Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/10959/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16 May 2019	**On 12 August 2019**

Before

UPPER TRIBUNAL JUDGE RINTOUL
UPPER TRIBUNAL JUDGE McWILLIAM

Between

HN
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr D Bazini, Counsel, instructed by Parker Rhodes Hickmotts Solicitors
For the Respondent: Mr T Lindsay, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Afghanistan. His date of birth is 1 January 1960.

2. The Appellant made an application on protection grounds 9 March 2009. His application was refused by the Secretary of State on 23 July 2015. The Secretary of State issued a certificate pursuant to Section 55 of the Immigration, Asylum and Nationality Act 2006 ("the 2006 Act"), having decided that the Appellant

was not entitled to protection with reference to Article 1F(a) of the Geneva Convention. Thus, he was not entitled to protection under Article 33(1) of the Geneva Convention.

3. For the same reasons, he was disqualified from the grant of humanitarian protection under paragraph 339C of the Immigration Rules. The Respondent concluded that returning the Appellant to Afghanistan would not breach the UK's obligations under Article 3 of the ECHR.

4. The Appellant appealed against the Secretary of State's decision. His appeal was dismissed by Designated First-tier Tribunal Judge McCarthy. That decision was set aside by Upper Tribunal Judge Storey following a hearing on 27 October 2017. The decision was communicated to the parties on 21 December 2017 and a copy of it is attached to this decision. There has been an unfortunate history of both parties having repeatedly failed to comply with directions of the Upper Tribunal. We will discuss this matter in more detail later in the decision. However, the result of this has been to delay the rehearing of the Appellant's appeal.

5. The appellant's case is that he was formerly a member of the People's Democratic Party of Afghanistan (PDPA) which came to power in April 1978. During the 1980s he was a police officer in charge of a detention facility housing political prisoners within Mahabas Prison in Jalalabad. In 1987 or 1988, he arranged for the execution of two Mujahideen commanders at the prison. This came to the knowledge of the Mujahideen; and, after he had left the police when the PDPA regime fell in 1992, he was later abducted, detained and tortured by the Mujahideen for 22 months. He was released through bribery and left Afghanistan, returning only in 2002. In 2005 he re-joined the police but, after his family were attacked, he fled Afghanistan, arriving in the United Kingdom in 2009.

6. The Secretary of State accepts that the Appellant was a member of the PDPA and was in charge of a detention facility in which political prisoners were held. He also noted that during the civil war in the 1980s government forces, its intelligence agency Khidamat-iIttila'at-iDawlati (KhAD) and the Soviet units supporting them were responsible for significant actions against the civilian population; and, that KhAD was responsible for the commission of war crimes and crimes against humanity.

7. The Secretary of State concluded that the Appellant must to be excluded from the Refugee convention by operation of article 1F because, during his time in charge of the detention facility, the Appellant: handed over political prisoners to be interrogated and tortured by KhAD; took them to and from courts where they faced trials which failed to meet international standards; and, was involved in the execution of convicted prisoners including two captured Mujahideen personnel, and so played a significant role in the context of abuse within the prison.

8. The Secretary of State did not, however, accept the Appellant's account of what had happened to him or his family after he had left the police in 1992.

The Law

9. We remind ourselves that it is for the Secretary of State to satisfy us on the balance of probabilities that the appellant is excluded from the Refugee Convention. That requires a detailed consideration of the Convention, the Qualification Directive and case law.

Article 1F of the Refugee Convention

10. Article 1F(a) of the Refugee Convention states as follows:

> "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."

Article 12(2)(a) and (3) of the EU Qualification Directive

11. Article 12(2)(a) of the EU Qualification Directive provides as follows:

> "2. A third country national or a stateless person is excluded from being a refugee where there are serious reasons for considering that:
>
> (a) he or she 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.
>
> 3. Paragraph 2 applies to persons who instigate or otherwise participate in the commission of the crimes or acts mentioned therein."

12. It is not in dispute that crimes against peace, war crimes and crimes against humanity are separate offences. Each is separately defined within the Rome Statute of the International Criminal Court ("the Rome Statute") to which we turn next. We do, however, observe that as regards a crime against peace, which arose from the Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis , this is referred to in the Rome Statute as a crime of aggression, as defined in article 8 bis. As article 8bis (1) limits the scope of that crime to 'a person in a position effectively to exercise control over or to direct the political or military action of a State', it is not relevant on the facts of this appeal. We therefore turn next to the definitions of "war crime" and "crime against humanity" as set out in the Rome Statute.

13. Articles 7 and 8 of the Rome Statute provides as follows:

"Article 7

Crimes against humanity

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

   (a) Murder;

   …

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

   (f) Torture;

   ...

2. For the purpose of paragraph 1:

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

   …

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

Article 8

War crimes

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

2. For the purpose of this Statute, 'war crimes' means:

   (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

      (i) Wilful killing;

      (ii) Torture or inhuman treatment, including biological experiments;

      (iii) Wilfully causing great suffering, or serious injury to body or health;

      (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

…

(c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

(i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

…

(iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

(d) Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature."

14. As can be seen from article 12 (2) and (3) of the Qualification Directive, exclusion applies not just to those who directly carried out the conduct which engages the definitions of war crimes or crimes against humanity, but also those who instigate or participate in such acts. We therefore must have regard to the provisions of articles 25 and 30 of the Rome Statute:

"Article 25

Individual criminal responsibility

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

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

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

…

(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;

4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

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."

Section 55 of the Immigration, Asylum and Nationality Act 2006 ("The 2006 Act")

15. Section 55 of the Immigration, Asylum and Nationality Act 2006 provides as follows:-

"**55 Refugee Convention: certification**

(1) This section applies to an asylum appeal where the Secretary of State issues a certificate that the appellant is not entitled to the protection of Article 33(1) of the Refugee Convention because –

(a) Article 1(F) applies to him (whether or not he would otherwise be entitled to protection), or

(b) Article 33(2) applies to him on grounds of national security (whether or not he would otherwise be entitled to protection).

(3) The First-tier Tribunal or the Special Immigration Appeals Commission must begin substantive deliberations on the asylum appeal by considering the statements in the Secretary of State's certificate.

(4) If the Tribunal or Commission agrees with those statements it must dismiss such part of the asylum appeal as amounts to an asylum claim (before considering any other aspect of the case)."

The case law

JS (Sri Lanka) v Secretary of State for the Home Department [2010] UKSC 15

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

> "*(2) The Gurung approach*
>
> ...
>
> 30. Rather, however, than be deflected into first attempting some such sub-categorisation of the organisation, it is surely preferable to focus from the outset on what ultimately must prove to be the determining factors in any case, principally (in no particular order) (i) the nature and (potentially of some importance) the size of the organisation and particularly that part of it with which the asylum-seeker was himself most directly concerned, (ii) whether and, if so, by whom the organisation was proscribed, (iii) how the asylum-seeker came to be recruited, (iv) the length of time he remained in the organisation and what, if any, opportunities he had to leave it, (v) his position, rank, standing and influence in the organisation, (vi) his knowledge of the organisation's war crimes activities, and (vii) his own personal involvement and role in the organisation including particularly whatever contribution he made towards the commission of war crimes.
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> ...
>
> *(3) The correct approach to article 1F*
>
> 33. There can be no doubt, as indeed article 12(3) of the Qualification Directive provides, that article 1F disqualifies not merely those who personally commit war crimes but also those 'who instigate or otherwise participate in the commission of [such] crimes'. Article 12(3) does not, of course, enlarge the application of article 1F; it merely gives expression to what is already well understood in international law. This is true too of paragraphs (b), (c) and (d) of article 25(3) of the ICC Statute, each of which recognises that criminal responsibility is engaged by persons other than the person actually committing the crime (by pulling the trigger, planting the bomb or whatever) who himself, of course, falls within article 25(3)(a). Paragraph (b) encompasses those who order, solicit or induce (in the language of article 12(3) of the Directive, 'instigate') the commission of the crime; paragraph (c) those who aid, abet, or otherwise assist in its commission (including providing the means for this); paragraph (d) those who in any other way intentionally contribute to its commission (paras (c) and (d) together equating, in the language of article 12(3) of the Directive, to 'otherwise participat[ing]' in the commission of the crime).

...

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. It seems to me, moreover, that Mr Schilling, the UNHCR Representative, was similarly correct to say in his recent letter that article 1F responsibility will attach to anyone 'in control of the funds' of an organisation known to be 'dedicated to achieving its aims through such violent crimes', and anyone contributing to the commission of such crimes 'by substantially assisting the organisation to continue to function effectively in pursuance of its aims'. This approach chimes precisely with that taken by the Ninth Circuit in McMullen (see para 106 of *Gurung* cited above): '[Article 1F] encompasses those who provide [the gunmen etc] with the physical, logistical support that enable modern, terrorist groups to operate.'

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. (I would for this reason reject the respondent's criticism of the omission from paragraph 21 of the German court's judgment of any separate reference to intent; that ingredient of criminal responsibility is already encompassed within the Court's existing formulation).

...

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

39. It would not, I think, be helpful to expatiate upon article 1F's reference to there being 'serious reasons for considering' the asylum-seeker to have committed a war crime. Clearly the Tribunal in *Gurung* (at the end of para 109) was right to highlight 'the lower standard of proof applicable in exclusion clause cases' - lower than that applicable in actual war crimes trials. That said, 'serious reasons for considering' obviously imports a higher test for exclusion than would, say, an expression like 'reasonable grounds for suspecting'. 'Considering' approximates rather to 'believing' than to 'suspecting'. I am inclined to agree with what Sedley LJ said in *Yasser Al-Sirri v Secretary of State for the Home Department* [2009] EWCA Civ 222, para 33: "[The phrase used] sets a standard above mere suspicion.

Beyond this, it is a mistake to try to paraphrase the straightforward language of the Convention: it has to be treated as meaning what it says.""

Lord Hope DP agreed with Lord Brown and said as follows:

"43. Like Lord Brown, I think that the guidance given in *Gurung* is not without its difficulties. The Tribunal was, of course, right to stress that mere membership of an organisation that is committed to the use of violence for political ends is not enough to bring an appellant within the exclusion clauses: para 104. As Toulson LJ observed in the Court of Appeal in this case, everyone is agreed on this point: [2009] EWCA Civ 364, [2010] 2 WLR 17, para 98. The complicity doctrine, too, is well established in international law: *McMullen* v *INS*685 F 2d 1312, 599; *Ramirez v Canada (Minister of Employment and Immigration)* (1992) 89 DLR (4th) 173, 178-180 per MacGuigan JA; the Rome Statute of the International Court, article 25(3)(c) and (d) and article 30; *Prosecutor v Tadic* 15 July 1999, ICTY; *Prosecutor v Krajišnik* 17 March 2009, ICTY. The problem lies in formulating what more is needed to bring the person within article 1F(a). How close does the person need to get to these activities for the protection of the Convention not to apply to him?

...

47. I have no difficulty with the formulation in para 115 of the Court of Appeal's judgment, where Toulson LJ said:

> "The starting point for a decision-maker addressing the question whether there are serious reasons for considering that an asylum seeker has committed an international crime, so as to fall within article 1F(a), should now be the Rome Statute. The decision-maker will need to identify the relevant type or types of crime, as defined in articles 7 and 8, and then to address the question whether there are serious reasons for considering that the applicant has committed such a crime, applying the principles of criminal liability set out in articles 25, 28 and 30 and any other articles relevant to the particular case."

Article 12(3) of the Qualification Directive 2004/83/EC and article 7(1) of the ICTY Statute are founded on the same principles, which are wider than those that apply in domestic law for joint enterprise criminal liability. As the German Federal Administrative Court said in *BVerwG 10C 48.07*, para 21:

> "Thus this principle covers not only active terrorist and participants in the criminal sense, but also persons who perform advance acts in support of terrorist activities."

48. Had Toulson LJ stopped at para 115 I would not have been disposed to find fault with his judgment. As it is, he went on to give further guidance to the decision-maker which, as Lord Brown has indicated in para 38, appears to have been drawn too narrowly. He was careful to base what he said on the provisions of the Rome Statute. But the guidance was more elaborate than it needed to be. He used the word 'participation', which does not appear in the relevant articles of the Rome Statute. It tends to suggest a closer connection with the criminal act than the international

law principle requires. The German Administrative Court, in para 21 of its judgment, used the words 'personally responsible' to express what, in international law, is the underlying concept:

> "Thus the person seeking protection need not have committed the serious non-political crime himself, but he must be personally responsible for it. This must in general be assumed if a person has committed the crime personally, or made a substantial contribution to its commission, in the knowledge that his or her act or omission would facilitate the criminal conduct."

The court then added, by way of further explanation, the sentence which I have quoted in para 47, above. The words 'substantial contribution' indicate what is needed to attach personal responsibility for what was done. I agree with Lord Brown that the German court's formulation encompasses the mental element that is required by article 30 of the Rome Statute: para 36, above."

17. Lord Kerr JSC similarly agreed with Lord Brown. He stated as follows:

> "55. I would be reluctant to accept that this list of factors provides the invariable and infallible prescription by which what I have described as the critical question is to be answered. What must be shown is that the person concerned was a knowing participant or accomplice in the commission of war crimes etc. The evaluation of his role in the organisation has as its purpose either the identification of a sufficient level of participation on the part of the individual to fix him with the relevant liability or a determination that this is not present. While the six factors that counsel identified will frequently be relevant to that evaluation, it seems to me that they are not necessarily exhaustive of the matters to be taken into account, nor will each of the factors be inevitably significant in every case. One needs, I believe, to concentrate on the actual role played by the particular person, taking all material aspects of that role into account so as to decide whether the required degree of participation is established.
>
> ...
>
> 57. The Canadian cases to which Lord Brown has referred seem for the most part to at least imply that the participative element involves either a capacity to control or at least to influence events. They appear to contemplate a minimum requirement that the mind of the individual be given to the enterprise so that some element of personal culpability is involved. A notable exception to this theme is to be found in the *obiter* statements in paragraph 16 of the judgment in *Ramirez v Canada (Minister of Employment and Immigration)* (1992) 89 DLR (4th) 173 where it is suggested that voluntary knowing participation can be assumed from membership of a brutal organisation. These statements have not been relied on by the Secretary of State in this case and, in my judgment, wisely so. The broad thrust of authority in this area is to contrary effect. A focus on the actual participation of the individual, as opposed to an assumption as to its significance from mere membership, appears to me to accord more closely

with that general trend and with the spirit of articles 25 and 30 of the ICC Rome Statute and article 12 (3) of Council Directive 2004/83/EC.

