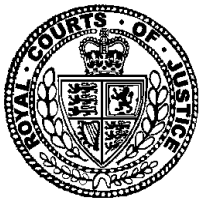

Neutral Citation Number: [2019] EWCA Civ 1253

Case No: C5/2018/1096

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
UPPER TRIBUNAL JUDGE LANE
Appeal No. AA/02785/2014

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/07/2019

Before :

LORD JUSTICE DAVID RICHARDS
LORD JUSTICE HAMBLEN
and
MR JUSTICE SNOWDEN

- -

Between :

MAB (IRAQ)	**Appellant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Henry Blaxland QC and Ronan Toal (instructed by **Wilson Solicitors LLP**) for the **Appellant**
Rory Dunlop QC (instructed by **Government Legal Department**) for the **Respondent**

Hearing date : 4 July 2019

- -

Approved Judgment

Lord Justice Hamblen :

Introduction

1. This appeal concerns whether, on the findings made, it was open to the First Tier Tribunal ("FTT") to conclude that that the appellant doctor was excluded from protection by the Refugee Convention ("the Convention") on the ground that the medical assistance he gave to victims of torture, knowing that some of them might be tortured again, meant that he was complicit in their torture and thus liable for a crime against humanity.

The factual background

2. The appellant ("A") was born on 7 March 1965 and is a citizen of Iraq.

3. Between 1992 and 1994 A worked as a doctor for the Al-Istikhbarat (Saddam Hussein's military intelligence agency). He worked at a clinic at their headquarters. He treated military intelligence officers and prisoners. On occasion he was also taken to visit camps where he treated prisoners. He was aware that some of those prisoners, but he did not know which, were likely to be tortured again after he had treated them. A never sought to leave the Al-Istikhbarat throughout his military service, such as by asking to be transferred to military service elsewhere.

4. A left Iraq in December 1995. He travelled to Libya where he worked as a doctor for four years.

5. A first arrived in the UK on 20 January 2000 where he was given leave to remain as a visitor for a period of six months. This leave was variously extended. On 2 February 2007 A claimed asylum.

6. In January 2011, the War Crimes Unit of the Border Agency completed a report in relation to A. On 24 October 2011, the Respondent ("the SSHD") sent a letter to A explaining that he had been excluded from the Convention by the operation of Article 1F(a).

7. In March 2013, proceedings were initiated before a panel of the Medical Practitioner Tribunal ("MPT"). The MPT found A's fitness to practise impaired by reason of having been an accessory to torture in Iraq. The MPT suspended A from practice for a year.

8. In April 2013, A's wife and children were granted five years' leave to remain as refugees. On 3 March 2014, the MPT found that A's fitness to practise was no longer impaired and his practising certificate was reinstated.

9. On 19 August 2013, A applied under para 327 of HC 395 for leave to remain on the grounds of asylum. That application was refused by the SSHD on 14 April 2014. The SSHD considered that A was excluded from the Refugee Convention under Article 1F(a) as a person in respect of whom there were "serious reasons for considering that you have committed crimes against humanity". The SSHD did, however, exercise her discretion in A's favour, deciding that he should be granted limited leave to remain outside of the Rules in accordance with the published Home Office Asylum Policy Instruction on Discretionary Leave.

10. Given the length of the periods of discretionary leave awarded to A, he was entitled to appeal against the SSHD's April 2014 decision under the provisions of s83 Nationality, Immigration and Asylum Act 2002.

11. The first hearing before the FTT took place on 27 and 28 April 2015 ("the 2015 FTT"). Before the 2015 FTT (UT Judge Renton, FTT Judge Broe) A conceded that he was complicit in a crime against humanity but argued that he had a defence of duress. The 2015 FTT allowed his appeal on the grounds of duress.

12. The SSHD appealed to the Upper Tribunal ('UT') against the decision of the 2015 FTT. On 12 April 2016, the UT ("the 2016 UT") allowed the appeal and remitted the matter back to another FTT.

