Upper Tribunal
(Immigration and Asylum Chamber)

Youssef (Refugee Convention – Article 1F(c)) [2016] UKUT 00137 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26 November 2015	.....

Before

UPPER TRIBUNAL JUDGE ALLEN

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

HANY YOUSSEF

(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Mr A Mackenzie, instructed by Birnberg Peirce & Partners

For the Respondent: Mr A O'Connor QC instructed by the Government Legal Department

For a person to be excluded from refugee protection under Article 1F(c) of the Refugee Convention on the basis that they knowingly incited and encouraged acts contrary to the purposes and principles of the United Nations it is not necessary to show that such acts have actually been committed or attempted.

DECISION AND REASONS

1. The appellant is a national of Egypt . We note that an earlier anonymity order was rescinded on 5 May 2015, on the appellant's request. In a decision dated 26 November 2012 the respondent decided that he should be excluded from the protection of the Refugee Convention under Article 1F (c) , and also from humanitarian protection in accordance with paragraph s 33 6 and 339D of HC 395. I t was also decided that he would currently be at risk of torture or inhuman or degrading treatment or punishment in breach of Article 3 of the European Convention on Human Rights if he were to be returned to Egypt at the present time, and as a consequence he was granted limited leave to remain.

2. He appealed against that decision and that appeal was allowed by a panel of the First-tier Tribunal. A subsequent challenge to that decision was successful be for e a panel of the Upper Tribunal, which found an error of law in the First-tier Tribunal's decision in its application of the test required in respect of Article 1F(c). A copy of that decision is attached to this judgment. The Upper Tribunal directed that the appeal should remain in the Upper Tribunal and hence the hearing before us today. As a consequence of a direction made by the Upper Tribunal, the respondent clarified, on 10 August 2015, the essence of her case , which is : that the appellant has knowingly incited and encouraged acts of international terrorism contrary to the purposes and principles of the United Nations and as a consequence he is excluded under Article 1F(c) from the protection the Convention would otherwise afford him.

3. The essence of the appellant's history is set out at paragraph s 3 to 5 of Mr Mackenzie's skeleton argument. The appellant claimed asylum on 6 May 1994 on the basis that he had been a defence lawyer in Egypt , working on behalf of political prisoners, and had been a political activist in his own right. He was detained and tortured on two occasions in 1981 and 1982. I n 1983 he was pressured by the S tate to speak out against his clients and when he refused to do so his office was destroyed and his files were stolen. He has been in the United Kingdom since 6 May 1994. He claimed asylum on arrival. On 13 September 1998 he was detained under the Prevention of Terrorism (Temporary Provisions) Act 1989, released four days later but rearrested on release on the basis that his detention pending a decision on his asylum claim was necessary in the interests of national security. On 23 December 1998 his claim for refugee status was rejected. The respondent acknowledged that his case was one which might ordinarily have led to a grant of asylum, but declined to do so on the basis that the appellant had been involved in terrorist activity. The UK Security Services assess ed him as being a senior member of Egyptian Islamic Jihad. On 18 April 1999 it was announced that he had been sentenced by an Egyptian military court to life imprisonment with hard labour, as one of the leaders of a revolutionary organisation. He has always denied these charges. His contention is that the conviction was tainted by the probable use of evidence obtained by torture. The rest of his immigration history is set out in detail at paragraphs 17-20 of the judgment of the Court of Appeal at [2014] EWCA Civ 1082. The essence of the conduct relied on b y the respondent to justify exclusion is that the appellant has incited and encouraged acts of terrorism, in particular, sermons and other ma terial that has been published o n the internet.

4. In essence there are two central issues before us, the latter contingent on the former. The first is a question of law. Much of the law in relation to this case is common ground, and we will set out that law shortly. The point of contention is, in essence the matter set out at paragraph s 29 to 33 of Mr Mackenzie's skeleton argument as amplified by him in oral submissions. This is the argument that, in contending that the appellant "knowingly incited and encouraged" acts contrary to the purposes and principles of the United Nations, it is necessary to show that such acts have actually been committed or attempted. Mr O'Connor QC on behalf of the respondent disagrees entirely with this submission. If Mr Mackenzie is right, there is no need to go and consider the further issue, which we may for convenience describe as the evidential issue, that is whether the evidence relied on by the respondent (it being accepted that the respondent cannot show that relevant acts have actually been committed or attempted as a consequence of what has been said by the appellant) amounts to knowing incitement and encouragement to commit act s contrary to the purposes of the principles of the United Nations .

The Law

5. Article 1F of the Refugee Convention provides 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)
h e has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make prov ision in respect of such crimes;

(b)
h e has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c)
h e has been guilty of acts contrary to the purposes and principles of the United Nations.”

6. Article 12 of Council Directive 2004/83/EC (“the Qualification Directive”) reproduces the terms of Article 1F with slight modifications . For our purposes the relevant provision i s Article 12(2)(c) which states as follows

“ (c) h e 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.”

7. The Qualification Directive was transposed into United Kingdom Law by the Refugee or Person in Need of International Protection (Quali fication) Regulations 2006 (SI2 006/2525).

8. Also relevant to note is section 54 of the Immigration, Asylum and Nationality Act 2006 (“the 2006 Act”). This provides as follows:

“(1) In the construction and application of Article 1F(c) of the Refugee Convention the reference to acts contrary to the purposes and principles of the United Nations can be taken as including, in particular –

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

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

(2) In this section –

‘t he Refugee Convention’ means the Convention relating to the status of Refugees do ne at Geneva on 28 July 1951, and

‘terrorism’ h as the meaning given by s ection 1 of the Terrorism Act 2000.”

9. In its decision in Al-Sirri v Secretary of State for the Home Department [2012] UKSC 54 , the Supreme Court provided helpful guidance on the nature and ambit of Article 1F(c). Having considered a number of authorities including Pushpanathan v Canada, Minister of Citizenship and Immigration (Canadian Council for Refugees I nterve ning) [1998] I S CR 982 and Bundsrepublik Deutschland B and D (joined cases C-57/09 and C-109/09), [2011] Imm AR 190, the court set out some conclusions as to the correct approach to Article 1F(c) as follows:

“ 16. In our view , this is the correct approach. T he a rticle should be interpreted restrictively and applied with caution. There should be a high threshold ‘defined in terms of the gravity of the act in question, the manner in which the act is organised, it s international impact and long- term objectives , and the implication for international peace and security’. And there should be serious reasons for considering that the person concerned bore individual responsibility for acts of that character.”

