eutral Citation Number: [2011] IEHC 198

THE HIGH COURT

2008 667 JR

BETWEEN

A. B.

APPLICANT

AND

REFUGEE APPEALS TRIBUNAL AND

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENTS

JUDGMENT of Mr. Justice Hogan delivered on 5th May, 2011

1. The applicant, Mr. B., is an asylum seeker who seeks leave to apply for judicial review of a decision of the Refugee Appeals Tribunal of 14th May, 2008, which rejected his asylum request. The point raised is an unusual one of some considerable importance, namely, whether by reason of his combat activities as a regional commander for the Taliban forces (or, more strictly, one of its factions, Hezb-i-Islami) in opposing the NATO-led International Security Assistance Force ("ISAF") in Afghanistan the applicant can be regarded as having forfeited his right to seek asylum. In essence, the question is whether the applicant can be regarded as fleeing persecution or prosecution.

2. Although perhaps not strictly proved in evidence, I can take judicial notice of the fact that ISAF is a NATO-led security mission in Afghanistan which is currently engaged in extensive peace enforcing activities (including military combat) in that country. ISAF was established by UN Security Council Resolution 1386 ("Resolution 1386")(2001) following the fall of the previous Taliban regime in the winter of 2001. The ISAF acts in support of the present Afghan government, led by President Karzai. It is clear from the country of origin information that this Government is democratically elected, albeit that it would have to be acknowledged that the democratic process in Afghanistan is somewhat fragile and, perhaps, imperfect.

3. The Hezb-i-Islami were originally one of the original Mujahadin groups who fought against the Soviet occupation of Afghanistan in the 1980s. Following the departure of the Soviet troops, the Taliban came de facto to power in 1996, although their regime was recognised only by a few countries. The overwhelming evidence is that the massive terrorist attacks in the United States on 11th September, 2001, were organised by the Al-Qaida forces, whose leader, Usama bin Laden, had been given sanctuary in Afghanistan by the Taliban. In the wake of the September 11th attacks, various countries (led by the United States) gave the Taliban regime an ultimatum to hand over bin-Laden and to dismantle the Al-Qaida support bases which had been allowed to operate unhindered. When this was not forthcoming, military action led by the United

States and the United Kingdom followed in early October, 2001. The Taliban regime collapsed within weeks of the commencement of these hostilities.

4. In the meantime, in response to the September 11th terrorist attacks the UN Security Council adopted Resolution 1373 (2001) on 28th September, 2001, on the basis of Chapter VII of the Charter of the United Nations. The preamble to Resolution 1373 (2001) reaffirmed 'the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts'. Paragraph 5 of the resolution declared that 'acts, methods, and practices of terrorism are contrary to the purposes and principles of the United Nations and … knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations'.

5. On 12th November, 2001, the UN Security Council adopted Resolution 1377 (2001) which stressed that "acts of international terrorism are contrary to the purposes and principles of the Charter of the United Nations, and that the financing, planning and preparation of as well as any other form of support for acts of international terrorism are similarly contrary to the purposes and principles of [that Charter]'. This is reflected within the sphere of European Union law by Common Position 2002/402/CFSP of 27th May, 2002, which adopted sanctions in respect of bin Laden, members of the Al-Qaida organisation and the Taliban and "other individuals, groups, undertakings associated with them." Regulation (EC) No. 881/02 gives effect in law to this Common Position.

6. Following the collapse of the Taliban regime, the establishment of the ISAF was authorised by UN Security Council Resolution 1386 (2001). This Resolution envisaged the establishment of democratic authority in Afghanistan and the gradual restoration of peace and security. While progress on these fronts could fairly be described as uneven, it is clear nonetheless that there have been significant military engagements between the ISAF and the Taliban forces over the last decade or so.

The position of the applicant

7. The applicant claims that is an ethnic Pashtun from the Garmsair District in the Helmand province. The Helmand province is an area in southern Afghanistan which has witnessed some of the heaviest fighting over the last decade. Mr. B. maintains that his father was a prominent military commander during the Soviet occupation and that he joined the Taliban when they came to power. He says that he graduated from the Nangharhar Islamic University School of Law in 2000 and that he was then appointed by the Taliban as a prosecutor in the Helmand province, with the task of investigating political and military prisoners. He says that the following the commencement of hostilities in October, 2001 his father was presumed killed following heavy fighting in Kundoz Province. In the wake of this Mr. B. says that he was then appointed a commander for the Taliban in Helmand.

