Neutral Citation Number: [2018] EWCA Civ 933
IN THE COURT OF APPEAL (CIVIL DIVISION)
Case No: C5/2016/3163 - Youssef
ON APPEAL FROM THE UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)
UT Judges Allen and Kopieczek
AA/11292/2012
Case No: T2/2017/0034 – N2
ON APPEAL FROM THE SPECIAL IMMIGRATION APPEALS COMMISSION
Mr Justice Flaux, Judge Ockleton and Ms Jill Battley
SC/125/2015

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/04/2018

Before :

LADY JUSTICE RAFFERTY
LORD JUSTICE McCOMBE
and
LORD JUSTICE IRWIN

- -

Between :

HANY EL-SAYED EL-SEBAI YOUSSEF	**Appellant**
-and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**
and	
N2	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Edward Fitzgerald QC and Alasdair Mackenzie (instructed by **Birnberg Peirce Limited**) for **Youssef**
Andrew O'Connor QC (instructed by **the Government Legal Department**) for **The Secretary of State for the Home Department**

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Danny Friedman QC and Edward Grieves (instructed by **Birnberg Peirce Limited**) for **N2**
Robin Tam QC and Melanie Cumberland (instructed by **the Government Legal Department**) for **The Secretary of State for the Home Department**

Hearing dates: 17 and 18 January 2018

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Judgment Approved

Lord Justice Irwin :

Introduction

1. In these linked cases, the Respondent argues that each Appellant was properly excluded from reliance on (and the benefit of) the United Nations Refugee Convention 1951 ["the Refugee Convention"], as their differing activities were sufficient to satisfy the test in Article 1F(c) of the Convention: each "has been guilty of acts contrary to the purposes and principles of the United Nations".

2. The Appellant Youssef is an Egyptian national, who arrived in the United Kingdom in 1994. He has a complex background, which has included the accusation (now no longer maintained for the purposes of these proceedings) that he has been involved in Islamic terrorist activities. However, it is said that he has published many sermons and other material on the internet glorifying Al Qaeda, and past and present leaders of Al Qaeda. Although there are competing submissions as to the proper emphasis and understanding to be applied to this material, there is little or no dispute as to the content. In a decision of the Upper Tribunal (Immigration and Asylum Chamber) ["UTIAC"] of 17 October 2014, they promulgated an error of law decision in relation to the determination of the First-tier Tribunal of 3 March 2014, and directed that the appeal should remain in UTIAC. In the substantive decision of UTIAC on 12 April 2016, they dismissed the appeal against the Respondent's decision of 27 November 2012, that the Appellant's activities excluded him from the Refugee Convention.

3. The Appellant N2 is thought to be a Jordanian national. He entered the United Kingdom, it is believed in 2002, on a false passport. His asylum claim was refused later that year as being fraudulent, and his appeal dismissed in 2003. Nevertheless, he remained in the UK. In 2007, he received a total of nine years' imprisonment for offences contrary to the Terrorism Act 2000. He was sentenced on the basis that he was a sleeper for a terrorist organisation. His applications for permission to appeal against conviction and sentence were dismissed by the Court of Appeal (Criminal Division) in November 2008. There followed a complex history of immigration dispute and litigation, which need not concern us. On 10 July 2015, the Respondent served the Appellant with a letter of refusal of asylum and exclusion from refugee status under Article 1F(c). The Appellant appealed, his case being certified so that his appeal was heard by the Special Immigration Appeals Commission ["SIAC"], because of the implications for national security of some of the evidence relied on. SIAC considered the exclusion issue and ruled against the Appellant on 1 December 2016.

4. By section 7(1) of the SIAC Act 1997, appeals from SIAC to this Court are confined to matters of law.

5. In neither of these cases will a sustained finding that the Appellant is excluded from the Refugee Convention mean that he faces immediate removal or deportation from the UK. In the case of Youssef, he has been granted successive six-month periods of restricted leave to remain. In the case of N2, the Respondent indicated in the decision letter of 8 July 2015 that she intended to deport the Appellant to Jordan, once suitable assurances were obtained from the Jordanian authorities as to his treatment. However, in July 2016 the Respondent informed the Appellant that it was no longer

appropriate to seek deportation at present, and he too was granted six months' restricted leave to remain.

The Refugee Convention: Article 1F

6. The Convention was promulgated in 1951 and entered into force in 1954. It has been amended only once, by the 1967 Protocol, which removed geographic and temporal limits, and gave the Convention universal coverage.

7. Article 1 endorses a single definition of the term "refugee". The fundamental protection represented by the Convention is that preventing the expulsion or return "of the refugee, against his or her will, to the territory where he or she fears threats to life or freedom". The acknowledged importance of that protection lends emphasis to the exclusion provisions in Article 1F which read:

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

8. This case is focussed on the third limb, Article 1F(c).

Youssef: the "acts" found

9. In the substantive appeal before UTIAC, the Respondent sought to sustain the decision on a narrower basis than below. Mr O'Connor QC, who appeared in this case for the Secretary of State before us and below, clarified the approach to the Tribunal, who recorded:

> "2. …the essence of her case, which is: that the appellant has knowingly incited and encouraged acts of international terrorism contrary to the purposes and principles of the United Nations and as a consequence he is excluded under Article 1F(c) from the protection the Convention would otherwise afford him."

10. It is important to note that it is not alleged that this Appellant incited or encouraged any specific piece of violence, or that any specific act of terrorism can be shown to be linked to the incitement or encouragement. It is accepted that no such specific link can be made. Rather it is argued that, in a sustained fashion over a long period, this

Appellant has praised Al Qaeda and its leaders, often by individual name, and encouraged others to follow them and support them.

11. UTIAC identified the material relied on as "largely speeches, sermons, commentaries, etc … made between 2004 and 2014" [paragraph 27]. Mr O'Connor suggested the material fell into three categories: firstly, praise for and glorification of the activities of leading Al Qaeda terrorists (including Osama bin Laden, Dr Ayman al-Zawahiri (the successor to bin Laden as leader of Al Qaeda), Anwar Al-Awlaki, Nidell Malik Hasan (the perpetrator of the Fort Hood shootings), and others).

12. The second category consists of material "applauding the international reach and aspirations of Al Qaeda, particularly the targeting of attacks on the US" [UTIAC paragraph 37]. For example, bin Laden was praised as follows:

> "- - - this hero went forth and stood in defence of his Ummah. He established this idea that has grown strong hands, thanks be to Allah, and these arms that are in Iraq, Afghanistan, Chechnya, Indonesia, Somalia, or Mali and now in Syria! These arms are blessings from this martyr, as we count him to be, and from his pious and devout brethren."

13. The third category of material was advanced as amounting to "an implicit encouragement to his audience to emulate" the leaders of violent Al Qaeda terrorism. In this category UTIAC cited:

> "38. …the interview of 2 May 2011 the appellant described bin Laden as having "handed over the banner to a generation that will eliminate this falsehood" and asserted that: "the Muslims will be victorious in Afghanistan and Iraq, otherwise how do you explain the Islamic state of Iraq currently in Iraq and the existing Jihadi movements".
>
> 39. In his encomium to bin Laden posted on the same day the appellant said: "If you have killed one Osama, the womb of the Ummah still contains a thousand times a thousand Osamas!"
>
> And also
>
> > "Rest in peace, Abu Abdullah! You shall remain an inspiration to ordinary Muslims in the mountains of the Hindu Kush, of Khorosan and of Chechnya, and in the villages, hamlets, rural areas and towns of Iraq, Egypt, Somalia, the land of the two holy sites, the Peninsula, Yemen, Oman, Sudan, Libya, Tunisia, Algeria, the Maghreb, Mauritania, and elsewhere!"
>
> 40. In his eulogy to Al-Awlaki of 14 October 2011 the appellant said:
>
> > "They imagine that by killing the person, by ending his life and suppressing his spirit, he will disappear and his words

> will die. They do not know that such words have been taken up by thousands of young people, who are a thousand Al-Awlakis. The womb of the Ummah is fruitful, praise be to Allah. Indeed, one better than Al-Awlaki has been killed and martyred. Was the Sheikh of Islam, the Holy Warrior, Osama bin Laden not martyred last May? Did the Jihad stop? Did the wheels of Jihad ground to a halt? Has the Ummah died? Does the Ummah die with the death of its leaders?"

