Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/06251/2008

THE IMMIGRATION ACTS

Heard at Field House	**Determination Sent**
On 16 July 2013	**On 24 September 2013**

Before

THE PRESIDENT, THE HON MR JUSTICE BLAKE
UPPER TRIBUNAL JUDGE PITT

Between

AN
(Anonymity Order Made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mark Henderson, instructed by Lawrence Lupin Solicitors
For the Respondent: Peter Deller, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction

1. The appellant is an Afghan citizen. He was born on 1 January 1962.

2. The appellant brings this appeal as he maintains that he will face a real risk of serious mistreatment if returned to Afghanistan because of his history as a commander in Hisbi-i-Islami.

3. This appeal comes before us as a remittal from the Court of Appeal. The terms of the remittal are set out in a Statement of Reasons attached to a Consent Order dated 28 March 2012. The Statement of Reasons is comprehensive regarding the appellant's background and the history of the appeal and it is expedient to set it out here in full:

> "1. The Appellant, a citizen of Afghanistan, was born on 1 January 1962 and clandestinely entered the UK on 1 December 2006 and claimed asylum on the same day.
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> 2. The Appellant claimed, inter alia, that he joined Hizb-i-Islam at sometime around 1982 and was selected as a leader. He was in charge of up to 500 people until around 1996 when the Taliban came into power. The Appellant claimed that between 1992 and 1996 he was responsible for security in the district of Z, as well as in Cherasiab, however that he spent most of his time in Z. He stated that on one occasion he was sent to defend the area know as Arzam Qemat.
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> 3. The Appellant claimed to have been detained by the Taliban in 1997, interrogated and tortured for information about Hizb-I-Islam and kept in prison for six months. Between 1997 and 2006 the Appellant was a Malak of his village and used bodyguards. In October 2006 he received information that Jamiat I Islami were going to kill him. He fled from his home and later from Afghanistan. His house was repeatedly attacked. He fled to the UK via Pakistan.
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> 4. The Respondent refused the Appellant's asylum claim in (sic) 24 July 2008 and on 28 July 2008 made a decision to remove the appellant from the UK. In particular, given his senior role in Hizb-I-Islam and that he admitted giving his men rocket launchers and having a personal involvement in the bombardment of Kabul, it was considered that he was both directly and indirectly complicit in war crimes. For this reason he was refused protection under the 1951 United Nations Convention relating to the Status of Refugees ("the Refugee Convention") by operation of Article 1F(a). Article 1F(a) states that the Convention shall not apply to any person to (sic) whom there are serious reasons for considering 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".
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> 5. The Secretary of State further considered whether the Appellant's return to Afghanistan would breach Articles 2 and/or 3 ECHR. Consideration was given to the country guidance case of PM and Others *(Kabul – Hizb-I-Islam) Afghanistan CG* [2007] UKAIT 00089, on the basis of which it was considered that the Appellant's past association with Hizb-I-Islam would not result in him experiencing treatment amounting to persecution if he was returned to Kabul.
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> 6. It was not disputed that the Appellant had been targeted in his home area, but it was considered that it was open to him to relocate to Kabul, whether (sic) it was considered that there was not a reasonable likelihood of being

considered an opposition member by the authorities there (on the basis of *PM and Others*).

7. The Secretary of State further considered and dismissed the Appellant's claim that his removal from the UK would breach Article 8 ECHR as he had a brother in the UK.

8. The Appellant appealed to the (then) AIT and, in a Determination promulgated on 22 October 2008, Immigration Judge Aziz allowed the Appellant's appeal under Article 3 ECHR, but upheld the Secretary of State's decision that he was excluded from the protection of the Refugee Convention by operation of Article 1(F)(a).

9. The Secretary of State applied for reconsideration of the decision to allow the appeal under Article 3 and on 11 November 2008, Senior Immigration Judge Nichols ordered reconsideration. He found it arguable that Immigration Judge Aziz had failed adequately to reason his conclusion that the Appellant had been targeted and found further that the Immigration Judge had not dealt with the Secretary of State's position in relation to this evidence. Senior Immigration Judge Nichols additionally found it arguable that the Immigration Judge had failed to have regard to the current country guidance case of *PM and Others*.

10. The Appellant lodged a reply on 15 December 2008 contending that Immigration Judge Aziz's decision was sound and adding a new issue, namely that the Immigration Judge had been wrong to find that the Appellant was excluded from the Refugee Convention.

11. Before Designated Immigration Judge Wilson in the AIT on 9 February 2010, the issue of Article 1F exclusion was adjourned until the outcome of the case of *JS (Sri Lanka)* [2010] UKSC 15. In relation to the Secretary of State's grounds for appeal against Immigration Judge Aziz's decision to allow the Appellant's appeal under Article 3 ECHR, Designated Immigration Judge Wilson found material errors of law in the Immigration Judge's determination of those issues.

