

REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 76332

AT AUCKLAND

Before: C M Treadwell (Member)
Counsel for the Appellant: I Uca
Appearing for the Department of Labour: No appearance
Date of Hearing: 20 May 2009
Date of Decision: 1 September 2009

DECISION

INTRODUCTION

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

[2] The crux of the claim is that the appellant says he is at risk of being killed or otherwise seriously harmed in Algeria by militant Islamists. The issues which arise are the credibility of the account and the question whether the appellant faces a real chance of serious harm.

THE APPELLANT'S CASE

[3] The account which follows is a summary of the evidence given by the appellant on appeal. It is assessed later.

[4] According to the appellant, he was born and raised in the city of Mascara, in the province of Mascara, one of the mountainous western provinces (*walaya*) of Algeria, close to the Moroccan border. Mascara city is variously described as

having a population of 80,000-150,000, depending on how wide the statistical net is cast.

[5] The appellant grew up in a moderate Muslim family and became a teacher. While two of his siblings left home once they married, the appellant and his other siblings continued to live with their parents in the family home, an arrangement which continued until the appellant's departure from Algeria in 2004.

[6] The appellant grew up during the secular FLN-dominated years in Algeria, following independence in 1962. At the time he became a teacher, the only trade union to which workers could belong was the *Union Générale des Travailleurs Algériens* ("the UGTA"). The appellant joined it and, by the late 1980s, had become secretary of the branch at his school. He would later come into conflict with supporters of the Islamist Union of Workers ("the SIT"), a radicalised union established after the restrictions on trade unions were eased in the late 1980s.

[7] In June 1990, there was a call for a general strike. The UGTA did not support the call. The SIT and other Islamists, however, were in favour of the strike and bitter arguments and confrontations arose. These were exacerbated by the detention of many Islamists in camps in the desert.

[8] Following the strike, the appellant did not resile from his support of the UGTA or his general belief in secular government and would voice his views to all and sundry, including his students, friends over coffee in cafes and to people in the street. As a result, he found himself subjected to increasing levels of abuse and threats by Islamists. He would be spat on by strangers, would be called names such as "infidel", "dog" and "western agent" and suffered intimidating actions such as having a finger suddenly put to his face by a stranger in the street. He recalls that threats and insults of this nature occurred on an almost-daily basis.

[9] Following the cancellation by the military of the first stage of the elections in February 1992 and the crackdown on supporters of the FIS and other Islamist political parties, Islamist militancy in Algeria both increased and went underground. The 1992-1993 period saw the emergence of the *Groupe Islamique Armé* ("the GIA"), a violent organisation which targeted both government forces and civilians (including other Islamists) who were not aligned with its aims.

[10] In 1997, the Algerian government issued a decree, declaring an amnesty for Islamists willing to lay down their arms. Many did so, including a number of GIA

members. Following the amnesty, the appellant met with a number of former students who had “gone to the mountains” with the GIA but who had taken advantage of the amnesty to quit and return to the city. They told the appellant that they had seen his name on a GIA “blacklist” of targets.

[11] The appellant became vigilant and careful as a result of this information. He continued to be abused and threatened but no physical attack was made on him until January 2000.

[12] In that month, the appellant was the victim of an attempted attack as he was leaving the house one morning. He had driven his car out of the garage and was just getting out to close the garage door when he saw two men sitting in a nearby car, with coverings over their faces. One of the men got out and began approaching the appellant, calling out “Excuse me”, at which point the appellant saw the barrels of a sawn-off shotgun concealed in his robes. The appellant ran into the garage and closed the door, locking it behind him. He could hear the man banging on the door and calling out abusively.

[13] The appellant re-entered his house and called the police. While he and his brother watched through the window, they saw the two men fetch a can of liquid from their car and douse the appellant’s vehicle. Setting fire to it, they returned to their own car and drove off.

[14] When the police arrived, some twenty minutes later, they called the fire department and a fire engine came to extinguish the blaze. The appellant accompanied the police to the police station to make a statement and he later filed an insurance claim, for which he received 40 per cent of the value of the car.

