Upper Tribunal
(Immigration and Asylum Chamber)

SK (Article 1F(a) – exclusion) Zimbabwe [2010] UKUT 327 (IAC)

THE IMMIGRATION ACTS

Heard at Field House
On 11 May 2010

Date Sent

Before

Mr Justice Ouseley
Senior Immigration Judge Eshun

Between

SK

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Pickup, instructed by Howe & Co
For the Respondent: Mr Ouseley, Home Office Presenting Officer

1. Article 7.1 of the Statute of the International Criminal Courts, the Rome Statute, is usually regarded as providing the best working definition of a crime against humanity for the purposes of Article 1F(a) of the Refugee Convention.

2. Where the act or crime does not involve the specifically listed forms of acts or crimes, in order to consider that a crime against humanity had occurred, the Tribunal must consider if the acts participated in by the appellant were of a "similar character" to those specified in Article 7.1(a) to (j) of the Rome Statute. In so doing, the Tribunal must consider the specific purpose of the crime, its intent and effect, the participation of an appellant in the crime and if needs be whether the appellant made a substantial contribution to the crime.

DETERMINATION AND REASONS

Introduction

1. The appellant is a citizen of Zimbabwe, born in 1971, widowed and with three children in Zimbabwe. She arrived in the UK in 2002 but did not apply for asylum until 7 May 2008. This was refused in September 2008 and she was then to be removed to Zimbabwe as an illegal entrant. She appealed against that decision of the SSHD on the grounds that her removal would infringe the Refugee Convention and her ECHR rights under Articles 2 and 3.

2. Her appeal was allowed on the grounds that removal would breach Article 3. Her asylum appeal was dismissed on the ground that she was excluded from the protection of the Refugee Convention under Article 1F, and from humanitarian protection. This was because of her participation in crimes against humanity through her involvement in the violent invasion of land owned by two white farmers and the violent expulsion of their black farm workers from their houses and jobs on those farms.

3. Immigration Judge Buchanan, in a carefully considered determination, rejected her claim that she had participated through duress or obedience to superior orders.

4. Reconsideration was ordered by Mitting J in June 2009. He concluded that the Immigration Judge's decision on the appellant's personal participation in the activity of the group, and on coercion were unimpeachable. He also thought it beyond doubt that the Zimbabwe regime's attacks on white farmers and their workers constituted an attack directed against any civilian population within Article 7.1 of the Statute of the International Criminal Court, the Rome Statute, which is usually regarded as providing the best working definition of a crime against humanity for the purpose of Article 1F(a) of the Refugee Convention. Such attacks must also involve one or more of the listed forms of violence for the attacks to be a crime against humanity. Mitting J thought that the specifically listed forms of violence were not involved and the IJ could only conclude that a crime against humanity

had occurred if the acts in which the appellant participated were "of a similar character" to those acts specified in Article 7.1(a)-(j) of the Rome Statute. Mitting J thought it arguable that the IJ had failed to ask himself whether the acts in which the appellant participated were of such a nature. The reconsideration ordered by Mitting J was confined to that issue.

The nature of the reconsideration

5. The AIT decided that there was indeed an error of law, as Mitting J had said was arguable. The IJ had not considered a relevant question. The AIT added that the Tribunal might need to hear further evidence about what she did during the farm invasions, although the existing determination was full and thorough. The appellant accordingly was to attend to deal, if required, with the acts she participated in during the farm invasions. The remainder of the IJ's findings were to stand.

6. The IJ had considered evidence in the appellant's first witness statement of 21 May 2008 and in her asylum interview which contained, or at least appeared strongly to contain, admissions that during her participation in two farm invasions, she had actually killed people. He concluded however, having heard her evidence about what she had done and why she had said what she had said, that she had not actually killed anyone. He found the rest of what she said had happened in Zimbabwe to be "comprehensive, detailed and truthful". He did not accept her as an entirely truthful witness however because of what she said about how she had obtained a passport illegally from a white person working in the Zimbabwe Embassy.

7. We decided that we needed to hear further evidence from the appellant. In the light of the determination and of her statements, we concluded that further detail was required as to what she had done, how serious the harm she had inflicted had been and with what intent she had inflicted it. The evidence already given was insufficiently detailed and focussed on those issues. We heard such evidence bearing in mind, as we emphasised to the parties, that we were not going behind the finding that she had killed no one. This did not preclude us hearing questions of her as to why she had said or had appeared to say, on two occasions, that she had in fact killed people, for what light that might cast on her credibility on the detail.

