
Polat, R (On the Application Of) v The Secretary of State for the Home Department [2011] EWHC 3445 (Admin)

**IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
ADMINISTRATIVE COURT**

Neutral Citation Number: [2011] EWHC 3445 (Admin)
Case No.: CO/13763/2009

Date of Hearing: 25/07/2011

Date of Ruling: 20/12/2011

Before:

MR STEPHEN MORRIS QC (Sitting as a Deputy High Court Judge)

Between:

THE QUEEN on the application of ALI POLAT
Appellant

- and -

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Respondent

JUDGEMENT

James Collins (instructed by **Trott & Gentry Solicitors**) for the **Claimant**
Andrew Deakin (instructed by **The Treasury Solicitor**) for the **Defendant**

Hearing date: 25 July 2011

Mr Stephen Morris QC :

Introduction

1. Mr Ali Polat ("the Claimant") is a Turkish national of Kurdish ethnicity, now aged 44. By this claim for judicial review, the Claimant seeks to challenge the decision of the Secretary of State refusing his application for indefinite leave to remain in the UK under a concessionary policy known as the One Off Exercise to allow Qualifying Asylum Seeking Families to stay in the UK ("the One Off Exercise"). The Secretary of State's decision was made by letters dated 28 April 2010 and 6 August 2010. In those letters, the Secretary of State decided that the Claimant did not qualify under the One Off Exercise because his case fell within Article 1F(b) and 1F(c) of the 1951 Convention and 1967 Protocol Relating to the Status of Refugees ("the Refugee Convention").

2. Prior to these decisions, on 9 April 2010 the Secretary of State had made two further decisions: first, refusing the Claimant's claim for asylum, again on the basis of Article 1F(b) and 1F(c); and secondly, granting the Claimant discretionary leave to enter the UK.

3. However this application for judicial review is, and has always been, directed towards the Secretary of State's consideration of the Claimant's application under the One Off Exercise. The

Claimant now seeks a declaration that the decision of 6 August 2010 is irrational, a quashing order to quash that decision and further relief in relation to the One Off Exercise.

4. The Secretary of State's decision, as set out in full in the letter of 6 August 2010, can be summarised as follows. As to Article 1F(b), the Secretary of State concluded that there were serious reasons for considering that the Claimant had committed a serious non-political crime prior to coming into the UK, namely that, in or around July 1996, he had been in possession of a pistol with ammunition. As to Article 1F(c), the Secretary of State concluded that there were serious reasons for considering that the Claimant had committed acts contrary to the purposes and principles of the United Nations ("UN"), namely that he had been actively involved in the Parti Karkerani Kurdistan ("PKK"), a terrorist organisation, to the extent of encouraging people in an armed struggle against the Turkish government and that he was involved in an incident on 2 July 1996 involving the PKK.

5. The Claimant's case is that his possession of a gun was not sufficient to bring the Claimant within the ambit of Article 1F(b) and that his political activities in Turkey were not sufficiently serious to constitute acts contrary to the purposes and principles of the UN on the basis of the test to establish such conduct set out in the Supreme Court decision of *R (JS (Sri Lanka)) v Secretary of State for the Home Department* [2010] UKSC 15 [2011] 1 AC 184 ("*JS (Sri Lanka)*"). Accordingly the Secretary of State's conclusions were unlawful and/or *Wednesbury* unreasonable.

The facts in summary

6. The Claimant arrived in the UK in 1997 with his wife and two daughters. His initial claim for asylum was concluded when his appeal to the Asylum and Immigration Tribunal ("AIT") was dismissed in September 2002. He made his application under the One Off Exercise in 2004. This was refused initially in May 2005. The Claimant reverted to the Secretary of State in correspondence and little was done in response for a period of about three years. Eventually these proceedings were commenced in November 2009, and, as a result, the Secretary of State made her further decisions of April and August 2010. The Claimant has, with reason, complained about the extensive delays - referring to the impact upon his wife, whose health has suffered, and upon one of his daughters, whose uncertain status has affected her ability to pursue University studies. Mr. Collins, counsel for the Claimant, submits that the delay forms relevant background to consideration of the reasoning in the Secretary of State's decision now in issue. The Secretary of State has acknowledged that there has been unacceptable and inexcusable delay in the consideration of the Claimant's case, but says that this is no longer relevant to the present proceedings.

7. The case has the following unusual feature. In reaching her decision, the Secretary of State relied upon admissions, contained in further representations made by the Claimant's solicitors in September 2003, as to the extent of the Claimant's activities in Turkey. The Claimant says that these representations should be treated with caution, and relies positively on the prior findings of the Adjudicator in the IAT that the Claimant's account of events was not to be believed. He further says that it is irrational for the Secretary of State to go behind the Adjudicator's findings. Thus, on the one hand, the Claimant now disavows his own admissions, relying on his own lack of credibility. On the other hand, the Secretary of State relies upon admissions from a witness who has been found not to be credible.

The Relevant Legal Background

8. Before expanding upon the facts, it is convenient to set out the relevant legal principles applicable to these issues and the terms of One Off Exercise.

The Refugee Convention

9. Article 1F of the 1951 Convention and 1967 Protocol Relating to the Status of Refugees ("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:

(a) he 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;

(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) he has been guilty of acts contrary to the purposes and principles of the United Nations." (emphasis added)

10. Article 33 of the Refugee Convention provides:

"Prohibition of expulsion or return ("refoulement")

1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

(emphasis added)

11. Section 72 of the Nationality Immigration and Asylum Act 2002 ("NIAA") makes the following provision in relation to Article 33(2) of the Refugee Convention:

"(1) This section applies for the purpose of the construction and application of Article 33(2) of the Refugee Convention (exclusion from protection)

(2)...

(3) A person shall be presumed to have been convicted by a final judgment of a particularly serious crime and to constitute a danger to the community of the United Kingdom if

a) he is convicted outside the United Kingdom of an offence,

b) he is sentenced to a period of imprisonment of at least two years, and

c) he could have been sentenced to a period of imprisonment of at least two years had his conviction been a conviction in the United Kingdom of a similar offence.

(4)...

(5)...

(6) A presumption under subsection (2)(3) or (4) that a person constitutes a danger to the community is rebuttable by that person."

12. The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention comments upon Article 1F(b) at §§151 to 161. Paragraph 155 states, inter alia:

"In the present context, however, a "serious" crime must be a capital crime or a very grave criminal act."

Paragraph 156 states:

"In applying this exclusion, it is also necessary to strike a balance between the nature of the offence presumed to have been committed by the applicant and the degree of persecution feared. If a person has a well founded fear of very severe persecution, e.g. persecution endangering his life or freedom, a crime must be very grave in order to exclude him...."

I was also referred to the European Council on Refugees and Exiles' paper "Position on Exclusion from Refugee Status", which at paragraph 20 considers the meaning of "serious" crimes in terms similar to those in the UNHCR Handbook.

Relevant case law

13. The leading case on the interpretation and application of Article 1F(a) and (c) of the Refugee Convention is the decision of the Supreme Court dated 17 March 2010 in *JS (Sri Lanka)*. The issue there was whether a senior voluntary member of the Tamil Tigers (LTTE) had been complicit in war crimes and crimes against humanity and was thus excluded under Article 1F(a) from the protection of the Refugee Convention. Prior to this case, the leading case had been considered to be the starred tribunal case of *Gurung v. SSHD* [2003] Imm AR 115. Whilst *JS (Sri Lanka)* addresses specifically Article 1F(a) (war crimes, crimes against humanity) it is common ground that its reasoning applies equally to Article 1F(c) (acts contrary to the UN), and it has subsequently been so applied (in *DD (Afghanistan)*, see paragraph 20 below).

14. Lord Brown of Eaton-under-Heywood, giving the leading judgment, with which the other Justices agreed, conducted a review of, and gave guidance for, the operation of Article 1F. At §§1 to 3, he set the parameters to the issues before the Court as follows:

"The Refugee Convention was drafted for a world scarred by long years of war crimes and other like atrocities. There remain, alas, all too many countries where such crimes continue. Sometimes those committing them flee abroad and claim asylum. It is not intended that the Convention will help them. However clearly in need of protection from persecution an asylum seeker may be, he is not to be recognised as a refugee where "there are serious reasons for considering that (a) he 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". So states article 1F(a) of the Convention (and, for good measure, article 12(2)(a) of the Qualification Directive (2004/83/EC) – this being implemented into domestic law by Regulations 2 and 7(1) of the Refugee or Person in Need of International Protection (Qualification) Regulations 2006 (SI 2006/2525)). It is the Court's central task on the present appeal to determine the true interpretation and application of this disqualifying provision. Who are to be regarded as having committed such a crime ("war criminals" as I shall generally refer to them) within the meaning of article 1F(a)? More particularly, assuming that there are those within an organisation who clearly are committing war crimes, what more than membership of such an organisation must be established before an individual is himself personally to be regarded as a war criminal?"

