REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 76170

AT AUCKLAND

Before:	B L Burson (Member)
Counsel for the Appellant:	E Griffin
Appearing for the Department of Labour:	No Appearance
Date of Hearing:	10 January 2008
Date of Decision:	17 January 2008

DECISION

---

[1] This is an appeal against a decision of a refugee status officer of the Department of Labour (DOL), declining the grant of refugee status to the appellant, a national of Algeria.

INTRODUCTION

[2] This is the appellant's second claim for refugee status. He arrived in New Zealand on 22 May 2006 and claimed refugee status at the airport (the first claim). He was interviewed by the RSB on 15 June 2006 in respect of the first claim. By decision dated 29 September 2006, the RSB declined the first claim and the appellant duly appealed to the Authority (the first appeal). The first appeal was heard on 16 and 17 November 2006. By decision dated 26 March 2007, the Authority dismissed the first appeal.

[3] On 7 August 2007, the appellant lodged his second claim for refugee status (the second claim). He was interviewed by the RSB in respect of the second claim on 4 September 2007. On 25 November 2007, the RSB declined the second application. On 6 December 2007, the appellant duly appealed to this Authority for

a second time (the second appeal).

PRELIMINARY ISSUES FOR DETERMINATION

[4] There are a number of preliminary legal issues that have arisen in this case.

THE LODGING OF THE APPEAL OUT OF TIME

[5] At the time the appellant lodged his second appeal, he was detained in Auckland Central Remand Prison. As a result, his appeal to the Authority had to be lodged within five working days of 21 November 2007 - see s129O(3)(a) Immigration Act 1987 (the Act). However, the notice of appeal was not lodged until 6 December 2007. On that day, counsel wrote to the Authority lodging the appeal and requesting that the Authority grant an extension of time, pursuant to s129O(4) of the Act on the basis that the decision declining the appellant's second claim had only been received in her offices on that date. Counsel indicated an enquiry was being undertaken as to why the couriers instructed to serve the decline had not done so within the statutory timeframe.

[6] When this matter came before the Authority on 10 January 2008, counsel produced to the Authority copies of email correspondence she had had with the RSB regarding the service of the decline decision on her. Having read this correspondence, the Authority is satisfied that, for reasons unknown, the decision was not received by counsel until after the period of time for lodging the appeal as of right had expired. The Authority is satisfied that special circumstances do exist which warrant an extension of time being granted.

JURISDICTION OF THE AUTHORITY TO HEAR THE SECOND APPEAL

[7] Section 129O(1) of the Immigration Act 1987 (which came into force from 1 October 1999) provides:

> "A person whose claim or subsequent claim has been declined by a refugee status officer, or whose subsequent claim has been refused to be considered by an officer on the grounds that the circumstances in the claimant's home country have not changed to such an extent that the subsequent claim is based on significantly different grounds to a previous claim, may appeal to the Refugee Status Appeals Authority against the officer's decision."

[8] This provision, now incorporated in the Act, is similar in content to the

provisions of the Authority's Rules, which applied prior to that date.

[9] It is also relevant to note that, pursuant to s129P(1) of the Act:

> "1. It is the responsibility of the appellant to establish the claim, and the appellant must ensure that all information, evidence and submissions that the appellant wishes to have considered in support of the appeal, are provided to the Authority before it makes the decision on the appeal."

[10] The question of whether there is jurisdiction to entertain a second or subsequent refugee application was considered under the previous Rules and Terms of Reference of the Authority which were similar in content to the provisions of s129O(1). A leading decision in that regard was *Refugee Appeal No 2245/94* (28 October 1994) at pp16-22. In that decision, the Authority ruled that the question of jurisdiction is one of mixed fact and law. Thus, in most cases, it is necessary first to hear the application so as to establish findings of credibility and fact before a final determination can be made.

[11] In this appeal, therefore, it is proposed to consider the appellant's original claim and his further claim, as presented at the second appeal, with a view to determining:

(a) whether, in terms of s129O(1) of the Act, the Authority has jurisdiction to hear the second appeal and, if so,

(b) whether the appellant is a refugee within the meaning of Article 1A(2) of the Refugee Convention.