8. We had to make up our own minds as to the detail of what she had done. The previous findings did not require us to accept that the detail of what she might say to us was inevitably true or reliable. We should not however overturn or go behind what the IJ had found on the evidence he had heard.

Crimes against humanity

9. Article 1F(a) of the Refugee Convention excludes from recognition as a refugee someone in respect of 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". Article 12(2)(a) of the Qualification Directive (2004/83/EC) is to the same effect. This became part of domestic law through the Refugee or Persons in Need of International Protection (Qualification) Regulations 2006 (SI 2006/2525).

10. The starting point for considering who is excluded by those provisions is the Rome Statue of the International Criminal Court; see R (JS (Sri Lanka)) v SSHD [2010] UKSC 15. This case concerns crimes against humanity. Article 7 of the ICC Statute provides:

> "1. For the purpose of this Statute "crime against humanity" means any of the following acts when committed as part of a widespread systematic attack directed against any civilian population, with knowledge of the attack:
> (a) Murder;
> (b) Extermination;
> (c) Enslavement;
> (d) Deportation or forcible transfer of population;
> (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
> (f) Torture;
> (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
> (h) Persecution against any identifiable group or collectivity on political, radical, national, ethnic, cultural, religious, gender, other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
> (i) Enforced disappearance of persons;
> (j) The crime of apartheid;
> (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

11. The terms of the order for reconsideration required the Tribunal to focus exclusively on subparagraph (k), "as the only arguably relevant subparagraph", as Mitting J put it. Mitting J said that it was not self-evident that the acts in which the appellant had participated were of

that character. We have confined ourselves to that subparagraph, although not necessarily agreeing that none of the other subparagraphs was arguably applicable to the forced removal of black workers from white owned farms for imputed political motives of support for the opposition to Mugabe. Of course, the reference to "other inhumane acts of a similar character" means that there may be a strong kinship between, say, persecutory acts on racial or political grounds or forcible transfer of population, and acts which fall within (k); and acts are not excluded from consideration under (k) because they might fit into one or more of the other subparagraphs. It was agreed that the proper interpretation of subparagraph (k) did not require some artificial compartmentalisation of the acts, followed by a narrow view of them.

12. Ms Pickup for the appellant did not take issue with the general point made by Mitting J that "the Zimbabwe regime's attacks on white farmers and their workers fall within the definition of "attack directed against any civilian population". She contended that the two farm invasions in which the appellant took part were not within subparagraph (k) on the evidence here. Her principal argument was however directed to what the appellant herself had intended and done during those attacks; and those she contended fell outside that subparagraph.

13. JS (Sri Lanka) also dealt with what had to be shown in relation to individual participation in crimes against humanity for that individual to be excluded from the Refugee Convention. We start however with the ICC Statute, Article 25 of which provides for individual criminal responsibility where a person:

> "(a) Commits [a crime against humanity] 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;

14. Article 30 deals with the mental element of the crime. Guilt requires both intent and knowledge which are elaborated as follows:

> "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 purpose 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."

15. Ms Pickup submitted that an individual could not be held responsible for a crime unless he had made a "substantial contribution" to it, even if that person had been a participant in a joint enterprise to commit it. Mr Ouseley for the SSHD submitted that if there was participation in a joint enterprise as understood in UK domestic law, there was no requirement for the degree of participation in it to be "substantial". The concept of responsibility for a crime on the basis of "substantial contribution" was not a limit on joint enterprise responsibility, but was relevant because responsibility in international law was wider than domestic joint enterprise liability; international responsibility extended not just to those who were liable as participants in a joint enterprise, but also to those who had knowingly made a "substantial contribution" to the crime.

16. Paragraph 18 of the UNHCR Guidelines, which deals with this exclusion provision, reads:

> "…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."

17. Lord Brown approved that approach in JS, in paragraphs 35 and 38, saying:

> "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."

18. Lord Hope adopted what Lord Brown had said above, but showed that the reference to "significant contribution" as used by the German Administrative Court contrasted those who had committed the crime personally and those who were still personally responsible because they had "made a substantial contribution to its commission." Lord Kerr, in paragraphs 57-58, cites the use of the phrase in the context of someone who "lends a significant contribution to the crimes involved [in the joint enterprise]" which might or might not suggest that a significant contribution was required from an actual participant in the joint enterprise. But he emphasised that the real point was that what was required was more than mere passivity or mere continued involvement in an organisation after acquiring knowledge of its crimes against humanity.