58. No consideration of the respondent's personal role was undertaken here, however. While it is true that the Secretary of State required only to be satisfied that there were serious grounds for considering that he had been involved in the relevant criminal activity, some examination of the respondent'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 respondent 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 into the question whether the requirements of articles 25 and 30 of the ICC Rome Statute have been met."

18. Lords Rodger JSC and Walker JSC expressed agreement with the judgments of Lords Brown, Hope and Kerr.

19. In SK (Article 1F(a) - exclusion) Zimbabwe [2010] UKUT 327, the Tribunal said:

> "21. We think that the answer is this: personal responsibility can arise through personal participation in the crime, which includes participation on a joint enterprise basis. But personal responsibility is not limited to that and also covers those who have made a 'substantial contribution' to the commission of the crime, with the requisite knowledge and intent. There is no requirement as such that the individual's participation on a joint enterprise be itself a 'substantial contribution' to the crime, although the combination of participation and intent will usually demonstrate that such a contribution was made. The need to keep a strict eye on the operation of the exclusion clause may mean that there are some whose participation might suffice in law for responsibility on a joint enterprise basis, but which could properly be described as trivial or insubstantial. It may well be that such a person would fall outside the scope of the exclusion clause, rather in the way that a judge might ask whether it really was in the public interest to prosecute such a person. Of course mere passivity would not suffice for joint responsibility anyway. That apart, there is in our judgment no further requirement in international law that those who participated in a joint enterprise crime against humanity should also have played a substantial part in it. It is also clear that at least a purpose of that requirement for a 'substantial contribution', which is very relevant to liability through acts where the involvement is more indirectly linked to the violence or force which underpins all these crimes, is to prevent mere passivity or membership of an organisation with knowledge constituting such crimes. That gives a clear pointer to the conclusion that it is not intended to exclude all lesser participants from the scope of international criminal responsibility leaving only the more serious criminals to face trial and punishment."

20. In Al-Sirri & Anor v Secretary of State for the Home Department [2012] UKSC 54 the court held as follows:

> "75. We are, it is clear, attempting to discern the autonomous meaning of the words 'serious reasons for considering'. We do so in the light of the UNHCR view, with which we agree, that the exclusion clauses in the Refugee Convention must be restrictively interpreted and cautiously applied. This leads us to draw the following conclusions:
>
> (1) 'Serious reasons' is stronger than 'reasonable grounds'.
>
> (2) The evidence from which those reasons are derived must be 'clear and credible' or 'strong'.
>
> (3) 'Considering' is stronger than 'suspecting'. In our view it is also stronger than 'believing'. It requires the considered judgment of the decision-maker.
>
> (4) The decision-maker need not be satisfied beyond reasonable doubt or to the standard required in criminal law.
>
> (5) It is unnecessary to import our domestic standards of proof into the question. The circumstances of refugee claims, and the nature of the evidence available, are so variable. However, if the decision-maker is satisfied that it is more likely than not that the applicant has *not* committed the crimes in question or has *not* been guilty of acts contrary to the purposes and principles of the United Nations, it is difficult to see how there could be serious reasons for considering that he had done so. The reality is that there are unlikely to be sufficiently serious reasons for considering the applicant to be guilty unless the decision-maker can be satisfied on the balance of probabilities that he is. But the task of the decision-maker is to apply the words of the Convention (and the Directive) in the particular case."

21. Concerning the offences of aiding and abetting and joint common enterprise, the Upper Tribunal said about (JCE) in MT (Article 1F (a) – aiding and abetting) Zimbabwe [2012] UKUT 00015 at [119]:-

> "... Aiding and abetting differs from joint criminal responsibility (jce) in that whilst the former generally only requires the knowledge that the assistance contributes to the main crime, participation in jce requires both a common purpose and an intentional contribution of the participant (Triffterer, pp. 756-758) to a group crime. Aiding and abetting encompasses any assistance, physical or psychological, that has a substantial effect on the commission of the crime. Article 2 para 3(d) of the 1996 Draft Code requires that aiding and abetting should be 'direct and substantial', i.e. the contribution should facilitate the commission of a crime in 'some significant way'. The Trial Chamber in Tadic II, the Trial Chamber in the Prosecutor v Naletilic and Martinovic (IT-98-34) cases and the Appeal Chamber in Prosecutor v Akeyesu (Case No. IT-95-14/l-T), paras 484, 706) interpreted 'substantial' to mean that the contribution has an effect on the commission, that is have a causal relationship with the

> result and it included within the concept 'all acts of assistance by words or acts that lend encouragement or support'. In Prosecutor v Furundzija (IT-95-17/1-T, 10 December 1998), paras 199, 232, 273-4, the Trial Chamber said that assistance need not be tangible: 'moral support and encouragement' can suffice, albeit it must 'make a significant difference to the commission of the criminal act by the principal': see also Prosecutor v Brdanin (IT-99-36-A, Appeal Chamber, 3 April 2007) and Prosecutor v Perisic (IT-04-81-T, 6 September 2011). The requisite knowledge may be inferred from all relevant circumstances, i.e. it may be proven by circumstantial evidence (Prosecutor v Tadic, para 689; Prosecutor v Akeyesu para 498). With these essential elements in mind we turn to consider what is said in this case as to whether the appellant was a co-perpetrator in a jce and/or as an aider or abettor."

22. In Al-Sirri (Asylum - Exclusion - Article 1F(c)) [2016] UKUT 448, the Upper Tribunal gave the following guidance:

> "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 involves the application of a standard higher than suspicion or belief."

23. Pausing there to take stock before going on to consider the evidence, we consider that our task is to determine whether first the alleged acts, namely the execution of prisoners, and the torture of detainees constitute war crimes or crimes against humanity, and second, whether there are serious grounds for believing that the Appellant has participated in these acts or crimes.

24. The definition of war crimes is found in 8 (2) of the Rome Statute which in turn reflects the definitions under the 1949 Geneva Conventions and Additional Protocols thereto of 1977 as well as other relevant instruments and customary international law. The Rome Statute was implemented in July 2002. The acts complained of occurred prior to its implementation[1]. This was not a matter explicitly raised by either party. It can reasonably be inferred that Mr Bazini was aware of this, which would explain why his skeleton argument does not engage with the Statute of Rome. The date of the crimes does not make any difference to our decision. In determining whether acts which occurred prior to the adoption of the Rome Statute constitute war crimes or crimes against humanity, it could be necessary to examine them in the light of these

[1] Article 11 - Jurisdiction *ratione temporis*

The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.

If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3.

instruments and customary law. In this case it was not suggested that the crimes committed were not crimes before the implementation of the Statute of Rome. The war crimes that have been committed in this case were offences under the 1949 Geneva Conventions and Additional Protocols of 1977. Crimes against humanity have primarily developed through customary international law and have not been codified in a convention. However, it could not sensibly be argued that torture and murder were not crimes against humanity under international law at material times. We are satisfied that they were.

25. War crimes under the 1949 Geneva Conventions are crimes that occurred in the context of an international armed conflict ("IAC"). We were not addressed on what constitutes an IAC. Common Article 2 to the Geneva Conventions of 1949 states that: "In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance." The International Criminal Tribunal for the former Yugoslavia (ICTY) proposed a general definition of international armed conflict. In the Tadic case, the Tribunal stated that "an armed conflict exists whenever there is a resort to armed force between States"[2] There was no assistance from the parties on the issue of which law applies to the Afghan conflict during the Russian occupation. We note that the UNCHR report of 30 August to which Mr Bazini referred us in submissions talks of the decade of "international armed conflict", but we are not sure whether the definition used is the same as that in International law. Neither party made reference to this. We were not assisted by either party. It has not been established by the Respondent that there was an IAC armed conflict at the relevant time. Furthermore, POW status applies only in the context of an IAC. There was no legal argument on the status of the two commanders that would have enabled us to conclude that they were POWs. Thus, as a matter of law, the Respondent cannot rely on war crimes that rely on an IAC.

26. Common Article 3 applies to "armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties". Our understanding of this is that they include armed conflicts in which one or more non-governmental armed groups are involved. Depending on the situation, hostilities may occur between governmental armed forces and non-governmental armed groups or between such groups only. In order to distinguish an armed conflict, in the meaning of common Article 3, from less serious forms of violence, such as internal disturbances and tensions, riots or acts of banditry, the situation must reach a certain threshold of confrontation.

[2] ICTY, The Prosecutor v. Dusko Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, 2 October 1995, para. 70.

First, the hostilities must reach a minimum level of intensity. This may be the case, for example, when the hostilities are of a collective character or when the government is obliged to use military force against the insurgents, instead of mere police forces. Second, non-governmental groups involved in the conflict must be considered as "parties to the conflict", meaning that they possess organized armed forces. This means for example that these forces have to be under a certain command structure and have the capacity to sustain military operations. We are satisfied that there was an armed conflict not of an international character in Afghanistan at the material time. This was another matter on which we were not addressed by the parties. However, it is clear from the background evidence (to which we turn in detail below) that this was occurring in Afghanistan. Common Article 3 applies in this case. The text of Article 3 is replicated in Article 8 (2) (c) of the Rome Statute.

The Evidence

27. There was before us a Respondent's core bundle (RB) which contains the Special Cases Unit (SCU) evidence bundle at Annex B. Mr Lindsay relied on a skeleton argument (25 pages). Mr Bazini relied on a skeleton argument. The Appellant relied on a "consolidated bundle" (AB1) and a supplementary bundle (AB2). There was also an authorities' bundle.

The Appellant's Evidence

28. There was one witness statement from the Appellant in AB1 dated 1 May 2019. It was not immediately clear from the way in which his case was presented to us, but this was in fact the fourth witness statement that the Appellant has produced in these proceedings. We shall refer to it as ws4. We drew Mr Bazini's attention to the undated witness statement, that the Appellant relied upon before the First-tier Tribunal (ws3). We located two further witness statements in the Respondent's bundle. One (ws1) is undated but appears to have been submitted before the asylum interviews and another (ws2) which appears to have been prepared for a bail application. There were no more witness statements in the papers before us and our attention was not drawn to any. As stated only ws 4 was in AB1. There was before us the Appellant's screening interview (SCR). The Appellant was interviewed at length by the Respondent on two separate occasions. The first interview (AIR 1) took place on 3 July 2012. We have what appears to be a full transcript of this with sequentially numbered questions and answers (RB, G). The second interview took place on 9 July 2013. There were 3 tapes of this interview. The Respondent has provided a transcript of the interview (RB, H), but the questions and answers are not numbered. The presentation of this evidence was very unhelpful. The transcript is in three parts; tape 1, tape 2 and tape 3. The Appellant gave oral evidence before us through an interpreter. We established understanding between the Appellant and the interpreter. He adopted the four witness statements as evidence-in-chief.

29. The Appellant's evidence is that he was member of the PDPA and member of the Afghan police. He worked in Mahabas prison in Jalalabad. He was in charge of the part of the prison which housed political prisoners. There were no crimes against humanity or war crimes committed in the prison. If there were, he was unaware of this. In 1987 or 1988 he arranged for the execution of two Mujahideen commanders. There was a spy for the Mujahideen present at the execution. His name was Salam Jam. In 1987 the Appellant left the prison. He continued to work as a police officer. In 1992 the PDPA regime fell and he ceased working for the police. He established a business in Nangahar; a restaurant called the Nadeem hotel. He was abducted by the Mujahideen in 1992 -93. They learnt about his activity in the prison from Salam Jam. He was tortured and detained by them for 22 months. His family paid a bribe which secured his release. They did not kill him because of the Appellant's brother-in-law's connections. He was released and he went to Iran via Pakistan. He returned to Afghanistan in 2002. He was injured by a bomb in Nangahar in 2002. He was blamed for planting the bomb by the then governor of Nangahar. He was injured by another bomb in Nangahar, at the Nadeem hotel, in 2004/05 and he was again blamed until another person confessed. He re-joined the police in 2005 and was assigned to a police station near to the border with Pakistan. His duties included opposing the Taliban and those involved in the drug trade. His family was attacked in 2008 in Kabul and in the attack his son, E, was seriously injured. The Appellant's wife told him that the attackers identified themselves as from Hizb-i-Islami. His family fled Afghanistan. Their asylum application was refused in Turkey and his wife and younger children returned to Kabul, where they live in hiding. He has two sons in Germany.

30. We set out a summary of the Appellant's oral evidence. We will refer to the evidence in his witness statements and SCR and asylum interviews (AIR) throughout the decision.

The Appellant's oral evidence

31. The Appellant stated that he did not attend trials whilst working at Mahabas prison. He did not ever go into a court hearing himself because the judge would not allow him to. He would wait outside with the suspects. The hearings would last one or two hours. He would remain outside. After the court hearing, the Appellant would return prisoners to detention. The Appellant described himself as a guard in charge of the section of the prison which housed political prisoners. He was initially reluctant to give an estimate to the Tribunal of how many prisoners were under his charge at one time because of the significant lapse in time. He had physical health issues. He was on medication. His memory was vague. He said that maybe there were twenty to 25 cells, each containing one or two prisoners but that the overall figure would vary. When prisoners arrived, they did not look as though they had been tortured. They would come in from the battlefield and then investigations

would start. They would be conducted by the special courts and prosecutors. KhAD had their own prisons that were separate.

32. The Appellant did not know the details of the prisoners. Their case files were dealt with by other people. They may have been there for selling guns or ammunition. There was another section of the prison dealing with very serious crimes. The two Mujahideen prisoners who were executed admitted their crimes. They were convicted in a court and their execution authorised by the President. He initially stated that they had not killed anyone. He then said he would not know whether they had killed anybody. They were armed insurgents in opposition to the government. Their crimes would be a matter for the court and the prosecutors. He was just a guard, subject to orders. He had nothing to do with KhAD. KhAD had their own judges, codes, prosecutors and hearings. He was not present at the trial of the two Mujahideen prisoners. He simply took them to be executed.

33. In cross-examination the Appellant stated that he came to the UK in 2009. His family was attacked five, six, seven months prior to his arrival. He then stated it was seven to eight months, maybe a year, and his final answer was eight to nine months. He did not know who attacked his family, but the attackers told his wife they belonged to Hezb-i-Islami. The Appellant was in Kabul at the time. His son who was severely beaten in the attack was aged 13 at the time.

