Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/11488/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 2 July 2019	**On 3 February 2020**

Before

UPPER TRIBUNAL JUDGE PERKINS
UPPER TRIBUNAL JUDGE CRAIG

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

A-A-E
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Ms C Patry, Counsel instructed by the Government Legal Department
For the Respondent: Mr A Mackenzie, Counsel instructed by Migrant Legal Action

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 we make an order prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the Respondent (also the "Claimant). Breach of this order can be punished as a contempt of court. We make this order because the Claimant is an asylum seeker and so is entitled to privacy.

2. This is an appeal by the Secretary of State against a decision of a panel of the First-tier Tribunal allowing the appeal of the Respondent, hereinafter the "Claimant", against a decision of the Secretary of State on 24 October 2017 refusing her claim for leave to remain on asylum grounds.

3. The claimant is a national of Iraq. She was born in 1992 and left Iraq in 2001 with her family to reside in Turkey. She arrived in the United Kingdom on 31 December 2007 accompanied by her mother and younger sisters to join her father who was already there. The Claimant was given four years' discretionary leave which expired on 11 May 2014. An attempt at a timely application for further leave failed because there was a problem with paying the required fee but the Claimant made a valid application on 2 June 2014.

4. However, the Claimant has committed criminal offences leading to her being sentenced to 42 months' imprisonment on 11 June 2015. The Secretary of State made a decision to deport her pursuant to Section 32(5) of the UK Borders Act 2007 on 21 January 2016 and the Claimant responded by making a protection and human rights claim. She expressed fear of returning to Iraq and particularly the area surrounding Mosul where she had lived as a child. She also relied on the possible consequences of her convictions in the United Kingdom becoming known to others to support her claim for protection.

5. The Secretary of State warned her that it may be the Secretary of State's view that the Claimant could not resist refoulement under the terms of the Refugee Convention.

6. On 24 November 2017 her application for asylum was refused but the Secretary of State accepted that she could not be returned safely to Iraq and granted her Restricted Leave. The appeal to the First-tier Tribunal and then to the Upper Tribunal concerns her claim to be a refugee and entitled to protection against removal.

7. The Claimant has committed offences under the Terrorism Act 2000. Such offences are emotive and it is perhaps particularly important that we remind ourselves that we are not, at least initially, primary decision makers. Our function is to see if the Secretary of State is able to show that the First-tier Tribunal's decision to allow the appeal was wrong in law. We must be careful to apply our minds dispassionately and clearly to areas of law that might be thought technical and, given their importance, might be thought surprisingly unclear.

8. Broadly there are two ways in which a person who might otherwise be a protected refugee under the Refugee Convention cannot rely on the protection of that Convention.

9. One way is where a person's misconduct has taken them out of the scope of the protection of the Convention. Article 1F(c) of the 1951 Convention relating to the Status of Refugees is particularly important in this appeal. We set out below the provision, in its English form, of all of Article 1F to give context to Article 1F(c). It states that:

> "The provisions of this Convention shall not apply to any person with respect to whom there are serious grounds for considering that:
>
> (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
>
> (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to the country as a refugee;

(c) he has been guilty of acts contrary to the purposes and principles of the United Nations".

10. Additionally a person who is not a person excluded from the scope of protection of the Convention by Article 1F may still be refouled, notwithstanding being within the scope of protection where Article 33, entitled "Prohibition of expulsion or return (refoulement)" applies.

11. Article 33(2) states:

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

12. In the law of the United Kingdom (in all its jurisdictions) the proper operation of Article 33(2) is illuminated by Section 72 of the Nationality, Immigration and Asylum Act 2002. It creates presumption that can be rebutted. Section 72(2) provides:

> "A person shall be presumed to have been convicted by a final judgment of a particularly serious crime and to constitute a danger to the community of the United Kingdom if he is –
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> (a) convicted in the United Kingdom of an offence, and
>
> (b) sentenced to a period of imprisonment of at least two years".

