IMMIGRATION APPEAL TRIBUNAL

Date of Hearing: 21 December 2000
Date Determination notified: 12 February 2001

Before

The Honourable Mr Justice Collins
Mr. P. R. Moulden
Mr. G. Warr

APPELLANT

Omar SLIMANI

and
SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

For the appellant: Mr. Jacobs, counsel
For the respondent: Mrs Giltrow

DETERMINATION AND REASONS

1. The appellant, a citizen of Algeria, born on 21 June 1970, left his native country in November 1991. He had obtained a passport without difficulty in 1990. He went to France where he stayed for 4 months. He did not claim asylum there because, he said, he had been told by Algerian friends that any such claim would not succeed. He then decided to come to the United Kingdom. He obtained a false French identification card and used it to gain entry. On 7 May 1994, following a denunciatory letter, he was detained on suspicion of immigration offences whereupon he claimed asylum.

2. His claim was refused by letter dated 2 August 1996 which was not served until 2 November 1996. The reason he gave for leaving Algeria was that the situation there was very bad, there were killings and it was hard to survive; he did not feel safe. He had not himself suffered any persecution. He had attended a rally in 1988 and had been detained for three days after failing to stop at a road block. He had been beaten, but had been released without charge. He was due to undergo military service and would, if returned, be prosecuted for evading the draft and would be compelled to join in the killings perpetrated by the army and would also become a target of the Muslim Fundamentalists.

3. He appealed to an adjudicator. The appeal was not heard until 15 April 1999. It was dismissed. The adjudicator decided that the appellant was not a true conscientious objector. He had no religious or moral objections to military service as such. His reasons for not wanting to undergo military service were described by the adjudicator as vague and

amounting to no more than a wish not to be involved in killings and a fear of reprisals. His stay in France coupled with his clandestine entry into the United Kingdom and failure to claim asylum until apprehended in no way assisted the credibility of his account. For good reason, the adjudicator rejected the appellant's claim. He was entitled to decide that he had no valid convention reason for leaving Algeria - indeed, any other decision would have been surprising. The Refugee Legal Service, who represented him before the adjudicator, presented lengthy and detailed arguments based on the proposition that the appellant was a genuine conscientious objector and that the conflict in Algeria was one which was internationally condemned so that refusal to serve in the army was justified and the punishment for draft evasion would amount to persecution for a convention reason. In addition, it was contended that the appellant would as a failed asylum seeker be at risk of persecution if returned.

4. All the arguments were rejected by the adjudicator. The appellant applied for leave to appeal to the tribunal. The grounds related in the main to a contention that the adjudicator had erred in deciding that the conflict was not internationally condemned and so had erred in rejecting the appellant's claim that he had a conscientious objection to performing military service. In addition, it was argued that the adjudicator had failed to consider the evidence of risk on return.

5. On 2 July 1999 the tribunal (His Honour Jeremy Fordham) refused leave to appeal. The refusal did not follow any formula and gave substantial reasons. Unfortunately, it did not in terms refer to the 'risk on return' argument, no doubt because the chairman was well aware that there was no material which established that in July 1999 there was a real risk of persecution of failed asylum seekers. The adjudicator had said:-

> "Nothing before me suggests that this [i.e. return as a failed asylum seeker] would cause the appellant a problem within the meaning of the Convention".

As we shall see, that observation was correct and the situation has not since changed.

6. The appellant sought judicial review of the refusal and managed to persuade a judge that it was arguable that the adjudicator's 'failure to give reasons' in relation to risk on return was an error of law. The result has been a further 12 months delay and an unfortunate waste of time and money when there was no real prospect of success in any appeal. In the end, to save yet further cost and delay, the tribunal decided to accept that the refusal of leave should be quashed and that was done by a consent order dated 9 August 2000. The appeal was listed to be heard by the tribunal on 26 October 2000 but was then adjourned because of difficulties encountered by the appellant's solicitors. It was heard on 21 December 2000.

