Upper Tribunal

(Immigration and Asylum Chamber)

AA (Art 1F(a) – complicity – Arts 7 and 25 ICC Statute) Iran [2011] UKUT 00339(IAC)

THE IMMIGRATION ACTS

Heard at Manchester	**Determination Promulgated**
On 4 May 2011	**29 July 2011**

Before

MR C M G OCKELTON, VICE PRESIDENT

SENIOR IMMIGRATION JUDGE GRUBB

IMMIGRATION JUDGE COKER

Between

AKBAR AZIMI-RAD

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Ms M Plimmer, instructed by Jackson & Canter Solicitors

For the Respondent: Ms S Marsh, Home Office Presenting Officer

1. In establishing for the purposes of Art 1F(a) of the Refugee Convention that an individual was complicit under Art 25(3)(d) of the Rome Statute of the International Criminal Court ("ICC Statute") in crimes against humanity perpetrated by others in an organisation, it was necessary to consider all the circumstances of the appellant's involvement in that organisation in order to determine whether what the appellant did made a significant contribution to the organisation's ability to carry out crimes against humanity: R (on the application of JS) (Sri Lanka) v SSHD [2010] UKSC 15. (See also Joined Cases C-57/09 and C-101/09 Bundesrepublik Deutschland v B and D [2011] Imm AR 190).

2. However, in establishing this (wider) form of complicity liability under international criminal law it was not necessary to establish that the appellant's acts formed 'part of" a crime against humanity committed by others in the sense that the appellant's acts were of such a character as, in themselves, to fall within one or more of the categories of acts which if committed as part of a widespread or

systematic attack directed against any civilian population were capable of amounting to a crime against humanity under Art 7 of the ICC Statute.

DETERMINATION AND REASONS

1.

The appellant is a citizen of Iran who was born on 9 January 1984. He arrived in the United Kingdom on 3 April 2007 and claimed asylum the following day. On 22 June 2010, the Secretary of State refused to grant the appellant asylum under para 336 of the Immigration Rules HC 395 (as amended) and on 28 June 2010 made a decision to remove him as an illegal entrant to Iran by way of directions under paras 8-10A of Schedule 2 to the Immigration Act 1971. The appellant appealed against that latter decision to the First-tier Tribunal. In a determination sent on 20 August 2010, Immigration Judge Lambert allowed the appellant's appeal under Art 3 of the European Convention on Human Rights but dismissed his appeal on asylum and humanitarian protection grounds. The judge found that the appellant was excluded from the protection of the Refugee Convention by virtue of Art 1F(a) in that there were serious reasons for considering that he had been complicit in crimes against humanity as a member of the Basij (Nirouye Moqavemate Basij) which is a volunteer paramilitary force founded in 1979 by Ayatollah Khomeini whose mission is to maintain law and order and to enforce ideological and Islamic values in Iran.

2.

The appellant sought permission to appeal on the basis that the judge had erred in law in finding that the appellant was excluded from the protection of the Refugee Convention by virtue of Art 1F. On 14 September 2010, Senior Immigration Judge Freeman granted the appellant permission to appeal to the Upper Tribunal. Thus, the matter came before us.

Background

3.

The judge accepted much of the appellant's account and the underlying facts are no longer in dispute. The appellant was a member of the Basij in Iran which he had joined at the age of 12 in 1995. In 2003-4 he performed his military service with the Revolutionary Guard in Teheran. He was a committed and respected member of the Basij of some local rank. In fact, he was the commander in his village. In 2004 he received a "Basij of the year" award. The appellant had not personally been involved in acts of violence against Iranian civilians. However, he had witnessed such acts of violence when he and his men were seconded to patrol or man checkpoints in the nearby town of Miyaneh. There, however, he was not in command of his Basij colleagues.

4.

The appellant is a Shia Muslim of Azeri ethnicity. He provided helpful information to an Azeri friend, with whose politics he had some sympathy. The appellant gave his friend advance warning of the nights that he would be on duty so that his friend, in furthering his political activities, could avoid checkpoints manned by the appellant on behalf of the Revolutionary Guard. The appellant also identified to his friend a number of plain clothes Basij operating in Miyaneh so that he would know not to mention his activities to them. In March 2007, whilst at his uncle's home, the appellant received a phone call from a friend in his village telling him that the Etelaat were looking for him and had searched his house and the Basij base. He later heard that they had also searched the coffee shop that he owned. The appellant concluded that it must be because his friend had been arrested.

5.

Although the judge identified a number of discrepancies in the appellant's evidence, she nevertheless accepted the core elements of his account to be true. As a consequence, the judge found that he would return to Iran, which he had illegally left, without a passport and as a former member of the Basij who had departed suddenly after being suspected of having actively assisted dissident Aziris in their illegal activities. On the basis of that, the judge found that there was a real risk that the appellant would suffer serious ill-treatment by the Iranian authorities on his arrival at Tehran Airport in breach of Art 3 of the ECHR. Those factual findings were not challenged by the respondent in response to the grounds of appeal made under rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698). Ms Marsh, who represented the respondent before us, also did not seek to challenge those factual findings and the judge's decision to allow the appeal under Art 3.

6.
Before us, the sole issue raised by the parties was whether the judge had erred in law in finding that the appellant was excluded under Art 1F of the Refugee Convention.

