Appeal no: SC/56/2009
Hearing Dates: 13th & 14th July 2010
Date of Judgment: 30th July 2010

SPECIAL IMMIGRATION APPEALS COMMISSION

OPEN JUDGMENT

Before:

THE HONOURABLE MR JUSTICE MITTING (Chairman)
SENIOR IMMIGRATION JUDGE GLEESON
MR M G TAYLOR CBE DL

(SS)

APPELLANT

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

For the Appellants:	Mr M MacKenzie Instructed by TRP Solicitors
For the Respondent:	Mr S Kovats QC Instructed by the Treasury Solicitor for the Secretary of State
Special Advocate:	Ms S J Farby & Mr M Goudie Instructed by the Special Advocates Support Office

The Hon. Mr Justice Mitting :

Background

1. SS is a forty four year old Libyan national. He arrived in the United Kingdom on 8 April 2001 and claimed asylum on arrival. He said that he feared persecution because he had been an active member of the Muslim Brotherhood in Libya. His claim was refused by the Secretary of State on 7 June 2001. He appealed to an adjudicator, who dismissed his appeal in a determination promulgated on 7 February 2002. The adjudicator said that he did not believe anything which SS had said which was material to his case. Nevertheless, he concluded, for reasons which did not depend upon the truth or otherwise of SS's account, that he could not safely be returned to Libya. Consequently, on 7 May 2002, he was granted four years exceptional leave to remain. On 24 May 2006, he was detained and served with a notice of intention to deport him on conducive grounds. The Secretary of State believed him to be an active member of the Libyan Islamic Fighting Group ("LIFG") and that his continued presence in the United Kingdom posed a threat to its national security. Following the judgment of SIAC in the lead cases of DD and AS, handed down on 27 April 2007, SS was released on bail on 11 May 2007. Following the dismissal by the Court of Appeal of the Secretary of State's appeal against SIAC's judgment, notice of intention to deport was withdrawn on 7 April 2008.

2. On 30 April 2008 he made a fresh claim for asylum. The basis for the claim was a note verbale from the Libyan Government 2193 of 27 July 2006, which confirmed that SS was a Libyan national and stated that he would be detained

on return and investigated on a charge of membership of a prohibited terrorist organisation, the LIFG. Asylum was refused on 13 February 2009, but SS was granted six months discretionary leave to remain, which was renewed for a further six months until 13 February 2010. He thereupon became entitled to appeal against the rejection of his asylum claim: s83 Nationality, Immigration and Asylum Act 2002. For the purposes of this appeal only, the Secretary of State accepts that SS has a well-founded fear of persecution in Libya for a Refugee Convention reason, but asserts that he is excluded from the protection of the Convention under Article 1(F)(c). The sole issue in this appeal is whether or not that assertion is justified.

3. The substance of the case against SS is set out in the closed material. No gist of the key allegations against him has been provided to him, save for the assertion that he was and is a member of the LIFG. He has given brief oral evidence. In it, he denied that he had ever belonged to the LIFG, said that he was not aware of its objectives, and that he only knew the names of some of its members because they had been mentioned in the media. He said that he did not support the use violence to overthrow Colonel Gaddafi and had not helped to raise money to help others to do so. Like the adjudicator who dismissed his original asylum appeal, we do not believe anything which he has said which is material to his asylum claim. He was an unimpressive witness. He did not, as some of his colleagues and former colleagues have done, begin to tell the truth about his beliefs and actions in the period before he left Libya and before and after his arrival in the United Kingdom. To the extent that we are able to make findings about those matters, they are set out in the closed judgment and are based on closed material. We are satisfied that he was, while

in the United Kingdom and almost certainly before his arrival, a member and supporter of the LIFG. For the reasons explained below, that fact, though relevant, is not, by itself, determinative of the appeal.

4. The dismissal of this appeal would not result, without more, in the removal of SS to Libya. It would, however, deprive him of valuable benefits which would flow from the grant of refugee status; three or five years leave to remain, removal of the need to apply for permission to marry (he is divorced), freedom to work or set up in business and the possibility that his son could apply for leave to enter the United Kingdom to join him. The fact that he would not be removed has an impact, explained below, on the law applicable to this appeal, but does not make it academic.

