Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: AA/08375/2011
AA/01251/2010, AA/12321/2011
AA/12302/2011, AA/11697/2009
AA/01316/2010, AA/12039/2011
AA/01500/2010, AA/14533/2009

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4 March 2019	**On 14 May 2019**

Before

UPPER TRIBUNAL JUDGE DAWSON
UPPER TRIBUNAL JUDGE BLUM

Between

A A S
T S
K A (FORMERLY KNOWN AS) (A S)
M S
M N S
N U M
M K
A G

and

KU
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants:	Mr D Seddon & Mr P Jarro, instructed by Duncan Lewis & Co, Solicitors.
For KU	Mr C Jacobs, instructed by Hammersmith and Fulham Community Law Centre
For the Respondent:	Mr A Payne, instructed by the Government Legal Department

Anonymity

We make an order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 whereby the disclosure or publication of any matter likely to lead members of the public to identify the appellant KU is prohibited. Any breach of the terms of this order may result in contempt proceedings.

DECISION AND REASONS

INTRODUCTION

1. On 6 February 2000 the appellants and others took control of an Ariana Afghan Airlines Boeing 727 during an internal flight from Kabul to Mazar-e-Sharif in Afghanistan, their country of nationality. The plane flew to Tashkent where it refueled and then to Kazakhstan for a minor repair, before reaching Moscow. It is believed that some passengers were released at a point prior to the aircraft reaching Moscow where a further number were released. The plane continued to the United Kingdom where it landed in the early hours on the following day. The appellants were accompanied by several of their family members. The complement of those on board by the time the plane landed in Stansted included the flight crew, some 50 passengers being the appellants and their family members and about 100 other passengers. A handful of those passengers were released after arrival. Some of the flight crew escaped but otherwise the appellants, their family members and the other passengers remained on board for upwards of 70 hours until the hijackers surrendered to the UK authorities on 10 February when they claimed asylum.

2. Prior to a decision on their asylum claims, charges were laid against the appellants who were remanded to HMP Belmarsh Prison. They were subsequently released on bail by the Crown Court and from administrative detention by the immigration authorities under the Immigration Act 1971.

3. Their appeals are before us in order to decide whether the First-tier Tribunal (the 2015 Panel) erred in law in their decision dated 7 July 2015 that the appellants are excluded from the Refugee Convention under Article 1F(b). Any reference to 'the appellants' is to all. Reference to 'the eight appellants' does not include KU. We have both contributed in equal part to this decision.

THE CRIMINAL PROCEEDINGS

4. The first criminal trial ended inconclusively on 18 April 2001 after the jury could not agree verdicts. A second trial presided over by Sir Edwin Jowitt commenced in late 2001 when three of the appellants gave evidence.

5. On 6 December 2001 the appellants, apart from KU, were convicted of hijacking. KU was unfit to stand trial and was formerly acquitted of all charges on 26 June 2003 upon the Crown electing to offer no evidence against him unconditionally.

6. The sentences imposed by Sir Edwin on 18 January 2002 were 60 months' imprisonment for [AAS] and [MNS] (who are brothers) with an order that they should serve half their sentences in custody before being eligible for parole. The remainder of the eight appellants were sentenced to 30 months' imprisonment on the basis that they would be released on licence after serving half their sentences. The eight appellants had been on bail but returned to custody after their conviction.

7. On 22 May 2003 the Court of Appeal quashed all of the convictions on the basis of a "crucial misdirection" given by the trial judge as to their defence of duress. By this time six of the eight appellants had already been released from custody on licence and as a result of the court's decision the remaining two brothers were released having served respectively 22 months and 24 months of their 60 months sentences.

8. The Court of Appeal did not direct a retrial. The Crown did not seek a retrial after unsuccessfully applying for permission to appeal the decision.

HISTORY OF THE PROTECTION APPEALS

9. On 25 June 2003 the eight appellants were refused asylum and leave to enter the United Kingdom. Their appeals were heard by a panel of immigration adjudicators (the 2004 Panel) between 26 April and 10 May 2004. In a lengthy and detailed decision dated 3 June 2004, the appeals of the eight appellants together with an additional party to the hijacking, DD, who had subsequently absconded, were dismissed on asylum grounds. Each of the appeals however were allowed on human rights grounds on the basis that their return to Afghanistan would be in breach of Article 3.

10. The 2004 Panel heard evidence from the eight appellants. Their claims had been based on their involvement in a group called the Young Intellectuals of Afghanistan (YIA), an organisation whose leaders all had direct or indirect connections with the previous communist regime. The appellants' fears were based on hostility from the Taliban Government who had taken control of Kabul in 1996 and extended their control over most of the country. The YIA had been founded by the brothers [S] in 1997. Members of the group had been arrested by the Taliban in January 2000 and as

a result, the group's security had been compromised. This led to the decision by the appellants to escape from Afghanistan by hijacking the aircraft on 6 February.

11. The issue of exclusion under Article 1F(b) had been raised by the Secretary of State late in the day. The 2004 Panel conclusions on this aspect were in terms that:-

    (i) There was no doubt in the appellants' minds that hijacking by its very nature was serious.

    (ii) The panel agreed with the submissions by the Secretary of State that the hijacking was not a political crime.

    (iii) The appellants could have attempted an alternative means of escape to a neighbouring country and could have chosen to travel to Pakistan.

    (iv) That there were no serious grounds for concluding that the appellants were placed in such a position that they were compelled to carry out the hijacking or that they were under such pressure as to justify the hijacking.

12. Having regard to the narrow ambit of the issue we are required to decide, there is no need to dwell on why the eight appellants were successful on Article 3 grounds except to observe that it was essentially because the 2004 Panel found there was a real risk they would be targeted for assassination by the Taliban who had condemned them to death *in absentia*. The 2004 Panel considered that the eight appellants could be at risk because of their particularly high profile and their unique position as the main actors in the hijacking.

13. The eight appellants did not appeal the exclusion decision. The Secretary of State however applied for permission to appeal the decision on Article 3 grounds. Permission was refused by the Deputy President of the Immigration Appeal Tribunal who introduced his analysis of each of the grounds with the following remarks:-

> "The determination appears to me to be a careful and proper examination of all the evidence in its proper context. It could not be said that the evidence compelled the findings: but looking at them generally and in the light of the grounds I can see no error of law. The adjudicators were entitled to reach the findings they did, and in general the grounds amount only to differences of opinion arising out of preferences of emphasis."

14. The Secretary of State did not grant the eight appellants leave to remain despite their success under Article 3. Following successful proceedings by way of judicial review, each was granted discretionary leave to remain in the United Kingdom for a period of six months on 19 May 2006. They applied on 15 November 2006 for further leave to remain including the basis that they were refugees and entitled to protection under the Refugee Convention.

15. A decision on KU's application (made six years previously with the eight appellants) was not given until 12 October 2009. In essence, the Secretary of State reviewed the decision on 18 November 2009 and decided to exclude KU from the Refugee Convention by a supplementary decision letter dated 18 January 2012.

16. The remaining eight appellants' applications were refused by the Secretary of State on dates between 15 September 2009 and 25 October 2011. The First-tier Tribunal heard their appeals in 2009; they were unsuccessful and were granted permission to appeal to the Upper Tribunal who in 2010 set aside the decision after concluding the First tier had erred in law. The case was remitted to the First tier Tribunal who decided the appeals in three stages.

    (i) The first hearing was to decide the issue whether the appellants would be at risk of persecution or subject to serious harm if returned to Afghanistan. In a decision dated 15 October 2013 a panel of First-tier Tribunal judges (DJ FtTJs Campbell and Peart) concluded that all the appellants had demonstrated that their removal would put them at risk of persecution and of ill-treatment in breach of Article 3 of the Human Rights Convention.

    (ii) A second hearing was by what we have referred to as the 2015 Panel in order to decide whether the appellants were properly to be excluded from the Refugee Convention under Article 1F(b). In a decision dated 7 July 2015 the same panel concluded that the appellants including KU were excluded under Article 1F(b). Our task is to decide whether this panel erred in law.

    (iii) The third hearing was to decide whether the co-appellants (the family members) of the appellants were at real risk of being persecuted and thus entitled to refugee status. A single judge (DJ FtTJ Campbell) decided that they were for reasons given in his decision dated 20 December 2017.

17. Each of the appellants sought permission to appeal the decision of the 2015 Panel to the Upper Tribunal. Upper Tribunal Judge Martin granted permission to appeal in a decision dated 18 January 2018. The President of the Upper Tribunal and UTJ Dawson decided on 2 November 2018 that the proper construction of the grant of permission by UTJ Martin was entirely unrestricted, see *Safi and others (permission to appeal decisions)* [2018] UKUT 388.

THE GROUNDS OF CHALLENGE.

18. KU is separately represented and we shall refer to his grounds after setting out those relied on by the first eight appellants which are as follows:-

    Ground 1

    Having been acquitted of committing the asserted crime of hijacking the aircraft, it is argued that Article 1F(b) is manifestly inapplicable to the appellants. It is contended that the 2015 Panel erred by concentrating

exclusively on the differing standards of proof in rejecting the appellants' submission based on the acquittal and inapplicability and by failing to consider adequately or at all the principal basis for applying exclusion under Article 1F(b) in the first place. It is argued that the ground raises an important point of principle that has not been considered or tested in the higher courts.

Ground 2

In rejecting the appellants' submission that there were no serious reasons for considering the offence to have been committed, the 2015 Panel had misdirected itself in law by applying too high a standard to the duress test for the purposes of determining whether there were serious reasons for considering the appellants had committed a crime with the necessary *mens rea* by applying the test for duress under international criminal law as set down in *MT (Article 1F(a) – aiding and abetting) Zimbabwe* [2012] UKUT 00015 (IAC). Further, and/or in the alternative, the 2015 Panel had misdirected itself in law by erroneously conflating the issue of "whether there was or may have been, as a matter of fact and as found to be the case by the 2004 Panel, an alternative to the hijack of the aeroplane as a means for the appellants to escape from the Taliban … and the correct legal question of whether the appellants could reasonably have believed that their only safe means of escape was to do as they did".

Ground 3

With reference to the appellants' political opposition to the Taliban controlled government, their hijacking of the aircraft fitted clearly within the meaning of a political crime as per Lord Diplock's definition in *R v Governor Pentonville, exparte Cheng* [1973] AC 931 that was citied with approval by the House of Lords in *T v Immigration Officer* [1996] AC 742 when directly addressing Article 1F(b). But for the 2015 Panel's error over the proper approach to duress, the Panel would and should have concluded the appellants' case fell squarely within "a political crime" as per the position of the Polish seaman in *R v Governor of Brixton ex parte Kolczynski & Others* [1955] 1QB 540.

Ground 4

The appellants reserved their position on their submission that any criminal liability was expiated and inapt to exclude the appellants in the light of the judgment in *AH (Algeria) v SSHD (No. 2)* [2015] EWCA Civ 1003.

19. At the hearing we granted the appellants permission to amend their grounds. They applied to do so after Mr Payne argued that they had not challenged the 2015 Panel's decision over the second limb to the test of whether a crime was political by reference to its remoteness.

20. The amendment was in the following terms (in relation to ground 3):-

> "In particular with reference to paragraph 47 in the determination it is submitted that the [2015 Panel] erred in law by finding that [a] there was insufficient political motive and [b] for finding that any actions taken brought them outside a political crime by reference to remoteness and proportionality."

