Gurung (Refugee exclusion clauses especially 1F (b)) Nepal CG * [2002] UKIAT04870

IMMIGRATION APPEAL TRIBUNAL

Date heard: 28 May 2002
Date notified:.....14 October 2002.……..

Before: -
MR JUSTICE COLLINS (PRESIDENT)
DR H H STOREY
MR A MACKEY

Between

MR INDRA GURUNG

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DETERMINATION AND REASONS

1. The appellant, a national of Nepal, has appealed with leave of the Tribunal against a determination of Adjudicator, Mr M E Curzon Lewis, dismissing the appeal against the decision of the Secretary of State giving directions for removal following refusal to grant asylum. Mr Mark Braid of Counsel instructed by Gillman-Smith Lee Solicitors appeared for the appellant. Mrs E Grey of Counsel instructed by Treasury Solicitors appeared for the respondent.

2. Although deciding to remit this appeal we have starred it for the purpose of giving guidance to adjudicators on the proper approach to the Refugee Convention`s Exclusion Clauses at Art 1F. The events of September 11, 2001 have made the need for clarity of approach as regards Art 1F imperative.

3. We are grateful to both Counsel for their careful submissions, including those sent on our invitation post-hearing. Largely due to their efforts we have been able to consider the relevant issues in the light of a very considerable body of material including: The Exclusion Clauses: Guidelines on their Application, UNHCR, Geneva, December 1996; Lisbon Expert Roundtable,

Global Consultations on International Protection May 2001 – Summary Conclusions: Exclusion from Refugee Status; articles from the Special Supplementary Issue of the International Journal of Refugee Law, Vol 12, 2000 on Exclusion from Protection; the EU Commission Working Document on the Relationship between Safeguarding Internal Security and complying with International Protection Obligations and Instruments, COM (2001) 743 final, Brussels, 5.12.2001; UNHCR`s, ECRE`s and Amnesty International`s comments on the same; the Proposed Council Directive on minimum standards for the qualification and status of third country nationals and stateless person as refugees or as persons who otherwise need international protection COM (2001) 510 final Brussels 12 September 2001; and ECRE Position on The Interpretation of Art 1 of the Refugee Convention, September 2000. In addition to UK court[1] and Tribunal[2] cases dealing with Art 1F-related issues, we were also referred to leading cases from Canada, the Netherlands, New Zealand, the United States and a very recent Australian High Court judgment.

4. The account the appellant gave was as follows. Now aged 33, he came from a farming family who lived in a village in Kaki district, West Nepal. Before his departure in January 2001, he had been a relatively successful movie actor. He joined the Nepalese Communist Party (Maoist) (hereafter CPN) in 1997 if not earlier and was also a member of that party's farmer-oriented Kissan Movement. He attended meetings, rallies and demonstrations up to 5 times a month. Most of these were to protest about government corruption and to demand land reform. In 1996 he was involved in a raid on Land Registration offices at Chawil. He was one of 20 who protested against corruption by throwing stones and chanting. In August 1999 his brother, Mohan, who had also joined the Maoists, had been killed when police invaded a public meeting in Besi Sahar Lanjung and fired indiscriminately. In December 1999 the appellant was arrested and detained for 5 months in Pokhara Central Jail. During his detention he was ill treated, the police pressurising him to reveal the names of leaders, location of training camps and future plans of the Maoists. He was released in April 2000 on bail of 400,000 Nepalese rupees on condition that he was never again to support the Maoists. However his work for the Maoists continued. On 10 September 2000 he was arrested for a second time, again experiencing interrogation and ill treatment. In December 2000 his father procured his release with the help of a police inspector friend; a bribe was also paid. He was told he must leave the country within 25 days or suffer the same fate as his brother. With the help of an agent, he left Nepal on January 2001. He claimed he was still wanted in Nepal where the authorities were accusing him of being a Maoist.

[1] Baljit Singh [1994] Imm AR 42; O v Immigration Appeal Tribunal [1995] Imm AR 494; Raziastaraie [1995] Imm AR 459 (on Art 33(2); T v Immigration Officer [1996] AC 742, [1996] 2 WLR 766 (hereafter "T"); Mukhtiar Singh v SSHD (SC 4//99 unreported); Sivakumar [2001] EWCA Civ 1196, judgment of 24 July 2001.

[2] Abwedi (11974, March 1995); Amberber (00TH01570, 13 June 2000); Amirthalingam (11560, 2 March 1994); Arulendran (11827, February 1997); B (13827, August 1996); Bulut (18078, August 1998); De Silva (13668, July 1996); Hua (G0077, April 1999); Jesuthasan (01TH01444, July 2001); Kathirpillai (12250); King (13452, May 1996); Mete (17980, April 1998); Nackereen (6419, 1989 (a case in which the UNHCR was an intervenor); Rajkumar (11562, November 1994); Randhawa (10694, February 1994); Re Y (14847, January 1997); Singh (10866, April 1994); Sivayogan (22437, December 1999); Timatine (12250, August 1998); Woldamichael (17633).

The Secretary of State`s assessment

5. The respondent in his Reasons for Refusal letter did not believe the appellant. He did not find credible the account of two detentions, primarily because of its lack of detail. He also found implausible the appellant`s claim to have been released on condition he leave Nepal soon after. He saw no good reason for the appellant claiming asylum late. However, in the alternative he concluded that, even accepting the appellant`s account, he would at most face a risk of prosecution, not persecution. His reasoning in this regard was that the CPN (Maoist) party was an illegal, armed revolutionary movement which had openly admitted it has used, and would continue to use, violence in order to achieve its goals. He wrote:

> "The Secretary of State considered that were you an active member of such an armed organisation which is fighting to overthrow the elected Nepalese state it is likely that the Nepalese authorities might have a legitimate interest in you. However, he considered that this would be on account of your actions as a member of an illegal armed revolutionary organisation rather than any political opinion you expressed. The Secretary of State considered that you have expressed a fear of prosecution, not persecution…"

The adjudicator's assessment

6. The adjudicator's findings of fact were jumbled and incomplete. On the one hand he rejected the appellant`s credibility wholesale. On the other hand he appeared to accept the appellant had been involved with the Maoists even before 1997 and, albeit doubting he had heard the full truth about the appellant`s account of his release from his second period of detention, he found his claim to have been detained twice `quite possible`. He made no findings, however, on whether during these detentions the appellant was ill treated and interrogated. He speculated whether the appellant, despite claims to the contrary, had had charges brought against him, but then concluded:

> "I do not know why no charges were ever brought against the appellant but clearly on his own admission, he was involved in terrorist activities and he has produced an article from Janamat [a Nepalese publication] to prove it."

7. This conclusion followed on from his earlier observation that, when questioned about the extent of his knowledge of the fact that the Maoists were engaged in terrorist activities, the appellant had said he knew the Maoists were an illegal terrorist organisation.

8. On the strength of these findings the adjudicator reached two distinct conclusions.

9. One was that the appellant fell under the Exclusion Clauses. Having set out the text of Art 1F, he concluded:

> "The appellant frankly admits to having taken part in the raid on the Land Registration Offices in 1996. Janamat records him as having been involved in a subsequent raid on the Kathmandu Tax Office. He is not a person who should be considered to be deserving of international protection under the Refugee Convention".

10. The other was that the appellant did not qualify under the Inclusion Clauses. Citing paragraph 60 of the 1979 UNHCR Handbook, which in the context of dealing with the prosecution/persecution issue acknowledges that sometimes a person fearing prosecution or punishment can have a well-founded fear of persecution, he concluded at paragraph 56:

> " In the present case, whatever the deficiencies in the police, the fact remains that this appellant has been engaging in anti-state activities, for which he is properly liable to prosecution. He claims that no charges have been brought against him, that (sic) I do not necessarily believe his evidence about that. In my judgment this appellant has fled from Nepal because he fears prosecution. He does not qualify for asylum under the Refugee Convention".

11. The adjudicator also addressed the appellant`s human rights grounds of appeal which made mention of breaches of articles 2,3 and 6 of the ECHR. But, in contrast to the approach he took in relation to the asylum claim, he did not conduct any analysis of them in the alternative: he simply relied on a `want of credibility`.

The appellant`s submissions

12. In his appeal to the Tribunal the appellant relied upon a number of points. Firstly he challenged the adjudicator's adverse credibility findings, in particular his failure to accept that the two incidents mentioned by the appellant – one at the Tax Office and one at the Land Registry offices – were one and the same. He criticised the adjudicator's rejection of credibility for relying unduly on a disbelief in the account he had given of the circumstances of his release, an account shown by the objective country materials to happen in some instances. Secondly he contended that, taking account of the entirety of the prosecution process likely to face a member of the Maoist Party in Nepal currently, the adjudicator was wrong to try and distinguish the instant case from the type of situation considered by the Tribunal in *Rajesh Gurung* (01/TH/1371) which found that this process would entail persecution. He pointed to evidence indicating that the courts are inefficient and susceptible to political pressure and corruption, that the authorities target Maoists for arbitrary detention, torture and beatings in a climate of impunity and that there has been a worsening of the situation in Nepal with the declaration in November 2001 of a state of emergency.

13. The appellant also raised a number of criticisms of the adjudicator's approach to the Art 1F issues. These can be classified into failure to deal properly with inclusion issues on the one hand and exclusion issues on the other.

14. As regards the adjudicator's treatment of the inclusion issues, the grounds contended that the adjudicator failed or failed to deal properly with the appellant`s position under the Inclusion Clauses. To the extent he did deal with them, the grounds continued, he was wrong to conclude the appellant would simply face due process of legitimate prosecution. Following *Sivakumar* [2001] EWCA 1196, an appellant should be recognised as at risk of persecution where he would be exposed to excessive or arbitrary punishment. The Nepalese authorities not only failed to respect human rights generally, but they had a concerted policy of mistreatment and torture of suspected Maoists.

15. As regards the adjudicator's treatment of exclusion issues, the appellant contended that the adjudicator had been wrong to raise such issues of his own motion, when the Secretary of State had not previously raised them. Only the Secretary of State should do this because only he "is in a position to conduct security checks on an individual and apply his findings to any Art 1F contentions …". The appellant went to identify the following errors in the adjudicator's treatment: his failure to specify which sub –clause of Art 1F he considered applied; his blanket assumption that mere membership of the Maoist party proved complicity in crimes contrary to Art 1F; his disregard for the "wholly political nature of the appellant's actions"; his failure to accept that the appellant had never defined himself as a terrorist but had merely agreed that Maoists do, on occasions, perpetrate violent acts; his reaching of a conclusion that the appellant was involved in terrorist activities in the absence of any concrete evidence; his failure to make any adequate findings about the raid the appellant conducted with 20 others on the Land Registry offices; and his failure to adopt a restrictive approach to the Exclusion Clauses as urged by the 1979 UNHCR Handbook, recent EU pronouncements and almost all commentators.

