

REVOLUTIONARY VIOLENCE AND REFUGEES

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(A) The General Proposition

Three recent cases of 'exclusion' all concern "actions contrary to the purposes and principles of the United Nations." All three highlight the role of 'political violence' in revolutionary situations. The first arose in 2009 is *KJ (Sri Lanka)*.¹ The claimant, an LTTE member, had been involved in 5 battles with the Sri Lankan Army, even though he was a foot soldier and had not attacked civilians. Stanley Burnton LJ in the Court of Appeal observing of "acts contrary to the purposes and principles of the United Nations," that "it is clear that acts of terrorism – in particular the deliberate killing or injuring of civilians in pursuit of political objects – are such acts," but this is not true of "acts of a military nature committed by an independence movement (such as the LTTE) against the military forces of the government."² This suggests that combatants on the streets of Aleppo in Syria may kill other combatants and still qualify as refugees.³

The second case arising in 2010 is *SS*,⁴ decided by the UK's specialist terrorism tribunal, the Special Immigration Appeal Commission, involved a Libyan national who was an active member of the Libyan Islamic Fighting Group (LIFG). Mitting J. distinguished *KJ (Sri Lanka)* and the approach of Stanley Burnton LJ. He decided that,⁵ "the fundamental definition of terrorism.

¹ *KJ(Sri Lanka) v SSHD* [2009] EWCA Civ 292

² *ibid* at para 34

³ Aleppo is Syria's second city. It became a key battleground in July 2012, when rebel fighters launched an offensive to oust government forces in northern Syria: see, <http://www.bbc.co.uk/news/world-middle-east-18957096>

⁴ *SS v Secretary of State for the Home Department* (SC/56/2009), (30 July 2010)

⁵ Mitting J.'s decision was based on an analysis and comparison of Article 1.3 of the definition of terrorist act, adopted by the European Council on 27 December 2001, in a statement setting out their common position (2001/931/CFSP), and on the UK legislation where the definition of terrorism includes the threat of action,

which is designed to influence the government, with the purpose of advancing a political or ideological cause, involving a serious damage to property

an electronic system: see Section 1 of the Terrorism Act 2000 at

<http://www.legislation.gov.uk/ukpga/2000/11/contents>

or interference with o

.... is the use or threat of action designed to influence a government or to intimidate a population by serious acts of violence and some acts of economic disruption.”⁶ Therefore, “a definition of terrorism which had at its heart the use or threat of serious or life threatening violence against the person and/or serious violence against property, including economic infrastructure, with the aim of intimidating a population or influencing a government, except when carried out as a lawful act of war,”⁷ was adopted. Carnwath LJ in the Court of Appeal reversed this decision because, “went too far [to say] that *KJ(Sri Lanka)* could not be relied on to support a distinction between different categories of violence for political ends.”⁸ The confusion thrown up between the two approaches became obvious.

The third case is *D*.⁹ An Afghan national, aligned to insurgent groups, fought both against Afghan government Coalition forces, present in the country pursuant to UN resolutions. Pill LJ in the Court of Appeal followed Stanley Burnton LJ in *KJ (Sri Lanka)*. Armed insurrection *per se* is not terrorism. Although, “the circumstances in which acts of violence against a government are acts of terrorism is a difficult question” nevertheless “*KJ* appears to be authority for the proposition that military action directed against the armed forces of the government does not as such constitute terrorism or acts contrary to the purposes and principles of the United Nations.” Accordingly, “it is difficult to hold that every act of violence in a civil war, the aim of which will usually be to overthrow a legitimate government, is an act of terrorism...”¹⁰ Given that, “the only findings were findings of acts against government forces” this meant “acts of terrorism had not been committed on the findings made.”¹¹ Thus, revolutionary violence does not *ipso facto* exclude a person from refugee status for that reason alone. What is surprising is not that violence occurs, but why as refugees lawyers we are so surprised by it when revolutions happen. To the examination of this question we now turn.

