CH

Heard at Field House

On 27 June 2002

AD (Return - Garde a Vu)
Algeria CG [2002] UKIAT 03392
HX09013-2001

IMMIGRATION APPEAL TRIBUNAL

Date Determination notified:
.....2 –8-2002.....

Before:

MR D K ALLEN (CHAIRMAN)
MR C A N EDINBORO
MRS S HEWITT

Between

AHMED DJEBARI

APPELLANT

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

DETERMINATION AND REASONS

1. The Appellant is a citizen of Algeria who has been granted leave to appeal to the Tribunal against the determination of an Adjudicator, Mrs L H S Verity, who dismissed his appeal against the Respondent's decision giving directions for his removal from the United Kingdom and refusing to grant asylum.

2. The hearing before us took place on 27 June 2002. Mr G Hodgetts for Irving & Co. appeared on behalf of the Appellant, and Mr R Holmes of the Home Office Presenting Officer's Unit appeared on behalf of the Respondent.

3. Mr Hodgetts put an amended skeleton argument before us. He argued that the Appellant was at risk on return to Algeria on account of the fact that his passport would show, in effect, that he had been refused asylum in the United Kingdom. Mr Joffe, in his first report, had expressed the view that the Algerian perception of the United Kingdom is that there was an extensive network of fundamentalists here. He would be detained under the terrorist legislation which allowed for

twelve days being held in detention incommunicado. The Secretary of State had agreed in other cases that detention and questioning occurred on return to Algeria. There was some indication that the period of twelve days was in practice exceeded. The case was not just based on an unlawful extension of detention, but that any period of detention on return would be unlawful under Article 5 of the Human Rights Convention. The lowest submission was that any detention, even without mistreatment, would be unlawful under Article 5, and it was argued that, although there had to be a flagrant denial of the rights secured by the Convention, as had been held was the requirement in Devaseelan [2002] UKIAT 00702 (starred) that would be the case here, given the facts. The detention did not fall within any exceptions to Article 5(1). A detention which was completely unlawful would be a flagrant denial of the Appellant's rights. There were both procedural and substantive aspects to this. If the substantive right were breached, it was flagrant as the very essence of the right would be taken away. It could not properly be argued that the exception contained in Article 5(1)(c) was applicable. This was a consequence of the Adjudicator's findings concerning the Appellant's history, at paragraph 31 of her determination. The Tribunal was referred to the various judgments of the European Court of Human Rights set out in the skeleton argument. There could be no reasonable suspicion on an objective basis that he had committed an offence and in effect, since there could be no reasonable suspicion of him, holding him for the purpose simply of obtaining information would be unlawful. The question of the period of detention was also relevant.

4. It was also the case that there would be a breach under Article 3. Here the decision in Ribitsch v Austria [1995] 21EHRR573 showed that any use of physical force would be a violation of Article 3 unless it was as a consequence of something in the Appellant's own conduct.

5. There was a lack of direct evidence about abuse of failed asylum seekers, but there was evidence that there were no complaints as a consequence of fears of reprisals and also fears on the part of lawyers of reprisals and this could be seen from the State Department report. There was a culture in Algeria of police ill-treating people in custody generally. People would be unlikely to go to lawyers and make official complaints. As regards the suggestion in the document produced by Mr Holmes that there had been hundreds of returns from other European countries, that was not disputed, but there was no evidence of any returns from the United Kingdom and therefore a distinction had to be drawn, particularly in the light of the events of 11 September 2001 and their aftermath. General inferences could be drawn from the human rights situation in the country in question, as had been said by the court in Juma.

6. In his submissions, Mr Holmes argued that the case was very much tied in with the particular facts. The Appellant was a married man of 46 who had no history of involvement with terrorists or suspicion of

involvement with terrorists and no criminal record. He had a properly issued Algerian passport. He had previously travelled to Spain and returned on that passport. He had been exempted from military service. There was no reason to believe that the Algerian authorities had any interest in him when he left Algeria. He did not claim to have any sympathy with fundamentalists and the only factor was the refusal of leave to enter on 29 January 2000. The original report of Mr Joffe was four years old and Mr Roberts' report was two years old. They involved people with very different histories from this Appellant. Professor Seddon's report was opinion and not concrete facts. It was not clear how often he had been to Algeria or how recently. In contrast, the UNHCR were based on the ground and concerned on an ongoing basis. The Canadian report produced by Mr Holmes was of significance. If there were widespread mistreatment of failed asylum seekers, it was most unlikely the UNHCR or the various countries who returned people would be unaware. The Appellant was not a person who had been rejected on the basis of the exclusion clauses and this was the only category which concerned the UNHCR. Professor Seddon also referred to the good intelligence record keeping system in Algeria, and therefore it was unlikely that there would be significant delays in establishing that the Appellant was of no interest. There would be no file on him and therefore no suspicion and he would be less likely to be held for long or mistreated.

