



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: AA/09919/2014

**THE IMMIGRATION ACTS**

Heard at Field House  
On 8<sup>th</sup> June 2017

Determination Promulgated  
On 5<sup>th</sup> September 2017

Before

UPPER TRIBUNAL JUDGE COKER

Between

XY

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr D Chirico, instructed by Wilson Solicitors LLP

For the Respondent: Mr O Sanders QC, instructed by Government Legal Department

**ERROR OF LAW / DETERMINATION AND REASONS**

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original Appellant/parties in this determination identified as XY. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings

1. The appellant was recognised as a refugee by the United Kingdom on 7 July 2011 and granted leave to remain until 7<sup>th</sup> July 2016. He left the UK in mid-2013

and was, at the time of the cancellation of his refugee status, at the time of his First-tier Tribunal appeal and now, in France. On 23<sup>rd</sup> October 2014, the respondent decided to cancel the appellant's refugee status on the grounds that he should have been or is excluded from being a refugee in accordance with regulation 7 of The Refugee or Person in Need of International Protection (Qualification) Regulations 2006<sup>1</sup> and therefore paragraph 339A(vii)<sup>2</sup> of the Immigration Rules applied. He had no appeal against that decision. The respondent, on the same day, decided that the appellant no longer met the requirements of the Immigration Rules under which he was granted leave to remain in the UK, that this was a material change in circumstances and therefore cancelled his leave to remain under paragraph 321A(1) of the Immigration Rules. He had an appeal against that decision. He lodged an appeal to the First-tier Tribunal.

2. There is no statutory appeal against the decision to revoke refugee status. If it is the SSHD's view that the nature of the change of circumstances is such that leave should be cancelled, then cancellation is mandatory. A decision made under paragraph 321A(1) does not import a discretion by the SSHD whether to cancel leave to remain. The tribunal cannot take a decision on how the respondent reached her decision to revoke refugee status but rather whether the decision by the SSHD to cancel leave was correct. If the judgment of the SSHD to revoke refugee status was correctly reached, there is no scope for any other outcome. Because the decision to revoke leave to remain is irrevocably linked to the decision to cancel leave to remain, the appeal against that latter decision would be meaningless if the Tribunal was not also able to consider whether the revocation of refugee status was lawful. For example, if the SSHD had unlawfully revoked refugee status, then it would follow that the decision to cancel leave to remain would itself be unlawful. This contrasts with the position where the SSHD takes a decision under paragraph 323(ii) where the SSHD has exercised a discretion whether to curtail leave to remain. A decision taken under that paragraph of the Immigration Rules does import a discretion which is justiciable by the Tribunal.
3. The appellant's appeal was dismissed by Designated Judge of the First-tier Tribunal Shaerf for reasons set out in a decision promulgated on 4<sup>th</sup> January 2017.
4. Permission to appeal that decision was granted by Upper Tribunal Judge Allen on 12<sup>th</sup> April 2017 and the appeal came before me on 8<sup>th</sup> June 2017. At the hearing, I directed the parties to file and serve written submissions addressing

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<sup>1</sup> Regulation 7.—(1) A person is not a refugee, if he falls within the scope of Article 1 D, 1E or 1F of the Geneva Convention.

(2) In the construction and application of Article 1F(b) of the Geneva Convention:

(a) the reference to serious non-political crime includes a particularly cruel action, even if it is committed with an allegedly political objective;

(b) the reference to the crime being committed outside the country of refuge prior to his admission as a refugee shall be taken to mean the time up to and including the day on which a residence permit is issued.

(3) Article 1F(a) and (b) of the Geneva Convention shall apply to a person who instigates or otherwise participates in the commission of the crimes or acts specified in those provisions.

<sup>2</sup> 339A(vii) he should have been or is excluded from being a refugee in accordance with regulation 7 of The Refugee or Person in Need of International Protection (Qualification) Regulations 2006;

whether cancellation of the appellant's leave to remain would have been an automatic consequence of the cancellation of the appellant's refugee status and the relevance, if any, of the fact that the appellant was outside the UK when the respondent took her decision, when his appeal was heard by the First-tier Tribunal and when his original 5-year period of leave was due to expire<sup>3</sup>.

