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Heard at Field House

_M (Djebari Decision-
Evidence) Algeria CG [2003]
UKIAT 00089

On 20 August 2003

IMMIGRATION APPEAL TRIBUNAL

Date Determination notified:

1st October 2003

Before:

His Honour Judge N Ainley (Chairman)
Mr A Smith
Mr N Kumar, JP

Between

APPELLANT

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

DETERMINATION AND REASONS

1. This is a claimant's appeal from the determination of Mr Brennan, Adjudicator, sitting on 22 August 2002. By that determination Mr Brennan dismissed the appeal of the claimant from removal directions and refusal of asylum by the Home Office.
2. Leave was granted to appeal from the determination of the Adjudicator on limited grounds. Those grounds were whether, as a returning failed asylum seeker, the claimant would be at real risk of persecution for a Refugee or Human Rights Convention reason if he were to be returned to Algeria. There were many findings on credibility by the Adjudicator, but we do not need to refer to them for they are not the subject of appeal. It is sufficient

to say that this appeal is concerned with this claimant solely as a failed economic migrant to this country.

3. He is an Algerian citizen who was born on 4 December 1967, he is thus 35-years of age. He claims to have entered the United Kingdom on 8 June 2000. He claimed asylum on 15 June 2000 and it is from the refusal of that claim that the proceedings have sprung.
4. The question of the treatment of failed asylum seekers to Algeria has been before the Tribunal, and indeed the Court of Appeal, on occasions in the past. This matter was adjourned so that further expert evidence could be submitted on the topic, if such expert evidence were available. The Tribunal does now have before it material that was available at the last adjourned hearing and also a further report. I shall be referring to that material in the course of this determination.
5. I shall begin by referring to the expert's report of Professor Seddon which was initially compiled for another case, the case of Djebari [2002] EWCA Civ.813. This report was compiled on 26 September 2001 and the report is largely concerned with the risk on return of failed asylum seekers. I will quote from the passages that seem to us to be relevant to the issues that arise in this particular case. On the final page of his report, which is page 97 of our bundle, Dr Seddon states as follows:

“Failed asylum seekers are highly likely, on their return to Algeria, to be detained by the immigration security services for further questioning as to the reasons for being abroad and to having sought asylum. They are usually easily detected by virtue of the papers they carry which are often issued by the Algerian Embassy in the country in which they sought asylum, which mark them out from other Algerians returning after a period of time abroad. Those returning on an Algerian laissez-passer are, therefore, more likely to be detained and interrogated than those holding a legitimate Algerian passport – although it should be emphasised that all failed asylum seekers are at risk, and even someone with a valid passport, who has been refused entry to or returned from the UK is at risk of being detained and questioned.

This observation is substantiated by several reports from personal friends and colleagues of mine who have observed this process on arrival at immigration when returning themselves (after having been legitimately out of the country). It is also confirmed by other ‘specialists’ familiar with the procedures adopted – including Mr

George Joffe and Dr Hugh Roberts, both of whom have provided expert witness reports which refer to the routine questioning and detention of returnees (failed asylum seekers).

Those who are detained for questioning may be held *garde a vue* (incommunicado) for up to a week or so in order to allow stories to be checked and records consulted. The Algerian authorities have a good intelligence and record keeping system, which usually allows them to identify those who have been, for example identified as suspected political activists with one of the illegal Islamist movements or para-military groups, or as deserters from the army.

Individuals with suspicious or criminal backgrounds are still highly likely to be held in detention or passed swiftly to the appropriate military authorities and detention centres respectively. In detention there remains a strong risk that they will be subjected to brutal, inhuman and degrading treatment. Those without a file with the authorities, those not providing any basis for being suspected of 'undesirable' political affiliations, and those whose military service status is regular, are less likely to be held for long, and are less likely to be beaten or brutally treated while in detention. The very fact, however, that they have sought asylum in the first place puts them at risk and there are cases known to me (from former political asylum cases which have been refused by the UK Home Office) where returnees have been subjected to prolonged detention and very rough interrogation."

