Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/03739/2015

THE IMMIGRATION ACTS

Heard at Stoke	**Decision & Reasons Promulgated**
On 27th November 2017	**On 18th December 2017**

Before

UPPER TRIBUNAL JUDGE KING TD

Between

[S J]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Blundell of Counsel, instructed by M & K Solicitors
For the Respondent: Mr Bates, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Afghanistan born on [ ] 1980. He arrived in the United Kingdom in 2006 and claimed asylum. That application was refused by the respondent on 11th August 2006. The appellant sought to appeal against that decision, which appeal came before Immigration Judge Hawden-Beal.

2. In a determination promulgated on 30th October 2006 the appellant's claim for asylum was dismissed on the basis that he fell within Article 1F(a) of the Refugee Convention. However, his claim under Article 3 of the ECHR was allowed and he was granted discretionary leave to remain in the United Kingdom until 1st August 2007.

3. On 10th September 2007 the appellant renewed his application for leave to remain but it took the respondent until 13th February 2015 to make a decision. That decision was to refuse to grant any further leave, essentially on the basis that circumstances had changed, such that the Article 3 risk no longer was a live one.

4. The appellant sought to appeal against that decision, which appeal came before First-tier Tribunal Judge James at a hearing on 22nd May 2015. The Judge noted in that decision that he was considering an appeal against a decision to refuse to extend his discretionary leave to remain, rather than one to refuse asylum. Thus the Judge did not engage with the issue of Article 1F. Nevertheless the appeal was allowed on the basis of Articles 3 and 8 of the ECHR, particularly having regard to the risks which the appellant would face upon return.

5. The Secretary of State sought to appeal against that decision, which matter came before Deputy Upper Tribunal Judge McGinty at a hearing in Field House on 7th March 2016. In a determination of 11th April 2016, the Judge upheld the findings as to Article 3 of the ECHR. However, it was noted that the First-tier Tribunal Judge had failed to make any findings in respect of Article 1F or Article 8. Thus the decision of Judge James was set aside to be reheard on those issues but Article 3 was preserved.

6. The matter came before First-tier Tribunal Judge Juss on 10th November 2016. The Judge applied the principle of **Devaseelan** to the issue of Article 1F and dismissed the appeal in respect of Articles 3 and 8.

7. Thus the appeal comes before the Upper Tribunal on the challenge that at the very least the appeal on Article 3 should have been allowed, particularly given the findings of Judge James and Judge McGinty. It was argued that it was an error of law for the Judge not to have grappled with the issue of 1F.

8. I considered the matter on 7th August 2017 and adjourned the matter in order that proper consideration can be given to the issue of 1F(a) and whether or not that should continue to apply.

9. At the hearing Mr Bates indicated that he had no instructions to concede the Article 1F(a) point. Thus it was that the hearing proceeded to consider the argument as to whether or not that Article should be continued or not in the light of subsequent jurisprudence.

10. The matter as was presented before Immigration Judge Hawden-Beal is set out in paragraphs 57 to 62 of the determination.

11. In interview the appellant agreed that he had attacked forces of the Karzai government but denied attacking civilians. He said in his interview at question 26 that he did kill people sometimes because it was war. He said

he took no prisoners and did not mistreat enemy combatants but rather fought with the enemy. He said he would come down from mountains and attack them.

12. In evidence he said that the new government was anti-Hizb-i and that when they attacked him he defended himself. He said that the new government would not leave Hizb-i alone and so he fought back. He confirmed that coalition forces were in Kunar Province when he was fighting with the Karzai government forces but, in spite of being bombed by the coalition forces, the appellant denies shooting at them. He said he had never deliberately killed anybody but if he was fired upon he returned the fire and if returned to Afghanistan he would again take up arms on behalf of Hizb-i.

13. The Judge commented at paragraph 60 as follows: "Having considered Article 1F(c) I am not satisfied that the appellant has been guilty of acts contrary to the purposes and principles of the United Nations." The Judge went on, however, in paragraph 61 to say as follows:

> "However, the evidence before me shows that the appellant has participated in a crime against peace as defined in Annex 5 Article 6 of the 1951 Convention, in that the appellant has taken part in the planning, preparation, initiation and waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or has participated in a common plan or a conspiracy for the accomplishment of any of the above. I therefore find the appellant is excluded from being a refugee under Article 1F(a)."

14. Mr Blundell submitted that merely being with a band of fighters in an internal conflict situation was not sufficient to constitute a crime against peace.

15. In that connection my attention was drawn to an old decision of the Immigration Appeal Tribunal, as it then was, 00/TH/01570, in the matter of **Amberber**. The relevance of that decision is that it sets out a letter from UNHCR as to how Article 1F(a) should be read. Paragraphs 147 – 150 of the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status set out the categories of persons who are not considered to be deserving of international protection under Article 1F(a) of the Convention. A list of international instruments, which contained definitions of "a crime against peace, war crime, or a crime against humanity" are found in Annex VI of the UNHCR Handbook. In particular, Article 6 of the Charter of the International Military Tribunal defines "crimes against peace" as namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

16. The United Nations General Assembly resolution 3314 (XXIX) on the definition of aggression, defines aggression as the use of armed force by a

state against the territorial sovereignty, or political independence of another state. Such would suggest that there are two conditions which should be met in terms of an act of aggression, namely that the act must have been committed by a leader of the state and must have been committed against the territorial sovereignty of another state, that is, there must be some kind of conflict waging across international borders.

17. Further, the crime of aggression, as defined in Article 16 of the International Law Commission's 1996 "Draft Code of Crimes against Peace and Security of Mankind," relates to the crime of aggression in any deed committed by leaders of a state. This led the Tribunal to conclude that a conflict of action of AAPO members against EPRDF soldiers did not amount to a war of aggression and did not constitute a crime against peace.