The Appellant's Grounds

7.
Before us, Ms Plimmer advanced three arguments in support of her submission that the judge had erred in law in applying Art 1F to the appellant.

8.
First, she submitted that the judge had erred in law in finding on the evidence before her that the Basij were committing "crimes against humanity" falling within Art 7 of the Rome Statute of the International Criminal Court 2008 ("the ICC Statute"). In particular, Ms Plimmer submitted that the judge had been wrong to find that the Basij committed acts "as part of a widespread or systematic attack directed against any civilian population" that fell within the terms of Art 7 of the ICC Statute. We will refer to this as "Ground 1(a)".

9.
In her grounds of appeal, Ms Plimmer also argued that the judge had erred in applying Art 7 of the ICC Statute to the Basij on the basis that any attacks were directed only against civilians "seen to transgress the ideological and Islamic views laid down in Iranian law" and not against the population generally. Before us, Ms Plimmer no longer relied upon this argument. She accepted that it was sufficient that any such widespread or systematic attacks by the Basij were directed at this particular section of the Iranian population. We need say no more about this other than to note, in our view, Ms Plimmer was right not to pursue this argument which could not be sustained as a proper legal interpretation of Art 7 of the ICC Statute.

10.
Secondly, Ms Plimmer submitted that the appellant's activities on behalf of the Basij must be linked to acts amounting to crimes against humanity falling within Art 7 of the ICC Statute. In particular, these acts must be "part of" those crimes. On the evidence accepted by the judge, Ms Plimmer submitted that the appellant had never been involved in any acts that fell within Art 7 of the ICC Statute and thus his actions could not amount to a "crime against humanity" within Art 1F(a) of the Refugee Convention. We will refer to this as "Ground 1(b)".

11.
Thirdly, Ms Plimmer submitted that the judge had erred in law in assessing the appellant's "personal responsibility" within Art 25 of the ICC Statute for the acts committed by the Basij which – if the judge

were correct in making this finding – amounted to “crimes against humanity” within Art 7 of the ICC Statute. Ms Plimmer submitted that in assessing the appellant’s “personal responsibility” the judge had failed to carry out a proper assessment of the appellant’s circumstances (his actions and involvement with the Basij) in accordance with the approach set out in the Supreme Court decision of R (on the application of JS) (Sri Lanka) v SSHD [2010] UKSC 15, especially as set out by Lord Brown at para [30]. We will refer to this as “Ground 2”.

The Law

12.
We begin with the relevant legal provisions in (1) the Refugee Convention and so far as relevant, the Qualification Directive (Council Directive 2004/83/EC); (2) the ICC Statute; and (3) the relevant case law, in particular the Supreme Court decision in JS .

1. Art 1F

13.
The starting point is Art 1F of the Refugee Convention which sets out the circumstances in which an individual will be excluded from the protection of the Refugee Convention. Art 1F(a) provides, so far as relevant to this appeal, as follows:

“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 humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; ...”

14.
That provision is reflected in Art 12(2)(a) of the EU Qualification Directive.

2. The ICC Statute

15.
It is common ground in this appeal that the burden lies upon the Secretary of State to establish that Art 1F applies, namely that there are “serious reasons for considering” that the appellant has committed a crime against humanity (see Al-Sirri v SSHD [2009] EWCA Civ 222 per Sedley LJ at para [27]). That burden applies regardless of whether the Secretary of State issues a certificate under s. 55(1) of the Immigration, Asylum and Nationality Act 2006, as she did in this appeal, or not. The s.55 certificate merely requires the judge to determine whether Art 1F applies before considering any other aspects of the case and to dismiss the appeal on asylum grounds if it does (ss.55(3) and (4)).

16.
In determining what amounts to a “crime against humanity” the Supreme Court in JS accepted that the ICC Statute was the “starting point” (per Lord Brown at para [8]. See also SK (Article 1F(a) – exclusion) Zimbabwe [2010] UKUT 327 (IAC)). That was common ground between the parties before us and, as a result, the parties’ submissions focussed on the relevant provisions in the ICC Statute, namely Articles 7, 25 and 30. Those Articles deal respectively with the definition of “crimes against humanity” (Art 7), “individual responsibility” (Art 25) and “mental element” (Art 30).

17.
Before we set out the relevant part of those provisions, we should also refer to Art 28 which is headed “responsibility of commanders and other superiors”. This provision deals with the responsibility of a

military commander or person effectively acting as such for any crimes falling within the ICC Statute committed by forces under his or her command and control or effective authority and control. It was not part of the Secretary of State's case before the judge that the appellant as a commander of the Basij in his village was responsible for any acts of those under his command by virtue of Art 28. As will become clear shortly, the Secretary of State's case was that the appellant was complicit by virtue of his own acts in crimes against humanity committed by the Basij though not specifically by any members of the Basij whilst under his command.

"Crimes against humanity" (Art 7)

18.
Article 7 of the ICC Statute defines a "crime against humanity" in the following terms:

" **Article 7**

Crimes against humanity

1. For the purpose of this Statute 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(a) Murder;

(b) Extermination;

(c) Enslavement;

(d) Deportation or forcible transfer of population;

(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

(f) Torture

(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, on other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

(i) Enforced disappearance of persons;

(j) The crime of apartheid;

(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:

(a) 'Attack directed against any civilian population' means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack; ...