12. Subsequently, following the decision of the Supreme Court in *JS (Sri Lanka)*, Designated Immigration Judge Barton heard the adjourned hearing in the Upper Tribunal on 30 July 2010 and found there had been no error of law in the reasoning and findings of Immigration Judge Aziz in regard to exclusion of the Appellant from the protection of the Refugee Convention by operation of Article 1F.

13. The hearing therefore proceeded exclusively in regard to Article 3 ECHR and was heard by Designated Immigration Judge Barton in the Upper Tribunal on 8 December 2010. In his Determination promulgated on 9 February 2011, Designated Immigration Judge Barton held that the Appellant "fits within the same category of returnees as those appellants whom the Tribunal considered in PM and who were found to be able to re-settle in Kabul" and so dismissed the Appellant's appeal on the Article 3 ground.

14. The Upper Tribunal subsequently refused the Appellant's application for permission to appeal to the Court of Appeal (Senior Immigration Judge Spencer, dated 16 March 2011). The grounds of appeal were:

    1) That there was an error of approach with respect to Designated Immigration Judge Barton's reliance on the apparent failure of Immigration Judge Aziz's (sic) to consider *PM and Others*

    2) That there was an error of approach with respect to Designated Immigration Judge Barton (sic) finding that the only risk to the Appellant was from those who took his property. Under this ground the Appellant also challenged the Designated Immigration Judge's finding that he was only a middle ranking officer in Hizb-I-Islam and so would not fit the profile of a suspect; and

    3) That there was an error of approach with respect to Article 1F.

15. The Appellant then made an application for permission to appeal to the Court of Appeal on 4 April 2011 on essentially the same grounds. These grounds were subsequently amended on 3 June 2011 and, following refusal of permission to appeal by Sedley LJ on 11 July 2011 in a further skeleton argument prepared for the hearing of the Appellant's renewed application for permission to appeal on 25 October 2011. In an order dated 31 October 2011, Lady Justice Arden granted permission on the grounds 1 and 2 which were as follows:

    1) The Upper Tribunal erred in law in its consideration(§§35-36) of the Appellant's case that there are substantial grounds for considering that he faces a real risk of serious ill-treatment and/or torture if removed to Afghanistan in failing properly to consider A's case and, in particular:
        a. failing to have any regard to the finding of IJ Aziz that Jamiat-e-Islami had attacked A's home twice in 2006 intending to kill him because of his position as the commander of forces of Hizb-i-Islami 'Hizb') before 1996;
        b. failing to consider whether the security forces would ill-treat or torture A to seek to obtain information from him about Hizb.
    2) If, which is denied, the Upper Tribunal's findings on the risk in Kabul are independent of the findings referred to in ground 1, then the Tribunal also made material errors in law in those findings in failing properly to consider A's case and, in particular, making a finding for which there was no evidence, namely that very many former Hizb commanders who have not denounced Hizb are living safely in Afghanistan. [D]esignated Immigration Judge Barton failed to have regard to the finding of Immigration Judge Aziz that the Appellant's home had been attacked twice by Jamiat-e-Islami in 2006 because of the appellant's position as a commander of Hizb-I-Islami forces prior to 1996. Under this ground the Appellant also challenged the failure of the Designated Immigration Judge to consider whether the Appellant would be tortured or detained by security forces in order to obtain information about Hizb-I-Islami.

> Accordingly, the Upper Tribunal failed to properly assess whether there were substantial grounds for considering that the Appellant faced a real risk upon return to Afghanistan and accordingly, erred in law.
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> 16. The Respondent is of the view that the Upper Tribunal erred in its decision as when considering the question of relocation, the Designated Immigration Judge seemingly ignored a concession by the Secretary of State that the Appellant's factual account should stand and there was a risk on return of the Appellant to his home area. In particular, the Determination seems to ignore the fact that the Appellant's home had been attacked twice by Jamiat-e-Islami in 2006.
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> 17. In the circumstances, the parties agreed that the Determination of Designated Immigration Judge Barton promulgated on 9 February 2011, should be quashed, and the matter should be remitted to a differently constituted Upper Tribunal for the determination of the issue of whether the Appellant would be at risk upon return to Afghanistan on the facts found by Immigration Judge Aziz and the concession by the Respondent that A is at risk in his home area on the basis of those facts."

4. Paragraph 17 the Statement of Reasons contains the task set for us by the Court of Appeal. We must assess whether, in the light of the concession that the appellant is at risk of mistreatment in his home area and on the facts as found by Immigration Judge Aziz, the appellant can relocate within Afghanistan in order to avoid adverse interest.

Internal Relocation

5. Mr Deller confirmed that the respondent accepts a great deal of the appellant's account, certainly the facts in paragraphs 2 and 3 of the Statement of Reasons. For completeness sake we should clarify that the appellant's home was attacked twice in 2006 rather than "repeatedly", one of his bodyguards being killed in the second attack and that he left his home prior to the second attack after receiving information that Jamiat-i-Islami (JI) intended to kill him.