5. The appellant relies upon Paragraph 339B<sup>4</sup> and 339Q<sup>5</sup> Immigration Rules and refers to the Secretary of State's discretion to curtail or revoke leave to remain. He submits that the curtailment of leave does not automatically follow from the cancellation of refugee status.
6. The respondent accepts that basic analysis but emphasises that the appellant's leave was cancelled under paragraph 321A(1)<sup>6</sup>; the change in circumstances namely the cancellation of refugee status, causing the mandatory cancellation of leave.
7. Although at first blush these may seem to be contradictory propositions they are not. The scheme of the Rules is such that sufficiently reprehensible behaviour on the part of an individual brings that person within the mandatory cancellation provisions of the Immigration Rules. So, if a person's refugee status is cancelled because of some unacceptable behaviour on their part, it is perfectly rational for the Secretary of State to curtail or cancel existing leave to remain under the mandatory provisions because of the material change in circumstances. If on the other hand, a person's refugee status is cancelled because of, say, a change in conditions in their country of origin such that they no longer need international protection and do not meet the requirements of the Immigration Rules, such change has not been brought about by any behaviour on the part of the individual; it is eminently reasonable for the Secretary of State to exercise her discretion to cancel leave to remain under paragraph 323 Immigration Rules (or indeed enable the individual to remain in the UK for the balance of their leave and possibly beyond). This analysis is also congruent with the approach of the First-tier Tribunal judge and the parties, that the cancellation of refugee status was inextricably linked to the cancellation of leave to remain – if the cancellation of refugee status was contrary to the Immigration Rules, then it would follow that the appeal against the decision to cancel leave to remain would be successful.
8. In so far as the relevance of the appellant being outside the UK is concerned, the submissions by Mr Chirico in his first written note are not relied upon by him

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<sup>3</sup> I received written submissions from Mr Chirico dated (incorrectly) 6<sup>th</sup> June 2017 and a further note from him dated 23<sup>rd</sup> June 2016; and from Mr Sanders QC dated 19<sup>th</sup> June 2017.

<sup>4</sup> Paragraph 339B as in force at date of decision: When a person's grant of asylum is revoked or not renewed any limited leave which they have may be curtailed.

<sup>5</sup> Paragraph 339Q as in force at date of decision: (i)...

(ii)...

(iii) ...

(iv) The Secretary of State may revoke or refuse to renew a person's UKRP where their grant of asylum or humanitarian protection is revoked under the provisions in the immigration rules.

<sup>6</sup> Paragraph 321A(1) The following grounds for the cancellation of a person's leave to enter or remain which is in force on his arrival in, or whilst he is outside, the United Kingdom apply;

(1) there has been such a change in the circumstances of that person's case since the leave was given, that it should be cancelled;

and he has apologised for incorrectly asserting that which was not the case. He does however submit that if the appellant now sought to re-enter the UK it would be potentially relevant if he could demonstrate that his previous leave had been cancelled as a result of a decision which was not in accordance with the law because this would have relevance to the exercise of discretion by an Entry Clearance Officer. But if the appellant succeeds in his appeal against the curtailment of his leave (and thus the cancellation of his refugee status), on whatever ground, it is self-evident that this would have relevance to the exercise of any discretion by an Entry Clearance Officer. An Entry Clearance Officer will, on taking a decision, consider all relevant matters.

9. I am satisfied having had regard to the submissions advanced by both parties that, in the light of the decision by the respondent to revoke refugee status, the decision to cancel the appellant's leave under paragraph 321A(1) was rationally and lawfully open to her. But, as explained above, for any appeal to be meaningful the Tribunal is required to consider the lawfulness of the decision to revoke refugee status.
10. I am satisfied also, having considered the submissions made, that the appellant's leave to remain in the UK was not extended pending the determination of his appeal. In so far as any future application for variation is concerned, the appellant has been at liberty to apply for entry to the UK at any time since he left the UK and his leave was cancelled or after it would in any event have expired.