13. A further hearing took place before a newly constituted FTT (FTT Judge McCarthy, FTT Judge M Hall) on 10 February 2017 ("the 2017 FTT"). The 2017 FTT found that there were serious reasons for considering that A had committed crimes against humanity. Although A himself had not tortured anyone, he had provided medical aid to the perpetrators and treated prisoners in circumstances where if he had not done so, their torture might have ceased. The 2017 FTT also found, however, that A had a defence of duress.

14. The SSHD appealed to the UT against that decision. A issued a Rule 24 cross appeal, the scope of which is in issue between the parties,

15. The appeal hearing took place on 22 September 2017 before UT Judge Lane.

16. In a determination promulgated on 11 December 2017, the UT ("the 2017 UT") found that the SSHD's appeal succeeded because the 2017 FTT had made a material error when considering the defence of duress. Applying the correct principles and burden of proof, the defence of duress should fail. It was further found that A's cross appeal failed.

17. A sought permission to appeal on four grounds. On 13 December 2018 Underhill LJ granted permission to appeal on all four grounds.

18. On 15 January 2019 the SSHD filed a Respondent's notice, seeking, if necessary, to uphold the UT's order on different or additional grounds, namely that the 2017 FTT had reached a finding on complicity that was open to them on the facts.

The legal framework

19. Article 1F of the Convention, as amended by the Protocol of 31 January 1967, provides:

> "F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes..."

20. It is well established that the serious consequences of exclusion for the person concerned means that the article must be interpreted restrictively and applied with caution – see *R (JS (Sri Lanka) v Secretary of State for the Home Department* [2010] UKSC 15; [2011] 1 AC 184 at [2]; *Al-Sirri v Secretary of State for the Home Department* [2012] UKSC 54 at [12] and [16].

21. In the *Al-Sirri* case the Supreme Court stated at [75] that:

    (1) "Serious reasons" is stronger than "reasonable grounds".

    (2) The evidence from which those reasons are derived must be "clear and credible" or "strong".

    (3) "Considering" is stronger than "suspecting". It is also stronger than "believing". It requires the considered judgment of the decision maker.

    (4) The decision maker need not be satisfied beyond reasonable doubt or to the standard required in criminal law.

    (5) There are unlikely to be sufficiently serious reasons for considering the applicant to be guilty unless the decision maker can be satisfied on the balance of probabilities that he is.

22. In *JS (Sri Lanka)* Lord Brown stated at [8] that the Rome Statute of the International Criminal Court ("the ICC Statute") "should now be the starting point for considering whether an applicant is disqualified from asylum by virtue of article 1F(a)".

23. Article 7(1) of the ICC Statute specifically includes torture as an act which may involve a "crime against humanity". It provides:

> "For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
>
> …
>
> (f) torture;
>
> …"

24. In relation to individual criminal responsibility, Article 25 of the ICC statute provides:

> "**Article 25**
>
> **Individual criminal responsibility**
>
> …

> 3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
>
> …
>
> (c) for the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
>
> (d) in any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
>
> (i) be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the court; or
>
> (ii) be made in the knowledge of the intention of the group to commit the crime."

25. In relation to the mental element, Article 30 of the ICC statute provides:

> "**Article 30**
>
> **Mental element**
>
> 1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
>
> 2. For the purposes of this article, a person has intent where:
>
> (a) In relation to conduct, that person means to engage in the conduct;
>
> (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
>
> 3. For the purposes of this article, 'knowledge' means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. 'Know' and 'knowingly' shall be construed accordingly**.**"

26. *JS (Sri Lanka)* concerned whether the appellant's membership over a number of years of the Liberation Tigers of Tamil Eelam ("LTTE") was sufficient for him to have committed a crime within the meaning of Article 1(F)(a). Lord Brown at [1] summarised the issues in the following terms:

> "….who are to be regarded as having committed such a crime ("war criminals" as I shall generally refer to them) within the meaning of article 1F(a)? More particularly, assuming that there are those within an organisation who clearly are committing war crimes, what more than membership of such an organisation must be established before an individual is himself personally to be regarded as a war criminal?"