7. As regards Article 3, it was the case that the nature of any mistreatment was relevant in the context of the situation of the individual. As regards the Article 5 argument, it was clear from paragraphs 107 to 112 in Devaseelan that different criteria were appropriate where a person was being returned to a non-signatory state, rather than the nature of the obligations owed under the Convention by signatory states.

8. By way of reply, Mr Hodgetts referred to the report of the Research Directorate of the Immigration and Refugee Board of Ottawa, including the comment both from the local UNHCR office and the Algerian Foreign Ministry that persons returned to Algeria did not encounter problems. It was unclear what was meant by "problems". The Foreign Minister would be unlikely to detail problems in any event. There was also reference to the desirability of seeking guarantees from the Algerian government for returnees, and that had not been done in this case. The earlier report of Mr Joffe and that of Mr Roberts made it clear that there were risks to failed asylum seekers on return, and the Joffe report had in any event now been updated. The authorities were more likely to be keen to question UK returnees since 11 September 2001.

9. We reserved our determination.

10. This appeal comes before us as a consequence of remittal by the Court of Appeal of an earlier determination of the Tribunal. In essence,

the Court of Appeal remitted the case on the basis, as set out at paragraph 27 of its judgment, that the Appellant was entitled to a properly reasoned decision upon the question of whether he would be subjected to the garde à vue procedure, and if it were concluded that he might, he was entitled also to a properly reasoned decision upon the question of whether he might suffer treatment that would constitute a violation of his rights under Article 3 of the Human Rights Convention.

11. In essence, the Appellant's claim is that as failed asylum seeker he would be at risk on return to Algeria since the authorities would realise he was a failed asylum seeker. He is aged approximately 46 and has a wife and three children who presently live in Algeria. He has never had an interest in politics and has never shown sympathy for or joined a terrorist group. It appears that he experienced problems from three unidentified men who demanded what in effect was protection money from him from his business and he paid this for over five years but claimed never to have established the identity of the group who were extorting money from him. The Adjudicator did not accept that he had left Algeria because he feared persecution from either the authorities or an Islamic fundamentalist group. The Appellant's passport contains a refusal of leave to enter stamp which, it has been argued, and which was previously accepted by the Tribunal, would identify the Appellant on return to the Algerian authorities as a failed asylum seeker.

12. The Tribunal has before it two reports of Professor Seddon of the University of East Anglia, the more recent of which was prepared in the light of the Tribunal's early determination and the Court of Appeal's decision, and was designed to deal with various issues raised during those proceedings. There are also two reports from Mr Joffe, the earlier one some four years old and the more recent one some three months old, the latter updating the former. There is also a report of a Dr Hugh Roberts dated 30 April 2000. The claim has in essence been argued under the Human Rights Convention, in particular Articles 3 and 5.

13. In his earlier report, dated 26 September 2001, Professor Seddon 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 the reasons for being abroad and for having sought asylum. The reports of Mr Joffe and Dr Roberts bore this likelihood out. 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.

15. As against this, we note from the CIPU country assessment of April 2002, it is reported that the UNHCR has not called for a ban on the return of rejected asylum seekers. The basis for this is a paper from the Research Directorate of the Immigration and Refugee Board, Ottawa, to which we shall return in due course, and also a UNHCR letter dated 13 March 2000 which is referred to in the index. There is reference in the Research Directorate Board paper that every year several European countries, including France, Spain, Germany, Belgium, Sweden and Denmark, return hundreds of persons to Algeria, either under a formal agreement with Algeria or on a case by case basis. We note also a reference at paragraph 5C4 of the CIPU report to a report of the Netherlands Immigration Department on the situation in Algeria, dated July 2001, that applying for asylum abroad is not regarded by the Algerian authorities as a political act, that an Algerian has no need to fear persecution on return solely on the grounds of submitting an asylum application, and that Western countries do not regard the overall situation in Algeria as a reason not to deport rejected non-suited asylum seekers and other inadmissible persons to that country.