41. Finally there is to be found in the appellant's remarks following the death of Al-Libi posted on 11 September 2012 the following:

> "Our slain are in paradise, Allah willing... and your dead are in the fire, the Almighty willing! ... O believers, who profess the unity of Allah and believe in the promise of your Lord! Do not falter ... do not fall back ... Do not despair of the spirit of Allah. Only the people who disbelieve despair of the spirit of Allah! Your slain are martyrs ... those of you who return are happy ... your captives are rewarded and your enemy is overwhelmed ..."."

14. We have had the opportunity to consider the transcripts of the postings ourselves. Their context and presentation, says Mr O'Connor, are of significance. The website presents this Appellant as a scholar and a man of intellectual authority, with a masters degree and a doctorate, both in respect of Islamic law, and the "character of Maqreze Centre for Historical Studies in London". The website cites a large number of his publications, sermons and talks, the great majority of similar import. He is described at one point as having:

> "…summarized and explained the provisions of jihad and apostasy … and he focussed in his appeal to the young people who adhered to their religion on reading the provisions of Jihad and apostasy from the book, Al Maghani for its importance."

15. Part of the Respondent's case is that this Appellant's activities attracted a good deal of attention. It seems to be unchallenged that his website received:

> "hits ranging from 12,000 in a week to 80,000 over an undefined period."

Youssef: The Grounds of Appeal

16. This Appellant, following amendment, advances three Grounds:

> "i. The Upper Tribunal erred in finding that individual responsibility for acts falling within Article 1F(c) can arise solely by way of implicit or explicit encouragement of such acts, in the absence of evidence that an offence has been committed or attempted as a consequence of anything said or done by the Applicant.

ii. The Upper Tribunal erred in finding that the elements of individual responsibility are not the same under all three "limbs" of Article 1F.

iii. In the alternative, if (as is argued by the SSHD) the Upper Tribunal held that HY was excluded not on the basis of secondary liability but on the basis that his own conduct in publishing the speeches and sermons […] was sufficient in itself to engage Article 1F(c), the Upper Tribunal erred in failing to make any findings:

(a) on whether mere speech could in itself be contrary to the purposes and principles of the United Nations; and/or

(b) about how HY's speech in itself (i.e. divorced from any impact it may have had on others) had the requisite impact on international peace and security."

What did UTIAC Decide? - A Digression

17. It will be seen from the opening words of Ground iii that there is a dispute between the parties as to the basis of the decision by UTIAC, which arises from the competing arguments advanced below. In short form, the Appellant argues, for reasons which I address below, that "acts falling within Article 1F(c)" have to be substantive acts (in this context) of terrorism, and that "mere speech" constituting encouragement or incitement of such acts cannot constitute conduct justifying exclusion from the Convention. The Appellant submits that he lost his appeal before UTIAC because only part of that argument was lost, and that the Upper Tribunal proceeded on the basis that the relevant "acts" were those acts of substantive terror committed by others, yet decided (wrongly) that the Appellant's encouragement or incitement of such substantive acts were nevertheless sufficient to be the basis of exclusion. The Respondent disagrees, submitting that the "acts" falling within Article 1F(c) were all along those of the Appellant himself, in inciting or encouraging the activities of others. It is therefore necessary to clarify the analysis and approach of UTIAC on this point.

18. Key starting points, says Mr O'Connor, arise from two documents: a letter written by the Respondent in August 2015, and Mr O'Connor's skeleton argument for the UTIAC hearing. The relevant part of the letter reads:

> "The core factual allegation upon which the Secretary of State will rely is that the Appellant has knowingly incited and encouraged terrorist acts contrary to the purposes and principles of the United Nations."

19. The most relevant passages from the skeleton argument read:

"**The conduct relied upon**

> 16. The conduct of the Appellant that the Secretary of State relies upon is the making and the publishing on the Internet of the speeches, sermons, commentaries etc that appear in the Supplementary Bundle at TABs 5 to 14 and 16.
>
> "17. It does not appear to be in dispute either (a) that the Appellant was the author of this material, or (b) that he was responsible for publishing it. The Appellant has not served any evidence to counter what are obvious inferences from the documents. At the very least, there are '*serious reasons for considering*' both these matters.
>
> …
>
> 44. In summary, the Appellant has, through his Internet postings, incited and encourage Al Qaida violence. He deliberately made his inflammatory material available to the widest possible audience for a period of years. This conduct in itself was contrary to the purposes and principles of the United Nations and, when judged in the round, was sufficiently serious to pass the Article 1F(c) threshold."

20. Mr Fitzgerald QC for the Appellant, who did not appear below, argues that the letter was ambiguous on the relevant point since it could be read as implying "… incited and encouraged terrorist acts [which were] contrary to the purposes and principles of the United Nations". I have reflected on that, and with great respect I do not find that convincing. However, even if the letter were thought to be ambiguous, it seems to me that the Respondent's skeleton is unarguably clear, particularly in paragraph 44, where the Secretary of State was alleging it was "this conduct" of the Appellant which passed the necessary threshold.

21. Moreover, it does not appear to me that UTIAC were in any doubt about the point. In their judgment at paragraph 3 they recited the essential case advanced:

> "…The essence of the conduct relied on by the respondent to justify exclusion is that the appellant has incited and encouraged acts of terrorism, in particular, sermons and other material that has been published on the internet."

22. The Appellant's argument was (and is) that conduct justifying exclusion must constitute crime or crimes within the narrower definition of criminal conduct drawn from the Rome Statute of the International Criminal Court ["ICC statute"] (or international law generally), and thus any act breaching Article 1F(c) must also breach Article 1F(a) and/or (b). In rejecting that, UTIAC said:

> "23. The point of distinction as it seems to us, is the distinction between crimes and other acts. Article 1F(a) and (b) are both concerned with crimes and it is not surprising therefore that rules emanating for example from the ICC Statute should be regarded as applicable to both of those limbs, though applicability to 1F(b) must be a matter in our view for future

> litigation since JS was concerned with 1F(a) only. But the fact that there may be an overlap does not in our view justify the conclusion that there is anything surprising or curious about the fact that different elements of secondary liability may apply to the different heads under Article 1F bearing in mind the different types of matter with which they are concerned. The fact that a particular act may fall within 1F(c) and at the same time fall under (a) or (b) does not in our view invest it with the necessarily criminal character of a kind which would require incorporating the ICC Statute provisions into our assessment of the Rules pertaining to 1F(c)."

23. There can never have been any doubt that the substantive acts of terrorism, perpetrated and to be perpetrated by others, for which the Appellant expressed support represented crimes within the definitions set down in Article 1F(a) and/or (b). Hence to conclude, as they did, that conduct might satisfy Article 1F(c) without satisfying Article 1F(a) or 1F(b) meant, *a fortiori*, that the Tribunal were focussed on the acts of the Appellant, and on whether those acts satisfied the test in Article 1F(c). Moreover, in their conclusions, UTIAC stated that "the language used by the Appellant is such that it can properly be characterised as explicit direct encouragement or incitement to acts of terrorism" [paragraph 55] and they concluded in paragraph 56:

> "…we consider that the respondent has made out her case. We do not consider that these words can be taken as falling short of the test as contended by Mr Mackenzie. These are statements comprising incitement and encouragement made by a man whose words, in our view, clearly cross the border of implicit encouragement and incitement and indeed amount to explicit encouragement and incitement such that his actions fall within the exclusion clause as set out in Article 1F(c) and as expressed in the Qualification Directive in Article 12(2)(c)."