10. The court went on at paragraph 36 to emphasis that it is clear that the phrase “a cts contrary to the purposes and principles of the United Nations ” must have an autonom ous meaning, emphasising that it could not be the case that individual member states were free to adopt their own definitions. Guidance given by the UNHCR was not binding but should be accorded considerable weight. The court endorsed what had been said by Sedley LJ in the Court of Appeal [2009] EWCA Civ 222 that: “ the adoption by s ection 54(2) of the 2006 Act of the meaning of terrorism contained in the 2000 Act has where n ecessary to be read down in an a rticle 1F(c) case so as to keep i ts meaning within the scope of a rticle 12(2)(c) of the Directive”.

11. The court thought it appropriate to adopt paragraph 17 of the UNHCR guidelines:

“Article 1F(c) is only triggered in extreme circumstances by activity which attacks the very basis of the international community’s co-existence. Such activity must have an international dimension. Crimes capable of a ffecting international peace, security and peaceful relations between states, as well as serious and sustained violations of human rights would fall under this category.”

12. At paragraph 39 the Supreme C ourt went on to note that the essence of terrorism was the commission, organisation, incitement or threat of serious acts of violence against persons or property for the purpose of intimidating a population or compelling a government or international organisation to act or not to act in a particular way. The court thought it was very likely that inducing terror in the civilian population or putting such extreme pressures upon a government would also have the international repercussions referred to by the UNHCR.

13. Subsequently, in its attempt to discern the autonomous meaning of the words “serious reasons for considering” the court drew the following conclusions, at p aragraph 75:

“(1) ‘S erious r easons’ 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 decisio n-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 t o 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.”

14. It is also relevant to note what was said about individual responsibility at paragraph 15 in Al-Sirri . The court said that in establishing that there are serious reasons for considering that the person concerned had individual responsibility for acts within the scope of Article 1F(c), this requires an individualised consideration of the facts of the case, which will include an assessment of the person's involvement in the act concerned, his mental state and possible grounds for rejecting individual responsibility. As a general proposition, individual responsibility arises, it was said, where the individual committed an act within the scope of Article 1F(c) or participated in its commission in a manner that gives rise to individual responsibility, for example through planning, instigating or ordering the act in question, or by making a significant contribution to the commission of the relevant act, in the knowledge that the act or o mission would facilitate the act.

15. Mr Mackenzie argued that exclusion must be based on an intention not only to carry out or contribute to a particular act but also to carry out or contribute to an act of a quality which bring s it within Article 1F. He went on to argue that the Supreme Court in Al-Sirri c ould not have been indicating that incitement falling short of active involvement in a completed or attempted crime could come within Article 1F(c).

16. In t his regard Mr Mackenzie attached weight to the position in intern ational criminal law, and to what was said by the Supreme Court in R (on the application of JS) (Sri Lanka) v Secretary of State for the Home Department [2010] UKSC 15, which is a case concerned with Article 1F(a) of the Refugee Convention, and therefore, also Article 12(2)(a) of the Qualification Directive. Mr Mackenzie contra sted the situation in English domest ic law under which soliciting, inducing or inciting an offence would each constitute an "auxiliary" or "inchoate" offence, regardless of whether any primary offence was committed or attempted, with the position under the Rome Statute of the International Criminal Court (hereafter the ICC Statute) which makes it clear that under Article 25(3)(b) ordering, soliciting or inducing the commission of a crime within the jurisdiction of the International C rimin al C ourt only give s rise to individual criminal responsibility if a crime in fact occurs or is attempted. The same, he says, is true under sub-paragraph s (c) and (d) in respect of aiding and abetting or in any other way contributing. Mr Mackenzie contrasts this with the situation in relation to genocide in respect of which it is clear from (e) of Article 2 5(3) that an offence is committed where a person directly and public incites others to commit genocide, without any reference to genocide actually having to be committed or attempted.

17. At paragraph 8 in JS Lord Brown endorse d the view of T o ulso n LJ in the Court of Appeal [2009] EWCA Civ 364 at paragraph 115, that the ICC Statute should now be the starting point for considering whether an applicant is disqualified from asylum by virtue of Article 1F(a).

18. Mr Mackenzie, of course, anticipa ted the argument that J S and its reliance on Article 25 of the ICC Statute was concerned with Article 1F(a) rather than 1F(c). He argued that there were four particular reasons why what was said by the Supreme Court in JS in this context was equally applicable to Article 1F(c) cases.

19. The first of these came from what was said by the Supreme Court in JS . When Lord Brown spoke at paragraph s 33 to 40 of his judgment concerning the correct approach to Article 1F this was not qualified by reference to 1F(a) in particular. At paragraph 33 of JS Lord Brown noted the ambit of Article 1F, referring to Article 12(3) of the Qualification Directive which we have set out above and also paragraphs (b), (c), and (d) of Article 25(3) of the ICC Statute, each of w hich, as he said, recognises that criminal responsibility is engaged by persons other than the person actually committing the crime. At paragraph 34 he referred also to the Statute of the International Criminal

Tribunal for the former Yugoslavia (ICTY) and the definition there of individual criminal responsib i lity. He noted the width of these provisions. He continued to refer to Article 1F rather than limiting what he said to Article 1F(a) at paragraph 35 and the fact that it disquali fied those who made " a substantial contribution to" the crime, knowing that their acts or omissions will facilitate it. He bo r e in mind also what had been said by the ICTY Chamber in Tadic [1999] 9 IHRR 1051 that mens rea is defined in a way which recognises that when the accused is participating in a common plan or purpose not necessarily to commit any specific or identifiable crime but to further the organisation ' s aims by committing Article 1F crimes generally, no more need be established than that they had personal knowledge of such aims and intended to contribute to their commission (at paragraph 37) . Mr Mackenzie also referred to what was said by Lord Hope at paragraph 49. H e noted t hat the words "serious reasons f or considering" were of course taken from Article 1F itself and that the words "in a significant way" and "will in fact further that purpose" provided the key to the exercise and were the essential elements that were required to be satisfied to fix the applicant with personal responsibility.

20. We do not see this as a basis for supporting Mr Mackenzie's argument. We agree with Mr O'Connor that the use of Article 1F in these parts of the judgments in JS are effectively shorthand. That can in part be seen from what is said at paragraph 37 where there is reference to "Article 1F crimes generally". 1F(c) is not of course concerned with crimes although we accept that the conduct falling within 1F (c) may amount to criminal conduct but it is not a prerequisite , and it seems to us clear that the reference at paragraph 37 f or example is a reference to 1F(a) and perhaps 1F(b) also since both of those are concerned with crimes. So we do not accept that the references to Article 1F in JS can be taken as clearly intending the personal responsibility elements to apply to all limbs of Article 1F, as Mr Mackenzie argued.

