Neutral Citation Number: [2009] EWCA Civ 222

Case No: C5/2007/2372

**IN THE SUPREME COURT OF JUDICATURE**
**COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL**
**AA/10668/2006**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/03/2009

**Before :**

**LORD JUSTICE SEDLEY**
**LADY JUSTICE ARDEN**
and
**LORD JUSTICE LONGMORE**

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**Between :**

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|---|---|
| **YASSER AL-SIRRI** | **Appellant** |
| **- and -** | |
| **SECRETARY OF STATE FOR THE HOME DEPARTMENT** | **Respondent** |
| **- and -** | |
| **UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES** | **Intervener** |

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**Mr Andrew Nicol QC and Mr Simon Cox** (instructed by Messrs Deighton Guedalla) for the **Appellant**
**Mr Tim Eicke and Mr Iain Quirk** (instructed by Treasury Solicitors) for the **Respondent**
**Ms Samantha Knights** (instructed by Messrs Baker & McKenzie) for the **Intervener**

Hearing dates: Thursday 27 and Friday 28 November 2008

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# Approved Judgment

**Lord Justice Sedley :**

***The appeal***

1. Yasser Al-Sirri is an Egyptian national, now in his mid-forties, whose application for asylum has been turned down, first by the Home Secretary and then by the AIT, under art. 1F(c) of the 1951 Refugee Convention.

2. When the Convention was drawn up in Geneva in 1951, one of the concerns of the states parties was that use might be made of it by individuals guilty of the kinds of conduct against which the Convention was designed to afford protection. Article 1F accordingly provided as follows:

> …..
>
> F. 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.

3. This appeal raises two questions, one of law and one of fact. The question of law is whether art. 1F(c) reaches individual acts of terrorism. The question of fact is whether, if it does, there are "serious reasons for considering" that the appellant has been guilty of such acts.

4. We have had the advantage not only of oral argument from Andrew Nicol QC (with Simon Cox) for the appellant and Tim Eicke for the Home Secretary but of the United Nations High Commissioner for Refugees, whose written intervention, prepared pro bono by Samantha Knights and Alexis Martinez, has provided the court and the parties with much valuable material.

***History***

*The Egyptian convictions*

5. The appellant, who is a committed Islamist, was repeatedly arrested and tortured by the Egyptian police between 1981 and 1988. In the latter year, warned of another impending arrest, he fled from Egypt to Jordan and then to Yemen, where he worked

for some four years as a school inspector, making visits to Pakistan and Saudi Arabia. Then in 1993 an abortive attempt was made on the life of the Egyptian prime minister. The appellant learnt that he was suspected of being implicated in the plot and fled with his wife and children to Sudan. In his absence, in March 1994, he was found guilty by the Egyptian Supreme Military Court of participating in the plot and was sentenced to death. Five co-accused were also sentenced to death and hanged.

6. From Sudan Mr Al-Sirri came with his family in April 1994 to the United Kingdom. He claimed asylum on arrival, identified himself and admitted travelling to the UK on a false passport. He was detained and was not bailed until the end of the year. The following year, again in his absence, he was found guilty by the Egyptian Supreme Military 0Court of belonging to a terrorist organisation and sentenced – perhaps superfluously – to 15 years' hard labour. This was followed in 1999 by a further sentence, this time of life imprisonment, for membership of an illegal jihadi movement and for planning attacks on state personnel.

7. Having been here for five years without a decision on his asylum claim, Mr Al-Sirri in October 1999 applied for leave to remain under the Home Office's backlog clearance policy. This was refused under art. 1F on the basis of the first two of his Egyptian convictions. A decision was taken to grant him and his dependants exceptional leave to remain for a limited period pursuant to ECHR art 3, but no such grant was in the event made. Towards the end of 2000 the appellant began to manage his brother-in-law's Islamic and Arabic bookshop in west London.

*The Old Bailey indictment*

8. On 9 September 2001 (two days before the attack on the World Trade Center and the Pentagon), the Afghan vice-president and defence minister, General Masoud, was assassinated by two Taliban suicide bombers posing as journalists. They had gained access to him using fake credentials for which, it turned out, the appellant had knowingly or inadvertently provided the template by writing letters of introduction. He was indicted at the Central Criminal Court on the following counts:

(1) Conspiracy to murder General Masoud.
(2) Inviting support for a proscribed organisation, Al-Gamm'a al-Islamiya [the Islamic Group, or IG].
(3) Soliciting funds for terrorist purposes.
(4) Arranging to make property available for terrorist purposes.
(5) Publishing material likely to stir up racial hatred.

9. The Crown's case summary, when served, related only to counts 1 and 5. Counts 2, 3 and 4 were not proceeded with, and the fifth count was eventually dropped because no translation of the material publication had been obtained. On 16 May 2002 the Common Serjeant, exercising the power contained in §2 of Sch.3 to the Crime and Disorder Act 1998, dismissed the first count on the ground (in the statutory wording) that the evidence would not be sufficient for a jury properly to convict the accused. This was because, in his judgment, the evidence was as consistent with innocence as with guilt.

*The US indictment*

10. On the same day, however, Mr Al-Sirri was rearrested on an extradition request made by the United States government, pursuant to an indictment handed down by a New York grand jury. The indictment in substance charged him with providing material support to a terrorist organisation, namely IG, and solicitation of crimes of violence.