The law

5. Article 1(F)(c) of the Refugee Convention provides:

> "The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:…
>
> (c) he has been guilty of acts contrary to the purposes and principles of the United Nations".

What that means in practice is difficult to ascertain. There are four sources of authority:

(i) international law, including relevant international instruments and decisions,

(ii) domestic legislation,

(iii) European Union decisions and legislation, and,

(iv) case law (including decisions of the Court of Appeal and Supreme Court).

6. In principle, the meaning of Article 1(F) should be autonomous and found in international, rather than domestic law: *R (JS) (Sri Lanka) v SSHD* [2010] UKSC 15, paragraph 2. Unfortunately, that meaning has not yet been authoritatively determined and may never be. Further, in relation to Article 1(F)(c), as we explain below, the principle must give way to domestic primary legislation and must be considered in the light of EU decisions and legislation.

7. Nevertheless, international law, instruments and decisions, provide a sensible starting point. The United Nations High Commissioner for Refugees ("UNHCR") explained the history, and cast light on the originally intended purpose, of Article 1(F)(c) in its background note of 4 September 2003. Although the *traveaux preparatoires* are of limited assistance (paragraph 46), statements were made by the delegate who pressed for the inclusion of the clause at the Conference of Plenipotentiaries, that it was not aimed at the "man in the street". The UNHCR handbook stated that for an individual to have committed an act contrary to the purposes and principles of the United Nations, he must have been in a position of power in a member state and instrumental to his state's infringing the principles (paragraph 48). The purposes and principles are stated in Articles 1 and 2 of the Charter of the United Nations, which focus upon the maintenance of international peace and security and the prevention and removal of threats to that peace. The preamble states the purposes and principles somewhat more broadly, so as to include a determination "to practice tolerance and live together in peace with one

another as good neighbours". The narrower focus of Articles 1 and 2 of the Charter might have been thought to have precluded the categorisation of acts of terrorism as being contrary to the purposes and principles of the United Nations unless, perhaps, state-sponsored or on such a scale as to threaten international peace. Resolutions of the Security Council, notably 1267 (1999), 1373 and 1377 (2001) and 1624 (2005) have now put the matter beyond doubt: acts of terrorism are contrary to the principles and purposes of the United Nations, as the recitals and operative provisions of Resolution 1624 unequivocally demonstrate:

> "The Security Council,…
>
> *condemning* in the strongest terms all acts of terrorism irrespective of their motivation, whenever and by whomsoever committed, as one of the most serious threats to peace and security, and *reaffirming* the primary responsibility of the Security Council for the maintenance of international peace and security under the Charter of the United Nations…
>
> *deeply concerned* that incitement of terrorist acts motivated by extremism and intolerance poses a serious and growing danger to the enjoyment of human rights, threatens the social and economic development of all states, undermines global stability and prosperity, and must be addressed urgently and proactively by the United Nations and all states, and *emphasising* the need to take all necessary and appropriate measures in accordance with international law at the national and international level to protect the right to life,…
>
> *recalling in addition* the right to seek and enjoy asylum reflected in Article 14 of the Universal Declaration and the non-refoulement obligation of states under the Convention relating to the status of refugees adopted on 28 July 1951…and also *recalling* that the protections afforded by the Refugee Convention and its protocol shall not extend to 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,
>
> *reaffirming* that acts, methods, and practices of terrorism are contrary to the purposes and principles of the United Nations and that knowingly financing, planning and inciting terrorist

> acts are also contrary to the purposes and principles of the United Nations,…
>
> *recalling* that all states must cooperate fully in the fight against terrorism in accordance with their obligations under international law, in order to find, deny safe haven and bring to justice, on the basis of the principle of extradite or prosecute, any person who supports, facilitates, participates or attempts to participate in the financing, planning, preparation or commission of terrorist acts or provide safe havens,
>
> (i) *calls upon* all states to adopt such measures as may be necessary and appropriate and in accordance with their obligations under international law to:
>
> (a) prohibit by law incitement to commit a terrorist act or acts;
>
> (b) prevent such conduct;
>
> (c) deny safe heaven to any persons with respect to whom there is credible and relevant information giving serious reasons for considering that they have been guilty of such conduct"

8. These ringing declarations establish that acts of terrorism are contrary to the principles and purposes of the United Nations, but they do not define what "terrorism" is. Perhaps unsurprisingly, there is no internationally agreed definition: one man's terrorist is another man's freedom fighter. The political and judicial authorities of nation states and regional organisations, such as the EU, must, perforce, fill the gap.