21. His second argument in this respect was that when one examines the structure of Article 12 of the Qualification Directive it is clear that Article 12(3), applying paragraph 2 as it does to persons who instigate or otherwise participate in the commission of the crimes or acts mentioned therein is applicable to all three limbs of Article 12. However we do not consider that it follows from the fact that paragraph 12(3) of the Qualification Directive applies to all of Article 12(2) that the same r ules on secondary liability apply to all three limbs of Article 12(2). All paragraph (3) does in effect is to e xtend the applicability of Article 12 (2) to people instigating or otherwise participating in the commission of the crimes or acts mentioned in Article 12(2) , but that says nothing that could justify the conclusion that the secondary liability provisions apply in the same the way to all three limbs of Article 12(2).

22. Nor do we agree with the further argument that it would be surprising if different elements of secondary liability were applicable to the three limbs of Article 12(3), given the fact that as is clear, for example from paragraph 3 of Al-Sirri , a particular act may fall within more than one of the three categories . I n particular terrorism, which is relevant in the case before us, may be both a "serious non-political crime" and an act "contrary to the purposes and principles of the United Nations".

23. The point of distinction as it seems to us, is the distinction between crimes and other acts. Article 1F(a) and (b) are both concerned with crimes and it is not surprising therefore that r ules emanating for example from the ICC Statute should be regarded as applicable to both of those limbs, though applicability to 1F(b) must be a matter in our view for future litigation since JS was concerned with 1F(a) only. But t he fact that there may be an overlap does not in our view justify the conclusion that there is anything surprising or curious about the fact that different elements of secondary liability may apply to the different heads under Article 1F bearing in mind the different types of matter with

which they are concerned. The fact that a particular act may fall within 1F(c) and at the same time fall under (a) or (b) does not in our view invest it with the necessarily criminal character of a kind which would require incorporating the ICC Statute provisions into our assessment of the Rules pertaining to 1F(c).

24. Nor do we accept Mr Mackenzie's fourth point that the fact that what was set out at paragraph 15 in Al-Sirri was said at the end of that paragraph to be consistent with the approach adopted by the Supreme Court in JS means that the assimilation argued for by Mr M ackenzie is made out. W e read the last sentence of paragraph 15 in Al-Sirri as doing no more than noting the consistency of the approach in emphasising the need for an individualised assessment to establish individual responsibility with what is said at paragraphs 33 to 39 in JS which is similarly concerned with "individual criminal responsibility " , as referred to at paragraph 34 and the final sentence of paragraph 38, summarising the court's conclusions and emphasising the voluntary contribution by the person in a significant way to the organisation ' s ability to pursue its purpose of committing war crimes. That in our view is far from being an endorsement of the argument that the ICC Statute approach is applicable in the context of Article 1F(c). The latter, as we have said, is not a provision concerned with the commission of a crime, and we do not accept Mr Mackenzie's argument that whether on the basis of what was said in JS or on any other basis can it properly be said to be a requirement of Article 1F(c)'s applicability that it is necessary to show anything beyond incitement and /or encouragement of acts of international terrorism without such acts having to be shown to have taken place.

25. The further issue, in light of our conclusions on the point of law, that we have to consider is whether the respondent has shown that there are serious reasons for considering that the appellant has knowingly incited and encouraged acts of international terrorism contrary to the purposes and principles of the United Nations. As was noted at paragraph 37 in Al-Sirri , there is as yet no internationally agreed definition of terrorism, bu t as the court pointed out at paragraph 39, as we have set out above, it is very likely that inducing terror in a civilian population or putting such extreme pressures upon a government would also have the international repercussions referred to by the UNHCR at paragraph 17 of its guidelines which were adopted by the court at paragraph 38. We have also set out above paragraph 75 from Al-Sirri containing the Supreme Court's guidelines as to the proper approach in discerning the autonomous meaning of the words "serious reasons for considering". In this regard it is also relevant to note that, as was said by Stanley Burnton LJ in KJ (Sri Lanka) v SSHD [2009] EWCA Civ 292 paragraph 34 , it was not suggested that acts of a military nature committed by an independence movement against military forces of a government were themselves acts contrary to the purposes and principles of the United Nation, as summarised by Lord Brown in JS at paragraph 27:

"Nor, of course, as Stanley Burnton LJ noted in KJ (Sri Lanka), is military action against government forces to be regarded as a war crime".

26. Bearing these points in mind, we turn to the evidence.

27. As regards the materials upon which the Secretary of State places reliance, these are largely speeches, sermons, commentaries etc. that the appellant has made between 2004 and 2014. The respondent has provided extracts from some of these and the appellant has provided entire translations rather than extracts. There are minor differences between the translations in places and to an extent explanations for this have been provided by the translators. This is a matter we shall come on to in due course. In addition the respondent places reliance on a document containing draft

reasons for a recommendatio n by the O mbudsperson ’ s recommendation to the UN Security Council Committee reta ining the appellant on the Al-Q aeda sanctions list. She also place d reliance on a Wikipedia entry annexed to the first witness statement of Guy Higginson, which relates to Anwar Al-Awlaki.

28. Mr O’Connor structured his argument with regard to the material emanating from the appellant’s sermons, speeches, interview s etc. by reference to three categories. The first of these is praise for and glorification of the activities of lea ding Al-Q aeda terrorists. In an item posted on the internet on 20 July 2006 (all of the items were translated by the respondent in July 2015) the appellant listed several terrorist leaders including Mullah Omar, Osama bin Laden, Abu Al-Za r qawi and Shamil Basayev as “master s of the Ummah”. Referring to them cumulatively the appellant said “these heroes, who did not submit or falter when all the world was against them, knelt only to Allah, the Lord of the Worlds! They are truly masters!.”

29. In a YouTube interview posted on the internet on the day (2 May 2011) in which Osama bin Laden was killed, the appellant described bin Laden as “ a lion among the lions of Islam” and said that he was “an anthem in the hearts of the oppressed from Jakarta to the Hindu Kush, to Egypt and the villages and rural areas”. “ Ask these poor and oppressed people and they will be mourning Sheikh Osama bin Laden”. He also said that “ Sheikh Osama bin Laden was fighting forces of occupation. He did not kill civilians and did not say that. ” He also denied that he was glorying anything or extolling anything but said he was describing a reality.

