



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: AA/09438/2011

**THE IMMIGRATION ACTS**

Heard at Birmingham  
on 24<sup>th</sup> July 2012

Date Sent  
On 19 September 2012

Before  
UPPER TRIBUNAL JUDGE HANSON  
Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MOHAMED ISSA SALIM

Respondent

**Representation:**

For the Appellant: Mr Smart – Senior Home Office Presenting Officer.  
For the Respondent: Mr Vokes – instructed by Blakemores Solicitors.

**DETERMINATION AND REASONS**

1. On 17<sup>th</sup> May 2012 it was found that First-tier Tribunal Judge Lloyd had made an error of law in her determination promulgated after a hearing at Birmingham on the 12<sup>th</sup> October 2011 for the following reasons:

**“ERROR OF LAW FINDING AND DIRECTIONS**

1. This is an appeal against a determination of First-tier Tribunal Judge Lloyd, promulgated following a hearing at Birmingham on 12<sup>th</sup> October 2011 in which she allowed the appellant's appeal on asylum and human rights grounds.
2. The Secretary of State sought permission to appeal which was granted by First-tier Tribunal Judge O'Connor on 7<sup>th</sup> November 2011 in the following terms:
  1. The appellant is a citizen of Sudan. In a determination sent to the appellant on 28<sup>th</sup> October 2011, Immigration Judge Lloyd allowed the appellant's

appeal against the SSHD's decision to remove him. The Immigration Judge concluded that such removal would lead to a breach of the Refugee Convention and Articles 2, 3 & 8 ECHR. The SSHD had asserted that the appellant ought to be excluded from Refugee Status as a consequence of his actions in Sudan (issuing a certificate pursuant to section 55 of the Immigration, Asylum and Nationality Act 2006).

2. The SSHD's grounds assert, in terms, that the Immigration Judge failed to resolve conflicts of fact within the evidence and made a material misdirection in law by misapplying the decision of the Court of Appeal in JS (Sri Lanka).
3. It is arguable that the Immigration Judge's reasoning in relation to the issue of exclusion is inadequate for, inter-alia, the reasons set out by the SSHD in the grounds. Permission to appeal is granted. The SSHD will need to be prepared to address the materiality of the aforementioned arguable errors in relation to the Immigration Judge's conclusions on Articles 2 & 3 ECHR.

### **The Grounds**

3. The grounds relied upon by the Secretary of State allege that the Judge failed to resolve the conflict within the evidence between interviews given by the appellant to named publications, in which he explicitly confirmed that he killed people, attacked 30 villages, and was unable to count the number of people he shot, and his oral evidence that he did not agree with the attacks and that he did not kill people.
4. The grounds allege that had such evidence been properly considered the appellant's credibility will be in question as will the fact he was not a witness of truth and, as such, his exclusion from the protection of the Refugee Convention and potential breach of Articles 2 and 3 which are based on his own oral evidence would be unsustainable.
5. In relation to the alleged material misdirection of law the grounds allege the Judge materially erred in misapplying the conclusions of the Court of Appeal in JS (Sri Lanka) as the Judge needed to ensure that she was deciding the correct factual matrix. It is further alleged that JS defines criminal culpability for international crimes in light of which findings made by the Judge are unsustainable.
6. The application is challenged by Mr Salim in a Rule 24 reply prepared by Mr Vokes of Counsel which was relied upon by Mr Howard in addition to his oral submissions.

### **Error of law finding**

7. Mr Vokes is correct to note in the Rule 24 reply that the correct authority is not JS (Sri Lanka) as considered by the Court of Appeal but the judgment of the Supreme Court reported as JS (Sri Lanka) [2010] UKSC 15.