27. Lord Brown set out "the correct approach to article 1F" at [33]-[39] stating that:

> "35. It must surely be correct to say, as was also said in that paragraph, that article 1F disqualifies those who make "a substantial contribution to" the crime, knowing that their acts or omissions will facilitate it…..
>
> 36. Of course, criminal responsibility would only attach to those with the necessary mens rea (mental element). But, as article 30 of the ICC Statute makes plain, if a person is aware that in the ordinary course of events a particular consequence will follow from his actions, he is taken to have acted with both knowledge and intent….
>
> 37. Similarly, and I think consistently with this, the ICTY Chamber in Tadic defines mens rea in a way which recognises that, when the accused is participating in (in the sense of assisting in or contributing to) a common plan or purpose, not necessarily to commit any specific or identifiable crime but to further the organisation's aims by committing article 1F crimes generally, no more need be established than that the accused had personal knowledge of such aims and intended to contribute to their commission.
>
> 38. …Put simply, I would hold an accused disqualified under article 1F if there are serious reasons for considering him voluntarily to have contributed in a significant way to the organisation's ability to pursue its purpose of committing war crimes, aware that his assistance will in fact further that purpose."

28. Lord Hope agreed, stating as follows at [49]:

> "49. Lord Brown puts the test for complicity very simply at the end of para 38 of his judgment. I would respectfully endorse that approach. The words "serious reasons for considering" are, of course, taken from article 1F itself. The words "in a significant way" and "will in fact further that purpose" provide the key to the exercise. Those are the essential elements that must be satisfied to fix the applicant with personal responsibility. The words "made a substantial contribution" were used by the German Administrative Court, and they are to the same effect.

> The focus is on the facts of each case and not on any presumption that may be invited by mere membership."

29. At [44] Lord Hope highlighted the need for "a close examination of the facts and the need for a carefully reasoned decision as to precisely why the person concerned is excluded from protection under the Convention". Similarly, at [58] Lord Kerr stressed the need for "consideration of the claimant's personal role" and said that:

> "…examination of the claimant's actual involvement was needed. This inevitably involved recognition of the ingredients of the offences in which he was said to be complicit and of what it was about the known behaviour of the claimant that might be said to bring him to the requisite level of participation. I do not consider that it is necessary to show that he participated (in the sense that this should be understood) in individual crimes but his participation in the relevant criminal activity can only be determined by focusing on the role that he actually played. Only in this way can a proper inquiry be undertaken in the question whether the requirements of articles 25 and 30 of the ICC Rome Statute have been met."

30. In *Al-Sirri* the Supreme Court stated at [15] that there needed to be "an individualised consideration of the facts of the case, which will include an assessment of the person's involvement in the act concerned, his mental state and possible grounds for rejecting individual responsibility".

31. In oral argument, Mr Blaxland QC for A submitted that the reference in Lord Brown's summary at [38] in *JS (Sri Lanka)* to "voluntarily" means that this is a requirement of proof of complicity. I reject that submission. In particular:

    (1) It is not found in Articles 25 and 30 of the ICC Statute.

    (2) It is not mentioned in Lord Brown's summary of what is required for Article 1F disqualification at [35].

    (3) It is not mentioned in Lord Hope's endorsement of Lord Brown's approach and summary of the test for complicity.

    (4) If "voluntariness" was a necessary ingredient of complicity there would be little or no need for the defences in Articles 31-33.

    (5) The most likely explanation of Lord Brown's use of the word is that he was seeking to encapsulate all elements, including defences, and that this was a shorthand for "not under duress" or "in circumstances where he cannot rely on the defences under Articles 31-33".

32. In summary, on the facts of the present case what needed to be established was that there were serious reasons for considering that:

    (1) A had aided, abetted or otherwise assisted the Iraqi regime's crime of torture by making a "significant" contribution to it.