The factual basis of the first claim

[12] The basis of the first claim was that the appellant was at risk of being persecuted from Islamic fundamentalists who had killed his brother who worked as a policeman. The appellant claimed that following the funeral of his brother, he began receiving death threats from Islamists, as a result of which he fled the country. These claims were not believed by the Authority (differently constituted) which heard his first appeal.

The factual basis of the second claim

[13] The appellant's second claim for refugee status is based on the fact that following receipt of the Authority's decision in respect of the first appeal, the DOL

made attempts to obtain for him a new Algerian passport. His previous passport had expired while he was in Indonesia where he had lived for some years after fleeing Algeria prior to his arrival in New Zealand. The Algerian Embassy in Indonesia had refused his request to renew it. Subsequent attempts by the DOL were also not successful. The Algerian consulate in Canberra indicated that they would only issue the appellant with a *laissez-passer*, a one-way travel document to facilitate his return to Algeria. The appellant claims that the Algerian authorities will have deduced that he has claimed refugee status here in New Zealand and that this would cause them to view him as a traitor. He fears that upon arrival in Algeria, he would be arrested at the airport, detained, interrogated and tortured on the basis of his having claimed refugee status in New Zealand.

Assessment of the jurisdictional question

[14] The Authority is satisfied that it has jurisdiction to hear this appeal. Whereas the first claim was based on the fear of an Islamic group as a result of the appellant's brother's occupation as a policeman, the second claim is based on a negative political opinion being imputed to the appellant by the Algerian state. Furthermore it is the fact of the approach by the DOL after the determination of the first claim which the appellant claims will have given the Algerian authorities knowledge of his claim to refugee status and exposed him to harm.

[15] In light of these particulars, the Authority is satisfied that the circumstances in Algeria, as claimed by the appellant, have changed to such an extent that the second claim is brought on significantly different grounds from the first. The Authority therefore accepts it has jurisdiction to hear and determine the second appeal.

[16] What follows is a summary of the appellant's evidence to the Authority in respect of the second appeal. An assessment of that evidence follows thereafter.

<u>THE APPELLANT'S CASE</u>

[17] The appellant was issued with a genuine Algerian passport in 2000 which expired while he had been in Indonesia in 2005. Using a friend as an intermediary, the appellant tried to renew his passport but the Embassy in Jakarta had refused to issue him with a new passport because he had not registered with them upon his arrival in Indonesia and because he had overstayed his visitor's permit in Indonesia. The Embassy officials in Jakarta had indicated to him that

they would only issue him with a *laissez-passer* and then only after he had approached the Indonesian authorities to regularise his position

[18] Upon arrival in New Zealand in 2006, the appellant was originally detained in prison for a period of three months, after which time he was released on bail to reside in the Mangere Accommodation Centre. While there, an Algerian national made contact with him and they met socially on one occasion. This person then caused problems for the appellant with the officials at the Centre and the appellant had no further contact with this person. The appellant believes this person may have been a spy for the Algerian government and would have passed on information that he was an asylum seeker.

[19] In January 2007, the appellant asked a different Algerian friend in Indonesia to contact the embassy there to inquire about renewing his passport which had expired in 2005. He was advised by his friend that the Embassy had indicated that Algerian nationals in New Zealand were the responsibility of the Consulate in Canberra and he should approach them. The appellant is unsure if his name was mentioned.

[20] Following receipt of the appellant's decision in respect of the first appeal, the appellant was taken into custody. He was visited by officials from the DOL who requested his assistance in their obtaining for him a new Algerian passport to facilitate his removal from New Zealand. Hoping that the New Zealand Government could succeed where he had failed, the appellant was happy to comply. The appellant supplied the DOL with photographs of himself and filled out the appropriate form. This was sent to the Embassy in Jakarta. Again, it was indicated that being in New Zealand, the appellant's application fell within the jurisdiction of the consulate in Canberra. The consulate was approached by the DOL. The consulate replied that a new passport would not be issued to the appellant. Instead he would be issued with a *laissez-passer*.

