



UNHCR

United Nations High Commissioner for Refugees
Haut Commissariat des Nations Unies pour les réfugiés

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By fax and post

Re: **JS (Sri Lanka) v Secretary of State for Home Department**

Dear Sirs,

In view of the forthcoming appeal, due to be heard by the Supreme Court in January 2010, the Office of the United Nations High Commissioner for Refugees (UNHCR) is pleased to reiterate its position with respect to the interpretation and application of Article 1F of the 1951 Convention relating to the Status of Refugees (hereafter "1951 Convention").¹

This letter does not address the particular facts of the case, but we hope that it will assist the parties in understanding UNHCR's position regarding Article 1F (a) of the 1951 Convention, in particular the issue of establishing individual responsibility and complicity.

UNHCR has been entrusted by the United Nations General Assembly with, *inter alia*, the mandate to provide international protection to refugees and, together with Governments, to seek solutions to the problem of refugees.² Paragraph 8 of its Statute³ confers responsibility upon UNHCR to supervise the application of the 1951 Convention, and Article 35 of the 1951 Convention obliges States Parties to cooperate with UNHCR in the exercise of its mandate.

UNHCR's authoritative interpretation of Article 1F of the 1951 Convention is outlined in the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* (hereafter "UNHCR Handbook")⁴, UNHCR's *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the*

¹ The 1951 Convention relating to the Status of Refugees, 189 U.N.T.S. 137, *entered into force* 22 April 1954 (hereafter "1951 Convention").

² *Statute of the Office of the United Nations High Commissioner for Refugees*, UN General Assembly Resolution 428(V), Annex, U.N. Doc A/1775, 1950, para. 1.

³ *Ibid.*, para. 8 (a).

⁴ UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* (1979, reedited, Geneva, January 1992) (hereafter "UNHCR Handbook").

Status of Refugees (hereafter “UNHCR Guidelines on Exclusion”)⁵ and its accompanying *Background Note on Exclusion*⁶, which forms an integral part of the Guidelines. In addition, UNHCR’s *Statement on Article 1F of the 1951 Convention* of July 2009 complements and clarifies the Guidelines.⁷ The above-mentioned Guidelines on International Protection provide UNHCR’s interpretative legal guidance on exclusion. Any related policy papers issued by UNHCR, including the November 2001 document *Addressing Security Concerns without Undermining Refugee Protection – UNHCR’s Perspective*⁸, need to be read in line with these Guidelines. Thus, nothing in the 2001 document is to be understood as qualifying the fundamental principles outlined in other key documents with which this letter should be read.

In relation to Article 1F (a) of the 1951 Convention, UNHCR also is guided by subsequent legal developments in other fields of international law, including international human rights law, international humanitarian law and international criminal law.

For the convenience of the parties involved in this case the following compilation of extracts has been selected from the above-mentioned key documents.

The application of Article 1F of the of the 1951 Convention

Article 1F provides that the 1951 Convention “shall not apply to any person with respect to whom there are serious reasons for considering that:

- (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
- (c) he has been guilty of acts contrary to the purposes or principles of the United Nations.”

The *rationale* of the exclusion clauses is twofold. First, certain acts are so grave they render their perpetrators undeserving of international protection as refugees. Second, the refugee framework should not stand in the way of serious criminals facing justice. While these underlying purposes must be borne in mind in interpreting the exclusion clauses, they must be viewed in the context of the overriding humanitarian objective of the 1951 Convention.⁹ This provision is intended to protect the integrity of the

⁵ UNHCR *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, HCR/GIP/03/05, 4 September 2003 (hereafter “UNHCR Guidelines on Exclusion”).

⁶ UNHCR, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 September 2003 (hereafter “UNHCR Background Note on Exclusion”).

⁷ UNHCR *Statement on Article 1F of the 1951 Convention*, July 2009.

⁸ UNHCR, *Addressing Security Concerns Without Undermining Refugee Protection – UNHCR’s Perspective*, 29 November 2001, Rev.1.

