Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/05707/2007

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 26th June 2013	**On 9th September 2013**

Before

UPPER TRIBUNAL JUDGE WARR
UPPER TRIBUNAL JUDGE PETER LANE

Between

DD
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Appearances:

For the Appellant: *Christopher Jacobs*, instructed by Lawrence Lupin Solicitors
For the Respondent: *Jonathan Auburn*, instructed by the Treasury Solicitor

DETERMINATION AND REASONS

Introduction

1. Article 1F of the Geneva Convention Relating to the Status of Refugees 1951 and New York Protocol 1967 provides that the provisions of that Convention shall not apply in three specified sets of circumstances. The effect of Article 1F is that a person

who would otherwise be recognised as a refugee under the Convention, with all that that entails, must not be given that recognition if he or she falls within one or more of paragraphs (a), (b) and (c) of Article 1F.

2. Our task in the present case is to determine whether the appellant falls to be excluded by reason of Article 1F(c). This entails making a finding as to whether there are serious reasons for considering that the appellant "has been guilty of acts contrary to the purposes and principles of the United Nations". As we shall describe in more detail, the Court of Appeal ([2010] EWCA Civ 1407) remitted the appellant's appeal to the Tribunal for it to perform that task; and the Supreme Court agreed (Al Sirri v Secretary of State for the Home Department; DD (Afghanistan) v Secretary of State for the Home Department [2012] UKSC 54.

3. We should, however, make it plain that, irrespective of our finding on this issue, there is no current prospect of the appellant being removed from the United Kingdom to Afghanistan, the country of his nationality. In 2008, Immigration Judge E M Simpson found that such removal would be reasonably likely to violate the appellant's rights under Article 3 of the ECHR, whereby no one is to be subjected to torture or to inhuman or degrading treatment or punishment. Being recognised as a refugee under the 1951 Convention, however, carries various benefits, both under the Convention itself and by reason of the operation of various policies of the respondent. These include the ability to have certain family members join the refugee in the United Kingdom, even though this would entail additional burdens on public funds. In addition, a refugee is accorded a significantly longer period of leave to enter or remain in the United Kingdom, compared with a person to whom Article 1F applies.

The Supreme Court's description of the facts of the appellant's case

4. At this stage, it is convenient to set out [41] to [46] of the judgment of Lady Hale and Lord Dyson in Al-Sirri and DD (with whom Lord Phillips, Lord Kerr and Lord Wilson agreed). Though there appears to have been no issue before the Supreme Court that these were, indeed, the salient facts of the appellant's case, the appellant has, as we shall see, sought to resile from them:-

> "[41] The appellant is a citizen of Afghanistan. He arrived in the United Kingdom on 18 January 2007 and applied for asylum on the same day. The basis of his claim was that he feared persecution because of his association with his brother AD, who was a well known Jamiat-e-Islami commander in Afghanistan. Following the fall of the Najibullah government in 1992, the appellant's brother became responsible for other commanders in the north of Afghanistan and formed a number of strategic alliances, ultimately allying himself with the Taliban. The appellant acted as his deputy and commanded between 50 and 300 men. He was later demoted and reduced to the command of no more than 20 men.
>
> [42] Following US military intervention in Afghanistan, the appellant and his brother fled to Pakistan. In 2004, the appellant's brother was assassinated in Pakistan by

his enemies who held positions in the Karzai government of Afghanistan. The appellant was also a target of the assassination attempt and sustained gunshot injuries. After about a month, he returned to Afghanistan and sought protection from his enemies by joining a military grouping, Hizb-e-Islami. He commanded 10-15 people and engaged in both offensive and defensive military operations against both the Afghan government and the forces of ISAF.

[43] The appellant's nephew (the son of his deceased brother) was killed in Peshawar in about September 2006. The appellant was ordered to fight in his home area. He decided that it would be too dangerous for him to do so as he had enemies there who were high ranking members of the Karzai government. He fled once again to Pakistan and arrangements were made through an agent for him to travel from there to the United Kingdom. He claimed asylum saying that he feared that, if he were returned to Afghanistan, he would be killed by his deceased brother's enemies or by Hizb-e-Islami as a traitor.

[44] By letter dated 27 April 2007, the Secretary of State refused the claim on the grounds that the appellant's account was not credible. In particular, he did not accept the account that he gave of his role in Hizb-e-Islami. By letter dated 6 August 2007, the Secretary of State gave supplementary reasons for the refusal. These were that, even if the appellant's claimed activities in Afghanistan were substantiated, he was not entitled to asylum in any event. This was because his claim that he had fought against ISAF, if accepted, meant that he had been guilty of acts contrary to the purposes and principles of the United Nations and was therefore excluded from the definition of refugee by reason of article 1F(c) of the Refugee Convention.

[45] The appellant appealed to the Asylum and Immigration Tribunal ('AIT'). IJ Morgan found the appellant to be credible and allowed his appeal under the Refugee Convention and under Article 3 of the European Convention on Human Rights ('ECHR'). He had a well-founded fear of persecution by his brother's enemies some of whom were members of the Karzai government. The judge was not persuaded that the appellant had been guilty of acts contrary to the purposes and principles of the United Nations. For reasons that are immaterial to the present appeal, a second stage reconsideration was ordered by SIJ Moulden.

[46] The second stage reconsideration was conducted by IJ Simpson who, by a determination promulgated on 28 August 2008, allowed the appellant's appeal on both asylum and Article 3 of the ECHR grounds. The judge found the appellant to be credible, except that she rejected his assertion that his actions with Hizb-e-Islami in Afghanistan were defensive. He had a longstanding history of military involvement in Afghanistan, 'including at a high level, deputy to his Commander brother, and independently a Commander in Hizb-e-Islami Hekmatayar in Kunar'. There were *prima facie* grounds for considering his actions were both offensive and defensive. As regards article 1F(c), the judge concluded that section 54 of the 2006 Act (see para 7 above), which came into effect on 31 August 2006, appeared to have effected a substantive change in the

law and that, as a matter of natural justice, it applied only to acts after it came into force, that is from September 2006[1]. She concluded at para 151:

> 'Having regard to the combined lack of specificity of evidence of the appellant's conduct with Hizb-e-Islami and the highly reasonable likelihood, given the chronology, that his involvement with Hizb-e-Islami was at its end stage after September 2006 and the coming into effect of section 54, I find in sum there are not serious grounds for considering he committed a barred act(s). I find article 1F(c) does not apply.'"

The issues in the Court of Appeal

5. In its judgments, the Court of Appeal ([2010] EWCA Civ 1407) held that section 54 of the 2006 Act was, in law, capable of covering events prior to the date on which it came into effect; but, on the findings of Judge Simpson, the appellant had not, in fact, committed any acts of terrorism within the meaning of that section. The Court held that the issue of whether the appellant fell to be excluded under the Convention by reason of Article 1F(c) nevertheless remained. In its judgment:-

> "The UN Security Council has mandated forces to conduct operations in Afghanistan. The force is mandated to assist and maintain security and to protect and support the UN's work in Afghanistan so that its personnel engaged in reconstruction and humanitarian efforts can operate in a secure environment. Direct military action against forces carrying out that mandate is in my opinion action contrary to the purposes and principles of the United Nations and attracts the exemption provided by (article 1F(c) of the Convention [64] (Pill LJ)."

6. The Court accordingly remitted the case for reconsideration by the Upper Tribunal, since the judge had failed to consider the appellant's individual responsibility, as required by JS (Sri Lanka) [2010] UKSC 15 and by the Court of Justice of the European Union in Bundesrepublik Deutschland v B and D [2011] Imm AR 190; and whether the appellant had been guilty of acts contrary to the purposes and principles of the United Nations. That remains our task ([76] of Al-Sirri and DD).

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[1] 54 (1) In the construction and application of article 1F(c) of the Refugee Convention the reference to acts contrary to the purposes and principles of the United Nations shall be taken as including, in particular-

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

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

(2) In this section-
"the Refugee Convention" means the Convention relating to the Status of Refugees done at Geneva on 28 July 1951, and

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

The appellant's case in the Supreme Court

7. Before the Supreme Court, the appellant's stance was that direct military action against the ISAF forces in Afghanistan could not, as a matter of law, constitute behaviour falling within Article 1F(c). The Supreme Court found against the appellant on that issue, concluding as follows:-

> "[68] In short, an attack on ISAF is in principle capable of being an act contrary to the purposes and principles of the United Nations. The fundamental aims and objectives of ISAF accord with the first purpose stated in article 1 of the United Nations Charter. By attacking ISAF, the appellant was seeking to frustrate that purpose. To hold that his acts are in principle capable of being acts contrary to the purposes and principles of the United Nations accords with common sense and is correct in law. This conclusion accords with that of Hogan J in the High Court of Ireland in *B v Refugee Appeals Tribunal and others* [2011] IEHC 198 at para 56. For these reasons, we agree with the conclusion of the Court of Appeal, quoted in para 47 above."

