KK (Article 1F(c)) Turkey) [2004]
UKIAT 00101

IMMIGRATION APPEAL TRIBUNAL

Date Determination notified:
.....7/5/2004.....

Before:

Mr C M G Ockelton (Deputy President)
His Honour Judge N Huskinson (Vice President)
Professor D B Casson (Acting Vice President)

Between

APPELLANT

and

Secretary of State for the Home Department

RESPONDENT

DETERMINATION AND REASONS

I INTRODUCTION

1. This determination concerns the ambit of Article 1F(c) of the Refugee Convention, which excludes from the benefits of that Convention persons who have been guilty of acts contrary to the purposes and principles of the United Nations.

II THE FACTS

2. The Appellant, a citizen of Turkey, appeals with permission against the determination of the Chief Adjudicator, HH Judge Hodge, OBE, dismissing his appeal against the decision of the Respondent on 8 April 2001 to grant him limited leave to enter. His appeal is under section 69(3) of the 1999 Act and is on the grounds that any requirement that he leave the United Kingdom at the end of the period limited by his leave would be contrary to the United Kingdom's obligations under the Refugee Convention.

3. This determination has had a long period of gestation. We heard oral arguments on 16th and 17th April 2003, when the Appellant was represented by Mr Scannell, instructed by Deighton Guedalla, and the Respondent was represented by Mr Tam, instructed by the Treasury Solicitor. There were a number of matters left uncompleted, and we made directions for the forwarding to the Tribunal of certain information and any further written submissions, with both parties having liberty to apply for the appeal to be restored for further oral hearing. There were extensions of time for compliance with those directions, but by the beginning of July 2003, we had received submissions from both sides and an acknowledgement that neither side wished to make any further oral submission. Shortly thereafter, a member of the panel became ill. Before we had prepared our determination, an important further document, the UNHR's revised 'Guidelines', dated 4th September 2003, became available to the parties. That document, together with the parties' indication that they had no further submissions to make based on it, was sent to us only in mid-March 2004.

4. The Appellant arrived alone at Heathrow on 10th March 1992, when he was aged about eighteen. He claimed asylum. For some reason, he was not interviewed about that claim for over three years. The basis of his claim has not changed substantially. He is a Kurd and a Kurdish nationalist. His political views and activity are stated by his solicitors as that he has "*a known history of activism on behalf of the PKK (and in alliance with Dev Sol) having been arrested, interrogated and detained for short periods on seven different occasions in Gaziantep and Istanbul, between June 1990 and February 1992, culminating in his respective implication in a serious bombing incident in Istanbul in February 1992 which forced his departure to seek asylum abroad*".

5. The PKK, or Kurdistan Workers Party, advocates armed struggle both at home and abroad, to achieve an independent Kurdish state covering territories presently within Turkey, Syria, Iraq and Iran. Dev Sol has transmogrified into DHKP-C or the Revolutionary Peoples Liberation Party–Front. It is a radical left wing Marxist underground group which seeks to use violence to overthrow the Turkish government and create a Marxist Leninist regime in Turkey by means of armed revolutionary struggle. Both Dev Sol and DHKP-C have carried out attacks against Turkish police security forces targets and individuals and both have attacked or tried to attack British and American interests.

6. The PKK and the DHKP-C are, as it happens, proscribed in the United Kingdom under Section 3 of the Terrorism Act 2000: see the Terrorism Act (Proscribed Organisations) (Amendment) Order 2003.

7. The Respondent accepts that the Appellant has a well-founded fear of persecution in Turkey for reason of his political opinions. It is for that reason that he has granted him leave to enter, because in these circumstances to remove him to Turkey would breach Article 3 of the European Convention on Human Rights. The Appellant is therefore at no immediate risk of removal from the United Kingdom if his appeal fails. The principal matter at stake is

his entitlement to various Social Security benefits, which he can receive as a refugee but not as a person whose expulsion is inhibited merely by the European Convention.

8. The Secretary of State also acknowledges that if it were not for events in the United Kingdom since the Appellant arrived, he would be entitled to be regarded as a refugee. It is to those events that we must now turn.

9. On 15th March 1996, the Appellant was sentenced at the Inner London Crown Court to four years imprisonment for conspiracy to commit arson and three years imprisonment concurrent for arson. The two counts related to two attacks, one on the Turkish and Beyond Travel Agents in Marylebone Street, Marylebone, and the other on the Turkish Bank UK Ltd in Borough High Street, Southwark. In each case, the attack was by petrol bomb; and in each case a red flag emblazoned with the insignia of DHKP was left at the premises attacked. Further background facts are set out as follows in the Secretary of State's skeleton argument. They all appear to be accepted on behalf of the Appellant with a few reservations to which we shall refer.

> "(1) The attacks were aimed at legitimate Turkish businesses operating in the United Kingdom.
>
> (2) It is accepted that the arson attacks were committed for a political purpose. It is common ground between the appellant and the Secretary of State that the offences were 'associated with Dev Sol [DHKP] and were manifestly aimed against the Turkish State' since that is part of the basis of the application for asylum: see paragraph 1(b) of Deighton Guedalla's representations dated 24 November 1997. This is significant because it is therefore common ground that the appellant's criminal acts were aimed at a foreign (friendly) state with the intention of influencing the acts of the legitimate government of that foreign State.
>
> (3) The arson attacks were part of a concerted effort by two (and probably more) people. In other words, they were planned and premeditated.
>
> (4) It is also accepted that the flag of the DHKP was placed in the window of the premises as part of the attack by the appellant or his accomplices(s).
>
> (5) The DHKPC (and the PKK) are a terrorist organisation committed to the overthrow of the Turkish Government by violent means. They have a history of carrying out terrorist attacks including murder.
>
> (6) The attack on the Bank appears to have been discovered as soon as it was committed and the appellant was arrested immediately afterwards as he fled from the scene (it appears the car that he and his accomplice had borrowed failed to start). It appears that the flames were extinguished by members of the public. It is a reasonable inference that this was not intended by the appellant – the attack was no doubt carried out at the time it was in part at least to minimise the risk of detection and maximise the chance of causing serious damage.
>
> (7) There is no dispute between the appellant and the Secretary of State that the appellant 'is a Kurdish nationalist with a known history of activism on behalf of the PKK (and in alliance with Dev Sol [DHKP]': see paragraph 1(a) of Deighton Guedalla's representations dated 24th November 1997. it is also

correct (and common ground) that the appellant accepts that he supports the PKK which he accepts commits terrorist acts and DHKP/Dev Sol 'with whom he has been to some extent willing to make common cause' and that he justified the use of 'revolutionary force' against the Turkish State, albeit that he also stated he had never been directly involved in terrorist actions: see paragraph 6(b) and (c) of Deighton Guedalla's representations dated 24th November 1997.

(8) It is also common ground that the appellant was an active supporter of the two terrorist organisations prior to his arrest in the UK including propaganda and fundraising activities and 'is manifestly a political animal' who maintained contact with his 'PKK comrades' while in prison: see paragraph 10(a), (b) and (d) of Deighton Guedalla's representations of 24th November 1997.

(9) There is no evidence which shows whether the appellant made any attempt to ascertain whether or not the premises were empty at the time of the attacks. It is apparently accepted that he could not have been sure that persons would not be injured as a result of the attacks or that serious damage would not result: see Deighton Guedalla's letter of 21st May 2000.

(10) It appears the trial Judge stated at the conclusion of the criminal trial that he was 'satisfied that…the detriment to this country of your remaining here is overwhelming'. As such, the trial Judge clearly concluded that the arson attacks were very serious."

10. The reservations are as follows. First, the Appellant has, since the time of his interview at the police station, consistently denied taking any part at all in these two attacks. For the purposes of these proceedings, however, his representatives accept that the Secretary of State and the Appellate Authority are entitled to proceed on the basis that the Appellant was in fact involved in them, because of his conviction. In any event, given the Appellant's conviction for these two offences, there clearly are '*serious reasons for considering*' that he was involved in those two attacks, which as we shall indicate shortly, is the appropriate test under Article 1F(c) of the Refugee Convention.

11. Secondly, the Appellant claims that the fact that his sentences were of four and three years concurrent shows that the offences to which he was convicted were not seen as serious. That, in our view, is an argument without substance: as the Chief Adjudicator appears to have pointed out in argument, he was a person of previous good character. In our view that factor, taken with the judge's remarks in sentencing, show that the offences are properly to be regarded as serious.

12. There is simply no substance in the argument that the Appellant was not charged with any more serious offence, such as arson with intent to endanger human life. It is not disputed that sometimes offences are committed that are more serious than those with which the Appellant was charged and of which he was convicted: but that does nothing to reduce the seriousness of these offences.

13. The third matter is that the Appellant claims it is not right to evaluate the attacks on the basis that human life might have been endangered. That argument is, in Mr Scannell's skeleton, based firmly on the Appellant's own remarks at the time he was arrested in Southwark. Those remarks are recorded as follows in paragraph 6 of the Prosecution Case Summary at the trial:

> "[K] then agreed that he was a Kurd and he was then arrested for arson. He immediately said 'this is political, we were demonstrating, we threw the petrol to demonstrate against the Turkish'. He was then cautioned and repeated 'we were demonstrating. No one was hurt'."

14. It is surprising that Mr Scannell's argument should be based on those comments, because from his interview onwards the Appellant has denied saying anything that admitted his involvement in these attacks. His acknowledgement now that, in these proceedings, the Secretary of State will not allow him to go behind the conviction does not, in our view, allow him to say simultaneously both that he was not involved in the Southwark attack and that he knew all about it. Similarly, without going behind the Appellant's denial, there can be no substance in the assertion in Mr Scannell's skeleton (paragraph 8(b)) that '*it was known that no-one would be in the building*'.

15. For these reasons, having taken into account the points of disagreement, we have concluded that we can adopt in full the passage from the Respondent's skeleton which we have set out above.

III THE LAW

Relevant Provisions of the Refugee Convention

16. Articles 1A(2) and 1F of the Refugee Convention, so far as material, provide as follows:

> "**Article 1 Definition of the terms 'Refugee'**
>
> A For the purposes of the present Convention, the term 'refugee' shall apply to any person who:
>
> (2) … owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, 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 …
>
> …
>
> 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, war crime, or a crime against humanity, as defined in international instruments drawn up to make provisions 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."

