Hilary Term
[2010] UKSC 15
On appeal from: [2009] EWCA Civ 364

JUDGMENT

R (on the application of JS) (Sri Lanka) (Respondent) *v* Secretary of State for the Home Department (Appellant)

before

Lord Hope, Deputy President
Lord Rodger
Lord Walker
Lord Brown
Lord Kerr

JUDGMENT GIVEN ON

17 March 2010

Heard on 13 and 14 January 2010

Appellant	*Respondent*
Tim Eicke Jasbir Dhillon (Instructed by Treasury Solicitors)	Rabinder Singh QC Shivani Jegarajah Michelle Butler (Instructed by K Ravi Solicitors)

LORD BROWN

1. The Refugee Convention was drafted for a world scarred by long years of war crimes and other like atrocities. There remain, alas, all too many countries where such crimes continue. Sometimes those committing them flee abroad and claim asylum. It is not intended that the Convention will help them. However clearly in need of protection from persecution an asylum seeker may be, he is not to be recognised as a refugee 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". So states article 1F(a) of the Convention (and, for good measure, article 12(2)(a) of the Qualification Directive (2004/83/EC) – this being implemented into domestic law by Regulations 2 and 7(1) of the Refugee or Person in Need of International Protection (Qualification) Regulations 2006 (SI 2006/2525)). It is the Court's central task on the present appeal to determine the true interpretation and application of this disqualifying provision. Who are to be regarded as having committed such a crime ("war criminals" as I shall generally refer to them) within the meaning of article 1F(a)? More particularly, assuming that there are those within an organisation who clearly *are* committing war crimes, what more than membership of such an organisation must be established before an individual is himself personally to be regarded as a war criminal?

2. It is common ground between the parties (i) that there can only be one true interpretation of article 1F(a), an autonomous meaning to be found in international rather than domestic law; (ii) that the international instruments referred to in the article are those existing when disqualification is being considered, not merely those extant at the date of the Convention; (iii) that because of the serious consequences of exclusion for the person concerned the article must be interpreted restrictively and used cautiously; and (iv) that more than mere membership of an organisation is necessary to bring an individual within the article's disqualifying provisions. The question is, I repeat, what more?

3. As need hardly be stated, only if the decision-maker in respect of a particular application for asylum correctly identifies and answers this question will he be in a position to decide, in all but the clearest cases, whether "there are serious reasons for considering" the asylum-seeker to be disqualified as a war criminal under article 1F(a).

4. The particular context within which the question arises on the present appeal can be comparatively briefly stated. A substantially fuller description of the facts can be found in the judgment below. The respondent is a 28 year old Sri Lankan Tamil. In 1992, at the age of 10, he became a member of the Liberation

Tigers of Tamil Eelam ("LTTE"), the following year joining the LTTE's Intelligence Division. At 16 he became team leader of a nine-man combat unit, at 17 the leader of a 45-man platoon, on each occasion engaging in military operations against the Sri Lankan army, and on each being wounded. At 18 he was appointed to lead a mobile unit responsible for transporting military equipment and other members of the Intelligence Division through jungles to a point where armed members of the Division could be sent in plain clothes to Colombo. He continued to do this for some three years from September 2000 until early 2004 except for some two and a half months (from late April to early July 2002) when he was appointed one of the chief security guards to Pottu Amman, the Intelligence Division's leader, whom he accompanied as a trusted aide on visits to the LTTE District Leader, Colonel Karuna, and other prominent LTTE members. From early 2004 to September 2006 he served as second in command of the combat unit of the Intelligence Division. In October 2006 he was sent incognito (in plain clothes and under an assumed name) to Colombo to await further instructions. In December 2006 he learned that his presence in Colombo had been discovered and arrangements were made for him to leave the country. On 7 February 2007 he arrived in the UK and two days later applied for asylum.

5. The respondent's application (and a subsidiary application for humanitarian protection based on the fear of mistreatment if returned) was refused on 14 September 2007 solely by reference to article 1F(a). The core of the appellant Secretary of State's reasoning appears in paragraphs 34 and 35 of the decision letter:

> "34 . . . [I]t is considered that you continued [during the six-year period from the respondent's 18th birthday until he left the intelligence wing of the LTTE] to operate within the LTTE and even gained promotions. This shows that you were a voluntary member of the LTTE. In this regard the case of *Gurung* [2002] UKIAT 04870 (starred) has been considered in which it was determined that voluntary membership of an extremist group could be presumed to amount to personal and knowing participation, or at least acquiescence, amounting to complicity in the crimes in question.
>
> 35. Accordingly, it is concluded that your own evidence shows voluntary membership and command responsibility within an organisation that has been responsible for widespread and systemic war crimes and crimes against humanity. From the evidence you have provided it is considered that there are serious reasons for considering that you were aware of and fully understood the methods employed by the LTTE."

6. By virtue of section 83 of the Nationality, Immigration and Asylum Act 2002, the appellant's decision was unappealable: the respondent had been granted only six months' leave to enter. The respondent therefore sought judicial review. Leave was eventually granted and an order made for the substantive challenge to be heard by the Court of Appeal. On 30 April 2009, following a single day's hearing on 25 February, the Court of Appeal quashed the appellant's decision: [2009] EWCA Civ 364; [2010] 2 WLR 17. Toulson LJ gave the sole reasoned judgment with which Waller LJ, Vice President of the Court of Appeal Civil Division, and Scott Baker LJ simply agreed.