19. The distinction drawn by Mr Ouseley is supported by paragraph 18 of the UNHCR Guidelines, and the structure of Article 25 itself, where contribution in a way other than those specified, which cover joint enterprise, leads to criminal responsibility. There is no requirement for a particular degree of participation in domestic law before that participation is a criminal act. But the requirement in domestic law for a shared guilty intention, taking the issue at a simple level, would act as an indirect control on the degree of participation which would actually lead to criminal responsibility in a joint enterprise. JS decided that criminal responsibility in international law went beyond domestic joint enterprise. Much of what it discussed and decided about "substantial contribution" relates to the basis for that wider criminal responsibility, rather than to what is required for international responsibility on a joint enterprise basis. That phrase is used largely in the context of joint enterprise being too narrow a definition of that liability.

20. The debate, so far as this case is concerned, is not advanced by consideration of what is required beyond mere membership of a terrorist organisation, or the role of the military foot soldier in an organisation which has both military and terrorist purposes, or the person who raises money for an organisation, which at some later stage carries out a crime against humanity.

21. We think that the answer is this: personal responsibility can arise through personal participation in the crime, which includes participation on a joint enterprise basis. But personal responsibility is not limited to that and also covers those who have made a "substantial contribution" to the commission of the crime, with the requisite knowledge and intent. There is no requirement as such that the

individual's participation on a joint enterprise be itself a "substantial contribution" to the crime, although the combination of participation and intent will usually demonstrate that such a contribution was made. The need to keep a strict eye on the operation of the exclusion clause may mean that there are some whose participation might suffice in law for responsibility on a joint enterprise basis, but which could properly be described as trivial or insubstantial. It may well be that such a person would fall outside the scope of the exclusion clause, rather in the way that a judge might ask whether it really was in the public interest to prosecute such a person. Of course mere passivity would not suffice for joint responsibility anyway. That apart, there is in our judgment no further requirement in international law that those who participated in a joint enterprise crime against humanity should also have played a substantial part in it. It is also clear that at least a purpose of that requirement for a "substantial contribution", which is very relevant to liability through acts where the involvement is more indirectly linked to the violence or force which underpins all these crimes, is to prevent mere passivity or membership of an organisation with knowledge constituting such crimes. That gives a clear pointer to the conclusion that it is not intended to exclude all lesser participants from the scope of international criminal responsibility leaving only the more serious criminals to face trial and punishment.

22. This case is concerned with the responsibility of someone who, on her own evidence, used violence herself on black farm workers to help to drive them from their homes during two farm invasions, which were intended to remove those workers as well as the white farmer, so that his land could be taken by others, usually regime acolytes or its marauding supporters. She was not a ring leader, nor one of the hard core of the Zanu-PF youth militia, but she was one of the large group of militia members, one of the mob, who were taken to the farms to drive out the workers, burn their homes and ensure that they were too intimidated ever to return. Of course, we accept that it is necessary to look at what she personally actually did, and with what intent. But we reject what seemed to be Ms Pickup's suggestion that her personal acts and intent are the end of the matter, as if there were no context to what she did, as if she were not doing what she did as part of an invading mob which had a clear and violent purpose. This has to be examined to judge whether she was part of this joint enterprise.

23. We also reject Ms Pickup's submission that the question of the intent with which the appellant committed the acts of violence is to be answered by reference to her motivation in committing those acts, namely out of fear and to seem to be a participant in order to protect herself, when in reality she did not want to see these workers driven from their homes. We reject this not just because her plea of duress was

rejected by the Immigration Judge, but because the Rome Statute deals with intent not motivation, as is the commonplace in the criminal law. Ms Pickup's reference to what the ITFY Appeals Chamber said at paragraph 117 in Kordic, is a misreading of it; the reference to "motivated by intent" is more to emphasise the need for intent than to introduce the need for a separate examination of motivation, as we think the rest of that judgment on intent puts beyond doubt.

The evidence

24. The most convenient starting place is with the evidence as recorded by the Immigration Judge. The appellant had explained how her uncle had taken her into his family after her parents had died; he was an ardent Zanu-PF supporter. In 2001, he had made her join the Zanu-PF youth brigade or militia in 2001. She described the sexual abuse to which she was subjected, and other activities of the militia to which she objected. This included forcing villagers to attend rallies. Those are not the basis of the SSHD's case that she should be excluded from the Refugee Convention. His case is based on the two farm invasions.

