Neutral Citation Number: [2015] EWCA Civ 684

Case No: C5/2013/3765

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION & ASYLUM CHAMBER)
AA/06251/2008

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday 9th July2015

Before :

LADY JUSTICE GLOSTER
LORD JUSTICE RYDER
and
LORD JUSTICE SALES

- -

Between :

AN (AFGHANISTAN)	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -

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

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Mr M Henderson & Ms B Asanovic (instructed by **Lawrence Lupin Solicitors**)
for the **Appellant**
Mr R Kellar (instructed by **The Government Legal Department**) for the **Respondent**

Hearing date: 10 June 2015

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Judgment

Lord Justice Sales:

Introduction

1. The Appellant is an Afghan national, born in 1962. He entered the United Kingdom on 1 December 2006 and promptly claimed asylum.

2. The result of a complicated procedural history is that he has been granted leave to remain in the United Kingdom on the grounds that his return to Afghanistan would violate his rights under Article 3 of the European Convention on Human Rights, but his additional claim for protection by reference to the Convention relating to the Status of Refugees (1951) (Cmd 9171) ("the Refugee Convention") and article 12 of Council Directive 2004/83/EC ("the Qualification Directive") has been rejected. This is on the basis that he is deprived of protection by virtue of Article 1F of the Refugee Convention because he has been assessed by the Secretary of State and by the Asylum and Immigration Tribunal (as it then was – "the AIT") to have been complicit in war crimes in Afghanistan. The AIT's decision was upheld on appeal to the Upper Tribunal ("the UT").

3. Although by reason of his success under Article 3 the Appellant will not be returned to Afghanistan, we were told that the effect of the dismissal of his claim for protection against *refoulement* under the Refugee Convention is that he is subject to a less generous level of support in the United Kingdom than would otherwise be the case and will not be provided with a travel document which would enable him to travel to see his family in Pakistan. Accordingly, the Appellant appeals to this court on the issue of application of Article 1F.

4. Article 1F of the Refugee Convention provides in relevant part that an individual is not to be recognised as a refugee for the purposes of that Convention where

> "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 ..."

5. The factual ingredients (i.e. the *actus reus* and the *mens rea*) which have to be present to constitute complicity in war crimes and crimes against humanity were authoritatively explained by the Supreme Court in *R (JS (Sri Lanka)) v Secretary of State for the Home Department* [2010] UKSC 15; [2011] 1 AC 184.

6. The standard of proof inherent in the concept of "serious reasons for considering" that a war crime or crime against humanity has been committed by someone was initially explored by the Immigration Appeal Tribunal in *Gurung v Secretary of State for the Home Department* [2002] UKIAT 04870; [2003] Imm AR 115, in which the Tribunal held that "in accordance with the approach of the Court of Appeal in *Karanakaran* [2002] 3 All ER 449, rigid application of the civil approach to 'standard of proof' has to give way to a more rounded approach taking into account the possibility that doubtful events may have taken place" (para. [95]). However, in *Al-Sirri v Secretary of State for the Home Department* [2012] UKSC 54; [2013] 1 AC 745, the Supreme Court held that the standard of proof laid down in *Gurung* was insufficiently demanding, especially in the context of a provision which, where it applies, has the

effect of depriving an individual of a right of protection as a refugee. Instead, at para. [75], the Supreme Court held that the relevant standard of proof is as follows:

> "We are, it is clear, attempting to discern the autonomous meaning of the words "serious reasons for considering". We do so in the light of the UNHCR view, with which we agree, that the exclusion clauses in the Refugee Convention must be restrictively interpreted and cautiously applied. This leads us to draw the following conclusions: (1) "Serious reasons" is stronger than "reasonable grounds". (2) The evidence from which those reasons are derived must be "clear and credible" or "strong". (3) "Considering" is stronger than "suspecting". In our view it is also stronger than "believing". It requires the considered judgment of the decision-maker. (4) The decision-maker need not be satisfied beyond reasonable doubt or to the standard required in criminal law. (5) It is unnecessary to import our domestic standards of proof into the question. The circumstances of refugee claims, and the nature of the evidence available, are so variable. However, if the decision-maker is satisfied that it is more likely than not that the applicant has *not* committed the crimes in question or has *not* been guilty of acts contrary to the purposes and principles of the United Nations, it is difficult to see how there could be serious reasons for considering that he had done so. The reality is that there are unlikely to be sufficiently serious reasons for considering the applicant to be guilty unless the decision-maker can be satisfied on the balance of probabilities that he is. But the task of the decision-maker is to apply the words of the Convention (and the Directive) in the particular case. "

The factual and procedural background

7. The Appellant had a senior leadership role within an organisation called Hizb-i-Islami ("HI") in Afghanistan in the 1990s. HI was a group involved in the civil war in Afghanistan between 1992-6, fighting with some groups and against others.

