



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal Number: PA/00145/2017

THE IMMIGRATION ACTS

Heard at Field House

Decision & Reasons Promulgated

On 29 September 2017

On 10 October 2017

Before

UPPER TRIBUNAL JUDGE FINCH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ASD

Respondent

Representation:

For the Appellant:

Miss J. Anderson and Miss N. Barnes of counsel, instructed by
the Government Legal Department

For the Respondent:

Mr. P. Haywood of counsel, instructed by Wilson
Solicitors LLP

ANONYMITY ORDER

FURTHER TO the anonymity order made by First-tier Tribunal Judge Hodgkinson on 5 July 2017

AND PURSUANT TO section 11 of the Contempt of Court Act 1981, section 25 of the Tribunals, Courts and Enforcement Act 2007 and rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008

IT IS ORDERED THAT:

1. The Respondent be granted anonymity in the following terms:
 - a) Nothing should be published that would or might tend to (i) identify the Respondent in these proceedings, or (ii) identify the address at which he lives or (iii) tend to have either of these consequences.
 - b) The Respondent shall be identified only as ASD for the purposes of these proceedings. (This order does not prevent publication of or reference to ASD as being the Respondent in these proceedings.)
 - c) In particular, and without prejudice to the generality of the foregoing this Order prohibits (except where necessary for the effective and proper management of national security, the international relations of the UK or the detection and prevention of crime) the:
 - i) Publication and/or release by way of newspaper, magazine, leaflet, journal or any other paper form,
 - ii) Broadcast and/or release in any sound or television format on radio, satellite, cable, television or by telephone,
 - iii) Publication and/or release on any internet site or electronic/digital forum, public computer network or social media,Of the information referred to in paragraph 1 a) above by any person, legal or natural.
2. No non-party is to have access to pleadings, evidence or interlocutory orders, or any other court documents, which might lead to the identification of the Respondent and his address.
3. This Order is to remain in force until further order.
4. There shall be liberty to apply to vary this Order.

Failure by a person, body or institution whether corporate or unincorporated or any party to this appeal to comply with this direction may lead to proceedings for contempt of court.

DECISION AND REASONS

BACKGROUND TO THE APPEAL

1. The Respondent, who was born on [] 1966, is a national of Algeria. He entered the United Kingdom on 7 October 1999 and applied for asylum on arrival. His application was refused on 14 March 2000 but his subsequent appeal was allowed and on 10 April 2001 he was granted indefinite leave to remain, as a refugee. He was convicted of a number of offences over the subsequent years; obtaining pecuniary advantage by deception, having a bladed article in a public place, using threatening, abusive or insulting words/behaviour or disorderly behaviour to cause harassment, possessing material for contaminating or interfering with goods with intent to cause alarm, anxiety or loss, four counts of contaminating or interfering with goods with intent to cause public alarm and anxiety and having an offensive weapon. On 14 April 2009, he was sentenced to nine years' imprisonment for the last three offences.
2. On 29 June 2012, the Respondent was notified that his refugee status fell to be revoked pursuant to section 72 of the Nationality, Immigration and Asylum Act 2002 and on 28 December 2012 he was notified of the cessation of his refugee status. A deportation order was served on the Appellant on 1 March 2013. He was granted a right of appeal but did not exercise it. Removal directions were set for 10 May 2013 but were cancelled when the Algerian authorities refused to issue the Respondent with an Emergency Travel Document until they had made further checks.
3. The Respondent made a fresh asylum claim on 7 January 2016 and on 13 January 2016 he was served with a section 72 notification. On 19 February 2016, the Algerian authorities agreed to issue an Emergency Travel Document for the Respondent and on 29 February 2016 his asylum claim was refused without a right of appeal.
4. On 25 November 2016, the Appellant sent a supplementary letter maintaining her decision to refuse the Respondent's protection and human rights claims and maintain his deportation order. The Respondent then lodged a claim for judicial review in relation to this decision and

on 23 December 2016 the Appellant agreed to withdraw the certification and grant him a right of appeal. The Respondent then appealed on 6 January 2017. First-tier Tribunal Judge Hodgkinson allowed the appeal in a decision, promulgated on 5 July 2017. The Appellant appealed on 18 July 2017 and First-tier Tribunal Judge Keane granted her permission to appeal on 25 July 2017.