7. In his lengthy and (right or wrong) impressive judgment, Toulson LJ disapproved certain aspects of the guidance given in the starred tribunal case of *Gurung* (on which the Secretary of State had relied), criticized parts of the UNHCR's approach, and reached the following main conclusions:

> Para 119:
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> ". . .[I]n order for there to be joint enterprise liability:
>
> > (1) there has to have been a common design which amounted to or involved the commission of a crime provided for in the statute;
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> > (2) the defendant must have participated in the furtherance of the joint criminal purpose in a way that made a significant contribution to the crime's commission; and
> >
> > (3) that participation must have been with the intention of furthering the perpetration of one of the crimes provided for in the statute."
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> Para 123:
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> " . . . I conclude that the Secretary of State failed to address the critical questions. Given that it was the design of some members of the LTTE to carry out international crimes in pursuit of the organisation's political ends, [the Secretary of State] acted on a wrongful presumption in para 34 of the decision letter that the claimant, as a member of the LTTE, was therefore guilty of personal

> and knowing participation in such crimes, instead of considering whether there was evidence affording serious reason for considering that he was party to that design, that he had participated in a way that made a significant contribution to the commission of such crimes and that he had done so with the intention of furthering the perpetration of such crimes. The fact that he was a bodyguard of the head of the intelligence wing . . . shows that he was trusted to perform that role, but not that he made a significant contribution to the commission of international crimes or that he acted as that person's bodyguard with the intention of furthering the perpetration of international crimes. Reference was made by the Secretary of State . . . to his command responsibilities in a combat unit, but there was no evidence of international crimes committed by the men under his command for which he might incur liability under article 28. His own engagement in non-criminal military activity was not of itself a reason for suspecting him of being guilty of international crimes."

8. That reference to article 28 is to the Rome Statute of the International Criminal Court ("the ICC Statute") which Toulson LJ (at para 115) had said, correctly in my view, should now be the starting point for considering whether an applicant is disqualified from asylum by virtue of article 1F(a) and upon which Toulson LJ had already drawn in stating his view (at para 119, set out above) of the constituents of joint enterprise liability.

9. It is convenient to go at once to the ICC Statute, ratified as it now is by more than a hundred States and standing as now surely it does as the most comprehensive and authoritative statement of international thinking on the principles that govern liability for the most serious international crimes (which alone could justify the denial of asylum to those otherwise in need of it).

10. Although (by article 5) the ICC Statute confers on the Court (established by article 1) jurisdiction also with respect to "the crime of genocide" and (once provision is adopted to define it) "the crime of aggression", it is "crimes against humanity" and "war crimes" to which article 1F(a) is directed. Crimes against humanity are defined in article 7 which lists a series of criminal acts and states them to be crimes against humanity "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack". Article 8 defines war crimes by reference to an extensive list of wrongful acts and confers jurisdiction on the Court in respect of such crimes "in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes". The requirement that the listed criminal acts are widespread (the *chapeau* requirement as it has been called) needs no further consideration here nor, indeed, is it necessary to consider the detailed criminal acts listed. On the evidence before her the Secretary of State was amply entitled to conclude that the LTTE in

general, and the Intelligence Division in particular, were guilty of widespread such criminal acts and atrocities, the most obvious perhaps being suicide bombings, attacks upon civilians, assassinations, kidnappings and the forcible recruitment of children. I can therefore pass at once to articles 25 and 30 of the ICC Statute, those most central to the issue now before the Court.

11. Article 25 (headed "Individual criminal responsibility") includes within its provisions:

> "3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
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> > (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
> >
> > (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
> >
> > (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
> >
> > (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
> >
> > (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
> >
> > (ii) Be made in the knowledge of the intention of the group to commit the crime; . . ."

12. Article 30 (headed "Mental element") provides:

> "1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
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> 2. For the purposes of this article, a person has intent where:
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> > (a) In relation to conduct, that person means to engage in the conduct;
> >
> > (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
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> 3. For the purposes of this article, 'knowledge' means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. 'Know' and 'knowingly' shall be construed accordingly."

13. I should also refer briefly to article 28 under the heading "Responsibility of commanders and other superiors". Essentially this provides that military commanders and other superiors shall be criminally responsible for crimes committed by forces under their effective command and control, or subordinates under their effective authority and control, as a result of their failure to exercise proper control over such forces or subordinates, where they knew or should have known that such crimes were being or were about to be committed and where they failed either to take all necessary and reasonable measures to prevent them or subsequently to submit them to the competent authorities for investigation and prosecution.

14. I would mention at this stage two other international instruments. First, the Qualification Directive (2004/83/EC) which provides a common standard for the application of the Refugee Convention's requirements across the EU's 27 Member States. As already noted, article 12(2)(a) precisely mirrors article 1F(a) itself. Article 12(3), however, provides in addition that article 12(2) "applies to persons who instigate or otherwise participate in the commission of the crimes or acts mentioned therein." The effect of article 12(3) has been helpfully considered by the German Federal Administrative Court in *BVerwG* 10C 48.07, judgment dated 14 October 2008:

> "21. In the case of the activities of terrorist organisations in particular, the question additionally arises as to attribution. Under Article 12(3) of Directive 2004/83EC, the reasons for exclusion also apply to persons who instigate or otherwise participate in the mentioned crimes or acts. Thus the person seeking protection need not have committed the serious non-political crime himself, but he must be personally responsible for it. This must in general be assumed if a person has committed the crime personally, or made a substantial contribution to its commission, in the knowledge that his or her act or omission would facilitate the criminal conduct (see Paragraph 18 of the UNHCR Guidelines). Thus this principle covers not only active terrorists and participants in the criminal sense, but also persons who perform advance acts in support of terrorist activities. . .
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> 22. In this Court's opinion, all three prerequisites of fact are met in the case of a person who actively supported the armed struggle of a terrorist organisation. . ."

Paragraph 18 of the UNHCR Guidelines On International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees (the paragraph there referred to) reads:

> "18. For exclusion to be justified, individual responsibility must be established in relation to a crime covered by Article 1F. . . . In general individual responsibility flows from the person having committed, or made a substantial contribution to the commission of the criminal act, in the knowledge that his or her act or omission would facilitate the criminal conduct. The individual need not physically have committed the criminal act in question. Instigating, aiding and abetting and participating in a joint criminal enterprise can suffice."