8. Regulation 7 of the Refugee or Person in Need of International Protection (Qualification) Regulations 2006 deals with the issue of exclusion where it states:
  - “(1) A person is not a refugee, if he falls within the scope of Article 1D, 1E or 1F of the Geneva Convention.
  - (2) In the construction and application of Article 1F(b) of the Geneva Convention:
    - (a) the reference to serious non-political crime includes a particularly cruel action, even if it is committed with an allegedly political objective;
    - (b) the reference to the crime being committed outside the country of refuge prior to his admission as a refugee shall be taken to mean the time up to and including the day on which a residence permit is issued.
  - (3) Article 1F(a) and (b) of the Geneva Convention shall apply to a person who instigates or otherwise participates in the commission of the crimes or acts specified in those provisions.”
9. In R(on the application of JS (Sri Lanka) v SSHD [2010] UKSC 15 the Supreme Court decided that a person may be excluded from protection under Article 1F if there were “serious reasons for considering” that the person falls within Articles 1F(a)(b) or (c).
10. The Supreme Court took the view that the phrase imports a lower standard of proof than that applicable in actual war crimes and cited with approval the Court of Appeal’s finding in Yasser Al-Sirri v SSHD [2009] EWCA Civ 222 that the phrase sets a standard above ‘mere suspicion’.
11. The Supreme Court said that the Court of Appeal’s construction of Article 1F in JS had been too narrowly drawn. The Court of Appeal appeared to confine such liability to just the same sort of joint criminal enterprises as would result in convictions under domestic law. It had directed itself to specific identifiable cases rather than consider wider concepts of common design. An accused would be disqualified under Article 1F if there were serious reasons for considering him voluntarily to have contributed to the organisation’s ability to pursue its purpose of committing war crimes, aware that his assistance would further that purpose.
12. The Supreme Court also said that the guidance given in Gurung v SSHD [2002] UKIAT 04870 for determining whether there were serious reasons for considering that a person was guilty of an international crime should not be followed. The approach in Gurung deflected decision makers from focusing on what ultimately would prove to be the determining factor in any case, namely the size of the organisation, particularly that part of it with which the claimant was most closely concerned; whether, and if so by whom, the organisation was proscribed; how the asylum seeker came to be recruited; the length of time he remained in the organisation and what, if any, opportunities he had to leave it; his rank, position, standing and influence in the organisation; his knowledge of the organisation’s war crime activities and his own involvement, particularly whatever contribution

he made towards the commission of war crimes. The SC said that whether or not the organisation was promoting government that was predominantly authoritarian in character was not relevant in the process of determining whether someone was guilty of war crimes; actions that are not otherwise war crimes do not become so merely because they were taken in pursuit of policies abhorrent in a western liberal democracy. Article 1F disqualified those who made a substantial contribution to the crime knowing that their acts or omissions would facilitate it. Moreover Article 1F would attach to anyone in control of the funds of an organisation known to be dedicated to achieving its aims through such violent crimes and anyone contributing to the commission of such crimes by substantially assisting the organisation to continue to function effectively in pursuance of its aims. Criminal responsibility would only attach to those with the necessary mens rea. However, if a person was aware that, in the ordinary course of events a particular action would follow from his actions he would be taken to have acted both in knowledge and with intent. Similarly and consistent with that, when the accused was participating in a common plan, not necessarily to commit a specific crime, no more needed to be established than that the accused had personal knowledge of such aims and intended to contribute to their commission.

13. In [Bundesrepublik Deutschland v B and D \(Cases C-57/09 and C-101/09\) CJEU \(Grand Chamber\)](#) the applicants were Turkish Kurds, each of whom had been a member of an organisation which employed terrorist methods. B was a sympathiser of Dev Sol (now DHKP/C) and had supported armed guerrilla warfare. D had been a guerrilla fighter and senior official for the PKK. The ECtHR held that the exclusion of refugee status of a person who had been a member of an organisation which used terrorist methods was conditional on an individual assessment of the specific facts. Before a finding could be made that the grounds for exclusion laid down in Article 12(2)(b) and (c) of the Directive applied, it must be possible to attribute to the person concerned a share of the responsibility for the acts committed by the organisation in question while that person was a member. That individual responsibility must be assessed in the light of both objective and subjective criteria. To that end the competent authority must assess the true role played by the person concerned in the perpetration of the acts in question; his position within the organisation; the extent of the knowledge he had, or was deemed to have, of its activities; any pressure to which he was exposed; or other factors likely to have influenced his conduct. The fact that a person had been a member of an organisation which, because of its involvement in terrorist acts, was on the list forming the Annex to Common Position 2001/931 and that that person had actively supported the armed struggle waged by that organisation did not automatically constitute a serious non-political crime or acts contrary to the purposes and principles of the United Nations. The grounds for exclusion at issue were introduced with the aim of excluding from refugee status persons who were deemed to be undeserving of the protection which that status entailed and of preventing that status from enabling those who had committed certain serious crimes to escape criminal liability. Accordingly it would not be consistent with that dual objective to make exclusion from refugee status conditional upon the existence of a present danger to the host Member State. Exclusion from refugee status on one of the grounds laid down in Article 12(2)(b) or (c) was linked to the seriousness of the acts committed, which must be of such a degree that the person concerned could not legitimately claim the protection attaching to refugee status. It was important to note that the exclusion of a person

from refugee status did not imply the adoption of a position on the separate question of whether that person could be deported.

