Case No: C5/2010/2998

Neutral Citation Number: [2012] EWCA Civ 807
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)
MR JUSTICE OUSELEY
AA/08206/2008

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/06/2012

Before :

LORD JUSTICE RIX
LORD JUSTICE LLOYD
and
LORD JUSTICE STANLEY BURNTON

- -

Between :

SK (ZIMBABWE)	**Appellant / Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent / Defendant**

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

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Mr Richard Hermer QC and Ms Alison Pickup (instructed by **Messrs Howe & Co**) for the **Appellant**
Mr Charles Bourne (instructed by **Treasury Solicitor**) for the **Respondent**

Hearing dates : Wednesday 18th April 2012
Thursday 19th April 2012

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Judgment

Lord Justice Rix :

1. This appeal raises the narrow but important issue of the content of the international crime of "other inhumane acts" under article 7(1)(k) of the Rome Statute[1]. It arises because the appellant, SK, has been excluded from the protection of the Refugee Convention[2], pursuant to its article 1F(a), by reason of the findings of the Upper Tribunal in its determination dated 6 August 2010 (Ouseley J and SIJ Eshun).

2. The issue is narrow, in the context of this litigation, because there is no appeal, even if there could be, on any findings of fact; nor any issue as to whether SK may be said (the article 1F test is that "there are serious reasons for considering…") to be allegedly (and indeed, admittedly) responsible for serious acts of brutal injury in her home country of Zimbabwe. But it is argued on her behalf, as appellant in this court, that even so her acts do not amount to the international crime of "other inhumane acts" under the Rome Statute, because, on the true interpretation of that statute, the facts found against her by the Upper Tribunal cannot, for the purposes of the article 1F(a) test, amount to that crime, which is submitted to be of still greater seriousness.

3. The issue is important because we are asked to consider what the scope of that crime is. We have been assisted by plenteous citation of jurisprudence from the International Criminal Court (the "ICC") and the international tribunals for the Former Yugoslavia and Rwanda, as well as by references to scholarly treatises.

4. I will refer further to the provisions of the Rome Statute and its ancillary Elements of Crimes below. For the present we highlight the essential clause by reference to which SK has been excluded, to be found in article 7(1)(k):

> "1. For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
> …
> (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health."

5. The requirement of the context of a widespread or systematic attack on civilian population, of which the individual concerned has knowledge, is known as the *chapeau* requirement, for it takes its place at the head of the definitions of the listed acts, and applies to each of them. There is no issue in the present appeal but that the *chapeau* requirement has been met in this case.

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[1] The Rome Statute of the International Criminal Court, 1998
[2] The UN Convention relating to the Status of Refugees, 1951

6. What this appeal is about is rather the two requirements of sub-paragraph (k) itself: (i) "of a similar character", and (ii) "causing great suffering, or serious injury…". On behalf of SK, Mr Richard Hermer QC has submitted that, on the findings of the Upper Tribunal, neither of these constituents of the crime of "other inhumane acts" can, as a matter of law, be said here to have been fulfilled. In essence, Mr Hermer submits that "of a similar character" imports above all the need for the acts under sub-paragraph (k) to be of the same gravity as the other listed acts in article 7(1), that both requirements (i) and (ii) must be viewed from that perspective, and that, serious as SK's responsibility may be, it does not amount and cannot be viewed as amounting to the fulfilment of those requirements. As he, and his junior, Ms Alison Pickup, write in their supplementary skeleton: "It is no part of the Appellant's case to belittle her culpability for the crimes that she committed. As she herself acknowledges, they were undoubtedly serious criminal acts which plainly infringed the human rights of the victims. The Appellant's case is however that they cannot properly be defined as crimes against humanity, a class that stands apart as the most serious crimes of concern to the international community as a whole. Any court, domestic or international, should be astute to ensure that the crime is interpreted strictly and reserved only for cases of the utmost gravity not least to avoid diluting and demeaning the power of the charge of a crime against humanity."

Article 1F of the Refugee Convention

7. Article 1F contains an exclusion, as follows:

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

We are concerned here with the exclusion in article 1F(a).

8. Although SK has succeeded to some extent in her litigation with the respondent Secretary of State, in that it has been accepted that she would face a real risk of being subject to serious ill-treatment if she were returned to Zimbabwe, sufficient to breach her rights under article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"), she has so far failed to achieve the

status of a refugee under the Refugee Convention. Therefore her appeal against the decision of the Secretary of State to remove her succeeded on human rights grounds, but failed on refugee status grounds. We bear in mind the importance and value of that status (see for instance the UNHCR Guidelines on International Protection at paras 8/9).

9. The standard of proof under article 1F is "serious reasons for considering". This is what Lord Brown of Eaton-under-Heywood JSC said about that standard in *Regina (JS (Sri Lanka)) v. Secretary of State for the Home Department* [2010] UKSC 15, [2011] 1 AC 184 (where war crimes under article 1F(a) were under consideration):

> "[39]…Clearly the tribunal in *Gurung's* case [2003] Imm AR 115 (at the end of para 109) was right to highlight "the lower standard of proof applicable in exclusion clause cases" – lower than that applicable in actual war crime trials. That said "serious reasons for considering" obviously imports a higher test for exclusion than would, say, an expression like "reasonable grounds for suspecting". "Considering" approximates rather to "believing" than to "suspecting". I am inclined to agree with what Sedley LJ said in *Al-Sirri v Secretary of State for the Home Department* [2009] Imm AR 624, para 33:
>
> > "[the phrase used] sets a standard above mere suspicion. Beyond this, it is a mistake to try to paraphrase the straightforward language of the Convention: it has to be treated as meaning what it says.""

10. The UNHCR Guidelines at para 35 state this:

> "35. In order to satisfy the **standard of proof** under Article 1F, clear and credible evidence is required. It is not necessary for an applicant to have been convicted of the criminal offence, nor does the criminal standard of proof need to be met. Confessions and testimony of witnesses, for example, may suffice if they are reliable."

11. In the present case, as will become clear, the evidence is largely based on SK's own evidence. Moreover, the issue on appeal is essentially one of law, not of fact.

The findings of the Asylum and Immigration Tribunal

12. SK's appeal from the decision of the Secretary of State to remove her as an illegal entrant came first before IJ Buchanan in the Asylum and Immigration Tribunal (AIT). His determination was dated 4 February 2009.

13. SK is a citizen of Zimbabwe, now 31 years old. She arrived in the United Kingdom on 23 October 2002 and asked for asylum on 1 May 2008. She was interviewed in connection with her claim on 21 May 2008. For the purposes of her appeal to the AIT she relied inter alia on her own witness statements and on an expert report on Zimbabwe by Dr Steve Kibble. She admitted wrongdoing, as a member of the Zanu PF youth militia, in connection with inter alia two farm invasions, in April and October 2002, but said that she had been the victim of duress.

14. She had certainly suffered misfortune in her life. When she was five, her parents were killed in a traffic accident. She had gone to live with her maternal grandparents, but they were killed in a fire started by a lightning strike. She then went to live with her maternal uncle. In 1999 she married, but her husband died of poisoning caused by home-made alcohol, so she returned to her uncle's house. He was an ardent supporter of Zanu PF. In November 2001 he prevailed on her to join the Zanu PF youth militia to campaign for the party. The socialising required of that militia involved alcohol, cannabis and sex. She was sent to nearby villages to force people to attend Zanu PF meetings and rallies.

15. However, the Secretary of State's case that she should be excluded from the Refugee Convention was ultimately based in particular on the two farm invasions I have mentioned, about which her evidence was as follows (as set out in IJ Buchanan's determination, itself quoted in the determination of the Upper Tribunal):

> "16. In April and October 2002 the appellant was involved in two farm invasions which she had explained in detail and which involved her being part of a large group of Zanu PF activists who attacked two white owned farms. The first attack took place at a place called Manzou Farm where a white farmer had been given an eviction order which he had disregarded. The appellant was with a mob of perhaps one hundred and twenty people, including members from different areas and trained youth members and senior leaders.
>
> 17. The group was split into two and the senior members which included the appellant's uncle went to the farmer's house and beat him up. The appellant in the other group was involved in going to the farm workers' houses, beating them up and burning their houses down. The appellant admitted that she was one of those carrying a stick or "chamu", but she was not involved in burning any of the houses. She found the situation very scary and although she hit people she did not use excessive force…

> 20. In early October 2002 she and others were involved in another farm invasion at a place called Bellrock Farm where the white farmer had been given orders to leave the farm and had ignored it. Again she went with a large mob which might have included over one hundred youth members. Her uncle was amongst the senior members of the group. When they got to the farm her group was ordered to beat up the farm workers in the fields and everyone joined in, including the appellant. They chased the farm workers and if they caught up with any worker they beat them until they left the farm. The appellant remembered that she had beaten one woman in particular and felt very guilty about this. She felt horrible as to what had happened. She stopped hitting the woman when she saw what distress she had caused and the woman scrambled away. Farm workers' houses were set on fire but the appellant was not involved in that. But she did witness the Zanu PF leaders questioning the white farmer when she saw him being beaten badly and his property being destroyed."