(e) ‘Torture’ means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions; ...

(g) ‘Persecution’ means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity ...”

19.
Consequently, a crime against humanity requires the “multiple commission of acts” falling within Art 7(1)(a)–(k) committed in furtherance of a state or organisational policy as “part of a widespread or systematic attack directed against any civilian population” with knowledge of that attack.

20.
The Secretary of State’s case, accepted by the judge, was that the Basij are, as part of or acting on behalf of the Iranian government, engaged in such a “widespread or systematic attack” against religious or ideological dissidents in Iran in that they murder, imprison, torture or engage in other inhumane acts intentionally causing great suffering or serious injury to the body or to the mental or physical health of civilians.

“Criminal responsibility” (Art 25)

21.
Article 25 sets out the circumstances in which an individual may be “criminally responsible” for a crime against humanity falling within Art 7. It provides as follows:

Article 25

Individual criminal responsibility

1. The Court shall have jurisdiction over natural persons pursuant to this Statute:

2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.

3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

(b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

(c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

(ii) Be made in the knowledge of the intention of the group to commit the crime ...”

22.
The meaning and application of Art 25 is at the heart of this appeal.

23.
In setting out in Art 25(3) the circumstances in which an individual may be criminally responsible for, inter alia, a crime against humanity, Art 25(3)(a)-(d) lay down, in effect, in descending order the level of involvement that an individual must have to be criminally responsible. Art 25(3) begins with an individual who actually "commits" the crime whether by himself or jointly with another (Art 25(3)(a)) and ends with an individual who merely "contributes to the commission" of the crime by a group of persons acting with a common purpose (Art 25(3)(d)).

24.
In addition to the ICC Statute, Art 12(3) of the Qualification Directive provides that, inter alia, Article 1F(a) applies not only to those who personally commit crimes against humanity but also those "who instigate or otherwise participate in the commission of [crimes against humanity]". In JS , the Supreme Court regarded Art 12(3) of the Qualification Directive as offering no more than a shortened version of the provisions found in Art 25(3) of the ICC Statute (see, especially per Lord Brown at [33] set out below).

"Mental Element" (Art 30)

25.
Before turning to the proper interpretation of these provisions following the Supreme Court's decision in JS , we set out Art 30 dealing with the "mental element" required for criminal responsibility. It is in the following terms:

" **Article 30**

Mental element

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.

2. For the purposes of this article, a person has intent where:

(a) In relation to conduct, that person means to engage in the conduct;

(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3. For the purposes of this article, 'knowledge' means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. 'Know' and 'knowingly' shall be construed accordingly."

26.
It is not disputed in this appeal that the appellant had the required mental element for complicity in a crime against humanity.

3. JS

27.

In JS , the Supreme Court offered authoritative guidance on the meaning of Art 25 of the ICC Statute and Art 12(3) of the Qualification Directive. Having set out the terms of Art 12(3) of the Qualification Directive, Lord Brown JSC set out the scope of that provision and Art 25(3) of the ICC Statute in the following terms:

“33. .... Article 12(3) does not, of course, enlarge the application of article IF; it merely gives expression to what is already well understood in international law. This is true too of paragraphs (b), (c) and (d) of article 25(3) of the ICC Statute, each of which recognises that criminal responsibility is engaged by persons other than the person actually committing the crime (by pulling the trigger, planting the bomb or whatever) who himself, of course, falls within article 25(3)(a). Paragraph (b) encompasses those who order, solicit or induce (in the language of article 12(3) of the Directive, ‘instigate’) the commission of the crime; paragraph (c) those who aid, abet, or otherwise assist in its commission (including providing the means for this); paragraph (d) those who in any other way intentionally contribute to its commission (paras (c) and (d) together equating, in the language of article 12(3) of the Directive, to ‘otherwise participat[ing]’ in the commission of the crime).”

28.
Lord Brown concluded that the Court of Appeal had been wrong to restrict the scope of Art 25(3) only to those who would be criminally liable (whether as perpetrators or accessories) under domestic criminal law. At para [38] of his judgment he said, referring to the judgment of Toulson LJ in the Court of Appeal at para [119], that:

“38. .... I have to say that paragraph 119 does seem to me too narrowly drawn, appearing to confine article 1F liability essentially to just the same sort of joint criminal enterprises as would result in convictions under domestic law. Certainly para 119 is all too easily read as being directed to specific identifiable crimes rather than, as to my mind it should be, wider concepts of common design, such as the accomplishment of an organisation’s purpose by whatever means are necessary including the commission of war crimes. Put simply, I would hold an accused disqualified under article 1F if there are serious reasons for considering him voluntarily to have contributed in a significant way to the organisation’s ability to pursue its purpose of committing war crimes, aware that his assistance will in fact further that purpose.”

29.
As Lord Brown acknowledged at para [36] of his judgment, to establish complicity in a crime covered by Art 7, and which act fell within Art 25, would nevertheless require proof of the necessary mental element under Art 30 of the ICC Statute, namely intent and knowledge. And, as he made plain at para [36]:

“36. ...if a person is aware that in the ordinary course of events a particular consequence will follow from his actions, he is taken to have acted with both knowledge and intent.”