14. In AA (Art 1F(a) – complicity – Arts 7 and 25 ICC Statute) Iran [2011] UKUT 00339(IAC) the Tribunal held that:
  - (i) In establishing for the purposes of Art 1F(a) of the Refugee Convention that an individual was complicit under Art 25(3)(d) of the Rome Statute of the International Criminal Court (“ICC Statute”) in crimes against humanity perpetrated by others in an organisation, it was necessary to consider all the circumstances of the appellant’s involvement in that organisation in order to determine whether what the appellant did made a significant contribution to the organisation’s ability to carry out crimes against humanity: **R (on the application of JS) (Sri Lanka) v SSHD [2010] UKSC 15**. (See also Joined Cases **C-57/09 and C-101/09 Bundesrepublik Deutschland v B and D [2011] Imm AR 190**).
  - (ii) However, in establishing this (wider) form of complicity liability under international criminal law it was not necessary to establish that the appellant’s acts formed ‘part of’ a crime against humanity committed by others in the sense that the appellant’s acts were of such a character as, in themselves, to fall within one or more of the categories of acts which if committed as part of a widespread or systematic attack directed against any civilian population were capable of amounting to a crime against humanity under Art 7 of the ICC Statute.
15. The starting point is clearly the need to make clear findings regarding the factual matrix and what exactly Mr Salim is found to have done and whether this is sufficient to amount to a war crime or crime against humanity.
16. Judge Lloyd in paragraph 46 of her determination notes that the Home Office accepted Mr Salim’s account of his Janjaweed activities and specifically states that she does too.
17. The Secretary of State accepted that the appellant was a paid-up member of the Janjaweed for over three years and notes at paragraph 38 that the evidence indicates he failed to leave the Janjaweed at the earliest opportunity and voluntarily participated in war crimes/crimes against humanity with this group and accordingly there was serious reasons for considering that he had committed war crimes/crimes against humanity both individually and as part of a joint criminal enterprise as a member of the Janjaweed.
18. This is clearly the Secretary of State's position which Judge Lloyd indicated she accepted. In paragraph 52 of her determination she found it was not disputed that the appellant participated in Janjaweed battles with rebels in raids on villages where there were civilians, women and children who were killed and that their villages were destroyed.
19. In paragraph 64 Judge Lloyd accepts that the appellant was in the militia which made many attacks on Darfurian villages between 2003 and 2006 during which many civilian villagers died and that once he participated in several such raids he must surely have realised that civilians would be killed. The appellant admitted in

his media interviews to shooting people in the village but denied this in his asylum claim.

20. At paragraph 68, having commented about the media interviews and Mr Salim's oral evidence, Judge Lloyd finds that the appellant did not wish or intend to help the government and therefore lacked the necessary intent to commit a war crime or crime against humanity.
21. It is arguable therefore that there is a contradiction in the determination between accepting the appellants account of his activities as did the SSHD, which must amount to his committing a war crime or crime against humanity, and later finding to the contrary.
22. Judge Lloyd in relation to the mens rea element also stated she did not believe the appellant had this as a result of his claim they did not wish or intend to help the government but it is clear from JS (Sri Lanka) that if a person was aware that, in the ordinary course of events a particular action would follow from his actions he would be taken to have acted both in knowledge and with intent. The determination makes no mention of this specific additional element and makes findings based solely upon what was said in his oral evidence.
23. Judge Lloyd, also appears to make contradictory findings on the one hand indicating that she does not accept the appellant was guilty of committing a war crime or crime against humanity but then going on to discuss the defence of duress. The defence of duress is only an issue if raised by an individual who has been found to have committed a crime that would satisfy either or both of the above definitions, but wishes to absolve him or herself from responsibility for that crime in the same ways as self defence may be used in the United Kingdom by a person charged with causing harm to another individual.
24. In relation to duress, among other relevant issues, in MT (Article 1F (a) - aiding and abetting) Zimbabwe [2012] UKUT 00015(IAC) the Tribunal held in the context of exclusion under Article 1F(a) of the 1951 Refugee Convention (Article 12(2)(a) of 2004/83/EC (the Refugee Qualification Directive)) that (i) The requirement set out at Article 7(1) of the International Criminal Court Statute (ICC Statute) that acts be "...committed as part of a widespread or systematic attack directed against any civilian population with knowledge of the attack" (the "chapeau requirement") is an essential element in the definition of a crime against humanity. (ii) In principle the question of whether acts are '...committed as part of a widespread or systematic attacks directed against any civilian population' is a matter that could be dealt with in future country guidance cases; although the question of whether there exist acts with such a nexus must ultimately be decided on a case-by-case basis; (iii) Commission of a crime against humanity or other excludable act can take the form of commission as an aider and abettor, as a subsidiary (or non-principal) form of participation. Drawing on international criminal law jurisprudence (as enjoined by R (JS) (Sri Lanka) v SSHD [2010] UKSC 15), aiding and abetting in this context encompasses any assistance, physical or psychological, that has a substantial effect on the commission of the crime, i.e. the contribution should facilitate the commission of a crime in some significant way; (iv) The fact that the Article 7(1)(a)-(g) list of acts capable of being crimes against humanity does not include the "cover-up" of murders, whilst a surprising lacuna, should not be filled by judicial interpretation; (v) Duress is a defence to