34. In answer to questions from the bench, the Appellant stated that there were interrogations by KhAD within the prison. They would take place in the prison chief's office. The KhAD officials would take the prisoners to be interrogated. The KhAD officials did not work within the prison. They belonged to a separate system. They would come into the prison and they would tell the prison chief that they wanted a prisoner. The prisoner would be got by the prison chief or two deputies. When asked how he was aware that this was happening in the prison, he stated that the guards would see KhAD coming into the prison. They wore uniforms and their vehicles were recognisable. They would see the KhAD officials and the prison chief going into and out of the chief's room, bringing the prisoners, but they would not know what went on in the prison chief's office. The Appellant confirmed that he was responsible for 25 to 30 guards.

E's evidence

35. The Appellant's son E (date of birth 1 January 1996) relied on the witness statement that was before the First-tier Tribunal. It is undated and skeletal. It comprises eight lines. The witness states that on an unidentified night, unknown persons carried out an attack. The attackers asked him about his father's whereabouts and also where his father's weapons were. He was hit by the attackers and became unconscious. When he woke he was in hospital in Pakistan.

36. E gave oral evidence via video link from Germany. He confirmed that there was nobody else in the room with him and that he understood the interpreter. He was shown a copy of his witness statement and he stated that he recalled making it and what he said and that he adopted as evidence-in-chief. He confirmed that he arrived in Germany in 2014 and had been given six months' leave to remain. His application for protection is pending. He identified himself on photographs that he was shown. He stated that the attackers came after his father. There were four of them. They were armed. Their faces were covered. They asked for his father and the location of his father's gun. He still has visible scars from the incident.

The Evidence of Dr Antonio Giustozzi of 29 April 2016

37. The expert's conclusions can be summarised as follows:

    (i) During the 1980s, the interrogation of political prisoners was the job of KhAD, which had a specific directorate directed to that. The prisons were of two types: the majority were under the control of the Ministry of Interior, KhAD also had its own prisons where political detainees were kept before being sentenced. In principle, executions were to take place in the prisons of the Ministry of Interior if due process was respected although it was not uncommon for deaths under torture to happen.

    (ii) The Appellant could plausibly have organised the executions of the two prisoners as he claims to have done.

    (iii) Interrogation and torture would have occurred before the prisoners were tried and transferred to the prisons of the Ministry of Interior.

    (iv) Abuse of prisoners by the police in police stations and jails was reported but it was not finalised to the extraction of information, which was a task of KhAD. It cannot therefore be automatically assumed that the Appellant would have been responsible for torturing prisoners.

    (v) If the information about the executions become known to the comrades of the victims, the Appellant would have been a target for revenge after the fall of the PDPA regime in 1992.

    (vi) Revenge attacks are known to have happened after the fall of the PDPA regime and more recently. The expert gives examples of this.

    (vii) From 2005, there has been a resurgence of tension with regard to individuals involved in the violence of the 1980s and early 1990s because of the Parliamentary elections and the candidacy of former Minister of Interior Gulabzoi and an ongoing campaign to try war criminals.

    The discovery of a number of mass graves in 2007 has also "contributed to re-invigorate the memories of the abuses of the past".

    (viii) The official figures for the disappearance of individuals in Kabul between 2002 and 2003 is one a week and some of the killings could clearly be politically motivated.

(ix) Considering the length of time lapsed and the general evolution of politics in Afghanistan, it is unlikely that either Jamiat or Hizb-i-Islami as such would still be interested in the Appellant. However, his actions could have started a blood feud with the surviving victims and the families of those who died.

(x) Revenge taking is made much easier by the ongoing conflict. Afghan on Afghan violence has increased and in support of this Dr Giustozzi produced graphs which show an increase of violent incidents reported in Kabul. It is plausible that the Appellant is caught in a blood feud with relatives of either or both of the men he had executed. Whether the relatives would be able to pursue him away from Nangahar would depend on a set of circumstances which are difficult to assess, given the lack of information. The relatives might be able to rely on fellow members of Hizb-i-Islami or Jamiat-e-Islami to pursue the Appellant, including those serving in the security apparatus of the government. If so, their ability to track down the Appellant would be greatly enhanced.

(xi) Many former members of the armed opposition in the 1980s now serve in security forces and would be very strongly placed to easily track the Appellant down and to exploit the high level of violence to take revenge on him. The police are known for being abusive and inefficient and could not be expected to protect the Appellant.

(xii) Dr Giustozzi was not able to identify any reports of the bomb attack against the hotel/restaurant where the Appellant was working in 2002. However, Haji Qadir was the governor of Nangahar at that time before he was assassinated in Kabul. He had been a leader of the armed opposition to the PDPA, so he would not be well-disposed towards the Appellant.

(xiii) The Appellant would not receive mental health care comparable to what he would receive in the UK. The country's only mental health hospital in Kabul is in bad condition as a result of war damage and lack of maintenance. There is a problem of understaffing and few professionals with the necessary training and qualifications. As at 2010 The World Health Organisation found 60% of Afghans suffer from various forms of mental health problems. Dr Giustozzi reports in some detail about the problems with the provision of treatment for mental health problems in Afghanistan. He also identifies as an additional problem for the Appellant marginalisation as a result of his mental health problems. Because the Appellant suffers from mental health issues and a lung problem it makes it impossible for him to hide. He would have to live in Kabul in order to access the modest level of care available. Earning a living would be very difficult for him.

The Evidence of Dr Antonio Giustozzi of 26 March 2019

38. Dr Giustozzi's supplementary report focuses on the issue of the relationship between the Ministry of Interior (MoI) and KhAD in the 1980s. The expert

answers specific questions that he has been asked by the Appellant's solicitors. His evidence can be summarised:

(i) In his report he referred to executions taking place in the Ministry of Interior prisons "if due process was respected". He expands upon this, stating that; "The due process was that executions should take place after a trial and at the Ministry of Interior, not elsewhere. There would be a representative of the courts in attendance as well."

(ii) The interrogation of political prisoners occurred in KhAD facilities while interrogation of other detainees occurred in the MoI facilities. Because of the classified character of the information potentially being gathered, KhAD wanted to be sure it gathered all the information itself. Occasional mistreatment of political prisoners could still happen at MoI prisons.

(iii) A blood feud could be reactivated by the Appellant's return to Afghanistan. However, it could not be pursued if the victims' relatives were unable to reach the Appellant and that parties like Jamiat or Hizb-i-Islami must have other priorities at this point as the political landscape has evolved.

(iv) In relation to the bomb attack and the fact that it could not be identified, the expert states that the size of the attack is not clear but an actual bomb attack would not have been missed by the chronicles in 2002, which was a quiet year compared to what happened later.

(v) The kidnapping gangs linked to armed groups active in the country operated in the 1990s and might have kidnapped the Appellant primarily for ransom, claiming a revenge intent in order to persuade the family to pay. However, there is very little detailed information about the 1990s in general.

(vi) The expert was specifically asked whether the Appellant's account of leaving the hospital following being caught up in a bomb blast was plausible, and in answer to this, he stated that he would need to know more details about the alleged bomb attack to comment on this and that it would only make sense if the attack could be construed as a terrorist operation.

(vii) After the collapse of the Afghan health system it was common, and it is still common today to take sick relatives to Pakistan or India for treatment.

(viii) By 2006 the "escalating conflict pushed up demand for experienced police professional to replenish the ranks".

(ix) The issue with joining the police in those years was primarily political affiliation and political recommendations, but if there had been any serious allegations of crimes [the Appellant] would have faced some scrutiny at least.

(x) Torture and abuse have always happened in Afghan prisons and happen even now on a large scale. He goes on to opine that:

> "If a blanket condemnation of all working in prisons for human rights abuses was applied to those working in the 1980's, it should be applied even today and British soldiers who handed prisoners to police officers in recent years would be implicated as well."

(xi) The police are overwhelmed and unable to protect even serving members and would not be able to extend protection to the Appellant.

(xii) Following an interview with, Abdul Alim Khaksaar, who was a deputy director of prisons and detention centres under the government of Mohammad Najibullah in 1989 to 1992, the following points are made;

(1) During the 1980s, political detainees would normally be taken to KhAD detention centres. Upon being detained, prisoners would be taken to the prisons of the MoI but a report would be issued to KhAD, whose officer would then normally transfer them to KhAD prisons.

(2) KhAD detention facilities were overcrowded.

(3) Some political detainees therefore might have been kept in ordinary (MoI) prisons because of overcrowding.

(4) The transfer of prisoners from MoI to KhAD was handled through procedures and paperwork agreed by MoI and KhAD and was not arbitrary in nature. There were no cases of "disappearances" of prisoners. The claim always made by the authorities at that time is that all the executions were carried out after a trial. There has been no thorough research carried out to challenge this, as far as the interviewee was concerned.

(5) KhAD had its own officers posted in each office and directorate of the Ministry of Interior and their task was to report to KhAD about any detention that could be relevant for KhAD. The division of labour between ordinary prisons and KhAD prisons was clear; all political crimes were within the competence of KhAD.

(6) Political prisoners were interrogated exclusively by KhAD. KhAD officers had the right to visit MoI prisons as they saw fit and did not need prior authorisation.

(7) KhAD had great authority over MoI officials and although in general relations were handled through official channels no MoI officer would dare contradict a KhAD officer. Occasionally, friction and tension between MoI officials and KhAD officers would arise over the fate and treatment of prisoners but usually such friction would be resolved through the intervention of senior officials.

(8) No MoI officer would want to escalate tension with KhAD for fear of being accused of being a sympathiser of the opposition. If anybody

at MoI wanted to save some individual from KhAD the only way would be to avoid reporting him as a political prisoner, hoping that KhAD did not identify him as such.

(9) KhAD had the authority to visit MoI prisons and interrogate prisoners there without previous authorisation but usually prisoners would be taken to KhAD interrogation centres, which were mostly located in confiscated private houses.

(10) It would never happen that KhAD request MoI to carry out interrogation on KhAD's behalf.

(11) MoI officers knew that some prisoners taken by KhAD would be beaten and tortured under interrogation. Sometimes, the prisoners could be handed back to the MoI if found to be little or no relevance to KhAD. In these cases, MoI would be responsible for treating the prisoners and overseeing their recovery.

(12) There was a department of KhAD specifically tasked with the interrogation of political prisoners, called 105th Interrogation Directorate.

39. The expert concludes by stating that the fact that the Appellant had two political prisoners in his jail was quite unusual and should be put down to the overcrowding of KhAD detention centres. Although the Appellant claims there might be as many as 80 detainees in the political prison section they would be divided up as it was considered dangerous for too many political prisoners to share space. Prisoners had probably been processed by KhAD (interrogated) and then parked in an MoI prison, waiting for sentence. Once sentenced, they were taken to be executed. The main involvement of MoI officers would be to hand over designated prisoners to KhAD on the basis of the paperwork produced by KhAD officers.

The background evidence

40. The Respondent relied on a considerable amount of background evidence. The source material was available to us. There was no challenge to the background evidence as set out in the decision letter in so far that it was sourced and gave a credible account of what was happening in Afghanistan at the material time. The challenges made related to interpretation and context. Mr Bazini took us to some of the source material and to background evidence relating to risk on return which we set out when recording his submissions. However, for now we set out salient numbered paragraphs of the decision letter which set out the background evidence relied on by the Respondent in his letter: -

"(25) Amnesty International reported on the way cases were handled by the Special Revolutionary Courts:

'No accounts suggest that prisoners tried by special revolutionary courts have had access to defence Counsel or that other defence or prosecution witnesses are presented. … Members of special

> *revolutionary courts are PDPA members and in some cases recruited from KhAD itself; most do not have a legal training or judicial background. Hearings are not public and relatives are unaware that trials are taking place, although a few trials are filmed for showing on television.'*

The verdict of the trials of political prisoners was decided in advance by KhAD, rather than being decided by the court itself[114]. Between 1980 and 1988 it was estimated that more than 8,000 Afghans were executed following trial in the 'Revolutionary Courts'.

> [114]United Nations Mapping Report on War Crimes and Human Rights Abuses. Page 149-153 (SCU Evidence Bundle: Document 1, pages 141-145) & 'Situation of Human Rights in Afghanistan' Report to the UN General Assembly, Felix Ermacora, U.N. Special Rapporteur on Afghanistan, October 30th 1990, pages 12-13 (SCU Evidence Bundle: Document 8, pages 226-227) & 'Tears, Blood and Cries' Human Rights in Afghanistan Since the Invasion 1979-1984. A Helsinki Watch Report December 1984. P157-158 (SCU Evidence Bundle: Document 9, pages 258-259) & Netherlands, The: Ministry of Foreign Affairs, *Afghanistan – Security Services in Communist Afghanistan (1978-1992). AGSA, KAM, KhAD and WAD*, 26 April 2001, page 26: http://www.refworld.org/docid/467006172.html (SCU Evidence Bundle: Document 2, page 171)
>
> [115]'The Fragmentation of Afghanistan' by Barnett R. Rubin. Yale University Press 1995. Page 137 in 2002 edition. (SCU Evidence Bundle: Document 1, pages 274).

(27) Those found guilty were denied the right of appeal[117]. One Afghan judge, who fled to Pakistan, reported how KhAD – working alongside the KGB – controlled the judicial system and was able to influence the working and outcome of trials[118]. Sentences, including the death penalty, simply required confirmation by the President.