16. After we had indicated that on the facts of this case we saw Article 1F(b) as the only sub-category of Art 1F with any real potential application, Mr Braid on behalf of the appellant argued further that, following the criteria approved by their lordships in *T* [1996] 2 All ER 443 for analysing Art 1F(b) cases, throwing stones and chanting was not conduct sufficiently serious to fall within Art 1F(b). Even on the dubious assumption that the appellant`s actions could be construed as serious crimes, they were, he said, plainly political and committed out of political motives. The attack on the Land Registry offices, he added, was borne out a desire to overthrow an element of state apparatus.

The respondent`s submissions

17. Mrs Grey accepted that it should normally be for the Secretary of State to identify and raise any exclusion issues but that an adjudicator could raise them of his own motion where such issues were obvious. It was now Home Office policy to consider exclusion where a person is a member of a proscribed organisation within the meaning of the Terrorism Act 2000.

18. Mrs Grey submitted there was no requirement as a matter of law to make findings on the persecution feared before considering exclusion. In support she cited the Canadian case of *Gonzalez v Canada (Min of Employment and*

Immigration) [1994] 2 F.C. 646 and the UK case of *T,* both of which held that, in assessing whether someone qualified as a refugee, the decision-taker should not weigh the severity of potential persecution against the gravity of the conduct said to constitute an Art 1F crime. She reminded us that that principle had now been made a statutory requirement by s.34 of the Anti-terrorism, Crime and Security Act 2001.

19. Mrs Grey hastened to add that the Secretary of State did not adopt the converse principle that exclusion should always be considered first. It would only be apt in cases where there was an obviously serious crime or act at issue. The position she advanced was that in more `mixed` or marginal cases, there were pragmatic reasons to do with avoiding unnecessary remittances for ensuring inclusion and exclusion were considered and in that order:

> "The order in which issues should be considered will therefore depend on the circumstances. If the application of the exclusion clauses were central to the case (if, for example, it was a central ground in the Secretary of State`s reasons for the refusal of asylum status), then it would be appropriate to address the issue of `exclusion` first and to rely on one ground only if dismissing the appeal. If, however, the application of Art 1F was one only of a number of issues raised by the evidence or its application was problematic, the `inclusion first` approach may be more sensible".

20. As regards the adjudicator's treatment of the inclusion issues, Mrs Grey accepted this was inadequate but pointed out that the respondent did not accept that in Nepal there was a "concerted policy" of mistreatment and torture of Maoists and suspected Maoists.

21. As regards the exclusion issues, Mrs Grey accepted the adjudicator had erred in failing to specify which sub-clause or clauses of Art 1F he considered to be engaged. An adjudicator should, she said, make findings about the crime or act committed by the claimant and then explain how that fitted within the limbs of Art 1F(a), (b) and (c), i.e. identify the legal category into which the appellant's actions were said to have fallen. The Secretary of State accepted that the evidential burden of raising the exclusion issue was on him. As regards the standard of proof, she urged us to follow the approach of the Canadian Federal Court of Appeal in *Ramirez v Canada* [1992] FC 306 in viewing the test as being whether there were " serious reasons for considering" that a barred act had been committed, a test which required a lower standard of proof than either beyond reasonable doubt or the balance of probabilities. This, she submitted, was consistent with the approach of the Court of Appeal in *T*.

22. Mrs Grey said that the Secretary of State maintained his position that the Maoists` frequent recourse to violent acts meant that there was a real issue in this case of complicity on the part of any CPN (Maoist) member in any acts done by that organisation. An appellant`s claim to have disagreed with, and not to have been responsible for, or complicit in, terrorist activities, should be assessed rigorously.

23. As regards complicity or association, useful guidance was to be found, she said, in Canadian cases describing the test for complicity as “personal and knowing participation in persecutorial acts”. Participation should be widely construed. Mere membership was not enough, but complicity or association may be inferred from: (i) a leadership role or other position of authority in an organisation (a proximity test); (ii) the existence of a principal or dominant purpose of the organisation concerned being that of committing acts which would fall within the three limbs of the exclusion clauses (a dominant purpose test). In *Ramirez v Canada* [1992] FC 306 the latter test was said to apply if an organisation was “ principally directed to a limited brutal purpose”, The Secretary of State accepted that this two-fold test would appear to cover current-day extremist terrorist groups whether national or international.

24. As regards the nature of the inquiry called for in this context, the severity of the crime had to be considered in the context of the aims and objectives of the group concerned. For example, acts of violence against property may be included, if calculated to create a state of terror in the minds of, e.g. government officials or the public at large.

25. Mrs Grey accepted that the failure of the adjudicator to make proper findings about the appellant`s activities necessitated remittal, but she maintained that, going by the accepted evidence, there were reasons to doubt: (a) the political purpose of the protest (how it served the purpose of overthrowing or changing the government had not been explained); and (b) the closeness of the link between any such purpose and the activities which took place. Additionally, given the civilian nature of the target, it was unlikely the offenders could reasonably have expected that their actions would yield any result directly related to the ultimate political goal they held. The `seriousness` of the crime had to be be judged against the general background of Maoist violence and insurgency; this may make an incident which might normally seem relatively minor a serious one, as it functions as a reminder and strengthens a more general campaign of violence and intimidation.

Relevant principles in assessing exclusion issues under Art 1F

26. Before turning to evaluate the adjudicator’s treatment of this appeal, we propose setting out a number of principles which in our view adjudicators should adopt in relation to the Exclusion Clauses.

27. Whilst the provisions of Art 1F are traditionally referred to as the “Exclusion Clauses”, it must not be forgotten that Articles 1D and E also exclude certain persons from the scope of the Convention. The first part of Article 1D provides that the Convention shall not apply to persons receiving protection or assistance from organs or agencies of the United Nations other than UNHCR. Under Article 1E the Convention does not apply “to a person who is recognised by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country”. Additionally, albeit not an exclusion clause, Article 33(2) provides that the benefit of Art 33(1), the non-

refoulement provision, “may not be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country, in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country”.

28. Article 1F states the provisions of the Refugee Convention “shall not apply to any person with respect to whom there are serious reasons for considering” that:

> a) he has committed a crime against peace, a war crime or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
> (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
> (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.”:

29. Paragraph 148 of the 1979 UNHCR Handbook states the rationale behind the Exclusion Clauses as follows:

> “At the time the Convention was drafted the memory of the trials of major war criminals was still very much alive, and there was agreement on the part of States that war criminals should not be protected. There was also a desire on the part of States to deny admission to their territories of criminals who would present a danger to security and public order”.

30. Of course, the resolve to exclude those undeserving of international protection is an abiding concern: Grotius writing in *De Jure Belli ac Pacis Libri Tres* commented that whilst international law for fugitives accepted asylum for those who suffered undeserved enmity, it did not accept it for those who had done something injurious to human society.

31. The wording of Art 1F makes clear that it is not any crime which brings its provisions into play: it would obviously be an error for an adjudicator to apply Art 1F to every claimant with a criminal history. Art 1F is only concerned with serious criminality. Conversely, Art 1F is not just concerned with serious crimes committed in the context of war and armed conflict. It also covers common crimes if sufficiently serious.

32. Whilst the subject matter is serious criminality it is not as assessed according to national law criteria: it is as assessed according to an international law perspective which seeks to give an autonomous meaning to the acts and crimes specified.

33. In seeking to give an autonomous meaning to key concepts in Art 1F, there is as much a need as under Art 1A(2) to adopt a dynamic approach to interpretation. Lord Mustill noted over six years ago in *T*, that, even though the wording of Art 1F has not changed, the world around it has. In the

aftermath of the events of September 11th these thoughtful words remind us that, whilst there is nothing new about criminality, the precise forms and methods used by those who perpetrate violent acts or crimes continue to undergo change.

34. But it is not just the world which has changed, so has the law dealing with such crimes. As emphasised by the recent Summary Conclusions from the Lisbon Expert Roundtable, held as part of the 2001 UNHCR Global Consultations on International Protection, there is a need, in the interpretation and application of Art 1F, to draw on "developments in other areas of international law since 1951, in particular international criminal law and extradition law as well as international human rights law and international humanitarian law." Cases before the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) have greatly advanced the jurisprudence. Basing interpretation of Art 1F on international law developments yields the same advantage as has accrued from doing the same in respect of key terms contained within Art 1A(2): it enables decision-makers to proceed on a more objective footing. In deciding such issues as complicity we will need to look more and more to international criminal law definitions.

35. Thus, in respect of the Exclusion Clauses it is particularly salient to recall the well-settled principle that the Refugee Convention is a living instrument whose interpretation requires a dynamic approach which bears in mind the objects and purposes set out in its Preamble, so as to ensure that it gives a contemporary response to contemporary realities.

36. The provisions of Art 1F being exclusionary, it will almost always be appropriate to apply them restrictively. That is the position stated at paragraph 149 of the 1979 Handbook. The basis for it is twofold: firstly that the Refugee Convention is quintessentially an instrument designed to protect those in need of asylum; and secondly that the consequences of exclusion may be very serious. In all past cases the Tribunal has consistently adopted the same approach. We see no reason to depart from it, save to note that we doubt this principle is entirely unqualified. In the Canadian Supreme Court case, *Pushpanathan v MCI* [1998] 1 SCR 982, [1999] INLR 36, Bastarache, J said this:

> "What is crucial, in my opinion, is the manner in which the logic of the exclusion in Art 1F generally, and Art 1F (c) in particular, is related to the purpose of the Convention as a whole. The rationale is that those who are responsible for the persecution which creates refugees should not enjoy the benefits of a Convention designed to protect those refugees. As La Forest J observes in *Ward*, above at 66E, `actions which deny human rights in any key way` and `the sustained or systemic denial of core human rights… se[t] the boundaries for many of the elements of the definition of "Convention refugee". This purpose has been explicitly recognised by the Federal Court of Appeal in the context of the grounds specifically enumerated in Art 1F(a) in

Sivakumar v Canada (MEI) [1994] 1 FC 433, where Linden JA stated (at 445):

> `When the tables are turned on persecutors, who suddenly become the persecuted, they cannot claim refugee status. International criminals, on all sides of the conflicts, are rightly unable to claim refugee status`".