international criminal responsibility (see Article 31(1)(d) of the ICC Statute). Again, drawing on international criminal law jurisprudence, such a defence is confined to situations where the defendant's freedom of will and decision is so severely limited that there is eventually no moral choice of counter activity available. It has four components: the threat must be of imminent death or continuing or imminent serious bodily harm; the threat must result in duress causing the crime; a threat results in duress only if it is otherwise avoidable (i.e. if a reasonable person in comparable circumstances would have submitted and would have been driven to the relevant criminal conduct); and the act directed at avoiding the threat must be necessary in terms of no other means being available and reasonable for reaching the desired effect.

25. It can be seen that although duress is a defence to international criminal responsibility it has four components. Judge Lloyd in paragraph 65 refers to one such component and I find, that her analysis that the defence of duress was available is not adequately reasoned.
26. I find therefore it is arguable that Judge Lloyd made a material error of law in failing to make adequate findings in relation to key aspects of the evidence as required by the case law, making findings that can be said to be contradictory in their nature, and in failing to make adequate findings in relation to the issue of duress.
27. Although Mr Smart submitted the findings under Articles 2 and 3 were similarly tainted I find that no error of law has been shown in relation to such findings as the risk sufficient to engage these Articles is based upon it being known that the appellant had given the interviews that he admits to giving to the named organisations in the United Kingdom which will have come to the attention of the authorities in Sudan sufficient place him at risk on return. This is a risk not dependent upon any findings relating to his activities in Sudan.
28. I therefore find the determination shall be set aside although the findings in relation to Articles 2 and 3 shall therefore be preserved findings.
29. The following directions shall therefore apply to the future conduct of this appeal:
  1. The Secretary of State shall file a bundle containing all the evidence upon which she intends to rely limited to the article 1F issue by 4.00pm 28<sup>th</sup> June 2012. Statements from any witnesses who are to be called to give oral evidence must be in sufficient detail to stand as the evidence in chief of the maker.
  2. Mr Salim shall have leave to file a supplementary bundle, if so advised, containing any additional evidence upon which he intends to rely provided the same is filed by 4.00pm 12<sup>th</sup> July 2012. Witness statements in the bundle must be in sufficient detail to stand as the evidence in chief of the maker and shall be limited to the Article 1F issue.
  3. List for hearing on the first open date after 19<sup>th</sup> July 2012 before Upper Tribunal Judge Hanson sitting at Birmingham with a time estimate of three hours.

4. An Arabic (Sudanese) interpreter shall be provided by the Tribunal.

Signed.....

Upper Tribunal Judge Hanson

Dated the 17<sup>th</sup> May 2012"

