IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006269

First-tier Tribunal No: PA/50687/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 4 September 2023

Before

UPPER TRIBUNAL JUDGE SHERIDAN

Between

The Secretary of State for the Home Department

Appellant

and

SG
(ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr Melvin, Senior Home Office Presenting Officer
For the Respondent: Mr Spurling, Counsel instructed by David Benson Solicitors Ltd

Heard at Field House on 24 July 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity. No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The appellant is the Secretary of State. However, for convenience I will refer to the parties as they were designated in the First-tier Tribunal.

2. By a decision promulgated on 21 June 2023 the Upper Tribunal set aside a decision of the First-tier Tribunal allowing the appellant's appeal against a

decision of the respondent dated 29 January 2021 ("the refusal letter"). I now remake the decision.

3. I heard comprehensive and well-thought out submissions from both Mr Spurling and Mr Melvin, for which I am grateful.

Introduction

4. The issue before me is whether the appellant is excluded from the protection of the Refugee Convention by operation of Article 1F(b).

5. Article 1F(b) provides:

> "The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> .....
>
> (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee"

6. There are two issues in dispute between the parties. The first is whether the appellant committed a serious crime. The second is whether the crime was non-political.

7. It is common ground that:

(a) the appellant is a citizen of Sri Lanka who was involved with the LTTE;

(b) in 2002 the appellant was arrested in Thailand for smuggling weapons that were found in a vehicle in which he was travelling and that, following his arrest, he pleaded guilty and was sentenced to 5 years in prison; and

(c) the appellant was returned to Sri Lanka by the Thai authorities where he was imprisoned.

8. The respondent's contention is that the appellant is excluded by Article 1F(b) because:

(a) smuggling weapons is a serious crime; and

(b) the offence was non-political because acts of terror are wholly disproportionate to any political motive and the procurement of weapons for the LTTE at a time when there was a ceasefire in Sri Lanka was "disproportionate to bringing about a democratic political change" (paragraph 31 of the refusal letter). In his skeleton argument Mr Melvin stated that the respondent "does not accept that smuggling arms for a proscribed terrorist organisation can be deemed a political act".

9. The appellant accepts that smuggling weapons is a serious crime but argues that he is innocent. He contends that he did not know that there were weapons in the vehicle (in which he was accompanying two other Sri Lankan nationals) and that he pleaded guilty, on the advice of his lawyer, in order to avoid a far longer sentence.

10. The appellant also argues that the crime he is said to have committed is political in nature.

11. For the reasons set out below, I am not satisfied that there are serious reasons for considering that the crime the respondent contends the appellant committed was non-political. Accordingly, I do not need to decide whether or not he committed the crime - as even if he did, the exclusion under article 1F(b) is not applicable.

A political crime for the purposes of Article 1F(b)

12. The leading authority on the meaning of "non-political" in Article 1F(b) is *T v Immigration Officer* [1996] UKHL 9; [1996] AC 742. Lord Lloyd gave the judgment with which the majority agreed. He stated at [786H-787C]:

> 'Taking these various sources of law into account one can arrive at the following definition. 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.
>
> 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.'

13. Applying the test described by Lord Lloyd, there are two questions to address. The first is whether the appellant committed a crime for a political purpose, such as to overthrow a government. The respondent's position is that the appellant was smuggling weapons for the LTTE to use in its conflict in Sri Lanka. This is clearly a political purpose and therefore the first condition is established. This is similar to *T*, where Lord Lloyd found that the appellant in that case satisfied the first condition because he was attempting to overthrow the government.

14. The second part of the test is to consider whether there is a sufficiently close link between the crime and political purpose. The respondent's case is that there is not, because the purpose of procuring weapons was to arm a terrorist organisation.

15. At the time the crime was committed (2002), the LTTE was a proscribed terrorist organisation: it has been proscribed since 2001. It does not necessarily follow from this, however, that the appellant's crime was non-political. This is because the LTTE did not operate solely by carrying out acts of terror; it was also involved in military action against armed forces. This was considered in *KJ (Sri Lanka) v Secretary of State for the Home Department* [2009] EWCA Civ 292 where it was stated:

> 37. The application of Article 1F(c) will be straightforward in the case of an active member of organisation that promotes its objects only by acts of terrorism. There will almost certainly be serious reasons for considering that he has been guilty of acts contrary to the purposes and principles of the United Nations.
>
> 38. However, the LTTE, during the period when KJ was a member, was not such an organisation. It pursued its political ends in part by acts of terrorism and in part by military action directed against the armed forces of the government of Sri Lanka. The application of Article 1F(c) is less straightforward in such a case. A person may join such an organisation, because he agrees with its political objectives, and be willing to participate in its military actions, but may not agree with and may not be willing to participate in its terrorist activities. Of course, the higher up in the organisation a person is the more likely will be the inference that he agrees with and promotes all of its activities, including its terrorism. But it seems to me that a foot soldier in such an organisation, who has not participated in acts of terrorism, and in particular has not participated in the murder or attempted murder of civilians, has not been guilty of acts contrary to the purposes and principles of the United Nations.