21. Mr Jacobs on behalf of KU adopted and sought the same amendment to his grounds which we refer to below.

22. Mr Payne opposed the application with reference to its timing (on day 3) and the significant prejudice to the Secretary of State as it was not well articulated with reference to the second limb and still unclear.

23. In deciding to permit the amendment we observed the length of time the case had been running and that it was one in which the representatives had been involved for at least a decade. They were very familiar with the facts and the legal issues. We had heard argument on the previous day in relation to the issue of remoteness and there had been no intervention at that stage on the basis that it was not encompassed within ground 3. Accordingly, Mr Payne was aware of the extent of the appellants' challenge before he came to make his own submissions towards the end of day 2. The ground as initially pleaded brought into scope the correctness of the application of the test by the 2015 Panel. The amended grounds were in general terms but we were satisfied that, when considered in the light of the arguments raised on day 2, the respondent knew well the case the appellants had advanced. It was open to Mr Payne to launch an attack on the amended grounds reflecting the concerns expressed in this opposition, but they were not a reason not to grant. It was in the interests of justice and having regard to the overriding objective of the Tribunal Procedure (Upper Tribunal) Rules 2008 that we considered it appropriate to accede to the application.

24. In an exchange that followed, Mr Jorro, on behalf of all the appellants, confirmed that they were not challenging the findings of the 2004 Panel and there was no need for further submissions based on the amended grounds. Mr Payne was content to make his submissions on the amended grounds at the conclusion of his arguments which had opened with his concerns that the remoteness aspect had not been a ground of challenge on which permission had been granted.

KU

25. KU adopted and relied on the grounds of challenge set out above and specifically adds and develops the following points:-

> *Ground 1*
>
> The 2015 Panel erred in failing to apply a purposive approach to the determination of the exclusion issue and failed to consider the position of the UNHCR set out in its note on the exclusion clauses dated 30 May 1997. Having

been formally acquitted of all criminal charges relating to the hijacking KU did not meet the rational of exclusion in that he is not a criminal who presents a danger to the security of the UK and therefore does not abuse the integrity of the concept of asylum through recognition as a refugee.

In addition, the 2015 Panel erred in applying the obiter comments of Blake J in *AH.* The UNHCR view that the exclusion clauses must be restrictively interpreted and cautiously applied were endorsed by the Supreme Court in *Al-Sirri*.

Ground 2

Whilst the medical expert found that KU was aware of his involvement in the hijacking, his finding of a very severe duress amounted to a material issue which the 2015 Panel failed to consider properly or at all. The accepted medical evidence was that KU had been severely tortured by the Taliban and suffered from severe trauma in that he saw no option other than going along with the hijacking plan in order to save his life. The 2015 Panel therefore erred when finding that KU was not acting under duress and failed to apply the correct test and failed to address the medical evidence on this aspect.

Ground 3

The 2015 Panel made no finding whether KU's involvement in the hijacking arose ~~a~~ from political persecution and therefore outside the scope of Article 1F(b). The hijack was clearly political as opposed to criminal for the purposes of that provision. The hijack was the means by which KU fled persecution arising from his political activity with the YIA. There was no other motivation. Fleeing from persecution amounts to a political purpose under Article 1F(b).

Ground 4

As with the other appellants, KU reserves his position on the issue of expiation in the light of *AH (Algeria)*.

Ground 5

The 2015 Panel erred in failing to apply a discretion in KU's case by reference to a passage from The Refugee in International Law (Third Edition) by Professor Goodwin-Gill and which was accompanied by an extract from page 176.

26. Finally, the 2015 Panel had erred in failing to reach fact specific findings in relation to KU whose appeal had come before them for the first time and in respect of whom there were compelling reasons for applying the approach brought forward by Professor Goodwin-Gill.

MATTERS ARISING AT THE HEARING

27. The hearing took place over three days and we are grateful to the parties for their written submissions and the care with which they advanced their respective cases.

28. In response to our query during Mr Seddon's submissions on the first ground in which he referred to autrefois acquit being a bar to any further prosecution we were provided in due course with a statement from Mark Summers QC who had represented the appellants at the time. Our enquiry had come about as the result of an assertion by the appellants' solicitor to the 2004 Panel that no retrial was pursued by the Crown because the appellants had largely served their sentences. Neither the 2004 nor the 2015 Panels were given evidence on the matter and accordingly any new evidence will only be relevant should we decide to set aside the decision of the 2015 Panel.

29. Similarly, we hold in abeyance the application under r.15(2A) by the appellants to adduce new evidence.

30. We were provided with versions of Home Office guidance: Exclusion (Article 1F) and Article 33(2) of the Refugee Convention and the European Asylum Support Office Judicial Analysis: Exclusion: Articles 12 and 17. No reliance was placed on this material.

LEGAL FRAMEWORK

31. Article 1F of the Refugee Convention provides:

> 'F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
>
> (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
>
> (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.'

32. Article 12 of the Qualification Directive 2004 provides under the heading exclusion:

> '1. A third country national or a stateless person is excluded from being a refugee, if:
>
> (a) he or she falls within the scope of Article 1 D of the Geneva Convention, relating to protection or assistance from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees. When such protection or assistance has ceased for any reason, without the position of such persons being definitely settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall ipso facto be entitled to the benefits of this Directive;

(b) he or she is recognised by the competent authorities of the country in which he or she has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country; or rights and obligations equivalent to those.

2. A third country national or a stateless person is excluded from being a refugee where there are serious reasons for considering that:

(a) he or she has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) he or she has committed a serious non-political crime outside the country of refuge prior to his or her admission as a refugee; which means the time of issuing a residence permit based on the granting of refugee status; particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes;

(c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations.

3. Paragraph 2 applies to persons who instigate or otherwise participate in the commission of the crimes or acts mentioned therein.'

33. The Refugee or Person in Need of International Protection (Qualification) Regulations 2006 provide in paragraph 7 under the heading exclusion:

'7. (1) A person is not a refugee, if he falls within the scope of Article 1 D, 1E or 1F of the Geneva Convention.

(2) In the construction and application of Article 1F(b) of the Geneva Convention:

(a) the reference to serious non-political crime includes a particularly cruel action, even if it is committed with an allegedly political objective;

(b) the reference to the crime being committed outside the country of refuge prior to his admission as a refugee shall be taken to mean the time up to and including the day on which a residence permit is issued.

(3) Article 1F(a) and (b) of the Geneva Convention shall apply to a person who instigates or otherwise participates in the commission of the crimes or acts specified in those provisions.'

THE 2015 PANEL'S SURVEY OF THE FINDINGS BY THE 2004 PANEL

34. The 2015 Panel took the findings of fact by the 2004 Panel as their starting point noting the agreement of the parties that there was no need to displace those findings. That remains the case today. Although KU was not a party to those proceedings, the 2015 Panel noted the parties' agreement that he was in a similar position to the other appellants with regard to exclusion as he was in relation to the assessment of risk on return. Mr Jacobs's position is recorded at [4] of the 2015 Panel's decision as follows:-

> "Mr Jacobs submitted on [KU's] behalf that although he was involved in a hijack in the sense that he boarded the plane and was aware of the intentions of the hijackers, he played a minimal role due to trauma related ill-health on the flight. In his particular case, exclusion under 1F(b) was not justified."

35. None of the appellants gave evidence before the 2015 Panel. With the exception of KU, all gave evidence in 2004. The 2015 Panel was not persuaded to have any regard to the findings including the adverse credibility findings by the Tribunal in 2009.

36. As we have observed above, the decision of 2004 Panel is a lengthy and very detailed one. The 2015 Panel surveyed the findings in relation to exclusion in various passages as follows:-

> "17. … The 2004 Panel found that the appellants and their family members could have attempted an alternative means of escape to a neighbouring country. The 2004 Panel made a clear finding that there was not such an immediacy of danger of arrest or lack of opportunity to move away from the Kabul area such that the appellants would have been left with no alternative to the hijack. They found that the appellants could have chosen to travel to Pakistan and if they had travelled there, it was most unlikely that they would have experienced any particular difficulties moving on from there to another destination. The further they travelled away from Afghanistan and the Peshawar area, the less likely they would have been to fall into danger. The appellants could have remained elsewhere in Pakistan or, having travelled from there, could have claimed asylum in another country.
>
> 18. … There is nothing to displace the clear findings of fact made by the 2004 Panel that there was no such immediacy of danger of arrest, or lack of opportunity to move away from Kabul. We have taken into account the 2004 Panel's findings that the appellants had ample access to finance and contacts with expertise, to assist in the planning and implementation of the hijack. They had access to military skills and weapons. There was a prolonged period of preparation for the hijack which involved the collection of weapons from Pakistan and the gathering of family members in Kabul, ready for the flight. …
>
> …

26. … The Panel found that it was evident that hijacking poses a grave threat to the life and safety of innocent passengers and crew and it is for that reason that there is such opprobrium attached to acts of hijacking. The Panel found that hijacking is, by its very nature, serious and, overall, that a serious crime was committed.

…

28. … Important factors leading us to conclude that the crime was a serious one are the extent of the prior planning, involving as it did trips to Pakistan to purchase weapons, the threats and violence towards the crew and the passengers and the fact that there was clearly more than one manifestation of the armed seizure and control of the aircraft, the journey from Kabul to London consisting as it did of more than one landing and take-off. There was significant physical, psychological and emotional harm to others on the aeroplane and, as we make clear below, we agree with the 2004 Panel's conclusion that the hijacking was not a last and unavoidable recourse to escape danger.

…

30. … The individual accounts which emerged in evidence [in 2004] reveal the extent of the planning of the hijack and two of the appellants travelled to Pakistan to purchase weapons. In summary, the 2004 Panel found that the appellants had alternative means available to them other than hijacking the Ariana aircraft and that travel to Pakistan (including to Peshawar) to escape Afghanistan was possible, although not free from risk …

…

39. The 2004 Panel found as a fact that the appellants had time to consider their options. Between them, they had skills in military and commando training, military intelligence, the use of weapons, communications surveillance and undercover surveillance (paragraph 71 of the determination). They were able to purchase guns and grenades in advance of the hijack. The Panel found that there was a large measure of support for the view that the funds and weapons available to the appellants could have been used to effect escape from Afghanistan by means other than hijacking a plane. In relation to one appellant, the Panel found that if the Taliban were really looking to arrest him, it would have been more dangerous to go to the airport at Kabul rather than slip across the border into Pakistan.

40. … Having left Afghanistan, the plane landed in Tashkent and then again in Moscow. On each occasion, it was hijacked again to the next destination and although there was a possibility of surrendering to the authorities on each landing, the appellants chose not to do so (paragraph 84 of the 2004 Panel's determination). In considering whether a viable alternative to hijacking existed the Panel took into account the extensive business links outside Afghanistan that a number of the appellants had in the period before the hijack. The Panel found that the appellants were resourceful with substantial links to Pakistan, access to large sums of money, the

wherewithal to purchase weapons and the ability to bribe at least one higher ranking official.