16. Not long after this second farm invasion, she was raped by another member of the youth militia. It was this rape which had led to her leaving Zimbabwe for England, after eleven months in the militia.

17. In her first, handwritten, witness statement, made on the day of her asylum interview, she had said this:

> "As a Zanu PF youth member, I was forced to inflict pain on my fellow brothers and sisters. In Zanu PF, I was encouraged to hate and hurt those who disagreed with the government. I will not be lying to say that I never beat somebody to death. Surely the people I was forced to assault, even if they may have survived during the beatings, I am afraid to say that some of my victims lost their lives, as a result of the beatings I perpetrated."

18. In her interview, she was asked (question 76) whether she had ever been involved in any one's death and replied: "If you beat them so hard they can't get out or go away, I wouldn't be surprised." In her subsequent detailed witness statement and in her evidence at the hearing, however, she –

> "75…sought to distance herself from her first statement and what she had said at the interview. She admitted that she had been involved with the Zanu PF youth militia for eleven months, that she had been involved in visiting villages and beating MDC supporters to encourage them to vote for Zanu PF, and had been involved in the two farm invasions. She also confirmed that she had at least beaten one woman with her stick, even though the woman was able to crawl away from the attack. But she denied ever having killed anyone."

19. IJ Buchanan expressed his own findings in this way:

> "77…I find that she was a member of the Zanu PF youth militia for eleven months, that she did participate in events which led to beatings of those who opposed to the Zanu PF regime…Despite the discrepancy to the extent of her activities with the militia, she had been involved in serious offences against innocent civilians.
>
> 78. However I do not accept that the appellant had actually killed anyone. Her hand written statement suggested that she had beaten people to the extent that they might have been killed. This was the gist of her reply to paragraph 76 of the asylum interview…the appellant is of a very slight build. I do not believe that she was ever a strong woman, and although she had clearly been implicated in the beatings of innocent civilians, I do not accept that she had ever actually beaten anybody to the extent that they had died from their injuries. That alone, I find that the remainder of her account of what happened in Zimbabwe, before she left the country, was comprehensive, detailed and truthful…
>
> 84. Bringing these strands together…I further find that she had participated in actions against civilians which had resulted in innocent civilians, both MDC supporters and farm workers on two farms, being badly harmed, and that she had used force with a stick to beat these innocent people. I do accept that she was only one of a number of people on the two farm invasions, that she had not personally been involved in setting fire to people's houses, or that she was a prominent member of these groups. But there is no denying the serious nature of these attacks on innocent civilians, and that the appellant participated in them.
>
> 85. The onus is on the respondent to show that the appellant falls within the categories identified in Article 1F of the 1951 Convention. I am entirely satisfied that the actions taken by the group in which the appellant participated were acts involving crimes against humanity. The appellant had voluntarily joined the Zanu PF militia, even though at the instigation of her uncle; she had participated in its activities, she was aware of the actions taken against civilians and she had failed to disassociate herself from these activities at the earliest safe opportunity. I accept the respondent's suggestion that it was not so much due to remorse that she had decided to desert from the militia, but on account of having been raped by another member of the militia that prompted her eventually to leave…"

20. IJ Buchanan then went on to consider SK's submission that she had been subject to duress from her uncle, and subject to superior orders. He rejected these defences, and they are no longer in issue. He concluded that the exclusion in article 1F applied to SK's asylum claim.

21. IJ Buchanan did not, however, make clear findings about the *chapeau* requirement of article 7(1) of the Rome Statute (but he did find that SK "was aware of the actions taken against civilians" see above within his para 85), nor did he set out that article,

nor did he identify which crimes against humanity within that article he had in mind in making his findings. However, he had previously set out within his determination the submissions on behalf of the Secretary of State which were to the effect that the respondent was putting her case for exclusion on a broad basis. Thus –

> "49…The respondent submitted that the actions of the appellant, in participating with the youth militia, constituted a crime against humanity involving murder, torture, rape, and actions directed predominately against civilians…
>
> 50. It was noted that the Solidarity Peace Trust comprising church leaders from Zimbabwe and South Africa had reported that since January 2002 the youth militia was one of the most commonly reported perpetrators of human rights violations recorded by local human rights groups. Accounts of systematic and widespread actions against civilians, were reported. The militia were used to occupy farms, force people from their homes, and routinely being involved in beatings [of] civilians. This degree of violence inflicted upon farm workers in the farm invasions arising from the fast track land reform programme introduced by President Mugabe was well-documented. There were serious reasons for considering that between November 2001 and October 2002 Zanu PF policies, as executed by the Zanu PF youth militia or youth brigade amounted to crimes against humanity because they were directed predominately against civilians and were widespread and systematic."

22. The respondent's case as outlined by IJ Buchanan then went on to make submissions about SK's own evidence, summed up in the determination as follows:

> "52. The fact that the appellant had admitted beating both MDC supporters and farm workers, displacing farm workers and attacking them had shown that there were serious reasons for considering that she was directly responsible for the crimes against humanity of murder, torture, forcible transfer, persecution and other inhuman acts."

As will appear below, those crimes are listed within article 7(1) of the Rome Statute within headings (a), (d), (f), (h) and (k). In other words, the Secretary of State was putting her case against SK pursuant to the Rome Statute in a broad way, both as a matter of the *chapeau* requirement, and as to SK's personal responsibility.

23. The Solidarity Peace Trust's report, referred to in the passage cited above, was one of a number of reports about the activities of the youth militia at that and later times, placed before the AIT by SK or the respondent.

24. It will have been observed that IJ Buchanan did not go into any detail as to how much of the respondent's case he had accepted. Perhaps he had accepted it all. Clearly, he had to have accepted a critical part of it to have come properly to his conclusion.

Permission from Mitting J for reconsideration

25. These uncertainties led to an application for reconsideration, which was granted by Mitting J on paper by order dated 17 June 2009 in these terms:

> "The determination and reasons of the immigration judge are thorough, careful and unimpeachable save, arguably, in one respect: he did not address the question of what amounts to a crime against humanity for the purpose of Article 1F(a) of the Refugee Convention. The best working definition is that contained in Article 7.1 of the…Rome Statute. On the immigration judge's findings of fact, the only arguably relevant definition is that contained in Article 7.1(k)…
>
> There is no doubt that the Zimbabwe regime's attacks on white farmers and their workers fall within the definition of "attack directed against any civilian population"…But the immigration judge should have asked himself whether the acts in which the Applicant participated were "of a similar character" to those set out in Article 7.1(a) to (j). They range from extermination to apartheid. It is not self evident that the acts in which the Applicant participated were of that character.
>
> The immigration judge's determination on the two other principal issues raised (personal participation in the activity of a group and coercion) is unimpeachable. Reconsideration should be confined to the single issue identified above."

26. Thus permission was given for reconsideration on the single issue of whether the acts in which SK participated were "other inhumane acts of a similar character" to the acts listed in article 7.1(a) to (j).

The reconsideration by the AIT

27. The first stage of the reconsideration came before SIJ Nichols who gave her decision, finding an error of law and requiring reconsideration, on 9 December 2009. She wrote:

> "2…both parties agreed with the Tribunal that Mr Justice Mitting had identified an error of law in the Immigration Judge's determination and that on the discrete issue which he identified the Tribunal should reconsider the evidence.
>
> 3. The Tribunal does not consider this to be a straightforward issue as it would involve a consideration of the scope of the Rome Statute. The Tribunal was also of the view that it may need to hear further evidence from the appellant: much is at stake from her point of view and although the Immigration Judge's determination is thorough and detailed, the Tribunal cannot rule out the possibility that it may want to hear further from her as to the acts in which she participated during the attacks on white farms in Zimbabwe.
>
> 4. The Tribunal makes it clear that the only issue for reconsideration is the single discrete issue identified by Mr Justice Mitting in his order. In the circumstances the remainder of the Immigration Judge's findings will stand."

The determination of the Upper Tribunal

28. The Upper Tribunal decided that it needed to hear further evidence from SK. It stated –

> "7…we concluded that further detail was required as to what she had done, how serious the harm she had inflicted had been and with what intent she had inflicted it. The evidence already given was insufficiently detailed and focussed on those issues. We heard such evidence bearing in mind, as we emphasised to the parties, that we were not going behind the finding that she had killed no one. This did not preclude us hearing questions of her as to why she had said or had appeared to say, on two occasions, that she had in fact killed people, for what light that might cast on her credibility on the detail.
>
> 8. We had to make up our own minds as to the detail of what she had done…We should not however overturn or go behind what the IJ had found on the evidence he had heard."