8. Mr. B. claims that he then fought against the ISAF and Afghani Government forces in this region between 2001 and 2006, save for one year spent in a village in Nangahrar in 2004-2005. During this latter period Mr. B. claims that the fighting involving the Taliban and Hizb-i-Islami forces on the one hand and the ISAF troops on the other was so intense that they were forced to move out of Helmand. He then says that he returned to Garmsair in Helmand in 2005 when the Taliban took control of that region and when police began to look for him in Nangahar. He then says that he fought with local Mujahadin on behalf of the Taliban until bombing by NATO troops caused him to flee Afghanistan.

9. The essence of Mr. B.'s claim if that he is returned to Afghanistan he would be likely to be suffer persecution by reason of his status as a prominent Taliban commander. There is an extant warrant for Mr. B. issued by the Afghan authorities by which his arrest for such activities is actively sought. Mr. B. further contended that he might well be imprisoned and even that his life might be at risk. These latter contentions were in substance accepted by the Tribunal, which found that Mr. B. presented:

> "with a credible fear of harm. On the basis of the country of origin information of/and concerning persons such as the applicant, the fear would appear to be well founded."

10. To my mind, this finding of fact suggests that the Tribunal must have found that the applicant was in principle entitled to refugee status, subject only to the question of an Article 1F exclusion, a critical issue which I will presently address. It is true that the Tribunal member went on to say that he did not accept that the applicant was a refugee, but this was because he concluded that:

> "the applicant is in fact fleeing prosecution as a result of those activities which he volunteered to the Tribunal that he participated in and the same cannot be said to amount to persecution for the purposes of the [Geneva] Convention."

11. The Tribunal member then went on to discuss the question of the Article 1F exclusion clause:

> "The Convention makes clear that in order for the exclusion to apply, the applicant must otherwise be somebody who would be entitled to the protection of the Convention. Since I do not accept that the applicant is a refugee, it is not necessary for me to reach a definitive conclusion on the point. Nonetheless, I agree with the conclusion implicit in the section 13 report to the effect that if the applicant were otherwise entitled to protection, then he should be excluded by virtue of his participation in fighting on behalf of the Taliban and Hezb-i-Islami, both of which it is accepted are classified nationally and internationally as terrorist organisations."

12. In reality, however, this is probably a distinction without a real difference. In other words, as the Tribunal found that the applicant's case was credible and presented with a well founded fear, the applicant is *prima facie* entitled to refugee status in view of the definition contained in s. 2 of the Refugee Act 1996 ("the 1996 Act"). This is underscored by all relevant country of origin information which shows that any commitment to the rule of law and democratic accountability within Afghani officialdom is, at best, tenuous. Judicial protection is weak and undeveloped and the evidence points to the fact that there is a real risk that the applicant would be exposed to the risk of arbitrary detention and, perhaps, worse if returned to that state.

13. The real question, therefore, is whether the applicant comes within any of the exclusions to that primary definition of refugee by reason of what the Tribunal described as his "relatively senior position in both the Hezb-i-Islami and the Taliban." This is, in truth, the principal issue in the case and it is to this issue that we must now turn.

The Refugee Act 1996 and the status of the Geneva Convention in Irish domestic law

14. It is axiomatic that an international agreement such as the Geneva Convention will only be part of the domestic law of the State "save as may be determined by the Oireachtas" in accordance with Article 29.6 of the Constitution. In some cases the Oireachtas has determined that the international agreement will itself be part of the domestic law of the State. Thus, s. 9(1) of the Jurisdiction of Courts and Enforcement of Judgments Act 1993 provides:-

"(1) The Lugano Convention shall have the force of law in the State and judicial notice shall be taken of it."

15. While the Long Title to the 1996 Act that it is "an Act to give effect to" the Geneva Convention (and the New York Protocol thereto), there is no statement in the body of the Act to the effect that the Convention *in and of itself* is part of the domestic law of the State. Indeed, this is (at least) indirectly confirmed by the definition clause contained in s. 1(1) of the 1996 Act which, in its reference to the Convention, merely recites that the English language text of the Convention "is, for *convenience of reference*, set out in the Third Schedule to this Act." (Emphasis supplied).

16. It must therefore be accepted, therefore, that the Oireachtas has here instead adopted a slightly different legislative method to that adopted in the case, for example, of the Lugano Convention in that it has here enacted a law (i.e., the 1996 Act) which has given effect to the obligations which adherence to the Geneva Convention entails. The practical effect of this is that, by way of parallel with the observations of the Supreme Court vis-a-vis the European Convention of Human Rights in *McD v. L.* [2009] IESC 81, the Geneva Convention was not given directly effect in Irish law by the 1996 Act. It is rather to be presumed that the 1996 Act is the legislative instrument designed to give effect in Irish legislative form to the obligations of that Convention. The 1996 Act should be construed accordingly in that light.