13. The First-tier Tribunal explained its reasoning in some care.

14. At paragraph 200 it concluded unequivocally that the Claimant had not committed a "particularly serious crime". She had rebutted the statutory presumption to the contrary raised by Section 72 of the 2002 Act.

15. At paragraph 213 it concluded that the Claimant was not a "danger to the community of the United Kingdom". Again, she had rebutted the statutory presumption raised by Section 72.

16. It follows that, on the First-tier Tribunal's findings, if the Claimant is entitled to the protection of the Convention she is protected against refoulement.

17. In reaching this conclusion the First-tier Tribunal had regard to Section 54(1) of the Immigration, Asylum and Nationality Act 2006. This does not purport to *define* the scope of Article 1F(c) of the Refugee Convention but does identify the conduct that will be included. We set out below its full terms:

> "In the construction and application of Article 1F(c) of the Refugee Convention the reference to acts contrary to the purposes and principles of the United Nations shall be taken as including, in particular –
>
> (a) acts of committing, preparing or instigating terrorism (whether or not the acts amount to an actual or inchoate offence), and
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> (b) acts of encouraging or inducing others to commit, prepare or instigate terrorism (whether or not the acts amount to an actual or inchoate offence)".

18. The First-tier Tribunal's approach to Article 1F was illuminated by Section 54(1)(b) of the 2006 Act, the decision of the Supreme Court in **Al-Sirri (FC) v SSHD**

[2012] UKSC 54, the decision of the Court of Appeal in **Youssef v SSHD [2018] EWCA Civ 933** and also Resolution 2178 of the United Nations Security Council passed in September 2014. The relevant terms of that Resolution are set out by the Court of Appeal in the decision in **Youssef**.

19. The First-tier Tribunal when considering Article 1F(c) distinguished between the quality of the bad behaviour complained of, which the First-tier Tribunal accepted was of a kind that could exclude the claimant from the scope of protection under the Convention, and the gravity of the offence which the Tribunal concluded was not of a sufficiently high level to warrant exclusion.

20. We consider now the conduct complained of. The First-tier Tribunal made clear findings about the claimant's offending beginning at paragraph 110.

21. It is a matter of record that she was convicted on her confession of two offences under the Terrorism Act 2006 which were punished with 42 months' imprisonment. There was little evidence about the offences from either party before the First-tier Tribunal but there was a copy of the sentencing remarks of HH Judge Wide QC which are set out in detail in its Decision and Reasons.

22. We are disappointed that we have not been able to find a copy of the indictment in the papers before us. This is a case where the nature rather than merely the fact of the claimant's criminality is important and we would have preferred to have seen precisely how the offence was identified and presented to a court. Nevertheless, the opening remarks of HH Judge Wide QC are helpful. He said:

> "You pleaded guilty to a count of encouraging terrorism and a count for dissemination of terrorist publication".

23. It was also clear that the Claimant accepted that she had committed the offences with intent to encourage others to commit acts of terrorism rather than committing the offences recklessly.

24. At paragraph 115 the First-tier Tribunal quoted from the sentencing remarks at paragraph 46H to 47D which said:

> "The material that you were disseminating encouraged young men to go to fight ... Furthermore, to encourage women to go to support them and indeed to bring up their children in the belief that it is their duty to take up arms, to wage violent Jihad and embrace martyrdom. And furthermore, to encourage mothers to be proud of their sons who die as martyrs. The material included gruesome images of corpses and prisoners about to be beheaded".

25. The Tribunal then confirmed that the material was "avowedly pro-Islamic State in nature". It also described the material as "particularly vile". It is also right to say that the First-tier Tribunal accepted that the claimant did not herself commit or intend to commit any acts of terrorism or do anything of a practical nature and none of the material posted included the provision of any practical assistance to others.

26. The Tribunal also accepted that the "vast majority" of material posted was not created by the Claimant. She was "re-tweeting" content originally posted by others. It had never been the Secretary of State's case that anyone undertook any specific act of terror at the Claimant's behest or as a result of reading the material that she had posted.