THE HEARING

5. It was the Respondent's case that his deportation to Algeria would give rise to a breach of Article 3 of the European Convention on Human Rights. He had not challenges the decision taken by the Respondent that he was a serious criminal for the purposes of section 72 of the Nationality, Immigration and Asylum Act 2002 or that he was subject to automatic deportation for the purposes of section 32 of the UK Borders Act 2007. .
6. Counsel for the Appellant took me through her skeleton argument in some detail and then counsel for the Respondent replied and I have given detailed consideration to their submissions and referred to them, where necessary, in my findings below.
7. I have reminded myself that, for the purposes of section 11 of the Tribunals, Courts and Enforcement Act 2007, I must consider whether any error of law arises from the decision made by First-tier Tribunal Judge Hodgkinson.
8. I have reminded myself of the serious nature of the Respondent's crimes and the length of his sentence and note that First-tier Tribunal Judge Hodgkinson referred to them in detail in paragraphs 5 to 14 of his decision. But I have also to take into account that the Respondent is relying on the provisions of Article 3 of the European Convention on Human Rights and that the right not to be subjected to inhuman or degrading treatment or torture is an absolute one, which is not subject to paragraphs A398 to 399A of the Immigration Rules or sections 117A to 117D of the Nationality, Immigration and Asylum Act 2002.
9. Counsel for the Appellant asked me to take judicial notice of the fact that the United Kingdom has a sophisticated anti-terrorism apparatus but did not provide me with any evidence relating to this apparatus. I was not able to take judicial notice of any such apparatus, as this was outside the range of my judicial experience.

FIRST GROUND OF APPEAL

10. Counsel for the Appellant submitted that the First-tier Tribunal Judge had erred in law and misapplied *Devaseelan (Second Appeals - ECHR - Extra-Territorial Effect) Sri Lanka* * [2002] UKIAT 701 in so far as in paragraph 58 of his decision he accepted in their totality the 2001 findings of Adjudicator Renton. These were that the Respondent had been trained as a technician working with industrial chemicals, had distributed anti-regime literature on behalf of the Union of Free Students in Algeria and supported the activities of the Islamic Salvation Front. He also found that the Respondent had been arrested by the Algerian security service in 1994 and detained and tortured and interrogated about his political activities. In addition, he accepted that the Respondent had also been arrested in July 1999 and detained and beaten before he was able to escape and flee from Algeria.

11. I have taken into account that in paragraph 32 of *Devaseelan*, the Tribunal held that:

“We consider that the proper approach lies between that advocated by Mr Lewis and that advocated by Miss Giovanetti, but considerably nearer to the latter. The first Adjudicator’s determination stands (unchallenged, or not successfully challenged) as an assessment of the claim the Appellant was then making, at the time of that determination. It is not binding on the second Adjudicator; but, on the other hand, the second Adjudicator is not hearing an appeal against it. As an assessment of the matters that were before the first Adjudicator it should simply be regarded as unquestioned. It may be built upon, and, as a result, the outcome of the hearing before the second Adjudicator may be quite different from what might have been expected from a reading of the first determination only. But it is not the second Adjudicator’s role to consider arguments intended to undermine the first Adjudicator’s determination”.

12. In paragraph 39 the Tribunal also found that:

“(1) **The first Adjudicator’s determination should *always* be the starting-point.** It is the authoritative assessment of the Appellant’s status at the time it was made. In principle, issues such as whether the Appellant was properly represented, or whether he gave evidence, are irrelevant to this.

- (2) **Facts happening since the first Adjudicator's determination can *always* be taken into account by the second Adjudicator.** If those facts lead the second Adjudicator to the conclusion that, at the date of his determination and on the material before him, the appellant makes his case, so be it. The previous decision, on the material before the first Adjudicator and at that date, is not inconsistent.
- (3) **Facts happening before the first Adjudicator's determination but having no relevance to the issues before him can *always* be taken into account by the second Adjudicator.** The first Adjudicator will not have been concerned with such facts, and his determination is not an assessment of them".
13. Before First-tier Tribunal Judge Hodgkinson, the Appellant submitted that the credibility of the account given to Adjudicator Renton was undermined by the fact that the Respondent had not, for the purposes of that appeal, disclosed that he had been imprisoned for assault in 1992 and that his current account of the route he had taken to the United Kingdom was different to the one he had relied upon in 2001. In paragraphs 54 to 58 of his decision First-tier Tribunal Judge Hodgkinson gave detailed consideration to these submissions in the context of the evidence provided by the Respondent in a recent statement and the lack of any evidence about any injuries he may have suffered in 1992. When doing so he complied with the approach outlined in *Devaseelan*. He took into account material which had come to light since Adjudicator Renton's determination but decided that they were not sufficient to undermine the decision reached that the Respondent had been persecuted for a Convention reasons before he left Algeria in 1999.
14. Counsel for the Appellant submitted that Adjudicator Renton had merely relied upon the Respondent's own evidence when hearing his appeal but in his determination he had found that the account given by the Respondent was plausible in the light of the objective evidence about the situation in Algerian and the expert report provided by Mr. Joffe.