(2) A was aware that "in the ordinary course of events" this consequence would follow from his assistance.

The grounds of appeal

33. The grounds of appeal are:

(1) **Ground 1:** The 2017 UT was wrong to proceed on the basis that the question of whether A was liable for crimes against humanity was not in issue. That question was in issue before the 2017 FTT and was put in issue before the UT by way of A's cross appeal.

(2) **Ground 2:** The 2017 UT mistakenly assumed that, in his cross appeal, A was arguing that he was not liable for crimes against humanity on the basis that Article 1F of the Convention did not apply to medical personnel and failed to consider the argument A was actually relying on.

(3) **Ground 3:** In remaking the decision, the 2017 UT failed to carry out the "close examination of the facts" required in an Article 1F(a) case and failed to give "a carefully reasoned decision as to precisely why the person concerned is excluded from protection under the Convention".

(4) **Ground 4:** The facts found by the 2017 FTT were not capable of establishing A's liability for crimes against humanity: (i) they did not show that he had aided, abetted, otherwise assisted in or contributed to crimes against humanity; or (ii) in any event, A's contribution was not of a kind that the drafters of the applicable instruments of international criminal law intended should be criminalised.

Grounds 1 to 3

34. These Grounds were not developed orally at the hearing of the appeal.

35. Grounds 1-3 depend on the correctness of A's assertion that the 2017 UT misunderstood A's case and wrongly failed to appreciate that A had cross appealed the 2017 FTT's finding that he had committed the necessary *actus reus* in Article 25 of the ICC statute. This requires a detailed consideration of the procedural history of the proceedings before the 2017 FTT and the 2017 UT.

36. For the hearing before the 2017 FTT A submitted a skeleton argument which raised five distinct issues, namely:

(1) The FTT was bound to follow the conclusions of the MPT and the MPT found he had a defence of duress (paras 20-42);
(2) A had not committed the necessary *actus reus* – he had not aided, abetted or otherwise assisted the use of torture because his contribution was humanitarian, or not substantial enough (para. 48-54), or
(3) A did not have the *mens rea* - Article 30 of the ICC statute should be construed in the light of, or give way to, the common law principle of joint enterprise, as laid down by the Supreme Court in *Jogee v R* [2016] UKSC 8 (paras 55-67).
(4) A had a defence of duress (para. 68-70).

(5) A had a "separate defence" that "a doctor that treats a prisoner in good faith in order to heal the prisoner even if he knows that the authorities will torture the prisoner is not guilty of the crime against humanity" (para. 71).

37. In its decision of 6 April 2017, the 2017 FTT reached the following conclusions on the first four of these issues:

(1) It was not bound by the findings of the MPT (para. 16).

(2) There were serious reasons for considering that A had committed crimes against humanity. Although A himself had not tortured anyone, he had provided medical aid to the perpetrators and treated prisoners in circumstances where if he had not done so, their torture might have ceased (paras 42-44).

(3) It rejected A's submissions on *mens rea* and *Jogee*. *Jogee* did not affect the law on Article 1F (para. 18).

(4) A had a defence of duress (paras 47-57).

38. In light of its finding on duress, the 2017 FTT did not find it necessary to consider issue (5) - A's "separate defence" that he was a doctor trying to heal a patient.

39. The SSHD was granted permission to appeal against finding (4) – i.e. the finding that A had a defence of duress.

40. A submitted a Rule 24 cross appeal in which he said:

> "4. The Respondent submitted a detailed skeleton argument before the FtT and invites the UT to take the relevant parts of the skeleton argument into account as part of the Rule 24 Reply to avoid this Response being too cumbersome.
>
> …
>
> 6. The Respondent… requests the Upper Tribunal to dismiss the Appeal for the reasons given by the FtT…
>
> 7. The Respondent also invites the UT to dismiss the Appellant's appeal for the additional reasons/grounds set out below…:
>
> a) the FtT erred in law in holding that they are not bound by the findings of the MPTS…
>
> b) the FtT erred in law in holding that it was not required to adopt the guidance on joint enterprise… in *Jogee v the Queen* [2016] UKSC 8; [2016] 2 WLR 681.
>
> c) the FtT failed to address the novel proposition advanced that the Respondent has a separate defence… on the grounds that a doctor who treats a prisoner in good faith in order to heal the prisoner even if he knows that the authorities will torture the

