**Upper Tribunal**
**(Immigration and Asylum Chamber)**

AB (Article 1F(a) – defence - duress) Iran [2016] UKUT 00376 (IAC)

**THE IMMIGRATION ACTS**

**Heard at Field House**
**On 1 June 2016**

**Decision Promulgated**

**Before**

**LORD TURNBULL**
**(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)**
**UPPER TRIBUNAL JUDGE CANAVAN**

**Between**

**A B**
(ANONYMITY DIRECTION MADE)

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Anonymity**
*Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008*
Anonymity was granted at an earlier stage of the proceedings because the case involves protection issues. We find that it is appropriate to continue the order. Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her 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.

**Representation:**

For the Appellant: Ms A. Pickup, Counsel, instructed by Wilsons Solicitors
For the Respondent: Ms J. Isherwood Senior Home Office Presenting Officer

1. *In response to an allegation that a person should be excluded under Article 1F(a) of the Refugee Convention because there are serious reasons for considering that the person has committed a crime against peace, a war crime or a crime against humanity as defined in the Rome Statute, there is an initial evidential burden on an appellant to raise a ground for excluding criminal responsibility such as duress.*

2. *The overall burden remains on the respondent to establish that there are serious reasons for considering that the appellant did not act under duress.*

## DECISION AND REASONS

### Background and introduction

1. This appeal concerns the remaking of the decision on the appellant's appeal against the respondent's refusal to grant her claim for asylum.

2. The appellant is an Iranian citizen. She held a senior role in a women's prison under the control of the Islamic Revolutionary Guard Corps in which political prisoners were detained and tortured. In 2009 she, her husband and her young child left Iran clandestinely with the help of an agent. Having become separated from her husband, the appellant arrived in the United Kingdom with her child in September 2009 and claimed asylum. It transpired that her husband had made his way to Turkey but had been forcibly returned from there to Iran, where he was detained and tortured over a period of months. On his release he subsequently made his way to the United Kingdom, arriving in December 2010, when he too claimed asylum.

3. The respondent refused each of the applications, giving reasons for doing so in the appellant's case by letter dated 2 October 2012. In that letter the respondent explained her conclusion that the appellant was to be excluded from the protection of the Refugee Convention upon the grounds set out in article 1F(a), namely that there were serious grounds for considering that she had committed a crime against humanity, and her consequential certification under section 55 of the Immigration Asylum and Nationality Act 2006 that she was not entitled to the protection of article 33 paragraph 1 of the Refugee Convention. For the same reasons she concluded that the appellant did not qualify for protection under the Qualification Directive. The appellant, her child and her husband all appealed against the respondent's decisions and their linked cases were heard together before the First-tier Tribunal on 28 April 2014.

4. In its determination, the First-tier Tribunal upheld the respondent's decision to exclude the appellant from protection under the Refugee Convention and the Qualification Directive and in doing so rejected the appellant's claim that she was excluded from criminal responsibility on account of having acted under duress. However, by concession it allowed the appellant's appeal on human rights grounds on the basis that she would be at real risk of ill treatment on return to Iran. The appeals of the appellant's husband and her child were each allowed on both asylum and human rights grounds.

5. After permission to appeal to the Upper Tribunal was refused the appellant sought Judicial Review, which was granted with the following observations:

> "The Grounds for seeking Judicial Review are reasonably arguable. Furthermore, a point of principle of general importance is at issue, namely the proper burden of proof when an applicant for refugee status claims that she should not be regarded as complicit in a crime against humanity because of duress (and, more specifically, whether it is for her to show that she could not have avoided the duress by, for instance, resigning from her post, or whether it is for the SSHD to show that this was a course that had been open to her)."

6. By determination dated 19 December 2015, Deputy Upper Tribunal Judge Chamberlain held that the decision of the First-tier Tribunal involved the making of an error on a point of law, as its finding that the appellant could have left the prison service "without serious difficulty" was inadequately reasoned and not supported by evidence before it. The decision on the appellant's appeal was ordered to be remade with the original findings and decision in relation to exclusion from protection under the Refugee Convention and the Qualification Directive (paragraphs [55] to [65]) being set aside. The remaining findings and decisions of the First-tier Tribunal were preserved.

**The history of the appellant's involvement with the Iranian Revolutionary Guard Corps**

7. The evidence available on this matter comprised the content of the appellant's screening interview dated 15 September 2009, the content of her asylum interview dated 23 October 2009, the content of her statement dated 27 April 2014, the content of her supplementary statement dated 26 May 2016 and the oral testimony which he gave before us. With one possibly significant exception, to which we will return later, the appellant has been broadly consistent in the account which she has given throughout.

8. From these sources an accepted account of the appellant's life in Iran can be distilled. As a teenager, and after her two older brothers were sent to war, she began working for the Basij (a volunteer organisation for young Iranians subordinate to the Revolutionary Guards). In this capacity she attended to fairly menial tasks in her local mosque whilst still at school and thereafter, whilst studying at University, provided assistance to the mosque in other ways, such as

bookkeeping. She obtained a degree and was then referred by her mosque to the personnel department of the Revolutionary Guard. In due course, in her mid-twenties, she was invited for an interview and offered a position as a prison guard in a women's prison. She was given to understand that the prisoners were political prisoners who attempted to mislead others with philosophy and writings and were in prison because of the danger which they posed to other members of society. After discussion with a senior member of her mosque she decided to accept the position, understanding that she might be able to help rehabilitate those in prison and through her belief in the Revolution might be able to help them back to the right way of thinking by bringing them back to Islam and the Hezbollah way.

9. The prison at which the appellant commenced work was operated by the Revolutionary Guard Corps and contained between 150-260 female inmates. It was a temporary detention facility, known by number rather than name and had no official address. Correspondence was brought to and taken from the prison by the Revolutionary Guard's own courier service. Within the prison there was a separate section controlled by the Hefazat-e Etelaat-e Sepah Pasderan - the Intelligence Service of the Revolutionary Guard. Certain prisoners were selected for transfer to that section for interrogation achieved by means of torture. Part of the appellant's function as a guard was to participate in the physical process of transferring these prisoners.