8. HI was responsible for war crimes committed in Kabul during this period, when it deliberately shelled civilian areas of the city. The Appellant was a commander for HI in the Zazai area of Afghanistan away from the front line and was not directly involved in the decision to shell civilians in Kabul. In due course, the AIT made important findings about the extent of his knowledge of and complicity in these war crimes.

9. In 2006, the Appellant became a target for a rival organisation, Jamiai-e-Islami, which tried to assassinate him. He fled Afghanistan in fear of his life. He managed to get to the United Kingdom and claimed asylum here, relying on Article 3 and the Refugee Convention and Qualification Directive.

10. By a decision dated 24 July 2008, the Secretary of State rejected both claims. As regards Article 3, she considered that the Appellant had safe options to relocate internally in Afghanistan. As regards the Refugee Convention and the Directive, she

assessed that he had been complicit in war crimes in Afghanistan, and so by virtue of Article 1F was not entitled to protection. The Appellant appealed.

11. By a decision of the AIT dated 23 October 2008, Immigration Judge ("IJ") Aziz rejected the appeal in respect of Article 1F of the Refugee Convention but allowed the appeal in relation to Article 3. It is IJ Aziz's decision in respect of Article 1F which is the operative decision for the purposes of the present appeal to this court.

12. The judge was provided with country reports about Afghanistan and heard evidence from the Appellant, his two brothers and expert witnesses regarding the situation in Afghanistan. The expert witness called for the Appellant was Dr Guistozzi. Since the decision pre-dated both *JS (Sri Lanka)* and *Al-Sirri* in the Supreme Court, the judge said that he bore in mind and applied the burden of proof and standard of proof set out in the *Gurung* decision of the Tribunal.

13. On the basis of the evidence about the situation in Afghanistan in 1992-6, the judge found that HI had committed wide-scale human rights atrocities and war crimes in the fighting for Kabul in that period: paras. [64]-[66].

14. He found significant aspects of the evidence of the Appellant and his brothers to be credible. The judge found that the Appellant joined HI in the 1980s during the Russian invasion of Afghanistan and that by the early 1990s he had been appointed as a commander of about 500 men, with his main role being to ensure that security was maintained in the Zazai district; he had not been deployed on the front line and had not been personally involved in committing the war crimes committed by HI troops there: paras. [68]-[72].

15. However, the judge found that the Appellant had been complicit in those war crimes because of his position and role within HI, together with his knowledge that HI was engaged in perpetrating such human rights abuses and war crimes: paras. [73]-[81]. In this part of his decision, the judge disbelieved the Appellant on his denials in his evidence that he knew about the war crimes being committed by HI on the front line in Kabul. There was a material discrepancy in the Appellant's evidence on this point; moreover, the Appellant and his men had been to the front line on occasion, and in view of what HI was doing there it was not credible that he was unaware of its behaviour. Then, in the central part of his reasoning on this part of the case, the judge said this at para. [80]:

> "… I find that not only was the appellant most likely aware of the human rights abuses and war crimes being committed on the front line by [HI] troops, he was complicit in such atrocities. It was because individuals such as the appellant were ensuring that security in [HI] captured areas was maintained, that enabled his colleagues on the front line to divert their attention to taking control of Kabul in the inhumane and callous manner that they did. I find the expert report of Dr Guistozzi to be helpful in allowing me to come to this finding. I note that at paragraph 12 of his report, Dr Guistozzi concludes that although the appellant would not have been much use in offensive operations, "*... they were likely used to hold the line and secure the logistical rear, an area including the southern*

> *part of Kabul province and the northern parts of Logar*." Therefore, although individuals such as the appellant did not actively engage in the types of human rights atrocities detailed in the country information reports before me, such individuals were part of the organised machinery of [HI] which allowed the leadership to be in a position to deploy some individuals to maintain security in captured areas (which the appellant claimed was his role), whilst allowing others to carry out the kinds of violations and war crimes detailed in the country information reports. The appellant may not have fired the rockets or artillery into the civilian areas of Kabul, but he played his role in ensuring that others in his group were in a position to do so during this most regrettable period of Afghan history."