16. A similar observation about the LTTE was made by the Supreme Court in *R (JS) (Sri Lanka)* v Secretary of State for the Home Department [2010] UKSC 15, where it is stated:

> 27. Although I wondered at the hearing whether, realistically, the Secretary of State could properly not have found on the facts of this case "serious reasons for Page 17 considering" the respondent to be a war criminal, I have not thought it right to allow the Secretary of State's appeal on this basis. The plain fact is that, whatever view one takes on questions 2 and 3, the Secretary of State's reasoning in the decision letter is insupportable. It could not be said of the LTTE – nor even, on the available evidence, of its Intelligence Division – that as an organisation it was (it seems inappropriate in the light of recent events in Sri Lanka to continue speaking of the LTTE in the present tense) "predominantly terrorist in character" (Gurung para 105) or "an extremist international terrorist group" (para 18 of the UNHCR's Perspective, quoted in the same para 105). There was accordingly no question of presuming (consistently with Gurung) that the respondent's voluntary membership of this organisation "amount[ed] to personal and knowing participation, or at least acquiescence, amounting to complicity in the crimes in question" – as para 34 of the decision letter stated. Nor was the respondent's "command responsibility" within the organisation a basis for regarding him as responsible for war crimes. As Toulson LJ pointed out (para 123 of his judgment), the respondent's command was of a combat unit and there was never any suggestion here of article 28 liability. Nor, of course, as Stanley Burnton J noted in KJ (Sri Lanka), is military action against government forces to be regarded as a war crime.

17. The crime the respondent considers the appellant to have committed did not involve participating in or planning an act of terror. This distinguishes him from the appellant in *T*, who Lord Lloyd found was closely associated with an attack at an airport using indiscriminate means. Lord Lloyd found that the use of indiscriminate means meant that the link between the crime and political object was too remote.

18. I am satisfied that the link between the appellant's alleged crime and political object was not too remote as there is not a serious reason to consider that the weapons he is said to have smuggled would ultimately be used (or were intended for use) in a way that would involve indiscriminate killing or injury to the public. The LTTE at that time was an organisation involved in a wide range of activities (only some of which involved attacks resulting in indiscriminate killing or injury) and there is no reason to believe that the guns smuggled by the appellant were

intended for, or would be used for, terror rather than for a non-terror related purpose.

19. Accordingly, I am not satisfied that the respondent has established that there are serious reasons for considering that the appellant has committed a non-political crime. I am satisfied that the crime the respondent alleges the appellant committed was political, and therefore that the exclusion in Article 1F(b) is not applicable.

Notice of decision

20. The appellant's removal from the UK would breach the UK's obligations under the Refugee Convention and therefore his appeal against the respondent's decision to refuse his asylum claim is allowed.

D . Sheridan

Judge of the Upper Tribunal
Immigration and Asylum Chamber

25 August 2023

THE ERROR OF LAW DECISION

IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006269

First-tier Tribunal No: PA/50687/2021
IA/01903/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

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Before

UPPER TRIBUNAL JUDGE SHERIDAN
DEPUTY UPPER TRIBUNAL JUDGE JOLLIFFE

Between

The Secretary of State for the Home Department

Appellant

and

SG
(ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr Clarke, Senior Home Office Presenting Officer
For the Respondent: Mr Spurling, Counsel instructed by David Benson Solicitors Ltd

Heard at Field House on 27 March 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity. No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. This is an appeal by the Secretary of State. However, for convenience we will refer to the parties as they were designated in the First-tier Tribunal.

2. The appellant is a citizen of Sri Lanka born in April 1976 who claims to face a risk of persecution on account of his involvement with the LTTE. In a decision dated 29 January 2021 the respondent accepted that the appellant faces a risk of persecution in Sri Lanka but rejected his asylum claim on the basis that he was excluded from the protection of the Refugee Convention by operation of Article 1F(b). The respondent granted the appellant Restricted Leave.