6. This report was supplemented after the judgment of the Court of Appeal in Djebari by Professor Seddon in a further report dated 13 June 2002 in which he clarified certain issues that arose in that case. I do not need to identify what those issues are but they refer back to Dr Seddon's initial report and add certain detail to that report that was not previously given. At page 117 of the bundle in the fourth paragraph, Professor Seddon wrote as follows:

"I understand that the Court of Appeal in the course of argument considered that the last paragraph of my first report was open to some ambiguity regarding the assessment of the degree of risk to Mr Djebari. I stated that in my opinion that "those without a file with the authorities, those not providing any basis for being suspected of 'undesirable' political affiliations, and those whose military service status is regular, are less likely to be held for long,

and are less likely to be beaten or brutally treated while in detention". I can only add to this assessment as to relativity that for persons in this category there remains a real risk that they will be detained for further interrogation and a real risk of brutal treatment.

Again, with reference to the Court of Appeals comment at paragraph 34 that the phrase used with such persons such as Mr Djebari without political affiliation and irregular military service status and without a criminal file are 'less likely' to be held for long and 'less likely' to be beaten or brutally treated does not evidence 'whether the degree of risk is now a real risk' but couches the risk in relative rather than positive terms. I can state that, even for persons in this category (of 'less likely') there is in my opinion a real risk of more prolonged detention and ill treatment.

If find it difficult in regard to this matter to make the very fine distinctions that the Court of Appeal appears to feel is possible, for example between a reasonable likelihood, a real risk and a serious possibility, if these are intended to mark a point on some scale of risk being applied to these cases. I attempted in my earlier reports to indicate a distinction between 'more likely' and 'less likely' and the criteria for making this distinction. I repeat that there is in my opinion in the case of Mr Djebari and indeed in the case of all returnees a real risk of more prolonged detention and ill treatment. If Mr Djebari were to be held it could well be for longer than the maximum 12-day limit pre-arraignment detention allowed by Algerian law, (which is already far in excess of that required by international standards). Longer than two weeks without charge would seem unlikely.

I take the point made by Lord Justice Schiemann at paragraph 34 of his judgment to the effect that "it is not helpful for the determination of the essential issues in this case to say that the risk of ill treatment is less than it was a few years ago" and note his statement to the effect that "the Tribunal will be concerned with whether the risk now is a real risk, not with whether that risk is less than it was a few years ago". The risk of prolonged detention and of ill treatment while in detention remains very real in cases like that of returned asylum seekers like Mr Djebari in Algeria today.

As to the risk of prolonged detention and rough interrogation for failed asylum seekers on return, I know directly of at least two cases of individuals who were

refused asylum by the Home Office and were subject on return to prolonged detention and what could only be described as very rough treatment. I have not been able to name these persons because of the risks this might lead to for them and their families, (through whom I learned of their treatment), given that reports of court hearings in the UK, such as the one to which this report is directed, can be obtained and passed on to those who might misuse them under the present circumstances in Algeria.

By rough treatment I mean serious physical and verbal abuse, the former including beatings and other forms of physical ill treatment. It is unlikely that the more extreme forms of torture and physical ill treatment would be applied to those returning asylum seekers without a file with the authorities, those not providing any basis for being suspected of 'undesirable' political affiliations and those whose military service status is regular."

7. Professor Seddon then goes on to illustrate instances of severe ill treatment by the Algerian police authorities, but in light of what he says about the likelihood of what he describes as the more extreme forms of torture and physical ill treatment being meted out on someone in this claimant's position, I do not need to set out in detail what he there says.
8. It would appear from what Professor Seddon says in this report that he has evidence of what he says are at least two cases of individuals who have been refused asylum by the Home Office who have been subject to very rough treatment, which I take to mean from what he says in the next paragraph, beatings or other forms of physical ill treatment but forms of ill treatment falling short of extreme forms of torture or physical ill treatment.
9. It is not easy, indeed it is impossible to say exactly what Professor Seddon means by this degree of ill treatment, but also we do not know what the background of the returned asylum seekers was in the two cases, it may be that there are more cases but he says at least two, where such ill treatment occurred. They may have been targeted by the authorities for some reasons, but we do not know whether they were.
10. The second expert's report is one that was produced by recently by Mr Emile Joffe for this Tribunal and this is dated 13 August 2003. Much of this report is of only marginal use to this particular hearing because it relied on Mr Mokhtari's assertions as to what had happened to him in Algeria. These no longer form part of the appeal. Mr Joffe deals with the issues to be faced on return to Algeria in his report at the fifth page.