30.
At para [35] of his judgment, Lord Brown acknowledged that Art 1F:

“Disqualifies those who make ‘a substantial contribution to’ the crime, knowing that their acts or omissions will facilitate it.”

31.
Lord Brown went on to accept that this would include a person in control of the funds of an organisation, “dedicated to achieving its aims through ... violent crimes” and to anyone contributing

to the commission of such crimes “by substantially assisting the organisation to continue to function effectively in the pursuance of its aims”.

32.
At para [30] of his judgment, which was relied upon by Ms Plimmer, Lord Brown set out a series of factors to be taken into account in assessing whether, on the basis of the appellant’s involvement with an organisation engaged in crimes against humanity, that individual could be said to be complicit and criminally responsible in those crimes. He said this:

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

33.
Lord Brown rejected the approach of the IAT in Gurung v SSHD [2003] Imm AR 115 that organisations could be divided into those that were, in effect, terrorist in nature, and those which were not, in determining an individual’s criminal responsibility because of his involvement in the organisation in question. Rather, Lord Brown concluded that the relevant factors he set out in paragraph [30] allowed the decision-maker to assess properly whether an individual’s membership and activities within an organisation that committed crimes against humanity resulted in his criminal responsibility on the basis of his complicity in those crimes (see para [29]). It was common ground before the Supreme Court that “mere membership” of an organisation would not be sufficient to bring an individual within the exclusion provisions (see paras [1] and [2]).

34.
Lord Hope DP agreed with Lord Brown. Mere membership of an organisation committed to the use of violence would not, in itself, necessarily exclude an individual from the protection of the Refugee Convention (see paras [43] and [49]). Like Lord Brown, Lord Hope concluded that the Court of Appeal had drawn too narrowly the scope of criminal responsibility for international crimes falling within Art 7 of the ICC Statute which was wider than those applicable in domestic criminal law (see paras [47] and [48]). Lord Hope agreed with Lord Brown’s test for complicity stated at para [38] of his judgment which we set out above. At para [49] Lord Hope said this in relation to Lord Brown’s test:

“49. .... The words ‘serious reasons for considering’ are, of course, taken from article 1F itself. The words ‘in a significant way’ and ‘will in fact further that purpose’ provide the key to the exercise. Those are the essential elements that must be satisfied to fix the applicant with personal responsibility. The words ’made a substantial contribution’ were used by the German Administrative Court, and they are to the same effect. The focus is on the facts of each case and not on any presumption that may be invited by mere membership.”

35.
Lord Kerr JSC similarly agreed with Lord Brown and the factors set out by Lord Brown at para [30] of his judgment in assessing an individual’s complicity in a crime falling within Art 7. However, at para [55] Lord Kerr cautioned against that list becoming prescriptive. He said this:

"55. I would be reluctant to accept that this list of factors provides the invariable and infallible prescription by which what I have described as the critical question is to be answered. What must be shown is that the person concerned was a knowing participant or accomplice in the commission of war crimes etc. The evaluation of his role in the organisation has as its purpose either the identification of a sufficient level of participation on the part of the individual to fix him with the relevant liability or a determination that this is not present. While the six factors that Counsel identified will frequently be relevant to that evaluation, it seems to me that they are not necessarily exhaustive of the matters to be taken into account, nor will each of the factors be inevitably significant in every case. One needs, I believe, to concentrate on the actual role played by the particular person, taking all material aspects of that role into account so as to decide whether the required degree of participation is established."

36.
At paras [57] and [58] Lord Kerr emphasised that the assessment required an examination of the individual's actual involvement in the organisation which committed crimes against humanity.

37.
Lords Roger JSC and Walker JSC expressed agreement with the judgment of Lords Brown, Hope and Kerr.

38.
With this legal framework in mind, we now turn to the specific grounds upon which Ms Plimmer relied in her submissions that the judge had erred in law in applying Art 1F to the appellant.

<u>Ground 1(a)</u>

39.
As we have indicated, the Secretary of State's case before the judge was not that the appellant had personally committed acts within Art 7 of the ICC Statute amounting to crimes against humanity but rather was criminally responsible (complicit) in crimes against humanity committed by the Basij in Iran. In order to establish that, the Secretary of State had to show that the Basij were engaged in acts falling within Art 7(1)(a) to (k) as part of "a widespread or systematic attack directed against any civilian population". That attack had to be "pursuant to or in furtherance of a State or organisational policy" to commit such attack.

40.
Ms Plimmer's submission is that the judge was not entitled to make a factual finding that the Basij were committing crimes against humanity in Iran on the basis of the background evidence submitted to the judge.

41.
The judge's reasoning can be found at paras 9.3-9.5 of her judgment. At para 9.3, the judge noted that the respondent relied heavily upon a 33-page report and analysis prepared in respect of the appellant by the Home Office War Crimes Unit dated March 2009. The judge noted that the report was "cogent, detailed and well-resourced". At para 9.4 the judge observed that:

"Ms Plimmer accepted on behalf of the appellant that the WCU report correctly identified the Basij generally as carrying out violent activities. However she argued that the Basij could not be said in terms of Article 7 of Rome Statute to be part of a widespread or systematic attack directed at the civilian population."