[21] As a result of the approach made by the DOL in 2007, the appellant has no doubt that the Algerian authorities will know that he has claimed refugee status. They were aware in 2005 that his passport had expired because of the approach made while he was in Indonesia. Now, some two years later, a further application was being made on his behalf by officials in New Zealand. This would leave the Algerian authorities in no doubt that he had tried to enter New Zealand on a false passport but had been refused entry. This, he claims, would inevitably lead the Algerian authorities to conclude that he was a failed asylum seeker.

[22] The appellant claims that because he has claimed asylum in New Zealand, he would be seen as a traitor by the Algerian authorities. It does not matter that his original claim was based on a fear of the Islamic authorities - the Algerian authorities would not care as to what statements he had made. They would subject him to torture and other forms of ill-treatment.

SUBMISSIONS AND DOCUMENTS

[23] On 7 January 2008, the Authority received from counsel a written memorandum of submissions and a supplementary statement from the appellant in support of his appeal.

[24] At the conclusion of the hearing, the Authority served upon counsel copies of:

(i) a report of the Switzerland Federal Office of Refugees for Algeria: Possibilities of document acquisition - CX37072 (August 1999);

(ii) printouts of information relating to registration requirements for Algerian nationals abroad from the website of the Algerian consulate in Canberra;

(iii) an application for passport renewal or extension.

(iv) the decision of the United Kingdom Immigration Appeal Tribunal (IAT) in *AD* (return - *garde à vue*) Algeria CG [2002] UKIAT 03392 (2 August 2002); and

(v) *M* (Djebari decision - evidence) Algeria CG [2003] UKIAT 00089 (1 October 2003).

[25] Counsel was given time to consider these documents and thereafter made oral submissions thereon. Counsel's written and oral submissions have been taken into account in reaching this decision.

<u>THE ISSUES</u>

[26] The Inclusion Clause in Article 1A(2) of the Refugee Convention provides that a refugee is a person who:-

> "... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to

> avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

[27] In terms of *Refugee Appeal No 70074/96* (17 September 1996), the principal issues are:

(a) Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to the country of nationality?

(b) If the answer is yes, is there a Convention reason for that persecution?

ASSESSMENT OF THE APPELLANT'S CASE

CREDIBILITY

[28] The Authority accepts the appellant's evidence as to the circumstances surrounding his second claim for refugee status to be credible. There is email correspondence from the DOL to the Algerian embassy in Jakarta and Canberra as to the issuing of a passport to the appellant. In particular, there is:

(i) a DOL notation on the file stating:

> "Passport received back from Algerian embassy in Jakarta."

(ii) copy of an e-mail from the consulate in Canberra stating that a *laissez-passer* only will be issued.

[29] There can be little doubt therefore that at the very least the embassy in Jakarta is aware that the appellant has been in New Zealand. A copy of his passport is on the file which establishes that it did expire in 2005. Plainly, the appellant could not have used this document to attempt to enter New Zealand. It is highly likely the Algerian authorities will be aware that the use of false passports is a common means by which persons seeking refugee status seek to enter the particular country of refuge. Whilst the Authority finds the appellant's evidence about the person attending the Mangere Accommodation Centre being a spy to be far-fetched, in the circumstances, the Authority is prepared to accept that the Algerian embassy in Jakarta could infer from the approach lawfully and properly made by the DOL in 2007 that the appellant had unsuccessfully sought refugee status in New Zealand and that this, in turn, could be made known to the authorities in Algeria.

[30] It is argued on the appellant's behalf by Ms Griffin that a return of the appellant to Algeria in these circumstances would expose him to a well-founded fear of being persecuted. In addition, counsel asserts that the risk to him is enhanced by:

(i) his being absent from Algeria for nearly eight years; and

(ii) his passport containing false immigration stamps relating to exit and entry to Algeria in 2003, exit and entry to Sri Lanka in late 2003/early 2004 and subsequent false entry visa for Indonesia in 2004. As to these stamps, the Authority hearing the first appeal had doubts about the appellant's claim that these were, in fact, false – a claim which he maintained before the Authority in his second appeal. It was only because a substantial period of time had elapsed without any response from the Sri Lankan authorities that the Authority hearing the first appeal was obliged to give him the benefit of the doubts it had in relation to those stamps. This Authority does not preclude the possibility that they are, in fact, genuine stamps and that the appellant did, in fact, return to Algeria, contrary to his evidence. However, like the Authority hearing the first appeal, this Authority has before it a complete lack of any evidence in relation to this matter. Any doubts that remain because of the lack of the evidence suggesting the contrary must be resolved in his favour.