11. By virtue of art. IX of the Treaty which was given effect by the United States of America (Extradition) Order 1976, extradition could at that date be granted "only if the evidence be found sufficient according to the law of the requested Party … to justify the committal for trial of the person sought …" No evidence whatever was tendered in support of the request by the US authorities. In consequence the Home Secretary on 29 July 2002 declined to give authority to proceed, and the appellant was discharged.

*The asylum claim*

12. Between 2004 and 2006 the Home Secretary granted the appellant three periods of discretionary leave to remain. These, by reaching a total of more than a year, triggered a right under s.83 of the Nationality, Immigration and Asylum Act 2002 to appeal to the AIT against the art. 1F refusal of asylum which had occurred in October 2000. It is against the adverse outcome of that appeal that the present appeal is brought.

***The law***

13. Article 1F of the 1951 Refugee Convention is set out in paragraph 2 above.

14. Section 54 of the Immigration, Asylum and Nationality Act 2006 provides:

> Refugee Convention: construction
>
> (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—
>
> "the Refugee Convention" means the Convention relating to the Status of Refugees done at Geneva on 28th July 1951, and
>
> "terrorism" has the meaning given by section 1 of the Terrorism Act 2000 (c. 11).

15. Section 1 of the Terrorism Act 2000 as amended provides:

**Terrorism: interpretation**

(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 an international governmental organisation] 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, [racial] 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.

(3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.

(4) In this section—

(a) "action" includes action outside the United Kingdom,

(b) a reference to any person or to property is a reference to any person, or to property, wherever situated,

(c) a reference to the public includes a reference to the public of a country other than the United Kingdom, and

(d) "the government" means the government of the United Kingdom, of a Part of the United Kingdom or of a country other than the United Kingdom.

(5) In this Act a reference to action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organisation.

16. Council Directive 2004/83/EC (the Qualification Directive) provides by art. 12:

> ….
>
> 2. A third country national or stateless person is excluded from being a refugee where there are serious reasons for considering that:
>
> (a) he or she 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 or she has committed a serious non-political crime outside the country of refuge prior to his or her admission as a refugee; which means the time of issuing a residence permit based on the granting of refugee status; particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes;
>
> (c) he or she has been guilty of acts contrary to the purpose and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations.
>
> 3. Paragraph 2 applies to persons who instigate or otherwise participate in the commission of the crimes or acts mentioned therein.

17. The first purpose set out in art. 1 of the Charter of the United Nations is:

> "To maintain international peace and security, and to that end to take effective collective measures … for the suppression of acts of aggression or other breaches of the peace …"

By art. 25 the Members agree to accept and carry out the decisions of the Security Council.

18. By Resolution 1624, adopted on 14 September 2005, the Security Council reaffirmed that

> "acts, methods and practices of terrorism are contrary to the purposes and principles of the United Nations…"

It called upon all states to prohibit and prevent incitement to commit terrorist acts and to

> "deny safe haven to any persons with respect to whom there is credible and relevant information giving serious reasons for considering that they have been guilty of such conduct."

### *The AIT decision*

19. The AIT (Hodge J, the President; SIJ Lane and IJ Woodhouse) held that individual acts of terrorism fell within art 1F(c) as being contrary to the purposes and principles of the United Nations, and found that there were serious reasons for considering that Mr Al-Sirri had been guilty of such acts. In so finding they placed "little weight" or "no significant weight" on the Egyptian convictions because these had probably been obtained by torture; but they paid "particular regard" to the US indictment. They went on to conclude in §51:

> "….. Whilst acknowledging that the appellant was discharged from the conspiracy to the murder count in relation to General Masoud we have noted the reason for this and consider that the evidence does point to the appellant as having played a role in facilitating the access of the suicide bombers to General Masoud. We have noted the production of a book authored by one of the leading members of IG and the manuscript written by Ayman Al-Zawahiri a leader of a proscribed organisation. We do consider there are serious grounds for believing that the appellant is guilty of providing support and assistance both financial and logistical to terrorists and terrorist organisations in particular IG."

20. I will come to some of the detail underlying these findings when I deal with the factual challenges.

### *The presumption of innocence*

21. The appellant's leading counsel, Andrew Nicol QC, began his submissions with the contention that art 6(2) of the European Convention on Human Rights, now patriated by the Human Rights Act 1998, required the AIT to respect the effect of the Common Serjeant's decision by treating Mr Al-Sirri as innocent of any wrongdoing in relation to the death of General Masoud.

22. Art 6(2) provides:

> "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

23. The jurisprudence of the European Court of Human Rights establishes that this provision is not confined to criminal proceedings in the narrow sense but reaches other proceedings which are closely linked to or continuous with criminal proceedings. Thus in *O v Norway* (ECtHR 11.2.03; 29327/95) it was held that the presumption of innocence applied not only to the criminal proceedings in which the applicant had been acquitted but to the subsequent proceedings in which the High Court had refused him compensation because it could not find on the balance of probability that he was innocent. The compensation proceedings, like the prosecution, were brought under the Norwegian Code of Criminal Procedure. Accordingly the art 6

presumption of innocence carried through and displaced any need for the applicant to establish his innocence.