16. The point is also made in the Research Directorate of the Immigration and Refugee Board of Ottawa report that whereas none of the countries from Europe appears to have carried out a formal study of what happens to "deportees", they all believe they would have heard had persons who were returned to Algeria encountered serious difficulties. The point is made that such deportees sometimes contact the embassies concerned to sort out administrative matters relating to the time spent in the other country and none have ever complained of their treatment by the Algerian authorities upon their return to Algeria. The point is also made that it could be expected that the relatives of

such people would in some cases make it known if a person suffered at the hands of the Algerian authorities, but there has been no incident of this sort ever brought to the attention of the embassies concerned. Against that, Mr Hodgetts makes the point that there is some evidence in the State Department report of fear of reporting problems both by deportees and their lawyers, for fear of reprisals. He also refers to Mr Joffe's report that the Algerian authorities regard European laxity as the reason for the persistence of terrorism and primarily accuse Britain and Germany of this. We also note from the Research Directorate Report that the UNHCR office in Algiers and the Algerian Foreign Ministry both reported that persons returned to Algeria did not encounter problems. There is a reference also to UNHCR recommending guarantees being sought from the Algerian government in relation to proposed returnees and there should be extreme reluctance to return rejected applicants where the exclusion clause has been applied. We note that the sources for Mr Joffe's report, as set out in his 11 March 2002 report, include the statement that the information concerning the end of the triage process on travel documents was provided from official sources within the Algerian diplomatic service and that information coming from security sources has been used in assessing the treatment of returned asylum seekers. Professor Seddon describes his observations with respect to the identification, detention and questioning of "suspicious individuals" including returned asylum seekers are based on the known behaviour of the Algerian Embassy in the United Kingdom and of immigration officials in Algeria as reported by various sources including other experts on Algeria (i.e. Mr Joffe and Dr Roberts). He states that these sources include the Algerian Immigration Procedures reports by Algerian academic and professional friends and colleagues who have observed the procedures involved at first hand on arrival at Immigration when returning themselves after having been legitimately out of the country.

17. We consider that there is weight to Mr Holmes' argument that particular significance has to be attached to reports on the ground and, in particular, from the UNHCR. We bear in mind also that there is no indication as to the histories of those persons to whom Mr Seddon refers at page 24 of the bundle in his earlier report concerning the substantiation by various reports from personal friends and colleagues who have observed the process of people being detained and interrogated on return as failed asylum seekers. There is no indication as to whether these people fell into any of the categories that would be likely to cause them to be of particular concern to the Algerian authorities.

18. In our view, the evidence is sufficiently clear that the Appellant would be questioned on return to Algeria. This would be as a consequence of the fact that he would be identified as a failed asylum seeker from his passport. We do not consider, however, that it has been shown that there is a real risk that he would be held incommunicado for his story to be checked. We accept that of course his story would require to be

checked by the authorities but equally, as Professor Seddon points out in his report, the Algerian authorities have a good intelligence and record keeping system which would enable them to identify whether he fell into one of the suspected categories. We attach particular significance to the report of the Research Directorate of the Immigration and Refugee Board of Ottawa, the author of which met with the local UNHCR office, and also to the quotations that we have set out from the Netherlands Immigration Department report on the situation in Algeria as of July 2001. We accept that it would have been preferable if we had had the entirety of that report before us, but consider that the quotations that have been provided serve as a helpful indication of the views taken by that body of the relevant issues. We accept that there might be some reluctance amongst people returned and their representatives to complain, we cannot ignore the apparent entire absence of any complaint being recorded by or on behalf of anybody who has been returned to Algeria. The fact that a number of countries return hundreds of people to Algeria and the absence of any reported complaints must speak for itself. Whereas there might be some slightly enhanced suspicion of the Appellant as a consequence of coming from the United Kingdom rather than one of the other European countries named, we consider that in the light of the good information services available to the Algerian authorities, it would be a relatively speedy and easy matter to check his history and to discover that he is not a person who is likely to be regarded as causing any threat to the Algerian authorities or the Algerian state or people.