9. The UK Parliament has done so. Section 54 Immigration, Asylum and Nationality Act 2006, which came into force on 31 August 2006, provides,

> "54. Refugee Convention: construction
>
> (i) in the construction and application of Article 1(F)(c) of the Refugee Convention the reference to acts contrary to the purposes and principles of the United Nations shall be taken as including, in particular –

(a) acts of committing, preparing or instigating terrorism (whether or not the acts amount to an actual or inchoate offence), and

(b) acts of encouraging or inducing others to commit, prepare or instigate terrorism (whether or not the acts amount to an actual or inchoate offence).

(ii) in this section - …

"terrorism" has the meaning given by section 1 of the Terrorism Act 2000"

Section 1 of the Terrorism Act 2000 provides:

"1. Terrorism: interpretation.

(1) In this Act "terrorism" means the use or threat of action where -

(a) the action falls within subsection (2),

(b) the use or threat is designed to influence the government or to intimidate the public or a section of the public, and

(c) the use or threat is made for the purpose of advancing a political, religious or ideological cause.

(2) Action falls within this subsection if it –

(a) involves serious violence against a person,

(b) involves serious damage to property,

(c) endangers a person's life, other than that of the person committing the action,

(d) creates a serious risk to the health or safety of the public or a section of the public, or

(e) is designed seriously to interfere with or seriously to disrupt an electronic system.

(3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.

(4) In this section –

(a) "action" includes action outside the United Kingdom,

(b) a reference to any person or to property is a reference to any person, or to property, wherever situated,

(c) a reference to the public includes a reference to the public of a country other than the United Kingdom, and

(d) "the government" means the government of the United Kingdom, of a part of the United Kingdom or of a country other than the United Kingdom."

(set out without the amendments inserted by the Terrorism Act 2006 and by the Counter-Terrorism Act 2008).

10. On 27 December 2001, the European Council adopted a common position which included, in Article 1.3, a definition of "terrorist act":

"3. For the purposes of this Common Position, '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:

(i) seriously intimidating a population, or

(ii) unduly compelling a Government or an international organisation to perform or abstain from performing any act, or

(iii) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation:

(a) attacks upon a person's life which may cause death;

(b) attacks upon the physical integrity of a person;

(c) kidnapping or hostage taking;

(d) causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property, likely to endanger human life or result in major economic loss;

(e) seizure of aircraft, ships or other means of public or goods transport;

> (f) manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons;
>
> (g) release of dangerous substances, or causing fires, explosions or floods the effect of which is to endanger human life;
>
> (h) interfering with or disrupting the supply of water, power or any other fundamental natural resource, the effect of which is to endanger human life;
>
> (i) threatening to commit any of the acts listed under (a) to (h);
>
> (j) directing a terrorist group;
>
> (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.
>
> For the purposes of this paragraph, 'terrorist group' shall mean a structures group of more than two persons, established over a period of time and acting in concert to commit terrorist acts. 'Structures group' means a group that is not randomly formed for the immediate commission of a terrorist act and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure."

11. Council Directive 2004/83/EC of 29 April 2004 laid down minimum standards for the qualification of third country nationals and stateless persons as refugees or as persons who otherwise need international protection. The recitals indicate the purpose of the Directive: to ensure that member states apply common criteria for the identification of persons genuinely in need of international protection and to ensure that a minimum level of benefits is available for them in all member states, with a view to limiting secondary movements of applicants for asylum between member states: recitals (6) and (7). To that end, it was deemed necessary to introduce common criteria for recognising applicants for asylum as refugees or for international protection:

recitals (17) and (25). Particular issues of definition were addressed, including Article 1(F)(c), in recital (22):

> "Acts contrary to the purposes and principles of the United Nations are set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations and are amongst others, embodied in the United Nations Resolutions relating to measures combating terrorism, which declare that 'acts, methods and practices of terrorism are contrary to the purposes and principles of the United Nations' and that 'knowingly financing, planning and inflicting terrorist acts are also contrary to the purposes and principles of the United Nations'".