29. The detailed consideration then given to the issue posed by Mitting J regarding article 7.1(k), and the hearing of further evidence from SK, led the Upper Tribunal to give new attention to her responsibility under the Rome Statute for her acts. The Upper Tribunal therefore considered articles 25 and 30 of the Rome Statute and *JS (Sri Lanka)* which had been recently decided in the Supreme Court. It continued:

> "22. This case is concerned with the responsibility of someone who, on her own evidence, used violence herself on black farm workers to help to drive them from their homes during two farm invasions, which were intended to remove those workers as well as the white farmer, so that the land could be taken by others,

usually regime acolytes or its marauding supporters. She was not a ring leader, nor one of the hard core of the Zanu-PF youth militia, but she was one of the large group of militia members, one of the mob, who were taken to the farms to drive out the workers, burn their homes and ensure that they were too intimidated ever to return. Of course, we accept that it is necessary to look at what she personally actually did, and with what intent. But we reject what seemed to be Ms Pickup's suggestion that her personal acts and intent are the end of the matter, as if there were no context to what she did, as if she were not doing what she did as part of an invading mob which had a clear and violent purpose. This has to be examined to judge whether she was part of this joint enterprise."

30. The Upper Tribunal next considered SK's activities by reference to the context of what the youth militia were doing in Zimbabwe at that time in general. Thus the determination continued:

"28. The Appellant's account of how she was forced to join the youth brigade, the sexual abuse she suffered, the activities of the militia in which she participated, including helping to force villagers to come to Zanu-PF meetings with threats and violence, and the terrible consequences for those in the youth brigade who appeared unsympathetic to its aims and methods, were all of a piece with how her expert, Dr Kibble, described the militia behaving in 2002/3, and with what the Solidarity Peace Trust and other reports told of their wanton, sadistic, and extreme brutality against those whom they perceived as Mugabe's enemies…

29. Dr Kibble was asked to comment on how her account fitted with his knowledge of what was happening in Zimbabwe at that time, with what the youth militia were doing, and the risks she faced through disobedience. This was in connection with her argument about duress. It was from the start of 2002 that allegations emerged against the youth militia of murder, rape, torture, and property destruction. This is when they began to be used to occupy farms and to force people from their homes, the farm invasions…

30. He does not suggest that the appellant's description of them was atypical. Rather he says that her account captured the way in which indoctrinated youth were worked up into a state of mass hysteria, often fuelled by drugs and alcohol, to unleash violence on opponents and farm workers.

31. The violent occupation of farms and forcing people, including farm workers from their houses, was part of the State violence, formal and informal, used to crush opposition and those who were not regime supporters."

31. The determination's next heading concerned the fresh evidence which SK had given to the Upper Tribunal itself:

"32. On the first farm invasion, she said that she had beaten no more than ten people, inflicting enough pain to get them to run away. She beat them as hard as she could on their clothed backs and bottoms, carefully avoiding hitting them on their heads. She could not see, through their clothes, if she had injured them. She was beating them as their homes were burning. She did not see how severely others were hurt. It was the Youth Brigades who were beating people so severely that she thought they would die.

33. She only hit one person severely on the second farm invasion. She was shocked that she had beaten her so severely. It was the way she beat her which made her think that the woman would die; but she only beat her back and bottom. She saw other people being beaten and had never seen people beaten like that before. She beat other people on the second farm invasion as severely as she had beaten people on the first farm invasion; in re-examination she said that this was the only person she had beaten on the second farm invasion. She did not intend to hurt the woman but only to beat her so that she could run away.

34. She had said that she had beaten people to death because she had beaten so hard that she thought she was dead but she did not in fact die. Although she thought that others would die from the beatings they received, in fact none of them died. She mentioned death because the beatings were so severe.. She only beat one lady that way, so that the Youth Brigades could see her sympathy to their cause. She never intended to kill anyone. But she had hit other people on both farm invasions. She had referred to beating many because she went on two farm invasions."

32. The determination's next heading was "Were the farm invasions crimes against humanity?". As this passage stated at its start, this comprised the sole issue on which Mitting J had ordered reconsideration. (Indeed, Mitting J's defined issue may have been even narrower, viz whether the acts were "of a similar character". However, no point was taken as to that.) I will set out the passage under this heading in full:

"35. This was the issue upon which Mitting J ordered reconsideration, rather than what the argument before us focussed on, which was whether the role of the Appellant in the farm invasions might mean that she was not guilty of participation in crimes against humanity, if that is what the farm invasions were. We first deal with the issue identified by Mitting J, taking as our starting point his barely contested and obviously correct point that the farm invasions were part of a systematic attack directed against civilian population, and that applies to the two farm invasions here.

36. We are satisfied that these two farm invasions were part of widespread systematic attacks against the civilian population of farmers and farm workers, carried out not just with the full knowledge of the regime but as a deliberate act of policy by it, with the intention of advancing its grip on power, suppressing opposition, and helping its supporters.

37. We are satisfied that the intention behind these invasions in general, and it applies as well to the two in which the Appellant participated, was to cause great suffering or inflict serious physical and mental injury. The aim was to drive people from their homes and their work, and to do so in such a way that they would be so cowed by their experience that they would neither return to their homes nor foment opposition outside. It would also deter resistance on other farms or in other potential areas of opposition. The aim was achieved by the mob violence of beatings and lootings in a deliberately brutal and terrifying experience.

38. These acts were obviously inhumane and were, in our judgment, of a similar character to those in sub-paragraph (h) of Article 7 [the crime of "persecution"]. These acts were clearly persecutory acts against an identifiable group, farmers and farm workers. They were undertaken for political reasons, the suppression of perceived opposition and for the financial advancement of the regime members and supporters. There was a clear racial element in the attacks on the farms, and the farm workers who were a necessary part of the white farmers' ability to benefit from the farm.

39. Accordingly, on the issue on which Mitting J ordered reconsideration, we are satisfied that the two farm invasions were crimes against humanity. No doubt, these actions could have been charged in a variety of ways, including causing grievous bodily harm with intent, affray, violent disorder, and arson. But such an exercise would distract from the true question: did these two farm invasions, with their specific aim, intent and effect fall within Article 7 sub-paragraph (k). In our view, they did."

33. The determination's final heading was "Participation". That was not the issue for reconsideration, however it is understandable that the Upper Tribunal revisited it where it had chosen to hear further evidence from SK and where the *mens rea* elements of the Rome Statute could be said to be involved in their decision as to whether there were serious reasons for considering that any crime against humanity within its article 7 had been committed by her.

34. The Upper Tribunal said:

"40. We now turn to whether the Appellant's participation in them [the two farm invasions] makes her criminally responsible. The Appellant was a participant in serious mob violence. The intention of the instigators and the participants, including her, was that the farmer and the farm workers be driven from their homes, by violent beatings and burnings, never to return and to deter them from opposition to the regime. The intention was that the farms would then be available for regime supporters.

41. We accept the generality of her evidence, and specifically that no one was murdered. We accept that she was a lesser participant, and that others, below the

ringleaders, were more active and brutal. But we also felt that, in her evidence to us, she falsely underplayed her role at the second farm invasion. She clearly beat a number of people on it. She beat one woman very severely to demonstrate her loyalty, not just to make the woman run away. We note her evidence that she was shocked at how hard she had beaten the woman and thought she had beaten her so severely she would die.

42. The Appellant was not merely present. She was on each occasion a voluntary, even if reluctant, actual and active participant in beatings; even taking her evidence at face value, beating many people hard as part of the aim of driving them away. She specifically tried to demonstrate her loyalty to Zanu-PF in her actions.

43. She is plainly criminally liable on a joint enterprise domestic law basis.

44. If there is an additional requirement that, in these circumstances, there be a substantial contribution to the crime, we consider that she provided it. That expression is not intended to exclude all but ringleaders and major participants. Each of those who guard extermination camps, for example, make a substantial contribution to genocide.

45. Active participation in mob violence which itself falls within sub-paragraph (k) makes a substantial contribution to that crime against humanity, and is a sufficient basis for exclusion from refugee status of those who actively and intentionally participated in the violence, seeking to achieve its purpose."

35. In sum, therefore, on her own admission SK participated in two farm invasions, as part of a widespread and systematic attack against the civilian population. Although no one was killed on these two invasions (as distinct from others), she had fully and intentionally participated on a joint enterprise basis in the beatings and burnings committed at them. She had personally beaten many people on these occasions, and had beaten one woman so hard that she had thought her victim would die. The invasions were politically inspired mob violence, intended to drive the farmers and their workers off the land, never to return. To do this, their homes were to be burnt and they were to be terrified into submitting to their fate. The intention behind these two invasions (as others) was "to cause great suffering or inflict serious physical or mental injury". That aim "was achieved" by the mob violence of beatings, burnings and lootings in a deliberately brutal and terrifying experience. SK had made a substantial contribution to these events and shared the intention behind them. These acts were "obviously inhumane" and "of a similar character" to the crime of persecution referred to in sub-paragraph (h), involving as they did a "clear racial element". SK was responsible for the crime against humanity found in sub-paragraph (k).