17. We shall also refer to Articles 32 and 33 of the Convention, which are as follows:

> "**Article 32**
>
> **Expulsion.**
>
> (1) The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.
>
> (2) The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.
>
> (3) The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.
>
> **Article 33**
>
> **Prohibition of expulsion or return ("refoulement")**
>
> (1) No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
>
> (2) The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

Burden and Standard of Proof

18. Both parties before us take the view that it is for the Government to show that an exclusion clause applies. We would not dissent. In a case such as this, however, where none of the facts are in dispute for the purposes of the appeal, it is by no means clear that the phrase "*burden and standard of proof*" has any real application. We proceed, however, on the assumption that it is for the Government to establish that Article 1F(c) applies to the Appellant.

19. We do not accept some of the remarks on burden and standard of proof made by the UNCHR, particularly in their most recent guidance upon Article 1F. We deal with this topic in more detail below.

IV INTERPRETATION OF THE LAW

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.

What are the purposes and principles of the United Nations, and what acts are contrary to those purposes and principles?

21. The starting point must be Articles 1 and 2 of the Charter of the United Nations (1945):

> "Article 1
>
> The Purposes of the United Nations are:
>
> 1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
>
> 2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
>
> 3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and
>
> 4. To be a centre for harmonizing the actions of nations in the attainment of these common ends.
>
> Article 2
>
> The Organisation and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles:

1. The Organisation is based on the principle of the sovereign equality of all its members.

2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them In accordance with the present Charter.

3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity, or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

5. All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.

6. The Organisation shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.

7. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII."

22. Chapter VII is headed 'Action with respect to threats to the peace, breaches of the peace, and threats of aggression'. We do not need to set out that chapter in full. For present purposes, we only need to refer to Article 48:

"1. The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.

2. Such decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they remembers."

23. The functions of the Security Council are laid down in Article 24, which reads as follows:

"Article 24

1. In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

2. In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers

granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII and VIII and XII.

3. The Security Council shall submit annual and, when necessary, special reports to the General Assembly for its consideration."

24. Those Articles give the powers of the Security Council and the context in which they are exercised. It is to be noted that the Security Council is not said to have power to act other than in accordance with the purposes and principles of the United Nations: see Article 24(2).

25. Further, it is clear that in deciding what those purposes and principles are, we should not limit ourselves to the wording of Articles 1 and 2, for Article 31 of the Vienna Convention on the Law of Treaties reads as follows:

"**Article 31 General rule of interpretation**

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

   (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

   (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

   (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

   (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

   (c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended."

Resolutions of the Security Council

26. Article 31(3)(b), taken in combination with the articles of the United Nations Treaty to which we have referred, clearly demonstrates that Resolutions of the Security Council are relevant in interpreting the phrase "*the purposes and in principles of the United Nations*".

27. We have been referred to three Security Council resolutions and a statement by the President of the Security Council.

Security Council Resolution 1269 (1999)

"The Security Council,

Deeply concerned by the increase in acts of international terrorism which endangers the lives and well-being of individuals worldwide as well as the peace and security of all States,

Condemning all acts of terrorism, irrespective of motive, wherever and by whomever committed,

Mindful of all relevant resolutions of the General Assembly, including resolution 49/60 of 9 December 1994, by which it adopted the Declaration on Measures to Eliminate International Terrorism,

Emphasizing the necessity to intensify the fight against terrorism at the national level and to strengthen, under the auspices of the United Nations, effective international cooperation in this field on the basis of the principles of the Charter of the United Nations and norms of international law, including respect for international humanitarian law and human rights.

…

Determined to contribute, in accordance with the Charter of the United Nations, to the efforts to combat terrorism in all its forms,

Reaffirming that the suppression of acts of international terrorism, including those in which States are involved, is an essential contribution to the maintenance of international peace and security,

1. Unequivocally condemns all acts, method and practices of terrorism as criminal and unjustifiable, regardless of their motivation, in all their forms and manifestations, wherever and by whomever committed, in particular those which could threaten international peace and security;

2. Calls upon all States to implement fully the international anti-terrorist conventions to which they are parties, encourages, all States to consider as a matter of priority adhering to those to which they are not parties, and encourages also the speedy adoption of the pending conventions;

3. Stresses the vital role of the United Nations in strengthening international cooperation in combating terrorism and, emphasizes the importance of enhanced coordination among States, international and regional organizations;

4. Calls upon all States to take, inter alia, in the context of such cooperation and coordination, appropriate steps to:

   - prevent and suppress in their territories through all lawful means the preparation and financing of any acts of terrorism;
   - deny those who plan, finance or commit terrorist acts safe havens by ensuring their apprehension and prosecution or extradition;
   - take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum-seeker has not participated in terrorist acts;

…

7. Decides to remain seised of this matter."

Statement by the President of the Security Council

…"The Security Council is deeply concerned by the increase, in many regions of the world, of acts of terrorism in all its forms and manifestations. The Council reiterates its condemnation of all acts of terrorism, irrespective of motive, wherever and by whomever committed. It welcomes the efforts of the General Assembly and other organs of the United Nations in the field of combating international terrorism."….

Resolution 1373 (2001) (adopted on 28 September 2001)

"*The Security Council*,

… *Reaffirming* also its unequivocal condemnation of the terrorist attacks which took place in New York, Washington, DC and Pennsylvania on 11 September 2001, and expressing its determinations to prevent all such acts,

Reaffirming further that such acts, like any act of international terrorism, constitute a threat to international peace and security,

…

Acting under Chapter VII of the Charter of the United Nations,

1. *Decides* that all States shall:

(a) Prevent and suppress the financing of terrorist acts;

(b) Criminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts;

(c) Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities;

(d) Prohibit their nationals or any persons and entities within their territories from making any funds, financial or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons;

2. *Decides also* that all States shall:

...

(d) Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens;

(e) Ensure that any person who participates in the financing, planning preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts;

…

3. *Calls* upon all States to:

…

(g) Ensure, in conformity with international law, that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts, and that claims of political motivation are not recognised as grounds for refusing requests for the extradition of alleged terrorists;

…

5. *Declares* that acts, methods, and practices of terrorism are contrary to the purposes and principles of the United Nations and that knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations."

28. We do not need to set out any of the text of Security Council Resolution 1455 (2003), which is specifically directed against Al Qa'eda, but which reaffirms that "a*cts of international terrorism constitute a threat to international peace and security*".

Resolutions of the General Assembly

29. We have also been referred to a number of Resolutions of the General Assembly of the United Nations. Resolutions of the General Assembly do not, unlike Security Council Resolutions, have legislative force: but, in the light of Article 31(3)(a) of the Vienna Convention, they are clearly relevant in determining the purposes and principles of the United Nations.

30. In Resolution 49/60, dated 9th December 1994 and adopted without a vote, the Assembly declared as follows:

"1. The States Members of the United Nations solemnly reaffirm their unequivocal condemnation of all acts, methods and practices of terrorism, as criminal and unjustifiable, wherever and by whomever committed, including those which jeopardize the friendly relations among States and peoples and threaten the territorial integrity and security of States;

2. Acts, methods and practices of terrorism constitute a grave violation of the purposes and principles of the United Nations, which may pose a threat to international peace and security, jeopardize friendly relations among States, hinder international cooperation and aim at the destruction of human rights, fundamental freedoms and the democratic bases of society;

3. Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them."

It is this Resolution that is the subject of specific reference in the Preamble to Security Council Resolution 1269.

31. General Assembly Resolution 51/210 is intended as a supplement to the 1994 Resolution. It reads in part as follows:

"1. The States Members of the United Nations solemnly reaffirm their unequivocal condemnation of all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whomsoever committed,

including those which jeopardize friendly relations among States and peoples and threaten the territorial integrity and security of States;

2. The States Members of the United Nations reaffirm that acts, methods and practices of terrorism are contrary to the purposes and principles of the United Nations; they declare that knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations;

3. The States Members of the United Nations reaffirm that States should take appropriate measures of conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum-seeker has not participated in terrorist acts, considering in this regard relevant information as to whether the asylum-seeker is subject to investigation for or is charged with or has been convicted of offences connected with terrorism and, after granting refugee status, for the purpose of ensuring that that status is not used for the purpose of preparing or organizing terrorist acts intended to be committed against other States or their citizens; …

2. In particular, for purposes of extradition between Contracting States, none of the following offences shall be regarded as a political offence or as an offence inspired by political motives:

   (a) An offence within the scope of the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970;

   (b) An offence within the cope of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 23 September 1971;

   (c) An offence within the scope of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly on 14 December 1973;

   (d) An offence within the scope of the International Convention against the Taking of Hostage, signed at New York on 17 December 1979;

   (e) Murder, manslaughter or assault causing serious bodily harm, kidnapping or serious unlawful detention

   (f) An offence involving the use of firearms, weapons, explosives or other dangerous substances when used as a means to perpetrate indiscriminate violence involving death or serious bodily injury to persons or serious damage to property;

   (g) An attempt to commit any of the foregoing offences or participation as an accomplice of a person who commits or attempts to commit such an offence.

Article 3 (...)

3. The Contracting States shall take appropriate measures, before granting asylum for the purpose of ensuring that the asylum seeker has not engaged in terrorist activities, in particular those referred to in Article 2, and, after

granting asylum, for the purpose of ensuring that refugee status is not used in a manner contrary to the provisions of this Convention. …"

32. There are other resolutions to the same or similar effect, for example, Resolution 55/158, dated 3rd January 2001, which:

> "… 2. *Reiterates* that criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them; …"

33. Resolution 54/164, dated 24th February 2000:

> "1. *Expresses its solidarity* with the victims of terrorism;
>
> 2. *Condemns* the violations of the right to live free from fear and of the right to life, liberty and security;
>
> 3. *Reiterates it unequivocal condemnation* of the acts, methods and practices of terrorism, in all its forms and manifestations, as activities aimed at the destruction of human rights, fundamental freedoms and democracy, threatening the territorial integrity and security of States, destabilizing legitimately constituted Governments, undermining pluralistic civil society and having adverse consequences for the economic and social development of States;
>
> 4. *Calls upon* States to take all necessary and effective measures in accordance with relevant provisions of international law, including international human rights standards, to prevent, combat and eliminate terrorism in all its forms and manifestations, wherever and by whomever committed;
>
> 5. *Urges* the international community to enhance cooperation at the regional and international levels in the fight against terrorism, in accordance with relevant international instruments, including those relating to human rights, with the aim of its eradication;
>
> 6. *Condemns* the incitement of ethnic hatred, violence and terrorism;
>
> 7. *Commends* those Governments that have communicated their view on the implications of terrorism in response to the note verbale by the Secretary-General dated 16 August 1999;
>
> 8. *Welcomes* the report of the Secretary-General, and requests him to continue to seek the views of Member States on the implications of terrorism, in all its forms and manifestations, for the full enjoyment of all human rights and fundamental freedoms, with a view to incorporating them in his report;
>
> 9. *Decides* to consider this question at its fifty-sixth session, under the item entitled 'Human Rights questions'."