8. The Supreme Court also made findings on the autonomous meaning of the words "serious reasons for considering" in Article 1F. The Court agreed with the UNHCR view "… that the exclusion clauses in the Refugee Convention must be restrictively interpreted and cautiously applied. This leads us to draw the following conclusions:

> (1) 'Serious reasons' is stronger than 'reasonable grounds'.
>
> (2) The evidence from which those reasons are derived must be 'clear and credible' or 'strong'.
>
> (3) 'Considering is stronger than 'suspecting'. In our view it is also stronger than 'believing'. It requires the considered judgment of the decision-maker.
>
> (4) The decision-maker need not be satisfied beyond reasonable doubt or to the standard required in criminal law.
>
> (5) It is unnecessary to import our domestic standards of proof into the question. The circumstances of refugee claims, and the nature of the evidence available, are so variable. However, if the decision-maker is satisfied that it is more likely than not that the application has *not* committed the crimes in question or has *not* been guilty of acts contrary to the purposes and principles of the United Nations, it is difficult to see how there could be serious reasons for considering that he had done so. The reality is that there are unlikely to be sufficiently serious reasons for considering the applicant to be guilty unless the decision-maker can be satisfied on the balance of probabilities that he is. But the task of the decision-maker is to apply the words of the Convention (and the Directive) in the particular case." [75]

9. Before turning to the evidence, it is necessary to consider in more detail what is required by the case law when making an "individualised" assessment or consideration of the facts of a particular case.

KJ (Sri Lanka) [2009] EWCA Civ 292

10. In KJ (Sri Lanka) the issue was whether KJ's membership of the LTTE in Sri Lanka brought him within the exclusion in Article 1F(c) of the Convention. The judgment of the Court was given by Stanley Burnton LJ:-

> "35. I turn … to consider what must be shown in relation to the person in relation to whom a question of the application of the exclusion clause arises. Certain points are, I think, clear. First, the Convention may be excluded even if the evidence available does not establish positively that the person in question committed a crime against peace or one of the other crimes or acts identified in paragraphs (a), (b) or (c): it is sufficient if there are 'serious reasons for considering' that he did so. Nonetheless, the crimes and acts referred to are all serious, and the seriousness of the reasons must correspond with the seriousness of the crimes and acts in question. Secondly, each of the paragraphs requires the personal guilt of the person in question: paragraphs (a) and (b) refer to his having committed a crime of the nature described, and paragraph (c) refers to his having committed acts contrary to the purposes and principles of the United Nations. It follows that mere membership of an organisation that, *among other activities*, commits such acts does not suffice to bring the exclusion into play. On the other hand, in my judgment a person who knowingly participates in the planning or financing of a specified crime or act or is otherwise a party to it, as a conspirator or an aider or abettor, is as much guilty of that crime or act as the person who carries out the final deed.
>
> 36. Lastly, so far as paragraph (c) is concerned, it is common ground that acts of terrorism, such as the deliberate killing of civilians, are contrary to the purposes and principles of the UN.
>
> 37. The application of Article 1F(c) will be straightforward in the case of an active member of organisation that promotes its objects only by acts of terrorism. There will almost certainly be serious reasons for considering that he has been guilty of acts contrary to the purposes and principles of the United Nations.
>
> 38. However, the LTTE, during the period when KJ was a member, was not such an organisation. It pursued its political ends in part by acts of terrorism and in part by military action directed against the armed forces of the government of Sri Lanka. The application of Article 1F(c) is less straightforward in such a case. A person may join such an organisation, because he agrees with its political objectives, and by willing to participate in its military actions, but may not agree with and may not be willing to participate in its terrorist activities. Of course, the higher up in the organisation a person is the more likely will be the inference that he agrees with and promotes all of its activities, including its terrorism. But it seems to me that a foot soldier in such an organisation, who has not participated in acts of terrorism, and in particular has not participated in the murder or attempted murder of civilians, has not been guilty of acts contrary to the purposes and principles of the United Nations."

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

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

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

> "36. Of course, criminal responsibility would only attach to those with the necessary mens rea (mental element). But, as article 30 of the ICC Statute makes plain, if a person is aware that in the ordinary course of events a particular consequence will follow from his actions, he is taken to have acted with both knowledge and intent. (I would for this reason reject the claimant's criticism of the omission from para 21 of the German court's judgment of any separate reference to intent; that ingredient of criminal responsibility is already encompassed within the court's existing formulation.)"

13. In conclusion, at [38] Lord Brown said that:-

> "Put simply, I would hold an accused disqualified under Article 1F if there are serious reasons for considering him voluntarily to have contributed in a significant way to the organisation's ability to pursue its purpose of committing war crimes, aware that his assistance will in fact further that purpose."

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

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

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

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

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

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

15. For present purposes, we are potentially concerned with only the first of those questions. The CJEU held that exclusion from refugee status of a person who had been a member of an organisation which used terrorist methods was conditional on an individual assessment of the specific facts, and that before a finding could be made, it must be possible to attribute to the person concerned a share of the responsibility for the acts committed by the organisation of which he or she was a member. Individual responsibility had to be assessed in the light of objective and subjective criteria, and an assessment had to be made of the true role played by the person concerned in the perpetration of the acts in question; his position within the organisation; the extent of the knowledge he had or was deemed to have of its activities; any pressure to which he was exposed; or other factors likely to have influenced his conduct.

16. Having examined the relevant case law, it is now possible fully to appreciate the use to which it was put by the Supreme Court in Al-Sirri and DD:-

> "[15] … for exclusion from international refugee protection to be justified, it must be established that there are serious reasons for considering that the person concerned had individual responsibility for acts within the scope of article 1F(c): see the detailed discussion at paras 50 to 75 of the UNHCR "Background Note". This requires an individualised consideration of the facts of the case, which will include an assessment of the person's involvement in the act concerned, his mental state and possible grounds for rejecting individual responsibility. As a general proposition, individual responsibility arises where the individual committed an act within the scope of article 1F(c), or participated in its commission in a manner that gives rise to individual responsibility, for example through planning, instigating or ordering the act in question, or by making a significant contribution to the commission of the relevant act, in the knowledge that his act or omission would facilitate the act. In *Bundesrepublik Deutschland v B and D* (Joined Cases C-57/09 and C-101/09) [2011] Imm AR 190 ("*B and D*") the Grand Chamber of the Court of Justice of the European Union confirmed the requirement of an individualised assessment and held that it was not justifiable to base a decision to exclude solely on a person's membership of a group included in a list of "terrorist organisations". This too is consistent with the approach adopted by this Court in *R (JS (Sri Lanka)) v Secretary of State for the Home Department* [2011] 1 AC 184.
>
> [16] In our view, this is the correct approach. The article should be interpreted restrictively and applied with caution. There should be a high threshold

> "defined in terms of the gravity of the act in question, the manner in which the act is organised, its international impact and long-term objectives, and the implications for international peace and security". And there should be serious reasons for considering that the person concerned bore individual responsibility for acts of that character. …"

Applying the law to the facts of the present case

17. Whilst we are closely aware of the need to avoid applying any "gloss" to the relevant case law, in particular by following any methodological approach which might restrict the holistic nature of our task, we nevertheless agree with Mr Auburn that the following headings may provide a useful means of approaching that case law:

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

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

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

    (iv) **Probability**: Is the respondent's case made out to a sufficient degree of probability? (as required by Al-Sirri and DD).

The evidence

(a) The appellant's statement of 5th February 2007

18. The appellant's first statement was made within three weeks of his arrival in the United Kingdom. In it, he described the role played by his brother as a commander with Jamiat-e-Islami, who had 800 to 1,000 mujahids under his control. In 1996, the appellant's brother agreed to join forces with the Taliban, handing over a senior member of Jamiat to the Taliban. The brother became a commander and the appellant was given a role as a fighter "and also was given a job as a driver sometimes. However, I was mostly a fighter and fought in Mazar-e-Sharif, Kunduz and also the northern areas of Kabul". The siblings continued to fight the Northern Alliance until the Taliban were defeated, when the appellant and his brother moved to Pakistan, along with other family members. During Ramadan 2004 the appellant and his brother were at a mosque when men started firing at them. The appellant's brother was killed and the appellant was injured by a bullet entering his right leg. After about one and a half months, the appellant moved back to Afghanistan, where

he joined Kashmir Khan, fighting for Hizb-e-Islami: "In the battles I was wounded in the bombardments. I injured my right and left legs and right arm and back."