36. There is no dispute as to the *chapeau* requirement at the start of article 7. It might have been said that the Upper Tribunal's expression of its finding as to the *chapeau*

requirement at its para 36 was infelicitous for the purpose of identifying *SK's* knowledge of the regime policy behind the farm invasions: but no point has at any time been made about this and it is accepted, as must be the case on SK's own evidence, that the *mens rea* element of the *chapeau* requirement has been sufficiently proved.

37. It will have been observed that over the course of the litigation the Secretary of State's case has been narrowed, from its original more general accusation against SK that she was responsible, by reason of her participation in the farm invasions but also other political attacks on non-supporters of the regime, for the crimes of murder, rape and torture committed by the youth militia on a wider basis, to a more refined concentration on the two farm invasions in particular. However, the more general situation has always remained the context, relied upon by the Secretary of State, in which these two farm invasions took place.

38. The Upper Tribunal was in any event conscious of the principles which are applicable to such cases, and which have been explored in *JS (Sri Lanka)* and in *KJ (Sri Lanka)* [2009] EWCA Civ 292, [2009] Imm AR 674 to which Lord Brown referred in his judgment in *JS (Sri Lanka)*. SK was neither a mere member, such as did not participate in the activities of an organisation beyond membership alone, nor was she a senior officer or planner, whose responsibility lies not so much in direct participation as in the conspiring and originating of the offences. In *KJ (Sri Lanka)* Stanley Burnton LJ said this:

> "35. First, the Convention may be excluded even if the evidence available does not establish positively that the person in question committed a crime against peace or one of the other crimes or acts identified in paragraphs (a), (b) or (c): it is sufficient if there are "serious reasons for considering" that he did so. Secondly, each of the paragraphs requires the personal guilt of the person in question: paragraphs (a) and (b) refer to his having committed a crime of the nature described, and paragraph (c) refers to his having committed acts contrary to the purposes and principles of the United Nations. It follows that mere membership of an organisation that, *among other activities*, commits such acts does not suffice to bring such exclusion into play. On the other hand, in my judgment a person who knowingly participates in the planning or financing of a specified crime or act or is otherwise a party to it, as a conspirator or as an aider or abettor, is as much guilty of that crime or act as the person who carries out the final deed."

The appeal to the court of appeal

39. SK's amended grounds of appeal for which she has received permission to appeal are limited to two issues of law, as indicated above. The first complains that the Upper

Tribunal erred in holding that the farm invasions were inhumane acts "of a similar character" to persecution; the second complains that the Upper Tribunal erred in law with respect to article 7.1(k) in that it misdirected itself as to the meaning and/or effect of the requirement of "great suffering, or serious injury to body or to mental or physical health", in that "its findings of fact do not permit the conclusion that this requirement was met." If this second complaint goes beyond the limits to which Mitting J confined reconsideration, no point has been made of this.

The Rome Statute

40. The *Preamble* to the Rome Statute provides inter alia as follows:

> "**Mindful** that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity,…
>
> **Affirming** that the most serious crimes of concern to the international community as a whole must not go unpunished…
>
> **Determined** to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole…"

41. The emphasis on "the most serious crimes" there marked is enacted in the Statute's article 5 ("Crimes within the jurisdiction of the Court"):

> "1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:
> (a) The crime of genocide;
> (b) Crimes against humanity;
> (c) War crimes;
> (d) The crime of aggression…"

42. Article 7 is headed "Crimes against humanity" and needs citation (almost) in full:

> "1. For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(a) Murder;
(b) Extermination;
(c) Enslavement;
(d) Deportation or forcible transfer of population;
(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental principles of international law;
(f) Torture;
(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of this Court;
(i) Enforced disappearance of persons;
(j) The crime of apartheid;
(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:
(a) 'Attack directed against any civilian population' means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;

(b) 'Extermination' includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

(c) 'Enslavement' means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;

(d) 'Deportation or forcible transfer of population' means forced displacement of the persons concerned by expulsion or other coercive means from the area in which they are lawfully present, without grounds permitted under international law;

(e) 'Torture' means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

(f) 'Forced pregnancy' means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

(g) ‘Persecution’ means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

(h) ‘The crime of apartheid’ means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

(i) ‘Enforced disappearance of persons’ means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time…”

43. Article 8 concerns “War crimes”. These require a context of armed conflict, for they require “Grave breaches of the Geneva Conventions of 12 August 1949” or “Other serious violations of the laws and customs applicable to international armed conflict” or, to an extent defined in detail, of “armed conflict not of an international character”. Among the grave breaches of the Geneva Conventions listed are “Wilfully causing great suffering, or serious injury to body or health” (article 8.2(a)(iii), which reflects the language also found in article 7.1(k)).

44. Article 9 (“Elements of Crimes”) states that such a document “shall assist the Court in the interpretation and application of articles 6, 7 and 8”. The Elements of Crimes contain the following provisions of relevance:

“**Article 7**
Crimes against humanity

Introduction

1. Since article 7 pertains to international criminal law, its provisions, consistent with article 22, must be strictly construed, taking into account that crimes against humanity as defined in article 7 are among the most serious crimes of concern to the international community as a whole, warrant and entail individual criminal responsibility, and require conduct which is impermissible under generally applicable international law, as recognized by the principal legal systems of the world.

2. The last two elements for each crime against humanity describe the context in which the conduct must take place. These elements clarify the requisite participation in and knowledge of a widespread or systematic attack against a civilian population. However, the last element should not be interpreted as requiring proof that the

perpetrator had knowledge of all the characteristics of the attack or the precise details of the plan or policy of the State or organization. In the case of an emerging widespread or systematic attack against a civilian population, the intent clause of the last element indicates that this mental element is satisfied if the perpetrator intended to further such an attack.

3. 'Attack directed against a civilian population' in these context elements is understood to mean a course of conduct including multiple commission of acts referred to in article 7, paragraph 1, of the Statute against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack. The acts need not constitute a military attack. It is understood that 'policy to commit such attack' requires that the State or organization actively promote or encourage such an attack against a civilian population…

Article 7(1)(d)
Crime against humanity of deportation or forcible transfer of population

Elements
1. The perpetrator deported or forcibly transferred, without grounds permitted under international law, one or more persons to another State or location by expulsion or other coercive acts.

2. Such person or persons were lawfully present in the area from which they were so deported or transferred.

3. The perpetrator was aware of the factual circumstances that established the lawfulness of such presence.

4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population…

Article 7(1)(h)
Crime against humanity of persecution

Elements
1. The perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights.

2. The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such.

3. Such targeting was based on political, racial, national, ethnic, cultural, religious, gender as defined in article 7, paragraph 3, of the Statute, or other grounds that are universally recognized as impermissible under international law.

4. The conduct was committed in connection with any act referred to in article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court.

5. [as under article 7(1)(d), element 4, above]

6. [as under article 7(1)(d), element 5, above]

Article 7(1)(k)
Crime against humanity of other inhumane acts

Elements
1. The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act.

2. Such act was of a character similar to any other act referred to in article 7, paragraph 1, of the Statute. [Footnote 30 of Elements of Crimes here states that "It is understood that 'character' refers to the nature and gravity of the act."]