[15] After this attack, the appellant became afraid for his safety. He no longer went out, except to work, and he did not leave the house without having his brother check that the coast was clear.

[16] Some two weeks after the attempted attack, the appellant received two ‘death threat’ letters, on consecutive days. Both were pushed under the front door. He believes that they were delivered by the GIA because of the tone of the documents (beginning with highly religious proclamations and justifications) and because the documents accused the appellant of being a traitor to the GIA. He reported the letters to the police but nothing eventuated.

[17] One consequence of the attack was that the appellant received a visit from the local office of the *Organisation Nationale des Victimes du Terrorisme* (“the ONVT”) a nationwide NGO established in 1994 to provide support to the victims of terrorism. He was given a membership card and a letter recording his membership. He visited the office in the city on a number of occasions, over a period of a few months, but he was not really in need of any assistance from the ONVT and he had stopped attending by about May 2000.

[18] The attack convinced the appellant that, in spite of the passage of years, he was still at risk from Islamists and he resolved to leave Algeria. He tried several times, unsuccessfully, to obtain a visa for either France or Spain. Eventually, in 2004, he was able to secure a visa to Bulgaria, in transit to a conference in Greece. Unfortunately, two days before departure, an uncle passed away and it became impossible for the appellant to leave at that time.

[19] Still determined to find a way to leave Algeria, the appellant approached the South African embassy and was able to obtain a visitors visa on the strength of a return ticket and a confirmed hotel booking.

[20] The appellant departed Algeria in September 2004. In Johannesburg, he stayed for a night in a hotel before he found a Moroccan man who took pity on him and gave him lodgings for several weeks, until he could find a place of his own.

[21] The appellant met a South African woman of Indian descent not long after he arrived and they married in January 2005. Thereafter, the appellant was able to obtain a “temporary residence permit” which permitted him to remain for a year at a time, while the necessary five years passed before he could apply for permanent residence on the ground of marriage to a South African national. He did not think that the temporary residence permit gave him the right to work so, when he did manage to secure manual work, it was ‘under the table’ and he had no real employment protection.

[22] The appellant and his wife moved around, staying in several different locations in Johannesburg and in Petersburg. They had a child in late 2005. They did not have any serious difficulties but the appellant lived in a state of constant fear of burglary and violent crime. Eventually, he decided that it was intolerable and he resolved to find a country in which he could live safely. He found an ‘agent’ who provided him with a false passport which he used to fly to New Zealand, arriving on 7 November 2008.

[23] On arrival, the appellant lodged a claim for refugee status in New Zealand. He was interviewed by a refugee status officer on 15 December 2008 and his application was declined on 11 March 2009, giving rise to the present appeal.

Documentary evidence

[24] The Authority and the appellant have been provided with the files of the Refugee Status Branch, including copies of all documents submitted by the appellant at first instance.

[25] On appeal, the appellant also submits the following:

- (a) His ONVT membership card;
- (b) His letter of membership from ONVT;
- (c) A Police report into the attempted attack in January 2000;
- (d) A Fire Department report into the attempted attack in January 2000;
- (e) Amnesty International's 2009 report "A Legacy of Impunity: A Threat to Algeria's Future".

[26] Other documents relating to country conditions in South Africa were also tendered but, for reasons which will become apparent, it is unnecessary to record them in detail.

[27] In the course of the appeal interview, the appellant was given copies of several items of country information by the Authority, including:

- (a) Human Rights Watch report Algeria, dated January 2009;
- (b) Canadian Immigration and Refugee Board, Research Directorate "Response to Information Request DZA43566.FE: Update to DZA35700E of 19 December 2000 on the situation in Algiers; whether terrorist groups are present....", dated 10 May 2005;
- (c) US Council on Foreign Relations report dated 27 June 2008 Armed Islamic Group (Algeria, Islamists) (aka GIA, Groupe Islamique Armé, or al-Jama'ah al-Islamiyah al Musallah), by Laurens Vreins;

- (d) United Kingdom Home Office *Country Report Algeria*, dated October 2003 (from clause 6.76 – 6.80).