7. We are concerned at the number of cases such as this in which permission is granted for judicial review but which have no real prospect of success on the merits. It is of course essential that proper reasons are given by adjudicators and (albeit now only in summary form) by the tribunal. But it is not necessary to deal in detail with every matter; the reasons need only deal with the substantial points which have been raised: see *Re Poyser & Mills Arbitration* [1964] 2 Q.B. 467. They must tell the losing party why he has lost and enable him to appreciate whether there has been any appealable error. In *Save Britain's Heritage v Secretary of State for the Environment* [1991] 1 WLR 153, Lord Bridge said this:-

"The three criteria suggested in the dictum of Megaw J [in *Re Poyser & Mills Arbitration*] are that the reasons should be proper, intelligible and adequate. If the reasons given are improper they will reveal some flaw in the decision-making process which will be open to challenge on some ground other than the failure to give reasons. If the reasons given are unintelligible, this will be equivalent to giving no reasons at all. The difficulty arises in determining whether the reasons given are adequate, whether they deal with the substantial points that have been raised or enable the reader to know what conclusion the decision-maker has reached on the principal controversial issues. What degree of particularity is required? I do not think one can safely say more in general terms than that the degree of particularity required will depend entirely on the nature of the issues falling for decision".

8. In deciding whether or not to grant leave to appeal, the tribunal will consider the adjudicator's determination and the reasons given by him or her. It will recognise the need for the most careful scrutiny of any asylum claim but will also, as an expert tribunal, have regard to the evidence put before the adjudicator (and before it if there is any additional evidence which can properly be considered within the Rules). If it decides that, whatever shortcomings there may have been in the adjudicator's determination, there is no real prospect of success, it will refuse leave. All too often, when applications for judicial review are made, the claimant and the judge concentrate on the adjudicator's reasons. Where the tribunal has not assisted by adopting a formulaic approach to its reasons for refusing leave, such a concentration is not only understandable but inevitable and the tribunal has only itself to blame. But where the tribunal has obviously considered the grounds and the appeal, such an approach is with respect less appropriate. In particular, the tribunal expresses the hope that in every case the judge should ask himself whether any arguable error of law may have vitiated the tribunal's conclusion that there was no real prospect of success in any particular appeal and only grant permission if that is the position.

9. We have dwelt on the issue of judicial review because there has in the past - and the tribunal must take some of the blame for this - been too great a concern to see that every matter is dealt with by an adjudicator however unimportant or peripheral. The observations of Schiemann, J in *R v I.A.T. ex p. Amin* [1992] Imm AR 367 at 374 are all too often cited as if they were a statutory requirement and are regularly misunderstood. What Schiemann J said was this:-

"But it is not clear to me on reading the adjudicator's decision what precisely it is that she is describing as 'an incredible arrangement'. .....[P]arts of the story the adjudicator appears to accept. In my judgment adjudicators should indicate with some clarity in their decisions

(1) What evidence they accept;
(2) What evidence they reject;
(3) Whether there is any evidence as to which they cannot make up their mind whether or not they accept it;
(4) What, if any, evidence they regard as irrelevant".

Those observations were in the context of a failure by the adjudicator to give adequate reasons for her findings on primary purpose in relation to a marriage application and the headnote in the report correctly refers to the observations under that heading: see [1992] Imm A.R. 367 Heading 3. They do not mean nor could the learned judge have intended that they should mean that an adjudicator must carry out the exercise specified in them in relation to all the evidence given before him.

10. But even in relation to specific issues which are material and which have to be properly reasoned, they go too far. The reality is that it is quite impossible to set out a detailed check list of what must be done in all cases. It will in many cases be quite unnecessary to set out evidence regarded as irrelevant; indeed, very few judges would recognise that as an exercise they carry out in giving judgment following a trial. Equally, the circumstances will dictate whether there is a need to identify the evidence upon which they cannot make up their minds, although in deciding on credibility it may be necessary to deal with such evidence. The only guidance needed is that the conclusions reached must be justified and it must be clear that any adverse findings in particular are based on evidence put before the adjudicator or the tribunal and a proper explanation must be given to show why the conclusions on the issues of substance have been reached. We have no wish to encourage lengthy decisions. Succinctness is a virtue provided that the guidance given by Lord Bridge which we have already cited is followed and the decision does show why the findings of material fact have been made and the important conclusions have been reached.