### **Error of law**

11. The respondent, for reasons set out in two decision letters dated 23<sup>rd</sup> October 2014 and 10<sup>th</sup> March 2015, concluded there were "*serious reasons for considering the appellant had committed a serious non-political crime outside the UK prior to being recognised as a refugee in the UK*". In reaching that decision the respondent relied upon judgments of the UK courts in civil proceedings brought against XY by JSC BTA Bank, a bank in Kazakhstan. The respondent had, prior to the civil judgments, recognised the appellant as a refugee in the UK and had accepted that the unfairness suffered by the appellant during his trial in Kazakhstan had been politically motivated and that he would be at risk of being persecuted if returned to Kazakhstan because of his political activity, high profile and the political situation in Kazakhstan. The appellant had received an "Osman" warning issued by the Metropolitan police on 29<sup>th</sup> January 2011. The respondent had been aware that there were pending civil actions against the appellant in the UK courts at the time he was recognised as a refugee; the appellant had informed the respondent of these and had stated they would come to nought. There is no dispute but that were it not for the operation of the exclusion clause, the appellant would continue to be recognised as a refugee. There were no UK criminal proceedings pending against the applicant at the time of the respondent's decision or his hearing before the First-tier Tribunal (or indeed now, so far as I am aware).

12. The appellant appealed to the First-tier Tribunal under s82(1) and 82(2)(e) Nationality, Immigration and Asylum Act 2002<sup>7</sup> against the decision to cancel his leave on the grounds
- (a) that the decision was not in accordance with the law (s84(1)(e) of the 2002 Act) in “fail[ing] to give individual consideration to the facts of the appellant’s case, fail[ing] to have regard to relevant considerations and/or to apply anxious scrutiny to the evidence and representations before her, acted with procedural impropriety, took account of improper and therefore irrelevant considerations and acted with actual or apparent bias”;
  - (b) the decision is not in accordance with the Immigration Rules (s84(1)(a) of the 2002 Act) in that the “respondent erred in fact and law in deciding that the Appellant is no longer entitled to refugee status, that being the only basis upon which she decides to cancel his leave to remain”;
  - (c) The respondent’s decision to cancel the Appellant’s leave to remain amounts to an unlawful and/or disproportionate interference in his and his family’s rights to respect for their private lives (s84(1)(c) of the 2002 Act).
13. The appellant did not appeal under s84(1)(g) of the 2002 Act – that the person taking the decision should have exercised differently a discretion conferred by the Immigration Rules.
14. Designated Judge Shaerf stated in [113] that the sole issue he had to decide was “whether the respondent had, on the balance of probabilities made out her case that recognition of the Appellant as a Convention refugee should be revoked” on the basis that he is excluded under Article 1F(b) of the 1951 Convention because there are serious reasons for considering the Appellant has committed a serious non-political crime. He concluded ([120])
- “To my mind the frauds for which there are serious reasons for considering the Appellant to have perpetrated amount to serious non-political crimes within the meaning of Article 1(F)(b). I have come to this conclusion without reliance on the Appellant’s conviction and sentence for contempt of court and flight from the United Kingdom.....the appeal is dismissed.”
15. The appellant sought, and was granted, permission to appeal. The grounds relied upon are extensive, but can be summarised as follows:
- (1) That the First-tier Tribunal failed to determine the first ground of appeal before it, namely that the respondent’s decision was otherwise than in accordance with the law (s84(1)(e) of the 2002 Act), and
  - (2) (i) the First-tier Tribunal Judge failed to determine core issues relevant to the weight to be attached to civil judgments in the UK going to the motivation of the BTS Bank and the ability of the Bank to manipulate evidence;

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<sup>7</sup> The appellant’s appeal was filed prior to the Immigration Act 2014 coming into force and he thus had available to him the grounds of appeal under s84 of the 2002 Act prior to amendment by the Immigration Act 2014.

- (ii) the First-tier Tribunal judge unlawfully disregarded the unchallenged evidence of the witnesses, Q and Dr Lewis; he treated the evidence as irrelevant but because that evidence was relevant to the assessment of the core issues, it was not irrelevant;
- (iii) the First-tier Tribunal judge made a clear mistake of fact in the decision namely that the First-tier Tribunal decision records the appellant as having admitted to lies in the civil proceedings whereas he had not and does not;
- (iv) the First-tier Tribunal judge erred in his approach to a prior judgment of the High Court in a civil claim.