> *'Trials did not normally last more than a few minutes, and accounts given to Amnesty International suggest that some prisoners tried by Special Revolutionary Courts did not have access to defence counsel and that neither defence nor prosecution witnesses were presented. Judges of Special Revolutionary Courts were reportedly PDPA members and in some cases recruited from the KHAD (State Security Intelligence Service) itself. Most judges did not have any legal training or judicial background. Hearings were not public and relatives were seldom informed that trials were taking place. Some trials were filmed for broadcast on television for propaganda purposes and were called 'open' trials[119].'*

Furthermore, reports indicated that:

> *'examining magistrates do not have adequate training in law, and that they are sometimes unable to examine the case because the KHAD has instructed them not to. The main Riasat interrogation centres have their own examining magistrates who are themselves reportedly KHAD officials[120].'*

[117]Netherlands, The: Ministry of Foreign Affairs, *Afghanistan - Security Services in Communist Afghanistan (1978-1992). AGSA, KAM, KhAD and WAD*, 26 April 2001: http://www.refworld.org/docid/467006172.html (SCU Evidence Bundle: Document 2, pages 171)[118]'Afghan legal system attacked by defecting judge' BBC Summary of World Broadcasts, 25/11/1986. SCU Evidence Bundle: Document 13, pages 293)

[119]Amnesty International, *Afghanistan: Unfair Trials by Special Tribunals*, August 1991, ASA 11/03/91, available at: https://www.refworld.org/docid/ 47a707980.html. Page 4 (SCU Evidence Bundle: Document 12, pages 279)

[120]Amnesty International, *Afghanistan: Unfair Trials by Special Tribunals*, August 1991, ASA 11/03/91, available at: https://www.refworld.org/docid/47a707980.html. Page 4 (SCU Evidence Bundle: Document 12, pages 282)

(28) In a 2001 report for the Council of Europe121 the Netherlands Ministry of Foreign Affairs noted:

> *'The Special Revolutionary Court was not independent but formally answerable to the Revolutionary Council. The judges of the Special Revolutionary Court were members of the PDPA, almost all to some degree connected with the State security service and in some cases directly recruited from the KhAD/WAD … Judges of the Special Revolutionary Court could only obtain their posts and carry out their duties if they subscribed fully to the repressive nature of the Communist legal system. Most of them had no legal or court experience at all. Trials did not comply in any way with internationally recognised standards. Hearings were not public and family members were not told that a trial was in progress. Sittings of the Special Revolutionary Court, composed of a panel of three judges, generally lasted only a few minutes. In many cases bright lamps were positioned behind the judges so that the accused could not see the judges' faces … The accused had no right to legal assistance, but had to conduct his own defence. He could, however, prepare a short written statement of his defence or this could be done for him. Sometimes the accused was permitted to read out his defence, but often his written defence was simply added to the file without further consideration. The judge, dressed as an ordinary citizen, always complied with the demands of the public prosecutor, which were based on the recommendation of the KhAD/WAD. It was also well-known that the confession had been obtained through torture. We know of no cases in which the judge did not comply with the prosecutor's demands. In effect, then, the sentence had already been pronounced before the accused entered the courtroom.'*

[121]Netherlands, The: Ministry of Foreign Affairs, *Afghanistan Judicial Process under the Communist Regime (1978-1992)*, 26 April 2001, pages 13-14: https://www.refworld.org/docid/4670043d2.html (SCU Evidence Bundle: Document 6, pages 196-197)

(33) The majority of trials of political prisoners took place in Kabul, however some were carried out in the provinces. The UN reported on trials carried out in Jalalabad:

> *'Abdul Wahid, who was in prison in Jalalabad for two years and seventeen days, described to Syed Fazl Akbar (former director of Radio Kabul and, in 2004, government of Kunar province) a visit by members of the special revolutionary court to the Jalalabad central jail … The Communist judges ordered the execution of the 12 detainees who were lying there without trial for the last more than two years … 200 more detainees were punished with from 3 to 20 years of imprisonment because they defected from the army. With some of them they had captured cards of the mujahidin groups. I was also imprisoned for 3 years without knowing the crime and the charge of my imprisonment. All the comments by KhAD department regarding these detainees were confirmed by the judges*[125]*.'*
>
> [125]United Nations Mapping Report on War Crimes and Human Rights Abuses. Page 150-151 (SCU Evidence Bundle: Document 1, pages 142-143)

During the 1980s Afghan political prisoners were routinely subjected to torture by KhAD officers, with all political prisoners being interrogated by KhAD officers. Torture was practiced on a widespread basis despite it being criminalised in 1980 under Article 30 of the 'Fundamental Principles of the Democratic Republic of Afghanistan' (which was effectively the Afghan constitution)[126]. As noted by the EU in its 2001 report: *'all KhAD and WAD NCOs and officers were guilty of human rights violations … all KhAD and WAD NCOs and officers took part in interrogation and torture of real and alleged opponents of the Communist regime*[127]*.'* According to the UN's Special Rapporteur, KhAD officers *'regularly practiced torture'* whilst Amnesty International noted

> *'Testimonies and other information received by the organization indicate that torture is inflicted in detention centres throughout the country which are administered by the State Information Services, Khedamat-I Etela 'at-I Dawlati, known as KhAD*[128]*.'*

In SO and SO Afghanistan [2006] UKAIT 00003 the Tribunal found 'there is no doubt that KhaD was a ruthless security service organisation who between 1978-1992 was responsible for grave human rights violations'[129]. (The Tribunal came to this conclusion having reviewed, inter alia, the 'Netherlands Report' and a UNHCR paper of July 2003[130].)

> [126]Netherlands, The: Ministry of Foreign Affairs, *Afghanistan Judicial Process under the Communist Regime (1978-1992)*, 26 April 2001, page 6: https://www.refworld.org/docid/4670043d2.html (SCU Evidence Bundle: Document 6, pages 189)
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> [127]Netherlands, The: Ministry of Foreign Affairs, *Afghanistan – Security Services in Communist Afghanistan (1978-1992). AGSA, KAM, KhAD and WAD*, 26 April 2001,

page 33: http://www.refworld.org/docid/467006172.html (SCU Evidence Bundle: Document 2, pages 178)

[128]United Nations Mapping Report on War Crimes and Human Rights Abuses. Page 132-133 (SCU Evidence Bundle: Document 1, pages 124-125)

[129]SO and SO Afghanistan [2006] UKAIT 00003 Para 20

[130] CF. para 12

(36) According to the UN, Human Rights groups identified the mechanism by which political prisoners were treated following their arrest[131]:

(37) 'Numerous reports have indicated that the treatment meted out to suspects by KhAD agents has followed a pattern: they are arrested and taken to one of many KhAD detention centres – Amnesty International knows of eight in Kabul alone – where they are first subjected to various forms of deprivation and then soon afterwards intensively tortured.'

[131]United Nations Mapping Report on War Crimes and Human Rights Abuses. Page 133-134 (SCU Evidence Bundle: Document 1, pages 125-126)

(38) 'Suspects are reportedly deprived of all contact with family, lawyers or doctors, or even other prisoners, by being held incommunicado and in solitary confinement. During this period they may be continuously interrogated, threatened, and be deprived of sleep or rest; cases have also been reported of detainees having been deprived of food.'

(39) 'Former detainees have told Amnesty International that suspects who fail to cooperate with KhAD are then tortured – the methods reported have included electric shocks, beatings, burning with cigarette ends, and dousing with water.'

(40) 'Detainees are also known to have been kept in shackles or bound hand and foot for prolonged periods. In some cases prisoners are reported to have been forced to watch their relatives being tortured.'

…

(43) The doctor also reported on the long term effects of the torture:

> *'Physical symptoms like scars, burns, fracture, missing teeth, deformed finger joints, hemiparesia and deafness etc. are found in 61% of the victims. 89% of the victims are suffering from somatic pains such as headaches, migraine attacks, pain in the joints and bones, muscle cramps, gastric pains, dysuria etc. All of these victims suffer from mental disorders like irritability, aggressiveness, startle reaction, emotional disturbances, anxiety, depression, intellectual disorders and psychosomatic complaints.'*[134]

[134]United Nations Mapping Report on War Crimes and Human Rights Abuses. Page 136 (SCU Evidence Bundle: Document 1, page 128)

(44) The EU also reported on the torture methods employed by KhAD against political prisoners, noting that many prisoners died under torture[135]. The report identified KhAD agents as being *'inventive in their selection of methods of torture*[136]:

> *'Heavy punches to a suspect's body and face constituted a simple yet effective means of extracting a confession. Punches were often so heavy and lasted for so long that the suspect would lose consciousness. After coming round, the punishment would be repeated as necessary. As well as bare fists, KhAD and WAD agents would use objects such as bottles, sticks, whips, rifle butts, metal rods and electric flexes. In some instances the suspect would be suspended from a rotating fan during such punishment. Sometimes the suspect's body would be worked over with knives, pieces of glass or other sharp objects. Another method of forcing a suspect to talk was to give him the hot-iron treatment or mutilate his lips with a lighted cigarette. There were also cases in which a suspect was forced to place his penis and testicles on a table, whereupon another table would be placed upside down on top. One or more of the interrogators would then jump up and down on the table.*

[135]Netherlands, The: Ministry of Foreign Affairs, *Afghanistan - Security Services in Communist Afghanistan (1978-1992). AGSA, KAM, KhAD and WAD*, 26 April 2001, pages 24-28: http://www.refworld.org/docid/467006172.html (SCU Evidence Bundle: Document 2, pages 169-173) & Netherlands, The: Ministry of Foreign Affairs, *Afghanistan Judicial Process under the Communist Regime (1978-1992)*, 26 April 2001, page 12: https://www.refworld.org/docid/4670043d2.html (SCU Evidence Bundle: Document 6, page 195)

[136]Netherlands, The: Ministry of Foreign Affairs, *Afghanistan - Security Services in Communist Afghanistan (1978-1992). AGSA, KAM, KhAD and WAD*, 26 April 2001, pages 25-26/32: http://www.refworld.org/docid/467006172.html (SCU Evidence Bundle: Document 2, pages 171/177)

(49) Political prisoners were primarily detained and tortured in KhAD facilities in Kabul. However, KhAD also maintained facilities and tortured prisoners in all of the provincial centres, including Bamian, Gbazni, Jalalabad, Kandahar, Lashkargah and Pul-iKhomri, and in the prisons of Kunduz and Mazar. Prisoners were routinely held incommunicado throughout the period of their interrogation. In some cases, prisoners were tortured on a daily basis[141]. As reported by Human Rights Watch in 1991, a prisoner who was also released from Mahabas Prison in Jalalabad in 1989 reported on the summary execution of prisoners at the prison in the period after he was detained in 1984. He described up to 25 people a day having their hands and being blindfolded then taken away in an ambulance to be

executed. He stated that up to 25 people a day were executed in this manner[142]. In a 1986 report on human rights in Afghanistan, the UN's Special Rapporteur noted the execution of political prisoners in Jalalabad[143].

> [142]Human Rights Watch, *Afghanistan: The Forgotten War: Human Rights Abuses and Violations of the Laws of War since the Soviet Withdrawal*, 1 February 1991: http://www.refworld.org/docid/45c9a5d12.html (SCU Evidence Bundle: Document 19, pages 323–326)
>
> [143]UN Commission on Human Rights, *Report on the situation of human rights in Afghanistan/prepared by the Special Rapporteur, Felix Ermacora, in accordance with Commission on Human Rights resolution 1985/38*, 17 February 1986, E/CN.4/1986/24: https://www.refworld.org/docid/482996d02.html page 12 (SCU Evidence Bundle: Document 20, page 328)."

(50) From late 1986 onwards KhAD was decreasingly responsible for the commission of international crimes against prisoners. However, although numbers of crimes were fewer, political prisoners continued to be held without a trial – or as a result of unfair trials – and torture was still practiced. Although the 'Special Revolutionary Courts' were closed down and figures for executions diminished, political prisoners continued to face imprisonment without having a fair trial[144]. In January 1987 President Najibullah announced a policy of 'national reconciliation'. A number of categories of political prisoners were selected for release

> *('all female convicts; all male convicts under the age of 18 and over the age of 60; all prisoners sentenced to up to five years' imprisonment; all prisoners sentenced to up to seven years' imprisonment who had served at least four years of their sentences; and all convicts suffering from a chronic disease on the recommendation of an 'authoritative medical commission'. Prisoners involved in 'crimes of spying, murder and explosion' could only be released on the recommendation of a peace Jirga (committee)')*

Political prisoners eligible for release from Jalalabad prison were released by April 1987[145].

> [144]United Nations Mapping Report on War Crimes and Human Rights Abuses. Page 127/142-143/153 (SCU Evidence Bundle: Document 1, pages 119/134-135/145)
>
> [145]Amnesty International, *Afghanistan: Unfair Trials by Special Tribunals*, August 1991, ASA 11/03/91, page 5: https://www.refworld.org/docid/47a707980.html (SCU Evidence Bundle: Document 12, page 280) &Netherlands, The: Ministry of Foreign Affairs, *Afghanistan – Security Services in Communist Afghanistan (1978-1992). AGSA, KAM, KhAD and WAD*, 26 April 2001, page 11: http://www.refworld.org/docid/467006172.html (SCU Evidence Bundle: Document 2, pages 156)."

41. There is much said about KhAD by the Respondent in the Reasons for Refusal Letter. This is supported by the source material. We did not hear any cogent

submissions from the Appellant challenging the background evidence relied on by the Respondent relating to KhAD's activities in Afghanistan during the relevant period. From the unchallenged and sourced background evidence about KhAD, we summarise, briefly the activities of KhAD throughout the relevant period.

I. Victims of KhAD numbered in tens of thousands, hundreds of which were "disappeared." It is believed that up to 1990 KhAD had arrested approximately 150,000 people, while over 8,000 people were executed between 1980 and 1986.

II. It was the task of KhAD to ensure the continued short and long-term existence of the Communist regime, giving them a licence to track down and fight the regime's external and internal enemies as they saw fit.

III. KhAD leaders would instruct their subordinates to carry out arrest, detention, judicial sentencing, exile, torture, attempted murder and extrajudicial execution of real or alleged opponents of the communist regime. Their behaviour created a climate of terror aimed at eliminating opposition among the civil population to the communist regime.

IV. KhAD were exempted from serving in the Afghan government army. Executions continued on a large scale and carried out in accordance with "socialist legality" under the Soviet-installed regime. Accused prisoners were tried by a Special Revolutionary Court, and, according to reports, prisoners were always found guilty. The court would decide upon sentence, including death. There was no judicial appeal from the sentence of the Special Revolutionary Court. However, prisoners could escape punishment by agreeing to cooperate with the government by being spies. Some political prisoners were detained without charge or trials for protracted periods before being released.

V. Some trials took place in secret within KhAD's own headquarters, others were staged as "show trials", deliberately broadcast on television. Reports indicate that the courts had no independence and in effect operated like a branch of KhAD. Prisoners were presented with documents informing them of the judgment of the court and the sentence to be imposed upon them.

VI. The accused were not allowed to meet their defence team, confront witnesses or prepare their defence. Many of those on trial were denied access to defence Counsel and not allowed to offer their own defence.

VII. In respect of the Special Revolutionary Courts, the prisoners did not have access to defence Counsel or witnesses, and members of the Special Revolutionary Court were PDPA members and in some cases recruited from KhAD with no legal or judicial background. The verdict at trials of political prisoners was decided in advance by KhAD. Between 1980 and 1988, it is estimated that more than 8,000 Afghans were executed following trial in the Special Revolutionary Courts. Those found guilty in

the Revolutionary Courts were denied the right to appeal. The Special Revolutionary Court was not independent but answerable to the Revolutionary Council.

