Neutral Citation Number: [2015] EWCA Civ 1003

Case No: C1/2013/712

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/10/2015

Before :

LORD JUSTICE LAWS
LORD JUSTICE BURNETT
and
SIR COLIN RIMER

Between :

AH (Algeria)	**Appellant**
- and -	
Secretary of State for the Home Department	**Respondent**
- and -	
United Nations High Commissioner for Refugees	**Intervener**

- -
- -

Mr Raza Husain QC and Ms Naina Patel (instructed by Luqmani Thompson) for the **Appellant**
Mr Alan Payne (instructed by the Treasury Solicitor) for the 1st **Respondent**
Mr Michael Fordham QC and Ms Samantha Knights and Mr Jason Pobjoy (instructed by Baker & McKenzie) for the 2nd **Respondent**

Hearing dates : 30 June and 1 July 2015

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Approved Judgment

Lord Justice Laws:

INTRODUCTION

1. This appeal is brought with permission granted by Aikens LJ on 30April 2014 (and on a discrete point by Underhill LJ on 14 October 2014) against a determination of the Upper Tribunal (the President, UTJJ Gleeson and King) of July 2013. The Upper Tribunal (UT) upheld the decision of the Secretary of State to exclude the appellant from the protection of the 1951 United Nations Convention relating to the Status of Refugees (the Convention) by force of Article 1F(b) of the Convention, and/or Article 12 of European Council Directive 2004/83/EC (the Qualification Directive).

2. It is convenient at once to set out the material terms of these provisions. Article 1 of the Convention is headed "Definition of the Term 'Refugee'". The primary definition is in Article 1A(2), which sets out the test of a well-founded fear of persecution. The repeal of certain temporal restrictions in the definition has dispensed with Article 1B. Article 1C provides that the Convention shall no longer apply, in effect, to persons who for various stated reasons no longer need its protection. Articles 1D and 1E disapply the Convention from certain classes of person whom I need not describe. Article 1F provides:

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

Article 12(2) of the Qualification Directive excludes a third country national or a stateless person from being a refugee

> "where there are serious reasons for considering that (a) he or she has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) he or she has committed a serious non-political crime outside the country of refuge prior to his or her admission as a refugee; which means the time of issuing a residence permit based on the granting of refugee status; particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes; (c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations."

Article 12(3) applies paragraph 2 to "persons who instigate or otherwise participate in the commission of the crimes or acts mentioned therein".

3. The principal issue in this case is as to the scope of Article 1F(b) of the Convention.

THE COURSE OF THE PROCEEDINGS

4. The appellant is an Algerian national. In 1992 he went to France. In 1993 he was convicted in Algeria, in his absence, of complicity in a bombing at Houari Boumediene Airport in Algiers. In October 1995 he was arrested in France and charged with two offences said to have been committed in France, namely falsifying administrative documents and being a member of an association or grouping formed with a view to preparing acts of terrorism. He was tried with others in June 1998 at the Tribunal de Grande Instance de Paris. He was convicted of the first offence and sentenced to six months imprisonment, but acquitted of the second. However on 22 October 1999 the acquittal was overturned upon the prosecutor's appeal to the Paris Cour d'Appel, which substituted a conviction and imposed a sentence of two years imprisonment together with an order that the appellant be excluded from France for good. Given time already served (or other factors which in French law affected the calculation of the length of sentence) the appellant was released from custody, and in July 2001 made his way to the United Kingdom.

5. He applied for asylum here on 5 October 2001. By a decision letter of 8 March 2004 he was granted discretionary leave, it being accepted that he had a well-founded fear of persecution within the meaning of Article 1A(2) of the Convention; but the Secretary of State decided to exclude him from the Convention's protection by force of Article 1F "because you were convicted of a serious criminal offence in France". By a later decision on 27 February 2006 he was granted further limited leave, but the application of Article 1F was maintained.

6. The appellant's appeal against the refusal of asylum was dismissed by Designated Immigration Judge McClure on 19 July 2006. However that determination was found to be flawed by error of law, and at length the appeal was reconsidered by the Asylum and Immigration Tribunal (Senior Immigration Judges Latter and Lane). That tribunal's fresh decision, given on 19 January 2010, remained adverse to the appellant, and was to the effect that he was excluded from the Convention's protection under Article 1F(b) and (c). The case then came to this court, which ([2012] 1 WLR 3469 – Ward, Rix and Sullivan LJJ) held that the AIT had fallen into error "because the decision upon which they relied and upon which they based their approach, namely, *Gurung v SSHD* [2003] Imm AR 115, was subsequently disapproved of by the Supreme Court in *R (JS) (Sri Lanka) v Home Secretary* [2010] UKSC 15, [2011] 1 A.C. 184" (*per* Ward LJ at paragraph 48). The case was therefore remitted to the tribunal for a fresh hearing. I will have more to say about this decision of the Court of Appeal.

7. The ensuing hearing before the UT took place on 30 October 2012. Its determination, now subject to appeal before us, is dated 25 July 2013. The UT had a full text and certified translation of the judgment of the Cour d'Appel, which had not been before this court. The UT held at paragraph 102:

> "Overall, we are satisfied that there are serious reasons to consider that the appellant committed a serious crime in France before coming to the United Kingdom and as a consequence, that he is excluded from the protection of refugee status and subsidiary humanitarian protection."