Other international conventions

34. We were also referred to a number of international conventions against terrorism, including the European Convention on the Suppression of Terrorism (1997), the UN Convention for the Suppression of Terrorist

Bombings (1997) and the International Convention for the Suppression of the Financing of Terrorism (1999), as well as other conventions on similar topics including, in particular, those relating to hijacking of aircraft. For reasons which we trust will become clear in the course of this determination, we do not need to set out the terms of any of them.

The UNCHR's Position

35. There are before us four documents from the UNCHR. The first is a letter from the Office of the Representative for the United Kingdom and Ireland. It is dated 3rd December 2001 and it is addressed to the Adjudicator. It deals with both Article 1F(c) and Article 33. We do not need to make a further mention of the UNCHR's views on Article 33, as they are not relevant to this appeal. On Article 1F(c), the UNCHR writes as follows:

> "4. The exclusion clauses need to be interpreted restrictively because they detract from protections that would otherwise have been available to the refugee. As emphasised in paragraph 149 of the UNCHR Handbook, a restrictive interpretation and application is also warranted in view of the serious possible consequences of exclusion for the applicant. The exclusion clauses should be used with utmost caution being, in effect, the most extreme sanction provided for by the relevant international refugee instruments.
>
> Article 1F(c)
>
> 5. Article 1F(c) refers to acts contrary to the purposes and principles of the United Nations. The purposes and principles of the United Nations are set out in Articles 1 and 2 of the Charter of the United Nations. They enumerate fundamental principles that would govern the conduct of their members in relation to each other and in relation to the international community as a whole. The very character of the UN's purposes and principles suggests that the violations that would properly fall within Article 1F(c) would be those with an international or global dimension, for example the way the crime was organised, its impact or its long-term objectives. Crimes capable of affecting peace, security and peaceful relations between States would fall within this clause, as would serious and sustained violations of human rights on a massive scale.
>
> 6. Given that the applicability of Article 1F(c) is related to the international scale or impact of a given offence, it follows that its use should be confined to exceptional situations and to situations that do not fall within any of the other exclusion clauses. Comments by delegates recorded in the *travaux préparatoires* support this view. The drafters of the 1951 Convention envisaged this provision as one that would be rarely invoked, and applicable only to individuals who were in a position of power or influence in a State and instrumental in the State's infringement of the UN purposes and principles.
>
> 7. While it is fair to expect that 'acts against the principles and purposes of the United Nations' would in the majority of cases be perpetrated by persons linked to State power, recent developments demonstrate that individuals and groups are capable of crimes that generate serious international repercussions. UNHCR is aware that the assertion in Security Council Resolution 1377 (2001) that acts of international terrorism are contrary to the purposes and principles of the Charter of the United nations, may promote

the application of Article 1F(c) to a broader circle of persons, in the specific context of acts of international terrorism which may be qualified as serious threats to international peace and security. UNCHR does not rule out the possibility that individuals who are responsible for such acts could come within the ambit of Article 1F(c), particularly where none of the other two exclusion clause are applicable. It has, however, to be borne in mind, that this clause should only be applied to those individuals involved in the most extreme of cases.

8. Applying Article 1F often involves consideration of a myriad of issues, some of them related to criminal law concepts, which require careful and differentiated analysis in this context. In the present case, Mr K has been convicted of criminal acts committed in the United Kingdom (arson and conspiracy to commit arson) and was sentenced to 4 years imprisonment. Whilst the crimes committed by Mr K are reprehensible, UNCHR does not agree that these crimes fall within the category of acts falling under Article 1F(c)."

36. The second document is a letter from the Office of the Representative for the United Kingdom and Ireland. It is dated 20th November 2002 and is addressed to the Tribunal. It refers to the earlier letter, and continues as follows:

"**The Scope of Article 1F(c) of the 1951 Convention**

Article 1F(c) excludes from protection as refugees persons who have been 'guilty of acts contrary to the purposes and principles of the United Nations'. Paragraph 163 of UNCHR's Handbook (quoted in the Adjudicator's decision) notes that the purposes and principles are set out in the preamble and Articles 1 and 2 of the Charter of the United Nations. These provisions are couched in broad and general terms. They do not specify the particular acts that would violate the purposes and principles of the United Nations. However, they explicitly suggest that the matters which engage the United Nations are those which are pervasively global in their impact.

Whilst the work of the UN is carried out in accordance with its purposes and principles, this cannot mean that every act which obstructs the UN's broad aims can be interpreted as falling within Article 1F(c). Similarly, while Security Council and General Assembly resolutions and multilateral conventions convened and adopted under the aegis of the UN are carried out in accordance with its purposes and principles, it is incorrect to equate every action contrary to such instruments as falling within Article 1F(c). In UNCHR's opinion, such an approach to Article 1F(c) would be misguided and could result in giving it a wider scope than is appropriate.

The very character of the UN's purposes and principles suggests that the violations that would properly fall within Article 1F(c) would be those with a potentially international or global impact. Crimes capable of affecting international peace and security would fall within this clause, as would serious and sustained violations of human rights on a massive scale. Given that the applicability of Article 1F(c) is related to the international scale and universal impact of a given offence, it follows that its use should be confined to exceptional situations that do not fall within any of the other exclusion clauses. Comments by delegates recorded in the *travaux préparatoires* support this view.

UNHCR is aware that the international materials cited by the Adjudicator, notably Article 1 of Resolution 49/60 of 9 December 1994 and Security Resolution 1373 (2001) of 28 September 2001 assert that 'acts, methods and practices of terrorism are contrary to the purposes and principles of the UN' and that 'knowingly financing,

planning and inciting terrorist acts are also contrary to the purposes and principles of the UN'. However, UNHCR is of the view that all 'terrorist acts', bearing in mind that an international definition has yet to be agreed by the international community, should not automatically be seen to fall within Article 1F(c). Such acts would normally be considered under Article 1F(b). In this connection, it should also be recalled that only terrorist acts which generate serious international repercussions – in the words of General Assembly resolution 51/210 – 'acts which jeopardise friendly relations among States and peoples and threaten the territorial integrity and security of States' – are considered as contrary to the purpose and principles of the United Nations.

As Articles 1 and 2 of the UN Charter essentially address themselves to States, it would seem that persons who are or have been in positions of power in their countries or in state-like entities are capable of violating them. This view is reflected in paragraph 163 of the UNHCR Handbook. However, UNHCR accepts that under certain circumstances and in the light of recent experiences, certain acts committed by persons not associated with any State or State-like entity may engage the purposes and principles of the UN. Such circumstances could include extreme acts of egregious terrorism threatening international peace and security. Such acts may, however, also be considered under Article 1F(a) or Article 1F (b).

Application of Article 1F(c) to the Appellant

We understand that the appellant was convicted of arson and conspiracy to commit arson and sentenced to 4 years' imprisonment. UNHCR would like to reiterate that, irrespective of whether the acts committed by the appellant can be categorised as 'terrorist' or not, UNHCR is of the view that these acts fall short of the particularly egregious acts of terrorism which have international repercussions envisaged by Article 1F(c).

In this respect, UNHCR would also make a comment on expiation. UNHCR is aware that the exclusion clauses in Article 1F are silent on this point. Bearing in mind that the rationale of the exclusion clauses is to deny international protection to "persons undeserving of international protection", UNCHR is of the view that a person who has served a sentence for a crime should not be excluded unless the crimes for which he is convicted is of such a truly heinous nature as to justify continued denial of international protection.

In conclusion, UNHCR would like to reiterate its opinion that although the crimes committed by the appellant in the present appeal are reprehensible, UNHCR does not agree that these crimes fall within the category of acts falling under Article 1F(c) of the 1951 Convention relating to the Status of Refugees."

37. The third document is a letter is from the Office of the Representative for the United Kingdom and Ireland and is addressed to the Appellant's solicitor. It was prepared in response to questions raised by the Tribunal at the hearing of this appeal. It reads as follows:

"Please refer to your letter of 24 April 2003 in which you request UNHCR to respond to a query raised by the Immigration Appeal Tribunal (IAT) regarding a particular sentence in UNCHR's letter of 20 November 2002. We understand that the IAT seeks clarification on UNHCR's use of the word "only" in the following sentence:

> 'In this connection, it should also be recalled that **only** terrorist acts which generate serious international repercussions – in the words of General Assembly resolution 51/210 – "acts which jeopardise friendly relations among States and peoples and threaten the territorial integrity of and

security of States" – are considered as contrary to the purposes and principles of the United Nations'. (Emphasis added).

We further understand that in raising this query, the IAT had in mind:

(a) The 1994 *Declaration on Measures to Eliminate International Terrorism* (approved by general Assembly resolution 49/60, point l(1) which condemns "*all*" acts of terrorism "… *including* those which jeopardise friendly relations among States…); (Emphases supplied in your letter of 24 April 2003); and,

(b) The 1997 *Convention on the Suppression of Terrorist Bombings* (adopted by General Assembly resolution 52/164) and the 1999 *International Convention for the Suppression of the Financing of Terrorism* (adopted by General Assembly resolution 54/109).

In your letter, you point out that neither of these Conventions contemplate any limit on the range of terrorist activity covered other than as set out in each in Article 3. You mention that the terms of Article 3 do not apply to the instant case.

We would draw the IAT's attention to the following considerations:

Our use of the word 'only' in our letter of 20 November 2002, should be understood within the particular context in which it was used. In the paragraph in question, UNHCR was at pains to describe the circumstances under which it might be appropriate to invoke exclusion under Article 1F(c) of the 1951 Convention relating to the Status of Refugee in preference to the other exclusion clauses. We stressed that the key words in Article 1F(c) – "acts contrary to the purposes and principles of the United Nations" should be construed restrictively, and that the application of Article 1F(c) should be reserved for situations where an act and the consequences thereof satisfy a high threshold. This threshold should be 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. Crimes capable of affecting peace, security and peaceful relations between States would fall within Article 1F(c), as would serious and sustained violations of human rights.

Thus, the assertion – even in a UN instrument – that an act is 'terrorist' in nature would not by itself suffice to warrant the correct application of Article 1F(c), not least because "terrorism" is without clear or universally agreed definition. Rather than focus on the terrorism" label, a more reliable guide to the correct application of Article 1F(c) is the extent to which the act in question impinges on the international plane – in terms of its gravity, international impact, and implications for international peace and security. In UNHCR's view, only terrorist acts that are distinguished by these larger characteristics should qualify for exclusion under Article 1F(c).