17. It should also be observed, of course, that Member States are obliged by virtue of the Qualifications Directive, Directive 2004/83/EC to provide refugee status to claimants otherwise coming within the scope of the Geneva Convention and who are not otherwise disqualified by Article 12 of that Directive. While I will presently return to this question in the context of the Court of Justice's decision in Joined Cases C-57/09 and C-101/09 *Bundesrepublik Deutschland v. B. und D*. [2010] ECR I-000, it is sufficient to note that in appropriate case the 1996 Act may have to be interpreted in the light of the obligations placed on this State by the Qualifications Directive as transposed into our domestic law by the European Communities (Eligibility for Protection) Regulations 2006 (S.I. No. 518 of 2006).

Section 2 of the 1996 Act and the definition of a refugee

18. Section 2 of the 1996 Act (as amended by s. 7(a) of the Immigration Act 2003) provides:-

"In this Act "a refugee" means a person who, owing to a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his or her nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country; or who, not having a nationality and being outside the country of his or her former habitual residence, is unable or, owing to such fear, is unwilling to return to it, but does not include a person who—

.....

(c) there are serious grounds for considering that he or she

(i) 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,

(ii) has committed a serious non-political crime outside the State prior to his or her arrival in the State, or

(iii) has been guilty of acts contrary to the purposes and principles of the United Nations."

19. We have already noted that in view of the findings of fact made by the Tribunal that the applicant must be taken to qualify as a "refugee" for the purposes of the main body of the definition clause contained in s. 2. The question is thus whether he comes within any of the specific exclusions in either s. 2(c)(i),(ii) or (iii). These statutory exclusions replicate more or less verbatim the language of the exclusion clause of Article 1F of the Geneva Convention which provide that:-

> "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."

20. These exceptions are also reflected in Article 12(2)(a) of the Qualification Directive (2004/83/EC). So far as can be ascertained by the diligent industry of counsel on both sides, it does not appear that the present question has ever been considered by an Irish court. But in view of the fact that the exclusionary provisions of s. 2 of the 1996 Act mirror almost completely the language of Article 1F and the clear intent of the Oireachtas to give effect to the Convention, it follows, therefore, that the international jurisprudence dealing with Article 1F is directly relevant to the construction of s. 2 and, specifically, to the exclusionary provisions of (c)(i), (ii) or (iii).

21. Perhaps the most comprehensive analyses of the Article 1F issue is to be found in three recent judgments, all of which post-date the Tribunal decision. The decisions in question are that of the UK Supreme Court in *R. (JS) v Secretary of State for the Home Department* [2010] UKSC 15, [2010] 2 WLR 766; that of McGrath J. for the New Zealand Supreme Court in*Attorney General v. Tamil X* [2010] NZSC 107 and, finally, the decision of the Court of Justice in Joined Cases C-57/09 and C-101/09 *Bundesrepublik Deutschland v. B und D* [2010] ECR I-000. As it happens, both *JS* and *Tamil X* were cases which concerned questions of whether asylum seekers who had both been members of the Liberation Tigers of Tamil Eelam ("Tamil Tigers") must thereby be regarded as being disqualified by reason of the Article 1F exceptions. We may start with a consideration of the decision in *Tamil X*.

Attorney General v. Tamil X

22. In *Tamil X* the respondent was a Sri Lankan citizen who claimed refugee status shortly after his arrival in New Zealand and admission under a visitor's permit in 2001. The respondent had been a member of the Liberation Tigers of Tamil Eelam ("Tamil Tigers") which has been engaged in armed conflict against government forces, McGrath J. also noted that the organisation had committed many crimes against humanity during the period of conflict in Sri Lanka.

23. The respondent had been employed as Chief Engineer on a vessel, *MV Yahata*. This cargo vessel, which was owned by the Tamil Tigers, transported legitimate goods but also, at times, munitions and weapons for use by the Tamil Tigers in both conventional military and other operations, in some of which, as McGrath J. found, war crimes and crimes against humanity were committed. On what transpired to be the *Yahata's* last voyage, the vessel left Phuket in Thailand with a quantity of munitions on board. She was intercepted in international waters by the Indian navy and gave chase. The master of the*Yahata* then agreed to proceed to Chennai, where she dropped anchor. Having been surrounded by Indian navy vessels, the*Yahata* opened fire which was then returned. The vessel went on fire and sank. Some crew members (including the respondent) jumped into the water and were rescued, while others - including a legendary Tamil Tiger deputy commander - elected to remain on board as the vessel sank.

24. The respondent was ultimately convicted of various offences by the Indian courts. Following his release from prison, he made his way to New Zealand where he promptly claimed asylum. Just as in the present case, the fundamental question was whether the Article 1F exclusion applied.