10. After the appellant's child was born she took maternity leave for a period of nine months. After that she remained off work for a period of two years having been diagnosed with depression which she attributed to the work which she did and the effect that it had upon her.

11. Towards the end of 2007, by which time she been employed at the prison for over ten years, the appellant was promoted to a senior post with a staff of around 12 other guards under her command.

12. She had responsibility for arranging the transfer of inmates from the general area of the woman's prison to the section controlled by the Intelligence Service. A list of the inmates to be sent for interrogation would be provided to the governor who would in turn pass it to the appellant. The appellant would personally arrange the transfer of the named prisoners or instruct members of her staff to do so.

13. Prisoners transferred for interrogation were never returned to the general section of the prison. In evidence before us the appellant was coy in part about the fate of these individuals. She explained that she did not know whether they were transferred on to other prisons or what became of them. In her asylum interview though she explained that the section was where people were taken to get the last information out of them and within the prison it was known as: "the end of the line". When asked at interview what she meant by that she explained that: "normally they wouldn't be alive after that".

14. Having expressed that reservation about the appellant's evidence, it is fair to recognise that from her screening interview onwards she has explained that prisoners were tortured and beaten. Consistently with this, while stating that she had never been in that section, in giving evidence before us she accepted straightforwardly that her understanding was that the prisoners who were sent there were tortured.

15. The appellant continued in her employment until 2009 when a relative was brought to her prison having been arrested at a demonstration. Her relative was placed in solitary confinement and the appellant's understanding was that her relative was to be transferred to the section controlled by the Intelligence Service. After discussion with other family members the appellant arranged for her relative to be transferred to hospital from where they arranged for her relative to escape. Having paid a significant sum of money to an agent to provide assistance the family then left Iran.

16. From the date of her screening interview onwards the appellant has maintained that she was required to sign a contract of employment on taking up her position at the prison. At that time she explained that it was not possible to resign, she could not leave unless fired, she could not choose to leave and that she was sworn to secrecy. In her April 2014 statement she explained that when she signed her contract of employment she was told that she had to continue to work there until her retirement, or until her term of service had been completed, unless they transferred her elsewhere. She was not aware of anyone else ever leaving their post at the prison in any other circumstances. She said that she was quite sure that if she left she would have had a serious problem with the Revolutionary Guard. She thought that if she had asked to leave this would raise suspicions and she would have been suspected of having sold out or having passed on secret information about the prison. She explained that if she had left without permission she would have been treated as a traitor, imprisoned, tortured and perhaps raped.

17. In the appellant's supplementary statement of May 2016, she stated that her term of service was twenty five years and that this was the period which she would have required to complete before being allowed to retire. She claimed that this was the normal period which women had to complete before they could leave their job or retire. It was a longer period for men. The appellant also claimed that it would have been possible for her to apply for early retirement after twenty years' service.

**The respondent's overarching position on the appellant's conduct**

18. The respondent's reasons for refusal letter begins with an assessment of the conduct of the Iranian authorities in recent years and then narrates, over some thirty or so pages, various, sometimes repetitive, circumstances and considerations which she appears to have taken into account in determining whether the appellant ought to be excluded from the protection of the Refugee

Convention by virtue of article 1F. It is not always easy to follow the thinking which lies behind this letter and a number of the considerations identified have no application to the appellant and her conduct. However, having the benefit of the skeleton argument prepared on behalf of the respondent, and having heard submissions from Ms Isherwood, we understand the respondent's position to be this. Article 1F of the Refugee Convention provides as follows:

> "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;"

19. The meaning to be given to article 1F(a) is to be found in international law rather than domestic law and the guiding instrument is the Rome Statute of the International Criminal Court ("the ICC Statute").

20. The respondent contended that the acts of torture admittedly perpetrated within the prison in which the appellant worked were of a nature and extent such as would fall within the definition of a crime against humanity, as set out in article 7 of the ICC Statute. Although it was not suggested that the appellant personally conducted any acts of torture, she fell to be held responsible in light of the terms of article 25 paragraph 3(c) which attached criminal responsibility to someone who:

> "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;"

21. The Secretary of State's contention was that the appellant facilitated the acts of torture which occurred in the part of the prison controlled by the Intelligence Service by her conduct in identifying those prisoners who were listed for interrogation and by taking them from the general part of the prison to the part controlled by the Intelligence Service. It was contended that the mental elements of intent and knowledge required for criminal responsibility by the ICC Statute were met in light of the terms of article 30, which provides as follows:

> 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."

22. On the appellant's own evidence she intended that those identified by her as corresponding to the names on the list should be transferred to the relevant part of the prison and she did this in the knowledge that they would be subjected to torture once she had done so. She personally undertook the transfer on various occasions. In these circumstances the respondent contended that on the evidence available it was clear that the appellant's conduct facilitated what occurred, that she knew what the consequence for the prisoners of her participation would be and she had therefore made a substantial contribution to the acts of torture constituting a crime against humanity perpetrated in the prison. Relying on the authority of R (JS (Sri Lanka)) v SSHD [2010] UKSC 15, the respondent submitted that she was therefore correct to conclude that there were serious reasons for considering that the appellant had committed a crime against humanity and her decision should be upheld.

23. We shall look separately at the respondent's submissions on the issue of duress later.

**The appellant's overarching position**

24. On behalf of the appellant, Ms Pickup drew attention to the background material available describing the constitution and purposes of the Revolutionary Guard Corps. She drew attention to the various different functions which were encompassed within the organisation. She pointed out that it had security functions, military functions, economic functions, and political functions. She also emphasised the distinction to be drawn between the general body of the Revolutionary Guard and the much smaller and separate Intelligence Directorate within the group. She submitted that the appellant's membership of the Revolutionary Guard alone would not be sufficient to attach responsibility for the commission of crimes against humanity. She submitted that given the wide ranging functions of the Corps it could not be said that membership equated to support for torture or that the appellant's previous association would have given her knowledge of what took place in the section of the prison controlled by the Intelligence Service prior to her taking up her post.