42.
The judge then went on in four bullet points in para 9.4 to deal with the background evidence as follows:

"• The fact that the Basij are 'not one and the same as' the Revolutionary Guard (E4) is immaterial because, as the report and an abundance of background material makes clear, the Basij forms an essential part of the Iranian security system of control of the civilian population and (E17) comes under the IRGC land unit command.

• The instances of independent acts by elements of the security forces referred to at E5 of the report do not mean that the Basij is not as an organisation essentially acting under the direction of the government and implementing a system of often violent control.

• It is well known that the Basij are involved in detentions and arrests without order or warrant from the authorities (E9). However it is equally well known (cf. eg US State Department Report F6; Human Rights Watch report 'Parallel Institutions' K2) that this forms part of the way in which in practice the Iranian regime operates its 'parallel' system of control. Arbitrary arrest and detention are common and the civilian authorities do not fully maintain effective control of the security forces. This does not mean that the Basij are not part of the system – indeed quite the opposite. Unpredictability and lack of accountability are essential elements of control by fear.

• The Appellant's own description of the Basij as 'in principle' being a body whose role is to enforce the law may accurately represent his personal view and may even be correct, but this does not mean that this is what happens in practice or that they act with restraint. As he himself makes clear in his statement (paragraphs 18-21) he had been reported for being 'soft' on several occasions, had been told by his superior officer to 'become harder' in his approach and he knew that his colleagues engaged in violence and ill treatment as part of their duties. Moreover he says that he was aware that civilian people generally were in fear of the Basij – he could see it in their demeanour towards him when he was on duty in the city."

43.
At para 9.5, on the basis of the appellant's evidence and the background material, the judge reached the following conclusion.

"9.5 Thus the Appellant's own evidence in addition to all the other background material before me leads me to conclude that the violent activities of the Basij in carrying out its perceived duties do form part of what can be regarded as a widespread or systematic attack designed to maintain control over the Iranian civilian population generally."

44.
Both in her grounds of appeal and submissions, Ms Plimmer offered little by way of direct challenge to the judge's finding in para 9.5 based upon the evidence which she had set out at para 9.4. At para 4 of her grounds, Ms Plimmer simply stated that there is

"considerable evidence within the respondent's own analysis at E1-E35 that individual members of the Basij have acted outside of the limited mandate and they acted independently of government authority and not necessarily as part of <u>systematic attack directed against the civilian population</u> ." (emphasis in original)

45.

In her oral submissions, Ms Plimmer repeated her generalised challenge to the judge's finding. Having done so, she frankly accepted that this was perhaps not her strongest point in challenging the judge's decision. We entirely agree.

46.
The judge had before her a detailed report from the Home Office War Crimes Unit (at Appendix E1-E35 of the respondent's bundle). As we have already set out, at para 9.4 the judge considered in some detail the terms of that report, setting out as it does the role played by the Basij in

"helping to maintain law and order; enforcing ideological and Islamic values and combating the 'western cultural onslaught'; assisting the [Iranian Revolutionary Guard Corps] in defending the country against foreign threats".

47.
The report identifies the Basij's important and embedded role within the Iranian state. It highlights their involvement in the control and suppression of dissidents and those involved in anti-Iranian demonstrations which have resulted in deaths, injuries and detentions and arrests without any order or warrant. Although there is reference to some members of the Basij acting "as vigilantes", the report also notes that the civilian authorities do not "fully maintain effective control of the security forces". The report is replete with references from other sources such as Human Rights Watch, Amnesty International and Freedom House, which deal in detail with the role played by the Basij and its activities directed against those who are perceived as dissidents or anti-Iranian. It also notes the link between the IRGC (the Iranian Revolutionary Guard Corps), which is described as a "leading instrument of the repression and dissent in Iran", and the Basij militia.

48.
In addition, the appellant's own evidence (at question 44 of his interview at B14-15) was that he witnessed "lashings, beatings with batons and sticks" by the Basij. He stated that "whoever is arrested by the Basij before going to court has to be beaten up". He went on to state that,

"If someone is reported, house would be raided, arrested by force. Taken to base and beaten up. Had to hand people over who would be beaten. I told my men I didn't beat people but my men did in my village – some of them."

49.
In other words, it was the appellant's own evidence that the Basij were engaged in unlawful acts of serious violence and unlawful detention against those whom they arrested (see also his answers at questions 40 and 41 of his interview). At question 47 he was asked whether he had seen anyone die. He replied, "I haven't seen anyone die but seen many unconscious after beatings and torture – some people not many".

50.
Ms Plimmer's task, as she frankly acknowledged, is a difficult one in establishing ground 1(a). She has to show that, on the evidence before the judge, the judge could not lawfully conclude that the Basij were engaged in acts falling within Art 7 of the ICC Statute: that is a perversity or irrationality challenge. The issue is not whether we, as a panel, would have reached the same conclusion as the judge. The issue is whether the judge could reasonably, on the basis of the evidence before her, reach the conclusion that she did. We are in no doubt that she could reasonably reach that conclusion based upon the background evidence and the appellant's evidence about his personal knowledge of the Basij in his own area.