25. The New Zealand Refugee Authority found that the respondent was a trusted supporter of the Tamil Tigers who was willingly assisting the organisation to smuggle war material into Sri Lanka through his skills and ability to ensure continuing propulsion of the *Yahata*. It concluded that "he knew that the arms which he was helping smuggle into Sri Lanka would be as likely to be used by the Tamil Tigers in perpetrating further human rights abuses as in conventional warfare against the Sri Lankan army." The Authority found that there were serious reasons for considering that the respondent was a knowing and willing accomplice and party to the commission of war crimes by the Tamil Tigers. It followed that he was excluded from refugee status under Article 1F(a) of the Convention (war crime or crime against humanity) of the Convention.

26. The Authority then went on to consider the application of Article 1F(b) in relation to the respondent's involvement in the sinking of the *Yahata*. In the criminal charges which had been laid against him in India, the Supreme Court of India ultimately decided that he was party to the intentional destruction by fire of a vessel carrying explosives and convicted him of serious crimes. That act had endangered the lives of those on board the *Yahata*, the members of the naval boarding party and others on navy and coastguard vessels nearby. The Authority decided that these acts were not committed for a political purpose but, rather, to prevent seizure of the vessel and cargo by the Indian Government. The Authority concluded that he had committed serious non-political crimes within the exclusionary provision of Article 1F(b)(serious non-political crime).

27. The respondent challenged this finding in judicial review proceedings before the New Zealand courts and culminated in the judgment of the New Zealand Supreme Court. On the question of whether the Tigers were engaged in crimes against humanity, McGrath J. referred to the Rome Statute of the International Criminal Court, which came into force on 1 July 2002. He observed that the Rome Statute:

> "is a recent international instrument which directly addresses the principles that govern liability for international crimes including those of particular relevance to this case. It is appropriate to refer to it for authoritative assistance on what is a 'crime against humanity'."

> 28. Pausing at this point, it is pertinent to note that Article 29.9 of the Constitution (as inserted by the 23rd Amendment of the Constitution Act 2001) allows Ireland to ratify the Rome Statute. The phrases "crime against humanity" and "war crime" have been ascribed the same meaning

> for the purposes of the domestic jurisdiction of the Irish courts in respect of offences otherwise coming within the International Criminal Court's jurisdiction as in Article 7 and Article 8(2) respectively of the Rome Statute: see s. 6(1) of the International Criminal Court Act 2006 ("the 2006 Act"). Even though the Rome Statute and, for that matter, the new Article 29.9 and 2006 Act, all post-date the Geneva Convention and, indeed, the 1996 Act, it would be unreal not to have regard to a major international treaty dealing with this very topic in seeking to elucidate the meaning of these words. In any event, s.2 of the 1996 Act expressly envisaged that the definition of the terms "war crime, or a crime against humanity" would be that as defined in "international instruments drawn up to make provision in respect of such crimes" and the Rome Statute is, *par excellence*, one such instrument.

29. Article 7(1)(a) of the Rome Statute defines "crimes against humanity" as meaning any of the listed proscribed criminal acts, including murder, "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack". Article 7(2) provides that "[a]ttack directed against any civilian population" means a course of conduct involving the multiple commission of the proscribed acts against a civilian population pursuant to or in furtherance of a state or organisational policy to commit such attack.

30. Returning now to the decision in *Tamil X*, on the question of whether the Tamil Tigers had engaged in crimes against humanity, McGrath J., drawing on the language of Article 7 and Article 8 of the Rome Statute, observed:

> "In its decision, the Authority summarised more than 20 instances of attacks by the Tamil Tigers between May 1985 and April 1996, mostly against groups of civilians. In the instances of Tamil Tiger crimes cited by the Authority, the common underlying offence is the proscribed act of murder. It is plain that those who were directly involved caused death and intended to do so. Both physical and mental elements of the underlying proscribed act of a crime against humanity committed by the perpetrators are made out in these instances. It is also plain that the instances concerned demonstrate a course of conduct involving multiple proscribed acts of violence by the perpetrators in furtherance of the Tamil Tigers' policy of committing such attacks. The acts were part of an attack that was widespread because of the scale, frequency and seriousness of the incidents involving a multiplicity of victims. It was systematic because the incidents were part of an organised and regular pattern of violence. Further analysis is not required of the underlying acts by the Tamil Tigers. There has been no dispute in this proceeding that they constituted crimes against humanity."

31. McGrath J. went to conclude, however, that the respondent's "conduct during the last voyage, while capable of doing so, is not shown to have supported the commission of any completed crimes covered by Article 1F(a)", so that he was not held to be excluded from the Convention on this ground. To complete the picture, McGrath J. also held that the offences here were political in nature, so that one of the other exclusion clauses - namely, Article 1F(b) - did not apply.

Have the Taliban committed crimes against humanity?