A WELL-FOUNDED FEAR OF BEING PERSECUTED

The Authority's jurisprudence

[31] The Authority reminds itself that the test for persecution has been widely accepted as comprising two elements namely, serious harm and the failure of state protection; see *Refugee Appeal No 71427/99* (16 August 2000) at [67]. The Authority further reminds itself that the appropriate standard for persecution is the anticipated future harm represents a sustained or systemic violation of the claimant's core human rights; see Hathaway The *Law of Refugee Status* (Butterworths Toronto) 1993 at p108; *Refugee Appeal No 2039/93* (12 February 1996).

[32] The Authority has considered the question of whether the return of failed asylum seekers to Algeria exposes them to a real chance of being persecuted in the past - see *Refugee Appeal No 73210* (20 November 2001) at [44] - [47] and

Refugee Appeal No 75648 (17 May 2006) at [99] - [103]. In both cases, the Authority concluded that there was an absence of country information to indicate that the Algerian authorities have an interest in refugee claimants being returned from overseas who are not involved in terrorist activities or suspected thereof. Ms Griffin challenges the correctness of these findings.

[33] In her written submissions to the Authority and her submissions to the RSB, counsel draws attention to the Authority's own jurisprudence which has for a long time recognised Algeria as being a state plagued by gross human rights abuses and refers, in particular, to *Refugee Appeal No 73673* (15 February 2005) and *Refugee Appeal No 73923* (21 January 2005). In *Refugee Appeal No 73673*, reference was made to the extensive review of the conflict in Algeria in the Authority's decision in *Refugee Appeal No 74540* (1 August 2003). In this decision, at [40]-[62], the Authority traversed *in extensio* the history of the civil war that erupted in Algeria following the intervention by the army in 1991 following the success of the *Front Islamique Du Salut* (FIS) in municipal and legislative elections in 1990 and 1991. Little point is served in repeating what was said in that decision, except to note that at [61] of that decision, the Authority concluded from its traverse of the country information that:

> "Arbitrary detention and summary executions of those suspected of being linked to armed groups has been widespread, while torture and ill-treatment of detainees by the security forces remains endemic. Such abuses continue to this day, albeit on a reduced scale, in what appears to be a climate of almost total impunity. According to Amnesty International:
>
>> 'Despite the urgent need, no independent and impartial investigations have taken place into the thousands of killings, massacres, "disappearances", abductions, instances of torture, extra-judicial executions and deliberate and arbitrary killings of civilians which have occurred in recent years – and which, though on a lesser scale, continue to occur.'"

[34] Recent country information confirms that although there may have been some reduction in the level of violence in the country, there remain persistent reports of torture and ill-treatment of suspects detained by the authorities and accused of terrorism-related offences; see Amnesty International *Country Report 2007: Algeria* at p1; United States Department of State *Country Reports on Human Rights Practices 2006: Algeria* (6 March 2007) at section 1c.

Country information relating to forced returns to Algeria

[35] Against this background, the issue of forced returns of failed Algerian asylum seekers to Algeria has been raised as an issue of concern by both UNHCR

and Amnesty International. The UNHCR *Position paper on the return of Algerian nationals found not to be in need of international protection*, (December 2004) UNHCR has expressed a concern:

> "… that asylum seekers found not to be in need of international protection, who are returned to Algeria, may face hostile treatment due to the Algerian government's perception that such persons may have been involved in international terrorism."

[36] UNHCR base their concern on the listing of two well-known Islamic militant groups in Algeria as proscribed organisations by the United States in the wake of 11 September 2001 and reports that European intelligence agencies have uncovered networks associated with these groups operating within Algerian and other North African immigrant communities in Europe. UNHCR considered these factors

> "… contribute to the suspicion with which failed asylum seekers would be treated upon return to Algeria, notably those persons who have had strong links to prior Islamist movements."