25. That having been said, Ms Pickup did not challenge the respondent's contention that the Iranian state had been responsible for crimes against humanity as defined in article 7 of the ICC Statute, nor did she suggest that the respondent was wrong in founding upon the acts of torture perpetrated within the prison for this purpose. Taking account of the guidance given in JS (Sri Lanka) and in AA-R (Iran) v SSHD [2013] EWCA Civ 835, Ms Pickup accepted that, subject to other considerations, the appellant's conduct met the test of facilitating the acts of torture by aiding and abetting their commission as defined in article 25 of the ICC Statute. Her contention was that the appellant had been acting under duress and was therefore not criminally responsible. Again, we shall look separately at Ms Pickup's submissions on this point later.

**Our initial assessment**

26. The respondent would only be entitled to conclude that the appellant was excluded from the protection of the Refugee Convention if the terms of article 1F(a) of that Convention applied. In the present case the respondent relies on the evidence of torture taking place within the area of the prison under the control of the Intelligence Service and contends that this conduct falls within the definition of a crime against humanity. As was correctly acknowledged, that requires an analysis of the meaning of a crime against humanity as specified in article 7 of the ICC Statute. So far as relevant to the present case, article 7 provides as follows :

> "1. For the purposes of this Statute 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
>
> (f) Torture;
>
> 2. For the purposes 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;"

27. The first sentence of paragraph 1 of article 7 comprises what is known as the "chapeau" requirement, meaning that it covers or prefaces the particular provisions which follow. The available background evidence referred to in the respondent's reasons for refusal letter, as taken along with the country expert reports relied upon by both the respondent and the appellant, vouch that the Iranian regime has been engaged in the brutal and systematic repression of civil society. The means through which that repression has been achieved include the widespread use of arbitrary detention of dissidents, activists and intellectuals accompanied by the routine use of torture to induce confessions which can be used in legal proceedings to support vague charges such as "propaganda against the state" and "endangering the security of the state". We accept this evidence, none of which was challenged. The prison in which the appellant worked was one of those to which such political prisoners and dissidents were taken for the purposes of this detention. We also accept that acts of torture such as would fit the definition in article 7 paragraph 1(f) of the ICC Statute took place on a routine basis over many years within the prison where the appellant was employed. We accordingly hold that the "chapeau" requirement has been established and that the respondent was correct to conclude that crimes against humanity were committed in the prison.

28. In examining the appellant's own involvement in such crimes we recognise the importance of the distinction drawn by Ms Pickup between membership of, or association with, the general body of the Revolutionary Guard and membership of the Intelligence Directorate or Service. We see the force in her submissions concerning the wide range of functions undertaken by the Revolutionary Guard and we therefore do not accept that the appellant must have known of or approved of what was taking place at the prison prior to commencing her post. Mere membership of an organisation with such a diverse function as the Revolutionary Guard Corps could not be said to involve personal and knowing participation in persecutory conduct conducted by some of its elements – JS (Sri Lanka) Lord Hope at paragraph 44.

29. The appellant's own evidence was that she had no reason to be aware of the practices conducted in the section of the prison controlled by the Intelligence Service prior to her commencing employment but that she became aware of them after working within the institution for a short period of time. Although she may, perhaps, have been somewhat idealistic, given her age and background when being offered the post at the prison we accept the appellant's evidence as to her appreciation of what her role would involve. We accept her consistent account that she only learned of the conduct of the Intelligence Service after commencing her employment. Nevertheless, it is plain that from shortly after commencing her service the appellant's conduct contributed in a significant way to the Intelligence Service's ability to pursue its purpose of committing a crime against humanity. On a regular basis over a period of years she was directly responsible for removing those prisoners listed for interrogation and ensuring that they were transferred directly to the separate torture facility, in the full knowledge of what would befall those individuals on being left there. In later years she had a supervisory and controlling function. Article 25 paragraph 3(c) of the ICC Statute brings home criminal responsibility to those who aid and abet for the purpose of facilitating the commission of a crime. Aiding and abetting in this context encompasses any assistance, physical or psychological, that has a substantial effect on the commission of the crime, it is not necessary to establish a common purpose – MT (Article 1F(a) - aiding and abetting) Zimbabwe [2012] UKUT 15.

30. Having assessed the appellant's conduct in the manner we have, it is worth repeating the approach to article 1F as articulated by Lord Brown in JS (Sri Lanka) which the Upper Tribunal drew on in arriving at its decision in the case of MT Zimbabwe. At paragraphs 35 – 39 Lord Brown said the following:

> "35. It must surely be correct to say … that article 1F disqualifies those who make a 'substantial contribution to' the crime, knowing that their acts or omissions will facilitate it … [and] that article 1F responsibility will attach to anyone … contributing to the commission of such crimes by substantially assisting the organisation to continue to function effectively in pursuance of its aims.

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.

38….. Put simply, I would hold an accused disqualified under article 1F if there are serious reasons for considering him voluntarily to have contributed in a significant way to the organisation's ability to pursue its purpose of committing war crimes, aware that his assistance will in fact further that purpose."

31. Applying all of these considerations to the question of whether the Secretary of State has established that there are serious reasons for considering that the appellant has been guilty of crimes against humanity, we turn to the autonomous meaning to be given to the words "serious reasons for considering". We have applied the guidance given in paragraph 75 of the decision in Al Sirri v Secretary of State for the Home Department [2012] UKSC 54 where their Lordships said:

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

(2) The evidence from which these 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 judgement of the decision maker.

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

32. The evidence bearing upon the appellant's complicity is clear, credible and strong. It comes from her own statements and testimony and provides an uncontested picture of her knowingly providing assistance to those who perpetrated torture within the prison in which, latterly, she was the Deputy Governor. That knowledge and assistance, in our view, easily meets the test of aiding and abetting and, but for the qualification of whether her participation was "voluntary", we would hold that the Secretary of State was correct to conclude that there are serious reasons for considering that the appellant has been guilty of crimes against humanity. That conclusion takes us into the only real issue in the case, that of duress.