32. Before considering the UK Supreme Court's decision in *RS (Sri Lanka),* it is convenient at this point to examine first the question of whether the Taliban have committed crimes against humanity within Afghanistan. On this point, judged by the country of origin information available to the Tribunal, there seems little doubt but that

the Taliban have committed such crimes against humanity within the meaning of Article 7 of the Rome Statute. Thus, for example, the Amnesty International's report for 2007 observed that the Taliban:

> "were responsible for breaches of international humanitarian law by undertaking indiscriminate and disproportionate acts of violence; by killing those not involved in combat; and by ill-treating and torturing those over whom they have had effective control. For example, in the context of quasi-judicial processes, at least 11 people were killed. The true number may have been far higher:
>
> > - On 28 August [2006] a suicide blast attributed to the Taliban in a market in Lashkar Gah, Helmand, killed 17 people, many of them civilians.
> >
> > - At least 19 individuals, including 13 civilians, were killed and another 20 injured on 26 September when a suicide bomber attacked a security post near a mosque in Lashkar Gah."

33. Events such as these - which, unfortunately, have been all too common features of the Taliban's insurgency over the last nine years or so - plainly constitute crimes against humanity in the sense envisaged by s.2 of the 1996 Act given the definition of this term in Article 7 of the Rome Statute. Suicide bombing involves the commission of a proscribed criminal act (murder) which, in the language of Article 7(1)(a), is "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack". Article 7(2) provides that the words "attack directed against any civilian population" means a course of conduct involving the multiple commissions of the proscribed acts against a civilian population pursuant to or in furtherance of a state or organisational policy to commit such attack.

34. The country of origin information plainly shows that it is the policy of the Taliban to sponsor and encourage the tactic of suicide bombing, a tactic which inevitably involves the targeting of places such as markets, squares and routine security posts, often with hideous numbers of civilian deaths and casualties. This is plainly an "attack directed against any civilian population" within the meaning of Article 7(2). There clearly has been "widespread or systemic use" of suicide bombing within the meaning of Article 7(1), so that by sponsoring such activities the Taliban are guilty of crimes against humanity within the meaning of Article 7.

35. If the Taliban have been guilty of crimes against humanity, does that mean therefore that the applicant comes within the exclusion provisions of s. 2 of the 1996 Act? On this point the Tribunal observed:

> "The applicant made much of the fact that he denied at the oral hearing that he participated in the killing of civilians. I would not expect any person to say otherwise if asked such a question. The test to be applied is whether there are 'serious reasons for considering' that the applicant had participated in such crimes or events. I am satisfied that there are. Membership of terrorist organisations that are known to carry out such atrocities is indicative of such a consideration. Where a person volunteers that he participated in what he describes as a 'war' against the democratically elected government of his country of origin, I believe therefore that there are 'serious reasons' for considering that he has participated in the acts contemplated in Article 1F of the Refugee Convention. Therefore, if he were a refugee, I would have no difficulty in concluding that he is excluded from the protection afforded by the

> Convention, in light of his relatively senior position in both Hezb-I-Islami and the Taliban."

36. It will thus be seen that the Tribunal took the view that by virtue of his senior membership of the Taliban and his acknowledged participation in military combat activities that the applicant would thereby *per se* be disqualified under Article 1F.

The decision in RS (Sri Lanka)

37. We may now turn to consider the decision of the UK Supreme Court in *RS*, a case where this very question was at issue. In that case the asylum applicant had equally been a relatively senior commander in the Tamil Tigers who had participated in military combat against the Sri Lankan Government forces. He was ultimately sent incognito under an assumed name in Colombo to await further instructions, but he escaped immediately upon learning that his identity had been compromised. He ultimately arrived in the United Kingdom whereupon he applied for asylum.

38. This application (and a subsidiary application for humanitarian protection based on the fear of mistreatment if returned) was refused on 14 September 2007 solely by reference to Article 1F(a). As Lord Brown explained in his judgment, the core of the appellant Secretary of State's reasoning appears in paragraphs 34 and 35 of the decision letter:

> "34 . . . [I]t is considered that you continued [during the six-year period from the respondent's 18th birthday until he left the intelligence wing of the Liberation Tigers of Tamil Eleam] to operate within the LTTE and even gained promotions. This shows that you were a voluntary member of the LTTE. In this regard the case of *Gurung*[2002] UKIAT 4870 has been considered in which it was determined that voluntary membership of an extremist group could be presumed to amount to personal and knowing participation, or at least acquiescence, amounting to complicity in the crimes in question.
>
> 35. Accordingly, it is concluded that your own evidence shows voluntary membership and command responsibility within an organisation that has been responsible for widespread and systemic war crimes and crimes against humanity. From the evidence you have provided it is considered that there are serious reasons for considering that you were aware of and fully understood the methods employed by the LTTE."