30. On the same day the appellant issued a statement eulogising bin Laden, describing him as the “reviver of Islam” and the “lion of Islam”.

31. Two years after bin Laden’s death the appellant published a sermon in which among other things he referred to bin Laden as a “hero [who] went forth and stood in defence of his Ummah” and also repeatedly referred to him as a martyr.

32. In a biography of the appellant he was recorded as having met Ayman Al-Zawahiri (who repl aced bin Laden as leader of Al-Q aeda after bin Laden’s death) and he was recorded a s describing him as “the Mujahi d and the a scetic Sheikh Dr Ayman Al-Zawahiri, may Allah protect him and make him a thorn in the throat of the enemies of Islam – he is a model of humility and selflessness and dedication ….”.

33. On 11 September 2012 the appellant posted a tribute to Abu Yahya Al-Libi, a senior Al-Q aeda official. In that the appellant r eferred to Al-Zawahiri as “the E mir of the Qaeda Al Ji had organisation, Holy Warrior S heikh Dr Ayman Al-Zawahiri”. He described Al-Libi as “ Holy Warrior Sheikh , the Persistent Patient Sentinel , a Fundamentalist Theologian , the active scholar, the masterful and Exalted leader, the Eloquent Preacher , t he Holder of the Sword and the P en”.

34. Anwar Al-Awlaki was killed in a drone attack in Yemen on September 30 of 2011. Two weeks later the appellant posted a sermon on the website which he used regularly referring to Al-Awlaki and saying for example:

“ America and these people will disappear and young men, by the will of Allah (May He be praised and exalted) will always remember Al-Awlaki and his tapes. They will remember Al-Awlaki and his speeches and they will remember his incitement of his Ummah to defend the members of his Ummah. He lived a short time; he wrote, published and preached; he engaged in the Call and recorded and all for the sake of defending his religion. Those hearts delight ed in receiving the words of that dance d

like brides in their hearts. America therefore feared the word because he was eloquent in the language they speak."

35. Mr Mackenzie did not accept that Anwar Al-Awlaki was, as cl aimed by the respondent, an Al-Q aeda militant. In relation to this issue both sides referred to the Wikipedia article about Al-Awlaki. Certainly we should be wary of treating Wikipedia as evidence of the truth of anything said in it, and as Mr Mackenzie reminded u s, from an earlier discussion of this point at the CMR, many of the people cited as text sources write under what Mr Mackenzie appropriately described as whimsical pseudonyms, and Mr Mackenzie argued that it is clear there is a difference of view as to whether Al-Awlaki was in fact a terrorist or a threat to the US. He referred for example to a quotation at page 11, column 2 of the Wikipedia article where the Yemeni Foreign Minister said: "Anwar Al-Awlaki has always been looked at as a preacher rather than a terrorist and should not be considered as a terrorist unless the Americans have evidence that he has been involved in terrorism". Also a journalist and author Glenn Greenwald mentioned doubt among Yemeni expert s about Al-Awlaki's role in Al-Q aeda and called US government accusations against him unverified and lacking in evidence. In addition Al-Awlaki's father stated that he believed his son had been wrongly accu sed and was not a member of Al-Q aeda.

36. Against that however has to be placed a good deal of evidence to the contrary . Mr O'Connor took us to referenced passages about Al-Awlaki having spoken with and preached to three of the 9/11 hijackers when Imam at a mosque in Fa lls C hurch, Virginia, having presided in 2001 at the funeral of the mother of Nidal Malik H a san an army psychiatrist who later e-mailed him extensively in 2008 to 2009 before the Fort Hood shootings carried out by Ha san; the fact of his ass ociation with Umar Farouk Abdul Mu tallab who attempted the 2009 Christmas Day bombing of an American airliner, the fact that the Yemeni government began to try him in absentia in November 2010 for plotting to kill forei gners and being a member of Al-Q aeda, reference by some US offic ials to Al-Awlaki in 2009 having been promoted to the rank of "regional commander" within Al-Q aeda and the fact that he repeatedly called for Jihad against the United States. There are many other examples of this throughout the article and they satisfy us that Al-Awlaki can properly be characterised as he has b een by the respondent as an Al-Q aeda militant and as the inspiration of Al -Q aeda terrorists. The appellant's remarks about him have to be seen in that context.

37. The respondent's second heading is with reference to applauding the internation al reach and aspirations of Al-Q aeda, particularly the targeting of attacks on the US . Here there is reference again to the item posted on 2 May 2011 where the appellant referring to bin Laden said "you have built a mighty edifice with its base in Afghanistan and its great structures in Jakarta , Malaysia , Pakistan , Ch echnya , Iraq , Somalia and Islamic Maghreb". There is also quoted from the item of 3 May 2013:

" - - - this hero went forth and stood in defence of his Ummah. He established this idea that has grown strong hands, thanks be to Allah, and these arms that are in Iraq , Afghanistan , Chechnya , Indonesia , Somalia , or Mali and now in Syria ! These arms are blessings from this martyr, as we count him to be, and from his pious and devout brethren."

38. The third heading and perhaps the most specific one to which Mr O'C onnor referred refers to ex c er p ts which he says involve inciting the audience to conduct act s of terrorism on behalf of Al-Q aeda. He argued that the praise and glorification offere d to the leaders of violent Al-Q aeda terrorism in the course of his speeches and sermons amounted in itself to an implicit encouragement to his audience to emulate them, and on occasions the appellant went further and expressly incited those

reading or listening to his words to take up arms and fight for Al-Q aeda. Thus, in the interview of 2 May 2011 the appellant described bin Laden as having “handed over the banner to a generation that will eliminate this falsehood” and asserted that: “the Muslims will be victorious in Afghanistan and Iraq, otherwise how do you explain the Islamic state of Iraq currently in Iraq and the existing Jihadi movements”.

39. In his encomium to bin Laden posted on the same day the appellant said: “ If you have killed one Osa ma, the womb of the Ummah still contains a t housand times a thousand Osamas!”

And also

“ R est in peace, Abu Abdullah! You shall remain an inspiration to ordinary Muslims in the mountains of the Hindu Kush, of Khorosan and of Chechnya , and in the villages, hamlets, rural areas and towns of Iraq , Egypt , Som alia , the land of the two holy s ites, the P eninsula, Yemen , Oman , Sudan , Libya , Tunisia , Algeria , the Maghreb, Mauritania , and elsewhere!”