24. It seems perfectly clear to me that the Upper Tribunal were deciding that the actions of the Appellant in encouraging jihadist terror in themselves amounted to acts sufficient to justify exclusion. In doing so they were, of course, rejecting the principal argument advanced by the Appellant that, in order to cross that threshold, the acts relied on must amount to crimes within the ICC statute or within international law, or at least must be shown to lead to the commission of such substantive crimes.

25. It is against that background that we must proceed.

N2: The Facts

26. The facts in this case, and the conduct which SIAC found to justify exclusion from the Refugee Convention, are a matter of public record. N2 was convicted of six counts of possession of a record for a purpose connected with the commission or preparation of an act of terrorism, contrary to section 54 of the Terrorism Act 2000. He was also convicted of two counts of acquiring criminal property for non-terrorist purposes. The convictions were based on computer files discovered on two computers in his possession in April 2006. The material included descriptions of how to establish a jihadist organisation, and how to make viable explosives or other dangerous material.

27. In the course of sentencing him, the Recorder of Manchester HHJ Maddison emphasised the degree of detail in the material found, including:

> "… an organisational chart for the establishment of terrorist cells and detailed and genuine instructions in relation to the making of harmful chemicals, explosive substances, detonators, explosive devices and bombs and the placing of such devices and the targeting of particular premises, public places and public figures."

28. The sentencing judge also emphasised the context, and the conclusions he drew:

> "Your possession of this material has to be seen in the context of other features of the case. One, is the additional material also found on your computer at Lansdowne Road, but part of the background is formed also by your multiple identities, your different addresses, your coming to this country from Holland, late in 2002 under an assumed name and, on any fair view, the end also lies which you then told before and during the police inquiry into this case.
>
> Doubts remain as to who you really are and where you really come from. In my view the only reasonable conclusion to be drawn from these features of your case is that you were indeed as the prosecution contended, a sleeper for some sort of terrorist organisation."

29. At the same time, it was accepted that it was not possible to demonstrate that N2 had been involved in the commission, preparation or instigation of:

> "…an act of terrorism, and there is no evidence you have done so. It is not known if, when and how you might have been called on to play your part".

30. Mr Friedman QC for this Appellant accepts these facts cannot be challenged, and his appeal falls to be considered against that background. He too accepts that the acts of terrorism which must have been in contemplation here would, if committed or attempted, have been sufficient to satisfy Article 1F(c) (and indeed Article 1F(a)). Here too the argument is centred on whether acts preparatory for such substantive offending, but falling short of attempts or completed terrorist attacks, are sufficient to satisfy the requirements of Article 1F(c).

31. There is a single ground of appeal in this case, in respect of which SIAC granted leave to appeal:

> "(1) SIAC erred when it decided that the Appellant was guilty of acts contrary to the purposes and principles of the United Nations [within the meaning of Article 1F(c) of the UN Convention Relating to the Status of Refugees 1951 (the "Refugee Convention")], despite the absence of a completed, or attempted, terrorist act."

32. It is worth noting that SIAC refused permission to appeal on a further ground, that the Commission:

> "… erred in its approach when deciding that the acts of the Appellant (a) crossed the gravity threshold of Article 1F(c) and/or (b) satisfied the condition that the acts had the "requisite serious effect upon international peace, security and peaceful relations between states"."

No application was made to renew that ground, hence the gravity or seriousness of the acts of this Appellant, or indeed their international impact, are not a matter for argument in this appeal.

The Issue Common to Both Appeals

33. It follows from the above that the common issue in both appeals is whether acts may be sufficient to satisfy the threshold for exclusion from the Convention under Article 1F(c), where those acts were neither themselves completed or attempted terrorist acts, nor can they be shown to have led to specific completed or attempted terrorist acts by others.

What are Acts Contrary to the Purposes and Principles of the United Nations: United Nations Materials

34. Chapter 1, Article 1 of the United Nations Charter specifies the purposes of the United Nations. Article 1.1 reads:

> "1.1 To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace…"

35. In Resolution A/RES/49/60 of 9 December 1994, the General Assembly of the United Nations resolved to adopt measures to eliminate international terrorism. In the course of the document, the General Assembly:

> "Solemnly declares the following:
>
> 1. The States Members of the United Nations solemnly reaffirm their unequivocal condemnation of all acts, methods and practices of terrorism, as criminal and unjustifiable, wherever and by whomever committed, including those which jeopardize the friendly relations among States and peoples and threaten the territorial integrity and security of States;
>
> 2. Acts, methods and practices of terrorism constitute a grave violation of the purposes and principles of the United Nations,

> which may pose a threat to international peace and security, jeopardize friendly relations among States, hinder international cooperation and aim at the destruction of human rights, fundamental freedoms and the democratic bases of society;
>
> 3. Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them;"

36. By Resolution A/RES/51/210 of 17 December 1996, the General Assembly reaffirmed the declaration of 1994 and approved a supplementary declaration including the following:

> "Deeply disturbed by the worldwide persistence of acts of international terrorism in all its forms and manifestations, including those in which States are directly or indirectly involved, which endanger or take innocent lives, have a deleterious effect on international relations and may jeopardize the security of States,
>
> Underlining the importance of States developing extradition agreements or arrangements as necessary in order to ensure that those responsible for terrorist acts are brought to justice,
>
> Noting that the Convention relating to the Status of Refugees, done at Geneva on 28 July 1951, does not provide a basis for the protection of perpetrators of terrorist acts, noting also in this context articles 1, 2, 32 and 33 of the Convention, and emphasizing in this regard the need for States parties to ensure the proper application of the Convention,
>
> Stressing the importance of full compliance by States with their obligations under the provisions of the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, including the principle of non-refoulement of refugees to places where their life or freedom would be threatened on account of their race, religion, nationality, membership in a particular social group or political opinion, and affirming that the present Declaration does not affect the protection afforded under the terms of the Convention and Protocol and other provisions of international law,"

37. On the day after the terrorist attack on the World Trade Centre on 11 September 2001, the UN Security Council passed Resolution 1368, which condemned unequivocally "in the strongest terms" the attack on the day before and continued:

> "The Security Council

> …
>
> 3. Calls on all States to work together urgently to bring to justice the perpetrators, organisers and sponsors of these terrorist attacks and *stresses* that those responsible for aiding, supporting or harbouring the perpetrators, organisers and sponsors of these acts will be held accountable."

38. Later that month on 28 September 2001, the Security Council adopted Resolution 1373 (2001) reaffirming the condemnation of terrorism and, deciding that further measures were required to be taken, the Security Council continued by declaring:

> "5. … that acts, methods, and practices of terrorism are contrary to the purposes and principles of the United Nations and that knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations."