6. Mr Deller also confirmed that the accepted facts of the appellant's status in Hisbi-i-Islami (HI) and the attacks in 2006 were sufficient to show a reasonable likelihood that the appellant is at risk in his home area now.

7. It remained the respondent's position, however, that seven years had passed since the appellant left Afghanistan and that the passage of time and changes within the country meant that he would no longer be at risk if he relocated to Kabul. The attacks on him in his home area in 2006 were not sufficient to show a risk in Kabul if he returned now from either:

    a. the security services acting alone on the basis his profile in HI, or

b. the security services influenced or informed by JI about the appellant because of the JI animosity towards HI members and the appellant in particular, or

c. the JI faction in his home area who had attempted to kill him in 2006 seeking to harm him in Kabul**.**

8. Mr Henderson queried whether the risk to the appellant could be assessed against the discrete categories put forward by Mr Deller given the complexities on the ground in Afghanistan. In any event, Mr Henderson also submitted that interest in the appellant from any of the sources identified by the respondent would be likely to lead to mistreatment comprising, at the least, detention accompanied by physical abuse. This was shown to be so not only by the country evidence on Afghanistan from the usual sources but also by the evidence of the country expert, Dr Antonio Giustozzi and the evidence of the appellant's brother-in-law who lives in Kabul.

9. We had the benefit of three reports and oral evidence from Dr Giustozzi. Mr Deller did not seek to suggest that he was anything other than a reliable country expert, having given evidence in the country guidance cases of **AK (Article 15(c)) Afghanistan CG [2012] UKUT 00163(IAC)**, **AA (unattended children) Afghanistan CG [2012] UKUT 00016 (IAC)** and **HK and others (minors – indiscriminate violence – forced recruitment by Taliban – contact with family members) Afghanistan CG [2010] UKUT 378 (IAC)**, amongst others.

10. The first report from Dr Giustozzi is dated 29 August 2008. Paragraph 6 states that HI commanders such as the appellant were:

> "… particularly likely to be targeted by the security services, now controlled by their former enemies of Jamiat-i Islami, who can rely on the information supplied by many former members of Hizb-i Islami who have now joined the government side to track them down. However, the concerns of the Jamiats in targeting former members of Hizb-I Islami is primarily not due to security, but rather to the potential emergence of competitors in the political arena, who could endanger the monopoly enjoyed by Jamiat and its splinter factions (like Shura-i Nezar) in a number of regions of the country."

11. Paragraph 13 of the report identifies that as the appellant has not formally distance himself from HI, he would be assumed to have retained links with them. Paragraph 24 indicates that even if the appellant was able to pass through security on return, any attempt to find accommodation or work would require him to provide information about his place of origin and family, and, although it might take weeks, his HI background would become known.

12. Dr Giustozzi's second report is dated 18 June 2010. Paragraph 4 indicates that by 2010 HI had become more of a force and remained in an "uneasy" alliance with the Taliban. It continues:

> "As a result, in practice, the security forces do not distinguish very much between Hizb-i Islami and Taliban. The return of an old activist of the party like [the appellant] would certainly trigger a reaction from the security services, which would at least place him under observation. If they believed he was re-establishing contact with Hisb-i Islami, an arrest would be likely, [t]his could be triggered by a meeting with some friend from the days of jihad, for example. Hizb-i Islami itself is likely to try to recruit back [the appellant], as they have a shortage of experienced cadres and of locally respected personalities. While [the appellant] could reject the invitation, a contact like this could trigger the security services into action… ."

13. At paragraph 6, Dr Giustozzi considers that the manner in which the police obtain information about newcomers meant that if the appellant relocated to Kabul he "certainly would not go unnoticed and would get reported". At paragraph 10 he concluded that:

> "In sum, the intensification of the conflict means that the risk to [the appellant] has increased since 2008, rather than diminished. The fact that he has spent time abroad would not mean in the eyes of the security services that he has not been active during this period. There are circles of Hizb-i Islami members in the UK, including at least two members of the Central Council of the party. Therefore, the security services might well assume that [the appellant] is sent back by the party leadership for some specific purpose."

14. At paragraph 11, referring to the attacks on the appellant's home by local JI enemies, Dr Giustozzi comments:

> "… [w]hile this per se does not demonstrate an interest of the security services, it does suggest that [the appellant] indeed was seen as a figure still linked to Hekmatyar. Moreover, there is much overlap between Jamiat and the security services (NDS), whose top officials are mostly from Jamiat. The NDS certainly keeps file of suspects; its district level informers (several of whom I meet) are usually former mujadhidin from Jamiat or other groups aligned with it and have detailed knowledge of who is who in their area; they then report to Kabul."