THE APPEAL POINTS IN OUTLINE

8. Mr Raza Husain QC for the appellant grouped his submissions under three heads. (1) The UT did not find facts sufficient to show such a degree of personal involvement in serious crime on the appellant's part as to justify exclusion under Article 1F; they failed to mark important distinctions between him and some of his co-accused; and failed properly to assess or confront the nature of the participatory offence with which he was charged. (2) The UT failed to apply the correct construction of Article 1F(b), by which "serious" is to be equated with "particularly serious", to the facts of the case. (3) They also failed to take into account facts arising since the commission of the offence which, Mr Husain submitted, went to expiate the appellant's discredit and should have saved him from exclusion under Article 1F(b).

"EXPIATION"

9. It is convenient to address this third argument first. It raises an important point of principle. The question whether post-offence events are material to a decision under Article 1F(b), so as in particular to allow an offender to "expiate" his crime for the purpose of the sub-article, is critical to the administration of the provision. In *Febles* [2014] 3 SCR 431 the Supreme Court of Canada held by a majority that

> "Article 1F(b) excludes anyone who has ever committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee. Its application is not limited to fugitives, and neither is the seriousness of the crime to be balanced against factors extraneous to the crime such as present or future danger to the host society or post-crime rehabilitation or expiation." (*per* McLachlin CJ at paragraph 60)

Two earlier decisions of the Immigration Appeal Tribunal in this jurisdiction, *KK (Article 1F(c)) (Turkey)* [2004] UKIAT 00101 (paragraph 92) and *AA (Exclusion Clause) (Palestine)* [2005] UKIAT 00104 (paragraphs 59-60), are in line with *Febles.*

10. Mr Husain submits that this approach is wrong in principle. So does Mr Michael Fordham QC on behalf of the Office of the United Nations High Commissioner for Refugees (UNHCR), which has intervened with the court's permission and for whose assistance we are grateful. They say that post-offence events may be not only relevant but critical to a determination under Article 1F(b). Their submissions as they were developed at the hearing proposed, in effect, two alternative routes to such a conclusion. The first, primarily espoused by Mr Husain, is that such events may properly qualify the decision-maker's judgment as to whether the offence was "serious". The second is that words should be read into the provision. This was articulated by Mr Fordham as an implied proviso, so that Article 1F should be read thus:

> "*The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that [(a), (b) or (c)]* insofar as the non-application to such a person of this Convention is consistent with its object and purpose".

11. Each of these recourses is, to say the least, extremely radical. In my judgment neither can be justified by the measure of any ordinary canon of construction. Neither is required to make good sense of the provision. What gives them purchase? The appellant and the UNHCR rely on a series of materials. The Preamble to the Convention states that its object is to endeavour "to assure refugees the widest possible exercise of [their] fundamental rights and freedom". There is much authority to the effect that the Convention is to have a purposive construction consistent with its humanitarian aims: see for example *R v Asfaw* [2008] 1 AC 1061 at paragraph 11; *HJ (Iran) v Secretary of State* [2011] 1 AC 596 at paragraph 14; *RT (Zimbabwe) v Secretary of State* [2013] 1 AC 152 at paragraphs 29-31; *Pushpanathan* [1998] 1 SCR 982 at paragraph 57. In *Al-Sirri* [2013] 1 AC 745 the Supreme Court expressly agreed with "the UNHCR view… that the exclusion clauses in the Refugee Convention must be restrictively interpreted and cautiously applied" (paragraph 75). See also *R (ST) v SSHD* [2012] 2 AC 135, *per* Lord Hope at paragraph 30. There is great emphasis in the academic learning on the high threshold set by the reference to "serious" crime: see in particular Hathaway, *The Law of Refugee Status,* (1991), 222-223 and Grahl-Madsen, *The Status of Refugees in International Law* (1966), Vol 1, 292. See also the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (paragraph 155), the UNHCR *Guidelines on International Protection* (paragraph 14) and paragraphs 38-40 of the UNHCR *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*.

The UNHCR

12. The UNHCR occupies a special place in this field, as is clear from the materials very helpfully gathered in Mr Fordham's skeleton argument, which I acknowledge as the principal source of the following summary. The 1950 Statute of the Office of the UNHCR (annexed to UN General Assembly Resolution 428(V) of 14 December 1950), entrusts the UNHCR with the protection of refugees and (together with governments) the search for permanent solutions to their problems. Under the Statute (paragraph 8(a)), the UNHCR is to fulfil this mandate by (*inter alia*) "[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto." The UNHCR's supervisory responsibility is also reflected in Article 35 of the Convention. It is exercised in part by the issue of interpretative guidance, including UNHCR's Handbook and the subsequent Guidelines. The House of Lords and the Supreme Court have previously recognised the assistance that may be derived from such sources. Lord Bingham said in *Asfaw* at paragraph 13 that "[t]he opinion of the Office of the UNHCR… is a matter of some significance, since by article 35 of the Convention member states undertake to co-operate with the office in the exercise of its functions, and are bound to facilitate its duty of supervising the application of the provisions of the Convention." Lord Bingham referred to the observations of Simon Brown LJ (in *R v Uxbridge MC ex p Adimi* [2001] QB 667 at 678), suggesting that UNHCR Guidelines "should be accorded considerable weight". The observations of both Lord Bingham and Simon Brown LJ were recently endorsed by the Supreme Court in *Al-Sirri* at paragraph 36. Lord Clyde noted in *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489 at 515 that the Handbook has "the weight of accumulated practice behind it". It has been accepted as an important source of

interpretation under Article 31(3)(b) of the 1969 Vienna Convention on the Law of Treaties, as reflecting "subsequent practice in the application of the treaty": *Pushpanathan* (paragraph 54). See also *Adan v SSHD* [2001] 2 AC 477 *per* Lord Hutton at 524C and *Sepet v SSHD* [2003] 1 WLR 856 *per* Lord Bingham at paragraph 12.