27. There were also clear findings about the "scale of dissemination" (see paragraph 121). The sentencing judge had referred to this as "massive" but that is a subjective observation. The First-tier Tribunal found that it averaged: "at most 50 Tweets a day over the course of 347 days". The Tribunal then noted that this comes to a total of 17,350 Tweets. There was a dispute about how many people followed the Claimant. The figure of 85,000 had been stated in the pre-sentence report but the lower figure of 8,500 appeared elsewhere and before the First-tier Tribunal Ms Patry (for the Secretary of State) accepted the lower figure for the purposes of the appeal. The First-tier Tribunal speculated that the Crown Court Judge may have worked from the wrong figure but if there was a material error in sentencing it could be addressed in the appropriate forum and that is not the First-tier Tribunal.

28. The Tribunal also found that the Claimant, at the time of committing the offences. did "hold what can properly be described as extremist views".

29. There was no evidence about the extent of "re-tweeting". The Tribunal noted that it had "no information as to the nature, profile, or potential social medial following of anyone among the 8,500".

30. At paragraph 129 the First-tier Tribunal said:

> "On the basis of what is said by HHJ Wide, QC, at 46G we find that the [Claimant's] Twitter account did in fact appear on a website 'associated' with Al Qaeda, and that it was in a list of what were described as 'sixty-six important Jihadist accounts'. What we are unable to do is make any further findings of fact relating to: the nature of the association between the website in question and Al Qaeda; the particular content of the website itself; whether, for example, the list containing the [Claimant's] account only ran from 1 to 66, or whether the list had been selected on the basis of content or the number of followers, or perceived influence (as opposed to sheer volume of postings). Our inability is based on the absence of evidence from the Respondent".

31. In determining the application of Appendix 1F the Tribunal recognised particularly three authorities. First there is Section 54 of the Immigration, Asylum and Nationality Act 2006, then there is the decision of the Supreme Court in **Al-Sirri v SSHD [2012] UKSC 54** and there is the decision of the Court of Appeal in **Youssef v SSHD [2018] EWCA Civ 933**. It is right to emphasise that the operation of Section 54 was considered expressly in **Al-Sirri** and **Youssef**, being a decision of the Court of Appeal, was bound by and followed the decision in **Al-Sirri**.

32. Nevertheless, we look closely at the decision in **Youssef** because it guides the Tribunal's approach. The Court of Appeal in **Youssef** emphasised that there was a "high threshold defined in terms of gravity" and remitted the decision to dismiss Youssef's appeal because the Court was not satisfied that the Upper Tribunal had appreciated the need for gravity.

33. The Court of Appeal clearly followed **Al-Sirri** (as it was bound to do), after noting that although Resolution 2178 (which expressed grave concern about the growing threat posed by foreign terrorist fighters) post-dated the decision in **Al-Sirri** the need for conduct to cross a "high threshold" necessary before someone could be taken outside the protection of the Convention was not diminished.

34. It is appropriate to set out Irwin L.J.'s summary of resolution 2178. He said at paragraph 41:

> Finally, on 24 September 2014 the Security Council passed Resolution 2178 (2014), which *inter alia* recorded the Security Council as:
>
> "*Expressing grave concern* over the acute and growing threat posed by foreign terrorist fighters, namely individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict, and *resolving* to address this threat, *...*
>
> *Expressing* concern over the increased use by terrorists and their supporters of communications technology for the purpose of radicalizing to terrorism, recruiting and inciting others to commit terrorist acts, including through the internet, and financing and facilitating the travel and subsequent activities of foreign terrorist fighters, and *underlining* the need for Member States to act cooperatively to prevent terrorists from exploiting technology, communications and resources to incite support for terrorist acts, while respecting human rights and fundamental freedoms and in compliance with other obligations under international law, *...*
>
> *Calling* upon States to ensure, in conformity with international law, in particular international human rights law and international refugee law, that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts, including by foreign terrorist fighters,"