15. First-tier Tribunal Judge Hodgkinson also took into account the discrepancies in the account given by the Respondent about the route he took from Algeria to the United Kingdom and the reasons he gave for accepting the Respondent's explanations were not irrational.
16. In her skeleton argument and in the oral submissions before me the Appellant raised a further and broader ground, which had not been raised before First-tier Tribunal Judge Hodgkinson. This was that, when considering whether to rely on the findings of Adjudicator Renton, First-tier Tribunal Judge Hodgkinson should have taken into account the contents of the criminal judge's sentencing remarks, the pre-sentence report and the OASys report.
17. In her sentencing remarks, Her Honour Judge Hagen said that she found the Respondent to be arrogant and inflexible in his thinking and noted that he had insisted on all the witnesses attending, despite the strength of the evidence against him, which was, on any view, overwhelming. This was in keeping with the pre-sentence report, where it was noted that "being obstructive and failing to co-operate may also give him a sense of control and power over others". The report also said that he indicated that he was frustrated in all aspects of his life by the state and would hint at his treatment being part of a wider conflict between the east and west. It was also said that he viewed western societies with suspicion and extreme hostility. In the OASys Assessment he was reported as saying that he had experienced a period of growing ostracism from the community, leading him to feel isolated and develop grievance thinking and that this increased after he was held in custody for offences he had not committed. There was nothing in these reports to suggest that the Respondent had felt ostracised prior to applying for asylum in 1999 or at the appeal hearing before Adjudicator Renton.
18. In addition, there was nothing in the report of Dr. Obuaya, a consultant psychiatrist, which indicated that the Respondent had any mental illness or psychological condition which would have undermined the credibility of the account he provided in his asylum

appeal before Adjudicator Renton. As a consequence, I find that there was nothing in the material before First-tier Tribunal Judge Hodgkinson which gave rise to a “*Robinson obvious*” point about whether the credibility findings in relation to Adjudicator Renton’s determination should be disregarded.

19. Counsel for the Respondent also noted that any tendency on the part of the Respondent to “big up” his role to make himself seem powerful and dangerous would place him at additional risk if interrogated after being removed to Algeria.

SECOND GROUND OF APPEAL

20. In the second ground of appeal it is submitted that the First-tier Tribunal Judge had misdirected himself in relation to the expert evidence before him. In particular, it was submitted that the First-tier Tribunal Judge did not engage with all the evidence and had just copied passages from the experts’ reports without subjecting them to any analysis. However, in my view, First-tier Tribunal Judge Hodgkinson gave very detailed consideration to the expert evidence in paragraphs 69 to 82 of his decision. When doing so, he listed key aspects of their evidence and referred to the relevant paragraphs in their reports. He also carefully listed evidence which both supported and undermined the case being made by the Respondent.
21. In addition, in paragraphs 71 to 79 of his decision, First-tier Tribunal Judge Hodgkinson did analyse the key issues in the Respondent’s appeal. When doing so he referred to relevant passages from the expert reports before going on in paragraph 80 of his decision to set out the content of the short letter from the North Africa Joint Unit of the Foreign & Commonwealth Office, dated 5 May 2017. At paragraph 82 of his decision the First-tier Tribunal Judge also confirmed that he had taken into account the statement by Jill Rice of the Criminal Casework Department and the Country Information response by Robin Tichenor. Then, in paragraph 92 of his decision he stated that “in arriving at my decision in this appeal, I have taken into account the totality of the available evidence, which includes...the expert evidence referred to and the country material and case law of relevance”.