[37] The UNHCR opined:

> "There is a strong presumption that such persons may be subjected to persecutory treatment upon return and emphasised the need for the utmost caution when receiving states consider the forced return of rejected asylum seekers to Algeria."

[38] Similar concerns have been raised in a recent reports and urgent actions by Amnesty International as to the forced return of a number of Algerian nationals by the United Kingdom government on the basis that the Algerian government had obtained an assurance - known as a Memorandum of Understanding - that the deportees' human rights would be respected on return. In its report *United Kingdom: Deportations to Algeria at all costs* (AI index EUR45\001\2007) 26 February 2007, Amnesty International refer to 15 Algerian men whom the United Kingdom government alleged posed a threat to the national security of the United Kingdom. It details the deportations of two persons, H and D. Both were among a group of men arrested under the United Kingdom anti-terrorism legislation, who withdrew their appeals against deportation orders made against them and were deported to Algeria. The report states that Amnesty International were informed that, contrary to assurances given to the United Kingdom authorities, H had been arrested and charged with terrorism related offences and held in a place where he could hear cries and screams of pain, although H had made no allegation of torture himself. Similarly, D was also arrested, charged with terrorism related offences and taken into custody, contrary to assurances given to the United Kingdom authorities. The report also refers to another Algerian national who had

been arrested in London but had subsequently fled the United Kingdom for Algeria while on bail. The report notes that this person was arrested on terrorism related offences and detained for seventeen months and tortured.

[39] In another report *Algeria: torture in the 'war on terror' - a memorandum to the Algerian President* (AI index MDE\28\008\2006 (18 April 2007), Amnesty International give details of a number of other individuals who were recently arrested by the security services in Algeria on suspicion of involvement in terrorist related activities abroad. In all cases the detainees were subjected to *garde à vue* detention (incommunicado detention) which is permitted under Algerian law for a period of 12 days. In eight of the 12 cases reviewed, the detainees were held for longer than the legally specified period of 12 days. In five cases, the duration of incommunicado detention was exceeded by several months and, in one case, two years. The detainees were interrogated about their alleged role in terrorist activities in Algeria and abroad and subjected to various forms of ill-treatment ranging from being slapped in the face to more serious beatings and electric shock treatment and other forms of torture.

[40] Finally, in an "Urgent Action" release *Algeria: Incommunicado detention\torture or ill-treatment. Algerian asylum seeker (M) known as "X"* AI index MDE\28\012\2007 (12 June 2007) Amnesty International refer to a failed Algerian asylum seeker deported to Algeria from the United Kingdom in June 2007 who disappeared shortly after returning to Algeria. In a subsequent "Urgent Action" release, issued on 20 June 2007 and relating to the same person, Amnesty International reported they had now been able to meet with X who told them that he had been held incommunicado for a period of 10 days. Although X told Amnesty International that he was treated well and his daily interrogations were carried out in a dignified manner, Amnesty International was sceptical about the veracity of these claims as to fair treatment.

The United Kingdom cases

[41] Unsurprisingly given the concerns raised by Amnesty International regarding the forced returns to Algeria from the United Kingdom of failed asylum seekers, the issue has come before the United Kingdom immigration authorities. In its decisions in AD's case (2 August 2002) and M's case (1 October 2003), the United Kingdom IAT considered the position of return to Algeria of failed asylum seekers.