15. The other important international instrument to be noted is the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY), articles 2-5 of which define comparatively succinctly the war crimes which it governs. Article 7 then sets out the principles for determining individual criminal responsibility. These include:

> "1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution

> of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.
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> 2. [Article 7(2) is concerned with Heads of State or Government, or responsible government officials.]
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> 3. [Article 7(3) is concerned with the criminal responsibility of superiors for the criminal acts of their subordinates and is comparable, therefore, to article 28 of the ICC Statute.]
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> 4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires."

16. As was noted by the court below, the principles on which a person may incur criminal responsibility through participation in a joint criminal enterprise – essentially, therefore, responsibility pursuant to article 7(1) of the ICTY Statute – have been considered by the ICTY Appeals Chamber in a series of cases. These begin with *Prosecutor v Tadic*, 15 July 1999, (1999) 9 IHRR 1051 where the Chamber identified from the post World War II war crimes jurisprudence about common criminal purpose three distinct categories of collective criminality. First, the usual sort of joint enterprise case where all the co-defendants have the same criminal intent and each plays a part in executing the crime (paras 196-201). Second, the so-called "concentration camp" cases where all those in authority who participate in enforcing the repressive system are to be regarded as co-perpetrators of the war crime of ill-treatment – "really a variant of the first category" as the Chamber itself recognised (paras 202-203). Third, cases where the principal offender commits an offence outside the common design but where the defendant foresaw and knowingly took the risk of its occurrence (para 204) – the standard basis for secondary liability for joint enterprise criminality under domestic law.

17. Describing the *actus reus* for each of the 3 categories of collective criminality the Chamber noted (para 227):

> "(iii) Participation of the accused in the common design involving the perpetration of one of the crimes provided for in the Statute . . . need not involve commission of a specific crime under one of those provisions (for example, murder, extermination, torture, rape, etc) but may take the form of assistance in, or contribution to, the execution of the common plan or purpose."

18. Turning then to the required *mens rea* the Chamber said (para 228):

> "By contrast, the *mens rea* element differs according to the category of common design under consideration. With regard to the first category, what is required is the intent to perpetrate a certain crime (this being the shared intent on the part of all co-perpetrators). With regard to the second category (which, as noted above, is really a variant of the first), personal knowledge of the system of ill-treatment is required (whether proved by express testimony or a matter of reasonable inference from the accused's position of authority), as well as the intent to further this common concerted system of ill-treatment."

19. For my part I have not found the *Tadic* three-part categorisation of collective criminality especially helpful. The third category has no present relevance: it is not suggested here that the Tamils' war crimes were committed outside the common design of such part of the LTTE's (or its Intelligence Division's) organisation as were directly responsible for them. Such crimes were clearly committed intentionally as a means of furthering their aims. As for category 2, this, as *Tadic* itself recognises, is just an illustration of how category 1 liability may be engaged, a particular case of joint enterprise criminal responsibility. The real question is how category 1 applies in a case like this.

20. More recently, in *Prosecutor v Brđjanin* (unreported) 3 April 2007, the ICTY Appeals Chamber re-asserted that, although the accused need not have performed any part of the *actus reus* of the crime, he had to have participated in furthering the common purpose at the core of the criminal enterprise and "not every type of conduct would amount to a significant enough contribution to the crime for this to create criminal liability" (para 427) – "JCE [joint criminal enterprise] is not an open-ended concept that permits convictions based on guilt by association" (para 428). (The later ICTY Tribunal decision in *Prosecutor v Krajišnik* (unreported) 17 March 2009 – considered by the court below at paras 45-51 – appears to me of little assistance here: *Krajišnik's* criminal liability was based upon high governmental responsibilities, a very different factual scenario from what we are considering here.)

21. It is convenient next to turn to *Gurung v Secretary of State for the Home Department* [2003] Imm AR 115, the starred decision of the IAT (under its President, Collins J) on which the Secretary of State's refusal decision was based in the present case. It is necessary, I fear, to cite it at some length. It was, after all, the only case to which the decision letter referred. Having noted (at para 102) that in many article 1F cases "an adjudicator will be faced with evidence that an individual is a member of an organisation committed to armed struggle or the use

of violence as a means to achieve its political goals", the Tribunal's judgment continued:

> "104. The Tribunal has consistently stated that mere membership of such organisations is not enough to bring an appellant within the Exclusion Clauses: … In the light of previous case law and the further materials now before us, we would highlight two further principles that should be borne in mind when considering complicity.
>
> 105. One is that it would be wrong to say that an appellant only came within the Exclusion Clauses if the evidence established that he has personally participated in acts contrary to the provisions of Art 1F. If the organisation is one or has become one whose aims, methods and activities are predominantly terrorist in character, very little more will be necessary. We agree in this regard with the formulation given to this issue by UNHCR in their post September 11, 2001 document, Addressing Security Concerns without Undermining refugee Protection: UNHCR's Perspective, at paragraph 18:
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> > 'Where, however, there is sufficient proof that an asylum-seeker belongs to an extremist international terrorist group, such as those involved in the 11 September attacks, voluntary membership could be presumed to amount to personal and knowing participation, or at least acquiescence amounting to complicity in the crimes in question. In asylum procedures, a rebuttable presumption of individual liability could be introduced to handle such cases. Drawing up lists of international terrorist organisations at the international level would facilitate the application of this procedural device since such certification at the international level would carry considerable weight in contrast to lists established by one country alone. The position of the individual in the organisation concerned, including the voluntariness of his or her membership, as well as the fragmentation of certain groups would, however, need to be taken into account'.
>
> 106. That complicity in this type of case should be sufficient to bring an appellant within the Exclusion Clauses is necessary in order to adequately reflect the realities of modern-day terrorism. The

terrorist acts of key operatives are often possible only by virtue of the infrastructure of support provided by other members who themselves undertake no violent actions. As the US Court of Appeals, Ninth Circuit noted in *McMullen v INS* 685 F 2d 1312 (9th Cir 1981) at 599:

> 'We interpret both the convention and the [A]ct to permit deportation of individuals who commit serious, non-political crimes, and we have concluded that this includes terrorist acts against ordinary citizens. We refuse to interpret these documents to apply only to those who actually "pulled the trigger", because we believe that this interpretation is too narrow. In our judgment, the only reasonable interpretation of the exception is that it encompasses those who provide the latter with the physical, logistical support that enables modern, terrorist groups to operate'.

