

Neutral Citation Number: [2013] EWCA Civ 835

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**  
**UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER (UT))**  
**AA/09808/2010**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: Friday 12<sup>th</sup> July 2013

**Before :**

**LORD JUSTICE TOMLINSON**  
**LADY JUSTICE RAFFERTY DBE**  
and  
**SIR STANLEY BURNTON**

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**Between :**

**AA-R(IRAN)**  
**- and -**  
**SECRETARY OF STATE FOR THE HOME**  
**DEPARTMENT**

**Appellant**

**Respondent**

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(Transcript of the Handed Down Judgment of  
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**Raza Husain QC and Ms Melanie Plimmer** (instructed by **Messrs Jackson & Canter**) for the  
**APPELLANT**  
**Charles Bourne** (instructed by **Treasury Solicitors**) for the **Respondent**

**Judgment**

### **Lady Justice Rafferty:**

1. In a determination of 16 August 2010 the FTT allowed an appeal from the 22 June 2010 decision of the SoS in reliance on Article 3 of the ECHR but upheld her decision to exclude the Appellant from refugee status since he had committed a crime against humanity. On 9 October 2012 Rix LJ gave permission to challenge the 29 July 2011 conclusion of the UT upholding the decision of the FTT.
2. **Ground 1** is that the UT erred in finding that the Appellant made a significant contribution to the general acts of the Basij. He argues that his local role and involvement in propaganda, budgetary and social activities did not cross the threshold for “significant contribution” so as to render him complicit in those general acts. In concluding to the contrary UT failed to have regard to a mandatory relevant consideration, the size and nature of the Basij in Iran.
3. **Ground 2** The UT’s decision is bad for want of proper, adequate and clear reasons. If the Secretary of State or the UT sought to rely on the local acts of the Basij as the relevant crimes against humanity (they did not) it was incumbent upon them to identify those acts so that they could be clearly advanced and tested.
4. The overwhelming majority of the evidence was not in dispute. The Basij is a paramilitary force which enforces ideological and what it considers to be Islamic values in Iran. The Appellant held the highest rank in his village, in command of 30 men in his district. He accepted presence on patrol duty outside his village, where he witnessed acts of violence and, in his contention reluctantly, handed people over to colleagues who beat them. Such local beatings were not identified as crimes against humanity but relied upon to show his significant contribution to the Basij’s general acts.

### **The legal framework**

5. **ARTICLE 1F** (a) Refugee Convention reads where relevant:

“The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

he has committed ... a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; ...”
6. Art 12(2)(a) of the EU Qualification Directive is in identical terms.
7. It is for the Secretary of State to prove on the balance of probabilities that an individual should be excluded: *Al-Sirri*.
8. The leading domestic case on Article 1F(a) is *R (JS (Sri Lanka)) v SSHD* [2011] 1 AC 184 (“JS”). Lord Brown said: “because of the serious consequences of exclusion for the person concerned the article must be interpreted restrictively and used cautiously”.

9. The Rome Statute, the contemporary international instrument for Article 1F(a) purposes, is the starting point. Article 7 where relevant defines “*Crimes against humanity*” as:

“(1) ... any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(a) Murder;

(b) Extermination;

(e) Imprisonment or other severe deprivation of physical liberty

(f) Torture;

(h) Persecution ...[on grounds which are] political, racial, national, ethnic, cultural, religious, gender

(i) Enforced disappearance of persons;

(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”

10. In *SK (Zimbabwe) v SSHD* [2012] 1 WLR 2809 (“SK”) the Court of Appeal considered the definition of “other inhumane acts of a similar character” under Article 7(1)(k). Rix LJ said:

“...the critical feature of the requirement of ‘similar character’ is that ‘other inhumane acts’ should be, by their nature and the gravity of their consequences, of comparable (‘similar’) character to the other enumerated crimes .. What constitutes “other inhumane acts” of similar character is, of course, a matter of evidence, but also for judgment, and may depend on all the circumstances of the case.”

11. **Article 25 of the Rome Statute** regulates individual criminal responsibility for a crime against humanity falling within Article 7. Article 25(3) provides:

“3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

(b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

(c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

(ii) Be made in the knowledge of the intention of the group to commit the crime; . . .”

