Upper Tribunal
(Immigration and Asylum Chamber)

AH (Article 1F(b) – 'serious') Algeria [2013] UKUT 00382 (IAC)

THE IMMIGRATION ACTS

Heard at Field House
On 30 October 2012

Determination Promulgated

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Before

THE PRESIDENT, THE HON MR JUSTICE BLAKE
UPPER TRIBUNAL JUDGE GLEESON
UPPER TRIBUNAL JUDGE KING

Between

AH

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Naina Patel, instructed by Luqmani Thompson & Partners
For the Respondent: Paul Greatorex, instructed by Treasury Solicitors

1. *In considering exclusion under Article 1F(b), the test is whether there are 'serious reasons to consider that the appellant is guilty of conduct that amounts to a serious non-political offence'. 'Serious' in this context has an autonomous international meaning and is not to be*

defined purely by national law or the length of the sentence. Guidance on the meaning of 'serious' in relation to Article 1F(c) may be found in the decision of the Supreme Court in Al-Sirri and another v Secretary of State for the Home Department [2012] UKSC 54 at paragraph [75]. Arts 1F(a) and (c) serve to illustrate the level of seriousness required to engage Article 1F(b); the genus of seriousness is at a common level throughout.

2. *A claimant's personal participation in acts leading to exclusion under Article 1F(b) must be established to the ordinary civil standard of proof, that the material facts are more probable than not. The appellant's guilt need not be proved to the criminal standard. Personal participation in a conspiracy to promote terrorist violence can be a 'serious crime' for the purpose of Article 1F(b). Where the personal acts of participation by a claimant take the form of assistance to others who are planning violent crimes, the nature of the acts thereby supported can be taken into account. The relevant crime may be an agreement to commit the criminal acts (in English law a conspiracy), rather than a choate crime.*

3. *In the absence of some strikingly unfair procedural defect, United Kingdom courts and tribunals should accord a significant degree of respect to the decision of senior sister Courts in European Union legal systems; there is a particular degree of mutual confidence and trust between legal systems that form part of the same legal order within the European Union. However, the ultimate question of whether the conduct of which the United Kingdom court or Tribunal is satisfied is sufficiently serious to justify exclusion is a matter for the national court or tribunal.*

4. *The examination of seriousness should be directed at the criminal acts when they were committed, although events in the supervening passage of time may be relevant to whether exclusion is justified: a formal pardon, or subsequent acquittal, or other event illuminating the nature of the activity may be relevant to this assessment. Despite suggestions to the contrary by respected commentators, it does not appear to be the case that service of the sentence, or indeed a final acquittal, brings the application of the exclusion clause to an end.*

DETERMINATION AND REASONS

Introduction

1. The appellant is an Algerian citizen who cannot return to Algeria as his life and liberty are in jeopardy and it is recognised that he has a well founded fear of persecution there. He arrived in the United Kingdom in 2001 and claimed asylum and humanitarian status. Those claims were refused because the Secretary of State concluded that the exclusion clauses applied in both cases.

2. The appellant has been granted periods of discretionary leave for six months at a time and there are no removal directions. He appealed against the refusal of status in 2006 and his appeal has not been finally resolved since. In the appeal he seeks to upgrade his status from discretionary leave to remain to that of refugee or humanitarian status under Council Directive 2004/83/EC (the Qualification Directive).

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3. The basis for his exclusion was his conviction in France in 1999 of the offence of '*participation à une association de malfaiteurs en relation avec une entreprise terroriste*' (*'*participation in a criminal association with a terrorist enterprise'*)*.

4. He had been acquitted of this offence by the Tribunal de Grand Instance on 30 June 1998 but given a six month sentence for a lesser offence of possession and use of false documents. The prosecutor appealed the acquittal and, on a re-hearing before the Cour d'Appel, he was convicted of the above offence and sentenced to two years' imprisonment that had already been served on remand.

5. The particulars of charge, translated from the French, were :

> 'In Paris, Nanterre, and the Lyon region, during 1994, 1995 and 1996, more precisely, until October 1995 at any rate on French territory for an unspecified length of time, having been involved in a gang formed or arrangement set up in view of the preparation- demonstrated by one or more material facts - of acts of terrorism in connection with an individual or collective undertaking which aimed to seriously disturb public order through intimidation or terror. In Paris, during 1995, at any rate on French territory for an unspecified length of time, committed a fraudulent manipulation of the truth likely to cause damage to documents issued by a public authority in view of granting a right, identity or capacity, granting a permission; in the case in point, a passport in the name of Gutierrez and an identity card in the name of Wane and having made use of those documents. With the additional circumstance that all of the above-mentioned offences were committed directly or indirectly in connection with an individual or collective undertaking which aimed to seriously disturb public order through intimidation or terror.'

6. Article 1F of the Refugee Convention[1] is in the following terms:

> "The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
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> > (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;
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> > (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
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> > (c) he has been guilty of acts contrary to the purposes and principles of the United Nations."

7. The Secretary of State relies principally on Article 1F(b) although she also prays in aid Article 1F(c).

[1] Geneva Convention relating to the Status of Refugees 1951 and New York Protocol 1967

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8. Here, there are clearly serious reasons for considering that the appellant has committed a crime outside the country of his refuge prior to his admission to the United Kingdom; the French Cour d'Appel has convicted him of such a crime and its judgment is before us. It is not contended that this conviction was for a political crime as it was a crime committed against the law of a host state to which the appellant had fled in 1992 from Algeria. France is, of course, both a Member state of the European Union and a party to the European Convention on Human Rights.

9. The sole issue under Article 1F(b) is whether the crime of which he is convicted is a serious one. This apparently simple issue has proved difficult to resolve. It is common ground that the offence of possession/use of false identity documents alone is not sufficiently serious to lead to exclusion from the Refugee Convention, whilst personal participation in a terrorist conspiracy against the French state probably would be.

10. In 2006 the Asylum and Immigration Tribunal dismissed his appeal but reconsideration was ordered. On 19 January 2010, the AIT again dismissed the appeal, but in doing so used the concept of "membership of a group", following Gurung (Exclusion-Risk-Maoists) Nepal [2002] UKIAT 04870 (starred) [2003] Imm AR 115, to attribute to the appellant the terrorist activities of others and found him to be excluded under both Articles 1F(c) and 1F(b).

11. The decision of the Supreme Court in R (JS (Sri Lanka)) v Secretary of State for the Home Department [2011] 1 AC 184 disapproved this approach to the application of the exclusion clause and the authority of Gurung, on which it had been based. The Court of Justice of the European Union had similarly concluded that individual participation in crime was needed in Bundesrepublik Deutschland v B and D (Cases C-57/09 and C-101/09) [2011] Imm AR 190, when it considered Article 12 of the Qualification Directive, where the same words are used as in Article 1F.

The decision of the Court of Appeal:

12. The AIT's second decision in the present case was set aside by the Court of Appeal on 3 April 2012 (AH (Algeria) v Secretary of State [2012] EWCA Civ 395) and the appeal remitted to the Upper Tribunal for remaking for a third time.