51.
For these reasons, we reject ground 1(a) relied upon by Ms Plimmer. The judge did not err in law in concluding that the Basij in Iran commit crimes against humanity falling within Art 7 of the ICC Statute.

Ground 1(b)

52.
This ground seeks to establish that the judge erred in law because the acts committed by the appellant (which are not disputed) did not in themselves form "part of" the "widespread or systematic attack directed against any civilian population". As we understood Ms Plimmer's submission, identified not in her grounds but in her oral submissions, the appellant's acts were not "part" of any crime against humanity but were distinct and discrete from them. As a matter of law, those acts could not therefore result in his complicity in the Basij's crimes against humanity which, at this point in her submissions, must be taken to have been properly established on the evidence by the judge.

53.
Ms Plimmer's submission in our judgment obfuscates the proper relationship between Art 7 and Art 25 of the ICC Statute. In essence, her argument amounts to an assertion that, based upon the specific wording of Art 7, the appellant can only be responsible for the Basij's crimes against humanity if in fact his acts were of a character falling within Art 7(1).

54.
Clearly, if an individual is said to have personally perpetrated a crime against humanity or to have been involved in a joint enterprise that amounts to a crime against humanity, his acts will be "part of" that crime. Indeed, in the former instance, his acts will be those that amount to the crime itself. Likewise, it might be said that a person's complicity lies as a secondary party (an aider or abetter or other participant), his acts will be "part of" the ultimate crime. However, they need not be. For example the individual who provides the means (such as explosives or otherwise) to commit the crime may be complicit under Art 25 but it is difficult to see why the character of his act can be said to be "part of" the crime against humanity in the sense argued for by Ms Plimmer. Clearly, his act does not fall within the specific offences set out in Art 7(1) such as "murder" etc. His act is different in character from that of the perpetrator of the crime against humanity but he is nevertheless complicit (subject to establishing the required mental element under Art 30) under Art 25. Likewise, the person who "bankrolls" a terrorist organisation knowing its activities could well be complicit under Art 25 in their crimes against humanity (see, for example, Lord Brown at para [35] in JS). Yet, the character of his acts which give rise to his complicity in the resulting crime is different to those acts set out in Art 7(1) of the ICC Statute.

55.
What these examples go to show, in our judgment, is that Ms Plimmer's submission confuses what must be proved when complicity liability is alleged: first, that crimes against humanity are perpetrated or committed by others (that is that Art 7 applies); and secondly but distinctly, that the individual concerned has a sufficient involvement to give rise to complicity liability under Art 25(3)(d).

56.
In establishing that complicity liability, as we have already indicated, the Supreme Court in JS requires that all the circumstances of the individual's involvement in the organisation be taken into account. Mere membership alone will not suffice. However, if his involvement is such that (again, subject to establishing the requisite mental element under Art 30) he has, in the terms of Art 25(3)(d),

“contribute[d] to the commission ... of such a crime by a group or persons acting with a common purpose”, then that individual will be criminally responsible. In that sense, and in that sense alone, his involvement is “part of” the crime against humanity. However, his acts do not, and there is no suggestion to the contrary in JS , have to be in themselves of a character falling within Art 7. They must, as was recognised in JS , of course make a significant contribution to the organisation’s ability to carry out crimes against humanity (see also SK (Article 1F(a) – exclusion) Zimbabwe [2010] UKUT 327 (IAC)). But, in respect of the lowest level of the descending ladder of involvement in Art 25(3)(a)-(d), that contribution is very unlikely to be to any specific crime against humanity or in itself to have the character of one of the offences falling within Art 7 and so, as we apprehend Ms Plimmer’s submissions, could not be said to be a “part of” that crime. But, it is this very situation which the Supreme Court in JS envisaged as falling within Art 25(3)(d) as a form of complicity under international law in respect of a crime against humanity that went beyond accomplice liability under the domestic criminal law.

57.
In support of her submission that the appellant’s act must be “part of” a crime against humanity, Ms Plimmer referred us to the decision of the Canadian Supreme Court in Mugesera v Canada (Minister of Citizenship and Immigration) [2005] SCC 40.

58.
In that case, Mr Mugesera was an active member of a hard-line Hutu political party in Rwanda. In 1992 he spoke at a meeting of that party in Rwanda. In his speech the Canadian Government alleged that he had incited murder, genocide and hatred and had committed a crime against humanity because he had encouraged killing and violence against the Tutsi population in Rwanda. As a consequence, the Canadian government sought to deport the appellant, inter alia, on the basis that he was excluded from the protection of the Refugee Convention because he had committed a crime against humanity. The Supreme Court of Canada upheld the decision of the Immigration and Refugee Board (Appeal Division) which itself upheld an Adjudicator’s decision that the appellant had been guilty of crimes against humanity. We restrict our consideration of the court’s decision to that issue although other bases were relied upon under the Canadian domestic legislation as a basis for permitting his deportation. The Supreme Court also found that Mr Mugesera had committed the crimes of incitement to murder, genocide and hatred under the Criminal Code RSC 1985.

59.
The Supreme Court in a single judgment dealt at some length with the issue of whether the appellant had committed a crime against humanity at paras [112]-[179]. As we understand Ms Plimmer’s submissions, she relied upon that part of the judgment at paras [164]-[171] which addressed the question of “what does it mean for an act to occur ‘as part of’ a systematic attack?”

