AA (Exclusion clause) Palestine [2005] UKIAT 00104

IMMIGRATION APPEAL TRIBUNAL

Date: 7 December 2004
Date Determination notified:
18 May 2005

Before:

The Honourable Mr Justice Ouseley (President)
Ms C Jarvis (Vice President)
His Honour Judge G Risius CB (Vice President)

Between:

SECRETARY OF STATE FOR THE HOME DEPARTMENT
APPELLANT

and

RESPONDENT

Appearances:
For the Appellant: Mr A Sheikh, Home Office Presenting Officer
For the Respondent: Mr B Lams, instructed by Fitzgrahams Solicitors

DETERMINATION AND REASONS

1. This is an appeal against the determination of an Adjudicator, Mr R J Oliver, promulgated on 2 December 2003. He allowed the Claimant's appeal on asylum and human rights grounds against the Secretary of State's decision in July 2003 to refuse asylum and to give removal directions for Palestine. The Secretary of State appeals against that decision. In granting permission to appeal, the Vice President commented that it was "*surprising that exclusion under the Refugee Convention had not been raised*".

2. The Claimant is a Palestinian originally resident in Gaza, born in 1975, who entered the United Kingdom in 1997 on a student visa. He was given two months' leave to enter and claimed asylum after a month. He was not interviewed until June 2003.

3. The Claimant's case was that when he was fourteen he had been asked the join the "*Jihad Islamic Movement*", and had no choice but to join. He underwent

two years' intensive training in Islamic rules and in understanding those governments, including Israel, which did not adhere to Islamic precepts. When he was sixteen, he was taken for specialist commando-style "*army*" training in using guns, and making bombs; he was selected for his fitness and strength.

4. The Claimant denied that his asylum interview showed these claims to be false: the delay of six years before the interview had affected the detail of his memory; and the interpreter had been unable to translate accurately the technical language which he used to name parts of guns, and her general level of competence was very low because she came from Sudan and spoke a different dialect. The Claimant tried to elaborate on his technical knowledge to the Adjudicator in answer to questions from his own counsel.

5. From the age of eighteen to twenty, he transported guns as required. But the Israeli inspired crackdown on Hamas in 1995 led to arrests being made by the Palestinian authorities. One of his group was arrested and, under torture, revealed the Claimant's name.

6. In consequence, when on his way to carry out a suicide bombing mission, the Claimant was arrested at an Israeli checkpoint and thereafter routinely and severely tortured for six months. He gave away the names and details of the activities of those working with him for the Palestinian cause. The torture then stopped but he was kept in detention for a further eighteen months.

7. An agreement between Israel and the Palestine Authority led to an exchange of prisoners. The Claimant's good conduct led him to be transferred to a Palestinian prison. His time in detention caused him to rethink his ways and to decide to leave the Jihad Islamic Movement. But he knew that because arrests had followed the information which he had given under torture, he would be regarded as a traitor and killed by the JIM.

8. However, notwithstanding the good conduct which caused his transfer, the Israelis put his name on a list of thirteen men who were dangerous to the peace process, asking that the Palestine Authority expel him or jail him for at least twenty-five years. He accepted the expulsion option from the Palestine Authority; he could not then return. A friend of his father in the Palestine Secret Service arranged for him to receive a student visa from the British authorities in Jerusalem. He was released shortly before the visa was granted, and was given two weeks to leave the country.

9. He claimed to be in fear of persecution now because between his arrival on 23 July 1997 and the expiry of his visa on 22 September 1997, he had converted from Islam to Christianity. He was baptised on 20 September 1997. He feared execution by Muslim fanatics. His brother and sister had disowned him.

10. He also claimed that his disclosure under torture of the names of Palestinians involved with the JIM would mean that he would be seen as a traitor. His mother was having a hard time because of it, and he was being sought in Gaza. An imam who had helped to train him and Secret Service men were looking for him.

11. If he returned he would be detained for at least twenty-five years or worse.

12. He had had various jobs in the United Kingdom, mainly in private security firms including one involved in aviation. The Adjudicator was not shown the CV supplied, if any, for those posts.

13. The Secretary of State had wholly rejected the credibility of the Claimant. The Adjudicator found him to be "*transparently honest*", a "*highly trained commando*", detained when he was about to attempt a suicide mission.