[42] In *AD* at paragraph 13, the Tribunal refer to the expert report of a Professor Seddon who expressed the view that failed asylum seekers were highly likely, on their return to Algeria, to be detained by the immigration and security services for further questioning as to their reasons for being abroad and having sought asylum. It notes further that additional expert reports by Mr Joffe (the expert relied on extensively by the Authority in *Refugee Appeal No 74540*) and a Dr Roberts also made the same point. The decision continues at paragraphs 13 to 14:

> "13. […] Professor Seddon went on to say that those who are detained for questioning may be held garde à vue (incommunicado) for up to a week or so in order to allow stories to be checked and records consulted. He notes that 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 paramilitary groups, or as deserters from the army. He goes on to say that 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. He says that 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. He considers, however, that the very fact that they have sought asylum in the first place puts them at risk and refers to cases known to him from former asylum cases refused by the Home Office where returnees have been subjected to prolonged detention and very rough interrogation.
>
> 14. In his supplementary report, which is dated 13 June 2002, he comments among other things, at page 81 of the bundle, 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 less likely to be beaten or brutally treated whilst in detention. Nevertheless, there is a real risk that such people will be detained for further interrogation and a real risk of brutal treatment."

[43] In *M*, expert evidence from Professor Seddon and Mr Joffe was also relied on. At paragraph 5 the evidence of Professor Seddon elaborating on the evidence he had given in AD's case is recorded. He states:

> "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 à 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."

[44] M's case ultimately went on appeal to the Court of Appeal and was remitted for reconsideration by the Tribunal. It is the Tribunal's reconsidered decision which is made on 1 October 2003. Responding to concerns raised by the Court of Appeal as to the vagueness of his assertions in his earlier expert report, Professor Seddon filed a further report for the remitted Tribunal hearing in which he stated:

"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 relativeness 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."

[45] At paragraph 10, the Tribunal referred to an expert report of Mr Joffe who also stated that it is normal for deportees to be interrogated upon arrival and if there are any grounds for any kind of suspicion, they can be subjected to the *garde à vue* procedure.

[46] Despite this expert evidence, in both cases the appellants were unsuccessful. In both cases, the Tribunal referred to reports prepared by the Research Directorate of the Immigration and Refugee Board of Canada and the Netherlands Immigration Department (see paragraphs 15, 16 of *AD* and paragraphs 11, 13 of *M*). The thrust of these reports is, essentially, that a number of western European governments have been returning failed Algerian asylum seekers to Algeria. It was accepted that returnees may be interrogated upon their entry to determine their identity and to check whether they have a history of involvement with the political or Islamic opposition or have outstanding criminal proceedings or unfulfilled military service obligations, and that this detention can take place for several days. However, in no cases have the embassies of these western European governments been made aware that any person who has been returned to Algeria has been subjected to harm simply on the basis they have

claimed asylum abroad.

[47] In *AD*, the Tribunal concluded, at paragraphs 20 to 21, that the evidence did not support the contention that the appellant faces "a real risk of prohibitive ill-treatment in detention". The Tribunal accepted there is, to some degree, a culture of violence towards detained suspects in Algeria but that having regard to the appellant's personal circumstances which did not involve any actual or suspected association with terrorist or criminal activity and an exemption from his military service obligations, this culture of violence would not create a real risk of him suffering serious harm. Although not expressly stated, it appeared to have been accepted that the appellant in that case may suffer some minor physical harm but it would not rise to a sufficient level to breach his rights under Article 3 of the European Convention of Human Rights to be free from torture or inhuman or degrading treatment or punishment.

[48] The Tribunal in *M* was more explicit. The Tribunal accepted that upon return, the appellant would be detained and interrogated. It accepted that while that may be the end of the matter there was a real chance that the appellant's detention may be for a longer period and that he may be detained incommunicado for some days while enquiries were made about him. Having regard to the more detailed evidence provided by Professor Seddon in that case, the Tribunal accepted that whilst the appellant "might encounter a beating, he might encounter other forms of physical ill-treatment, he will not be likely to be severely tortured or to be seriously physically ill-treated"; see paragraph 15.

[49] In both cases, the Tribunal gave some weight to the fact that there was a wholesale absence of any complaint being recorded by or on behalf of anybody who had been returned to Algeria that they had been mistreated simply on the basis they were failed asylum seekers - see paragraph 18 of *AD* and paragraph 17 of *M*. In the later decision, at paragraph 18, the Tribunal also observed that Professor Seddon's assertion that failed asylum seekers without any "file" face a real risk of prolonged detention and ill-treatment appears to be based on two cases only, the details of which were not given and which may be isolated cases in any event.

