGE KAMARA

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

YASSER TOUFIQ ALI AL-SIRRI

Respondent

Representation:

For the Appellant: Mr J Auburn, of Counsel, instructed by the Government Legal Department
For the Respondent: Mr A Mackenzie, of Counsel, instructed by Birnberg Pierce and Partners

In every case involving exclusion of protection under Article 1F of the Refugee Convention, the onus of proof is on the Secretary of State, a detailed and individualised examination of the facts is required, there must be clear and credible evidence of the offending conduct, and the overall evaluative judgment involves the application of a standard higher than suspicion or belief.

DECISION AND REASONS

INTRODUCTION

1. While this is the appeal of the Secretary of State for the Home Department (the "*Secretary of State*"), we shall, for convenience, continue to describe Mr Al-Sirri as the Appellant.

2. From Appendix 1, the "Chronology of Events", one quickly discerns the protracted and moderately complex history of this appeal. In brief compass, the Appellant is a national of Egypt, now aged 53 years. Upon entered the United Kingdom in 1994, accompanied by his spouse and four children, the Appellant made an application for asylum which was refused some six years later on the basis that he was excluded from the protection of the Refugee Convention by reason of Article 1F(c) thereof. Some 22 years after his arrival, the Appellant continues to reside in the United Kingdom. His interaction with the U.K. legal system dates from September 2006. During the ensuing period, the landmark events in the litigation calendar have included the decision of the Supreme Court, promulgated on 21 November 2012; see Al-Sirri v Secretary of State for the Home Department [2012] UKSC 54.

3. The effect of the decision of the Supreme Court was to require a fresh hearing of the Appellant's appeal by the First-tier Tribunal (the "*FtT*"). The period thereafter was punctuated by case management review hearings, much *inter-partes* correspondence, debates about disclosure, exchanges regarding a proposed further interview of the Appellant by the Secretary of State's agents and, ultimately, a fresh decision by the Secretary of State dated 10 January 2014. This represents the current, active decision which culminated in the decision of the FtT now under appeal.

THE REFUGEE CONVENTION

4. By Article 1A(2) of the Refugee Convention, a person qualifies for refugee status if –

> "…. *owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion,* [he] *is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country ….*"

Article 1F provides:

> "*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.*"

The operative provision in this case is Article 1F(c).

THE SECRETARY OF STATE'S DECISIONS

5. On 30 April 1994, upon arrival in the United Kingdom, the Appellant claimed asylum. His application was, ultimately, refused on 11 October 2000. By a supplementary decision dated 31 March 2004 the original decision was affirmed. This was followed by a fresh decision dated 05 December 2006. The ensuing six years were occupied by proceedings before various courts and tribunals.

6. The current, operative decision of the Secretary of State is contained in a letter dated 10 January 2014. This detailed letter is susceptible to the following breakdown:

   (a) The Appellant claimed that while in Egypt he was involved in Islamic charities with a view to implementing Sharia Law and establishing an Islamic regime in Egypt. This included public demonstrations and he was detained periodically.

   (b) In 1993 he was accused of the attempted murder of the Egyptian Prime Minister. This was the impetus for his flight to the United Kingdom.

   (c) The basis of the Appellant's claim for asylum is his fear that if repatriated to Egypt he will be murdered by the regime.

   (d) On 29 October 2001 he was charged with conspiracy to murder the leader of the "Afghan Northern Alliance" (whom we shall call "ASM"), who had been killed in Afghanistan on 09 September 2001, which charge was withdrawn some months later.

   (e) The decision continues:

> "*It has therefore been considered whether the act of conspiracy to murder* [ASM] *was an act that attacked the very basis of the international community's co-existence, whether it had an international dimension and whether the crime was capable of affecting international peace, security and peaceful relations between states. This has been assessed in light of the international repercussions of the murder.*"

   (f) ASM was the established leader of the anti-Taleban forces in Afghanistan and his murder was perpetrated by Al-Qaeda, a proscribed terrorist group which has been held responsible for the terrorist attacks in the United Kingdom on 11 September 2001.

   (g) Since the late 1990s, Al-Qaeda has been considered "*the most infamous worldwide terrorist organisation*".

   (h) ASM was a towering figure in the war between the Taleban and the Northern Alliance:

> "*It is considered that his elimination from* [this conflict] *had a significant impact on the conflict and on the course of the war. The terrorist attacks in the US on 11 September 2001 and the subsequent involvement of the US in the war demonstrate not only the international impact of the conflict but, in the elimination of the most prominent anti-*

Taleban leader, the international impact of his murder. Therefore the event of the murder of [ASM] *had a significant international dimension. The background information indicates that the impact was that it was more difficult for the US to inflict a decisive defeat against Taleban throughout Afghanistan in the absence of the unifying force and military capability of* [ASM]."

(i) The above is the preface to the following conclusion:

"*It is therefore considered that the murder of* [ASM] *was an act of terrorism of such gravity and international impact, committed by a terrorist group of worldwide notoriety, that it was clearly against the principles and purpose of the United Nations outlined under Article 1F(c) of the Refugee Convention, as interpreted in the judgment of the Supreme Court.*"

(j) The decision then discusses the Appellant's "*alleged role*" in the murder in question:

"*It is noted that you have been accused of providing a letter of introduction to the perpetrators of the murder of* [ASM]. *It is considered that this allegation,* ***if proven****, amounts to organising a terrorist act. Careful consideration has been given to whether the evidence against you amounts to serious reasons for considering that you conspired to commit the murder ….*

The evidence that has been included in this consideration is that which was available to the criminal court when you were charged with conspiracy to murder [ASM]. *Additionally, available circumstantial evidence has been included in this consideration.*"

(k) The decision continues:

"*The evidence contained in the attached Case Research and Analysis Report has been considered and its evidence and conclusions support the conclusions set out in this letter.*"

(l) There follows a recitation of various items of documentary evidence: documents found in the possession of the assassins at the scene of the murder, which included in particular certain letters containing the Appellant's particulars and *prima facie* linking him with a purported journalistic exercise, the object whereof was direct access to ASM; evidence of the police examination of the Appellant's computer following his arrest on 23 October 2001; other documents found at the Appellant's home at this stage; the Appellant's statements to the police and the records of his police interviews.

(m) Next, the decision maker notes the Appellant's admission that he provided documentation to ASM's assassins, who posed as journalists and his claim that he did so innocently without knowledge of the murder plot. The Appellant further claimed that the operation involved the creation of a broadcasting arm, Arab News International, of his organisation, the Islamic Observation Centre ("IOC"). This would provide the organisation with both news dissemination capacity and some profit. In return, the Appellant would provide the assumed journalists with letters of introduction and identity cards from IOC.

(n) The decision maker notes that the Appellant was entirely passive in matters of broadcasting and news dissemination subsequently, thereby undermining the credibility of his explanation. The Appellant's evident failure to check the credentials of the persons concerned is also highlighted. In addition, the Appellant's failure to provide an explanation for a letter dated approximately one month preceding the murder requesting that he "*… get rid of all the letters which I sent you previously because you are aware of the circumstances*" is underlined, together with his continued assistance to the person concerned subsequently. Also highlighted was the Appellant's failure to mention certain email exchanges during interview, indicative of the deliberate withholding of information concerning his involvement in the alleged murder conspiracy.

(o) The decision maker then draws attention to the Appellant's alleged failure to avail himself of opportunities to account for his conduct and the documents found in his possession and to answer the evidence against him, in particular by failing to give evidence at the initial tribunal hearing and refusing to attend a proposed interview with the Home Office.

7. The case against the Appellant is encapsulated in the following passage:

> "*As such it is considered that you deliberately provided documents for individuals posing as journalists to gain access to* [ASM]. *It is considered that your knowledge that they were not genuine journalists yet wanted to gain access to him means that you were aware that they wished to cause him harm. Therefore, it is considered that you conspired with others to murder* [ASM]."