13. It is clear from these materials that the UNHCR is a significant voice in the interpretation of the Convention. But it is not a lawgiver, or a source of law. It is a contributor of the first importance to the protection of refugees; and that fact itself must qualify the force of what it has to say when a balance falls to be struck between the interests of a putative refugee and those of the potential receiving State: "exclusion clauses should not be enlarged in a manner inconsistent with the *Refugee Convention*'s broad humanitarian aims, but neither should overly narrow interpretations be adopted which ignore the contracting states' need to control who enters their territory" (*Febles*, headnote: see further on *Febles* below).

The Two Arguments Developed

14. Mr Husain and Mr Fordham both submit that the exclusion provisions of Article 1F possess a twofold rationale: (a) to disentitle from claiming asylum those persons whose past acts are so wicked or heinous that they do not deserve international protection as refugees, and (b) to prevent serious criminals, wanted in another jurisdiction for trial or sentence, from taking advantage of the institution of asylum to avoid extradition. Mr Fordham submits that Article 1F(b) is primarily intended to address (b), to which Mr Husain for his part adds a gloss: the purpose is to bar fugitives from justice who "pose a continuing danger to the receiving community" (skeleton, paragraph 9(1)). But as a matter of logic this is a third, free-standing, putative rationale for Article 1F.

15. The two arguments I have summarised – a qualification of the meaning of "serious" in the expression "serious non-political crime", and the insertion of an implied proviso into Article 1F – are crafted to give effect to these rationales. It is I think clear that at least in the view of the UNHCR the practical process by which they are to be given effect consists in a series of interlocking judgments or evaluations. Thus paragraph 23 of the UNHCR Guidelines has this:

> "Where expiation of the crime is considered to have taken place, application of the exclusion clauses may no longer be justified. This may be the case where the individual has served a penal sentence for the crime in question, or perhaps where a significant period of time has elapsed since commission of the offence. Relevant factors would include the seriousness of the offence, the passage of time, and any expression of regret shown by the individual concerned."

Compare paragraph 73 of the Background Note:

> "Bearing in mind the object and purpose behind Article 1F, it is arguable that an individual who has served a sentence should, in general, no longer be subject to the exclusion clause as he or she is not a fugitive from justice. Each case will require individual consideration, however, bearing

> in mind issues such as the passage of time since the commission of the offence, the seriousness of the offence, the age at which the crime was committed, the conduct of the individual since then, and whether the individual has expressed regret or renounced criminal activities…"

16. Mr Fordham cites academic learning (Weis, "The Concept of the Refugee in International Law" (1960) 87 *Journal du Droit International* 928, at 984-986) to like effect. He accepts that "exclusion may be appropriate in the case of an applicant who is determined to have committed, or participated in the commission of, crimes that are of a comparable nature and gravity and thus of a similar egregiousness as those covered by Article 1F(a) or Article 1F(c) of the 1951 Convention, even if he or she has served a sentence or has otherwise been rehabilitated" (UNHCR skeleton argument, paragraph 62), and that "the application of Article 1F(b) to dangerous criminals was also seen as having the effect of protecting the community of the receiving country" (paragraph 63). This last point reflects Mr Husain's third rationale for Article 1F – to bar fugitives from justice who "pose a continuing danger to the receiving community". Towards the end of his submissions at the hearing Mr Fordham posed the question for the Article 1F(b) decision-maker thus: is the exclusion of the individual on grounds of having committed this serious non-political crime justifiable in all the circumstances consistently with the object and purposes of the Convention? This formulation sits with the implied term which Mr Fordham suggested.

17. The principal focus of Mr Husain's argument at the hearing was on the Canadian Supreme Court decision in *Febles*, to which I will come separately. Otherwise I apprehend he would wish, certainly in general terms, to endorse Mr Fordham's submissions as to the judgments which the Article 1F decision-maker must make. Both he and Mr Fordham placed some reliance on the decision of the Court of Justice of the European Union in *Germany v B and D* C-57/09, C-101/09, [2010] ECR I-10979, [2012] 1 WLR 1076, a reference from Germany on (so far as relevant) the interpretation of Article 12(2)(b) and (c) of the Qualification Directive. Mr Husain drew attention to certain observations of the Advocate General. With respect I will not set them out, for they are not replicated in the reasoning of the court. The material passage in the judgment is as follows:

> "106 By its third question in each of the cases, the Bundesverwaltungsgericht asks whether exclusion from refugee status pursuant to Article 12(2)(b) or (c) of Directive 2004/83 is conditional upon a proportionality test being undertaken in relation to the particular case.
>
> 107 In that regard, it should be borne in mind that it is clear from the wording of Article 12(2) of Directive 2004/83 that, if the conditions laid down therein are met, the person concerned 'is excluded' from refugee status and that, within the system of the directive, Article 2(c) expressly makes the status of 'refugee' conditional upon the fact that the person concerned does not fall within the scope of Article 12.