## Ground 1

16. The appellant does not submit that had the First-tier Tribunal judge reached a decision that the respondent's decision was not in accordance with the law, then it should be remitted to the respondent but contended that the First-tier Tribunal judge could and should have taken the decision itself; i.e. XY invited the Tribunal to allow the appeal on the grounds that the respondent had failed to give anxious scrutiny to the material before her and to give any or any adequate reasons for its rejection, and to take a decision for itself. There were two limbs to this ground: firstly, that there had been procedural unfairness in that the appellant's solicitors had informed the respondent they intended submitting further evidence yet the respondent proceeded to take her decision without awaiting that information. Secondly that there was improper motive and/or apparent bias in the decision-making process. Mr Chirico relied, in particular, upon what he asserted was improper contact by the respondent with the Kazakhstan authorities about the appellant's case including a note of a meeting on 31<sup>st</sup> January 2014 which states that a decision had been made to revoke XY's asylum status. He submits that the respondent failed to make proper disclosure, that the respondent has not denied that meetings took place between the UK Ministry of Justice, Kazakh officials and a private consultant working for BTA bank and that the respondent had not engaged with these matters when taking her decision. Mr Chirico submitted that the further reasons letter dated 10<sup>th</sup> March 2015 did not adequately respond to the representations made in considering whether there were serious considerations justifying the decision she took. The First-tier Tribunal judge should, he submitted, have taken this into consideration in determining whether the decision of the respondent was not in accordance with the law.
17. The submission by Mr Chirico that the respondent had proceeded to take a decision prior to receipt of further evidence, which it knew was going to be submitted is correct but in my view immaterial. The further submissions were considered by the respondent and a further "reasons" letter issued. That the appellant does not agree with that consideration is the context within which the statutory appeal was heard; the appellant was aware of the scope of the decision against him and his grounds of appeal to the First-tier Tribunal make clear that he raised all the matters upon which he wished to rely. Even if the failure to await further submissions could be perceived as a procedural irregularity, that irregularity was remedied by the service of the further reasons letter. This gave rise to no disadvantage to the appellant because both the

submissions and the decision letters were before the First-tier Tribunal judge who considered them in reaching his decision. There is no allegation that the procedure before the First-tier Tribunal was tainted by procedural impropriety.

18. The ground of appeal asserting that the decision under challenge was not in accordance with the law enables public law duties to be considered in the context of a statutory appeal. But it does not mean that the Tribunal should approach that ground in isolation from the consideration of all the matters that are in issue in the statutory appeal. The respondent's letter or letters do not stand in isolation from the whole of the statutory appeal as argued. The appellant has not argued that the case should be "remitted to the respondent for a fresh decision" to be taken or that the appeal be allowed such that a lawful decision remains to be taken by the respondent but submitted that the First-tier Tribunal judge should have taken the decision himself. That is exactly what the First-tier Tribunal judge did.
19. In so far as Mr Chirico relies upon the failure of the respondent, in the decision letters, to provide full disclosure and/or engage with the submission that there had been improper discussions between the UK Ministry of Justice, Kazakh officials and the bank, again those are matters that fall properly for consideration within the statutory appeal and are not indicative of a decision not being in accordance with the law.
20. Judge Shaerf recorded XY's evidence that there had been a lack of full disclosure by the respondent and recorded the submissions of both advocates in that regard. The judge concluded that XY's evidence was inconsistent and unhelpful. He found that XY was unable to focus on any detail and his evidence addressing what was described as the 'political narrative' was vague, lacking in detail and repetitive. That no specific reference is made to the very limited documents relied upon by Mr Chirico in this ground is not, in these circumstances and in relation to this ground of appeal, material.
21. That the First-tier Tribunal judge did not specifically make a finding on whether the decision of the respondent was "not in accordance with the law" is therefore not an error of law, or if it is, then it is immaterial.
22. The appeal on ground 1 is dismissed.

## **Ground 2**

23. Judge Shaerf concluded

"113. ....the sole issue I have to decide is whether the respondent has on the balance of probabilities made out her case that recognition of the appellant as a Convention refugee should be revoked on the basis that he is excluded under Article 1F(b) of the 1951 Convention because there are serious reasons for considering the appellant has committed a serious non-political crime.