35. Here the First-tier Tribunal found that the Claimant was entitled to the protection of the Refugee Convention.

36. We set out below paragraphs 238 and 239 of the First-tier Tribunal's decision where their findings and reasons on this point are summarised:

> "238. We have asked ourselves the question of whether there is anything more to the circumstances surrounding the [Claimant's] actions. By 'more' we mean additional factors sufficient, alone or in combination, to meet the high threshold. For the reasons set out above, we conclude that whilst there are certain additional factors in this case, most notably (but not exclusively) the inclusion in a list on a website and the volume of posts made during the offending period, these are not sufficiently strong, alone or in combination, for the respondent to be able to show that the high threshold in relation to gravity and impact has been met.
>
> 239. Finally, we conclude that the simple fact of the [Claimant's] convictions under domestic law is not sufficient for the [Secretary of State] to be able to reach the relevant threshold. Whilst we have placed appropriate weight upon the sentencing remarks of HHJ Wide, QC, these alone or in combination with other matters do not represent a sufficiently robust basis for concluding that Article 1F(c) applies to the [Claimant]. Similarly, the combination of the statutory definition in Section 54 of the 2006 Act and the very real concerns set out in Resolution 2178 does not raise the [Secretary of State's] case against the [Claimant] up to a level where the particular facts of the case are of little consequence, or at least do not carry the same significance as they otherwise might".

37. The conclusion that the Claimant was no longer a "danger to the community" is based on several findings not the least being that the Claimant does not hold

extremist views now and has not held such views for "a significant period of time following the offending".

38. The Tribunal noted that the finding in the OASys Report that the Claimant presented a "medium risk of serious harm to the public" had to be put in the context of that risk existing but of the Claimant being unlikely to cause any harm "unless there is a change of circumstance, for example, a failure to take medication, loss of accommodation, relationship breakdown, drug or alcohol misuse" and there was no reason to find such things at all likely to happen. The Claimant was subject to stringent licence conditions with which she had complied and was given support and treatment for the conditions that promoted social isolation.

39. The Tribunal also found that the Claimant had not been convicted of a "particularly serious crime".

40. There are often difficulties with the meaning of this phrase for reasons that will be obvious to any lawyer. Firstly the phrase "serious crime", a phrase which is itself imprecise, is qualified with the word "particularly" which means it has to be in a category of serious crime that distinguishes it in some way from others. This difficulty is compounded by the statutory presumption to the effect that a person has committed a "particularly serious crime" if it attracted a sentence of two years' imprisonment or more. Whilst there are occasional examples of very serious crimes indeed being punished with less severe sanctions they are in their nature most unusual. Without being disrespectful to anyone, and certainly not Parliament, we find that most lawyers would instinctively think that a "particularly serious crime" would attract a sentence of rather more than two years' imprisonment.

41. We begin by seeing how these findings are challenged by the Secretary of State. The grounds of appeal are sensibly and helpfully short.

42. The first challenge is to the decision that the claimant is not excluded from the protection of the Refugee Convention.

43. The grounds contend, correctly, that the First-tier Tribunal accepted that the convictions were of a kind that could lead to exclusion from protection but it was necessary to find not only that they were of a suitable kind but that they were of a sufficiently high level of gravity. According to the grounds the Tribunal had found that the acts could be committed recklessly rather than intentionally and still achieve a sufficient level of gravity but, according to the Secretary of State, the Tribunal erred in concluding that the acts committed did not reach a sufficient level of gravity. The Secretary of State said that this finding was based on an unlawful rejection of the finding of the sentencing judge that the claimant had "re-tweeted jihadist material on a 'massive scale', that she had been included on a website of important jihadist accounts and that she had intended her acts". Criticism is made that the First-tier Tribunal "appears to have focused almost exclusively on the consequences of the tweeting, rather than the fact that the acts in and of themselves were of sufficient gravity. This amounts to an error of law".