It is common ground between the parties (i) that there can only be one true interpretation of article 1F(a), an autonomous meaning to be found in international rather than domestic law; (ii) that the international instruments referred to in the article are those existing when disqualification is being considered, not merely those extant at the date of the Convention; (iii) that because of the serious consequences of exclusion for the person concerned the article must be interpreted restrictively and used cautiously; and (iv) that more than mere membership of an organisation is necessary to bring an individual within the article's disqualifying provisions. The question is, I repeat, what more?

As need hardly be stated, only if the decision-maker in respect of a particular application for asylum correctly identifies and answers this question will he be in a position to decide, in all but the clearest cases, whether "there are serious reasons for considering"

the asylum-seeker to be disqualified as a war criminal under article 1F(a)." (emphasis added)

15. At §§24 and 25, Lord Brown referred, with approval, to the Court of Appeal's judgment in *KJ (Sri Lanka) v Secretary of State for the Home Department* [2009] Imm AR 674 and in particular cited §§37 and 38 of the judgment of Stanley Burnton LJ. As noted below, *KJ (Sri Lanka)* was an Article 1F(c) case and concerned a Tamil whose involvement was with the LTTE's military action against the armed forces of the Sri Lankan Government rather than action against civilians. Lord Brown then turned to the correctness of the principles laid down in *Gurung*, indicating that, in important aspects, it should not be followed. Critically, at §30, Lord Brown identified "the determining factors" to be applied in considering Article 1F(a) as follows:

"Rather, however, than be deflected into first attempting some such subcategorisation of the organisation, it is surely preferable to focus from the outset on what ultimately must prove to be the determining factors in any case, principally (in no particular order) (i) the nature and (potentially of some importance) the size of the organisation and particularly that part of it with which the asylum-seeker was himself most directly concerned, (ii) whether and, if so, by whom the organisation was proscribed, (iii) how the asylum-seeker came to be recruited, (iv) the length of time he remained in the organisation and what, if any, opportunities he had to leave it, (v) his position, rank, standing and influence in the organisation, (vi) his knowledge of the organisation's war crimes activities, and (vii) his own personal involvement and role in the organisation including particularly whatever contribution he made towards the commission of war crimes."

16. Then, at §§33 to 39, Lord Brown addressed "the correct approach to Article 1F" and conducted an analysis of the nature of an individual's participation in the commission of war crimes. He concluded at §§38 and 39 as follows:

"Returning to the judgment below with these considerations in mind, I have to say that paragraph 119 does seem to me too narrowly drawn, appearing to confine article 1F liability essentially to just the same sort of joint criminal enterprises as would result in convictions under domestic law. Certainly para 119 is all too easily read as being directed to specific identifiable crimes rather than, as to my mind it should be, wider concepts of common design, such as the accomplishment of an organisation's purpose by whatever means are necessary including the commission of war crimes. 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.

*It would not, I think, be helpful to expatiate upon article 1F's reference to there being "serious reasons for considering" the asylum-seeker to have committed a war crime. Clearly the Tribunal in *Gurung* (at the end of para 109) was right to highlight "the lower standard of proof applicable in exclusion clause cases" – lower than that applicable in actual war crimes trials. That said, "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 *Yasser Al-Sirri v Secretary of State for the Home Department* [2009] EWCA Civ 222, para 33: "[the phrase used] sets a standard above mere suspicion. Beyond this, it is a mistake to try to paraphrase the straightforward language of the Convention: it has to be treated as meaning what it says."*

(emphasis added)

Lords Hope and Kerr gave concurring judgments. In particular, at §§48 and 49, and §§54 to 56 respectively, they endorsed the test for personal responsibility as being one of "substantial" or "significant" contribution. They also emphasised the need to look carefully at the particular facts. Lord Hope referred (at §44) to a need for "a close examination of the facts and the need for a carefully reasoned decision as to precisely why the person concerned is excluded from protection under the

Convention". Lord Kerr stated (at §55) "*One needs, I believe, to concentrate on the actual role played by the particular person, taking all material aspects of that role into account so as to decide whether the required degree of participation is established*".

17. Thus, in summary, *JS (Sri Lanka)* establishes the following:

i) Mere membership of a terrorist organisation is not sufficient for an applicant to fall within Article 1F(c).

ii) The relevant test is whether the applicant has "voluntarily contributed in a significant way to the organisation's ability to pursue its purpose of committing acts contrary to purposes and principles of the UN, aware that his assistance will in fact further that purpose".

iii) In applying that test, the seven factors identified in §30 of Lord Brown's speech fall to be applied to the facts of the particular case.

iv) It is necessary to conduct a close examination of the evidence and the facts relating to the actual role of the individual in question and to reach a carefully reasoned decision as to precisely why the person concerned is excluded.

18. The Claimant has referred to four further authorities, two of which pre-date, and two of which post-date *JS (Sri Lanka)*. The first, *MH (Syria) & DS (Afghanistan) v Secretary of State for the Home Department* [2009] EWCA Civ 226 concerned a Syrian Kurd who had been a member of the PKK for 11 years from the age of 13. This was a case decided on *Gurung* principles, so it has to be considered with some caution. During that time she had carried a banner at a demonstration, carried a gun, lived and worked at a refugee camp, and had visited PKK camps in the mountains. The Court of Appeal held (at §§36 and 37) that this evidence could not reasonably be said to disclose serious reasons for considering that MH had been guilty of acts contrary to the purposes and principles of the UN. The case fell "well short" of engaging Article 1F(c). The PKK was not at the extreme end of terrorist organisations and what MH "actually did for the PKK" was relatively minor in nature.

19. *KJ (Sri Lanka) v Secretary of State for the Home Department* [2009] EWCA Civ 292 was another Article 1F(c) case. Its importance, for present purposes, lies in the distinction drawn by Stanley Burnton LJ, for the purposes of Article 1F(c), between acts of terrorism properly so called and acts of a military nature committed by an independence movement against the military forces of the incumbent government. Stanley Burnton LJ said:

"34. The first question that arises in the present case is: what are "acts contrary to the purposes and principles of the United Nations"? It is clear that acts of terrorism – in particular the deliberate killing or injuring of civilians in pursuit of political objects – are such acts. The Tribunal in their decision under appeal stated that acts contrary to the purposes and principles of the United Nations are not to be equated with acts of terrorism. It is unnecessary for me to debate this issue, because Mr Johnson did not suggest that acts of a military nature committed by an independence movement (such as the LTTE) against the military forces of the government are themselves acts contrary to the purposes and principles of the United Nations. I do not think that they are. Moreover, the Tribunal in its determination under appeal seems to have accepted that an armed campaign against the government would not constitute acts contrary to the purposes and principles of the United Nations. For present purposes it is necessary to distinguish between terrorism and such acts.

35. I turn, therefore, 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. ... 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 be 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.

...

40. ... In my judgment, the facts found by the Tribunal showed no more than that he had participated in military actions against the government, and did not constitute the requisite serious reasons for considering that he had been guilty of acts contrary to the purposes and principles of the United Nations."

(emphasis added)

Participating in military actions against the government was not sufficient to bring KJ within Article 1F(c).

20. As pointed out above, *KJ (Sri Lanka)* was cited with approval by Lord Brown in *JS (Sri Lanka)*, and in particular at §27. It was also cited with approval in the Court of Appeal's decision, subsequent to *JS (Sri Lanka)*, in *DD (Afghanistan) v Secretary of State for the Home Department* [2010] EWCA Civ 1407. That case concerned a deputy commander in an Afghan paramilitary organisation which was proscribed under the Terrorism Act 2000 and who, it was suggested, had been involved in operations, over a prolonged period of time, both against the Afghan government and against UN forces. The Court of Appeal held, expressly applying *KJ (Sri Lanka)*, that military action against government armed forces even by a proscribed terrorist organisation did not as such constitute terrorism within the 2000 Act or acts contrary to the purposes and principles of the UN; on the other hand, military action against UN forces could fall within Article 1F(c). Pill LJ said:

"55. *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. *SIAC in SS* stated that these observations were made *per incuriam*. I am not prepared, in the absence of argument beyond that addressed to this court to hold that the observations were *per incuriam* and it does not appear to me that they were, though the circumstances in which acts of violence against a government are acts of terrorism is a difficult question. Serious violence against members of the government forces would normally be designed to influence the government and be used for the purpose of advancing a political, religious or ideological cause, within the meaning of those words in section 1 of the 2000 Act. On the other hand, 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 within the 2000 Act.

56. ... on the authority of KJ, military actions against the Afghan Government, even if conducted by proscribed organisations, are not necessarily terrorist in nature. If that is so, they are not, as terrorist acts, contrary to the purposes and principles of the UN Charter.

...