114. I see no reason to depart from the oft-repeated findings of the higher courts, that the evidence shows on the balance of probabilities, having regard to both the requirement for the cogency of the evidence relied on to be commensurate with the seriousness of the conduct alleged and the evidence about the conduct of banking in Kazakhstan, that the

appellant has perpetrated a series of frauds involving what may fairly be described as extraordinarily large sums of money. There was no submission that the political narrative alone was sufficient to excuse the frauds. Indeed, in the light of the appellant's evidence which imparts (sic) amounted to little less than a denial, it would have been difficult to make such an argument. I find the respondent has surmounted the demanding hurdle to show that the "serious reasons for considering" requirement has been met. I am satisfied that for the purposes of Article 1F(b) of the 1951 Convention the appellant has committed a serious non-political crime.

115. The appellant perpetrated the frauds or the bulk of them before he left Kazakhstan and the bank was nationalised(sic). Judgments of Teare J and Henderson J contain findings that on the balance of probabilities, the appellant has committed frauds on the Bank as defined by the laws of both Kazakhstan and the UK. ....I have to decide whether the serious non-political crime or crimes for which there are serious reasons for considering the appellant has committed for (sic) within the scope of that term as used by the 1951 Convention.

116. Authoritative guidance is to be found in the judgment of *AH (Algeria) v SSHD* [2012] EWCA Civ 395.....At paragraphs 32-35 the Court referred to the views of Professors Goodwin-Gill, Hathaway and Grahl-Marsden, the last of whom suggests by way of reference to the UNHCR definition that serious non-political crimes which fall within the scope of Article 1(F)(b) involve significant violence against persons which warrant severe punishment and are such as to require exclusion of the perpetrator so as "to make clear the Convention's commitment to the withholding of protection only from those who have committed truly abhorrent wrongs" Sullivan LJ went on at paragraphs 36-38 to conclude

36. In a statement provided to the Grand Chamber in the B and D case, the UNHCR set out its view as to the seriousness of the acts covered by Article 1F, as follows:

"All the types of criminal acts leading to exclusion under Article 1F of the 1951 Convention involve a high degree of seriousness. This is obvious regarding Article 1F(a) and (c), which address acts of the most egregious nature such as "war crimes" or "crimes against humanity" or "acts contrary to the purposes and principles of the United Nations". In light of its context and the object and purpose of the exclusion grounds highlighted above, a "serious non-political crime" covered by Article 1F(b) must also involve a high threshold of gravity. Consequently, the nature of an allegedly excludable act, the context in which it occurred and all relevant circumstances of the case should be taken into account to assess whether the act is serious enough to warrant exclusion within the meaning of Article 1F(b) and 1F(c)." (paragraph 2.2.1)

37. The four questions answered by the Grand Chamber in B and D did not directly address this issue, but the Grand Chamber did say in paragraph 108 of its judgment:

"[108] Exclusion from refugee status on one of the grounds laid down in Article 12(2)(b) or (c) of Directive 2004/83, as stated in respect of the answer to the first question, is linked to the seriousness of the acts committed, which must be of such a degree that the person concerned cannot legitimately claim the protection attaching to refugee status under Article 2(d) of that directive."

38. In paragraph [109] of its judgment the Grand Chamber accepted the submission of, inter alia, the UK Government, that Article 12(2) did not require a proportionality assessment, but it did so upon the basis that the competent



authority would already have undertaken an assessment of the seriousness of the acts committed by the person concerned and of that person's individual responsibility, so that "a fresh assessment of the level of seriousness of the acts committed was not required." It is clear, therefore, that for the purpose of Article 12(2)(b) or (c) there must be an assessment of the level of seriousness of the acts committed, and the seriousness must be of such a degree that the offender cannot legitimately claim refugee status.

.....

117. I am satisfied that this finding of the Grand Chamber is sufficient to show that the scope of crimes which can give rise to exclusion under Article 1F(b) includes crimes of any nature. Indeed the 2009 UNHCR Statement on Article 1F of the 1951 Convention at page 20 states: -

many recognised commentators have also placed significant emphasis on the seriousness of the crime. Some refer to capital crime or particularly serious crime, while others to crimes against physical integrity, life and liberty or crimes which potentially attract long periods of custodial punishment.