107. Likewise the Tribunal noted in *Ozer* (10922, May 1994) when considering the appeal of a person who had voluntarily joined and supported Dev Sol which, with reference to objective country materials on Turkey was described as then being an illegal party dedicated to violence,

> '. . .then it is no use his asserting that he does not support its policy or methods. If he does not endorse a central policy of the party he should not be a member of it: in any event his membership and contribution to the life of the party is indirect support for its violent acts.'

108. The other principle to be borne in mind is that whilst complicity may arise indirectly, it remains essential in all cases to establish that the appellant has been a voluntary member of such an organisation who fully understands its aims, methods and activities, including any plans it has made to carry out acts contrary to Art 1F. Thus for example it would be wrong to regard the mere fact that an appellant has provided a safe house for LTTE combatants as sufficient evidence that he has committed an excludable offence. If, however, he has transported explosives for LTTE combatants in circumstances where he must have known what they were to be used for, there may well be a serious 1F issue.

109. We would also observe that international criminal law and international humanitarian law, which in our view should be the principal sources of reference in dealing with such issues as complicity, adopt similar although more detailed criteria in respect of those who for the purpose of facilitating an international crime aid, abet or otherwise assist in its commission or its attempted commission, including providing the means for its commission (see Art 25 of the International Criminal Court Statute and Art 7(1) of the ICTY Statute as analysed in the case of *Tadic* Case No.IT-94-1-T, 7 May 1997). Of course such reference will need to bear in mind the lower standard of proof applicable in Exclusion Clause cases.

110. However, as the passage just cited from UNHCR highlights, even when complicity is established the assessment under Art 1F must take into account not only evidence about the status and level of the person in the organisation and factors such as duress and self-defence against superior orders as well as the availability of a moral choice; it must also encompass evidence about the nature of the organisation and the nature of the society in which it operates. Such evidence will need to include the extent to which the organisation is fragmented.

111. Observing as we do that in certain past Tribunal cases, *Karthirpillai* (12250) being an unhappy example, adjudicators and the Tribunal have not always taken a contextual approach, we think it useful to consider cases along a continuum.

112. On the one end of the continuum, let us postulate an organisation that has very significant support amongst the population and has developed political aims and objectives covering political, social, economic and cultural issues. Its long-term aims embrace a parliamentary, democratic mode of government and safeguarding of basic human rights. But it has in a limited way or for a limited period created an armed struggle wing in response to atrocities committed by a dictatorial government. In such a case an adjudicator should be extremely slow to conclude that an appellant's mere membership of such an organisation raises any real issue under Art 1F, unless there is evidence that the armed actions of this organisation are not in fact proportionate acts which qualify as 'non-political crimes' within Art 1F(b) and, if they are not, that he has played a leading or actively facilitative role in the commission of acts or crimes undertaken by the armed struggle wing.

> 113. At the other end of this continuum, let us postulate an organisation which has little or no political agenda or which, if it did originally have genuine political aims and objectives, has increasingly come to focus on terrorism as a modus operandi. Its recruitment policy, its structure and strategy has become almost entirely devoted to the execution of terrorist acts which are seen as a way of winning the war against the enemy, even if the chosen targets are primarily civilian. Let us further suppose that the type of government such an organisation promotes is authoritarian in character and abhors the identification by international human rights law of certain fundamental human rights. In the case of such an organisation, any individual who has knowingly joined such an organisation will have difficulty in establishing he or she is not complicit in the acts of such an organisation."

22. Before coming to consider the correctness or otherwise of those paragraphs it is to be noted that the UNHCR have consistently followed the approach adopted in paragraph 18 of their post-9/11 *Addressing Security Concerns without Undermining Refugee Protection: UNHCR's Perspective* of 29 November 2001 (referred to in paragraphs 105 and 110 of *Gurung* as above). Indeed, as recently as 8 December 2009, in a letter to the parties following the Court of Appeal's judgment in this case, their Representative, Roland Schilling, stated (at page 5):

> "In some instances, depending on the organisation's purposes, activities, methods and circumstances, individual responsibility for excludable acts may be presumed if membership is voluntary, and when the members of such groups can be reasonably considered to be individually responsible for acts falling within the scope of article 1F(a). For example, this would be the case where such activities involve indiscriminate killings or injury of the civilian population, or acts of torture, or where the person concerned is in control of the funds of an organisation that s/he knows is dedicated to achieving its aims through such violent crimes; or if the individual concerned contributed to the commission of excludable crimes by substantially assisting the organisation to continue to function effectively in pursuance of its aims.
>
> However, caution must be exercised when such a presumption arises, as due consideration needs to be given to the individual's involvement and role, including his/her position; the voluntariness of his/her membership; his/her personal involvement or substantial contribution to the criminal act in the knowledge that his/her act or omission would facilitate the criminal conduct; his/her ability to

influence significantly the activities of the group or organisation; and his/her rank and command responsibility."

23. Mr Schilling's letter concludes:

> "The exclusion clauses are intended to deny refugee status to certain persons who otherwise qualify as refugees but who are undeserving of refugee protection on account of the severity of the acts they committed. It is important that the rigorous legal and procedural standards required of an exclusion analysis outlined above are followed carefully.
>
> UNHCR shares the legitimate concern of States to ensure that there is no impunity for those responsible for crimes falling within article 1F(a) of the 1951 Convention. Care needs to be taken to ensure a rigorous application in line with international refugee principles whilst avoiding inappropriate exclusion of refugees.
>
> In particular, in cases involving persons suspected of being members of, associated with, or supporting an organisation or group involving crimes that may fall under article 1F(a), where presumption of individual responsibility for excludable acts may arise, a thorough and individualised assessment must be undertaken in each case. Due regard needs to be given to the nature of the acts allegedly committed, the personal responsibility and involvement of the applicant with regard to those acts, and the proportionality of return against the seriousness of the act."