VIII. The role of judges and prosecutors in the unfair trial and conviction of political prisoners meant that they were responsible for the violation of human rights. The majority of trials of political prisoners took place in Kabul, however, some were carried out in the provinces.

IX. The UN reported on trials in Jalalabad. From late 1986 onwards KhAD was decreasingly responsible for the commission of international crimes against prisoners. However, political prisoners continued to be held without trial or as a result of unfair trials and torture was still practised.

Submissions

42. Both parties made extensive oral submissions.

43. The Respondent's skeleton argument comprises 24 pages. Most of it sets out the legal framework. Mr Lindsay accepted that there was an omission in the skeleton argument and that contrary to what he stated therein, the Secretary of State relied on Article 8 of the Treaty of Rome. Mr Lindsay's skeleton argument sets out case law and the background evidence relied on by the Secretary of State, which is taken from the Reasons for Refusal Letter. The Respondent relies on Article 7(1) (a), (e) and (f). Mr Lindsay submitted that there is sufficient evidence to establish that the Appellant committed acts as part of a widespread or systematic attack. He relied on Article 8(2). This was not raised in the skeleton argument, but he relied on the decision letter which indicates that Article 8 (2) (i) – (iv) were relied on. He relied on common Article 3 which is raised in his skeleton argument (replicated at Article 8 (2) of the Statute of Rome and specifically 8 (2) (c) (i) and (iv)).

44. Mr Lindsay confirmed that the Respondent relied on two acts; the participation in the execution of the two commanders and the facilitation of torture. Mr Lindsay was specifically asked by us whether there was according to the Secretary of State an international armed conflict (IAC) or an armed conflict not of an international character. He was not entirely clear on the issue. He said that he did not intend to focus on there being an IAC; however, he indicated that he did not concede the issue. He relied in full on the Reasons for Refusal Letter of 23 July 2015.

45. The Appellant had responsibility for the detention of political prisoners, including those charged with serious political crimes. He handed over personnel to KhAD, knowing that there was an institutionalised policy of torture and treatment. There was sufficient evidence to establish the actus reus and mens rea required under the Statute of Rome.

46. Mr Lindsay drew are attention to AIR 2 (H, RB). The Appellant stated that defence lawyers were not in attendance. The description that the Appellant

gave in the interview was of a trial. It is contrary to what he stated in oral evidence that he did not attend trials. The Appellant was complicit in what amounted to show trials. There was no due process. It was well-known that confessions were obtained by torture.

47. The Appellant was not just a guard. He had a rank with oversight for political prisoners. It is not credible that a person of rank would not be aware that torture was going on within the prison. The background evidence set out at [35] of the decision letter establishes that all political prisoners were interrogated by KhAD officers. It follows that all political prisoners were subjected to torture. This was a stark statement and dispositive of a key issue. It was not credible, considering the background evidence, that political prisoners that the Appellant oversaw were not tortured and he was not aware of this. The Appellant has sought at every stage to minimise the extent of his aiding and abetting institutionalised torture of political prisoners in Afghanistan. He would have been aware of the criminal nature of KhAD which was responsible for the mistreatment of political prisoners. He was a long-term member of PDPA and there were serious reasons for considering that he would have had knowledge of the high level of crimes committed by the PDPA and KhAD from the time it took control in 1978 until it fell in 1992.

48. The Appellant was aware that prisoners under his control, including the captured Mujahideen fighters, whom he took to and from court, faced unfair trials where they were not allowed legal representation and where the verdicts and sentences were predetermined. The Appellant's own expert significantly undermines his credibility in a number of respects. Dr Giustozzi does not accept that due process was followed. His evidence was that, in principle at least, executions were to take place in the prisons of the MoI although it was not uncommon for deaths to occur under torture. The Appellant continued to deliver prisoners to court for a period of more than two years, thus aiding the courts in the commission of international crimes. The Appellant played an active role in the execution of two Mujahideen commanders who should have been treated as prisoners of war (POWs), according to the Secretary of State.

49. Although Dr Giustozzi's opinion is that it cannot be automatically assumed that the Appellant would have been responsible for torturing prisoners, this is not the test. Direct responsibility is not required. The Appellant's involvement does not need to be proven to such a high standard that the decision maker can "automatically assume" that the matters occurred as alleged. The expert's evidence (paragraph 23 of the 2019 report) is that MoI officers knew that the prisoners taken by KhAD would be beaten and tortured under interrogation. The Appellant himself accepts that he knew KhAD tortured people in his evidence before the FTT. Mr Lindsay submitted that it had always been the Appellant's case until appearing before us that there was no mistreatment of prisoners and no KhAD involvement with prisoners and reference was made to the Appellant's first witness statement at [36]. Mr Lindsay submitted that this was entirely contrary to the answers to the questions from the bench.

50. The Appellant's evidence under cross-examination was evasive. The Appellant sought to deny that those over whom he had charge were charged with serious crimes. This is not consistent with what he stated in AIR 2 (H, RB), when he explained what the two Mujahideen fighters had been convicted of. In oral evidence, he downplayed the seriousness of the prisoners' criminality when saying that those under his care were responsible for things like selling weapons and ammunition. The Appellant has attempted to minimise his complicity.

51. In relation to risk on return and an ongoing interest in the Appellant, this is not accepted. It is not accepted that he is of interest to Hizb-i-Islami. It is not accepted that in 2008 an attack took place on the Appellant's family home. According to the Appellant's own expert, it is unlikely that there would still be interest in him. Any blood feud would depend on family members being able to trace the Appellant. The Appellant would be able to return to Kabul, where he would have the ability to re-establish himself. His wife and children and brother-in-law are all in Kabul. There is no evidence supporting them having to keep on moving in order to avoid attacks. There Appellant worked as a police officer until 2008. There is no reason why he could not resume employment in Kabul.

52. Mr Bazini made oral submissions. He relied on his skeleton argument. He asked us to take into account that the Appellant was effectively before us giving evidence about matters that occurred 35 years ago and that any inconsistencies in his evidence could be expected.

53. The core of the Appellant's account is accepted. He was a police officer and a member of PDPA. There is evidence that he was involved in a bomb blast. The evidence establishes that he has shrapnel in his body. There is sufficient evidence that he was very seriously injured. There is evidence that his son also was seriously injured. We know that he was separated from his wife and six children. There is evidence that he is seriously depressed, upset and stressed.

54. It took the Secretary of State six years to make a decision on the Appellant's asylum claim. The attacks on the Appellant's credibility must be considered in this context. Dr Giustozzi concludes that the Appellant's account is generally plausible. The Secretary of State is critical of the Appellant being evasive and hiding matters. However, he has always been consistent about his involvement in the execution of two Mujahideen prisoners. The Appellant had a good job in Afghanistan. His family had assets. He worked in a restaurant, not a hotel, as asserted by the Respondent. He is not a normal candidate for economic migrancy. He has lost everything. Two of his sons have ended up in Germany. His wife and younger sons fled to Turkey. This all lends weight to the credibility of the Appellant's claim.

55. The Secretary of State's case is unclear. The status of the Mujahideen prisoners is a vexed point. There is no evidence about their status. It is not suggested

that the Appellant was a member of the political police, Da Afghanistan da Gato da SataloAdara (AGSA), or that he has been involved in the taking of hostages. The Appellant was not a member of KhAD. Mr Bazini drew our attention to the lack of reference throughout the background evidence relied upon by the Secretary of State to the prison where the Appellant was working (Mahabas) and that there were separate MoI and KhAD facilities.

56. Mr Bazini addressed us on paragraphs 34 of the decision letter and the source at footnote 125. He took us to the source; "United Nations Mapping Report on War Crimes and Human Rights Abuses" (SCU, P138). At 6.73, it is stated: "After interrogation by KhAD, most prisoners were reportedly transferred to Pul-I Charkhi Prison, where they often waited for many months without being charged or tried." At paragraph 6.84 under the heading "Trials, Sentences and Executions", the following is stated:

> "A prisoner could not meet with family members or lawyers, confront witnesses, or prepare a defence. According to human rights reports, in many cases the main evidence was a confession obtained under torture, and prisoners were at times not informed of their trial until the night before it was to begin. They were reported to have transferred to Pul-I Charkhi Prison to the KhAD's headquarters in Sedarat, where the Special Revolutionary Court held its sessions[108].
>
> [108]According to Human Rights Watch, 'A number of people we interviewed referred to it as 'KhAD court'' Helsinki Watch, Tears, Blood and Cries 157."

The report goes on at 6.86:

> "KhAD, rather than the court, determined innocence or guilt. The court reportedly confirmed KhAD's guilty verdict and determined the sentence in accord with the recommendations of KhAD. Human Rights Watch reported that they had not heard of a single case in which someone judged guilty by KhAD was found not guilty by the court."

And paragraph 6.87:

> "The procedure was reported to be similar in the provinces, except that there were no regular sessions of the revolutionary courts there. From time to time judges of the Special Revolutionary Court came from Kabul to hold sessions. Abdul Wahid, who was in prison in Jalalabad for two years and seventeen days, described to Syed Fazl Akbar (former director of Radio Kabul and, in 2004, governor of Kunar province) a visit by members of the Special Revolutionary Court to the Jalalabad Central Jail:
>
> > "The Communist judges ordered the execution of the twelve detainees who were lying there without trial for the last more than two years. …. 200 more detainees were punished with from three to twenty years of imprisonment because they defected from the army. With some of them they had captured cards of the Mujahideen groups. I was also imprisoned for three years without knowing the

> crime and the charge of my imprisonment. All the comments by KhAD department regarding these detainees were confirmed by the judges[111].
>
> [111]Afghan Realities, May 1-15, 1984: 5."

57. Mr Bazini submitted that the source document makes only one reference to the prison in Jalalabad. It establishes that it was not a KhAD facility and Pul-i-Charkhi prison was where political prisoners of interest to KhAD were transferred. Paragraph 6:87 is set out at [34] of the decision letter and relied on by the Respondent. However, footnote 111 of the source indicates that it relates to a period before the Appellant went to work at the prison in Jalalabad.

58. Mr Bazini said that the background evidence set out at [49] of the Reasons for Refusal letter supported that KhAD did not maintain facilities at Mahabas prison in Jalalabad, where the Appellant worked. It states that there were KhAD facilities in places including Jalalabad. However, later in the paragraph reference is made to a prisoner who was released from Mahabas Prison in Jalalabad in 1989. The reference to Mahabas Prions in Jalalabad and Jalalabad (prison) supports there being two separate entities and it supports KhAD not maintaining a facility at Mahabas prison, where the Appellant worked.

59. The evidence, according to Mr Bazini, contains one reference only to Mahabas Prison. He drew our attention to [49] and footnote 142, Mr Bazini referred us to the source, a Human Rights Watch Report (p 325 of the SCU bundle). It reads:

> "Halim Jan, a prisoner who had been captured in 1984 and who was released from Mahabas jail in Jalalabad in 1989, described the summary execution of prisoners he had witnessed when he was first detained:-
>
> > Usually they tied their hands, blindfolded them, put them in an ambulance, and drove away and shot them. At the beginning, maybe 25 people a day were executed. ... They would bring in herds of people at a time[59].
>
> He claimed that the practice continued after the Soviet withdrawal, but cited no specific examples. Asia Watch was not able to confirm whether summary executions of this kind have continued to take place in Jalalabad Prison. Such executions without charge or trial would constitute extremely grave violations of Common Article 3."

60. Mr Bazini referred us to the source footnote 143 (p328, SCU bundle) where there is reference to executions having been reported in Jalalabad. And [50] of the decision letter. It is not disputed that executions took place in Jalalabad; however, the evidence does not support they took place in Mahabas prison in Jalalabad.

61. It is extraordinary that if the Respondent's case was made out there would not be background evidence relating to what happened in the prison where the

Appellant worked and that the Tribunal were being asked to draw an inference that is not sustainable and which the evidence does not justify.

62. Dr Giustozzi's evidence is that there were two different types of prison and due process took place in MoI prisons. Dr Giustozzi's evidence is that it cannot be assumed that the Appellant was responsible for torturing prisoners. He also establishes that it is plausible that family members of the two Mujahideen prisoners whose execution the Appellant organised still would have an adverse interest in the Appellant. The Appellant's son's evidence was unchallenged.

63. Looking at the matter in the round, it is perfectly plausible that the blood feud could be reactivated. Our attention was drawn to an article from European Asylum Support Office (EASO) (p.96, AB 1) at specifically sections 7.3, 7.4, 7.6 and 77.4.

64. Our attention was drawn to a report from the United States Institute of Peace (USA), "Hezb-e Islami, Peace and Integration into the Afghan Security Forces, 02/07/2018" (p.109, Appellant's consolidated bundle), specifically pp 145 and 147 which he submitted are relevant when considering relocation. The report examines the struggle within Afghanistan's National Unity government over the country's security sector and the related impact on the recruitment of Hezb-e Islami commanders and fighters in the security forces agreed to under a 2016 peace deal. It is stated within the report that Hekmatyar's return to Kabul and his expectation and that of his supporters for a stake in the army and police throws the competition over the security sector into sharper relief.

65. We were addressed on the impact of Hekmatyar's return to Kabul in May 2017 and that human rights groups and some politicians expressed public scepticism that Hekmatyar would adapt to 21st century Kabul and leave behind the armed politics, ethnic hatred and deeply conservative views on the role of women. Hezb-e Islami have moved back into Kabul. If it is accepted by the Tribunal that the Appellant could not safely return to live in Jalalabad relocation would put the Appellant at risk.

66. There is insufficient evidence that the Appellant was personally responsible for any acts alleged. Our attention was drawn to a report from the United Nations High Commissioner for Refugees (UNHCR), UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan of 30 August 2018 (pp 209, AB1)) concerning exclusion from international refugee protection and to the following.

67. The Appellant's position is that torture did not take place within the prison. If it occurred under his watch it is not systematic and widespread within that prison and there is no evidence to support the case that it was. Mr Bazini referred us to the medical evidence relating to the Appellant and the Appellant's son.