14. The Adjudicator was referred to and accepted background evidence from Human Rights Watch which was said to show that Israeli soldiers repeatedly used indiscriminate and excessive force, "*killing civilians wilfully*" and used Palestinian civilians as human shields. The Adjudicator then referred to what he called "*tit for tat*" attacks by "*armed Palestinians*" on Israeli settlers in the Occupied Territories.

15. He noted that "*armed Palestinians*" killed suspected collaborators with Israel and that there were internal strains in Palestine between various armed groups and with the Palestine Authority. There was no effective justice system. Israelis could enter the Occupied Territories at will to "*retaliate against suicide bombings by Hamas and the JIM on its territories with impunity*".

16. The Adjudicator accepted that the Claimant would be known in the Gaza, both to the Israelis and had enemies in Arafat's then government. He would be arrested, and worse might follow. The Adjudicator concluded that return in those circumstances would breach Article 3.

17. The Adjudicator then considered the background evidence about the way in which in Israel and the Occupied Territories, Muslim "*fundamentalists*" sought to dominate over Christian Arabs, that Christian evangelising was not permitted in the Occupied Territories, where the Shari'a law against apostasy was enforced extra-judicially should anyone be sufficiently misguided as to convert from Islam. The Adjudicator concluded that the Claimant would be persecuted for his religious beliefs, adding that Article 3 would also be "*encapsulated*".

18. As for Article 8 and private life, the Claimant had been in the United Kingdom for six years, had established himself with a church, and employment. Had the case been dealt with within a year of his arrival, he would have been granted indefinite leave to remain. But the fact that he had established himself and gained employment meant that it would be disproportionate to remove him.

19. The Secretary of State appealed on three grounds. First, the failure of the Adjudicator to consider Article 1F of the Refugee Convention in the light of his findings as to the activities of the Claimant; Gurung* [2002] UKIAT 04870, [2003] Imm AR 115, showed that the Adjudicator should have considered the exclusion provisions.

20. Second, the findings of the Adjudicator in relation to religious persecution were criticised for its acceptance, without adequate reasoning, of the genuineness of the conversion, of there being any risk generated by any preaching activities in the absence of evidence of such a need to preach, and of there being a real risk of persecution simply as a Christian convert. No reasons were given for any apparent acceptance of a risk of persecution by Israelis or the Palestine Authority on account of his ethnicity as a Palestinian.

21. Third, the proportionality assessment under Article 8 had ignored the adverse significance of the Claimant's activities with the JIM, or Islamic Jihad.

22. We can deal fairly briefly with most of the issues. As to persecution on religious grounds, the language of the Adjudicator makes it difficult to tell to what extent his findings on this issue have been affected by his conclusions that the Claimant would be persecuted for his imputed political opinion or that he would be treated in a way which breached his rights under Article 3 because of his alleged Islamic Jihad activities, and the information he allegedly gave under torture. If the latter are justified and affected the conclusions on risk of religious persecution, we would regard the conclusions on religion as probably tenable.

23. Viewed as independent grounds, they are more problematic. Of course, they start from the premise that the Claimant was a credible person. It is not necessary as a matter of law that the Claimant produce supporting evidence of the genuineness of his conversion. There were circumstances present here which could have created real doubt about the conversion's genuineness to many a rational non-sceptical eye: the rapidity of conversion from Islamic radical extremist torture victim to Christian, is not far short of Damascene; its timing is suspiciously fortuitous; there was every opportunity for the successful church to identify itself and attest to the strength of the convert's continuing devotion. However, we cannot overturn that finding. We ourselves would not agree with the assessment of the background evidence by the Adjudicator. The effect of the background evidence does require attention to be placed on the degree of activism likely from an apostate on return, even though it showed that ethnic Christian Arabs are intimidated and harassed in Israel and the Occupied Territories by increasingly domineering and assertive Islamic groups. Harassment and discrimination are in evidence as is the possibility, but no more than that, of severe extra-judicial treatment, against which the Palestine Authority would not be likely or able to offer protection. There is no finding that the Claimant would be active as leader, preacher or proselytiser or would do more than attend church. A convert would be worse placed but it does not reasonably show a real risk of persecution by state agents, or extra-judicially by Islamic radicals, for an ordinary convert.