39. On 4 September 2003, the UNHCR issued "GUIDELINES ON INTERNATIONAL PROTECTION: Application of the Exclusion Clauses: Article 1F of the 1951 Convention". The Guidelines were "intended to provide interpretive legal guidance for governments, legal practitioners, decision-makers and the judiciary". The Guidelines explicitly addressed Article 1F, including Article 1F(c), as follows:

> **"C. Article 1F(c): Acts contrary to the purposes and principles of the United Nations**
>
> 17. Given the broad, general terms of the purposes and principles of the United Nations, the scope of this category is rather unclear and should therefore be read narrowly. Indeed, it is rarely applied and, in many cases, Article 1F(a) or 1F(b) are anyway likely to apply. Article 1F(c) is only triggered in extreme circumstances by activity which attacks the very basis of the international community's coexistence. Such activity must have an international dimension. Crimes capable of affecting international peace, security and peaceful relations between States, as well as serious and sustained violations of human rights, would fall under this category. Given that Articles 1 and 2 of the United Nations Charter essentially set out the fundamental principles States must uphold in their mutual relations, it would appear that in principle only persons who have been in positions of power in a State or State-like entity would appear capable of committing such acts. In cases involving a terrorist act, a correct application of Article 1F(c) involves an assessment as to the extent to which the act impinges on the international plane – in terms of its gravity, international impact, and implications for international peace and security.
>
> **D. Individual responsibility**

18. For exclusion to be justified, individual responsibility must be established in relation to a crime covered by Article 1F. Specific considerations in relation to crimes against peace and acts against the purposes and principles of the UN have been discussed above. 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.

…

C. ARTICLE 1F(c): ACTS CONTRARY TO THE PURPOSES AND PRINCIPLES OF THE UNITED NATIONS

46. Article 1F(c) excludes from international protection as refugees persons who have been "guilty of acts contrary to the purposes and principles of the United Nations". The purposes and principles of the United Nations are spelt out in Articles 1 and 2 of the UN Charter, although their broad, general terms offer little guidance as to the types of acts that would deprive a person of the benefits of refugee status. The *travaux préparatoires* are also of limited assistance, reflecting a lack of clarity in the formulation of this provision, but there is some indication that the intention was to cover violations of human rights which, although falling short of crimes against humanity, were nevertheless of a fairly exceptional nature. Indeed, as apparently foreseen by the drafters of the 1951 Convention, this provision has rarely been invoked. In many cases, Article 1F(a) or Article 1F(b) are likely to be applicable to the conduct in question. Given the vagueness of this provision, the lack of coherent State practice and the dangers of abuse, Article 1F(c) must be read narrowly.

47. The principles and purposes of the United Nations are reflected in myriad ways, for example by multilateral conventions adopted under the aegis of the UN General Assembly and in Security Council resolutions. Equating any action contrary to such instruments as falling within Article 1F(c) would, however, be inconsistent with the object and purpose of this provision. Rather, it appears that Article 1F(c) only applies to acts that offend the principles and purposes of the United Nations in a fundamental manner. Article 1F(c) is thus triggered only in extreme circumstances by activity which attacks the very basis of the international community's coexistence under the auspices of the United Nations. The key words in Article 1F(c) – "acts contrary to the purposes and

principles of the United Nations" – should therefore be construed restrictively and its application reserved for situations where an act and the consequences thereof meet a high threshold. This threshold should be defined in terms of the gravity of the act in question, the manner in which the act is organised, its international impact and long-tem objectives, and the implications for international peace and security. Thus, crimes capable of affecting international peace, security and peaceful relations between States would fall within this clause, as would serious and sustained violations of human rights.

48. Furthermore, given that Articles 1 and 2 of the UN Charter essentially set out the fundamental principles States must uphold in their mutual relations, in principle only persons who have been in a position of power in their countries or in State-like entities would appear capable of violating these provisions (in the context of Article 1F(c)). In this context, the delegate at the Conference of Plenipotentiaries, who pressed for the inclusion of this clause, specified that it was not aimed at the "man in the street". The UNHCR Handbook likewise states in paragraph 163 that "an individual, in order to have committed an act contrary to these principles, must have been in a position of power in a member State and instrumental to his State's infringing these principles". Indications in some jurisdictions that this provision can apply to individuals not associated with a State or State-like entity do not reflect this general understanding. Moves to apply this provision more broadly, for example to activities such as drug trafficking or smuggling/trafficking of migrants, are also misguided.

49. The question of whether acts of international terrorism fall within the ambit of Article 1F(c) has nevertheless become of increasing concern, including not least since the Security Council determined in Resolutions 1373 (2001) and 1377 (2001) that acts of international terrorism are a threat to international peace and security and are contrary to the purposes and principles of the United Nations. Yet the assertion – even in a UN instrument – that an act is "terrorist" in nature would not by itself suffice to warrant the application of Article 1F(c), not least because "terrorism" is without clear or universally agreed definition. Rather than focus on the "terrorism" label, a more reliable guide to the correct application of Article 1F(c) in cases involving a terrorist act is the extent to which the act impinges on the international plane – in terms of its gravity, international impact and implications for international peace and security. In UNHCR's view, only terrorist acts that are distinguished by these larger characteristics, as set out by the aforementioned Security Council Resolutions, should qualify for exclusion under Article 1F(c), although only the leaders of groups responsible for such

> atrocities would in principle be liable to exclusion under this provision. As discussed in paragraphs 41, 79-84, terrorist activity may also be excludable under the other exclusion provisions."

40. By Res/1624 (2005) of 14 September 2005 the Security Council, reaffirming earlier relevant resolutions:

> *"Condemning also* in the strongest terms the incitement of terrorist acts and *repudiating* attempts at the justification or glorification (*apologie*) of terrorist acts that may incite further terrorist acts,
>
> ...
>
> *Recalling* the right to freedom of expression reflected in Article 19 of the Universal Declaration of Human Rights adopted by the General Assembly in 1948 ("the Universal Declaration"), and recalling also the right to freedom of expression in Article 19 of the International Covenant on Civil and Political Rights adopted by the General Assembly in 1966 ("ICCPR") and that any restrictions thereon shall only be such as are provided by law and are necessary on the grounds set out in paragraph 3 of Article 19 of the ICCPR,
>
> *Recalling in addition* the right to seek and enjoy asylum reflected in Article 14 of the Universal Declaration and the non-refoulement obligation of States under the Convention relating to the Status of Refugees adopted on 28 July 1951, together with its Protocol adopted on 31 January 1967 ("the Refugees Convention and its Protocol"), and also *recalling* that the protections afforded by the Refugees Convention and its Protocol shall not extend to any person with respect to whom there are serious reasons for considering that he has been guilty of acts contrary to the purposes and principles of the United Nations,
>
> ...
>
> *Recalling* that all States must cooperate fully in the fight against terrorism, in accordance with their obligations under international law, in order to find, deny safe haven and bring to justice, on the basis of the principle of extradite or prosecute, any person who supports, facilitates, participates or attempts to participate in the financing, planning, preparation or commission of terrorist acts or provides safe havens,
>
> 1. *Calls upon* all States to adopt such measures as may be necessary and appropriate and in accordance with their obligations under international law to:

> (a) Prohibit by law incitement to commit a terrorist act or acts;
>
> (b) Prevent such conduct;
>
> (c) Deny safe haven to any persons with respect to whom there is credible and relevant information giving serious reasons for considering that they have been guilty of such conduct."

41. Finally, on 24 September 2014 the Security Council passed Resolution 2178 (2014), which *inter alia* recorded the Security Council as:

> *"Expressing grave concern* over the acute and growing threat posed by foreign terrorist fighters, namely individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict, and *resolving* to address this threat,
>
> …
>
> *Expressing* concern over the increased use by terrorists and their supporters of communications technology for the purpose of radicalizing to terrorism, recruiting and inciting others to commit terrorist acts, including through the internet, and financing and facilitating the travel and subsequent activities of foreign terrorist fighters, and *underlining* the need for Member States to act cooperatively to prevent terrorists from exploiting technology, communications and resources to incite support for terrorist acts, while respecting human rights and fundamental freedoms and in compliance with other obligations under international law,
>
> …
>
> *Calling* upon States to ensure, in conformity with international law, in particular international human rights law and international refugee law, that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts, including by foreign terrorist fighters,"

42. It is worth noting that this Resolution post-dated the judgment of the Supreme Court in *Al-Sirri v Secretary of State for the Home Department* [2012] UKSC 54.