24. The decision has to be contrasted with the Court's contemporaneous decision in *Ringvold v Norway* (ECtHR 11.2.03; 34964/97). Compensation was sought, again under the Code of Criminal Procedure, by the victim of a crime of which the applicant had been acquitted. Answering the question whether art 6(2) operated in the compensation proceedings, the Court held that these did not amount to a criminal charge, and went on:

> 41. The question remains whether there were such links between the criminal proceedings and the ensuing compensation proceedings as to justify extending the scope of Article 6 §2 to cover the latter.
>
> The court reiterates that the outcome of the criminal proceedings was not decisive for the issue of compensation. In this particular case, the situation was reversed: despite the applicant's acquittal it was legally feasible to award compensation. Regardless of the conclusion reached in the criminal proceedings against the applicant, the compensation case was thus not a direct sequel to the former. In this respect, the present case is clearly distinguishable from those referred to above, where the Court found that the proceedings concerned were a consequence and the concomitant of the criminal proceedings, and that Article 6 §2 was applicable to the former.

25. In my judgment the appeal to the AIT against the invocation of art 1F of the Refugee Convention bore no relationship to the Central Criminal Court proceedings which was in any way comparable with that found in *O v Norway*. It is in fact considerably more remote than the relationship between the two sets of proceedings in *Ringvold v Norway*, a relationship which, although both proceedings arose out of the same legal instrument and had been conducted in tandem, was held insufficient to attract the art 6(2) presumption. The two proceedings are in my judgment discrete, with the consequence that no legal presumption applicable to the criminal proceedings is carried through to the AIT proceedings.

26. This is sufficient to dispose of the issue; but I would add that, even if a close enough link had been established to engage the art 6(2) presumption of innocence in the AIT proceedings, there is no logical reason why the consequence should be, as Mr Nicol contends it is, that the appellant must be treated as irrebuttably innocent by the AIT. The presumption of innocence is always rebuttable, and it is to the statutory criteria for its rebuttal that I turn next.

27. I put the issue in this way because I am willing to accept that, until the Home Secretary has produced evidence capable of amounting to serious reason for considering that an individual comes within one of the art. 1F categories, there can be no foundation for denying him such protection as the Convention would otherwise afford. In this simple sense, which was the sense adopted by common consent before

the IAT in *KK (Turkey)* [2004] UKIAT 00101, there will be a presumption of innocence in art. 1F proceedings. The critical questions are, first, what standard of proof is required to displace it and, second, what evidence can lawfully contribute to such proof.

***Article 1F(c)***
*"The purposes and principles of the United Nations"*

28. Ours being a dualist system of law, the Refugee Convention has no domestic force save to the extent that it is adopted by national legislation. Formerly the route lay through the Immigration Rules, with their origin in the Immigration Act 1971. Since 2006 it has been through the Qualification Directive, which is given domestic force by the European Communities Act 1972. This is not merely a technical fact: by common consent it conditions and qualifies the application of s.1 of the Terrorism Act to art. 1F proceedings.

29. The reason is this. As has been seen, art 12 of the Directive, which sets minimum standards for the protection that member states are committed to give asylum-seekers, by paragraph (2)(c) reproduces the class of acts stigmatised by art. 1F(c) – acts contrary to the purposes and principles of the United Nations – and defines these by reference to paragraphs 1 and 2 of the Preamble to the Charter. Mr Eicke, on behalf of the Home Secretary, has not disputed that, even taken at its most generous, this formula does not go as wide as s.1 of the Terrorism Act 2000. It follows that the adoption by s.54(2) of the 2006 Act of the meaning of terrorism contained in the 2000 Act has where necessary to be read down in an art. 1F case so as to keep its meaning within the scope of art 12(2)(c) of the Directive.

30. What may in my judgment be a legitimate indicator of the meaning and scope of the Preamble to the UN Charter are relevant Security Council resolutions. I accept Mr Eicke's submission that Resolution 1624 (see above) puts it beyond argument that terrorism is contrary to the principles and purposes of the United Nations.

*Terrorism*

31. What then constitutes terrorism? There is no present need for an elaborate definition (which may, I accept, be needed in other contexts): terrorism here means the use for political ends of fear induced by violence. This is not materially different, I think, from the second limb of Security Council resolution 1566 (2004) which the UNHCR, with the support of the General Rapporteur, commends:

> "acts … committed with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organisation to do or abstain from doing any act".

32. I see the force of Mr Nicol's submission that terrorism must have an international character or aspect in order to come within art 12 of the Directive, but for reasons to which I shall come when I deal with the evidence I do not think this helps the appellant. If the evidence here reaches the necessary standard, it has a clear international dimension.

*"serious reasons for considering"*

33. It is part of Mr Nicol's case that the standard of proof set by art. 1F is cognate with the criminal standard, that is to say proof beyond reasonable doubt or such that the tribunal is sure of guilt. This is manifestly not right. The whole point of art. 1F is that it is dealing, at least in limbs (a) and (b), with people who in many instances might have been convicted and gaoled but have not been. If the receiving state is in a position to prosecute them, it is a necessary assumption that it will do so. Art. 1F therefore deals with asylum-seekers who are suspect but still at large. At the same time it clearly sets a standard above mere suspicion. Beyond this, it is a mistake to try to paraphrase the straightforward language of the Convention: it has to be treated as meaning what it says.

34. What it says can, however, be legitimately read in the light of the co-ordinate French text, which uses the phrase "*des raisons sérieuses de penser*". This certainly imports no additional weight into the verb "consider" in the English text.

"*has been guilty"*

35. Nor do I accept that the use of the word "guilty" imports a criminal standard of proof. Research by counsel for the United Nations High Commissioner for Refugees has found little in the *travaux préparatoires* to cast light on the genesis or motivation of paragraph (c), and there is no reason in the text itself, in my judgment, to regard "guilty of" as meaning more than "responsible for".