[28] The appellant sought, and was granted leave, to obtain further documents from Algeria, to address issues which had been raised by the Authority during the course of the hearing. Leave was granted for these to be filed, together with counsel's closing submissions, by 19 June 2009.

[29] On 19 June 2009, the Authority received from counsel a letter from the appellant, explaining that he had been unable to obtain verification from Algeria of his insurance claim or of his membership of the ONVT. Counsel also enclosed a clipping from the *New Zealand Herald* newspaper of 4 June 2009, recording that "al-Qaeda linked militants' had killed two teachers and eight police escorts in an ambush near Algiers by detonating a roadside bomb.

[30] On 21 August 2009, the Authority received from counsel written closing submissions, together with the 17 July 2009 Refugee Documentation Centre (Ireland) report no Q10370 "Problems Faced by Failed Asylum Seekers Upon Return to Algeria".

THE ISSUES

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

"... owing to a 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."

[32] 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?

[33] On this appeal, the question also arises as to the identification of the appellant's country (or countries) of nationality. It is necessary to address that issue first, followed by the issues raised by the Convention.

THE DUAL NATIONALITY ISSUE

[34] The second paragraph of the definition of a refugee in Article 1A(2) of the Convention provides:

“In the case of a person who has more than one nationality, the term “the country of his nationality” shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.”

[35] Thus, Article 1A(2) excludes from refugee status anyone with multiple nationality who can, in at least one country of nationality, avail themselves of protection from being persecuted. The reason for this exclusion is the underlying assumption in refugee law that, where available, national protection takes precedence over international protection, which is surrogate in nature. See Professor J C Hathaway, *The Law of Refugee Status* (Toronto, 1991) at p 57.

[36] The appellant is undoubtedly a national of Algeria. The question which arises is whether he is also able to acquire effective South African nationality by way of permanent residence.

[37] It is assumed, for the purpose of this decision, that permanent residence in South Africa affords the holder the rights and obligations of a national, particularly the “protection afforded to a national” – see the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva, 1992), at para 106.

[38] At first instance, the refugee status officer found that the appellant has the effective rights of a South African national and measured his claim against that country, as well as against Algeria. He acknowledged that the appellant is not presently a permanent resident in South Africa, but found that he would be granted a further temporary residence permit on his return, which would in due course enable him to apply for permanent residence – an application which would be a mere formality because of the appellant's marriage to a South African national.

[39] For the reasons which follow, the Authority is satisfied that the appellant does not, in fact, have the rights of a South African national.

[40] It is well-established that a person whose nationality is not yet formally recognised can nevertheless be considered a national of a country if the obtaining of nationality is a mere formality. See *Refugee Appeal No 72635/01* (6 September 2002) at [138]-[141] and *Refugee Appeal Nos 72558/01 & 72559/01* (19 November 2002) at [83], both citing *Tatiana Bouianova v Minister of Employment and Immigration* [1993] FCJ No 576; (1993) 67 FTR 74 (FC:TD).

[41] As to whether the appellant's acquisition of permanent residence in South Africa could be said to be a mere formality, section 26(b) of South Africa's Immigration Act 2002, as amended by section 27 of the Immigration Amendment Act 2004, provides:

"26. Subject to section 25, the Director-General [of Home Affairs] may issue a permanent residence permit to a foreigner who -

(a)

(b) has been the spouse of a citizen or permanent resident for five years and the Director-General is satisfied that a good faith spousal relationship exists: Provided that such permit shall lapse if at any time within two years from the issuing of that permit the good faith spousal relationship no longer subsists, save for the case of death."

[42] Refugee law requires the decision-maker to assess refugee status on the conditions at the time the decision is made. The appellant has been married to his wife since January 2005, some four years and seven months. As at today, he does not meet the five year requirement. For this reason alone, the acquisition of permanent residence in South Africa could not be said to be a mere formality. Nor is the further effluxion of time a mere formality because a claimant's status might change by reason of intervening death, divorce or instability in the relationship.