15. Dr Giustozzi's third report is dated 16 May 2013. At paragraph 4 he refers to the intelligence services becoming more effective during 2010 to 2013, in part as a result of an improved "informer network in and around Kabul". HI remained a minority group but "its role is slowly and steadily growing while the growth of the Taliban has stalled." At paragraph 5, Dr Giustozzi considers that

> "… one of the most common ways to obtain information is to detain people suspected of holding useful information and subject them to psychological and physical pressure, including torture. For this reason they tend to arrest large numbers of people in order to interrogate them. The growth in the informer network in the last three years and plugging gaps in that network has assisted in this. The Afghan security organisations continue rounding up increasing numbers of suspected insurgents, numbering in the thousands… ."

16. At paragraph 8, Dr Giustozzi states that it is "particularly detainees linked or allegedly linked to the insurgency who face the worst abuse." Paragraph 9 comments that "Jamiat people remain very influential in the intelligence service." It goes on to state that:

> "There is a strong core of Jamiat people in the service, including many of the heads of departments below that level. Several of the top figures in the Ministry of Interior are also linked to Jamiat. Jamiat people have personal animosities against the Taliban and Hizb-i Islami from the history of fighting them and therefore would be particularly strongly motivated against [the appellant] (which is reflected by the fact that they were targeting him in 2006 when he left Afghanistan). It would not be necessary for Jamiat to pursue him separately to the security service. It would be enough when enquiries were made from Kabul to Z to simply confirm that he has an adverse profile, in order to have him imprisoned and tortured. There would anyway be an institutional risk from the security services in view of the relatively low level of suspicion that will now lead to interrogation about the insurgency and his past role as a commander."

17. Paragraph 10 continues:

> "As a Hizb-i Islami cadre, [the appellant] would still be well known and remembered to people in his home areas and throughout the district of Z; to the informers of the security services in Kabul, he would stand out as a single man, arriving in Kabul without family, of mature age (so the absence of family would be particularly noticeable), of Pashtun origins with a south-eastern accent. The south-east, as indicated above, is where most attacks against Kabul are originated … . The security services are very likely to consider him at least worth a check; the informer would collate basic information about [the appellant] from employers, landlords, neighbours, and then the intelligence services would ask the Z office to check out about his background. His past in Hizb-i-Islami would immediately come up, especially since he was being targeted as a result of it just before leaving Afghanistan."

18. In cross-examination, Dr Giustozzi was asked whether the passage of time would have reduced the threat to the appellant. He thought not. The appellant would be returning from the UK where there is an organised HI presence, known to the Afghan authorities. In the eyes of the Afghan security service, return from the UK was compatible with the appellant having been an active member of HI here. The security services would assume that the appellant had information about fund raising, transfer of funds to Afghanistan, flow of HI cadres to and from the UK, knowledge of issues and discussions within HI and so on. The same would be so if he were presumed to have been in Pakistan. Even if the appellant was able to show that he had been present in the UK since 2006, the evidence showing this might not remain with him or in his file after his return and the assumption made that he had been in Pakistan. This would aggravate his situation as Pakistan was considered to be a centre for insurgency forces including HI. It was also Dr Giustozzi's view that the appellant now being an older man would not reduce the risk as former commanders remained important within the organisation and were within in the leadership.

19. Dr Giustozzi went on to suggest that the attacks on the appellant's home in 2006 could well have been out of personal revenge as he would be considered personally responsible for specific assassinations or deaths of JI members. Such killings had been a feature of the conflict in the 1990s between the two parties. The appellant's profile as a former commander would also attract revenge attacks as he would be viewed as responsible for acts of subordinates even if he had not been personally involved. In Dr Giustozzi's opinion, JI was now relatively weak in the appellant's area but he remained at risk of a revenge attack in Kabul. The ability to track him to Kabul and organise an attack against him there would depend, to some extent, on the resources of the particular family concerned. Given that those in the appellant's home area who still wished him harm came from JI, however, and would be likely to continue to have some contact with former colleagues, they could merely inform their JI associates in Kabul in order to draw adverse attention to him.

20. Dr Giustozzi went on to indicate that the presence in Kabul of someone with this appellant's profile would be taken seriously and arrest would be likely. Interest in someone like the appellant would routinely involve arrest and mistreatment under interrogation. That would be the likely outcome whether the arrest followed interest from the security services acting alone or from the security services influenced by their internal JI affiliates or outside information. The historical animosity of JI towards the appellant could only but increase the chance of adverse attention from the security services which were comprised in significant part of JI.

21. In addition to the evidence of Dr Giustozzi, we were provided with a statement dated 16 May 2013 from Mr Z. Mr Z is married to the appellant's sister and is therefore his brother-in-law. Mr Z's evidence is that since 2011 the security services have been to his home on several occasions to ask him and the appellant's sister about the appellant and on one occasion he was taken away for questioning. The security services indicated that they knew that the appellant had gone abroad but wanted to know if he had returned. They threatened to punish Mr Z if it was found that the appellant had returned and that he had been untruthful about this.