41. The 2004 Panel accepted that the appellants would have faced challenges in travelling to a neighbouring country and that there was a danger that they would have been found and thereafter arrested. Accepting that the Taliban or at least those members to whom the arrest warrant had been distributed would have been aware that some of the appellants were "wanted", the 2004 Panel rejected the contention that there was effectively a ring round Kabul so that there was no alternative to leaving by means of a hijack. Many of the appellants, in giving evidence showed that they were able to move around Afghanistan at a time when they were wanted by the authorities and therefore in danger. The 2004 Panel noted that the borders of Afghanistan were porous and found that the appellants could have attempted an alternative means of escape to a neighbouring country. There were routes into Pakistan, notwithstanding a strong Taliban and radical Islamic movement presence there. If the appellants crossed the border, it was most unlikely that they would have experienced any further difficulties moving on, further away from Afghanistan and the Peshawar area. They could have remained in Pakistan or travelled onto another country to claim asylum and they could have claimed asylum in Tashkent or in Moscow."

THE 2015 PANEL SYNOPSIS OF THE SENTENCING REMARKS BY SIR EDWIN JOWITT

37. Specifically in respect of Sir Edwin Jowitt's sentencing remarks, the 2015 Panel observed at [35] and [36]:-

"35. … Sir Edwin Jowitt's sentencing remarks were, of course made entirely in the context of the criminal trial, and included a clear finding that he had not heard the whole truth about the decision to hijack from the three defendants who gave evidence and those defendants lied in parts of their evidence. Importantly, Sir Edwin Jowitt sentenced on the basis that the planning of the hijack took at least some days. This is consistent with the 2004 Panel's assessment, regarding the extent of the prior planning and the sophistication of the arrangements put in place before the hijack began.

36. Sir Edwin Jowitt sentenced on the basis that it had not been proved that the hijack was criminal from the outset. He was sure that it became criminal at the latest from the time the aircraft took off from Moscow, as those who wished to leave were not given the opportunity to do so. He accepted that there was a risk of the identities of the defendants becoming known to the Taliban, as members of the YIA with a further risk of arrest and torture or worse. As Mr Payne submitted, Sir Edwin Jowitt was clear that the hijack caused great fear and anxiety to those who shared no cause with the hijackers and their family members. There were about 100 passengers and the flight crew in this category. They were all taken from Moscow onto Stansted and kept for more than 70 hours save for a handful released on arrival in the United Kingdom. This displayed a callous disregard for the

> interests, anxieties and fears for the passengers and crew. The hijackers patrolled the isle of the aircraft armed with handguns and knives. Sir Edwin Jowitt accepted the [S] brothers wished to make a political point about conditions in Afghanistan and Pakistan but found that this did not excuse the continuing detention of the passengers, who had nothing to do with the YIA and their families. He found that the threats made to those on board must have been terrifying to a significant number of the passengers although he accepted that the hijackers had no wish or intention to harm them. The flight crew escaped at some point and this resulted in violence inflicted by the hijackers on the stewards."

2015 PANEL FINDINGS IN RELATION TO KU

38. The 2015 Panel explained how it took into account the medical evidence in particular that of Dr Silver who provided reports in 2001 and 2010 and who also reviewed KU's circumstances in 2002. The Panel observed at [50] and [51]:-

> "50. … The conclusion he reached in the most recent report is that [KU] was suffering from a mental disorder at the time of hijacking, which caused severe distress, incapacity and disability. On the other hand, Dr Silver did not believe that the psychiatric disorder itself, post-traumatic stress disorder affected [KU's] culpability and he did not believe that [KU] was acting in effect due to automatism. Although too unwell to participate to the extent that his colleagues were able to, [KU] knew what he was doing when he boarded the aeroplane in order to hijack it.
>
> 51. We find that the evidence shows that [KU] was able to play a substantial role of the planning and organisation of the hijack including taking part in collection of weapons from Pakistan. As Mr Payne submitted [KU] was able to leave Afghanistan for this purpose and return, at a time when he was by his own account taking medicines to control his symptoms."

DID THE 2015 PANEL ERR IN LAW?

39. The parties relied extensively on case law in support of their submissions as to the correct approach in relation to each of the issues raised in each ground. Our task at this stage is to decide whether the decision of the 2015 Panel is legally sustainable by reference to the grounds of challenge set out above and which, in summary, are the effect of the acquittal for the appellants (including KU), on whether there are serious reasons for considering the appellants committed a serious non-political crime, the issue of duress and finally (since we are bound to dismiss the appeals on the issue of expiation) on whether the hijacking was a non-political crime. We need in addition to specifically consider the discretion point discreetly raised for KU. There is unsurprisingly no dispute as to the 2015 Panel's conclusion that the hijacking was serious. We begin our analysis of each of the grounds with a summary of the authorities followed by a summary of the submissions before reaching our conclusions. Some of the authorities overlap the grounds particularly those where

the courts considered the overall purpose of 1F(b). To the extent that KU warrants different treatment we have done so.

THE EFFECT OF THE ACQUITTAL ON ARTICLE 1F(b).

40. The starting point is what is understood by Article 1F(b). The interpretation of international treaties is governed by Art 31(1) of the Vienna Convention on the Law of Treaties. This requires good faith interpretation in accordance with the "ordinary meaning" of a treaties' terms, the context, and the object and its purpose as the starting point.

41. In *R v Asfaw (Appellant)* [2008] UKHL 31, a case concerning a decision to prosecute an individual with an offence that was not included in s.31(3) of the Immigration and Asylum Act 1999, but which clearly and unambiguously fell into the ambit of Article 31 of the Refugee Convention (dealing with the prohibition of penalties for illegal entry by refugees), the House of Lords, adopted a construction of Article 31 that was consistent with the humanitarian purpose of the Refugee Convention (paras 26). This purposive construction has been recently re-articulated in *F v M* [2017] EWHC 949 (Fam), at para 32.

42. *Al-Sirri (FC) and DD (Afghanistan) (FC) (Appellant) v Secretary of State for the Home Department (Respondent)* [2012] UKSC 54 concerned an Egyptian whom the SSHD excluded from the Refugee Convention under 1F(c). The exclusion was based on several matters, including his alleged participation in a conspiracy to murder a military and political leader, although the charges in respect of which he had been indicted in the UK were dismissed by the Crown Court on the ground that the evidence would be insufficient for a jury to properly convict.

43. The Supreme Court accepted that 1F(c) should be interpreted restrictively and applied with caution (at [16] & [75]). The Court also held that the guidance given by the UNHCR, while not binding, should be accorded considerable weight in light of the obligation of Member States under Article 35 of the Convention to facilitate its duty of supervising the application of the provisions of the Convention (see *R v Asfaw* [2008] AC 1061, per Lord Bingham at para 13, and *R v Uxbridge Magistrates' Court, Ex p Adimi* [2001] QB 667, 678). Moreover, in *R v Secretary of State for the Home Department, ex parte Adan* [2001] 2 AC 477, 520, Lord Steyn described UNHCR guidance concerning the application of the Refugee Convention as having "*high persuasive authority*". The guidance in the Handbook however remains advisory. While assistance may be derived from the Handbook, it is not a lawgiver or a source of law (the view of the Court of Appeal in *AH (Algeria) v Secretary of State for the Home Department & Anor* [2015] EWCA Civ 1003, at [12] & [13]).

44. The Supreme Court in *Al-Sirri* considered the issue of the standard of proof, what was meant by "serious reasons for considering" that a person committed the crimes in question. The Court concluded that it was not appropriate to apply the criminal

standard of proof. The Court reached the following conclusions at [75]), in light of the UNHCR's view that the Refugee Convention must be restrictively interpreted and cautiously applied:

> "(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 applicant 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."

45. In *AH (Article 1F(b) – 'serious') Algeria* [2013] UKUT 00382 (IAC) the appellant, an Algerian, was convicted and sentenced to two years' imprisonment in France in respect of an offence of participation in a criminal association with a terrorist enterprise (the offence involved his close contact with others implicated in terrorist attacks in France, although he was also convicted of a lesser charge of possession of false ID documents). After the appellant claimed asylum in the UK the SSHD considered that he was excluded from the Refugee Convention under Art F1(b). The central issue was whether his offence was a serious one. In considering this question, the Upper Tribunal considered the purpose of 1F(b) and at [85], the Upper Tribunal stated,

> "It seems clear that the exclusion clause was intended to have two purposes: first, the prevention of abuse of the asylum system by undermining extradition law or the mutual interest amongst states in prosecuting serious offenders. This first reason can have no purchase where the offence has been prosecuted and the offender served his punishment. The second is to exclude from protection those who have demonstrated by their conduct they are not worthy of it. It is this purpose that is relevant here."

The Upper Tribunal therefore recognised a dual purpose in Article 1F(b).

46. At [97] The Tribunal made *obiter* remarks when considering whether events subsequent to the acts that constituted the basis for exclusion were relevant when considering whether exclusion was justified:

> "The examination of seriousness should be directed at the criminal acts when they were committed, although events in the supervening passage of time may be relevant to whether exclusion is justified: a formal pardon, or subsequent acquittal, or other event illuminating the nature of the activity may be relevant to this assessment. Despite suggestions to the contrary by respected commentators, it does not appear to be the case that service of the sentence, or indeed a final acquittal, brings the application of the exclusion clause to an end. It may be that the passage of time may serve to remove any basis for exclusion of protection but if so we have no basis for deciding how long a period is appropriate and in reality a claimant who has protection against expulsion is likely to be eligible for settlement on long residence grounds before being able to expiate culpability sufficiently to acquire refugee status."

47. In *Febles v Canada (Minister of Citizenship and Immigration)* [2014] SCC 68 Mr Febles, a Cuban national, was admitted to the USA as a refugee from Cuba. Whilst in the USA he was convicted and served time in prison for two assaults. His refugee status was revoked in the USA and he fled to Canada. He maintained that Art 1F(b) was confined to fugitives from justice and, as he had already been convicted and jailed, he was not a fugitive. The Supreme Court (SCC) considered in detail authorities from various jurisdictions and from academic writers and held, by a majority, that the ordinary meaning of 1F(b), its context when considered with 1F(a) and 1F(c), and the object and purposes of the Refugee Convention, did not support the contention that 1F(b) was confined to fugitives. A majority of the SCC rejected *obiter dicta* to the contrary in *Canada (Attorney General) v Ward* [1993] 2 S.C.R. 689 and *Pushpanathan v Canada (Minister of Citizenship and Immigration)* [1998] 1 SCR 982.

48. The SCC considered that post-crime events, such as rehabilitation or expiation, were not relevant. The Refugee Convention had the twin purposes of needing to ensure humane treatment of the victims of oppression on the one hand, and the wish of sovereign states to maintain control over those seeking entry to their territory on the other. The SCC concluded that Article 1F(b) serves one main purpose - to exclude persons who have committed a serious crime.

> "This exclusion is central to the balance the *Refugee Convention* strikes between helping victims of oppression by allowing them to start new lives in other countries and protecting the interests of receiving countries. Article 1F(b) is not directed solely at fugitives and neither is it directed solely at some subset of serious criminals who are undeserving at the time of the refugee application. Rather, in excluding all claimants who have committed serious non-political crimes, Article 1F(b) expresses the contracting states' agreement that such

> persons by definition would be undeserving of refugee protection by reason of their serious criminality" (para 35).