13. Sullivan LJ gave the leading judgment. He observed:

> "18. If the underlying objective for the purpose of Article 1F is to establish the individual's personal role and responsibility, the nature of the particular offence with which this Appellant was charged presents a problem. In "The Investigation and Prosecution of Terrorists Suspects in France", an independent report commissioned by the Home Office, dated November 2006, Professor Jacqueline Hodgson says that the expanded definition of terrorism in 1996:
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> > "…widened the scope of the *magistrates*' powers significantly, allowing them to open investigations into those involved with terrorist organisations

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> (within and outside France) before any terrorist act had taken place. …This offence pushes back the boundary of criminality, enabling the judge to act very much earlier when no act has been committed, but when the 'suspect' is perhaps buying materials, is in the very early stages of preparation towards a terrorist act, or is simply associating with a group established to prepare acts of terrorism – even when the judge is unable to identify a specific date or terrorist target to which these activities are linked." (emphasis added)

19. While it is true that the French Appeal Court did not simply find that the Appellant was in close contact with men involved in terrorist acts, it went further and concluded that he belonged to a "common organisation", it was not necessary for the French Appeal Court to form any view as to the Appellant's role in the "conspiracy or grouping formed with a view to committing terrorist acts", nor was it necessary to establish that the group had carried out any particular preparatory act: it was sufficient that the conspiracy or grouping had been "formed with a view to the preparation, taking the form of one or more material acts, of acts of terrorism …." (emphasis added).

20. It is not clear what "material acts" were relied upon by the Appeal Court in allowing the prosecutor's appeal. The only specific conduct attributed to the Appellant was that he falsified a French passport by affixing his own photograph in place of the genuine holder

> "…so that he could travel in connection with unlawful activities of that organisation or grouping, and where necessary to escape any investigations which might be carried out by the French police as a result of that organisation or grouping in France."

The conviction relates to the falsification of administrative documents. The Appellant had also falsified a French national identity card by affixing a photograph of his brother. While the Appeal Court found his explanation for this unconvincing, it said that "the actual circumstances in which his brother in Algeria was to use this falsified document are unknown."

21. There can be no dispute that, as an instrument of state policy, "nipping terrorism in the bud" is eminently sensible. However, if the criminal law framed in aid of the policy foils the aspiring terrorist's intentions well before he has undertaken any, or any significant, preparatory acts, then the consequence for the purpose of Article 1F may well be that the offence of which he is convicted, at the outer boundary of criminality, will not be an offence which is so serious as to exclude him from protection under the Convention."

14. He then concluded:

"30. I do not accept the submission that each signatory state is free to adopt its own definition of what constitutes a serious crime for the purpose of Article 1F(b). In JS Lord Brown recorded in paragraph 18 of his judgment that it was common ground between the parties "that there can be only one true interpretation of Article 1F(a), an autonomous meaning to be found in international rather than

domestic law". This approach was endorsed by Pill LJ in DD in the context of Article 1F(c): see paragraph 47 of his judgment.

31. It seems to me that the same approach must apply to paragraph (b) in Article 1F. While the Convention leaves it to the domestic courts of the signatory states to decide whether, in any particular case, a non-political crime is "serious", that determination must be founded upon a common starting point as to the level of seriousness that must be demonstrated if a person is to be excluded from the protection of the Convention by reason of his past criminal conduct.

32. Although the parties' researches did not identify any binding domestic authority on the point, the proposition that signatory states do not have an unfettered discretion when deciding whether an offence is "serious" for the purpose of Article 1F(b) is supported by academic authority. In The Refugee in International Law 3rd Edn. Professor Goodwin-Gill says:

> "Each State must determine what constitutes a serious crime, according to its own standards up to a point, but on the basis of the ordinary meaning of the words considered in context and with the objectives of the 1951 Convention. Given that the words are not self-applying, each party has some discretion in determining whether the criminal character of the applicant for refugee status in fact outweighs his or her character as *bona fide* refugee, and so constitutes a threat to its internal order. Just as the 1951 Conference rejected 'extradition crimes' as an *a priori* excludable category, so *ad hoc* approaches founded on length of sentence are of little help, unless related to the nature and circumstances of the offence. Commentators and jurisprudence seem to agree, however, that serious crimes, above all, are those against physical integrity, life and liberty." (page 176)

33. There would appear to be a degree of uniformity among the commentators that the Handbook sets the threshold at or about the correct degree of seriousness. Thus, Professor Grahl-Madsen concluded in "The Status of Refugees in International Law" that:

> "As we see it, Article 1F(b) should only be applied in cases where the person in question is considered guilty of a major offence (a '*crime*' in the French sense of the word), and only if the crime is such that it may warrant a really substantial punishment, that is to say: the death penalty or deprivation of liberty for several years, and this not only according to the laws of the country of origin, but also according to the laws of the country of refuge." (page 297)

34. In "The Law of Refugee Status" Professor Hathaway agrees with Grahl-Madsen:

> "Atle Grahl-Madsen interprets this clause to mean that only crimes punishable by several years' imprisonment are of sufficient gravity to offset a fear of persecution. UNHCR defines seriousness by reference to crimes which involve significant violence against persons, such as homicide, rape, child molesting, wounding, arson, drugs traffic, and armed robbery. These are crimes which ordinarily warrant severe punishment, thus making clear

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> the Convention's commitment to the withholding of protection only from those who have committed truly abhorrent wrongs." (page 224)

35. Professor Gilbert in "Current issues in the application of exclusion clauses", a background paper commissioned by the UNHCR, points out that the statement in the Handbook is not supported by authority in international or domestic law, but suggests that while capital crimes may not in and of themselves be a sufficient test, "offences of sufficient seriousness to attract very long periods of custodial punishment might suffice to guide states as to what might fulfil Article 1F(b)". (page 449)

36. In a statement provided to the Grand Chamber in the B and D case, the UNHCR set out its view as to the seriousness of the acts covered by Article 1F, as follows:

> "All the types of criminal acts leading to exclusion under Article 1F of the 1951 Convention involve a high degree of seriousness. This is obvious regarding Article 1F(a) and (c), which address acts of the most egregious nature such as "war crimes" or "crimes against humanity" or "acts contrary to the purposes and principles of the United Nations". In light of its context and the object and purpose of the exclusion grounds highlighted above, a "serious non political crime" covered by Article 1F(b) must also involve a high threshold of gravity. Consequently, the nature of an allegedly excludable act, the context in which it occurred and all relevant circumstances of the case should be taken into account to assess whether the act is serious enough to warrant exclusion within the meaning of Article 1F(b) and 1F(c)." (paragraph 2.2.1)

37. The four questions answered by the Grand Chamber in B and D did not directly address this issue, but the Grand Chamber did say in paragraph 108 of its judgment:

> "[108] Exclusion from refugee status on one of the grounds laid down in Article 12(2)(b) or (c) of Directive 2004/83, as stated in respect of the answer to the first question, is linked to the seriousness of the acts committed, which must be of such a degree that the person concerned cannot legitimately claim the protection attaching to refugee status under Article 2(d) of that directive."

38. In paragraph [109] of its judgment the Grand Chamber accepted the submission of, inter alia, the UK Government, that Article 12(2) did not require a proportionality assessment, but it did so upon the basis that the competent authority would already have undertaken an assessment of the seriousness of the acts committed by the person concerned and of that person's individual responsibility, so that "a fresh assessment of the level of seriousness of the acts committed was not required." It is clear, therefore, that for the purpose of Article 12(2)(b) or (c) there must be an assessment of the level of seriousness of the acts committed, and the seriousness must be of such a degree that the offender cannot legitimately claim refugee status.

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39. The Tribunal did not give separate consideration to paragraphs (b) and (c) in Article 1F. While terrorism is a grave international threat, merely labelling an offences a terrorist offence is not sufficient, of itself, to establish that the offence is a serious offence for the purpose of Article 1F(b). There is no discussion in the Tribunal's determination of either the seriousness of this particular terrorist offence, or the appropriate threshold of seriousness for the purpose of Article 1F.