37. If the underlying purpose of the Refugee Convention is protection of human rights, then it is surely relevant, when applying the Exclusion Clauses, to take account of the extent to which those guilty of Art 1F crimes have violated the human rights of others. As set out in the Preamble, the objects of the Refugee Convention are not confined to protection of the rights of refugees; they begin by referring to the principle that "human beings shall enjoy fundamental rights and freedoms without discrimination". In our view, the greater the scale of the violation of the human rights of others by those who perpetrate acts or crimes proscribed by Art 1F, the less rationale there is for a restrictive approach. To take the example of an individual terrorist who exploded a nuclear device in a large city, in such a case we doubt that a restrictive approach should have any place at all.

38. A further principle of considerable importance is that the Exclusion Clauses are in mandatory terms. They stipulate that the provisions of the Convention "shall not apply…" to those who fall within Art 1F. It may be that at present appeals that come before adjudicators raising issues under the Exclusion Clauses are few and far between. Whether they should remain quite as rare as they are is a matter we shall return to below. However, it is imperative that adjudicators do not confuse the rarity of exclusion cases with the existence of some discretion as to whether to consider them. The mandatory wording admits of no discretion. The question of whether or not a person falls under the Exclusion Clauses is not an optional one: it is an integral part of the refugee determination assessment.

39. That brings us to the important principle of the need for a holistic approach. The place of the Exclusion Clauses in the overall schema of the Convention also demonstrates that exclusion issues should never be examined in complete isolation from the examination of the appellant`s overall claim. The approach must always be holistic.

40. This simple axiom provides the key we think to the proper answer to be given to the question of when, if at all, an adjudicator is justified in addressing exclusion issues even when the respondent in his Reasons for Refusal letter has not raised them.

41. If the respondent has raised them prior to the hearing, then obviously the appellant has been put on notice that exclusion is in issue and the adjudicator can and should (unless he thinks the issue is not truly raised) require both parties to deal with the issue during any oral examination and submissions. The adjudicator's determination should then make clear findings on whether the Exclusion Clauses apply or not.

42. What should happen, however, when (as happened in this case) the respondent has not expressly raised any exclusion issues prior to the hearing?

43. In our view the first step should be to scrutinise what was actually said in the Reasons for Refusal letter. Even when not expressly raising exclusion issues, their contents may sometimes nevertheless be considered to have effectively put the appellant on notice that exclusion is an issue. Here what seems crucial to us is to focus on the *subject matter* of what is raised in the Reasons for Refusal letter rather than on formal reference to Art 1F or the Exclusion Clauses. The subject matter of Art 1F is, as already noted, serious criminality. Where, as we think happened in this case, the terms in which the respondent deals with the prosecution/persecution issue sufficiently indicate that exclusion subject-matter is involved (e.g. in this case the Reasons for Refusal letter noted that the appellant claimed to be a member of an armed, illegal, revolutionary organisation committed to armed struggle), that may be viewed as enough to put the appellant on notice that his possible criminality made Art 1F a live issue.

44. But, assuming there is nothing in express or implied terms raising exclusion issues by the time of the hearing, what should an adjudicator do? It may be he or identifies an exclusion issue immediately prior to the hearing or at the outset of the hearing or at some point during the hearing itself. But at whichever point such identification is made, even when late in the day, the basic question is the same. Can an adjudicator ever raise such issues of his or her own motion? Mr Braid on behalf of the appellant argued that an adjudicator should either never raise such issues of his own motion or do so only in the most exceptional circumstances.

45. Mrs Grey, by contrast, submitted that the adjudicator may raise the issue of his own motion but that, if he does so, he should inform the parties that he considers Art 1F to be relevant during the course of the oral hearing, so as to give them an opportunity to deal with the issue: procedural fairness required that an appellant is aware of the issues under consideration. The same applied, mutatis mutandis, if the Tribunal considered the issue relevant. As to when it would be appropriate for the appellate authorities to raise it of their own motion, that would inevitably depend on the facts of the case. Guidance on the circumstances in which such a duty would arise could, she submitted, be derived from *R v Secretary of State for the Home Department, ex p. Robinson* [1997] 3 WLR 1162, [1997] 4 All ER 210, at para. 39:

> "The appellate authorities should, of course, focus primarily on the arguments adduced before them, whether these are to be found in the oral argument before the special adjudicator or, so far as the tribunal is concerned, in the written grounds of appeal on which leave to appeal is sought. They are not required to engage in a search for new points. If there is readily discernible an obvious point of convention law which favours the applicant although he has not taken it, the special adjudicator should apply it in his favour, but he should feel under no

> obligation to prolong the hearing by asking the parties for submissions on points which they have not taken but could properly be categorised as merely `arguable` as opposed to `obvious`… When we refer to an obvious point we mean a point which has a strong prospect of success if it is argued. Nothing less will do."

46. Although the Court of Appeal was here discussing the duty of the appellate authorities to consider points which, although not raised by the asylum-seeker, were in his favour, the same logic, submitted Mrs Grey, should apply with equal force to points which are not so favourable. Thus if an adjudicator considers that on the facts that have emerged (whether on the papers or at the hearing) there is a "strong prospect" that one of the three limbs of the exclusion clause might apply, he should raise the issue.

47. We find ourselves in agreement with Mrs Grey`s submissions on this point. Because Art 1F is in mandatory terms, the answer an adjudicator must give to the overall question of whether someone is a refugee can only be made by reference to the elements of the definitions variously set out in Articles 1A – IF. So long as the Art 1F issues are "obvious" they can, indeed must, be raised.

48. When raised in this way by an adjudicator (or the Tribunal), the difficult issue then arises of whether an adjournment should be granted (or, if so, for how long) so as to ensure the parties have had an opportunity to deal with the issue. We do not propose to lay down any separate guidelines on this issue here save to emphasise that adjudicators will no doubt bear in mind that after the events of September 11, the EU Commission has echoed UNHCR`s call to States to apply the Exclusion Clauses scrupulously and rigorously.

49. That brings us to the contentious issue that has arisen as to whether consideration of the inclusion clauses should always precede consideration of the exclusion clauses.

50. Mr Braid has raised or adverted to a number of arguments in favour of his argument that it would be an error of law not to address inclusion issues first. We have identified the following arguments in favour of inclusion first.

51. Firstly it is said that "logically" one cannot exclude someone who has not first being included.

52. Secondly it is said that the fact that the Exclusion Clauses are listed last within the schema of Article 1 indicates they should be approached sequentially.

53. Thirdly it is said that exclusion being exceptional it is not appropriate to consider an exception first.

54. Fourthly it is said there are textual reasons why exclusion should be dealt with first, most notably the reference within Art 1F(b) to the appellant being a

refugee: he is said to be excluded where there are serious reasons for considering that:

> "he has committed a serious non-political crime outside the country of refuge prior to his admission to that country *as a refugee*" (emphasis added).

55. In *Re SK*, Refugee Appeal No. 29/91, New Zealand Refugee Status Authority, 17 February 1992, it was arguably implicit in the reasoning of the Authority that Art 1F(b) was only to be applied after the applicant had been found to be a refugee.

56. Fifthly it is said that inclusion first conforms to the long-established UNHCR approach: paragraph 141 of the UNHCR Handbook propounds that it will normally be during the determination process under Art 1A(2) that the facts leading to exclusion under Art 1F will emerge. The 1996 UNHCR Guidelines on Exclusion also recommend (chiefly because cases of exclusion are "inherently complex") that the Exclusion Clauses should only be applied "after the adjudicator is satisfied that the individual fulfils the criteria for refugee status".

57. Sixthly it is said that exclusion before inclusion risks "criminalising" refugees. Given that Art 1F speaks of "crimes" and "guilt", it is argued that refugee decision-makers should adopt a presumption of innocence and apply Art 1A(2) first. To apply Art 1F before Art 1A(2), so it is said, involves an erroneous presumption that all applicants for refugee status are potentially excludable.

58. Inclusion first is also seen as the only approach which is compatible with a holistic approach to the assessment of a refugee claim. The Global Consultation Conclusions state that: "Interviews which look at the whole refugee definition allow for information to be collected more broadly and accurately". Allied to this argument is the concern that exclusion first is too akin to an admissibility test. In its 1996 Guidelines UNHCR stated that exclusion should not be used to determine the admissibility of an application or claim for refugee status:

> "A preliminary or automatic exclusion would have the effect of depriving such individuals of an assessment of their claim for refugee status. By their very nature, the exclusion clauses relate to acts of an extremely serious nature. As such, the refugee claim and any related exclusion aspects should in every case be examined by officials trained in refugee law."

59. Another contention has been that dealing first with inclusion issues can help avoid having to address complex criminality issues. In this regard inclusion before exclusion is said to allow proper distinction to be drawn between prosecution and persecution. It is argued that dealing with exclusion first could encourage adjudicators to fail to see that a claim may not even get to first base under the Inclusion Clauses in any event – because the

appellant`s apparent criminality in fact amounts to a case of prosecution as opposed to persecution. Particularly in countries of origin where there is no reason to think that the laws of the country are unjust or that the appellant will not receive a fair trial, at least in its bare essentials, a finding of prosecution should be all that is necessary. When such a finding is made and an appellant has not shown he can bring himself within the Inclusion Clauses, there is then no basis for an adjudicator proceeding to consider the Exclusion Clauses. If, however, an adjudicator is satisfied the appellant has shown persecution rather than prosecution and so comes within the Inclusion Clauses, then plainly the appellant is entitled to succeed in his appeal unless he is caught by the Convention`s (Cessation or) Exclusion Clauses.

60. A point is also made regarding the situation of family members. It is said that inclusion before exclusion enables consideration to be given to protection obligations to family members. The 1996 UNHCR Guidelines state:

> "The exclusion of an applicant can have implications for family members. Paragraph 185 of the Handbook states that the principle of family unity generally operates in favour of dependants, and not against them. In cases where the head of a family is granted refugee status, his or her dependants are normally granted ("derivative") status in accordance with this principle. If a refugee is excluded, derivative refugee status should also be denied to dependants. Dependants and other family members can, however, still establish their own claims to refugee status. Such claims are valid even where the fear of persecution is a result of the relationship to the perpetrator of excludable acts. Family members with valid refugee claims are excludable only if there are serious reasons for considering that they, too, have knowingly participated in excludable acts".