44. This was supplemented by a skeleton argument from the Secretary of State signed by Ms Patry dated 25 June 2019. The skeleton argument analyses the

findings leading to ground 1. The grounds refer to guidance given by Irwin LJ in **Youssef** at paragraph 85 where the learned Lord Justice said:

> "It is easy to conceive of an immature 18 year old going online from his suburban bedroom, and using the most lurid terms, in calling for international jihad. The nature and quality of this would, it seems to me, satisfy the requirements of Article 1F(c). It would represent active encouragement or incitement of international terror. However, it would be unlikely, without more, to be grave enough in its impact to satisfy the approach laid down in *Al-Sirri*. That might well require more: evidence of wide international readership, of large-scale repetition or re-tweeting, or citation by those who were moved to join an armed struggle, for example".

45. The skeleton argument then picks up on the decision of the Upper Tribunal in **Youssef** when it re-made the decision as directed by the Court of Appeal and again dismissed the appeal. This is Appeal Number: AA/11292/2012 and the decision was promulgated on 8 March 2019. It was drawn to our attention after proper notice had been given. The arguments used by the Upper Tribunal then were drawn to our attention and the implication is that we were encouraged to follow them. The Upper Tribunal looked at the requirement for "impact" or gravity and said at paragraph 34:

> "It clearly follows on from what is said at paragraph 16 in **Al-Sirri**, itself borrowing from UNHCR's background note on the application of the exclusion clauses (4 September 2003) at paragraph 47 that the high threshold is to be defined in terms of the gravity of the act in question, the manner in which the act is organised, its international impact and long term objectives and the implications for international peace and security. It is in that sense that we understand the term 'impact' to be used by the Court of Appeal ... There does not have to be shown any offence committed or attempted as a consequence of anything said or done by the appellant".

46. The skeleton argument points out the Upper Tribunal looked at other factors that would be relevant to gravity including holding out to be a scholar, using the internet, the length of time in which incitements were made and the number of hits on the website and on the facts of that case decided that the acts were sufficient.

47. The skeleton argument then contrasted that approach with the findings in the present case on the issue of gravity. The skeleton argument challenges the Tribunal's finding that Irwin LJ "appeared to have concluded" that the volume of tweeting does not necessarily equate to acts being sufficiently grave. The skeleton argument contends that is not what Irwin LJ said. His example of a teenager calling for jihad in "lurid terms" did not deal with quantities of tweets. The skeleton argument also says that more weight should have been given to the volume of the tweets. The Tribunal's decision to give weight to the fact there was no evidence of re-tweeting was wrong. The Tribunal had decided there was no causal link required and so should not have been concerned with re-tweeting. The fact that the claimant's account was amongst the list of sixty six most important Twitter accounts was written off for no particular reason as insufficiently strong.

48. The Tribunal is then criticised for apparently stepping away from the sentencing judge's observation that "dissemination of material was an

important factor in the encouragement of young men and women to travel abroad and engage in acts of terrorism" even though there was no evidence that anybody had done that. The grounds say that more regard should have been given to the sentencing judge having made findings about the gravity and severity of the acts. The core complaint is that the Tribunal looked for evidence of anyone taking any notice and the skeleton argument contends that that is not necessary and more regard should have been given to the sentencing judge's use of the phrase "massive scale".

49. Mr Mackenzie produced a reply and skeleton argument in the form of a Rule 24 notice. This is, with respect, an entirely sensible way of producing a skeleton argument and we are grateful to both Counsel for producing skeleton arguments which are apposite and not indulgently long.

50. This asserts that the Tribunal did not go behind the sentencing judge but the sentencing judge had a different task. When he was assessing the appropriate punishment he did not necessarily have in mind whether the acts were "contrary to the purposes and principles of the United Nations" because that was not part of the sentencing exercise. The Tribunal was right to note that the use of the word "massive" was a subjective and imprecise term. The sentencing remarks were clearly in the mind of the First-tier Tribunal. According to Mr Mackenzie the First-tier Tribunal did its job by applying the relevant test. At paragraph 11(c) the Rule 24 notice asserts:

> "Saying so does not involve rejecting what the judge found: it merely highlights the difficulty which the SSHD inevitably encountered in opting to rely almost exclusively on remarks made in a different legal context, in circumstances where the original material could and should have been put before the Ft-T".