22. The evidence of the appellant's brother-in-law was not challenged by the respondent but we bore in mind that it was untested and that he could be said to have an interest in the outcome of the appeal. That being so, however, we also noted that credibility of witnesses was not a feature of this appeal; the appellant was found credible in the important aspects of his evidence, as were his two brothers who gave evidence in support of his appeal before Judge Aziz. We concluded that some weight could be placed on the evidence of the appellant's brother-in-law, particularly where the level of continuing interest in the appellant shown therein was consistent with the evidence of Dr Giustozzi.

23. Without meaning any disrespect to Mr Deller, who represented the respondent with his usual acuity, the Secretary of State had no sensible response to the inferences arising from the evidence provided by Dr Giustozzi of a continuing risk of harm if the appellant returns to Kabul or the evidence of the appellant's brother-in-law.

24. We accept that enquiries will be made about the appellant on returning to Afghanistan, either immediately upon arrival or reasonably soon thereafter, as he attempted to re-integrate in Kabul. At whatever point those enquiries take place, a risk of mistreatment will arise. As pointed out by Mr Henderson, the personal revenge attacks of 2006 occurred 10 years after the appellant had been active for HI so that extended period of time did not act in his favour to reduce risk. The information networks in Afghanistan are such that adverse interest could come from those in his local area who tried to harm him in 2006 or their agents in Kabul, JI or otherwise, from JI affiliates in the security services or the security services on learning of the appellant's HI profile. There was no dispute before us that adverse interest in this appellant would comprise mistreatment amounting to a breach of his rights under Article 3 of the ECHR. We **allow** the appeal on that basis.

Article 1F(a) of the Refugee Convention

25. We now turn to a second argument put forward by the appellant before us.

26. On 31 January 2013 there was a directions hearing held at Field House conducted by Upper Tribunal Judge Lane about case management of the remittal from the Court of Appeal. A document was issued the following day headed "Agreed basis on which the Upper Tribunal will deal with remitted appeal and directions to parties'. Paragraph 6 states:

> "It is agreed that if the appellant would otherwise be entitled to the grant of humanitarian protection, the Tribunal needs to consider the issue of the appellant's possible exclusion from such protection under paragraph 339D of the Immigration Rules and the corresponding provisions of the Qualification Directive (The issue of humanitarian protection may also lead to a need to consider if the appellant is entitled to refugee status by reference to the QD)."

27. We were puzzled how this agreement came to be made and what it meant. It seems to us that humanitarian protection has never been an issue in this appeal.

28. How the appeal comes before us is explained in the Statement of Reasons from the Court of Appeal, set out above. Our understanding is as follows:-

> i) The Claimant appealed the refusal of asylum dated 24 July 2008 and claimed entitlement to both refugee status and Article 3 protection.
>
> ii) Judge Aziz on 22 October 2008 concluded that he was excluded from refugee protection by reason of the Article 1F(a) exclusion clause but was entitled to Article 3 protection.
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> iii) The Article 3 protection was not a right to humanitarian protection status under the Immigration Rules or the Qualification Directive. The appellant only failed as a refugee because of the exclusion clause and the same exclusion clause applied to humanitarian protection. If the appellant

was not excluded from humanitarian protection he would be a refugee on Judge Aziz's findings of fact.

iv) The Secretary of State sought and obtained an order for reconsideration of the Article 3 issue and the appellant served a respondent's notice on the Article 1F(a) exclusion clause issue.

v) The reconsideration decision was adjourned on 9 February 2010 to await the decision of the Supreme Court of the Secretary of State's appeal from the Court of Appeal in the case of in JS (Sri Lanka) [2009] EWCA Civ 364, that had disapproved the decision of the AIT in Gurung (Nepal) v SSHD [2002] UKAIT 4870; [2003] Imm AR 115 on which the Secretary of State had relied and is cited in Judge Aziz's decision.

vi) On 30 July 2010 DIJ Barton decided that there was no error of law in Judge Aziz's decision on exclusion having regard to the test laid down in the Supreme Court in R (JS (Sri Lanka) v SSHD [2010] UKSC 15, [2011] 1 AC 184 handed down on 17 March 2010. He gave his reasons for that when he reached his decision on the Article 3 issue, where he decided Judge Aziz had erred in not considering relevant country guidance.

vii) On 9 February 2011 DIJ Barton gave his decision reconsidering and dismissing the appellant's appeal on the Article 3 issue and explaining the earlier decision that the exclusion aspect of the appeal would not be reconsidered.

viii) Permission to appeal to the Court of Appeal was refused by the Upper Tribunal on 16 March 2011. Upper Tribunal Judge Spencer noted that DIJ Judge Barton had considered JS (Sri Lanka) and concluded that Judge Aziz's reasoning and conclusions were consistent with it.

ix) The appellant renewed this application before the Court of Appeal and the application was refused on the papers by Sedley LJ. This decision only refers to the Article 3 issue. It may be that the appellant had by then not raised an issue as to the exclusion clause in the notice of appeal.

x) On 31 October 2011 Arden LJ granted permission on the Article 3 issue but refused permission on the Article 1F(a) exclusion clause issue that had, at least by then, been added to the appellant's grounds on an amendment drafted by Mr Henderson.

xi) On 28 March 2012 the Court of Appeal made the consent order and Statement of Reasons, as above. As we indicate in [4], the terms of the remittal were set out in paragraph 17 of the Statement of Reasons and were limited to whether the appellant could relocate in order to avoid Article 3 mistreatment.

