

IN THE COURT OF APPEAL
ON APPEAL FROM THE UPPER TRIBUNAL

C5/2013/2712

BETWEEN:

AH (ALGERIA)

Appellant/Claimant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent/Defendant

UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES

Intervener

**FURTHER SUBMISSION
ON BEHALF OF THE INTERVENER**

Introduction

1. The United Nations High Commissioner for Refugees (“UNHCR”) makes brief further submissions to this Court in light of (1) the judgment of the Supreme Court of Canada in *Febles v Canada (Minister of Citizenship and Immigration)* [2014] SCC 64 and (2) the Supplemental Note of the Respondent dated 11 November 2014 addressing *Febles*. These submissions should be read together with the UNHCR’s Case for the Intervener dated 21 October 2014 (“UNHCR’s Case”).
2. In *Febles*, the majority took the view that the terms of Article 1F(b) of the 1951 Convention relating to the Status of Refugees (“1951 Convention”) preclude any consideration of factors other than whether or not the individual concerned committed a serious non-political crime outside the country of

refuge prior to admission to that country as a refugee (at §§17-18). The majority in *Febles* also held that a person who commits a serious crime is forever barred from claiming refugee protection (at §33) and concluded that the only purpose of Article 1F(b) is to exclude serious criminals (at §35). The majority rejected UNHCR's view that the proper approach to determining eligibility for refugee status requires a holistic, individualized assessment of all relevant circumstances, including elements of expiation where they arise, with a view to determining whether the person was deserving of refugee status despite his or her past criminal conduct (see UNHCR's submissions to the Supreme Court of Canada in *Febles*, which are attached).

3. The judgment of the minority in *Febles* is for the most part in line with UNHCR's position. UNHCR shares the view of the minority in *Febles* at §131 that a “relentlessly exclusionary – and literal – approach” that considers that everyone who has committed a serious non-political crime outside the country of refuge remains permanently undeserving of international refugee protection regardless of their supervening personal circumstances would not be in line with the good faith approach mandated by the 1969 Vienna Convention on the Law of Treaties as well as the human rights purpose of the 1951 Convention (see §§91-94, see also UNHCR's submissions in *Febles* at §§8-9).

Common aspects of Article 1F

4. All three limbs of Article 1F are informed by the following common aspects.
 - (1) They are intended to preserve the integrity of the institution of asylum (see §20 of UNHCR's Case).
 - (2) They reflect the idea that international refugee protection should not be extended to those who are considered undeserving (see §20 of UNHCR's Case; and see the heading to §§147 to 149 of UNHCR's *Handbook* [UNHCR Materials/tab 1]).

- (3) They are to be given a narrow and restrictive interpretation in the light of the consequences of exclusion (as to which see *Al-Sirri v Secretary of State for the Home Department* [2013] 1 AC 745 at §§12, 75 [**Authorities/tab 23**]).
- (4) Certain acts are so grave as to render those responsible for them undeserving of international refugee protection (see UNHCR Guidelines 2003 at §2) [**UNHCR Materials/tab 3**].

Dual Purposes of Article 1F(b)

5. UNHCR submits that in understanding the proper approach to expiation in relation to serious non-political crimes it is important to recognise the twofold purposes of the exclusion clauses in the 1951 Convention generally, and of Article 1F(b) more specifically. They have been explained by UNHCR at §§15-19 of UNHCR's Case. The purposes of Article 1F(b) are:
 - (1) Denial of refugee status to fugitive criminals. The refugee framework should not stand in the way of serious criminals facing justice, nor should it undermine extradition relations between States.
 - (2) Denial of refugee status to those unworthy of international protection as refugees. Certain acts are so grave that they render their perpetrators undeserving of international protection as refugees.
6. These dual purposes were recognised by the Upper Tribunal in the present case at §85. Far from disputing them, the Secretary of State specifically refers to the two purposes at §36 of her Skeleton Argument dated 13 July 2014. The dual objective of Article 1F has also been expressly recognised by the CJEU in *Federal Republic of Germany v B & D* [2012] 1 WLR 1076 at §104 [**Authorities/tab 29**].
7. In her Supplemental Note, the Secretary of State recommends to the Court an approach consistent with the reasoning of the majority of the Supreme Court of Canada in *Febles*. With respect to that Court, the view that Article 1F(b) serves one main purpose – to exclude persons who have committed a serious crime –

is at odds with the rationale behind the exclusion clauses and may, when applied in the context of expiation, lead to results which, in UNHCR's view, are not consistent with the object and purpose of the 1951 Convention.