This view is consistent with the above-cited General Assembly Declarations (GAR 49/60 of 1994 and GAR 51/210 of 1996) and the Conventions of 1997 and 1999. These instruments express the resolve of the international community to condemn and eliminate international terrorism, to suppress terrorist bombings, and to curb the financing of terrorist activities. Given that the object of these instruments is to denounce terrorism and to identify and punish its perpetrators, it is quite appropriate that the range of activities under their remit should be cast in the broadest possible terms. Entirely different – and more restrictive – considerations apply to delineating the proper scope of exclusion under Article 1F(c). There may be overlap between the subject matter of the instruments cited above and the acts that should properly fall within the scope of Article 1F(c). There is however, no exact congruence between them.

We wish at this stage to reiterate a point we have consistently argued – that the key words in Article 1F(c) – "act contrary to the purposes and principles of the United Nations" should be restrictively construed for the specific purposes of that particular exclusion provision. We recognise that the principles and purposes of the UN are reflected in a myriad of ways, for example in multilateral conventions adopted under the aegis of the UN General Assembly and in Security Council resolutions. We acknowledge that new developments have taken place since the UN Charter was adopted and that the scope of the purposes and principles of the UN should be considered in the light of contemporary challenges. These developments cannot however justify a simple equation between acts that violate any UN instrument and acts that properly fall within the ambit of Article 1F(c) and care should be taken to avoid a simplistic approach.

UNHCR accepts that there are situations where a clear link can be established between the contravention of a UN instrument, the violation of the purposes and principles of the UN and exclusion under Article 1F(c). For example, in the aftermath of the attacks of 11 September 2001, the UN Security Council has reaffirmed in resolutions 1373 (2001) and 1377 (2001) that acts of international terrorism are a threat to international peace and security and are contrary to the purposes and principles of the UN. These resolutions have called on States not to provide refuge to terrorists, in particular SCR 1373 (2001 which calls for appropriate measures with regard to asylum seekers. Given the general approach to Article 1F(c), as described in previous communications to the Tribunal on this case, acts of international terrorism of type envisaged by these particular resolutions may indeed fall within the scope of Article 1F(c).

The position is much less clear where the UN instruments in question are non-binding resolutions with no law making authority, or where the interpretation of the UN instrument has to be informed by the terms of an existing UN treaty, (in this case, the 1951 Convention), or where the UN instrument in question does not evince a clear intention to override the provisions of an existing UN treaty. The application of Article 1F(c) should be informed by such considerations as well as by the objects and purposes of that provision.

In conclusion, UNHCR remains of the view that to directly equate any act contrary to UN instruments with exclusion under Article 1F(c) is inconsistent with the object and purpose of Article 1F(c). Article 1F(c) is triggered only in extreme circumstances by activity, which attacks the basis of the international community's coexistence under the auspices of the United Nations. The very nature of the UN's purposes and principles suggests that acts which fall under 1F(c) must have an international dimension, for example, in terms of the manner the crime is organised, its impact or its long-term objectives. Thus crimes capable of affecting peace, security and peaceful relations between States would fall within this clause, as would serious and sustained violations of human rights."

38. The fourth document is a letter from the Office of the Representative for the United Kingdom dated 29th September 2003 and addressed to the Appellant's solicitor. Specifically referring to the present appeal, it encloses a copy of the document 'Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees' dated 4th September 2003. That document is a summary of the background note of the same date, to which we have not been otherwise referred. The relevant paragraphs are the following:

> "2. The rationale for the exclusion clauses, which should be borne in mind when considering their application, is that certain acts are so grave as to render their perpetrators undeserving of international protection as refugees. Their

primary purpose is to deprive those guilty of heinous acts, and serious common crimes, of international refugee protection and to ensure that such persons do not abuse the institution of asylum in order to avoid being held legally accountable for their acts. The exclusion clauses must be applied "scrupulously" to protect the integrity of the institution of asylum, as is recognised by UNCHR's Executive Committee in Conclusion No 82 (XLVIII), 1997. At the same time, given the possible serious consequences of exclusion, it is important to apply them with great caution and only after a full assessment of the individual circumstances of the case. The exclusion clauses should, therefore, always be interpreted in a restrictive manner.

C. Temporal Scope

5. Articles 1F(a) and 1F(c) are concerned with crimes whenever and wherever they are committed. By contrast, the scope of Article 1F(b) is explicitly limited to crimes committed outside the country of refuge prior to admission to that country as a refugee.

D. Cancellation or revocation on the basis of exclusion

6. Where facts which would have led to exclusion only come to light after the grant of refugee status, this would justify **cancellation** of refugee status on the grounds of exclusion. The reverse is that information casting doubt on the basis on which an individual has been excluded should lead to reconsideration of eligibility for refugee status. Where a refugee engages in conduct falling within Article 1F(a) or 1F(c), this would trigger the application of the exclusion clauses and the **revocation** of refugee status, provided all the criteria for the application of these clauses are met.

F. Consequences of exclusion

8. Although a State is precluded from granting refugee status pursuant to the 1951 Convention or the OAU Convention to an individual it has excluded, it is not otherwise obliged to take any particular course of action. The State concerned can choose to grant the excluded individual stay on other grounds, but obligations under international law may require that the person concerned be criminally prosecuted or extradited. A decision by UNHCR to exclude someone from refugee status means that that individual can no longer receive protection or assistance from the Office.

II. SUBSTANTIVE ANALYSIS

C. Article 1F(c): Acts contrary to the purposes and principles of the United Nations

17. Given the broad, general terms of the purposes and principles of the United Nations, the scope of this category is rather unclear and should therefore be read narrowly. Indeed, it is rarely applied and, in many cases, Article 1F(a) or 1F(b) are anyway likely to apply. Article 1F(c) is only triggered in extreme circumstances by activity which attacks the very basis of the international community's coexistence. 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. Given that Articles 1 and 2 of the United Nations Charter essentially set out the fundamental principle States must uphold in their mutual relations, it would appear that in principle only persons who have been in positions of power in a State or State-like entity would appear capable of committing such acts. In cases involving a terrorist act, a correct application of Article 1F(c) involves

an assessment as to the extent to which the act impinges on the international plane – in terms of its gravity, international impact, and implications for international peace and security.

E. Grounds for rejecting individual responsibility

21. Criminal responsibility can normally only arise where the individual concerned committed the material elements of the offence with knowledge and intent. Where the **mental element** is not satisfied, for example, because of ignorance of a key fact, individual criminal responsibility is not established. In some cases, the individual may not have the mental capacity to be held responsible a crime, for example, because of insanity, mental handicap, involuntary intoxication or, in the case of children, immaturity.

22. Factors generally considered to constitute **defences** to criminal responsibility should be considered. For example, the defence of superior orders will only apply where the individual was legally obliged to obey the order, was unaware of its unlawfulness and the order itself was not manifestly unlawful. As for duress, this applies where the act in question results from the person concerned necessarily and reasonably avoiding a threat of imminent death, or of continuing or imminent serious bodily harm to him or herself or another person, and the person does not intend to cause greater harm than the one sought to be avoided. Action in self-defence or in defence of others or of property must be both reasonable and proportionate in relation to the threat.

23. Where **expiation** of the crime is considered to have taken place, application of the exclusion clauses may no longer be justified. This may be the case where the individual has served a penal sentence for the crime in question, or perhaps where a significant period of time has elapsed since commission of the offence. Relevant factors would include the seriousness of the offence, the passage of time, and any expression of regret shown by the individual concerned. In considering the effect of any pardon or amnesty, consideration should be given to whether it reflects the democratic will of the relevant country and whether the individual has been held accountable in any other way. Some crimes are, however, so grave and heinous that the application of Article 1F is still considered justified despite the existence of a pardon or amnesty.

F. Proportionality considerations

24. The incorporation of a proportionality test when considering exclusion and its consequences provides a useful analytical tool to ensure that the exclusion clauses are applied in a manner consistent with the overriding humanitarian object and purpose of the 1951 Convention. The concept has evolved in particular in relation to Article 1F(b) and represents a fundamental principle of many fields of international law. As with any exception to a human rights guarantee, the exclusion clauses must therefore be applied in a manner proportionate to their objective, so that the gravity of the offence in question is weighed against the consequences of exclusion. Such a proportionality analysis would, however, not normally be required in the case of crimes against peace, crimes against humanity, and acts falling under Article 1F(c), as the acts covered are so heinous. It remains relevant, however, to Article 1F(b) crimes and less serious war crimes under Article 1F(a).

III. PROCEDURAL ISSUES

34. The **burden of proof** with regard to exclusion rests with the State (or UNCHR) and, as in all refugee status determination proceedings, the applicant should be given the benefit of the doubt. Where, however, the individual has been indicted by an international criminal tribunal, or where

> individual responsibility for actions which give rise to exclusion is presumed, as indicated in paragraph 19 of these Guidelines, the burden of proof is reversed, creating a rebuttable presumption of excludability."

The United Kingdom Authorities

39. Other than Adan and Aitseguer [2001] INLR 44, which is authority for the general principles of the interpretation of the Refugee Convention and the search for an autonomous meaning of it, only three of the United Kingdom authorities cited to us are of very much assistance. They are T v SSHD [1996] Imm AR 443, a decision of the House of Lords, Mukhtiar Singh and Paramjit Singh v SSHD, a decision of the Special Immigration Appeals Commission (Potts J, HHJ Dunn QC and Sir Michael Weston) dated 31st July 2000, and Gurung v SSHD [2003] Imm AR 115, a starred determination of this Tribunal.

40. In T, the Appellant had been a member of the FIS in Algeria, and had been involved in the planning of the bombing of an airport in which ten people were killed, as well as a raid to obtain arms. His claim to asylum was rejected on the grounds that he was excluded by Article 1F(b). The submissions on his behalf were to the effect that his activities in Algeria, based as they were under FIS's armed struggle against the government of Algeria, were properly to be regarded as "*political*", and so not such as to lead to the Appellant's exclusion from the Refugee Convention. The Appellant's appeal was dismissed by the Adjudicator, the Tribunal, the Court of Appeal and the House of Lords. After a wide-ranging view of the authorities, Lord Lloyd of Berwick (with whom Lord Keith of Kinkel and Lord Browne-Wilkinson agreed) held as follows, at p480:

> "A crime is a political crime for the purposes of Article 1F(b) of the Geneva Convention if, and only if:
>
> (1) it is committed for a political purpose, that is to say, with the object of overthrowing or subverting or changing the government of a state or inducing it to change its policy; and
>
> (2) there is a sufficiently close and direct link between the crime and the alleged political purpose. In determining whether such a link exists, the Court will bear in mind the means used to achieve the political end, and will have particular regard to whether the crime was aimed at a military or governmental target, on the one hand, or a civilian target on the other, and in either event whether it was likely to involve the indiscriminate killing or injuring of members of the public."