29. In the light of that procedural history it seemed to us, whatever the parties had agreed between themselves, that the issue and the only issue to be re determined in this appeal was that set out in paragraph 17 of the Statement of Reasons.

30. We were clear that exclusion as a refugee had been dismissed as an arguable issue by the Upper Tribunal in March 2011 and by Lady Justice Arden in the Court of Appeal on 31 October 2011. There was no evidence of an application to re-open the issue before the full court and nothing in the Statement of Reasons to indicate that there was anything about exclusion the Upper Tribunal needed to look at.

31. In any event we were satisfied that there is no issue at all before us of humanitarian protection status or exclusion from that status. If the appellant now accepts that irrespective of the application of the exclusion clause he is not a refugee but nevertheless contends that he is entitled to humanitarian protection status he can always seek it from the Secretary of State. He has not done so hitherto and a previously unventilated issue cannot simply emerge at this stage as something we have to decide.

32. Mr Henderson submitted that as the Court of Appeal had remitted the appeal to us, it was open to us to vary the issues in the appeal from those directed by the Court of Appeal consent order. We will assume without deciding that there is statutory jurisdiction to do so, but in our judgment, subject to what we say at [35] and following, it would be an abuse of process to permit the claimant to re-open an issue decided against him by Judges Aziz, Barton and Spencer and on which the Court of Appeal had refused permission to appeal. The scheme of the Tribunal Courts and Enforcement Act 2008, as amplified by the decision of the Supreme Court in R (on the application of Cart v Upper Tribunal [2011] UKSC 28, envisages that the decision of the Upper Tribunal on appeal or permission to appeal is final save where the Court of Appeal is satisfied that an arguable error of law meeting the second appeal criteria has been identified. The application of that test is largely a matter for the Court of Appeal and not the Upper Tribunal. Not every arguable error of law will meet that test even in a refugee appeal.

33. It was common ground that we are not bound by the parties' agreement as to the issues in the case, and, for the reasons given in the previous paragraphs, we do not accept that the Article 1F(a) exclusion issue formed part of the remitted appeal before us.

34. Mr Henderson then submitted that the law had changed since the case passed from the Upper Tribunal and indeed since the decision of the Court of Appeal. The change relied on was the decision of the Supreme Court in Al-Sirri [2012] UKSC 54, [2012] 3 WLR 1263, delivered on 21 November 2012.

35. We were prepared to accept that if the law had changed since the final disposal of the appeal by ourselves and the Court of Appeal, it would not be an abuse to permit the issue of whether there was a material error of law in the previous decisions by reason of the new declaration of the law.

36. There is an analogy here with rule 45 of the Tribunal Procedure (Upper Tribunal) Rules 2008 in the following terms:

> **Upper Tribunal's consideration of application for permission to appeal**
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> **45.** (1) On receiving an application for permission to appeal the Upper Tribunal may review the decision in accordance with rule 46 (review of a decision), but may only do so if—
>
> (a) when making the decision the Upper Tribunal overlooked a legislative provision or binding authority which could have had a material effect on the decision; or
>
> (b) since the Upper Tribunal's decision, a court has made a decision which is binding on the Upper Tribunal and which, had it been made before the Upper Tribunal's decision, could have had a material effect on the decision.
>
> (2) If the Upper Tribunal decides not to review the decision, or reviews the decision and decides to take no action in relation to the decision or part of it, the Upper Tribunal must consider whether to give permission to appeal in relation to the decision or that part of it.

37. If the Upper Tribunal can review a final decision when a decision has been made by a higher court binding on the Upper Tribunal, then in our judgment, it would be appropriate to consider whether the issues in an appeal of which the Tribunal is seized by a remittal decision of the Court of Appeal should be amended by including a ground based on the change of the law.

38. Even if such a ground was arguable there is no obligation on the Upper Tribunal to grant permission to re-argue it. In some circumstances the newly arguable ground might so affect the decision-making process below that a fresh application should be made to the Secretary of State so the new state of the law can be applied by the original decision maker and re-examined on appeal.

39. We then adjourned the appeal to permit the parties to reflect on the matter and prepare submissions about the effect of Al-Sirri.

40. When we returned, Mr Henderson, with his customary and exemplary energy, had re-formulated his submissions and supplied us with the new authorities.

41. He submitted that the case of Gurung, relied upon by Judge Aziz at]53] and following, whose finding on exclusion had been upheld by the Court of Appeal, was not merely concerned with the application of the exclusion clause by operation of the membership doctrine, it also had something to say on the standard of proof.