Conclusions and Findings

68. We bear in mind at the outset that significant elements of the Appellant's case are not in dispute. Much of what the Appellant stated when interviewed is accepted by the Respondent. The Appellant was interviewed on two separate occasions at length. He gave an account of his activities within the prison. A proper reading of the interviews reveals a significant level of involvement by the Appellant in criminal activities. They do not help the Appellant. The exclusion decision followed from what the Appellant said in his interviews. We find that at no time in these proceedings has the Appellant advanced a clear and consistent account concerning his activities in response to the decision to exclude him. The account he has given at various times is not consistent in a number of respects. The witness statements fail to engage in any meaningful way with what the Appellant said, or the issues raised by the Respondent in the very lengthy decision letter. We have engaged with what he said in some detail, however, there was little, if any, engagement by the Appellant or his legal team with what the Appellant stated in 2012 and 2013 when interviewed. He has not sought to further clarify what he said or sought to advance a cogent argument that the evidence is not reliable. The Appellant now seeks to advance before us that his involvement in activities was minimal, but this does not accord with what he said when interviewed. We find that he has sought to back track and distance himself from what he said to minimize his involvement and the extent of his criminality. The Appellant's evidence is inconsistent. He initially suggested in his interview (and elsewhere in his evidence) that there were no human rights abuses at the prison. He has also accepted that there were human rights abuses by KhAD in the prison, but he was not involved (this was his evidence before us). He has also stated that KhAD had no authority once the prisoners were at Mahabas. We reasonably infer from this, having assessed the evidence in the round, that he has not been honest about the extent of his involvement in human rights abuses. The case that he sought to advance before us was not credible. It was undermined by what he had previously told the Respondent and inconsistencies in his own evidence and the background evidence, including that from his own expert.

69. We have taken into account that the events in the prison took place over 30 years ago. It is inevitable that the Appellant's ability accurately to recall events at this distance will have diminished and be less clear. We find that there is some evidence of a mental health disorder which may have been caused by his activities in Afghanistan; however, there was no medical evidence that would support that his memory is materially impaired but equally no medical evidence could confirm the obvious point that memory and recall simply diminishes over time.

70. We have engaged with the evidence of Dr Giustozzi in our findings. In short, we accept his evidence, in so far as he describes MoI facilities, but for reasons we will explain we find that the Appellant worked at a MoI prison with a KhAD facility. There are further limitations to the value of his evidence as it

concerns this Appellant and parts of his evidence do not assist him and supports the Respondent's case.

71. The Appellant joined the PDPA at the age of 17. His evidence at various points throughout the proceedings is that he was a member of the "democratic Khalq" faction of the PDPA. The Appellant joined the police. From what he said in AIR 2 (H9, RB), he was able to join the police rather than complete military service, which was a privilege given to PDPA members. [3] He has not been consistent in his evidence about the dates when he joined the police and when started to work at the prison. In AIR 2 (H11, RB), he stated that he joined the police in 1980. He has also stated that he trained from 1982 -1983 at the police academy in Jalalabad and then he joined the police and worked in a prison. In ws 1 he stated that he trained from 1982 to 1983 and then he joined the police. In AIR 1 (Q88) he stated that he started working as a police officer in 1986. In AIR 2 (H12 RB) he stated that about four months after his training he commenced working in the prison. In ws 4 he stated that from around 1986 he worked at a prison in Jalalabad.

72. We drew Mr Bazini's attention to the chronology before the First- Tier Tribunal. It was lacking in detail, but regrettably we had not been assisted with a proper chronology, contrary to the express directions of the UT.

73. In the chronology provided to the First-tier Tribunal it is claimed that the Appellant was posted to Mahabas prison in Jalalabad in 1986/1987. The document does not attempt to provide information about the duration of his

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[3] "Q. Okay. At your previous interview you stated that you joined the police because you were obliged to carry out military service explain what you mean by that?

A. When I was 17 years old I was a member of organisation of democratic organisation of people in Afghanistan. When my age went up and I went up since I was armed and I was serving the ruling party democratic party which is known in Afghanistan is a communist party socialist party and we were instructed by the party that you should join the armed forces. It was up to the individuals who like to join the police or join the national army the army.

Q. So please explain to me how if you were called up you had to do your military service explain to me how the police is deemed as being the equivalent of the military service because that part doesn't make no sense to me you see.

A. As I was member of the organisation and member of the party so we were given the privilege to have the choice which armed forces we wanted we could join.

Q. So were the police part of the arm forces?

A. No the police had their own interior ministry and arm forces had their own military.

Q. So why did you choose the police rather than the military?

A. It was always the slogan of the police that you were servants of the people. I wanted since I struggled for that and I wanted to be among the people.

Q. So did you have free choice as to whether you wanted to be police or military? Is that correct?

A. Yes yes 100%."

employment there. In AIR 1 (Q108), he stated that he worked as a prison guard between 1986 and 1987. In the SCR, at 3.1, he stated that in 1984 he was in charge of a detention centre. The chronology states that the two prisoners were executed in 1987/1988). This is consistent with what he said in AIR 1 (Q147) and ws 3. However, in ws 1 he stated that this took place in 1986. He also said that he was employed at the facility for a period of three years (AIR 1, Q109) or two or two and a half years (AIR 2, H13, RB,).

Overall, the Appellant has failed to give a clear and coherent account of the duration of his employment at Mahabas prison. We find that it is reasonably likely that he started employment at Mahabas Prison in 1984 and that he left in or around 1988. We find that the two commanders were executed in 1987/88. We do not expect the Appellant to be entirely accurate about dates because of the time lapse since events occurred. However, we take into account that the magnitude of the inconsistencies is large in terms of years. Whilst an inconsistency in respect of dates, considered in isolation, may not be a matter of concern, having considered the Appellant's evidence as a whole, we find that the common thread running through it is an attempt to minimize his role at the prison and that this accounts for the various dates that he has given. (In respect of Mr Bazini's submission about footnote 111 of the source material, we find that the Appellant was reasonably likely to be working at the Jalalabad/Mahabas prison at the material time).

74. The Appellant worked in a part of the prison which housed political criminals. At times during the interviews and evidence generally the Appellant refers to the prison as Mahabas Prison or Prison of Jalalabad, Jalalabad Prison and the Detention centre Jalalabad. At AIR 1 (Q126) the Appellant's referred to the prison as "Mahbas of Jalalabad". In AIR 2 (H13, RB), he was asked the name of the prison and the answer he gave was, "It was called (inaudible) Jalalabad, which literally means the detention of Jalalabad. The detention centre of Jalalabad." He was then asked whether that was the official name of the prison, and he stated, "A. It has official name and the name was in Pushtu the name is the Prison of M___ [INT]. It has a sign board he's telling us."

75. We find that Mahabas and Jalalabad Prison are one and the same. We have considered Mr Bazini's submissions relating to the source material relied on by the Secretary of State to which he drew our attention. We reject his submission entirely. The fact that in one paragraph in the decision, different names are used for the same facility is of no surprise. The information comes from different sources and the Appellant himself uses different names for the prison where he worked. There is no supporting evidence that Mahabas prison in Jalalabad is a distinct entity from Jalalabad prison or Jalalabad detention facility. All the background evidence (and significantly the Appellant's own evidence) leads to the inevitable conclusion that it is the same facility. The distinction, which we find to be artificial, between Mahabas prison and Jalalabad prison or detention centre, is an issue that the Appellant raised for the first time at the hearing before us through Mr Bazini in submissions. It ignores

what the Appellant stated in his interviews and that he was asked several questions on the basis that he worked at Jalalabad prison and he has not at any time sought to correct this. There was no evidence from the Appellant himself supporting the proposition that there were two separate facilities or his expert.

76. We accept from the background evidence, including the evidence of Dr Giustozzi that there were two types of prisons; KhAD facilities where political prisoners were detained and MoI prisons for non-political prisoners. We accept the evidence that the majority of prisons were under the control of the MoI. We accept that Mahabas prison was under the control of the MoI. However, the evidence supports the Respondent's case that KhAD maintained facilities in provincial centres, including Jalalabad. We find that reference to this in the background evidence is reference to the Mahabas prison Jalalabad where the Appellant worked.

77. Dr Giustozzi in his supplementary report, at [5], concedes that occasional mistreatment of political prisoners could still happen at MoI prisons. He concludes that the fact that the Appellant had two political prisoners in his jail was "quite unusual, and should be put down to overcrowding of KhAD detention centres". However, this does not, in our view, show an understanding of the Appellant's case or that of the Respondent. It is the Respondent's case that there was a KhAD facility at the MoI prison at Jalalabad (Mahabas). It not the Appellant's case that there were only two political prisoners. Whilst we take into account what Dr Giustozzi states about the prisoners having been "parked" in MoI prison's waiting for sentence, this is not what was happening at Mahabas prison. Whilst political prisoners may well have been interrogated elsewhere, the prisoners at Mahabas, were on the Appellant's own evidence, interrogated by KhAD at the prison.

78. We find that KhAD had a facility within Mahabas prison. This is supported by the background evidence and the Appellant's own evidence. Dr Giustozzi's evidence is that interrogation would have occurred before the prisoners were tried and transferred to a MoI prison. We note that the Appellant when interviewed AIR 2 (H20, RB) did not say that prisoners had been tried and convicted and had come to the facility pending sentence. This was not his evidence.[4]

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[4] Q. Okay that's fine thank you. So had the prisoners; before the prisoners had got to Jalalabad Prison had the prisoners already been tried and convicted before they actually arrived at the prison?

A. No, no. No, no they would, they would be yeah they would bring them to the prison first and then the indictment and their file would be managed it would be taken by the prosecution and to the judge the trial and the judge and the court.

Q. So they would be held in the prison under your supervision prior to being going through a trial process is that correct?

79. The Appellant's evidence when interviewed was that 80 political prisoners were accommodated at the prison. Whilst it may have been unusual for a MoI prison without a KhAD facility to house political prisoners, we are in no doubt that there was a KhAD facility in Mahabas prison. Political prisoners of significant interest to KhAD were housed within the facility. The Appellant's own evidence is that interrogation of political prisoners by KhAD officers took place at Mahabas prison. In AIR 2 (H15, RB) his account of the prison was that it was very big prison and there were almost 1,000 to 1,500 prisoners at a time, 80 of whom were political prisoners. Furthermore, we find that the political prisoners included those accused of serious offences. This is supported by the Appellant's account in AIR 2 (H15, RB) in relation to those housed in the political wing of the prison. He stated as follows:

> "They were the (inaudible) commanders who would attack the government the military government the doorman and they would kill police they would have (inaudible). For example a vagrant would be coming Kabul these people would come down to the road they would take the children all the passengers and females and everything they would rob their money took their money and they would slash their throats. All these are part of the (inaudible) the United Nations and everywhere that was happening of the way of Kabul Jalalabad."

80. During the same interview, he went on to state that the political prisoners were not able to mix with the other prisoners who were housed in the facility and that they were kept separate. In relation to the two commanders whose executions he arranged, he spoke of their criminality. When describing their executions, he stated what they had been accused of, which unarguably on his account involved serious criminality. In the same interview he was asked whether there were any other groups apart from Mujahideen detained, and he stated as follows:

> "No, all of them were Mujahideen since that was the time of war and that was the situation of war and situation was emergency state. Those was the people who were fighting against the government and they were robbing the vehicles and people and smashing the (inaudible) of people."

He was then asked as follows:

A. Yeah, yeah, yeah every prisoner whether it is political or non, un, not political, not political yeah first they are detained and after their indictment and their file is prepared by the prosecution the judge and all the process is taken (inaudible). It is every prisoner is detained on the basis of commendation and there are documents there are evidence against.

Q. Okay so how, whilst the prisoner is detained how are the investigations carried out into the prisoner?

A. The prosecution would the prosecutors would come to the prison and they had a separate room okay and they would sit there and every prisoner they would want to look at their file or indictment they would ask to be brought to them.

> "So, so the people who were being detained there these were people who had been fighting against the government they were people who would carry out killings, people who had carried out torture against members of the Afghan regime is that correct?"

The Appellant in answer stated as follows:

> "Yes. Yeah the wing the corridor that I was in charge of was people the kind you describe and the other wings were different."

We find that those detained on the political wing of Mahabas prison under the Appellant's charge were Mujahideen fighters alleged to have committed very serious offences. The Appellant's evidence at the hearing before us was an attempt to present a different picture to what he has previously stated about the extent of criminality of the political prisoners which undermines his credibility.

81. We now go on to consider the Appellant's evidence about his role at the prison. In ws 4 he simply states that he was working in the prison. In his oral evidence he described himself as a guard. He has not been consistent on this issue. In the SCR at 3.1, he stated that he was "in charge of a detention centre …". In ws 1 (para 3) his evidence is; "There were 30 guards and three administrative staff working under my command." In AIR 1 (Q102, 103, 104), the Appellant said that he started in the police at the lowest rank and that by 1992 he was a first lieutenant. In AIR 2 (H13, RB), he stated that whilst he was at the prison his rank was "like third lieutenant or third sergeant". He said that he "was in charge of 30 soldiers or people and there were like three different companies or unit small unit and each of them had a sergeant under it and so altogether there were 33." From what the Appellant stated in his interviews we find that he was in command of 33 officers, three of whom held the rank of sergeant, who themselves had charge of ten officers. Whilst we accept that there may have been a problem with interpretation about his role as he said that he said he was a first lieutenant and not third, as evidenced by his ID card, his role was unarguably significant. What is important is not his precise title or rank, but that he had a role of command. Throughout the interviews he said that he was in charge of the political section of the prison. At the hearing before us he was unable to give a coherent answer about the number of political prisoners at Mahabas prison. We accept that the Appellant may no longer recall accurately and in any event the number probably fluctuated. It is reasonably likely that the answer that he gave when interviewed in 2013 reflects the reality and that he was in charge of in the region of 80 political prisoners.

82. The activities of KhAD were not in issue. We have no doubt that KhAD was a ruthless security agency who between 1978 and 1992 was responsible for grave human rights violations. The Appellant was not a member of KhAD. He was a member of the PDPA, which became the ruling party in 1978. He remained a member of PDPA until 1992. KhAD was the security agency of the government and played a fundamental role in the PDPA's control of Afghanistan. The

Appellant's own evidence is that he was in a privileged position and because of his membership of the PDPA was not obliged to carry out military service, a privilege that was available to KhAD members.