### **Background**

2. In his original witness statement dated 4<sup>th</sup> December 2006 Mr Salim states that he was born on 14<sup>th</sup> July 1985 and lived in the village of AL Sheikh in Katum, Northern Darfur Region.
3. He claims to have worked as a shepherd and that members of his tribe were mostly engaged in raising livestock. He stated since the war started in Darfur, in 2003, his tribe was named as Janjaweed. All members of his tribe had guns and belong to the Janjaweed - Arab militia.
4. Mr Salim stated that when the conflict started their tribal leader approached government officials and agreed that members of the tribe would participate in the fighting on condition that the government paid a salary for every individual fighter and provided them with weapons. The government agreed.
5. It is alleged that men older than eighteen were recruited and were told they needed to participate in the war to protect their tribe and their land. They received equipment and an income.
6. Mr Salim claims one of the tribe's representatives came to the place where he was staying with his livestock where there were seventy other shepherds. They were forced to sign on as fighters for the Janjaweed. Mr Salim stated that some objected but were told if they did not fight the Chief would be called whose authority they had to respect. They all agreed to go and receive training.
7. They were taken to a training camp in Northern Darfur and received twenty days training in weapons and physical military training. After twenty days they started to take part in the fighting. Mr Salim stated they used to receive orders to go and attack different places.
8. In paragraph 9 he recalls his first attack on a place he names as Mangory in Western Kutum. He stated he followed the orders of the commander and destroyed the village completely. He claimed he was forced to do that as he was serving in the military and could not object to orders from the authorities. He continued to attack the rebels and villages on a constant basis.



9. At the end of 2003 Mr Salim took part in an attack on a village called Alboos in West Kutum, North Darfur. Most of the residents of the village were from the Fur - a black African tribe. Thousands of Janjaweed fighters took part in the attack during which the village was completely destroyed and many people killed. Mr Salim claimed he saw many women and older people killed and burned during the attack.
10. At paragraph 13 he stated he still continued in the Janjaweed as he could not object to the government who supported them. He remained involved with the group for more than two years and claimed he could not stop because the orders came directly from the government; although he claimed he was sad and hated to attack innocent people and wanted to run away.
11. In August 2006 he decided to flee the country and on the 25<sup>th</sup> of that month he was with a group of fighters patrolling an area. During the night the group settled for a rest and he told another fighter, a relative, that he was going to escape which he did. He hid in the mountains for two days after which he went to his parents. After telling his parents he needed money he hid again returning to his parent's house only to collect the money, after which he found an agent who helped him to leave the area. He was eventually able to travel to Libya where he was introduced to another agent who helped him enter Italy by boat after which he travelled to France and then onto the United Kingdom.
12. In his oral evidence to the Upper Tribunal Mr Salim claimed that a further statement dated 23<sup>rd</sup> September 2011 contains the truth. In this statement, prepared in response to the reasons for refusal letter, Mr Salim claimed that he was forced to participate in the Janjaweed against his will as if he had not it would have a detrimental effect upon his family. He claimed that if he did not fight the government would have killed his family.
13. Mr Salim further claimed he was forced to join and left as soon as he had the opportunity to do so, whilst on patrol. He claimed that by escaping in this way his family could not be blamed for what he had done although he claimed they were interrogated about his escape.
14. Mr Salim was asked about the income he earned as a shepherd in relation to which his answers were somewhat vague. He was asked why he was reluctant to join Janjaweed which he stated was because they forced him into joining. He did not want to kill people although he then claimed he did not know before he joined that he was required to kill civilians.
15. Mr Salim claimed he was forced to join by force and that the recruiters visited his village many times before he joined. He claimed it was difficult to escape from them and that they were never given a chance to flee before he was forced to join the Janjaweed.

16. Questions were asked about the income received and his claim at paragraph 5 of his witness statement to receive between 300,000 - 500,000 Sudanese Pounds. In his oral evidence he claimed that he received 500,000 from the beginning of the war but then that he received this sum after a year or two; although he also claimed he was never promoted and denied receiving an increase in his income as a result of having greater experience. He then claimed that he was paid 500,000 from the start and then 350,000 to 500,000 later. He claimed he was not sure whether they all received the same income.
17. Mr Salim stated that he remained in the Janjaweed for two years, claiming he had no leave or holidays during this period although if he was near home he would visit. He claimed to have married before he joined the group and to have started a family although alleges he was only able to have one day at home with his wife and son.
18. When asked how often he saw his family he stated that if he was passing the area he would see them.
19. The appellant claims that he told the BBC reporter the truth as he did with the Aegis Trust. He denied saying that he was responsible for shooting civilians, as reported, and denied having told any reporter or the Aegis Trust that he had done so.
20. When it was put to Mr Salim by Mr Smart that the sources claimed that he did say this and that he had said he killed civilians, he acknowledged that may have been what they wrote but claimed he had not done it. He claims not to have killed anybody in his life which Mr Vokes confirmed had been confirmed in a letter from his solicitors to the respondent.
21. Mr Salim was asked whether he had seen the interview published by the Aegis Trust, which he stated he had, which had been read to him in a language he understood. He was referred to the article, and specifically to page 84 of the consolidate bundle prepared for the hearing in May 2012, and the third question from the bottom of that page to which he responded by stating that he had not said that he killed anybody and denied ever raping anybody in any of the villages that were attacked.
22. In her determination Judge Lloyd made a specific finding that the appellant was recruited as a young man, aged 17 or 18, who felt unable to refuse as it was necessary to follow the wishes of their tribal chief.
23. At paragraph 66 it was found that the appellants statement that he did not want to fight and, in so far as he realised what was going on, he disagreed with it and hated the attacks on the villages was a genuine view. Judge Lloyd notes the media reports to the effect that the appellant admitted killing people which was compared to Mr Salim's statements and interviews where he has always said that he did not intend to kill people and had not done so.