16. The Secretary of State sought reconsideration of the AIT's decision on the Article 3 point, and on 11 November 2008 Senior IJ Nichols ordered reconsideration of the decision. The Appellant filed a reply to contest IJ Aziz's decision under Article 1F.

17. By a decision dated 9 February 2010, IJ Wilson held that there had been a material error of law in the determination under Article 3 and that there should be a redetermination of that issue. He adjourned consideration of the issue under Article 1F pending judgment in *JS (Sri Lanka)*, which was then on appeal to the Supreme Court. That judgment was handed down on 17 March 2010. It dealt with the substantive ingredients for complicity in war crimes, but did not call in question the standard of proof to be applied as set out in *Gurung*.

18. In a determination of 30 July 2010, IJ Barton reviewed IJ Aziz's decision on Article 1F in detail in light of the guidance in *JS (Sri Lanka)*. IJ Barton held that IJ Aziz's decision was compliant with that guidance: IJ Aziz had made all the necessary findings to meet the relevant substantive test under Article 1F for exclusion from protection under the Refugee Convention. IJ Barton therefore held that there was no basis on which the Upper Tribunal should re-make his decision under Article 1F.

19. By a decision dated 2 February 2011, IJ Barton, sitting in the UT, re-made the decision under Article 3. He held that the Appellant could safely relocate in Afghanistan. Therefore, the Appellant's appeal against the decision of the Secretary of State had failed under both Article 3 and Article 1F. IJ Barton formally incorporated into his decision of 2 February 2011 the decision of IJ Wilson of 9 February 2010 and his own determination of 30 July 2010.

20. The Appellant applied to the UT for permission to appeal to the Court of Appeal in relation to both these issues. On 16 March 2011, UT Judge Spencer refused permission on both issues. The Appellant then sought permission to appeal from the Court of Appeal.

21. We were told that as originally formulated the grounds of appeal for consideration by the Court of Appeal covered both the Article 3 and the Article 1F points, but they were revised so as to cover only the Article 3 point. They were considered in that revised form by Sir Stephen Sedley on the papers, who refused permission to appeal in relation to Article 3.

22. On 26 October 2011, the Appellant then made a renewed oral application for permission to appeal to Arden LJ. By this stage, the Appellant had new Counsel (Mr Henderson, who also acts on this appeal), who had reviewed the case and considered that the appeal under Article 1F should be pursued, as well as an appeal under Article 3. He prepared a skeleton argument for the oral renewal hearing which, among other matters, went into considerable detail in relation to the substantive international criminal law and the substantive test for criminal complicity in war crimes according to that law and as explained by the Supreme Court in *JS (Sri Lanka).* The argument was to the effect that, on the basis of the findings by IJ Aziz in para. [80] of his decision (set out above), complicity in war crimes had not been established according to the relevant substantive rules of international criminal law. At the oral hearing before Arden LJ, Mr Henderson sought permission to appeal in respect of both the Article 3 and the Article 1F points.

23. Arden LJ granted permission to appeal in relation to the Article 3 point, but refused it in relation to Article 1F. In respect of the proposed appeal in relation to Article 1F, Arden LJ noted that the argument was that the decision of IJ Aziz and the UT in relation to complicity based on command responsibility was not compliant with the guidance of the Supreme Court in *JS (Sri Lanka)*, which post-dated the decision of IJ Aziz. She rejected that contention. Arden LJ said this at para. [7] of her decision:

> "Mr Henderson argues forcefully that there was no command responsibility in the present case, because it is not enough that a person is a member of an armed force and that war crimes occur, but in the present case the Upper Tribunal came to the clear finding that what the appellant did assisted in the commission of those war crimes. In those circumstances I refuse permission to appeal on [the ground in respect of Article 1F]. I am not satisfied that there is a real prospect of success on that point."

24. In the event, the Secretary of State decided to concede the appeal in relation to Article 3. By an order of this court dated 12 April 2012, made by consent, it was ordered that:

> "1. The determination of Designated Immigration Judge Barton promulgated on [2] February 2011 be quashed;
>
> 2. The matter be remitted to a differently constituted Upper Tribunal for redetermination of the issue of whether the Appellant would be at risk upon return to Afghanistan on the facts found by Immigration Judge Aziz …"

25. It appears from the Statement of Reasons filed with the draft consent order that the parties had agreed that the matter should be remitted to a differently constituted UT for redetermination of the Article 3 issue. That explains paragraph 2 of the order. However, paragraph 1 of the order was in general terms, and was effective to quash the entirety of IJ Barton's decision of 2 February 2011 which, as explained above, incorporated his previous decision of 30 July 2010 in relation to the Article 1F issue.