⁹ UNHCR *Guidelines on Exclusion*, para. 2. UNHCR *Background Note on Exclusion*, para. 3.

institution of asylum, and therefore needs to be applied “scrupulously”, as repeatedly stated by the Executive Committee.¹⁰

As with any exception to human rights guarantees, the exclusion clauses always need to be interpreted restrictively and used with great caution. As paragraph 149 of the UNHCR *Handbook* emphasises, such an approach is particularly warranted in view of the serious possible consequences of exclusion for the individual.¹¹ The exclusion clauses are exhaustively enumerated in Article 1F.¹²

When considering exclusion from refugee status, the application of Article 1F requires: (i) that the acts in question be assessed against the exclusion grounds, taking into account the nature of the acts as well as the context and all the individual circumstances in which they occurred; (ii) it must be established, in each case, that the individual concerned committed a crime which is covered by one of the sub-clauses of Article 1F, or participated in the commission of such a crime in a manner which gives rise to criminal liability in accordance with internationally applicable standards; and (iii) if individual responsibility is established, it must be determined whether the consequences of exclusion from refugee status are proportional to the seriousness of the act committed.¹³

The standard of proof for establishing individual responsibility under Article 1F – “*serious reasons for considering*” – requires that the individual committed or participated in the commission of excludable acts. Although the application of the exclusion clauses does not require a “determination of guilt” in the criminal justice sense and, therefore, the standard of proof required would be less than “proof of guilt beyond reasonable doubt”, it must be sufficiently high to ensure that *bona fide* refugees are not erroneously excluded. The words “serious reasons for considering”, thus, need to be interpreted literally with regard to the serious consequences of exclusion and the need to preserve and adhere to the object and purpose of Article 1F of the 1951 Convention. For the standard, “serious reasons for considering”, to be met, clear and credible evidence beyond mere suspicion or allegation is required to demonstrate that individual responsibility exists.¹⁴

¹⁰ *Conclusion on Safeguarding Asylum*, ExCom Conclusion No. 82 (XLVIII), 17 October 1997, para. (v); *General Conclusion on International Protection*, ExCom Conclusion No. 102 (LVI)2005, 7 October 2005, para. (i); *Conclusion on the Provision of International Protection Including Through Complementary Forms of Protection*, ExCom Conclusion No. 103 (LVI), 7 October 2005, para. (d). See also, UNHCR *Guidelines on Exclusion*, para. 2. UNHCR *Background Note on Exclusion*, para. 2.

¹¹ UNHCR *Guidelines on Exclusion*, para. 2. UNHCR *Background Note on Exclusion*, para. 4.

¹² UNHCR *Guidelines on Exclusion*, para. 3. UNHCR, *Background Note on Exclusion*, para. 7.

¹³ UNHCR *Statement on Article 1F of the 1951 Convention*, July 2009, p. 7. For guidance on proportionality see, UNHCR *Guidelines on Exclusion*, para. 24 and UNHCR *Background Note on Exclusion*, paras. 26-28.

¹⁴ UNHCR *Guidelines on Exclusion*, para. 35. UNHCR *Background Note on Exclusion*, paras. 107-111. See also UNHCR *Statement on Article 1F of the 1951 Convention*, July 2009, p. 9-10.

Application of exclusion clauses in relation to persons suspected of being members of, or associated with, or supporting an organisation or a group involved in crimes that may fall under Article 1F (a) of the 1951 Convention

Bearing in mind the general considerations regarding the application of the exclusion clauses, as indicated above, the following issues need to be addressed when determining whether a person suspected of being a member of, associated with, or supporting an organisation or group involved in crimes that may fall under Article 1F (a) should be excluded from refugee status.

Determining the Excludable Act - Article 1F (a) of the 1951 Convention

In assessing excludability, it first needs to be determined whether the conduct at issue brings the individual within the scope of one of the exclusion clauses of Article 1F of the 1951 Convention. For acts committed by organisations or groups that are involved in violent and international crimes, an analysis of “war crimes” and “crimes against humanity” under Article 1F (a) would be most relevant for the purposes of this letter.¹⁵

Establishing individual responsibility

For exclusion to be justified, individual responsibility must be established in relation to a crime covered by Article 1F.¹⁶ Three issues must be addressed in this context: (i) the involvement of the applicant in the excludable act; (ii) the applicant’s mental state (*mens rea*); and, (iii) possible grounds for rejecting individual responsibility.¹⁷

As the exclusion clauses contained in Article 1F of the 1951 Convention are based on criminal conduct, the requirement under fundamental principles of criminal law for an individualized assessment to determine responsibility for criminal acts applies also in the context of exclusion proceedings, including acts falling within Article 1F (a).¹⁸

Personal Involvement in Underlying Act

Depending on the circumstances, a person may incur individual responsibility (i) by perpetrating excludable crimes him/herself; (ii) for crimes committed by others, either by provoking others to commit such crimes (for example, through planning, inciting, ordering); or (iii) by making a substantial contribution to the commission of crimes by others knowing that his/her acts facilitated the criminal conduct (for example, by aiding or abetting, or participating in a joint criminal enterprise). Under certain circumstances, applicants who held a position of authority within a civilian or military hierarchy may be held responsible and may incur individual responsibility for crimes committed by persons under their effective command or control.¹⁹

¹⁵ A detailed analysis of the scope of Article 1F (a) of the 1951 Convention can be found in UNHCR *Guidelines on Exclusion*, paras. 10-13 and UNHCR *Background Note on Exclusion*, paras. 33-45.