Articles 12 and 17 deal with exclusions, from being a refugee and from being eligible for subsidiary protection, respectively:

> "12.2 A third country national or a stateless person is excluded from being a refugee where there are serious reasons for considering that:…
>
> (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.
>
> 12.3. Paragraph 2 applies to persons who instigate or otherwise participate in the commission of the…acts mentioned therein".
>
> "17.1 A third country national or a stateless person is excluded from being eligible for subsidiary protection where there are serious reasons for considering that:…
>
> (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…
>
> 17.2 Paragraph 1 applies to persons who instigate or otherwise participate in the commission of the…acts mentioned therein".

Article 38 required member states to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive before 10 October 2006. The UK did so by the Refugee or Person in Need of International Protection (Qualification) Regulations 2006 SI 2006 No. 2525,

which came into force on 9 October 2006 and by paragraph 339C of the Immigration Rules, which was inserted on the same date.

12. Section 54 of the 2006 Act was not enacted to give effect to the Qualification Directive. Accordingly, Mr Kovats QC submits that it should not be interpreted so as to give effect to the Directive, under the principles established in *Litster v Forth Dry Dock and Engineering Co Ltd* [1990] 1 AC 546. He does not repeat the concession made by counsel for the Secretary of State that Section 54 should be read down to keep its meaning within the scope of Article 12(2)(c) of the Qualification Directive in *Al-Sirri v SSHD* [2009] EWCA Civ 222 at paragraph 29. Nevertheless, he accepts that the Directive has direct effect in the United Kingdom and that SS is entitled to the benefit of the protection conferred by it. He submits that on a proper understanding of EU law, the Directive does not require the United Kingdom to depart from the definition of terrorism which the UK Parliament has required to be adopted for the purpose of determining exclusion under Article 1(F)(c). His argument is based upon the observation of the Advocate General in *B and D v Germany*, cases 57/09 and 101/09, presented on 1 June 2010. In paragraphs 57 and 71 of his opinion, he suggests that member states enjoy a margin of appreciation in the recognition of refugees under Article 12(2)(b) and (c) of the Qualification Directive (the equivalents of Articles 1(F)(b) and (c) of the Refugee Convention). Thus, the Qualification Directive permits the UK to define acts of terrorism and to refuse to grant asylum or subsidiary protection to individuals who have perpetrated such acts.

13. We are not convinced that the Luxembourg Court will accept the Advocate General's opinion on this issue. The declared purpose of the Qualification Directive was to require member states to adopt minimum standards for the recognition of persons who qualified for asylum or subsidiary protection for the purpose, amongst others, of limiting secondary movements of applicants between member states. If UK law is notably more stringent in its definition of those who may be excluded under Article 1(F)(c) than other member states, that purpose will be frustrated. We believe that a more secure approach is to compare the Council definition of terrorist act with the definition in section 1 of the 2000 Act, to identify common ground and then to see if there is anything in the case law of England and Wales or of other countries or in international instruments and decisions which suggests that an act of terrorism, as defined by both, is not an act contrary to the purposes and principles of the United Nations for the purpose of Article 1(F)(c).

14. The principal differences are as follows:

(i) Section 1 requires a purpose of advancing a political, religious or ideological cause. Article 1.3 does not. The reason may be that some member states wished to include within those who could commit a terrorist act, members of a powerful criminal organisation, capable of intimidating the public or influencing the government. If so, it is the EU measure which may need to be compared against international standards, not section 1.

(ii) Article 1.3(iii) includes the aim of seriously destabilising or destroying fundamental political, constitutional, economic or social structures. This is

simply an example of the purposes identified in Article 1.3(i) and (ii) and Section 1(1) and is not a true difference.