49. In reaching its decision, the SCC relied on a number of decisions from different jurisdictions, including the Upper Tribunal decision in *AH (Algeria)* and the House of Lords decision in *T v SSHD* [1996] 2 All E.R. 865, which discussed the purpose of Article 1F generally and indicated that the purpose of Article 1F(b) was not limited to exclusion of fugitives, but that it recognised that there were those whose criminal habits made it unreasonable for them to be forced on to a host nation against its will. The SCC also considered *Germany v B and D* C-57/09, C-101/09, [2010] ECR I-10979, a case concerning the interpretation of Article 12 (2)(b) & (c) of the Qualification Directive (Directive 2004/83/EC) involving two Turkish nationals who had been involved in proscribed terrorist organisations prior to their admittance to Germany.

50. The CJEU concluded in *B and D* that the grounds for exclusion were intended as a penalty for acts committed in the past, and that the relevant grounds for exclusion were introduced with the aim of excluding from refugee protection persons who are deemed to be underserving of the protection which that status entails and of preventing that status from enabling those who have committed certain serious crimes to escape criminal liability. In its conclusion the SCC stated, at para 60,

> "Article 1F(*b*) excludes anyone who has ever committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee. Its application is not limited to fugitives, and neither is the seriousness of the crime to be balanced against factors extraneous to the crime such as present or future danger to the host society or post-crime rehabilitation or expiation."

51. As was the case before us, the SCC considered its earlier decisions in *Ward* and *Puspanathan* and the contribution by Professor Hathaway to the interpretation of Article 1F(b) (being confined to fugitives from justice). The Court also considered the shift by Professor Goodwin Gill in his position from 1996 (The Refugee in International Law - 2nd Ed 1996- "ordinary criminals…extraditable by treaty) to the 3rd edition in 2017 ("fugitives from justice … appears to be on the wain"). McLachlin CJ began his review of case law with this conclusion at [43],

> "Courts around the world have suggested various rationales for the inclusion of Article 1F(*b*) in the *Refugee Convention* and have interpreted the provision in different ways. While the jurisprudence is inconclusive as to the precise scope and all of the rationales, there is agreement that Article 1F(*b*) is not limited to fugitives. After reviewing the foreign jurisprudence, I conclude that the interpretation adopted by the German Federal Administrative Court and the European Court of Justice, that Article 1F(*b*) excludes anyone who has previously committed a serious non-political crime, is the most consistent with both the prevailing trend in the case law and the text of the provision."

52. With respect we agree with the reasoning of the SCC and are not persuaded that Professor Hathaway is correct in his interpretation that Article 1F(b) is confined to fugitives from justice and includes those who have been convicted and in certain cases those who have been acquitted. The UNHCR has published a Background Note on Application of the Exclusion Clauses and Guidelines have been provided by the UNHCR Executive Committee (No 82(XLVIII) 1997). These set out the rationale for exclusion under 1F. With relevance to 1F(b) the objective is that the refugee framework should not stand in the way of serious criminals facing justice. The exclusion clauses should be applied scrupulously to protect the Convention's integrity and to prevent abuse.

53. The UNHCR Handbook raises the question at [159] whether hijacking to escape from persecution constitutes a non-political crime and at [160] the alternatives given to Contracting States of extradition (which was not available in this case) or instituting proceedings domestically (as if fact happened). [161] concludes with the observation that "the question of exclusion under Article 1F(b) of an applicant who has committed an unlawful seizure of an aircraft will also have to be carefully examined in each individual case."

54. The submissions from Mr Seddon under this heading, supplemented by Mr Jorro on behalf of the eight appellants can be summarised as follows:

    (a) When a conviction is quashed in the Court of Appeal without any order for retrial, with reference to Archbold at 4-195 and the Criminal Appeal Act 1968 s.2(3), an appellant is "in the same position for all purposes as if he had actually been acquitted": per Lord Reading CJ in *R v Barron* 10 Cr.App.R. 81 at 88. The submissions made to the 2015 Panel were correct as a matter of law.

    (b) Article 1F falls to be restrictively and cautiously applied supported by the authorities above.

    (c) The views of UNHCR are to be given "considerable weight": *Al-Sirri.*

    (d) The 'extradition' based rationale for 1F(b) is apparent in its temporal and geographic restriction when compared with 1F(a) and (c) consistent with the Universal Declaration of Human Rights and with the *travaux preparatoires* to the Refugee Convention.

    (e) Criminal liability for the hijacking was justiciable outside and within the UK given that the alleged offence covered the period from the taking of the aircraft in Kabul, a scenario engaged in the Handbook.

    (f) Although it was accepted that exclusion might still apply to those who have been convicted of a serious crime and served their sentence, the appellants cannot be regarded as "serious criminals" because the legal process had led to an outcome that they were not guilty. As a consequence, the institution and integrity of the Convention is neither undermined or abused.

(g) The 2004 Panel determination did not provide a basis for exclusion and its passages from Goodwin- Gill do not address the situation where a criminal process has been discharged with no finding of guilt.

(h) Although in most exclusion cases, the nature of the evidence would render it impractical for the receiving state to be able only to exclude where a criminal prosecution could be brought, here, it would be contrary to the principle of a restrictive and cautious application of Article 1F where exclusion was considered (applying the lower standard of proof) on the basis of a crime for which there had been an acquittal. Equal treatment requires those who have been acquitted to be treated the same as those who have not committed an offence.

(i) The burden was on the Secretary of State to justify exclusion where there has been an acquittal. A restrictive approach required a halt to exclusion in the light of the acquittal.

55. Mr Jacobs reminds us in his submissions that KU had been formally acquitted of all charges as the Crown had elected to offer no evidence against him. He was involved in the preparation for the hijacking and was aware of the intentions of the group when he boarded but had become unwell and the medical evidence established that he was suffering from a mental disorder at the time of hijacking.

56. He emphasised that the absence of any authority for the proposition that exclusion could still apply where there had been an acquittal and exclusion would be inconsistent with the restrictive and cautious approach the Secretary of State was required to take and with the principles in *Al-Siri.* KU has received an absolute acquittal and there had been no findings made against him. The 2015 panel had erred in relying on Blake J's *obiter* observations in *AH;* there was never any issue before the tribunal as to the approach to be adopted towards 1F(b) in *AH* which was concerned with 1F(c).

57. Mr Jacobs argued that the facts in *Al-Sirri* were very different. He had been acquitted in the central criminal court on an indictment for the murder but the charge had been dismissed on the basis that the evidence would not be sufficient for the jury to properly convict. In the absence of that conviction the Secretary of State chose to proceed under 1F(c). There was no consideration in the case of whether 1F(b) applied.

58. The 2015 Panel had erred in relying on the passage from *Al-Sirri* at [75] of the judgment as authority for the proposition that an acquittal does not prevent the application of 1F(b); the issue was never before the Supreme Court.

59. The 2015 Panel had failed to apply the requisite purposive approach to its determination of the exclusion issue: *AH (Algeria)* and had failed to consider the UNHCR position.

60. Mr Payne's written submissions on the issue of the effect of the acquittal addressed the object of 1F(b) with reference to *Febles* which considered the intervention by UNHCR. He argues that appellants had repeated arguments that had been considered and rejected by the 2004 and 2015 Panels without engaging with the reasoning in the determinations. The appellants had failed to refer either to *AH (Algeria)* or *Febles.* There was no engagement with the findings in those cases that 1F(b) was not extradition based and/or has the sole purpose of ensuring that refugee claimants are held accountable for their past conduct.

61. The appeal against conviction in the Court of Appeal was allowed due to a misdirection and the Court commented on the seriousness of their actions and the force of the suggestion that the misdirection was not material in relation to the hijacking in Moscow and Stansted. The decision not to prosecute subsequent to the Court of Appeal decision reflected the fact that they had largely served their sentences.

62. Although it was correct to say that they had not been convicted, it is clear that there was compelling evidence to suggest that the appellants had committed serious crimes. At no stage did their evidence result in an acquittal. Even if they had been acquitted this would not have prevented application of 1F(b) which does not require a conviction, an acquittal can be for procedural reasons and there are different standards of proof between criminal proceedings and exclusion as recognised by Lady Hale in *Al-Sirri.* The decision not to prosecute KU had nothing to do with the strength of evidence against him but it reflected an assessment that he was not fit to stand trial. The 2015 Panel had given compelling reasons why leading up to the hijacking he had aided and abetted the commission of a serious crime.

63. In his oral submissions, Mr Payne engaged with a point that we had raised during the appellants' submissions with regard to the mandatory nature of the provisions in 1F reflected in the Qualification Directive and the 2006 Regulations. He argued that the decision whether someone was entitled to be recognised as a refugee remained a matter for the Secretary of State. In determining whether exclusion was appropriate, it was irrelevant that someone had finished serving a sentence. Mr Payne referred to the mandatory provisions of 1F and the absence of any mention in 1F(b) of any reference to whether an acquittal or conviction was determinative of an application for protection. If it is accepted that there is no requirement for a conviction in 1F(a) and (c) or there is no bar to (a) and (c) being engaged if there is an acquittal, there was no reason why an acquittal should be a bar to (b). He contended that the appellants had sought to extend and rewrite the words of 1F(b) in a manner inconsistent with its mandatory nature. It was inappropriate to have criminal proceedings being determinative of refugee proceedings in reliance on *M.* It was clear from a consistent line of cases (being *AH* and *Febles*) that there is a dual purpose to 1F(b) and that it was not confined as contended by the appellants to extradition

principles but included consideration of whether someone was entitled to refugee protection for which there did not need to be a conviction.

64. Mr Payne also argued that it was clear that there may be compelling reasons for applying 1F(b) even where there has been an acquittal given the wide variety of reasons for such a result which ranged from a finding by the jury to technical grounds such as non-attendance of a witness. There were very different rules of evidence in criminal proceedings.

65. By way of reply, Mr Jorro with Mr Seddon submitted that there was a clear distinguishing feature between a person who has committed a crime and where a person has been convicted or acquitted of crime. The proper place for determining whether someone has committed a crime is the criminal court. *Febles* dealt with a person convicted in another country and the observations in *B and D* and *AH* were not part of the ratios in those decisions. There was no binding authority that a person convicted can be excluded. The use of the lower standard as referred to in *AH* was unprincipled and inconsistent with the restrictive approach. *Al-Sirri* was not such an example as the Secretary of State has chosen to rely on 1F(c).

66. Mr Jacobs added that the Laws LJ in *AH* had not endorsed the observations by Blake J which had been referenced in *Febles.* As to his fourth ground relating to discretion, courts must be able to act judicially and should not be overly restrictive.