¹⁶ UNHCR *Guidelines on Exclusion*, para. 18.

¹⁷ UNHCR *Background Note on Exclusion*, paras. 50-63.

¹⁸ UNHCR *Statement on Article 1F of the 1951 Convention*, p. 24.

¹⁹ UNHCR *Guidelines on Exclusion*, para. 18. UNHCR, *Background Note on Exclusion*, paras. 51-56.

Thus, the degree of involvement of the person must be analysed carefully in each case. Factors for consideration include whether the individual committed the act him/herself, induced its commission by others, made a substantial contribution toward its commission, or incurred responsibility as a superior officer for the crimes of persons under his/her effective command and control.²⁰ Whether or not the conduct of a person may give rise to individual responsibility needs to be determined in an individualized assessment in light of the context and circumstances of the case in question.

While membership *per se* of an organisation that commits or incites others to carry out violent crimes is not necessarily sufficient to exclude a person from refugee status, it could allow for the application of the exclusion clauses.²¹ Thus, the fact of membership does not, in and of itself, amount to participation in an excludable act. In such cases, as with any exclusion analysis, decision-makers need to conduct a thorough assessment of the activities, roles and responsibilities of the individual concerned and determine if there are “serious reasons for considering” that the person’s conduct and state of mind amount to individual responsibility for crimes within the scope of Article 1F (a).

In some instances, depending on the organisation’s purposes, activities, methods and circumstances, individual responsibility for excludable acts may be presumed if membership is voluntary, and when the members of such groups can be reasonably considered to be individually responsible for acts falling within the scope of Article 1F (a). For example, this would be the case where such activities involve indiscriminate killings or injury of the civilian population, or acts of torture; or where the person concerned is in control of the funds of an organisation that s/he knows is dedicated to achieving its aims through such violent crimes; or if the individual concerned contributed to the commission of excludable crimes by substantially assisting the organisation to continue to function effectively in pursuance of its aims.²²

However, caution must be exercised when such a presumption arises, as due consideration needs to be given to the individual’s involvement and role, including his/her position; the voluntariness of his/her membership; his/her personal involvement or substantial contribution to the criminal act in the knowledge that his/ her act or omission would facilitate the criminal conduct; his/her ability to influence significantly the activities of the group or organisation; and his/her rank and command responsibility.²³

In the context of asylum procedures, such presumption is always rebuttable and, thus, the applicant must be informed of the evidence or allegations on the basis of which exclusion may be decided and given the opportunity to show that s/he should not be excluded. A plausible explanation regarding the applicant’s non-involvement or dissociation from any excludable acts, coupled with an absence of serious evidence to the contrary, would remove the applicant from the scope of the exclusion clauses.²⁴

²⁰ UNHCR *Background Note on Exclusion*, paras. 51 and 56.

²¹ UNHCR *Statement on Article 1F of the 1951 Convention*, p. 24.

²² UNHCR *Guidelines on Exclusion*, para. 19. UNHCR, *Background Note on Exclusion*, paras. 60-61.

²³ *Ibid.*

²⁴ UNHCR *Guidelines on Exclusion*, para. 19. UNHCR *Background Note on Exclusion*, para. 59.

Care also needs to be taken to consider the actual activities and methods of the group, the organisation's place and role in the society in which it operates, its organisational structure, and the possible fragmentation of certain organisations. In some cases, the group in question is unable to control acts of violence committed by militant wings. Unauthorised acts also may be carried out in the name of the group. Moreover, the nature of the group's violent conduct may have evolved, so the individual's membership must be examined in the context of the organisation's behaviour at the relevant time.²⁵ Defences to exclusion, such as duress/coercion, also need to be kept in mind.²⁶

Similarly, where an individual appears to be associated with an organisation denounced as "terrorist" or that commits or incites others to commit violent acts that may fall under Article 1F (a) on a list drawn up by the international community (or, indeed, individual States) this does not mean exclusion is *ipso facto* justified. Rather, as stated above, consideration of the applicability of the exclusion clauses may be triggered, and a presumption of individual responsibility may arise but only if the list has a credible basis and if the criteria for placing a particular organisation or individual on the list are such that all members or the listed person(s) can be reliably considered to be individually and heavily involved in excludable crimes.²⁷ As indicated above, each individual case needs to be examined carefully, including the individual's role and position in the organisation. Moreover lists drawn up by the international community should not be treated as reversing the burden of proof.²⁸