59. On an application of KJ, however, there were no findings of terrorist acts, as distinct from armed action against the authorities, which would attract the operation of the exemption. It is unlikely that the distinction was in mind at the hearing before the Tribunal but there was no finding of paradigm terrorist acts such as random bombings, indiscriminate violence and attacks on the civilian population, as distinct from military action targeted at government and coalition forces. It is difficult to detect, in the Tribunal's findings, evidence of gross human rights violations on the civilian population. Following KJ, I am not able to hold, on the Tribunal's findings, that acts of terrorism had been committed. Further analysis, with the KJ distinction in mind, might have revealed acts of terrorism."

21. Most recently, in Cases C-58 and 101/09 *B & D v Germany*, judgment of 9 November 2010, the European Court of Justice has given its interpretation of Article 12(2)(b) and (c) of Council Directive 2004/83/EC of 29 April 2004. The Directive provides a common standard for the application of the Refugee Convention across the European Union. Article 12(2)(b) and (c) mirrors Article 1F(b) and (c). In particular the ECJ held (at §§87, and 86 to 99) first, that the relevant authority must undertake, for each individual case, an assessment of the specific facts within its knowledge, in order to determine whether the exclusion applies. Secondly, mere membership of a proscribed organisation is not sufficient. Thirdly, the fact that a person "has actively supported the armed struggle waged by that organisation" does not automatically mean that the person has committed acts contrary to the purposes and principles of the UN. Fourthly, there must be a case by case assessment of the specific facts in order to determine whether individual responsibility can be attributed to the person concerned. That assessment must include, inter alia, the person's position within the organisation, and the extent of the knowledge he had of its activities.

22. In the context of Article 1F(b) I have also been referred to *T v Immigration Officer* [1996] AC 742 and to *IH (s 72 Particularly Serious Crime) Eritrea* [2009] UKAIT 00012, where, at §67, it is suggested that the addition of the word "particularly" in Article 33(2) of 1951 Convention provides a higher threshold than is required under Article 1F(b). On this basis, reading across s.72 NIAA might result in a crime punished with less than 2 years imprisonment being treated as "serious" within Article 1F(b).

The "One Off Exercise"

23. In October 2003 the Government announced a special one-off exercise to clear an estimated 15,000 asylum-seeking family cases, under which the Home Office was to grant certain asylum seeking families who had been in the UK for three or more years indefinite leave to remain (ILR). In order to be eligible for ILR, the main applicant had to have made an application for asylum before 2 October 2000 and to have at least one dependant under the age of 18 in the UK on 2 October 2000. Further there had to be an outstanding asylum application or appeal or, where the asylum application had been refused and there was no further avenue of appeal, the applicant had not to have been removed. The terms of the exercise further provided as follows:

"Who is excluded?"

*The **concession** will not apply to a family where the main applicant or any of the dependants*

- have a criminal conviction

....

- present a risk to national security

- have committed crimes against humanity or against the purposes of the United Nations as outlined in Article 1F of the 1951 Refugee Convention

- whose presence in the UK is otherwise not conducive to the public good."

The reference to Article 1F is in terms only to the exclusions covered by Article 1F(a) and (c), and not to the exclusion for serious non-political crime in Article 1F(b)).

24. It is the Claimant's application under this One Off Exercise which is in issue in these proceedings.

The facts in detail

Events in Turkey

25. According to the Claimant's original asylum interview, on 2 July 1996 he was working on a dam construction in Tunceli. On that day there took place an incident at the dam location between the PKK and Turkish government soldiers, in the course of which there was fighting, gunfire and loss of life. The PKK guerillas had come out of the woods. A large number of local Kurds were detained as a result. The Claimant said that he himself ran away and went to Adana, where he stayed for four months and then he went on to Ankara to stay with an uncle.

26. Subsequently the Claimant produced official documents, which are now accepted by both parties to be genuine documents. Amongst these is a document entitled "Indictment", issued on 13 December 1996 by the Chief Public Prosecutor in Adana, Turkey. It in fact records the Claimant's conviction and sentence.

27. The Indictment contained the following details. The offence is stated to be "*Contesting the Article 125. Carrying out illegal activities under the roof of the HADEP party. Carrying out planned, designed activities against Rep of Turkey*". The date of the offence is given as 2 July 1996. The evidence relied upon is stated to be "*Documents, banners and brochures against the T.R. that he left behind. Apprehended suspects statements, Notebooks, empty cassette player and cassettes. One Takarof make 9mm calibre pistol, [one cartridge clip and 38 rounds of ammunition]*". The Indictment then concludes:

"In accordance with Article 192 of the Criminal Courts Proceedings Act, preliminary investigation documents concerning defendant Ali Polat were enclosed within. Upon the arrests of investigations against Ramazan Aydin, dob 22.01.1963 and Ismail Kaya, dob 13.10.1965, it was understood that the referred to suspects carried out illegal activities under the roof of HADEP party and stated that they knew defendant Ali Polat. The named suspects also stated that defendant Ali Polat assembled and marched, in meetings and seminars made calls in KURDISH to invite people to rebel and took part in a struggle in order to establish a Kurdish nation and therefore breached the Article 125 of the TR, Upon receiving the information that the defendant escaped to Adana/Dagcilar village area, the house he was using was searched and the above listed evidence were found. The court has CONSIDERED: In his absence A DECISION WAS MADE to sentence the defendant to 12 years, 4 months and 8 days IMPRISONMENT. 1996/928 E. 971 Kar. [Decision]"

(emphasis added)

Article 125 of the Turkish Criminal Code makes it an offence punishable with death, inter alia, to commit "any act ... diminishing the State's independence, breaking its unity or removing part of the national territory from the State's control".

28. The Claimant says, and accepts, that he was a member of HADEP from about 1995. HADEP, the People's Democracy Party, was a political party campaigning for greater cultural rights for Kurds and a peaceful solution to the Kurdish issue. It appears that at the relevant times, it was a legitimate political party. There is evidence, referred to in the case of *IA and others (Risks-Guidance-Separatist Turkey CG [2003] UKAIT 00034*, that even low level political supporters of HADEP might be the

subject of harassment from Turkish authorities in South East Turkey. The PKK is an organisation advocating armed struggle in order to achieve an independent Kurdish state. In 2000 it was proscribed under the Terrorism Act 2000.

The Claimant comes to the United Kingdom

29. The Claimant arrived in the United Kingdom on 29 June 1997 with his wife and two daughters, Meltern and Zeliha (now aged 21 and 17 respectively) and claimed asylum on the basis of a fear of the Turkish authorities on the grounds that he was a suspected Kurdish separatist. He also has a son, Mustafa, now aged 24 (who himself was subsequently granted asylum). A further child was born subsequently in the United Kingdom.

Original decision refusing asylum

30. By a decision dated 10 April 2001 the Secretary of State refused the Claimant's application for asylum under paragraph 336 of the Immigration Rules HC 395. The Secretary of State concluded that the Claimant did not have a fear of persecution in Turkey. He considered that the Claimant was able to move with his family to Ankara and did not accept the account of events on 2 July 1996.

Appeal to the IAT

31. The Claimant appealed against that decision to the IAT. The Claimant submitted a witness statement dated 21 August 2002 (although almost certainly prepared, in part, somewhat earlier in 2001). In that witness statement, the Claimant stated that he was a member of HADEP and his support and sympathy for the PKK was low level. He said that he had been targeted for his Kurdish ethnicity and his involvement with HADEP and support for the PKK.

32. By a determination promulgated on 21 September 2002, the Adjudicator, Mr H Youngerwood, dismissed the Claimant's appeal. The Adjudicator's account and conclusions can be summarised as follows.

33. The Claimant's appeal to the IAT was based on the specific incident on 2 July 1996 *and* upon his consequent conviction in his absence, for carrying out illegal activities on behalf of HADEP and sentence of over 12 years imprisonment. Upon arrival in the UK, the Claimant's original asylum interview took place on 4 July 1997. In that interview he mentioned that he had joined, but was just an ordinary member of, HADEP. He also referred to the incident of 2 July 1996 when he had witnessed the fight between PKK guerillas and soldiers. He said that it was as a result of that incident that had run away. He made no mention of the conviction.

34. The witness statement dated 21 August 2002 appeared to be in two parts. At the end of the first part (at paragraph 9), the Claimant stated "*I am unable to comment as to why the authorities were looking for me unless they had information to trigger their interest in me*". Then in the second part of the statement, the Claimant, for the first time, referred to and exhibited the documentation dated 13 December 1996, and in particular the Indictment (see paragraph 27 above). He gave evidence as to when he had become aware of the existence of these documents and was questioned as to why he had not mentioned the conviction or sentence in his original interview. He also denied that the Turkish authorities had come to the house where he was hiding in Adana, as alleged in the Indictment.