> 108 Exclusion from refugee status on one of the grounds laid down in Article 12(2)(b) or (c) of Directive 2004/83, as stated in respect of the answer to the first question, is linked to the seriousness of the acts committed, which must be of such a degree that the person concerned cannot legitimately claim the protection attaching to refugee status under Article 2(d) of that directive.
>
> 109 Since the competent authority has already, in its assessment of the seriousness of the acts committed by the person concerned and of that person's individual responsibility, taken into account all the circumstances surrounding those acts and the situation of that person, it cannot – as the German, French, Netherlands and United Kingdom Governments have submitted – be required, if it reaches the conclusion that Article 12(2) applies, to undertake an assessment of proportionality, implying as that does a fresh assessment of the level of seriousness of the acts committed.
>
> 110 It is important to note that the exclusion of a person from refugee status pursuant to Article 12(2) of Directive 2004/83 does not imply the adoption of a position on the separate question of whether that person can be deported to his country of origin.
>
> 111 The answer to the third question is that the exclusion of a person from refugee status pursuant to Article 12(2)(b) or (c) of Directive 2004/83 is not conditional on an assessment of proportionality in relation to the particular case."

This reasoning does not support the arguments advanced by Mr Husain and Mr Fordham on "expiation".

18. Those arguments, moreover, are in my view fatally undermined by implications which they themselves carry. I have said that the process by which the putative rationales of Article 1F contended for by Mr Husain and Mr Fordham are to be translated into concrete decisions must consist in a series of interlocking judgments or evaluations: as to the gravity of the offence, the passage of time, the criminal's atonement if any, such punishment as he has suffered, his age at the time of the offence, his present danger to the receiving State, and so forth – potentially a wide-ranging and open-ended exercise. This feature of the appellant's case is, to my mind, of the first importance; it demonstrates why that case is wrong.

The Two Arguments Rejected

19. The point is perhaps most simply expressed by the proposition that the evaluative process demanded by the appellant's argument amounts precisely to the kind of proportionality assessment ruled out by the Court of Justice in the parallel context of Article 12(2) of the Qualification Directive. Indeed Mr Fordham acknowledges in terms the UNHCR's advocacy of such an assessment:

> "In UNHCR's view, a proportionality assessment, in which the seriousness of the applicant's criminal conduct is weighed against the consequences of exclusion, needs to be conducted

> as part of an individualised assessment of all relevant facts." (UNHCR skeleton paragraph 14(3), citing UNHCR Guidelines paragraph 24 and Background Note paragraphs 76-78)

20. But the arguments advanced by Mr Husain and Mr Fordham are not simply to be dismissed by reference to a decision of the Court of Justice on the Qualification Directive. They demand a deeper response. The reality is that the function wished on Article 1F by their submissions is categorically different from the function which it in fact possesses. As I have said, Article 1 of the Convention is a definition section. In the administration of the exclusion provisions in Article 1C, D and E the decision-maker is required to decide only matters of objective fact. Once he has ascertained the facts, he applies the exclusion or not, as the case dictates. He is not called on to evaluate the individual's merits in light of the ascertained facts. The drafters must surely have intended Article 1F to be of a piece with this – *ejusdem generis.*

21. But Article 1F would, on the approach urged by the Appellant and UNHCR, amount to a radically different measure. The passage from Paul Weis' work which as I have said Mr Fordham cites is I think revealing:

> "It is … difficult to see why a person who before becoming a refugee, has been convicted of a serious crime and has served his sentence, should for ever be debarred from refugee status. *Such a rule would seem to run counter to the generally accepted principle of penal law that a person who has been punished for an offence should suffer no further prejudice on account of the offence committed.*" (my italics)

The implication, at least the suggestion, is that Article 1F(b) should be read so as to require the decision-maker to act judicially, in the sense that he is to see that the individual in question is treated justly having regard to his earlier punishment for his crime. But such a function, and more generally the making of interlocking evaluations of the kind which Mr Husain and Mr Fordham commend, gives to the decision-maker what in truth has been retained by the Convention itself: the judgment whether the individual asylum-seeker should obtain protection or not. Taken in isolation, the words of Article 1F do not invoke such evaluations; taken in context, they belong to the same *genus* as 1C, D and E: the application of a definition.

22. Moreover the arguments which favour such evaluations produce results which are to say the least eccentric. Mr Husain submitted that post-offence conduct by the offender might *exacerbate* the seriousness of the offence, just as it might *mitigate* it; and although the offence must in every case be a serious one when it is committed, it may lose, regain, and lose again that quality according to the merits of the offender's conduct over time. I find it impossible to believe that such a state of affairs was contemplated by the drafters of the Convention; or that so stark a recipe for uncertainty should have a place in an area of law which touches such deep interests.

23. The mandatory, defining nature of Article 1F is I think confirmed by the Convention's *travaux préparatoires.* There is a useful discussion of some of the *travaux* in the 2014 edition of Hathaway's well known work, *The Law of Refugee Status*, which was helpfully produced by counsel at the hearing. Hathaway refers (Chapter 7, pp. 525-

526) to the views expressed during the Convention's evolution on behalf of France, Yugoslavia, the United Kingdom and Belgium, and states (p. 526):

> "Thus, as the [CJEU] has determined, the fundamental purpose of Art. 1(F) is essentially instrumentalist, to 'maintain the credibility of the protection system' [and Hathaway cites *Germany v B and D*, at paragraph 115].
>
> In line with this systemic objective, exclusion under Art. 1(F) is framed in categorical, rather than particularized, terms. The provision excludes *all* persons who have 'committed' or 'been guilty of' relevant acts, not simply those who might personally be deemed unsavoury or specifically undesirable. Rather than authorizing an inquiry into the character of persons subject to exclusion proceedings, the Convention presumes that the admission to refugee status of any person who has committed a crime of the stipulated gravity poses a risk to the systemic integrity and viability of refugee law."

