RM (Military Service – RCD-FIS) Algeria CG [2002] UKIAT 04232
HX26189-2001

IMMIGRATION APPEAL TRIBUNAL

Date heard: 25 June 2002
Date notified:.18 September 2002

Before: -

DR H H STOREY (CHAIRMAN)
MR C THURSBY

Between

MR RACHID MAZARI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DETERMINATION AND REASONS

1. The appellant, a national of Algeria, has appealed with leave of the Tribunal against a determination of Adjudicator, Mr S S Chohan, dismissing the appeal against the decision of the Secretary of State giving directions for removal from the United Kingdom, having refused asylum. Ms S Naik of Counsel instructed by Tyndallwoods Solicitors appeared for the appellant. Mr M Davidson appeared for the respondent.

2.The Tribunal has decided to dismiss this appeal.

3.The appellant claimed he was an active member of RCD (Rally for Culture and Democracy) who during the last Presidential elections had been arrested and detained for a short period. He had spoken out against FIS and the government. He feared that if returned to Algeria he would face risk both from the authorities, as a failed asylum seeker with liability to perform military service, and from FIS because he had spoken out against them.

4.The adjudicator said he was prepared to accept the centrepiece of the appellant`s account as true. However, he did not think the appellant's account feel under any of the exceptions to the general rule that draft evasion or desertion does not ground refugee status. As regards the claim to fear FIS, the adjudicator concluded that, since the authorities had released him from detention after either one or seven days, there was no reason why they would not protect him.

5. The grounds challenged the adjudicator's findings on a number of grounds.

6. One ground was that the adjudicator did not make clear what evidence he accepted and what evidence he rejected. Whilst we would agree that having stated he accepted the "centrepiece" of the appellant`s account, the adjudicator should have made clearer precisely what he accepted and what he rejected. However, it is clear enough that he effectively accepted the entirety of the appellant's account save for the appellant's claim to have strong views against performing his military service.

7. In regard to the adjudicator's findings as to the appellant`s objections to military service, we think they were sustainable. The adjudicator relied on the fact that the appellant's evidence was vague and lacked clarity. We note that all the appellant had been able to say in describing his beliefs was that he did not want to do military service because he did not want to carry out arrests or kill people. Given that the appellant had failed to elaborate his beliefs beyond this bare assertion and that the adjudicator saw and heard the appellant we are not persuaded there was any error here.

8. Another ground relied on was that the adjudicator had dealt inadequately with the expert evidence. At paragraph 27 he wrote:

> "Finally, I shall deal very concisely with Mr Joffe`s report and the Canadian report. Mr Joffe is a respected expert and according to him the appellant "would have a very uncomfortable reception, were he to be returned to Algiers". However, this is a personal opinion and must be seen as such. According to the objective material, his view, with respect, does not stand up. It is worth noting that the Tribunal in the case of *Foughali* considered Mr Joffe`s various reports (not submitted in this case) but was not prepared to accept his opinions."

9. At paragraph 27 he went on to place no reliance on the Canadian report because there was no indication as to the qualifications of the author or whether he is to be regarded as an expert.

10. We would agree with Miss Naik that the adjudicator erred in rejecting Mr Joffe`s evidence as mere "personal opinion". As the evidence of an accepted expert on Algeria and an expert to boot whose evidence dealt with the appellant's case in particular, it merited careful consideration. The adjudicator also erred in treating the findings of fact of the Tribunal in *Foughali* (00/TH/01514) as conclusive of the facts he had to decide. Plainly the findings of fact in *Foughali* were not intended to be binding on other adjudicators, although they did set out the Tribunal's views of the materials placed before it in that case (and in many other Algerian cases).

11. However, as the Tribunal clarified in *Slimani* (01/TH/ 00092) starred, it is ultimately for an adjudicator to assess what weight to attach to the evidence of an expert so long as he gives clear reasons. In this case we think there were sound reasons for concluding that Mr Joffe`s report did not establish the appellant would face a real risk of persecution.

12. The principal point raised in the grounds is that in assessing the appellant's claim the adjudicator failed to consider his difficulties cumulatively. The grounds are perfectly correct to reiterate the general point that in cases raising issue of military service, it is crucial that adjudicators consider the appellant's overall situation so as to ensure they assess any harms cumulatively. We would also accept that this adjudicator (despite extensively citing *Foughali* where this point is forcibly made) nowhere sets out that he has assessed the appellant's difficulties cumulatively. However, even considering the appellant's difficulties cumulatively, we do not consider they justified coming to a conclusion different from that reached by the adjudicator.

13. As regards the military service issue, even assuming that the adjudicator was wrong to assume, as he did in paragraph 25 of his determination, that the appellant as a deserter and not simply a draft evader could take advantage of the current exemption from military service for men over the age of 27, the furthest this takes the appellant's case is that on return he would face punishment as a deserter. The adjudicator had only relied on the exemption point in the alternative: he began the paragraph with the words, "[i]n any event". At paragraph 24 he had summarised the conclusion reached about punishment for military service in Algeria in *Foughali* to the effect that a penalty in the 2-10 year bracket is not a disproportionate penalty. We consider that this conclusion continues to reflect the correct position.