41. Although that decision is in its terms limited to the interpretation of Article 1F(b), it is of clear relevance in any attempt to assess the meaning of Article 1F as a whole. It is also of interest to note that Lord Slynn of Hadley, agreeing that the appeal should be dismissed, stated as follows, at p469:

> "'… serious non-political crime' as a matter of interpretation of the Convention and of the Rules includes acts of violence which are intended or likely to create a state of terror in the minds of persons whether particular persons or the general public and, which cause or are likely to cause, injury to persons who have no connection with the Government of the state. This is not intended to be a complete definition. There

> may be other acts which constitute terrorism which are far outside the concept of political crime … ."

42. Lord Mustill also reviewed the authorities and took particular account of international statements on terrorism, beginning with a draft Convention on the prevention and punishment of terrorism promoted within the League of Nations in 1937. His conclusion was that a notion of terrorism should be written into the definition of "*non-political crime*", in order to reflect properly the meaning of that phrase in the modern world. At pp465-6, he said this:

> "I am however more persuaded by the idea of writing 'terrorism' into the modern concept of the political crime. To accept this requires, as must any model which involves departure from the concept of incidence, an important step: the recognition that some characteristic of the crime can disconnect it from its political origins, using the word in its widest sense. Once this step is taken, as I believe it must be, I would prefer terrorism to atrocity as a test, because it concentrates on the method of the offence, rather than its physical manifestation. The terrorist does not strike at his opponents: those whom he kills are not the tyrants whom he opposes, but people to whom he is indifferent. They are the raw materials of a strategy, not the objectives of it. The terrorist is not even concerned to inspire terror in the victims, for to him they are ciphers. They exist only as a means to inspire terror at large, to destroy opposition by moral enfeeblement, or to create a vacuum into which the like-minded can stride. It seems to me in a real sense that a political crime, the killing of A by B to achieve an end, involves a direct relationship between the ideas of the criminal and the victim, which is absent in the depersonalised and abstract violence which kills twenty, or three, or none, it matters not how many or whom, so long as the broad effect is achieved. I find it hard to believe that the human rights of the fugitive could ever have been intended to outweigh this cold indifference to the human rights of the uninvolved.
>
> There are two further reasons to think that this is the right answer. First, there is detectable in the international legislation and the debates surrounding it in a recognition that terrorism is an evil in its own right, distinct from endemic violence, and calling for special measures of containment. Secondly, the law of asylum fundamentally affects the lives of human beings, and yet must be applied at speed. Whether employed individually or as parts of a battery of tests, criteria such as remoteness, causation, atrociousness and proportionality seem too subjective to found the consistency of decision which must surely be essential in a jurisdiction of this kind. By contrast, once it is made clear that terrorism is not simply a label for violent conduct of which the speaker deeply disapproves, the term is capable of definition and objective application. I quote again from the League of Nations Convention of 1937: '"*Acts*" of terrorism mean criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public'. The Convention never came into force, but the definition is serviceable, and I am content to adopt it."

43. The other members of the House did not expressly agree with Lord Mustill's proposal. All five of their Lordships did, however, agree that no concept of proportionality was appropriate in the interpretation or application of Article 1F(b).

44. Singh and Singh v SSHD was, as we have indicated, an appeal to the Special Immigration Appeals Commission. One of the issues before the Commission was whether the Appellants were excluded from the protection of the Refugee Convention by Article 1F(c). The Commission concluded (at

paragraph 24) that the Secretary of State's allegations in his open statements had been proved to a high degree of probability by the evidence heard in open and closed session. Those allegations were that each of the Appellants had, after arriving in the United Kingdom in 1995 (in the case of the first Appellant) and 1995 or 1996 (in the case of the second Appellant) been involved in supporting and organising terrorist activity in India to further the aims of those who aspired to create an independent Sikh homeland in Khalistan by violent means. They had been associated with Sikhist extremist groups in the United Kingdom, had engaged in conspiracies with those planning terrorist attacks which would take place in India, and had conspired with terrorists based in Pakistan to ship explosives from Pakistan to India for the purposes of terrorist activities there. On behalf of the Appellants, it was suggested that Article 1F(c) applied only to those holding a position of authority in a state or acting on behalf of a state; that acts could only fall within Article 1F(c) if they were committed other than for a political reason or in pursuance of a right of self-determination; and that the gravity of the acts committed ought to be weighed against the risk of ill-treatment, in order to assess the proportionality of applying Article 1F(c). The Commission's response to those arguments is in paragraph 65 of the determination:

> "65(a) Requirement for State Authority or Position
> We consider that Article 1F(c) is not limited in the sense contended for by the Appellants. We have reached this conclusion primarily because Article 1F(c) itself does not expressly limit those who may be excluded from the protection afforded by the Refugee Convention to those in positions of power who have ordered or lent authority to state actions, and there is no other provision in the Refugee Convention suggesting any such limitation. Further, we accept the submission of the Secretary of State that neither the Handbook on Procedures and Criteria for determining refugee status nor the Joint Position (96/196/JHA) contain any firm statement that there is any such limit. Moreover, as the Secretary of State submits, and as we accept, the exclusions in Articles 1F(a) and 1F(b) are plainly not limited to any such category of individual, even though they (and Article 1F(a) in particular) may clearly be committed by persons in such a category, which suggests that Article 1F(c) allows for the exclusion of individuals outside that category, even if it also includes individuals within it.
>
> (b) Political Crimes/Self Determination
> (i) We consider that there is no 'political crime' exception to Article 1F(c). Article 1F(b) expressly refers to 'non-political crime'. This expression could have been included in Articles 1F(a) and 1F(c). It was not. Many examples of conduct which fall within the plain words of Articles 1F(a) and 1F(c) could be regarded as 'political'. Had the drafters of the Convention intended there to have been the limitation suggested by the Appellants in either of these provisions then it is surprising that they did not express it as they did in Article 1F(b). We accept the Secretary of State's submission in this respect.
> (ii) [The Commission also decided that for the purposes of the appeal before them, insofar as the definition of 'terrorism' was in issue, the appropriate definition was that found in clause 1 of the Terrorism Bill then before Parliament (which became the Terrorism Act 2000).]
>
> (c) Proportionality
> We accept that the Handbook and the EU Joint Position suggest that the principle of 'proportionality' should be applied to Article 1F(b). However,

neither of these sources suggests that it should be applied to Article 1F(c), or indeed to the related Article 1F(a). We accept the submission of the Secretary of State that there being no express suggestion of 'proportionality' in relation to any of the three limbs of Article 1F, then it must be open to doubt whether the principle applies in respect of 1F(b). 1F(b) is in any event irrelevant for the determination of the instant case. We therefore give Article 1F(c) what we consider to be its plain and clear meaning and proceed on the basis that no principle of 'proportionality' is to be adopted in relation to it."

45. Having concluded that the acts in which the Appellants before them engaged were "*terrorist acts*", the Commission went on to decide whether those acts were contrary to the principles and purposes of the United Nations. The Commission's determination on that issue reads as follows:

> "67. Were those acts contrary to the purposes and principles of the United Nations? We have been supplied with a vast quantity of written material. We do not propose to rehearse its contents in this Determination. It is sufficient to refer only to 'The Declaration of Measures to Eliminate International Terrorism' (the United Nations General Assembly Resolution 49/60), which was adopted on 9th December 1994 by all 185 member states without opposition and reaffirmed in 1996 and 1999. It expressly declared that:
>
> > '*Acts, methods and practices of terrorism constitute a grave violation of the purposes and principles of the United Nations, which may pose a threat to international peace and security, jeopardise friendly relations among states, hinder international co-operation and aim at the destruction of human rights, fundamental freedoms and the democratic bases of society*.'
>
> 68. We accept the Secretary of State's submission that this Declaration and the material supplied to us show beyond doubt that terrorism is contrary to the purposes and principles of the United Nations. It follows that the Appellants '*terrorist acts*' exclude them from the Refugee Convention by virtue of Article 1F(c) and we so find."

46. Needless to say, the Secretary of State relied on that determination. It is clearly entitled to the highest respect, although it is not formally binding on us. Insofar, however, as it relates the question to a definition of "*terrorism*", and uses a United Kingdom definition of that word, it must perhaps be read with some caution in the light of Adan and Aitseguer. But that is not to say that it has been in any other sense superseded by later authority.

47. In Gurung v SSHD, the claimant had admittedly been involved in crimes in Nepal and the question was whether he was excluded by Article 1F(b). Much of the Tribunal's decision (which was, in the result, to remit the appeal for rehearing) is concerned with procedural issues arising out of the exclusion clauses. The Tribunal's decision that, in appropriate cases, a decision on exclusion could be made without considering whether, but for the exclusion, the claimant would be a refugee indicates a rejection of a notion of proportionality. The Tribunal endorses the approach of a previous Tribunal in Thayabaran (12250) that the words of the exclusion clauses should be given their ordinary meaning, and not glossed. In particular, in considering questions of terrorism, Article 1F was not to be regarded as a simply anti-terrorism clause, but, in the words of Thayabaran, "*the question is not whether*

the claimant can be characterised as a terrorist, but whether the words of the exemption clause apply to him".

Overseas Jurisdictions

48. It is perhaps slightly surprising that there is little authority on Article 1F(c) from other countries around the world. We had anticipated that a considerable amount of overseas authority would be cited to us, because of a passage in G S Goodwin-Gill's '*The Refugee in International Law*' (second edition 1996) where, at p114, we find this:

> "Article 1F(c) of the Convention is potentially very wide. … Once rarely used, the exception is now frequently invoked; its interpretation and development are likely to vary, however, given the disparate interests of the sovereign States members of the United Nations."

That is the concluding passage of the author's discussion of Article 1F(c) in this work, which is sometimes regarded as authoritative. The only case cited in the footnote to that paragraph is a Canadian one, Pushpanathan, which we shall consider shortly. In the preceding pages of analysis, the author discusses "*the drafting history of Article 1F(c)*", "*the purposes and principles of the United Nations*", and "*individuals and persons acting on behalf of the state*". It is the second of those which is of particular interest to us. No cases are cited there. It was for this reason that we invited the parties to see if the statement that "*the exception is now frequently invoked*" could be elaborated in any way.