(iii) Article 1.3 identifies means by which a terrorist act may be committed which to do not expressly appear in section 1(2): kidnapping and hostage taking, damaging the economic infrastructure, seizing aircraft ships and other means of public or goods transport, the manufacture etc of weapons, explosives and nuclear, biological or chemical weapons and the release of dangerous substances or causing fires etc and interference with water supply. These are mostly examples of the acts more simply stated in section 1(2). Certainly, nothing in section 1(2) goes beyond the means identified in Article 1.3.

(iv) Article 1.3 includes directing and participating in the activities of a terrorist group, including supplying information and resources and funding its activities, with requisite knowledge. Again, the definition in Article 1.3 is wider than that in Section 1. The gap is substantially closed by Section 54(1).

(v) Section 1(3) defines as terrorism the use or threat of serious violence etc "which involves the use of firearms or explosives", whether or not it is designed to influence the government or to intimidate the public or a section of the public. Article 1.3 contains no similar provisions.

We do not discern any difference between Section 1(1)(b) ("the use or threat is designed to influence the government…") and Article 1.3(ii) ("unduly compelling a government…to perform or abstain from performing any act"). Mr Mckenzie asks rhetorically whether the words "unduly compelling" in Article 1.3 add something which is not present in Section 1(1)(b). We do not

think it does. A government would be "unduly compelled" to perform or abstain from performing any act by all or almost all of the means identified in Article 1.3(a) to (i). All the phrase does is to emphasise that those means are illicit: a government which performed or abstained from performing an act because a person or group of persons had done any of the things there set out would be acting under undue compulsion.

15. The common ground between the two instruments is far greater than the differences. The fundamental definition of terrorism in both 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.

16. We have not been referred to and are not aware of any widely accepted international definition of terrorism which differs in any essential respect from that summarised above. There is clearly room for debate about the inclusion of serious disruption to the economic infrastructure of a country not caused by violence in the definition and an implied exclusion of lawful acts of war, possibly including civil war. (cf. *KJ (Sri Lanka) v SSHD*, below). But we doubt that any international organisation or reputable commentator would disagree with 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.

17. The leading case on Article 1(F)(c) in England and Wales is *KJ (Sri Lanka) v SSHD* [2009] EWCA Civ 292. Mr Mckenzie places heavy reliance upon it. KJ

played a military role in the LTTE: reconnoitring and surveying army camps and sentry points, to enable the LTTE the more accurately to target Sri Lankan Armed forces. He had been involved in five battles and numerous clashes with the Sri Lankan army. The AIT found that he had played a crucial role for the LTTE in its armed campaign against the government. He denied planning or participating in attacks on civilians. The procedural history of the case was complex, but the final hearing, which gave rise to the Court of Appeal's decision took place on 20 November 2007 – over a year after Section 54 of the 2006 Act came into force. Counsel for the Secretary of State conceded that acts of a military nature committed by an independence movement such as the LTTE against the military forces of government were not themselves acts contrary to the purposes and principles of the United Nations. Stanley Burnton LJ, with whose judgment Waller and Dyson LJJ agreed, accepted that concession and determined that it was necessary to distinguish between "terrorism" and "such acts": paragraph 34. There were other issues in the appeal, some of which we refer to below, but the conclusion of the Court on this issue was that because, on the facts found by the Tribunal, he had done no more than participate in military actions against the government, he was not excluded from recognition as a refugee under Article 1(F)(c): paragraph 40. Relying on this decision and those observations, Mr Mackenzie submits that the LIFG has never done anything more than target the central government of Libya and its officials and armed forces. Consequently, he submits, if all that SS is alleged to have done is to plan, support or even participate in such acts, the exclusion does not apply to him. There are two problems about this submission: in reaching its decision, the Court of Appeal made no reference to

Section 54 and the definition of terrorism in Section 1; and the acts for which the LIFG has been responsible go well beyond those assessed not to be acts of "terrorism" by the Court of Appeal in *KJ*. The omission of any reference to Sections 54 and 1 in the judgment of the Court of Appeal suggests that the Court was not referred to them. The clear words of Section 1(1)(c) and (iii) appear to preclude the conclusion reached by the Court of Appeal. LTTE military action must have involved the use of firearms and explosives (artillery shells) and was undoubtedly undertaken for the purpose of advancing a political cause – the independence of North East Sri Lanka. As such, it falls squarely within the definition of terrorism in Section 1. It is possible that, as counsel for the Secretary of State conceded, and Sedley LJ observed, in *Al-Sirri v SSHD*, the natural meaning of the words in Section 1 may not provide a complete answer; but the authority of a decision which does not even address the question must itself be called into question. We are driven to the conclusion that the observations in *KJ* were made *per incuriam* and do not bind us.