67. Both sides argued that the absence of authorities supports the strength of their respective positions. By way of conclusion, we accept Mr Payne's submission that the Secretary of State has a positive obligation to consider exclusion in relation to each of the limbs of Article 1F. That obligation is expressed also in Article 12 of the Qualification Directive and in paragraph 7 of the 2006 Regulations transposing the Directive. Applying the ordinary meaning of the Convention's terms, exclusion is a mandatory requirement where someone has committed a serious non-political crime outside the country of refuge prior to admission as a refugee. We also accept that the decision-maker on whether someone is in need of protection or is excluded is the Secretary of State. As observed by Hayden J in *F & Others v SSHD* [2018] 2 WLR 178 at [27]:

> "In the UK, in compliance with this framework of requirements Parliament has, through the immigration rules (HC 395), appointed the Secretary of State for the Home Department as the designated single 'determining authority'. As such it is the SSHD who is the sole responsibility for investigating and determining claims for international protection. … For the sake of completeness, the Immigration Rules are made pursuant to the Immigration Act 1971 ('the 1971 Act'). Accordingly and given that these powers are rooted within this statutory framework, the SSHD submits, and I agree, that the grant of asylum is not made pursuant to Royal Prerogative but reflects and exercise of statutory authority. No party has sought at this hearing, to argue to the contrary. This discrete

> question has, to my mind now been comprehensively resolved by the Supreme Court: Munir v SSHD [2012] UKSC 32.
>
> …"

68. Further at [33] Hayden J observed:

> "I agree with Mr Payne's analysis, it follows, from the above that the governmental, administrative, judicial bodies of Member States are required to adopt an approach to those seeking or granted asylum that furthers the objectives of the Convention, to do otherwise would frustrate its primary purpose, …"

69. It is unarguable as a matter of law that the first eight appellants have been acquitted of the five counts on which they were charged. In these proceedings we are concerned only with the first count in the light of the geographical restriction in Article 1F(b) which relates to the hijacking from its inception and as a continuing offence until arrival within the territory of the United Kingdom.

70. Longmore LJ describes count 1 in paragraph [2] of his judgment as follows:

> "Count 1 charged the appellants with hijacking the aircraft, using various weapons to threaten those on board and making threats to blow it up, and covered the period from taking over the plane shortly after take-off, to the time of its landing at Stansted."

As he observed counts 2 to 5 arose out of events after landing at Stansted.

71. The Court of Appeal was satisfied that there was a misdirection by the trial judge in the case which Longmore LJ would not agree was inconsequential. As explained at [29] of his judgment:

> "For these reasons, we were satisfied that there was a misdirection in this case. Mr Houlder submitted that the misdirection did not matter because the Crown always accepted that, if the defendants' evidence were believed, there was a sufficient threat in fact to enable them to raise the defence of duress. We cannot agree that the misdirection was inconsequential in that sense. First, once the ruling had been made at a comparatively early stage of the trial on 26th October, before the close of the prosecution case, the belief of the defendants, if the jury were sure that there was no threat, became legally irrelevant. The jury may have rejected the evidence, say, about the list of 35 named, but were never able to take the defendants' actual fear into account. Secondly, the Crown always put their case of hijacking on two bases (a) the hijacking of the aircraft in Afghanistan and (b) the continuation of the hijacking in Moscow. The Crown never accepted that there were threats in fact in Moscow but the defendants asserted that they believed they would be sent back to their death in Afghanistan (directly or via Pakistan) by the Moscow authorities and also that they believed that, if they allowed the passengers to leave, the authorities would storm the plane. That was

> evidence which the jury was unable to take into account, if again, if they were sure there was no threat. We were informed by counsel that, when it came to sentencing, the judge observed that he could not be sure that the defence of duress had not succeeded in relation to the initial hijacking. The 5 year sentence imposed by the judge reflected, therefore, what happened in Moscow rather than the original hijacking."

72. Longmore LJ however also observed in his concluding remarks at [33] as follows:

> "In the light of some of the newspaper comments on the announcement of our decision, we think it right to add that we do not for a moment accept that the success of this appeal is a charter for future hijackers. The only reason why this appeal has succeeded is that there was a misdirection in relation to the law as explained to the jury. As earlier jury was given a direction that, in one respect may have been too generous to the defendants, and was unable to agree. We have every confidence that future juries given a correct direction, in accordance with the law set out in R v Graham in 1982, will convict in appropriate cases and acquit, if it is right to do so."

73. KU was acquitted on all five counts as a consequence of the Crown not offering evidence. It is not in dispute that this was because he was not fit to enter a plea.

74. The established authorities have endorsed the UNHCR view that the Refugee Convention must be restrictively interpreted and cautiously applied as explained in *Al-Sirri*.

75. The appellants' principal point is that their acquittals, by taking a cautious and restrictive approach to the exclusion, meant that there were no longer serious reasons for considering they had committed a serious non-political crime.

76. In our judgment the Supreme Court in *Febles* correctly interpreted the purpose behind Article 1F(b) having had regard to the *travoux preparatoires* and the authorities including the CJEU in *B and D*. As explained by the court at [35]:

> "I cannot accept the arguments of Mr Febles and the UNHCR on the purposes of Article 1F(b). I conclude that Article 1F(b) serves one main purpose – to exclude persons who have committed a serious crime. This exclusion is central to the balance the Refugee Convention strikes between helping victims of oppression by allowing them to start new lives in other countries and protecting the interests of receiving countries. Article 1F(b) is not directed solely at fugitives and neither is it directed solely at some subset of serious criminals who are undeserving at the time of the refugee application. Rather, in excluding all claimants who have committed serious non-political crimes, Article 1F(b) expresses the contracting states', agreement that such persons by definition would be underserving of refugee protection by reason of their serious criminality."

77. It follows that the Secretary of State would not be discharging his legal obligations under the Refugee Convention by simply treating without more an acquittal in the criminal courts as an answer to the question whether there are serious grounds for believing a crime has been committed. Even when taking a cautious and restrictive approach, it is incumbent upon the Secretary of State to examine the circumstances of the acquittal to decide whether his obligation has been discharged and that the mandatory exclusion provisions have been satisfied. We readily accept that in most cases an acquittal will provide a compelling answer to the question of whether there are serious reasons. This would usually be so where a jury had returned a verdict of not guilty on counts based on offending that would other give rise to exclusion. However, we agree with Mr Payne that there will be cases where an acquittal arises for procedural, technical or other reasons as was the case for the first eight appellants. KU is another example of where an acquittal may not provide a complete answer to the enquiry.

78. In our judgment, the 2015 panel did not err in looking beyond the acquittal to see whether the appellants were to be excluded. They gave legally sustainable reasons for doing so and correctly identified the issue at [10] where they summarised the arguments that were fully developed before us and at [11] where they addressed the Secretary of State's position. The 2015 Panel correctly identified the basis on which the Court of Appeal had allowed the eight appellants' appeals and did not err in taking into account the remarks of Blake J in *AH* which they correctly acknowledged were overturned. We do not consider that the fact that Blake J was referring to the operation of Article 1F(c) undermined the relevance of his remarks to the articles other provisions. Furthermore, we do not accept that the reference by the 2015 Panel at [14] to the lower standard identified by Baroness Hale in *Al-Sirri* was erroneous. Although the Panel did not make reference to the mandatory nature of the exclusion provisions and the cautious and restrictive approach required, in our view they were rationally entitled and legally correct in reaching their conclusion that:

> "… Notwithstanding the appellants' acquittal and the absence of any finding beyond reasonable doubt that they committed the crime of hijack, it remains open to us to assess whether there are "serious reasons" for considering that they have committed a serious, non-political crime, so as to justify exclusion under Article 1F(b). We conclude that the appellants' acquittal does not prevent the application of Article 1F(b)."

79. Specifically in respect of KU, the 2015 Panel correctly noted his formal acquittal and the basis for that at [49]. Nevertheless, taking account of their approach to the eight appellants, we are not persuaded that they erred in considering whether there were also serious reasons for considering KU's position notwithstanding his acquittal by reference to the nature of the medical evidence and the fact that KU was not fit to plea. This aspect is adequately reasoned and reflects a correct legal approach.

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80. The appellants accept that if the 2015 Panel was entitled to look beyond the acquittal it is necessary to consider the issue of duress which has the same potential to arrest any further consideration of 1F(b) if made out. In *Graham* [1982] 1 WLR 294 the Court of Appeal considered the elements of the defence of duress. The case concerned a gay man who participated in the murder of his wife because, he claimed, he was in fear of his co-accused and lover, a man called King. At issue was whether the judge gave a lawful direction to the jury by requiring the jury to consider whether a reasonable person with the appellant's characteristics would have behaved in the way the appellant did, importing an objective element. Lord Lane stated that,

> "As a matter of public policy, it seems to us essential to limit the defence of duress by means of an objective criterion formulated in terms of reasonableness. The correct direction to the jury should have been:
>
> (1) Was the defendant, or may he have been, impelled to act as he did because, as a result of what he reasonably believed King had said or done, he has good cause to fear that if he did not so act King would kill him or cause him serious physical injury?
>
> (2) If so, have the prosecution made the jury sure that a sober person of reasonable firmness, sharing the characteristics of the defendant, would not have responded to whatever he reasonably believed King said or did by taking part in the killing?"

81. In *R v Safi (Ali Ahmed) and Ors* [2003] EWCA Crim 1809, a decision arising from the prosecution of the current appellants, the Court of Appeal concluded that Sir Edwin Jowitt misdirected the jury by requiring that there must be a threat in fact, rather than something the appellants reasonably believed to be a threat, before the defence of duress could be invoked. The Court of Appeal held that the suggested direction in *Graham* continues to be the law in relation to duress. The Court of Appeal considered a number of authorities including *Abdul-Hussain* (noted in [1999] Crim. L. Rev. 570), which involved another hijacking of a plane by Shiite Muslims from Iraq. In this case the Court held that imminent peril of death or serious injury had to operate on the defendant at the time he committed the act so as to overbear his will, but the execution of the threat did not need to be immediately in prospect. Rose LJ V-P said,

> "If Anne Frank had stolen a car to escape from Amsterdam and had been charged with theft, the tenets of English law would not, in our judgment, have denied her a defence of duress of circumstances, on the ground that she should have waited for the Gestapo's knock on the door."

82. According to the Court of Appeal in *Safi* the relevant authorities stressed the need for great and imminent danger and required that a defendant's response to the situation be judged by an objective standard of reasonableness and proportionality.

83. *R v Z* [2005] UKHL 22 was concerned with the issue whether the defence of duress was available to someone who voluntarily associated with known criminals. The House of Lords noted that duress affords a defence which, if raised and not disproved, exonerates the defendant altogether. "Where the evidence in the proceedings is sufficient to raise an issue of duress, the burden is on the prosecution to establish to the criminal standard that the defendant did not commit the crime with which he is charged under duress" (at [20]). The House of Lords did not suggest that the *Graham* direction, approved in *R v Howe* [1987] AC 417, was inappropriate. Their Lordships stated,

> "It is of course essential that the defendant should genuinely, i.e. actually, believe in the efficacy of the threat by which he claims to have been compelled. But there is no warrant for relaxing the requirement that the belief must be reasonable as well as genuine."

84. The respondent and the 2015 Panel relies on *MT (Article 1F (a) – aiding and abetting) Zimbabwe* [2012] UKUT 00015 (IAC), where the Upper Tribunal held that a person falls to be excluded under 1F(b) where there are serious reasons for considering that he or she has aided and abetted the commission of a serious non-political crime. The case concerned a Zimbabwean policewoman whom the SSHD excluded from the protection of the Refugee Convention under Articles 1F(a) and (c) (the case did not concern Art 1F(b) and the Upper Tribunal only considered 1F(b) on an *obiter* basis – see [96]) because of her participation in various incidents involving serious human rights abuses. She argued that she was entitled to the defence of duress.

