



17 March 2010

PRESS SUMMARY

R (on the application of JS) (Sri Lanka) (Respondent) v Secretary of State for the Home Department (Appellant) [2010] UKSC 15

On an appeal from [2009] EWCA Civ 364

JUSTICES: Lord Hope (Deputy President), Lord Rodger, Lord Walker, Lord Brown, Lord Kerr

BACKGROUND TO THE APPEAL

The respondent is a Sri Lankan Tamil. In 1992, at the age of 10, he became a member of the Liberation Tigers of Tamil Eelam (“LTTE”), the following year joining the LTTE’s Intelligence Division. He occupied various positions of responsibility and gained promotions within the organisation. At 18 he was appointed to lead a mobile unit transporting military equipment and other members of the Intelligence Division through jungles to a point where armed members of the Division could be sent in plain clothes to Colombo. He continued to do this for some three years from September 2000 until early 2004 except for some two and a half months where he was appointed one of the chief security guards to the Intelligence Division’s leader, whom he accompanied as a trusted aide on visits to the LTTE District Leader and other prominent LTTE members. From early 2004 he served as second in command of the combat unit of the Intelligence Division. In October 2006 he was sent incognito to Colombo to await further instructions.

In December 2006 the respondent learned that his presence in Colombo had been discovered by the Sri Lankan government and his LTTE membership known. On 7 February 2007 he arrived in the UK and two days later applied for asylum on the basis that if he returned to Sri Lanka he would face mistreatment due to his race and LTTE membership.

The respondent’s application for asylum was refused by the Secretary of State (“SoS”) in September 2007 solely by reference to article 1F(a) of the Refugee Convention. It states that a person is not to be recognised as a refugee where “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”.

In his decision letter the SoS referred to the case of *Gurung* [2002] UKIAT 04870 (starred), which the SoS considered was authority for the proposition that voluntary membership of an extremist group could be presumed to amount to personal and knowing participation, or at least acquiescence amounting to complicity in the crimes in question. The SoS was of the view that the respondent’s own evidence showed voluntary membership and command responsibility within an organisation that has been responsible for widespread and systemic war crimes and crimes against humanity, such that there were serious reasons for considering that the respondent was aware of and fully understood the methods employed by the LTTE.

The respondent sought judicial review of the SoS’s decision. The Court of Appeal quashed the SoS’s decision. The Court of Appeal held that as it was the design of some members of the LTTE to carry out international crimes in pursuit of the organisation’s political ends, the SoS acted on a wrongful presumption that the respondent, as a member of the LTTE, was guilty of personal and knowing

participation in such crimes. He should have considered whether there was evidence affording serious reasons for considering that he was party to that design, that he had participated in a way that made a significant contribution to the commission of such crimes and that he had done so with the intention of furthering the perpetration of such crimes. The SoS appealed the decision.

JUDGMENT

The Supreme Court unanimously dismisses the appeal, but varies the order made by the Court of Appeal to provide that in re-determining the respondent's asylum application, the SoS should direct himself in accordance with the Court's judgments, not those of the Court of Appeal. Lord Brown gives the leading judgment of the Court. Lord Hope and Lord Kerr give concurring judgments.

REASONS FOR THE JUDGMENT

- The Court on this appeal has essentially three tasks. The first is to decide whether the Court of Appeal was right to quash the refusal decision and remit the case for redetermination by the SoS. Secondly, the Court has to decide on the correctness of the principles laid down in *Gurung*. The Court's third task is to decide whether the Court of Appeal was right to interpret war crimes liability under article 1F(a) as narrowly as they appeared to do, essentially so as to encompass no more than joint enterprise liability (**para 26**).
- In relation to the first issue, it could not be said of the LTTE or its Intelligence Division that as an organisation it was "predominantly terrorist in character" – *Gurung* para 105. There was accordingly no question of presuming that the respondent's voluntary membership of this organisation amounted to personal and knowing participation, or at least acquiescence amounting to complicity in the crimes in question. Nor was the respondent's command responsibility within the organisation a basis for regarding him as responsible for war crimes (**para 27**).
- As to the second issue, there are criticisms to be made of *Gurung* and it should not in future be accorded the same standing as it seems hitherto to have enjoyed.
 - In the first place, it is unhelpful to attempt to carve out from amongst organisations engaging in terrorism a sub-category of those "whose aims, methods and activities are predominantly terrorist in character", and to suggest that membership of one of these gives rise to a presumption of criminal complicity – *Gurung* para 105 (**para 29**). It is preferable to focus on what must prove to be the determining factors in any case, principally (in no particular order):
 - the nature and (potentially of some importance) the size of the organisation and particularly that part of it with which the asylum-seeker was himself most directly concerned,
 - whether and, if so, by whom the organisation was proscribed,
 - how the asylum-seeker came to be recruited,
 - the length of time he remained in that organisation and what, if any, opportunities he had to leave it,
 - his position, rank, standing and influence in the organisation,
 - his knowledge of the organisation's war crimes activities, and
 - his own personal involvement and role in the organisation including particularly whatever contribution he made towards the commission of war crimes.
 - The second major criticism to be made of *Gurung* is its introduction of the idea of a "continuum" in relation to the types of organisations, and their political aims and objectives, for war crimes cases. War crimes are war crimes however benevolent and estimable may be the long-term aims of those concerned. And actions which would not otherwise constitute war crimes do not become so merely because they are taken pursuant to policies abhorrent to western liberal democracies (**para 32**).

- As to the third issue, article 1F disqualifies persons who make a substantial contribution to the crime, knowing that their acts or omissions will facilitate it (**para 35**). Criminal responsibility will only attach to those with the necessary mental element. But, as article 30 of the Rome Statute of the International Criminal Court 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 (**para 36**). The Court of Appeal took too narrow an approach. It appeared to confine article 1F liability essentially to just the same sort of joint criminal enterprises as would result in convictions under domestic law. An accused is 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 (**para 38**).

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at: www.supremecourt.gov.uk/decided-cases/index.html