49. A reply from the author of the book appears to indicate that the statement is incorrect. He writes as follows:

> "[T]he reference to Article 1F(c) now being 'frequently invoked' is not free of ambiguity, particularly insofar as it may give the impression that, in 1996, it was being invoked frequently and *successfully* in proceedings for the determination of refugee status. This was not the case; exclusion under Article 1F(c) was still relatively rare, although it appeared to me, on the basis of developments in a number of jurisdictions, that it was beginning to attract increasing attention, particularly as regards asylum seekers who appeared to have been associated with persecution in their country of origin.
>
> I have reviewed my manuscript notes from the period 1994-1996 and I have not found any other instances in which Article 1F(c) was applied to individuals not themselves falling within the three general categories listed on page 114 of the Refugee in International Law [that is to say policy makers, officials and government members implementing policies, and 'individuals, whether members of organisations or not, who, for example, have personally participated in the persecution or denial of the human rights of others']."

The remainder of the reply is an indication that Article 1F(c) should be restrictively interpreted and restrictively applied. Again, no decided cases are cited. The inevitable conclusion is that not only were there no cases extending the ambit of Article 1F(c), but there were also no decisions restricting its ambit: if there had been, no doubt they would have been cited. It would appear to follow that the assertion that the exception was in 1996 "*frequently invoked*" is far from easy to understand.

50. We turn therefore to the overseas cases which were cited to us.

51. Pushpanathan v Canada [1999] INLR 36 is a decision of the Supreme Court of Canada on an appeal by a claimant whom the Immigration Refugee Board and the Federal Court had decided was excluded from refugee protection by Article 1F(c) because he was a drug dealer. Five of the seven judges subscribed to the leading judgment, written by Bastarache J. For present purposes, we can indicate its content by reference to the head-note:

> "(2) The purpose of Art 1 of the 1951 Convention was to define a refugee. The purpose of Art 1F, however, was to identify persons who were ab initio excluded from that definition and not to protect the society of refuge from dangerous refugees. By contrast, the purpose of Art 33 was to allow for the refoulement of a bona fide refugee to his native country where he posed a danger to the security of the country of refuge, or to the safety of the community; its function was not to define a refugee.
>
> (3) Article 1F(c) excluded from the definition of 'refugee' those individuals responsible for serious, sustained or systemic violations of fundamental human rights which amount to persecution in a non-war setting. As Art 1 was concerned with the recognition of refugee status, any act committed prior to the obtaining of refugee status, whether within or outside the country of refuge, could be relevant to Art 1F(c). The category of persons covered by Art 1F(c) was not, however, restricted to persons in positions of power. Although it may be more difficult for a non-state actor to perpetrate human rights violations on a scale amounting to persecution without the State thereby implicitly adopting those acts, the possibility should not be excluded.
>
> (4) In determining whether an act is one which is 'contrary to the purposes and principles of the United Nations' as set out in Art 1F(c), the guiding principle was that Art 1F(c) was applicable where there was consensus in international law that particular acts constitute sufficiently serious and sustained violations of fundamental human rights as to amount to persecution, or are explicitly recognised as contrary to the purposes and principles of the UN. Where the rule which had been violated was very near the core of the most valued principles of human rights and was recognised as immediately subject to international condemnation and punishment, then even an isolated violation, particularly where it related to an offence which attracted universal jurisdiction, could constitute 'persecution', depending on the facts, including the extent of the applicant's complicity. In the absence of such an international consensus or explicit recognition, individuals should not be deprived of the essential protections contained in the 1951 Convention for having committed those acts. Such an interpretation of Art 1F(c) did not preclude a State from taking appropriate measures to ensure the safety of its citizens as Art 33 allowed for the expulsion of individuals who presented a threat to a State's society.
>
> (5) Article 1F(b) of the 1951 Convention was generally meant to prevent ordinary criminals from avoiding extradition by seeking refugee status, but this exclusion was limited to cases where serious crimes had been committed before entry into the State of asylum. Given the precisely drawn scope of Art 1F(b), limited as it was to 'serious' 'non-political crimes' committed outside the country of refuge, the unavoidable inference was that serious non-political crimes were not included in the general, unqualified language of Art 1F(c). Article 1F(b) identified non-political crimes committed outside the country of refuge, while Art 33(2) addressed non-political crimes committed within the country of refuge. The presence of Art 1F(b) therefore,

indicated that even a serious non-political crime, such as drug trafficking, was not covered by Art 1F(c).

(6) Even though international trafficking in drugs was an extremely serious problem that the UN had taken extraordinary measures to eradicate, it was not clear that the international community recognised drug trafficking as a sufficiently serious and sustained violation of fundamental human rights as to amount to persecution or that it was to be considered contrary to the purposes and principles of the UN, and individuals should not, therefore, be deprived of the essential protections contained in the Convention for having committed those acts."

52. The other two members of the Court differed because their analysis of international materials led them to the conclusion that drug trafficking was indeed contrary to the purposes and principles of the United Nations.

53. In Suresh v Canada [2002] SCC 1; [2002] 1 SCR 3, the Supreme Court of Canada had to examine the legality of the proposed deportation of the claimant, who was alleged to have been involved in terrorist activities in Sri Lanka. The unanimous judgment of the Court contains some useful observations on the definition of "*terrorism*", but, so far as we can see, nothing on Article 1F(c), which is not referred to. Gonzalez v Canada, a decision of the Federal Court of Appeal [1994] 3 FC 646, holds firstly that there is no question of proportionality when a person's acts are found to come within Article 1F(a); but that the act by a private soldier engaged in action against an armed enemy is not of itself to be found to be a war crime or a crime against humanity.

54. In submissions made on behalf of the Appellant on 25th June 2003, we were referred to three further cases. One of them, YZ and family v Swiss Federal Office for Refugees, Switzerland Asylum Appeals Commission, 14th September 1998, is merely an indication that, at any rate at that date, the authority making that decision regarded Article 1F(c) as requiring personal responsibility or co-responsibility for government in direct connection with any contraventions of the principles of the United Nations. Haddan v INS, US Board of Immigration Appeals, 1st December 2000, which we have also not seen in full, appears to be a decision on the interpretation of the United States legislation. The final case is an Australian one, SRLL v MIMIA [2002] AATA 795, a decision of the Administrative Appeals Tribunal, dated 12th September 2002. The applicant in that case was a Sikh who had admitted that, before his admission to Australia he had been involved in the Bhindrawale Tiger Force, a militant movement, and had killed three police officers. The Deputy President of the Tribunal held at paragraphs 56-59 that the applicant was excluded from refugee protection under all three paragraphs of Article 1F. The strong evidence showed that he had committed a "*crime against humanity*", namely murder, which was sufficient to exclude him under Article 1F(a). The murder of three police officers was a serious crime and even if a proportionality test were to be applied to Article 1F(b), the killing of three officers was disproportionate so he was excluded by that paragraph. There was also strong evidence that the killing of the three officers was terrorist in nature and the Tribunal considered it "*reasonable to rely on paragraph 5 of*

Security Resolution 1373" in order to find that the applicant had done acts contrary to the purposes and principles of the United Nations.

55. This last decision obviously supports the Secretary of State's claim that an act of terrorism is sufficient to cause Article 1F(c) to be invoked; but it is also of interest in that it patently sees no difficulty in the application of more than one part of Article 1F to the same individual and the same past events. This approach contrasts with that summarised in paragraph (5) of the head-note of Pushpanathan.

V SUBMISSIONS

56. We have been greatly assisted by the submissions made on behalf of both parties, both in the form of skeleton arguments and orally. We intend no disrespect by summarising them here in the form of a few propositions.

The Secretary of State's Arguments

57. The Secretary of State's argument is simple and can be simply expressed:

R1. The Claimant had committed acts of terrorism.

R2. Acts of terrorism are contrary to the purposes and principles of the United Nations.

R3. Therefore the Claimant is excluded by Article 1F(c).

The Respondent's Arguments

58. The Respondent seeks to meet the Secretary of State's arguments on several levels, as follows:

C1a There is no international or internationally agreed definition of terrorism such as to give meaning and force to the Secretary of State's arguments.

C1b In so far as there are any hints of an international sense of the word "terrorism", they seem to indicate that applies only to acts committed by states and acts of the utmost seriousness.

C1c There is therefore no basis for characterising the claimant's crimes as terrorist in the sense required for the Secretary of State's arguments.

C2a The Secretary of State therefore needs a freestanding reason for saying that the Claimant's crimes are contrary to the purposes and principles of the United Nations. None can be identified.

C2b The exclusion clauses are to be interpreted and applied and restrictively.

C3a In any event, Section 1F(c) should not be applied so as to exclude the Claimant from refugee protection, because he has expiated his crime by suffering full penalty under the criminal law.

C3b In any event, Article 1F(c) does not apply to the claimant because it has no application to acts committed after a person becomes entitled to the benefits of the Refugee Convention.

59. Thus it appears that the Secretary of State's principal submission is that Article 1F(c) should be read and applied entirely literally, subject only to incorporation within it of some notion of "*terrorism*". The Appellant, however, whilst resisting the Secretary of State's arguments, seeks also to establish that the words of Article 1F(c) should be glossed in various ways, with the effect that for one or more reasons they do not apply to him.

VI OUR TASK

60. We are searching for the international autonomous meaning of the relevant provisions of the Refugee Convention. It is not open to us to provide a purely national or local interpretation. For this reason, English statutes relating to the definition of terrorism, treatment of terrorists, or even to the interpretation of the Refugee Convention are of very limited assistance. Likewise, the fact that as the Appellant finds himself in a State which is a Member of the Council of Europe, he is protected from return to Turkey by the application of Article 3 of the European Convention on Human Rights can have no impact on the general question of whether he is entitled to protection as a refugee.

61. In the same way, however, other international agreements are also of limited assistance. Clearly, it is right to say that there is a measure of international agreement on matters within the scope of other Conventions. But it is difficult to see why it should be said that, if a particular matter is <u>not</u> the subject of an international convention, there is no international agreement on it. Similarly, when we search for an international autonomous meaning, we are not in principle looking for a meaning with which we are sure that everyone would agree today (despite Article 31 of the Vienna Convention), as <u>Adan</u> itself shows. What is sought is a meaning that is intellectually respectable and would have a considerable measure of international agreement, so that it could properly be said that the dissent from the interpretation proposed was a difficult position to take.