22. The Appellant submitted that the content of the expert reports amounted to mere speculation but the expertise and experience of both experts was clear from their reports, which were well sourced and reasoned. In addition, Alison Pargeter is a Senior Research Associate at the Royal United Services Institute and is regularly called upon to brief policy-makers in the UK and abroad and to participate in international conferences. She has also undertaken consultancy projects for the Government. Furthermore, as the First-tier Tribunal Judge noted in paragraph 70 of his decision, Dr. Spencer's expertise was not the subject of any challenge by the Appellant and she regularly gives evidence before SIAC. In his email, dated 16 March 2017, Robin Titchener, a member of the Appellant's Legal Strategy Team and Country Policy and Information Team, also stated that in his view her report appears to be pretty balanced and measured.
23. First-tier Tribunal Judge Hodgkinson did state that he found "the reports of Dr Pargeter and, in particular, Dr Spencer, to be particularly helpful, persuasive and reliable, such evidence satisfactorily addressing...the country material relied upon by the Respondent in the RFRLs and elsewhere". It is my view that this did not mean that he had reversed the burden of proof and required the Appellant to prove that the Respondent would not be persecuted if deported to Algeria. Instead, he had adopted the approach approved in *Karanakaran v Secretary of State for the Home Department* [2000] EWCA Civ 11, which required him to take into account the evidence in the round, having applied appropriate weight to each individual piece of evidence.
24. The Appellant obtained the evidence from the Foreign and Commonwealth Office and the Home Office in order to respond to the initial expert evidence being relied on by the Respondent and was granted an adjournment in order to do so. When this evidence raised further issues, the Respondent obtained a supplementary report from Dr. Spencer. The totality of this evidence then became the factual matrix on which First-tier Tribunal Judge Hodgkinson had to follow the guidance provided in *Ravichandran*.
25. It was the view of the experts that there was evidence, principally in the form of media reports which were in the public domain, which was capable of raising a reasonable suspicion that the Appellant had links with Islamic terrorists.

26. In her skeleton argument the Appellant submitted that First-tier Tribunal Judge Hodgkinson had failed to take into account that if the Algerian authorities suspected that the Respondent was a terrorist, its specialist anti-terrorism services could share information with its UK counterpoints to ascertain if this was the case. However, there was no evidence before the First-tier Tribunal Judge to suggest that this was an option or, in the alternative, that this option had been explored and any assurances sought from the Algerian authorities.
27. Therefore, I find that First-tier Tribunal Judge Hodgkinson did not misdirect himself in relation to the expert evidence.

THE THIRD GROUND OF APPEAL

28. The Appellant also submitted that the First-tier Tribunal Judge erred in law in his approach to *AF (Terrorist Suspects – HS (Algeria confirmed) Algeria CG* [2009] UKAIT 00023. However, in this case the Upper Tribunal found that:

- “i). An appellant who can establish that he has a history that suggests he may have connections to international terrorism is at real risk of being detained on arrival in Algeria, and investigated.
- ii). It is reasonably likely that when the suspicion is of international terrorism such a returnee will be passed into the hands of the Department du Renseignement de la Sécurité (“DRS”) for further interrogation.
- iii) The historic evidence about the DRS’s propensity to use torture as a means of interrogation, together with the continuing absence of any evidence of accountability or monitoring, strongly suggests that, in the absence of evidence to the contrary, the DRS still uses torture and other serious ill-treatment in its places of secret incommunicado detention”.

29. In relation to 1) it was the Respondent’s case that there were a number of different factors which viewed together, would suggest that he had connections to international terrorism. These included the media reports who referred to him as a jihadist or terrorist, the length of time he had been absent from Algeria, the length of the time he had been in a prison system known to contain jihadists and the fact that he had been deemed unsuitable for release from detention when he completed his criminal sentence. Counsel for the Appellant relied on the fact that the Respondent did not claim to have any links to international terrorism, had not been charged with any terrorist offences and had not been detained in prison premises

reserved for those suspected of terrorism. But, as First-tier Tribunal Judge Hodgkinson found, the question was whether the Algerian authorities were reasonably likely to hold a suspicion that he had such links. This was the aspect of his case which was analogous with that of *AF*. Furthermore, the ratio of *AF* was not restricted to teachers who had been absent from Algeria for a long period of time., had travelled to certain countries and had worked for organisations which had been deemed by some governments to be terrorist in nature. It applied to those who had not formally been charged as terrorists but whose history would give rise to a suspicion that they were nevertheless linked to terrorism.

30. At paragraphs 88 to 91 of his decision First-tier Tribunal Judge Hodgkinson gave cogent reasons for finding that *AH* also applied to the Respondent's case but that the link to terrorism arose from the media reports of his particular form of jihad and the choice of his targets. It was not simply that he had been out of the country for so long. As counsel for the Respondent noted, *AH* was not a country guidance case which listed known risk factors in Algeria. Instead, it made general findings on risk which may or may not fit the individual circumstances of an appellant's case.
31. Therefore, I find that First-tier Tribunal Judge Hodgkinson did not misapply the country guidance in *AH*.