**The submissions on duress for the respondent**

33. On behalf of the Secretary of State it was acknowledged that article 31 of the ICC Statute provides for a defence of duress, as there defined. It was submitted though that there was no onus on the Secretary of State to disprove the defence

and that since the process of the International Criminal Court was inquisitorial it was really a matter for the court alone to resolve. This was developed into a submission that the burden of establishing duress lay with the appellant and reliance was placed for this proposition on the decision of the Canadian federal court in Oberlander v Attorney General of Canada 2015 FC 46 (CanLII). However, the Secretary of State was not able to assist with a submission as to what standard of proof the appellant would require to reach.

34. Despite these submissions on the availability of a defence of duress, the Secretary of State also submitted that duress did not constitute a defence in international criminal law and went only to mitigation. For this submission she relied upon the decision of the International Criminal Tribunal for the former Yugoslavia in the case of Erdemovic (IT-96-22-A).

35. On the facts of the present case, the Secretary of State submitted that on her own evidence the appellant was fully aware of what was taking place within the prison and that she had taken no steps to distance herself or to avoid participation. It was pointed out that she had been away from work for a period of maternity leave and had returned voluntarily. It was pointed out that she had subsequently been promoted, that she had never asked to resign or sought a transfer to a different post and the totality of the evidence suggested that she participated voluntarily in her duties.

**The submissions on duress for the appellant**

36. On behalf of the appellant, Ms Pickup drew attention to the terms of article 31 of the ICC Statute, which sets out the available defences and observed that acting under duress was specifically included. She drew attention to the terms of article 66 setting out the presumption of innocence and to the terms of article 67 setting out the prohibition on any reverse burden of proof or onus of rebuttal. She drew attention to the way this had been interpreted in Ambos's Treatise on International Criminal Law, Volume 1 pp 312 to 315, where the author stated:

> "In the context of defences it is particularly important that the ICC Prosecutor is under the legal obligation to establish the truth and, in doing so, investigate incriminating and exonerating circumstances equally. [….] At the very least, one has to apply the rule prohibiting any reversal of the burden of proof or onus of rebuttal to the detriment of the accused not only to the elements of the offence, but equally to defences, that is, the Prosecutor is obliged to disprove the existence of a defence beyond reasonable doubt."

37. Ms Pickup accordingly submitted that as a matter of international criminal law the defence of duress was available to the appellant and that the onus of disproving that defence lay on the Secretary of State. The particular application of that onus in the present proceedings would require the Secretary of State to demonstrate that there were serious reasons for considering that the appellant did

not act under duress. Ms Pickup submitted that the case of Erdemovic was of no assistance as it did not concern the application of the ICC Statute and the case of Oberlander was distinguishable, as it concerned the application of Canadian statutory provisions.

38. Ms Pickup relied upon the evidence given by the appellant herself and the expert report from Ms Enayat. She submitted that this evidence in combination supported the finding that the appellant was required by law to complete a 25 year term of employment at the prison. She submitted that the evidence vouched the proposition that resignation would only be possible after the minimum required period and that even asking for permission to resign would lead to suspicion and possibly threat. She asked us to accept that if in reality permission to resign would not have been given it would not be reasonable to have expected the appellant to have made that request. Ms Pickup submitted that on the evidence the appellant's only realistic method of leaving the prison was to do so without permission which would be considered desertion. The expert evidence vouched that desertion would lead to imprisonment in conditions in which there would be a high risk of torture and other forms of abuse.

**The issue of duress**

39. The first question to be addressed is whether an individual could avoid exclusion from the protection of the Refugee Convention under article 1F(a) upon the basis that whilst he or she might appear to have engaged in conduct which would fit the definition of crimes against humanity, he or she was acting under duress.

40. Since it is recognised that the meaning to be given to this article is to be found in international law, and that the guiding instrument is the ICC Statute, this would seem the most obvious place to begin to look for the answer. Article 31 is headed up: "Grounds For Excluding Criminal Responsibility". Paragraph 1 provides as follows:

> "1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:
>
> …
>
> (d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:
>
> (i) Made by other persons; or
> (ii) Constituted by other circumstances beyond that person's control."

41. The wording of this article appears to provide an unequivocal statement that criminal responsibility shall not attach to an individual who acts under duress, as so defined. If it was accepted that an individual acted under duress it is therefore difficult to see how there could be serious reasons for considering that such a person had committed a crime against humanity, as defined in the international instruments. However, the respondent does not appear to adopt this interpretation. In her letter giving reasons for refusal of the appellant's claim, the respondent sets out a heading of "Defences/Excuses" above paragraph number 136. She then quotes article 31 of the ICC Statute, without any elaboration or explanation. The next paragraph is in the following terms:

> "137. Duress is not a complete defence in international criminal law but can be pleaded in mitigation. In Erdemovic (ICTY Appeals Chamber), para 19, it was held: 'duress does not afford a complete defence to a soldier charged with a crime against humanity and/or a war crime involving the killing of innocent human beings.'"

42. The same submission was made by Ms Isherwood before us and she drew our attention to what had been said by the Upper Tribunal in the case of MT Zimbabwe at paragraph 106 where, having observed that article 31 paragraph 1(d) of the ICC Statute makes clear that duress can be a defence to international criminal responsibility, the panel stated:

> "Whether it is a complete defence and whether it can apply in all types of cases remains unsettled: see the Trial Chamber discussions in Prosecutor v Erdemovic (IT-96-22) 7 June 1997"

43. It seems to us that there is an obvious contradiction between the statement in the ICC Statute that criminal responsibility shall not attach to an individual who acts under duress, and the respondent's proposition that duress is not a complete defence in international criminal law but only constitutes mitigation. It would have been helpful had the Secretary of State provided us with the analysis, or reasoning which led to her conclusion on this matter. No further amplification is provided in the letter giving reasons for refusal and Ms Isherwood was not able to advance the matter either. We offer no criticism of her in this respect, the effect of duress is something which has troubled many domestic courts throughout the world, as can be seen from the comprehensive review conducted by the Appeal Chamber in Erdemovic of the way duress is treated in other jurisdictions. As Judges McDonald and Vohrah observed in their joint opinion at paragraph 66:

> "On the one hand, a large number of jurisdictions recognise duress as a complete defence absolving the accused from all criminal responsibility. On the other hand, in other jurisdictions, duress does not afford a complete defence to offences generally but serves merely as a factor which would mitigate the punishment to be imposed on a convicted person."