24. We regard the Adjudicator's conclusions as tenable in law only on the basis that they are not free-standing findings but are related to the Adjudicator's conclusions about the Claimant's political activities. His past would make his conversion all the more likely to lead to severe difficulties.

25. We conclude that there were errors of law in the conclusion on religious persecution, taken on its own, if that were the basis of the Adjudicator's analysis. But it is not a material error of law because the conclusion on Article 3 based on the Claimant's actions in Palestine remains sound. Nonetheless, we consider that, for other cases, the comments above need to be made.

26. We regard the suggestion as to persecution by the Israelis or the Palestine Authority on ethnic grounds as a misreading of the Adjudicator's determination. Such a finding would have been wholly misconceived. That is not the true basis of the Adjudicator's findings, which relate to the Claimant's potentially lethal activities for Islamic Jihad or JIM, his torture and proposed transfer for good conduct, coupled with the requirement that he be expelled for twenty-five years at least.

27. The Adjudicator's proportionality conclusions in relation to Article 8 are untenable but do not amount to a material error of law. This is because his findings on Article 3 are not challenged and so the result of the Claimant's success on human rights grounds will remain unaffected by the legal error in his Article 8 conclusions. These are untenable first, because on no lawful approach to Article 8 viewed in isolation from the Article 3 risks, could the fact that the Claimant had spent five years in this country, gaining employment and establishing a life for himself, have made the interference with his private life through removal disproportionate, once the interests of immigration control had been allowed for. He has no family life to be interfered with. There was real and untoward delay in the processing of his claim, but it is not a delay which occasioned him any significant disadvantage, beyond uncertainty. The Immigration Rules and extra-statutory discretions or policies do not provide for someone to stay with simply those characteristics to support them. Adjudicators should recognise that the circumstances in which return would be disproportionate will be genuinely exceptional, and return does not become remotely disproportionate because it may be harsh or unsympathetic.

28. It is not clear, second, that the Adjudicator did view this issue in isolation from the Article 3 risks, because of his conclusion that delay was disadvantageous since indefinite leave to remain ought to have been granted within a year of arrival. But that depends on the Adjudicator's view of the substantive claim. No subsequent change of circumstances by 2003 was alleged to have removed the basis for that claim. But, if the Adjudicator was not viewing Article 8 in isolation from those risks, it was a serious error not to put into the proportionality scales the activities for Islamic Jihad which had led him into the difficulties he now faced. Subject to the overriding effect of Article 3, it is difficult to see that his return could be other than proportionate, in human rights terms.

29. We recognise that the Adjudicator was hampered by the lack of a Home Office Presenting Officer in pursuing lines of enquiry which he might otherwise have thought appropriate, but even without the Tribunal's later commentary on the Surendran guidelines in WN (DRC) [2004] UKIAT 00213, those guidelines did not prevent proper and obvious points being raised by Adjudicators, particularly those contained in the Secretary of State's refusal letter.

30. We now turn to Article 1F. The conclusions here are not academic even though we do not reject as legally erroneous the conclusions on Article 3, nor were we asked to. They are not academic because recognition as a refugee within the Geneva Convention brings with it certain rights, eg family reunion, certain social security benefits and travel documents, which lesser forms of humanitarian protection may not provide. Certain individuals are excluded from those rights and from recognition as a refugee. If it becomes possible to return someone without breach of their Article 3 rights and that person is not a refugee, the Geneva Convention cessation provisions do not fall to be considered. If the Claimant is not a refugee, on the material before the Adjudicator, lawfully appraised, it is only the risk of ill-treatment at a level breaching Article 3 which prevents his return.

31. Article 1F comes within the definition section of the Convention. It states:

> "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."

32. Mr Sheikh for the Secretary of State submitted that on the facts as found by the Adjudicator, Article 1F, and (c) in particular, were obvious points which he ought to have considered: the Claimant was an intended suicide bomber and Islamic Jihad activist; he was an Islamic Jihad member, trained, who had possession of weapons, transported them and undertook missions. Article 1F(b) was also at issue. The Tribunal decision in Gurung* [2002] UKIAT 04870 showed that the Adjudicator ought to have considered the issue.

33. Mr Lams submitted that this issue could not be regarded as a strong and obvious point of the sort envisaged in Robinson [1997] 3WLR 1162 Court of Appeal, as requiring an Adjudicator to intervene. The issue had not been raised, even contingently, by the Secretary of State in his refusal letter, in case the Claimant were believed.