40. While I would accept that an offence which carries a maximum sentence of 10 years imprisonment is capable of being the kind of offence which warrants "severe" or "really substantial" punishment, or which attracts a "very long period" of custodial punishment, the fact that this Appellant was sentenced to 2 years imprisonment suggests that such facts as were found in respect of his particular offence placed it at the lower end of seriousness of this kind of offence.

41. I do not overlook the fact that the [French] Appeal Court said that the original sentence of six months imprisonment was "not proportionate to the serious nature of the acts and the disruption to public order", and was of the opinion that "by reason of the seriousness of the acts" only a non-suspended sentence was appropriate, but these observations are simply a reflection of the fact that "seriousness" is bound to be a relative concept when a domestic court is considering the appropriate sentence for a particular offence. Nor do I overlook the fact that "definitive deportation" was ordered as an additional penalty.

42. Taking all of these factors into account, I do not see how it could have been concluded on the basis of the very limited findings of the French Appeal Court that the particular offence of which this Appellant was convicted crossed the threshold of seriousness for the purpose of Article 1F(b), as that threshold has been variously described by the academic commentators referred to in paragraphs 32-36 (above). Further discussion of the threshold is unnecessary because there is another, fatal, flaw in the Tribunal's reasoning."

15. Lord Justices Rix and Ward concurred in the result but for briefer reasons: the Tribunal had erred in its approach and it was unclear, from the extracts from the judgment of the French Cour d'Appel cited by the Tribunal, precisely what overt acts the appellant had committed.

16. The appeal was heard in the Upper Tribunal on 30 October 2012, and the decision reserved, with leave to the parties to provide written closing submissions within 21 days. The appellant did not give further oral evidence. The appeal proceeded on the basis of the facts already found and the documentary material before the Upper Tribunal.

The decision of the Supreme Court in Al-Sirri

17. On 21 November 2012, the United Kingdom Supreme Court published its decision in Al-Sirri and another v Secretary of State for the Home Department [2012] UKSC 54 and the parties were also given an opportunity to make submissions on that judgment. The case concerned whether participation in armed uprisings could amount to acts contrary to United Nations for the purposes of Article 1F(c).

18. The Supreme Court identified three issues for consideration in that decision:

    i. whether all activities defined as terrorism by our domestic law are for that reason alone acts contrary to the purposes and principles of the United Nations, or whether such activities must constitute a threat to international peace and security or to the peaceful relations between nations;

    ii. whether armed insurrection is contrary to the purposes and principles of the United Nations if directed, not only against the incumbent government, but also against a United Nations-mandated force supporting that government, specifically the International Security Assistance Force ("ISAF") in Afghanistan; and

    iii. what is meant by "serious reasons for considering" a person to be guilty of the acts in question?

19. The principles and purposes of the United Nations are set out in Article 1 of its Charter and summarised at paragraph 10 of the judgment:

> "10. The purposes of the United Nations are set out in article 1 of the Charter. The first purpose is
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> > "1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace."
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> "The second is "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace"; the third is "to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian nature", and in "promoting and encouraging respect for human rights and for fundamental freedoms for all"; and the fourth is to be a centre for harmonising the actions of nations in the attainment of these common ends."

20. The Court held that:

    (i) Article 1F(c) must be interpreted narrowly and applied restrictively, following in particular the commentary of Grahl-Madsen in *The Status of Refugees in International Law*, 1966, p 283 that such was the basis on which agreement was reached to insert the provision into Article 1F;

    (ii) The Article 1F(c) exclusion applies to acts which, "even if they are not covered by the definitions of crimes against peace, war crimes or crimes against humanity as defined in international instruments within the meaning of Article 1F(a), are nevertheless of a comparable egregiousness and character, such as sustained human rights violations and acts which

have been clearly identified and accepted by the international community as being contrary to the purposes and principles of the United Nations";

(iii) Not every act condemned by the United Nations is to be deemed contrary to its principles and purposes. The Court looked for guidance to the UNHCR Background Note on the application of the Exclusion Clauses (September 2003) at paragraph 47:

> "... [Article] 1F(c) only applies to acts that offend the principles and purposes of the United Nations in a fundamental manner. Article 1F(c) is thus triggered only in extreme circumstances by activity which attacks the very basis of the international community's co-existence under the auspices of the United Nations. The key words in article 1F(c) 'acts contrary to the purposes and principles of the United Nations' should therefore be construed restrictively and its application reserved for situations where an act and the consequences thereof meet a high threshold. This threshold should be defined in terms of the gravity of the act in question, the manner in which the act is organised, its international impact and long-term objectives, and the implications for international peace and security. Thus, crimes capable of affecting international peace, security and peaceful relations between states would fall within this clause, as would serious and sustained violations of human rights."

(iv) Mere membership of a terrorist organisation is insufficient to engage the exclusion provisions of Article 1F(c). At paragraph 15 of the judgment, their Lordships held that:

> "Thirdly, for exclusion from international refugee protection to be justified, it must be established that there are serious reasons for considering that the person concerned had individual responsibility for acts within the scope of article 1F(c): see the detailed discussion at paras 50 to 75 of the UNHCR "Background Note". This requires an individualised consideration of the facts of the case, which will include an assessment of the person's involvement in the act concerned, his mental state and possible grounds for rejecting individual responsibility. As a general proposition, individual responsibility arises where the individual committed an act within the scope of article 1F(c), or participated in its commission in a manner that gives rise to individual responsibility, for example through planning, instigating or ordering the act in question, or by making a significant contribution to the commission of the relevant act, in the knowledge that his act or omission would facilitate the act. ..."

(v) It was not appropriate to apply the criminal standard of proof of guilt although 'considering' was stronger than 'believing', which was the word Lord Brown in JS (Sri Lanka) thought at [39] it was more approximate to than 'suspecting'. The Court concluded at [75]:

> "We are, it is clear, attempting to discern the autonomous meaning of the words "serious reasons for considering". We do so in the light of the UNHCR view, with which we agree, that the exclusion clauses in the

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Refugee Convention must be restrictively interpreted and cautiously applied. This leads us to draw the following conclusions:

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

(2) The evidence from which those 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 judgment of the decision-maker.

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

(5) It is unnecessary to import our domestic standards of proof into the question. The circumstances of refugee claims, and the nature of the evidence available, are so variable. However, if the decision-maker is satisfied that it is more likely than not that the applicant has *not* committed the crimes in question or has *not* been guilty of acts contrary to the purposes and principles of the United Nations, it is difficult to see how there could be serious reasons for considering that he had done so. The reality is that there are unlikely to be sufficiently serious reasons for considering the applicant to be guilty unless the decision-maker can be satisfied on the balance of probabilities that he is. But the task of the decision-maker is to apply the words of the Convention (and the Directive) in the particular case."

The fuller translations

21. In the course of our deliberations we discovered that there were parts of the French judgments that had not been translated into English. In the case of the Paris Cour d'Appel proceedings, the translation omitted all parts of those proceedings not directly related to the present appellant. We considered, particularly in the light of the history and issues in this case, that we should have the fullest understanding of what the French courts had decided and why, and we directed that the remaining passages be translated. The principal charges laid against the appellant and his sixteen co-defendants were conspiracy charges: many of the other defendants were found by the Cour d'Appel to have been involved, with various degrees of responsibility, in the conspiracy.

22. At our request, a full professional translation of the first instance and Cour d'Appel proceedings was provided to us in January 2013 and it is on the basis of that translation that we consider the decisions of the French courts.