40. In his eulogy to Al-Awlaki of 14 October 2011 the appellant said:

“ T hey imagine that by killing the person, by ending his life and suppressing his spirit, he will disappear and his words will die. They do not know that such words have been taken up by thousands of young people, who are a thousand Al-Awlakis. The womb of the Ummah is fruitful, praise be to Allah. Indeed, one better than Al-Awlaki has been killed and martyred. Was the S heikh of Islam, the Holy Warrior , Osa ma bin Laden not martyred last M ay? Did the Jihad stop ? Did the wheels of Jihad ground to a halt? Has the Ummah died? Does the Ummah die with the death of its leaders?”

41. Finally there is to be found in the appellant’s remarks following the death of Al-Libi posted on 11 September 2012 the following:

“Our slain are in paradise, Allah willing... and your dead are in the fire, the Almighty willing! ... O beli evers, who profess the unity of Allah and believe in the promise of your Lord! D o not falter ... do not fall back ... D o not despair of t he spirit of Allah. Only the people who disbelieve despair of the spirit of Allah! Your slain are martyrs ... those of you who return are happy ... your captives are rewarded and your enemy is overwhelmed ...”.

42. More generally Mr O’Connor argued that insofar that there were differences between the translations he did not wish to overstate these and considered it was unsurprising that they were not identical . The message, the cont en t , emerged just as clearly from all of them. He did make the general point that there was a tendency to paraphrase in the appellant’s translations, and referred to what had been said in that respect at paragraph 7 of Mr Bruce Watts ’ first witness statement (he being the translator of a number of the documents on behalf of the respondent). He also referred to paragraph 5 in the witness statement of the second translator relied on by the government who had listened to and transcribed four of the audio files and had been asked to comment on a witness statement made by the appellant’s translator concerning the style of the documents he had been asked to translate. In the view of the government’s second expert it was more accurate to say that the content was written using both an archaic vocabulary in the style.

43. With regard to the material itself it was a question of the inferences that the Tribunal could draw from it and how it should characterise the appellant’s intentions in making the statements. He argued that where items had been referred to as praising and glorifyin g the activities of leading Al-Q aeda terrorists the inference was that they implicitly encourage d emulation of these people. Also it formed

the context for the rest of the material. The reference to “fight the fight” was in the context of praise for bin Laden and that gave colour to that phrase.

44. With regard to the reference s to the Ummah in the document of 20 July 2006, Mr O’Connor argued that this was used clearly as a rhetorical device and it was clear that the appellant meant the Jihadi community, bearing in mind that the references were all to Al-Q aeda leaders except for Basayev . The context gave colour to the use of the word “Ummah” and it was clear that it was being used as a rhetorical device by the appellant. This was not captured in the appellant’s translation , for example where at the appellant’s translation “ Ummah ” was simply translated as “nation”. Mr O’Connor also referred to paragraph 9 of the appellant’s translator ’ s witness statement where when the word “revolutions” was used for a second time in a sentence he used the word “experiences” in order to avoid repetition which Mr O’Connor argued was quite concerning. The main point he made however was the importance of the term “Ummah” and what the appellant meant by it which had to be taken from its context.

45 . Another general point made by Mr O’Connor was t hat the term “Jihad” was capable of a number of meanings. It could be a spiritual struggle but it was argued that here in context it was to be taken as meaning acts of mass terrorism.

46 . Mr O’Connor argued that this was also to be seen in the context of a further general point he made, that the appellant had not taken advantage of the opportunity to provide any explanation of the documentation on which the Secretary of State relied and that could have been done with regard to this term , for example. A common sense str aightforward inference was, Mr O’Connor argued, violent Jihad and terrorism as that was what bin Laden had done and the reference in this regard to Jihad at for example the interview posted on 2 May 2011 was to be seen in this light. On any reading these were tract s encouraging violence. The items concerning bin Laden taken together amounted to a glorification of him and Al-Q aeda, which he had built. Reference to the might y edifice in the eulogy of 2 May 2011 had clearly to be seen as sup port and encouragement to readers and listeners to become a brick in the might y edifice and was clearly a reference to Al-Qaeda .

47 . There was t he reference in the post of 2 May 2011 to bin Laden having not killed civilians and not having said that. Given that Al-Q aeda had been built by bin Laden as a big idea and was responsible for thousands of deaths, this had not been explained by the appellant and it was for him to do so and the statement was simply untrue. The context was important together with the lack of evidence by way of explanation on the part of the appellant. In general the same points were made with regard to the eulogising of Al-Awlaki. Again no evidence had been put in to explain what had been said or to refute the Wikipedia entry. The Wikipedia article gave context to the appellant’s remarks about Al-Awlaki. The level of praise of him as a person who had b een so intimately linked to Al-Q aeda violence must lead to the conclusion that the appellant had intended inciting people to emulate and follow Al-Awlaki.

48 . The specific references to incitement were emphasised. These were not just matters of praise but did actually express incitement to join Al-Q aeda.

49 . With regard to the O mbudsperson’s report, th e appellant had been on the Al-Q aeda sanctions list since 2005. The Secretary of State had made it clear that she did not rely on the fact of the appellant’s listing but asked the Tribunal to have regard to the way in which the O mbudsperson had looked at the material and had provided sensible powerful reasoning for her conclusion that she was fully satisfied that the appellant’s statements and postings constituted speech which evidently crossed the threshold and in which he encouraged and invited participa tion in, and assistance to, Al-Q aeda

and through which he glorified that organisation and its members. It was the case that the test employed by the Ombudsperson was different i.e. whether or not the ap pellant was associated with Al-Q aeda, and there wa s a different standard of proof, akin to a reasonable suspicion. Nevertheless it was a valuable exercise and the material was useful though clearly not binding. It assisted the Tribunal, which was asked to have regard to the entirety of the document.

50 . In his submissions Mr Mackenzie argued that the respondent h ad not disclosed a single item i n which the appellant had mentioned an act of terrorism in approving term s let alone stating that anyone should commit one. His remarks about Osama bin Laden had to be seen in the context of his belief that bin Laden “did not kill civilians and did not say that”. It was beside the point whether the Tribunal regarded that as a correct summary of bin Laden’s career; the point was that that was what the appellant believed. It was important to note his clear opposition to Isl amic S tate on account of its brutal acts of terrorism. In a co-authored article posted on 25 August 2014 he had spoken critically of Islamic S tate, listing a number of its crimes and particularly criticising it for murdering civilians. The only references to terrorism referred to by the appellant therefore were ma tters mentioned in critical terms.