85. The issue of duress was considered with respect to Art 1F(a) and Article 31(1)(d) of the ICC Statute. While recognising that it was unclear whether duress provided a complete defence in all cases in the context of the exclusion clauses, the Upper Tribunal in *MT(Zimbabwe)*, stated, at [106]:

> "We believe we can dispose of the duress claim relatively briefly. Article 31(1)(d) of the ICC Statute makes clear that duress can be a defence to international criminal responsibility. In draft Article 9 (dealing with 'Exceptions to the principle of responsibility') the International Law Commission (ILC) UN GAOR Supp.No.10: UN doc. A/42/10/ (1987) at 18 noted that for 'coercion to be considered as an exception, the perpetrator of the incriminating act must be able to show that he would have placed himself in grave imminent and irremediable peril if he had offered any resistance'. Whether it is a complete defence and whether it can apply in all types of cases remains unsettled: see the Trial Chamber discussions in Prosecutor v Endermovic (IT-96-22) 7 June 1997 (a case, like all the other overseas cases to which we refer elsewhere in this decision - unless otherwise specified- decided by the International Criminal Tribunal for

> the Former Yugoslavia or ICTFY). It appears uncontroversial, however, that such a defence is confined to situations where the defendant's freedom of will and decision is so severely limited that there is eventually no moral choice of counter activity available; and that it has four components: the threat must be of imminent death or continuing or imminent serious bodily harm; the threat must result in duress causing the crime; a threat results in duress only if it is otherwise avoidable (i.e. if a reasonable person in comparable circumstances would have submitted and would have been driven to the relevant criminal conduct); and the act directed at avoiding the threat must be necessary in terms of no other means being available and reasonable for reaching the desired effect."

86. The submissions on behalf of the eight appellants identifies the issue for determination as whether they could reasonably/genuinely have believed that their only safe means of escape was as they did. If they could so have believed, then the Secretary of State has failed to make out the necessary criminal intent for the purposes of exclusion under Article 1F(b) on application of the balance of probabilities standard. Our attention is drawn to the sentencing remarks and Sir Edwin Jowitt's reasoning and findings which were made on the unlawfully strict test which applied a standard to the appellants' conduct that was more rigorous than the criminal law applied. That test did not require the appellants *in fact* to be in imminent peril before the defence of duress was capable of succeeding by reference to *R v Graham*.

87. With reference to the *Graham* test, it is submitted that if the answer to the first question set out in paragraph 79 above is 'no', guilt is established. If the answer is 'yes' the second question requires answering. If the answer to that question is 'no' guilt is not proved but if 'yes', guilt is established. The appellants also rely on the conclusion of the Court of Appeal in *Safi* as to the immediacy of the threat.

88. The eight appellants' submissions then turned to the findings of the 2004 Panel. It is argued that the appellants reasonably as well as genuinely believed that taking the aircraft was their only realistic option to avoid the danger. The findings by the 2004 Panel read as a whole positively underline such a belief. Whether speaking objectively they could have attempted another means and whether in fact the danger was not such that they could not have found an alternative is not the point. With the 2004 Panel having found that had the appellants travelled overland, there was a danger they would be identified and thereafter arrested and tortured or worse. It is argued that this aspect of itself given that family members were also involved was sufficient to underline a reasonable/genuine belief whatever the ultimate reality in the appellants' mind that such was not a realistic choice and taking the aircraft was the only realistic option.

89. Applying the second stage of *Graham*, it was very hard to see how such a person could have acted in any different way from the appellants in the light of their reasonably/genuinely held beliefs in the very particular circumstances of a group of

men facing arrest, torture and death at the hands of a notoriously cruel and ruthless ruling authority.

90. As to the 2004 Panel's finding that the hijack engaged Article 1F(b) from the outset (the taking of the aircraft in Kabul) the findings of the Criminal Court were to be preferred having heard days of evidence directed to the point.

91. Specifically in respect of the 2015 Panel's findings it is argued that-

(i) The First-tier Tribunal had misdirected itself in law by approaching the issue of duress on the basis of whether there were other possible means of escape that, as a matter of fact, the appellants could have availed themselves of, notwithstanding the risk to them, rather than whether they had a reasonable/genuine belief of circumstances compelling them to act as they did and whether it had been very clearly shown that reasonable persons, sharing their characteristics and in those circumstances, would not have behaved in that way.

(ii) The 2015 Panel had failed to recognise or have regard to the intense dangers and risks of leaving Afghanistan by alternative means.

(iii) Its conclusion was not open to it applying the appropriate and correct legal tests.

(iv) The 2015 Panel had misdirected itself in law by applying too high a standard to the duress test.

92. For KU, Mr Jacobs argued that where there was prime facie evidence of duress that alone should suffice to render Article 1F(b) inapplicable by reference to the text in the Law of Refugee Status, Second Edition, Hathaway and Foster. The 2015 Panel had misdirected itself on the medical evidence which relating to KU would set out a plausible defence of duress.

93. Mr Payne's submissions identify aspects of the 2015 Panel's findings with reference to the appellants' military experience, access to funds, ability to travel to Pakistan for preparation and the absence of any sufficient immediacy of danger or the availability of alternative means for leaving Kabul. The appellants were resourceful with links to Pakistan and the borders were relatively porous to many countries. It is contended that the appellants have not challenged the findings by the 2004 Panel that there was no sufficient immediacy of danger which he contended is fatal to their appeal.

94. Mr Payne also argued that it was significant the appellants chose not to give evidence before the 2015 Panel on these issues. Sir Edwin Jowitt commented in his sentencing remarks that he could not be sure (Mr Payne's emphasis) that the hijacking was criminal from the outset reflecting an assessment applying the criminal standard to the more limited evidence considered during the criminal trial.

95. Specifically in respect of KU, Mr Payne argued that he had not established that he was acting under duress during the weeks when the preparations were made for the hijacking and the 2015 Panel had noted that he had played a substantial role in the preparation.

96. We reach the following conclusions under this heading. We were drawn in oral submissions to a detailed analysis of the findings by the 2015 Panel with reference to those reached by the Panel in 2004 as well as argument on whether the Panel applied the correct test to the facts found in 2004. It is important to our mind to note that the grounds do not challenge the rationality of the 2015 Panel's conclusions on the earlier findings in the absence of any further evidence from the appellants. Accordingly, if we are satisfied that the 2015 Panel proceeded on the basis of the correct test or in substance did so the only question that would arise is whether the 2015 Panel erred in its understanding of the evidence and the findings by the 2004 Panel.

97. Drawing upon the above authorities, the questions the 2015 Panel was required to ask themselves may be framed in this way. Were the appellants impelled to hijack a plane as a result of their reasonably and genuinely held belief that the Taliban authorities were pursing them and whether, if they did act in this way was there was a serious and imminent (as opposed to an immediate) threat to their lives or a risk of serious harm? This is the subjective element which also has an objective component as to the reasonableness of the belief. The second question, if the first is answered in the affirmative, is whether others in the same position, with the same characteristics, with the same reasonably held fears of a serious imminent threat would not have hijacked a plane to avoid the threat but would have chosen another course of action. This is the objective analysis that requires to be answered for the defence to be made out.

98. The 2015 Panel explained in [15]:

> "… The correct approach is to consider whether the appellants had a reasonable belief of circumstances compelling them to act as they did whereas, in contrast, the 2004 Panel approached the matter on the basis of whether there were other possible means of escape that, as a matter of fact, the appellants could have availed themselves of."

99. This is followed by a short analysis of *MT* and an extract from that decision which identifies four components at [106] of the decision:

> "It appears uncontroversial, however, that such a defence is confined to situations where the defendant's freedom of will and decision is so severely limited that there is eventually no morale choice of counter activity available; and that it is four components: the threat must be of imminent death or continuing or imminent serious bodily harm; the threat must result in duress causing the crime; a threat results in duress only if it is otherwise avoidable (i.e. if a reasonable person in comparable circumstances would have submitted and would have

> driven to the relevant criminal conduct); and the act directed at avoiding the threat must be necessary in terms of no other means being available and reasonable for reaching the desired effect."

100. Examination of the 2004 Panel's decision shows a detailed summary of the evidence given by the eight appellants between [66] and [88]. The reference in [91] to the absence of an immediacy of danger and arrest needs to be considered in context:

> "91. Having heard the evidence of the appellants and the experts and having read the objective evidence, we are satisfied that the borders of Afghanistan are and were at the relevant time porous relative to many countries. We find that these appellants could have attempted an alternative means of escape to a neighbouring country. There were routes through the mountains and unmanned border posts. We find that despite all of the appellants' statements to the contrary there was not such an immediacy of danger of arrest or lack of opportunity to move away from the Kabul area such that they could not have found an alternative to hijacking. The appellants could have chosen to travel to Pakistan although there was a strong Taliban and radical Islamic movement presence there. If they had gone to Pakistan, it was most unlikely they would have experienced any particular difficulties moving on from there. The further they travelled from Afghanistan and the Peshawar area, the less likely they would have been in danger. They could have remained elsewhere in Pakistan or if they still felt in danger of persecution they could have travelled on to claim asylum in another country. They could have claimed asylum in Tashkent or in Moscow but chose not to do so."

101. In paragraph [17] of its decision, the 2015 Panel considered the 2004 Panel's assessment of the circumstances (see [36] above). This includes an observation that the 2004 Panel "… made a clear finding that there was not such an immediacy of danger of arrest or lack of opportunity to move away …". The 2015 Panel continued at [18] as we have cited above:

> "… We find that the evidence before the 2004 Panel, and before ourselves does not show that the threat of serious imminent harm was such that a reasonable person would have felt compelled to hijack the Ariana airplane. There is nothing to displace the clear findings of fact made by the 2004 Panel that there was no such immediacy of danger of arrest or lack of opportunity to move away from Kabul."

102. The above passage indicates that the 2015 Panel came to a negative answer on the first question. This is followed by a further reference to the absence of evidence to replace the "clear findings of fact made by the 2004 Panel" and a repetition of their survey of the earlier panel's findings in [17]. This is indicative that although it was unnecessary for them to do so, the 2015 Panel went on to consider the second question with reference to the time allocated to preparation for and the sophisticated planning for the hijack. Whilst the panel might have structured the approach more

clearly, in substance, its approach was legally sound and open to them on the evidence.

103. It is correct that the 2004 Panel found that there was an absence of immediacy of danger. We do not consider this fatal to the 2015 Panel's decision in the light of the later Panel having found that the evidence did not show the "threat of serious imminent harm". The reference to immediacy is an aspect of the evidence rather than a statement of the test. It was a consideration of the likelihood of events occurring which is an essential ingredient of the consideration whether an event was imminent. In this respect a lack of immediacy might well show something was not imminent. The 2015 Panel gave cogent reasons why, based on the findings by the 2004 Panel, the threat of serious imminent harm was such that a reasonable person would have felt compelled to hijack the Ariana airplane.

104. In concluding that the appellants could have attempted an alternative means of escape, the 2004 Panel were addressing not only the reasonableness of their belief asserted after a careful analysis of all the evidence but also answering the second question. In our judgment the finding that the appellants could have chosen alternative means indicated that their belief that hijacking was the only option available to them was not one that was reasonably or genuinely held or one that a person sharing such a belief would not have done in the light of the alternatives. We conclude therefore that there was no error by the 2015 Panel on the second ground of challenge.

105. We turn to KU. Having satisfied ourselves that the 2015 Panel took the correct approach to the issue of duress for the eight appellants, there was no need for them to repeat their decision in relation to KU.