18. Even if they do, the publicly reported activities of the LIFG do amount to acts of terrorism within the definition summarised above. For present purposes, we rely, we believe uncontroversially, on the following sources: the report of Alison Pargeter of 31 March 2010, paragraph 1.vii, an article by Moshe Terdman in the June 2005 edition of PRISM occasional papers, page 3, and the article by Omar Ashour of 26 April 2010 in The Star. Between 1995 and 1998, the LIFG conducted a number of violent attacks in Libya. The first two were at a hospital and at a prison, to release detained comrades. There were fierce clashes between security forces and LIFG members in Benghazi in

September 1995, leaving dozens killed on both sides. Thereafter, the LIFG carried out targeted attacks on police stations and high ranking officials within the Libyan Government and security services. In June 1996, LIFG fighters killed eight policemen at a training centre in Derna. As many as three assassination attempts were made against Colonel Gaddafi: the first in February 1996, when several of his bodyguards were killed; the second in November 1996, when a grenade was thrown at him and missed; and the third in 1998, when his vehicle was ambushed in Egypt. According to Omar Ashour, these attacks left 165 Libyan "officials" dead and 159 injured. LIFG losses were comparable.

19. All of these acts were, as far as we can tell from the brief descriptions from which we have culled that summary, acts of terrorism. It is not a necessary ingredient of a terrorist act that it should be aimed at or endanger "civilians" – by which we understand Mr MacKenzie to mean those who are not part of the armed forces, police service or state apparatus of a country. A number of historical examples will demonstrate why. No-one would dispute that the Enniskillen and Canary Wharf bombings were acts of terrorism. Few would dispute that the Warrenpoint attack and the assassination of Airey Neave MP and of Ian Gow MP and the Brighton bombing were also acts of terrorism. In a different context, few would doubt that the assassination of Admiral Carrero Blanco, the murder of local politicians in the Basque country and attacks on members of the Guardia Civil throughout Spain were acts of terrorism any less than the recent bombing of the car park at Madrid airport which, almost certainly unintentionally, killed two members of the Spanish public. The distinction sought to be drawn between different violent acts of groups such as

the Provisional IRA/INLA and ETA cannot sensibly be drawn. Mr MacKenzie, we believe, accepts as much. He does, however, seek to draw a distinction between such terrorist groups and the LIFG, but does so on a basis that we do not understand. Some argue that the use of violence against a tyrannical regime is excusable, in the way that it would not be against a democratic government and should not be categorised as terrorism. This was the argument advanced, and rejected in *R v F* [2007] QB 960. That is, in fact, the only difference between the acts of the Provisional IRA/INLA and ETA which are accepted to be terrorist acts and those of the LIFG summarised above. We are satisfied that they fall within the definition of terrorism in s1 Terrorism Act 2000, Article 1.3 of the Council's common position, and the core of any generally accepted definition of terrorism.

20. Facilitating or planning to carry out such attacks likewise falls within the definition of terrorism, whatever its source. Section 54 expressly includes acts of encouragement and preparation and inchoate offences. Recital (22) of the Qualification Directive refers to financing, planning and inciting terrorist acts and Articles 12.3 and 17.2 apply the exclusionary provisions to persons who instigate or otherwise participate in the commission of (terrorist) acts. The Preamble to Security Council Resolution 1624 reaffirms the statements cited in Recital (22). There can be no principled basis for distinguishing between completed and planned, but aborted or unsuccessful, terrorist attacks, for the purposes of Article 1(F)(c). Mr Mckenzie does not suggest otherwise.

21. He does, however submit that Sedley LJ's observations in *Al-Sirri* at paragraph 31 take the acts of the LIFG outside a proper definition of terrorism:

> "31. What then constitutes terrorism? There is no present need for an elaborate definition (which may, I accept, be needed in other contexts): terrorism here means the use for political ends of fear induced by violence".