34. He also submitted that Gurung, T v SSHD [1996] Imm AR 443, [1997] 2WLR 766 House of Lords, and other cases showed that the Secretary of State first had to decide which sub clause he relied on, inform the Claimant, and show that on the facts there was a strong case so that it could be said that the Adjudicator ought to have considered it.

35. Mr Lams drew attention to the following factors as showing that the facts were not sufficiently strong, for the operation of an exclusion provision which the UNHCR Handbook showed should be restrictively applied. There was coercion about his recruitment into Islamic Jihad at fourteen; he had then been indoctrinated. He had been punished extra-judicially for his activities by

detention and torture, and he had done nothing in the United Kingdom to suggest that he was a continuing danger; he had no continuing involvement with Islamic Jihad and was, in effect, a reformed character. His activities were not sufficiently obvious; he failed in his suicide bombing and his target might have been military rather than civilian. Article 1F was not a simple anti-terrorism provision, as Gurung had pointed out. The crimes, if any, were not obviously "*non-political*", within the definition of political crimes set out in T. There was a cycle of violence responding to violence in the struggle between various Palestinian groups and Israel over the Occupied Territories. Islamic Jihad was part of the politics of Gaza.

36. Judges should beware the dangers of strong emotions and approval or disapproval of the objects of the Claimant when applying Article 1F, and heed what was said by Kirby J in Minister for Immigration and Multicultural Affairs v Singh [2002] High Court of Australia 7.

37. The Tribunal raised with both parties its decision in KK [2004] UKIAT 00101, which held that acts of terrorism could fall within Article 1F(c). KK concerned the exclusion from refugee status of a Turkish separatist, who, whilst in the United Kingdom but before his claim had been determined, was involved in two politically inspired acts of arson against legitimate Turkish businesses operating in the United Kingdom. These were petrol bomb attacks for which he was sentenced to four years imprisonment in total, following a trial. Mr Lams alone provided written submissions on this case. Mr Lams submitted that KK had been wrongly decided; he adopted the UNHCR position as set out in KK. He drew attention to the UNHCR Background Note on the Application of the Exclusion Clauses which accompanied its Guidelines on International Protection of September 2003, paragraph 49 of which said:

> "Given the general approach to Article 1F(c) described above, egregious acts of international terrorism affecting global security may indeed fall within the scope of Article 1F(c), although only 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."

38. In submitting that KK had been wrongly decided, Mr Lams contended that it had not treated the UNHCR Notes and the Handbook as relevant to the question of what the UN meant by "*terrorism*" in the various Resolutions relied on in KK. The UNHCR was charged by the UN with implementation and interpretation of the Convention; and its Handbook, produced in pursuance of that aim, had been recognised as an important source of law in T at p 799F. It was admissible as evidence of international practice, although Laws LJ in R v SSHD ex parte Adan and others [1999] Imm AR 521 at 543 disavowed a role for it as a source of international law. Elsewhere it has been treated as a guide to international understanding of the way the Convention has been applied. We point out that in context Lord Lloyd in T was not treating the Handbook as a source of law in the sense that it created additional or alternative obligations; he meant that it was a guide, as were the other sources he was examining.

39. This led Mr Lams to submit that the UNHCR's views as to the application of the exclusion clause were as relevant to the meaning of "*terrorism*" as were UN Resolutions, and therefore that UN "*labelling*" of activities as "*terrorist*" could not be automatically determinative of exclusion. The UN Resolutions left open the meaning of "*terrorist*", as to which there was no internationally agreed definition. Those excluded from being refugees were those "*responsible for serious, sustained or systematic violations of fundamental human rights which amount to persecution in a non-war setting*". Non-state actors might possibly be included. Broad definitions of exclusion were wrong, especially if they were motivated by the thought that Article 3 ECHR would provide appropriate protection, for there were many countries which were parties to the Geneva Convention which did not accept such complementary forms of international protection. Exclusionary measures were required by the UN to conform to international law, which included the Refugee Convention, so guidance about the latter must influence the interpretation of UN resolutions.