61. There is one final argument we need to consider. Mr Braid implicitly raised it although in order to properly evaluate it we shall put it in our own words. It is one specific to countries such as the UK which feature parallel systems of legal protection of asylum-seekers under the Refugee Convention and international human rights treaties. Since 2 October 2000 provisions of the Human Rights Act 1998 and the Immigration and Asylum Act 1999 (and other pieces of legislation dealing with appeals involving national security that come before the Special Immigration Appeals Commission) require that, even if a person is found to be excluded from the Refugee Convention for Art 1F reasons, the decision against him may still be unlawful if it exposes the claimant to a real risk of treatment prohibited by Art 3 of the European Convention on Human Rights: Art 3 prohibits in absolute terms torture or inhuman or degrading treatment and punishment.

62. Thus it can be argued that, since adjudicators must address human rights issues in any event, it makes doubly bad sense for them to deal with exclusion first. One way or another, whether under the Refugee Convention`s Inclusion Clauses (which focus on real risk of persecution) or under the ECHR (whose Art 3 focuses on real risk of ill treatment), an adjudicator has to make findings on the issue of serious harm.

63. What are we to make of these various arguments in favour of inclusion first? Plainly some simply concern the order in which the two issues are to be tackled; others have wider implications for whether, regardless of the order, both issues or only one need tackling.

64. It seems to us that the primary question here must be whether or not to deal with exclusion first constitutes an error of law. We are satisfied it does not. Whilst in our view (for reasons we shall come to) exclusion should only be dealt with first in limited circumstances, an adjudicator will not err if he or she goes straight to the exclusion issue in the appropriate case. Indeed for an adjudicator not to go straight to exclusion is certain types of cases would frustrate the objective set out at Rule 30 of the Immigration and Asylum Appeals (Procedure) Rules 2000 of securing "the just, timely and effective disposal of appeals…" We would echo the words of Kirby, J when considering this issue in *Minister for Immigration and Multicultural Affairs v Singh* [2002] HCA 7 at paragraph 87:

> "The Convention is expected to operate in the real world of speedy, economical and efficient decision-making. Where there is a choice between a construction of the Convention that would further decision-making of that character and one that would frustrate those objectives, the former construction should be preferred".

65. We are not persuaded by the arguments advanced in favour of inclusion first as a general principle.

66. The argument that "logically" one cannot exclude unless one has first included does not withstand examination. Art 1F states that: "The provisions of this Convention shall not apply to any person with respect to whom …". It does not state that, having applied the provisions of Art 1A(2), a person is to be excluded. To illustrate by use of the metaphor of a garden gate, it would only be illogical to talk about excluding people from entering through a gate if they were already inside the garden.

67. Nor do we see any force in the argument that Art 1F dictates a sequential treatment of a refugee claim. Apart from Art 1C which specifies that the Convention shall cease to apply to any person falling under the terms of Art 1A, there is no apparent reason why, if someone falls within Art 1D or IE, there would be any reason to have first considered Art 1A(2).

68. As regards the exceptionality argument, it is true the Exclusion Clauses amount to an exception to the rule that if one has a well-founded fear of persecution one qualifies as a refugee. But it does not follow that, in order to apply an exception one has first to *decide* whether a person falls within the rule.

69. The reference to "refugee" in Art 1F(b) does at first sight poses a real difficulty. However, again we find ourselves in agreement with the judgment of the justices of the Australian High Court in *Minister for Immigration and*

Multicultural Affairs v Singh [2002] HCA 7 (7 March 2002). Gleeson, CJ, albeit dealing with the issue in the context of how the Convention operates within Australian law, noted at paragraph 5 that to read Art 1F(b) literally, so it can only apply to someone already found to be a refugee, would involve an internal inconsistency, since:

> "Art 1F is expressed as an exception. If it is satisfied, the provisions of the Convention are said not to apply to the person in question. If the provisions of the Convention do not apply to the person, the person cannot be entitled to protection under the Convention".

70. We note that in *ex parte Adimi* [1999] Imm AR 560 at 566 Simon Brown LJ held, no doubt for similar reasons, that the reference in Art 31(1) to refugees included "presumptive refugees".

71. He concluded that the "preferable solution is to read the reference to admission…as a refugee' as a reference to putative admission as a refugee". We do not see that the New Zealand case of *Re SK* - said to have implicitly decided that inclusion should always come first – assists very much at all. It simply does not address the issue. The same can be said about the judgment *in O v Immigration Appeal Tribunal* [1995] Imm AR 494. However, if indeed the New Zealand position is inclusion first, we would prefer the position set out by the Australian High Court.

72. We recognise that UNHCR has long urged that inclusion should normally be considered first. However, as use of the word "normally" makes clear, UNHCR`s position has not been that exclusion can never be considered first. As regards the primary decision-making stage, we would agree with their analysis that normally exclusion issues will only come to light in the course of assessment of a claim under Art 1A(2). However, once it becomes clear that a claim raises a definite issue about serious criminality, it seems to us that different considerations have already kicked in and the use of the adverb "normally" simply confuses things. It erroneously suggests that inclusion should come first even when exclusion subject matter has been plainly identified. All that is necessary to operate the inclusion and exclusion clauses of the Refugee Convention holistically is to bear in mind that there are two types of cases: ones that raise issues of serious criminality and ones that do not.

73. We would accept, however, that if in assessment of refugee claims generally it would be wrong for decision-makers to adopt an "exclusion culture". If exclusion were to be considered first as a matter of routine, there would be a risk of criminalising refugees. If the first substantive question an asylum-seeker is asked is not " What do you fear?" but "Have you committed a serious crime?" he might well lose confidence his asylum claim was going to be considered fairly. But we fail to see that dealing with exclusion issues first - once it is manifest that serious criminality is an issue - involves any kind of stereotyping as such. The "criminalising" argument at best goes to the need to avoid dealing with exclusion first when serious criminality is not involved.

74. Does the evident need for a holistic approach to refugee determination dictate that inclusion should be dealt with before exclusion? We think not. As we have already noted, it is essential when examining any type of refugee claim to consider the particular circumstances in the round and not to examine any issue in isolation. However that is really a point about what facts one takes into account. It is not a point about what one must legally decide bearing in mind the full picture. There seems nothing wrong in principle with deciding in respect of any case where serious criminality is involved to apply Art 1F criteria first, so long as when doing so sight is not lost of the individual`s particular circumstances.

75. That brings us to the argument that it is only by dealing with inclusion first that one can ensure proper distinction between prosecution and persecution. In favour of this argument it is also sometimes asserted that dealing with inclusion first can avoid having to deal with exclusion issues which are "inherently complex".

76. It is a valid point to make that certain claims potentially excludable under Art 1F might not qualify under the Inclusion Clauses anyway. And in cases in which the evidence about serious criminality is quite unclear, it may serve little or no purpose to broach the exclusion issues at all, particularly as they can be complex. But if the evidence is sufficiently clear that there is an issue of serious criminality, then an adjudicator is obliged by the mandatory terms of Art 1F to decide whether an appellant is excluded: it is not enough simply to say that in any event he does not qualify under Art 1A(2). Moreover, we cannot see that dealing with exclusion first distorts proper consideration of the prosecution versus persecution issue. Both issues have to do with criminality, but they stand to be determined according to quite distinct legal criteria. Certain differences are readily apparent. Under Art 1F the focus is on the past: whether the *person has committed* excludable crimes or acts. Under Art 1A(2) (even though past experiences may be relevant) the focus is by contrast on current risk: whether the claimant *faces* a real risk of persecution rather than simple prosecution. Furthermore, the concept of prosecution as developed by case law for use in certain Art 1A(2) cases covers a much broader spectrum of crimes and acts than those proscribed by Art 1F. There may be cases where the crime involved is not sufficiently serious to bring it within Art 1F confines. And even when the crime concerned is also one falling under Art 1F, its relevance under Art 1A(2) has to be considered by reference to a much wider range of factors than those relevant under Art 1F. The issue of the proportionality of punishment, for example, is not at all relevant under Art 1F, except possibly in relation to the issue of expiation. Ultimately, therefore, the only sustainable point this type of argument yields in favour of inclusion first is that the decision-maker must ensure that he makes consistent findings of fact in relation to any criminality issues, whether they arise under Art 1A(2), Art 1F or both.

77. At a general level, UNHCR`s concerns about the problems which can arise in the case of family members of an excluded person are entirely valid. In principle, the sins of the father are not to be visited on the sons. But

resolving the issue of whether or not family members who are not themselves implicated in excludable acts should get refugee status simply requires not applying to such cases the logic of determining claims by dependants in line with those of the principal family member. Avoiding in this way negative application wholly preserves the principle of family unity and also accords with the common-sense need to consider the claims of such dependants separately. Disapplying the normal approach to dependants is far preferable to turning matters on their head and letting the situation of family dependants dictate how refugee law should apply to persons who apply in their own right.

78.That brings us to the last argument we have noted in favour of inclusion first, which was that since adjudicators need to address Article 3 issues anyway, it makes sense for them to deal with inclusion first. We recognise that persons who are caught by the provisions of Art 1F can form one of the limited exceptions to the general rule set out in *Kacaj* [2002] Imm AR 213 that asylum claims and Art 3 claims stand or fall together. It is perfectly clear from leading cases in Strasbourg, *Chahal v UK* (1997) 23 EHRR 413 in particular, that even a terrorist excluded from the Refugee Convention may be able to succeed in an Art 3 claim if he can show his return would expose him to a real risk of treatment contrary to Art 3. It is a consequence of having acquired a human rights jurisdiction, therefore, that asylum cases involving serious criminality have also to be examined under Article 3.

79. But that does not necessarily mean in our view that inclusion issues should be addressed first or at all. It does mean that in cases where exclusion is dealt with first and a claimant is found to be excluded, an adjudicator must go on to address the issue of Art 3 risk on its own. He will when examining Art 3 issues cover some of the same type of ground as he would under Art 1A(2), but there is nothing wrong with him not addressing Art 1A(2) issues as such. Dealing with a common or overlapping subject matter does not require an adjudicator to apply two sets of legal criteria to it when only one is called for. If one says of a war criminal that, without considering Art 1A(2) he is excluded from the Refugee Convention by the terms of Art 1F(a) but nevertheless qualifies under Art 3 of the ECHR by virtue of the nature of the harm likely to befall him upon return, what is the legal error in that? Nothing is said about the Inclusion Clauses as such, that is all. What is said about the ill treatment concerned may or may not have amounted to persecution under the Refugee Convention, but that has simply become an academic question. No distortion of the relevant legal concepts has occurred. No injustice has been done to the claimant.