43. As will be clear, there are three categories of UN material bearing on this issue: resolutions of the General Assembly, resolutions of the Security Council and the UNHCR Guidelines. How is each category to be treated? In particular, what is the force and significance of a Security Council Resolution?

44. The Appellant N2 places emphasis on the guidance of Lord Sumption in *Al-Waheed v Ministry of Defence* [2017] AC 821, where he considered the drafting and application of Security Council resolutions, in the following terms:

> "25. A Security Council Resolution adopted in the exercise of these responsibilities is not itself a treaty, nor is it legislation. But it may constitute an authority binding in international law to do that which would otherwise be illegal in international law. Sir Michael Wood, a former Principal Legal Adviser to the Foreign and Commonwealth Office, has made the point that Security Council Resolutions are not usually drafted by the Secretariat, but within the various national missions. For this reason they are not always clear or consistent either in themselves or between one resolution and another: "The Interpretation of Security Council Resolutions", *Max Planck Yearbook of United Nations Law* [1998] 73. The meaning of a Security Council Resolution is generally sensitive to the context in which it is made. In its advisory opinion of June 1971 on the *Legal consequences for states of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* [1971] ICJ Rep 16, 53, para 114, the International Court of Justice observed:
>
> > "The language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect. In view of the nature of the powers under article 25 [which requires member states to carry out decisions of the Security Council], the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council."'

45. Lord Sumption went on to conclude that the Security Council resolutions relied on in that case "in principle constituted authority in international law": see paragraph 30.

46. I bear in mind that the language of a Security Council resolution may have to be approached with the specific context in mind. It may be apt to consider any Security Council resolution very much in the light of the language of the Charter itself, and perhaps as carrying less authority than a resolution of the General Assembly. I note however that even so careful a jurist as Sedley LJ concluded that relevant Security Council resolutions could be "a legitimate indicator of the meaning and scope of the preamble to the UN Charter": see *Al-Sirri v Secretary of State for the Home Department* [2009] INLR 56 at paragraph 30.

The Effect of EU and Domestic Legislation

47. Mr O'Connor QC, for the Secretary of State in Youssef, relies on the provisions of the European Union Council Directive 2004/83/EC, the "Qualification Directive" and on s.24 of the Immigration, Asylum and Nationality Act 2006 ("the 2006 Act").

48. The Qualification Directive has the objective of carrying into European Union law "the full and inclusive application of the Geneva Convention": see Article (2) of the Recital. The Directive was transposed into United Kingdom law by the Refugee or Person in Need of International Protection (Qualification) Regulations 2006. Article 12 of the Directive lays down the basis for exclusion within EU law in the following terms, essentially mirroring Article 1F:

> "*Article 12*
>
> **Exclusion**
>
> …
>
> 2. A third country national or a stateless person is excluded from being a refugee where there are serious reasons for considering that:
>
> (a) he or she has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
>
> (b) he or she has committed a serious non-political crime outside the country of refuge prior to his or her admission as a refugee; which means the time of issuing a residence permit based on the granting of refugee status; particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes;
>
> (c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations."

49. However, Article 22 of the Recital to the Directive reads:

> "Acts contrary to the purposes and principles of the United Nations are set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations and are, amongst others, embodied in the United Nations Resolutions relating to measures combating terrorism, which declare that "acts, methods and practices of terrorism are contrary to the purposes and principles of the United Nations" and that "knowingly financing planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations"."

50. The Respondent therefore argues that the Qualification Directive, in enshrining the Refugee Convention in European law, is explicit that acts contrary to the purposes and principles of the UN are wider than the commission or attempts to commit specific

terrorist acts and expressly include "knowingly financing, planning and inciting terrorist acts". This formulation, says the Respondent, is inconsistent with the Appellants' contention that specific completed terrorist acts, or fully attempted specific terrorist acts, must be shown.

51. Moving from the Qualification Directive to the 2006 Act, Mr O'Connor relies on s.54(1) of that Act which provides:

> "**54 Refugee Convention: construction**
>
> (1) In the construction and application of Article 1(F)(c) of the Refugee Convention the reference to acts contrary to the purposes and principles of the United Nations shall be taken as including, in particular—
>
> (a) acts of committing, preparing or instigating terrorism (whether or not the acts amount to an actual or inchoate offence), and
>
> (b) acts of encouraging or inducing others to commit, prepare or instigate terrorism (whether or not the acts amount to an actual or inchoate offence)."

Hence, the Respondent argues, as a matter of English statute, the broader interpretation sought by the Respondent is made explicit.

52. The Appellants respond to these arguments firstly by submitting that the Refugee Convention must have a single autonomous meaning irrespective of where it is applied. That meaning cannot diverge as between States and legal systems, and neither the European Directive nor English statute can alter or qualify the meaning of the Convention. Here the Appellants emphasise the phrase in Article 12(2)(c) of the Qualification Directive set out above:

> "As set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations."

In other words, says Mr Fitzgerald, the Directive does not seek to expand or redefine the meaning of the Charter or of the Refugee Convention, but merely to apply it.

53. As to the single autonomous meaning of the Convention, Mr Fitzgerald relies on the decision of the House of Lords in *R v SSHD ex parte Adan* [2001] 2 AC 477, where Lord Steyn observed, in relation to this Convention:

> "It follows that, as in the case of other multilateral treaties, the Refugee Convention must be given an independent meaning derivable from the sources mentioned in articles 31 and 32 and without taking colour from distinctive features of the legal system of any individual contracting state. In principle therefore there can only be one true interpretation of a treaty. If there is disagreement on the meaning of the Refugee Convention, it can be resolved by the International Court of Justice: article 38. It has, however, never been asked to make

> such a ruling. The prospect of a reference to the International Court of Justice is remote. In practice it is left to national courts, faced with a material disagreement on an issue of interpretation, to resolve it. But in doing so it must search, untrammelled by notions of its national legal culture, for the true autonomous and international meaning of the treaty. And there can only be one true meaning." (p 516H/517B)

This was confirmed by the Supreme Court in *Al-Sirri*: see paragraph 36.

54. I am grateful for having had sight in draft of the judgment of McCombe LJ bearing on this issue. I recognise the difficulty of the point expressed by him in elegant terms. However, it appears to me that Mr Fitzgerald is probably correct in his submissions on this point. I do not see how a single autonomous meaning can be preserved if the meaning of the Convention is altered by the European Directive, or by the 2006 Act. However, I also agree that nothing in the construction of the Convention which I have considered contradicts the terms of s.54(1) of the 2006 Act, and thus the difficulty here does not affect the outcome of this case.

The Charter and Resolutions of the General Assembly of the UN

55. There is no suggestion that the Charter itself, and Resolutions of the General Assembly, represent other than authoritative statements as to the purposes and principles of the United Nations.

The UNHCR Handbook

56. There remains the question as to the authority of the UNHCR Handbook as to the meaning of the Convention.

57. The guidance of the UNHCR has carried weight in the interpretation of the Charter in more than one English case. In *R (JS (Sri Lanka)) v Home Secretary* (SC (E)) [2011] 1 AC 184, the Supreme Court was concerned with the application of Article 1F(a) of the Convention. In his leading judgment, Lord Brown of Eaton-under-Heywood placed direct reliance on paragraph 18 of the Guidelines (judgment, paragraph 14), and subsequently quoted extensively from a letter to the parties passed to the Court from the UNHCR's representative Roland Schilling: see paragraphs 22 and 23.