40. Article 1F(b) and (c) should not be interpreted as excluding expiation. KK was wrong to treat expiation as excluded by the language of Article 1F(b), "*committed*". Proportionality, ie the balance between the potentially exclusionary acts and the consequences of a refusal of asylum were also relevant, consistently with international human rights law; KK was wrong to exclude that balance.

41. Cases required individual consideration for such factors as the lapse of time since the offence, the offender's age and attitude towards the offence, and his subsequent activities.

42. Applying those factors to the Claimant's circumstances, Mr Lams submitted that there were no strong prospects for success for the reasons already given: coercion into joining Islamic Jihad, age at joining, the absence of any proof that the target of the Claimant's suicidal endeavours were civilians, and even if he had intended to target civilians, those actions did not have a sufficiently international character to engage Article 1F.

Conclusions

43. Our conclusions on Article 1F are as follows. First, Gurung, in paragraphs 151.4 to 151.5 states:

> "151.4 It would be wrong for adjudicators to adopt an 'exclusion culture' and go searching in every case for exclusion issues under Art 1F. Pragmatism is called for. However, the Exclusion Clauses are in mandatory terms and where obvious issues arise under them these must be addressed by an adjudicator, even if the Secretary of State has not raised them expressly or by implication in the Reasons for Refusal letter. That may happen prior to the hearing, at the outset of the hearing or during it. This approach is subject only to the need to ensure procedural fairness.
>
> "151.5 It is only necessary to consider exclusion issues in cases obviously involving serious criminality as defined by Arts 1F(a)-(c). However, once the case is identified as one obviously involving serious criminality, there is nothing wrong with an adjudicator dealing with exclusion issues first."

44. We find it very surprising that the Adjudicator did not consider exclusion, of his own motion, under limbs (b) and (c) of Article 1F in view of his findings. Of course, it can be said with some justification that the Secretary of State should have raised the matter on a contingent basis, in case his views on the Claimant's credibility were successfully appealed, but that does not provide a sufficient answer. The Adjudicator did not consider Gurung at all, even though it is a starred decision, not even to the limited extent of saying that the issues were not obvious. That decision makes it clear that an Adjudicator has a duty to consider exclusion where obvious issues arise, even though not raised in the Secretary of State's refusal letter. Article 1F, as Gurung makes clear in paragraphs 38 and 47, is in mandatory terms and if there is material which sufficiently obviously brings it into play, it must be considered. The exclusion clauses may give rise to difficulties in application, but what matters is not that the answer is obvious but that the question obviously arises.

45. It is clear that questions arise under both Article 1F(b) and (c), which merited proper consideration on the facts as found by the Adjudicator.

46. It would be difficult for the Claimant to argue that his activities in training to be an Islamic Jihad armed militant, smuggling guns, undertaking missions and preparing for a suicide mission did not constitute serious crimes under the formal, if ineffective, legal system or systems in Gaza.

47. A more serious issue would be whether or not such offences were political. The test in T v SSHD is that the crimes would have to be sufficiently closely and directly linked to a political purpose, not too remote from it, by having regard to the nature of the target, the risk of indiscriminate killing or injuring of members of the public. Acts of terrorism likely to cause indiscriminate injury to the public fell within the scope of the exclusion clause.

48. These issues are also discussed in Gurung. The exclusionary provisions are to be applied restrictively, but they are of mandatory application. The standard of proof is no more or less than that conveyed by the words of Article 1F: there must be "*serious reasons for considering*" that someone has committed a serious non-political crime. Although Article 1F(b) is not to be equated with a simple anti-terrorist provision, largely because of the difficulties inherent in such language and in its application to particular cases, membership of a particular organisation may itself suffice for exclusion if that organisation's activities are "*predominantly terrorist*" (Gurung, para 105). Specific reference was made to the UNHCR comment that belonging to an extremist international terrorist group could be presumed to amount to participation or complicity in the group's crimes; lists of international terrorist organisations should be drawn up at international level; the position of the individual in the organisation would be relevant. The issues of duress, self-defence, political organisation and fragmentation are usefully considered in the succeeding paragraphs of Gurung.

49. We point out that the Claimant's case here was that the consequences of his activities was such that he was regarded so seriously by Israel that he was on a list of the thirteen most dangerous men in the Occupied Territories and his enforced exile was acquiesced in by the Palestine Authority. Islamic Jihad is

also a proscribed organisation under the Terrorism Act 2000 by virtue of the Proscribed Organisations (Amendment) Order 2000 SI 1261. It may or may not be on the lists appended to various UN Resolutions on combating terrorism. He was a would-be suicide bomber – even if his target had been a checkpoint, that is a place where many civilians gather and queue.