*"any person"*

36. Next Mr Nicol submits that art. 1F is directed solely at persons who are state actors, that is to say who are in some tangible way using or abusing the powers of (or ordinarily deployed by) a sovereign state. His starting point is that the entire purpose of the UN Charter is to regulate relations between states, which is why art. 2(7) expressly excludes matters within states' domestic jurisdiction from the UN's purview. He has the broad support both of academic commentators and of the UNHCR, whose Guidelines draw attention to the vagueness of art. 1F(c) and propose that it should therefore be read as being "only triggered in extreme circumstances by activity which attacks the very basis of the international community's existence".

37. This approach was considered and rejected by the IAT (as it then was) in *KK (Turkey)* [2004] UKIAT 00101:

> What persons are capable of committing acts covered by Article 1F(c)?
> 20. Because the United Nations is an organisation of States, there is a considerable amount of older opinion indicating that only those responsible (whether de facto or de jure) for the government or control of States could commit acts which were contrary to the purposes and principles of the United Nations. Owing at least partly to the growth of terrorist activity, it is now accepted by almost everybody that the meaning of Article 1F(c) is not so confined. As a result, this issue was not argued before us. For our part, we are perfectly content to hold that a private individual may be guilty of an act contrary to the purposes and principles of the United Nations, and we see no difficulty

> in reading the words in this way. Indeed, in the light of other materials before us, we think we should have had some difficulty in confining Article 1F(c) to individuals who control States.

38. A similar view was taken by the Supreme Court of Canada in *Pushpanathan v Canada* [1999] INLR 36:

> 68. …. Although it may be more difficult for a non-state actor to perpetrate human rights violations on a scale amounting to persecution without state thereby implicitly adopting those acts, the possibility should not be excluded a priori. As mentioned earlier, the court must also take into consideration that some crimes that have specifically been declared to contravene the purpose and principles of the UN are not restricted to state actors.

39. I would adopt the same approach. Once again the need is to give effect to the words on the page, bearing in mind the scope and purpose of the provision but without fixed or prior limitations other than those contained in the text itself. I would accordingly not regard it as a requirement of art. 1F that the asylum-seeker must have been deploying state powers if his claim is to be impugned. As the outcome in *Pushpanathan* illustrates, this does not mean that every reprehensible act with international ramifications (in that case, major drug trafficking) falls within art. 1F(c). The purposes and principles of the UN will always be central to the adjudication.

***The case against the appellant***

*The Egyptian convictions*

40. There is a clear finding by the AIT that "there is good evidence that the procedures of the Egyptian Supreme Military Court are unfair and that evidence before it is probably obtained by torture". In consequence they ascribe "little weight" (later described by them as "no significant weight") to the Egyptian convictions. Mr Nicol says this is equivocal and contrary to principle: no credence or weight whatever should be countenanced for any conviction based, as the appellant's convictions were, on such evidence.

41. The Home Secretary through Mr Eicke takes the position that it is open to a judicial tribunal in this country to give at least marginal weight to such evidence, which is what the AIT did. Not only would I unhesitatingly reject this submission; I find it disturbing that the holder of one of the great offices of state should have thought fit to advance it.

42. The repudiation of torture as a means of obtaining evidence was an important aspect of the historic struggle for human and civil rights in this and other countries. Some account of it can be found in my paper "Wringing out the fault: self-incrimination in the twenty-first century" (the MacDermott Lecture) (2001) 52 NILQ 107; see also D.Friedman, "Torture and the common law" (2006) 2 EHRLR 180. The moral and legal foundation of the repudiation was powerfully reasserted in the recent decision of the House of Lords in *A v Home Secretary (No. 2)* [2005] UKHL 71. It is sufficient for present purposes to cite from the headnote at [2006] 2 AC 221-2:

> "… evidence of a suspect or witness which had been obtained by torture had long been regarded as inherently unreliable, unfair, offensive to ordinary standards of humanity and decency and incompatible with the principles on which courts should administer justice … [I]n consequence, such evidence might not lawfully be admitted against a party to proceedings in a United Kingdom court, irrespective of where, by whom or on whose authority the torture had been inflicted…."

43. The Appellate Committee went on to hold that this did not debar the executive from placing such reliance as it thought right for its own purposes on evidence obtained by torture, but that it debarred any judicial body from doing so. There is no question that the AIT is such a body. By a majority the House also held that the use of torture must be established not simply as a real possibility but as a probability. The AIT in the present case made a clear finding that such a probability existed in the case of the Egyptian convictions. It has not been suggested that their finding made it possible to distinguish between evidence which had and evidence which had not been obtained by torture in the material trial.

44. It follows, in my judgment, that the Egyptian convictions constituted tainted evidence to which the AIT were required by law to accord no weight whatever. I have set out in §18 above the equivocal terms in which in the event they dealt with this material. Although the phrases used do not suggest that it had a substantial influence on the outcome, they make it possible that the material played a part in what could have been a marginal decision. Whether this is so or not, there was only one principled way in which to deal with the Egyptian convictions once the probability of torture was established, and that was to accord them no evidential weight at all. The reluctance of the Home Secretary to accept this principle is a matter of concern, and the failure of the AIT to respect it was in my judgment a serious error of law.

*The Old Bailey indictment*

45. I have dealt with the argument founded on the presumption of innocence and arising out of Mr Al-Sirri's discharge on the principal (and in the event the only effective) count on the English indictment. There remains Mr Nicol's argument that the evidential material was in law insufficient to meet the test in art. 1F. I will consider this question for the present in isolation from the US indictment.