60.
In that case, mirroring Ms Plimmer’s submission in this case, the appellant argued that Mr Mugesera’s speech was not a “part of” the systematic attack occurring against Tutsis in Rwanda in the early 1990s. At para [164], the court observed that “purely personal crimes” did not fall within the scope of crimes against humanity. Even if “a widespread or systematic attack” on a civilian population is established, the court noted that “a link must be established between the act and the attack which compels international scrutiny” (at para [164]). To this extent, the court said (at para [166]) that “an act must be part of a pattern of abuse or must objectively further the attack”. And, at para [167], the court stated that “the act must further the attack or clearly fit the pattern of attack, but it need not comprise an essential or officially sanctioned part of it”. On the facts, the court found (at para [169])

that, given the circumstances in Rwanda at the time, Mr Mugesera's speech "not only objectively furthered the attack, but also fitted into a pattern of the abuse prevailing at that time".

61.
We accept, of course, that decisions of the highest courts in other jurisdictions relevant to our decision are entitled to due respect. We, however, approach the decision of the Supreme Court of Canada in Mugesera with some caution in helping us resolve the issue raised by Ground 1(b).

62.
First, it was the only decision of a foreign jurisdiction to which we were referred by Ms Plimmer. She was not able to provide us with the jurisprudential context of this case decided in 2005. It is, of course, a decision of the highest court in Canada. However, Ms Plimmer was not able to tell us whether there were any other relevant decisions of the Supreme Court or, indeed, of other courts within the Canadian system such as the Federal Court of Appeal which impacted upon her submission and, possibly, which might explain or gloss the Supreme Court's decision.

63.
Secondly, the Canadian Supreme Court was undoubtedly interpreting its own domestic legislation. Certainly, a definition of a "crime against humanity" is set out in ss.7(3.76) and (3.77) of the Criminal Code . In addition, at least on one reading of the case, the Supreme Court was enquiring into the liability of Mr Mugesera as an accomplice to a crime against humanity. However, although the court cited a number of decisions from international tribunals (particularly the International Criminal Tribunal on Yugoslavia), complicity liability in Canadian domestic criminal law which, on the face of it the Supreme Court was seeking to apply, is derived from s.21 of the Criminal Code , which may well not reflect the "wider" complicity liability in Art 25(3)(d) of the ICC Statute considered by the UK Supreme Court in JS .

64.
Thirdly, it is, however, at least arguable that in considering the issue of whether Mr Mugesera's act was as "part of" a systematic attack being perpetrated against the Tutsi population in Rwanda, the Canadian Supreme Court may in truth have been dealing with his liability as if he were a perpetrator of a crime against humanity which, in our terms, fell within Art 7 of the ICC Statute. We are far from clear why the court considered this to be relevant if Mr Mugesera's criminal responsibility was being asserted by the Canadian Government on the basis of his complicity in the criminal acts of others. We are, however, as we have said, not entirely clear as to the precise jurisprudential basis on which the Supreme Court determined that Mr Mugesera was guilty of a crime against humanity.

65.
In any event, it does not seem to us that the case provides any material support to Ms Plimmer's submissions. As is clear from the parts of the judgment we have already quoted, the court required that the appellant's act (namely his 'hate speech') either furthered the 'widespread or systematic attack' or fitted 'the pattern' of [that] attack" (see para [167] of the judgment). Principally, the court's approach was designed to ensure that "purely personal crimes", potentially falling within the category of acts amounting to crimes against humanity, were not included within that category unless they were connected with ("part of") a widespread or systematic attack (see para [164]). In our view, the court's decision is entirely consistent with the approach that we have set out above as the correct one in determining whether an individual is criminally responsible on the basis of his complicity by virtue of Art 25(3) of the ICC Statute. Taken overall, Mr Mugesera's actions were such as to show (subject to

establishing mens rea) that he had contributed in a significant way to the crimes against humanity being committed against the Tutsi population in Rwanda.

66.
For these reasons, nothing we have read in the decision in Mugesera leads us to conclude that there is any foundation in ground 1(b) relied upon by Ms Plimmer.

67.
For these reason, we reject ground 1(b) relied upon by Ms Plimmer in the way that it was argued. Unless Ms Plimmer can make good ground 2, there is no basis upon which she can succeed in establishing that the judge erred in finding that the appellant's acts made him complicit in crimes falling within Art 7 of the ICC Statute.

Ground 2

68.
We turn then to ground 2. Put in stark terms, Ms Plimmer submitted that the judge had failed explicitly to set out the factors found in para [30] of Lord Brown's judgment in JS . While she ultimately accepted that this was not a checklist, it was a helpful starting point and she submitted that it was unclear from the determination whether the judge had considered all relevant matters in finding that the appellant was complicit in the crimes against humanity committed by the Basij. She further relied upon the judgments of Lords Hope and Kerr which emphasised the need for a careful consideration of each individual's circumstances in assessing whether or not they were excluded under Art 1F.