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The background to the appellant's arrest in France

Events in Algeria

23. The appellant's arrest and conviction occurred at a time of heightened terrorist activity in France by Algerian nationals in the 1990s, which for the purpose of this appeal began with the banning of the political party FIS (Front Islamique du Salut) in Algeria in 1992, after it won a resounding victory in the Algerian elections. The sequence of events in Algeria and France in the early 1990s is well known to judges of this Chamber and the following background is taken from information in the public domain. There was an army-led coup, a state of emergency was declared, and on March 4 1992, the FIS was dissolved by government decree. Prominent FIS leaders were arrested: those who could move abroad to continue political opposition from there or seek safety in exile.

24. The Groupe Islamique Armé (GIA) was opposed both to the Algerian government and the FIS, formed in July 1992 as a breakaway from the FIS and the Mouvement Islamique Armee (MIA). On 26 August 1992 Algiers airport was bombed, killing 9 and injuring 128. Hossein Abderrahim, a member of the FIS, was arrested, tortured, and executed for his part in the bombing. Algeria descended into civil war. Government reprisals were swift and many of those convicted in relation to the bombing were executed.

25. After the Algiers airport bombing and the executions which followed, many of those connected with the FIS and GIA travelled abroad, where they continued their activities of fund raising for the cause, and planned, and carried out, acts of terrorism. The leader of the FIS, Mourad Dhina, travelled to Switzerland where he successfully claimed political asylum and continued to engage with those working in France.

26. The appellant himself on his own admission was connected with the FIS in Algeria and left Algeria in 1992. In 1993 he was convicted in absentia for participation in the airport bombing and sentenced to death. Neither the Secretary of State, nor the French Cour d'Appel relied on the fact of his Algerian convictions, but his connection with Algerian militants in France needs to be seen against the background of these events.

27. The appellant was lawfully in France, first as a businessman and later on various temporary residence permits, until mid-1995. He did not have leave to remain thereafter. The criminal proceedings began with his arrest in October 1995 in connection with a wave of terrorist incidents across France that summer. The overt acts in this campaign are a matter of public record and the background at [28] to [34] is derived from publicly available sources to set the context from the arrest of the appellant and his immediate associates.

Algerian terrorism in France

28. In 1994, Yassin Boubekeur arranged transport of arms for the GIA to Sweden.

29. On 11 July 1995, Imam Sahraoui was assassinated in Paris by Khaled Kelkal and a national manhunt for Kelkal commenced. It was thought that the assassination was ordered by the GIA or persons close to that organisation, because the Imam's position was too moderate, and there were suspicions that he had embezzled GIA funds.

30. Meanwhile, on 25 July 1995, a three-man cell comprising Rachid Ramda, Boualem Bensaïd and Smain Belkacem organised a bomb attack on the Paris Metro. Ramda was the financier and organiser of the attack. A glass bottle full of nails exploded in the St Michel RER station, killing 8 and seriously injuring another 87 civilians. Ramda escaped to the United Kingdom in November 1995, but was extradited to France in December 2005.

31. On 26 August 1995, the third anniversary of the Algiers airport bombing, Kelkal placed a gas bottle bomb on the Paris-Lyon TGV line, near Cailloux-sur-Fontaines in the Rhône area. It was very similar in manufacture to the St Michel bomb. The TGV bomb was discovered and made safe before it exploded.

32. On 7 September 1995, Bensaïd, described as Kelkal's superior, was responsible for the planting of a car bomb which exploded outside a Jewish school in Villeurbanne, a suburb of Lyon, timed to coincide with the end of the school day. Fortunately, the children came out of school late on that day, and no one was hurt, but the potential for harm to the schoolchildren and those collecting them from school was significant.

33. On 29 September 1995, Kelkal was shot and killed in the Forest of Malval, near Lyon, while resisting arrest. His address book was found and used to locate and arrest other members of the terrorist network. On the same day, Bensaïd was arrested in Paris. He was found to have been planning a further bombing in Lille. He was later convicted of the abortive bombing of the Paris-Lyon TGV train and sentenced to 30 years' imprisonment.

The arrests in 1995 and 1996

34. The information derived from the French criminal proceedings is as follows.

35. In March 1995, Djamel Tehari was arrested. He was found to have on him a list of weapons to be purchased, and an electronic diary in which many of the telephone numbers were encoded which provided useful information on the rest of the network with which he was involved. He was in due course prosecuted along with the appellant.

36. On 22 September 1995, three scientists were arrested in the Lyon area. Ali Drif was working as a research assistant at INSA (the National Institute of Applied Science) in Lyons. The two others, Kamel Eddine Ouadou and Sebti Bouabdallah were lecturers in mathematics and information technology at the Ecole Centrale in Lyons.

37. On 6 October 1995, the appellant was arrested, along with a relative described variously as his brother-in-law or cousin whom we will refer to as his cousin KS, who was looking after two falsified identity documents, namely a passport and an identity card, for him, in the names of Guterriez and Wane.

38. On 13 May 1996, the authorities arrested ten men who ran a document forgery ring from an Algerian workers' hostel, the Foyer Sonacotra, in Nanterre: their leader, Salem Nassah, allowed Algerians to stay in the hostel without papers and kept a telephone line which was manned and messages taken by the other members of the team. The full list of those arrested was: Salem Nassah, Khaled Abaidia, Nacer Bouhemila, Yousr Dahdouh, Mohamed Hanachi, Abdelfateh Khankar, Mohamed Toufik Kridech, Youssef Layachi and three men whose real names were unknown but who gave their names as Hamralaf Meddah, Mohamed Mehaibia, and Fouad Touhami. As well as trading in personal identity documents, they admitted buying used cars in France which they shipped back and sold in Algeria, altering or forging the logbooks to make them appear newer than they were.

39. There were further arrests at Briançon in the High Alps, Rive-de-Gier in Loire, and in the Rhone Alps region, in particular at Chasse-sur-Rhône.

The Tribunal de Grand Instance

40. The appellant and sixteen other men were tried in Paris before the Tribunal de Grande Instance on 30 June 1998. They were charged with the French conspiracy charge of participating in an association of wrongdoers with a view to the preparation, characterised by one or several material facts, of a terrorist offence punishable by a sentence of 10 years. The offence was one of a number of anti-terrorist measures introduced into French law in the early 1990s. As has already been noted by the Court of Appeal these laws have been controversial in their application to conspiracy cases.

41. Tehari, who was charged only with the terrorism offence, was convicted and sentenced to five years' imprisonment and permanent exclusion from French territory. Nothing further is heard of him in the French court documents in the present appeal. The three scientists were acquitted of all charges, the determination in relation to Bouabdallah being reserved and the other two judgments pronounced orally.

42. The appellant was convicted at first instance only of the documents charge, sentenced to six months in prison, but not excluded from French territory. His cousin KS was also convicted in relation to his custody of the two falsified documents and irregular stay in France. He received a sentence of four months' imprisonment and no exclusion from French territory.

43. The forgery group were all convicted only of documents charges. They received sentences varying from just a few months to 14 months. Those who were in France

irregularly were also excluded from French territory for three years: those who had leave to remain received no exclusion sentence.

The Cour d'Appel

44. The French prosecutor appealed against all the acquittals. There was one additional defendant, Abdelhakim Dridi. Most of the defendants did not appear or arranged representation; most of them appear to have been served, but three of the document forgers had no known address by this stage. The cases of the missing defendants were decided *in absentia*.