58. Mr Schilling's letter was written in the specific context of crimes justifying exclusion under Article 1F, but the conclusion of his letter set out in the judgment emphasises the intended threshold of gravity under Article 1F:

> "23. Mr Schilling's letter concludes, at p7:
>
> "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 involved in crimes that may fall under article 1F(a), where presumption of individual responsibility for excludable acts may arise, a thorough and individualised assessment must be undertaken in each case. Due regard needs to be given to the nature of the acts allegedly committed, the personal responsibility and involvement of the applicant with regard to those acts, and the proportionality of return against the seriousness of the act.""

59. In *Al-Sirri* in the Court of Appeal, Sedley LJ made explicit reference to the guidance from the UNHCR as to the meaning of terrorism for the purpose of exclusion from the Convention: see paragraph 31. When *Al-Sirri* came before the Supreme Court, the leading judgment was given by Baroness Hale and Lord Dyson, and they placed considerable emphasis on paragraph 17 of the UNHCR guidelines, quoted above: see paragraphs 14 and 16 of their judgment, with which the other justices agreed.

60. Mr Tam for the Secretary of State in N2 argued forcefully that the Guidelines are no more than guidelines, and that explicit approval of an individual paragraph on the part of the Supreme Court should not be taken necessarily to imply approval of the whole.

61. His argument is lent force by consideration of some of the contents of paragraphs 17 and 18 of the Guidance, again quoted above. The indication in paragraph 17 that "in principle only persons who have been in positions of power in a State or State-like entity would appear capable of committing such acts" along with the similar reference in paragraph 48 cannot any longer be considered accurate guidance. There is no requirement for the individual to be a state-actor: see *Germany v B* [2012] 1 WLR 1076. If such a requirement existed, the Claimant in *Al-Sirri* would have had a straightforward and unanswerable defence to exclusion from the convention, but the argument was abandoned: see *Al-Sirri*, paragraph 25.

62. It is also relevant to note that, as is clear from the chronological presentation of UN material set out above, the Security Council Resolutions of 2005 and 2014 were promulgated after the Guidance was formulated. The 2005 resolution emphasises the obligations of States to address the "incitement … justification or glorification … of terrorist acts" and calls upon States to "deny safe haven … any person who supports, facilitates, participates or attempts to participate in the financing, planning, preparation or commission of terrorist acts". The 2014 Resolution addresses directly the "increased use by terrorists and their supporters of communications technology for the purpose of radicalizing to terrorism, recruiting and inciting others to commit terrorist acts" and calls upon States "to ensure … that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts".

63. The mechanisms by which States may discharge those obligations clearly include extradition and prosecution and "denial of safe haven", see the 2005 Security Council Resolution. These references, and the direct reference to abuse of refugee status in

the 2014 Security Council Resolution, in my view clearly point to consideration of Article 1F, and to obligations on States to take action rather more broadly, and more readily, than would be indicated by a straightforward application of paragraphs 17 and 18 of the Guidance. I bear well in mind the judgment of Baroness Hale and Lord Dyson in *Al-Sirri*, to which I turn below.

Does Article 1F(c) require proof of a crime contrary to International Law

64. I turn to what was the principal argument of law advanced by Youssef before the Upper Tribunal and which bears on the common issue in both appeals. This submission is supported by Mr Friedman for N2. Mr Fitzgerald acknowledges that the Supreme Court in *Al-Sirri* (paragraph 39: see below) indicated that the "essence of terrorism" included "incitement" but submits that the Supreme Court did not spell out how broadly "incitement" was to be interpreted. Youssef's case is that the Supreme Court could not have intended that incitement falling short of active involvement in a completed or attempted crime "or course of action" could come within Article 1F(c). In essence, Youssef's submission is that, by operation of international criminal law, contravention of Article 1F(c) can only be established in respect of an individual where the act or acts in question constitute a crime or crimes in international law and, as a consequence, would also amount to a breach of Article 1F(a).

65. The Claimants submit that the "key text on the limits of individual responsibility" is to be found in the judgment of the Supreme Court in *JS (Sri Lanka)*. At paragraph 8, Lord Brown stated that the ICC Statute was the "starting point" when considering whether an applicant was disqualified under Article 1F(a) and that Articles 25 and 30 of the ICC Statute were those central to the issue before the Court.

66. Articles 25 and 30 in their material parts read:

> "**Article 25**
>
> **Individual criminal responsibility**
>
> 1. The Court shall have jurisdiction over natural persons pursuant to this Statute.
>
> 2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.
>
> 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:
>
> > (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;

(e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;

(f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

Article 30

Mental Element

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.

2. For the purposes of this article, a person has intent where:

(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.

> 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. […]"

67. Proceeding from that starting point, Mr Fitzgerald summarises the steps followed by Lord Brown, and advances the proposition that there is a critical difference between international criminal law and domestic criminal law in relation to incitement or encouragement. The argument is that while in English domestic law soliciting, inducing or inciting an offence are accepted as constituting inchoate or auxiliary offences, regardless of whether any primary offence was in fact committed or attempted, that is said not to be so in relation to international criminal law, since within the terms of Article 25 there is a clear distinction between an individual who "orders, solicits or induces the commission of a crime within the jurisdiction of the court" (Article 25(3)(b)) and someone who "directly and publicly incites others" to commit certain crimes (Article 25(3)(e)).

68. The Appellant relies on the exceptional provision regarding genocide under Article 25(3)(e) as supporting the position that the ICC Statute gives rise to individual criminal responsibility only if the act of soliciting or inducing relates to an offence which is actually committed or attempted. If Article 25(3)(e) had to be introduced to fix with criminal responsibility those who publicly incite genocide, criminal responsibility cannot otherwise arise on the part of those who encourage or incite other offences.

69. The Appellant relies on the similar provision in the updated statute of the International Criminal Tribunal for the Former Yugoslavia ["ICTY Statute"] in which Article 4(3)(c) criminalises "direct and public incitement" in respect of genocide but not in respect of other crimes.

70. For these reasons, says Mr Fitzgerald, individual responsibility cannot arise for the purposes of Article 1F(c) without evidence of contribution to an actual criminal event. A decision-maker cannot rationally find that a contribution by means of support or encouragement was "significant" unless there is evidence of cause and effect: a merely hypothetical or potential effect is insufficient. Youssef's written submissions continue:

> "Whilst it is accepted that there may be no need to show complicity in any *particular* crime, where a group of people are acting with a common purpose, it does not follow that individual responsibility can exist where there is no evidence of any significant contribution to such common purpose or course of action."

I understood that concession on the part of the Appellant Youssef to extend to an acceptance that membership of a terrorist organisation would qualify under Article 1F(c): it remains unclear whether the concession is intended to extend any farther.

71. Youssef further argues that the elements of individual responsibility must be taken to be the same under all three limbs of Article 1F. Firstly, this is based on the language employed by Lord Brown in paragraph 38 of *JS (Sri Lanka)*, where he focussed on whether an individual was "disqualified under Article 1(F)" and not just 1F(a).

Secondly, Youssef argues that Article 12(3) of the Qualification Directive, in addressing "persons who instigate and participate in crimes or acts", expressly covers all three limbs of Article 1(F). Thirdly, it is submitted that it would be "surprising" if different levels of individual responsibility attached to different limbs of Article 1F, and fourthly it is submitted that the language of the Supreme Court in *Al-Sirri*, when considering individual responsibility under Article 1F(c), refers to "planning, instigating or ordering the act in question or … making a significant contribution to the commission of the relevant act" (see paragraph 15).

72. The Respondent submits that these arguments are misconceived. First, and perhaps foremost, the Secretary of State relies on the language of Article 1F(c). It cannot be taken to be a redundant provision, which would be the case if all acts for which individuals were responsible had to constitute crimes within international criminal law and therefore by definition constitute breaches of Articles 1F(a). Individuals may be in breach of both Article 1F(a) and Article 1F(c), but its very existence must give rise to the inference that individuals may breach 1F(c) without breaching 1F(a). The obvious reading of Article 1F(c) is that it founds exclusion for "acts" which are not "crimes" in international law.