35. The Adjudicator's findings are at §18 and following. At §18 he found:

"In his original interview in 1997, the appellant confirmed that it was the July 1996 incident which was the effective cause of his escape from Turkey. At that stage ... the appellant was asserting that, not only was he just "an ordinary member" of HADEP, having only joined in 1995 or 1996, but, in addition, he had done absolutely nothing to incur the displeasure of the authorities in July 1996, except to have been present when a fight broke out between the army and PKK guerrillas. On the basis of this account, it seems to some extent surprising that the appellant took such relatively extreme measures as to run away from his work place and to hide effectively with a friend for four months, even though he had done absolutely nothing and had only been a recent low-level member of HADEP not, apparently, involved in any specific activities."

The Secretary of State relies upon this passage (and in particular the underlined wording) as indicating that the Adjudicator thought that the Claimant was *understating* (rather than fabricating) his involvement in the incident on 2 July 1996.

36. The Adjudicator then remarked upon the oddity of paragraph 9 of the witness statement. He found that the Claimant in evidence did accept that what was said in the Indictment, namely that he had a much higher level of activity with HADEP and further found that, if the Indictment was genuine, there must have been a visit by Turkish army to the friend's house in Adana. He described the Claimant's own evidence that he was totally unaware of this visit as "very puzzling".

37. Then at §24 the Adjudicator went on to find that, on his own account, the Claimant accepted that, *prior to leaving Turkey in 1997*, he had been aware of the conviction and sentence and that this was the effective cause of his escape from Turkey. Yet he had made no mention of this in his asylum interview or subsequently in 2001. The Adjudicator found this to be "totally extraordinary". The Adjudicator continued (at § 26):

"When asked on more than one occasion why he had not mentioned the fact that he was subject to over twelve years imprisonment in Turkey, the appellant said ... that he had not mentioned this fact because he did not have the proof, the evidence, in his possession. I have to say, quite bluntly, that I find this explanation not only unsatisfactory, but preposterous. given that the very basis of asylum claims is fear, I do not accept for one moment that this appellant made no mention of this factor until some time in 2002 ... simply because he did not yet have the proof, the documentation, within his possession. On his version, he failed to mention until very recently the root cause of his escape from Turkey, the fact that he faced the appalling prospect of a lengthy sentence of imprisonment were he to be returned."

38. Then, finally, at §27, the Adjudicator rejected the Claimant's account of events in the following terms:

"In the present case I consider that the documents are not merely insufficient to enable me to conclude that the appellant is basically credible, but that it is those very documents allied to his explanations about them, that found my view as to his total lack of credibility on the issues concerned. I cannot, of course, form any concluded view as to the origins of these documents or the circumstances in which they were obtained. There are many ways in which documents may not be genuine, in the sense that they represent facts or events which are not true. I am also of the view that I am not compelled to accept the authenticity of these documents by reason of any formal concession by the respondent as to any facts contained in those documents. ... the documents have been produced ... recently ... and have not been supported by any independent evidence as to authenticity. Given that I have rejected, as totally beyond belief, the appellant's reasons for failing to mention the most vital aspect of his claim, until very recently, it follows that on credibility alone, I am of the view that the appeal on the asylum and Article 3 claims must fail in so far as they are based on events of 2 July 1996 and the purported Indictment and accompanying documentation."

So at that point that the Adjudicator found that the Claimant's account was not credible at all and did not accept the documents as being genuine.

39. But the Adjudicator then went on in §27:

"It is tempting to speculate whether, in fact, this appellant had been less than frank about his activities in Turkey, especially as he puts forward the indictment against him as genuine and admits far more activities than previously admitted."

So here, by contrast, the Adjudicator was considering whether, rather than there being no truth in his account, in fact the Claimant was telling less than the whole truth.

40. Finally the Adjudicator concluded at §27 as follows:

"However, notwithstanding that the standard of proof is a relatively low one, I am totally unable to transform speculation and mere possibility into the establishment of a real likelihood of torture or ill-treatment when I am basically unable to accept anything of significance this appellant has said about the circumstances in which he left Turkey. The likelihood is that the simple reason this appellant made no mention until very recently of his alleged conviction in absence and long imprisonment is that he had, contrary to what he now asserts, no knowledge of any such event at the time he left Turkey and that these assertions have been manufactured in order to bolster a rather insubstantial basis for seeking asylum based on what he originally said in his 1997 interview."

Thus the Adjudicator's ultimate conclusion was that, despite his speculation, the matters described in the Indictment were untrue and that either the entire July 1996 incident was made up or at least his involvement in the July 1996 was at a very low level.

The Claimant's further representations 30 September 2003

41. By letter dated 30 September 2003 to the Immigration and Nationality Directorate ("IND"), Sheikh & Co, solicitors acting for the Claimant, submitted further representations, in which they sought to renew his claim for asylum. The letter was expressly approved and counter-signed by the Claimant himself. This letter is of central significance, since the challenged decision is based very largely upon its contents.

42. After summarising the findings of the Adjudicator, the letter pointed out, first, that, subsequent to the AIT hearing, an independent expert, Mr J D Norton of Durham University, had confirmed that the Indictment and arrest warrant are genuine documents. The letter continued:

"that being the case withstanding not the Adjudicator's finding of fact about these documents, Mr Polat wants to renew his claim for asylum based on these documents not relied upon in his original claim.

Mr Polat was naive and frightened about disclosing the time [sic] extent of his involvement in the political activities of HADEP and PKK when he first arrived in the country. To do so he believed would result in his arrest in the UK and return to Turkey. Having suffered the consequences of failing to make a full and frank disclosure about his past activities at the outset, Mr Polat has decided to reveal it all now threatened with the prospect of removal from the UK and the serious consequences awaiting him in Turkey if his removal were to materialise. Mr Polat was afraid to disclose his past, afraid to be labelled as supporter of an organization involved in a violent struggle an allegation he felt would prove counterproductive to his claim for asylum in the United Kingdom.

According to our instructions, Mr Polat was more actively involved in the PKK that extended to his encouraging people in an armed struggle against the Turkish Government for the creation of a separate Kurdish state. The incident took place on 2nd July 1996. Mr Polat was with the PKK members who had exchanged fire with the Turkish soldiers. Mr Polat did possess a weapon that was later discovered by the security forces who raided his flat in the Adana district. Mr Polat never used the weapon but kept it with him for his personal safety as he was well known to the authorities to be an active member within HADEP and the PKK.

The indictment, the arrest warrant and other related documents were sent to Mr Polat in 2001 and not as he stated in oral evidence just before his appeal hearing in August 2002. Mr. Polat's reasons for concealing this information was as stated above not to put himself into the category of association with those who were condemned as terrorists in Turkey that he believed would result in his detention in the UK for removal to Turkey where apart from a long imprisonment, probable death awaits him."

In the letter, the Claimant stated that the account was the full and frank story and gave an explanation for not having given that full account earlier, namely a fear that he would have been sent back "if he came clean". The terms of this letter (and in particular the underlined passages above) are relied

upon by the Secretary of State, whilst the Claimant now seeks to distance himself from them, stating that they are not well drafted or particularly clear.

Application and first refusal under the One Off Exercise

43. Following an invitation to apply, on 18 March 2004 the Claimant submitted an application that he and his family be allowed to remain indefinitely in the United Kingdom pursuant to the One Off Exercise. In so doing, he completed and submitted the requisite Family Questionnaire, in which the Claimant stated that he had never been convicted of a criminal offence or been involved in terrorist activities.

44. By a decision dated 11 May 2005, the Claimant's application under the One Off Exercise was refused on the grounds that the Claimant had a criminal conviction in Turkey, which he himself had declared. At that time, there was no mention that the Claimant came within Article 1F of the Refugee Convention. On 25 May 2005 the Claimant's solicitors wrote to the IND, asking for confirmation that the conviction referred to was the one in Turkey following a trial in absentia. On 25 September 2005, Sheikh & Co complained that it was unreasonable for the Secretary of State to rely upon a conviction, the existence of which the Adjudicator had expressly found to be unreliable.

45. In the meantime, on 9 June 2005 the IAT allowed the Claimant's son's appeal in relation to his claim for asylum and under Article 3 ECHR. The Secretary of State contends that the Adjudicator accepted the Claimant's son's account that he was persecuted because of the Claimant's activities in Turkey. On 26 August 2005 the Claimant's son, Mustafa, was recognised as a refugee and granted asylum and indefinite leave to remain.

March 2006 to July 2009: extended correspondence and delay

46. There then ensued a period of substantial delay in the consideration by the Secretary of State of the Claimant's case, despite frequent and regular correspondence from Sheikh & Co from March 2006 onwards. On 5 December 2006 the Claimant and his family applied for indefinite leave to remain under the 7 year concession known as DP5/96. Thereafter the Claimant's solicitors wrote a number of letters seeking a decision from the Secretary of State both under the One Off Concession and the 7 year concession.

47. Eventually, by letter before action dated 24 July 2009, Sheikh & Co wrote to the Secretary of State setting out the history of the matters and that there was urgency because the Claimant's daughter might lose her place at university unless her status was settled. By letter dated 10 August 2009, the Secretary of State stated that the Claimant's case was exceptional and would be considered out of turn.