26. On 21 November 2012, the Supreme Court handed down judgment in *Al-Sirri*.

27. On 1 February 2013 there was a directions hearing before UT Judge Lane. He gave directions in accordance with an agreement between the parties for reconsideration of both the Article 3 and the Article 1F points.

28. On 16 July 2013, the reconsideration of the Appellant's appeal took place in the UT (Blake J and UT Judge Pitt). The UT's decision was promulgated on 24 September 2013. The UT allowed the Appellant's appeal under Article 3, but dismissed his appeal in relation to Article 1F.

29. The UT was mystified about how the parties had come to agree that the Article 1F point should be re-visited in the appeal, since the Statement of Reasons had only said that there should be a redetermination on the Article 3 point and permission to appeal had been refused on the Article 1F point by the UT and again by Arden LJ. However, it accepted a submission by Mr Henderson that it was open to the UT to consider the ambit of the redetermination to be made by it and, assuming without deciding that there was statutory jurisdiction to do so, decided that it would do so to the limited extent that this would not involve an abuse of process: para. [32]. The UT was prepared to accept that if the law had changed since the final disposal of the Article 1F point by the UT and the Court of Appeal, it would not be an abuse of process to permit reconsideration of the Appellant's appeal in relation to the Secretary of State's decision and IJ Aziz's determination on that point to see if there had been a material error of law in the previous decisions by comparison with the new authoritative declaration of the law: paras. [35]-[38]. The UT then entertained and considered submissions by Mr Henderson to the effect that the Supreme Court in *Al-Sirri* had materially reformulated the relevant test in respect of the standard of proof applicable under Article 1F by contrast with the formulation in *Gurung*.

30. The UT accepted (para. [50]) that there had been a material change in that respect. However, the UT considered that this change in the formulation of the legal test was not a material change so far as concerned the decision of IJ Aziz as regards Article 1F, because application of the *Al-Sirri* approach to the standard of proof would have made no difference to the relevant findings and conclusion of IJ Aziz: paras. [51]-[60]. It is this determination which is now under appeal to this court.

31. The UT noted at para. [60]:

> "It was not argued that we should also re-open the findings of Judge Aziz as a result of a change in the law on participation in acts capable of leading to exclusion under Article 1F. *Al-Sirri* has not changed the law in this respect, and there was nothing in the order of reference from the Court of Appeal indicating that this issue should be re-examined. …"

32. The significance of this last point for this appeal should be explained. The UT was not invited to re-visit the issue of the substantive elements in international criminal law of the offence of complicity in war crimes. That issue had been examined at the level of the Supreme Court in *JS (Sri Lanka)* and had been determined in the Appellant's case by IJ Barton in his determination of 30 July 2010 (in which he found that IJ Aziz's decision had been in compliance with the test laid down in *JS (Sri Lanka)*) and by the refusal of permission to appeal in respect of that issue by Arden LJ. As the UT pointed out, *Al-Sirri* did not reformulate or change the substantive law governing the

elements which had to be proved to establish complicity in war crimes. *Al-Sirri* only reformulated and changed the law regarding the standard of proof according to which those substantive elements had to be established. It clearly would have been an abuse of process (according to the test which, in my view, the UT correctly applied in deciding the extent to which the issue under Article 1F could be re-opened by the Appellant) if the Appellant had sought to go behind the decisions of IJ Barton and Arden LJ refusing the Appellant permission to appeal in relation to the decision of IJ Aziz on that issue of substantive law.

33. Mr Henderson implicitly recognised the logic of this position on this appeal, since his skeleton argument for us did not include the argumentation on the substantive elements of complicity in war crimes which had been included in his skeleton argument for the renewed oral application for permission to appeal before Arden LJ. We heard no significant argument about what those elements might be.

A procedural objection to the appeal: the respondent's notice

34. Pursuant to a respondent's notice, the Secretary of State contends that the UT erred in allowing the Appellant to re-open the Article 1F point in the way that he did. In the submission of Mr Kellar for the Secretary of State, paragraph 2 of the order of the Court of Appeal dated 12 April 2012 was such as to preclude any consideration whatever of Article 1F on the remitted appeal. Mr Kellar submitted that the UT had no jurisdiction to embark upon consideration of Article 1F as it did; and it made no difference that the parties had agreed directions for the hearing in the UT which contemplated that it could do so.