FOURTH GROUND OF APPEAL

32. The Respondent submitted that the First-tier Tribunal Judge erred in law in paragraph 91 of his decision, when concluding that the Algerian authorities would consider that the Appellant had links to international terrorism because he had not said which reports about the Appellant would come to the attention of the Algerian authorities. However, in paragraphs 90 and 91 of a long and cogent decision, the First-tier Tribunal Judge was reviewing the totality of the evidence made available to him and it was not unreasonable to suppose that some of the reports, for example the pre-sentence and OASys reports may not come to the attention of the Algerian authorities. However, as the First-tier Tribunal Judge noted, that still left a wealth of evidence in the public domain; namely the facts of his offences and the media interest in his case. He also said that he was satisfied from the evidence he had previously reviewed in his decision that this other evidence would be known to the Algerian authorities. This was the evidence which he had reviewed in detail in paragraphs 68 of his decision before reminding

himself in paragraph 69 5) that Dr. Pargeter had said that the appellant's case had been well-publicised, including in the influential Algerian newspaper *El Watan*, which had commented that early indications had pointed to him being, from his choices of target, an Islamist. She went on in sub-paragraphs 6) and 7) to consider the information that the Algerian authorities would also have been able to obtain from websites and other media reports.

33. In paragraph 91 of his decision First-tier Tribunal Judge Hodgkinson carefully weighed the evidence before concluding that “even if the [Respondent] does not have what might properly be described as terrorist motivations, his criminal history very arguably suggests links to such motivations and, logically, at the very least is such as to arouse a material suspicion of his motivations”.
34. The Appellant submitted that just because the Respondent could be deemed a “loner”, this did not mean that he would be viewed as a terrorist. She also characterised the “loner” argument as an opportunistic attempt to draw benefit from recent attacks by individuals in Europe. It was the expert, Claire Spencer, who is a senior research fellow at the prestigious Chatham House in London, who first raised a comparison to “lone wolf” attackers in paragraph 2.4 of her first report, dated 7 March 2017, where she said that “a number of recent recruits to ISIS from within the expatriate North African communities of Europe have been loners, with petty criminal backgrounds and personality disorders of the kind that may be inferred from the behaviour that led to [the Respondent] being arrested, tried and imprisoned for criminal damage in the UK in 2009”. She elaborated on this possibility in her supplementary report, dated 30 May 2017, in which she said at paragraph 1.4 that, as he fitted this profile, he may well be detained on a precautionary basis by the DSS (DRS) on his arrival in Algeria.
35. In order to make good an assertion that Dr. Spencer was acting in an opportunistic manner, it would be necessary to show that the expert was acting contrary to her instructions and her professional expertise. It was the Appellant's case, as supported by the letter from the Foreign and Commonwealth Office, dated 5 May 2017, that the Algerian authorities would likely treat the Respondent as a criminal rather than a terrorist. In particular, it stated that “the Algerian authorities would view the Appellant as a criminal, as opposed to a terrorist, if they were to interview him on his return to Algeria [and, therefore,] it follows that he would likely be interviewed by the police and not the DRS, but we cannot say definitively”. In her supplementary report, Dr. Spencer was asked to “comment on the Home Office's assertion

that [the Respondent] is unlikely to be considered a credible threat by the Algerian authorities”. She did so in detail and concluded that “there is nothing in the information provided by the Foreign and Commonwealth Office or contained within the ‘Country Information Response’...that alters my conclusion (at paragraph 4.9 of my report dated 7 March 2017) that ‘fair treatment of [the Respondent] in detention cannot be guaranteed’”.

36. The weight that First-tier Tribunal Judge Hodgkinson gave to the expert evidence of both Dr. Spencer and Dr. Pargeter was a matter for him. This was particularly the case when the evidence from the Foreign and Commonwealth Office was equivocal. For instance, as noted above, it was said that it could not be definitively be said that the Respondent would not be interviewed by the DRS. Earlier in the letter, it was also said that it was unclear whether the Algerian authorities would have an interest in him on the basis of him being detained there over 18 years previously.
37. Therefore, I find that First-tier Tribunal Judge Hodgkinson did not make any errors of law in paragraph 91 of his decision.

FIFTH GROUND OF APPEAL

38. The Respondent submitted that the conclusion reached by the First-tier Tribunal Judge fell outwith the range of conclusions which could be reached on the basis of the evidence before him.
39. This was a composite ground which relied on the content of the previous four grounds of appeal. As stated above, I have not found that these grounds were made out. Therefore, I find that there is no basis to find that there was an error of law on this composite ground.
40. As a consequence, I find that First-tier Tribunal Judge Hodgkinson did not make any material errors of law in his decision and reasons.

DECISION

(1) The Appellant's appeal is dismissed

Nadine Finch

Signed

Date 5 October 2017

Upper Tribunal Judge Finch