Hathaway proceeds to note (p. 527) the rejection of the position advanced by the United States, that the receiving State should enjoy a discretion whether or not to refuse or admit serious criminals.

24. In my judgment these materials are plainly inconsistent with the notion that "expiation" should somehow enter into the mix when a decision is being made whether or not to grant asylum to an individual who has committed what on the face of it is a serious non-political crime. I should note that the Supreme Court of Canada in *Febles* considered it unnecessary and inappropriate to take account of the *travaux*:

> "With respect to the *Travaux préparatoires*, the *Vienna Convention* conditions for their use in interpretation are not present in this case. The meaning of Article 1F(b) is clear, and admits of no ambiguity, obscurity or absurd or unreasonable result. Therefore, the *Travaux préparatoires* should not be considered. Further, even if they were considered, the *Travaux préparatoires* do not support the contention that Article 1F(*b*) is confined to fugitives." (headnote)

25. Even without the authority of the Supreme Court of Canada in *Febles*, I would in the circumstances have rejected the submissions of Mr Husain and Mr Fordham on this part of the case, on grounds that (a) given the language of Article 1F(b), they cannot be justified by the measure of any ordinary canon of construction; (b) in particular they would confer on Article 1F a function and purpose quite different from the other provisions in Article 1; and (c) that function tends anyway to be contradicted by the *travaux préparatoires* of the Convention.

26. Before coming to *Febles* I should indicate, in light of that conclusion, the scope which seems to me to be properly attributable to the proposition vouched at paragraph 75 of the high authority of *Al-Sirri*, that "the exclusion clauses in the Refugee Convention must be restrictively interpreted and cautiously applied". In my judgment there are in particular two areas in the administration of Article 1F(b) where the proposition bites.

The first is the application of the term "serious non-political crime". The second is the sense to be given to "serious reasons for considering that… he or she has committed [a crime]". The latter expression imposes a demanding hurdle for the application of Article 1F(b). It is unnecessary to discuss it further in this case, since it is accepted that there were "serious reasons for considering" that the appellant had committed the offence which led the Secretary of State to bar him from the Convention's protection – he was convicted of it by the Cour d'Appel.

27. It is right, of course, that there is a very live question whether there were "serious reasons for considering" that the appellant's crime was "serious" (indeed paragraph 3 of Mr Payne's skeleton argument for the Secretary of State describes this as "the only issue"), but the resolution of that question turns on what is meant by "serious". That engages the former expression to which I have referred, "serious non-political crime"; which in turn touches both the argument about expiation and the second head of Mr Husain's submissions – that for textual reasons, "serious" is to be equated with "particularly serious". I will address that separately (and briefly). For present purposes the dictum in *Al-Sirri* and related texts serve to emphasise the necessary gravity of offences sufficiently heinous to exclude the perpetrator from international protection by force of Article 1F.

Febles

28. In *Febles*, as in the present case, the court had the benefit of full submissions from the UNHCR. The issue was precisely that raised before us by the submissions of Mr Husain and Mr Fordham on "expiation": "the main issue in the present case is whether 'has committed a serious . . . crime' is confined to matters relating to the crime committed, or should be read as also referring to matters or events after the commission of the crime, such as whether the claimant is a fugitive from justice or is unmeritorious or dangerous at the time of the application for refugee protection" (paragraph 14, *per* McLachlin CJ). I have already set out McLachlin CJ's conclusion at paragraph 60 of her judgment. She also stated:

> "62. Article 1F(b) excludes anyone who has ever committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee. Its application is not limited to fugitives, and neither is the seriousness of the crime to be balanced against factors extraneous to the crime such as present or future danger to the host society or post-crime rehabilitation or expiation."

29. On the way to this conclusion the Chief Justice drew support from the ordinary meaning and context of Article 1F(b). She also considered the Convention's overall object and purpose, namely to strike a balance "between humane treatment of victims of oppression and the other interests of signatory countries" (paragraph 29). While exclusion clauses should not be enlarged, neither should "overly narrow interpretations be adopted... the purpose of an exclusion clause is to exclude. In short, broad purposes do not invite interpretations of exclusion clauses unsupported by the text" (paragraph 30).

30. All this seems to me entirely compelling and I would, with great respect, adopt it. Mr Husain, in a full and careful written argument supplemented by his oral submissions,

urged us to follow the minority judgment delivered by Abella J. The minority declined to hold that Article 1F(b) was to be construed in such a "relentlessly exclusionary – and literal" manner (paragraph 131). The Convention "consolidated and entrenched international protection for refugees" (paragraph 71) and "except in the case of very serious crimes, an individual should not automatically be disqualified from [refugee status] and should be entitled to have any expiation or rehabilitation taken into account" (paragraph 74**).** Mr Husain, in line with the minority judgment, submitted that "a broad approach is what is needed, rather than a narrow linguistic approach" (*R v SSHD ex p Adan* [1999] 1 AC 293, *per* Lord Lloyd at 305D). He cites instances where, he says, that is just what the courts have done. Thus the jurisprudence shows that Article 1A(2) recognises as a refugee a person who could avoid persecution on return by relocating internally where it would be unduly harsh to do so; refugee status will also be accorded to someone who could (and *would*) avoid persecution by suppressing a protected characteristic (such as sexual identity or political opinion). Mr Husain submits that these examples cannot sit with a "literal" interpretation of the Convention.

31. Mr Fordham confirmed that "[t]he judgment of the minority in *Febles* is for the most part in line with UNHCR's position". Again, he submits that the merits of the individual asylum seeker have to be looked at against what he says is the twofold purpose of Article 1F(b), that is, denial of refugee status (a) to those unworthy of international protection and (b) to fugitive criminals. I have given my reasons for rejecting this position.