In the end, the majority judges seem to have been influenced by the prevailing view in the common-law jurisdictions that duress operated as a defence to any crime *except* that of murder.

44. Nevertheless, if it is the Secretary of State's view that the case of Erdemovic supplies the governing jurisprudence in circumstances concerning the application of article 1F(a) of the Refugee Convention where duress arises, then this is a matter of some importance. We shall require to consider it unaided.

45. Any consideration of the import of the Appeal Chamber decision in Erdemovic has to begin by acknowledging the extent of the differences in reasoning and conclusion as between the five judges. The court decided by a majority of three to two that duress does not afford a complete defence to a soldier charged with a crime against humanity and/or a war crime involving the killing of innocent human beings. At page 662 of the Oxford Companion to International Criminal Justice, published in 2009, the case is described as one which:

> "Stands out for the sincere, transparent and therefore most stimulating attempt of five appellate judges to cope with the fundamental methodological problem of how to determine the applicable law where the sources of international law do not in their entirety provided for a clear cut answer."

46. The extent of the differing conclusions which the appellate judges arrived at is striking and a flavour of this can be seen from the dissenting judgement of the President, Judge Cassese, when he stated at paragraph 11 of his opinion:

> "On the strength of international principles and rules my conclusions on duress different widely from those of the majority of the Appeals Chamber".

Judge Cassese went on to explain that in his opinion duress was capable of providing a defence in international criminal law for crimes involving the killing of innocent persons, but that the defence was subject to the stringent requirements which he itemised. Unlike the majority, he seems to have been influenced by the thinking reflected in the civil law jurisdictions in which duress was accepted as a defence to any crime.

47. If the majority view was to be taken as reflecting the applicable law two questions would immediately arise. The first concerns whether the case has general application, or whether it only applies to a restricted category of individuals. The majority judges who ruled that duress did not constitute a defence expressly narrowed the issue for their decision to the specific one of a serving soldier who killed innocent civilians – see paragraph numbers 41 and 88 of the Joint Separate Opinion of Judges McDonald and Vohrah. The reason why the judges looked at the matter through such a narrow prism is set out in paragraph 84 of the opinion, which is in the following terms:

> "84. Secondly, as we have confined the scope of our inquiry to the question whether duress affords a complete defence to a soldier charged with killing innocent persons, we are of the view that soldiers or combatants are expected to exercise fortitude and a greater degree of resistance to a threat than civilians, at least when it is their own lives which are being threatened. Soldiers, by the very nature of their occupation, must have envisaged the possibility of violent death in pursuance of the cause for which they fight. The relevant question must therefore be framed in terms of what may be expected from the ordinary soldier in the situation of the Appellant. What is to be expected of such an ordinary soldier is not, by our approach, analysed in terms of a utilitarian approach involving the weighing up of harms. Rather, it is based on the proposition that it is unacceptable to allow a trained fighter, whose job necessarily entails the occupational hazard of dying, to avail himself of a complete defence to a crime in which he killed one or more innocent persons."

48. Since these were at least some of the considerations which weighed with the majority judges in arriving at the decision which they did, one might legitimately ask why the conclusion on the issue of duress which they arrived at ought to apply to civilians? The Secretary of State has provided us with no answer.

49. The second question which arises is this. Even if the import of the case extends beyond the narrow category of soldiers or combatants, does Erdemovic only govern cases involving crimes against humanity involving the killing of innocent human beings, or does it also govern cases where this crime is committed by the act of torture, such as is founded upon in the present case? Again we have no guidance. This question would be of importance given that the dominant common law jurisdictions influencing the majority opinion only exclude the crime of murder from the defence of duress.

50. Whilst it seems to us that the two questions we have identified would need to be answered satisfactorily before we could give effect to the submission that Erdemovic provides the governing law for our purposes, there is another even more fundamental question to be addressed concerning the applicability of this case. Since it is agreed that the ICC Statute is the governing international instrument, what relevance does the case of Erdemovic have for us in assessing the issue of duress under any circumstances?

51. The case of Erdemovic was prosecuted before the International Criminal Tribunal for the former Yugoslavia. The Tribunal was bound by the terms of its own Statute, which was adopted in May 1993. That Statute says nothing about the issue of duress. The question in Erdemovic came before the Appeal Chamber in 1997 and since the applicable statute was silent on the issue, the court sought to find an answer to whether duress would provide a complete defence by drawing on the sources of international law.

52. However matters moved on. The ICC Statute was adopted in July 1998, after many years of discussion and compromise, and it entered into force on 1 July

2002. Unlike the circumstances with which the judges had to grapple in the case of Erdemovic, a definition of the concept of duress is now given in the binding international instrument, along with a statement that an individual who acts under duress shall not be criminally responsible. As Professor Schabas observed in his 1998 article on General Principles of Criminal Law in the International Criminal Court Statute (6 EUR.J.Crime.L & Crim.J.):

> "The fourth and final defence enumerated in Article 31 is duress. An exhaustive judgement of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia, in 1996, determined by a majority of three to two, that duress is not admissible as a defence to crimes against humanity. The consequence of the provision in the Rome Statute is to set aside the judgement of the Court."

53. A similar observation can be found in chapter 24.4 of Volume I of The Rome Statute of the International Criminal Court: A Commentary, edited by Cassese and others (published in 2002), at page 1044. There it is noted that the remaining question is no longer whether duress can be invoked in the case of the killing of innocent persons, but what the requirements of such a defence are. It is also noted that Judge Cassese's dissenting opinion in Erdemovic in effect became the model for the terms of Article 31 paragraph 3(d) of the ICC Statute. A detailed discussion of the nature and requirements of the "defence" is given in Triffterer and Ambos – The Rome Statute of the International Criminal Court: A Commentary (3rd edition 2015) at pages 1149 – 1154.