35. This submission turns upon the proper construction of the order of the Court of Appeal. I assume, without having to decide, that if this court makes an order which limits any appeal remitted to the Tribunal to a specific ground of appeal and excludes other grounds of appeal, that order will be binding on the Tribunal and will delimit its jurisdiction in relation to consideration of the appeal. In my judgment, however, on its proper construction, the order of 12 April 2012 did not have the effect for which Mr Kellar contends.

36. Paragraph 1 of the order quashed the decision of IJ Barton of 2 February 2011 in its entirety. As explained above, that decision incorporated his decision of 30 July 2010 in relation to Article 1F. Therefore, in strict jurisdictional terms, issues relating to Article 1F were formally kept open for the UT by that paragraph. Paragraph 2 of the order made it clear in positive terms that the UT should reconsider the Article 3 issue, but it did not include words of limitation which would exclude the general jurisdiction for the UT created by paragraph 1 of the order.

37. In my view, the approach of the UT was correct. It was justified in proceeding on the assumption that it had formal jurisdiction to consider matters relating to Article 1F and it was right to say that it should do so to the extent that this would not involve an abuse of process in going behind the refusal by the UT and Arden LJ of permission to appeal in relation to Article 1F.

The appeal: discussion

38. In my judgment, once one understands the admittedly complicated procedural history in this case, it is clear that the appeal should be dismissed. The issue on this appeal is a narrow one, relating to the standard of proof applied by IJ Aziz as compared with that set out by the Supreme Court in *Al-Sirri*. On that issue, as I set out below, I agree with the UT that there was no material error of law by IJ Aziz in relation to his decision in relation to Article 1F.

39. I would wish to reserve my opinion on the distinct question – which was not in issue before the UT in its reconsideration of the case and was not in issue before us - regarding the substantive elements which have to be proved to establish complicity in war crimes under international criminal law and whether the elements set out in para. [80] of the decision of IJ Aziz are sufficient to do so. For reasons explained above, we heard no argument on this substantive question. For present purposes, the relevant point on this is that those judges who have looked at it in detail in the light of *JS (Sri Lanka)* – i.e. IJ Barton, UT Judge Spencer and Arden LJ – all considered that there is no error in IJ Aziz's judgment on this issue.

40. The issue which is live in this appeal is whether the change in the approach to the standard of proof set out in *Al-Sirri* is a material one so far as concerns the decision of IJ Aziz. In my view, it is not. IJ Aziz would plainly have come to the same conclusion on Article 1F if he had in fact applied the standard of proof set out in para. [75] of the *Al-Sirri* judgment, rather than that in *Gurung*.

41. I come to that view by reason of the way in which IJ Aziz expressed his conclusion on Article 1F and also by consideration of each of the elements which provided the basis for that conclusion, as identified by him in para. [80] of his decision, set out above. In para. [80] IJ Aziz found that the Appellant "was complicit" in the atrocities of the HI; and in para. [81] he said he was "satisfied that the appellant has been complicit in war crimes …". This language indicates that IJ Aziz had found this as a fact, not on the basis of a possibility that the Appellant was complicit according to the substantive international criminal law.

42. Consideration of the elements identified in para. [80] of the decision bear out that interpretation. Each element was found by the judge as a fact and on the basis of material which he clearly thought met (at least) a balance of probabilities standard: (i) the commission of war crimes by HI was well attested in the country information available to the judge and the judge plainly considered at para. [64] that this was established to at least the balance of probabilities standard of proof – "I am satisfied that [HI] … committed wide-scale human rights atrocities and war crimes" - and, indeed, probably to a higher standard, since he noted that the country information on this issue was "fairly consistent and unanimous"; (ii) the judge found on consideration of the evidence, and after finding that the Appellant was to be disbelieved on this point, that the Appellant was "most likely aware" of the atrocities and war crimes being committed by HI – again, the judge considered that this element of the offence was established to at least the balance of probabilities standard of proof; (iii) the judge's finding that the Appellant ensured security in a HI captured area and was part of the organised machinery of HI was principally based on the Appellant's own evidence about his position and also reflected aspects of the country information about HI which were not under challenge on the appeal; and (iv) the judge's finding that the Appellant's activities enabled his colleagues in HI on the front line to divert their attention to taking Kabul by the means they did was again based on the

Appellant's own evidence about his role and also on part of the evidence of his own expert witness which was not under challenge.

43. For these reasons, which reflect in substance the reasoning of the UT below, I consider that this appeal should be dismissed.

Lord Justice Ryder:

44. I agree.

Lady Justice Gloster DBE:

45. I also agree.