"The Algerian authorities will be aware of his expected return because it will be necessary to apply for travel documents for him as he has no passport. If Mr Mokhtari is successfully returned to Algeria on travel documents obtained for him at the Algerian Embassy in London the border authorities in Algeria will have been warned of his impending arrival, because the delivery of such documents is only made upon approval from the security authorities in Algiers. It is normal for such persons to be interrogated upon arrival and, if there are grounds for any kind of suspicion, they can be detained in custody. This is the "*garde vue*" procedure used in Algeria, confirmed by a magistrate after 12 days when it becomes a "mandate de depot. In practice the period is often arbitrarily lengthened beyond the 12 days maximum without a magistrate being consulted, since the border authorities, being part of the security system, are effectively unaccountable to the legal authorities.

Quite apart from Mr Mokhtari's specific claims of regime hostility towards him, it should be borne in mind that detention in Algeria, as elsewhere in North Africa except perhaps Morocco, tends to be a testing experience to say the least. The security services customarily use physical abuse and torture as part of the interrogation procedure so that he is very likely to be ill treated. There is also a pre-disposition to assume that persons returned on travel documents are a potential threat to national security, so that the security services often assume they may have information about Islamist networks abroad who are engaged in supporting the violence inside Algeria. If Mr Mokhtari is suspected of this the ill treatment is likely to be severe ...

This is known to other European governments to be the case. In fact the process of return is fraught with uncertainties and danger in terms of the potential for ill treatment, as the German government admits. Although several governments do return Algerians now, all of them admit they do not monitor what happens after return. "

The comment about the German government is sourced from the CIPU enquiry to France, Germany, Netherlands and Belgium of February 2000 where those countries authorities were asked: "If you have returned asylum seekers any views/knowledge of how they have been treated at the airport of subsequently on return". The German government's response was:

“There are serious indications of torture in police custody but no proof that an Algerian expelled from Germany has been subject to “state repression.”

11. In addition to those reports, there is before the Tribunal, the CIPU report on Algeria of April 2003, as well as the bulletin on that country of February 2003 which relies heavily on a Netherlands report. We will turn first to the CIPU report. The relevant paragraphs begin at 6.153. I will begin to quote at 6.154.

“A 1998 report quoting an academic at the Centre for Middle Eastern and Central Asian Studies at the Australian National University stated the following. “It is certain that an unsuccessful asylum applicant who has a high profile in opposition or held a high ranking position in government, diplomatic corps or the armed forces would be subject to punitive measures by the state. And in the light of the above, if the unsuccessful applicant is neither known to the regime nor his asylum application, he or she categorically faces no threat to their life or freedom. Algeria is a country of hundreds of thousands of migrants and ex-patriots and movement by citizens is not in itself cause for concern or for state suspicion. Should the state have information on returning asylum seekers, especially those with no history of political opposition, Islamic affiliation or criminal activities, some irritations I should imagine should be expected. Asylum is not always about politics, it has economic motivations. The latter category does not necessarily invite state suspicion or retaliation. I see no problem with Algerian seekers of asylum, which more often than not are motivated by economic concerns, returning home without being retaliated against by the state.”

At 6.155: “Since the 1990s European countries have returned hundreds of such persons to Algeria, either under formal agreements or on a case by case basis. An Algerian has no need to fear persecution on return solely on the grounds of submitting an asylum application. ”

The sources for paragraph 6.155 and the assertions made in it are the report on Algeria by the Council of Immigration of the Embassy of Canada in Paris of May 2001 and the general country report on Algeria for December 2002 by the Netherlands Department of Immigration Affairs.