3. The perpetrator was aware of the factual circumstances that established the character of the attack,

4. [as under article 7(1)(d), element 4, above]

5. [as under article 7(1)(d), element 5, above]"

45. On behalf of SK, Mr Hermer emphasised that the wording of the preamble and of article 5 underlines the seriousness of any of the listed crimes, as does the requirement within article 7(1)(k) itself that "Other inhumane acts" must share a "similar character" with previously listed crimes. He also emphasised that the requirement of "great suffering" etc similarly reflects the seriousness of the crime stated within sub-paragraph (k); and pointed to footnote 30 within the Elements of Crimes, to the effect that "character" refers to the nature and gravity of the act. As for the crime against humanity of persecution, to which the Upper Tribunal referred in its determination, he emphasised the requirement that the proscribed conduct be committed "in connection with" some other act within article 7, and the fact that this requirement is separately picked up and listed within the Elements under article 7(1)(h). As for the crime against humanity of deportation or forcible transfer of population, to which the respondent's notice and submissions for the Secretary of State have also referred, Mr Hermer emphasised the element of that crime which requires that the victims should be "lawfully present" in the area from which they are displaced, and submitted that in the present case they were not so lawfully present, since an eviction notice had been served on the farmers in question under Zimbabwe's land reform legislation.[3]

46. In all his submissions Mr Hermer was at pains to underline the gravity which any crime must display for it to come within the purview of article 7, as well as the

[3] IJ Buchanan's findings referred to an "eviction order" in relation to the first farm invasion, and to "orders to leave" in relation to the second farm invasion. Country material referred to below suggests that such orders ran into legal difficulties in the courts of Zimbabwe.

strictness with which the necessary criteria for the finding of a crime within the Statute must be applied. The concern, he suggested, was that the nature of a crime against humanity as one that offends the conscience of humanity should not be watered down: see *Prosecutor v. Erdemovic* (ICTY, judgment of Judge McDonald and Judge Vohrah, 7 October 1997) at paras 21/22). However, that is the importance of the *chapeau* requirement (in the ICTY (International Criminal Tribunal for Yugoslavia) and ICTR (International Criminal Tribunal for Rwanda) statutes being indicated quite simply, by the words "directed against any civilian population"), as was well explained early on in *Prosecutor v. Tadic* (ICTY, IT-94-1-T, judgment 7 May 1997):

> "644. The requirement in Article 5 of the Statute that the prohibited acts must be directed against a civilian "population" does not mean that the entire population of a given State or territory must be victimised by these acts in order for the acts to constitute a crime against humanity. Instead the "population" element is intended to imply crimes of a collective nature and thus exclude single or isolated acts which, although possibly constituting war crimes or crimes against national penal legislation, do not rise to the level of crimes against humanity. As explained by this Trial Chamber in its *Decision on the Form of the Indictment*, the inclusion in Article 5 of the requirement that the acts "be 'directed against any civilian population' ensures that what is to be alleged will not be one particular act but, instead, a course of conduct." The purpose of this requirement was clearly articulated by the United Nations War Crimes Commission when it wrote that:
>
> > Isolated offences did not fall within the notion of crimes against humanity. As a rule systematic mass action, particularly if it was authoritative, was necessary to transform a common crime, punishable only under municipal law, into a crime against humanity, which thus became also the concern of international law. Only crimes which either by their magnitude and savagery or by their large number or by the fact that a similar pattern was applied at different times and places, endangered the international community or shocked the conscience of mankind, warranted intervention by States other than that on whose territory the crimes had been committed, or whose subjects had become their victims.
>
> Thus the emphasis is not on the individual victim but rather on the collective, the individual being victimised not because of his individual attributes but rather because of her membership of a targeted civilian population. This has been interpreted to mean, as elaborated below, that the acts must occur on a widespread or systematic basis, that there must be some form of governmental or group policy to commit these acts and that the perpetrator must know of the context within which his actions are taken, as well as the requirement imported by the Secretary-General and members of the Security Council that the actions be taken on discriminatory grounds."

It is possible to see in such jurisprudence the origins or underpinnings of the expanded wording of the *chapeau* requirement in the Rome Statute.

"Of similar character"

47. On the whole Mr Hermer's submissions sought to emphasise the gravity rather than the nature of "other inhumane acts", or else to emphasise that the necessary nature of such acts was that they partook of the gravity of the other listed crimes. At other times, however, Mr Hermer suggested that the concept of "similar character" necessitated the appearance of the elements of the other enumerated crimes, or submitted that the absence of such elements meant that conduct could not be charged as "other inhumane acts" of a comparable nature. The commentaries concerning article 7 would appear, however, to support Mr Hermer's former, and main, approach, for they emphasise the deliberate width of the language of the crime, subject to its requirement of gravity.

48. Thus Amnesty International's memorandum of January 1997, submitted to the United Nations in support of the creation of an international criminal court and entitled "The International Criminal Court: Making the Right Choices", at its chapter IV.J "Other inhumane acts", made the point, via citation of the ICRC Commentary on article 3 of the Geneva Conventions, that it is always dangerous to go into too much detail and that the flexibility of the wording is a virtue, and went on to say this:

> "The International Law Commission stated that only acts "similar in gravity" to other crimes against humanity would be included. The Secretary-General in his analysis of the Nuremberg Judgment suggested that depriving part of the civilian population of the means of subsistence might be such an inhumane act. Although the approach of the International Law Commission has merit, care will have to be taken in defining this criteria [sic] to ensure that it covers all acts which might be subject to international criminal responsibility."

49. Professor Darryl Robinson's *Defining "Crimes against Humanity" at the Rome Conference*, AJIL Vol 93, No 1 (Jan 1999) at 43 said this about "Other inhumane acts":

> "As the final heading, "other inhumane acts," appeared in the major precedents (including the Nuremberg Charter, the Tokyo Charter, Control Council Law No. 10, and the ICTY and ICTR Statutes), many delegations raised grave concerns about its imprecise and open-ended nature…The solution was to agree to include this final heading but to provide a clarifying threshold, specifying that the acts must be of a character similar to that of the other enumerated acts and must intentionally cause great suffering or serious injury to mental or physical health. Unlawful human experimentation and particularly violent assaults were two possibilities considered likely to fall within this heading."

50. Professor William Schabas, in *An Introduction to the International Criminal Court*, 2nd ed, 2004, speculated (at 49/50) whether the requirements of sub-paragraph (k) may have narrowed the concept of "other inhumane acts" as it is found in the statutes setting up the international criminal tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR). Those statutes, by their articles 5 and 3 respectively, simply refer to "other inhumane acts" without further definition. In *Prosecutor v. Akayesu* (ICTR-96-4-T, judgment 2 September 1998) the forced nakedness of Tutsi women was sanctioned as "other inhumane acts". Similarly, in *Prosecutor v. Krstic* (ICTY, IT-98-33-T, judgment 2 August 2001), the forced bussing of thousands of women and children, in overcrowded and unbearably hot conditions, was considered to be an inhumane act. Schabas comments:

> "It is open to question whether the acts of sexual indignity condemned by the Rwanda Tribunal would now fit within the restrictive language of the Rome Statute."

51. Despite the unadorned language of the crimes listed in the Former Yugoslavia and Rwanda statutes, ending in "Other inhumane acts", the tribunals concerned have nevertheless developed their own jurisprudence to limit such crimes to reflect doctrines of international criminal law, and such doctrines and jurisprudence are reflected in the language of the Rome Statute itself. Thus in *Prosecutor v. Kayishema and Ruzindana* (ICTR-95-1-T, judgment 21 May 1999) the Rwanda Tribunal said this (at para 583):

> "For the accused to be found guilty of crimes against humanity for other inhumane acts they must, *inter alia*, commit an act of similar gravity and seriousness to the other enumerated crimes, with the intention to cause the other inhumane act. This important category of crimes is reserved for deliberate forms of infliction with (comparably serious) inhumane results that were intended or foreseeable and done with reckless disregard. Thus, the category of other inhumane acts demands a crime distinct from the other crimes against humanity, with its own culpable conduct and *mens rea*. The crime of other inhumane acts is not a lesser-included offence of the other enumerated crimes. In the opinion of the Trial Chamber, this category should not simply be utilised by the Prosecution as an all-encompassing 'catch all' category."

52. *Prosecutor v. Galić* (ICTY, IT-98-29-T, judgment 5 December 2003) contains this:

> "152. The crime of inhumane acts is a residual clause for serious acts which are not otherwise enumerated in Article 5 but which require proof of the same chapeau elements. The elements of the crime of inhumane acts are that:

(a) there was an act or omission of similar seriousness to the other acts enumerated in Article 5;
(b) the act or omission caused serious mental or physical suffering or constituted a serious attack on human dignity;
(c) the act or omission was performed intentionally by the accused or persons for whose acts and omissions the accused bears criminal responsibility.

153. In order to assess the seriousness of the act or omission, consideration must be given to all the factual circumstances of the case. These circumstances may include the nature of the act or omission, the context in which it occurred, the personal circumstances of the victim including age, sex, and health, and the physical, mental and moral effects of the act or omission upon the victim."

See also *Prosecutor v. Vasiljevic* (ICTY, IT-98-32-T, judgment 29 November 2002) at paras 234-235.

53. This jurisprudence has been cited and relied on by the ICC itself, for instance in *Prosecutor v. Katanga and Chui* (ICC-01/04-01/07, judgment 30 September 2008) at paras 448-494: even if the court there noted that under the Rome Statute a crime could not fall within sub-paragraph (k) if it would fall within any of the other sub-paragraphs of article 7(1), emphasising the word "*other*". Thus where the specific intention of the accused in attacking civilians was to cause death "rather than the intent to cause severe injuries" (at para 458), the attempted, even if not completed crime, had to be charged under sub-paragraph (a) rather than sub-paragraph (k). However, whether the ICC (pre-trial chamber) in *Katanga and Chui* was right to suggest that the ICTY and ICTR used "other inhumane acts" as a "catch all provision" (see at para 450) may be doubted: see, for instance, *Prosecutor v. Kayeshima and Ruzindana* (ICTR-95-1-T, judgment 21 May 1999) at para 583, cited above.