51. It said the First-tier Tribunal should not be criticised for stating, correctly, that it could not make further findings about the Twitter account appearing on a website "associated" with Al Qaeda because there was no further evidence before the Tribunal. The First-tier Tribunal was perfectly aware that the Claimant had admitted her guilt on the basis of intent even if that was not her initial position.

52. Mr Mackenzie argued that the First-tier Tribunal was right to have regard to the observations of Irwin LJ that "for the reasons given by the Supreme Court in *Al-Sirri*, that careful consideration be given to the gravity or impact of any acts relied on".

53. The First-tier Tribunal, rightly, had commented that there was no evidence that anyone was influenced by the conduct complained of, no evidence of anyone approving of her conduct, no evidence of anyone following her who had committed any terrorist offence or been motivated to join an armed group and no evidence whether "any follower of the [Claimant] had in fact travelled abroad to engage in acts of terrorism". The Tribunal was right to say "the absence of such evidence is of relevance to our assessment of gravity".

54. In short, he contended that the facts of themselves did not establish the high threshold had been reached. The Secretary of State had not discharged the burden and it is not the job of the Tribunal to guess and assume.

55. We have considered the written and oral submissions but it comes down to this. It is the Secretary of State's contention that the Tribunal was not entitled to find on the evidence before it that the high threshold had not been reached. The parties agree that the Claimant has committed terrorist offences and that she has been involved in tweeting profoundly unpleasant material. There is some disagreement about the extent of its circulation but on anybody's version it has gone to thousands of people. There is no evidence that anybody has taken any direct notice of it and certainly no evidence that anybody has been actually inspired to do anything of a serious nature as a result of reading it.

56. We remind ourselves of what this is all about. It is the Secretary of State's contention that the Claimant is disqualified from the scope of the Refugee Convention because she has been "guilty of acts contrary to the purposes and principles of the United Nations". The United Nations Charter sets out four main purposes:
    1. Maintaining worldwide peace and security
    2. Developing relations among nations
    3. Fostering cooperation between nations in order to solve economic, social, cultural, or humanitarian international problems
    4. Providing a forum for bringing countries together to meet the UN's purposes and goals

57. In this appeal it is agreed that the Claimant has done things capable of beings acts contrary to these purposes. It is also clear law that it is a very serious step to determine that a person's conduct is so reprehensible that it takes them outside the protection of the Refugee Convention being a decision that they are not entitled to be protected from the risk of serious ill-treatment under the Refugee Convention. There has to be a high threshold defined in terms of the gravity of the act in question.

58. All of these things were fully in the mind of the First-tier Tribunal.

59. It is apposite to remind ourselves of the approach of Irwin LJ in **Youssef**. He said:

> "85. It may be helpful to consider separately the quality of the acts in question and their gravity or severity. To adopt an illustration which arose in argument, it is easy to conceive of an immature 18 year old going online from his suburban bedroom, and using the most lurid terms in calling for international jihad. The nature or quality of this would, it seems to me, satisfy the requirements of Article 1F(c). It would represent active encouragement or incitement of international terror. However, it would be unlikely, without more, to be grave enough in its impact to satisfy the approach laid down in *Al-Sirri*. That might well require more: evidence of wide international readership, of large-scale repetition or re-tweeting, or citation by those who were moved to join an armed struggle, for example.
>
> 86. It is obviously right, for the reasons given by the Supreme Court in *Al-Sirri*, that careful consideration is given to the gravity or impact of any acts relied upon. This is the answer to the appellant's arguments as to the vital importance of protection of refugees, and that such protection should not be lost for 'mere speech'. Freedom of speech is qualified under the United Nations Convention, as under ECHR or the European Charter.