Proceedings are commenced

48. On 16 November 2009 this application for judicial review was issued, challenging, at that stage, the Secretary of State's continuing failure to grant the Claimant indefinite leave under the One Off Exercise. In his original grounds, the Claimant contended, that it was irrational for the Secretary of State to rely upon a Turkish conviction against a politicised Kurdish individual as a reason not to apply the One Off policy; and secondly, that the conviction relied upon was disbelieved by the Adjudicator. Further the Claimant relied upon the unreasonable and unlawful delay in the assessment of Claimant's various applications.

49. By order dated 21 December 2009 Collins J ordered that the claim be adjourned and directed that if the Secretary of State did not deal with the claimant's application by 14 February 2010, the matter be listed with a view to making a mandatory order. The judge was critical of the Secretary of State's conduct: the delay was totally unacceptable and it was ridiculous for the Secretary of State to rely upon the conviction, when it had been disbelieved by the Adjudicator, and where, if it had been true it would have grounded the Claimant's claim to be a refugee.

Decision letters of 9 April 2010

50. Just before a hearing listed for 14 April 2010, the Secretary of State served on the Claimant three letters dated 9 April 2010. The Claimant points out that, in those letters, the Secretary of State relied, for the first time, and after 6 years of correspondence, upon Article 1F of the Refugee Convention. She no longer relied upon Turkish *conviction* in light of Collins J's observations, but rather upon the Claimant's own admission of having "committed" a serious offence. Mr Collins, counsel for the Claimant, suggests that the reliance, at this late stage, upon Article 1F was a pretext to maintain the original decision, in the face of the considerable delay.

51. The Secretary of State served two formal decision letters dated 9 April 2010 and an accompanying letter entitled "Reasons for refusal - exercise of exclusion". In the first decision letter, entitled "determination of asylum claim", the Secretary of State refused the claims for *asylum* of the Claimant, his wife and two daughters. However in the second letter, the Secretary of State indicated that she had decided to grant the Claimant and his dependants discretionary leave to enter the UK.

52. In the accompanying reasons letter, the Secretary of State set out, in 35 numbered paragraphs, her detailed reasons for concluding that the Claimant did not qualify for asylum under the Refugee Convention or for Humanitarian protection. The Secretary of State concluded that the Claimant did not qualify for asylum directly because of the exclusions in Article 1F(b) and in Article 1F(c). As regards Article 1F(b) the Secretary of State concluded (at paragraphs 10 to 17 and 24) that there were serious reasons for considering that the Claimant had committed a serious non-political crime; the relevant serious non-political crime being the Claimant's admitted possession of a firearm and ammunition found at his house, which the Claimant kept for personal use. As regards Article 1F(c), the Secretary of State concluded (at paragraphs 18 to 23 and 25) that there were serious reasons for considering that the Claimant was guilty of acts contrary to the purposes and principles of the UN. In reaching that conclusion at that stage, the Secretary of State applied the guidance in *Gurung*. There was no reference to *JS (Sri Lanka)*, which by that time had been decided. The Secretary of State concluded that the Claimant's activities for the PKK, a terrorist organisation, amounted to acts contrary to the purposes and principles of the United Nations. Most of the reasoning addressed the issue of the nature of the PKK as an organisation. As far as the Claimant's activities were concerned, after referring to what had been said in the September 2003 representations, the Secretary of State concluded (at paragraph 23):

"There is no suggestion within your representations ..., in which you provide "a full and frank disclosure about past activities" ... that you were coerced in any way in order to support the PKK. Furthermore, it is considered that your activities for this organisation, namely that you encouraged people in an armed struggle against the Turkish government, demonstrates that you willingly carried out these activities and that you were fully aware of the PKK's violent tactics in attempting to achieve it's aims. As such, it is considered that you are guilty of acts contrary to the purposes and principles of the United Nations."

Finally the reasons letter went on to state that the Claimant would be granted discretionary leave to enter on the basis that he would face a real risk of treatment contrary to Art 3 ECHR and but for the exclusion would have been given Humanitarian protection.

53. However neither of these decision letters addressed the Claimant's application for indefinite leave under the One Off Exercise. At the hearing on 14 April 2010, Sales J ordered that the matter be adjourned upon the Secretary of State undertaking to come to a decision on the Claimant's application under the One Off Exercise within 14 days. At the same time Sales J gave the Claimant permission to amend his grounds and the Secretary of State permission to amend her Summary Defence.

The Decision in issue

Decision letter of 28 April 2010

54. On 28 April 2010 the Secretary of State wrote to the Claimant refusing his application for indefinite leave under the One Off Exercise on the grounds that the Claimant did not qualify. She gave the following, briefly stated, reason:

"The terms of the exercise do not apply to a family where the principle applicant or any of the dependants is regarded as presenting a risk to security or falls within the scope of Article 1F of the Refugee Convention or whose presence in the UK is otherwise considered not conducive to the public good. Our records show that you fall into one or more of these categories."

This decision letter contains no express reference to any of particular sub-paragraphs of Article 1F and in particular no reference at all to Article 1F(b), nor does it refer expressly to the reasons letter of 9 April 2010. No explanation is given as to what "records" demonstrated that the Claimant fell into "more than one" of the three enumerated exclusions from the One Off Exercise. There was no reference to *JS (Sri Lanka)*.

55. Thus by the end of April 2010, the Secretary of State had determined as follows:

- i) In light of further evidence, not available to the Adjudicator, the Claimant's account of his history and the basis of the criminal charges against him was accurate.
- ii) The Secretary of State had serious reasons for considering that the Claimant had committed a serious non-political crime (namely admitted possession of a firearm) and so fell to lose the protection of the Refugee Convention pursuant to Article 1F(b).
- iii) That, given the Claimant's admitted involvement in the PKK and encouragement of people in an armed struggle against the Turkish Government, the Secretary of State had serious reasons for considering that the Claimant had been guilty of acts contrary to the principles and purposes of the UN and so lost the protection of the Convention pursuant to Article 1F(c).
- iv) Accordingly the Claimant did not qualify for asylum nor for inclusion in the One Off Exercise.
- v) However the Claimant was granted discretionary leave to remain for a specified period given the risk of breach of his Article 3 ECHR rights if returned to Turkey.

56. On 8 July 2010, and pursuant to Sales J's direction, the Claimant served his Amended Grounds. In those grounds, the Claimant observed that the Secretary of State had not given any consideration to the Supreme Court's decision in *JS (Sri Lanka)*.

Decision letter of 6 August 2010

57. On 6 August 2010, the Secretary of State served Amended Grounds of Resistance, opposing permission and at the same time served a further decision letter, which, inter alia, addressed *JS (Sri Lanka)*.

58. By the 6 August 2010 decision letter, the Secretary of State refused (once more) the application under the One Off Exercise and set out the detailed reasoning for that decision. (This letter is not concerned with the earlier decision of 9 April 2010 refusing for asylum). The letter stated as follows:

" ...

2) We have carefully considered whether you are eligible for a grant of indefinite leave within the terms of the exercise, but for the reasons given below we have concluded that you do not qualify.

3) The terms of the exercise do not apply to a family where the principal applicant or any of the dependants is regarded as presenting a risk to security or falls within the scope of Article 1F of the Refugee Convention or whose presence in the UK is otherwise considered not conducive to the public good.

4) *It is considered that there are serious reasons for believing that you have committed a serious, non-political crime, prior to coming to the UK and that you have committed acts contrary to the purposes and principles of the United Nations.*

5) *In your further submissions dated 3 October 2003 you state that you were actively involved in the Parti Karkerami Kurdistan (PKK) to the extent of encouraging people in an armed struggle against the Turkish government for the creation of a separate Kurdish state. You further stated that on 2nd July 1996 you were with some PKK members when the exchanged fire with Turkish soldiers. You admit to possessing a firearm which was later discovered by the security forces who raided your flat in the Adana district. You claim never to have used the weapon but kept it with you for your personal safety as you were well known to the authorities as an active member with Halkin Demokrasi Partisi (HADEP) and the PKK.*

6) *You have submitted an indictment issued by the Chief Public Prosecutor in Adana, dated 13 December 1996, which records that you have been sentenced to 12 years, 4 months and 8 days imprisonment for carrying out illegal activities under the auspices of the HADEP party and carrying out activities against the Republic of Turkey. The indictment also records that your house was searched and a Takarof 9mm calibre pistol, one cartridge clip and 38 rounds of ammunition were found.*

7) *Consideration has been given to your representations of 3 October 2003, along with the evidence provided since your appeal determination of 23 September 2002 relating to your conviction in Turkey and activities in support of HADEP and the PKK whilst in Turkey, including the evidence provided in support of your son Mustapha Polat's asylum claim. It is noted that the Immigration Judge in Mustapha's appeal considered further evidence to that which was produced in your own appeal, including an expert report from Mr Norton of the University of Durham in relation to the documents recording your conviction in Turkey. Furthermore, in the determination of your son Mustapha's appeal dated 9 June 2005, reference was made to expert medical evidence in support of your son's claim to have been targeted in Turkey due to his connection to you and your absence from Turkey. In light of your representations of 3 October 2003 and the findings of the AIT in relation to your son's asylum claim, it is therefore considered that there is a reasonable likelihood that you were engaged in the activities in which you claim and that you have been convicted of carrying out illegal activities in Turkey, as contained in the indictment dated 13 December 1996."*

Then, after setting out expressly the provisions of Article 1F(b) and 1F(c), this letter addressed, in turn and in detail, the position of the Claimant under each of those distinct provisions. In paragraphs 10 to 17, the Secretary of State addressed Article 1F(b) in detail, concluding in paragraph 13 that "*there are serious reasons for considering that you committed a serious non-political crime in Turkey prior to your admission to the United Kingdom*". Much of the reasoning in these paragraphs repeats the reasoning in paragraphs 10 to 17 of the 9 April reasons letter (dealing with refusal of asylum).