The decision maker then considers evidence of the Appellant's conduct in the publication and distribution of texts supporting terrorist. Attention is also drawn to the discovery in the Appellant's home of a substantial quantity of press articles concerned an American military base in Saudi Arabia which was bombed in 1996, together with documents relating to two suspects which included passports and photographs, coupled with the Appellant's refusal to answer questions about these documents during his police interview and to account for aerial photographs of an oil well in California and envelopes addressed to California and Texas, giving rise to a negative inference. Furthermore, he failed to account for the discovery at his home of military manuals and related documents, giving rise to the negative inference that he had in his possession material relating to terrorism for a sinister purpose. In addition, the decision alleged that the Appellant's associates include the leadership of Gama Al Islamiya, a proscribed terrorist organisation and that through the IOC platform he defended one of those convicted in the United States of seditious conspiracy in relation to the 1993 World Trade Centre bombing.

8. The decision expresses the following conclusion:

> "*With all the evidence considered, for the above reasons there are serious reasons for considering that you have committed an act contrary to the principles and purposes of the United Nations and therefore you are excluded from a grant of refugee status as you do not qualify under Article 1F(c).*"

This is followed by an adverse assessment of the Appellant's credibility under the auspices of section 8 of the Asylum and Immigration (Treatment of Claimants etc)

Act 2004. The decision maker made two further conclusions, namely that the principal decision did not entail any infringement of the Appellant's rights under Article 8 ECHR and that discretionary leave was not considered appropriate.

DECISION OF THE FtT

9. By its decision promulgated on 13 April 2015 the First-tier Tribunal ("*FtT*") allowed the Appellant's appeal. At the outset of its decision, the Tribunal noted the Secretary of State's decision under section 55 of the Immigration, Asylum and Nationality Act 2006. Section 55 provides:

> *"55 **Refugee Convention: certification***
>
> *(1) This section applies to an asylum appeal where the Secretary of State issues a certificate that the appellant is not entitled to the protection of Article 33(1) of the Refugee Convention because–*
>
> *(a) Article 1(F) applies to him (whether or not he would otherwise be entitled to protection), or*
>
> *(b) Article 33(2) applies to him on grounds of national security (whether or not he would otherwise be entitled to protection).*
>
> *(2) In this section–*
>
> *(a) 'asylum appeal' means an appeal–*
>
> *(i) which is brought under [section 82 of the Nationality, Immigration and Asylum Act 2002 (c. 41)] or section 2 of the Special Immigration Appeals Commission Act 1997 (c. 68), and*
>
> *[(ii) which is brought on the ground mentioned in section 84(1)(a) or (3)(a) of that Act (breach of United Kingdom's obligations under the Refugee Convention), and]*
>
> *(b) 'the Refugee Convention' means the Convention relating to the Status of Refugees done at Geneva on 28th July 1951.*
>
> *(3) The [First-tier Tribunal] or the Special Immigration Appeals Commission must begin substantive deliberations on the asylum appeal by considering the statements in the Secretary of State's certificate.*
>
> *(4) If the Tribunal or Commission agrees with those statements it must dismiss such part of the asylum appeal as amounts to an asylum claim (before considering any other aspect of the case).*
>
> *(5) Section 72(10)(a) of the Nationality, Immigration and Asylum Act 2002 (serious criminal: Tribunal or Commission to begin by considering certificate) shall have effect subject to subsection (3) above.*
>
> *[(5A) Subsections (3) and (4) also apply in relation to the Upper Tribunal when it acts under section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007.]*
>
> *(6) Section 33 of the Anti-terrorism, Crime and Security Act 2001 (c. 24) (certificate of non-application of Refugee Convention) shall cease to have effect."*

The certificate made by the Secretary of State is in the following terms:

> "*With all the evidence considered, it is concluded that there are serious reasons for considering that you committed acts contrary to the purposes and principles of the United Nations.*
>
> …
>
> *With all the evidence considered, for the above reasons there are serious reasons for considering that you have committed an act contrary to the principles and purposes of the United Nations and therefore you are excluded from a grant of Refugee Status as you do not qualify under Article 1F(c).*"

The FtT continued:

> "*The effect of the certificate is that the issue we are required to determine is a narrow one. We must consider the certificate first and, if in agreement with the statements contained in it, we are required to dismiss the asylum grounds of appeal.*"

The evidential matrix had two basic components. First, there was a substantial quantity of documentary evidence, certain aspects whereof we have highlighted above. Second, the FtT heard evidence from Detective Chief Inspector Dingemans.

10. The FtT also noted, *inter alia*, the circumstances in which the charge against the Appellant of conspiracy to murder came to a conclusion. It is evident that an application was made to have the charge dismissed on the basis that the evidence was insufficient to warrant putting the Appellant on trial. The Common Serjeant of the Old Bailey acceded to this application, as recorded in the decision of the Supreme Court, at [23]:

> "*The Common Serjeant concluded that the evidence was as consistent with the innocence of the Accused (who had made no secret of his authorship of the templates which could easily be traced to him and had not destroyed any of the relevant documentation in his possession) as it was with his guilt. Accordingly, on 16 May 2002, he dismissed the charge on the ground that the evidence would not be sufficient for a jury properly to convict.*"

The FtT formulated its task in the following terms:

> "*Conscious of the need to avoid over-simplification, the critical issue between the parties is this: has the Appellant been shown to have been sufficiently involved in the assassination …. to show in turn that he falls to be excluded from the Refugee Convention under Article 1F(c) or, on the other hand, has such involvement not been shown and, further, may he be properly described as a person (one of many, perhaps) innocently duped by the real actors in the plot?*"

11. The FtT made the following specific findings and conclusions:

    (i) The "international dimension required for the purposes of Article 1F(c)" is present.

    (ii) The assassination in question was the product of "*an internationally co-ordinated attack*".

(iii) The evidence did not show any direct link between the assassination and the attacks in the United States two days later: however, this nexus was not necessary to demonstrate the international dimension of the assassination.

(iv) There was no forensic link between the letters found at the scene of the assassination and the items recovered from the Appellant's home subsequently.

(v) The "Osman letter" does not amount to "*significant evidence that Osman and the Appellant were involved in activities which, presumably to safeguard Osman in some way, led to the request that the Appellant destroy letters*", particularly since the Appellant made no attempt to either destroy or conceal the documents.

(vi) There was nothing sinister about the Appellant's possession of £3,000 in cash.

(vii) The letters of introduction recovered from the scene, which were of central importance in the assassination, were forgeries of the documents found at the Appellant's home. The inclusion of particulars of the Appellant and the IOC in the documents concerned "*… falls short as reliable evidence of the Appellant's involvement in the conspiracy as a conscious and knowing agent*".

(viii) Substantial support for the Appellant's account was provided by the evidence of AM, which the Tribunal accepted.

(ix) The evidence of the Appellant's interviews, including his demeanour, "*falls short of showing that the Appellant was a conspirator involved in the plot, rather than an innocent dupe*".

(x) Some of the publications recovered from the Appellant's home were undoubtedly extreme, radical and would cause outrage to many. However, this constituted at most "*circumstantial evidence of the Appellant's sympathy for extremist views and support for Jihad but it does not go further and does not overcome the absence of reliable evidence that he was involved in the assassination …. other than indirectly and innocently*".

(xi) The same assessment of the "military manuals" was considered appropriate by the Tribunal.

(xii) The Appellant gave detailed explanations during his police interviews. These were "*capable of dispelling the suspicion that he had been involved in terrorism*" as noted by the Court of Appeal: see [2009] EWCA Civ 222, at [67], per Sedley LJ. No substantial new evidence had emerged since the interviews. While the Appellant had not given evidence to the Tribunal and had refused to attend further interview by the Secretary of State's agents, this constituted no more than "*an adverse factor of modest weight*".