45. The four defendants who appeared at the Cour d'Appel hearings were this appellant, his cousin KS, and two of the three scientists, Drif and Ouadou. All of them were legally represented at the beginning of the hearings. KS and the scientist Ouadou had separate lawyers. At the beginning of the appeal, Drif (the other scientist) and the appellant were represented by the same lawyer.

46. On the first day of hearing the appeal, 16 September 1999, the Cour d'Appel heard oral evidence from the appellant and KS. However, during that day, Drif indicated that he wished to be separately represented and that he no longer wished the appellant's lawyer to represent him. At the end of the first day, the Court appointed a lawyer to represent Drif, and adjourned the appeals for a week.

47. When the case resumed on 23 September 1999, the Court heard oral evidence from Drif and Ouadou, submissions from the Assistant Public Prosecutor, and from KS's lawyer. The following day, oral pleadings were taken from lawyers for the appellant, Drif and Ouadou. The appellant, Drif, Ouadou and KS were also permitted to make personal statements to the court. The Court reserved its judgment until 22 October 1999. When the hearing resumed, the Court formally joined the case of the absent defendant Dridi to that of the other defendants.

48. The judgment sets out the submissions of each party. In relation to the appellant, the Prosecutor highlighted the improbability of his statements being true and asked the Court to overturn the acquittal on the charge of being involved in a criminal gang, and for him to be convicted and sentenced to 30 months in prison and permanent exclusion from French territory. The appellant's lawyer submitted that there was no case against him; that there was no evidence that he was preparing an act of terrorism or even intended to, nor that he was in possession of a weapon or explosives; and that the Court had two options available, either to take a 'blinkered approach' and convict, or to uphold the first Court's decision.

The lesser defendants

49. The Court's decision dealt first with the lesser defendants. The prosecutor deferred to the opinion of the Court in relation to Layachi and Touhami, and in relation to the motivation of Hanachi and KS since 'they could have been manipulated'. The Cour d'Appel upheld the acquittals of Layachi, Medjadi and Touhami on the conspiracy

charge, but upheld both conviction and sentence in relation to Touhami and Layachi for unauthorised residence. In relation to Hanachi, the Court confirmed his earlier conviction for documents offences and the five months sentence imposed by the first court.

50. In relation to KS, the Court noted that he had never claimed to have been manipulated or forced to look after the appellant's false documents, by the appellant or anyone. Rejecting the prosecution concession, the Cour d'Appel considered that KS must have known that it would be legally impossible to exclude the appellant from French territory since he faced a death sentence in Algeria. There was no reason therefore for himself to fear *refoulement* to Algeria and the appellant's creation of a fake passport for himself 'could only have been intended to help [the appellant] evade being discovered in France, which means that he must have been involved in France in committing acts which are punishable under [French] criminal law'. A four months' suspended sentence did not adequately reflect the seriousness of KS's offence and only a custodial sentence would do. He was sentenced to five months' imprisonment and five years' exclusion from French territory.

51. In the case of Kridech, the Court upheld his documents conviction. As one of the forgery unit, he was in contact with the members of a group which was sufficiently organised to steal and sell blank passports, had boasted to Nassah about it and suggested to two other people that he could provide them with forged documents. He had suggested himself to Nassah as a supply source of forged documents. However, the Court found that Kridech was not linked to the terrorists: he was a mere criminal. They considered that the sentence below did not sufficiently reflect that he both stole and used forged documents and did so frequently. Kridech had subsequently married a French wife, but the offences were committed before he did so; the marriage was disregarded in concluding that a sentence of ten months (not the seven months imposed by the Court below) and an additional penalty of ten years' exclusion from French territory better reflected the seriousness of his actions.

52. In the case of Bouhemila, the Court upheld the documents conviction below. It reversed his acquittal in part, and convicted him of being an accessory to the principal charge committed by Nassah of unlawfully obtaining administrative documents, but upheld the acquittal in relation to the terrorism conspiracy charge. In place of the six months' imprisonment and three years' exclusion imposed below, the court imposed a year's imprisonment and permanent exclusion from French territory, as the defendant had been fully integrated into Nassah's documents ring, even staying at the Foyer Sonacotra run by Nassah in Nanterre.

53. Mehaibia's acquittal on the terrorism charge was overturned. He had worked out of the Foyer Sonacotra in Nanterre, where he was arrested. He worked with Khankar importing second-hand cars to Algeria, falsifying registration cards for those vehicles. He was able to say without difficulty how much it would cost to get a false work permit in Italy; he left his own passport in Naples where he visited Nasser

Yacine, who was known to be involved with FIS. He was sentenced to 18 months in prison on appeal, and permanent exclusion from French territory.

54. The additional defendant, Dridi, had been involved with Nasser, Khankar and Mehaibia in the export of second-hand vehicles to Algeria and in falsifying the vehicle documents, to make the cars seem newer than they were. He dealt with Khankar via Nasser and assisted them in supplying false documents. That was a lucrative criminal business, but the Cour d'Appel considered that Dridi's part in it was merely criminal and not connected with terrorism. He was convicted as an accessory to the document forgery charges and sentenced to a fixed prison term of 18 months and permanent exclusion from French territory.

55. Similarly, the Cour d'Appel upheld the sentences of Meddah and Dahdouh, for possession of false documents, but did not consider that they were part of the terrorism conspiracy group, partly because the group had charged Dahdouh a substantial amount (Fr. 30,000) for a false residence card. The court did not consider that the network would have charged a member of the terrorist group for a false document. Dahdouh had been allowed to use Nassah's accommodation at the Foyer Sonacotra. In relation to Meddah, the Cour d'Appel upheld the decisions of the Tribunal de Grande Instance in all respects, save that it added exclusion from French territories.

56. Khankar's case was more serious. He was living unlawfully in France and moving around on a false French passport in another name. He was closely connected to Nassah in France, Yassine in Italy, and Chaouki the German forger. He had travelled to visit Yassine in Naples. When making his asylum claim to OFPRA (the French Office for the Protection of Refugees and Stateless Persons), he had claimed to be an FIS militant. He was involved in the vehicle exportation ring, forging registration cards for vehicles to be sent to Algeria. The Court was satisfied that he was deeply involved in the conspiracy and that his criminal offences were committed in connection with an individual or collective undertaking with terrorist aims. It reversed his acquittal and sentenced him to two years in prison and permanent exclusion from French territory.

57. Abaidia was deeply involved in the forgery ring, with Dahdouh, Nassah and Bouhemila. In his case, there was no question of his involvement being merely criminal: he had supplied forged documents to Nassah while aware that Nassah was connected, or a member of, the FIS or the GIA. The Cour d'Appel substituted a sentence of two years' imprisonment and permanent exclusion from French territory.

The main defendants

A. The appellant

58. The next defendant to be considered was the appellant. The Cour d'Appel reviewed the original proceedings relating to him, both oral and documentary. They heard two

hours of oral evidence from the appellant. He was legally represented, and originally shared a lawyer with Drif. They heard submissions from his lawyer and gave the appellant a final opportunity to speak directly to the court.

59. They endorsed the finding by the first court that the allegations against the appellant in relation to the Algiers airport attack were not decisive of his involvement in terrorism in France, and that the Algerian offence was not within the jurisdiction of the French court. They noted that the appellant had never been questioned by the Algerian authorities and claimed to have left Algeria on the basis of information that he had been implicated, which he claimed was given to him by a member of the Algiers police force who knew him.