51 . All the matters referred to by Mr O’Connor had to be seen in the context of the appellant’s firm refusal to accept that any of the people of whom he spoke had done anything wrong. Nor was there any evidence that anyone had ever been in fact encouraged to commit any act of terrorism or join a terrorist organisation or to commit support or contribute to any such act or any such organisation by reading or listening to the appellant’s views. There was only the fact that people had visited the web pages where the comments were posted , but that did not show how many if any of them had agreed with those comments let alone how many if any were encouraged by them to take any action of any sort. The tone and content of the speeches, which Mr Mackenzie characterised as dens e, wordy and full of scholarly Ko ranic illusions were hardly likely, Mr Mackenzie argued , to attract potential terrorists , in particular impressionistic or vulnerable people as contended by Mr O’Connor, in comparison to the graphic and violent internet postings of organisations such as Islamic S tate. The fact that the appellant had not provided a statement or chosen to give evidence in respect of the allegations against him was by the way , in that th e respondent had chosen to put he r case entirely on the basis of his public pronouncements. At no point had he expressed approval of any act of terrorism and never said that anyone should commit an act of terrorism and had actively criticised people who did and praised people who in his view did not commit acts of terrorism.

52 . Mr Mackenzie submitted that t here was nothing in the various ex c er p ts from the appellant’s pronouncements which made good the Secretary of State’s claim. For example the sermon of 3 May 2013 address ed the second anniversary of the killing of bin Laden by US Special Forces, in respect of which much technical detail was given as to what happened, and bin Laden was referred to in the context of the Islamic leaders who expanded Islamic rule as far as Spain and Portugal i.e. he was a military leader and referred to him as resisting “ the evil American power”. The item concerning Al-Libi referred to him as a warrior, scholar and martyr and again there was no reference to acts of terrorism or call to others to commit such acts. All that was said about Al-Awlaki was that he wrote, published and preached, and that people delighted in receiving his words and that America feared the word. There was no ref erence to incitement of Al-Q aeda violence , and defending the members of his Ummah was not the same thing. It was relevant to note that the appellant added that Al-Awlaki “told us to fight against the unbelievers ‘with your tongues ’, with words” and asking rhetorically whether Al-Awlaki carried weapons he answered himself: “he used the word and the word was a missile”.

53 . As noted above, the interview with the appellant on 2 May 2011 contained an express denial on the part of the appellant that bin Laden killed civilians. The i tem of 18 November 2007 contained no approving reference to any acts of terrorism but in fact the appellant criticised practices such as killing people on sectarian grounds and using human shields. He defended Jihadi groups against allegations of carrying out such things , saying it was the American s and despotic Middle E ast regimes who did this. Again this was a matter of his belief and could not sensibly be read as a call to other s to commit acts which he attributed to those whom he regarded as enemies. Sympathetic comments about Al- Zawahiri in the biography fell far short of demonstrating involvement in acts falling within Article 1F(c).

54 . As reg ards the O mbudsperson's report, it was important to bear in mind that s he was answering a different question from that posed to the Tribunal, applying a different standard of proof, not inclined to take any account of the First-tier Tribunal's decision and she applied a broad definition of "support" for Al-Q aeda as an organisation which s he treated as including expressions of sympathy. Her focus was not on the question which was before the Tribunal. It was also clear that she had taken account of evidence which was not before the Tribunal, for example there was reference to a telephone interview of April 2007 and reference to material which indicated uses made of the website which was a forum for many of the appellant's emanations.

Discussion of the Evidence

55 . We have set out above the legal tests which must be applied to our assessment of the evidence in this case. We should emphasise that we have done no more than note the O mbudsperson's report as background , but have not based our reasoning or conclusions on it, given the different standard of proof, different evidence and different legal test with which s he was concerned. What she has to say is c learly of interest but it can in no sense be a guide to us as to how we determine this appeal. We have considered the evidence otherwise in the round. We have not just looked at the extracts provided by the Secretary of State from the appellant's speeches but looked at the broader content to be found in the full translations provided by the appellant. We see no materiality to any differences between the translations except as to the instances that we refer to specifically below. We consider that the language used by the appellant is such that it can properly be characterised as explicit direct encouragement or incitement to acts of terrorism (which we use as shorthand for Article 1F(c)), given the very significant equation to be made, and which we find to exist in this case, between terrorism and acts contrary to the purposes and principles of the United Nations: see Section 54(1) of the Immigration, Asylum and Nationality Act 2006 (set out at paragraph 8 above). In the alternative, knowing incitement and encouragement can be implicit as well as explicit. It is a quest ion of degree. The reference to Mullah Omar, Osama bin Laden and Abu Musab Al-Zarqawi and the praise given to them in the post of 20 July 2006 and the particular praise of bin Laden in the YouTube interview of 2 May 2011 give a context to the appellant's remarks as a whole. In that interview on the day of bin Laden's death the appellant referred to bin Laden as a lion among the lions of Islam who left for Jihad, and was loved by millions of people from the Ummah. In light of bin Laden's history the statement that " bin Laden did not kill civilians and did not say that " has to be taken in context. It cannot be seen as in effect justifying or clarifying everything else said by the appellant about bin Laden or otherwise. It simply flies in the face of reality. We do not accept that this is a belief that the appellant could rationally claim to have held. On any understanding bin Laden was the mastermind behind terrorist attacks such as those in New York on 11 September 2001, in which very significant numbers of civilians died. The appellant simply chose to ignore the point made to him by the interviewer that bin Laden used to boast about and call for military operations including those that targeted civilians

in the W est. He simply avoided that question and came out with a statement subsequen tly about bin Laden not killing civilians which is untrue and which we consider he must have known to be untrue.

56 . The further eulogies of bin Laden , Zawahiri and Al-Libi to which we ha ve referred to above also form part of a climate of praise for and glorification of the activit ies of these people. Taken together with the applauding of the intern al reach and aspirations of Al-Q aeda and in particular the targeting of attacks on the USA, they can be seen as background to and part of the more specific matters referred to in Mr O'Connor's third category of case. In referring to bin Laden having " handed over the banner to a generation that will eliminate this falsehood " , and that the Muslims will be victo rious in Afghanistan and Iraq; the reference to "if you have killed one Osama the womb of the Ummah will still contain a thousand times a thousand Osamas, and the further eu logistic remarks and the post of 2 May 2011 concerning the inspiration to ordinary Muslims that bin Laden represents to people in the various places cited there, together with the 14 October 2011 eulogy to Al-Awlaki referring to his words having been taken up by thousands of young people or a thousand Al-Awlakis and that the womb of the Ummah is fruitful ; that one better than Al-Awlaki has already been killed and martyred, and the rhetorical question : did the Jihad stop , and d oes the Ummah die with the death of its leaders, we consider this is sufficient as contended on behalf of the Secretary of State to amount to at least implicit and indeed explicit encouragement and inducement to the a ppellant's audience to emulate these people in their activities which are activities of terrorism and activities contrary to the purposes and principles of the United Nations. Consequently we consider that the respondent has made out her case. We do not consider that these words can be taken as falling short of the test as contended by Mr Mackenzie. These are s tatements comprising incitement and encouragement made by a man who se words , in our view , clearly cross the border of implicit encouragement and incitement and indeed amount to explicit encouragement and incitement such that his actions fall within the exclusion clause as set out in Article 1F(c) and as expressed in the Qualification Directive in Article 12(2)(c).