46. The nature of the case against the appellant can be taken initially from the Common Serjeant's description of it (edited for typographical errors):

> "One: I am satisfied that there is a sufficiency of evidence from which the jury could find proved, as a primary fact, that General Masoud was murdered by persons then named as Touzani, and Bakkali (hereafter referred to as "T" and "B") by means of an explosion caused by the detonation of a bomb carried into the presence of General Masoud, on 9th September 2001, by the said T and B, posing as a journalist and a cameraman, respectively, having, as such, been granted an interview with the General.

Second: I am further satisfied that there is sufficiency of evidence, from which the jury could find proved, that the letter of introduction from the Islamic Observation Centre (hereafter IOC) purportedly signed by the applicant, informing anyone reading them that T and B are journalists of Arab News International, itself a TV media subsidiary of IOC, and giving various contact details of IOC, including telephone, fax, e-mail and internet, did play a part in securing the interview at which the assassination of General Masoud took place.

I reach that conclusion having regard to the inferences, in my judgment, readily available from the details and sophistication of the means of gaining access to General Masoud, in which the IOC was the central theme.

I dwell on that because although it is undoubtedly correct that the persons pretending to be journalist and cameraman respectively, had with them other letters of introduction, and the interview was secured by means in which third parties played a part, principally, as Mr Emmerson submits, one Sayef, there is, in my judgment, a clear thread tying three of the four letters of introduction, to the role ascribed to T and B, as journalists, provided for them by the IOC and supported by the follow up props, like the cards found in the room occupied by the journalists T and B, at the government centre from which they were taken to interview General Masoud, all hanging together to the role ascribed for them in the letters of introduction provided by the applicant.

Third: the question remains -- and it is determinative of the application -- is there evidence of the writing of the letters of introduction by the applicant. Strictly speaking, the creation of them by means initiated by him. That is to say, are the letters subsequently found at his home, sufficient to permit the inference to be drawn, so that the jury is sure, that in doing so he was a knowing party to the murder of General Masoud? 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. As part of that process can inferences consistent with innocence be safely excluded?

I am persuaded, for the reasons advanced by Mr Emmerson on the applicant's behalf, that the evidence is insufficient for this purpose. In outline; beginning with the two letters in fact carried by T and B, and adding into the equation the agreed chronology of the provisions of the drafts, as they have been referred to me under the rubric "To whom it may concern", and standing alongside that the agreed chronology, albeit largely false, provided by what the entries in T and B's passports

> indicate, the two letters in fact carried by the assassins are proved to be, as Mr Emmerson characterised them, careful and elaborate forgeries of the letters that the applicant created.
>
> "Elaborate", because they included the use of the forged rubber stamps. That is to say, different to the stamps in the defendant's possession, but similar to those on the IOC letter heading. "Careful", because they involved -- the forgery that is -- backdating what was created, in order to fit into a forged trail that had been created for T and B in their passports, supported by the visas within them.
>
> Since, in my judgment, it is -- and since the crucial fact is that it is – common ground that the defendant cannot have created his letters before, at the earliest, 28th July, and more likely the 29th, it is in my judgment as consistent with T and B using the letters created by the applicant as the template for the documentation that they were to forge, thus using the applicant as an innocent fall guy and furthermore one who could, if necessary, provide verisimilitude 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, the applicant, knew that they were intended to be used for the purpose of killing General Masoud by the persons or through the medium of the persons for whom he was providing those letters by way of introduction."

47. To this the Common Serjeant added the evidence that Mr Al-Sirri had been entirely candid with the police about his authorship of the "templates", which had anyway been readily traceable to him, and had not sought to destroy the material documentation in his possession.

48. The AIT dealt with the Old Bailey indictment in this way:

> 43. The appellant provided and has accepted that he provided documents intended to be used as credentials of the Islamic Observation Centre and its television project Arab News International. The evidence shows clearly that letters in English composed by a friend of the appellant were written to a colleague of General Masoud known to the appellant in Afghanistan introducing the two deceased bombers. Copies of these documents were found at a search of the appellant's house.
>
> 44. The appellant has accepted that a contact of his had telephoned him from Afghanistan and suggested that the Islamic Observation Centre be involved in a profitable project to interview on film a number of leading persons in Afghanistan and Chechnya. The two journalists were to

> conduct the interviews. On being sent the names of the two journalists the appellant sent letters of introduction from the IOC. He claims then to have received telephone calls from the journalists saying they had begun the interviews in question. It appears to be the case that on 23 July 2001 the appellant described Arabic News International as a subsidiary of his Islamic Observation Centre and as a TV news agency. It also appears that he claimed to have made film on Bosnia Herzgovina. However it appears that Arabic News International did not exist and never has existed. According to the appellant's evidence to the police the name of this news agency was suggested by his contact Osman.
>
> 45. It is however the appellant's case that the actual letters of introduction used by the suicide bombers who killed General Masoud were fabricated on notepaper using his organisation's details from his original letter of introduction. It is the case that the surviving letter of introduction is not in exactly the same form as those found on the search of the appellant's premises.

49. They noted the Common Serjeant's reasons for dismissing the murder count, but then reminded themselves correctly that:

> "It is, however, always the case that in a criminal trial, for evidence to be sufficient for a jury to convict it must be evidence of which they are sure. That is not the same test as … whether there are serious reasons for considering that this appellant has been guilty of acts contrary to the purposes and principles of the United Nations."