24. At paragraph 68 of her determination Judge Lloyd found that he had not made a voluntary contribution to the government operations against black African tribes and was forced to do so and that his contribution was not substantial or significant as he was a fighter and one of many foot-soldiers. Judge Lloyd stated that he may have helped the Government pursue its aims in that all the fighters made a contribution and that as his involvement continued he must have known that people would die even though he did not wish or intend to help the Government. Judge Lloyd records that terrible crimes against humanity occurred and that although the appellant did not instigate the policy or plan against the victims and was not a commander or leader she found his activities were at the lowest possible level.

### Discussion

25. The Secretary of State's position is that the appellant is excluded from the protection of the Refugee Convention for, having accepted his nationality, ethnicity and role as a Janjaweed fighter, he falls to be excluded under the provisions of Article 1 F (a). As a result his claim was certified. This is as a result of his participation, both individually and collectively, in militia atrocities which amounted to war crimes and crimes against humanity given the attacks on civilians, mainly the black African tribes of Fur, Massaleit and Zaghawa. It was not accepted that the appellant had acted under duress, was forced to follow orders or faced action against himself, he failed to desert when he had the opportunity for example when given leave to see his family, fought for the Janjaweed militia for about three years, and admitted participating in militia activities.
26. The country material records the atrocities committed by members of the Janjaweed against the non-Arab tribes of Darfur which in reality amounts to ethnic cleansing. Hundreds of thousands of individuals were forced to flee and many slaughtered as their villages were raised to the ground, cattle and personal possessions were looted by the militia, and livelihoods destroyed on behalf of the Sudanese government.
27. Exclusions under the Refugee or Person in Need of International Protection (Qualification) Regulations 2006. Regulation 7 states:
- “(1) A person is not a refugee, if he falls within the scope of Article 1D, 1E or 1F of the Geneva Convention.
- (2) In the construction and application of Article 1F(b) of the Geneva Convention:
- (a) the reference to serious non-political crime includes a particularly cruel action, even if it is committed with an allegedly political objective;
- (b) the reference to the crime being committed outside the country of refuge prior to his admission as a refugee shall be taken to mean the time up to and including the day on which a residence permit is issued.

- (3) Article 1F(a) and (b) of the Geneva Convention shall apply to a person who instigates or otherwise participates in the commission of the crimes or acts specified in those provisions."
28. Paragraph 46 of the reasons for refusal letter states "As Article 1F (a) is applicable to you, the Secretary of State hereby issues a certificate that you are not entitled to the protection of Article 33 (1) of the Geneva Convention and your asylum claim has been refused."
29. What constitutes a crime against humanity, which the basis of Article 1F (a) is defined in Article 7 (1) of the Rome Statute of the International Criminal Court 1998.
30. Article 7 is headed "Crimes against humanity" and states:
  1. For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
    - (a) Murder;
    - (b) Extermination;
    - (c) Enslavement;
    - (d) Deportation or forcible transfer of population;
    - (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental principles of international law;
    - (f) Torture;
    - (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
    - (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of this Court;
    - (i) Enforced disappearance of persons;
    - (j) The crime of apartheid;
    - (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.
  2. For the purpose of paragraph 1:
    - (a) 'Attack directed against any civilian population' means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;
    - (b) 'Extermination' includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

- (c) 'Enslavement' means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;
- (d) 'Deportation or forcible transfer of population' means forced displacement of the persons concerned by expulsion or other coercive means from the area in which they are lawfully present, without grounds permitted under international law;
- (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;
- (f) 'Forced pregnancy' means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;
- (g) 'Persecution' means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;
- (h) 'The crime of apartheid' means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;
- (i) 'Enforced disappearance of persons' means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time..."