[50] Being decisions of the UK IAT, these decisions are in no way binding upon the Authority. Furthermore, the Authority confesses to some confusion as to what the Tribunal was meaning by its reference to a lack of real risk of "severe torture". By definition, all forms of torture involve the infliction of severe pain and suffering;

see Article 1 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984. Nevertheless, the recording of the expert and other evidence is helpful to the Authority in reaching its determination in this matter.

CONCLUSIONS ON WELL-FOUNDEDNESS

[51] In her written submissions to the RSB dated 31 October 2007 at p5, counsel submits that the decision in *Refugee Appeal No 73210* "flies in the face" of country information in respect of the suspicion with which the Algerian authorities treat people returning who have been absent a long time and the general climate of suspicion in the context of the post-September 11 environment. This submission was adopted by her in her written submissions to the Authority dated 7 January 2008. In her oral submissions, counsel expanded on this point. She submits that the assertion in the UNHCR position paper that asylum seekers who are returned to Algeria "may face hostile treatment" due to their government's perception that they may have been involved in international terrorism, coupled with the institutionalised propensity to torture and other forms of serious ill-treatment by the Algerian state security apparatus as established by the country information and the Authority's own jurisprudence, means that a person with the appellant's characteristics would, in fact, be subjected to forms of harm amounting to their being persecuted.

[52] Plainly, the persistence of torture and other forms of ill-treatment of some returnees to Algeria warrants the utmost caution by the Authority in reviewing the appellant's case, forcefully argued on his behalf by counsel. After careful reflection, however, the Authority does not accept counsel's submission in this regard. It notes that based on its own understanding of the position, UNHCR do not advocate a blanket ban on the removal of Algerian asylum seekers to Algeria. The UNHCR position paper clearly links the risk of being subjected to "hostile treatment" to a perception by the Algerian authorities that the person concerned may have been involved in international terrorism abroad. It urges caution for Western European nations returning failed asylum seekers because public reports from European intelligence agencies that Algerian and other North African communities have terrorist networks operating within them may increase the chance of such a perception being held. That said, the Authority accepts that the concerns raised by UNHCR are likely to apply to a person suspected of involvement with terrorist activity anywhere.

[53] The Authority notes that Amnesty International also do not, as a result of their understanding of the position, advocate a blanket ban on returning failed asylum seekers simply because of the fact of having claimed asylum exposes them to a risk of suffering serious harm amounting to their being persecuted. In the report *Algeria: Asylum seekers fleeing a continuing human rights crisis – A Briefing on the situation of Asylum seekers originating from Algeria* AI Index MDE/38/007/2003 at p.5. Amnesty International state:

> "Where there is not a risk that a rejected asylum seeker would face grave human rights abuses upon their return to their country of origin, such person may normally be returned."

[54] Had there been any concern that length of absence combined with return as a failed asylum seekers gave rise to a risk of serious harm, it is inconceivable that Amnesty International would have made such a statement. Indeed, this is what the Authority understands Professor Seddon to be saying in his expert evidence – namely, that while the exposure of failed asylum seekers to any form of ill-treatment such as slapping or verbal abuse could not be ruled out, it is only those with a "file" for terrorist or criminal activity or association who face a real chance of serious harm as is borne out by the Amnesty International material.

[55] In light of the country information before it including the expert evidence presented to the UK IAT in *M* and *AD*, the Authority accepts that upon his return to Algeria on a *laissez-passer*, the appellant will be detained while identity and background checks are made. Investigations will be made with the Algerian authorities both in Algeria and abroad as to his background and circumstances.

[56] It is further accepted that there is a real chance that the appellant will be held for a period of incommunicado detention while those investigations are carried out. The Authority notes that being held in incommunicado detention is, in many countries, often a precursor to the infliction of serious harm and is to be treated with appropriate seriousness and caution. It further notes that a period of lengthy (seven months) incommunicado detention in damp and overcrowded conditions has in itself been held constitute inhuman and degrading treatment in breach of Article 7 of the International Covenant on Civil and Political Rights (ICCPR); see Human Rights Committee decision in *Shaw v Jamaica* Communication No704/ 1996 (4 June 1998) U.N.Doc. CCpr/C/62/D/704/1996 at paragraph 7.1 and may constitute a breach of the Article 10(1) ICCPR right of persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person; see *Arzuaga-Gilboa v Uruguay*

Communication No 147/83(1990) U.N.Doc. CCPR/C/OP/2 at paragraph 14.