18. Further, my attention was drawn to a decision of the Supreme Court in **Al-Sirri v Secretary of State for the Home Department (United Nations High Commissioner for Refugees intervening) [2012] UKSC 54**. The court at paragraph 36 indicated that the general principles and guidance given by the UNHCR, although not binding, should be accorded considerable weight. My attention was further invited to **R on the application of JS (Sri Lanka) v Secretary of State for the Home Department [2010] UKSC 15**. This perhaps was a very relevant decision as the court paid careful regard to what constituted a crime against peace, a war crime or a crime against humanity as set out in Article 1F(a) of the Convention.

19. In that particular case the appellant was a member of the LTTE and team leader of a combat unit engaging in military operations against the Sri Lankan Army (a situation not dissimilar from that in the current appeal.

20. Reference was made to Article 28 of the Rome Statute of the International Criminal Court (the ICC Statute), which was considered to be the starting point for considering whether an appellant was disqualified from asylum by virtue of Article 1F(a). Considerations are also given to the Qualification Directive 2004/83/EC (in particular Article 12(2)(a), which mirrors 1F(a) itself. The court considered the decision in **Gurung** to be one not without its difficulties, in particular the view that mere membership of an organisation that is committed to the use of violence for political ends is not enough to bring an appellant within the exclusion clauses. The starting point for a decision maker in addressing the question, whether there are serious reasons for considering that an asylum seeker has committed an international crime so as to fall within Article 1F(a), should be the Rome Statute. The decision maker will need to identify the relevant types of crime as defined in Articles 7 and 8 and then address the question whether there are serious reasons for considering that the appellant has committed such a crime. There has to be a focus upon the actual participation of the individual as opposed to an assumption as to its significance from mere membership.

21. The Rome Statute came into force on 1st July 2002. Article 8 defines what is a war crime. Wilful killing or wilfully causing suffering, or serious injury to body or health is within the context of acts against persons or property protected under the provisions of the relevant Geneva Convention, which does not apply in the current case of civil war.

22. Significantly, other serious violations of laws and customs are against civilians or those involved in humanitarian assistance or peacekeeping by employing violence in humiliating and degrading situations such as rape or slavery. Properly speaking, there is an expectation that that is an international context.

23. In the case of armed conflict, not of international character, the violations that are specified, mutilation, cruel treatment and torture, outrages upon personal dignity, taking of hostages and carrying out executions without proper procedures. None of those matters are suggested in relation to the appellant. His case is simply that he fights those who seek to invade his territory and responds to such aggression with aggression.

24. As Mr Blundell indicates, the nature of the action that is described so far as the appellant is concerned is not one of those falling within Article 8.

25. Article 22 provides that the definition of a crime shall be strictly construed. The protecting of the tribal area from the Taliban or government forces lacks the international element, but in any event does not denote conduct against individuals that are envisaged in Article 8 or under the Code itself. Taking part in a war of aggression is taking part in a much wider operation of international dimensions or of significance, which is not being envisaged in the case of the appellant.

26. As Mr Blundell indicated, there are sadly many areas of conflict at present, many of which are in local areas with local militia fighting those who seek to control the territory. Such is not the nature of the conduct, which is envisaged in the Rome Statute, nor do any of the acts fall within the categories envisaged. As I so find, the appellant falls more within the context considered by the Supreme Court in **JS (Sri Lanka)**. His involvement has very much a local rather than an international or state character.

27. Having heard the submissions by Mr Blundell I invited Mr Bates for his response. He indicated that he had no submissions to make.

28. Accordingly it seems to me, on the authorities that have been presented, that Immigration Judge Hawden-Beal was in error in categorising the activities of the appellant as a crime against peace. In any event, the jurisprudence has developed since 2006 in the decisions to which reference has been made.

29. I do not find that that what was described by the appellant, as to his participation in armed conflict, was such as to constitute a war crime or a crime against peace such as to justify the imposition of Article 1F(a) and certainly not to continue that exclusion.

30. To the extent therefore that there is an appeal against the finding of 1F(a) that is allowed such that the exclusion is revoked.

31. That in practical terms enables the appellant to advance his claim for asylum.

32. In that connection it is important to note that the findings as to Article 3 of the ECHR were specifically preserved. The nature of the reasoning behind Article 3 is set out in some detail in the decision of First-tier Tribunal Judge James promulgated on 19th June 2009 and set out in paragraphs 65 to 72 onwards. In that connection the Judge had had regard to the report of Dr Giustozzi and to the country case of **PM and Others (Kabul - Hizb-i-Islami) Afghanistan CG [2007] UKAIT 00089** and **RQ (Afghan National Army - Hizb-i-Islami - Risk) Afghanistan CG [2008] UKAIT 00013**. It was the finding of Judge James, as set out, that the appellant would be at risk of arbitrary arrest, detention and torture were he to return, on account of his political involvement with Hizb-i-Islami. Clearly therefore there is a finding that the appellant is at risk for a Convention reason were he to return. This clearly satisfies the requirement of asylum. Mr Bates does not seek to go behind the ambit of the findings by Judge James, which were in essence preserved, nor does he contend that asylum would not be an appropriate disposal.

33. In terms of Article 8, private and family life, it was considered by Judge James at paragraphs 73 to 81 and Article 8 was allowed. Those findings are also preserved.

34. In all the circumstances therefore the appellant's appeal in respect of asylum is allowed as is the appeal in respect of Article 3 and Article 8 of the ECHR.

Decision

The appellant's appeal is allowed as to asylum, Article 3 of the ECHR and Article 8.

No anonymity direction is made.

Signed Date 18 December 2017

Upper Tribunal Judge King TD