59. At paragraphs 18 to 24, the Secretary of State turned to Article 1F(c). In paragraph 18, the Secretary of State - no doubt in response to the Claimant's earlier complaint - referred to JS (*Sri Lanka*) and set out, verbatim, the factors set out in §30 of Lord Brown's judgment. The letter went on, at paragraphs 19 to 21, to address the nature of the PKK as a terrorist organisation - repeating much of what was set out in paragraphs 20 to 22 of the 9 April reasons letter. The Secretary of State concluded that "*available information clearly indicates that the PKK is willing to employ violent means in order to achieve its stated aims*".

60. The letter then turned to *the Claimant's* involvement with the PKK in the following terms (repeating and expanding (as underlined below) upon the wording of the 9 April reasons letter):

"22) It is noted that there is no suggestion within your representations ... , in which you provide " a full and frank disclosure about past activities" ... that you were coerced in any way in order to support or assist the PKK. It is considered, from your own evidence, that you were aware of the PKK's aims and the methods that the organisation employs in

achieving its aims , as you would have been unable to "encourage people in an armed struggle" without this knowledge.

23) It is considered that you held a position of some significance within the PKK, as you were able to encourage others in an armed struggle against the Turkish authorities. Furthermore, you claim to have been actually present at an incident in which PKK activists exchanged gunfire with Turkish security forces.

24) Furthermore, it is considered that your activities for the PKK, namely that you encouraged people in an armed struggle against the Turkish government, demonstrates that you were fully aware of the PKK's violent tactics in attempting to achieve its aims and that you voluntarily contributed in a significant way to the PKK's ability to pursue its purpose of seeking a separate Kurdish state through terrorist acts. As such, it is considered that you have voluntarily contributed to the PKK's attempts to pursue its purpose, aware that your acts will assist this organisation. As such, it is considered that you are guilty of acts contrary to the purposes and principles of the United Nations."

Finally, at paragraph 25, the letter reached its overriding conclusion, in the following terms:

"You are therefore regarded as a person who falls within the scope of Article 1F of the Refugee Convention. As such, you do not qualify for inclusion in the exercise."

61. On 2 November 2010 Kenneth Parker J granted permission to apply for judicial review. There is a suggestion, not recorded in the order, that permission was not granted on a ground that the Secretary of State could not go behind the decision of the Adjudicator and find that the Claimant's history was as reported by the Claimant in the letter of 30 September 2003. Nevertheless, as the matter was raised before me, I consider this issue below.

62. On 14 July 2011 the Claimant served Additional Grounds and a witness statement dated 12 July 2011. The contents of this new evidence can be summarised as follows:

- The Claimant had been a very active member of HADEP, which was a legal political party until 2003. The activities in the Indictment were HADEP activities.
- He had been a more avid supporter of the PKK than stated in the initial asylum claim and he had provided food and shelter for the PKK and supported them in the separatist struggle. However he had never been a member of the PKK and he had not been involved in any violence or advised anyone in violence.
- He had never been involved in or supported any terrorist activity.
- As regards the incident on 2 July 1996, he had been there because he worked at the dam and had been merely a witness to events.
- A sentence of 12 years had been imposed in his absence, but he had not done anything to justify such a sentence.
- The weapon was not a Takarof – it was a hunting gun for which he had a permit.

The Issue and the parties' contentions

The Issue

63. The issue that falls for decision is whether the Secretary of State's decision to refuse the Claimant's application under the One Off Exercise was unlawful or *Wednesbury* unreasonable. That issue in turn has two aspects: whether the Secretary of State was justified in her reliance, as grounds for the refusal, upon, first, Article 1F(b) and, secondly, upon Article 1F(c) .

The Claimant's case

64. The Claimant submits, first, that the Secretary of State was not entitled, nor was it rational, to go behind the Adjudicator's findings of fact in the original asylum appeal and she should not have relied upon the Claimant's letter of 30 September 2003. Secondly, in any event, even if every aspect of the letter of 30 September 2003 is accepted and even if every finding by the Adjudicator is ignored, it is clear on any rational view that the Claimant does not fall within either Article 1F(b) or Article 1F(c). Accordingly, the Secretary of State's decision to exclude the Claimant from the benefit of the One Off Exercise on this basis is unlawful.

The Secretary of State's case

65. The Secretary of State submits that she has accepted and was entitled to accept the Claimant's account of his firearms offence and involvement with the PKK contained in the letter of 30 September 2003. Given the Claimant's *clear admissions* of both serious non-political criminal activity and acts contrary to the purposes of the UN, the Secretary of State was entitled to reach the decisions that she had at least serious reasons for considering that the Claimant's conduct fell within both Article 1F(b) and 1F(c). Thus conclusion was not *Wednesbury* unreasonable and the Secretary of State's decision cannot be impugned on public law grounds.

Analysis

The relevant evidence: the letter of 30 September 2003 and the further witness statement

66. Before turning to consider the application of Article 1F(b) and 1F(c), I address as a preliminary matter the question of the Secretary of State's reliance upon the Claimant's letter of 30 September 2003, and in particular whether the Secretary of State was entitled to rely upon the assertions of fact made in that letter on the Claimant's behalf.

67. In the Determination, the Adjudicator considered that the Claimant's evidence was so "puzzling" and "extraordinary" that he could not accept his evidence as being credible. There were too many inconsistencies in his account and the way in which it had been given. In particular, the failure to mention, at an earlier stage, the facts stated in the Indictment and other documents produced closer to the hearing, led the Adjudicator to refuse to accept that the documents themselves were genuine (let alone that their contents were true): see paragraph 40 above. Whilst ultimately the Adjudicator rejected the Claimant's account in its entirety, he also had concerns that, in fact, rather than not being true at all, the Claimant understated the extent of his involvement in matters in Turkey (paragraphs 35 and 39 above).

68. The subsequent letter of 30 September 2003 amounted to a change in the evidential picture. The Claimant now seeks to distance himself from his September 2003 representations, suggesting that they are not particularly clear. However the Claimant himself expressly approved the letter and, whilst at times the grammar may not be perfect, the letter, on its face, strikes me as a detailed and carefully drafted account. The letter itself constituted fresh material advanced by the Claimant himself and was written by the Claimant's solicitors, expressly stated to be a "full and frank account" of events and formally verified by signature by the Claimant himself. Moreover, by that time and as pointed out in the letter, there was by then independent expert evidence (from Dr Norton) to the effect that the Indictment and other documents were in fact genuine documents. Thus, it seems to me to be reasonable for the Secretary of State to have accepted the truth of the contents of the letter of 30 September 2003. Its contents, at face value, appear to explain the apparent ambiguities and doubts found by the Adjudicator.

69. In these circumstances, in my judgment, the Secretary of State was clearly entitled to rely upon the material in the letter of 30 September 2003. The weight to be accorded to the contents of that letter is distinct matter which falls for consideration, in particular, under Issue 2 below. The question there is whether on the basis of this evidence, and any other evidence relied upon by the Secretary of State, the application of Article 1F(c) was a conclusion which the Secretary of State could reasonably have reached.

70. As regards the further witness statement from the Claimant dated 12 July 2011, the Secretary of State submitted, first, that it is inconsistent with the evidence in the letter of 30 September and in the Indictment, that it is self serving and should not be relied upon, given the Claimant's lack of

credibility. Further the Secretary of State submitted that, since it post-dated the decisions in question and she has not been able to respond to that fresh evidence, it has no bearing on the lawfulness of the decision under review. Mr Collins for the Claimant submitted that it was, and would have been, open to the Secretary of State to invite the Claimant in and interview him further. If necessary, the new evidence should now be addressed, following which there should be a careful specific analysis and there should be a new decision. The Claimant submitted further that in any event the Secretary of State had one week before the hearing to consider this new evidence.

71. Whilst I am not necessarily prepared to accept the Secretary of State's contentions here, I proceed to consider the decisions, in relation to the issues below, in the first place, without taking account of the new evidence in the witness statement.