50. They concluded:

> 46. …..We consider the evidence as summarised above seriously points to some knowing involvement of the appellant in the events which lead to the death of General Masoud. The killing was designed to destabilise the political structure in Afghanistan of which the General was a key part and/or to intimidate the public in the area controlled by the Northern Alliance.
>
> 47. Nor for the reasons given above do we regard it as necessary that the killing of General Masoud should have an international aspect. But even if we are wrong about that we consider the killing itself to be an act of terrorism likely to have significant international repercussions, as indeed it appears to have done.

*International terrorism?*

51. Pausing here, the AIT had earlier recognised that it was generally accepted "that the killing was carried out to achieve the objectives of the Taliban who were at that time fighting the Northern Alliance". This on the face of it was therefore a domestic Afghan quarrel, notwithstanding the Taliban's international links. The international repercussions of the assassination, to which the AIT refer, are not described. But what in my judgment gives the appellant's suspected or alleged involvement a dimension which brings it within the purposes and principles of the United Nations is that, if true, it involved the use of a safe haven in one state to destabilise the government of another by the use of violence.

*Sufficiency of evidence*

52. This, however, was not the entirety of the material relied on by the Home Secretary and accepted as probative by the AIT:

> 48. The respondent also relied in the letter of refusal on a lengthy statement by Detective Constable (Acting Detective Inspector) Dingemans of the Counter-Terrorism Command at Scotland Yard. It includes reference to a book printed under the auspices of the Islamic Observation Centre entitled "*Bringing to light some of the most important judgements of Islam*". Substantial copies of the book were found in the appellant's home. The author of the book is one of the leaders of IG the proscribed terrorist organisation who is said to be close to Osama Bin Laden and a signatory to Bin Laden's Fatwa which preceded the 1998 US Embassy bombings in Tanzania and Kenya. The foreword to the book is the work of the Islamic Observation Centre and is attributed by the police officer to the appellant. The book is dedicated to Dr Rahman the leader of IG currently serving a prison sentence in the United States having been convicted for his part in the 1993 World Trade Centre bombing. Searches of the appellant's property produced as well as the documentation relating to the killers of General Masoud, numerous documents containing details of worldwide contacts and associates as well as books and videos relating to Osama Bin Laden and Al-Qa'ida. The appellant was, it appears, accustomed to move substantial sums around the world despite the fact that he was in receipt of state benefits here
>
> 49. Also said to have been found at the appellant's address was a manuscript written by Ayman Al-Zawahiri entitled "*Expectation of the Jihad Movement in Egypt*". Mr Al-Zawahiri is the leader of a proscribed organisation and is alleged to have helped fund and organised the massacre of 68 tourists and 4 Egyptians in Luxor during November 1997. During the course of being interviewed over the proposed criminal proceedings against him the appellant made a formal statement through his solicitors and answered some questions but at many of the early stages of the interview process

exercised his right of silence on the basis that he did not know what the allegations were that he was facing. It is the appellant's case that no reliance can be placed on the statement of ADI Dingemans. Much of it is hearsay. Others are summaries of detailed interviews.

53. While it is correct that the AIT is empowered to accept hearsay evidence, there are limits to how much weight, if any, can be fairly or judicially placed upon a second-hand assertion of something highly material for which the primary sources are or ought to be accessible. Within a very detailed witness statement prepared by A/DI Piers Dingemans of the Metropolitan Police Counter-Terrorism Command , dated 4 December 2006 (the day before the date of the Home Office decision letter), is the following account of what was found on a raid of the appellant's home:

> "The searches recovered substantial amounts of documents, paperwork and other exhibits. Below is a summary of items of interest:
>
> PS/222 – a letter of introduction in the name of Kareem BAKKALI
>
> PS/223 – a letter of introduction in the name of Karim TOUZANI
>
> PS/248 – a fax in the name of TOUZANI and BAKKALI
>
> There were numerous documents that contain the details of worldwide contacts and associates, as well as books and videos relating to Usama BIN LADEN and Al Qaida.
>
> Amongst the documentation relating to worldwide dealings were many that relate to shipping orders, banking and money transfers. A substantial financial investigation was undertaken and in the early stages, it was clear that significant cash movements of funds was taking place. Several large debits – one for £5000.00 (five thousand pounds) had been identified and been electronically transferred to various accounts in the Middle East (by way of example, Palestine; Egypt; and, Dubai). Al-Sirri was in receipt of state benefits and allowances and his involvement in these financial transactions far exceeded his legitimate income.
>
> During interviews conducted on 29th October 2001 (29/10/2001), Al-Sirri put forward explanations when questioned about specific cheque transactions relating to AL HEDAYA, although they are dubious to say the least. Satisfactory explanations were not given regarding the origins of cash transactions involving monies sent abroad and not shown within the known financial structure [of] his business."

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. The full transcripts were put before the AIT by the appellant's counsel. As has been seen, the AIT (§49) noted them but derived no assistance from them.

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 effect of the latter. The allegation that Mr Al-Sirri had been moving around the world sums of money greater than his known income could explain was potentially highly significant in the context of what the AIT had to decide. The risk of error if such issues are decided on the say-so of a third party is not obviated by reducing the weight given to it on account of its secondary character. 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. It was of course open to either side to adduce the primary material.