12. Article 28 of the Rome Statute - command responsibility - provides that military commanders and superiors shall be criminally responsible for crimes committed by forces under their effective command and control, or by subordinates under their effective authority and control, as a result of failure to exercise proper control over such forces or subordinates, where they knew or ought to have known that such crimes were being or were about to be committed, and where they failed to take all necessary and reasonable measures to prevent their commission.
13. Art 12(3) of the Qualification Directive provides inter alia, that Article 1F(a) applies not only to those who personally commit crimes against humanity but also those “who instigate or otherwise participate in the commission of [crimes against humanity]”.
14. In JS, Lord Brown said that the language of relevant provisions was wider than joint enterprise liability under domestic law. Accordingly “.....article 1F disqualifies those who make a substantial contribution to the crime, knowing that their acts or omissions will facilitate it. ....responsibility will attach to anyone .....contributing to the commission of such crimes by substantially assisting the organisation to continue to function effectively in pursuance of its aims.” As to the mental element, “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” and therefore mens rea would be established if “the accused had personal knowledge of such aims and intended to contribute to their commission”. Lord Hope said each case turns on its facts.

## **THE BACKGROUND**

15. The Appellant, born on 9 January 1984, is a citizen of Iran. He arrived in the United Kingdom on 3 April 2007 and claimed asylum the following day. The Secretary of State’s decision letter rehearsed his activities with the Basij and accepted the credibility of that aspect of his account. Her justification for exclusion was :

- i) There were serious reasons for considering that the Basij conducted widespread and systematic attacks against the civilian population, which amount to crimes against humanity;
  - ii) The Appellant bore command responsibility for those crimes; from 2004 he bore command responsibility for some and then all personnel in his Basij unit;
  - iii) During his checkpoint duties whilst a commander he saw people beaten or handed over for further mistreatment;
  - iv) His failure to seek to curb the behaviour of his subordinates amounted to serious reasons for considering he “bore command responsibility for crimes against humanity”;
  - v) The UNHCR’s view was that “where a group is involved in indiscriminate killing, attacks on civilians or torture, voluntary membership raises a presumption that the individual contributed significantly to the commission of violent crimes, even if this is simply by substantially assisting the organisation to continue to function”. Since he was a voluntary member of the Basij, he was complicit in its crimes against humanity.
16. She relied upon general acts of the Basij as the crimes against humanity, and on local acts to support the Appellant’s complicity in them.
17. Various to be found in his interviews and in his statement was a number of concessions. Those relevant are as follows:
18. The Appellant joined the Basij aged 12 in 1995. He became an active member aged 16 in 1999. In 2004 he won ‘Basij of the year’ and became commander in his village. He was mostly in charge of propaganda, not involved in military matters, his motivation primarily religious. He was known and respected in his village where no violence occurred under his command and it would not have been condoned. His primary concern was to organise social, sports and religious events. He had not personally been involved in violence against Iranian civilians but had witnessed such when he and his men patrolled or manned checkpoints in the border town Miyaneh, where he was not in command.
19. He wrote:
- “I was afraid to remonstrate with the commanding officer and I felt it was not my place. However, upon returning to the village I did reproach some of my men. I would tell them our role is preventative rather than punitive and that it was strictly illegal to ill-treat prisoners. Some of them accepted my criticism and some frankly did not. They would say they were punishing those who worked against Islam.....I witnessed no ill treatment in Alnajaroq.....a small village and everyone knows each other. My colleagues would never be allowed to get away with that kind of behaviour in the village....I was responsible for managing our budget. These were funds allocated to us by central government.”

20. His evidence was that:
- i) On a monthly basis he took a group of 10 on patrol for law enforcement purposes. He referred to his success at recruitment increasing his command to 100. Those under his command acted as his ears and eyes. He was hated in Iran. People saw him and ran away.
  - ii) Most of his colleagues were awful and mistreated young people. He closed his eyes to this. He did not mistreat people but had to hand over people who were then very badly mistreated by others. He was under pressure to arrest people and his colleagues beat the detainees as soon as they were arrested.
  - iii) He witnessed lashings, and beating with batons and with sticks. Whoever was arrested by the Basij, before going to court, had to be beaten up. He had not seen anyone die but had seen many unconscious after beatings and torture.
  - iv) He did not beat people himself and was reported by his colleagues for being too soft. Because of his softness he could go into the community and attract them. They needed a person like him.
  - v) In 2006, disillusioned, he gave helpful information undermining the effectiveness of the Basij. In March 2007, told that the Etelaat were looking for him, he left Iran.

### **The findings of the tribunals**

21. The FTT Judge concluded that the Basij were involved in a widespread or systematic attack against the civilian population. The Appellant had contributed in a significant way to its operational ability because he continued to turn up for work, to turn a blind eye to violence and ill-treatment when he was on duty and to command others whom he knew used violence.
22. The Judge said:

“Thus the Appellant’s own evidence in addition to all the other background material before me leads me to conclude that the violent activities of the Basij in carrying out its perceived duties do form part of what can be regarded as a widespread or systematic attack designed to maintain control over the Iranian civilian population generally.