60. The Cour d'Appel gave weight to the appellant's admitted FIS sympathies; his use of his van as an informal ambulance during the events of 1991 when the Algerian authorities had banned ambulances; and his friendship with Abderrahim, an FIS deputy who had been sentenced to death for his role in the Algiers Airport attack, and executed. They had regard to the change in the appellant's account as to who told the Algerian authorities of his alleged involvement in the attack; he at first claimed that it was Abderrahim who had told the authorities; later, he changed that account and said it was a baker named Allili. The Cour d'Appel was surprised that a man who was under suspicion in this way had been able to obtain a business tourist visa for France, and leave Algeria, apparently without difficulty.

61. Once in France, the appellant had not claimed asylum promptly: he had waited over three years. When his business tourist visa expired, he had applied for and been given three one-year residence permits, and he had not claimed asylum until the third was about to run out.

62. Between the two dates when the appellant claimed to have been interviewed by the Direction de la Surveillance du Territoire (DST), while he still had a valid residence permit, and before he claimed asylum, the appellant had approached a document forger, claiming that his status was precarious. At that time it was not. The appellant had been given the standard formal receipt (*récépissé*) for his asylum application while it was under consideration, which he could show within France and which prevented his being refouled to Algeria until the asylum application had been completed. The reason he gave for needing forged documents was not credible and his possession thereof was never justified.

63. The Cour d'Appel rejected as unsatisfactory the appellant's explanation for his having the Guterriez passport, which was a genuine passport stolen from its owner and altered for his use. Nor was the court satisfied with the explanation the appellant gave for putting the photograph of his brother in Algeria, which he just happened to have with him, in another 'lost' identity card in the name of Wane. His brother was a shopkeeper in Algiers with no connection to the Algiers airport attack. The court considered that the circumstances in which the brother had been intended to use the Wane document remained unknown.

64. The overall chronology gave the lie to the appellant's account of his reasons for having a forged French passport and the court considered that the document must have been prepared to enable the appellant to move clandestinely around inside and outside French territory. The appellant had hidden both documents in an envelope given to KS for safe keeping; the court did not consider that he would have done so unless he was expecting his own address to be searched by the police, based on the actions he had committed since arriving in France.

65. Drif's number had been found written down at the home of the appellant's brother, in Choisy-le-Roi, where he had stayed from time to time. The appellant told the authorities that he was sure his brother did not know Drif: if that was so, the only explanation for Ghomri and Drif having written down the brother's phone number in their address books was the relations existing between the appellant, Drif and Ghomri.

66. The appellant had links with members of the Lille and Lyon GIA groups which he had attempted to conceal. He was in contact with Mehdi Ghomri and Khaled Kheder, who were both in contact with a member of the Lyon GIA group, Joseph Jaime. The appellant at first denied knowing Ghomri, but Ghomri, when interviewed, admitted knowing both the appellant and Kheder. Confronted with these statements, the appellant admitted knowing them both. He said he had worked with them at Relais H kiosks in Marne-la-Vallée and Paris Gare de Lyon.

67. The appellant admitted being in touch with Ali Touchent, the main person in charge of the Lille group. Another man, Ali Ben Fattoum, had been questioned during the investigation of Karim Koussa, one member of a three-man cell entrusted by Bensaïd with committing the Wazemmes market attack. The other two members of that cell were Belkacem and Dridi.

68. The appellant had used a particularly complex way of getting hold of Ghomri after the latter's arrest (it involved the appellant's sister, another of his brothers, Salim Ben El Hadj, Belkacem, and 'Radio Notre Dame'). Using the same route, he had also tried to find out what was happening to Ali Ben Fattoum.

69. Having regard to the appellant's associates, his admitted possession and imputed use of false documents, and setting aside any concerns about the Algerian airport attack in relation to him, the Cour d'Appel concluded that the appellant was "in close contact with the men implicated in the terrorist attacks committed in the Lyon region and in the North of France, and that his bothering to check whether his arrest was connected with those of Ghomri and Kheder demonstrates their belonging to the same organisation". The Court considered that his acquittal before the Tribunal de Grande Instance was unsafe and they overturned it.

70. The Cour d'Appel found that the appellant's possession of false administrative documents and his use thereof was for purposes connected with his involvement in a

gang of criminals or an arrangement set up with a view to committing acts of terrorism. He was sentenced to two years' imprisonment, and permanent exclusion from French territory.

B. Salem Nassah

71. Nassah did not appear. His phone number was in the Tehari electronic diary, as well as in that of Bouabdallah, and Mourad Chergui, one of the main leaders of the FIS. He admitted having altered vehicle registration cards to make vehicles appear newer for sale; he had run a document falsification and accommodation facility for Algerians in the Foyer Sonacotra in Nanterre, including providing accommodation and documents to Chaouki, a forger who normally lived and worked in Germany. Through Khankar, he was linked to the survivors of the Lounici group, a significant backer of Algerian Islamic resistance movements in Europe, and also with Yacine, in Naples, Italy. He was at the centre of a network which trafficked second-hand vehicles to Algeria, with forged documents increasing their value.

72. Using the prayer room at the Foyer Sonacotra, Nassah had organised the unauthorised accommodation of numerous Algerians who were passing through and either had no, or forged, documents and were living clandestinely in France. On 14 July 1995 a bag of weapons had been discovered at the Foyer Sonacotra. Among those to whom Nassah provided hospitality at the Foyer Sonacotra were Dridi, Ouchène, Ben Larbi, Chaouki, and the Chenine brothers, all of whom were known to be involved in trafficking weapons and supplying them to groups backing Algerian terrorists. He had knowingly given accommodation to persons whose mission was to collect weapons, and had maintained relations with others who did so. He was described as "a hard, calm and authoritative figure, nothing could be done in the [Foyer Sonacotra in Nanterre] without his knowledge".

73. Nassah himself had possessed documents to which he was not entitled, in the years 1994, 1995 and 1996, including birth certificates in four names, one of which supported an identity card and passport which he kept for personal use (he had been unlawfully in France for 15 years by this time). He carried out a business of supplying forged documents for the terrorist organisation and in order himself to move about clandestinely. He had furnished false documents to Ben Larbi and to Ouchène, and given longer term accommodation to Ben Larbi at the Foyer Sonacotra, to which he was not entitled. The verdicts on Ben Larbi and Nassah were overturned. Due to the extreme seriousness of his acts, the Cour d'Appel considered that Nassah should be sentenced to three years' imprisonment and permanent exclusion from France.

C. Ali Drif

74. When arrested, Drif was working as a research assistant at France's National Institute of Applied Science (INSA) in Lyons, but his phone number was one of those in the Tehari electronic diary, and he did not dispute having met Tehari. Drif's own diary

contained the appellant's phone number (though he claimed that was because his wife knew the appellant's sister-in-law, and that was why he had the number, the appellant lived at the same address and the Cour d'Appel found as a fact that the number was recorded for the purpose of telephoning the appellant, not his sister-in-law). He had travelled to visit Dhina, the exiled head of the FIS in Switzerland, along with Bouabdallah, Ouadou, and Boulouh Messadek. He had claimed the journey was for tourism, but they had certainly met Dhina and then travelled on to Zurich where they spent two nights at the mosque.

75. Drif had made low voltage electric circuits at Ouguenoune's request; had prepared simple ignition mechanisms and tried to buy fertiliser which could have been used to make a bomb. His obedience to Ouguenoune, who was close to the GIA, was striking. Ouguenoune was linked to Talhajt, who was implicated in the Chalabi network; Drif sought to please him and anticipate his unexpressed wishes, lent him money, and collected him from Marseille after a 5 am telephone call. The court considered that the evidence indicated that when Ouguenoune left France that Drif, who had been Ouguenoune's right hand man, succeeded him.