14. At paragraph 21 the adjudicator gave reasons why he did not think that the appellant came within any of the other exceptions to the general rule that draft evasion or desertion does not ground refugee status. Again we think his

conclusions were fully justified. On the evidence in this case the appellant could not show he would face persecution due to conditions of life in the military during his period of conscription. Nor could he show that performance of his military service duties would expose him to participation in an armed conflict contrary to international law. As a result of the Court of Appeal judgment in *Sepet and Bulbul* [2001] Imm AR 452, the adjudicator was not obliged to consider the exception relating to partial or absolute conscientious objection and, in any event, as already noted, the appellant had singularly failed to show that his beliefs opposed to military service were sincere.

15. As regards the appellant's fear of the authorities, on his own account he had experienced one short period of arrest during the height of the presidential elections and he had not been charged as a result of the detention. Nothing submitted in the grounds leads us to conclude that the adjudicator was wrong in consequence to conclude that the authorities would not have any adverse interest in him as a result of either his arrest or his RCD membership. The objective materials do not document that ordinary RCD members face any particular difficulties from the authorities.

16. As regards the appellant's fear of FIS, we would agree that the adjudicator did not deal with this as fully as he should have. On the appellant's evidence, accepted by the adjudicator, the RCD had problems with FIS and in 1996/7 an article had appeared in a newspaper called The Horizon, which had his picture holding a placard. He further claimed that " I speak out all the time against FIS and my opinions are known to everyone, which puts me in danger, both from FIS and from the government".

17. We must say that on the evidence in this case we do not think the adjudicator had sufficient before him to conclude the appellant would indeed be targeted by FIS. On the appellant's own account he was not a prominent member of RCD. The article which had appeared of him holding a placard was not one which linked him as such with opposition to FIS. He did not claim that members of FIS had targeted him previously. He had failed to furnish an account which gave any real substance or detail to his claim to be at real risk from FIS.

18. Even assuming however, that the appellant had established a well-founded fear of serious harm at the hands of FIS, we agree with the adjudicator that he failed to show that the authorities would not be able to effectively protect him against such harm. Given that the RCD was opposed to FIS, the government would have no reasons not to consider him as someone they were willing to protect in the normal way. Given too that he was not a prominent member of RCD and that he had not had any previous experiences of being targeted by FIS members, we consider that, should any difficulties arise from FIS members targeting him, he would not fall into the category of someone whom they would find difficulty in adequately protecting.

19. Miss Naik urged the Tribunal to reassess the appellant's claim in the light of two recent judgments in the Court of Appeal that of *Ahmed Djebari* [2002] EWCA Civ 813, judgment of 13 May 2002 and that of *Mohammed Hasan Es-Eldin* C/2000/2681, judgment of 29 November 2000. However, having carefully studied these judgments we do not think they take matters as far as Miss Naik contends.

20. Insofar as both judgement emphasise the importance of giving due weight to expert reports written by specialist with respectable credentials, we have already indicated we entirely agree.

21. So far as these judgments, the *Djerbari* judgment in particular, contain evidence based on expert opinions concerning risk to failed asylum-seekers, we would agree that such evidence requires careful assessment, albeit the adjudicator cannot be blamed for ignoring the report of Professor Seddon since it was not before him. On the evidence that was before him, however, we are satisfied he was correct in concluding that it did not establish that being a failed asylum seeker liable for punishment as a deserter gave rise to a real risk of persecution or treatment contrary to the appellant's human rights.

22. Before concluding we need to say something in particular about Professor Seddon`s report. The text of his report was not produced before us, despite our grant of a further 7 days after the hearing in which to produce it and despite our having waited for a further 5 weeks in case papers enclosing it had not found their way to our file. Accordingly we must decide this case without having this report before us.

23. Given the principle established in *Ravichandran* that the appellate authorities must assess risk as at the date of hearing, the position we have found ourselves in over Professor Seddon`s report illustrates a dilemma which is not uncommon. On one reading, this principle could be taken to mean all evidence that comes to hand late should be admitted and considered. However, since there will quite often be some report or other which has only just become available, that reading could totally defeat any finality of litigation. On another reading the appellate authorities could always rely on the powers given them by the Immigration and Asylum Appeals (procedure) Rules 2000 to refuse production of any evidence not served in time before the hearing. But too strict reliance on such powers could lead to injustice. Ensuring that there is a just disposal of an appeal often means, therefore, balancing these two opposite approaches.

24. We would emphasise that in this case not only did the appellant's representatives fail to avail themselves of the opportunity to adduce this evidence in accordance with Tribunal rules of procedure prior to the hearing. They also failed to avail themselves of the opportunity given to them of adducing it after the completion of the hearing. In our view they can scarcely complain as a result that we have failed to consider it. If they imagine that the Tribunal is obliged to seek out evidence for itself in this way, they are wrong. However, there are two further

reasons, why, in addition to lack of compliance with procedural rules, which lead us to think that no injustice to the appellant has resulted from our course of action. Although production of this report would doubtless have benefited our deliberations, we note that the Court of Appeal did not make any definitive findings on this report: it simply ruled that the production of it which had been made in that case was sufficient to require the Tribunal not to have refused an application for leave to appeal. But it goes no further than that.

25. The other reason we have for determining this appeal without looking at the text of Professor Seddon`s report is that there is a considerable body of materials which deal with the issue of failed asylum seekers, including those produced by Dr Joffe. That we did have before us. It did not lead us to take a different view from that taken by the adjudicator.

26. For the above reasons this appeal is dismissed.

DR H H STOREY
VICE-PRESIDENT