.....in Spain, France....., "Serious crimes" are considered to be those crimes for which domestic law imposes a minimum penalty of 5 years imprisonment.... Rather, criminal penalties should be considered as part of the assessment of all circumstances of the crime including any aggravating elements, the gravity of which should be judged by international standards rather than by domestic laws.

.....

120. .... the frauds for which there are serious reasons for considering the appellant to have perpetrated amount to serious non-political crimes within the meaning of Article 1F(b). I have come to this conclusion without reliance on the appellant's conviction and sentence for contempt of court and flight from the United Kingdom. ....

24. The essence of this second ground of appeal is that the question to be asked is whether, taking all the evidence in the round, it was demonstrated to the applicable standard of proof that the appellant had committed a serious non-political crime. It is submitted on behalf of the appellant that the segregation of the decisions of the UK courts from the other evidence (the claimed conduct of the respondent, the links between the Kazakh State and the Bank in the UK domestic court cases and XY's motives for ceasing to defend the proceedings) is unlawful and this is one single substantive issue to be determined. All the evidence is to be looked at in the round rather than treating the civil judgments as probative and then looking for evidence to undermine those judgments.

25. The respondent submits that the question to be determined is not whether XY *has* committed a serious non-political crime outside the UK but whether there were serious reasons for considering that he had. Thus, the real issue was not whether the civil court judgments gave rise to the conclusion that XY did defraud the Bank. The respondent submits that the correct approach is to place reliance on the decisions of the courts of this country and that, unless there were very good grounds, it would be improper to assume they cannot be relied upon. He submitted that the First-tier Tribunal judge considered the substance of the civil

judgments and the evidence relied upon by XY does not undermine those judgments.

26. XY accepts there has been a “massive fraud on the Bank” [63] but denies that he is responsible or involved in any way. Although no criminal proceedings have been brought (against anyone) either in the UK or outside the UK, it was not argued that a fraud on the bank to the extent considered in the civil proceedings, did not amount to a serious non-political crime.

27. Article 1F(b) is as follows:

The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

.....

(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

.....

28. As referred to by the First-tier Tribunal judge, the Grand Chamber in *B and D* accepted that a proportionality assessment was not required because the competent authority would already have undertaken an assessment of the seriousness of the alleged crime. In this case, there was no dispute but that fraud to the extent of \$4.4bn was sufficient to bring the crime within Article 1F(b). It is not necessary or required that a further assessment is undertaken, in this case, to establish whether a \$4.4bn fraud is a serious non-political crime. The issue can only be whether there are serious reasons for considering (“serious reasons”) that XY has committed such a crime.

29. To that extent, the submission that the evidence as a whole is indivisible, is incorrect.

30. As for the assessment of whether there are serious reasons, Mr Chirico submitted, in essence, that evidence had come to light since the civil proceedings that casts doubt on the outcome of those proceedings, that the involvement of the Kazakh State in bringing civil proceedings against political opponents was identified and referred to by the expert witnesses and the First-tier Tribunal judge fell into legal error in failing to place weight upon their expert opinion, the reasons given to explain why the applicant had not participated in some of the civil proceedings were genuine and understandable, that the civil proceedings he had participated in had not resulted in a direct adverse finding, that the First-tier Tribunal judge had mistakenly stated the applicant had admitted lying which directly impacted upon his credibility and that there was evidence in the form of leaked emails of improper contact between the respondent and the Kazakh State giving the appearance of bias by the respondent which it was in the public interest to be explored. Mr Chirico did not submit that no weight should be placed upon the civil judgments but that they were not the starting point; the civil judgments formed a part of the evidence and should be considered in the context of the evidence as a whole. He stressed he was not seeking to re-adjudicate the civil proceedings but that the context within which the civil court reached their decisions was different to that within which the Tribunal reached its decision on a refugee claim. He did not argue that the

standard of proof applied by Judge Shaerf was incorrect. The expert evidence, of the extensive political interference by the Kazakh State which included the bringing of civil claims to support political persecutory conduct went unchallenged and was important in the assessment of “serious reasons”. The appearance of bias was a matter of public interest given the context of the claim and extent of the civil claims. Mr Chirico accepted that the appellant failed to co-operate with court orders, failed to participate in some of the actions without giving reasons (until later) and although remaining on the record in one case, failed to participate. None of the civil claims were presently subject to appeal although the applicant had indicated that when he had access to funds he would be seeking to appeal. Mr Chirico submitted that the First-tier Tribunal judge had, in treating the civil judgments as a starting point, thus erred in how he approached the evidence that was before him.