3. The reason the respondent considered that Article 1F(b) was applicable was that in 2002 the appellant was arrested in Thailand for smuggling weapons (found in a vehicle he was travelling in); and, after pleading guilty, was sentenced to 5 years imprisonment. The respondent did not accept the appellant's claim that he was unaware of the weapons and had only pleaded guilty to avoid a far longer sentence.

4. The appellant appealed to the First-tier Tribunal where his appeal came before Judge of the First-tier Tribunal Easterman ("the judge"). In a decision dated 13 December 2022, the judge found that Article 1F(b) was not applicable and allowed the appeal.

Relevant Law

5. Article 1F(b) provides:

> "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."

6. The standard of proof, where it is alleged that an individual falls for exclusion under Article 1F(b), was considered by the Supreme Court in *Al-Sirri and DD (Afghanistan) v Secretary of State for the Home Department* [2012] UKSC 54. Paragraph 75 states:

> "75. We are, it is clear, attempting to discern the autonomous meaning of the words 'serious reasons for considering'. We do so in the light of the UNHCR view, with which we agree, that the exclusion clauses in the Refugee Convention must be restrictively interpreted and cautiously applied. This leads us to draw the following conclusions:
>
> (1) 'Serious reasons' is stronger than 'reasonable grounds'.
>
> (2) The evidence from which those reasons are derived must be 'clear and credible' or 'strong'.
>
> (3) 'Considering' is stronger than 'suspecting'. In our view it is also stronger than 'believing'. It requires the considered judgment of the decision-maker.
>
> (4) The decision-maker need not be satisfied beyond reasonable doubt or to the standard required in criminal law.
>
> (5) It is unnecessary to import our domestic standards of proof into the question. The circumstances of refugee claims, and the nature of the evidence available, are so variable. However, if the decision-maker is satisfied that it is more likely than not that the 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."

7. Shortly after *Al-Siri*, the Upper Tribunal decision in *AH (Article 1F(b) – 'serious') Algeria* [2013] UKUT 00382 (IAC) was reported. The headnote states:

> 1. In considering exclusion under Article 1F(b), the test is whether there are 'serious reasons to consider that the appellant is guilty of conduct that amounts to a serious non-political offence'. 'Serious' in this context has an autonomous international meaning and is not to be defined purely by national law or the length of the sentence. Guidance on the meaning of 'serious' in relation to Article 1F(c) may be found in the decision of the Supreme Court in Al-Sirri and another v Secretary of State for the Home Department [2012] UKSC 54 at paragraph [75]. Arts 1F(a) and (c) serve to illustrate the level of seriousness required to engage Article 1F(b); the genus of seriousness is at a common level throughout.
>
> 2. A claimant's personal participation in acts leading to exclusion under Article 1F(b) must be established to the ordinary civil standard of proof, that the material facts are more probable than not. The appellant's guilt need not be proved to the criminal standard. Personal participation in a conspiracy to promote terrorist violence can be a 'serious crime' for the purpose of Article 1F(b). Where the personal acts of participation by a claimant take the form of assistance to others who are planning violent crimes, the nature of the acts thereby supported can be taken into account. The relevant crime may be an agreement to commit the criminal acts (in English law a conspiracy), rather than a choate crime.

Decision of the First-tier Tribunal

8. The central issue in contention before the judge was whether the appellant was excluded from the protection of the Refugee Convention by operation of Article 1F(b). The judge directed himself three times as to the standard of proof in respect of Article 1F(b).

(a) In paragraph 9 the judge stated that the respondent had to prove her case "to a higher standard than on balance, although precisely how much more, is unclear".

(b) In paragraph 52 the judge stated that "the serious reasons for considering must be more than on the balance of probabilities, but need not be beyond the reasonable doubt".

(c) In paragraph 73, the judge stated, "What is clear from the authorities is that in order to exclude someone from refugee protection, one needs to be satisfied on more than a balance of probabilities that he has committed an offence which is serious."

9. The judge's consideration of the evidence and submissions concerning whether the appellant committed a serious crime in Thailand for the purposes of Article 1F(b) are set out in paragraphs 52 – 74. The judge concluded that the appellant had not committed a serious crime. The main reasons given were that: (a) it was plausible the appellant pleaded guilty in Thailand in order to avoid a significantly longer prison sentence; (b) the only evidence of the appellant committing the crime for which he was convicted was his guilty plea and subsequent explanation

for it; and (c) no evidence had been submitted on the question of whether the crime the appellant was convicted of in Thailand was one of strict liability such that the appellant would have been convicted even if unaware of the weapons.