83. The Appellant has not given consistent evidence about KhAD's activities in the prison. The Appellant's evidence in ws 3 is as follows [36]:

> "In reply to 57(a)(b) and (e) of the refusal letter, I confirm again there was no mistreatment of the prisoners. If there was I would have said so as I did with the two commanders that were killed. I have no gain in stating that prisoners were not mistreated if they were. I was there and I witnessed that they were not. If it did happen it was not something that I ever witnessed when I was there. My role simply involved escorting the prisoners when they went for food, prayer and their daily activities. The prison allowed the prisoners to take part in daily activities such as sports, crafts etc. In my block there was 60 – 70 prisoners. My position did not require any contact with KhAD offers [sic]. Once they were sent to the prison KhAD no longer had any authority. It is true that they tortured people but only when they were under their care. Once they were sent to prison their authority ended. KhAD did not have absolute rule."

84. In ws 4 the Appellant does not engage with the issue of mistreatment of prisoners. In ws 1 (submitted before he was interviewed and before the Respondent's decision) his evidence is that he was not involved in war crimes or torture. In AIR 2 (H27, RB)) and in oral evidence before us, the Appellant accepted that interrogation by KhAD took place in the prison. He described KhAD officers coming to the prison. In AIR 2 (H34-35, RB) he stated that prisoners would not be ill-treated and that any guard guilty of mistreatment would be punished. In AIR 2 (H27, RB) he was specifically asked whether he was aware of war crimes or crimes against humanity going on in the prison. He gave an evasive answer going on to say that he did not see any such conduct. [5] The Appellant's evidence before us is that KhAD had a role within the prison which is inconsistent with what he stated in ws 3. In the light of this, we find it wholly incredible and reject the Appellant's evidence that human rights abuses were not going on in the prison. It is unsupported by the background evidence. His lack of consistency on this fundamental issue undermines his evidence generally. We considered his evidence that he did not know about human rights abuses and played no role in it, but we find this not to be credible for the reasons we will explain.

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[5] "A. When some was (inaudible) someone was brought to the prison, until his crime was not proven and his indictment and his file was not completed and processed, nobody has the right to do any operation to him or any abuse to him.

Q. But you say yourself with regards to the legal process that is in place now since Karzai has been in charge, none of that existed previously, you say that yourself. Okay. Yeah so.

A. What I means is that defence Counsel or defence lawyers that didn't exist in that time."

85. It is not credible that the Appellant would not be aware of KhAD's activities in the prison and generally. Considering his role in the prison it is not credible that he would not be responsible for the escorting prisoners to and from interrogations. On his own evidence he was responsible for taking them to their executions. There is no reason why he would be excluded from the interrogation process. During AIR 2 (H20, RB) he was asked how the investigations (of political prisoners by KhAD) would be carried out. He stated that prosecutors would come to the prison and they had a separate room. He then stated that the prosecutors were really part of the military and part of the MoI. He also stated that the prosecutor and the interrogator from KhAD would carry out the interrogation. He stated that if an inmate or prisoner was not very dangerous, they would be taken to the Office of Prosecutors but if he was dangerous the interrogation would be done in the prison. Dr Giustozzi, the Appellant's own witness, does not assist him. At [23] of the supplementary report his evidence is that MoI officers knew that prisoners taken by KhAD would be beaten and tortured under interrogation and that the MoI would be responsible for treating the prisoners and overseeing their recovery. Dr Giustozzi's evidence is that the main involvement of MoI officers would be to hand over designated prisoners to KhAD on the basis of the paperwork produced by KhAD officers. In the 2016 report at [4] Dr Giustozzi states that:

> "Abuse of prisoners by the police, both in police stations and jails, was also reported but it was not finalised to the extraction of information, which was a task for KhAD. It cannot therefore be automatically assumed that [HN] would have been responsible for torturing prisoners."

However, the Respondent's case is not that the Appellant has committed any excludable act as a principle. It is not suggested that the Appellant himself tortured prisoners.

86. In AIR 2 (H23, RB) the Appellant describes a Russian adviser having a surveillance role within the prison. Furthermore, he stated that KhAD had some kind of role overseeing "the humane treatment of prisoners." We note that in AIR 2 (H19, RB)), he made a similar assertion about KhAD and supervision at the prison but in addition stated that they (the prison officers) would also be keeping KhAD officers under surveillance. Any genuine surveillance by KhAD with the aim of maintaining humane standards within the prison is not capable of belief. In any event, in the same interview the Appellant seemed to accept that it was a pretence to appease the international community. We attach significance to Dr Giustozzi's report in relation to KhAD and their authority over MoI officials and that one of their tasks was to supervise MoI operations and that KhAD had offices throughout the MoI. This is consistent with the background evidence generally. Whilst we find it plausible that there would be an environment where there was surveillance by KhAd or the Russians, this would have been to ensure loyalty to the regime and not protection of prisoners. In any event, this evidence does not sit well

with the Appellant's case that either there was no mistreatment or that if there was, he was unaware of it.

87. There is overwhelming evidence of human rights abuses within the prison whilst the Appellant was working there in charge of 80 political prisoners and 33 officers. It is not capable of belief that he was not aware of this. We find that his evidence that the interviews of suspects with KhAD would be conducted without his involvement and he played no part in them is put forward in an attempt to evade responsibility. We find that the Appellant escorted prisoners to and from interrogation with knowledge that he was taking them to be tortured. We find that the Appellant, who was in charge of the political prisoners in Mahabas prison, took them to be tortured by KhAD. He did not himself torture any prisoner, but he knowingly and intentionally escorted them to a place where he knew that would be tortured.

88. The Appellant's claim for asylum was based on his organising the execution of two commanders and the consequences that followed thereafter. The limit of his involvement, according to him, was that he was in charge of the organisation of the execution. His case as advanced in Mr Bazini's skeleton argument is put on the basis that he escorted the two prisoners, who were commanders in the Mujahideen, in accordance with their conviction and sentence to a place of execution.

89. It is necessary for us to examine what the Appellant has stated about this in his interviews. The Appellant was asked in AIR 1 (Q149) what he did to organise the executions, and he stated as follows:

> "I was in charge of the political section of the prison. The person who was in charge of the prison told me to handcuff those guys and blindfold them and take them out from their cells. When I took them out an ambulance was waiting. There was a doctor in their [sic], a judge + a person in charge of the prison. He asked me to put them inside the ambulance + he said let's go. I got inside the ambulance with the detainees + they got inside another car + we followed them. We went to a village, later we went there we saw there were soldiers guarding the area + two graves were dug. Then when we arrived at first the doctor, the judge + the person who was in charge of the prison came out of the car. I was asked to take out my detainees. When I took them out he stood up one of the detainees on top of a grave + the other one by the other grave. The judge started reading the verdict which was from the Presidential Office. At first he started reading Mouli Ahmed's verdict that he was the military commander of HezbiIslami. Their leader was Goalbodin Hekmatyar. He started reading his offences for him. He told him that due to his offences he's been convicted to be executed + the decision has been made by the President + he started in the same way with Mouli Ashraf. The judge asked if they confessed to the offences. They said yes. When he took the confession letter off then the judge ordered the soldiers

> to shoot them. When they were shot they fell into their graves. After two or three mins the doctor went inside the grave + checked their pulse + examined their heart to check for death. They were declared dead. The doctor told me to open their handcuffs as I had the keys. And then the prison head asked the soldiers to cover the grave. When they were buried we returned to the prison. In our prison there was a soldier called Salam John. I didn't know that he was from Hekmatyar."

90. In AIR (H20, RB) he was asked about who would take the prisoners to court for their trial. The Appellant's answer was as follows: "Whoever was on duty on that day, for example me, you, him and he had the duty to take the prisoner to trial". He was asked further about this. He said as follows:

> "Yeah head of for example head of the prison would ask me that Ahmad ___ so and so political prisoner bring here. Then I would ask the head of the prison shall I bring them free or tied. Then he would since he was head of the prison he would instruct me that for example bring him in handcuff and covering his head and I would do so. I would do so. We would bring the prisoner in front of his office and then ask yes Sir he is here and then he would instruct me that take him to the ambulance and sit five or six or six people armed people with him … take him to the military prosecutors. And then we would take him there and the prosecutor would order us to release his hand and we would do so and he would sit there and the interrogation would start."

91. He was then asked (H22, RB) whether he had attended any of the trials of the political prisoners, and he stated:-

> "Yes. Yes I was there yes. Yes I was there in the saying of their execution and then I sorry I should have told you I should tell you, should have told you that (inaudible) means a trial. He said yes the judge the prosecutor and a doctor was there and it was an open trial."

The Appellant went on to confirm that he attended the trial of the two Mujahideen prisoners. This was the only trial he attended because he did not like it. He confirmed that it was his role to attend the trials of political prisoners but that an execution was only possible with the order of the President, and in those circumstances, there would be a judge, prosecutor and a doctor present.

92. In the same interview (H23, RB) he said that it was part of his role to attend the trial of political prisoners. He made reference to the two Mujahideen prisoners and stated that he was on duty that night. He was asked in response to this where the two trials took place, and he stated they took place in the city of Jalalabad. He was asked whether the trial took place in a court room or in an office room, and he went on to state as follows:

> "The execution was carried out in a desert a plain a desert yeah but the indictment and the file had already been completed it was sent by the

military of Jalalabad to Kabul to the President to be, to be endorsed and signed by the President."

93. He was asked at that stage if what he was saying was that these people did not actually go through a trial and that it was a case of the evidence just being presented to the President, who then authorised their execution, and the Appellant stated as follows:

> "Yes that's right but everything all the indictment, accusation and the charge were read to them and they said you have committed this, this, this and this crime do you plead guilty they said yes." He then went on to state that the judge ordered the execution. He confirmed that the prisoners did not have a defence Counsel but his family or someone who was educated could represent them.

94. In AIR 2 (H30, RB), the Appellant is asked about the execution of the two prisoners and the verdicts. He stated as follows:

> "He had a base of duty in T___, which mean black mountain, and he was coming down to the road and he was also fighting in S___ area. The other, his name was, name of the other was M___ A___, who was part of the Hizb-i-Islami. When the verdicts in the indictment was read to M___ Ashraf, he was told that 'look you robbed and you attacked so many'. This men (inaudible) and the judge told him 'have you done this or was it is just an accusation?'. He said 'yes, I did that'. The judge said 'okay' and then left him and then come to M___ A___. He was the military deputy of Hekmatyer. He was told that
>
> > 'you robbed and stole that money, goods from the homes and kill people and attacked caravans. You fought against the, you fought and you attacked them militarily in D___, which is an area, and you tore and attacked the tower of power of electricity and you were captured, you were captured with in red hands, with red hands and fight in battle by the unit, the fighting unit which belong to the security. The terms that I told you. Have you done that? Do you please guilty for committing that or not?'
>
> He said 'yes, Sir, it has happened but I asking for forgiveness from the government, from the state'. The judge told him that 'now there is no chance of forgiveness because the order has been issued by the President'. The manager of the prison order the soldiers to shoot them."

The Appellant during the same interview stated that there were possibly other executions of prisoners, but he attended just the executions of the two mentioned.

95. In evidence before us the Appellant stated that he did not attend trials and was not present at the trial of the two men and that he simply took them to be executed. This is not consistent with the accounts he gave in his interview and

we are not satisfied that this can be accounted for by the lapse of time. Rather, it is another attempt to distance himself from involvement in excludable conduct. From what he said in his interview, we find that there was no lawful effective trial of the two commanders. A proper reading of the accounts that he has given describes a process that the Appellant has had difficulty in defining as a trial or an execution. We find that this is because what he describes was effectively both. The prisoners whilst standing by graves, in a desert, were asked whether they pleaded guilty, after a verdict has been reached and their execution authorised by the president. We have taken into account what Dr Giustozzi states in his first report at [5] that "in principle at least, executions were to take place in the prisons of the Ministry of Interior, if due process was respected". He was asked to clarify this in his supplementary report, and at [4] he states that: "The due process was that executions should take place after a trial and at the Ministry of Interior, not elsewhere. There would be a representative of the courts in attendance as well."

96. According to the Appellant, the execution of the two prisoners did not take place, in a MoI facility. They were executed in a desert. Whilst his evidence is that they were executed in the presence of a doctor and a judge, we are not satisfied that the men had been lawfully tried. Whilst Mr Bazini drew our attention to the Appellant's evidence about the execution having been authorised by the President, considering the background evidence, this does not support the two prisoners having received a fair trial. We also take into account what the Appellant stated about the lack of legal representation which further supports the man having not received a fair trial. There was no representative or family member present at the "trial"/execution of the two commanders according to the Appellant's account. The Appellant on his own admission arranged for the execution and took the them to the place, outside of a MoI facility where they were "tried" and executed. Whilst he did not "pull the trigger," he took the men to a place knowing that they would be unlawfully executed and intending that they would be having fully understood that they had not been properly tried for the offences.

97. The Appellant was a member of the PDPA, and we have made findings about what he did whilst he was employed at Mahabas Prison and his involvement in the execution of two Mujahideen prisoners and he took prisoners to be executed. We take into account that the Appellant, on his own evidence remained in the police until 1992. He re-joined police in 2005. On his account his activities and identity had become known to Hizb-i-Islami and Jamiat in 1992 through a spy. His evidence that despite this he re-joined the police and remained in Afghanistan undermines this. It may be that in 1992, following the fall of the PDPA, the Appellant was kidnapped but we do not accept that this was as a result of his involvement in the execution of the two Mujahideen prisoners or his activities working in Mahabas prison. We have taken into account what Dr Giustozzi says in his 2009 report at [8] that kidnapping gangs linked to the armed groups were active in the country operated in the 1990s and might have kidnapped him primarily for ransom. We take into account

that the Appellant was a businessman and the fact that his family was able to pay the kidnappers suggests they had means.

98. In respect of the bomb blast in 2002, the Appellant's own expert evidence is that an actual bomb attack would not have been missed by the chronicles in 2002 (see second report, [7]). This seriously undermines the Appellant's account. There may have been a bomb blast in 2004/5 in which the Appellant may have been injured. This would explain the shrapnel in his lungs. However, we do not accept that it occurred in the circumstances he describes or that he was the target. It is, in our view, not reasonably likely that he would have decided to rejoin the police in October 2005 if he felt that he was at risk as a result of the activities that he had previously been involved in.