19. In September 2006 the appellant was told that his nephew, the son of his deceased brother, had been murdered in Peshawar. A little while later, Commander Hekmatyar, the leader of the forces with whom the appellant was fighting, "sent a letter to Kashmir Khan and advised Kashmir that [the appellant] should be sent to [S] as he is from there and that the war should be such that everyone should be sent to their home areas to fight". Deciding that this was too dangerous for him, the appellant decided to flee back to Pakistan, before travelling to the United Kingdom with the assistance of an agent. The statement ended with a plea to be granted asylum "as I will be killed if returned to my country by the Afghan government". The statement is signed, underneath written confirmation "that I have had the statement read to me in Pushtu by [interpreter] and it is correct and I wish to rely on it".

(b) The appellant's interviews with the respondent

20. When he arrived in the United Kingdom, the appellant received a screening interview. In answer to the question "What is/was your normal occupation?", he is recorded as having replied "Commander with Kashmir Khan of Hizb-e-Islami". He said his reason for coming to the United Kingdom was that his brother was against the present government and his property had been confiscated by the present regime.

21. On 30th April 2007, the appellant underwent a detailed interview. This was undertaken with the assistance of an interpreter in the Pushtu language. The interview commenced at 10am and (with various breaks) concluded at 4.30pm. At the end, the appellant was recorded as stating that he had understood all the questions put to him and had understood the interpreter.

22. The appellant stated that his brother had become a Commander with Jamiat in order to defend Afghanistan against the Russian occupation (11). The appellant named seven Northern Alliance commanders who answered to the appellant's brother (15). The appellant was also a member of Jamiat (16) and by "the end of my brother's time, I used to be his deputy commander" (20). After the brother's death "I was interested in his post" (22). Then this:-

"23. How many people did you command as his deputy commander in Jamiat?	I used to carry my brother's orders as his deputy. Most of his orders would pass through me or depending on the type of task given to me. I used to command 50 people, sometimes more, sometimes less.
24. What types of tasks would he give you?	Mostly military tasks, fighting the enemy.
25. How many military engagements did you fight in during your time as your	Many, I have been to Mazare-Sharif's war and Kunduz war during Taliban. It is

brother's deputy?	called Shamali, it is the northern part of Afghanistan including Shahardara.
26. What sort of orders would you have as part of a military engagement?	My task was mainly to engage the enemy. Depending on the kind of area we were fighting, my duties were to support the fighters in the front line – military and morally.
27. What sort of military support would you provide to fighters in the front?	I was provided with intelligence. If I found out they were losing a bit of territory during the war, I had to gather men and take them to the front for support and my presence there was of moral support because they all knew I was the brother of a major commander.
28. Did you command men in a fight?	Yes.
29. How many?	It is difficult to give you a number but depending upon the type of war, 50-300 people.
30. How would you ensure your orders would be effectively arranged to as many as 300 men?	The way it worked, every 15 to 50 people had a group leader and they were equipped with wireless equipment as I would pass my orders through a wireless then it was conveyed further.
31. What weapons were your men armed with?	Everything from light to heavy artillery. From AK47 to PK rocket launchers and tanks.
32. What is the effective (accurate) firing range of the AK47?	800 metres would be the accurate firing range of the AK47. It can travel further depending upon your position.
33. How do you clear a weapon jam in an AK47?	If it is a shell of the bullet (the cause of the jam) then it has a special metal stick and you push the bullet with that to clear the jam.
34. How many component parts are there to an AK47?	[Applicant attempted to name every part but was stopped and question was repeated]. There are four major parts.
…	
39. What was your role at the time that your brother had his conflict with Ahmed Shah Masud?	At the time I was his deputy commander carrying out his orders.
40. What did you have to do at this time?	We were mainly defending the territory. I was coordinating things from my village.
41. So you were fighting Ahmed Shah Masud's men?	Yes and our times only when they attacked our area (sic).
…	
51. When had your brother first joined the Kohdaman Assembly?	I don't remember the date, it was a year before the war.
	Translator made a mistake.
52. What war?	A year before when Ahmed Shah Masud

	tried to capture our area [translator explained his error in the previous answer]
…	
60. Did your brother's men (under his command) also change sides to the Taliban?	Yes, the whole area defected to the Taliban. After that my brother received $200,000 and 500 weapons from Ahmed Shah Masud as a gesture of goodwill. He wanted my brother to rejoin him [**interpreter clarifies answer**]. Eight months after joining the Taliban my brother received the sum of money that I mentioned earlier and the weapons.
…	
70. What was your role after your brother joined the Taliban?	I was still my brother's deputy. I still had to follow his orders and go to war with my brother's fighters.
71. How many deputies did your brother have at that time?	He had another deputy as well.
72. What was his name?	Mujahid.
73. Was his role the same as yours?	Most of our responsibilities were the same but at the end of the day I was his brother.
74. Was the position of "deputy" the most senior part in your brother's chain of command?	Yes, the deputy's rank was the same as my brother.
75. How many men would you command during this time with the Taliban?	During Taliban, I would normally command 10 to 20 people depending on the kind of war we were fighting. They had a different system of fighting. Every 10 to 20 people had a group leader and there were a maximum of 10 groups.
76. So you were a group leader in this system?	Yes, they used to gather different groups from different areas and then send them to a front line. No one could fight his own battle anymore.
77. So your brother could only command 10 groups during his time with the Taliban?	Yes, starting from 100-300 people. He would give a few hundred men for Taliban for a war but when he commanded a group of men in a war, these men were not necessarily his own people.
78. You have stated that your brother could command a maximum of 300 men but in your answer to Q75 you stated that he could only command a maximum of 200, can you explain this?	It really depends on how things were happening. My brother used to work in completely different ways and positions. He had commanded thousands of people but when he was engaged in a war in the front, he could only control 300 at a time – that was the Taliban's strategy.
79. So you command between 10-20 people?	During Taliban we were allowed to command 10 people only but there were

	times when they needed all the support they could get. During that time they needed 20 people under one commander.
80. And the 10 people you commanded were called a group correct?	Yes, it was called a group. At the time I could take 500 men to the front line and easily command them as well but Taliban had this system in place where I could not take many people to war. This was in order to avoid detection to the enemy or giving control to the area to one commander.
81. So how many of these groups of normally 10 men did your brother have under his control?	Depending on the kind of war my brother was fighting it was up to Taliban to decide to give him a command of 100 or 300 people.
82. You previously said in your statement of 25 February 2007 that your role at this time was a fighter and sometimes a driver, but you now claim that you were a commander of 10 men. Can you explain the difference in your answers?	I don't know what the difference between these statements is. When my brother was the head of Kohdaman Assembly, I used to drive him around but I have always been his deputy because as his brother I could be trusted. I remember having an argument with the interpreter at my solicitor's office.
83. Where did you fight for the Taliban?	I fought in Kunduz, Mazare Sharif and Shamali.
84. What was the outcome of each of these battles?	It was a success for Taliban side.
85. What was your group's role in these battles?	My group was directly engaged in fighting. My responsibility was to look after them, make sure they don't retreat, to take the injured to the doctor and in case of causalities.
…	
87. Fighting must have been a scary experience for some of your men, how did you motivate them to fight and continue to fight?	I used to convince them of the fact that if the enemy succeeds, they could push us back to their villages and it could have negative consequences. I used to regroup at night to attack an enemy post, take over the post and by morning, the Taliban's flag was up and the enemy had lost the post and could not take it back.
88. What did you and your brother do when the US intervened in Afghanistan?	My brother and I were in Shahardara at the time. We were fighting the Northern Alliance trying to defend the area we controlled and we were under attack from Americans from the air. Once my brother and I realised that we could not win this war, we went to Pakistan.
89. Where in Pakistan did you go?	Hayatabab of Peshawar.
90. Why did you go there?	We went there because the Americans

	won the war.
91. What did you and your brother do in Peshawar?	We continued with our military skills in Peshawar. My brother was in contact with many different people from tribal leaders to people in the Pakistani government until we went back to Kunar, Afghanistan. When I came back from Kunar, my brother and I were coming back home from the local mosque, a vehicle stopped and people started shooting at us, I got injured, I was hit twice, once in my leg, once in my back. I still bear the marks. We believe that these men were paid £300,000 dollars (US) to carry out the shooting. The attack took place under the orders of Fahim as a revenge, also Dr Khalid's brother was involved.
92. Why had you not surrendered in Afghanistan when the US intervened?	I would not surrender to Americans even now.
93. Why did you leave Pakistan for Kunar?	First of all because of my brother's death, to carry on his name and because of the letters lead commanders received from Gulbuddin Hekmatyar, the leader of Hezbe Islami. It was written in these letters that all lead commanders should go back to their area and resist the American occupation.
94. Did your brother die in the shooting after you left the mosque?	Yes right in front of me.
95. When was this?	This is the third year since he died.
96. When this happened you said that you had just got back from Kunar, but you now state that you only went to Kunar after your brother died, can you explain this?	I went to Kunar 4½ months after my brother died and I got injured. I was being treated for one and a half months in Pakistan. I did not feel secure while I was in Pakistan and that was the main reason why I went back to Kunar. When I was in Kunar, my nephew was killed, after that I decided to leave the country.
…	…
114. What did you do in Kunar?	I was involved in fighting.
115. Who was your commanding officer?	Kashmir Khan.
116. Did you report directly to him?	Yes.
117. How many men did he command?	5-600 men approximately.
118. Who commanded Kashmir Khan?	Hikmatyar himself.
119. Who did you fight?	People who were called enemy by Kashmir Khan whether they were