NON-POLITICAL CRIME

106. If the appellants are unable to show that the acquittal provided a complete answer or that they were acting under duress, the next step (and basis of challenge) is whether there are serious reasons for considering the crime was non-political. The cases we were directed to begin with, *R v Governor of Brixton ex parte Kolczynski and others* [1955] 1 QB 540 concerned Polish sailors serving on a fishing vessel whose views of the communist regime were overheard by a political officer and who thereafter feared they would be prosecuted on return to Poland for their political views. They overpowered the remaining crew (although there was not much resistance except by the political officer) and brought their vessel to the UK where they claimed asylum and were arrested. The Polish government sought their extradition. The case was concerned with the point whether the scheduled offences that were the subject of the extradition request were, in reality, of a political character. The Queen's Bench Division found that the sailors would be punished as for an offence of a political character. Lord Goddard C.J. stated,

> "The revolt of the crew was to prevent themselves being prosecuted for a political offence and in my opinion, therefore, the offence had a political character."

107. *Kolczynski* was considered in the House of Lords case of *R v Governor of Pentonville Prison ex parte Cheng* [1973] AC 931. The applicant in *Cheng* was a member of an organisation opposed to the Taiwan regime and was convicted in the USA of attempted murder of the Taiwanese vice-premier. Having fled the USA and entered the UK, the American authorities sought his extradition. He claimed his offence was "one of a political character." The House of Lords concluded, by a majority, that political character connoted opposition to the requesting state on some issue connected with the political control or government of that state and, as the offence was committed in the USA and not Taiwan, the offence was not one of a political character. It was unnecessary for the purposes of the issue before their Lordships, to determine the issue of how remote from the physical act the objective had to be (at [945A-D]), although Lord Diplock was of the view that the robbing of a bank to obtain funds for a political party would be too remote to constitute a political offence.

108. Lord Diplock then stated, at 945F,

> "So, even apart from authority, I would hold that prima facie an act committed in a foreign state was not "an *offence* of a political character "unless the only purpose sought to be achieved by the offender in committing it were to change the government of the state in which it was committed, or to induce it to change its policy, or to enable him to escape from the jurisdiction of a government of whose political policies the offender disapproved but despaired of altering so long as he was there." [our emphasis]

109. In *T v Immigration Officer* [1996] AC 742 the applicant, an Algerian national, was a member of an political movement prepared to use violence to achieve its aims. *T* had been involved in and had prior knowledge of a bomb attack at an airport that killed 10 people, and had been engaged in planning a raid on an army barracks to obtain weapons that involved a further death. The issue was whether he was excluded from the Refugee Convention under Article 1F(b) on the basis that his offence was not political. Although all members of the House of Lords agreed that the offence was not political, their reasons differed. The majority agreed with Lord Lloyd of Berwick. He stated that it was common ground that the words "non-political crime" must bear the same meaning as they do in extradition law, and said it appeared from the *travaux preparatoires* that the framers of the Convention had extradition law in mind when drafting the Convention.

110. Lord Lloyd referred to a number of decisions from different jurisdictions, including refugee cases from Canada ((*Gil v Canada (Minister of Employment and Immigration)* [1994] F.C.J No. 1559, concerning an Iranian dissident who planted bombs on the business premises of the regime's supporters and which resulted in the deaths of

many innocent bystanders) and the USA (*McMullen v Immigration and Naturalization Service*, 788 F.2d 591, concerning an application for deportation of a former member of the Provisional IRA), as well as to *Cheng*. Lord Lloyd also referred to the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status and the European Convention on the Suppression of Terrorism (1977) (Cmnd. 7031), which represented an attempt to limit by agreement among member states the availability of the political exception in extradition cases. Although member states were entitled to enter a reservation at the time of signing or depositing its instrument of ratification, such states undertook to take into due consideration, when evaluating the character of an offence, any particularly serious aspects of the offence, including, "(a) that it created a collective danger to the life, physical integrity or liberty of persons; or (b) that it affected persons foreign to the motives behind it: or (c) that cruel or vicious means have been used in the commission of the offence."

111. At 786H to 787B Lord Lloyd defined a political crime.

> "A crime is a political crime for the purposes of article 1F(b) of the Geneva Convention if, and only if (1) it is committed for a political purpose, that is to say, with the object of overthrowing or subverting or changing the government of a state or inducing it to change its policy; and (2) there is a sufficiently close and direct link between the crime and the alleged political purpose. In determining whether such a link exists, the court will bear in mind the means used to achieve the political end, and will have particular regard to whether the crime was aimed at a military or governmental target, on the one hand, or a civilian target on the other, and in either event whether it was likely to involve the indiscriminate killing or injuring of members of the public."

At 787C Lord Lloyd provided the following qualification,

> "Although I have referred to the above statement as a definition, I bear in mind Lord Radcliffe's warning in *Reg. v Governor of Brixton Prison, Ex parte Schtraks* [1964] A.C. 556, 589, that a question which was first posed judicially more than 100 years ago in *In re Castioni* [1891] 1 Q.B. 149 is unlikely now to receive a definitive answer. The most that can be attempted is a description of an idea. But to fall short of a description would, in Lord Radcliffe's words, be to abdicate a necessary responsibility, if the idea of a political crime is to continue to form part of the apparatus of judicial decision-making."

112. The 2015 Panel considered this limb between paragraphs [29] and [48] in which they reviewed the "relatively few" authorities (*Cheng* and *T*) and the approach of the UNHCR. The panel then turned to the evidence beginning with the remarks by Sir Edwin Jowitt in respect of the political nature of the crime. Thereafter the panel returned to the 2004 Panel's findings on the alternative to the hijacking as cited above in paragraph [99]**.** The 2015 Panel's conclusions are hinted at in the preceding paragraphs but finally reached a full expression in [47] as follows:

> "The 2004 panel's findings show an acceptance of the existence of the YIA and a political programme and aims which were similar, as Mr Jorro said, to the programme eventually established by means of the Bonn agreement. Political demands were made by the hijackers, at Stansted. Our assessment, however, is that the hijack itself, preceded by detailed and sophisticated planning, and amounting to an offence with separate, relevant episodes in Tashkent and Moscow, was a non-political crime. The principal aim in seizing the aircraft was to make good the escape of the appellants and their family members. We have adopted the 2004 panel's finding that a viable alternative existed, to leave Afghanistan by other means, perhaps for Pakistan. Applying the test identified in T, we find that the Ariana aircraft was seized in order to effect an escape from Afghanistan rather than to achieve a political purpose, even though the appellants were members of the YIA with political aims and objectives opposed to those of Taliban. We also conclude that no sufficiently close and direct link between the hijack and the alleged political purpose exists. The hijack was directed at a civilian target as the aircraft was not a military vehicle and it contained a wholly innocent flight crew and about 100 passengers not associated with the appellants or their families. Hijacking is, by its very nature, to a large extend a chaotic and uncertain event and, taking into account the weapons taken on board, it was likely to involve at the very least a risk of injury to members of the public. In the event, violence was meted out to the stewards on board."

113. By way of submissions My Jorro on behalf of the eight appellants, and Mr Jacobs on behalf of KU, reminded us that the appellants were members of a political organisation ideologically opposed to the Taliban controlled government, that arrest warrants had been issued in some of their names on the basis that they were traitors, that they could not 'stand their ground' and fight the Taliban, and that the hijack was motivated by a desire to escape political persecution arising from their political activity with the YIA. The political nature of the offence was demonstrated by reference to the Taliban's reaction to what they perceived as a significant political humiliation, and this was supported by the findings of the panels in 2004 and 2013. Mr Jorro relied on the excerpt from the judgment of Lord Diplock in *Cheng* set out above at [108] and the decision in *Kolczynski*, and invited us to find that a person can commit a political offence by escaping from a regime and that the hijacking of the aircraft in Afghanistan clearly fitted within the meaning of a political offence contained in 'T'.

114. Mr Jorro drew to our attention to an extract in *T* setting out the views of Goodwin-Gill in *The Refugee in International Law* (1983), who considered it was necessary to examine, *inter alia*, whether there was a close and direct causal link between the crime committed and its alleged political purpose, and who stated that the political element should in principle outweigh the common-law character of the offence, which may not be the case of the acts committed or grossly disproportionate to the objective, or of an atrocious or barbarous nature. Mr Jorro additionally drew our attention to an extract in 'T' from the UNHCR handbook on Procedures and Criteria for Determining Refugee Status which indicated that there should be a close and

direct causal link between the crime committed and its alleged political purpose and object, that the political element of the offence should also outweigh its common-law character, and that this would not be the case if the acts committed are grossly out of proportion to the alleged objective. He also directed us to the Advocate General's opinion in *Federal Republic of Germany v B & D* [2012] 1 WLR 1076 who stated, with reference to article 12(2)(b) of the Qualification Directive (2004/83) ("particular cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes"), that the term "particularly cruel actions" should be applied, not only to the crimes subject to prosecution under the international instruments for the protection of human rights and humanitarian law, but also to crimes which involve the use of abnormal and indiscriminate violence, especially when directed at civilian targets.

115. Mr Jacobs reminded us that the appellants made political demands after landing at Stansted and that, as they were fleeing from political persecution, there was "unreality" in concluding that their actions were not political. He also invited us to note how the appellants actions were viewed by the Taliban.

116. Mr Payne reminded us that at [46] of its decision the 2015 Panel took into account art 12(2)(b) of the Qualification Directive and the mention of "particularly cruel actions" but found that this did not substantially assist in their application of the autonomous meaning of Article 1F(b). The appellants had in any event conceded that the crime was a "serious crime". He submitted that Mr Jorro inappropriately sought to minimise the seriousness of the crime so that it did not fall within art 12(2)(b) of the Qualification Directive. Mr Payne submitted that in *Cheng* the House of Lords was dealing with the narrow point of whether an offence committed in the jurisdiction of the state seeking extradition and which related to a political issue in a 3rd country could itself be considered a political offence. In stating that an "offence of a political character" could include, inter alia, an act by a person "… to enable him to escape from the jurisdiction of the government of whose political policies he disapproved but despaired of altering so long as he was there", Lord Diplock was dealing with what could amount to an offence of a political character, not one that did amount to an offence of a political character, and was not dealing with issues of remoteness because this did not arise in the case.

117. Mr Payne directed us to the definition of political offence in '*T*' and to the 2004 Panel's reliance on the European Convention on the Suppression of Terrorism 1977. He submitted that the 2015 Panel correctly cited the test in '*T*' and that it explained in detail why there was a viable alternative available to the appellants by leaving through Pakistan. The 2015 Panel were reasonably entitled to find that there was no political purpose to the offence for the reasons given, but even if this was wrong, the 2015 Panel's conclusion that there was no sufficiently close link between the offence and its political purpose was reasonably open to it and that it properly took into

account relevant factors such as the risk of violence and the civilian nature of the target.

118. We are satisfied that a crime committed to effect an escape from political oppression that threatens harm has a political nature; see Lord Diplock [108] above, but there is a need to assess the link between the crime and the political object to see whether this resulted in disqualification from such status, see Lloyd LJ in *T* at 787G. In our view there is a need for the crime, in order to maintain its political character, to be proportionate to the purpose pursued.