> prisoner is not guilty of the crime against humanity." [Emphasis added]

41. Attached to the Rule 24 Grounds was a revised version of A's skeleton argument for the 2017 FTT hearing, it being stated that "this skeleton argument includes submissions on the Rule 24 Grounds".

42. The appeal hearing took place on 22 September 2017. It is the recollection of the SSHD's counsel, Mr Dunlop QC, that A's counsel indicated, at the start of the hearing, that he would not pursue the *Jogee* point (para. 7(b) of the Rule 24 Grounds) before the UT (while reserving his right to take the point at a higher level).

43. In its determination of 11 December 2017, the 2017 UT found that the SSHD's appeal succeeded because the 2017 FTT had made a material error when considering the defence of duress and that the defence of duress should fail. It was further found that A's cross appeal failed because.

    (1) The 2017 FTT had not been bound to follow the MPT decision. In any event, the MPT had not found that A acted under duress.

    (2) It is not a defence that A was a doctor treating, and not actively injuring, patients.

44. On this appeal A is represented by different counsel, Mr Blaxland QC and Mr Toal, neither of whom acted for him at any of the earlier hearings. It is submitted that the combined effect of the reference to "the relevant parts of the skeleton argument" in the Rule 24 Grounds and the attached skeleton argument was to raise by cross appeal the issue of whether A had committed the necessary *actus reus*, as addressed at paras 44-45 of the skeleton argument.

45. This was not the understanding of UT Judge Lane who stated at para. 7 that "the appellant has not disputed that he was complicit in a crime against humanity".

46. In my judgment UT Judge Lane's understanding was correct. Para. 4 of the Rule 24 Grounds makes clear that A was is not seeking to rely on all of the points taken in his skeleton argument before the FTT, only the "relevant" ones. Paragraphs 7(a)-(c) in the Rule 24 Grounds correspond to arguments (1), (3) and (5) from A's skeleton argument before the FTT. Para. 7(c) of the Rule 24 is taken word for word from para. 71 of A's argument before the FTT - each paragraph refers to a "separate defence".

47. In summary, the Rule 24 Grounds made it clear that A was not pursuing point (2) from his skeleton argument before the FTT – i.e. he was no longer disputing that he had committed the *actus reus* - a significant contribution to torture. If, however, A failed on the defence of duress, he wanted the UT to consider a "novel" and "separate" defence that was not limited to his particular facts but would apply to any doctor that acted to heal patients.

48. When it came to the hearing, A indicated that he would not pursue the *Jogee* point and no attempt was made orally to expand the scope of the Rule 24 Grounds. This meant that there were only two issues for the UT to decide, outside the SSHD's appeal on duress, namely:

(1) Whether the 2017 FTT was bound to follow the MPT (para. 7(a) of the Rule 24 Grounds); and

(2) Whether, if A failed in his defence duress, he had alternative defence of being a doctor treating patients (para. 7(c) of the Rule 24).

49. In these circumstances, the 2017 UT was entitled to consider that complicity was not in dispute and that only these two further issues needed to be addressed. Equally, as the reasons of the 2017 FTT on complicity were not under challenge, the UT did not need to give its own reasons on complicity or expressly 'preserve' the reasons of the 2017 FTT.

50. I would accordingly dismiss grounds of appeal 1-3.

51. In any event, I accept the SSHD's further submission that even if the 2017 UT erred in any of the ways alleged in grounds 1-3, such an error would be immaterial if A's appeal fails on ground 4. In short, if this Court concludes that the 2017 FTT's findings on complicity were open to them there would be no purpose in remitting the appeal to a third UT to consider that issue.