*The US indictment*

56. The remaining question is whether the US indictment could lawfully contribute to the case against the appellant. I have described how this indictment came to be relied on without any supporting evidence. Mr Nicol submits that in this situation it had no legitimate place whatever in the AIT's determination. The AIT took a very different view:

> 40. …..The appellant says that because there is no evidence to support the allegations they cannot be regarded as serious grounds for considering that the appellant might be guilty of them.
>
> 41. We do not agree. We were not given any details in relation to the extradition proceedings. However it is clear from a full reading of the indictment that a good deal of the evidence relied on by the Grand Jury will have been obtained by telephone intercepts. Such evidence is highly unlikely to be admissible in a UK Court. None of that however detracts from the fact that a US Grand Jury was satisfied that there was probable cause that this appellant had committed a criminal offence under the US law in relation to his involvement with and association with IG which is itself a terrorist organisation. As an example the appellant is said to have "*solicited, commanded, induced and otherwise endeavoured to persuade other persons to engage in violent, terrorist operations worldwide to achieve IG's objectives*". We regard this indictment as serious grounds for believing that the appellant has been guilty of acts contrary to the purposes and principles of the United Nations.

57. We have sought the parties' assistance about the New York State grand jury process. The grand jury is required to hand down an indictment if it finds probable cause for the charge or charges drafted by the prosecutor. The finding of probable cause depends entirely on what the prosecutor elects to put before it, which must take the form of witness testimony, not of mere assertion. Hearsay is admissible. Our understanding is that the procedure is ordinarily (though not mandatorily) conducted without any input from the intended defendant and behind closed doors. This, however, did not obviate the requirement for the United States government to submit to the UK the evidence on which it based its request for extradition, for there is no suggestion that, under the 1976 Treaty and Extradition Order, an indictment by itself could constitute such evidence.

58. Rule 6(e) of the Federal Rules of Criminal Procedure provides, however, for a court to authorise disclosure of the evidence put before a grand jury to, among others, a foreign government for law enforcement purposes. This marries up with the provision for the submission of evidence in the 1976 Extradition Order cited in §11 above.

59. If a bare indictment were entitled to evidential weight, one would have expected the Old Bailey indictment, albeit held to have been unsupported by sufficient evidence to found a safe conviction, to be similarly relied on. But an indictment, unlike the Dingemans witness statement, is not even secondary evidence. Nor does it have the character or evidential force of a conviction following a fair trial. It is an accusation based on evidence and argument of which the rest of the world, including the Home Secretary, the AIT and the appellant, knows nothing.

60. In my judgment a bare indictment, including one returned by a US grand jury, is entitled to no evidential weight whatever in deciding whether or not an asylum claim is defeated by art. 1F(c). The AIT accordingly erred in law in not only admitting the US indictment but according very substantial weight to it.

***Disposal***

61. I would therefore allow this appeal on the ground that the AIT erred in law in according any weight at all to the Egyptian convictions, which had probably been secured by the use of torture, and to the US indictment, which was unsupported by any evidence.

62. Two possible courses are now open to us. In my judgment the evidence, shorn of its inadmissible elements, is capable of sustaining an adverse determination under art. 1F(c). The most the appellant can therefore obtain is remission to the AIT for redetermination in accordance with the judgment of this court. But the appeal will fall to be dismissed outright if the court is satisfied either (a) that the AIT's determination includes an adverse finding on the Old Bailey and Dingemans evidence alone or (b) that any finding made on that evidence alone would have been bound to be adverse to the appellant. We have invited and received supplementary written submissions on both these possibilities.

63. In their §46 (quoted at §49 above) the AIT came very close to making an adverse finding on the Old Bailey and Dingemans evidence alone when they concluded that it "seriously points to some knowing involvement of the appellant in the events which

led to the death of General Masoud". But it may well be that they were choosing not to use the language of art. 1F ("serious reasons for considering that…") because they were going to give substantial weight to the US indictment, and to pay at least marginal attention to the Egyptian convictions, before expressing a conclusion in terms of art. 1F(c), as they finally did.

64. The question then is whether there is any realistic possibility that a tribunal of fact, confining itself to the admissible evidence, might have rejected the submission that there were serious reasons for considering that Mr Al-Sirri had been guilty of promoting or assisting international terrorism. In my judgment there is.

65. I have quoted in §51 above the two paragraphs in which the AIT dealt with this material and have commented on their approach in the succeeding paragraphs. Neither A/DI Dingemans nor Mr Al-Sirri gave evidence. But although there was before the AIT the material on which Mr Dingemans based his assertions and the full record of Mr Al-Sirri's interrogation about it, none of its detailed content was considered by the AIT in arriving at their conclusion.

66. Since we are agreed that the only proper course, in the light of this so far unaddressed material, is to remit the case to the AIT for redetermination in accordance with the judgment of this court, our own view of it does not matter save to the extent that it is necessary to explain why it is capable of coming below the threshold set by art. 1F.

67. Mr Dingemans' statement was made on 4 December 2006, the day before the Home Secretary wrote to the appellant refusing him asylum. It contains a damaging account and analysis of the material found at Mr Al-Sirri's premises. That material was itself, however, before the tribunal, and so was the record of Mr Al-Sirri's police interview about it. The record shows that, although initially his solicitor spoke for him and 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.

68. In particular, intelligible explanations were offered of the sums of money to which Mr Dingemans had rightly drawn attention – none of them, it has to be said, very great. It will be for the AIT to decide whether, in the light of the explanations and of what they make of them, together with all the other admissible evidence, the art. 1F threshold is crossed.

69. The other admissible evidence includes the physical material related to the assassination of General Masoud, the written evidence of a forensic document examiner (Mark Arbouine) and the answers given by the appellant about it. It includes detailed questions and answers about the appellant's contact with and knowledge of a man known as Osman. It also includes the literature found in the appellant's possession.