42. In Gurung, the AIT had said as follows:

> 95. As regards the standard of proof, we find ourselves entirely in agreement with Mrs Grey`s submissions. In isolation one could state, as did the Canadian Federal Court in *Ramirez v Canada* [1992] 2 FC 306 at 311-313, that the phrase implied something less than proof on either a criminal standard of beyond reasonable doubt or a civil standard of balance of probabilities. However, in accordance with the approach of the Court of Appeal in *Karanakan* [2002] 3 All ER 449, rigid application of the civil approach to "standard of proof" has to give way in any event to a more rounded approach taking into account the possibility that doubtful events may have taken place. Thus there is no need to go beyond the words of Art 1F, i.e. "…serious reasons for considering…"

43. This passage was quoted by Judge Aziz at [58] of his determination.

44. The AIT in Gurung went on to summarise its conclusions

> "151. **Summary of Conclusions.**
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> In order to resolve some of the issues in this case it has been necessary to go into detail. Now that we have done that, however, we consider that guidance can be given in relatively short form:
>
> 1. Bearing in mind the need to adopt a purposive approach to the interpretation of the Exclusion Clauses, they are to be applied restrictively. In contrast to the focus under Art 1A(2) on current risk, the focus under Art 1F is on past crimes or acts.
>
> 2. In any case in which an adjudicator intends to apply the Exclusion Clauses, he should avoid equating Art 1F with a simple anti-terrorism provision. He should make findings about the serious crime or act committed by the claimant and then explain how that fits within a particular sub-category (or particular sub-categories) of Art 1F - 1F(a), IF (b) or 1F(c). As the Tribunal held in *Thayabaran* (12250), he should treat the evidential burden of proving that a claimant is excluded by Art 1F as resting on the Secretary of State. The test specified in Art 1F of "serious reasons for considering" that a barred act had been committed was one requiring a lower standard of proof than either beyond reasonable doubt or the balance of probabilities. No other wording than "serious reasons for considering" should be introduced (our emphasis)."

45. Mr Henderson pointed out that in Al-Sirri the Supreme Court said something very different:

> "75. We are, it is clear, attempting to discern the autonomous meaning of the words "serious reasons for considering". We do so in the light of the UNHCR view, with which we agree, that the exclusion clauses in the Refugee Convention must be restrictively interpreted and cautiously applied. This leads us to draw the following conclusions:
>
> (1) "Serious reasons" is stronger than "reasonable grounds".

> (2) The evidence from which those reasons are derived must be "clear and credible" or "strong".
>
> (3) "Considering" is stronger than "suspecting". In our view it is also stronger than "believing". It requires the considered judgment of the decision-maker.
>
> (4) The decision-maker need not be satisfied beyond reasonable doubt or to the standard required in criminal law.
>
> (5) It is unnecessary to import our domestic standards of proof into the question. The circumstances of refugee claims, and the nature of the evidence available, are so variable. However, if the decision-maker is satisfied that it is more likely than not that the applicant has *not* committed the crimes in question or has *not* been guilty of acts contrary to the purposes and principles of the United Nations, it is difficult to see how there could be serious reasons for considering that he had done so. The reality is that there are unlikely to be sufficiently serious reasons for considering the applicant to be guilty unless the decision-maker can be satisfied on the balance of probabilities that he is. But the task of the decision-maker is to apply the words of the Convention (and the Directive) in the particular case."

46. Earlier the Court had noted that

> "70. In *JS (Sri Lanka)*, at para 39, Lord Brown was "inclined to agree" with this passage, having also pointed out that
>
> > ". . . 'serious reasons for considering' obviously imports a higher test for exclusion than would, say, an expression like 'reasonable grounds for suspecting'. 'Considering' approximates rather to 'believing' than to 'suspecting'."

47. Thus, approximating "considering" to "believing" weakened "considering" even though Lord Brown was seeking to strengthen it by comparison with "suspecting".

48. It is unfortunate that in its search for the true international meaning of the Refugee Convention the Supreme Court had not referred to the French text, equally authentic in clarifying its meaning, where (as Sedley LJ had pointed out in JS Sri Lanka) considering is given as "*penser*".

49. Pausing here, we note that throughout the three decisions under consideration, Gurung, JS (Sri Lanka) and Al-Sirri, the judges concerned were stating that the language of the Refugee Convention or indeed the EU Qualification Directive must be respected where the question is whether there are serious reasons for considering. The proper international meaning of the instrument cannot be ascertained if the text of the instrument is substituted for purely national concepts of evidentiary law such as proof on balance of probabilities. Nevertheless, national courts can give guidance to inferior courts and tribunals as to the kind of analysis that is required to give effect to the proper international meaning.

50. We agree with Mr Henderson's submission that national guidance has shifted from the "serious possibility" approach indicated in Gurung. The test is whether there are serious reasons to consider than the claimant is excluded because of relevant conduct; the test will be met where it is "more likely" that this is the case as stated by the Supreme Court in Al–Sirri.