54. In light of the plain words of the ICC Statute, and the commentaries referred to above, we cannot accept that the Secretary of State's undeveloped reference to the case of Erdemovic permits us to give weight to her submission that duress is not a complete defence in international criminal law. We therefore propose to determine this case in the following ways. First, upon the understanding that the appellant would be entitled to challenge the Secretary of State's conclusion that she was excluded from the protection of the Refugee Convention by arguing that she was acting under duress. Secondly, upon the understanding that if the appellant was acting under duress, as properly understood, she would be entitled to succeed in her appeal.

55. The view just explained of course leads into questions of burden of proof, as presaged by the High Court's observations in granting permission to proceed in the Judicial Review. Once again, the Secretary of State's position is somewhat stark. It is of course correct to say that it is for the court to adjudicate upon the question of whether a defence applies but we do not think it is correct to characterise the role of the ICC as inquisitorial. The ICC would adjudicate, as the domestic court does, on the basis of the information brought before it by the prosecuting authority and in the context of the burden of proof resting on the prosecutor.

56. In our own domestic criminal procedure a defence of duress (where available) is treated no differently from any other defence. There is an evidential burden

resting on the accused to raise or engage the defence but if this is done the persuasive burden of satisfying the court that the defence should be rejected remains with the prosecutor – R v Hasan [2005] 2 AC 467 at paragraph 20. In particular it should be noted that in domestic proceedings the necessary evidential burden does not impose a need for the accused to establish duress on a balance of probabilities.

57. As we noted earlier, The Secretary of State submitted that the decision of the Canadian Federal Court in Oberlander provided support for the contention that the burden of establishing duress lies on the appellant. Article 66 of the ICC Statute provides that the presumption of innocence applies to the accused, that the onus is on the prosecutor to prove guilt and that the standard of guilt must be established beyond reasonable doubt. Article 67 identifies the rights of the accused and provides:

> "1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:
>
> (i) not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal"

This provision would seem to undermine the Secretary of State's contention. In addition, Rule 80 of the ICC Rules of Procedure and Evidence provides that the defence must give notice to both the Trial chamber and the Prosecutor if it intends to raise a ground for excluding criminal responsibility under article 31. The purpose of this notice is to give the Prosecutor adequate opportunity to prepare for trial. The Rule also provides that the Trial Chamber may give the Prosecutor an adjournment to address the ground of defence raised. All of this goes to further underpin the statement that the onus remains on the prosecution to disprove any defence validly raised.

58. Further guidance might be found in the decisions of other tribunals applying international law. The impact of the defence of duress has been considered by the United Nations Special Panel for East Timor in the context of cases prosecuted before it where the definitions of the crimes and the available defences replicate those found in the ICC Statute. In the Court of Appeal decision in the case of Prosecutor v Julio Fernandes No. 7 of 2001 Judge Egonda-Ntende gave an opinion in which he dissented in part from the majority decision of the court. On duress however the court was unified. In paragraph 11 of his decision Judge Egonda-Ntende said the following:

> "In order for the defence of duress to succeed there must be evidence before the court that supports the existence of the above five elements[1]. Counsel for the appellant submits that all the accused has to do is raise the

[1] Those set out in article 31 paragraph 1 (d).

> defence of duress, and it is the duty of the prosecution to negative or disprove its existence. The duty to prove the indictment rests on the prosecution all the time. If any defence is raised the prosecution, in order to succeed must demolish the defence. But that is not all, in my view. In a defence of this kind, like that of self-defence, an evidential burden of proof shifts to the accused to put the defence in issue. It is not just enough to claim that he acted under duress. Evidence has to be produced by the person seeking to take advantage of this defence that establishes the existence of the five elements referred to above. He need not establish the matter beyond reasonable doubt but may do so on the balance of probabilities. It is then for the prosecution to establish beyond reasonable (sic) whether that defence is available or not to the accused in answer to the indictment."

59. These comments seem to us to provide support for the contention that in international criminal law the issue of duress would fall to be considered in a manner similar to that which we set out in paragraph 56 above. The only difference is the suggestion that the person claiming to be acting under duress might require to establish the circumstances underpinning the defence to the standard of the balance of probabilities. It is not clear from his decision why Judge Egonda-Ntende put the matter this way. This imposition of a persuasive burden would seem to be inconsistent with the terms of article 67. Further support for our own view can be found in the passage in Ambos's Treatise on International Criminal Law relied upon by Ms Pickup and as quoted in paragraph 36 above.

60. The remaining question is whether the case of Oberlander provides the support which the Secretary of State contends for. We would understand the Secretary of State to be referring to the lengthy and detailed decision of Mr Justice Russell issued on 13 January 2015, reported as Oberlander v Canada (Attorney General) 2015 FC 46 (CanLII). The passages from his decision quoted in the respondent's skeleton argument are all taken from the submissions of the Attorney General as made to Mr Justice Russell, rather than from the section of the decision in which he gives own analysis and reasoning. The Secretary of State does not assist with how these submissions were dealt with in the decision.

61. Whilst unhelpful, this is not the most pressing difficulty in assessing the import of this case. The case of Oberlander concerns an issue of Judicial Review in which the applicant has sought, since 2000, to challenge the decision of the Canadian Governor in Council to revoke his Canadian citizenship under the applicable statutory provisions. The litigation has had the most lengthy and remarkable history, having been through the Federal Court to the Federal Appeal Court and back to the Governor in Council on a number of occasions, at least once in light of a re-statement of the law by the Supreme Court of Canada. Mr Justice Russell's own decision was challenged before the Federal Appeal Court and by its decision dated 15 February 2016, reported as Oberlander v Canada (Attorney General) 2016 FCA 52 (CanLII), the Federal Appeal court allowed the appeal, set aside the decision and remitted the issue of complicity and duress to the Governor in Council for re-determination in accordance with the law. We do not therefore find

it helpful to place reliance on the submissions of one-party presented before a judge whose decision was subsequently overturned with the critical issue requiring to be revisited.