99. The Appellant's son gave evidence via video link. We attach limited weight to his evidence, having considered this evidence in the round. The witness statement that he provided is skeletal. His evidence concerns events that took place when he was aged 13. However, we accept that the Appellant's family home may have been attacked in August 2008. We accept that the Appellant's son was attacked and that he suffered injuries as claimed. We do not accept that the attack was in the circumstances described by the Appellant. We do not accept that the attack took place for the reasons advanced by the Appellant, namely that he has been identified as being involved in the execution of the two Mujahideen prisoners. We have taken into account that the Appellant has not been consistent about the identity of those he alleged attacked his family in 2008. In ws 1 at [27], he stated:

> "These people identified themselves during the attack as being from Hizb-i-Islami and they made it clear that they were doing this because of the executions in the prison many years earlier." In AIR 1 (Q199) he was asked, "Why were Hizb-i-Islami men coming to your house on 8 August 2008 looking for you when they had already had the opportunity to kill you in 1992 when they had held you for 22 months?" In answer to this question, the Appellant stated: "I don't know the people who came to my house were from Hezbi-Islami or Jameiyat. I couldn't recognise. They introduced themselves in different name, but I didn't identify them."

100. We attach weight to the evidence of Mr Giustozzi in his first report at [9], where he states: "Considering the length of time lapsed and the general evolution of politics in Afghanistan, it is unlikely that either Jamiat or Hizb-i-Islami as such would still be interested in [the Appellant]."

101. Whilst the Appellant has some responsibility for the execution of the two commanders, we do not accept that there is a blood feud. We have taken into account the background evidence relied on by Mr Bazini. However, there is no support that there is a blood feud as the Appellant claims. Considering the evidence as a whole, we do not find that the Appellant's activities have become known to either Jamiat or Hizb-i-Islami and we do not find that he has established that any members of the families of the two deceased Mujahideen

prisoners are aware of the Appellant's identity and his involvement with their execution or other activities at the prison in the 1980's.

102. The Appellant's evidence is that his wife and children fled Afghanistan after the 2008 attack. However, their applications for asylum made in Turkey have been unsuccessful. They have now returned to Kabul. The Appellant states that they are in hiding and are moved around by his brother-in-law in order to protect them. We note that if this is the same brother in –law who secured his release when kidnapped, he is someone of influence.[6] In any event, we do not accept this evidence. It is unsupported. We find that the family is not at risk and there is no need for them to be in hiding.

103. The Appellant has submitted a letter dated 30 March 2009 from a consultant in acute medicine and geriatrics of, which confirms the results of an x-ray and the presence of shrapnel in his lung. There is a letter of 19 August 2009 to the Appellant's solicitors from his GP, confirming that he is in the process of investigating two medical conditions which are, in his view, significant. The first is a mental health disorder, "probably posttraumatic stress disorder relating to his time in Afghanistan where he worked for the police force". The second relates to shrapnel injuries "from a bomb which he says was planted to kill him". The doctor in this letter opines that the best way to deal with this may involve surgery to remove part of the lung and chest. There is a letter to the Home Office from Dr N Guttoor which is undated and states that the Appellant has been diagnosed with bronchiectasis (secondary to previous shrapnel injuries to his chest) and that he has a history of insomnia and mood disorder. We accept he has these problems set out by Dr Guttoor.

104. There is a letter to AA Immigration Lawyers from Dr Gaunt of 4 February 2016. The doctor states that his current medical conditions are COPD and atelectasis. The doctor opines that COPD is related to smoking and the atelectasis is related to a previous wound where he had shrapnel in his chest. Dr Gaunt states that the Appellant is now no longer under the care of the chest clinic in the hospital but receives inhalers from the surgery for management of his breathing condition. From this letter it is understood that the Appellant had an operation

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[6] When he was asked (Q161) if he was blamed for the deaths of the two Mujahideen prisoners and therefore why was he not killed by those who detained him he stated as follows:-

"They wanted to kill me. But my brother-in-law, my wife's brother, knew influential people in that area. Before coming to me he went to Lagman + saw a few influential figures. Commander Rostam found out that my brother-in-law saw a few powerful figures. They promised, if I was captured by them they were going to release me. Rostam found out about this, then he told my brother to give ransom money otherwise we won't release him, not money to buy weapons at first."

During this interview he stated that the ransom paid for his release was 1,200,000 Pak rupees. This was paid by the Appellant's brother, who at that time had his own business in Afghanistan as a trader. He paid half of the ransom and the other half was raised by the Appellant's brother-in-law selling his land (see Q171).

for removal of the shrapnel on 9 November 2011. There is some evidence that the Appellant has a mental health disorder which we find may have been caused by his activities in Afghanistan.

Findings of fact

105. Taking all of the evidence into account and viewing in the round, we find that:

a. Political prisoners were tortured and executed without due legal process at Jalalabad prison whilst under the charge of the Appellant prior to 1992;

b. as part of his duties, the Appellant was present at and, through providing for guards at the execution, gave willing and significant assistance to the carrying out of those acts;

c. also, as part of his duties, the Appellant was responsible for and facilitated the transfer of prisoners into the custody of KhAD

d. the Appellant was aware that these prisoners would be subjected to torture;

e. the Appellant's assistance in facilitating the knowing transfer of prisoners to face torture was significant;

f. we reject that the Appellant's identity has become known to Hizbi-i-Islami or Jamiat or the families of the two executed men.

Exclusion from the Refugee Convention

106. Having made these findings, we must consider whether, the Respondent has made out the claim that he committed a war crime - common Article 3 (Article 8 (2) (c) of the Rome statute). We find that the crimes committed by the Appellant would amount to war crimes under common Article 3 as advanced by the Respondent (Article 8 (2) (c)), if he had the necessary criminal responsibility and mens rea for those offences. Similarly, in respect of crimes against humanity (Article 7), from the background evidence, parts of which are set out in this decision we do not hesitate in finding that the Respondent has established that KhAD committed crimes against humanity which were committed as part of a widespread or systematic attack directed against the civilian population with knowledge of the attack. Mr Bazini's submission on this point was that torture was not widespread or systemic in the prison. This is not the test to be applied. We find that KhAD was part of or acting on behalf of the Afghan government engaged in a widespread or systematic attack against those perceived to be political dissidents.

107. We now turn to consider whether the Appellant had the requisite individual responsibility and mens rea for the specific offences he is alleged to have committed, applying our conclusions and findings thus far and the law. We find that it was the common purpose of KhAD to eliminate dissent and continue the Rule of the PDPA at all costs. On the facts of this case it does not matter that the Appellant was not himself a member of KhAD. The law does

not require him to have acted as a principal. We have taken into account the UNCHR guidelines that Mr Bazini relied on in submissions (P209, AB2). We appreciate that the Appellant was not a member of KhAD and that even if he was this would not necessarily lead to exclusion because his criminality is assessed by looking at what he did and whether he had the necessary mens rea. Our conclusions are based on a thorough assessment of his role and activities as a prison officer with a significant role. We have not made assumptions based on his membership of the PDPA and that he was a prison officer. We have considered the evidence about the role he played, and we have found that his role within the prison at material times was significant.

108. We consider first of all the alleged offences concerning the torture of prisoners (Article 7(1)(e), Article 7(1)(f) and Article 8(2)(c)(i)) We find that the Appellant intended to escort prisoners to a place where he knew that they would be tortured. He knew that the assistance given by him contributed to the crime of torture. At the very least he aided and abetted torture. It is not strictly necessary to go on to consider jce, but in any event, we find that the Appellant made a significant and substantial contribution to the common purpose of KhAD by taking prisoners to be tortured with the intention of furthering the aims of KhAD. We find that his actions furthered the purpose of KhAD in a significant way. We are satisfied that he had full knowledge that he was facilitating criminal conduct and intended to do so. We have reached this conclusion having taken into account that he voluntarily undertook a significant role in the prison whilst understanding the aims, methods and motives of KhAD.

109. We now go onto consider the alleged offences concerning the execution of the two prisoners (Article 7 (1) (a) and Article 8 (2) (c) (iv)) We find that the Appellant played a significant role in the process by which prisoners were generally investigated, tried and executed. He arranged the execution/show trial of the two prisoners. He intended to take them to the place of execution with full knowledge that they had not been lawfully tried. At the very least he aided and abetted the execution which is sufficient to establish culpability; however, we are also satisfied that there was a jce. Our reasons for this overlap with those above relating to the allegation of torture. We find that he made a significant and substantial contribution towards the common purpose of KhAD. We find that he had full knowledge that he was facilitating criminal conduct and intended to do so.

110. We find that the Appellant had a moral choice. He has not advanced a defence of duress. It is not clear, on the evidence as presented to us, how such a defence could have been made out. His defence was that crimes did not happen, which we reject. It has evolved into an acceptance that crimes were committed but that he was not responsible. We reject this too.

111. We are mindful that the burden is on the Respondent. We find that there are serious reasons to consider that the Appellant has committed war crimes and

crimes against humanity. We have taken on board what was said by the Supreme Court in Al-Sirri & Anor v Secretary of State for the Home Department [2012]. We are satisfied that the Appellant is excluded from protection of the Refugee Convention. For the same reasons he is excluded from humanitarian protection (Article 17 of the QD).

Article 3

112. We find that there is no objective risk on return to the Appellant or to his family as a result of his membership of the PDPA and/or role at Mahabas prison. There is no risk on return to the Appellant's home area and thus there is no need for us to consider relocation to Kabul. However, the Appellant could choose to reside in Kabul there with his family. There is no evidence that he will be destitute. His family are looked after by the Appellant's brother-in-law. We reasonably infer from this that he would also be in a position to look after the Appellant on return. We have taken into account Dr Giustozzi's evidence about health care. There is no medical report or up to date medical evidence before us that would establish that the Appellant has ongoing medical treatment here for a mental disorder or that he has a condition for which medical treatment would not be available or accessible to him in Afghanistan. There is no evidence that he would not be able to obtain inhalers for his chest problem. We accept that the political landscape has changed more recently with Hekmatyar's return to Kabul in May 2017 and the government plan for the re-integration of Hizb-i-Islami commanders and fighters in the security forces. We have taken into account the report from the United States Institute of Peace (USA), "Hezb-e Islami, Peace and Integration into the Afghan Security Forces, 02/07/2018" (p 149, AB1); however, we do not find that this would lead to the Appellant being identified. His actions are historic. We reject his evidence that he has to date been identified. We do not accept that there is any reasonable prospect of him being identified after all these years or of his past becoming known to anyone who would be minded to seek revenge. The removal of the Appellant would not breach the UK's obligations under Article 3.

Article 8

113. Mr Bazini's skeleton argument did not address Article 8 and he did not address us on Article 8 in oral submissions. We cannot locate the original grounds before the First-tier Tribunal. However, we find that there is no evidence that this Appellant meets the Immigration Rules under Appendix FM or paragraph 276ADE. We do not find that there would be very significant obstacles to him returning to Afghanistan. In any event, we accept that he would not meet the suitability requirements of the Immigration Rules. There is no evidence before us that would establish that there are compelling circumstances so that the decision to return the Appellant would breach his rights under Article 8. His family is residing in Kabul and is financially supported by the Appellant's brother-in-law. Whilst we understand that the Appellant resides with his

brother and his brother's family here in the UK, the Appellant has not produced any evidence in support of family life here which is capable of engaging the Convention. When assessing proportionality, the crimes that the Appellant has committed would weigh very heavily in favour of removal; notwithstanding that the offences are historic. Similarly, any delay by the Home Office would not on the facts of this case be sufficient to tip the balance in favour of the Appellant. The removal of the Appellant does not breach his rights under Article 8.

The Procedural failings

114. On 24 May 2018 CMHR directions were issued by Judge O'Connor. The matter was listed for a substantive hearing on 28 September 2018. On 20 September 2018 an application was made by the Appellant's solicitors, Parker Rhodes Hickmotts (PRH) to adjourn the substantive hearing because they had recently taken over the case from AA Immigration Lawyers. From correspondence it appears that they had taken on the Appellant's case in August 2018. They asserted that there had been a failure by the previously instructed solicitors to serve an addendum expert report on the Respondent. The previous solicitors were blamed for the failure to comply with directions to date. The application was refused by Upper Tribunal Judge O'Connor.

115. The Appellant made a second application, which came before UTJ McWilliam. The application was refused. The matter came before Upper Tribunal Judge Storey and Upper Tribunal Judge McWilliam on 28 September 2018. On this occasion, a further application for adjournment was made and granted. Directions were given orally at the hearing and written directions were issued to the parties on 2 October 2019. The Respondent was ordered to serve a complete bundle. The Appellant's solicitors claimed that the failure to do this was preventing the Appellant preparing his appeal. The Respondent was ordered to serve a complete bundle by 28 October 2018.

116. The matter was listed on 29 January 2019 before UTJ McWilliam. The Respondent had failed to serve a bundle and was directed to explain the failure in writing. On 28 February 2019 the matter came before UTJ McWilliam for a CMHR. The Respondent had served the bundle one week before this hearing.

117. UTJ McWilliam issued directions to the parties in writing on 11 March 2019, given orally at the hearing on 28 February 2019. The Appellant was directed to, amongst other things, serve the expert report on the Respondent by 23 April 2019. There was a full set of directions relating to the service of evidence and preparation of bundles following the service of the expert report. The Respondent was ordered to file a statement of his case.

118. Having not received any further evidence, the UT contacted the parties on 9 May 2019. This prompted an email from the solicitor with conduct of the case, saying that he had forgotten to serve the expert report. The expert report was served on the Respondent and the Upper Tribunal on 9 May 2019. Mr Lindsay

sent an email to the Tribunal that day stating that he would do his best to serve a statement of case before the hearing. The Upper Tribunal received a "consolidated bundle" (AB1) from the Appellant on 10 May 2019. This contained the Appellant's evidence only. It was not a consolidated bundle of evidence agreed by the parties as envisaged in the directions. At about 5pm on 15 May 2019 the Appellant served an authorities bundle and a supplementary bundle (AB2).

119. The parties failed to provide a properly consolidated bundle containing agreed evidence in accordance with the Tribunal's directions. There was no chronology served by the Appellant in accordance with the directions. The Appellant's "consolidated bundle" was incomplete. The presentation of the Respondent's bundle was chaotic and incomplete.

120. The parties have not complied with their obligations under Rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008). There has been a complete failure by both parties to comply with directions and to assist the UT. The result of this has been significant delay.

121. We believe that it is fair to say that the parties have not properly grappled with the issues arising in this appeal. This is very concerning because of the very serious nature of the matter and the complexity of the law.

Notice of Decision

The Appellant is excluded from the Refugee Convention. His appeal is dismissed under Article 3 and Article 8 ECHR.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed *Joanna McWilliam*

Upper Tribunal Judge McWilliam Date 31 July 2019