54. We have been referred to the following examples of the treatment of "other inhumane acts" from the jurisprudence both of the ad hoc tribunals and of the ICC itself.

55. In *Prosecutor v. Katanga and Chui* (ICC-01/04-01/07, judgment 30 September 2008) the ICC held that there was "sufficient evidence to establish substantial grounds to believe" that the war crime of inhuman treatment (see article 8(2)(a)(ii) of the Rome Statute) had been committed where civilians had been detained, with their hands tied for many hours, in a room filled with corpses, hence suffering "severe physical and mental pain and suffering" (at paras 362-364).

56. In *Prosecutor v. Krnojelac* (ICTY, IT-97-25-T, judgment 15 March 2002), the ICTY was concerned with various incidents of beatings of detainees, charged either as cruel

treatment within article 3 or as other inhumane acts under article 5(i) of its statute (at paras 189ff). Some charges succeeded, while others failed for various reasons, such as lack of sufficient evidence of the level of gravity involved, or of lack of sufficient evidence of personal responsibility. However, it would be difficult to say that the evidence against SK in this case was not at least of the same, if not greater seriousness than some of the beatings referred to in that case.

57. In *Prosecutor v. Mbarushimana* (ICC-01/04-01/10, judgment 28 September 2010, the pre-trial chamber confirmed a warrant of arrest which contained in it a charge of other inhumane acts inter alia for forcing men to rape women (count 9).

58. In *Prosecutor v. Muthaura* (ICC-01/09-02/11, judgment 23 January 2012) the pre-trial chamber had to consider whether to confirm charges under the Rome Statute arising out of election violence in Kenya. Under the heading of "Other inhumane acts" (at paras 267ff) the chamber considered charges concerned with victims who were beaten, or suffered forcible circumcision or penile amputation, or other mutilations or severe injuries, or forced to watch as attackers killed husbands and children, or whose property was destroyed. The chamber directed itself that "this residual category of crimes against humanity must be interpreted conservatively and must not be used to expand uncritically the scope of crimes against humanity" (at para 269). The chamber considered the injuries, the witnessing of deaths of family members, and the destruction of property separately. The injuries, variously described as above or as "cases of trauma, including cuts, gun-shot wounds and blunt force trauma" (at para 272) gave rise to confirmed charges, as did the forced witnessing of family deaths; but the destruction of property did not. The chamber said of the injuries that "these acts of serious physical injury inflicted great suffering on the victims, of a character similar to the other acts referred to in article 7(1) of the Statute" (at para 273); of the forced witnessing of the deaths of others, that it "caused serious mental suffering, and are comparable in their nature and gravity to other acts constituting crimes against humanity" (at para 277); but in the case of the destruction of property, that the intensity of the alleged mental suffering had not been established (at para 279). The distinction appears to have been drawn because of the formulation of different counts against different defendants.

59. On the other hand, there is authority that the destruction of homes might in context lend seriousness to conduct which could be regarded as a crime against humanity. Thus, in the course of discussing the crime against humanity of "persecution", and drawing parallels between both that crime and the crime of "other inhumane acts", the ICTY (trial chamber) in *Prosecutor v. Kupreskić* (IT-95-6-T, judgment 14 January 2000), pointed out that a distinction may have to be drawn between the confiscation of industrial property and the destruction of homes. Thus it referred to the *Flick* case (heard by the US Military tribunal sitting at Nuremberg) and pointed out, on the basis of Notes on the Case, UNWCC, Vol IX at 50, that the judgment in that case declared that "A distinction could be made between industrial property and the dwellings, household furnishings and food supplies of a persecuted people", such that "offences

against personal property as would amount to an assault upon the health and life of a human being (such as the burning of his house or depriving him of his food supply or his paid employment) [might] constitute a crime against humanity" (see footnote 897 to para 619 of *Kupreskić*). The trial chamber continued (at para 631):

> "However, the case at hand concerns the comprehensive destruction of homes and property. Such an attack on property in fact constitutes a destruction of the livelihood of a certain population. This may have the same inhumane consequences as a forced transfer or deportation. Moreover, the burning of residential property may often be committed with a recklessness towards the lives of its inhabitants. The Trial Chamber therefore concludes that this act may constitute a gross or blatant denial of fundamental human rights, and, if committed on discriminatory grounds, it may constitute persecution."

60. In *Prosecutor v. Blaskić* (ICTY, IT-95-14-T, judgment 3 March 2000) the trial chamber referred (at para 146) to this passage in *Kupreskić* and said that "The Appeals Chamber agrees with this assessment."

61. In sum, in my judgment, the critical feature of the requirement of "similar character" is that "other inhumane acts" should be, by their nature and the gravity of their consequences, of comparable ("similar") character to the other enumerated crimes. They plainly do not, otherwise, have to share the elements of those other crimes. If they did have to do so, they could not be "other" inhumane acts, as the ICC emphasised in *Katanga*. The critical epithet in any event is "similar", not "identical" or "same". As violence goes, other inhumane acts will necessarily fall short of killing, for that is a separately listed crime under the title of "murder". However, it is clearly contemplated that violence short of killing or an intention to kill may fall within article 7(1)(k), as demonstrated by the citations above (and see, for instance, Robinson's reference to "particularly violent assaults" cited at para 49 above, which seems to me to fit well with the findings in this case). Similarly, these citations demonstrate that it is contemplated that violence may lead to serious consequences other than bodily injury, consequences such as "great suffering" or injury to "health", mental or physical, as indeed the text of the sub-paragraph (k) itself reveals. What constitutes "other inhumane acts" of similar character is, of course, a matter of evidence, but also for judgment, and may depend on all the circumstances of the case. Indeed, the requirement of sufficient seriousness is the inescapable lesson of almost every aspect of the definition in question, and all these aspects tend to merge into one another in emphasising the necessity for sufficient seriousness. Thus, the *chapeau* requirement itself will necessarily underline the gravity of the crime (as ICTY explained in *Tadic*). Similarly, the requirement of "great suffering" (etc) makes its own demands. And the need for "similar character" likewise enforces or re-inforces in its own way the requirement of comparability across the enumerated crimes. The crime must have, in its context, its intention, and/or in its consequences, an aspect which goes beyond the nature of merely domestic crime, however shocking (as it may be), and calls for international sanctions.

62. One factor, but not necessarily indispensable if other factors are present, is that the other inhumane acts partake of some or other element of the previously enumerated crimes: so that the closer that a crime which does not quite fit with nevertheless approaches to those other categories, the more that one can speak of its "similar character". Thus the crime of "torture" extends to "severe physical or mental pain or suffering" (see Elements of Crimes concerning article 7(1)(f)), which clearly may overlap with violence inflicted under sub-paragraph (k): but "torture" also requires the element of the victim being "in the custody or under the control of the perpetrator" (Elements of Crimes, *ibid*) or, as article 7(2)(e) itself puts it, "upon a person in the custody or under the control of the accused". Thus violent beatings may clearly be "of similar character" to "torture", even though the element of custody or control is not present. Similarly, the nature of persecution, with its requirement of discrimination on certain grounds, may never be all that far away from violence and other forms of inhumane acts which are meted out to opponents of a regime, as the Upper Tribunal itself observed in the present case. I will return to the crime of persecution below, because Mr Hermer addressed some more or less technical arguments about it in relation to its requirement of "in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court".

63. Again, as discussed in the jurisprudence cited above, the expelling of persons from their homes, accompanied by terror and the burning of their homes, so that the victims have lost their livelihood, may have similarities with both the crime of persecution and the crime of "forcible transfer of population": even in the absence of discrimination, and even against the background of a domestic law which might, as a matter of merely positivist rule (but nevertheless well arguably lacking in international recognition and respect), purport to state that the victims lack the element of being "lawfully present" which is necessary to the crime under sub-paragraph (d) (as in this case it is suggested that the eviction notices which may have been served on the white farmers could legalise the expulsion of them and their farm workers). I will similarly revert to the crime of "forcible transfer" below.

Persecution

64. Mr Hermer submits that the Upper Tribunal's reference to the crime of persecution under sub-paragraph (h), as a crime of a "similar character" is illegitimate or unhelpful, because, first, that crime itself requires a discriminatory breach of the most fundamental of human rights, and, secondly, the requirement that persecution takes place "in connection with" some other act proscribed by the Statute means that the argument simply comes round in a circle. In other words, if reliance on sub-paragraph (k) cannot be made good, there is nothing to be gained by reference to sub-paragraph (h).