31. Mr Sanders submitted that the political motivation of the Bank and Kazakh State had been considered by the civil courts and it had been acknowledged that even if there were political motivation, on which the courts made no finding although the allegations were put to them, that did not detract from the right of the bank to pursue the claim. The civil judgments should be the starting point for consideration and the First-tier Tribunal judge had correctly considered whether there was evidence before him that, in effect, reduced the weight to be placed upon those judgments to reach a conclusion that there were not serious reasons.
32. Mr Chirico submitted the First-tier Tribunal judge erred in law in taking the civil judgments against the appellant as a starting point. He submitted that the reliance upon *AH* [2012] EWCA Civ 395 and the concept of mutual confidence between different legal systems was not appropriate in the appellant’s case: there was a different standard of proof in civil matters as oppose to criminal matters (which was the position in *AH*), XY had not committed a criminal offence and XY had not given evidence.
33. XY took a positive decision not to defend some of the civil claims. Although he gave as his reason for this the kidnapping of his wife and daughter and threats that had been made to colleagues with whom he worked whilst in Kazakhstan and the use by the Kazakh State of court proceedings to persecute him, he made no attempt to explain to the Civil Courts the reasons why he failed to participate. In *JSC BTA Bank v XY* [2013] EWHC 3691 (CH) Teare J found that fraud had been established “to the criminal standard of proof”; despite the allegations of unfairness, the Court of Appeal held that “the bank must be entitled to take legal action to recover that sum, even on the assumption that its motivation for doing so was mainly political”. This was articulated by Teare J in *JSC BTA Bank v Ablyazov (no 6)* [2011] EWHC 1136 (Comm) [54]. The First-tier Tribunal judge examined the judgments carefully. His own judgment reproduces significant and relevant extracts from those judgments and in particular in his findings he referred to *JSC BTA Bank v XY and others* [2013] EWHC 510 (Comm). Teare J referred to having kept “well in mind” that the appellant’s decision not to comply with court orders had led to the striking out of his defence but that the alleged frauds by the appellant were an essential part of the case against the other defendants. Teare J found unequivocally that the scheme was

fraudulent and that the appellant “must” have orchestrated or “at least” authorised the fraud.

34. There are 11 civil judgments, all adverse to the appellant, in some of which he participated fully and others he chose not to. He did not disclose to the civil courts why he was not participating or why he had failed to comply with court orders. There are no outstanding applications for permission to appeal any of the judgments. The content of the judgments has to be considered – which is what the First-tier Tribunal judge did. But having considered the content and that the appellant did not participate, the judge rationally concluded that they were the starting point. To conclude that civil judgments of the courts of England and Wales were not the starting point for consideration in these circumstances would be irrational. There was no error of law by the First-tier Tribunal judge in taking that approach. It is entirely clear that it could not legitimately be said that there were not serious reasons for considering the appellant had committed serious non-political crimes outside the UK prior to his recognition as a refugee.
35. The First-tier Tribunal judge then carefully considered the evidence before him and whether it was such as to cast sufficient doubt upon that conclusion. Again, his approach cannot be faulted because to do otherwise would be irrational.
36. The First-tier Tribunal judge in his judgement makes clear reference to the appellant’s evidence. At paragraph 87 Judge Shaerf found the appellant had made “no real attempt to address any of the offensive adverse findings made against [him] in relation to the specific frauds practised on and misappropriations from the [Bank] extensively detailed in the findings of Teare J and Popplewell J and not set aside in whole or in part to any material extent by the Court of Appeal or the Supreme Court”. Judge Shaerf referred in detail to the failure of the appellant in his oral evidence to address the particular findings of the courts other than to deny his involvement or knowledge. He claimed that he had been unable to obtain documents to support his defence in the civil courts because of the political obstruction by the Kazakh State.
37. Judge Shaerf considered and accepted the evidence of Q and Dr Lewis. That evidence did not address the appellant’s personal involvement or lack of involvement. Both experts acknowledged they had no dealings or knowledge which went to the substance of the civil proceedings save that they described in detail, as accepted by Judge Shaerf, the political actions of the Kazakh state and how that could impact on whether or not proceedings were brought and/or pursued. Judge Shaerf referred to the political aspect of Dr Lewis’ evidence “to be expertly set out”. Dr Lewis in his report considered leaked emails which had come to light after the civil proceedings. First-tier Tribunal Judge Shaerf recorded ([40, 41]) that Dr Lewis concluded that the