(B) Analysing the General Proposition:

(1) KJ (Sri Lanka) [2009] EWCA Civ. 292

(1) In *KJ (Sri Lanka)* the issue was whether *KJ*'s membership of the LTTE in

⁶ *SS v Secretary of State for the Home Department* (SC/56/2009), (30 July 2010) at para 15

⁷ *SS v Secretary of State for the Home Department* (SC/56/2009), (30 July 2010) at para 16

⁸ *SS v Secretary of State for the Home Department* [2011] EWCA Civ 1547 at para 37.

⁹ *Secretary of State for the Home Department v D* [2010] EWCA Civ 1407

¹⁰ *ibid* at para 55.

¹¹ *Ibid* at para 58

Sri Lanka brought him within the exclusion in Article 1F(c) of the Convention. The judgment of the Court was given by Stanley Burnton LJ:-

“35. I turn ... to consider what must be shown in relation to the person in relation to whom a question of the application of the exclusion clause arises. Certain points are, I think, clear. First, the Convention may be excluded even if the evidence available does not establish positively that the person in question committed a crime against peace or one of the other crimes or acts identified in paragraphs (a), (b) or (c): it is sufficient if there are ‘serious reasons for considering’ that he did so. Nonetheless, the crimes and acts referred to are all serious, and the seriousness of the reasons must correspond with the seriousness of the crimes and acts in question.

Secondly, each of the paragraphs requires the personal guilt of the person in question: paragraphs (a) and (b) refer to his having committed a crime of the nature described, and paragraph (c) refers to his having committed acts contrary to the purposes and principles of the United Nations. It follows that mere membership of an organisation that, *among other activities*, commits such acts does not suffice to bring the exclusion into play. On the other hand, in my judgment a person who knowingly participates in the planning or financing of a specified crime or act or is otherwise a party to it, as a conspirator or an aider or abettor, is as much guilty of that crime or act as the person who carries out the final deed.

36. Lastly, so far as paragraph (c) is concerned, it is common ground that acts of terrorism, such as the deliberate killing of civilians, are contrary to the purposes and principles of the UN.

37. The application of Article 1F(c) will be straightforward in the case of an active member of organisation that promotes its objects only by acts of terrorism. There will almost certainly be serious reasons for considering that he has been guilty of acts contrary to the purposes and principles of the United Nations.

38. However, the LTTE, during the period when KJ was a member, was not such an organisation. It pursued its political ends in part by acts of terrorism and in part by military action directed against the armed forces of the government of Sri Lanka. The application of Article 1F(c) is less straightforward in such a case. A person may join such an organisation, because he agrees with its political objectives, and by willing to participate in its military actions, but may not agree with and may not be willing to participate in its terrorist activities. Of course, the higher up in the organisation a person is the more likely will be the inference that he agrees with and promotes all of its activities, including its terrorism. But it seems to me that a foot soldier in such an organisation, who has not participated in acts of terrorism, and in particular has not participated in the

murder or attempted murder of civilians, has not been guilty of acts contrary to the purposes and principles of the United Nations.”

(2) JS (Sri Lanka) v Secretary of State for the Home Department [2010]
UKSC 15

(2) Stanley Burnton LJ’s analysis in KJ found favour with the Supreme Court in JS. In JS the Court was concerned with potential exclusion under Article 1F(a) of the Convention, in a case which, like KJ, involved membership of the LTTE. The Supreme Court examined the wording of Article 1F, along with parallel wording in Article 12 of Council Directive 2004/83/EC (“the Qualification Directive”). The Court considered that, in determining whether a person was excluded by Article 1F(a) for being complicit in war crimes or crimes against humanity because of his membership of a particular organisation, the starting point was now the Rome Statute of the International Criminal Court.

(3) At [35] of the judgments, Lord Brown held that it “must surely be correct to say ... that Article 1F disqualifies those who make a ‘substantial contribution to’ the crime, knowing that their acts or omissions will facilitate it”, as well as “anyone contributing to the commission of such crimes ‘by substantially assisting the organisation to continue to function effectively in pursuance of its aims’”. At [36] Lord Brown held:-

“36. 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. (I would for this reason reject the claimant’s criticism of the omission from para 21 of the German court’s judgment of any separate reference to intent; that ingredient of criminal responsibility is already encompassed within the court’s existing formulation.)”