57 . Accordingly his appeal is dismissed.

58. No anonymity direction is made .

Signed Date

Upper Tribunal Judge Allen

Error of Law Decision

Upper Tribunal

(Immigration and Asylum Chamber)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 23 September 2014	

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Before

THE RIGHT HONOURABLE LORD BOYD OF DUNCANSBY

SITTING AS A JUDGE OF THE UPPER TRIBUNAL

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

HY

(ANONYMITY ORDER MADE)

Respondent

Representation :

For the Appellant: Miss L Giovannetti, QC, instructed by Treasury Solicitors

For the Respondent: Mr A Mackenzie, instructed by Birnberg Pierce & Partners

DETERMINATION AND REASONS

1. For convenience we shall refer to HY as the appellant, as he was in the proceedings before the First-tier Tribunal, and to the respondent as the Secretary of State.

2. The appellant was born on 1 March 1961 and is a citizen of Egypt. He was involved in political activity in Egypt with the Muslim Brotherhood. He also acted as a defence lawyer. He was arrested in 1981 and, as the FTT noted at paragraph 16 of the determination, was badly treated. He fled Egypt and came to the United Kingdom. Whilst in the UK he was found guilty in his absence of crimes, the evidence for which was obtained by torture. It is accepted by the Secretary of State that the appellant cannot be returned to Egypt.

3. The Secretary of State has granted the appellant limited leave to remain but, in considering the appellant's application for further leave to remain, excluded him from the Refugee Convention on the basis of Article 1F(c). An appeal under Section 83 of the Nationality, Immigration and Asylum Act 2002 against the decision of the Secretary of State to grant the appellant limited leave to remain was heard by a panel of FTT Judges Lobo and Kamara. In a determination dated 5 March 2013 the FTT allowed the appeal on asylum and human rights grounds.

Grounds of Appeal

4. The Secretary of State has appealed against the decision and permission was given on 31 March 2014. Two grounds of appeal are advanced. The first is to the effect that the Tribunal erred in law in failing to apply the correct standard of proof. The second asserts that the Tribunal made a series of errors in the way in which it analysed the submissions advanced and the evidence relied upon by the

Secretary of State. As a result, when looked at both individually and cumulatively, these errors amounted to an error of law.

5. Skeleton arguments were lodged on behalf of the Secretary of State and a Rule 24 response was lodged by the appellant.

Ground 1 – Standard of proof

6. The Geneva Convention on the status of refugees at Article 1F(c) excludes from refugee status or protection "any person with respect to whom there are serious reasons for considering that he has been guilty of acts contrary to the purposes and principles of the United Nations". In Al-Sirri v Secretary of State [2013] 1AC 745 the Supreme Court considered the standard of proof that is to be applied by the decision maker in determining whether a person claiming asylum should be excluded from the protection of the Refugee Convention under Article 1F(c).

7. It concluded at paragraph 75 as follows:

"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 application has not committed the crimes in question or has not been guilty of acts contrary to the purposes and principles of the United Nations, it is difficult to see how there could be serious reasons for considering that he has done so. The reality is that there are unlikely to be sufficiently serious reasons for considering the applicant to be guilty unless a 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."

8. The test was applied by the Upper Tribunal in AH (Article 1F(b) – 'serious') Algeria [2013] UKUT 00382 (IAC) by a panel consisting of Blake J sitting as the President and Upper Tribunal Judges Gleeson and King. At paragraph 82 the Upper Tribunal said this:

"82. 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. This is something stronger than reasonable suspicion but less than proof of guilt on the criminal standard. We conclude from the relevant authorities, including those discussed by the Court of Appeal in remitting this matter to ourselves and the conclusions of the Supreme Court in Al-Sirri that is sufficient so to consider if it is more probable than not on the information before us, that the appellant personally participated in such a crime."

The FTT's Approach

9. In its determination the FTT quoted paragraph 75 from Al-Sirri (see paragraph 8). At paragraph 17 the FTT asked what it was that the Secretary of State must persuade them of "to the appropriate standard" to enable them to decide that the appellant should be excluded from the Refugee Convention under Article 1F(c). They answered that question at paragraph 18 as follows:

“18. The respondent has to adduce clear, reliable and admissible evidence showing, at least to the balance of probabilities, that:-

(a) Mr Y perpetrated, or made substantial contribution, to particular crimes;

(b) those crimes constituted acts which threatened international peace and security, and, particular, but not purely domestic matters;

(c) insofar as reliance is placed on crimes said to have been committed by other members of an organisation, Mr Y was not only a member of that organisation, but had a role within it, and knowledge of its activities, sufficient to show that he had responsibility for the actions of those others.”

10. Having considered the evidence the FTT concluded at paragraph 34 as follows:

“34. The respondent has failed to provide sufficient evidence, for us to conclude to the required standard, at the highest (and to the balance of probability, at the lowest) that the appellant should be excluded from the Refugee Convention under Article 1F(c) because there are serious reasons for considering that he has been guilty of acts contrary to the purposes and principles of the United Nations.”

Submissions for Secretary of State

11. In the skeleton argument the Secretary of State submitted that when the determination is read as a whole it is apparent that the FTT quoted verbatim from the Supreme Court's guidance at paragraph 75 of Al-Sirri but then failed to understand and/or to apply that guidance properly when it came to reach its conclusion on the facts of this case. On the only two occasions when the FTT used its own words to describe the standard of proof it used formulations that were not obviously consistent with Al-Sirri .

12. Miss Giovanetti submitted that read properly paragraph 75, and in particular subparagraph (5) did not say that the standard of proof was proof on a balance of probabilities. Most particularly it did not say that the standard of proof was one higher than a balance of probabilities.