The appeal was allowed accordingly.

PERMISSION TO APPEAL

12. Permission to appeal to this Tribunal was granted on the basis that all of the grounds of appeal are arguable. The grounds are the following:

    (i) The FtT erred in its approach to adverse inferences from the Appellant's failure to answer questions or give evidence, adopting the wrong approach to section 8 of the 2004 Act.

    (ii) The FtT erred in law in its approach to the standard of proof, formulating the test correctly but applying it incorrectly.

    (iii) The FtT misstated and misunderstood certain material aspects of the evidence.

PREVIOUS JUDICIAL DECISIONS

13. The Appellant was charged with conspiring with others unknown to murder ASM, contrary to section 1(a) of the Criminal Law Act 1977. An application was made to dismiss the charge. This resulted in a ruling by the Common Serjeant of the Old Bailey, dated 16 May 2012. The test applied was formulated thus:

> "*In short, the Court is required to take into account the whole of the evidence against the applicant and to decide whether it is satisfied that it is sufficient for a jury properly to convict.*"

The first part of the ruling was that there was a sufficiency of evidence from which the jury could find proven that ASM was murdered by persons identified as Touzani and Bakkali and, further, that the letter of introduction emanating from the Appellant's organisation, the Islamic Observation Centre ("IOC"), played a part in securing the interview at which the assassination was carried out. The Common Serjeant then posed the following question:

> "*Third, the question remains – and it is determinative of the application – is the* [**there**] *evidence of the writing of the letters of introduction by the* [Appellant] *– strictly speaking, the creation of them by means initiated by him …. sufficient to permit the interference to be drawn, so that the jury is sure, that in doing so he was a knowing party to the murder … that is to say, at the time of writing them or, as indicated, causing them to be written he knew that they were intended for use in securing an interview with the General at which it was intended that the General should be killed?*"

To this question the Judge supplied a negative answer. He ruled that the evidence was insufficient. He considered that inferences consistent with the Appellant's innocence could not be safely excluded. In particular, the conclusion that the Appellant was "*an innocent fall guy*" could not be disregarded. The Common Serjeant identified two additional factors of significance. First, the Appellant's position as "*a highly visible figure in the Muslim world, thus providing a trail which led back to him*". Second, the Appellant had made no attempt either to abscond or to destroy documentary evidence at his home and office potentially incriminating of him.

14. Given the thrust of the Secretary of State's appeal, it is necessary to draw attention to two further passages in the ruling of the Common Serjeant. First:

> "… *The two letters in fact carried by the assassins are proved to be, as* [Counsel] *characterised them, careful and elaborate forgeries of the letters that the* [Appellant] *created ….*
>
> *'Elaborate' because they included the use of the forged rubber stamps …*
>
> *'Careful' because they involved – the forgery that is – back dating what was created in order to fit into a forged trail that had been created for* [the assassins] *in their passports, supported by the visas within them.*"

And in a later passage:

> "…. *It is common ground that the* [Appellant] *cannot have created his letters before, at the earliest, 28 July, and more likely 29, it is in my judgment consistent with* [the assassins] *using the letters created by the* [Appellant] *as the template for the documentation that they were to forge, thus using the* [Appellant] *as an innocent fall guy and furthermore one who could, if necessary, provide very similitude to the cover that was created for the assassins, as it is with the irresistible inference that at the time he provided his letters, by inference, he …. knew that they were intended to be used for the purpose of killing* [ASM] *by the persons or through the medium of the persons for whom he was providing those letters by way of introduction.*"

We draw attention to these passages because, as will appear *infra*, one of the grounds of appeal to this Tribunal is that the FtT misunderstood the case which the Secretary of State was making as regards the letters of introduction, specifically in relation to the issue of forgery.

15. In 2009 the Court of Appeal became seized of the Appellant's appeal against the decision of the AIT which had affirmed the Secretary of State's decision to refuse protection to the Appellant under Article 1F(c) of the Refugee Convention: see Al-Sirri v Secretary of State for the Home Department and UNHCR (Intervening) [2009] EWCA Civ 222. Delivering the main judgment of the Court, Sedley LJ adverted to the witness statement of Detective Chief Inspector Dingemans, who had been a Case Officer in the police investigation operation stimulated by the assassination. Reference was made in particular to a passage in his statement relating to evidence recovered during a search of the Appellant's home – the letters of introduction, a fax, shipping orders, records of banking and money transfers in particular. Sedley LJ observed in this context, at [54]:

> "*The Appellant was interviewed under caution about this and much else. On the advice of his solicitor, who was present throughout, he answered some questions and declined to answer others.*"

Next, he noted that while the transcripts of interviews had formed part of the evidence before the AIT, the latter "*derived no assistance from them*". He continued, at [55]:

> "*For reasons to which I will be coming, it is not necessary to say more about the Dingemans' statement than that the desirability of seeing and evaluating primary material in preference to secondary accounts of it grows in proportion to the damaging effects of the latter …*
>
> *The preferable course was for the AIT to be shown the documentary material supporting the allegation, to hear what each side said about it, to consider anything relevant the Appellant had*

said (or, if the circumstances permitted an adverse inference to be drawn, declined to say) about it at interview and to make up its own mind about it."

The "*primary material*" was not, however, adduced.

16. At [67] Sedley LJ returned to the issue of the police interviews:

> "*The record shows that, although initially his solicitor spoke for him and* [the Appellant] *declined to answer questions because of the generality of the investigation, as time went by* ***the Appellant began to offer detailed explanations****, all of them if accepted or acceptable, capable of dispelling the suspicion that he had been involved in terrorism ….*
>
> *In particular, intelligible explanations were offered of the sums of money.*"
>
> [Emphasis added.]

Next, in the context of a general reference to "*the literature found in the Appellant's possession*", Sedley LJ stated:

> "*About the latter I would say a cautionary word. It is one thing to have written, say, a foreword to a book; it is another to believe all that the book says or argues. Whether the latter is the case has to depend in some degree, perhaps a large one, on what the foreword says. Equally, most literate people own books with which they do not agree. Some caution is needed in attributing to anyone, in the absence of linking evidence, the contents of the books on his shelf.*"

The passages we have reproduced above are (mere) observations, discursive *dicta*. This is abundantly clear from the preface contained in [66].

17. The decision of the AIT was reversed and remittal ordered on the grounds that the AIT should have attributed no weight whatsoever to the Appellant's convictions *in absentia* in Egypt and should have treated the evidence of the bare US indictment against the Appellant similarly: see [44] and [56]. This explains the following passage in the concurring judgment of Arden LJ, at [79]:

> "*The result of this Court's decision is that at the remittal hearing the Respondent can at best succeed on some only of the grounds that it originally placed before the AIT.*"

18. The Appellant appealed to the Supreme Court, the outcome whereof appears in the following excerpt from the judgment of Baroness Hale, at [77]:

> "…. [The Appellant] *was challenging certain aspects of the guidance given* [by the Court of Appeal] *to the Tribunal which would hear the remitted case. In that he has succeeded to some extent.*"

The Supreme Court concluded, following receipt of further written submissions, that remittal to the FtT, rather than the Upper Tribunal, was appropriate.

19. The specific question of law raised by the appeal to the Supreme Court was formulated by Lady Hale in [2]:

> "… *The question is whether all activities defined as terrorism by our domestic law are for that reason alone, acts contrary to the purposes and principles of the United Nations, or whether*

such activities must constitute a threat to international peace and security or to the peaceful relations between nations."

The Supreme Court enunciated three guiding principles:

(i) First, Article 1F of the Refugee Convention is to be interpreted narrowly and applied restrictively.