50. It is obvious that there is a strong case to be considered for exclusion under Article 1F(b) on the Claimant's own, accepted, evidence.

51. We turn to Article 1F(c). There may well be a considerable degree of overlap between (b) and (c) when the serious non-political offences have what may generally be called a terrorist aspect to them. This means that both have to be considered.

52. The UNHCR Handbook, paragraph 163, states that the purposes and principles of the United Nations are set out in the Preamble and Articles 1 and 2 of its Charter. These are said to regulate the conduct of member states and so acts contrary to the principles of the UN can only be committed by someone in power, instrumental in the infringement. Its very general character meant that the clause should be applied with caution.

53. We do not accept this reasoning as a sound basis for the interpretation of the Refugee Convention. The purposes and principles of the UN are not confined to the particular provisions referred to; no reason is given for that limitation. The UN, through its Resolutions, may express its principles, and affect the scope or application of the exclusion clauses. Those clauses are intended to prevent the claim of refugee status being made successfully by those whose conduct is condemned by the international community, a condemnation which can be expressed through UN Resolutions. If the Refugee Convention is properly seen as a "*living document*" its adaptability to the needs of the times can be reflected in the development or elaboration of UN principles affecting exclusion, as well as in the development of protection needs.

54. The UN's recognition of the impact of terrorism on individuals and member states has found expression in its Resolutions recently. These are set out in KK, together with relevant Articles of the Charter (1, 2, 24 and 48). KK considers at some length the relationship between the various UN Resolutions on terrorism and the purposes and principles of the UN. Security Council Resolutions 1269 of 1999, 1373 of 2001 are legislative. General Assembly Resolutions are not legislative, but are relevant. The UNHCR's position on the exclusion clauses is fully set out, taken from the Handbook and various letters it wrote to KK's solicitors about Article 1F(c).

55. In paragraphs 24 to 26 and 69, it concludes that the Resolutions, referred to above briefly and set out in KK, are relevant to the content of the purposes and principles of the UN. It does so by reference to the powers of the Security Council in Articles 24 and 48, and to the general rule of interpretation of international treaties in Article 31 of the Vienna Convention on the Law of Treaties. In paragraph 20 it rejects the notion that Article 1F(c) is only applicable to the acts of state authorities.

56. In paragraph 85, having dealt with Article 1F(b) and the question, peculiar to KK, of how the exclusion provisions meshed or contrasted with Articles 32 and 33, the IAT presided over by the Deputy President, Mr Ockelton, said:

> "On the other hand, however, there are some acts which, despite being political or politically-inspired, do not depend for their criminality on the individual matrix of power within a particular state. These acts, in our view, are those which are intended to be covered by Article 1F(c). That subparagraph does not apply to every crime, nor to every political crime. It applies to acts which are the subject of intense disapproval by the governing body of the entire international community. An individual who has committed such an act cannot claim that his categorisation as criminal depends upon the attitudes of the very regime from whom he has sought to escape, because the international condemnation shows that his acts would have been treated in the same way wherever and under whatever circumstances they had been committed."

57. KK recognised that more than one subparagraph of Article 1F could be applicable to the one individual's acts.

58. As to proportionality, KK rightly points out not just the absence of any such provision but that UK authorities have excluded it; paragraph 90.

59. KK also rejected the notion that expiation, ie punishment, pardon or amnesty, and we add remorse or change of heart, is a basis, as a matter of Convention interpretation, for not applying the exclusion clause; see paragraphs 91 to 92. It said:

> "92. Our conclusion is that we should reject all the arguments put before us for applying glosses to Article 1F, and should instead apply its words exactly as they are written. We appreciate that in so doing we are adopting an approach to the Refugee Convention which is somewhat similar to that which we have criticised when the UNHCR adopts it in relation to the Charter of the United Nations. But the difference is that, in relation to the Refugee Convention, we have been shown no material properly leading to the invocation of Article 31(3)(b) or (c) of the Vienna Convention. So far from being supported by international agreement as to the application of the Refugee Convention, the arguments made on behalf of the Appellant, although to an extent endorsed by the UNHCR, lack authority, sometimes lack coherence and occasionally lack consistency."