12. To continue from the CIPU report:

"6.156. Algerian nationals who return to Algeria after their request for asylum is rejected in another country are often interrogated upon their entry into Algeria to determine their identity and check whether there are any outstanding criminal proceedings or unfulfilled military service. It can happen that people are held for several days. In the last couple of years there have been no known cases in any European country of former asylum seekers who were maltreated nor tortured upon their return."

This was according again to the Netherlands report cited above.

13. At 6.157:

"Another report stated that while none of the countries concerned appears to have carried out a formal study of what happens to "deportees", they all believe they would have heard had persons who were returned to Algeria encountered serious difficulties. Deportees sometimes contact the Embassies concerned to sort out administrative matters relating to the time they spent in the other country, and none have ever complained of their treatment by Algerian authorities upon their return to Algeria. It could also be expected that relatives of deportees would in some cases make it known if a person had suffered at the hands of the Algerian authorities. There has been no incident of this sort ever brought to the attention of the Embassies concerned. The UNHCR office in Algiers and the Algerian Foreign Ministry reported that persons returned to Algeria do not encounter problems. "

The source for this is the Canadian Report already cited above and a further Canadian report of 24 January 2002.

14. Thus against this background the Tribunal must consider whether there is a real risk of persecution or Article 3 harm to Mr Mokhtari as a returned failed economic migrant and failed asylum seeker if he were to be repatriated to Algeria.

15. First, what is likely to happen to him immediately upon his return? It seems to us the answer to this is clear; he will be detained at the airport and he will be interrogated. That may be the end of the matter. On a balance of probabilities we would hold it likely that it would be the end of the matter. Even Mr Joffe states that it is only where suspicion is excited that a person is likely to be detained for any greater period of time than that required for his identity and other particulars to be clarified. However, in this Tribunal we are not concerned with balance of probability but

with real risk or real likelihood and we consider in light of what is said in the CIPU report and the report of Professor Seddon that there must be a real likelihood that Mr Mokhtari's detention may be for a longer period than that and that he may be detained incommunicado for a period of some days whilst enquiries are made into him.

He is not a person with a political or Islamist past. We must therefore consider what risks of physical ill treatment he would run. It seems to us that the evidence of Professor Seddon is that he might encounter a beating, he might encounter other forms of physical ill treatment, but he will not be likely to be severely tortured or to be seriously physically ill treated. At least that is how we view his report.

16. It may therefore be that even if one takes Professor Seddon's report at its highest, he will not be at real risk of harm so severe as to contravene the relevant Articles of the Refugee Convention or the Human Rights Convention. But we do not feel it appropriate to leave the matter there. We should consider what likelihood there is in reality that he will suffer any sort of physical maltreatment that this Tribunal should recognise? Evidently the possibility of such maltreatment exists. Professor Seddon is aware of two cases where it has occurred. But as against that, we must also pay heed to the widespread experience of many western countries who have been returning failed asylum seekers to Algeria over a long period of time. We consider it inconceivable that if there was any real risk of ill treatment on a more than isolated basis of returned failed asylum seekers that word would not have got out by now.
17. Persons have been returning to Algeria in substantial numbers, not of their own free will but as failed asylum seekers from many western countries for many years now. In the CIPU report hundreds are specified. We would venture to suggest from our experience that the number must be thousands by now, from all the countries that are returning persons to that country. It would be astonishing, if there were any real risk of serious physical ill treatment of these people that no word of it has reached any of these Embassies. And yet it appears that none has.
18. We do not say that Professor Seddon is incorrect in recounting the detail that he has of the specific cases that are known to him. We do not know anything, as we have already pointed out, of the suspected political background of the two cases that he has instanced of serious ill treatment. No doubt such isolated cases do occur but that is not to say that in this case there is a real risk of such ill treatment being inflicted on Mr Mokhtari. This Tribunal is here to assess whether there is a real risk or real

likelihood of serious physical harm eventuating and we consider on all the material that has been placed before us that even though there is a real risk that he will be detained under the *gard a vue* procedures, there is not a real risk of the sort of physical harm that engages either the Refugee or Human Rights Convention being visited upon him.

19. For these reasons we consider that this appeal must be dismissed.

**His Honour Judge N Ainley
Vice President**