(ii) Second, Article 1F(c) applies to acts which, even if they are not covered by the definitions of crimes against peace, war crimes or crimes against humanity as defined in international instruments within the meaning of Article 1F(a), are nevertheless of a comparable egregiousness and character, such as sustained human rights violations and acts which have been clearly identified and accepted by the international community as being contrary to the purposes and principles of the United Nations.

(iii) In determining whether there are serious reasons for considering that the person concerned had individual responsibility for acts within the scope of Article 1F(c), there must be "*an individualised consideration of the facts of the case, which will include an assessment of the person's involvement in the act concerned, his mental state and possible grounds for rejecting individual responsibility*": see [15].

Lady Hale summarised the correct approach in [16], in these terms:

> "*In our view, this is the correct approach. The article should be interpreted restrictedly and applied with caution. There should be a high threshold 'defined in terms of the gravity of the act in question, the manner in which the act is organised, its international impact and long-term objectives and the implications for international peace and security.' And there should be serious reasons for considering that the person concerned bore individual responsibility for acts of that character.*"

20. The Supreme Court provided the following general guidance on the construction and application of the exclusion clauses in the Refugee Convention, at [75]:

> *"We are, it is clear, attempting to discern the autonomous meaning of the words 'serious reasons for considering'. We do so in the light of the UNHCR view, with which we agree, that the exclusion clauses in the Refugee Convention must be restrictively interpreted and cautiously applied. This leads us to draw the following conclusions:*
>
> *(1)'Serious reasons' is stronger than 'reasonable grounds.'*
>
> *(2)The evidence from which those reasons are derived must be 'clear and credible' or 'strong.*
>
> *(3)'Considering' is stronger than 'suspecting'. In our view it is also stronger than 'believing.' It requires the considered judgment of the decision-maker.*
>
> *(4)The decision-maker need not be satisfied beyond reasonable doubt or to the standard required in criminal law.*
>
> *(5) It is unnecessary to import our domestic standards of proof into the question. The circumstances of refugee claims, and the nature of the evidence available, are so variable. However, if the decision-maker is satisfied that it is more likely than not that the applicant has not committed the crimes in question or has not been guilty of acts*

contrary to the purposes and principles of the United Nations, it is difficult to see how there could be serious reasons for considering that he had done so. The reality is that there are unlikely to be sufficiently serious reasons for considering the applicant to be guilty unless the decision-maker can be satisfied on the balance of probabilities that he is. But the task of the decision- maker is to apply the words of the Convention (and the Directive) in the particular case."

21. The Supreme Court also examined the central tenets of the Secretary of State's case against the Appellant. It noted the decision of the Common Serjeant, at [23], in the following pithy terms:

> "*The Common Serjeant concluded that the evidence was as consistent with the innocence of the accused (who had made no secret of his authorship of the templates which could easily be traced to him and had not destroyed any of the relevant documentation in his possession) as it was with his guilt.*"

The Supreme Court approved the following passage in the UNHCR Guidelines:

> "[17] *Article 1F(c) is only triggered in extreme circumstances by activity which attacks the very basis of the international community's co-existence. Such activity must have an international dimension. Crimes capable of affecting international peace, security and peaceful relations between states, as well as serious and sustained violations of human rights would fall under this category.*"

With regards to whether the test can be set aside where a person plots in one country to de-stabilise conditions in another, the Court added, at [40]:

> "*The test is whether the resulting acts have the requisite serious effect upon international peace, security and peaceful relations between states.*"

The decision of the FtT under appeal to this Tribunal followed upon the judgment of the Supreme Court and ensuing remittal.

FIRST GROUND OF APPEAL: SECTION 8 AND ADVERSE INFERENCES

22. Section 8 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004 provides, in material part:

> ***"8 Claimant's credibility***
>
> *(1) In determining whether to believe a statement made by or on behalf of a person who makes an asylum claim or a human rights claim, a deciding authority shall take account, as damaging the claimant's credibility, of any behaviour to which this section applies.*
>
> *(2) This section applies to any behaviour by the claimant that the deciding authority thinks–*
>
> *(a) is designed or likely to conceal information,*
>
> *(b) is designed or likely to mislead, or*
>
> *(c) is designed or likely to obstruct or delay the handling or resolution of the claim or the taking of a decision in relation to the claimant.*

(3) Without prejudice to the generality of subsection (2) the following kinds of behaviour shall be treated as designed or likely to conceal information or to mislead–

(a) failure without reasonable explanation to produce a passport on request to an immigration officer or to the Secretary of State,

(b) the production of a document which is not a valid passport as if it were,

(c) the destruction, alteration or disposal, in each case without reasonable explanation, of a passport,

(d) the destruction, alteration or disposal, in each case without reasonable explanation, of a ticket or other document connected with travel, and

(e) failure without reasonable explanation to answer a question asked by a deciding authority.

……

(7) In this section–

'asylum claim' has the meaning given by section 113(1) of the Nationality, Immigration and Asylum Act 2002 (c. 41) (subject to subsection (9) below),

'deciding authority' means–

(a) an immigration officer,

(b) the Secretary of State,

(c) [the First-tier Tribunal] , or

(d) the Special Immigration Appeals Commission …….

……

[(9A) In paragraph (c) of the definition of a 'deciding authority' in subsection (7) the reference to the First-tier Tribunal includes a reference to the Upper Tribunal when acting under section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007.]"

23. The central thrust of this ground of appeal is that the FtT misdirected itself in law in its purported application of section 8 of the 2004 Act. The Secretary of State's grounds of appeal advance this discrete challenge in the following terms:

> "[The FtT] *failed to properly apply section 8 ……. It failed to reach necessary findings on the elements of that statutory test and failed to apply a mandatory statutory consideration in that test.*"

The factual substratum of this ground of appeal is uncontentous. It is based on the Appellant's twofold failure (a) to accede to the Secretary of State's request to undergo further interview and (b) to give evidence to the FtT. These, Mr Auburn argued, are "*at the highest possible end of actions giving rise to adverse inferences*" – to be contrasted with, for example, a (mere) failure to produce a passport.

24. Developing this ground, Mr Auburn criticised the FtT's failure to apply section 8 to the framework of this appeal in a structured way. He submitted that the FtT considered the issue of inferences in general terms only. The proper application of section 8, he contended, would have yielded the conclusion that the Appellant had concealed and misled "immigration authorities" on "fundamental matters", requiring a consequential evaluation which the Tribunal did not undertake. Mr Auburn submitted that the FtT erred by applying its own generalised concept of inferences rather than giving effect to what he termed the "mandatory considerations" enshrined in section 8.

25. The record of Mr Auburn's closing submissions to the FtT, which was provided in that forum and which we have considered, discloses that the following main submission was advanced on this issue. It was contended that by reason of the Appellant's twofold refusal (noted above), the FtT should attach little or no weight to his account and draw the adverse inference that he had no explanation for a series of issues which would have withstood the scrutiny of cross examination. The main issues detailed were the falsity of the letters of introduction, the inherent improbability that an innocent participant would be engaged by the assassins (and others) in a plot of such magnitude and sophistication; the unlikelihood that the Appellant did not know the assassins and others; the flimsy nature of the Appellant's claims about the media production benefit to him and his organisation; the Appellant's explanations of the "Osman letter"; and his explanations of the radical, inflammatory Islamic materials found in his possession.

26. The chief riposte of Mr Mackenzie on behalf of the Appellant was that the main issue in the appeal was whether the Secretary of State had discharged the onus of proving that the Appellant should be excluded from protection. The case, he argued, was not primarily about the Appellant's credibility and, further, the Appellant bore no onus of proof. Mr Mackenzie submitted that section 8 is directed to cases where the burden of proof is on the applicant and where the applicant's credibility is crucial.

27. Mr Mackenzie further submitted that the FtT's approach to section 8 accorded with the leading decision of the Court of Appeal, JT (Cameroon) v Secretary of State for the Home Department [2009] 1 WLR 1411. We pause to consider this decision.