	foreigners or Afghans.
120. What was your role at this time?	I had 10-15 people with me. There were 2 Arabs and 1 Afghan training us.
121. What military operations were you involved in?	I was mostly in Kunar. I did not leave.
122. Did you fight NATO forces?	I was fighting anyone who tried to take over the area in Kunar whether it was NATO or Afghan forces. I was told to resist the occupation and by fighting I was doing just that.
123. Were you able to tell the difference between NATO and Afghan forces?	It is easy to establish foreigners were mostly blonde with green or blue eyes and Afghan forces look like me.
124. Were you able to distinguish between their military equipment?	Afghans had only light equipment. They were less protected and less organised. Foreigners on the other hand were well protected with heavy artillery, weapons that I had never seen before and air support.
125. Why did you leave Hezb Islami in Kunar?	It was not possible for me to continue as I was still suffering from my injuries and in the meantime Gulbuddin Hikmatyar had sent a letter to Kashmir Khan asking him to send me to Kabul province. I could not go to Kabul because I was a known person there and because I had enemies in Kabul who are high ranking people in the government.
126. Other than Dr Khalid's brother who else did you fear in the government?	I fear all people who are connected to Rabbani or to the Northern Alliance. Karzai's government is formed of former Jamiat members, leaders and fighters and the Northern Alliance. People have been killed. Killings in Afghanistan have consequences.
127. Could you not ask for a different military assignment?	No, because you can only fight in your own area in Afghanistan where you have local support. If you go to another area, you will be killed shortly, because you don't know anyone but everyone knows you.
128. So you fled, correct?	Yes.
129. How did you leave Hezbe Islami in this context?	I did not inform Hezbe Islami of my intentions, I just fled. I did not tell them that I was going to Pakistan as they have a lot of power and influence there.

…"

(c) The appellant's statement of 31st May 2007

23. After receiving a letter dated 27th April 2007 from the respondent, refusing his asylum claim, the appellant made a second statement, responding to that letter. The statement confirmed "that I have had my refusal letter read to me in Pushtu by the interview and I would like to make the following comments". At [23] and [24] of the letter, the respondent doubted the appellant's alleged fear of Hizb-e-Islami. The respondent replied that "I was in the Hizb and was a person with a high profile. The Hizb had power in Kunhar and I was reporting to Kashmir Khan and he reported to Hekmatyar. Hekmatyar had given the leadership of the battlefield to Kashmir. Also Hekmatyar was not given to public access and only a few people met him. In the present times my profile was a big profile."

24. At [27] and [28] of the refusal letter, the respondent noted apparent contradictions in the appellant's evidence as to whether he had or had not joined the Taliban. In his statement the appellant said "I already explained that this was an error on the part of the interpreter. I was asked and I explained that I was a deputy commander in the Taliban and that my brother was a commander in the Taliban and so if after negotiations we joined the Taliban then how can we not be members of the Taliban this does not make sense and so is obviously the fault of the Government". In response to the respondent's concern at [29] that it could not be the case that individuals such as the appellant commanding just ten to fifteen men would report directly to a prominent commander such as Kashmir Khan, the appellant said that "Kashmir Khan is not a US commander, he is an Afghan commander in the mountains, he has not helicopters or big offices. He is in the mountains and he is with the men. I was a commander of a small batch of men but I am still under the command of Kashmir. He used to sit with us and eat with us and was with us all the time … Regarding the question about my answer about my military operations not being sufficient, this is not correct. My answer was sufficient. If you look at the other questions I have told them about my activities."

(d) The appellant's statement of 26th September 2007

25. In this short statement, made in response to the respondent's supplementary letter of 6th August 2007, in which the respondent contended that the appellant was excluded from the Refugee Convention by reason of Article 1F(c), the respondent said that when his brother was killed "I fled to Kunar to find protection. I was not safe in Pakistan and so had to find safety and I was only safe in Kunar as the Hizb-e-Islami had a base there. I never killed anyone and was only involved in defensive action. I fought to defend myself".

(e) The appellant's statement of 24th May 2013

26. This statement is strikingly different from previous recorded utterances of the appellant, both in writing and at the hearing before Immigration Judge Simpson. It is also at significant variance with the facts as stated by Lady Hale and Lord Dyson

in Al-Sirri and DD (see above). The appellant blames interpreters and his previous solicitors for misstating him in his previous written statements. He also asserts that "I never understood the meaning of exclusion until very recently when this was explained to me when my case proceeded to higher court."

27. The appellant's true role, he says, was as follows:-

> "3. I would like to submit that I was not a fighter as such. My role was that of a moral [sic] booster to my brother's troop. I was mainly a driver and I referred to my interview where I had said that I would command 50 to 300 people, in fact I mean by this statement that I would transport 50 to 300 people at my brother's orders. I was again asked what kinds of tasks did your brother give you? My reply is recorded – to fight against the enemies – I mean by this that I would support fighters by bringing them around and providing them with food and other supplies."

28. The statement continues that the appellant "had no importance within" Jamiat and that he "was not directly involved with" the Taliban. He also had "no involvement" with Hizb-e-Islami: "the nature of my involvement was minimal and I fled from fighting with them. I had never known their objectives and the fact that they are considered as terrorist organisation. I only learned this recently".

29. The central strand of the new statement is that the appellant was simply doing as his brother requested. During the time of the Taliban, the other deputy called Mujahid "was the one who had a prominent role within the party", in contrast to the appellant who had "taken part in the fights but never had a major involvement. My brother would want me to stay behind as he did not want me to get killed". Having correctly said in answer to question 85 of the interview that his group "was engaged in fights", the appellant states that "my responsibility was just to look after them, watch them and take the injured ones to hospital for treatment". As for his time with Kashmir Khan, "although I was engaged in fights I was a backup since I had injuries so I could not take part directly in the fight". The appellant had "simply got involved to find a shelter". He had left Hizb-e-Islami and Kashmir Khan as soon as he could "get a chance I was with them for two months approximately". The appellant is "against killing and I confirm that I have not killed anyone in my entire life". He was "just helping my brother". The appellant is "saddened by the fact that this government has portrayed me as a criminal. I am just an ordinary human being who has come to this country to save his life. I wanted to work and contribute to the welfare of this society".

(f) The appellant's statement of 5 June 2013

30. In his statement of 5 June 2013, the appellant said that when he gave his statement of May 2007, his case was being handled by another firm of solicitors, which had since "closed down". The appellant asserted that none of his statements had been read back to him, with the interpreter simply saying to him that he should sign the document, as it was about his case. The appellant was not even given a translation of

the statement. The appellant reiterated that his interview and the refusal letter had never been read back to him, contrary to what was said in the statement of May 2007. The same was true of the appellant's statement of September 2007 and the supplementary refusal letter of the respondent. As to these, the interpreter asked the appellant only one question, which was "have you killed anyone in Afghanistan and I answered no I have never killed anyone, I was defending my brother and myself".

(g) The evidence given to Immigration Judge Simpson

31. Immigration Judge Simpson recorded the following evidence, regarding the appellant's involvement with the Taliban:-

> "71. The Appellant was pressed as whether he was a full member of the Taliban to which he responded; he was still deputy for his brother; he was under the command of his brother; the Taliban gave orders to his brother and his brother gave orders to him; his brother was a commander for the Taliban; they were with the Taliban. The Appellant was referred to the interview (AIR8) when he had said he was not a member of the Taliban, and he responded when a brother was related to an organisation, like his brother and the Taliban, he could not be in another party.
>
> 72. He was pressed again on saying he was not a member, and Counsel for the Appellant objected asking that the entirety of the question and response in the interview be translated for the benefit of the Appellant, which was done (and put in context beginning with question 7 and his response followed by 8 and his response). The Appellant stated that the way the Taliban worked was that the commanders were with the Taliban. They were the members. Not every individual."

32. She also recorded the following evidence concerning the appellant's activities with Hizb-e-Islami, following his return from Pakistan:-

> "74. The Appellant was referred to his third statement and that his actions for Hizb-e-Islami were 'only … defensive' and as to what he actually did:
>
> > 'I had not gone after anybody. I did not attack anybody, only involved in defending myself. If somebody attacked me I defend myself.'
>
> He confirmed that he was in charge of ten to fifteen men and was asked what actions they were involved in. He variously referred to them as being friends whose lives had been in danger and had fled, they were drivers, bodyguards etc. The Appellant was pressed as to what their day to day role was in Hizb-e-Islami, and he responded:
>
> > 'These ten to fifteen men were with me, defending, protecting me, they were not involved in going to fight or anything else.'
>
> 75. He continued to reiterate they were involved only in defending themselves, when asked whether he was involved in arm to arm fighting (which I ensured

through the interpreter he understood in his own language). Government forces knowing Hizb-e-Islami people were in the mountains would come and they would have to defend themselves. They would be attacked with rocket launchers, Kalashnikovs. They also had Kalashnikovs and rocket launchers 'all for our own defence'. He had been with Hizb-e-Islami for five to six months altogether. As to whether any of his men were killed he responded that no one was killed but one was injured. As to whether any people they fought were killed, he had not seen anyone shot with his 'own eyes'.