80. It may be asked, given that a claimant who is excluded under the 1951 Convention can nevertheless succeed under the Human Rights Convention, why is it necessary for an adjudicator to deal with the Refugee Convention at all? One part of the answer is that he is required to decide the appeal on the grounds brought. Another is that from the point of view of the international community and the integrity of the Refugee Convention, it is highly desirable that in such a case the host asylum state has made crystal clear that such a person is not a refugee. Currently in the UK significant differences in status flow from a person being recognised as a refugee and someone only

considered to be an Art 3 risk. The former possesses a number of civil, political, social and economic rights guaranteed by Arts 2- 30 of the Refugee Convention; there is also currently a policy to grant him indefinite leave to remain (previously it was limited leave to remain). The latter may in certain circumstances possess nothing more than a guarantee of non-removal for so long as his return would place him at Art 3 risk.

81. Although we have concluded that exclusion first is a legally correct approach in appropriate cases, we are bound to say we were not persuaded of such by the logic of Mrs Grey`s principal argument in favour of this position. She contended that this was deducible from the fact that, following the case of *T* and s. 34 of the Anti-terrorism, Crime and Security Act 2001, it was an error of law, when considering whether an act or crime fell within Art 1F, to consider the gravity of the persecution a claimant might face upon return. However, that seems to us to simply confuse the issue. All one is doing when assessing the gravity or severity of acts or crimes in the context of Art 1F is deciding whether they are thereby excludable. One is not saying that those who have committed them face (more or less grave) persecution. Nor is one laying down anything about the order in which inclusion and exclusion issues are to be dealt with. For similar reasons we see no merit in the argument that s. 34 of the Anti-terrorism, Crime and Security Act 2001 effectively requires the exclusion first approach as enjoined by s. 33 of the Special Immigration Appeals Commission (SIAC) cases to apply outside the special context of national security cases.

82. Having concluded that to deal with exclusion first is not an error of law, it remains to clarify when it is appropriate to deal with exclusion issues and in what order.

83. We consider that adjudicators should first deal with the issue of exclusion whenever the claim discloses an obvious issue of serious criminality. We emphasise that the issue must be one that is obvious, since, if there is no clear evidence of serious criminality, there is then too great a danger of being unnecessarily diverted away from examination under the Inclusion Clauses.

84. In attempting to give guidance we would distinguish between the hearing stage and the determination stage.

85. So far as the hearing stage is concerned, whilst there would be nothing wrong in a case raising an obvious issue of serious criminality with requiring the parties to confine their examination and submissions to exclusion issues, that would only be appropriate in cases where the evidence strongly pointed to the appellant falling within the terms of Art 1F. Much will depend at what stage the adjudicator forms a view that the evidence strongly points to exclusion. If for example it emerges during the appellant`s oral testimony that in fact he participated in violent actions against unarmed civilians, there would be nothing wrong with the adjudicator then confining the parties to submissions relating to the exclusion issues.

86. If the exclusion issues are not obvious or manifest and the evidence does not strongly point to exclusion, then the hearing should proceed in the normal way, covering examination and submissions on both inclusion and exclusion issues.

87. So far as the determination itself is concerned, so long as there is an obvious exclusion issue, the adjudicator should address this first.

88. The question next arises, when is it appropriate for an adjudicator, having dealt with exclusion issues first, to go on for “belt and braces” reasons to consider the inclusion issues? Obviously, if he does so, it follows from all we have said that he should approach the issues in a structured way which clearly separates their treatment. To approach the issues in an unstructured way may well mean his decision falls between two stools dealing with neither issue satisfactorily.

89. The main argument advanced in favour of the “belt and braces” approach is that it is in general desirable in the interests of avoiding unnecessary remittal for an adjudicator to decide all potentially relevant issues. However, we do not see that that statistically limited concern should take precedence over the need to ensure just, timely and efficient disposal of appeals. There is no sound basis for requiring a “belt and braces” approach in all exclusion cases.

90. Obviously if an adjudicator, having considered the exclusion issues first, concludes that Art 1F does not apply, he must go on to consider the case under the Inclusion Clauses in the normal way.

91. What should he do, however, if he decides Art 1F does apply? In our view he need only go on to consider the appellant`s position under the Inclusion Clauses if he considers that his decision under Art 1F is problematic or turns on a narrow factual or legal point concerning, for example, whether the appellant concerned is in fact an active or a willing member of an armed struggle organisation or whether his crime is properly to be classed as non-political. In such circumstances, there are sound reasons for a saving approach. But we would emphasise that in our view it should only be used when the factual or legal issues are considered in that particular case to be finely balanced.

Treatment of the Exclusion Clauses

92. If the adjudicator considers there is an issue under the Exclusion Clauses, he should identify which sub-paragraph applies. There are two main reasons for this. First the parties are entitled to know the precise exclusionary basis (es) on which the appellant has been excluded, be it 1F(a), (b) or (c). To say simply (as the adjudicator did in this case) that he is excluded under Art 1F leaves quite unclear whether it is because he is considered simply as a serious common criminal or as a war criminal or as someone who has offended the principles and purposes of the United Nations. Given that the terms of Art 1F allow for odd bedfellows, those who fall within its terms are entitled not to be unnecessarily associated with the perpetrators of the most

heinous crimes of all. The second reason has to do with the scope of Art 1F. The wording of Art 1F makes clear that an appellant must be excluded even if caught by only one of the three sub-paragraphs. Hence to say simply that an appellant does not fall under one or two sub-paragraphs, as the Tribunal did in *Amberber* (00TH01570) in respect of Art 1F(a), will not suffice.

93. An adjudicator should also make clear that when the issue is exclusion the evidential burden of proving that an appellant comes within one or more of the Exclusion Clauses rests on the Secretary of State. We adopt in this regard what was said by the Tribunal in *Thayabaran* (12250):

> "It appears to us that the use of the phrase "there are serious reasons for considering that" in Art 1F relates to the state of the evidence on the issue in question. The phraseology makes it difficult to speak of a burden of proof. Clearly, however, the exclusion clause cannot be brought into play unless there is some evidence of the alleged crime and of K`s nature. If there is not such evidence, it must follow the claimant is not excluded by Art 1F, and the result would be that in an appeal contested on this point, the claimant would win and the Secretary of State would lose. We have tentatively reached the conclusion that it follows that the Secretary of State bears at least an evidential burden on this issue".

94. We did consider whether there was also a legal burden of proof on the Secretary of State. Given that in an examination under the Exclusion Clauses there is much that is akin to a criminal examination, such an approach could be said, by analogy, to ensure that there is a presumption of innocence. But by the same token an examination under the Refugee Convention is *not* a criminal examination and its purpose is *not* as such to establish an appellant`s guilt or innocence, although assessment must be made of whether acts or crimes have been committed. It would be obvious to any subsequent prosecution process that was brought against the appellant (whether in the country of origin, the country of asylum or before an international court) that what an adjudicator had found within the context of a refugee determination was neither binding nor necessarily conclusive of whether the appellant had committed an offence for their purposes. We consider, therefore, that the decision of the Tribunal in the case of *Thayabaran* remains good law.

95. As regards the standard of proof, we find ourselves entirely in agreement with Mrs Grey`s submissions. In isolation one could state, as did the Canadian Federal Court in *Ramirez v Canada* [1992] 2 FC 306 at 311-313, that the phrase implied something less than proof on either a criminal standard of beyond reasonable doubt or a civil standard of balance of probabilities. However, in accordance with the approach of the Court of Appeal in *Karanakan* [2002] 3 All ER 449, rigid application of the civil approach to "standard of proof" has to give way in any event to a more rounded approach taking into account the possibility that doubtful events may have taken place. Thus there is no need to go beyond the words of Art 1F, i.e. "…serious reasons for considering…"

96. In assessing whether the act or crime committed by the appellant is sufficiently severe to bring an appellant within the Exclusion Clauses an adjudicator should not conduct any type of balancing exercise or proportionality test between this act or crime and the extent of the risk the appellant faces of persecution. In this regard it is important to note that paragraph 156 of the 1979 UNHCR Handbook no longer represents a correct understanding of the law. In the case of *T* their lordships held per Lord Mustill that:

> "The gravity of the offence is relevant to the question of whether it is "serious" for the purposes of Art 1F (b). But the crime either is or is not political when committed, and its character cannot depend on the consequences which the offender may afterwards suffer if he is returned".

97. In *Mukhtiar Singh* (SC 4/99, para 46(c), unreported) the Special Immigration Appeals Commission also held that no principle of proportionality or balancing fell to be applied under Art 1F (c). The conclusion in these cases was in accord with that expressed earlier by the Canadian case of *Ramirez.* Furthermore the position in the UK is now the subject of statutory regulation. Section 34 of the Anti-Terrorism, Crime and Security Act 2001 states:

> "(1) Articles 1(F) and 33(2) of the Refugee Convention (exclusions: war criminals, national security & c) shall not be taken to require consideration of the gravity of –
> (a) events or fear by virtue of which Article 1(A) would or might apply to a person if Article 1(F) did not apply, or
> (b) a threat by reason of which Article 33(1) would or might apply to a person if Article 33(2) did not apply".

98. One of the most difficult issues arising under the Exclusion Clauses is that of terrorism. It is plainly wrong to equate automatically the serious criminality which the Exclusion Clauses exist to proscribe with terrorism. As the Tribunal said in *Thayabaran*:

> "The question is not whether the appellant can be characterised as a terrorist, but rather whether the words of the exemption clause apply to him".

99. Yet it is equally clear from the judgment of the House of Lords in *T* that increasingly many of the acts and crimes proscribed by the Exclusion Clauses are seen under a number of treaties cataloguing international crimes as terrorist in nature.

100. Precisely how to balance these considerations is no easy matter. On a *general* level we consider that until such time as we have an accepted international definition of terrorism and one which clearly matches up with definitions contained within sub-clauses of Art 1F, it remains important to note material differences between Art 1F offences and terrorist offences.

Categories within Art 1F(a), e.g. war crimes, will not always qualify as terrorist crimes. Art 1F(b) proscribes serious crimes which may have no terrorist element (e.g. "common" serious crimes such as murder and robbery). Furthermore, whilst it is clear from the Special Immigration Appeals Commission decision in *Mukhtiar Singh v SSHS* SC 4/99, para 68 (p.47 transcript) that terrorism can be taken to be "contrary to the purposes and principles of the UN" within the meaning of Art 1F (c), that remains a matter of continuing controversy within and outside the EU. Thus it remains crucial not to equate Art 1F with a simple anti-terrorism clause. Regular use of the concept of terrorism as a tool for identifying crimes contrary to Art 1F must await definitive codification by the international community.