52. Indeed, at the hearing it was common ground that the appeal stands or falls on ground 4.

Ground 4 – The facts found did not warrant a conclusion that there were serious reasons for considering A complicit in crimes against humanity

53. The FTT referred to the evidence before it as comprising interview records, witness statements, expert reports and documents relating to his MPT suspension. With regard to A's evidence, there was his screening interview of 2 February 2007; a statement of 22 February 2007; a full asylum interview of 23 March 2007; a further interview of 31 March 2010; a statement of 20 July 2013 and a statement of 15 January 2017 for the appeal hearing. In addition A gave oral testimony at the hearing.

54. In relation to the law, the FTT referred to *JS (Sri Lanka)* and *Al Sirri.* The FTT directed themselves in accordance with the principles set out in the headnote in *Al Sirri (Asylum – Exclusion – Article 1F(c)* [2016] UKUT 448 (IAC), namely:

> "In every case involving exclusion of protection under Article 1F of the Refugee Convention, the onus of proof is on the Secretary of State, a detailed and individualised examination of the facts is required, there must be clear and credible evidence of the offending conduct, and the overall evaluative judgment involved the application of a standard higher than suspicion or belief."

55. There were skeleton arguments from counsel for A and the SSHD, supplemented by oral submissions.

56. The main findings made by the FTT were as follows:

(1) "We have serious reasons for considering that, as part of his duties, the appellant encountered prisoners whom he suspected had been tortured" (para. 36).

(2) "There are serious reasons for considering the appellant was aware that some of the prisoners he treated had suffered torture. At the time, he was a medical professional and would have the specialist knowledge needed to make such an assessment. The appellant has also admitted that he knew it was likely that some of the prisoners he treated would suffer further torture" (para. 38).

(3) "The appellant has consistently claimed that he never tortured anyone. The respondent has produced no evidence to the contrary" (para. 39).

(4) "We also have serious reasons for considering the appellant saw the bodies of prisoners who had been hanged" (para. 40).

57. In relation to the issue of complicity the FTT found as follows:

> "41. …The question for us, therefore, is whether the appellant was involved in torture.
>
> 42. All the sources of evidence provided confirm that the intelligence agencies, including Al-Istikhbarat, tortured prisoners…The appellant worked for that organisation and he knew the organisation committed torture. Although he never tortured anyone himself, he was aware the organisation he worked for did torture people. We also take account of the fact the appellant admits he suspected some of the prisoners he treated would face further torture.
>
> 43. These facts are sufficient for us to find there are serious reasons for considering the appellant was involved in torture. He knew the organisation he worked for was involved in widespread and systematic torture of civilians. He assisted those who committed torture by providing medical aid to them. He also provided medical aid to victims in the knowledge that in the ordinary course of events some of them would suffer further torture. We find that he intended to treat the prisoners irrespective of what had happened to them and what might happen to them. We also take account of our finding that the appellant was aware the same organisation hanged some prisoners. He was aware the organisation committed a range of atrocities.
>
> 44. We find there is nothing in the law that enables the appellant to distance himself from his involvement in these atrocities. It is irrelevant whether he intended only to make the prisoners he treated better and did not think about what might happen to them afterwards. In simple terms, if he had not treated the prisoners, their torture may have ceased. The fact he treated the prisoners knowing what the organisation did and would do means he is linked to the torture of those prisoners.
>
> ….

> 46. Having had regard to articles 7, 25 and 30 of the ICC Statute, we conclude the evidence shows there are serious reasons for considering the appellant will have committed a crime against humanity unless he can raise a ground for excluding criminal responsibility, such as duress."

58. At the hearing of the appeal, the essential submission made by Mr Blaxland QC on behalf of A was that the findings made by the FTT did not justify the conclusion that he had made a significant contribution to the crime of torture.