He went on to observe that he saw the force of the submission made by counsel for the Appellant that terrorism must have an international character or aspect to come within Article 12 of the Qualification Directive. We do not accept Mr McKenzie's submission for two reasons: Sedley LJ was not attempting a universal definition of terrorism, merely setting out a minimum definition which applied on the facts of the case. Those facts were that Al-Sirri had provided letters which he knew were intended to be used for the purpose of gaining access to and killing General Masoud, in Northern Afghanistan. The Court of Appeal accepted that those facts alone were capable of sustaining exclusion under Article 1(F)(c): paragraph 62. If that is so, it is difficult to see in what respect Sedley LJ's partial definition differs materially from the definition which we have summarised above. Indeed, he treated them as equivalent: "acts…committed with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organisation to do or abstain from doing any act" (our emphasis). Secondly, we do not accept that terrorism must have an international character or aspect in order to come within Article 1(F)(c). As Security Council Resolution 1624 makes plain, it is the duty of states to deny safe haven to those who have committed a terrorist act. The assassination of a political leader by a national of the same state pursuant to a plot entirely organised and financed within that state can be just as much capable of disturbing the peace of the world as an identical attack financed from abroad. There is no rational basis for distinguishing between the

two. In any event, most terrorist organisations of any scale, and certainly the LIFG, are internationally organised or financed or have international links. On any view of the facts of this case, the issue is academic.

22. LIFG members have, for many years, shared facilities and fought with Al Qaeda in Afghanistan. Some of them, led by Abu Laith attempted to secure the merger of Al Qaeda and the LIFG in 2007. Abu Laith was killed, and the merger did not take. These events are briefly described in the open generic judgment in the Libyan control order casements [2008] EWHC 2789 paragraphs 8 - 12. Mr MacKenzie accepts that these activities were terrorist activities. To the extent that any UK based member of the LIFG provided support or encouragement to such activities, they would, in our view, have been guilty of acts contrary to the principles and purposes of the United Nations and so excluded from asylum under Article 1(F)(c).

23. If confirmation were required for the judgment that the LIFG has been a terrorist organisation, it is provided by the inclusion, on 6 October 2001, of the LIFG in the consolidated list established and maintained by the 1267 Committee of the Security Council with respect to Al Qaeda, Osama Bin Laden and the Taliban and by its designation in the UK as a proscribed organisation on 14 October 2005 by the Terrorism Act 2000 (Proscribed Organisations) (Amendment) Order SI 2005/2892. Mr Kovats submits that, by virtue of his membership of the LIFG alone, SS has been guilty of an act contrary to the principles and purposes of the United Nations. There is persuasive authority to the contrary. In every case in which the exclusion of an individual under Article 1(F)(a) (crimes against peace, war crimes and crimes

against humanity) a close examination of the role of the individual is required: *R (JS) (Sri Lanka) v SSHD* paragraph 38, per Lord Brown, paragraph 44, per Lord Hope and paragraph 57, per Lord Kerr. Only where it is shown that there are serious reasons for considering the individual "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", will exclusion be justified (per Lord Brown, with whom all but Lord Kerr expressly agreed at paragraph 59). We can discern no principled reason for distinguishing, in this respect, between exclusion under Articles 1(F)(a) and 1(F)(c). The German Federal Administrative Court applied a similar test in relation to Article 12(3) of the Qualification Directive in *BVerwG*, cited in paragraph 14 of Lord Brown's judgment in *JS*. The Advocate General in *B and D v Germany* unequivocally stated that mere membership of a proscribed organisation was insufficient to justify exclusion under Article 12 of the Qualification Directive: see paragraph 73 of his opinion. He proposed a three stage test in paragraph 77 to 79: examine the nature, structure, organisation, activities and methods of the group in question at the time when the individual belonged to it; ascertain the actual role played by the individual in it; and determine whether the acts for which personal responsibility is established are among the acts envisaged in Article 12(2)(c) and (3) of the Qualification Directive. The Advocate General's opinion is consonant with the approach proposed by Lord Brown. We accept it and have applied it.