…

79. As to Hizb-e-Islami and the organisation's beliefs, he responded they were to fight the government and the foreigners, adding that 'personally … he did not want to fight either, he did not want to hurt anyone or be hurt himself'. The party did not want to see peace coming to Afghanistan. As to why, he responded they believed foreigners had taken the country by force and did not want foreign forces to be in the country."

(h) Immigration Judge Simpson's findings

33. For our purposes, the following findings of Immigration Judge Simpson are of relevance:

"120. Altogether in the context of the above background evidence I consider plausible that Commander [D] would have gathered close to him those who he could trust, and having a brother younger than him would reasonably have had that brother close to him from a young age, increasingly assisting him in all ways, and with time and experience being given increasing responsibilities, including the position of deputy. It was the consistent evidence of the Appellant that he was simply 'always' with his brother, and it was effectively when interviewed and in detail when specifically asked about his role in respect of the brother that he evidence emerged that 'at the end' of his brother's time in Jamiat he was his deputy commander. (AIR – asylum interview record 20)

…

126. The weight of detail, the consistency of the detail in the Appellant's combined accounts, three statements, two interviews and his oral evidence at the hearing, together with its consistency with the history of events in Afghanistan at the time, and specifically its military and political history and the various actors I find I accept the Appellant did show to the requisite standard that his brother was Commander [D], that he became increasingly closely associated with his brother, a commander in the Jamiat-e-Islami, and followed with his brother and his militia to the Taliban in 1996, and that he did become a deputy to his brother, variously assisting him in the ways he described and also as a fighter.

127. With regard to the credible detail of the Appellant's evidence as to his familiarity with military matters I consider to be the familiar ease he had in describing the differing modes of fighting as between the Jamiat-e-Islami and the Taliban, and the dynamic of the Taliban in its small group fighting, seeking to ensure that

individual commanders do not have command of large numbers of men, and further those men of whom they have command not necessarily including their own militia.

…

136. With regard to Hizb-e-Islami and the Appellant's claimed involvement, I observed what appeared to be certain discrepancies in the evidence about their activity after going to Pakistan, that is between 2001 and 2004, and after. The Appellant claimed after leaving Afghanistan for Pakistan following the fall of the Taliban he had been to Kunar once. (AIR 5) Following the killing of his brother for his safety he went to Afghanistan and joined Hizb-e-Islami in Kunar. The timing of his going to Kunar after his brother's death appeared to differ between his evidence at the interview, four and a half months after his brother died (AIR 96) and his evidence at the hearing that it was the day following leaving hospital after being treated for one and a half months. More material however was the Appellant's response at the interview when asked what he and his brother did in Peshawar and he responded:

> '91… we continued with our military skills in Peshawar. My brother was in contact with many different people from tribunal leaders to people in the Pakistani government until we went back to Kunar, Afghanistan.
>
> When I came back from Kunar, my brother and I were coming back home from the local mosque. A vehicle stopped and people started shooting at us, I got injured, I was hit twice. Once in my leg, once in my back. I still bear the marks…'

…

139. Although differing organisations or movements the various background evidence does show degrees of association between the Taliban and Hizb-e-Islami Hekmatayar, and also the presence of Hizb-e-Islami Hekmatayar led by Kashmir Khan in Kunar. The Appellant described methods of organisation and fighting in Hezb-e-Islami not dissimilar to the Taliban, which would be consistent with their degree of association. Having faced and been in the thick of the assassination of his older brother with whom he had spent much of his life, I do not consider inconsistent that having faced this mortal risk in Pakistan, that he sought, together with others from their village, to return to Afghanistan and its isolated areas and seek the protection of a military grouping. I accept that the Appellant therefore did show to the lower standard he became involved with Hizb-e-Islami in Afghanistan.

140. As to the Respondent's consideration that the Appellant's account of his involvement of commanding just ten to fifteen men and reporting to Commander Kashmir Khan not to be a credible account of a role and profile in Hezb-e-Islami Hekmatayar, I consider that this lacks a real grasp of the differing modes of warfare of such groups in the conditions they fight and in the country they fight, Afghanistan.

141. Having regard to the close association with Commander [D], a prominent member both in Jamiat-e-Islami followed by the Taliban, I consider that the Appellant's involvement in Hizb-e-Islami has to be evaluated against that history, and that there is a reasonable likelihood that he would have as he claimed a high profile.

142. It is not inconsistent upon receiving orders that he should join Hizb-e-Islami in Kabul, that proximity to the family's former enemies would have been a material consideration in the Appellant's thinking, having regard to what, I accept, was a well-known history of his brother having been assassinated, and the background behind the 'settling of scores' that led to this assassination, and that the Appellant in his home province would have real fears of being well-known and at risk.

…

146. I accept that the Appellant was a fighter with Hizb-e-Islami Hekmatayar in the province of Kunar in Afghanistan prior to leaving Afghanistan. As to the period of involvement there appeared some uncertainty concerning its duration but I do consider the Appellant's estimate of some five to six months reasonably likely to be low and given in an effort to minimize his involvement, having regard to his earlier evidence at interview to have gone to Kunar to Hizb-e-Islami after recovering from being shot in Ramadan 2004.

147. The Appellant's evidence was that they were fighting both Afghan government forces and also foreign forces, that is the UN authorised forces. The Appellant was clearly familiar with the differences between the two sets of forces. There was no positive evidence that Hizb-e-Islami Hekmatayar actions were not against the international forces, rather Hizb-e-Islami actions were about resisting Afghan government forces and the 'occupation'. The Appellant described at certain stages his military involvement with Hizb-e-Islami as being defensive. However having regard to the evidence of increasing counter-insurgency in Afghanistan I consider this to be implausible. I found the Appellant credibly to have a longstanding history of military involvement in Afghanistan, including at a high level, deputy to his Commander brother, and independently a Commander in Hizb-e-Islami Hekmatayar in Kunar. I consider that there are prima facie grounds for considering that his actions with Hizb-e-Islami Hekmatayar in Afghanistan were both offensive and defensive. However I accept neither at interview or in cross-examination was there elicited any specificity about his actions or incidents."

(i) The appellant's oral evidence on 26 June 2013

34. The appellant gave evidence with the assistance of an interpreter. We were fully satisfied that he the appellant and the interpreter were able to communicate satisfactorily, and no issue as to the adequacy of interpretation arose at the hearing. The appellant was extensively cross-examined by Mr Auburn about his most recent statements, which attempted to paint a fundamentally different picture, compared with that given by the appellant earlier. It was put to him that, as regards the Home

Office interview, there were several recorded instances of the appellant indicating if he did not understand, and/or of the interpreter clarifying matters (e.g. 68 and 146). It was suggested to the appellant that these indicated that he was aware when difficulties were arising during the interview. The appellant had no coherent answer to this, merely reiterating that he did not understand various questions.

35. The appellant said that he had signed his name at the end of the interview record, to the effect that he understood all of the questions put to him, because that is what the interpreter told him to do and he was "quite frightened at the time". Mr Auburn put to the appellant that it was surprising for him to give an answer if he did not consider it to be true. The appellant replied that this had had happened to him quite often and other interpreters used by his former solicitors had told him that he should sign a document, because it was in his interest to do so.

36. Asked if he was aware that the interview was important for his future, the appellant replied that no one had told him it was important for him. He reiterated that he was unaware that the interview was a serious matter, because no one had told him this. Mr Auburn put to the appellant that this was simply not believable, to which the appellant responded: "it is up to you".

37. Asked if he had made a written complaint about the actions of his previous solicitors, the appellant said that he was not even aware that there had been difficulties with the previous statements until the "last hearing". This meant that he had not been aware of the problems with the earlier statements at the two previous Tribunal hearings; since it was not until two or three months ago that he had discovered the difficulties. This meant, the appellant accepted, that his case had been to the Supreme Court without him being aware of the contents of the statements and of the problems with the interview. When it was put to him that this was not credible, the appellant reiterated that it was "up to you".

38. It was put to the appellant that in his statement of 31st May 2007 (sometimes referred to as 30th May) he had said that he had had his interviews read to him in Pushtu and that the May 2007 statement then took issue with specific aspects of the respondent's letter of refusal. The appellant responded that the interpreter "hadn't told me anything about this". No one had read the refusal letter to him in his own language. Mr Auburn suggested that could not be right, to which the appellant responded that "if you look at the documents you will find no proof the documents have been translated to me in Pushtu". The appellant then re-iterated that his solicitors had, in effect, concocted statements on his behalf.