31. Article 9 ("Elements of Crimes") states that such a document "shall assist the Court in the interpretation and application of Articles 6, 7 and 8". The Elements of Crimes contain the following provisions of relevance:

**"Article 7**

**Crimes against humanity**

**Introduction**

1. Since article 7 pertains to international criminal law, its provisions, consistent with article 22, must be strictly construed, taking into account that crimes against humanity as defined in article 7 are among the most serious crimes of concern to the international community as a whole, warrant and entail individual criminal

- responsibility, and require conduct which is impermissible under generally applicable international law, as recognized by the principal legal systems of the world.
2. The last two elements for each crime against humanity describe the context in which the conduct must take place. These elements clarify the requisite participation in and knowledge of a widespread or systematic attack against a civilian population. However, the last element should not be interpreted as requiring proof that the perpetrator had knowledge of all the characteristics of the attack or the precise details of the plan or policy of the State or organization. In the case of an emerging widespread or systematic attack against a civilian population, the intent clause of the last element indicates that this mental element is satisfied if the perpetrator intended to further such an attack.
  3. 'Attack directed against a civilian population' in these context elements is understood to mean a course of conduct including multiple commission of acts referred to in article 7, paragraph 1, of the Statute against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack. The acts need not constitute a military attack. It is understood that 'policy to commit such attack' requires that the State or organization actively promote or encourage such an attack against a civilian population...

#### **Article 7(1)(d)**

#### **Crime against humanity of deportation or forcible transfer of population**

##### **Elements**

1. The perpetrator deported or forcibly transferred, without grounds permitted under international law, one or more persons to another State or location by expulsion or other coercive acts.
2. Such person or persons were lawfully present in the area from which they were so deported or transferred.
3. The perpetrator was aware of the factual circumstances that established the lawfulness of such presence.
4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population...

#### **Article 7(1)(h)**

#### **Crime against humanity of persecution**

##### **Elements**

1. The perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights.
2. The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such.
3. Such targeting was based on political, racial, national, ethnic, cultural, religious, gender as defined in article 7, paragraph 3, of the Statute, or other grounds that are universally recognized as impermissible under international law.
4. The conduct was committed in connection with any act referred to in article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court.
5. [as under article 7(1)(d), element 4, above]
6. [as under article 7(1)(d), element 5, above]

**Article 7(1)(k)**  
**Crime against humanity of other inhumane acts**  
**Elements**

1. The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act.
  2. Such act was of a character similar to any other act referred to in article 7, paragraph 1, of the Statute. [Footnote 30 of Elements of Crimes here states that "It is understood that 'character' refers to the nature and gravity of the act."]
  3. The perpetrator was aware of the factual circumstances that established the character of the attack,
  4. [as under article 7(1)(d), element 4, above]
  5. [as under article 7(1)(d), element 5, above]"
32. I find Mr Salim, on his own admission, participated in acts committed as part of a widespread or systematic attack directed against the non Arab civilian population, with knowledge of the attack and its aims, as a member of the Janjaweed in Darfur.
33. Although it is said he admitted killing civilians to members of the media it was submitted on his behalf that he never made any such statement. He does not, however, deny that he participated in attacks on civilians in their villages where, even if he did not know initially what the aim and intention was, it would have soon become clear after the first attack and would clearly have been known to him after a period of years within this militia group.
34. 'Attack directed against any civilian population' means a course of conduct involving the multiple commission of acts referred to in Article 7 paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack. I find that based upon this definition, Judge Lloyd's findings and the evidence, that it has been established that the appellant did participate in attacks directed against a civilian population.
35. I also find that as a member of a Janjaweed party raiding villages it has been proved that the appellant has committed acts falling within Article 7 (1) (k) namely "other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health", on the basis that violence short of killing or an intention to kill satisfies this definition. I also find that the acts undertaken by the appellant are of comparable character to the "other crimes" set out in Article 7 (1) as the appellant must have been fully aware that the violence of which he was partly responsible, collectively with other members of his group, would lead to consequences such as bodily injury or great suffering/injury to physical and/or mental health.
36. It is clear that the wording of Article 7 shows that the acts undertaken still have to be in the context of widespread and systematic attacks on civilians which, as stated, I find to be proved along with the necessary intention and consequences element.