11. The tribunal did not limit Mr. Jacobs to the returnability argument. He sought to argue that the appellant did genuinely find the activities of the military to be morally repugnant. The conflict was conducted with considerable brutality. The appellant pointed out there was evidence that the army had itself been responsible for killings and abductions which were allegedly perpetrated by the terrorists whom the army was fighting and that the conflict originally arose because those then in power refused to accept the result of an election. Mr. Jacobs relied in particular on a tribunal decision *Tallah v Secretary of State for the Home Department* [1998] INLR 258. That case involved Algeria and an appellant who faced military service. It is to be noted that the adjudicator had decided that Mr. Tallah held "views quite genuinely which precluded him from supporting police and military brutality". Furthermore, the tribunal was persuaded on the material put before it that as at November 1997 the Algerian military behaved with extraordinary brutality and seems to have accepted that there was no effective control or attempt at control by the central authority over the methods used which violated basic human rights and breached international legal standards. Whatever the position in November 1997, this picture is not, on the material before us, true of the situation today.

12. In the course of its determination, the tribunal in *Tallah* made the following observations (at p.262E):-

> "We have frequently encountered in this type of appeal emotive approaches manifested by the use of such terms as 'draft-evader', 'deserter' - notions which are founded in patriotic notions of fighting for one's country. Such notions are laudable in their proper context but not where those seeking to evade draft are doing so because they do not want to fight for some vicious group of power-hungry tyrants seeking to retain power or megalomaniac leaders following some sort of racial, tribal or religious jihad in a manner condemned by all decent-minded people".

Mr. Jacobs has relied on this passage. However valid they may be as general observations, it is, with respect, difficult to discern what relevance they have (or perhaps had) to military service in Algeria.

13. The tribunal has recently considered the issues arising in relation to military service in Algeria in depth in *Foughali v Secretary of State for the Home Department* (00/TH/01513: 2 June 2000). Although not itself a 'starred' decision, it together with another roughly contemporaneous decision of a different composition of the tribunal in *Sepet and Bulbul v Secretary of State for the Home Department* (00/TH/01266) was intended to give general guidance and, by starring this decision, we underline that that guidance should be followed. Mr. Jacob has introduced some further material which shows that the conflict continues and that atrocities are still being perpetrated. But there is nothing which in any way casts doubt on the conclusions reached in *Foughali's* case. Those conclusions are fatal to the appellant's case on any aspect of objection to military service. Further, a recent decision of the Court of Appeal, *Fadli v Secretary of State for the Home Department* (The Times December 12 2000), another Algerian case, establishes that fear of reprisals from terrorists does not justify an asylum claim.

14. It is unnecessary to set out the reasoning in *Foughali.* We draw particular attention to paragraphs 38 to 42, 45 and 46 of the decision. In addition, we adopt that tribunal's conclusions in paragraphs 47 to 50 since this appellant like Mr. Foughali has not been able to show that he had strong feelings against participation in the conflict because such participation was likely to involve actions repugnant to basic international humanitarian law norms.

15. We turn therefore to the issue of risk by virtue of return as a failed asylum seeker. Reliance has been placed on the evidence of Mr. Emile Joffe, an expert on North Africa in general and Algeria in particular. Evidence from him is frequently presented. We have no doubt that he has considerable expertise in Algerian affairs and has contacts there who provide him with information. The report before us from Mr. Joffe is in the form of a statement dated 18 May 1998. It was prepared for a specific appellant whose name has been deleted. It suggests that there is a general risk that those returned will face detention and torture. In *Foughali*, there were similar opinions. In a report of April 2000, Mr. Joffe had said that those returned would face the same dangers. Nothing had really changed as a result of what he regarded as the fraudulent election of a new president in December 1999 and the unsuccessful amnesty which followed it. We have been shown an Amnesty report of November 2000. While recognising that abuses continue and not enough is being done to 'address past atrocities (in particular the involvement of the authorities in torture and disappearances), the report does not reject the expressed concern to improve matters as a sham. It is also to be noted that it is there said that reports of torture and ill-treatment by the security forces have substantially decreased in the last two years.