51. What remains clear is that a judge of the Immigration and Asylum Chamber is not conducting a trial of the claimant for war crimes, crimes against humanity or serious non-political crime either on the criminal or civil standard, and in reality would rarely be in a position to do so, as the respondent will not have access to all the evidence and more usually in overseas cases there will have been no relevant investigation in the first place.

52. As it happens there had been an investigation and prosecution in Al- Sirri and the fruits of that investigation were before the courts as the prosecution had been conducted in the Central Criminal Court. The trial judge had concluded that the evidence was as consistent with innocence as guilt and therefore neither the criminal nor civil standard had been met. The Supreme Court rejected the appellant's contentions that the criminal standard applied but made the observation that the application of the serious grounds for considering test meant that in practice it was unlikely that the test could be made out without the civil standard being satisfied.

53. The Supreme Court was not stating that this standard must always be met; it would have said as much if that was intended: but in doing so it would have subordinated the true meaning of an international instrument that has to be applied in a variety of contexts to a principle of British law of evidence and procedure.

54. The core principle we take from the Al–Sirri decision is that we must consider whether there *are* serious grounds, rather than merely "suspecting" or "believing" that such grounds exist; and we should endeavour if possible to reach a conclusion that meets the "more likely" or "more probable" standard. Where that standard cannot be met, there must be doubt whether the grounds for considering are serious enough to meet exclusion.

55. When addressing the issue of exclusion, Judge Aziz concluded at [80]:

> "I find that not only was the appellant most likely aware of the human rights abuses and war crimes being committed on the front line by Hizb-e-Islami troops, he was complicit in such atrocities. It was because individuals such as the appellant were ensuring that security in Hizb-i-Islami areas were maintained that enabled his colleagues on the front live to divert their attention to taking control of Kabul in the inhumane and callous manner that they did."

56. Mr Henderson submits that the reference to "most likely" (reflecting, in our view, a balance of probabilities approach) in the first sentence of [80] is limited to whether the appellant had knowledge of the war crimes. He maintained that Judge Aziz's finding that the appellant was complicit in those war crimes must be read as a

finding based on the reasonable possibility or degree of likelihood test drawn from Gurung.

57. We rather doubt this is the case. It makes a rather strange exegesis of the sentence if a finding of fact was reached by two different criteria. In our judgement, a proper reading is that Judge Aziz found that it was "most likely" that the appellant was complicit in war crimes as he knew that he knew that his activities behind the lines were intended to enable the frontline artillery units in their indiscriminate shelling of civilians. It was therefore not our view that as regards this key finding on exclusion, Judge Aziz applied the incorrect Gurung test in his assessment of complicity.

58. Further, even if we were to be less certain in that regard, stepping back to the basis for the original exclusion decision, we do not consider that it depends on the fine nuances discussed above. As indicated by Judge Aziz at [80], the evidence in this case was a combination of the background data of war crimes being committed by HI (and others) in the battle for Kabul from 1992 to 1996 and the appellant's account of his role as a commander of 500 troops of HI during this time, securing the areas behind front line troops in order for them to act unhindered and an account that admittedly included some visits to the front line by either appellant or his troops. There was little reason to doubt the primary data or the inferences rising from it. It is not disputed for the appellant that the bombardments of civilian areas of Kabul amounted to war crimes.

59. Cumulatively, the evidence in this case amounted to the existence of "serious reason to consider" that the claimant had participated in war crimes rather than mere suspicion or speculation or belief that he had done so. In those circumstances, we conclude that the refinements to the standard requirement to apply Article 1(F) expressed in Al-Sirri make no material difference to Judge Aziz's conclusions. Accordingly they are not a sufficient basis to find that his conclusion should be set aside and remade because of a material error of law.

60. In our judgment this conclusion disposes of this head of challenge. It was not argued that we should also re-open the findings of Judge Aziz as a result of a change in the law on participation in acts capable of leading to exclusion under Article 1(F). Al-Sirri has not changed the law in this respect, and there was nothing in the order of reference from the Court of Appeal indicating that this issue should be re-examined. It is open to the appellant to make any further application to the respondent for humanitarian protection when it will be open to him to develop any issue he considers may still arise for further examination.

Decision

61. We accordingly:

(i) remake the Article 3 appeal by allowing it;

(ii) find that there was no material error of law in Judge Aziz's consideration of the decision relating to exclusion from refugee status

and dismiss the appeal against that aspect of the decision;

(iii) consider that there is no issue before us relating to exclusion from humanitarian protection status.

62. Both members of the panel have contributed to the preparation of this determination.

Anonymity

Under Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 we make an order for non-disclosure of the identity of the appellant and his brother-in-law in order to avoid the likelihood of serious harm to them or other relatives of the appellant arising from the contents of this determination.

Signed: 
Upper Tribunal Judge Pitt Date: 24 September 2013