101. At the same time, it may be obvious in a *particular* case that active involvement in crimes which have been or can properly be described as acts of terrorism will be serious enough to fall within Art 1F(b).

102. In certain cases raising Art 1F issues, an adjudicator will be confronted with someone who has acted on his own, having committed, for example, an ordinary serious crime such as murder. However, in many cases involving exclusion issues an adjudicator will be faced with evidence that an individual is a member of an organisation committed to armed struggle or the use of violence as a means to achieve its political goals. To take typical examples, the appellant may have been a member of the PKK in Turkey, the LTTE in Sri Lanka, the FLN or GIA in Algeria or, as in the instant case, the CPN (Maoist) in Nepal. Or he may be linked to a multi-national organisation vowing armed struggle such as Al-Qaeda. How relevant is it that that sometimes armed struggle organisations abandon violent methods or enter into peace agreements which result in the cessation of violent struggle? In contrast with the adjudicator`s task under the Inclusion Clauses where the test is one of current risk, under the Exclusion Clauses what is required in an historic inquiry. Hence the fact that since the appellant left his country of origin his organisation no longer pursues armed struggle, will not be relevant to whether he did commit proscribed acts or crimes before he left. Nor will it be relevant that, as the Tribunal noted in *Thayabaran*, an appellant has become a reformed character.

103. But in such cases the question arises, is mere membership at the time of the commission of acts or crimes proscribed by Art 1F enough to entitle an adjudicator to conclude an appellant is excluded under this provision?

104. The Tribunal has consistently stated that mere membership of such organisations is not enough to bring an appellant within the Exclusion Clauses: see for example, *Amirthalingam* (11560, March 1994), *Nanthakumar* (11619 Dec 1994), *Arulendran* (11827 Feb 1997). In the light of previous case law and the further materials now before us, we would highlight two further principles that should be borne in mind when considering complicity.

105. One is that it would be wrong to say that an appellant only came within the Exclusion Clauses if the evidence established that he has personally participated in acts contrary to the provisions of Art 1F. If the organisation is

one or has become one whose aims, methods and activities are predominantly terrorist in character, very little more will be necessary. We agree in this regard with the formulation given to this issue by UNHCR in their post September 11, 2001 document, Addressing Security Concerns without Undermining refugee Protection: UNHCR`s Perspective, at paragraph 18:

> " Where, however, there is sufficient proof that an asylum-seeker belongs to an extremist international terrorist group, such as those involved in the 11 September attacks, voluntary membership could be presumed to amount to personal and knowing participation, or at least acquiescence amounting to complicity in the crimes in question. In asylum procedures, a rebuttable presumption of individual liability could be introduced to handle such cases. Drawing up lists of international terrorist organisations at the international level would facilitate the application of this procedural device since such certification at the international level would carry considerable weight in contrast to lists established by one country alone. The position of the individual in the organisation concerned, including the voluntariness of his or her membership, as well as the fragmentation of certain groups would, however, need to be taken into account".

106. That complicity in this type of case should be sufficient to bring an appellant within the Exclusion Clauses is necessary in order to adequately reflect the realities of modern-day terrorism. The terrorist acts of key operatives are often possible only by virtue of the infrastructure of support provided by other members who themselves undertake no violent actions. As the US Court of Appeals, Ninth Circuit noted in *McMullen v INS* 685F 2d 1312 (9th Cir 1981) at 599:

> "We interpret both the Convention and the [A]ct to permit deportation of individuals who commit serious, non-political crimes, and we have concluded that this includes terrorist acts against ordinary citizens. We refuse to interpret these documents to apply only to those who actually "pulled the trigger", because we believe that this interpretation is too narrow. In our judgment, the only reasonable interpretation of the exception is that it encompasses those who provide the latter with the physical, logistical support that enables modern, terrorist groups to operate".

107. Likewise the Tribunal noted in *Ozer* (10922, May 1994) when considering the appeal of a person who had voluntarily joined and supported Dev Sol which, with reference to objective country materials on Turkey was described as then being an illegal party dedicated to violence,

> "…then it is no use his asserting that he does not support its policy or methods. If he does not endorse a central policy of the party he should not be a member of it: in any event his membership and contribution to the life of the party is indirect support for its violent acts".

108. The other principle to be borne in mind is that whilst complicity may arise indirectly, it remains essential in all cases to establish that the appellant has been a voluntary member of such an organisation who fully understands its aims, methods and activities, including any plans it has made to carry out acts contrary to Art 1F. Thus for example it would be wrong to regard the mere fact that an appellant has provided a safe house for LTTE combatants as sufficient evidence that he has committed an excludable offence. If, however, he has transported explosives for LTTE combatants in circumstances where he must have known what they were to be used for, there may well be a serious IF issue.

109. We would also observe that international criminal law and international humanitarian law, which in our view should be the principal sources of reference in dealing with such issues as complicity, adopt similar although more detailed criteria in respect of those who for the purpose of facilitating an international crime aid, abet or otherwise assist in its commission or its attempted commission, including providing the means for its commission (see Art 25 of the International Criminal Court Statute and Art 7(1) of the ICTY Statute as analysed in the case of *Tadic* Case No.IT-94-1-T, 7 May 1997). Of course such reference will need to bear in mind the lower standard of proof applicable in Exclusion Clause cases.

110. However, as the passage just cited from UNHCR highlights, even when complicity is established the assessment under Art 1F must take into account not only evidence about the status and level of the person in the organisation and factors such as duress and self-defence against superior orders as well as the availability of a moral choice; it must also encompass evidence about the nature of the organisation and the nature of the society in which it operates. Such evidence will need to include the extent to which the organisation is fragmented.

111. Observing as we do that in certain past Tribunal cases, *Karthirpillai* (12250) being an unhappy example, adjudicators and the Tribunal have not always taken a contextual approach, we think it useful to consider cases along a continuum.

112. On the one end of the continuum, let us postulate an organisation that has very significant support amongst the population and has developed political aims and objectives covering political, social, economic and cultural issues. Its long-term aims embrace a parliamentary, democratic mode of government and safeguarding of basic human rights. But it has in a limited way or for a limited period created an armed struggle wing in response to atrocities committed by a dictatorial government. In such a case an adjudicator should be extremely slow to conclude that an appellant`s mere membership of such an organisation raises any real issue under Art 1F, unless there is evidence that the armed actions of this organisation are not in fact proportionate acts which qualify as “non-political crimes” within Art 1F(b) and, if they are not, that he has played a leading or actively facilitative role in the commission of acts or crimes undertaken by the armed struggle wing.

113. At the other end of this continuum, let us postulate an organisation which has little or no political agenda or which, if it did originally have genuine political aims and objectives, has increasingly come to focus on terrorism as a modus operandi. Its recruitment policy, its structure and strategy has become almost entirely devoted to the execution of terrorist acts which are seen as a way of winning the war against the enemy, even if the chosen targets are primarily civilian. Let us further suppose that the type of government such an organisation promotes is authoritarian in character and abhors the identification by international human rights law of certain fundamental human rights. In the case of such an organisation, any individual who has knowingly joined such an organisation will have difficulty in establishing he or she is not complicit in the acts of such an organisation.

114. In operating this continuum, we agree with Mrs Grey that, so long as it is informed by reference to international criminal law and international humanitarian law developments, useful guidance has been furnished by several Canadian cases, *Ramirez* in particular, where the test is formulated as a two-fold one of assessing firstly, whether an individual occupies a leadership role or other position of authority in the organisation; and secondly, whether the organisation's principal or dominant purpose has come to be one of the commission of acts contrary to Art 1F.

Application of these principles to the particular circumstances of the case.

115. As we have already intimated, the adjudicator's principal findings of fact were inadequate and in parts contradictory. For that reason we see no real alternative to remitting the case to be heard by a different adjudicator. A remittal will also ensure that consideration of the evidence takes account of the letter from the British High Commission in Nepal alleging that the newspaper article is not authentic. That may have a significant bearing on assessment of credibility.

116. However, in order to illustrate the principal points made earlier, it is appropriate for us to set out various other respects in which the adjudicator failed to approach this case properly.

117. It is apparent that in this case the adjudicator raised the issue of the Exclusion Clauses of his own motion. The Secretary of State had not raised this issue, nor had the grounds of appeal anticipated that it would be raised at the hearing. Given however that the Reasons for Refusal did plainly identify what we have earlier described as obvious Art 1F subject matter (the appellant's membership of an illegal organisation dedicated to armed struggle), we think that the adjudicator was entitled to assume that both parties would have given some thought to the potential Art 1F implications of the appeal.

118. Even so, he was clearly wrong, once he had decided Art 1F issues were raised, not to have at least discussed with the parties whether in the circumstances they, the appellant in particular, had had sufficient opportunity to consider exclusion issues. Procedural fairness dictated that he should have

done so. Whether in this case he should have granted anything more than a very short adjournment, we doubt very much, because of the fact that it had been raised in substance if not expressly in the Secretary of State's refusal letter.

119. Having decided Art IF was in issue, the adjudicator should also have raised with the parties which sub-clause(s) he considered relevant. The Secretary of State should of course have identified the exclusion issues earlier, but, given that he had failed to do so, it was incumbent on the adjudicator, having decided to deal with the issue himself, to specify whether one or more sub-clause of Arts 1F(a), (b) or (c) were engaged. He failed to do this.

120. Despite deciding Art 1F was involved the adjudicator failed to give any indication as to what he saw as the relevant burden and standard of proof. We have set out what we consider these are at paragraphs 84-86. Nevertheless, although it was remiss of him not to have specified these, we are not persuaded that this failing on its own would have been fatal to his determination, had he gone on to effectively apply the correct burden and standard.

121. Nor did the adjudicator indicate his recognition that, being clauses whose effect was to exclude someone who otherwise might be viewed as facing a real risk of persecution, such clauses called for a restrictive interpretation. Certainly there was no exceptional circumstance in the case he was dealing with to warrant not applying such a restrictive approach.

122. Notwithstanding such failings in the adjudicator's treatment of this case, Mr Braid has urged us to find that in practice the adjudicator had properly dealt with both the inclusion and exclusion clause issues. He had in effect adopted a "belt and braces" approach.