16. The tribunal in *Foughali* explained in paragraphs 43 to 45 why it was not prepared to accept Mr. Joffe's opinions. We entirely agree. We would add that with the exception of a report from the Medical Foundation dated 19 May 1998 in relation to an individual who had been tortured before leaving Algeria and who had been allegedly tortured on return, no material has been produced which supports Mr. Joffe's views. While we appreciate that it is not easy to find such material, we are aware that there have been a number of returns, in particular from the Netherlands, France, Germany and Switzerland. If there was routine torture of such returnees, we would have expected at least some anecdotal material which suggested that such torture was occurring.

17. We would add a few words about expert evidence such as that given by Mr. Joffe. Adjudicators and the tribunal regularly have placed before them opinions of individuals about the situation in the country from which the appellant has come and, more importantly, about what is likely to happen to the appellant should he or she be returned. Often those opinions are in letters or statements and the writer is not called to give evidence or cross-examined. Some such experts are highly respected (and we are happy to place Mr. Joffe in this category) and at the very least their evidence can be said to have been given in good faith and to be based on reliable sources. Others range from the generally reasonable to the unacceptable and even venal. But all suffer from the difficulty that very rarely are they entirely objective in their approach and the sources relied on are frequently (and no doubt sometimes with good reason) unidentified. Many have fixed opinions about the regime in a particular country and will be inclined to accept anything which is detrimental to that regime. This means that more often than not the expert in question, even if he has the credentials which qualify him in that role, will be acting more as an advocate than an expert witness. While the principles which apply to expert witnesses called in High Court actions are not directly applicable, they give guidance when the weight to be attached to such evidence is considered. The most important are the need for independent assistance to the adjudicator or tribunal, the prohibition against assuming the role of an advocate and the need to specify the facts upon which an opinion is based: see *National Justice Compania Naviera S.A. v Prudential Assurance Co. Ltd ('The Ikarian Reefer')* [1993] 2 Lloyds Rep. 68 at 81 - 82 per Cresswell, J.

18. The tribunal and adjudicators have sometimes been criticised by the Court of Appeal for apparently failing to take proper account of experts' opinions. Thus in *Karanakaran v Secretary of State for the Home Department* [2000] 3 All ER 449 at p.472 Brooke LJ referred to the tribunal's dismissal of considerations 'put forward by experts of the quality who wrote opinions in this case' as 'completely wrong'. Certainly the tribunal was wrong to fail to explain why it did not place any weight upon the opinions, but, as the subsequent analysis when the case was reconsidered by the tribunal showed, the opinions were contradictory and unsatisfactory. The reality is that the tribunal is frequently aware from experience of the reliability of the various experts whose reports are produced. But the situation in any country has to be assessed upon a consideration of all relevant material which will include any reports of experts. The adjudicator or tribunal must then decide what weight to attach to those opinions.

19. What we have said is not an attempt at self-justification or an attack upon the Court of Appeal. The tribunal was clearly in error in failing to explain why it rejected the experts' views and in all cases reasons should be given for so doing. So here the adjudicator and the tribunal should have given reasons for rejecting Mr. Joffe's opinion and could not assume that it would be appreciated that the absence of any supporting material in the Country reports was without spelling it out a sufficient reason. It is important that in an appropriate case adjudicators and the tribunal should not spare an expert's feelings and should state clearly that his evidence is for whatever reason unacceptable.

20. We would add that all too often reports prepared for a specific case are relied on in other cases in which appellants from the same country are represented by the same advisers. This should not happen unless the report is stated to be general and to be valid for all cases or the author is asked to confirm that he is content for it to be relied on. Apart from anything else, conditions change and views which may have been valid when the report was written might not be 12 months later.

21. The observations of Moses J in *ex parte Z* [1998] Imm. A.R. 516 that:-

> "That material paints a depressing picture of the security regime in Algeria and certainly provides a substantial body of material on which a view might well be taken that if the authorities discover that the person being returned is a failed asylum-seeker, he may be subject to torture or even worse, death".

were no doubt based on the material put before him. Whether they were even at that time valid is open to doubt but it is clear that now they cannot be relied on.

22. It follows that this appeal must be dismissed.

Sir Andrew Collins
President