60. The same reasoning applies to remorse or change of heart as expiation.

61. The decision in KK points out that it is not necessary to define terrorism for the purposes of Article 1F, but rather it is necessary to ask what is the scope of the "*purposes and principles of the United Nations*" and how that body has used "*terrorism*" in its Resolutions. The question therefore was defined as follows, and the same applies here:

> "93. We therefore simply ask ourselves whether there are serious reasons for considering that the Appellant has been guilty of acts contrary to the purposes and principles of the United Nations. Although, as we have, we hope, made clear, the characterisation of acts as "*terrorist*" is neither necessary nor sufficient for exclusion under Article 1F(c), it is not irrelevant, because of the clear view of the United Nations on certain sorts of terrorism.

> 96. As we read and interpret the Refugee Convention, Article 1F(c) admits no exceptions. There are no acts that are contrary to the purposes and principles of the United Nations that do not cause exclusion under Article 1F(c). Any person guilty of such acts is excluded from the protection of the Refugee Convention."

62. We do not accept the submission that KK is wrong; it reflects to our minds the proper scope of Article 1F(b) and (c). We adopt its reasoning.

63. KK deals with a number of United Kingdom and foreign authorities on the scope of Article 1F. It is not necessary to repeat them here. It discusses the ascertainment of the Convention's autonomous meaning in paragraphs 61 to 61. It corrects one aspect of Gurung, pointing out that whilst a restrictive approach should be adopted to the interpretation of Article 1F, there was no justification for a restricted application of it; paragraphs 63 to 67.

64. In paragraphs 69 to 70, KK deals with the UNHCR letters, Guidelines and Handbook, specifically pointing out their inadequacies of analysis, including their contradictions of the Convention. This is continued in paragraph 89 where KK points out that expiation is not provided for in Article 1F(b) or (c), as a means of obviating exclusion.

65. The UNHCR suggests in paragraph 157 of the Handbook that the fact that a sentence has been served, pardoned or amnestied, creates a presumption that the exclusion clause is not to be applied. This is in contradiction of the Convention which says no such thing. It actually requires exclusion to be the result of the commission of a serious non-political crime or acts contrary to the UN's principles. An examination of the offence is required; the Convention offers no rehabilitatory or expiatory re-inclusion; see Gurung, paragraph 102 as well.

66. We add that paragraph 155 elevates the gravity of a "*serious non-political crime*" to "*a capital crime or a very grave punishable act*", which is an unwarranted gloss on "*serious*".

67. The UNHCR Handbook is a source of guidance as to the law and is not a source of legal obligation. It is not necessarily a guide to state practice, because it may not relate to state practice in any particular paragraph but more to UNHCR's exhortations. Its exhortations may also reflect the humanitarian perspective, wider than the Refugee Convention, which UNHCR sometimes adopts. Interpretation or guidance from UNHCR is entitled to great respect but it may also be inaccurate or tendentious.

68. To our minds, on the Claimant's own evidence as accepted, there is an obvious case with strong prospects for consideration of his exclusion under Article 1F(c), as well as (b).

69. We do not consider that we can resolve the issues finally. The facts of what he did and why require to be examined more closely. In the light of that examination, a view will need to be taken on whether the exclusion provisions

do apply. There is plainly scope for the Claimant's acts to be seen to have both an international and a terrorist element, within those condemned by the Security Council as contrary to the purposes and principles of the UN, whether or not they come within any other internationally accepted, free-standing definition of terrorism.

70. Accordingly this appeal is allowed to the extent that it is remitted. We would have remitted it to the same Adjudicator for him to consider the exclusion issues. We would not have wanted to deprive the Claimant of the benefit of this Adjudicator's consideration of his case and another might not have found it easy to reach conclusions on the exclusion issues if in effect compelled to adopt the findings on the credibility of the story told. There was a late and ineffectual challenge to those findings before us.

71. However, it will be for the new AIT to decide the precise format for reconsideration. The issues may merit consideration by a panel. But that is for the AIT. We could not and did not consider the effect of Arafat's death on the operation of the Palestine Authority.

72. This remitted appeal is reported for what we say about the operation of the exclusion clause.

MR JUSTICE OUSELEY
PRESIDENT