28. Pill LJ, delivering the main judgment of the Court of Appeal, noted, firstly, drawing on the Hansard Debates, that the impetus for section 8 had been the perception that those entering the United Kingdom were being advised to –

> *"…. throw away documents or refuse to co-operate either with the process of determining their country of origin and their passage into the country or with re-documentation for return purposes."*

The Court diagnosed the following error of law in the decision of the AIT, at [16]:

> *"…. there is a real risk that section 8 matters were given a status and a compartment of their own rather than taken into account, as they should have been, as part of a global assessment of credibility."*

At [19] Pill LJ added:

> "*Section 8 …. plainly has its dangers, first, if it is read as a direction as to how fact finding should be conducted, which in my judgment it is not and, in any event, in distorting the fact finding exercise by an undue concentration on minutiae which may arise under the section at the expense of, and as a distraction from, an overall assessment. Decision makers should guard against that. A global assessment of credibility is required.*"

He continued, at [21]:

> "*Section 8 …. is no more than a reminder to fact finding tribunals that conduct coming within the categories stated in section 8 shall be taken into account in assessing credibility.*"

The next passage is important, as it makes unambiguously clear that in any case where there is evidence of any of the behaviours specified in section 8, the weight to be given thereto in the overall assessment of the claimant's credibility is a matter for the tribunal:

> "*…. at one end of the spectrum, there may, unusually, be cases in which conduct of the kind identified in section 8 is held to carry no weight at all in the overall assessment of credibility on the particular facts ….*
>
> *Where section 8 matters are held to be entitled to some weight, the weight to be given to them is entirely a matter for the fact finder.*"

Laws LJ was in agreement with Pill LJ that the correct construction of section 8 involves the notional insertion of the adverb "*potentially*" immediately before the word "*damaging*" in section 8(1).

29. In [32] of its determination, the FtT noted the following aspects of the Secretary of State's case:

> "*The Appellant's refusal to be interviewed and his refusal to give evidence in his own appeal gave rise to certain inferences. Section 8 of the* [2004 Act] *fell to be applied and the two refusals were at the highest possible end of actions giving rise to adverse inferences, as amounting to a failure without reasonable explanation to answer a question, which was to be treated as behaviour designed or likely to conceal information or mislead.*"

We pause here to observe that this is a faithful portrayal of the submission contained in the record of Mr Auburn's closing argument. The FtT returned to this issue in [111]:

> "*What inferences may properly be drawn from the Appellant's refusal to attend a substantive asylum interview and his refusal to give evidence before us? Mr Auburn submitted that his failure to answer questions was behaviour designed or likely to conceal information or mislead, falling within section 8 …. and that it would be appropriate to draw adverse inferences as a result ….*
>
> *The Appellant's explanation that he had given all the information previously was insufficient. He was last interviewed by the Home Office regarding his asylum claim in 1994, years before the principal events in issue. When interviewed by the police in October 2001, he refused to answer questions before giving what Mr Auburn described as a brief, pre-prepared account on his own terms and he declined to answer any questions about individuals associated with Islamist or terrorist causes.*"

We can find no trace in this lengthy passage of any distortion or misunderstanding by the Tribunal of the Secretary of State's case on this issue.

30. In the immediately ensuing paragraph, [112], the FtT continues:

> "*Although we agree with Mr Auburn that public confidence in the asylum system is capable of being undermined by a refusal to co-operate with the authorities of the United Kingdom and by a refusal to give evidence in proceedings,* ***the particular circumstances have to be considered carefully.*** *The precis of the police interviews and the statements made by the Appellant on 27 October 2001 through his solicitor show, as Sedley LJ noted in the Court of Appeal, that detailed explanations were in fact given by the Appellant which, if accepted or acceptable, were capable of dispelling the suspicion that he had been involved in terrorism.*"

[Emphasis added.]

This is followed by:

> "*Since the events in issue and the police enquiries, no substantial evidence has emerged. Those events took place some thirteen years ago. At an earlier stage in the litigation, the appellant offered to answer questions so long as they were put to him in writing first. That stance might perhaps be taken to indicate some measure of non-cooperation but it does not amount to a refusal to engage with the process. And, of course, the burden of showing that the appellant is excluded lies with the Secretary of State. As submitted by Mr MacKenzie, there is no new salient feature which the appellant has been invited to deal with but has refused to do so. We have already noted the adverse impact, such as it is, of his uncertain answers when questioned about the Osman letter and some of the financial transactions the IOC was involved with.*"

This passage continues:

> "*Having carefully considered the application of section 8 of the 2004 Act and its impact in this case, we conclude that the appellant's credibility might well be potentially undermined by his refusal to answer questions or give evidence but, on the other hand, the account he gave in October 2001 is one we can assess and weigh without difficulty. His failure to give evidence does not obscure any part of the case he has put in response to the Secretary of State's contention that he falls within Article 1F(c) and, similarly, the Secretary of State has been able to put a clear case, identifying the particular parts of it where the appellant's silence can be highlighted as damaging. Overall, the appellant's conduct in this context is an adverse factor of modest weight.*"

31. It is trite that these passages must be considered in their entirety and in the context of the Tribunal's decision as a whole. They must also be viewed against the framework of the main issues thrown up by the appeal. Furthermore, these passages must be juxtaposed with the salient parts of the evidence considered by the Tribunal. These include the terms of the letters exchanged between the parties relating to the proposed further interview of the Appellant by the Secretary of State's officials and the Appellant's proposal in this respect, the records of the police interviews and the written statements proffered by the Appellant during the interview phase.

32. As regards the further interview issue, we are satisfied that the FtT understood the case being made on behalf of the Secretary of State. Furthermore, there is no challenge to its portrayal of the evidence bearing on this issue. The Tribunal stated correctly that the Appellant's stance was not one of outright refusal to engage.

Furthermore, the Tribunal reproduced accurately the observations of Sedley LJ and was entitled to adopt these. From the records of the police interviews the Tribunal would have been aware that the Appellant's initial stance, which was one of silence, was based on his experienced solicitor's advice and, as the 19 interviews progressed, was overtaken by two lengthy written statements which were read into the record, coupled with a fundamental change of position which entailed the Appellant engaging with the interviewing officers. Notably, this occurred at a stage when the Appellant had asked in terms for, and had been given, an assurance that the interviews were not based upon any preconception of guilt but were, rather, an exercise genuinely designed to establish the truth.

33. The second limb of this ground, namely the Appellant's failure to testify to the FtT, overlaps somewhat with the first. Once again, the Tribunal plainly understood the case which the Secretary of State was making and, *inter alia*, characterised some of the Appellant's responses during the police interviews as "*uncertain*". Taking both limbs together, the Tribunal's decision on the section 8 issue is properly analysed, in our view, as involving two conclusions. First, the Appellant's twofold failure, or refusal, damaged his credibility. Second, in the Tribunal's judgment, the damage was considered to be modest. We consider that the first of these conclusions, coupled with the Tribunal's antecedent approach, involved the correct application of section 8 of the 2004 Act and discloses no error of law. Our assessment of the second conclusion is precisely the same. This further conclusion, in our opinion, is a paradigm illustration of giving full effect to the Court of Appeal's recognition in JT (Cameroon) that where, at the first stage, a Tribunal decides that there is evidence of conduct falling within the compass of section 8, this leads to a second stage of assessing the consequential damage, if any, to the claimant's credibility, an exercise in which the weight to be accorded to the relevant fact or factor is "*entirely a matter for*" the Tribunal.

34. On the grounds and for the reasons elaborated above, we conclude that there is no merit in the first ground of appeal.