65. To illustrate those submissions, I refer to some further jurisprudence and scholarly material.

66. The latter suggests that it is not easy to formulate the consequences of the need for that "connection": see Robinson's article in AJIL, cited above, at 54/55, Schabas's *International Criminal Court: a Commentary*, 2010, at 177/178 and Professor Antonio Cassese, *The Rome Statute of the International Criminal Court: a Commentary*, 2002, at 376. Its inclusion appears to reflect a compromise whereby the uncertain scope of persecution ("vague and potentially elastic" in the views of certain delegates, see Robinson) on the one hand, and the concern on the other hand that, if it had to be grounded in some other crime, it would become merely an aggravating factor to some other crime, or "recondite" and emasculated (as Schabas puts it), were balanced. However, as Cassese comments, probably correctly: the phrase "is unclear and susceptible of many interpretations". Robinson helpfully suggests that the answer to this uncertainty is perhaps that –

> "It is not necessary to demonstrate that the "connected" inhumane acts were committed on a widespread or systematic basis; it will suffice to show a connection between the persecution and any instance of murder, torture, rape or other inhumane act, which need not amount to a crime against humanity in its own right."

Pragmatically, however, Robinson adds: "In practical terms, the requirement should not prove unduly restrictive, as a quick review of historical acts of persecution shows that persecution is inevitably accompanied by such inhumane acts." I do not regard such scholarly comment as of much assistance to Mr Hermer's submissions, rather the reverse.

67. As for jurisprudence, this appears to bear out Robinson's comment. Thus in *Kupreskić* the ICTY trial chamber said this about the crime of "persecution", in its unvarnished statute:

> "618…There must be <u>clearly defined limits</u> on the types of acts which qualify as persecution. Although the realm of human rights is dynamic and expansive, not every denial of a human right may constitute a crime against humanity.
>
> 619. Accordingly, it can be said that at a minimum, acts of persecution must be of an equal gravity or severity to the other acts enumerated under Article 5. This legal criterion has already been resorted to, for instance, in the *Flick* case.
>
> 620. It ought to be emphasised, however, that if the analysis based on this criterion relates only to the <u>level of seriousness</u> of the act, it does not provide guidance on <u>what types of act</u> can constitute persecution. The *ejusdem generis* criterion can be used as a supplementary tool, to establish whether certain acts

which generally speaking fall under the proscriptions of Article 5(h), reach the level of gravity required by this provision. The only conclusion to be drawn from its application is that only gross or blatant denials of fundamental human rights can constitute crimes against humanity.

621. The Trial Chamber, drawing upon its earlier discussion of "other inhumane acts" holds that in order to identify those rights whose infringement may constitute persecution, more defined parameters for the definition of human dignity can be found in international standards on human rights such as those laid down in the Universal Declaration on Human Rights of 1948, the two United Nations Covenants on Human Rights of 1966 and other international instruments on human rights or humanitarian law. Drawing upon the various provisions of these texts it proves possible to identify a set of fundamental human rights appertaining to any human being, the gross infringement of which may amount, depending on the surrounding circumstances, to a crime against humanity. Persecution consists of a severe attack on those rights and aims to exclude a person from society on a discriminatory grounds. The Trial Chamber therefore defines persecution as the gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in international customary or treaty law, reaching the same level of gravity as the other acts prohibited in Article 5…

623. The Trial Chamber does not see fit to identify which rights constitute fundamental rights for the purposes of persecution. The interests of justice would not be served by so doing, as the explicit inclusion of particular fundamental rights could be interpreted as the implicit exclusion of other rights (*expressio unius exclusio alterius*). This is not the approach taken to crimes against humanity in customary international law, where the category of "other inhumane acts" also allows courts flexibility to determine the cases before them, depending on the forms which attacks on humanity may take, forms which are ever-changing and carried out with particular ingenuity. Each case must therefore be examined on its merits."

68. In *Prosecutor v. Tadić* the ICTY trial chamber said this:

"709. The *Justice* case, in which the accused were former German judges, prosecutors or officials in the Reich Ministry of Justice, is also relevant to the variety of acts which can constitute persecution. The trial considered the legal aspects of the Nazi policy by various of the accused acting in their official or judicial capacity but, it continued, "all of the laws to which we referred could be and were applied in a discriminatory manner and in the case of many, the Ministry of Justice and the court enforced them by arbitrary and brutal means, shocking the conscience of mankind and punishable here"…

710…The *Eichmann* case also discusses the variety of acts which constitute persecution…the court stated that

> The purpose of these acts carried out in the first stage was to deprive the Jews of citizen rights, to degrade them and strike fear into their hearts, to separate them from the rest of the inhabitants, to oust them from the economic and cultural life of the State and to close to them the sources of livelihood. These trends became sharper as the years went by, until the outbreak of the war…
>
> Thus, the crime of persecution encompasses a variety of acts, including, *inter alia*, those of a physical, economic or judicial nature, that violate an individual's right to the equal enjoyment of his basic rights."

69. This citation of authority and learning no doubt needs to be treated with care. The ICTY statute is not the same as the Rome Statute, for the former lists the crimes against humanity without specifying requirements and elements and instead derives those from customary international law; and it has been said (by Professor Cassese) that the Rome Statute's requirement of the "in connection with" link is not required by customary international law. Nevertheless, in my judgment it is not possible to read such texts without the strong impression that the drafters and interpreters of the various statutes, which after all are by and large equally based on the same material, are uniformly seeking the same ingredients for such crimes: a combination of flexibility and definition, and a concentration on the most serious of crimes, marked by really serious consequences, so that, in one or another form, under one or another label, the crimes against humanity will be recognised for what they are intended to be. As the ICTY trial chamber recognised in *Kupreskić*, and as Professor Robinson recognised in the passage cited above, there is likely to be a strong affinity between the crimes of "other inhumane acts" and "persecution". Certainly, on the findings of the Upper Tribunal, there is no shortage of individual "other inhumane acts". On those findings, there is a strong affinity between the "other inhumane acts" found by the Upper Tribunal and the crime of persecution. This is, to my mind, all the clearer when the evidence on which the Upper Tribunal made its findings about the context of the farm invasions is considered (see below), and this is equally true of the affinity with forcible transfer of population.

70. In this connection, it may be observed that in *Campbell and others v. Republic of Zimbabwe* (SADC (T) Case No 2/2007), the SADC tribunal held that the farmer applicants had been discriminated against on the ground of race, and their farms improperly expropriated without compensation in breach of international law.

"Forcible transfer of population"

71. Mr Hermer submits that the comparison of SK's responsibility in the matter of the two farm invasions in which she participated with the crime of "forcible transfer of

population" (sub-paragraph (d) of article 7(1)) cannot fairly be raised: in that the Upper Tribunal did not explicitly draw comparison between the farm invasions and forcible transfer, and because, as he suggests, the farmers and their farm workers were legally evicted by notice.

72. I do not regard these submissions as having weight. The Upper Tribunal found that "the intention of the instigators and participants, including her, was that the farmer and the farm workers be driven from their homes, by violent beatings and burnings, never to return…" (at para 40). It is legitimate for the Secretary of State to refer to this finding in supporting her submission that SK's "other inhumane acts" share a "similar character" with the other crimes against humanity enumerated in article 7. It is a subject matter of the Secretary of State's respondent's notice. For that purpose it is not critical that it might be the case that the farmers were, under Zimbabwe's land reform legislation, subject to legal eviction. It is accepted by Mr Hermer that any such legal basis would not excuse the unlawful manner of its execution. In any event, what is ultimately important is the international legality of these events. I refer to the contextual evidence before the Upper Tribunal in this connection, as in connection with the comparability of the crime of persecution.

The context

73. The Upper Tribunal's findings are plainly based upon the reports which were before it with the assistance of SK's own expert, Dr Kibble.

74. The Upper Tribunal referred explicitly to Dr Kibble's evidence and to "what the Solidarity Peace Trust and other reports told of their [the youth militia's] wanton, sadistic, and extreme brutality".

75. Thus Dr Kibble reported inter alia as follows:

> "21. Allegations of murder, torture, rape and the destruction of property by youth militias emerged from January 2002 onwards. Youth militias were reportedly used to occupy farms, set up illegal roadblocks, force people from their homes…" (repeated at para 63).

This was taken verbatim from Child Soldiers Global Report for 2004 on Zimbabwe, and became findings of the Upper Tribunal's determination at para 29.