Required Mental State (Mens Rea)

The mental state, or *mens rea*, of the applicant at the time the excludable act was committed, is critical in assigning individual responsibility for purposes of exclusion from refugee status. In general, to satisfy the *mens rea* requirement, the individual must have acted with both "intent" and "knowledge".²⁹ "Intent" has been defined as requiring that the person meant to engage in the conduct at issue or to bring about a particular consequence, or was aware that that consequence would occur in the ordinary course of events.³⁰ "Knowledge" has been defined as an awareness that certain circumstances exist or that a consequence would occur in the ordinary course of events.³¹

The definitions of certain crimes within the scope of Article 1F (a) of the 1951 Convention contain additional requirements with regard to the mental element. For example, the commission of a war crime requires awareness of the existence of an armed conflict, while a person who commits a crime against humanity must not only

²⁵ UNHCR *Guidelines on Exclusion*, para. 19. UNHCR *Background Note on Exclusion*, para. 61.

²⁶ UNHCR *Guidelines on Exclusion*, paras. 21-23. UNHCR *Background Note on Exclusion*, paras. 61, 67, 68 and 69.

²⁷ UNHCR *Background Note on Exclusion*, paras. 62, 106 and 109. See also, UNHCR *Guidelines on Exclusion*, paras. 19 and 26.

²⁸ UNHCR *Background Note on Exclusion*, para. 106. See also UNHCR *Statement on Article 1F of the 1951 Convention*, July 2009, pp. 30-32 and UNHCR, *Addressing Security Concerns Without Undermining Refugee Protection – UNHCR's Perspective*, 29 November 2001, Rev.1, paras. 12-19.

²⁹ UNHCR *Guidelines on Exclusion*, para. 21. UNHCR *Background Note on Exclusion*, paras. 64 and 65.

³⁰ Rome Statute, Article 30(2).

³¹ *Ibid.* Article 30(3).

have intent and knowledge with regard to the underlying crime (e.g., murder, rape), but also act in the knowledge that his/her crime forms part of an ongoing systematic or widespread attack against civilians. Other crimes require a specific intent.

Where the person concerned did not have the mental element (*mens rea*) required for a particular offence, a fundamental aspect of the criminal offence is missing and no individual responsibility arises for the crime in question. Grounds for the absence of *mens rea* include, for example, insanity, mental handicap, involuntary intoxication or immaturity.³²

Grounds for Rejecting Individual Responsibility

A complete exclusion analysis also requires an assessment of whether or not any circumstances which would negate individual responsibility arise in the applicant's case, because the person concerned did not have the necessary mental element (*mens rea*); or because there are circumstances which give rise to a valid defence, thus exonerating him/her from individual responsibility for his/her acts.³³

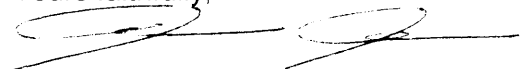
Conclusion

The exclusion clauses are intended to deny refugee status to certain persons who otherwise qualify as refugees but who are undeserving of refugee protection on account of the severity of the acts they committed. It is important that the rigorous legal and procedural standards required of an exclusion analysis outlined above are followed carefully.³⁴

UNHCR shares the legitimate concern of States to ensure that there is no impunity for those responsible for crimes falling within Article 1F (a) of the 1951 Convention. Care needs to be taken to ensure a rigorous application in line with international refugee principles whilst avoiding inappropriate exclusion of refugees.

In particular, in cases involving persons suspected of being members of, associated with, or supporting an organisation or group involved in crimes that may fall under Article 1F (a), where presumption of individual responsibility for excludable acts may arise, a thorough and individualised assessment must be undertaken in each case. Due regard needs to be given to the nature of the acts allegedly committed, the personal responsibility and involvement of the applicant with regard to those acts, and the proportionality of return against the seriousness of the act.

Yours faithfully,



Roland Schilling
Representative

³² UNHCR *Guidelines on Exclusion*, para. 21. UNHCR *Background Note on Exclusion*, para. 65.

³³ UNHCR *Guidelines on Exclusion*, paras. 21-23. UNHCR, *Background Note on Exclusion*, paras. 64-75.

³⁴ For a detailed analysis on procedural issues regarding exclusion, see UNHCR *Guidelines on Exclusion*, paras. 31 and 36, and UNHCR *Background Note on Exclusion*, paras. 98-113.