24. The court below examined a number of domestic cases concerning article 1F, cases for the most part decided by the AIT. To my mind the most assistance is to be found in the Court of Appeal's judgment in *KJ (Sri Lanka) v Secretary of State for the Home Department* [2009] EWCA Civ 292, a case concerning a Tamil whose surveying and reconnaissance work in support of LTTE military operations enabled these more accurately to target the Sri Lankan forces. Although the appellant was never involved in any conflict causing injury or death to civilians, the AIT nevertheless held him disqualified from refugee protection by reference to article 1F(c) – it was common ground that "acts contrary to the purposes and principles of the United Nations" included acts of terrorism such as the deliberate killing of civilians - holding "the appellant must have known the type of organisation he was joining, its purpose and the extent to which the organisation was prepared to go to meet its aims."

25. Stanley Burnton LJ, giving the leading judgment allowing the appeal, said:

> "37. The application of article 1F(c) will be straightforward in the case of an active member of [an] organisation that promotes its objects only by acts of terrorism. There will almost certainly be serious reasons for considering that he has been guilty of [relevant] acts . . .
>
> 38. However, the LTTE, during the period when [the appellant] was a member, was not such an organisation. It pursued its political ends in part by acts of terrorism and in part by military action directed against the armed forces of the Government of Sri Lanka. The application of article 1F(c) is less straightforward in such a case. A person may join such an organisation, because he agrees with its political objectives, and be willing to participate in its military actions, but may not agree with and may not be willing to participate in its terrorist activities. Of course, the higher up in the organisation a person is the more likely will be the inference that he agrees with and promotes all of its activities, including its terrorism. But it seems to me that a foot soldier in such an organisation, who has not participated in acts of terrorism, and in particular has not participated in the murder or attempted murder of civilians, has not been guilty of acts contrary to the purposes and principles of the United Nations."

26. At this point in the judgment it seems to me worth noting that the court on this appeal has essentially three tasks. The first, and easiest, is to decide whether the Court of Appeal was right to quash the refusal decision and remit the case for redetermination by the Secretary of State. Secondly and less easily we must decide on the correctness of the principles laid down in *Gurung* and make such criticisms of its approach as seem appropriate. Our third and to my mind altogether more difficult task is to decide whether the Court of Appeal was right to interpret war crimes liability under article 1F(a) as narrowly as para 119 of Toulson LJ's judgment appears to do, essentially so as to encompass no more than joint enterprise liability akin to that in respect of domestic law crimes (extended where appropriate, when crimes go beyond the scope of the joint enterprise). To some extent, of course, these three questions inter-relate. I shall seek, however, to address them separately.

(1) Should the Secretary of State's decision be quashed?

27. Although I wondered at the hearing whether, realistically, the Secretary of State could properly *not* have found on the facts of this case "serious reasons for

considering" the respondent to be a war criminal, I have not thought it right to allow the Secretary of State's appeal on this basis. The plain fact is that, whatever view one takes on questions 2 and 3, the Secretary of State's reasoning in the decision letter is insupportable. It could not be said of the LTTE – nor even, on the available evidence, of its Intelligence Division – that as an organisation it was (it seems inappropriate in the light of recent events in Sri Lanka to continue speaking of the LTTE in the present tense) "predominantly terrorist in character" (*Gurung* para 105) or "an extremist international terrorist group" (para 18 of the UNHCR's Perspective, quoted in the same para 105). There was accordingly no question of presuming (consistently with *Gurung*) that the respondent's voluntary membership of this organisation "amount[ed] to personal and knowing participation, or at least acquiescence, amounting to complicity in the crimes in question" – as para 34 of the decision letter stated. Nor was the respondent's "command responsibility" within the organisation a basis for regarding him as responsible for war crimes. As Toulson LJ pointed out (para 123 of his judgment), the respondent's command was of a combat unit and there was never any suggestion here of article 28 liability. Nor, of course, as Stanley Burnton J noted in *KJ (Sri Lanka)*, is military action against government forces to be regarded as a war crime.

28. Surely the better case against the respondent arises from the three years when he led a mobile unit transporting military equipment and personnel through the jungle so that members of the Intelligence Division could go armed in plain clothes to Columbo. As para 108 of *Gurung* concluded: "If, however, he has transported explosives for LTTE combatants in circumstances where he must have known what they were to be used for, there may well be a serious 1F issue."

(2) The Gurung approach

29. As noted at para 93 of Toulson LJ's judgment, the appellant below "did not on the surface challenge the guidance given by the IAT in *Gurung's* case". There are, however, criticisms to be made of it and it should not in future be accorded the same oracular standing as it seems hitherto to have enjoyed. In the first place, it is unhelpful to attempt to carve out from amongst organisations engaging in terrorism a sub-category consisting of those "whose aims, methods and activities are predominantly terrorist in character", and to suggest that membership of one of these gives rise to a presumption of criminal complicity: "very little more will be necessary" (*Gurung* para 105). True it is that this approach finds support from the quoted paragraph 18 of the UNHCR's post-9/11 Perspective – and, indeed, from a line of Canadian authority commencing with the decision of the Canadian Federal Court of Appeal in *Ramirez v Canada (Minister of Employment and Immigration)* (1992) 89 DLR (4^{th}) 173, 180 where to MacGuigan JA it "seem[ed] apparent . . . that where an organisation is principally directed to a limited, brutal purpose, such as a secret police activity, mere membership may by necessity involve personal and knowing participation in persecutorial acts".

30. Rather, however, than be deflected into first attempting some such sub-categorisation of the organisation, it is surely preferable to focus from the outset on what ultimately must prove to be the determining factors in any case, principally (in no particular order) (i) the nature and (potentially of some importance) the size of the organisation and particularly that part of it with which the asylum-seeker was himself most directly concerned, (ii) whether and, if so, by whom the organisation was proscribed, (iii) how the asylum-seeker came to be recruited, (iv) the length of time he remained in the organisation and what, if any, opportunities he had to leave it, (v) his position, rank, standing and influence in the organisation, (vi) his knowledge of the organisation's war crimes activities, and (vii) his own personal involvement and role in the organisation including particularly whatever contribution he made towards the commission of war crimes.