59. It was submitted that this issue must be considered against the background of A's duty of care as a medical professional. As a doctor involved in the treatment of prisoners A was bound by the Principles of Medical Ethics adopted by the UN General Assembly on 18/12/1982. The preamble to the Principles includes the observation that the General Assembly is:

> "Convinced that under no circumstances a person shall be punished for carrying out medical activities compatible with medical ethics regardless of the person benefiting therefrom, or shall be compelled to perform acts or to carry out work in contravention of medical ethics, but that at the same time, contravention of medical ethics for which health personnel, particularly physicians, can be held responsible should entail accountability".

60. The Principles include:

> "Principle 1:
>
> Health personnel, particularly physicians, charged with the medical care of prisoners and detainees, have a duty to provide them with protection of their physical and mental health and treatment of disease of the same quality and standard as is afforded to those who are not imprisoned or detained.
>
> Principle 2:
>
> It is a gross contravention of medical ethics, as well as an offence under applicable international instruments, for health personnel, particularly physicians, to engage, actively or passively, in acts which constitutes participation in, complicity in, incitement to or attempts to commit torture or other cruel, inhuman or degrading treatment or punishment."

61. It was further submitted that the importance of these principles is recognised in the decision of this Court in *MH (Syria) v SSHD* [2009] EWCA Civ 226. That case involved, MH, a Kurdish nurse in Syria who decided to join the PKK. She supported the group politically, volunteered to be armed and was transferred to a training camp. The PKK decided that MH would not fight, but would assist the group in other ways: in 1996 she became an assistant nurse in a hospital in the PKK camp she lived at. After

injury, she sought to leave the PKK (which was opposed) and eventually sought asylum in the UK

62. In respect of medical professionals and Article 1F, Richards LJ, with whose judgment Ward and Jackson LJJ agreed, stated as follows, at [31]:

> "It is not in dispute that nurses and other medical personnel enjoy a special status and protection under international humanitarian law. In my view that does not take them automatically outside the scope of the exclusion in Article 1F(c) : for example, a medically qualified member of a terrorist organisation who treated an injured suicide bomber with the intention that he or she should carry out a further bombing mission would have grave difficulty in resisting the application of the exclusion. The point is plainly relevant, however, to an assessment of whether the exclusion applies. In the ordinary course I would not expect the provision of medical or nursing services to bring a person within Article 1F(c) on the basis that they form part of the infrastructure of support for a terrorist organisation; but in each case the point will have to be taken into account with other relevant factors in reaching an overall assessment as to the application of Article 1F(c)."

63. At [36], Richards LJ concluded that "this case falls well short of engaging Article 1F(c)". In particular, reliance was placed on (i) the fact that MH joined the PKK when she was only 13 years old and most of the relevant events took place in the years of her minority; (ii) the PKK was not at the "extreme" end of the continuum; (iii) what MH did for the PKK was "relatively minor in nature"– inter alia, "she was…given training in first aid and became an assistant nurse, still at the refugee camp, albeit some of those treated were injured combatants".

64. At [39], Richards LJ stated that,

> "My view is reinforced if regard is had to the special position of nursing under international humanitarian law. MH's role as an assistant nurse in the refugee camp is in one sense the most significant of her activities, since it included the care of injured guerrillas; but it seems to me that the humanitarian nature of the work she was doing, and the context in which she was doing it, weigh against rather than in favour of a finding of complicity in the terrorist acts of the PKK."

65. Similarly, in the present case Mr Blaxland QC submitted that the humanitarian nature of the work A was doing, and the context in which he was doing it, weighed against rather than in favour of a finding of complicity in the Iraqi regime's crimes of torture.

66. Mr Dunlop QC for the SSHD accepted that humanitarian law considerations provide relevant context and that when addressing the issue of significant contribution regard should be had to medical ethics and what it requires. Ultimately, however, the outcome of this appeal depends on the more granular question of whether the FTT's findings are sufficient to support their conclusion of complicity.

67. Mr Blaxland QC did not seek to challenge or go behind the findings made by the FTT, save in relation to para. 45 and the statement that "if he had not treated the prisoners, their torture may have ceased". It was submitted that this was an inferential conclusion rather than a finding of fact, that there was no proper basis for such an inference to be drawn and that it was a perverse conclusion.