19. We go on, however, to consider what the situation would be if we were wrong and he were at real risk of being held incommunicado. We bear in mind the conclusions of the Tribunal in Devaseelan, to which we have referred above concerning Article 5. It is important to bear in mind when considering the relevant case law that, as was pointed out by the Tribunal at paragraphs 107 to 111 in Devaseelan, in particular at paragraph 109, the Appellant's situation on return to Algeria cannot be judged by the standards that would apply in a signatory state, because a signatory state would not be obliged to remain silent in the face of the claim. As a consequence, as Mr Hodgetts accepted, it is only if there would be a flagrant denial or gross violation of the Appellant's Convention rights that we would be able to find a breach of his Article 5 rights on return if held incommunicado for a week or so as it was described by Prof Seddon. The point was made at paragraph 111 in Devaseelan that as regards the case of a flagrant denial or gross violation of the Appellant's rights this would occur were the right to be completely denied or nullified in the destination country. The fact that the Adjudicator concluded that she did not find the Appellant's claim credible does not in any sense bind the Algerian authorities when considering the Appellant on return to Algeria. As a failed asylum seeker returning to a country which has had very significant problems with terrorism in recent years, we consider that his detention could be properly regarded as being a consequence of reasonable suspicion of him having committed an offence. In our view, in a state with the

recent political history of Algeria, it would be far from unreasonable for a person to be held for a period of time for such checks to be kept out, even if this were to be the case that he were held incommunicado. We emphasise the context in the country of return as was the case in Devaseelan. We do not consider that there would be a complete denial or nullification of his Article 5 rights, were he to be held as was described by Professor Seddon in his first report as being held incommunicado for up to a week or so to enable his story to be checked and records to be consulted. We consider that in the context, detaining him for that period would not be an excessive period such as to give rise to a breach of his human rights. We do not consider that it can reasonably be said that he would be being held purely for the purpose of effective internment as is argued in the amended paragraph 12 of the skeleton argument. We bear in mind that the various quotations contained in the skeleton argument are almost exclusively from cases involving complaints of breaches of the Human Rights Convention by signatory states, and again we emphasise the importance of bearing in mind that Algeria is not a signatory to the European Convention on Human Rights and cannot be judged by the same standards applicable to a signatory state.

20. Nor do we consider that the evidence bears out the contention that the Appellant faces a real risk of prohibited ill-treatment in detention. We bear in mind the background evidence concerning what happens to detainees in Algeria and accept that there is to a degree a culture of violence towards suspects there. This has to be seen in the context of the Appellant's history as would relatively speedily be revealed, in our view. We do not see the objective evidence as showing that there is such a degree of regularity of mistreatment of a significant nature of detainees as to give rise to a real risk of breach of the Appellant's Article 3 rights on return. We note the various comments of the experts as set out at paragraph 5 of the skeleton argument and, in particular, the quotation from Dr Roberts, albeit it in a somewhat different context from this case. We note his comment that a failed asylum seeker would have that fact held against him and it could have consequences prejudicial to his safety. We do not see that as giving rise to an arguable real risk that this Appellant with his history will be significantly mistreated on return. We note Mr Hodgett's argument, based on the quotation from Ribitsch, that any recourse to physical force which has not been made strictly necessary by the person's own conduct is in principle an infringement of the Article 3 rights of that person. We bear in mind also the more recent comment at paragraph 91 of the judgment of the European Court of Human Rights in Kudlav, Poland, that ill-treatment must attain a minimum level of severity to fall within the scope of Article 3. We do not find the objective evidence to show that there is a real risk of treatment amounting to a breach of Article 3 being meted out to this Appellant on return.

21. In conclusion therefore, we do not consider the case as being made out that the Appellant faces a real risk of being held incommunicado in

the garde à vue procedure by the Algerian authorities. If we are wrong in that regard, we consider that even if he were held it would be in the course of detention for the period of checking his identity and any records. We do not consider that the evidence shows that such a period of detention would be such or in such conditions as to give rise to his Article 5 rights, nor that there is a real risk that in the course of that detention he will be subjected to treatment of the kind giving rise to breach of his Article 3 rights.

22. This appeal is dismissed.

Mr D K Allen
Chairman