21 November 2012

PRESS SUMMARY

Al-Sirri (Appellant) v Secretary of State for the Home Department (Respondent)
DD (Afghanistan) (Appellant) v Secretary of State for the Home Department (Respondent)
[2012] UKSC 54
On appeal from [2009] EWCA Civ 222; [2010] EWCA Civ 1407

JUSTICES: Lord Phillips, Lady Hale, Lord Kerr, Lord Dyson, Lord Wilson

BACKGROUND TO THE APPEALS

These appeals concern a little used provision in article 1F(c) of the Geneva Convention on the Status of Refugees. This excludes from protection 'any person with respect to whom there are serious reasons for considering that…he has been guilty of acts contrary to the purposes and principles of the United Nations'. Both appellants have been refused the grant of refugee status by the respondent on this ground.

Al-Sirri is a citizen of Egypt who arrived in the UK in 1994. The facts relied on for the refusal of his asylum claim included his possession of and contribution to books connected with Al Qaeda and other proscribed organisations and his alleged involvement in the murder of General Masoud in Afghanistan in 2001. The issue raised by his case is whether all activities defined as terrorism by United Kingdom domestic law are for that reason acts falling within article 1F(c), or whether such activities must constitute a threat to international peace and security. DD is a citizen of Afghanistan who came to the UK in 2007. His claim for asylum was based on his fear of persecution as the brother of the leader of forces allied with the Taliban, who had fought against both the Afghan government and the UN-mandated International Security Assistance Force ('ISAF'). In his case the question is whether armed insurrection against not only the incumbent government but also a UN-mandated force supporting that government falls within article 1F(c). In both appeals the issue also arises as to what is meant by 'serious reasons for considering' a person to be guilty of the act in question.

The appellants appealed against the respondent's refusal to grant asylum. On 18 March 2009 the Court of Appeal set aside the determination of the Asylum and Immigration Tribunal (AIT) in Al-Sirri's case and remitted it to be determined afresh omitting certain matters on which the respondent had sought to rely. DD was initially successful in his appeals but the Court of Appeal remitted his case for reconsideration by the Upper Tribunal because the AIT had failed to consider DD's individual responsibility and whether he fell within article 1F(c). Both appellants have nonetheless pursued an appeal to the Supreme Court in order to challenge the approach of the Court of Appeal to the interpretation of article 1F(c) in a number of respects.

JUDGMENT

The Supreme Court unanimously dismisses both appeals. Both cases will now be remitted to the relevant tribunal for reconsideration in accordance with the orders of the Court of Appeal. In the case of Al Sirri the guidance given to that tribunal should be in line with the judgment of the Supreme Court. The judgment is given by Lady Hale and Lord Dyson, with whom the other justices agree.

REASONS FOR THE JUDGMENT

The general approach to article 1F(c)
Article 1F(c) should be interpreted restrictively and applied with caution. There should be a high threshold defined by the gravity of the act in question, the manner in which the act is organised, its international objectives and its implications for international peace and security. There should be serious reasons for considering that the person concerned bore individual responsibility for acts of that character [**16**].

International dimension
It is clear that the phrase 'acts contrary to the purposes and principles of the United Nations' must have an autonomous meaning and member states are not free to adopt their own definitions. There is as yet no internationally agreed definition of terrorism. It was appropriately cautious therefore to adopt paragraph 17 of the United Nations High Commissioner for Refugees (UNHCR) Guidelines which provided that article 1F(c) was 'only triggered in extreme circumstances by activity which attacks the very basis of the international community's co-existence. Such activity must have an international dimension. Crimes capable of affecting international peace, security and peaceful relations between States, as well as serious and sustained violations of human rights would fall under this category' [**36-38**]. It could be enough if one person plotted in one country to destabilise another. The test was whether the resulting acts had the requisite serious effect upon international peace [**40**].

Armed insurrection against UN-mandated forces
DD had been engaged in fighting against ISAF in Afghanistan. ISAF was an armed force under the lead command of individual nations authorised by the UN from 2001, and was distinct from the United Nations Assistance Mission in Afghanistan (UNAMA), which was established in 2002 as a peacekeeping force. Both ISAF and UNAMA had the same objective to maintain peace and security in Afghanistan. DD argued that simple participation in an attack against UN-mandated forces did not engage article 1F(c). The Supreme Court agreed that the protection for ISAF against attack was not the same as for peacekeeping forces. This was not however material to the issue under article 1F(c) which was to be judged under the same principle in paragraph 17 of the UNHCR Guidelines quoted above [**66**]. The fundamental aims and objectives of ISAF accorded with the purposes stated in the UN Charter and DD was seeking to frustrate that purpose [**68**].

Standard of proof
This issue arose in acute form in Al-Sirri. Al-Sirri had been indicted at the Old Bailey in relation to the murder of General Masoud but the charge was dismissed on the ground that the evidence was as consistent with his innocence as it was with his guilt. Article 1F(c) required that there be serious reasons for considering that the asylum seeker had been guilty of the acts. This had an autonomous meaning, and was not the same as the criminal standard of proof beyond reasonable doubt, or any domestic standard. 'Serious reasons' was stronger than 'reasonable grounds', strong or clear and credible evidence had to be present and the considered judgment of the decision-maker was required. The reality was that there were unlikely to be sufficiently serious reasons for considering an applicant to be guilty unless the decision-maker could be satisfied that it was more likely than not that he was. But the task of the decision-maker was to apply the words of article 1F(c) in the particular case [**75**].

References in square brackets are to paragraphs in the judgment