62. Having considered the matter in the light of the various authorities, textbooks and commentaries set out above, as explained, we propose to proceed upon the basis that article 31 paragraph 1(d) of the ICC Statute makes available a defence of duress which the appellant is entitled to state in response to the Secretary of State's claim that there are serious reasons for considering that she has been guilty of crimes against humanity. We propose to proceed upon the view that an evidential burden is imposed on the appellant to raise the existence of circumstances such as would permit the defence to be given effect to, and that if that burden is met a persuasive onus shifts to the Secretary of State to establish that there are serious reasons for considering that the appellant did not act under duress. We would treat the phrase "serious reasons for considering" in this context as having the same autonomous meaning as before. We consider that this approach is in line with the terms of the ICC Statute, with the views of the Commentators mentioned and with the interpretation of international criminal law by the United Nations Special Tribunal for East Timor, subject only to an adjustment on the approach to onus of proof.

**Our assessment of the appellant's claim to have acted under duress**

63. There are five requirements of the defence of duress as specified in article 31 of the ICC Statute. They are these:

    i. There must be a threat of imminent death or of continuing or imminent serious bodily harm;
    ii. Such threat requires to be made by other persons or constituted by other circumstances beyond the control of the person claiming the defence;
    iii. The threat must be directed against the person claiming the defence or some other person;
    iv. The person claiming the defence must act necessarily and reasonably to avoid this threat;
    v. In so acting the person claiming the defence does not intend to cause a greater harm than the one sought to be avoided.

    The requirements are cumulative, all require to be satisfied.

64. The appellant's position is that she did not seek out promotion within the prison and that she was only given it as a consequence of the discipline which she brought to her work and the fact of a senior post requiring to be filled. This process receives some general support from the expert report prepared for the appellant by Ms Enayat. Nevertheless, the appellant worked as a prison guard in the prison for a period of well over ten years, holding a senior position for the last two of these years.

65. The appellant's evidence was that she did not approve of the way the prisoners were treated but that having signed the contract she could not resign. She stated variously that she thought about leaving her job many times, that she was waiting for an opportunity to leave, that she was thinking of getting early retirement, that if there had been any possibility for her to leave her job she would have done so and that one could not leave unless fired. Her reasons for continuing to perform her duties require to be carefully measured against the requirements of duress.

66. The appellant's position was that her conduct had first of all to be seen in context. She stated that the requirement for a civilian employee of the Revolutionary Guard Corps was that she had to complete her term of service before she would be allowed to leave. The only people she knew who left the prison were those who had retired after the end of their term of service or who were transferred to another prison establishment. She stated that when her employment commenced she was required to sign a contract of employment and told that she had to continue to work at the prison until her retirement, unless she was transferred somewhere else.

67. This evidence of context received a degree of support from the evidence of Ms Enayat who provided a quote from article 136 of the Revolutionary Guards Employment Law of 1991 which provides:

> "Should the resignation of personnel be a personal request and they have undergone twice the duration of studies and the duration of service has been at least the minimal duration of service as determined in the employment contract and not less than five years, it is acceptable with the approval of the authorities mentioned in Article 87."

68. In her evidence before us the appellant claimed that her minimum duration of service was 25 years which, as Ms Isherwood observed, was the first time that this claim had been made. However this focus on the "employment law" aspect of the appellant's circumstances does not advance her claim to have been acting under duress. For this what matters is what would have happened had she not complied with her duties.

69. The essence of the defence of duress is that the criminal conduct which it is sought to excuse has been directly caused by the threats which are relied upon. The first question for the appellant to answer then is which threats does she rely on? The appellant has never claimed that she was told by anyone or in any circumstances that she would be subject to any form of ill treatment if she failed to comply with her duties. At one passage in her statement she explains she feared that if she did not continue with her duties her child would have problems in the future, such as being prevented from entering university and the marriage prospects of her child might be diminished. Plainly this is of no relevance. The closest to any form of threat which the appellant identifies is in paragraph 18 of her April 2014 statement where she states:

> "… and I was quite sure that if I was to leave, I would have had a serious problem with the Revolutionary Guard. I think that even if I had just asked to leave, this would have raised a lot of suspicions. I would have been suspected of having sold out or having passed on information about the prison which was secret. If I had left without permission, I would have been treated as a traitor for having acted against the Revolution and this would have resulted in a harsh punishment: I am sure that I would have been imprisoned and tortured and I was very afraid of the prospect of being tortured and raped."

70. The appellant deals with two separate situations in this passage, first her concerns about asking to leave and secondly her concerns about leaving without permission. Her concern about leaving without permission receives a level of support from the expert testimony of Ms Enayat who explains that absence from the appellant's post without permission would be penalised as desertion, with a penalty from six months to two years imprisonment in circumstances where there was a high likelihood of torture and severe ill-treatment in pre-trial detention. However, the position with the appellant's first concern is much more ambivalent. Ms Enayat explains in her report that resignation is possible but is only acceptable after the minimum duration of service as determined in the employment contract and not less than five years. It is also subject to the approval of the commander of the relevant division and that approval is likely to depend upon the view of the security units. She states that someone in the appellant's position employed in a politically sensitive role:

> "..would obviously face suspicion, investigation and possibly threats should they apply to resign."

71. The defence of duress in terms of article 31 of the ICC Statute is framed in light of the conduct which the defence addresses, namely genocide, crimes against humanity and war crimes. It is therefore unsurprising that it is available only in respect of conduct resulting from the threat of imminent death or of continuing or imminent serious bodily harm. A merely abstract danger or simply an elevated probability that a dangerous situation might occur would not suffice and the threat relied on must be objectively given and not merely exist in the perpetrator's mind – see Triffterer & Ambos page 1151.

72. The appellant's concern was that if she had sought to resign or be moved to other duties this would have given her a serious problem with the Revolutionary Guard leading to suspicion. She does not point to the evidence of what became of anyone else who sought to resign or be moved. Even if the evidence of her concern is accepted it amounts to an anticipation on her part rather than any form of express threat. Even if we proceed upon the basis that an implied threat would be sufficient, it is impossible to see that the consequence which the appellant identifies would meet the standard of threat required by article 31. This is not evidence which reflects her acting under the threat of imminent death or of continuing or imminent serious bodily harm. Neither does the evidence of Ms Enayat that she might have been the subject of suspicion, investigation and

possibly threats had she made such a request provide the necessary foundation evidence.