37. The intention behind the Janjaweed attacks on members of the civilian population was clearly "to cause great suffering or inflict serious physical or mental injury" and that this aim "was achieved".
38. The appellant himself claims that when he realised what he was required to do it caused revulsion. The level of violence used, and intended to be used during such attacks is also demonstrated in general by the incidence of deaths which are reported.
39. The knowledge of the Janjaweed's deliberately brutal and terrifying tactics when attacking their targets must have added to the suffering experienced by those individuals fortunate enough to survive. I find it proved that the attacks on villages in which the appellant admits he was involved were "obviously inhumane" and led to the further great misery of loss of home, loss of livelihood, and displacement of the targeted civilian population.
40. In R (on the application of JS (Sri Lanka) v SSHD [2010] UKSC 15 the Tribunal found that Article 1F disqualified those who made a substantial contribution to the crime knowing that their acts or omissions would facilitate it. Moreover Article 1F would attach to anyone in control of the funds of an organisation known to be dedicated to achieving its aims through such violent crimes and anyone contributing to the commission of such crimes by substantially assisting the organisation to continue to function effectively in pursuance of its aims. Criminal responsibility would only attach to those with the necessary mens rea. However, if a person was aware that, in the ordinary course of events a particular action would follow from his actions he would be taken to have acted both in knowledge and with intent. Similarly and consistent with that, when the accused was participating in a common plan, not necessarily to commit a specific crime, no more needed to be established than that the accused had personal knowledge of such aims and intended to contribute to their commission.
41. The appellant falls within the definition of a person who was aware of the consequences of his actions and yet he continued to act in both knowledge and with the intent of undertaking those actions. I find it has been shown that he has the necessary mens rea such as to warrant criminal responsibility being attached to him under international law.
42. The appellant claims that he had no choice but to join the Janjaweed but I note a discrepancy in his evidence claiming on the one hand that he joined as he could not refuse a tribal Chief and on the other hand that he and his family would have been held to account if he refused. He is therefore arguing a defence of duress. I find no merit in this claim and further find that the appellant joined out of loyalty to his tribal leader and remained in the Janjaweed for economic gain.
43. In MT (Article 1F (a) - aiding and abetting) Zimbabwe [2012] UKUT 00015(IAC) the Tribunal held duress is a defence to international criminal responsibility (see Article 31(1)(d) of the ICC Statute). Again, drawing on international criminal law



jurisprudence, such a defence is confined to situations where the defendant's freedom of will and decision is so severely limited that there is eventually no moral choice of counter activity available. It has four components: the threat must be of imminent death or continuing or imminent serious bodily harm; the threat must result in duress causing the crime; a threat results in duress only if it is otherwise avoidable (i.e. if a reasonable person in comparable circumstances would have submitted and would have been driven to the relevant criminal conduct); and the act directed at avoiding the threat must be necessary in terms of no other means being available and reasonable for reaching the desired effect.

44. I do not find that it has been proved that the appellant's freedom and will and decision making was so limited that there was no moral choice of counter activity available. I do not find it proved that he was ever threatened with imminent death or serious bodily harm. I do not accept he was the subject of any threat resulting in duress leading to the commission of the crimes he committed or that it has been shown that the matters of concern could not be avoided.
45. The appellant volunteered and remained in the organisation for a period of nearly three years undertaking numerous raids. I find no credible evidence that throughout that period he was subjected to duress sufficient to afford him a defence to international criminal irresponsibility.
46. He similarly claimed that he had no ability to escape as his family would have suffered reprisals but he was eventually able to escape with no evidence of reprisals and it is clear that he was able to visit his family and had leave, however short that period allegedly was, where it has not been shown that he could not have escaped if he really wished to do so. Many soldiers escape in the heat of battle yet the appellant chose to continue.
47. In conclusion, having taken into account the size of the organisation, particularly that part of it with which the claimant was most closely concerned; whether, and if so by whom, the organisation was proscribed; how the appellant came to be recruited; the length of time he remained in the organisation and what, if any, opportunities he had to leave it; his rank, position, standing and influence in the organisation; his knowledge of the organisation's war crime activities and his own involvement, particularly the contribution he made towards the commission of war crimes, that it has been proved by the Secretary of State that the appellant is guilty of crimes against humanity and as such the decision to exclude him from refugee status is lawful and justified. I uphold this decision.

## Decision

48. **The Immigration Judge materially erred in law. I set aside the decision of the original Immigration Judge. I remake the decision as follows. This appeal is dismissed.**

Signed.....  
Upper Tribunal Judge Hanson

Dated the 10<sup>th</sup> September 2012