SECOND GROUND OF APPEAL: THE STANDARD OF PROOF ISSUE

35. The Secretary of State has been granted permission to advance the following, further ground of appeal:

> "*The FtT erred in its approach to the standard of proof. While the FtT cited the correct test, when it came to applying that test …* (it) *erred in approach, resulting in legal error.*"

The outworkings of this ground involve the contention that the FtT focused only on doubts or uncertainties in the Secretary of State's version of events, rather than evaluating the relative likelihood of both parties' accounts. We have summarised in [7] above the improbabilities in the Appellant's case canvassed by the Secretary of State. Mr Auburn further submitted that the FtT failed to discharge its duty of analysing all of the evidence in the round before deciding whether it was sufficient to warrant the application of Article 1F(c). The discrete misdemeanour advanced is a failure to "*critically analyse*" the Appellant's account.

36. The essence of the response made on behalf of the Appellant is that this ground of appeal is fallacious as it overlooks that the burden was on the Secretary of State and the fundamental question for the FtT was whether the Secretary of State had discharged this burden to the appropriate standard. Mr Mackenzie further emphasised that there was no onus on the Appellant to disprove the Secretary of State's case or to demonstrate the truth or correctness of his version of events.

37. This ground of appeal, comparatively, received the least coverage in Mr Auburn's submissions. In this context we remind ourselves of what the Supreme Court decided in this case. First, there must be an individualised consideration of the facts of the case, which will include an assessment of the person's involvement in the act concerned, his mental state and possible grounds for rejecting individual responsibility: see [15]. Second, the onus rested on the Secretary of State to demonstrate "*serious reasons*", something stronger than reasonable grounds, based on clear and credible, or strong, evidence for considering (a standard higher than suspecting or believing) that the Appellant had been guilty of acts contrary to the purposes and principles of the United Nations. We consider that, bearing in mind the several ingredients in this formulation, the overarching and ultimate question for the FtT was whether the Secretary of State had discharged this burden.

38. The framework of the appeal to the FtT was fashioned by the Secretary of State's detailed decision. The FtT examined this in impressive detail, at [9] – [28] of its decision. There is no suggestion of any distortion or misunderstanding in these passages. Next, the Tribunal summarised the submissions on behalf of the Secretary of State, at [29] – [43] and those on behalf of the Appellant, at [44] - [62]. This was followed by a precis of the further submissions developed on behalf of both parties at the hearing, at [64] – [87]. This included the written format of Mr Auburn's final submissions. Next, at [88], the Tribunal stated:

> "*Conscious of the need to avoid over-simplification, the critical issue between the parties is this: has the Appellant been shown to have been sufficiently involved in the assassination of* (ASM) *to show in turn that he falls to be excluded from the Refugee Convention under Article 1F(c) or, on the other hand, has such involvement not been shown and, further, may he be properly described as a person (one of many perhaps) innocently duped by the real actors in the plot? We begin our assessment with the relevant burden and standard of proof.*"

The Secretary of State's case does not involve any criticism of this self-direction. Furthermore, contrary to the thrust of this ground of appeal, the FtT was, demonstrably, alert to <u>both</u> parties' cases.

39. In the section which follows, the FtT, quoting from the decision of the Supreme Court, considers the issues of burden and standard of proof. There is no challenge to the way in which it did so and we find no flaw in any event. From [93] – [110], the FtT considered the main elements of the documentary evidence, interspersed with occasional comments. At [111] – [112] the Tribunal addressed the section 8 issue (*supra*). At [113], it continued:

> "*We return to our central task, to assess whether there are serious reasons for considering that the Appellant falls within Article 1F(c) and is excluded from the Refugee Convention.*"

Next, it noted that there had been some growth and evolution in the Secretary of State's case against the Appellant with the passage of time. It then noted the evidence of DCI Dingemans and the "*substantial amount of documentary evidence in support of the assessment he has made of the Appellant's involvement in the assassination ….*". The Tribunal continued:

> "*Having weighed that evidence, however, and being acutely conscious that our task is a different one from that faced by the Common Serjeant, we conclude that serious reasons have not been shown for considering that the Appellant was an active participant in the assassination plot or that he has been guilty of acts contrary to the purposes and principles of the United Nations.*"

40. We have highlighted above those passages in the decision of the FtT which seem to us to bear most directly on this ground of appeal and have considered them in the light of the principles enunciated by the Supreme Court. Having done so, we consider that the FtT did not lapse into error in its approach to or application of the burden and standard of proof. We find no merit in this ground of appeal accordingly.

THIRD GROUND OF APPEAL: MISUNDERSTANDING CERTAIN EVIDENCE

41. The last of the three permitted grounds of appeal is formulated in the following terms:

> "*The FtT misunderstood the most important piece of evidence ….*
>
> *The FtT misstated the Secretary of State's account of some of its most important evidence, describing the drafts of the crucial letters of introduction held by the assassins as 'forgeries' of those held by* [the Appellant]."

This ground is directly linked to two paragraphs of the FtT's decision. The first [94], contains the following material passages:

> "*The letters of introduction constitute a very important part of the evidence ….*
>
> *These are letters found at the scene of the assassination and purport to be letters of introduction relating to ….. the assassins ….*
>
> [Other exhibits] *are letters of introduction found at the Appellant's premises. There are differences between the two sets of letters ….* [duly elaborated] ….
>
> *A report from a forensic document examiner, prepared in the course of the criminal investigation, contained a conclusion that the letters found at the scene were not printed or copied on any machine linked to the Appellant and were probably not printed or copied on the same machine as the letters found at the Appellant's home. The letters found at the scene were described by the Common Serjeant as 'careful and elaborate forgeries of the letters that* [the Appellant] *created'*."

42. The second paragraph of the FtT's decision which, through this ground of appeal, the Secretary of State specifically attacks is [102]. Here the Tribunal states:

> "*The specific evidence of the Appellant's involvement, as set out by DCI Dingemans, does not, as he accepts, implicate the Appellant directly in the conspiracy. The items found at the scene of the assassination fall short in this regard.*"

The Tribunal then pronounces the uncontroversial finding that there is no forensic nexus between a series of items of evidence recovered from the scene of the murder and the Appellant. The Tribunal, having specifically rehearsed Mr Dingemans' opinion that the documents recovered from the scene were suggestive of direct knowledge of or involvement in the conspiracy on the part of the Appellant, continues:

> "*As with the letters of introduction, there is a gulf between, on the one hand, the items found at the Appellant's home and business premises and the explanations in relation to them (which we deal with below) and, on the other hand, the items found at the scene, notwithstanding the fact that some contained details relating to the Appellant and the IOC. As Mr MacKenzie submitted, it is of very substantial importance that the letters of introduction found at the scene were forgeries of the items found in London. The extent of human agency in the reproduction of the letters of introduction, which included the altering of the dates and errors such as the Appellant's name being misspelled, is simply unknown.*"

This is followed by the finding, at [103]:

> "*…. We find that the inclusion of the Appellant's details and those of the IOC in some of the items fall short as reliable evidence of the Appellant's involvement in the conspiracy as a conscious and knowing agent.*"

43. The time devoted by both parties' counsel to this ground of appeal comfortably eclipsed that consumed by the other two grounds together. Mr Auburn developed his argument with some energy and enterprise. In doing so, we consider that he strayed well beyond the boundaries imposed by the grant of permission to appeal. The framework of this appeal was determined by the terms of the three grounds of appeal advanced on behalf of the Secretary of State and the decision of the permission Judge that each overcame the threshold of arguability. There was no application to amend the grounds. At times, counsel's submissions roamed freely and widely. We, for our part, shall confine our determination of this ground to the content and contours authorised by the grant of permission to appeal.