39. Lord Brown's judgment proceeds with a very erudite analysis of Rome Statute, as well as the corresponding provisions of the Statute of the International Criminal Tribunal for former Yugoslavia, together with a discussion of the well-known judgment of the ICTY Appeal Chamber in *Prosecutor v. Tadic* (1999) 9 IHRR 1051. He went on to conclude: -

> 34. "All these ways of attracting criminal liability are brought together in the ICTY Statute by according individual criminal responsibility under Article 7(1) to anyone who "planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution" of the relevant crime. The language of all these provisions is notably wide, appreciably wider than any recognised basis for joint enterprise criminal liability under domestic law. That, it seems to me, is what the German [Federal Administrative] court was saying, at para 21 of [its 2008] judgment.... when holding that the exclusion "covers not only active terrorists and participants in the criminal sense, but also persons who perform advance acts in support of terrorist activities."

> 35. It must surely be correct to say, as was also said in that paragraph, that article 1F disqualifies those who make "a substantial contribution to" the crime, knowing that their acts or omissions will facilitate it. It seems to me, moreover, that Mr Schilling, the UNHCR Representative, was similarly correct to say in his recent letter that Article 1F responsibility will attach to anyone "in control of the funds" of an organisation known to be "dedicated to achieving its aims through such violent crimes", and anyone contributing to the commission of such crimes "by substantially assisting the organisation to continue to function effectively in pursuance of its aims".....
>
> 37. Of course, criminal responsibility would only attach to those with the necessary *mens rea* (mental element). But, as Article 30 of the ICC Statute makes plain, if a person is aware that in the ordinary course of events a particular consequence will follow from his actions, he is taken to have acted with both knowledge and intent. ...
>
> 38. Similarly, and I think consistently with this, the ICTY Chamber in *Tadic* defines *mens rea* in a way which recognises that, when the accused is participating in (in the sense of assisting in or contributing to) a common plan or purpose, not necessarily to commit any specific or identifiable crime but to further the organisation's aims by committing Article 1F crimes generally, no more need be established than that the accused had personal knowledge of such aims and intended to contribute to their commission.
>
> 39. Returning to the judgment below with these considerations in mind, I have to say that paragraph 119 [of the judgment of the Court of Appeal] does seem to me too narrowly drawn, appearing to confine Article 1F liability essentially to just the same sort of joint criminal enterprises as would result in convictions under domestic law. Certainly para 119 is all too easily read as being directed to specific identifiable crimes rather than, as to my mind it should be, wider concepts of common design, such as the accomplishment of an organisation's purpose by whatever means are necessary including the commission of war crimes. Put simply, I would hold an accused disqualified under Article 1F if there are serious reasons for considering him voluntarily to have contributed in a significant way to the organisation's ability to pursue its purpose of committing war crimes, aware that his assistance will in fact further that purpose."

40. The UK Supreme Court proceeded accordingly to quash the Home Secretary's decision, because as Lord Kerr succinctly put it in his concurring judgment:

> "The latter document stated that *Gurung* had held that voluntary membership of an extremist group could be presumed to amount to personal and knowing participation, or at least acquiescence amounting to complicity. In effect therefore the Secretary of State was being invited to decide as a matter of automatic consequence that membership of the Intelligence Division of LTTE equated to complicity. This implicitly (at least) suggested that no consideration of the personal responsibility of the respondent was required and indeed that it was not appropriate to inquire into it beyond acknowledging that the respondent was a member of the Intelligence Division."

I will return present to consider the significance of this decision for the present case.

The decision of the Court of Justice in *B und D*

41. We may now proceed to consider the judgment of the Court of Justice in *B und D* whereby the Court was asked to rule on the proper interpretation of Article 12 of Directive 2004/83 ("the Qualifications Directive"). Recitals (16) and (17) to that Directive provide as follows:

> "(16) Minimum standards for the definition and content of refugee status should be laid down to guide the competent national bodies of Member States in the application of the [1951] Geneva Convention.
>
> (17) It is necessary to introduce common criteria for recognising applicants for asylum as refugees within the meaning of Article 1 of the [1951] Geneva Convention."

42. Article 2(c) of the Qualifications Directive states that, for the purposes of that directive:

> "refugee" means a third country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 12 does not apply."

43. Paragraphs 2 and 3 of Article 12 deal with exclusions from refugee recognition as follows:

> "2. A third country national or a stateless person is excluded from being a refugee where there are serious reasons for considering that:
>
> …
>
> (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.
>
> 3. Paragraph 2 applies to persons who instigate or otherwise participate in the commission of the crimes or acts mentioned therein."