31. No doubt, as Stanley Burnton LJ observed in *KJ(Sri Lanka)*, at para 37, if the asylum-seeker was "an active member of [an] organisation that promotes its objects only by acts of terrorism, [t]here will almost certainly be serious reasons for considering that he has been guilty of [relevant] acts". I repeat, however, the nature of the organisation itself is only one of the relevant factors in play and it is best to avoid looking for a "presumption" of individual liability, "rebuttable" or not. As the present case amply demonstrates, such an approach is all too liable to lead the decision-maker into error.

32. The second major criticism to be made of *Gurung* relates to its introduction (at paras 111-113) of the idea of a "continuum" for war crimes cases. The reality is that there are too many variable factors involved in each case, some militating one way, some the other, to make it helpful to try to place any given case at some point along a continuum. But more troublingly still, the tribunal in these paragraphs introduces considerations which properly have no place at all in determining how article 1F applies. Whether the organisation in question is promoting government which would be "authoritarian in character" or is intent on establishing "a parliamentary, democratic mode of government" is quite simply nothing to the point in deciding whether or not somebody is guilty of war crimes. War crimes are war crimes however benevolent and estimable may be the long-term aims of those concerned. And actions which would not otherwise constitute war crimes do not become so merely because they are taken pursuant to policies abhorrent to western liberal democracies.

(3) The correct approach to article 1F

33. There can be no doubt, as indeed article 12(3) of the Qualification Directive provides, that article 1F disqualifies not merely those who personally commit war crimes but also those "who instigate or otherwise participate in the commission of [such] crimes". Article 12(3) does not, of course, enlarge the application of article

1F; it merely gives expression to what is already well understood in international law. This is true too of paragraphs (b), (c) and (d) of article 25(3) of the ICC Statute, each of which recognises that criminal responsibility is engaged by persons other than the person actually committing the crime (by pulling the trigger, planting the bomb or whatever) who himself, of course, falls within article 25(3)(a). Paragraph (b) encompasses those who order, solicit or induce (in the language of article 12(3) of the Directive, "instigate") the commission of the crime; paragraph (c) those who aid, abet, or otherwise assist in its commission (including providing the means for this); paragraph (d) those who in any other way intentionally contribute to its commission (paras (c) and (d) together equating, in the language of article 12(3) of the Directive, to "otherwise participat[ing]" in the commission of the crime).

34. All these ways of attracting criminal liability are brought together in the ICTY Statute by according individual criminal responsibility under article 7(1) to anyone who "planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution" of the relevant crime. The language of all these provisions is notably wide, appreciably wider than any recognised basis for joint enterprise criminal liability under domestic law. That, it seems to me, is what the German court was saying, at para 21 of the *BverwG* judgment (cited at para 14 above) when holding that the exclusion "covers not only active terrorists and participants in the criminal sense, but also persons who perform advance acts in support of terrorist activities."

35. It must surely be correct to say, as was also said in that paragraph, that article 1F disqualifies those who make "a substantial contribution to" the crime, knowing that their acts or omissions will facilitate it. It seems to me, moreover, that Mr Schilling, the UNHCR Representative, was similarly correct to say in his recent letter that article 1F responsibility will attach to anyone "in control of the funds" of an organisation known to be "dedicated to achieving its aims through such violent crimes", and anyone contributing to the commission of such crimes "by substantially assisting the organisation to continue to function effectively in pursuance of its aims". This approach chimes precisely with that taken by the Ninth Circuit in *McMullen* (see para 106 of *Gurung* cited above): "[Article 1F] encompasses those who provide [the gunmen etc] with the physical, logistical support that enable modern, terrorist groups to operate."

36. Of course, criminal responsibility would only attach to those with the necessary *mens rea* (mental element). But, as article 30 of the ICC Statute makes plain, if a person is aware that in the ordinary course of events a particular consequence will follow from his actions, he is taken to have acted with both knowledge and intent. (I would for this reason reject the respondent's criticism of the omission from paragraph 21 of the German court's judgment of any separate

reference to intent; that ingredient of criminal responsibility is already encompassed within the Court's existing formulation).

37. Similarly, and I think consistently with this, the ICTY Chamber in *Tadic* defines *mens rea* in a way which recognises that, when the accused is participating in (in the sense of assisting in or contributing to) a common plan or purpose, not necessarily to commit any specific or identifiable crime but to further the organisation's aims by committing article 1F crimes generally, no more need be established than that the accused had personal knowledge of such aims and intended to contribute to their commission.

38. Returning to the judgment below with these considerations in mind, I have to say that paragraph 119 does seem to me too narrowly drawn, appearing to confine article 1F liability essentially to just the same sort of joint criminal enterprises as would result in convictions under domestic law. Certainly para 119 is all too easily read as being directed to specific identifiable crimes rather than, as to my mind it should be, wider concepts of common design, such as the accomplishment of an organisation's purpose by whatever means are necessary including the commission of war crimes. Put simply, I would hold an accused disqualified under article 1F if there are serious reasons for considering him voluntarily to have contributed in a significant way to the organisation's ability to pursue its purpose of committing war crimes, aware that his assistance will in fact further that purpose.

39. It would not, I think, be helpful to expatiate upon article 1F's reference to there being "serious reasons for considering" the asylum-seeker to have committed a war crime. Clearly the Tribunal in *Gurung* (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 crimes 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 *Yasser Al-Sirri v Secretary of State for the Home Department* [2009] EWCA Civ 222, 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."

40. In the result I would dismiss this appeal but vary the order below to provide that in re-determining the respondent's asylum application, the Secretary of State should direct himself in accordance with this Court's judgments, not those of the Court of Appeal.

LORD HOPE

41. There is always a risk, as one court after another seeks to formulate the principles that are to be applied in the interpretation of an international instrument, of making things worse, not better. A misplaced word here or there can make all the difference between an interpretation that will be respected internationally because it accords with the true purpose of the instrument and one that will not.