> 87. In paragraph 9 of their Decision and Reasons, UTIAC made direct reference to the 'helpful guidance' from the Supreme Court in *Al-Sirri*, quoted parts of paragraph 16 of the judgment and made direct reference to the contents of paragraph 36. They were clearly aware therefore of that guidance and of the need to consider the 'high threshold defined in terms of the gravity of the act in question'. However, perhaps because of the way the argument developed before them, they did not do so directly. As I have already indicated, they dealt fully with the argument that crimes must be proved, and did so correctly. However, there is no passage in their reasons which demonstrates that thereafter they stood back and considered the gravity or seriousness of Youssef's conduct, once that argument was disposed of. In the end I am not convinced that they directed themselves on this issue with sufficient clarity. On that ground, but on that ground alone, I would allow Youssef's appeal, and remit the matter to the Upper Tribunal for reconsideration".

60. As indicated above on reconsideration the Upper Tribunal again decided to dismiss the appeal. As far as we are aware that decision has not been the subject of any successful challenge.

61. It is apt to consider here Irwin LJ's summary of the relevant part of resolution 2178, emphasising the parts that are most relevant to the decision that we have to make. The resolution referred to:

> *Expressing* concern over the increased use by terrorists **and their supporters** of **communications technology** for the purpose of radicalizing to terrorism, recruiting and **inciting others** to commit terrorist acts, **including through the internet**, and financing and facilitating the travel and subsequent activities of foreign terrorist fighters, and *underlining* the need for Member States to act cooperatively to prevent terrorists from exploiting technology, communications and resources to incite support for terrorist acts, while respecting human rights and fundamental freedoms and in compliance with other obligations under international law,
>
> *...*

62. The nature of the conduct is not only clearly contrary to the purposes of the United Nations but is an example of a relatively recent way in which those purposes can be thwarted.

63. There are three factors in the First-tier Tribunal's reasoning which, we find, do at least cumulatively, make out the necessary gravity.

64. First is the volume of Twitter activity. The First-tier Tribunal asserted that that on its own is not of "great significance". According to the First-tier Tribunal the problem is not the scale of the dissemination but the effect that it has. We agree in the sense that we doubt that volume *alone* could establish the necessary gravity. Drivel, on a large scale, makes a lot of drivel but would not undermine the purpose of the United Nations. The conduct complained of here was not "drivel". It included "gruesome images of prisoners about to be beheaded" which conduct the Claimant intended to encourage (see sentencing remarks). We regard the scale as important. The conduct complained of was not a one-off rant said in private and possibly overheard but was circulated deliberately to as large an audience as could be found for the purpose of encouraging terror. As indicated there is some dispute over the size of that audience but it was conduct intended to encourage terrorism and it was sent to thousands of people.

65. Second, there is the timescale. According to the sentencing remarks this went on for nearly a year. Again, contrary to the view of the First-tier Tribunal, we find that this is a significant aggravating factor that increases the gravity of the conduct. It was not someone "sounding off" but persistent as well as large scale misconduct.

66. We note the First-tier Tribunal was not able to get a clear understanding of the number of occasions offensive tweets were sent. It rejected the highest figures found in some of the paper and gave good reasons for that but it is also clear that the First-tier Tribunal found expressly that the claimant "posted what we consider to be an average of at most 50 tweets a day over the course of 347 days" (see paragraph 121). We find that these are levels of activity which take the case away from the isolated youth ranting and elevate it into a higher category and that the First-tier Tribunal was just wrong to take a contrary view.

67. Further, these two points are linked by supporting a criminal prosecution. We are not saying that a criminal conviction is necessary or determinative and we accept that concepts and even phrases that appear in national criminal legislation and international treaties should not be assumed always to mean the same in each context. Nevertheless the fact that conduct amounted to offences under the Terrorism Act sufficiently serious to warrant a substantial sentence of imprisonment is, we find, itself a strong indicator that the conduct was contrary to the purposes of the United Nations and the First-tier Tribunal, we find, rather lost sight of this.