76. The acquittal of Drif by the Tribunal de Grande Instance was overturned and he was convicted on all charges, with a prison sentence of three years and permanent exclusion from French territory.

D. Kamel Ouadou

77. The Cour d'Appel found that Ouadou had visited Switzerland several times, three times meeting Dhina. He was an FIS sympathiser. He had given contradictory evidence as to whether he had visited Amar Blita and Mustapha Hamza in Zurich. He knew Drif, Bouabdallah and Abdelslam Ouili.

78. However, 'frequenting members claiming to be part of the FIS such as Dhina and Ouili, demonstrating an opinion based on adherence to ideas, or sympathising with a group or a political party because of what is personally considered as unjust treatment by a government, cannot, in the absence of positive evidence being provided from information' suffice to meet the terrorism conspiracy charge. The Cour d'Appel upheld the acquittal of Ouadou.

E. Bouabdallah

79. There was more to the factual matrix in Bouabdallah's case. He was on a low income (Fr 4000 a month), but had managed to visit, 'for studies or tourism', eight European countries, some of them several times, had kept documents for Chergui at his home, was associated with the visit by Drif, his friend, to Ouguenoune in Chilly Mazarin, and with Nassah, Ouchène, and Chaabane, all of whose numbers, like Bouabdallah's own, were in the Tehari electronic diary. He had planned and given a structured speech to a public meeting of the Fraternité Algérienne in 1992 or 1993. He had addresses for Islamic centres in London, Munich, Rome and Zurich.

80. Bouabdallah was sentenced to three years' imprisonment, and excluded permanently from French territory.

The task for the Upper Tribunal

81. We propose to analyse the application of the exclusion clause in this case by reference to Article 1F(b). If there are serious grounds to consider that the appellant was guilty of a serious non-political offence he falls to be excluded, whether or not the acts for which he is personally responsible were also acts contrary to the purposes and principles of the United Nations. If by contrast, the acts for which he was personally responsible were not serious crimes, then applying the guidance of the Supreme Court in Al Sirri, we have no doubt that they were not acts contrary to the purposes and principles of the United Nations.

82. The test is whether there are serious reasons to consider that the appellant is guilty of conduct that amounts to a serious non-political offence. This is something stronger than reasonable suspicion but less than proof of guilt on the criminal standard. We conclude from the relevant authorities, including those discussed by the Court of Appeal in remitting this matter to ourselves and the conclusions of the Supreme Court in Al-Sirri, that it is sufficient so to consider if it is more probable than not, on all the information before us, that the appellant personally participated in such a crime.

83. We accept that a serious crime for the purpose of the exclusion clause cannot be defined purely by national law or the length of the sentence. We must search for the autonomous international meaning of the term rather than what might be purely national law concerns about what conduct should be penalised and sentencing policy.

84. To find the autonomous meaning we first examine the text of the Refugee Convention and then have recourse to any supplementary measures of interpretation such as state practice in the application of the Treaty, the *travaux préparatoires* and the purposes and principles of the Convention[2]. The scholarly work of Professor Grahl-Madsen, writing in 1966, has always been considered of importance, as have the views of UNCHR as expressed in the Handbook produced at the request of States Parties represented in the executive committee of the High Commissioner's Programme.

85. It seems clear that the exclusion clause was intended to have two purposes: first, the prevention of abuse of the asylum system by undermining extradition law or the mutual interest amongst states in prosecuting serious offenders[3]. This first reason can have no purchase where the offence has been prosecuted and the offender served his

[2] See R v SSHD ex p Adan [2001] 2 AC 477 considering the Vienna Convention on the Interpretation of Treaties Articles 31 and 32 ; see also Al Sirri at [36].

[3] See UNHCR Handbook at [147] and [151].

punishment. The second is to exclude from protection those who have demonstrated by their conduct they are not worthy of it. It is this purpose that is relevant here.

86. We think that limbs 1F(a) and (c) serve to illustrate the level of seriousness required to engage Article 1F(b); the genus of seriousness is at a common level throughout. Those who commit war crimes and acts against the principles and purposes of the United Nations are clear examples of people who are unworthy of protection.

87. We reject an argument faintly advanced by the respondent that by contrast with Article 33 (2) of the Convention, where protection from expulsion (*non-refoulement)* is excluded where there is a conviction for a "particularly serious crime", the non-political crime referred to in Article 1F(b) does not have to be particularly serious. The reason for doing so lies in the French text, which is equally authentic in finding the true international meaning of "serious crime" in this context.

88. The French text of Article 1F(b) refers to "*un crime grave"* whereas that for Article 33 (2) refers to "*un délit particulièrement grave*".[4] A *crime* in French law is a more serious class of offence than a *délit*. According to Cornu's *Vocabulaire Juridique* (9th edition) 2011, "*crime"* is a "*transgression particulièrement grave*". We accept, however, that the classification of the offence in national law is not the issue (as it happens the offences of which the appellant was convicted in France were both *délits*). The point is rather that the focus on the use of the English word "crime" in both Articles loses the quality of seriousness reflected in the French word. It may be that the language of the French text is where the UNHCR[5] and the commentators obtain the notion that serious crimes were once capital crimes.

89. However, we recognise that state practice in the application of the exclusion clause has developed inside Europe and beyond, and that personal participation in a conspiracy to promote terrorist violence can be a particularly serious crime for the purpose of Article 1F(b), providing again that the focus is on the substance of the conduct [6] and undue emphasis is not given merely to the labels applied by domestic law.

90. The government of a hypothetical Ruritania may consider that public assembly without a prior police permit where the participants call for a change of government is a form of terrorist conspiracy against public order, but no one else should.

91. Problems arise where a claimant participates in violence in a foreign conflict, but Al Sirri tells us that personal participation in violent attacks directed against armed forces acting in a manner authorised by international law can be sufficient. By contrast, in this case the aims of the terrorist association or conspiracy were directed

[4] See Grahl- Madsen at pp. 192 and 196.

[5] UNCHR Handbook at [155].

[6] See Professor Gilbert's chapter in Refugee Protection in International Law UNCHR 2003. 'Current Issues in the Application of the exclusion clauses' at 440.

against the public order of France; it was neither a political offence nor could it be any form of justified self-defence against state violence.

92. The relevant crime may be an agreement to commit the criminal acts (in English law a conspiracy), rather than a choate crime[7]. Indeed an agreement amongst many to commit crimes may be an aggravating factor that makes it more serious than an offence committed by a single person. We are conscious that membership of an organisation that has committed such crimes is not enough; nor logically can mere membership of the association or being party to a conspiracy suffice. We need to examine the role the claimant played personally in order to ascertain whether the crime was a serious one within the meaning of Article 1F(b). However, where the personal acts of participation by the claimant take the form of assistance to others who are planning violent crimes, the nature of the acts thereby supported can be taken into account.

93. A particular issue of concern to Lord Justice Sullivan was whether there was sufficient basis for satisfaction as to personal participation in a serious crime, where the French prosecutor was able to intervene and bring charges at an early stage of preparation. However, as the whole of the decision and reasons of the Cour d'Appel had not been translated, the extent to which there had been terrorist acts actually carried out, and the connections with the criminal group of which the claimant was a member, may not have been apparent. We consider the wider context of the conspiracy; the parts played by the principal characters in the indictment and the links between them are important in this case. Particularly important is the distinction drawn by the French court between those whose role was limited to the production of false documentation or transfer of stolen vehicles and those involved in the planning and support for the objects of the conspiracy or terrorist association itself. The former were considered merely criminal and given lesser sentences. The appellant, however, belonged to the second group and was given one of the longer sentences.