44. Next, to complete the picture, it should be noted that in order to implement United Nations Security Council Resolution 1373 (2001), the Council of the European Union adopted, on 27 December 2001, Common Position 2001/931/CFSP on the application of specific measures to combat terrorism (OJ 2001 L 344, p. 93). This particular Common Position was summarised thus by the Court of Justice:

> "26 Under Article 1(1) of Common Position 2001/931, that act applies to 'persons, groups and entities involved in terrorist acts' and listed in the Annex thereto.

27 Paragraphs 2 and 3 of Article 1 of Common Position 2001/931 provide that, for the purposes of that act:

> '2. … "persons, groups and entities involved in terrorist acts" shall mean:
>
> – persons who commit, or attempt to commit, terrorist acts or who participate in, or facilitate, the commission of terrorist acts,
>
> – groups and entities owned or controlled directly or indirectly by such persons; and persons, groups and entities acting on behalf of, or under the direction of, such persons, groups and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons, groups and entities.
>
> 3. … "terrorist act" shall mean one of the following intentional acts, which, given its nature or its context, may seriously damage a country or an international organisation, as defined as an offence under national law, where committed with the aim of:
>
> …
>
> (iii) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation:
>
> …
>
> (k) participating in the activities of a terrorist group, including by supplying information or material resources, or by funding its activities in any way, with knowledge of the fact that such participation will contribute to the criminal activities of the group."

45. The cases at hand concerned two Turkish nationals of Kurdish origins. One, B., had been a sympathiser of the Devrimici Sol ("Revolutionary Left") movement and had participated in armed guerrilla mountain warfare. The second, D., had also participated in guerrilla mountain warfare in eastern Turkey and northern Iraq.

The first question considered in *B und D*

46. The first question posed by the German Federal Administrative Court was in substance:

> "whether a case where the person concerned has been a member of an organisation which, because of its involvement in terrorist acts, is on the list of persons, groups and entities annexed to Common Position 2001/931 and that person has actively supported the armed struggle waged by that organisation – and perhaps occupied a prominent position within that organisation – is a case of 'serious non-political crime' or 'acts contrary to the purposes and principles of the United Nations' within the meaning of Article 12(2)(b) or (c) of Directive 2004/83."

47. The Court of Justice answered this question affirmatively:

"81 First, it is clear that terrorist acts, which are characterised by their violence towards civilian populations, even if committed with a purportedly political objective, fall to be regarded as serious non-political crimes within the meaning of point (b).

82 Secondly, with regard to acts contrary to the purposes and principles of the United Nations, as referred to in point (c) of Article 12(2) of Directive 2004/83, recital 22 to that directive states that such acts are referred to in the preamble to the Charter of the United Nations and in Articles 1 and 2 of that Charter and that they are among the acts identified in the UN Resolutions relating to 'measures combating international terrorism.'

83 Those include Resolutions 1373 (2001) and 1377 (2001) of the UN Security Council, from which it is clear that the Security Council takes as its starting point the principle that international terrorist acts are, generally speaking and irrespective of any State participation, contrary to the purposes and principles of the United Nations.

84 It follows that.....the competent authorities of the Member States can also apply Article 12(2)(c) of Directive 2004/83 to a person who, in the course of his membership of an organisation which is on the list forming the Annex to Common Position 2001/931, has been involved in terrorist acts with an international dimension."

48. Given that the Taliban and "entities associated with them" are also sanctioned by Common Position 2002/402/CFSP, it follows equally that the applicant might in principle be disqualified from asylum entitlement by virtue of Article 12(2)(c) or, for that matter, s. 2(c)(iii) of the 1996 Act. The Court then went on to conclude that:-

"99 – ....the finding, in such a context, that there are serious reasons for considering that a person has committed such a crime or has been guilty of such acts is conditional on an assessment on a case-by-case basis of the specific facts, with a view to determining whether the acts committed by the organisation concerned meet the conditions laid down in those provisions and whether individual responsibility for carrying out those acts can be attributed to the person concerned, regard being had to the standard of proof required under Article 12(2) of the directive."

49. The Court had previously indicated that:-

"95. Before a finding can be made that the grounds for exclusion laid down in Article 12(2)(b) and (c) of Directive 2004/83 apply, it must be possible to attribute to the person concerned – regard being had to the standard of proof required under Article 12(2) – a share of the responsibility for the acts committed by the organisation in question while that person was a member.

96 That individual responsibility must be assessed in the light of both objective and subjective criteria.

97 To that end, the competent authority must, *inter alia*, assess the true role played by the person concerned in the perpetration of the acts in question; his position within the organisation; the extent of the knowledge he had, or was deemed to have, of its activities; any pressure to which he was exposed; or other factors likely to have influenced his conduct.