76. Amnesty International's January 2002 memorandum to the South African Development Community (SADC) "on the deteriorating human rights situation in Zimbabwe" contained the following passages:

> "the final communiqué from the SADC ministerial task force was sadly negligent in ignoring gross and widespread human rights violations in Zimbabwe. The ministers appear to have looked the other way as – in the month or two preceding their visit – thousands of farm workers were displaced, the Zimbabwe Republic Police refused to comply with Magistrate and High Court orders to facilitate farming operations and prevent violent attacks…"

77. The country report on Zimbabwe for 2003 issued by the US State Department's Bureau of Democracy, Human Rights and Labor contained these passages:

> "Ruling party supporters and war veterans (an extralegal militia), with material support from the Government, expanded their occupation of commercial farms, and in some cases, killed, abducted, tortured, beat, abused, raped and threatened farm owners, their workers, opposition party members, and other persons believed to be sympathetic to the opposition. There were reports of politically motivated disappearances. Security forces and youth militias tortured, beat, raped, and otherwise abused persons; some persons died from their injuries…The Government continued its far-reaching "fast-track" resettlement program under which nearly all large-scale commercial farms owned by whites were designated for seizure without fair compensation…Hundreds of thousands of farm workers were displaced internally due to the ongoing land resettlement policies…
>
> Police continued to detain farmers in connection with their land despite court orders confirming their title, although with redistribution under land reform largely complete by year's end, such incidents were less common…
>
> The new Section 8 orders issued in August [2002] superceded almost all of the legal challenges filed in 2002…Even on farms that did not receive Section 8 orders or those that received reprieves from the High Court, farmers were evicted with as little as 2 hours notice. "Settlers", war veterans, or government youth militia members enforced evictions often in full view of police who declined to intervene stating that it was a "political matter". Hundreds had relocated themselves and their families to the soil-poor Dande area in the north and across the border into the neighboring Tete Province of Mozambique. Estimates were that more than 500,000 farm laborers and their families were left evicted or unemployed…"

78. An article by the author Peter Godwin, published in National Geographic in August 2003, described Zimbabwe's land reform campaign and said that "Ten white farmers and 27 black workers were murdered, hundreds more were injured, tortured or arrested." His figure for the displaced farm workers was 1.2 million.

79. An "Analysis of the Situation of Displaced Farm Workers in Zimbabwe", published by Refugees International in August 2004 estimated that some 150,000 former farm workers had been displaced by harassment and intimidation.

80. In sum, the evidence before the Upper Tribunal fully justified its findings, which I have set out above.

81. Mr Hermer at times in his submissions appeared to wish to qualify those findings. It was not open to him to do so. In any event, the findings were properly supported in the evidence before the Upper Tribunal. Those findings in my judgment make Mr Hermer's submissions of law regarding the application of article 7 to the facts of this case, even if they are treated as allegations only, extremely difficult. I bear in mind the importance of the issue to SK, and the need for a conservative construction and application of the Statute. However, it cannot be said that there are not serious reasons for considering that SK has, through the farm invasions in which she acted, participated in events of the utmost seriousness, partaking of acts in the nature of discrimination, persecution, forced displacement of persons and inhumane acts.

"Great suffering" etc

82. Mr Hermer submitted that the threshold requirement of great suffering or serious injury caused by the acts for which SK had responsibility had not been shown. On the Upper Tribunal's findings of fact, this is another difficult submission. It is plain that, for the purposes of "other inhumane acts", the consequences of acts of violence must be great or serious, either in terms of suffering or injury. However, the Upper Tribunal has found that they were, and it is not possible to conclude that it misunderstood the statutory language or its fact-finding duties. While the gravity of the consequences in terms of suffering or injury is a necessary requirement, there is no magic in the language or concepts used by sub-paragraph (k): cf *Prosecutor v. Delalic* (ICTY, IT-96-21-T, judgment dated 16 November 1998) at para 510, which says of the terms "great" suffering and "serious" injury that "the Trial Chamber must look to the plain ordinary meaning of the word", viewing these "quantitative expressions as providing for the basic requirement that a particular act of mistreatment results in a requisite level of serious suffering or injury".

83. In my judgment, the Upper Tribunal's findings that the intention behind these invasions was "to cause great suffering or inflict serious physical or mental injury" and that this aim "was achieved" (at para 37) are binding on this court, but in any event are clearly justified on SK's own admissions as to what she did or participated

in, a fortiori when it has to be remembered that the standard of proof is not that of trial, but of "serious reasons for considering". As the Upper Tribunal observed (at para 42): "she was shocked at how hard she had beaten the woman and thought that she had beaten her so severely she would die". The level of violence used, and intended to be used, at such invasions is also demonstrated in general by the incidence of deaths which are reported. The knowledge of the youth militia's "deliberately brutal and terrifying" conduct (at para 37) must no doubt have added to the suffering experienced. The victims of the two farm invasions in which SK directly participated would in all probability have heard reports of killings and other brutal crimes committed at other farm invasions by the youth militia, and suffered the greater terror by reason of that knowledge. As the Upper Tribunal remarked, the acts at the two invasions in question were "obviously inhumane" (at para 38), and led to the further great misery of loss of home, loss of livelihood, and displacement.

Decision

84. Mr Hermer submitted, nevertheless, that the troubles on the farms in Zimbabwe have not been internationally recognised as crimes against humanity, and that it is the affront to the whole of the international community and to its conscience that is the hall-mark of such crimes. He sought to demonstrate by the detailed citation of texts and jurisprudence, the most relevant of which I have incorporated in this judgment, that the acts for which SK has admitted responsibility simply lack that hall-mark. In his detailed skeleton arguments, and in their appendices, he has sought to give chapter and verse for those submissions. Thus his appendix A, headed "Zimbabwe and the International Community" seeks to show that the Security Council and the General Assembly of the United Nations, UN human rights treaty bodies, UN special procedures, the Commonwealth and the European Community, have all failed to condemn Zimbabwe for its human rights' record in relation to the land reform and its violent consequences. His appendix B lists a number of the cases discussed in this judgment for the purpose of demonstrating that the charges confirmed or offences found proved in them were of a still more shocking nature.

85. I have carefully considered all these submissions. However, I am unable to draw the conclusions for the determination of the Upper Tribunal which Mr Hermer has urged on this court. In my judgment, the findings of the Upper Tribunal and the evidence on which it was based, including SK's own admissions, can speak for themselves. It may be that, unlike other countries, such as Rwanda and the Balkan states, but unhappily many more, which have descended into armed conflict, Zimbabwe has avoided that extreme calamity. The legal consequences of such armed conflicts have been seen in the cases brought before ICTY, ICTR and now the ICC. It is not surprising that such prosecutions portray the worst of crimes against humanity, especially in the context of ethnic cleansing. Even so, "other inhumane acts" (or their equivalent) have been charged or found proved in circumstances short of murder or mutilation to the victims of the crimes, as in *Akayesu* (forced undressing), *Blaskic* (using civilians as human shields), *Krstic* (forced bussing of women and children), *Muthaura* (forced witnessing

of family deaths), *Krnojelac* (forcible transfer, not a separate crime under the ICTY statute, also beatings), *Sesay, Kallay and Gbao* (beating with a belt resulting in serious injury)[4], *Katanga* (detention in a room with corpses) and *Mbarushimana* (men forced to rape women).

86. In sum, where the conduct in question is admitted by SK, involves direct participation in severe beatings and joint enterprise responsibility in the two farm invasions as a whole, where those farm invasions are described by the Upper Tribunal as brutal and terrifying, designed to force farmers and farm workers off the land on which they live by the use of violence and terror and the burning of their homes and the destruction of their livelihoods, and where this is done as part of a widespread and systematic attack on such farms for political and discriminatory aims such as can fairly be described as persecutory and as involving the forcible transfer of populations (whether or not amounting to those separate crimes), where the Upper Tribunal has found established to their satisfaction all the ingredients of "other inhumane acts" including the consequences of great suffering or serious injury, and the test is not the establishment of criminal guilt but the lower standard of "serious reasons for considering": in my judgment it has not been possible by the use of legal materials to show that the Upper Tribunal's findings and conclusions are not open in law or ought to be rejected as insufficiently or improperly grounded. On the contrary, while those legal materials may in many cases show still worse acts, they fully justify the conclusion in this case that, pursuant to article 1F(a) of the Refugee Convention, SK is to be excluded from refugee status.

Conclusion

87. For these reasons, I would dismiss this appeal.

Lord Justice Lloyd:

88. I agree that the appeal should be dismissed for the reasons given in the judgment of Rix LJ.

Lord Justice Stanley Burnton:

89. I agree.

[4] SCSL-04-15-T, judgment 25 February 2009

90. In my judgment, the summary in paragraph 85 of the judgment of Rix LJ speaks for itself. That the farm invasions were particularly aimed at white farmers and their employees, and therefore had the racial element to which the Upper Tribunal referred in paragraph 38 of its determination, is an aggravating, but not an essential, factor in the conclusion that the appellant participated in, and thus committed, a crime against humanity. By far the great majority of the victims of the invasions were the black employees of the farmers, who together with their employers suffered extreme physical violence and the loss of their homes and livelihoods, but who could least afford to bear their loss.