39. Regarding question 20 of the interview, the appellant said that he was not the deputy of his brother. Someone else had had that role. Again, the problem was one of mistranslation. To be a deputy, according to the appellant, meant that one was involved in the military, whereas his role "was more like a family". In Afghan culture, if one's brother was a commander, people would call you a commander because of your brother. The appellant said that he was not his brother's deputy

and simply helped his brother to transport 300 to 350 people from one area to another.

40. The appellant was asked about his answer at question 70 in the interview, where he said that after his brother joined the Taliban "I was still my brother's deputy. I still had to go to war with my brother's fighters". The appellant replied that he had not gone to war anywhere at that time, and he had not gone to war "the second time, especially after the US occupation of Afghanistan". It was put to the appellant that it would have been a huge mistake by the interpreter to say what was recorded at question 70. The appellant replied that he could show Mr Auburn lots of interpreters who were not properly qualified. So far as question 71 was concerned, where the appellant said that his brother had had another deputy as well as himself, the appellant said that his brother had only one deputy.

41. In answer to interview question 123, "Were you able to tell the difference between NATO and Afghan forces?" the appellant was recorded as saying that it was "easy to establish foreigners were mostly blonde with green or blue eyes and Afghan forces looked like me". The appellant said that he had not, in fact, seen foreign forces with his own eyes in Afghanistan, and had said what he had on the basis of what he had seen on TV, whilst in Pakistan.

42. The appellant was asked whether he accepted that, whoever was his brother's deputy would have been highly likely to have seen fighting. The appellant eventually responded in the affirmative, since the second in command "would have been involved in the fighting".

43. The appellant was asked about the evidence recorded by Immigration Judge Simpson, to the effect that the appellant was his brother's deputy. The appellant appeared to ascribe this to difficulties with translation of the word "deputy" in Pushtu. As regards the answer to interview question 22, where the appellant was recorded as saying that after his brother's death he was "interested in his post", the appellant said that this did not refer to his brother's military role but was on a "family basis". Asked about the answer to question 28: "did you command men in a fight? – yes", the appellant indicated that this was wrong and that he would merely help his brother transport people to the war zone and bring back the injured: "Taking ten people to the front line is regarded in our culture as commanding". The appellant then said that being a commander meant giving people military orders to fire mortars and such things and did not refer to a person who merely transported people to the front line. The appellant did not give military orders.

44. The appellant was asked about this question and answer in the interview record:

"93. Why did you leave Pakistan for Kunar?	First of all because of my brother's death, to carry on his name and because of the letters lead commanders received from Gulbuddin Hekmatyar, the leader of Hezbe Islami. It was written in these

> letters that all lead commanders should go back to their area and resist the American occupation."

45. The appellant said that he left Pakistan for Kunar because he was scared that someone would kill him. He denied going to Kunar to be involved in military activities. The letters "were actually sent to other commanders and I was told I should go as well but I was injured at the time". The interview record was, accordingly, incorrect, according to the appellant.

46. The appellant was asked about [19] of his statement of 5th February 2007:

> "Then about four months ago Hekmatayar sent a letter to Kashmir Khan and advised Kashmir that the [appellant] should be sent to [S] as he is from there and that the war should be such that everyone should be sent to their home areas to fight."

47. The appellant said he did not know Hekmatayar. It was put to him that the evidence regarding the letter indicated just how important the appellant had been. The appellant responded that he was not a high ranking person. Kashmir Khan had been told to inform "the other commanders and he told me as well".

48. In answer to interview question 31: "What weapons were your men armed with?", the appellant had described a range of weapons from light to heavy artillery. He said he had only seen these with his brother and his brother's people. It was put to him that, in such a case, it was strange that he had not indicated that they were not the appellant's men.

49. Mr Auburn suggested to the appellant that his answers to interview questions 32 to 34 suggested a thorough knowledge of military matters and weapons. The appellant replied that there had been war in Afghanistan for the past 35 years and even a two year old child in that country would be able to name "all artilleries". That would include the accurate firing range of an AK47. Asked about question 122: "Did you fight NATO forces? – I was fighting anyone who tried to take over the area in Kunar whether it was NATO or Afghan forces. I was told to resist the occupation and by fighting. I was doing just that", the appellant said that he had not said that, and said that if anybody wanted to kill him, then he would defend himself.

50. In re-examination, the appellant said that Kashmir Khan knew of the appellant only through his brothers and that the appellant had seen Kashmir Khan only once during the relevant time. The appellant remembered only 20 to 25% of the questions and answers at the interview in April 2007. He was not his brother's deputy. That would have been the person called Mr Mujadid. Asked about the letter from Hekmatayar to Kashmir Khan, which suggested the appellant was a lead commander, the appellant said that he was not and that possibly his brother would have got such a letter had he been alive.

(j) Background evidence

51. The COI Report of April 2007 on Afghanistan has this to say about Hekmatayar and Hezb-e-Islami:-

> "11.81 On 14 September 2004, the Institute for War and Peace Reporting reported that Hekmatyar was designated a terrorist by the US State Department in February 2003 for participation in and support for terrorist acts committed by al-Qaeda and the Taleban. **[73n]**
>
> 11.82 In September 2004 the UN-appointed independent expert of the Commission on Human Rights noted that Hizb-I Islami is one of the groups in addition to the Taliban and Al-Qaida known as "anti-Coalition forces" or "anti-Government forces" which represent a significant security threat in Afghanistan. "They have engaged in steady acts of relatively small-scale violence, targeted assassinations, bombings, rocket attacks and occasional armed assaults." **[39k] (para 36)**
>
> 11.83 An International Crisis Group (ICG) briefing dated 2 June 2005 stated:
>
> "In May 2004, a delegation from the party's executive committee, based in Peshawar, Pakistan, travelled to Kabul to pledge support for the Karzai government. Led by Khaled Farooqi, a Pashtun from Paktiya province, the group claimed to have broken with Hikmatyar [Hekmatyar] and declared its intentions to participate in the political process… Given Hikmatyar's long-time absolute control over the party machinery, many observers believe he may still have influence, especially since Farooqi has yet to demonstrate his ability to lead the party. However, many former Hizb-e Islami commanders in the north and south did support Karzai during the presidential elections, and many of them now hold key positions in Kabul and provincial administrations." **[26e] (p8)**
>
> 11.84 A Danish fact-finding mission to Kabul in March/April 2004 reported in November 2004 that, according to UNHCR, there are small groups of Hezb-e-Islami (Hekmatyar) in Kunar province. According to the source, "Nobody knows where Hekmatyar himself is living. Some of his men work with the Taliban. In the opinion of the source, Hekmatyar's position is weak." **[8] (section 6.8)**
>
> 11.85 The Danish fact-finding report also noted: "The ICG [International Crisis Group] was of the opinion that Hezb-e-Islami does not exist today as a political party, but could be characterized better as a loose structure of individual warlords." **[8] (section 6.8)**
>
> 11.86 Reports by the Afghanistan Justice Project (AJP) published on 29 January 2005 **[13a]** and 17 July 2005 **[13b]** give detailed information on war crimes committed by various individuals and parties, including Hizb-i-Islami, during the years of conflict (1978-2001) in Afghanistan. The January report focuses particularly on the post-1992 period. The reports should be referred to directly

> if further information on the activities of Hizb-i-Islami during those years is required. (See Annex F source numbers **[13a] [13b])**"

52. The 2005 Human Rights Watch Report: *Blood-Stained Hands: Past Atrocities in Kabul and Afghanistan's Legacy of Impunity* mentions the appellant's brother on a number of occasions, including in connection with the 1993 military Afshar campaign. There is also this:-

> "R.D., a former official in the interim government who was familiar with ongoing criminality by various factions, said that [the appellant's brother], a high-level commander in Shura-e Nazar, was 'deeply involved in kidnapping schemes,'…"

53. The activities of Hezb-e-Islami and its leader Gulbuddin Hekmatyar during the early 1990s are also covered in the report, which describes Hezb-e-Islami forces as having "committed grave violations of international humanitarian law by intentionally targeting civilians and civilian areas for attack, ordered indiscriminately attacking areas in Kabul without distinguishing between civilian areas and military targets". Hezb-e-Islami was said to have "had the capacity to arm artillery at military targets, but purposefully or recklessly fired artillery at civilian objects instead, in violation of international humanitarian law. They were also "implicated in murders, pillage and looting in violation of international humanitarian law".