[Counsel] fairly acknowledged that the Appellant was in difficulty so far as the mental element required under Article 1F was concerned. The Appellant was on his own evidence a committed and respected member of the Basij of some local rank. He accepts that his participation was on a voluntary basis. He cannot escape the definitions of complicity ...by stating that he did not agree with or actively take part in acts of violence. This is because he nevertheless continued to turn up for work, to turn a blind eye to violence and ill treatment that occurred when he was on duty and to command others in his

group whom he knew used violence. ...I find that he did contribute in a significant way to the Basij's ability to operate and therefore to pursue its purpose of committing crimes against humanity as defined by the Rome Statue. I also find that he must have been well aware that his assistance in the functioning of the Basij would further that purpose. He has admitted as much, in saying as part of his case that he began after 2006 to question the choices he had made."

23. In the UT there was no challenge to the factual findings of the FTT. The Appellant argued that the Judge had erred in assessing his responsibility for the acts carried out by the Basij and failed to have regard to relevant matters. The UT concluded it was not part of the Secretary of State's case that the Appellant was responsible for the acts of those under his command but rather for his own acts. Article 25 was at the heart of the appeal. The FTT was entitled, in reliance on the local acts, to find him complicit in the general acts of the Basij.
24. Mr Husain QC for the Appellant sensibly agreed with me in dialogue that were he unsuccessful in challenging complicity, his appeal fails without more.
25. He argued that to qualify as crimes against humanity local beatings should have been specifically identified and then one by one advanced so as to permit testing of precisely what happened and when. This was important since it would have been necessary to determine whether, when the Appellant handed people over, the ill treatment they received was sufficiently severe as to be proscribed by Article 7(1)(k).
26. There are major difficulties in Mr Husain's way. The Appellant's own evidence made out the mental element. He knew of the Basij's activities and intended, even if on his own account unwillingly or with regret, to contribute to them. These were serious incidents. He had seen victims unconscious after beatings and torture but continued his practice of handing people over for beating. His evidence of events at the checkpoint was without more ample to establish complicity.
27. If, and I do not, I needed fortification of my view I should find it in an analysis of the effect of his position. An organisation such as the Basij would be assisted in its purpose of persecuting the civilian population by loyal members who would take command responsibilities and turn a blind eye to serious violence. Still more would it be assisted by individuals skilled in budgeting, recruitment and propaganda. Those details demonstrate his substantial contribution to the Basij's ability to operate.
28. In taking an overall view of his contribution to the Basij, the tribunals were entitled to attach weight to his own words, that he closed his eyes to "awful mistreatment". The answer to the Appellant's submissions on this point is well expressed in the judgment of the UT and in the decision letter of the SSHD. The UT wrote:

"He was a local commander and although he had not committed any acts of serious ill-treatment himself his own evidence was in reality that he had been directly complicit in them when he had handed individuals over knowing that they would be seriously ill treated. He clearly on his own evidence had full knowledge of the Basij's activities. Given this evidence

it was in our judgment properly open to the Judge to find that the Appellant was complicit in crimes against humanity by the Basij by virtue of Art 25(3)(d) in that there were serious reasons for considering that he had voluntarily contributed in a significant way to the Basij's ability to commit crimes against humanity.”

29. The SSHD wrote:

“In summary your long term membership of and promotion to a responsible rank within and recognition of outstanding achievement by the Basij mean that you would have understood the aims methods and activities of each organisation and would have shared a common purpose with the organisation. There are therefore serious reasons for considering that you were both complicit in and had command responsibility for international crimes”

30. The issue in this fact-specific case is in my judgment complicity. I struggle to understand how, having conceded all he knew, saw, tolerated, and continued to embrace, the Appellant can hope to persuade us that complicity was not made out. This was a man who watched lashings, beatings, torture and use of batons, and having watched them sent yet more arrested individuals into the hands of those who had inflicted those indignities.

31. Complicity, Mr Husain agreed with me, goes to mens rea. An actus reus need not trouble us since the Appellant made so many concessions. Once there is evidence that he made significant contributions to the acts of an organisation of whose malign activities he was aware, he is complicit in those acts.

32. There is nothing in his first Ground. Consequent upon Mr Husain's concession it is unnecessary for me to consider his second.

**Sir Stanley Burnton:**

33. I agree.

**Lord Justice Tomlinson:**

34. I also agree.