Grounds of Appeal

10. Ground 1 submits that the judge applied too high a standard of proof. Relying on *Al-Sirri* and *AH (Algeria)*, the respondent submits that the judge erred by applying a standard of proof that was higher than the balance of probabilities.

11. Ground 2 argues that the judge failed to engage with the seriousness of the appellant's actual offending and instead focused on the lack of information about the offence for which he was convicted. Reference is made to the headnote to *AH (Algeria)*, where it is noted that "Serious in this context has an autonomous international meaning and is not to be defined purely by national law or the length of sentence". It is also submitted in ground 2 that the judge erred by failing to make findings on whether the crime was political or non-political.

Analysis

12. The judge made a very clear self-direction in the decision (repeated three times) that the burden was on the respondent to prove the case to a higher standard than the balance of probabilities. In paragraph 9 of the decision the judge referred to "a higher standard" and in paragraphs 52 and 73 the judge referred to the standard being "more than" the balance of probabilities. Mr Spurling was unable to identify any authority where a court or tribunal has described the standard of proof in these terms. It is certainly not the language used in *Al-Sirri* and *AH (Algeria)*.

13. Mr Spurling argued that, reading the decision as a whole, it is apparent that the judge applied the correct test; in that, in accordance with *Al-Sirri*, he recognised that a restrictive and cautious approach is required; and he addressed the question of whether there were serious reasons for considering that the appellant had committed a serious non-political crime in Thailand. We are not persuaded by this argument. The judge made a clear and unambiguous self-direction that the standard of proof was higher than the balance of probabilities and there is nothing in the decision to indicate that the judge did anything other than apply the test that he directed himself to.

14. Mr Spurling observed that twice in the decision (in paragraphs 65 and 68), when considering whether or not the appellant committed a crime, the judge made a finding of fact "on balance". He submitted that this indicates that the judge, in substance, applied the standard of "balance of probabilities" rather than a higher standard. The difficulty with this argument is that the language used by the judge (who in paragraph 65 used the phrase "even on balance" and in paragraph 68 stated "supposing for a moment I was satisfied on balance…") only serves to reinforce the view that the judge's overall assessment was carried out applying a higher standard then balance of probabilities. This argument also does not address the fact that the judge did not purport to make other findings of fact, or his overall assessment, applying the standard of "on balance".

15. Mr Spurling argued that a distinction can be drawn between the assessment of the severity of the crime and the assessment of whether or not the crime was committed. He argued that if the judge applied a higher standard it was only in the context of assessing the former. We are not persuaded by this argument for two reasons. First, the judge did not make this distinction. In fact, the judge was clear that a "higher" standard applied to all aspects of the Article 1F(b) issue. Secondly, the authorities do not support applying different standards to different issues arising under Article 1F(b).

16. We are satisfied that the judge applied the wrong standard of proof. We agree with Mr Clarke that this fundamentally undermines the decision such that it must be set aside. It is not therefore necessary for us to consider the respondent's second ground of appeal.

17. In accordance with paragraph 7 of the Practice Statement, and having regard to *AEB v SSHD* [2022] EWCA Civ 1512 and *Begum (Remaking or remittal) Bangladesh* [2023] UKUT 00046 IAC, we have decided that this case should be remade in the Upper Tribunal. This is because:

    (a) The parties have not been deprived of a fair hearing or of an opportunity to advance their case; and

    (b) The extent of further fact-finding for the decision to be remade is likely to be limited. This is because, although none of the findings of fact of the First-tier Tribunal can be preserved (in the light of the nature of the error of law we have identified), the remaking will concern only a narrow question: the applicability of Article 1F(b). Moreover, there is only a limited area of factual dispute given that it is common ground that the appellant was arrested and imprisoned in Thailand for smuggling weapons.

Notice of Decision

18. The decision of the First-tier Tribunal involved the making of an error of law and is set aside.

19. The decision will be remade at a resumed hearing in the Upper Tribunal .

Directions

The parties have permission to rely on evidence that was not before the First-tier Tribunal. Any such evidence must be filed with the Upper Tribunal and served on the other party at least fourteen days before the resumed hearing.

D. Sheridan

Judge of the Upper Tribunal
Immigration and Asylum Chamber

4.5.2023