Our assessment of the appellant's evidence

54. We do not find credible the appellant's attempt to resile from his earlier statements, as set out in both the record of April 2007 Home Office interview and the statements of February and May 2007. It is simply not believable that the appellant was not just ill-served by one, but by each and every one of the interpreters he encountered at that time. The record of the Home Office interview amply demonstrates the evident care that the interpreter on that occasion took to clarify matters, when occasion demanded, as well as the appellant's ability to say when he did not understand a particular matter. The statement of May 2007 specifically takes issue with specific paragraphs of the respondent's letter of refusal. It simply beggars belief that a well-known and respected firm of solicitors in the field (White Ryland Solicitors) would concoct this document, without input from the appellant. It is equally unbelievable that, if what the appellant tells us is true, these fundamental problems with the interview and written statements would not have come to light before or at the two hearings of the appellant's appeal - in particular, the hearing before Immigration Judge Simpson - or, failing that, upon receipt of the resulting determinations.

55. Instead, the appellant would have us believe that everyone concerned, even the Supreme Court, proceeded on a profoundly mistaken understanding of the facts of his case. Mr Jacobs submitted that the issue in the Supreme Court was whether military action against ISAF could, as a matter of law, fall within Article 1F(c). However, even whilst acknowledging that the Supreme Court was not involved in making an individualised assessment of the facts, it would plainly have been

pertinent to have told that Court that the appellant's case was that he had never been a fighter in Afghanistan.

56. In so finding, we are aware that, in his statement of 26th September 2007, made after receipt of the supplementary letter invoking Article 1F(c), the appellant asserted that he "never killed anyone and was only involved in defensive action. I fought to defend myself". That stance, however, is markedly different to the one now adopted by the appellant, in which he denies that he was deputy commander, denies any direct military activities (whether defensive or otherwise), paints a picture of his being concerned only with transportation (particularly of the wounded to hospital) and ascribes the position of deputy commander during his brother's lifetime entirely to the person known as Mujadid.

57. The stance adopted by the appellant in his latest statements and in evidence before us is, in short, completely disingenuous. Not only do we reject that stance; it powerfully points to what is, we consider, the true position. This is that what the appellant said in his February 2007 statement and April 2007 interview with the Home Office represents the truth, and that even the less extreme position adopted in the statement of September 2007 and before Immigration Judge Simpson, that the appellant's military activities with Hizb-e-Islami in 2004/2006 were purely "defensive", is also untrue. As we have seen, Immigration Judge Simpson found at [147] that the appellant's actions with Hizb-e-Islami "were both offensive and defensive". We entirely agree. We also consider that the reason why the appellant wishes to resile from his statements about being a deputy commander is that, as he acknowledged in his interview (see [42] above) and in his oral evidence to us ([43] above), being a commander involved giving military orders to use weaponry against opponents.

58. We also find ourselves in agreement with the judge, that the true nature of the appellant's involvement and profile with Hizb-e-Islami in 2004/2006 falls to be evaluated against his profile and activities before that time, both with the Taliban and, earlier, with Jamiat. It is entirely incredible that a seasoned military leader, used to the command of several hundred men in the field, as described by the appellant at his interview, would suddenly morph into a reluctant combatant, engaged only in "defensive" activities. We have no doubt that this point struck the appellant, at some point following receipt of Judge Simpson's determination: hence his belated unsuccessful attempt to portray himself throughout as a non-combatant.

59. We accordingly conclude that the appellant was speaking the truth to his Home Office interviewer in April 2007 and that what he was recorded as then saying is what he actually said and meant to say. The appellant's answers in respect of the period after he returned to Afghanistan from Pakistan (when ISAF was deployed in Afghanistan) fall, where necessary, to be interpolated by reference to his earlier activities, during the lifetime of his brother. Like Judge Simpson, we do not believe the appellant's claim to have been engaging in fighting for only a few months during that last period (a mere two months, according to the appellant's latest evidence).

Whilst we have no reason to doubt the claim that the appellant was motivated to return by fear for his safety in Pakistan, following the assassination of his brother and his own wounding at the mosque, it was in his established role as a military leader and fighter that the appellant chose to return.

60. Whilst we accept that, during the lifetime of his brother, the appellant had a lower profile than his sibling, we are fully satisfied on all the evidence that the appellant's own profile was significant and correctly described by him as that of a deputy commander, in the military sense. Following his brother's death, the evidence points clearly to the appellant's continuing to be regarded as a prominent military figure. We find that, in answer to question 93, the appellant was describing a letter sent to him (as well as to other leaders) by Hekmatayar, and that he was one of the "lead commanders" who was called "back to their area to resist the American occupation". That finding is supported by paragraph 19 of the appellant's statement of February 2007, which describes Kashmir Khan as having been sent a letter advising that the appellant should be sent to his home area to fight. That is evidence of the appellant's continuing to be regarded by Hekmatayar as a person of significance. Like Judge Simpson, we do not consider that Hizb-e-Islami's command structure, in which the appellant was in charge of far fewer men then in the days of Jamiat, is to be taken as any indication of his insignificance in the eyes of Hekmatayar. On the contrary, as the appellant's own evidence indicates, the purpose of that command structure was to ensure that individual commanders did not become too powerful.

61. As for the appellant's involvement with Kashmir Khan, we reject the appellant's assertion that he saw this individual only once. Indeed, the statement of the appellant of 31st May 2007 is somewhat indignant on the matter of Kashmir Khan:

> "I was a commander of a small bunch of men but I was still under the command of Kashmir who used to sit with us and eat with us and was with us all the time."

62. That answer accords fully with interview questions 115 and 117 of the interview, where the appellant said that his commanding officer was Kashmir Khan; that he reported directly to Kashmir Khan; and that the latter had the command of approximately 500-600 men.

63. In making our findings, we have had regard to the appellant's obviously detailed knowledge of weaponry. He told us that every child in Afghanistan has such a knowledge, given the chronic nature of conflict in that region. Whilst we accept that an Afghan child's knowledge of such matters may well be greater than that of his or her Western European counterpart, it remains a striking fact that the Home Office interviewer had to stop the appellant from naming every single part of an AK47 and that the appellant knew precisely how to clear a jam in that weapon. These answers reveal first-hand direct experience of using an AK 47. They are strongly indicative of the appellant's using such a weapon regularly, whilst in combat.

64. We find that, upon his return to Pakistan, the appellant had the command of ten to fifteen people (Q120) and that he fought against anyone regarded by Hizb-e-Islami as the "enemy … whether they were foreigners or Afghans" (Q119). That included "NATO" (ISAF) forces. This is the plain thrust of the appellant's answer to Q122, read in the light of all the other credible evidence. We reject entirely the appellant's belated assertion that he knew the difference between NATO and Afghan forces merely as a result of watching TV in Pakistan. Apart from anything else, watching TV would not elicit the answer to Q124 that:

> "Afghans had only light equipment, they were less protected and less organised. Foreigners on the other hand were well protected with the army artillery, weapons that I had never seen before …"

Applying the law to our findings of fact

65. On the basis of our findings of fact, it is now necessary to decide whether the appellant is excluded from the benefits of the 1951 Refugee Convention, by reason of Article 1F(c). It is common ground that the respondent's case in this regard turns on what happened in Afghanistan in 2004 to 2006. As we have explained, the appellant's actions and profile before he went to Pakistan in 2001 have a direct and significant bearing on what really happened in 2004-2006. But it is not the respondent's case that the appellant falls to be excluded from the Refugee Convention, directly by reference to what he did before the ISAF force was deployed.

66. We return to the four-fold categorisation described at [17] above. As will become apparent, useful though that categorisation is, as a guide to applying the relevant case law on Article 1F, the issues are not hermetically sealed. To treat them as such would be to misconstrue the case law.

(i) Nature of the "acts"

67. We remind ourselves of what the Supreme Court held at [68] of Al-Sirri and DD:-

> "In short, an attack on ISAF is in principle capable of being an act contrary to the purposes and principles of the United Nations. The fundamental aims and objectives of ISAF accord with the first purpose stated in article 1 of the United Nations Charter. By attacking ISAF, the appellant was seeking to frustrate that purpose. To hold that his acts are in principle capable of being acts contrary to the purposes and principles of the United Nations accords with common sense and is correct in law."