Issue (1): Article 1F(b)

72. In the decision of 6 August 2010, the Secretary of State concluded that the Claimant was excluded from the One Off Exercise under Article 1F(b) on the basis of having been in possession of a pistol and ammunition. The fact of possession of the pistol was evidenced by the terms of the Indictment. The Claimant's possession of a pistol was a crime that was both "serious" and "non-political". As regards the "non-political" character of the crime, the Secretary of State relied upon the definition of a political crime set out by Lord Lloyd in *T v. Secretary of State for the Home Department* at 786H-787B. As regards the "seriousness" of the crime, the Secretary of State relied, both in the decision letter and before me, upon the UK statutory presumption in s.72 NIAA regarding the term "particularly serious crime" in Article 33(2) of the Refugee Convention. She concluded that committing a crime for which a sentence of at least two years imprisonment could be imposed amounts to the commission of a "serious crime" within the meaning of Article 1F(b). By contrast, the Claimant submits that, even taking Secretary of State's case on the facts at its highest, the mere possession of a pistol and ammunition would not bring a person within the ambit of Article 1F(b). An offence of possession of a firearm of the sort in question here does not begin to approach the sort of crime which is intended to be covered by the term "serious non-political" crime in Article 1F(b), and relies, in that connection, upon the UNHCR Handbook guidance, referring to "a capital or very grave" crime.

73. In the present case, whilst I can see how the Claimant's possession of the pistol (as evidenced by the Indictment) was "non-political", the issue of whether it was a "serious" crime is less clear. It is certainly difficult to reconcile the approach to "seriousness" set out in the UNCHR handbook (and the ECRE paper) with the provisions of s.72 NIAA: see *MacDonald's Immigration Law and Practice* (8th edn) para.12.97. Nevertheless, it is equally difficult to see that the presumption does not apply, not least because a "serious crime" in Article 1F(b) must include a "particularly serious crime" in Article 33(2). The application of the s.72 presumption raises further issues as to whether the exclusion in Article 1F(b) applies wherever a person has committed an offence where the maximum punishment for the particular offence is two years or rather where the two years or more is the likely actual punishment for the crime in question. In either event, if s.72 does apply, then there is the prospect of offences such as burglary or causing death by careless driving falling with Article 1F(b).

74. However, I do not need to decide this issue in the present case. There is a distinct reason why the Secretary of State was wrong to rely upon Article 1F(b) as a basis for excluding the Claimant from the One Off Exercise. This reason emerges from consideration of the precise terms of the One Off Exercise itself and of the decision letters of 28 April 2010 and 6 August 2010.

75. "Serious non political crime" is not a ground for exclusion specified in the terms of the One Off Exercise. The terms of the "exclusions" specified in the One Off Exercise do not refer at all to Article 1F(b). By contrast, the exclusions do specify expressly both "war crimes etc" (under Article 1F(a)) and "acts contrary to the principles and purposes of the UN" (under Article 1F(c)). However in the decision letter of 6 August 2010, the Secretary of State does expressly rely upon Article 1F(b) as a ground for exclusion.

76. Faced with this difficulty, Mr Deakin submitted that the Secretary of State's finding in the decision letter of 6 August 2010 in relation to the commission of a "serious non political crime" justified the exclusion of the Claimant on the alternative basis for exclusion of "presence not conducive to the public good". He argued further that this ground was in fact relied upon in the decision in issue, by virtue of the reference to "one or more of these categories" in the letter of 28 April 2010 and the

reference to the "not conducive" ground in paragraph 3 of the letter of 6 August 2010. Finally Mr Deakin argued that it must have been the intention, in the One Off Exercise, that any and all Article 1F(b) "serious crimes" necessarily fall within the "not conducive to the public good" ground. As this ground is wider, it must encompass the narrower Article 1F(b) ground. For this reason, there was no need separately to identify Article 1F(b) in the exclusions in the One Off Exercise.

77. I do not accept these submissions. There is no evidence to support a conclusion that the Secretary of State did actually conclude that the Claimant's presence in the UK was "not conducive to the public good" on the basis of the facts said to establish Article 1F(b) exclusion.

78. First, the decision letter of 28 April 2010 contains no express reference to any of particular sub-paragraphs of Article 1F and in particular no reference at all to Article 1F(b). Nor does it contain any express reference to the detailed reasons letter of 9 April 2010. No explanation is given as to how the Secretary of State's records demonstrate that the Claimant fell into "more than one" of the three enumerated exclusions from the One Off Exercise. To the extent that the "records" were intended to be a reference back to the 9 April 2010 reasons letter, this cannot be a reference to the "not conducive to the public good" ground, since the only ground relied upon in that letter was Article 1F. That letter made no reference to "not conducive to the public good" ground.

79. Secondly, as regards the detailed decision letter of 6 August 2010, apart from the general statement of the three grounds in paragraph 3, there is no further reference to the "not conducive" ground. It is clear from paragraphs 4, 8 and 10 to 17 that possession of the pistol was considered solely on the basis that this was a serious non political crime under Article 1F(b). The matter is put beyond doubt by the terms of paragraph 25 of the letter, where the use of the words "as such" make it clear that the only ground for exclusion under the One Office Exercise relied upon by the Secretary of State is Article 1F, and not the separate ground of "not conducive to the public good". I do not accept the Secretary of State's contention that, because of the need to apply the guidance in *JS (Sri Lanka)*, paragraph 25 and, indeed the 6 August 2010 letter as a whole, was only really addressing Article 1F(c). That contention fails to explain the detailed consideration given to Article 1F(b) matters in the letter. Moreover, the reference in paragraph 2 of the letter to "the reasons given below" includes the Article 1F(b) reasoning.

80. Thirdly, there is no evidence to explain why Article 1F(b) is not included in the One Off Exercise. It does not follow that it was omitted because of the existence of the alternative "not conducive" ground. It might equally have been left out because of the separate exclusion for "criminal conviction" (which would cover a wider category of crimes, and include serious non-political crime). But this is no more than speculation.

81. In those circumstances, in my judgment, the Secretary of State's conclusion in her decisions of 6 August 2010 (and, possibly, of 28 April) that Article 1F(b) applied to the Claimant on the basis of the commission of a serious, non-political crime was entirely irrelevant to the Secretary of State's decision on whether to grant the Claimant's application under the One Off Exercise. To the extent that the Secretary of State's refusal was based upon Article 1F(b), the Secretary of State took account of an irrelevant consideration and was accordingly unlawful or *Wednesbury* unreasonable. The Secretary of State erred in law in deciding that the facts relating to possession of the gun fell within the terms of the Article 1F exclusion contained in the One Off Exercise. For these reasons, the decision, in so far as it is based on possession of the gun, cannot stand.

Issue 2 Article 1F(c) – contribution to terrorist acts

82. By contrast, Article 1F(c) is a specified basis for exclusion under the One Off Exercise. The issue is whether the Secretary of State's conclusion that Article 1F(c) applied to the Claimant was *Wednesbury* unreasonable. The Secretary of State's reasoning is contained in the decision letter of 6 August 2010. In that letter the Secretary of State, correctly, sought to apply the guidance laid down by the Supreme Court in *JS (Sri Lanka)*.

83. The guidance is most succinctly summarised by Lord Brown at §38, where he identifies a test of significant contribution, fully endorsed by Lords Hope and Kerr. In the present case, adapting that to Article 1F(c), the question for the Secretary of State was: Were there serious reasons for considering the Claimant voluntarily to have contributed in a significant way to the ability of the PKK to

pursue its purpose of committing terrorist acts or other acts contrary to the purposes and principles of the UN, aware that his assistance would in fact further that purpose? In answering that question, the seven factors enumerated in §30 of Lord Brown's speech fell to be considered.

84. This is what the Secretary of State sought to do in the letter of 6 August. She identified the §30 factors in paragraph 18. At paragraphs 21 to 24, those factors were sought to be applied to the Claimant; and finally, in the last two sentences of paragraph 24, the Secretary of State sought to answer the question arising from §38.

85. In making her assessment, the Secretary of State relied largely on the terms of the 30 September 2003 letter; and the essential evidence from that letter which the Secretary of State relied upon are the following particular assertions of fact. First, the Claimant was an "an active member" of, and "actively involved" with the PKK. Secondly, he "encouraged others in the armed struggle against the Turkish government". Thirdly that he was "with the PKK members who had exchanged fire with the Turkish soldiers" on 2 July 1996.

86. Further, the Secretary of State relied upon two particular aspects of the Indictment: first that the Claimant had been convicted of illegal activities against the Turkish state and secondly, that he "took part in a struggle in order to establish a Kurdish nation". Finally, the Secretary of State relied upon evidence in the Claimant's son's appeal suggesting that his son had been tortured because of the Claimant's own activities. No further detail of this evidence was referred to in the letter, nor placed before me.