Conclusions on "Expiation"

32. The moral force of the refugee's plight has in my opinion led some writers and authorities, including with respect the UNHCR, to contemplate a construction of Article 1F(b) which travels well beyond the proper territory of interpretation. Upon this construction the meaning of the term "serious" in the expression "serious non-political crime" is elucidated by reference to factors which have nothing whatever to do with the crime itself; and Article 1F(b) is mutated from a definition to a prescription for strategic evaluation by the decision-maker. These initiatives make bad law, for they are not rooted in the law's proper source, which is the terms of the Convention. They invite the court to legislate. It is elementary that we have no business to do so. The imperative of high authority such as *Al-Sirri* – "the exclusion clauses in the Refugee Convention must be restrictively interpreted and cautiously applied" – is certainly no mandate for such an approach.

33. It is in any event doubtful, to say the least, whether on the facts this appellant might be a proper beneficiary of a doctrine of expiation applied to Article 1F(b). He received a 2-year sentence of imprisonment which he did not serve in full, and permanent expulsion from France.

"PARTICULARLY SERIOUS"

34. I will turn next to Mr Husain's second principal submission, namely that the UT failed to apply the correct construction of Article 1F(b), by which "serious" is to be equated with "particularly serious", to the facts of the case. The real issue here is the asserted equivalence between "serious" and "particularly serious". The issue has

elicited a respondent's notice from the Secretary of State, given the approach taken by the UT:

> "87 We reject an argument faintly advanced by the respondent [Secretary of State] that by contrast with Article 33(2) of the Convention, where protection from expulsion (*non-refoulement)* is excluded where there is a conviction for a 'particularly serious crime', the non-political crime referred to in Article 1F(b) does not have to be particularly serious. The reason for doing so lies in the French text, which is equally authentic in finding the true international meaning of 'serious crime' in this context.
>
> 88 The French text of Article 1F(b) refers to '*un crime grave'* whereas that for Article 33(2) refers to '*un délit particulièrement grave'.* A *crime* in French law is a more serious class of offence than a *délit*. According to Cornu's *Vocabulaire Juridique* (9th edition) 2011, '*crime'* is a '*transgression particulièrement grave*'. We accept, however, that the classification of the offence in national law is not the issue (as it happens the offences of which the appellant was convicted in France were both *délits*). The point is rather that the focus on the use of the English word 'crime' in both Articles loses the quality of seriousness reflected in the French word. It may be that the language of the French text is where the UNHCR and the commentators obtain the notion that serious crimes were once capital crimes."

35. I mean no disrespect to Mr Husain in giving this argument short shrift. A distinction between "serious" and "particularly serious", fuelled only by a further distinction between the French terms "*crime*" and "*délit*", does little more to serve the practical interpretation of the Convention than a debate about the number of angels on the head of a pin. The offences of which the appellant was convicted in France were, as it happens, *délits.* Some individual *délits* will, on the particular facts, be more serious than some *crimes.* I have already accepted (paragraph 26) that *Al-Sirri* and related texts serve to emphasise the necessary gravity of offences sufficiently heinous to exclude the perpetrator from international protection by force of Article 1F: "serious crime" certainly denotes especially grave offending. But I do not think that is a function of nice distinctions in French criminal law, or the presence or absence of the adverb "particularly".

36. There is in fact authority of Ward LJ, in the earlier appeal in this very case, to the effect that the drafters of Article 1F(b) did not intend that "serious" should be qualified by "particularly". He said ([2012] 1 WLR 3469 at paragraph 51):

> Furthermore, in my judgment, 'serious' needs no further qualification. Where further qualification is required, the Convention gives it: compare Article 1F(b) with Article 33.2 which refers to 'a refugee … who, having been convicted by a final judgment of a *particularly* serious crime, constitutes a danger to the community of that country', with the emphasis

added by me. The same distinction is drawn in the EU Qualification Directive 2004/83/EC between Article 17 ('committed a serious crime') and Article 21 ('convicted… of a particularly serious crime')."

THE FACTS

37. I turn last to Mr Husain's first principal submission, whose dominant theme is that the UT did not find facts sufficient to show such a degree of personal involvement in serious crime on the appellant's part as to justify exclusion under Article 1F(b). As I shall show, in this context much was made of observations of Sullivan LJ upon the earlier appeal to this court. The appellant did not give live evidence before the UT, which however had a fuller translation of the Cour d'Appel proceedings than had been before this court, and we too have been referred to it (the English is occasionally eccentric). I have not heard or seen anything to suggest that the UT's factual conclusions do not properly reflect what had been found by the French court, or that either the French court or the UT mistook the roles of any of the participants; or that the French court was not entitled to make the findings it did. The UT state, in my view wholly correctly:

> "96 In the circumstances, in the absence of some strikingly unfair procedural defect, we conclude that we should accord a significant degree of respect to the decision of the French court; there is a particular degree of mutual confidence and trust between legal systems that form part of the same legal order within the European Union. The process deployed by the Cour d'Appel cannot be considered unfair. As we have already noted, the appellant was represented, appeared personally and gave evidence; he was able to fully participate in those proceedings. We recognise, however, that the ultimate question of whether the conduct of which we are satisfied is sufficiently serious to justify exclusion is a matter for ourselves, as the tribunal deciding the exclusion issue rather than a foreign court applying its own penal laws."