44. It was at all times common ground that the versions of the two letters of introduction recovered during a search of the Appellant's premises, while replicating the text of the equivalent documents recovered at the scene of the assassination, differ in a number of significant respects from the latter. The Tribunal noted these, with particularisation, in [94] of its decision. As appears from the last quoted passage, the Tribunal was also alert to, and took into account, the Appellant's "explanations" concerning the letters. These were noted in [95] of its decision. In this context the Tribunal also considered the evidence of a witness, contained in a police statement and, correctly, observed that this supported the Appellant's explanation.

45. The Tribunal gave further consideration to this discrete issue in [104], making the following assessment:

> "*It is certainly true that the* [witness's] *statement reveals that the Appellant made the approach for help but if the plot, sophisticated, carefully planned and well resourced, genuinely involved*

the Appellant, it is perhaps surprising that he would openly seek help, on the basis of his poor English, from [the witness], *who was in a position to tell the police exactly what he knew.*"

The witness proceeded to do precisely that in the event. Next, the Tribunal considered the evidence of the police interviews, making the assessment that from the cessation of the Appellant's stance of silence he provided –

"*…. an account which, in all important respects, has remained his account to date.*"

46. The Tribunal's characterisation of the letters of introduction recovered from the scene of the assassination as "forgeries" lies at the heart of this ground of appeal. The origins and evolution of the word "forgeries" are apparent from the following forensic tracing exercise:

    (i) The Appellant's application to the Crown Court to have the charges against him dismissed involved an argument by his counsel that the aforementioned letters were "*careful and elaborate forgeries of the letters that the* [Appellant] *created ….*": per the Common Serjeant - see [14] above.

    (ii) The Common Serjeant's assessment was that the forgery involved "*backdating what was created in order to fit into a forged trail that had been created for* [the assassins] *in their passports, supported by the visas within them*".

    (iii) The Common Serjeant, recognising that the Appellant had been the creator of the letters, stated that they were subsequently used as "*the template for the documentation that they* [the assassins] *were to forge …..*"

    (iv) In [94] of its decision, the FtT quoted, accurately, the "*careful and elaborate forgeries*" passage from the ruling of the Common Serjeant.

    (v) In [102] of its decision, the FtT recorded the submission of Mr MacKenzie that the letters recovered from the scene were '*forgeries of the items found in London*'. In the same passage the Tribunal crafted the phrase '*the reproduction of the letters of introduction*'.

47. It is also of importance to trace how the Secretary of State's case concerning the letters of introduction unfolded before the FtT:

    (i) It was contended on behalf of the Secretary of State, initially, that the two sets of letters were the same.

    (ii) The record of Mr Auburn's closing submission to the FtT contains the following passage:

    "*These are different <u>drafts</u> – 'forgery' is a misnomer – assassins copy' was not a forgery of A's letter ….*

    The different versions are simply plotter's perfecting their story …

Important issue is verifiability, ie when [the victim's] *security contact the IOC the story will stack up*."

In a later passage, one finds the submission that the issue was not whether the Appellant personally had composed the letters found at the scene. Rather, the real issue was that of verifiability.

48. The FtT clearly did not accept the Secretary of State's case that the two sets of letters of introduction were different drafts. Rather, it evidently aligned itself with the Common Serjeant's assessment – and accepted the submission on behalf of the Appellant – that the letters recovered from the scene were forgeries of those found at the Appellant's premises in London. We consider that neither the Common Serjeant nor the FtT was, consciously, attributing any special or technical meaning to the word "forgeries". This is particularly clear in the FtT's further statement that the letters created by the Appellant had been the subject of subsequent human intervention giving rise to "reproduction" of them. We consider that in adopting the formula of the Common Serjeant, and, simultaneously, acceding to the submission of counsel for the Appellant, the FtT cannot be said to have erred in law in any recognisable way.

49. Contrary to Mr Mackenzie's submission, it is not clear to us from Mr Auburn's skeleton argument at first instance that the Secretary of State was making the case that the two sets of letters were the same. Given the obvious and critical differences between the two sets, this case would have been manifestly unsustainable in any event. What is clear is that in closing submissions, Mr Auburn unequivocally espoused the appellation "*drafts*", simultaneously characterising "*forgery*" a misnomer. While the FtT clearly adopted the language of forgery in its decision, we are satisfied that the terms "*forgery*" and "*drafts*" were used in a loose and non-technical sense. Furthermore, neither of these descriptions necessarily excluded the other. The FtT unequivocally held that the versions of the letter recovered from the scene of the assassination were reproductions. This finding is not merely unassailable in the context of an error of law appeal. It is also, objectively, indisputably correct. In making this finding, the FtT clearly both understood the Appellant's case on this discrete issue and accepted it.

50. Bearing in mind the terms of this permitted ground of appeal, the real question, in our judgment, is whether the FtT misunderstood the Secretary of State's contention, advanced by Mr Auburn in closing submissions, that one of the functions of the letters of introduction and the Appellant's involvement in their creation was to provide a mechanism whereby, if certain checks and enquiries were pursued by the proposed victim's entourage, the letters could be verified, as could the assassins' previous contact with the Appellant and his IOC organisation. In our view the FtT's characterisation of these letters as forgeries, as we have analysed this above, is not supportive of the suggestion that it misunderstood the Secretary of State's case in this respect. Furthermore, the careful forensic examination of the FtT's decision which we have undertaken demonstrates clearly that it paid attention to the closing submission of Mr Auburn. It is well settled that there was no judicial duty to rehearse this in its full detail. Indeed, we would add that the trail of verifiability issue was such an obvious function of the letters that it was not incumbent on the Tribunal to spell it out *in extenso*. The Tribunal, in any event, summarised Mr

Auburn's submission on this issue in [65] of its decision. Furthermore, it characterised these letters "*a very important part of the evidence*", in [94] and then proceeded to examine this discrete issue with some care. In so doing it gave consideration to the differences between the two sets of letters, the evidence of the forensic document examiner, the Appellant's explanation of the letters, the evidence of the witness noted above, the lack of attempt by the Appellant to conceal or destroy this vital documentary evidence and the absence of any forensic link between the two sets of letters.

51. Giving effect to our analysis above, we conclude that this ground of appeal is not made out. To this we would add that having regard to elementary doctrine, reflected in decisions such as R (Iran) v Secretary of State for the Home Department [2005] EWCA Civ 982, the threshold which this ground of appeal would have had to overcome in order to prevail is that of Wednesbury irrationality or, adopting the less attractive taxonomy, perversity. The terms in which Mr Auburn's arguments were framed suggested clearly a recognition and acceptance of this analysis.

CONCLUSION

52. The Secretary of State grounds of appeal, by some measure, do not pass muster. The appeal is, accordingly, dismissed. The decision of the FtT is, therefore, affirmed. We would highlight that this latter decision has two elements. First, the Appellant's appeal against the Secretary of State's decision that he is excluded from the protection of the Refugee Convention under Article 1F(c) was allowed. Second, the FtT decided that the Appellant is a refugee.

Edward McCloskey.

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Date: 28 July 2016

Appendix 1

Chronology

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IN THE FIRST TIER TRIBUNAL **Appeal ref: AA/10668/2006**
IMMIGRATION & ASYLUM CHAMBER
TAYLOR HOUSE

Between

YASSER AL-SIRRI

Appellant

V

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

CHRONOLOGY OF EVENTS

Key:
A = Appellant.
BPP = Birnberg Peirce & Partners, present solicitors for the Appellant.
CPS = Crown Prosecution Service.
DG = Deighton Guedalla, previous solicitors for the Appellant.
R = Respondent.
TSols = Treasury Solicitors.

<u>Egypt</u>

22.11.62	A born in Dumiat, near Port Said, Cairo. A grows up in Suez and attends school there.
Sept 1981	President Sadat makes emergency law and orders arrest on national security grounds of 1536 of those he believes to be his opponents, including A.