Submissions for the Appellant

13. In the Rule 24 response and in the oral submissions by Mr Mackenzie, the appellant maintained that there was no error of law. The FTT had correctly set out the test at paragraph 75 of Al-Sirri . Having done so it was inconceivable that they would have forgotten it by the time they came to make their determination. In any event , while it was correct that the Supreme Court did not directly equate the standard of proof in the Refugee Convention with the domestic civil standard, it did say that the former was unlikely to be made out unless the latter was also made out. This accorded with the approach taken in AH at paragraphs 82, 101 and 102. It was accepted that paragraph 34 of the determination was not well worded but infelicitous words should not be interpreted as errors of law.

Decision on Ground 1 – Standard of proof

14. The words “serious reasons for considering” in Article 1F(c) have an autonomous meaning. In Al-Sirri the Supreme Court gave authoritative guidance on the meaning and application of the test. In particular the court said that it was unnecessary to import domestic standards of proof into the question as the circumstances of refugee claims and the nature of evidence available is so variable. The court said that if the decision maker is satisfied that it was more likely than not that the applicant

has not committed the crime or has not been guilty of acts contrary to the purposes of the United Nations it is difficult to see how there could be serious reasons for considering that he had done so. As Miss Giovanetti pointed out, that observation, which is carefully worded, does not mean that the opposite is true.

15. It is the next sentence which potentially gives rise to some confusion if not read in context. “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”.

16. We do not accept Mr Mackenzie’s submission that the Supreme Court in effect decided that the standard of proof was on the balance of probabilities, for the following reasons. First, in the next sentence the court says “But the task of the decision maker is to apply the words of the Convention … in the particular case”. Secondly, while the court notes the reality 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, the formulation leaves open the possibility that in a particular case the test in Article 1F(c) may be met even if the civil standard of proof is not met. While that may seem a theoretical possibility, the cases cited by the court at paragraph 73 and 74 show that other jurisdictions have adopted such an approach.

17. AH is cited for the proposition that a panel of the Upper Tribunal determined the civil standard of proof applied. However, despite the misleading head note at paragraph 2 we do not consider that this is what the UT determined. It does not appear from our reading of the case or the proceedings in the Court of Appeal (AH (Algeria) v Secretary of State for the Home Department [2012] EWCA Civ 395), which resulted in the remittal to the UT, that there was an issue in considering the standard of proof; the focus of debate was on the word “serious”. In any event, the UT at paragraph 82 correctly states the test in the first sentence. It is repeated in their conclusion at paragraph 102. The UT were able in that case to answer the question whether or not the test was met by asking themselves whether or not it was more probable than not that the appellant personally participated in the crime. That was no doubt the correct approach given the evidence in the case and the issue which was whether or not the appellant had personally participated in a serious crime.

18. Turning to the present case and adopting the analysis, it is clear in our view that the FTT did not apply the correct test. While they correctly quote the relevant passage from Al-Sirri it appears to us that they misinterpreted what it said. There is no evidence in paragraphs 18 or 34 of the determination that they applied the words of the Convention as they are required to do. Moreover they appear to have considered that the “required” test is higher than the balance of probabilities. Whatever else may be said about the comparison between the civil standard of proof and the test in Article 1F(c) there is no authority that supports such an approach.

19. Accordingly we are satisfied that there is an error of law and that the appeal by the Secretary of State should be allowed.

Ground 2

20. The Secretary of State maintained that there were a number of findings which disclosed a series of errors in the way in which the FTT had analysed the submissions and the evidence relied upon by the Secretary of State. In particular the FTT had recorded that the appellant was never arrested in connection with the alleged planned bombing of the United States Embassy in Albanian. While it was true he had never been prosecuted or convicted, that did not accord with the evidence before the FTT from the Security Service.

21. Secondly, while it was said that the FTT was technically correct to state that it had received no evidence as to the reasons for redactions to the Security Service documents, it had in fact received a full explanation of this point and the court in Youssef v Foreign Secretary [2012] EWHC 2091 (Admin) had approved the redactions on the grounds of public interest immunity. Thirdly, the Tribunal had erred in failing to address the submissions made on behalf of the Secretary of State to the effect that the credibility of the appellant's denials were weakened by his refusal to give oral evidence to the Tribunal. Fifthly, it was submitted that the Tribunal had failed to address in its determination the material relied upon by the Secretary of State (at Annex Y). Further, the Tribunal had erred in stating that “the evidence upon which the respondent relies for corroboration is either inadmissible or, if admissible, questions arise as to its translation, or it has been the subject of denial by the appellant”. None of that was true of the material at Annex Y.

22. In oral submissions Miss Giovanetti submitted that in effect the FTT had taken an over-formalistic approach to the admissibility of evidence and that was an error of law. She referred us to MN (Somalia) v Secretary of State [2014] UKSC 30 at paragraph 24 where Lord Carnwath said that “Generally ... the area of legitimate debate is about relevance and weight, not admissibility”.

23. Mr Mackenzie accepted that there was evidence that the appellant had been arrested in connection with the alleged conspiracy to bomb the US Embassy in Tirana but the important point was that he had not been prosecuted. Accordingly nothing turned on this. So far as the redactions were concerned, the fact was that the Security Service documents were redacted and the Tribunal was entitled to place less weight on the documents for that reason. While individual mention had not been made of Annex Y, it was clear from a full reading of the determination that it had been considered by the FTT.

Decision on Ground 2

24. Since we are clear there is an error of law in relation to ground 1, it is not necessary for us to reach a concluded view on ground 2. We note the criticisms but do not think that either individually or cumulatively these would amount to an error of law which would justify us overturning the FTT's decision on this ground.

Further Procedure

25. We invited submissions on further procedure in the event that we allowed the appeal. Miss Giovanetti submitted that we should remit the case to the FTT for a rehearing. That would allow the appellant, who had not given evidence before the FTT, to do so should he so wish. Mr Mackenzie submitted that the case should remain in the UT. He had no instructions that the appellant had changed his mind and now wished to give evidence.

26. Having regard to the Practice Statement at 7.2, we are not persuaded that this is a case that should be remitted to the FTT and accordingly the appeal will be listed for further hearing before the Upper Tribunal, and subject to the Directions set out below.

DIRECTIONS

(1) No later than 14 days before the next hearing, both parties are to file and serve a skeleton argument.

(2) It is not anticipated that there will be the need for any further evidence to be given. In the event that either party seeks to rely on further evidence, such is to be filed and served no later than 14 days

before the next hearing. It will be for the judge or judges seized of the appeal to determine whether to admit further evidence.

Anonymity Order

We make an anonymity order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008) and consequently, this determination identifies the appellant by initials only.

Lord Boyd of Duncansby 17/10/14