24. There is also high persuasive authority for the meaning of "serious reasons for considering". In paragraph 39 of *JS*, Lord Brown observed 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'. I am inclined to agree with what Sedley LJ said in (*Al Sirri*): '[the phrased used] sets a standard above mere suspicion. Beyond this, it is a mistake to try to paraphrase the straight forward language of the Convention: it has to be treated as meaning what it says'."

We take Lord Brown to disapprove of, and do not ourselves accept, the gloss put upon the phrase by the Court of Appeal in *KJ* in paragraph 35:

> "None the less, 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".

If what was there proposed was a standard of proof which varies according to the seriousness of the allegations, it reintroduces the now disavowed variable standard in ordinary civil proceedings: see *In re B* [2009] 1 AC 11 at paragraph 13. We accept the approach of Lord Brown and have applied it.

25. Proportionality has no part to play in our decision. As the Advocate General explained in paragraph 97 of *B and D v Germany*, proportionality is only in issue if the appeal against the asylum/subsidiary protection decision is the only opportunity which the individual has to challenge removal. Where, as here, the decision will not have that effect, proportionality need not be considered.

Conclusion and procedure

26. Applying the principles and approach set out above, we have concluded that there are serious reasons for considering that *SS* has been guilty of acts contrary to the principles and purposes of the United Nations and so is excluded from recognition as a refugee under Article 1(F)(c) of the Refugee Convention and Article 12(2)(c) of the Qualification Directive and from subsidiary protection under Article 17(1) of the Qualification Directive. In reaching that conclusion, we have relied determinatively upon closed material. Our reasons of fact for reaching it are set out in the closed judgment. Mr MacKenzie submits that it is not open to us to make that finding in proceedings in which the gist of the allegations against *SS* has not been made known to him. He accepts, correctly, that Article 6 does not apply to these proceedings, because they do not involve the determination of civil rights. He submits that, nevertheless, he is entitled to an equivalent standard of procedural fairness at common law. We do not agree. The grant or refusal of asylum has always been an administrative decision by or on behalf of the Secretary of State. Until the enactment of the Asylum and Immigration Appeals Act 1993, there was no means of challenging the decision on the merits, other than by proceedings for judicial review. The regime under which we have considered this appeal is entirely statutory. Rule 4(1) of the Special Immigration Appeals Commission (Procedure) Rules 2003 SI 2003 No. 1034 requires us to secure that information is not disclosed contrary to the interests of national security. Disclosure of the material upon which we have based our decision would be contrary to those interests. Because Article 6 does not apply, there is no basis for reading down Rule 4(1) so as to be able to put the Secretary of State to an election: to disclose sufficient of her case to permit SS

to give effective instructions about it or withdraw reliance on those aspects of her case about which such information cannot be given. The means by which closed material is to be assessed is set out in Part 7 of the Rules. We are not at liberty to depart from them. In so far as closed material is determinative of the appeal, we are not only permitted, but required, to examine it by those means only.

27. Because we have reached the view that there is no material distinction between the test for exclusion from asylum and from subsidiary protection, it is strictly unnecessary for us to express any view about Mr Kovats's interesting submission that the principle of equivalence requires us to determine the subsidiary protection appeal by applying Section 54 to it, but because he addressed brief arguments about it, to which Mr MacKenzie responded, we will give our answer. Mr Kovats's submission was based on the decision and reasoning of the Court of Appeal in *FA (Iraq) v SSHD* [2010] EWCA Civ 696, in which it was decided that an appeal to the First-Tier Tribunal lay against a refusal of subsidiary protection, because domestic law afforded a right of appeal against a refusal of asylum. We do not believe that the principle of equivalence goes as far as Mr Kovats contends. It is a rule of procedure: domestic procedural rules governing actions intended to ensure the protection of rights conferred by Community law must not be less favourable than those which govern similar domestic actions: per Longmore LJ at paragraph 21. The rule says nothing about substantive law. Mr Kovats's submission goes to substantive law: the definition of acts contrary to the purposes and principles of the United Nations, not the procedure by which that

substantive question may be determined. Accordingly, we would not have accepted Mr Kovats's submission.

28. For the reasons given, this appeal is dismissed.