68. There then followed a reference to the judgment of Hogan J in the High Court of Ireland in B v Refugee Appeals Tribunal and Others [2011] IEHC 198 at [56]. Mr Jacobs rightly points out that Hogan J's observations were *obiter* and that those observations were in proceedings on an application for leave to apply for judicial review. Their approval by our Supreme Court, however, nevertheless gives them weight. In particular, they usefully pinpoint the difference between (i) the task facing a court or tribunal in a case such as the present; and (ii) the task, such as that

in LK (Sri Lanka) and B and D, where the issue was whether persons who had not themselves directly carried out exclusionary actions nevertheless fell to be excluded by reason of membership or other involvement in an organisation which did (not exclusively) carry out such actions:-

> "55. I cannot conclude this judgment without observing that this case also presents one unique feature which would seem to distinguish it from the cases of *Tamil*, *X*, *RS* and *B unt D*. As we have seen, in the case of Afghanistan the UN Security Council has resolved that the ISAF was the legitimate force to act in support of the Afghan government. Of course, in the present case the applicant has openly proclaimed not only his opposition to the ISAF, but the fact that he engaged in military combat with the ISAF.
>
> 56. In the light of this fact it will be difficult to see how the applicant's own admitted conduct by openly engaging in combat with troops whose presence in Afghanistan was expressly sanctioned and authorised by UN Security Council resolutions was not *in and of itself* contrary to the purposes and principles of the United Nations within the meaning of s.2(c)(iii) of the 1996 Act. In this respect, it is different from *B unt D* where it was the fact that the applicants had participated in guerrilla warfare for terrorist organisations [which] raised the question of whether their own conduct was contrary to the purposes and principles of the United Nations by reason of, for example, their complicity in war crimes. This was precisely why an individualised assessment of their own personal knowledge and participation in such conduct was held to be necessary in that case by the Court of Justice. But if, as here, the applicant openly participates in combat operations against troops whose presence has expressly been sanctioned by United Nations Security Council resolutions, this in and of itself would seem to be contrary to the purposes and principles of the United Nations, thus disqualifying the applicant by reason of the operation of s.2(c)(iii) of the 1996 Act."

69. In the light of what we have said earlier, we are fully satisfied that it is more likely than not (and in our view much more likely) that the appellant in 2004 to 2006 engaged in combat against ISAF forces, both in a defensive and an offensive capacity. We shall have more to say about the nature of those acts when we come to deal with the issue of specificity. We are, however, fully satisfied that the appellant willingly engaged in those actions, which involved the use of ordinance of the kinds described by the appellant to his Home Office interviewer. The appellant did so, not on an isolated occasion, but as part of the ongoing Hizb-e-Islami conflict with ISAF and the Afghan government forces during that time.

(ii) Seniority/role

70. It is under this heading that the distinction articulated by Hogan J in B becomes important in the present appeal. In his oral and written submissions on behalf of the appellant, Mr Jacobs sought to rely upon passages in the judgment of Stanley Burnton LJ in KJ (Sri Lanka) including, in particular, these:-

> "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."

71. Relying upon the approval which KJ (Sri Lanka) received from Lord Brown in JS (Sri Lanka), Mr Jacobs submitted:-

> "that the actions of the appellant, which were entirely military in nature (and did not involve acts of terrorism), cannot properly be categorised as contrary to the purposes and principles of the UN Charter so as to fall within the ambit of Article 1F(c). The fact that there was no UN presence in Sri Lanka does not detract from the applicability of the principle in KJ (Sri Lanka) to the instant case."

72. With respect to Mr Jacobs, this submission is misconceived. If the respondent in the present case had sought to ground exclusion under Article 1F on the basis of the appellant's activities prior to the arrival on the scene of the UN-mandated ISAF force, the position would have been quite different. In that scenario, we would, indeed, have had to engage in the kind of exercise with which the Court of Appeal was concerned in KJ (Sri Lanka). It would have been necessary to analyse the range of activities undertaken by Jamiat and/or the Taliban during that time, and to determine, by reference to the appellant's position and activity in those organisations, whether it could be inferred that he agreed with and promoted all of the organisation's activities, including those actions described in Article 1F.

73. But that is not necessary in the present case. The Supreme Court has already held that fighting against ISAF is, itself, in principle contrary to the principles and purposes of the United Nations. That is not, of course, to say that an individualised assessment is not called for in the present case. On the contrary, this is precisely the task which both the Court of Appeal and the Supreme Court have set us. The important point, however, is that the analysis called for in cases turning upon the issue of an individual's relationship with an organisation has no bearing in a case where the individual has committed acts that are within the ambit of Article 1F(c).

74. Accordingly, even if a person has been a mere "foot soldier", not commanding any other combatant and having no other significant role in a military organisation fighting ISAF forces, he would not for that reason escape exclusion under Article 1F(c). For example, such a foot soldier may have willingly and frequently planted and/or detonated IEDs, resulting in ISAF fatalities; or may have acted as a sniper, targeting ISAF personnel. In either case it would frankly be subversive of the 1951 Geneva Convention for that person to enjoy refugee status. There is nothing in the relevant case law which compels such a result. By way of contrast, a proper application of the individualised assessment in such cases could result in a person defeating an attempt to exclude by reference to Article 1F(c) where, for example, the evidence is that he took only a minimal part in combat on a single occasion, when he was present reluctantly, through some form of coercion.

75. In cases such as the present, therefore, the issue of exclusion is not *necessarily* answered by reference to seniority or a person's place within a military command structure. The key questions are, rather: what did the person concerned do and why did he do it? Everything depends on the facts.

76. Anticipating to some degree our findings in relation to specificity, we find that, in the circumstances of the present case, the respondent has shown that there are serious reasons for considering the appellant has committed acts contrary to the principles and purposes of the United Nations, not only because the evidence points overwhelmingly to his having been personally and willingly involved in combat with ISAF, but also (and in any event) because of his position as commander of ten to fifteen other combatants, who were fighting ISAF whenever the occasion demanded.

77. In so finding, we have borne in mind the Supreme Court's approval in Al-Sirri and DD of what is stated in the UNHCR's Background Note on the application of the exclusion clause; namely, that Article 1F(c) should

> "be construed restrictively and its application reserved for situations where an act and the consequences thereof meet a high threshold. This threshold should be defined in terms of the gravity of the act in question, the manner in which the act is organised, its international impact and long term objectives, and the implications for intentional peace and security".

78. But it is crucial to bear in mind that, in following this approach, the Supreme Court found that fighting ISAF forces in Afghanistan at the relevant period *did* in principle fall within the scope of Article 1F(c). We therefore reject the appellant's apparent attempt, as articulated by Mr Jacobs, to rely upon the UNHCR's comments as in some way imposing a further discrete restriction upon the application of Article 1F(c) in the present case. In particular, the comment at [50] of the UNHCR Note that "it is generally understood that acts covered by Article 1F(c) can only be committed by persons holding high positions in a state or state-like entity" finds no endorsement in the judgments of the Supreme Court in the case of the appellant.

79. However, if we are wrong in concluding that, on the facts of the present case, no further findings about seniority are required, then we find as a fact that the appellant had a senior, significant and well-recognised position within Hizb-e-Islami in 2004-2006, as demonstrated by the findings we have made regarding his relationship with both Hekmatayar and Kashmir Khan. The interview record shows that the appellant was well aware that the policy of Hizb-e-Islami at the relevant time was to fight against both the Afghan government and international forces; not least, in order to rid Afghanistan of the presence of such "foreigners".

(iii) Specificity

80. Mr Jacobs submitted that, since the judgments of the Supreme Court were handed down, the respondent had not seen fit to make any investigations, whether with the British Embassy in Kabul or elsewhere, to try to identify precisely what acts the appellant had committed, whilst he was with Hizb-e-Islami. Mr Jacobs drew attention to the last sentence of [147] of Immigration Judge Simpson's determination, where she accepted that "neither at interview or in cross-examination was there elicited any specificity about his actions or incidents".

81. We agree with Mr Auburn that there is nothing in the relevant case law or the UNHCR Note that requires the acts upon which an Article 1F(c) exclusion case is based to be pleaded with the degree of particularity that one might find, say, in an indictment in the Crown Court. This is not to say that vague assertions or generalised inferences will do. Thus, for example, an assertion that a man of military age living in an area of high Hizb-e-Islami activity at the relevant time should be assumed on that account to have engaged in Article 1F(c) activity for that organisation, would clearly be problematic. But, in the present case, there is abundant evidence in the interview with the appellant in April 2007, and in his statement of February of that year, to show there are serious grounds for considering he fought against ISAF forces, deploying against them artillery and other weapons, and that he had the command of ten to fifteen men who were also engaged in such combat. We do not believe the appellant's claim that during all this time, he did not kill anybody or see anybody killed. But it is not necessary in law for the respondent to prove either of these things.

(iv) Probability

82. We remind ourselves of what the Supreme Court held in Al-Sirri and DD ([8] above). For the reasons we have given, we reject as entirely incredible the appellant's latest description of his activities in Afghanistan. Applying the standard set out Al-Sirri and DD, we conclude that the respondent has amply shown there are serious reasons for considering that the appellant has committed acts contrary to the principles and purposes of the United Nations, within the scope of Article 1F(c) of the Refugee Convention, such that he is to be denied the status of a refugee. The evidence relied

upon by the respondent is "clear and credible" and "strong". In our considered judgment, the requisite serious reasons exist.

Decision

83. The appellant is not a refugee. He is excluded from the 1951 Geneva Convention by reason of Article 1F(c) thereof.

Anonymisation

84. We make an order under rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the appellant.

Signed Date

Upper Tribunal Judge Peter Lane