123. As we clarified earlier, there may be cases where it is safest for an adjudicator to adopt a "belt and braces" approach. And we would accept that the adjudicator in this case did examine both issues. But because he did not differentiate between his treatment of the inclusion and exclusion clause issues and did not furnish any adequate explanation as to why he dealt with them in the way he did, his approach failed to do justice to either set of issues.

The Adjudicator's treatment of the Exclusion Clauses

124. Given that the adjudicator did address the Exclusion Clauses albeit not in a structured way, what is to be said about his conclusion that the appellant was caught by the Exclusion Clauses because he was a self-confessed Maoist? At paragraph 20 the adjudicator recorded the appellant`s evidence as follows:

> `Mr Dawodu (the respondent`s representative) asked the appellant whether he was aware that the Maoists were an illegal terrorist organisation in Nepal. The appellant challenged that definition. It was

> not right to describe the Maoists as an illegal terrorist organisation, because they were working within the law. Mr Dawodu pressed his point. The appellant agreed. He knew that the Maoists were an illegal terrorist organisation`.

125. Mr Braid submitted to us that the appellant had never himself been involved in any Maoist atrocities.

126. For the adjudicator the point was a very simple one. If we may paraphrase his logic, it was to maintain the syllogism that "A is a member of organisation X. Organisation X is an illegal terrorist organisation. Therefore A is involved in terrorist activities".

127. However for reasons explained above we consider the circumstances of this case called for a more careful assessment in the first instance of the nature of the organisation in question, in this case the CPN (Maoist).

128. Whilst materials placed before us dealing with the Maoists have been considerable in number, they nowhere give a precise account of the history, structure and aims and objectives of this organisation. However, on the basis of what has been placed before us, we can summarise the position as follows. Maobadi is a generic Nepali term meaning "the Maoists" and as such does not refer to a specific party organisation, although it is often used interchangeably with the term Communist party of Nepal (Maoist) (CPN (Maoist) who are said to be ideologically close to the Communist Party of Peru (Shining Path). The CPN (Maoist) declared a `people's war` in 1996. Since then the insurgency has resulted in the deaths of over 2,100 people including more than 200 civilians. In addition to suspected informers, Maoists have mainly targeted political leaders and local elites, including representatives of the more moderate Marxist-Leninist (UML) party and the Nepal Congress Party (NPC). They have looted banks and bombed or set on fire government offices, hospitals and the homes of political leaders. Their targets have included socio-economic targets such as factories and telecommunications centres. They have attacked landowners, civilians, and government officials in a number of districts. On occasions they have also attacked international non-governmental organisations. In October 1998 it announced the start of a `fourth phase` involving establishment of `base zones` or captured territory. In one report dealing with the situation in 2000 the Maoists were said to now control a sizeable proportion of the country. In July 2001 the country was said to have been brought to a standstill by a widely observed general strike called by the Maoists. When it further escalated its level of armed attacks in 2001, the Government responded in November 2001 by declaring a state of emergency. It declared the CPN (Maoist) and its sister organisations and any individual or organisation that support the Maoist Party and its activities as terrorist. It also began to employ the army directly in operations against the Maoists for the first time. The Maoists responded by extending their list of targets to including military personnel. Echoing major NGO assessments, the US State Department reports have consistently recorded the Maoists as being responsible for numerous human rights abuses and international humanitarian law violations, including the deliberate kidnapping and killing of

civilians and the forced abduction of children to turn them into armed soldiers. EU sources have described the Maoists campaign of violence as taking place on a carefully planned and systematic basis.

129. At the same time the background materials also disclose that the CPN (Maoist) has a detailed political programme known as the “40 points” covering a wide range of subjects, land reform and anti-corruption in particular. Furthermore, it has a number of “wings”, including a political wing (Samyukta Jana Marcha, United People`s Front (Bhattarai) (SJM), a cultural wing and a student`s wing. It was able in 2001 to bring the country to a standstill with a widely observed general strike, it or its subsidiary organisations has some considerable level of popular support, even if to some extent those who observed the strike did so out of fear of reprisal. The fact that there have been several unsuccessful attempts by the government to negotiate peace further indicates that it is far from being purely a military cadre or vanguard devoted exclusively to the pursuit of armed struggle.

130. Had the adjudicator considered these features of the CPN (Maoist) as it has operated in Nepal in recent years, it is likely his inquiry would have led to two main conclusions. One, which he did allude to at several points (albeit by using the unhelpful epithet, “terrorist”) would have been that the CPN (Maoist) is indubitably an organisation which has committed serious violations of international humanitarian law. That is to say, the organisation’s evident involvement in terrorist activities could be identified in terms of acts plainly contrary to Articles 1F (a), (b) and (c). (We make mention of Article 1F(a) here advisedly, because although in large part the focus of this sub-clause is crimes committed in the course of war between countries, crimes against humanity are now regarded as covering acts committed in the course of internal armed conflicts).

131. However the other main conclusion of any careful inquiry by the adjudicator into this organisation would have been that the CPN (Maoist) party is clearly not an organisation at the out-and-out `terrorist` end of the continuum.

132. Given the diversified (if not in some cases fragmented) nature of the activities of the Maoists in Nepal, we do not think the adjudicator could easily have come to the conclusion that the appellant was himself an excludable “terrorist” simply because he was a CPN (Maoist) member. That does not mean, however that such a conclusion would not have been open to him if there was specific evidence of the appellant`s own personal involvement in acts or crimes proscribed by Art 1F.

133. The legal criteria to be applied to cases falling under Art 1F(b) have been clarified by their lordships in the case of *T*. But what was the evidence relating to Art 1F(b) crimes in this case? So far as the appellant`s own activities in the context of his CPN (Maoist) membership are concerned, we have already commented on the paucity of the adjudicator’s findings of fact in respect of the raid on the Land Registry offices. Even assuming he was right to discount the appellant`s own evidence that he had only been involved in one incident (the

Tax Office/and Registry offices raid being treated as one and the same), the adjudicator did not make any specific findings as to whether he thought these activities and the appellant`s part in them amounted to acts or crimes contrary to Art 1F.

134. Had the adjudicator gone on to evaluate these activities, we think it most unlikely – assuming he did not think the appellant was involved in much more than he was letting on - he could have concluded these did amount to crimes contrary to Art 1F.

135. It is consistent with the criteria set out in *T* that in some circumstances stone throwing could amount to a serious crime within the meaning of Art 1F(b): in certain circumstances the mere threat of violence can also amount to a serious crime. We doubt that Mrs Grey can be right in saying that a raid on a set of government offices cannot be an action sufficiently related to the purpose of overthrowing or changing the government to qualify as "political". However, there was a lack of concrete evidence on most salient matters: whether the stone-throwing and chanting in this case seriously threatened persons or property; whether the Land Registry offices were occupied by anyone at the particular time of the protest or, if there were people there, whether they were solely government officials or a mixture of government officials and ordinary civilians; whether the effect of the raid was to create terror in the minds of those attacked. Also lacking was evidence concerning the applicant`s particular role in this raid. It is true the appellant himself at one point described this incident as an `implementation` of Maoist policy and it is true that objective country materials do mention, amongst the targets chosen by the Maoists, government offices. But there is insufficient evidence, particularly given that it would now appear little or no reliance can be placed on the newspaper article, to infer that this incident was in fact part of any armed struggle enterprise. We remind ourselves again that the objective country materials appear to indicate that the Maoist party is a multi- faceted organisation with various wings and that not everything done in its name emanates from a co-ordinated central command.

136. It remains sufficiently clear, however, that the appellant had joined the CPN (Maoist) voluntarily and had not done anything for them under coercion. It is also sufficiently clear that he must have known that the CPN (Maoist) did engage in armed struggle activities and had committed a number of atrocities. On his own account and having regard to his own written statements, he was a relatively educated person. Although we have concluded there is not enough evidence to equate his own role in the party and his own activities in support of it with acts or crimes contrary to Art 1F, we have not done so because we believe his erstwhile claims that the Maoists in general were working within the law. It is simply that in the particular circumstances of his case there is insufficient evidence to establish that he was working so far outside the law as to bring himself within the scope of Art 1F(a) or IF (b) or Art 1F(c).

137. We have thus found that the adjudicator was wrong to conclude the appellant was excluded by Art 1F. Of course, if the evidence had clearly

warranted treating the appellant as excluded under Art 1F(b), then the adjudicator would not have needed – indeed it would only have confused things – to go on and consider the Inclusion Clause issue of prosecution versus persecution. He would have been entitled, having set out his reasons why Art 1F(b) applied, to dismiss the asylum grounds of appeal without more. He would then, of course, have had to go on to consider whether nevertheless the appellant faced a real risk of treatment contrary to Article 3: indeed, for reasons we will mention in a moment, he might very well have concluded (always assuming acceptance of credibility) that there would be a breach of that guarantee.

The Adjudicator's treatment of the Inclusion Clauses

138. But since Art 1F should not have been applied against this appellant, the issue of whether he qualified under the Inclusion Clauses needed to be addressed. A central question was prosecution versus persecution. Insofar as the adjudicator also sought to deal with this issue, can we say he dealt with it properly? We think not. Assuming acceptance of credibility, he should have found in our view that the appellant would face a real risk of persecution. If the Nepalese authorities saw the appellant as a member of the CPN (Maoist) party, it was difficult to see that they would limit themselves to a legitimate process of prosecution. Going by the objective country materials placed before us, we see no reason to differ from the conclusions reached by the Tribunal in *Rajesh Gurung* and subsequent cases such as *Prakesh Sharma* [2202] UKIAT 02943 and *Hane* [2002] UKIAT 03945. Indeed, in our view the more comprehensive and in some respects more recent objective materials placed before us serve only to confirm the findings of fact reached by the Tribunal in these cases to the effect that someone currently viewed as a Maoist would face persecution rather than simple prosecution. It is true these materials no longer bear out in unqualified fashion that the government makes systematic use of torture and such-like abuses. It is also true these reports fall well short of demonstrating that ordinary civilians are systematically denied basic standards of justice and fair trial. The courts, particularly at a lower level, continue to be susceptible to political pressure and there remain lengthy delays in the trial process particularly at the higher level. Yet the Supreme Court and increasingly the appellate courts have shown themselves to be independent.

139. However, these materials do indicate that the use of torture, disappearances, and arbitrary detention remains widespread, particularly in areas affected by the Maoist insurgency. Whilst extrajudicial killings have not been widespread, most of those concerned were suspected of being sympathisers with the Maoists. In December 2001 the government announced abandonment of its policy of releasing imprisoned Maoists. It must also be borne in mind that with the implementation of the Public Safety Regulations 2001, the ability of the courts to check the acts of the police and security forces has been considerably circumvented. There is no suggestion that the National Human Rights Commission or the operation of the Torture Compensation Act 1996 or the government's accession to major international human rights instruments or the existence of several human rights non-governmental organisations have been significantly able to check these types

of abuses. Reports of government excesses against Maoists in the early part of 2002 in the context of police and military drives against the Maoists are particularly alarming.