94. The final question is the weight we should attach to the decision of the Cour d'Appel in respect of the findings made about the appellant. Criticisms have been advanced by the appellant of both the procedure and the quality of the reasoning whereby the acquittal was reversed and a conviction substituted. We recognise that the elements of the offence, the procedure of conviction on re-hearing on appeal, the means of proof and the applicable evidentiary rules are all unfamiliar to an English common lawyer. However, none of these criticisms amounts to a sufficient reason to ignore the decision. Indeed, by comparison with cases of the application of the exclusion clause by reason of acts committed abroad where there has been no criminal investigation at all, we are fortunate to have the material and the analysis that we do have.

95. Mr Greatorex makes two specific submissions: (i) the principle of comity would

[7] There is direct authority for this in the context of war crimes under Art 1F(a) and the terms of the London Charter see Grahl-Madsen at p. 277 and following; see also the discussion of joint responsibility for war crimes in JS Sri Lanka and the Upper Tribunal in MT (Article 1 F (A)-aiding and abetting) Zimbabwe [2012] UKUT 15.

suggest that we should give effect to an appellate decision of a senior sister court in the European family; (ii) in any event we should be alert to the fact that, even with the translation perfected, as it has been, we have not seen the dossier of evidence, and are not in position to try the case for ourselves. We give particular weight to the second submission, and further recognise that if the appellant had been aggrieved with the decision of the Cour d' Appel he could have appealed to the Cour de Cassation and to the Human Rights Court in Strasbourg.

96. In the circumstances, in the absence of some strikingly unfair procedural defect, we conclude that we should accord a significant degree of respect to the decision of the French court; there is a particular degree of mutual confidence and trust between legal systems that form part of the same legal order within the European Union. The process deployed by the Cour d'Appel cannot be considered unfair. As we have already noted, the appellant was represented, appeared personally and gave evidence; he was able to fully participate in those proceedings. We recognise, however, that the ultimate question of whether the conduct of which we are satisfied is sufficiently serious to justify exclusion is a matter for ourselves, as the tribunal deciding the exclusion issue rather than a foreign court applying its own penal laws.

97. The examination of seriousness should be directed at the criminal acts when they were committed, although events in the supervening passage of time may be relevant to whether exclusion is justified: a formal pardon, or subsequent acquittal, or other event illuminating the nature of the activity may be relevant to this assessment[8]. Despite suggestions to the contrary by respected commentators, it does not appear to be the case that service of the sentence, or indeed a final acquittal, brings the application of the exclusion clause to an end[9]. It may be that the passage of time may serve to remove any basis for exclusion of protection but if so we have no basis for deciding how long a period is appropriate and in reality a claimant who has protection against expulsion is likely to be eligible for settlement on long residence grounds before being able to expiate culpability sufficiently to acquire refugee status[10].

Our decision

98. We have each reviewed the material for ourselves in the light of the submissions advanced to us and the observations of the Court of Appeal, our analysis of the French material and the legal principles discussed above.

99. We return to the core finding of the Cour d'Appel in respect of this appellant. It concluded (F 142):

[8] UNHCR Handbook at [157].

[9] Hathaway 'Law of Refugee Status' (1993) at pp222-3; Grahl-Madsen at p.291; UNCHR see footnote 5 above. By contrast in Al-Sirri itself the inquiry into whether the exclusion clause continued despite his acquittal in the central criminal court.

[10] It may be that the appellant would be eligible for permanent residence after 10 years continuous lawful residence, even if he were excluded by Article 1F(b) but that is not an issue before us.

:

> "In any case the reasons given by [AH] to justify the existence of a fake French passport are contradicted by the chronology of the alleged events, and it is obvious that he must have used this forged document to move around clandestinely inside and outside of French territory. Besides, the circumstance that he gave this fake passport and the fake identity card to his cousin [KS] inside an envelope can only be explained by him fearing that the French police would search his address. Based on the actions he had committed in FRANCE since his arrival on 18 October 1992."

and it continued (F 143):

> "Although it is accurate as the former judges stated in the appealed ruling, that the assessment of [AH's] involvement and his potential responsibility for the attack committed at ALGIERS airport in 1992 does not fall within the jurisdiction of the French courts, and that it would not demonstrate his belonging to a criminal gang connected to a terrorist undertaking that acted on French territory during 1994 and 1995, on the contrary to the former judges, the Court must find that (AH) was, during the course of this period and while he was on French territory, in close contact with the men implicated in the terrorist acts committed in the Lyon region and in the North of France, and that his bothering to check whether his arrest was convicted with those of GHOMRI and KHEDER demonstrates their belonging to the same organisation.
>
> It was therefore by way of an analysis which is not shared by the Court that the former judges acquitted him of the charges of involvement in a gang of criminal or an arrangement set up in view of committing acts of terrorism; and it was in order to move around in the context of the illicit activities of this organisation or arrangement, and the need to evade a search potentially being carried out by the French police following the acts committed in FRANCE by this organisation or arrangement, that the facts of falsifying administrative documents and use of falsified administrative documents upheld by the former judges were committed."

100. This appellant was not an unwitting petty criminal caught up in the criminal actions of others, but a senior participant in the conspiracy, as reflected in the distinction in sentences imposed by the French court. The appellant received a sentence of two years and permanent exclusion from the territory of France. Those whose actions were considered merely criminal received sentences of five to eighteen months. Most participants in the terrorist conspiracy received sentences of at least two years. Those who received longer sentences were: Tehari who had a list of weapons for purchase and an encoded list of contacts and received a five years sentence; the scientist Drif who had made electronic circuits and purchased fertilisers that could be used in explosive devices received a sentence of three years; Nassah who provided safe houses for terrorist arms traffickers who received a sentence of three years; and Boudallah who was an international terrorist courier with a similar list of contacts to Tehari. All members of the terrorist group were permanently excluded from the French territory. The appellant was connected to Drif and Drif to Tehari. The appellant was also in contact with Gomri, Kheder and Touchent who were connected to terrorist attacks.

101. We put the appellant's FIS background together with his association with people who were planning terrorist violence during a campaign of such violence, his

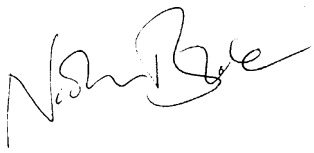
possession and use of a forged passport in the circumstances found by the French court, his interest in the circumstances of the arrest of others and the methods used to conceal his connections with those others, his possession of a false identity document, and the timing of his acts with respect to violent acts that were occurring as part of the campaign of terrorism in France. We are satisfied that it is more probable than not that the appellant's personal participation in this criminal association:

iv. was not confined to mere possession of false identity documents, but involved using these documents to move within and outside France in support of other senior members of this association, some of whom were planning and executing terrorist acts; and

v. was based on knowledge of and support for these terrorist acts, albeit it did not extend to the appellant personally executing these terrorist acts.

102. Overall, we are satisfied that there are serious reasons to consider that the appellant committed a serious crime in France before coming to the United Kingdom and as a consequence, that he is excluded from the protection of refugee status and subsidiary humanitarian protection.

103. The asylum and humanitarian protection appeals are dismissed. Each member of the panel has contributed to the preparation of this determination.



Signed

Chamber President
Date 25 July 2013