(4) In conclusion, at [38] Lord Brown said that:-

“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.”

(3) Bundesrepublik Deutschland v B and D [2011] Imm AR 190

(5) In the case of B and D, as it is commonly known, the German Federal Administrative Court asked the CJEU:-

(i) whether it constituted a serious non-political crime or an act contrary to the purposes and principles of the United Nations within the meaning of Article 12(2)(b) and (c) of the Qualification Directive if the person seeking asylum was a member of an organisation which, because of its involvement in terrorist acts, was on the list of entities annexed to the Common Position 2001/931 and that person actively supported the organisation's armed struggle or occupied a prominent position within that organisation;

(ii) whether exclusion from refugee status was conditional upon the person concerned continuing to represent a danger for the host member state;

(iii) whether exclusion from refugee status was conditional upon a proportionality test being undertaken in relation to that particular case;

(iv) whether it was compatible with the Qualification Directive for a member state to recognise that a person excluded from refugee status had a right of asylum under its constitutional laws.

(6) The CJEU held that exclusion from refugee status of a person who had been a member of an organisation which used terrorist methods was conditional on an individual assessment of the specific facts, and that before a finding could be made, it must be possible to attribute to the person concerned a share of the responsibility for the acts committed by the organisation of which he or she was a member. Individual responsibility had to be assessed in the light of objective and subjective criteria, and an assessment had to be made of 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.

(7) This analysis provides a basis which for fully appreciating the use to which it was put by the Supreme Court in Al-Sirri and DD:-

"[15] ... for exclusion from international refugee protection to be justified, it must be established that there are serious reasons for considering that the person concerned had individual responsibility for acts within the scope of article 1F(c): see the detailed discussion at paras 50 to 75 of the UNHC "Background Note". This requires an individualised consideration of the facts of the case, which will include an assessment of the person's involvement in the act concerned, his mental state and possible grounds for rejecting

individual responsibility. As a general proposition, individual responsibility arises where the individual committed an act within the scope of article 1F(c), or participated in its commission in a manner that gives rise to individual responsibility, for example through planning, instigating or ordering the act in question, or by making a significant contribution to the commission of the relevant act, in the knowledge that his act or omission would facilitate the act.

In *Bundesrepublik Deutschland v B and D* (Joined Cases C-57/09 and C-101/09) [2011] Imm AR 190 (“*B and D*”) the Grand Chamber of the Court of Justice of the European Union confirmed the requirement of an individualized assessment and held that it was not justifiable to base a decision to exclude solely on a person’s membership of a group included in a list of “terrorist organisations”. This too is consistent with the approach adopted by this Court in *R (JS (Sri Lanka)) v Secretary of State for the Home Department* [2011] 1 AC 184.

(8) So what this suggests is that the article should be interpreted restrictively and applied with caution. There should be a high threshold “defined in terms of the gravity of the act in question, the manner in which the act is organised, its international impact and long-term objectives, and the implications for international peace and security”. And there should be serious reasons for considering that the person concerned bore individual responsibility for acts of that character. ...”

(C) Application of the General Proposition to the facts.

(9) The Courts are now closely aware of the need to avoid applying any “gloss” to the relevant case law, in particular by following any methodological approach which might restrict the holistic nature of our task, but nevertheless the following headings are now seen as a useful means of approaching the case law:

(i) **Nature of the “acts”**: Has the appellant had involvement in acts which (assuming positive answer to questions (ii) to (iv)) fall within Article 1F(c)? (A principal issue addressed by the Supreme Court in Al-Sirri and DD);

(ii) **Seniority/role**: Did the appellant have a sufficient seniority/role in connection with those acts, so as to fall within Article 1F(c)? (the issue in KJ (Sri Lanka)). As we shall later explain, for the purposes of the present case, this heading needs to be approached with caution;

(iii) **Specificity**: Are the allegations against the appellant of sufficient specificity to satisfy the Supreme Court’s approach in JS (Sri Lanka)?

(iii) **Probability**: Is the respondent’s case made out to a sufficient degree of

probability? (as required by Al-Sirri and DD).

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