140. In view of the considerable body of evidence showing that Maoists are far more likely to experience torture and ill treatment in detention, such persecution would also demonstrably be for a Convention reason of political opinion.

141. Assuming the adjudicator had correctly concluded the appellant faced a real risk of persecution for a Convention reason and so came within the Inclusion Clauses, what should he have said about the human rights grounds of appeal. In our view he would have only needed to record - applying criteria set out in *Kacaj* and basing himself on the same findings of fact he had made in respect of the Art 1A(2) issues - that the appellant also faced a real risk of ill treatment contrary to Art 3.

142. We would re-emphasise that we have only included the foregoing analysis of the adjudicator's determination for illustrative purposes. Whether the adjudicator next looking at the case takes a similar or different view as to the credibility of the appellant's account has to be entirely a matter for that adjudicator.

The position of the Secretary of State

143. Although our direct concern is with the proper approach to be taken by *adjudicators* to cases raising Art 1F issues, it is salient that we underline what we think is the proper approach to be taken by primary decision-makers.

144. We hope we have already made clear our dismay at the relative rarity with which the Secretary of State raises Art 1F issues in appeals brought before adjudicators. As we have already noted, there are many asylum claims brought by persons who claim some degree of connection with organisations whose involvement to some degree in violations of international humanitarian law has been amply documented. We have already mentioned a number of typical examples. It may be that in many cases there is no need to consider Exclusion Clauses issues because of lack of credibility or because on the appellant`s own account his level of involvement in such organisations is too remote from acts contrary to Art 1F. The person who claims to have been a supporter of the LTTE merely assisting them with digging bunkers is perhaps a classic example. However, once the evidence extends to involvement in activities directly related to armed struggle activities, e.g. (to stay with the LTTE example) such as knowingly transporting arms intended to be used by LTTE combatants against civilians, then it is plainly inadequate to assume that this can always be confined to the issue in terms of prosecution versus persecution. For the decision-maker an alarm bell should ring at this point.

145. If one consideration in the mind of interviewing officers inclining them not to raise exclusion clauses issues is the fact that the appellant may have a separate potentially successful claim under Article 3, we would hope that such a consideration ceases to play any role. An appellant is entitled to a separate

decision on his asylum claim under the Refugee Convention and his human rights claim under the Human Rights Convention. Furthermore, there remains in UK law some important differences in status outcome. A successful claimant under the Refugee Convention is recognised as a refugee, which is a status existing at the level of international law. It is also a status which confers on him certain civil, political, social and economic rights specified in Arts 2-33 of the Refugee Convention. As a matter of current UK policy it also entitles him to a grant of indefinite leave to remain. By contrast, a successful claimant under the Human Rights Convention, even if found to be unremovable unless Article 3 is to be violated, is not entitled to receive any status. As a matter of current policy only he is granted certain civil, political, social and economic rights and he may also get exceptional leave to remain for varying periods. In the case of someone found to fall within the Exclusion Clauses, i.e. someone who because of serious criminality has been found to be undeserving of international protection, and someone who may well have been a persecutor, it would seem to us to make very good sense not to assimilate his or her position to that of the persecuted.

146. We are conscious from the contents of Mr Braid`s submissions that there is some anxiety that greater attention by the Secretary of State to exclusion issues may lead to genuine asylum seekers wrongly been labelled as terrorists. However, we see no real danger of any such result happening from the type of closer attention that we advocate. Given that very few asylum-seekers ever own to knowing involvement in acts contrary to the Exclusion Clauses, even a significantly redesigned approach to examination so as to better identify possible exclusion cases is unlikely to cause any real changes except in cases where there is some real evidential foundation for such identification.

147. We understand from Mrs Grey`s submissions that the Secretary of State is in the process of redesigning the assessment procedures to ensure that interviewing officers undertake examinations in the light of EU-oriented guidelines for the recognition of Art 1F cases. We are given to understand that a start-point for such assessment has already become whether the appellant is a member of an organisation proscribed under the Terrorism Act 2000. Cases raising national security issues are already the subject of statutory regulation through the Special Immigration Appeals Commission Act 1997 as amended.

148. Apart from cases which are identified as falling within the scope of the SIAC procedures, we see nothing wrong in principle – for reasons given earlier - whenever exclusion issues are seen to be involved in the Secretary of State deciding first about the appellant`s position under the Exclusion Clauses. However, at the primary decision-making stage there is a considerable value in the decision identifying in “belt and braces” fashion even potentially applicable issues. Only such an approach can ensure that at any further appeal stage the adjudicator knows the Secretary of State`s overall position. Mrs Grey`s submissions accepted this point. Accordingly, we expect it would be rare for exclusion solely to be addressed in the reasons for refusal letter.

149. Obviously special considerations may apply in at least three sets of exceptional circumstances, namely when the appellant is identified as (potentially) being the subject of extradition proceedings or of criminal proceedings under national (UK) law or of proceedings before an international court exercising international criminal law jurisdiction. Such cases are likely to be "frozen" before they get to the appeal stage anyway.

150. To our mind the primary objective behind the Secretary of State's examination of asylum claims should be to ensure that all salient issues, including but not limited to any exclusion issues, have been properly identified in the Reasons for Refusal letter. Although we have not ruled out that the adjudicator can properly address Exclusion clause issues not previously raised of their own motion, the less adjudicators find themselves having to confront this dilemma the better.

151. **Summary of Conclusions.**
In order to resolve some of the issues in this case it has been necessary to go into detail. Now that we have done that, however, we consider that guidance can be given in relatively short form:

1. Bearing in mind the need to adopt a purposive approach to the interpretation of the Exclusion Clauses, they are to be applied restrictively. In contrast to the focus under Art 1A(2) on current risk, the focus under Art 1F is on past crimes or acts.

2. In any case in which an adjudicator intends to apply the Exclusion Clauses, he should avoid equating Art 1F with a simple anti-terrorism provision. He should make findings about the serious crime or act committed by the claimant and then explain how that fits within a particular sub-category (or particular sub-categories) of Art 1F - 1F(a), IF (b) or 1F(c). As the Tribunal held in *Thayabaran* (12250), he should treat the evidential burden of proving that a claimant is excluded by Art 1F as resting on the Secretary of State. The test specified in Art 1F of "serious reasons for considering" that a barred act had been committed was one requiring a lower standard of proof than either beyond reasonable doubt or the balance of probabilities. No other wording than "serious reasons for considering" should be introduced.

3. In relation to cases raising issues under Art 1F(b), the principles enunciated by their lordships in the case of *T* remain valid. However, in deciding whether a person`s membership of an organisation amounts to complicity in any crimes or acts proscribed by Art 1F, it is of crucial importance to examine the particular circumstances, taking account not only of factors concerning the individual and his specific role in the organisation but also that organisation's place and role in the society in which it operates. The more an organisation makes terrorist acts its *modus operandi*, the more difficult it will be for a claimant to show his voluntary membership of it does not amount to complicity.

4. It would be wrong for adjudicators to adopt an “exclusion culture” and go searching in every case for exclusion issues under Art 1F. Pragmatism is called for. However, the Exclusion Clauses are in mandatory terms and where obvious issues arise under them these must be addressed by an adjudicator, even if the Secretary of State has not raised them expressly or by implication in the Reasons for Refusal letter. That may happen prior to the hearing, at the outset of the hearing or during it. This approach is subject only to the need to ensure procedural fairness.

5. It is only necessary to consider exclusion issues in cases obviously involving serious criminality as defined by Arts 1F(a)-(c). However, once the case is identified as one obviously involving serious criminality, there is nothing wrong with an adjudicator dealing with exclusion issues first.

6. So far as the hearing stage is concerned, whilst there would be nothing wrong in a case involving an obvious exclusion issue with requiring the parties to confine their examination and submissions to exclusion issues, that would only be appropriate in cases where the evidence strongly pointed to the appellant falling within the terms of Art 1F. In all other cases, e.g. where exclusion issues albeit relevant are not obvious or manifest, then the hearing should be conducted so as to cover evidence and submissions relating to both exclusion and inclusion issues.

7. So far as the reasons part of the determination itself is concerned, whenever there is an obvious exclusion issue, it should be dealt with first. Not to go straight to the exclusion issues could frustrate the objective set by Rule 30 of the Immigration and Asylum Appeals (Procedure) Rules 2000 of securing the “just, timely and effective disposal of appeals”.

8. If, having dealt with exclusion first in the determination an adjudicator decides that Art 1F does not apply, he or she must then go on to deal with the appeal under the Inclusion Clauses in the usual way.

9. If Art 1F is found to apply, adjudicators should only go on in “belt and braces” fashion to consider the Inclusion Clause issues when the decision to exclude is seen to be problematic or to turn on a narrow or finely balanced point.

10. But where an adjudicator (in a post 2 October 2000 appeal) concludes that an appellant falls within the Exclusion Clauses, it will be necessary in any event for him to go on to consider whether the decision to remove the appellant would violate Art 3 of the European Convention on Human Rights. In this regard exclusion cases form one of the very limited exceptions to the rule enunciated in *Kacaj* that asylum and Article 3 claims stand or fall together.

11. So far as the Secretary of State is concerned, however, different considerations should apply. Even if exclusion issues are addressed first, it is highly desirable in the interests of justice that at all stages of his examination of an asylum claim he adopts a “belt-and-braces” approach and that he sets out in his Reasons for Refusal his decision on the appellant`s position under both the Inclusion and Exclusion Clauses.

152. For reasons already given this appeal is thus to be remitted to be considered afresh by an adjudicator other than Mr Curzon Lewis. The adjudicator who hears this case can now treat the exclusion issues as having been raised. He or she will need to consider in particular the credibility of the appellant`s claim in the light of all the evidence including the letter which has now been submitted by the British Embassy, Nepal. If the adjudicator decides that the appellant`s account of being a member of the Maoist party is credible, then he will need to approach the exclusion issues in a structured way and, in relation to any Art 1F(b) issues, he will need to consider the appellant`s role in it in the light of the objective evidence about the history, structure, organisation and activities of that organisation in the context of present-day Nepal.

DR H H STOREY
VICE-PRESIDENT