42. Counsel for the Secretary of State said that until the judgment of the Court of Appeal in this case there was a significant degree of international consensus as to the correct approach to article 1F(a) of the Refugee Convention. This was built largely on the jurisprudence of the Canadian courts as explained by the Immigration Appeal Tribunal in the starred case of *Gurung v Secretary of State for the Home Department* [2002] UKIAT 4870, [2003] Imm AR 115. The Tribunal's formulation was referred to with approval in *Nagamany v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1554, where the judge said that it provided excellent information as to how a decision-maker should approach a case involving that article. It was adopted by the UNHCR in their *Background Note on Article 1F of the 1951 Convention relating to the Status of Refugees* of 4 September 2003: para 61, fn 61. And it was followed by the Court of Appeal in *MH (Syria) v Secretary of State for the Home Department* [2009] EWCA Civ 226, [2009] 3 All ER 564 and *KJ (Sri Lanka) v Secretary of State for the Home Department* [2009] EWCA Civ 292: see also *DKN v Asylum and Immigration Tribunal* [2009] CSIH 53. Counsel submitted that the Court of Appeal in this case failed to explain why it was departing from that approach, and that the scope of article 1F(a) and the complicity doctrine was correctly stated in *Gurung*.

43. Like Lord Brown, I think that the guidance given in *Gurung* is not without its difficulties. The Tribunal was, of course, right to stress that mere membership of an organisation that is committed to the use of violence for political ends is not enough to bring an appellant within the exclusion clauses: para 104. As Toulson LJ observed in the Court of Appeal in this case, everyone is agreed on this point: [2009] EWCA Civ 364, [2010] 2 WLR 17, para 98. The complicity doctrine, too, is well established in international law: *McMullen* v *INS* 685 F 2d 1312 (9th Cir 1981), 599; *Ramirez v Canada (Minister of Employment and Immigration)* (1992) 89 DLR (4th) 173, 178-180 per MacGuigan JA; the Rome Statute of the International Court, article 25(3)(c) and (d) and article 30; *Prosecutor v Tadic* 15 July 1999, ICTY; *Prosecutor v Krajišnik* 17 March 2009, ICTY. The problem lies in formulating what more is needed to bring the person within article 1F(a). How close does the person need to get to these activities for the protection of the Convention not to apply to him?

44. The Tribunal's mistake, it respectfully seems to me, was to say that if the organisation was or has become one whose aims, methods and activities are predominantly terrorist in character "very little more will be necessary": para 105. As the Tribunal explains later in the same paragraph, this proposition was based on the formulation by the UNCHR in their post 9/11 document *Addressing Security Concerns without Undermining refugee Protection*, para 18. But it is a dangerous doctrine. It leads people to think, as the Secretary of State did in this case, that voluntary membership of such a group gives rise to a presumption of personal and knowing participation, or at least acquiescence, amounting to complicity: para 34. It diverts attention from a close examination of the facts and the need for a carefully reasoned decision as to precisely why the person concerned is excluded from protection under the Convention.

45. It is true that the Tribunal's invitation to consider cases along a continuum reduces the force of the "very little more will be necessary" dictum at one end of it: para 112. But it reinforces it at the other end: para 113. Here too the Tribunal's approach is liable to mislead. Even in the case of the extremist organisation that is envisaged in para 113, joining it will not be enough to suggest complicity or that little more is required for it to be presumed. This mistaken approach tends to infect the whole length of the continuum. As Toulson LJ said in the Court of Appeal, para 114, the continuum approach takes the decision-maker's eye off the really critical question whether the evidence provides serious reasons for considering the applicant to have committed the actus reus of an international crime with the requisite mens rea. It invites a less clearly focused judgment. That was the trap that the Secretary of State fell into in this case.

46. I would therefore reject the Secretary of State's submission that the complicity doctrine was correctly stated in *Gurung*. The Court of Appeal's criticisms of it seem to me to be well founded. This leads inevitably to the question whether the approach which it sought to put in its place should be endorsed by this court.

47. I have no difficulty with the formulation in para 115 of the Court of Appeal's judgment, where Toulson LJ said:

> "The starting point for a decision-maker addressing the question whether there are serious reasons for considering that an asylum seeker has committed an international crime, so as to fall within article 1F(a), should now be the Rome Statute. The decision-maker will need to identify the relevant type or types of crime, as defined in articles 7 and 8,; and then to address the question whether there are serious reasons for considering that the applicant has committed such

> a crime, applying the principles of criminal liability set out in articles 25, 28 and 30 and any other articles relevant to the particular case."

Article 12(3) of the Qualification Directive 2004/83/EC and article 7(1) of the ICTY Statute are founded on the same principles, which are wider than those that apply in domestic law for joint enterprise criminal liability. As the German Federal Administrative Court said in *BVerwG 10C 48.07*, para 21:

> "Thus this principle covers not only active terrorist and participants in the criminal sense, but also persons who perform advance acts in support of terrorist activities."

48. Had Toulson LJ stopped at para 115 I would not have been disposed to find fault with his judgment. As it is, he went on to give further guidance to the decision-maker which, as Lord Brown has indicated in para 38, appears to have been drawn too narrowly. He was careful to base what he said on the provisions of the Rome Statute. But the guidance was more elaborate than it needed to be. He used the word "participation", which does not appear in the relevant articles of the Rome Statute. It tends to suggest a closer connection with the criminal act than the international law principle requires. The German Administrative Court, in para 21 of its judgment, used the words "personally responsible" to express what, in international law, is the underlying concept:

> "Thus the person seeking protection need not have committed the serious non-political crime himself, but he must be personally responsible for it. This must in general be assumed if a person has committed the crime personally, or made a substantial contribution to its commission, in the knowledge that his or her act or omission would facilitate the criminal conduct."