73. A separate requirement of the defence of duress is that the accused must act necessarily and reasonably to avoid this threat. As is said in Triffterer & Ambos at page 1153:

> "This, undisputedly, means that the act directing at avoiding the threat must be necessary in terms of no other means being available and reasonable for reaching the desired effect."

Another way of looking at this is that the defence of duress is only available if the individual cannot be fairly expected to withstand or assume the risk. A threat results in duress only if it is not otherwise avoidable i.e. if a reasonable person in comparable circumstances would not have submitted and would not have been driven to the relevant criminal conduct. It is therefore neither required to show special valour, prowess or heroism, nor does a weak will or weakness of character exclude the criminal responsibility of a defendant. This is not to say that one may simply follow the most convenient way out, rather has the coerced person to seek every reasonable, not too distant evasive alternative for avoiding the commission of a crime - Triffterer & Ambos, again at page 1153.

74. These observations are entirely in keeping with domestic law – see R v Hassan paragraph 21:

> "The defendant may excuse his criminal conduct on grounds of duress only if, placed as he was, there was no evasive action he could reasonably have been expected to take."

75. It seems clear from what is contained in Ms Enayat's report that it is possible to resign from the Revolutionary Guard Corps in certain circumstances. In light of the fact that the appellant only claimed for the first time before us that her minimum term contract was 25 years we are not inclined to accept her evidence on this point. The appellant does not claim to have ever even raised the question of resignation or transfer to different duties or to a different post. In her own statement the appellant talks of prison employees being transferred to another establishment and of being told on commencing work that she might be transferred elsewhere. It seems obvious therefore that there were at least some opportunities for movement. By her own testimony the appellant never explored the availability of any such opportunity.

76. The weakness of the appellant's position is revealed in the submission which Ms Pickup was forced to make on her behalf to the effect that if in reality permission to resign would not have been given it would not be reasonable to have expected the appellant to have made that request. It is implicit in what the appellant has herself said about the circumstances within the prison that it was possible to leave. She refers both to the possibility of transfer and of being fired. It is also plain from the evidence of Ms Enayat that there were circumstances in which it

was possible to resign. The appellant neither sought to explore the availability of any such opportunity or to engineer circumstances in which she was fired. On the contrary, she conducted herself with such exemplary and continuous diligence that she was promoted without even having to apply.

77. The appellant is an intelligent, articulate and qualified woman. She is also resourceful. The account which she gives of her escape from Iran is illuminating. On learning that her relative had been brought to the prison she spoke with other family members that evening. She obtained some form of medicine from another family member, a doctor, which she then secretly passed to her relative at the prison in order that this would induce a temporary period of vomiting. As a consequence of this, her relative was transferred to the infirmary section of the prison. Knowing that the resident doctor left at 3:30 pm the appellant contacted the infirmary after this time and instructed the nurse to transfer her relative to an outside hospital. In order to sanction this arrangement she required to forge the signature of the head of the prison on a temporary exit form. The appellant then collected her belongings and returned home from where she contacted the hospital. She instructed the prison escort to return to the prison leaving only a single male escort sitting outside her relative's room. She then attended at the hospital taking clothes for her relative to change into. She instructed the remaining escort that she would take over observation and released him from duty to go and get some refreshment and to pray. She then escorted her relative out of the hospital room to meet with another family member waiting outside. After the appellant returned to the hospital room she confirmed by telephone that her relative had been collected safely and waited for the return of the remaining escort. When he returned she locked the door, handed him the key and instructed him to wait there until the morning, knowing that as a male member of the Revolutionary Guard he would not enter the room of a female patient. The appellant then left and met with her husband and child before making an illegal exit from the country.

78. The reality of the appellant's account of acting under duress is that for a period of many years she took no steps whatsoever to avoid compliance with her duties in the prison, despite her knowledge of the consequence for those taken to the torture facility. Even despite being off work after the birth of her child for a lengthy period of time she chose not to explore any other option but to return to her duties in the prison. She continued in those duties accepting promotion along the way. The immediacy of her reaction on learning of her relative's detention and the combined manner of the transfer to hospital and subsequent escape is evidence of a cunning and resourceful nature, along with an ability and willingness to take appropriate steps when she chose to do so.

79. We are perfectly satisfied that the defence of duress cannot be engaged on the basis of the evidence which the appellant has adduced. It is untenable on the basis of the vague and speculative consequence which she has associated with making a request to be allowed to resign, leave or transfer. It is equally untenable on the basis of the appellant's own evidence of having made no effort of any description to extricate herself from her duties at the prison over a period of

many years. The harm which the appellant knew she was causing was out of all proportion to the risk to herself which she has identified as befalling her if she had made efforts to leave short of desertion.

80. In these circumstances we are satisfied that the necessary evidential burden has not been discharged by the appellant and she has advanced no valid answer to the serious reasons for considering that she has committed a crime against humanity as identified by the Secretary of State. Since we were otherwise satisfied that the Secretary of State was well entitled to arrive at the conclusion which she did, the appellant's appeal against the Secretary of State's decision of 2 October 2012 must fail. The same outcome would be reached if we viewed the matter in the way suggested by Ms Pickup. If we ask ourselves whether the Secretary of State has shown that there are serious reasons for considering that the appellant did not act under duress, then the answer is that she has, upon the same basis as we have just set out in paragraph 79 above.

81. We therefore uphold the Secretary of State's certificate under Section 55 of the Immigration Asylum and Nationality Act 2006. The appellant's claims under the Refugee Convention and the Qualification Directive are excluded by reason of article 1F(a) of the Refugee Convention and article 12.2 of the Qualification Directive and therefore cannot succeed.

**Decision**

82. The appellant is excluded from protection under the Refugee Convention and the Qualification Directive. The respondent's certificate in relation to exclusion by reason of article 1F of the Refugee Convention and article 12.2 of the Qualification Directive is upheld.

83. The appeal is dismissed on Refugee Convention grounds.

Signed:

Alan D. Turnbull

19/7/16

Judge of the Upper Tribunal