8. Thus, when determining whether Article 1F(b) should be applied to a person who has committed a serious non-political crime in the past but has since served a sentence or otherwise been rehabilitated, it is necessary to consider both of these dual purposes. Neither of the two operates as a single stand-alone rationale. Neither is exhaustive. Rather the approach should be an integrated one in which both purposes are considered.
9. The first purpose holds no purchase where expiation has taken place. However, Article 1F(b) is not confined to fugitives from justice (see UNHCR's Case at §60), and exclusion may be justified in light of the second purpose, if the crime is of a comparable nature and gravity, and thus of a similar egregiousness as those covered by Article 1F(a) or Article 1F(c) of the 1951 Convention.
10. Exclusion would apply to a person who has been punished for a past criminal offence or otherwise rehabilitated because his or her "criminal character" still predominates, as envisaged by Dr Paul Weis, writing in 1960 (at pp.984-986) [**Authorities/tab 41**], and in UNHCR's *Handbook* at §157, respectively [**UNHCR Materials/tab 1**]. Dr Weis was recognising, as does UNHCR, that if an individual is in no sense a fugitive from justice then what is needed is past action of grave seriousness to justify exclusion under Art 1F(b).
11. Moreover, as explained at §22 and §§63-64 of UNHCR's case, security concerns can be taken into consideration in the context of expiation as part of the holistic, individualised assessment of all relevant circumstances (see UNHCR's *Handbook*, at §151; see also §§23-24 of UNHCR's submissions to the Supreme Court of Canada in *Febles*).

The meaning of "expiation"

12. UNHCR further submits that it is important to maintain a clear distinction between the question of whether exclusion is applicable in the first place, and considerations related to the possibility of expiation arising from subsequent events and developments which may mean that a person who has incurred responsibility for excludable acts in the past should no longer be considered undeserving of refugee status.
13. The reference in the Upper Tribunal's determination in *AH (Algeria)* at §97 fn 9, in a passage considering the impact of service of a sentence or a final acquittal in criminal proceedings, to the case of *Al Sirri*, where the applicability of exclusion was considered by the UK Supreme Court despite an acquittal in a criminal procedure (also referred to in para. 42(c) of the Respondent's Skeleton Argument) is one example that may serve to illustrate this point. The issue in *Al Sirri* was whether the "serious reasons for considering" standard for exclusion could be considered to have been met if the decision-maker was satisfied that it was more likely than not that the applicant had not committed the crimes in question. Rather than addressing expiation, the Supreme Court's analysis was concerned with the question of whether the requirements for the application of Article 1F were met in the first place.
14. Similarly, when assessing the seriousness of the crime, it is important to distinguish whether this is done as part of the determination of the applicability of exclusion or in the context of expiation. Having committed a "serious crime" forms part of the criteria for the application of exclusion based on Article 1F(b) (see §§24-27 of UNHCR's case). When assessing the possibility of expiation, the seriousness of the crime is one of the factors to be considered, alongside other elements such as, in particular, service of sentence, passage of time, the person's conduct since then, etc. (see at §§57-58 of UNHCR's case). The purpose of this assessment is not, however, to balance post-crime conduct or security considerations against the seriousness of the crime (as the majority in *Febles* appears to have understood UNHCR's submissions on this point – at §59, referred to in para. 4(e) of the Respondent's Skeleton Argument). Rather, as explained in UNHCR's case, what needs to be determined is whether or not it would be consistent with the object and purpose of the 1951 Convention to

apply exclusion despite the fact that the person concerned has served a sentence for his or her crime or has otherwise been rehabilitated (see §§54-64 of UNHCR's case).

Conclusion

15. UNHCR respectfully commends these further submissions to the Court as to the proper interpretation of Article 1F(b) of the 1951 Convention in its consideration of this appeal.

11 June 2015

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