73. The Secretary of State argues that the Appellant misstates the meaning and application of the decision in *JS (Sri Lanka)*. That decision was directly concerned with consideration of Article 1F(a) and not Article 1F(c). It cannot properly be regarded as an authority limiting qualification for 1F(c) merely because Lord Brown made reference to "Article 1F". As a direct authority it is confined to the issue before the court in that case.

74. So far I am in agreement with the Secretary of State. I am not convinced that there is any persuasive argument based on international criminal law confining the ambit of Article 1F(c) to acts which would satisfy the requirements for specific prosecution in the ICC, or the ICTY. The specific creation of an international criminal offence of incitement to genocide cannot directly affect the ambit of Article 1F(c), although of course it may have an effect on the ambit of Article 1F(a). In my judgment it is clear that Article 1F(c) extends beyond acts which would also satisfy Article 1F(a). Lord Brown and Lord Hope in *JS (Sri Lanka)* were only considering the ambit of Article 1F(a) and, while their broad approach to the interpretation of the Charter is helpful, their particular conclusions are not decisive in this case.

75. I have already addressed the supposed erroneous basis upon which the Upper Tribunal took their decision. In that respect the Appellant's submissions are simply wrongly founded. The argument based on the supposed equivalence of the "elements of individual responsibility" under the three limbs of Article 1F seems to me to go nowhere. If the relevant act is the incitement or encouragement then that cannot be confined by the observations of Lord Brown (for the reasons I have given). Nor do I find it surprising that "different forms of individual responsibility" attach to the different limbs of Article 1F. Indeed it seems to me unsurprising that there may be somewhat differing requirements to establish responsibility for criminal offences as opposed to other "acts" inconsistent with the purposes of the United Nations.

76. Similarly, I am not persuaded by the additional submissions made by Mr Friedman on behalf of N2. Firstly, N2 submits that UNSCR 1624, set out at paragraph 40 above and relied upon by SIAC to support their decision, condemned incitement to commit

terrorist acts, rather than conduct akin to his own. This argument appears premised on accepting that certain forms of conduct which are not terrorist attacks have been declared contrary to the principles and purposes of the United Nations. As Mr Tam for the SSHD stated in his written submissions, this argument has the tenor of a disguised submission that N2's acts lacked sufficient gravity to be excluded under Article 1F(c), rather than that it could not be so excluded in principle.

77. Secondly, N2 submitted that the decision of the CJEU in *Belgian Commissioner General for Refugees and Stateless Persons v Mostafa Lounani* (Case C-573/14) [2017] 4 WLR 52 did not preclude a finding in his favour. As I have not been persuaded by N2's argument, it is not necessary to consider this matter at length. By way of observation, however, it seems that whilst *Lounani* concerned a different factual matrix, the decision of the CJEU lends support to the conclusion that acts contrary to the purposes and principles of the United Nations are not confined to specific terrorist acts, and therefore N2's conduct is, in principle, capable of falling within Article 1F(c).

Conclusions on Grounds i and ii in Youssef and on N2

78. For these reasons, it appears to me that none of the rather technical arguments advanced in relation to the ambit of Article 1F(c) can succeed.

79. Equally, I see no basis for successful appeal on Ground ii in Youssef, which appears to me somewhat obscure in its meaning, and is perhaps no more than a repetition of Ground i.

80. In respect of N2, given my view on Grounds i and ii in Youssef and N2's additional submissions, it follows that I would dismiss his appeal.

Ground iii in Youssef

81. Youssef's Ground iii is broader. It is not concerned with a technical requirement for crime in international law, but with the seriousness of Youssef's conduct in a larger sense. No point can be taken about the international nature of his exhortations and incitement: that requirement is clearly satisfied. The question is whether the Tribunal considered sufficiently closely and fully the seriousness and impact of the Appellant's conduct, and reached proper conclusions on the point.

82. I now turn to the guidance laid down by the Supreme Court in *Al-Sirri*. The critical guidance on the application of Article 1F(c) is contained in paragraphs 36 to 40 of the joint judgment of Baroness Hale and Lord Dyson in *Al-Sirri*. In paragraph 36 the judgment confirmed that the Charter must carry a single autonomous meaning. In paragraph 37 the Court confirmed the requirement for an international dimension to the terrorism in question, both because of the wording of successive Security Council Resolutions and by reference to the terms of the Qualifications Directive. The Court noted that in *Germany v B*, the CJEU carefully referred to international terrorism. The court went on to say:

> "38. In those circumstances, it is our view that the appropriately cautious and restrictive approach would be to adopt para 17 of the UNHCR Guidelines:
>
> > "Article 1F(c) is only triggered in extreme circumstances by activity which attacks the very basis of the international community's coexistence. Such activity must have an international dimension. Crimes capable of affecting international peace, security and peaceful relations between states, as well as serious and sustained violations of human rights would fall under this category."
>
> 39. The essence of terrorism is the commission, organisation, incitement or threat of serious acts of violence against persons or property for the purpose of intimidating a population or compelling a government or international organisation to act or not to act in a particular way (see, for example, the definition in article 2 of the draft comprehensive Convention), as Sedley LJ put it in the Court of Appeal, "the use for political ends of fear induced by violence" (para 31). It is, it seems to us, very likely that inducing terror in the civilian population or putting such extreme pressures upon a government will also have the international repercussions referred to by the UNHCR. In this particular case, the AIT did not consider that any such repercussions were required, but commented that "if we are wrong about that we consider the killing itself to be an act of terrorism likely to have significant international repercussions, as indeed it appears to have done" (para 47). When the case returns to the Tribunal, the Tribunal will have to consider the totality of the evidence and apply the test set out above.
>
> 40. Finally, is it enough to meet that test that a person plots in one country to destabilise conditions in another? This must depend upon the circumstances of the particular case. It clearly would be enough if the government (or those in control) of one state offered a safe haven to terrorists to plot and carry out their terrorist operations against another state. That is what the Taliban were doing by offering Osama bin Laden and Al-Qaeda a safe haven in Afghanistan at the time. As the UNHCR says, this would have clear implications for inter-state relations. The same may not be true of simply being in one place and doing things which have a result in another. The test is whether the resulting acts have the requisite serious effect upon international peace, security and peaceful relations between states."

83. The key points in that guidance might be summarised as follows. There is a high threshold before Article 1F(c) is triggered. The activity must be capable of affecting international peace and security. However, the Court concluded that "inducing terror in the civilian population or putting such extreme pressures upon a government will

also have the international repercussions referred to …". That is clearly an issue for specific consideration by the relevant court or tribunal. Finally, the question whether such international repercussions may be established by a person plotting in one country to destabilise another is a question of fact. The test is whether the "resulting acts have the requisite serious effect". In short, do the relevant acts have the necessary character and the necessary gravity?

84. In considering that guidance it is worth bearing in mind that the decision in *Al-Sirri* pre-dated the 2014 Security Council Resolution. I have set out the relevant terms of the Resolution in paragraph 41 above. The terms of the Resolution underscore the State's obligation to "prevent terrorists from exploiting technology, communications and resources to incite support for terrorist acts" and "to ensure … that refugee status is not abused by the … facilitators of terrorist acts", in all cases acting "in conformity with … international refugee law". This Resolution is very direct in its call to action.

85. It may be helpful to consider separately the quality of the acts in question, and their gravity or severity. To adopt an illustration which arose in argument, it is easy to conceive of an immature 18 year old going on-line from his suburban bedroom, and using the most lurid terms in calling for international jihad. The nature or quality of this would, it seems to me, satisfy the requirements of Article 1F(c). It would represent active encouragement or incitement of international terror. However, it would be unlikely, without more, to be grave enough in its impact to satisfy the approach laid down in *Al-Sirri*. That might well require more: evidence of wide international readership, of large-scale repetition or re-tweeting, or citation by those who were moved to join an armed struggle, for example.