68. It was submitted that the only instances in which it is self-evident that refraining from treating prisoners would have resulted in their not being tortured would have been those in which the want of treatment would have resulted in the prisoners' deaths since there was nothing to indicate that the torturers would have been unable and unwilling to torture a living but sick or wounded prisoner. It would, however, be perverse to conclude that a doctor was complicit in torture by performing his duty as a medical professional of saving a patient from death. Moreover, that the logic of the FTT's conclusion is that A should have deprived all those whom he suspected were the victims of torture of any medical assistance.

69. If this finding or conclusion falls away then it was submitted that there were no or no sufficient findings to support a conclusion of significant contribution to torture. This was the only "finding" which went to the consequences of the medical treatment given by A and how it may have assisted torture. Without such a "finding" there was no basis for concluding that A's acts had contributed to the torture, still less significantly so.

70. Mr Dunlop QC for the SSHD accepted that this "finding" was critical to the sustainability of the conclusion of the FTT on significant contribution and consequent complicity and therefore to the outcome of the appeal.

71. The first point to be made about this "finding" is that, in my judgment, it is not a finding of fact. The FTT have not found that the prisoners' torture would have ceased but merely that it "may" have done. That is a speculative conclusion rather than a determinative finding of fact.

72. Secondly, it is at most an inferential conclusion but there is no explanation of the factual basis and reasoning to support the inference drawn. Mr Dunlop QC suggested a line of reasoning which could have supported that conclusion, namely that it may properly be inferred that the reason that a regime that tortures its prisoners would take a sick or injured prisoner, that it has tortured in the past and intends to torture again, to see a doctor, is that his sickness or injury is getting in the way of the regime's aims: e.g. by preventing them from torturing the prisoner further and/or preventing the prisoner from speaking to them. In other words, the reason for asking A to treat such prisoners was that, without such treatment, the torture could not continue. I agree that this is a possible line of reasoning, but it is not the only possible one and it does not take account of the findings that A was not being asked to treat only those prisoners who were to be tortured again and that he did not know which prisoners were to be subject to further torture. In any event, there is no means of knowing whether the FTT adopted such a line of reasoning. They did not address the facts in sufficient detail for it to be known what their underlying reasoning was, and, without such detail, Mr Dunlop QC's argument is no more than speculation.

73. Thirdly, if it is sufficient to be complicit in torture that the torture of some patients "may" have ceased if treatment had not been given then the logical consequence is that no patients should have been treated. On the FTT's findings A did not know whether

the torture of any particular patient would cease but simply that it "may" do so. On the FTT's approach the only way to avoid complicity in such circumstances would be to refuse all treatment. That would be a perverse conclusion and in clear contravention of a doctor's duty of care.

74. For any or all of these reasons in my judgment this "finding" cannot be relied upon to support a conclusion of significant contribution to torture and, without that finding, it is common ground that the appeal must be allowed.

75. The FTT recognised the importance of carrying out a "detailed and individualised examination of the facts" but did not do so sufficiently to support the conclusion that they reached. The requirements of medical ethics made it all the more important that such an examination was carried out, as the *MH (Syria)* case illustrates.

76. For completeness, I should record that Mr Dunlop QC did not seek to support that part of the FTT's reasoning which relied on A's medical aid to those who committed torture. It was accepted that this was too remote from the crime to found a significant contribution on the facts of the present case.

Conclusion

77. Article 1F of the Convention has to be applied with caution. It requires "a close examination of the facts" and "a carefully reasoned decision as to precisely why the person is excluded from protection under the Convention". For the reasons outlined above, the FTT did not carry out a sufficiently "detailed and individualised examination of the facts" to support the conclusion of complicity which they reached. I would accordingly allow the appeal.

Mr Justice Snowden:

78. I agree.

Lord Justice David Richards:

79. I also agree.