25. Her evidence about the first one was this:

> "16. In April and October 2002 appellant was involved in two farm invasions which she had explained in detail and which involved her being part of a large group of Zanu PF activists who attacked two white owned farms. The first attack took place at a place called Manzou Farm where a white farmer had been given an eviction order which he had disregarded. The appellant was with a mob of perhaps one hundred twenty people, including members from different areas and trained youth members and senior leaders.
>
> 17. The group was split into two and the senior members which included the appellant's uncle went to the farmer's house and beat him up. The appellant in the other group was involved in going to the farm workers' houses, beating them up and burning their houses down. The appellant admitted that she was one of those carrying a stick or "chamu", but she was not involved in burning any of the houses. She found the situation very scary and although she did hit people she did not use excessive force.
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> 18. The appellant disliked what she had to do, but was afraid of the repercussions if she left the youth militia. Rumours abounded about how another girl had tried to escape, had been caught and severely punished."

26. Her evidence about the second was this:

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

Her witness statement said that she started beating the woman when she stumbled while the appellant was chasing her, she felt she had to beat her to avoid being a target herself, and punished; and she had stopped beating the woman when she realised that she was not being watched, and that enabled the woman to escape. She was also part of the group who watched as the farmer was badly beaten, and she was one of those who looted his maize.

27. The Immigration Judge accepted this evidence, finding at paragraph 84:

> "84 I further find that she had participated in actions against civilians which had resulted in innocent civilians, both MDC supporters and farm workers on two farms, being badly harmed, and that she had used force with a stick to beat these innocent people. I do accept that she was only one of a number of people on the two farm invasions, that she had not personally been involved in setting fire to people's houses, or that she was a prominent member of these groups. But there is no denying the serious nature of these attacks on innocent civilians, and that the appellant participated in them.
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> 85. The onus is on the respondent to show that the appellant falls within the categories identified in Article 1F of the 1951 Convention. I am entirely satisfied that the actions taken by the group in which the appellant participated were acts involving crimes against humanity. The appellant had voluntarily joined the Zanu PF militia, even though at the instigation of her uncle; she had participated in its activities, she was aware of the actions taken against civilians and she had failed to disassociate herself from these activities at the earliest safe opportunity. I accept the respondent's suggestion that it was not so much due to remorse that she had decided to desert from the militia, but on account of having been raped by another member of the militia that prompted her eventually to leave."

28. The Appellant's account of how she was forced to join the youth brigade, the sexual abuse she suffered, the activities of the militia in which she participated, including helping to force villagers come to Zanu-PF meetings with threats and violence, and the terrible consequence for those in the youth brigade who appeared unsympathetic to its aims and methods, were all of a piece with how her expert, Dr Kibble, described the militia behaving in 2002/3, and with what the Solidarity Peace Trust and other reports told of their wanton, sadistic, and extreme brutality against those whom they perceived as Mugabe's enemies. This did not start in 2008, though it may have become yet more widespread and severe against those who had not voted for him in the elections.

29. Dr Kibble was asked to comment on how her account fitted with his knowledge of what was happening in Zimbabwe at the time, with what the youth militia were doing, and the risks she faced through disobedience. This was in connection with her argument about duress. It was from the start of 2002 that allegations emerged against the youth militia of murder, rape, torture, and property destruction. This is when they began to be used to occupy farms and to force people from their homes, the farm invasions. He described the impunity with which the militias operated, and harsh treatment meted out to those who were suspected of supporting opposition parties and indeed those who were not sufficiently sympathetic supporters.

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

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

The Appellant's evidence to the Upper Tier

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

the Youth Brigades who were beating people so severely that she thought they would die.

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

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

Were the farm invasions crimes against humanity?

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

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

37. We are satisfied that the intention behind these invasions in general, and it applies as well to the two in which the Appellant participated, was to cause great suffering or inflict serious physical or mental injury. The aim was to drive people from their homes and their work, and to do so in such a way that they would be so cowed by their experience

that they would neither return to their homes nor foment opposition outside. It would also deter resistance on other farms or in other potential areas of opposition. The aim was achieved by the mob violence of beatings administered to men and women, burnings and lootings in a deliberately brutal and terrifying experience.

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

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

Participation

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

41. We accept the generality of her evidence, and specifically that no one was murdered. We accept she was a lesser participant, and that others, below the ringleaders, were more active and brutal. But we also felt that, in her evidence to us, she falsely underplayed her role at the second farm invasion. She clearly beat a number of people on it. She beat one woman very severely to demonstrate her loyalty, not just to make the woman run away. We note her evidence that she was shocked at how hard she had beaten the woman and thought she had beaten her so severely she would die.

42. The Appellant was not merely present. She was on each occasion a voluntary, even if reluctant, actual and active participant in beatings;

even taking her evidence at face value, beating many people hard as part of the aim of driving them away. She specifically tried to demonstrate her loyalty to Zanu-PF in her actions.

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

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

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

46. This appeal is dismissed.

Signed Date

Mr Justice Ouseley
sitting as a Judge of the Upper Tribunal