[43] There are also several other issues relevant to the application of the 'mere formality' principle. Section 25 of South Africa's Immigration Act 2002, for example, excludes the grant of residence to any prohibited person – a classification which includes, by section 29, a wide range of persons:

"29. (1) The following foreigners are prohibited persons and do not qualify for a visa, admission into the Republic, a temporary or a permanent residence permit:

(a) Those infected with or carrying infectious, communicable or other diseases or viruses as prescribed;

(b) anyone against whom a warrant is outstanding or a conviction has been secured in the Republic or a foreign country in respect of genocide, terrorism, murder, torture, drug-related charges, money laundering or kidnapping;

- (c) anyone previously deported and not rehabilitated by the Director-General in the prescribed manner;
- (d) a member of or adherent to an association or organisation advocating the practice of racial hatred or social violence;
- (e) anyone who is or has been a member of or adherent to an organisation or association utilising crime or terrorism to pursue its ends &
- (f) anyone found in possession of a fraudulent residence permit, passport or identification document.”

[44] Even if he met the five year threshold (which he does not), there are other relevant requirements for the grant of permanent residence in South Africa, including the section 26 “good faith” requirement, the section 29(a) health standards and the section 29(f) prohibition on persons in possession of a fraudulent passport. As to this last category, it is unclear whether “possession” includes past possession (such as the appellant’s use of a false passport to travel to New Zealand) but there must be at least a possibility of it. A grant of permanent residence to the appellant is by no means assured.

[45] On the available evidence, the appellant’s ability to acquire South African nationality cannot be said to be a mere formality. His claim for refugee status falls to be determined in relation to Algeria only.

ASSESSMENT OF THE APPELLANTS’ CASE

[46] Before considering the issues raised by the Convention, it is necessary to record that the appellant’s credibility is accepted. His evidence has been consistent over a long period. There are aspects of the account which might seem surprising, such as the appellant continuing to live in the same house for a further four years after the 2000 attack, without either going into hiding or leaving the country, but a retrospective view does not necessarily assist with an understanding of a person’s actions as events unfolded. On balance, the Authority finds that any implausibilities are not such as to undermine the credibility of the account.

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

[47] “Being persecuted” comprises two elements – serious harm and the failure of state protection. See *Refugee Appeal No 71427/99* (16 August 2000) at [67].

Further, the appropriate standard for persecution is a sustained or systemic violation of core human rights. See in this regard J C Hathaway *The Law of Refugee Status* (Butterworths, Toronto, 1993) at p108 and *Refugee Appeal No 2039/93* (12 February 1996).

Country information

[48] In *Refugee Appeal No 74540* (1 August 2003) the Authority traversed in detail the Algerian civil war in the decade following the army coup of early 1991, after the success of the *Front Islamique Du Salut* in the first round of elections. No purpose would be served by repeating it, but it is helpful background to the state of the insurgency in Algeria today, notably the fact that the GIA is now largely defunct. Its remnants are said by some to have merged with the *Groupe Salafiste pour la Prédication et le Combat* (“the GSPC”) which has, in turn, become known as al Qaeda in the Islamic Maghreb (“the AQIM”).

[49] The ‘Response to Information Request DZA43566.FE’, of 10 May 2005, although some years old, noted that the security situation in Algeria had improved in the preceding year, particularly in Algiers. It did, however, report a number of attacks on police officers and others outside Algiers and noted that 93 civilians had been killed in 2004 (down from 183 in 2003), the majority in the countryside. The decline in GIA activity was attributed to the July 2004 death of Rachid Abou Tourab, the head of the GIA, which led to the group’s “almost total collapse”.

[50] As to the GIA today, the US Council on Foreign Relations report of 27 June 2008 notes:

“What is the status of the GIA as of 2009?”

The U.S. State Department dates the GIA’s last significant terrorist attack to 2001, but this is debated. Some sources attribute the group with unclaimed terrorist attacks up until 2005, though the Salafist Group for Preaching and Combat (GSPC) is the more likely culprit. The Salafists, who ultimately became Al Qaeda in the Islamic Maghreb, eclipsed the GIA in numbers and popularity in 1998 by denouncing indiscriminant violence against civilians - a trademark of the GIA. The Salafists subsequently subsumed most of the GIA’s networks and financial resources in Europe. The final blows came in 2004, when Algerian police forces launched a widespread crackdown (PDF) on all local terrorist groups. Over four hundred members of both the GIA and the Salafists were arrested in that sweep.”