38. Between paragraphs 23 and 80 the UT embarks upon a detailed description of the factual background to the case and the French proceedings, paying careful attention to the individual defendants including of course the appellant. I will not replicate it here. At paragraph 3 they state the precise terms of the offence of which he was convicted by the Cour d'Appel, for which the 2-year prison sentence and exclusion order were imposed: "*participation à une association de malfaiteurs en relation avec une entreprise terroriste" (*"participation in a criminal association with a terrorist enterprise"). I must set out the greater part of the UT's decision as it appears towards the end of the determination:

> "99 We return to the core finding of the Cour d'Appel in respect of this appellant. It concluded (F 142):
>
> > 'In any case the reasons given by [AH] to justify the existence of a fake French passport are contradicted by the chronology of the alleged events, and it is obvious that he must have used this forged

document to move around clandestinely inside and outside of French territory. Besides, the circumstance that he gave this fake passport and the fake identity card to his cousin [KS] inside an envelope can only be explained by him fearing that the French police would search his address. Based on the actions he had committed in FRANCE since his arrival on 18 October 1992.'

and it continued (F 143):

> 'Although it is accurate as the former judges stated in the appealed ruling, that the assessment of [AH's] involvement and his potential responsibility for the attack committed at ALGIERS airport in 1992 does not fall within the jurisdiction of the French courts, and that it would not demonstrate his belonging to a criminal gang connected to a terrorist undertaking that acted on French territory during 1994 and 1995, on the contrary to the former judges, the Court must find that (AH) was, during the course of this period and while he was on French territory, in close contact with the men implicated in the terrorist acts committed in the Lyon region and in the North of France, and that his bothering to check whether his arrest was convicted with those of GHOMRI and KHEDER demonstrates their belonging to the same organisation.
>
> It was therefore by way of an analysis which is not shared by the Court that the former judges acquitted him of the charges of involvement in a gang of criminal or an arrangement set up in view of committing acts of terrorism; and it was in order to move around in the context of the illicit activities of this organisation or arrangement, and the need to evade a search potentially being carried out by the French police following the acts committed in FRANCE by this organisation or arrangement, that the facts of falsifying administrative documents and use of falsified administrative documents upheld by the former judges were committed.'

100 This appellant was not an unwitting petty criminal caught up in the criminal actions of others, but a senior participant in the conspiracy, as reflected in the distinction in sentences imposed by the French court. The appellant received a sentence of two years and permanent exclusion from the territory of France. Those whose actions were considered merely criminal received sentences of five to eighteen months. Most participants in the terrorist conspiracy received sentences of at least two years. Those who received longer sentences were: Tehari who had a list of weapons for purchase and an encoded list of contacts and received a five years sentence; the scientist Drif who had made electronic circuits and purchased fertilisers that could be used in explosive devices received a sentence of three years; Nassah who provided safe houses for terrorist arms traffickers who received a sentence of three years; and Boudallah who was an international terrorist courier with a similar list of contacts to Tehari. All members of the

terrorist group were permanently excluded from the French territory. The appellant was connected to Drif and Drif to Tehari. The appellant was also in contact with Gomri, Kheder and Touchent who were connected to terrorist attacks.

101 We put the appellant's FIS background together with his association with people who were planning terrorist violence during a campaign of such violence, his possession and use of a forged passport in the circumstances found by the French court, his interest in the circumstances of the arrest of others and the methods used to conceal his connections with those others, his possession of a false identity document, and the timing of his acts with respect to violent acts that were occurring as part of the campaign of terrorism in France. We are satisfied that it is more probable than not that the appellant's personal participation in this criminal association:

(i) was not confined to mere possession of false identity documents, but involved using these documents to move within and outside France in support of other senior members of this association, some of whom were planning and executing terrorist acts; and

(ii) was based on knowledge of and support for these terrorist acts, albeit it did not extend to the appellant personally executing these terrorist acts.

102 Overall, we are satisfied that there are serious reasons to consider that the appellant committed a serious crime in France before coming to the United Kingdom and as a consequence, that he is excluded from the protection of refugee status and subsidiary humanitarian protection."

39. It is true that there is a want of particularity in the allegations and findings as to what precisely the appellant did. But it seems to me entirely plain that the UT was entitled to conclude, as it did, that he was giving succour to a terrorist cause, and doing so as "a senior participant in the conspiracy".

40. I should give some account of the previous proceedings in this court, not least given the appellant's reliance on what was said by Sullivan LJ. In paragraph 7 of his judgment Sullivan LJ referred (through a quotation from the tribunal below) to the presumption in *Gurung* which had been disapproved in *JS (Sri Lanka)*: "voluntary membership in… an organisation [whose aims, methods and activities were exclusively terrorist in character] could be presumed to amount to personal and knowing participation in the crimes in question". These following passages in the judgment are material to Mr Husain's argument:

"18 If the underlying objective for the purpose of Article 1F is to establish the individual's personal role and responsibility, the nature of the particular offence with which this Appellant was charged presents a problem…