The court then added, by way of further explanation, the sentence which I have quoted in para 47, above. The words "substantial contribution" indicate what is needed to attach personal responsibility for what was done. I agree with Lord Brown that the German court's formulation encompasses the mental element that is required by article 30 of the Rome Statute: para 36, above.

49. Lord Brown puts the test for complicity very simply at the end of para 38 of his judgment. I would respectfully endorse that approach. The words "serious reasons of considering" are, of course, taken from article 1F itself. The words "in a

significant way" and "will in fact further that purpose" provide the key to the exercise. Those are the essential elements that must be satisfied to fix the applicant with personal responsibility. The words "made a substantial contribution" were used by the German Administrative Court, and they are to the same effect. The focus is on the facts of each case and not on any presumption that may be invited by mere membership.

50. For these reasons, and those given by Lord Brown with which I entirely agree, I would dismiss the appeal. I would make the order that Lord Brown proposes.

LORD RODGER

51. I agree with the judgment of Lord Brown. For the reasons which he gives, and for the further reasons of Lord Hope and Lord Kerr, I would dismiss the appeal but vary the order below, as Lord Brown proposes.

LORD WALKER

52. I am in full agreement with the judgment of Lord Brown. For the reasons that he gives, and for these further reasons given by Lord Hope and Lord Kerr, I would dispose of this appeal in the manner that Lord Brown proposes.

LORD KERR

53. For the reasons given by Lord Brown with which I am in complete agreement, I too would dismiss this appeal and vary the order of the Court of Appeal in the manner that he has suggested.

54. As Lord Brown has said, the critical question is "what more is required beyond mere membership of an organisation which commits war crimes for a person to be excluded from the protection of the Refugee Convention". It was suggested for the Secretary of State that in the case of an organisation which was not exclusively terrorist (in the sense that their only *modus operandi* was the commission of war crimes or crimes against humanity) the presence of the further necessary element apart from membership was to be determined by the

examination of six factors: the nature of the organisation; the method of recruitment to it; the opportunity to leave it; the position and rank enjoyed by the individual concerned; the length of time that he had spent in the organisation; and his knowledge of the organisation's atrocities.

55. I would be reluctant to accept that this list of factors provides the invariable and infallible prescription by which what I have described as the critical question is to be answered. What must be shown is that the person concerned was a knowing participant or accomplice in the commission of war crimes etc. The evaluation of his role in the organisation has as its purpose either the identification of a sufficient level of participation on the part of the individual to fix him with the relevant liability or a determination that this is not present. While the six factors that counsel identified will frequently be relevant to that evaluation, it seems to me that they are not necessarily exhaustive of the matters to be taken into account, nor will each of the factors be inevitably significant in every case. One needs, I believe, to concentrate on the actual role played by the particular person, taking all material aspects of that role into account so as to decide whether the required degree of participation is established.

56. The nature of the participation required has been described in various ways in the cases that Lord Brown has considered in his judgment. In an "Amicus Curiae Brief of Professor Antonio Cassese and members of the Journal of International Criminal Justice on Joint Criminal Enterprise Doctrine" (for Case File No 001/18-07-2007-ECCC-OCIJ) (2009) 20 CLF 289 it was suggested that the participation should be such as "allowed the institution to function" or that it allowed "the crimes to be perpetrated" or that it was "an indispensable cog". In *Prosecutor v Krajišnik* 17 March 2009 it was stated that "what matters in terms of law is that the accused lends a significant contribution to the crimes involved in the [joint common enterprise]" – (para 696). Common to all these expositions is that there should be a participation that went beyond mere passivity or continued involvement in the organisation after acquiring knowledge of the war crimes or crimes against humanity.

57. The Canadian cases to which Lord Brown has referred seem for the most part to at least imply that the participative element involves either a capacity to control or at least to influence events. They appear to contemplate a minimum requirement that the mind of the individual be given to the enterprise so that some element of personal culpability is involved. A notable exception to this theme is to be found in the *obiter* statements in paragraph 16 of the judgment in *Ramirez v Canada (Minister of Employment and Immigration)* (1992) 89 DLR (4^{th}) 173 where it is suggested that voluntary knowing participation can be assumed from membership of a brutal organisation. These statements have not been relied on by the Secretary of State in this case and, in my judgment, wisely so. The broad thrust of authority in this area is to contrary effect. A focus on the actual participation of

the individual, as opposed to an assumption as to its significance from mere membership, appears to me to accord more closely with that general trend and with the spirit of articles 25 and 30 of the ICC Rome Statute and article 12 (3) of Council Directive 2004/83/EC.

58. No consideration of the respondent's personal role was undertaken here, however. While it is true that the Secretary of State required only to be satisfied that there were serious grounds for considering that he had been involved in the relevant criminal activity, some examination of the respondent's actual involvement was needed. This inevitably involved recognition of the ingredients of the offences in which he was said to be complicit and of what it was about the known behaviour of the respondent that might be said to bring him to the requisite level of participation. I do not consider that it is necessary to show that he participated (in the sense that this should be understood) in individual crimes but his participation in the relevant criminal activity can only be determined by focusing on the role that he actually played. Only in this way can a proper inquiry be undertaken into the question whether the requirements of articles 25 and 30 of the ICC Rome Statute have been met.

59. It is true that an extensive rehearsal of some relevant facts is to be found in the earlier part of the decision letter but there is nothing to indicate that this in fact played a part in the Secretary of State's analysis. Indeed, a review of the sources which the author of the letter used to compose it indicates the contrary to be the case. It is clear that the "facts" were culled from the War Crimes Unit report and that the statement of the reasons for the decision was replicated from the legal annexe. The latter document stated that *Gurung* had held that voluntary membership of an extremist group could be presumed to amount to personal and knowing participation, or at least acquiescence amounting to complicity. In effect therefore the Secretary of State was being invited to decide as a matter of automatic consequence that membership of the Intelligence Division of LTTE equated to complicity. This implicitly (at least) suggested that no consideration of the personal responsibility of the respondent was required and indeed that it was not appropriate to inquire into it beyond acknowledging that the respondent was a member of the Intelligence Division.