87. I turn to consider the Secretary of State's reasoning in the 6 August 2010 decision letter in relation to each of the §30 factors.

(i) The nature and size of the organisation and particularly the part of it with which the Claimant was himself most directly concerned

88. At paragraphs 21 (and 19 and 20) of the letter, the Secretary of State did identify the PKK as a terrorist organisation and gave some details of its activities. There was however no reference to any evidence at all to any particular part or aspect of the PKK's activities with which the Claimant himself was concerned.

(ii) Whether and if so by whom the organisation was proscribed

89. At paragraph 21, the Secretary of State referred to the fact that the PKK had been proscribed by both EU and US and UK authorities. However the Claimant submits, without objection, that the PKK was only proscribed in 2000 and there was no evidence that it was proscribed at the time of the Claimant's activities in 1996 and earlier.

(iii) How the Claimant came to be recruited

90. The Secretary of State failed to refer to this factor, and there was no evidence relating to it at all.

(iv) The length of time the Claimant remained in the organisation and opportunities to leave

91. At paragraph 22, the Secretary of State observed that the Claimant had not suggested that he had been coerced to support the PKK. However there was no reference, nor any evidence relating, to the length of time the Claimant remained "in" the PKK.

(v) Position, rank, standing and influence in the organisation

92. At paragraph 23, the Secretary of State concluded that the Claimant "held a position of some significance within the PKK" and relied upon two matters only. *First*, she relied upon the fact that the Claimant "was able to encourage others in an armed struggle against the Turkish authorities." Mr Deakin in argument submitted that this fact made it "likely" that the Claimant held such a position. In my judgment, this was a conclusion which the evidence relied upon could not support. A blanket assertion of "encouraging others in an armed struggle" says nothing about the nature of that

encouragement. It could involve as little as carrying a banner, shouting a slogan or participating in a march. The assertion says nothing about position, rank, standing or influence within the organisation. It seems to me that this JS factor is seeking to address important issues of relative seniority within the operations of the particular organisation. The assertion, without more, could not possibly have informed the Secretary of State in relation to this factor. I do not accept the proposition that an admitted act of "encouraging" ruled out involvement at a low level.

93. *Secondly*, as regards this factor, the Secretary of State relied upon the Claimant's presence at the incident on 2 July 2006. In my judgment, that fact did not contain evidence going to establish the Claimant's particular position or influence. Although, at paragraph 23 of the letter, the Secretary of State did not expressly so rely, I note that the statement in the 30 September 2003 letter was that the Claimant was "*with* the PKK members". Whilst it is true that this might have suggested some form of participation in, rather than mere observation of, the incident of 2 July, it did not say anything about position or influence. Further, as I observe below, it appears that the Secretary of State gave no consideration to the question whether this particular incident was truly to be considered as a "terrorist" act.

(vi) Knowledge of war crimes activities

94. This was addressed in paragraph 22. (Technically, under Article 1F(c), the Secretary of State should have been referring to knowledge of "terrorist acts", as opposed to "war crimes"). The Secretary of State concluded that the Claimant was aware of the PKK aims and methods, again on the basis solely of the assertion of "encouraging others". However there was no specificity relating to what the "encouraging others" involved.

(vii) Own personal involvement and role in the PKK, including particularly whatever contribution the Claimant made towards the commission [of war crimes]

95. This was addressed in the first part of paragraph 24 of the letter. Again, the only evidence relied upon was the assertion of "encouraging others". On that evidence, the Secretary of State concluded that the Claimant "voluntarily contributed in a significant way" to the PKK's ability to pursue its purpose through terrorist acts. But that evidence said nothing at all about the nature and quality of the Claimant's "own personal involvement and role in the PKK". It was not possible to determine from that statement whether the Claimant's actions amounted to a contribution "in a significant way".

Conclusions on Article 1F(c)

96. On the basis of the evidence taken into account by the Secretary of State as at 6 August 2010 (and leaving out the subsequent witness statement) my conclusions are as follows.

97. First, membership of the PKK is not sufficient to amount to an act contrary to the principles and purposes of the UN. The Secretary of State did not suggest that it is.

98. Secondly there were, effectively, two aspects of conduct relied upon by the Secretary of State to support her conclusion. The first - encouraging others in the armed struggle - was a single sentence and a statement of an entirely general nature. This one single line statement was relied upon as the central evidence to establish factors (v) (vi) and (vii) of the §30 JS factors. It might cover conduct ranging from shouting a slogan to active participation in acts of terrorism. There was no evidence before the Secretary of State as to what specific conduct on the part of the Claimant constituted this "encouragement". There was no evidence of physical or logistical support for PKK and its operations and no evidence to support or explain what "encouragement" means. In this context, that this evidence was not *of itself* sufficient finds support in the ECJ's recent decision in *B and D* that even "actively supporting the armed struggle" does not, without more, amount to an act contrary to the purposes and principles of the UN.

99. The second aspect - and perhaps the closest the evidence came to any degree of particularity - was the Claimant's presence at the incident on 2 July 1996. However, on its face this was an incident between the PKK and the armed forces of the Turkish government. In the light of the Court of Appeal decisions in *KJ (Sri Lanka)* and *DD (Afghanistan)* (see paragraphs 19 and 20 above), it seems to me to be at least arguable that such an incident did not amount to "terrorist" activity and did not fall within

the scope of Article 1F(c). The Secretary of State gave no consideration to this issue at all, nor to the extent to which could be said that the PKK carried out military operations against the Turkish Government. Further and in any event, for the reasons given above, even if the Claimant was "with the PKK" rather than a witness, without any further detail as to what this meant, that was not sufficient evidence to establish "contribution in a significant way". The Indictment, although it does refer to the date of 2 July 1996 and, in general terms to a "struggle to establish a Kurdish nation, makes no reference to the incident itself nor to the Claimant's involvement in it or indeed with the PKK at all. Rather it refers only to activities with HADEP.

100. Thirdly, the requirement is that, in order to find that a person is excluded under Article 1F(c), there has to be an individual assessment of the particular person's circumstances, based on cogent evidence so as to enable the decision maker to reach a careful considered conclusion (see paragraph 16 and 17 (iv) above). In the present case, neither the evidence nor the Secretary of State's assessment was sufficient to meet this standard. Given the very general nature of the evidence both in the 30 September 2003 letter and in the Indictment, and the history of the case, in particular the Adjudicator's doubts about credibility, the Secretary of State could, and should, have made more specific inquiries.

101. Fourthly, in the 6 August 2010 letter, the Secretary of State strained hard to make the Claimant's case fall to meet the guidance contained in §§30 and 38 of *JS (Sri Lanka)*. Mr Deakin submitted in conclusion that there was clear evidence of "substantial" involvement with a terrorist group. I do not agree. I do not accept that the evidence was either clear or that the involvement was substantial in the sense of being a "significant contribution". Ultimately there was no evidence at all about *the quality* of the Claimant's alleged contribution to acts of terrorism on the part of PKK nor to establish that that contribution was "substantial" or "significant". By contrast, the evidential picture in the cases cited above was far more specific and detailed (see, e.g., *MH (Syria)*).

102. Finally, I recognise that the relevant assessment was not to be made by a mechanical or arithmetic application of the seven factors in §30 in *JS (Sri Lanka)*. Nevertheless, as appears from paragraphs 88 to 95 above, whilst there was evidence to suggest that some of these factors might have been satisfied *in part*, in my judgment, there was not sufficient evidence to satisfy any one of them in whole. That confirms the conclusion which I have reached.

103. Accordingly there was no sufficient evidence rationally to conclude that there were serious reasons for considering the Claimant voluntarily to have contributed in a significant way to the PKK's ability to pursue its purpose of committing terrorist acts, aware that his assistance would in fact further that purpose.

104. For these reasons, the Secretary of State's conclusion that there were "serious reasons for considering that the Claimant had been guilty of acts contrary to the purposes and principles of the United Nations" was *Wednesbury* unreasonable.

Conclusions

105. In view of my conclusions in paragraphs 81 and 104 above, I will make declarations that the decision letters of 28 April 2010 and 6 August 2010 were unlawful and *Wednesbury* unreasonable and will make a quashing order quashing the Secretary of State's decision excluding the Claimant from the grant of indefinite leave to remain under the One Off Exercise.

106. In the light of these conclusions, the new witness statement is not relevant. However I would add that if I had upheld the Secretary of State's decision of 6 August 2010 on the basis of the then existing material, I would have been minded to conclude that the new evidence did appear to be relevant new material and to direct that the Secretary of State to reach a fresh decision on the application under the One Off Exercise on the basis of that new material.

107. I will hear the parties as to the precise terms of the orders to be made (including if need be as to whether it would be appropriate to make mandatory orders relating to the grant of indefinite leave to remain under the One Off Exercise) and as to costs and any other consequential matters.

108. Finally, I should add that I am grateful to both Mr. Collins and Mr. Deakin for the assistance they have provided to the Court.

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