> 20 It is not clear what 'material acts' were relied upon by the Appeal Court in allowing the prosecutor's appeal. The only specific conduct attributed to the Appellant was that he falsified a French passport…
>
> 21 There can be no dispute that, as an instrument of state policy, 'nipping terrorism in the bud' is eminently sensible. However, if the criminal law framed in aid of the policy foils the aspiring terrorist's intentions well before he has undertaken any, or any significant, preparatory acts, then the consequence for the purpose of Article 1F may well be that the offence of which he is convicted, at the outer boundary of criminality, will not be an offence which is so serious as to exclude him from protection under the Convention…
>
> 23… Absent the Gurung presumption, the facts found by the French Appeal Court (while adequate for the purpose of convicting the Appellant of this particular offence under French criminal law) were so sparse that they did not enable the Tribunal to determine the Appellants 'personal involvement and role', or 'true role' in the grouping. The bare fact that the Appellant was knowingly part of a criminal conspiracy or grouping formed with a view to committing terrorist acts could not, unless the presumption was applied, have justified the Tribunal's conclusion in paragraph 35 of its determination that the Appellant fell within the definition in section 54(1) of the Immigration, Asylum and Nationality Act 2006 of someone involved in the acts of instigating or encouraging or inducing others to commit, prepare or instigate terrorism. There was simply no evidence of instigation, encouragement or inducement…
>
> 42 Taking all of these factors into account, I do not see how it could have been concluded on the basis of the very limited findings of the French Appeal Court that the particular offence of which this Appellant was convicted crossed the threshold of seriousness for the purpose of Article 1F(b)…"

41. If this court had held in 2012 that the facts found by the Cour d'Appel were incapable of supporting a conclusion that the appellant had committed "*a serious non-political crime"* for the purpose of Article 1F(b)*, then (absent further evidence) it would not have remitted the case to the UT but made a final order whose effect would have been that the appellant would have obtained refugee status. Manifestly that did not happen; and it is clear that, though Sullivan LJ might have concluded that the case could not have been made out against the appellant, Ward and Rix LJJ did not. Ward LJ stated:*

> "49 If we are to send it back for re-hearing, we should leave the Tribunal absolutely free to decide where the line is to be drawn and I would not wish to express any view as to whether or not the appellant falls within or outwith either limb of

> Article 1F. The question is whether we can give any helpful guidance as to the meaning of the words 'serious crime' in Article 1F(b)."

There follows Ward LJ's observation at paragraph 51 that "'serious' needs no further qualification", which I have already set out. Then these two paragraphs, which include a citation from *Germany v B and D* which I have already set out:

> "52 Although an ordinary word, 'serious' has shades of meaning and the appropriate colour is given by the context in which the word is used. What may be serious for one purpose may not be serious for another. The context here is that the crime which the refugee has committed must be serious enough to justify the withholding of the protection he would otherwise enjoy as a person having a well-founded fear of persecution and owing to such fear is unwilling to avail himself of the protection of the country of his nationality or to return to the country of his former habitual residence. This seems to be the view of the Grand Chamber in *Bundesrepublik Deutschland v B (C-57/09) and D (C-101/09)* [2011] Imm. AR 190 expressed with regard to Articles 12(2)(b) and (c) of the European Directive but, it seems to me, equally apposite for the Refugee Convention:
>
> > '108. Exclusion from refugee status on one of the grounds laid down in Article 12(2)(b) or (c) of Directive 2004/83 … is linked to the seriousness of the acts committed, which must be of such a degree that the person concerned cannot legitimately claim the protection attaching to refugee status under Article 2(d) of that Directive.'
>
> 53 Beyond that I would not go…"

42. Rix LJ said this:

> "45 I agree with Lord Justice Ward's concerns over the question of what is 'serious'. I therefore agree that the matter should be remitted to the Upper Tribunal and their expertise… I have found it hard to assess the findings of the French court. Mr Husain QC has submitted that they are to be understood as amounting to little, if anything, more than guilt by association. On another possible view, however, those findings are very serious indeed, viz that AH was not simply in close contact with but committed to assisting others, all part of a common organisation, in terrorist activities such as an attack on the Wazemmes Market…"

43. So the majority in this court in 2012 plainly considered that the case required a further evaluation on the merits by the UT.

44. Upon the case being remitted, the UT confronted Mr Husain's submissions about the earlier decision of this court. They said:

> "93 A particular issue of concern to Lord Justice Sullivan was whether there was sufficient basis for satisfaction as to personal participation in a serious crime, where the French prosecutor was able to intervene and bring charges at an early stage of preparation. However, as the whole of the decision and reasons of the Cour d'Appel had not been translated, the extent to which there had been terrorist acts actually carried out, and the connections with the criminal group of which the claimant was a member, may not have been apparent. We consider the wider context of the conspiracy; the parts played by the principal characters in the indictment and the links between them are important in this case. Particularly important is the distinction drawn by the French court between those whose role was limited to the production of false documentation or transfer of stolen vehicles and those involved in the planning and support for the objects of the conspiracy or terrorist association itself. The former were considered merely criminal and given lesser sentences. The appellant, however, belonged to the second group and was given one of the longer sentences."

45. In the result I can find nothing in this court's earlier decision to call in question my view that the UT was entitled to conclude, as it did, that the appellant was giving succour to a terrorist cause, and doing so as a senior conspirator; and as such had plainly committed a "serious non-political crime" within the meaning of Article 1F(b). Sullivan LJ himself observed (paragraph 17) that this was a case "in which the appellant was found to be a member of an organisation or grouping whose only purpose was terrorism".

46. I will add this. If it was wrong to presume that mere membership of an organization with terrorist aims was enough for Article 1F(b) to bite, so also is it wrong to presume that any particular level of overt activity has to be shown. *JS (Sri Lanka)* is nothing to the contrary. As Ward LJ said, "serious" is an ordinary word. Its interpretation therefore depends upon the context of its use, here Article 1F; and its application upon all the facts of the particular case.

47. I would dismiss the appeal.

Lord Justice Burnett:

48. I agree.

Sir Colin Rimer:

49. I also agree.