119. In our judgment the 2015 Panel erred in law in their reasoning, at [47], that the offence did not have a political purpose. An offence may be of a political character and may be politically motivated even if it has been the subject of "detailed and sophisticated planning". Whilst we have no doubt that the 2015 Panel were accurate in stating that the "principal aim in seizing the aircraft was to make good the escape of the appellants and their family members", the escape was due to a fear of politically motivated persecution based in turn on the appellants' political activities. The purpose was to escape political persecution. The 2015 Panel concluded, applying '*T*', that the seizing of the aircraft was not to achieve a political purpose. However, as Lord Lloyd explained at 787C, with reference to his definition, that "the most that can be attempted is a description of an idea."

120. We are not however persuaded that this error is of material kind that could have led to a different outcome or that there are other features that require the decision to be set aside. The critical passages are in [47]. We are satisfied that the 2015 Panel were unarguably entitled on the findings by the 2004 Panel to find, as they did at [47], that the second limb of the test for a political offence in '*T*' was not met. The 2015 Panel gave adequate reasons for their conclusion that there was no sufficiently close and direct link between the hijacking and its political purpose. The 2015 Panel noted that the hijack was directed at a civilian target and that the flight contained a wholly innocent flight crew and about a hundred passengers not associated with the appellants or their families.

121. The 2015 Panel also observed that, by its very nature, hijacking was a chaotic and uncertain event and that by taking weapons on board the flight, it was likely to involve at the very least a risk of injury to members of the public. The 2015 Panel indicated that they had referred to the Handbook and although not necessary for our conclusion we note that the serious nature of a hijacking of a plane is reflected in Article 1(a) of the European Convention on the Suppression of Terrorism 1977 which provides that, for the purpose of extradition between states, the hijacking of a plane shall not be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives.

122. There is no need for the appellants' actions to amount to "particularly cruel actions" within the terms of art 12(2)(b) of the Qualification Directive in order for the

hijacking of a commercial airline carrying over hundred innocent passengers, with the concomitant risk to lives and safety, to be found a disproportionate and remote response to the threat from the Taliban as perceived by the appellants. The Qualification Directive does not restrict the class of offences that may be classified as serious non-political crimes to those involving particularly cruel actions. It is, in any event, sufficiently clear from the evidence considered by the 2015 Panel that the hijacking was a serious offence (as we have already observed, a point not disputed by the appellants' representatives) that caused great fear and anxiety for the innocent passengers who were detained for a significant period of time. Moreover, it follows from our earlier conclusions on the approach to the issue of duress that the 2015 Panel were entitled to find that the hijacking of the plane was too remote/disproportionate to the political purpose of escaping political persecution given that reasonable persons facing the same perceived risk and sharing the same characteristics would not have hijacked the plane. Their finding that there was no sufficiently close and direct link between the hijacking and the political character of the escape was drawn from their conclusions on duress, an approach properly open to them when assessing the remoteness of the connection between the political purpose and the hijacking.

EXPIATION

123. The appellants have reserved their position on this aspect in the light of the judgment of the Court of Appeal in *AH (Algeria) v SSHD (No 2)* [2015] EWCA Civ 1003 which post-dated the decision of the 2015 Panel. We are invited to dismiss the appeal on this ground as a consequence although the position of the parties is reserved.

DISCRETION (KU)

124. Mr Jacobs submits that the 2015 Panel erred in failing to exercise a discretion not to exclude KU from the Refugee Convention given the particularly unusual facts of KU's appeal and the evidence before it. In his skeleton argument prepared for the 2015 Panel, Mr Jacobs relied on the medical evidence relating to KU as well as his acquittal, the nine-year delay in making a decision in respect of his protection claim, the passage of nearly 15 years, the issue of duress and the ongoing threat of persecution in Afghanistan as factors relevant to the exercise of discretion. He submitted before us that it was incumbent on Courts and Tribunals to consider the question of exclusion in relation to context and proportionality, and that the judicial

125. The 2015 Panel did not deal with Mr Jacobs' discretion ground as a discrete head but it did consider the medical evidence relating to KU at [49] to [51], when concluding at [52] that KU was in substantially the same position as the other hijackers and was therefore also excluded from the Refugee Convention. The 2015 Panel also considered the relevance of factors extraneous to the core elements of Article 1F(b) in its assessment of the expiation ground (from [20] to [22]).

126. We are not persuaded that the 2015 Panel fell into error in failing to exercise a discretion. The wording of Article 1F(b) itself is in mandatory terms ("The provisions of this Convention *shall* not apply to any person with respect to whom there are serious reasons for considering that … he *has* committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee"). The Secretary of State has a positive obligation to exclude a person who meets the requirements of each of the limbs of Article 1F.

127. In his skeleton argument prepared for the 2015 Panel (and his skeleton argument prepared for this appeal) Mr Jacobs relied on the following passage from The Refugee in International Law, 3rd Edtn, Professor Goodwin-Gill

> "Each State must determine what constitutes a serious crime, according to its own standards up to a point, but on the basis of the ordinary meaning of the words considered in context and with the objectives of the 1951 Convention. Given that the words are not self-applying, each party has some discretion in determining whether the criminal character of the applicant for refugee status in fact outweighs his or her character as *bona fide* refugee, and so constitutes a threat to its internal order. Just as the 1951 Conference rejected 'extradition crimes' as an *a priori* excludable category, so *ad hoc* approaches founded on length of sentence are of little help, unless related to the nature and circumstances of the offence. Commentators and jurisprudence seem to agree, however, that serious crimes, above all, are those against physical integrity, life and liberty." (page 176)

128. Prof Goodwin-Gill's comments on discretion relate to an individual's 'criminal character' and are made in relation to a discussion of what constitutes a 'serious crime'. This is apparent not only from the extract itself but from the context in which the extract was considered by the Court of Appeal in *AH (Algeria) v Secretary of State for the Home Department* [2012] EWCA Civ 395 (at [31] & [32]). We do not find the extract supports Mr Jacobs' contention that the 2015 Panel had a discretion whether to exclude KU from the Refugee Convention.

129. Mr Jacobs additionally relied on a further passage from The Refugee in International Law under the heading 'Context and proportionality' which considered the UNHCR's 2003 Guidelines on exclusion and in which the UNHCR argued that the exclusion clauses must be applied in a manner proportionate to their objective, so that the gravity of the offence in question is weighed against the consequences for exclusion. He also drew our attention to passages in the UNHCR Background Note on the Application of the Exclusion Clauses, and to paragraph 161 of the UNHCR Handbook

> "While there is thus a possibility of granting asylum, the gravity of the persecution of which the offender may have been in fear, and the extent to which such fear is well-founded, will have to be duly considered in

> determining his possible refugee status under the 1951 Convention. The question of the exclusion under Article 1 F (b) of an applicant who has committed an unlawful seizure of an aircraft will also have to be carefully examined in each individual case".

130. We do not consider that the passages assist Mr Jacobs. The commentaries related to the need to approach the evidential requirements of Article 1F(b) with the most anxious scrutiny in circumstances where there is credible evidence of likely persecution, and the issue of proportionality related to the seriousness of the offence. Neither the UNHCR nor Professor Goodwin-Gill were suggesting that there exists a discretion to not exclude once the core elements of Article 1F(b) were established. We remind ourselves in any event that the guidance provided by the UNHCR is advisory (*AH (Algeria)* [2015] EWCA Civ 1003).

131. In support of his submissions, Mr Jacobs also relied in paragraph 73 of *Pushpanathan v Canada (Minister of Citizenship and Immigration)* [1998] 1 SCR 982:

> "Article 1F(b) contains a balancing mechanism so far as the specific adjectives "serious" and "non-political" must be satisfied, while Article 33(2) as implemented in the Act by ss. 53 and 19 provides for weighing of the seriousness of the danger posed to Canadian society against the danger of persecution upon refoulement. This approach reflects the intention of the signatory states to create a humanitarian balance between the individual in fear of persecution on the one hand, and the legitimate concerns of states to sanction criminal activity on the other."

132. *Pushpanathan* was however a case concerned with Article 1F(c) and not with Article 1F(b). Moreover, the 'balancing mechanism' within Article 1F(b) considered by the Supreme Court of Canada related to the "serious" nature of the crime, and whether the crime was "non-political", and not to whether there existed a discretion to exclude from the Refugee Convention once the core elements of Article 1F(b) had been established. The appellants accept that the hijacking of the plane was "serious", and, for the reasons already given, we are satisfied that the 2015 Panel were entitled to find that the appellants' conduct, when considered in the full context of their actions, was "non-political".

133. In assessing whether there exists a discretion whether or not to exclude an individual from the Refugee Convention, we additionally note that the majority of the Supreme Court of Canada in *Febles*, decided after *Pushpanathan*, found that factors extraneous to the core elements of Article 1F(b) were not relevant to the question of exclusion.

> "18. The mandatory wording of the Article ("*shall* not apply") chosen by the parties to the *Refugee Convention* unequivocally supports the view that all a subscribing country can consider in determining whether a claimant is excluded under Article 1F(*b*) is whether the claimant committed a serious crime outside the country of refuge prior to applying for refugee status

> there. Nothing in the words used suggests that the parties to the *Refugee Convention* intended subsequent considerations, like rehabilitation, expiation and actual dangerousness, to be taken into account."

134. Then at [54] the Supreme Court of Canada stated,

> "… Article 1F(b) is aimed at excluding from refugee status persons who have committed a serious crime, regardless of what may have happened since."

135. The above extract followed an assessment by the majority of the Canadian Supreme Court of the CJEU's decision in *Germany v B and D* C-57/09, C-101/09, [2010] ECR I-10979. The CJEU stated, albeit by reference to the Qualification Directive and not Article 1F(b) directly,

> "106. By its third question in each of the cases, the Bundesverwaltungsgericht asks whether exclusion from refugee status pursuant to Article12(2)(b) or(c) of Directive 2004/83 is conditional upon a proportionality test being undertaken in relation to the particular case.
>
> 107. In that regard, it should be borne in mind that it is clear from the wording of Article12(2) of Directive 2004/83 that, if the conditions laid down therein are met, the person concerned 'is excluded' from refugee status and that, within the system of the directive, Article2(c) expressly makes the status of 'refugee' conditional upon the fact that the person concerned does not fall within the scope of Article12.
>
> …
>
> 109. Since the competent authority has already, in its assessment of the seriousness of the acts committed by the person concerned and of that person's individual responsibility, taken into account all the circumstances surrounding those acts and the situation of that person, it cannot — as the German, French, Netherlands and United Kingdom Governments have submitted — be required, if it reaches the conclusion that Article12(2) applies, to undertake an assessment of proportionality, implying as that does a fresh assessment of the level of seriousness of the acts committed.
>
> 110. It is important to note that the exclusion of a person from refugee status pursuant to Article12(2) of Directive 2004/83 does not imply the adoption of a position on the separate question of whether that person can be deported to his country of origin."

136. It is clear that the CJEU did not consider there was any requirement to undertake a proportionality assessment once the core elements of Article 12(2) were satisfied, which supports the respondent's contention that there was no discretion available to the 2015 Panel. We are not persuaded, for the reasons given, that the 2015 Panel erred on a point of law by failing to exercise a discretion not to exclude KU from the Refugee Convention.

NOTICE OF DECISION

We are satisfied that the 2015 Panel did not make an error that requires its decision to be set aside. The appellants' appeals are dismissed and the decision of the 2015 Panel stands.

Signed Date 8 May 2019

UTJ Dawson
Upper Tribunal Judge Dawson