03.09.81	Order for A's arrest signed (pursuant to emergency law). Police come to A's house in his absence. Mother sends message and A hides.
05.09.81	Following above speech, A surrenders to police and is imprisoned in Istiqbal Tora high security prison in Cairo.
06.10.81	Assassination of President Sadat.
1982	A banned from Egyptian military service because of detention. A resumes Islamist activities.
1984	A detained for approximately three weeks by Security Services in Cairo. No reasons given. A subjected to torture.
1985	A detained in 'appeal prison' following demonstration – tortured – released without charge after three months.
1986	A travelling between Cairo & Suez – detained by Security Service and held in Cairo for 45 days – tortured – released by judge.
1987	A detained in 'appeal prison' for one month, accused of distributing leaflets – tortured – accused of breaking prison rules – sent elsewhere for more than one month – released without trial.
	A shot at by security – his friend is hit by a bullet – detained for 45 days at Tora prison, Cairo – tortured by Deputy of SIS – released by court – no proof of guilt.
1987	(Approximate date) A's first marriage.
1988	A takes part in memorial for massacre in refugee camp in Chatilla, Lebanon – detained for three days for being pro-Palestinian.

Jordan / Yemen

22.08.88	A leaves Egypt having received warning of imminent arrest. Goes to Jordan, and a short time later, to Yemen.

Sudan

Nov 93	A is warned to leave Yemen because of claims of involvement in plot to kill Dr Sidqi. A goes to Sudan with his family.
17.03.94	A sentenced to death in absentia by Egyptian Supreme State Security Court Martial Criminal Court for involvement in the attempt to kill Dr Sidqi.

United Kingdom

29.04.94	A arrives in the UK from Sudan and applies for asylum at port. He is detained. His wife and four children are granted temporary admission.
02.05.94	Asylum application.
03.05.94	Amnesty International Urgent Action – five co-accused have been executed – A is one of four sentenced in absentia.
Dec 94	A released from detention.
30.11.95	A is sentenced in absentia by Egyptian Supreme State Security Court (Military Felonies) to 15 years hard labour on conviction of membership of a terrorist organisation.
Late 95	A establishes the one-man 'Islamic Observation Centre' ("IOC") from his flat.
Jan 99	Egyptian Supreme State Security Court Martial Criminal Court sentences A in absentia to life with hard labour for involvement in illegal Jihad movement and plotting to carry out attacks on officials and police. Nine others are sentenced to death. There are 107 Defendants in all (known as the 'return from Albania' case).
11.10.00	R refuses A's asylum application on the grounds of Article 1F(c) exclusion. R indicates A will be granted four years Exceptional Leave to Enter (but this is never implemented).
13.10.00	Four years Exceptional Leave to Remain granted in-country to A's spouse and daughter.
09.09.01	Assassination of General Ahmad Shah Masoud ("ASM").
23.10.01	A arrested in connection with assassination of ASM. Represented by BPP in connection with criminal matters.
29.10.01	A charged with (1) Conspiracy to murder ASM; (2) Inviting support for a proscribed organisation – 'Al-Gamm'a al-Islamiya' under the Terrorism Act 2000 s.12(1); (3) Inviting funds for the purposes of terrorism under the Terrorism Act 2000 s.15(1)(a); (4) Arranging availability of property for purposes of terrorism under the Terrorism Act 2000 ss.17 & 22; (5) Publishing written material likely to stir up racial hatred under the Public Order Act 1986 ss.19(a) & 27(3).

06.02.02 R withdraws the unimplemented ELR decision.

03.05.02 CPS serves case summary re charges (1) and (5) only. It did not formally discontinue the other charges but advised it would notify the Court and the defence if it intended to proceed with them, which it never did.

16.05.02 Charge (1), conspiracy to murder, dismissed by the Common Serjeant of the Central Criminal Court on the application of the defence. Charge (5) remained pending.

A immediately re-arrested in connection with United States extradition request on allegation of providing material support to a terrorist organisation, Al-Gamm'a al-Islamiya (aka The Islamic Group, 'IG').

29.07.02 A discharged in the extradition proceedings. Home Secretary (David Blunkett) declined to issue an order to proceed because there was no evidence to support the charges.

28.10.03 CPS discontinue charge 5, the last of the UK criminal charges, on the grounds that it was unable to comply with the order to serve a full translation of the book giving rise to the charge.

A granted 6 months' Discretionary Leave to Remain (DLR) to 30.09.04.

15.06.04 Leave in line with mother and sister granted to daughter.

13.04.05 A granted less than six months DLR to 09.10.05.

05.09.06 A granted six months DLR to 04.03.07.

Asylum appeal proceedings

20.09.06 A gives notice of appeal under s.83 Nationality Immigration and Asylum Act 2002.

05.12.06 R maintains decision to refuse asylum and serves fresh reasons for refusal letter & a Respondent's Bundle.

01.05.07 & 19.06.07 Appeal heard by the AIT.

20.07.07 Date of AIT determination, dismissing A's appeal against exclusion from refugee status.

03.09.07 Application to the AIT for permission to appeal to the Court of Appeal.

03.10.07	Application [above] refused.
04.06.08	Permission to appeal granted by the Court of Appeal before May LJ and Moses LJ.
27.11.08	Appeal heard by the Court of Appeal.
18.03.09	Judgment of the Court of Appeal, allowing the appeal to the extent of remittal to the AIT for reconsideration on the proper basis.
15.05.09	Petition to the Supreme Court.
14-17.05.12	Appeal heard in the Supreme Court (with joined case of DD (Afghanistan). (UNHCR intervening).
21.11.12	Supreme Court judgment. Dismisses appeal against the order for remittal but accepts A's legal arguments concerning, in particular, the standard of proof to be applied in exclusion cases.
14.05.13	FtT CMR and Directions.
25.06.13	R fails to comply with above direction.
08.07.13	TSols notify BPP of intention to interview A and that consideration was being given to exclusion under Articles 1F(a) and (b), in addition to (c).
23.07.13	BPP ask to be informed of proposed subject matter of interview and for sight of the documents on which it would be based.
06.08.13	TSols propose to BPP that by 16th August they will serve 'a copy of any material on which the SSHD proposes to either put questions to the Appellant in interview or to rely upon in any decision'.
07.08.13	BPP agree to timescale for disclosure but request that R should also supply any CPS material reviewed by her but not relied on. BPP advise A's instructions will be taken in relation to proposed interview but week of 16th September (proposed by TSols) would be unsuitable as solicitor with conduct would be on leave. This was followed by further disclosure.
12.09.13	TSols advise interview is to take place in Liverpool over the course of three days (the previous proposal had been for a one day interview in Croydon).

23.09.13	TSols advise that proposed interview would cover all relevant aspects of A's life since the 1980s and would be based around the disclosure provided in August. BPP asked to confirm within 14 days whether A would attend.
30.09.13	Further CMR.
10.01.14	R's further reasons for refusal letter.
27.01.14	Further CMR.
31.01.14	Grant of Restricted Leave to A and imposition of restricted leave conditions.
25.02.14	Letter before claim challenging restricted leave conditions.
07.04.14.	Further CMR.
09.04.14	FtT decision on witness summons issue.
25.04.14	Judicial Review claim issued re decision to grant Restricted Leave (JR/5697/2014)
28.05.14 & 17.03.15	FtT hearing. A's appeal against exclusion allowed by the FtT.
13.04.15	CMRH: Counsel for SSHD confirms SSHD accepts that A would be at risk on return to Egypt.
16.04.15	Promulgation of final FTT determination: A's appeal against refusal of refugee status allowed.
20.04.15	R applies for permission to appeal.
01.05.15	R's application refused.
15.05.15	R renews application to Upper Tribunal.
16.10.15	Upper Tribunal grants permission to appeal to R.
04 & 25 July 2016	Upper Tribunal hearing.
28 July 2016	Upper Tribunal's judgment.
17 August 2016	Unembargoed judgment disseminated.