<u>Restrictive Interpretation and Restrictive Application</u>

62. Proposition C2b has something in common with proposition C3a and b and we must look at it a little more closely. There is in the materials before us a certain amount of elision between declarations that the exclusion clauses should be restrictively <u>interpreted</u> and declarations that they should be restrictively <u>applied</u>. In our view, those two principles are not identical.

63. To <u>interpret</u> legislation restrictively is to give a narrower (rather than a more expansive) meaning to the words. To <u>apply</u> legislation restrictively is to decide that a situation that is covered by the words of the legislation is to be treated as if it were not so covered. Both processes are, to an extent, arbitrary; but the latter is likely to involve a greater element of discretion, in that it

envisages decisions not to apply the legislation to situations where it is clearly (or by interpretation, whether restrictive or not) applicable.

64. We readily accept that the exclusion clauses are to be interpreted restrictively. There is, for example, no basis for saying that Article 1F(c) should be read as applying to acts contrary to the purposes of any international organisation other than the United Nations; or acts contrary only to legislation of the United Nations; or to thoughts as well as acts. The decision of the majority of the Canadian Supreme Court in Pushpanathan is, in this sense, an example of the restrictive interpretation of the paragraph. If the Refugee Convention is a "*living instrument*", some other metaphor may have to be selected for those parts of it which, in this sense, should not be allowed to grow or be developed. In deciding this case, we restrict ourselves to considering whether the Appellant's acts are acts which were "*contrary to the purposes and principles of the United Nations*".

65. We see, however, no basis at all for saying that there should be any restriction on the application of Article 1F(c) in cases where the act in question falls within the words of the Article. It is inherent in Article 1F that there will be those who need protection under the Refugee Convention but do not have that protection because of their past acts. The High Contracting Parties who agreed to the Refugee Convention as a whole did so with the limitation that it would not apply to those within Article 1F. It has never been decided or accepted by those Parties that they should be obliged to shelter, as a refugee, any person who falls within Article 1F. To require decision makers to be sure that a person falls within the Article 1F on applying it to him is one thing: that is restrictive interpretation. But to ask decision makers not to apply Article 1F to such a person is quite another thing. In our view that is illegitimate.

66. We appreciate that the first of the summarised conclusions in the starred Tribunal decision in Gurung, is:

> "Bearing in mind the need to adopt a purposive approach to the interpretation of the exclusion clauses, they are to be applied restrictively."

67. We note, however, that in that case the Tribunal specifically decided that no issues of proportionality applied in assessing whether conduct came within the exclusion clauses, and that in the fourth summary conclusion the Tribunal said that "*the exclusion clauses are in mandatory terms*". We are confident that the Tribunal in Gurung did not intend to say that Article 1F should not be applied to any individual's conduct who came within the meaning of the words of Article 1F as properly interpreted. Either "*applied*" in summary conclusion 1 is a mistake, or it is intended as a synonym for "*interpreted*", bearing in mind the determination as a whole.

68. The views of the UNHCR, which has the responsibility under the governing statute for administering the Refugee Convention as it applies to nations and individuals, are of course entitled to the very greatest respect. Those views are not, however, binding on us and they do not necessarily reflect the correct

interpretation of the Convention. Such is apparent from Sivukumaran v SSHD [1988] AC 958 and El-Ali v SSHD [2003] Imm AR 179, disapproving a passage from the *Handbook* and the effect of general UNHCR guidance respectively. In the present case, it is clear that the UNHCR's view is that the Appellant should not be excluded from international protection by Article 1F(c). We are not primarily concerned with assessing why the UNHCR reaches that view. We must reach our own view, taking into account all the material before us. We would remark, however, that the position taken by the UNHCR does not appear to be shared by other authorities; and it is not even entirely consistent with the UNHCR's own guidance. The first letter, that of 3rd December 2001, makes, in paragraph eight, no reference at all to the political dimension of the Appellant's crimes. It asserts, however, that Article 1F(c) "*should only be applied to those individuals involved in the most extreme of cases*". Similar sentiments are expressed in the second letter, dated 20th November 2002, although here the sentiment is that "*irrespective of whether the acts committed by the appellant can be characterised as 'terrorist' or not, UNHCR is of the view that these acts fall short of the particularly egregious acts of terrorism which have international repercussions envisaged by Article 1F(c)*". Interestingly, it is in the very next paragraph, beginning "*in this respect*", that the UNHCR considers the doctrine of expiation, which we discuss briefly below in paragraph 91. It is not clear why the comments on expiation were needed, in a case where the crimes were not serious enough to evoke Article 1F(c) in any event. The conclusion of the letter is that the Appellant's acts simply do not fall within Article 1F(c). The third letter is the UNHCR's expansion of the view that only the most serious acts, capable of having an international dimension or international impact, can fall within Article 1F(c). As we understand the UNHCR's position, it is not consistently one advocating the application of a doctrine of proportionality, nor is it consistently (or perhaps at all) one which advocates a discretion in the decision-maker to decide whether Article 1F should be applied or not. Rather, the UNHCR's position is that the phrase "*acts contrary to the purposes and principles of the United Nations*" does not include all acts which the United Nations has condemned as contrary to its purposes and principles.

69. Merely to state that position is to show how difficult it would be to adopt it. It appears to us that the major difficulty in accepting the UNHCR's reasoning is its confining of the identification of the purposes and principles of the United Nations to those set out in Articles 1 and 2 of the Charter, without any real recognition, in the way we have described above, of subsequent Acts of the organs of the United Nations. To fail to give full effect to these Acts is not merely to ignore the Vienna Convention: it is to prevent the Charter of the United Nations being regarded as a living instrument, capable of being adapted by interpretation and use, by agreement and endorsement, to the circumstances of changing ages.

70. For these reasons, we have found little assistance in the views of the UNHCR as expressed either in the individual letters relating to this case or in the more general Guidelines, although we have reached similar conclusions to those of the UNHCR on some of the issues with which we are concerned. Before we

part from the Guidelines, we would point out one passage in them which appears to be flatly contradictory to both the Convention and to other guidance issued by the UNHCR. That is the phrase in paragraph 34 (almost at the end of the passage we cite in our paragraph 38) "*as in all refugee status determination proceedings, the applicant should be given the benefit of the doubt*". We are surprised to find this phrase in a discussion of Article 1F, where the standard of proof is specifically expressed as where there are "*serious grounds for considering*" that an individual has been guilty of the acts in question. The wording of the Convention quite clearly excludes the principle of giving the claimant the benefit of the doubt. We would further draw attention to the fact that, in paragraph 204 of its *Handbook*, the UNHCR's view is that the benefit of the doubt should not be given to all claimants but only those in respect of whom the person making the decision is satisfied of their general credibility. This restriction has an obvious application to many of the types of circumstance that would arise under Article 1F, even without the specific wording of that paragraph, for the identification and conviction of criminals of any sort will very often depend (as indeed it did in the present case) on the formal rejection of a story tendered by the defendant.

VII CONCLUSION

The meaning of "Terrorism"

71. It is true that there is no internationally agreed comprehensive definition of terrorism. It is also true that those international conventions that deal specifically with terrorism apply only to the most egregious acts. These considerations do not, however, assist the Appellant, for two reasons.

72. The first reason is that to which we have made reference under the heading "*Our Task*". The existence of international conventions dealing with terrorism in a narrow sense does not begin to show there would not be a general measure of agreement on a definition of terrorism in a wider sense – even if, because of rules of voting and considerations of practical diplomacy, no formal assent to a more widely expressed international convention has yet been possible.

73. Secondly, it is difficult to see why in order to make his argument, the Secretary of State should be required to show an internationally *accepted* definition of terrorism. This case is about what is contrary to the purposes and principles of the United Nations. The United Nations is a vitally important and central organ in the community of international relations, but that is not to say that the phrase "*the United Nations*" is synonymous with the phrase "*the international community*", much less "*the unanimous view of the international community*". If it were, the United Nations would need no enforcement powers, and the Security Council would need no legislative powers, as all would agree with its conclusions. Article 1F(c) refers specifically to the purposes and principles of the United Nations. It is, therefore, proper to look primarily at how the United Nations sees its own

purposes and principles in both its legislative functions and its expressions opinion.

74. For these reasons the argument that an "*internationally agreed definition of terrorism*" is necessary to give meaning to the Secretary of State's argument is a flawed one. When looking to see what acts are contrary to the purposes and principles of the United Nations, we look at what it is the United Nations says are contrary to its purposes and principles. If it characterises terrorism as something that is contrary to its purposes and principles, as it does, then the next question is (not 'What meaning does "*terrorism*" have by international agreement?', but) 'What does the United Nations mean by "*terrorism*"?' If a practicable answer to that question can be obtained, then it can properly be used to test whether certain acts are or were contrary to the purposes and principles of the United Nations.

75. That process does not give a comprehensive answer to the question "W*hat acts are contrary to the purposes and principles of the United Nations?*", because evidently the phrase is capable of bearing a meaning not limited to acts of terrorism. For the same reason, acts which *some* might call terrorist might not fall within the United Nations' understanding of the word, but might nevertheless, for some other reason, fall within the class of acts that are contrary to the purposes and principles of the United Nations. But what we wish to make clear is that the entire process of analysis is properly independent of any use of the word "*terrorism*" in other contexts.

76. This is entirely consistent with the view of Article 1F(c) taken in Pushpanathan, as summarised in paragraph 4 of the head note (see paragraph 51 above). The Court there recognised that in interpreting Article 1F(c) it was concerned with both (a) cases where "*there was a consensus in international law that particular acts constitute sufficiently serious and sustained violations of fundamental human rights as to amount to persecution*" and (b) cases where the acts "*are explicitly recognised as contrary to the purposes and principles of the United Nations*". The fact that an act does not fall within the first category does not prevent it from falling with the second.

77. It follows that we reject proposition C1a, b and c of the Appellant's argument as we have summarised it in paragraph 58. Proposition C2a therefore does not arise: no freestanding reason is needed.

The structure and meaning of Article 1F

78. It appears to us that, in interpreting Article 1F, we are entitled and indeed bound to take into account not only the range of acts covered by Article 1F in its various subparagraphs, but also those mentioned in Articles 32 and 33. Taking those provisions together, we find four classes of act.

79. Crimes against humanity and allied acts lead to exclusion from the Refugee Convention. No exceptions are expressed, and the exclusion applies when there are "*serious reasons for considering*" that the claimant has committed the

act in question. In other words, conviction by a criminal court is not necessary. These are acts at the highest level of international criminality.