70. 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 content of the books on his shelf.

71. This said, it will be for the AIT to evaluate the admissible evidence for itself. While it would be open to this court to set the terms of the hearing, I prefer to leave this to the AIT. They will need in particular to consider whether, if he seeks to resile from it, there is any good reason not to hold the appellant to his election not to give evidence. A similar issue may have to be decided in relation to the respondent's evidence.

72. While they can be expected to have before them all the documentary evidence which was previously before the tribunal, the AIT may also have to consider whether to admit fresh evidence which has come into being, or come to light, only since the initial hearing in mid-2007. All these matters are best left to their expert judgment.

73. We understand that it may be difficult to reconstitute the panel which decided this case. I would accordingly direct that the appeal be remitted to the AIT for redetermination in accordance with the judgment of this court by a differently constituted panel.

**Lady Justice Arden:**

74. I agree with Sedley LJ with the minor qualifications that follow.

75. My view as regards the conclusion in paragraph 46. of the AIT's determination is that this court could not rely on it as a ground for not ordering remittal of this case because (1) the AIT did not identify the evidence on which their conclusion was based (and therefore left it ambiguous as to whether it included the US indictment); (2) the AIT failed to give any reasons for this conclusion, and (3) the AIT failed to say how the AIT had dealt with the evidence contained in the respondent's interviews on the allegations of his participation in the murder of General Masoud.

76. There are in my judgment the following additional points:

*"serious reasons for considering"*

77. There is no doubt that the Refugee Convention imposes obligations of the highest importance on states to provide refuge to refugees, and that the exceptions from the obligation to give refuge, such as that contained in art. 1F(c), must be applied only when the state justifies this course as required by art. 1F(c). As to the meaning of "serious grounds", art. 33(2) of the Refugee Convention provides some guidance. Under that provision a refugee cannot claim the benefit of refoulement if "there are reasonable grounds for regarding [him] as a danger to the security of the country in which he is…". The expression "serious reasons" is different from, and in my judgment on the natural meaning of the words requires more than, "reasonable grounds", for otherwise the same phrase would have been used in art. 1F(c).

78. The policy of the Refugee Convention is that states are entitled to withhold the benefit of the Convention where there are serious reasons for considering that a person has been guilty of acts contrary to the principles and purposes of the United Nations, and in addition where art. 33 applies. The right to refugee status is therefore not absolute, in contrast to the rights guaranteed by arts. 2 and 3 of the European Convention on Human Rights.

*Terrorism*

79. The AIT considered the evidence as a whole. 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. While this question does not arise on the present appeal, I would wish to leave open the question whether, if the AIT had considered that none of the grounds placed before them succeeded, save in one respect which, when all the circumstances were taken into account, evinced serious grounds for believing that the applicant was involved in terrorism in only a minor role, whether art.1F(c) on its true interpretation applies in those circumstances. This question may additionally raise an issue of proportionality, that is, whether the loss of refugee status in those circumstances is necessary for the purpose of securing the aims of the exception in art. 1F(c) of the Refugee Convention.

**Lord Justice Longmore:**

80. I also agree that the AIT should have placed no weight on either the Egyptian convictions or the US grand jury indictment. To the extent that they did, they have committed an error of law.

81. I further agree with my Lord and my Lady that acts of terrorism will usually constitute acts contrary to the principles and purposes of the United Nations, because they will usually be aimed at destabilising recognised states and their relationship with other states.

82. In the present case the Secretary of State relied on a long statement of Acting Detective Inspector Dingemans of 4th December 2006 setting out the evidence gathered in England.

83. Mr Dingeman's statement made it clear that Mr Al-Sirri

i) ran the Islamic Observation centre ("IOC") from his flat at 102 Edinburgh House in Maida Vale;

ii) rented 99A Bell Street, Paddington where he ran a bookshop and a company called Al-Hedaya;

iii) published a book called (in translation) "Bringing to light some of the most important judgments in Islam", the author of which was Taha Musa, who was (i) leader of al-Gamma al-Islamiyya ("IG"), a proscribed terrorist organisation under the Terrorism Act 2000 and (ii) a signatory to the "fatwa" of Osama Bin Laden which preceded the 1998 bombings of United States embassies in Tanzania and Egypt;

iv) had in his possession (a) letters of introduction in the name of the two journalists who murdered Mr Masoud, (b) books and videos relating to Osama Bin Laden and Al Qaeda, (c) documentation relating to shipping orders and bank and money transfers which showed significant cash movements had taken place including sums paid to recipients in Palestine, Egypt and Dubai;

v) had given explanations of those cash movements which appeared to be no part of the financial structure of his legitimate business explanations which Mr Dingemans considered were "dubious";

vi) had, furthermore, in his possession a letter of 17th August 2001 from an Osman Al Said who had a contact address in Sana'a, Yemen. This letter enclosed a photocopy of a passport in the name of Hussain Yassein Taya Osman and asked Mr Al-Sirri to "take care of the matter". It referred to previous correspondence and said "please get rid of all the letters which I have sent you previously as you are aware of the circumstances".

84. Mr Dingemans attached to his statement a summary of 17 separate interviews between 23rd and 29th October 2001. Mr Al-Sirri decided not to give evidence himself to the Tribunal, and was content to rely on the explanations given in interview.

85. The Tribunal referred to some of this evidence but wrongly placed weight on the US indictment. It is impossible to know to what conclusion the Tribunal would have come if they had had regard only to the English evidence and I therefore agree that the matter will have to be remitted to them for reconsideration.