[57] Finally, the Authority notes that Article 9(3) of the ICCPR states that anyone arrested on a criminal charge must be brought promptly before judicial authorities. The Human Rights Committee has stated that the period within which a person arrested or detained should be brought before a judge or other officer should not exceed a few days – see Human Rights Committee *General Comment No 8* UN Document HRI\GEN\1\Ref.5. at paragraph 2. Joseph et al *The International Covenant on Civil and Political Rights: Cases Materials and Commentary* (2nd Ed.) Oxford University Press 2004 at p324, after reviewing the jurisprudence of the Human Rights Committee, suggest that the requirement of promptness of the guaranteeing judicial review for the purposes of Article 9(3) means this should tale place somewhere around three days after the detention first occurs, although they note that the Human Rights Committee has taken a stricter view in its concluding observations in relation to a particular state's party in suggesting detention should last no longer than 48 hours.

[58] In this case there is a real chance that the length of time the appellant may be held in incommunicado detention upon his arrival in Algeria would exceed this two or three day limit while investigations are made about him. There is, therefore, the real chance that his right under Article 9(3) to be promptly brought before a judicial officer to review his detention would be breached. However, based on the totality of this appellant's profile, the Authority is not satisfied that the period of his detention will be anything other than relatively brief, and not reaching anything like the levels which would mean that his detention would amount to breaches of Article 7 and Article 10(1) ICCPR. His particular background will be readily able to be established having regard to the approach made on his behalf by his friend in Indonesia.

[59] Furthermore, for the reasons set out above, the Authority is not satisfied that any period of detention, incommunicado or otherwise, that he may suffer will result in him suffering serious harm amounting to his being persecuted for the purposes of the Convention. Having regard to the total absence of any connection with terrorist or criminal activity or association in Algeria, Indonesia, New Zealand or any other country, the risk that the appellant will be subjected to a form of serious physical or psychological harm amounting to his being persecuted is, on the country information before the Authority, remote and speculative. There is no country evidence to support counsel's contention that the period of absence from

Algeria in any way negatively impacts upon the situation.

[60] In relation to the false passport stamps, the Authority accepts that this is a matter which will require investigation by the Algerian authorities upon his return. While the existence of the false passport stamps will cause additional investigations to be made of the appellant, the existence of the false stamps must be seen against the background of his wider circumstances which, as stated, include a complete lack of any association with terrorist or criminal activity. He has been exempted from his military service. Therefore, the existence of the false stamps will not show anything other than that the appellant as a person who used unlawful means to try and maintain his position as an economic migrant in Indonesia. While country information establishes that this will expose the appellant to a criminal prosecution, and expose him to imprisonment for six months to three years, a fine and loss of some civil rights – see Article 222 of the Algerian Penal Code, any criminal prosecution he may face for this will not amount to his being persecuted – see generally *Refugee Appeal No 29/91* (17 February 1992) and *Refugee Appeal No 1222/93* (5 August 1994). Counsel has not sought to argue to the contrary.

[61] At the end of the day, this appellant has no involvement with criminal or terrorist activities. He is exempt for military service. Investigations made by the Algerian authorities will not reveal anything suspicious in his background. He is simply one of many Algerians who have sought refugee status abroad unsuccessfully. There is nothing about him to excite any interest in him that creates a real chance of his suffering a sustained or systemic violation of his core human rights. He has no well founded fear of being persecuted.

[62] For these reasons, the Authority answers the first principal issue in the negative. The need to consider the second does not, therefore, arise.

CONCLUSION

[63] For the above reasons, the Authority finds that the appellant is not a refugee within the meaning of Article 1A(2) of the Refugee Convention. Refugee status is declined. The appeal is dismissed.

"B L Burson"

B L Burson
Member