86. It is obviously right, for the reasons given by the Supreme Court in *Al-Sirri*, that careful consideration is given to the gravity or impact of any acts relied on. This is the answer to the Appellant's arguments as to the vital importance of protection of refugees, and that such protection should not be lost for "mere speech". Freedom of speech is a qualified right under the United Nations' Convention, as under the ECHR or the European Charter.

87. In paragraph 9 of their Decision and Reasons, UTIAC made direct reference to the "helpful guidance" from the Supreme Court in *Al-Sirri*, quoted parts of paragraph 16 of the judgment and made direct reference to the contents of paragraph 36. They were clearly aware therefore of that guidance and of the need to consider the "high threshold defined in terms of the gravity of the act in question". However, perhaps because of the way the argument developed before them, they did not do so directly. As I have already indicated, they dealt fully with the argument that crimes must be proved, and did so correctly. However, there is no passage in their reasons which demonstrates that thereafter they stood back and considered the gravity or seriousness of Youssef's conduct, once that argument was disposed of. In the end I am not convinced that they directed themselves on this issue with sufficient clarity. On that ground, but on that ground alone, I would allow Youssef's appeal, and remit the matter to the Upper Tribunal for reconsideration.

88. I should make it perfectly clear that I imply no conclusion as to the outcome of that reconsideration in Youssef's case.

Lord Justice McCombe:

89. I agree with Irwin LJ that the appeal in N2's case should be dismissed and that Youssef's appeal should be allowed on the one narrow ground identified by Irwin LJ and I agree that Youssef's case should, therefore, be remitted to the Upper Tribunal as Irwin LJ proposes.

90. I write these few words only to express a short reservation, not affecting the results in these two cases, arising out of paragraph 47 to 54 of my Lord's judgment (The Effect of EU and Domestic Legislation). For my own part, I would like to hold over for consideration in some future case the precise extent of the power of Parliament and the institutions of the European Union to legislate for the interpretation (in English law) of an international instrument such as the Refugee Convention.

91. I entirely agree that the starting point is that the Refugee Convention must (or ought to) have a single and autonomous meaning, irrespective of where in the world its provisions are being applied. So much is clear from the judgments in *R v SSHD, ex p. Adan* [2001] 2 AC 277 and in particular from the speech of Lord Steyn in that case to which Irwin LJ has referred. The same is also clear from the judgments in the Supreme Court in *Al-Sirri*.

92. The argument in the *Adan* case centred round the differing interpretations in certain countries as to the application of the term "refugee" to persons subject to persecution by "non-state" actors: the "persecution theory" and the "accountability theory". Under the Asylum and Immigration Act 1996, a person seeking asylum in this country could, exceptionally, be removed from the country if the Secretary of State was satisfied (inter alia) that, in the country to which the asylum claimant was to be sent, "(c) …the government of that country…would not send him to another country…*otherwise than in accordance with the Convention*…" (italics added). The issue was what the italicised words meant. The Secretary of State argued that the phrase meant "in accordance with the Convention as legitimately interpreted by the (third) country concerned": see [2001] 2 AC at 515 D-G. Lord Steyn, with whom Lord Slynn of Hadley, Lord Hobhouse of Woodborough and Lord Scott of Foscote expressly agreed, rejected this argument and said:

> "…there is no warrant for implying such words. It is noteworthy that such a legislative technique, expressly accommodating a range of acceptable interpretations, is nowhere to be found in respect of multinational treaties or conventions incorporated or authorised by United Kingdom legislation. *Such a remarkable result would have required clear wording.* The obvious and natural meaning of section 2(2)(c) is that "otherwise than in accordance with the Convention" refers to the meaning of the Refugee Convention as properly interpreted." (Loc. Cit.) (Italics again added)

93. It was in this context that Lord Steyn proceeded to the passage in his speech quoted by Irwin LJ in paragraph 53. However, since Lord Steyn spoke a statute has been enacted (section 54(1) of the 2006 Act), expressly adopting such a "legislative technique", making provision for an interpretation of Article 1(F)(c) so as to include the acts specified in paragraphs (a) and (b) of that subsection. It seems to me that the subsection purports to amount to the "clear wording" which Lord Steyn noted were absent from section 2(2)(c) of the 1996 Act. When Lord Steyn spoke about finding a

meaning for a provision of the Convention "without taking colour from distinctive features of the legal system of any individual contracting state", it seems to me that (in view of the words that I have italicised above) he could not have been ruling out the possibility of Parliament legislating for the manner in which the Convention should be interpreted as a matter of English law. To interpret the Convention in accordance with a statutorily mandated construction would not, I think, be doing so "[trammelled] by notions of its national legal culture", but simply doing as English courts must, namely applying the clear words of a statute.

94. As Lord Hobhouse said in his speech in *Adan* the Secretary of State was bound by the law of England as to what is and is not "in accordance with the Convention". In the absence of a decision of the International Court of Justice, the decision of the House of Lords in the earlier case of *Adan v Secretary of State for the Home Department* [1999] 1 AC 293 remained "for the purposes of English law and the construction of section 2 of the 1996 Act, the determinative decision".

95. Since then, however, we have the Supreme Court's decision in *Al-Sirri*. Irwin LJ has referred to paragraph 36 of the judgment in that case. The paragraph reads as follows:

> "36. Approaching the matter in the light of the general principles discussed earlier, it is clear that the phrase "acts contrary to the purposes and principles of the United Nations" must have an autonomous meaning. It cannot be the case that individual member states are free to adopt their own definitions. As Lord Steyn said in *R v Secretary of State for the Home Department, Ex p Adan* [2001] 2 AC 477, 516, "In principle therefore, there can only be one true interpretation of a treaty". There is, at least as yet, no specialist international court or other body to adjudicate upon member states' compliance with the Refugee Convention. The guidance given by the UNHCR is not binding, but "should be accorded considerable weight", in the light of the obligation of member states under article 35 of the Convention to facilitate its duty of supervising the application of the provisions of the Convention: see *R v Asfaw (United Nations High Comr for Regugees intervening)* [2008] AC 1061, para 13, per Lord Bingham, and *R v Uxbridge Magistrates' Court, Ex p Adimi* [2001] QB 667, 678. Within the European Union the Qualification Directive is designed to lay down minimum standards with which member states must comply. Sedley LJ correctly concluded that
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> > "the adoption by section 54(2) of the 2006 Act of the meaning of terrorism contained in the 2000 Act has where necessary to be read down in an article 1F[(c)] case so as to keep its meaning within the scope of article 12(2)(c) of the Directive"."

96. While this paragraph states expressly that individual member states are not free to adopt their own definitions of terms used in the Convention, it also approves Sedley LJ's statement that section 54(2) of the Act had to be "read down" to meet the requirements of the Qualification Directive. In other words, at least to that extent, the

courts have to read Convention terminology in a manner compliant with legislation of the UK Parliament and directly applicable European Union instruments.

97. In my judgment, nothing in the construction of the Convention which Irwin LJ has carefully explained contradicts the terms of s.54(1) of the 2006 Act and, therefore, the possible problem which I have sought to isolate in the paragraphs above does not cause concern in the present case.

Lady Justice Rafferty

98. I agree. I have read in draft paragraphs 53 and 54 of the judgment of Irwin LJ, and the judgment of McCombe LJ. I agree with the way Irwin LJ has approached the question of interpretation of the Charter. I also agree with both Irwin and McCombe LJJ that the problem does not give rise to concern in this case.