[51] The January 2009 Human Rights Watch report on Algeria notes that AQIM remains a serious threat, largely by way of bombings:

“Terrorism and Counterterrorism

From January to September 2008 at least 265 people were reported killed in more than 21 bombings claimed mostly by the al Qaida Organization of the Islamic Maghreb. The largest of them, a car bomb outside a police academy in Issers on August 19, reportedly killed 44 people and injured 45. On December 11, 2007, two bombs exploded a few minutes apart in Algiers, one targeting the United Nations office and the other going off in front of the Constitutional Council. The blasts killed 41 and injured over 177, according to news agencies. The Algerian government said the bombs killed 26.”

[52] In essence, the brutal repression of the armed groups (see, for example, Amnesty International’s 2009 report “A Legacy of Impunity: A Threat to Algeria’s Future”) has resulted in the eradication of most of the armed groups in the last decade. Only the AQIM remains active, and even its activities are mostly confined to random bombings in towns, with the small hardcore of its members forced to hide in the mountains.

[53] It is against this overview that any risk of serious harm to the appellant must be assessed.

Application of the country information to the facts as found

[54] The appellant was, it is accepted, the target of Islamist antipathy in his home town during the 1990s, culminating in one attack on him in 2000. His account of his psychological stress at that time is noted, but the refugee enquiry is a forward-looking one. The Authority must determine whether there is a real chance of serious harm in the future.

[55] Nine years have passed since the appellant last experienced any attempt to harm him. While it is accepted that he received further threats in the years up to his departure in 2004, they occurred in the period in which the GIA was still operative. It has not been since then. Even if some GIA members joined the AQIM in the mountains, their activities are now mostly confined to random bombing. Further, it is speculative to suppose that those who knew the appellant in the days of the GIA are among the small residue which might have joined the GSPC. It is even more remote to speculate that those few would include any who would now remember the appellant more than five years after the GIA was crushed, let alone that they would find out, from their hideouts in the mountains, that he had returned, let alone that they would still regard him as warranting attack, even assuming they still have the means to carry it out.

[56] In summary, since the appellant left Algeria, the group that sought to harm him has been eradicated. Even if there are small numbers of surviving members who have joined a similar group, the evidence does not establish that those members know of the appellant or have any antipathy towards him.

[57] The appellant asserted, in his evidence, that there are still Islamists “around”. That may well be, but there is nothing to suggest that they know of the appellant or would do him harm. In particular, he is no longer a member of the *Union Générale des Travailleurs*.

[58] In her closing submissions, Ms Uca draws to the Authority’s attention the 2009 ‘travel advisory’ statements by the Ministry of Foreign Affairs and Trade and its Australian counterpart, both warning against unnecessary travel to Algeria. The Australian Department of Foreign Affairs and Trade records a number of bombings in Algerian cities and towns this year, most of which appear to have been targeted at the police or army. Westerners travelling outside major centres are viewed as being at high risk. The New Zealand authorities mirror these sentiments.

[59] The relevance of these concerns to the appellant’s case is, however, limited. He would not be viewed as a westerner and he lives, habitually, in a medium-sized city. Apart from the remote possibility of being caught in a random bombing – which could appropriately be described as ‘being in the wrong place at the wrong time’ – there is no discernible risk to the appellant on the face of the travel advisories. The 4 June 2009 *New Zealand Herald* account of two teachers and eight police escorts being killed by a roadside bomb does nothing to elevate the risk to the appellant beyond that of being a matter of chance.

[60] The absence of risk to the appellant is reinforced by the fact that his family continue to live in the family home, without any further difficulties arising since the appellant’s departure in 2004.

[61] The Authority finds that there is not a real chance of the appellant suffering serious harm at the hands of the GIA (or any later group), or at the hands of Islamists generally, if he returns to Algeria. He does not have a well-founded fear of being persecuted.

[62] Given this finding, it is unnecessary to address the second issue arising from the Convention – that of the reason for being persecuted.

CONCLUSION

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

"C M Treadwell"

C M Treadwell
Member