80. The next type of act to be considered in Article 1F is crimes which are both serious and non-political, and which are committed outside the country of refuge prior to admission as a refugee. This is Article 1F(b). Again, exclusion is mandatory, but there is room for the exercise of judgment in considering whether the crime in question is "*serious*", and "*non-political*". If there are serious grounds for considering that such an act has been committed by the claimant *before* he reaches a place of refugee, then he is excluded.

81. The test and the effects should be and are quite different where non-political crimes are committed *after* the person in question has obtained refugee status. In that case, provided he meets all the other requirements of Article 1, he is a refugee: he is not generally excluded. However, he may find that he cannot continue to claim refuge in his host country, because of the provisions of Article 32 or Article 33. These Articles do not affect his refugee status: they merely diminish the incidents of that status. If he has been convicted of a particularly serious crime, so that he is a danger to the community of the country where he has taken refuge, he may be expelled despite the fact that he is a refugee.

82. There are three substantial differences between Articles 32 and 33 on the one hand and Article 1F(b) on the other. Serious grounds for considering that the crime has been committed are not enough: there must be a legal process. That a crime is serious is not enough: either it must have been particularly serious or the refugee's continuing presence must pose a danger to national security or public order. In any event, expulsion is only permitted where it is justified as conducive to the safety of the country of refuge. These differences are entirely intelligible. Under the Refugee Convention, a person to whom Articles 32 and 33 apply is a person in respect of whom the international community has accepted a duty of offering surrogate protection. In such circumstances, the actual country in which an individual may find himself is, or may be, a matter of chance. The important thing is that the protection which he obtains for himself is essentially an <u>international</u> protection. It may be well understood in such circumstances that, although some of those who are refugees may be as inclined to criminality as any other members of the population of their host state, mere suspicion of crime is not to be regarded as sufficient to enable the host state to cast off its duties of protection and possibly impose them on another state in which the individual may subsequently find refuge. Hence the restrictions on the expulsion of refugees who commit acts of common criminality. Some nation is probably going to have to protect them and, in international terms, save where Article 32 or 33 applies, that will be the country where they currently are.

83. What then of political crimes? It is evident that although Article 1F(b) is confined to non-political crimes, Articles 32 and 33 are not so confined. Is it therefore right to say, as is urged on behalf of the Appellant in this case, that Article 1F(c) can have no application to acts committed after a person has

arrived in a country of refuge, because Articles 32 and 33 cover the case? We do not think that the answer is as simple as that. In order to explain why not, we observe the fact that most or much feared persecution has its origins in politics in the widest sense, for the risk of persecution generally arises from the policies of a sufficiently powerful group, that group being either formally in power or de facto able to carry out its acts. A person who has reached a country of refuge has reached a place where he is protected from the politics which in his own country exposed him to risk of persecution. The purpose of the restriction to non-political crimes in Article 1F(b) is to ensure that a claimant is not excluded from Refugee Convention protection simply because of having committed an act which, by the law of a country where he was at risk of persecution, amounted to a crime. To exclude such a person from protection, without more, would in many cases be to perpetuate the persecution in that country. If the truth of the matter is that the act characterised as criminal derived its criminality entirely from a political and persecutory classification by the country of persecution, then the commission of the act should not lead to exclusion and, under Article 1F(b), it does not.

84. In the country of refuge, however, the situation is entirely different. The claimant is, ex hypothesei, in a place where he is no longer at risk of his acts being classed as criminal for purely political reasons. He accedes to the criminal law of the country where he takes refuge and it is not for the international community to draw fine distinctions in the application of that law to him.

85. On the other hand, however, there are some acts which, despite being political or politically-inspired, do not depend for their criminality on the individual matrix of power within a particular state. These acts, in our view, are those which are intended to be covered by Article 1F(c). That subparagraph does not apply to every crime, nor to every political crime. It applies to acts which are the subject of intense disapproval by the governing body of the entire international community. An individual who has committed such an act cannot claim that his categorisation as criminal depends upon the attitudes of the very regime from whom he has sought to escape, because the international condemnation shows that his acts would have been treated in the same way wherever and under whatever circumstances they had been committed.

86. We see no objection in principle or in practice to an interpretation of these Articles which would lead to the conclusion that, in some cases, more than one subparagraph of Article 1F is applicable. On the other hand, Articles 32 and 33 cannot apply to a person excluded by Article 1F, because if he is excluded, then none of the rest of the Convention (including Articles 32 and 33) can apply to him. In Pushpanathan, as we have seen, the Supreme Court of Canada distinguished between Articles 32 and 33 and Article 1F(b). But it does not in our view follow that the mere fact that a person satisfies the requirements of Article 1 before he commits the act identified as causing exclusion under Article 1F(c) enables him to say that he continues to be a refugee. Article 1F(c) does not contain the words "*outside the country of refuge*

prior to his admission to that country as a refugee", which are found in Article 1F(b). There is no reason at all to suppose that that difference is accidental. Acts which merit the condemnation of the whole international community must lead to exclusion from the benefits of the Refugee Convention whenever they occur.

87. One argument raised on behalf of the Appellant in this appeal is that the application of Article 1F(c) rather than Article 32 or 33 to him is a matter purely of accident or indeed possibly of mismanagement by the Respondent. He says that he ought to have been recognised as a refugee when he arrived in the United Kingdom, and if he had been so recognised it would have been too late to apply Article 1F(c) to him when he committed these offences. It will be clear from the foregoing discussion that we entirely reject that submission. Article 1F(c) is not limited to acts committed before obtaining refuge. If he had been recognised as a refugee earlier, it would make no difference now.

88. Where, therefore, there are serious reasons for considering that an act contrary to the purposes and principles of the United Nations has been committed, it does not matter when or where it was committed, or whether it is categorised by municipal law as a crime. It leads to exclusion from the Refugee Convention. For acts of a political character which are <u>not</u> contrary to the principles and purposes of the United Nations, however, there is no exclusion, and the individual is protected internationally by the Refugee Convention, although the application of Article 32 or 33 may lead to his expulsion from the host country.

89. This interpretation of the relevant clauses of the Refugee Convention is entirely coherent and sensible. It identifies what acts will lead to exclusion despite their being "*political*". A person whose acts (at any time) are contrary to the purposes and principles of the United Nations disqualifies himself from protection under the United Nations' Refugee Convention.

<u>Proportionality and Expiation</u>

90. In some of the other cases, there has been an argument on proportionality. This asserts that, in deciding whether an individual should be excluded under Article 1F, the decision-maker should balance the harm which the claimant may suffer if deprived of protection against the harm he has committed. It is fair to say that that was not specifically argued in this appeal, although, as we have shown, it is urged in the UNHCR's '*Guidelines on International Protection*' dated 4th September 2003 at paragraph 24. There is in the United Kingdom clear authority against applying any principle of proportionality to exclusion under Article 1F: see <u>T v SSHD</u>, <u>Singh and Singh v SSHD</u> and <u>Gurung v SSHD</u>. That view is also reflected in the bulk of the overseas decisions.

91. The UNHCR also suggest that a principle of "*expiation*" applies to an exclusion under Article 1F(c): see their letter of 20th November 2002 in the penultimate paragraph cited by us in paragraph 36, and paragraph 23 of the

generally-applicable '*Guidelines on International Protection*' as cited to us. It is suggested that a person apparently excluded by Article 1F is to be treated as not excluded if he has served a sentence for the relevant crime, unless "*the crime for which he is convicted is of such a truly heinous nature as to justify continued denial of international protection*". As the UNHCR recognises, that doctrine does not appear in the Convention, and it appears that it is not consistently urged even by the UNHCR. There does not seem to us to be any basis for reading it into the Convention. It has never been suggested that it would apply to Article 1F(a), although we appreciate that it may be that any crime under that subparagraph would be governed by the exception from the doctrine of expiation in the words we have just quoted from the UNHCR letter. More importantly, however, we are unaware that it has been held to apply to Article 1F(b) where the principal evidence upon which the decision-maker relies will very often be conviction and sentence in the claimant's home country. It would have been entirely open to the framers of the Convention to restrict the application of Article 1F(b) by excluding from its effects any person who had, having committed such an offence, served the appropriate sentence for it before admission to the country of refuge. They did not do so. We reject the suggestion that the doctrine of expiation applies in the way urged by the UNHCR.

92. Our conclusion is that we should reject all the arguments put before us for applying glosses to Article 1F, and should instead apply its words exactly as they are written. We appreciate that in so doing we are adopting an approach to the Refugee Convention which is somewhat similar to that which we have criticised when the UNHCR adopts it in relation to the Charter of the United Nations. But the difference is that, in relation to the Refugee Convention, we have been shown no material properly leading to the invocation of Article 31(3)(b) or (c) of the Vienna Convention. So far from being supported by international agreement as to the application of the Refugee Convention, the arguments made on behalf of the Appellant, although to an extent endorsed by the UNHCR, lack authority, sometimes lack coherence and occasionally lack consistency.

93. We therefore simply ask ourselves whether there are serious reasons for considering that the Appellant has been guilty of acts contrary to the purposes and principles of the United Nations. Although, as we have, we hope, made clear, the characterisation of acts as "*terrorist*" is neither necessary nor sufficient for exclusion under Article 1F(c), it is not irrelevant, because of the clear view of the United Nations on certain sorts of terrorism.

The Characterisation of the Offences

94. Despite the submissions made by Mr Scannell, we accept Mr Tam's argument that the act of placing the DHKP flag at the scene of the attacks was significant. There is no plausible explanation other than that it was intended to indicate that the attacks were to be seen as DHKP activities. The Appellant, given his active support, knew about the activities of the DHKP and must have intended not to be caught. The acts were bound to imply that

the terrorist activities of the DHKP had moved to the mainland of Britain. We are entirely satisfied that the purpose of leaving the flags was to provoke a state of terror amongst those engaged in lawful Turkish businesses in the United Kingdom and thus to indicate that the fight against the Turkish Government was being pursued by violent means even here. Further, the attacks were avowedly aimed against the Turkish state, which is, as it happens, a friendly government.

95. These factors bring into these offences of arson both an international and a terrorist element. We are thus also entirely satisfied that the Appellant's acts fall within the category of acts condemned by the Security Council and by the General Assembly as contrary to the purposes and principles of the United Nations. That conclusion follows whether or not the acts come within any other internationally-accepted free-standing definition of terrorism.

96. As we read and interpret the Refugee Convention, Article 1F(c) admits no exceptions. There are no acts that are contrary to the purposes and principles of the United Nations that do not cause exclusion under Article 1F(c). Any person guilty of such acts is excluded from the protection of the Refugee Convention.

97. The Appellant is accordingly excluded. He is not a refugee. His appeal is dismissed.

C M G OCKELTON
DEPUTY PRESIDENT