68. We also do find it significant that the claimant's website was "on a site associated with Al Qaeda your Twitter account was noted to be one of 66 important jihadist accounts". We would have liked to know more about that as no doubt would the First-tier Tribunal but, unlike the First-tier Tribunal, we find that this clear, if limited, description is enough to show this claimant's activities were of sufficient prominence to be commended by Al Qaeda and the First-tier Tribunal was, with great respect, wrong to say that this was not a factor singularly or cumulatively to elevate the conduct to be sufficiently grave and severe to disqualify the claimant. It is clear evidence that the Claimant's intended behaviour mattered to Al Qaeda. It was significant even though there is no evidence that it was heeded directly.

69. We have reflected before making these observations. We do find that the Secretary of State has not given the Tribunal the assistance that it wanted. This is in no way a criticism of Ms Patry. The problem existed a long time before she had any conduct of the case. The difficulty is the very important decision that a person's conduct has taken her outside the protection of the Refugee Convention, is supported by little more than a few selected paragraphs in the judge's sentencing remarks. It could easily have been more but it was, we find, enough.

70. We have also applied our minds carefully to the question of whether we are merely disagreeing with the First-tier Tribunal, which is not relevant, or determining that they were wrong to take the view that it did which is highly pertinent. We have decided it is the latter. As Irwin LJ made clear since the case of **Al-Sirri** the United Nations has reflected on the harm that can be done

by computerised activity. It is not necessary to show actual harm being caused although it would not hinder the Secretary of State's case if that could be done.

71. We find that a person who sets out to encourage terrorism and does so by circulating encouraging and destructive material over the internet many times a day for the best part of a year cannot avoid being found to have been undermining the purposes of the United Nations. The necessarily high threshold is crossed by the repetition of the offences. In this case it is compounded by the clear evidence that there was success in the project because the conduct was commended by an Al Qaeda supporting organisation. That is independent evidence of the importance of the conduct. The First-tier Tribunal should have given a lot more weight to these things. This is why we find the First-tier Tribunal was wrong and why we overturn it.

72. We must also add that we are appreciative of the care taken by the First-tier Tribunal to set out its reasons in a difficult area.

73. This disposes of the appeal because if the Claimant cannot come within the protection of the Convention it is immaterial whether or not she can be a refugee who is refouled.

74. Nevertheless, we will consider the points made.

75. Given our finding on Article 1F(c) we find that the First-tier Tribunal must be wrong to say that the Claimant has not committed a particularly serious crime. We have already acknowledged that this is a difficult area of law. However it is clear that the offence must have some element or characteristic that makes it particularly serious. Our decision that it took the perpetrator out of the protection of the Refugee Convention does that.

76. With respect of Mr Mackenzie's arguments we see no need to say any more.

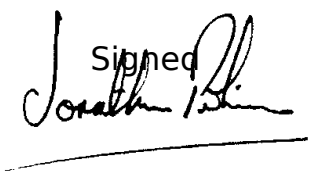
77. Ground 4 concerns the contention that the claimant is a danger to the community. Again, we do not wish to be disrespectful to Counsel but this time we are completely against Ms Patry. The First-tier Tribunal correctly recognised the need to look at the present circumstances because the test is cast in the present tense. There is an abundance of evidence considered very carefully and responsibly by the First-tier Tribunal in considerable detail to support its conclusion the claimant was not a danger to the community. It does not matter how dangerous she may have been in the past. There are very good reasons to think that those dangers have now passed.

78. It follows that if we are wrong in our finding that the claimant is excluded by Article 1F the appeal was allowed rightly even though we disagree about the particularly serious crime. However, we have explained why we disagree with the First-tier Tribunal. As was explained elsewhere this is not an appeal that will lead directly to the claimant leaving the United Kingdom, but we find she is not a refugee.

Notice of Decision

79. The First-tier Tribunal erred in law. We set aside its decision and substitute a decision dismissing the claimant's appeal.

Signed



Jonathan Perkins
Judge of the Upper Tribunal

Dated 31 January 2020