98 Any authority which finds, in the course of that assessment, that the person concerned has – like D – occupied a prominent position within an organisation which uses terrorist methods is entitled to presume that that

> person has individual responsibility for acts committed by that organisation during the relevant period, but it nevertheless remains necessary to examine all the relevant circumstances before a decision excluding that person from refugee status pursuant to Article 12(2)(b) or (c) of Directive 2004/83 can be adopted."

50. The judgment in *B und D* in many ways echoes the reasoning found in both *Tamil X* and *RS* and, indeed, all three judgments may be said to have a common theme, namely, that while the administrative body adjudicating on the asylum application is entitle to proceed on the working assumption that a person occupying a senior position in a terrorist organisation has individual responsibility for the crimes against humanity committed by the organisation during the relevant period, an individual examination of all relevant circumstances must nonetheless be conducted.

Application of these principles to the facts of the present case

51. Against that general background, we may now proceed to apply these principles to the present case. The Tribunal was clearly entitled to form the view that by virtue of the applicant's "relatively senior position" in the Taliban it was legitimate to presume that, in the language of the Court of Justice, he had "individual responsibility for acts committed by that organisation during the relevant period." Yet paragraph 97 in particular of the judgment of the Court of Justice in *B und D*clearly requires that adjudicating authority to conduct an individual assessment of the applicant's circumstances and, specifically, in his own complicity - if such be the case - in crimes against humanity which, as we have already noted, the Taliban undoubtedly committed.

52. In the context of an asylum application such as the present one, it is not immediately clear how this is readily to be done. One can sympathise with the Tribunal's observation that any applicant in this position will inevitably deny involvement in the killing of civilians. How, then, is the adjudicator to conduct that personalised assessment in respect of an applicant's alleged complicity in crimes against humanity a jurisdiction such as Afghanistan where, perforce, the witnesses and documents necessary to such an inquiry will invariably not be available?

53. It is, of course, correct to say that both the Refugee Applications Commissioner and the Tribunal are often faced with considerable difficulties in making credibility assessments in respect of events which are said to have occurred in unfamiliar jurisdictions of which we have put imperfect knowledge. But at least in such circumstances the adjudicator has the benefit of country of origin information. While such information can - and does - identify the likely perpetrators of terrorist activities, this type of documentation is generally unlikely to be able to shed much light on the question of whether an individual had the kind of personalised knowledge and complicity which the Court of Justice appear to require.

54. But difficult or otherwise, this type of assessment is what is now required in the light of the *B und D*. It seems to me that the applicant has established substantial grounds that the Tribunal did not conduct this type of assessment. I accordingly propose to give the applicant leave to apply for judicial review on this ground.

55. I cannot conclude this judgment without observing that this case also presents one unique feature which would seem to distinguish it from cases such as *Tamil X*, *RS* and *B und D*. As we have seen, in the case of Afghanistan the UN Security Council had resolved that the ISAF was the legitimate force to act in support of the Afghan Government. Of course, in the present case the applicant has openly proclaimed not only his opposition to the ISAF, but the fact that he engaged in military combat with the ISAF.

56. In light of this fact it would be difficult to see how the applicant's own admitted conduct by openly engaging in combat with troops whose presence in Afghanistan was expressly sanctioned and authorised by UN Security Council Resolutions was not *in and of itself* contrary to the purposes and principles of the United Nations within the meaning of s. 2(c)(iii) of the 1996 Act. In this respect, it is different from *B und D* where it was the fact that the applicants had participated in guerrilla warfare for terrorist organisations raised the question of whether their own conduct was contrary to the purposes and principles of the United Nations by reason of, for example, their complicity in war crimes. This was precisely why an individualised assessment of their own personal knowledge and participation in such conduct was held to be necessary in that case by the Court of Justice. But if, as here, the applicant openly participates in combat operations against troops whose presence has expressly been sanctioned by United Nations Security Council Resolutions, this in and of itself would seem to be contrary to the purposes and principles of the United Nations, thus disqualifying the applicant by reason of the operation of s. 2(c)(iii) of the 1996 Act. In this respect, regard must be had to the judgment of the International Court of Justice in *Libyan Arab Jamarihiya v. United Kingdom (Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie)* [1992] I.C.R. 3 which affirmed that by virtue of Article 25 of the Charter all states were obliged to accept and implement Security Council resolutions: see generally, Shaw, *International Law* (5th ed.)(Cambridge, 2003) at 1148-1151.

57. As, however, the Tribunal did not find against the applicant on this precise ground, it would not be appropriate for me to refuse to grant leave by reason of this consideration alone.

Conclusions

58. For the reasons just stated, I propose to grant leave on the single ground that the applicant has advanced substantial grounds for challenging the Tribunal's decision on that basis that it failed to conduct the individualised assessment of the applicant's complicity - if complicity there was - in the Taliban's crimes against humanity in the manner required by the Court of Justice in *B und D*.