69.
We set out earlier the seven factors set out by Lord Brown in his judgment at para [30]. As he accepted, those factors were "principally (in no particular order)" to be taken into account in assessing an individual's criminal responsibility for another's commission of a crime falling within Art 7 of the ICC Statute. He gave no indication that these are intended to be exhaustive or that they are necessarily relevant in every instance. Patently, the latter could not be the case. Indeed, that was the express view of Lord Kerr who, although he accepted the list of factors, noted that they could not provide "the invariable and infallible prescription" to determine the answer to the question whether a person was a knowing participant or accomplice in the commission of a crime falling within Art 7 (see para [55] of his judgment). There is no indication in the judgment of Lord Hope that he regarded the factors as prescriptive. As we have seen, Lords Roger and Walker agreed with Lords Brown, Hope and Kerr.

70.
In our judgment, the factors set out in Lord Brown's judgment at para [30] when relevant should be considered by a judge in assessing an individual's complicity in another's crime falling within Art 7. Those factors are, however, neither prescriptive nor necessarily complete. As all the Justices noted, it is crucial in determining whether a person is excluded under Art 1F from the protection of the Refugee Convention on the ground of his complicity in an international crime, that all the individual circumstances are considered: no more and no less. Thus, Ms Plimmer can only succeed in ground 2 if she can show that the judge materially failed to consider all the appellant's individual circumstances.

71.
Dealing with ground 1(a) above, we set out para 9.4 of the judge's determination in which she considered the nature and activities of the Basij. At paras 7.2 and 7.3, the judge set out the

appellant's evidence concerning his recruitment and membership of the Basij. At para 7.3 she noted his involvement in the following terms:

"7.3 His case is that he was promoted within the Basij because of his positive religious and personal influence. He describes his motivation as being primarily religious and the desire to be closely involved in the Islamic activities of his local community. The bulk of his work was within his own village where he was known and respected and where violence would not have occurred or been condoned. He was aware of and witnessed, but avoided participating in, serious ill-treatment perpetrated by the Basij against civilians outside the village."

72.
At para 9.6, drawing the evidence together, the judge dealt further with the appellant's involvement in the Basij before reaching her finding that he had contributed "in a significant way to the Basij's ability to operate and therefore to pursue its purpose of committing crimes against humanity as defined by the Rome Statute". The judge said this:

"9.6 Ms Plimmer fairly acknowledged that the Appellant was in difficulty so far as the mental element required under Article 1F was concerned. The Appellant was on his own evidence a committed and respected member of the Basij of some local rank. He accepts that his participation was on a voluntary basis. He cannot escape the definitions of complicity identified in paragraph 9.2 above by stating that he did not agree with or actively take part in acts of violence. This is because he nevertheless continued to turn up for work, to turn a blind eye to violence and ill treatment that occurred when he was on duty and to command others in his group whom he knew used violence. In doing so I find that he did contribute in a significant way to the Basij's ability to operate and therefore to pursue its purpose of committing crimes against humanity as defined by the Rome Statute. I also find that he must have been well aware that his assistance in the functioning of the Basij would further that purpose. He has admitted as much, in saying as a part of his case that he began after 2006 to 'question the choices he had made'."

73.
As the latter part of that paragraph makes clear, the judge correctly directed herself on the basis of the test to be applied as set out by Lord Brown in para [38] of his judgment in JS . Indeed, in para 9.2 she sets that test out in full. There can be no doubt that the judge correctly directed herself in law.

74.
We are in no doubt that the judge had fully in mind all the circumstances of the appellant. She took into account how he had joined the Basij and the basis upon which he remained a member for eleven years, including three as a commander in his village. The evidence of the appellant before the judge was unequivocal in regard to his involvement. Although he did not himself carry out beatings, lashings or unlawful detention of civilians, he accepted that his men did so whilst under the command of the IRGC and that he handed over individuals whom he knew would be subject to serious ill-treatment when detained and, to use his own words at interview, subject to "torture". The judge no doubt had in mind that the appellant remonstrated with his men when they returned to his village after they had committed acts of serious ill-treatment. The appellant admitted that he "closed his eyes" to abuses by others (see question 38 of his interview).

75.
The evidence before the judge was plainly that the appellant's complicity, if any, was based not merely on his membership of the Basij. He was a local commander and although he had not committed any acts of serious ill-treatment himself, his own evidence was – in reality – that he had been directly

complicit in them when he had handed individuals over, knowing that they would be seriously ill-treated. He clearly, on his own evidence, had full knowledge of the Basij's activities. Given this evidence, it was in our judgment properly open to the judge to find that the appellant was complicit in crimes against humanity by the Basij by virtue of Art 25(3)(d) in that there were serious reasons for considering that he had voluntarily contributed in a significant way to the Basij's ability to commit crimes against humanity.

76.
It was not suggested before the judge, nor was it before us, that the appellant lacked the required mental element.

77.
Accordingly, the judge did not err in law in making the finding that the appellant was complicit in crimes against humanity and we reject ground 2 relied upon by Ms Plimmer.

Decision

78.
For all these reasons, the judge did not err in law in finding that the appellant was excluded from the protection of the Refugee Convention by virtue of Art 1F(a) of that Convention. The decision to dismiss the appeal on asylum grounds stands.

79.
Further, the decision to allow the appeal under Art 3 also stands.

80.
The appeal to the Upper Tribunal is dismissed.

Signed

Senior Immigration Judge Grubb

Judge of the Upper Tribunal