“Bank in civil proceedings against the appellant had misrepresented its case...there is a pattern of collaboration between the authorities in Kazakhstan and the authorities in Ukraine and in Spain and Italy...He was satisfied the Kazakh authorities had near absolute control of [the Bank] and had prevented the appellant obtaining access to evidence with which to defend the civil proceedings ...and generally illustrated the plausibility of the appellant’s account....Dr Lewis considered the Kazakh authorities had presented the campaign seeking the prosecution and extradition of the appellant and his

business associates as the legitimate independent activity of the Bank, seeking redress and recovery of stolen assets....On the basis of his study...he argued that such a claim is misleading. His view, based on his extensive researches, was that it was more credible to view the actions taken by the Bank to recover assets as inextricably linked to the wider political pursuit of the President and his allies....”.

38. The First-tier Tribunal judge took into account Dr Lewis' evidence that he was unable to comment whether the appellant had committed fraud or embezzlement because he had no expertise in Kazakh corporate law. The judge accepted that the Kazakh authorities have pursued cases against the appellant in other jurisdictions and that at a certain level business in Kazakhstan becomes political. Dr Lewis took the view, unchallenged by the respondent and accepted by Judge Shaerf, that the civil proceedings in the UK leading to the freezing of the appellant's assets and actions to recover them would enable the Kazakh authorities to “establish a cover for a European network of surveillance of their political opponents”. But this could not rationally result in a finding that there were not serious reasons for concluding that the appellant did not commit fraud.
39. Although allegations of political interference were raised by the appellant in the civil proceedings and not determined, the issue was considered and it was held that whilst there may be such interference or motivation, the right of the Bank to recover its assets remained. Judge Shaerf considered the evidence of the experts in the context of the civil judgments, the appellant's oral and written evidence and in the knowledge of the leaked emails and reached the conclusion that their evidence did not provide any reason to depart from the findings of fact made by the civil courts. He was aware of and specifically referred to the consideration by Dr Lewis of the leaked emails. That conclusion was rational, entirely open to the First-tier Tribunal judge, and discloses no error of law.
40. Mr Chirico asserts the leaked emails are evidence that requires further and closer examination and in particular full disclosure by the respondent of contact she has had with the Kazakh State. He submits that this could impact upon the weight to be placed on the civil court judgments. One of the emails referred to a disclosure that the appellant's refugee status was to be revoked prior to the appellant being informed that a decision had been taken to that effect. The appellant has sought fuller disclosure of the source and context of these emails which has not been forthcoming. The submission that this gives an appearance of bias on the part of the respondent and needs to be examined does not impact upon the judgments of the civil courts. To assert that would be to imply that the judges were in some way complicit in meetings that may or may not have taken place between officials of the UK Government and the Kazakhstan Government, adverse to the appellant or that each judge in all 11 cases was duped. There is no possible justification for such an assertion. Whatever the outcome of the search for disclosure such an implication cannot be sustained. The appellant withdrew from some civil proceedings, failed to comply with court orders and did not seek particular disclosure of documents. The civil proceedings involved several hundred companies. The appellant failed to explain how the Kazakh government or the Bank could maintain control over documents relating to several hundred companies such that no or inadequate disclosure took place.

41. It was accepted by both parties that Judge Shaerf had incorrectly stated that the appellant had admitted lying in connection with a number of companies, but this does not detract from the conclusion reached by Judge Shaerf that the appellant's evidence was unfocussed:

“vague, lacking in detail and repetitive.... [his] evidence on the commercial aspects and the banks litigation in the UK Courts amounted to no more than a general disagreement with the conclusions reached in the High Court. Even before the Tribunal he was unable to focus on any detail and gave unhelpful or inconsistent evidence...”.

That error by Judge Shaerf is immaterial when seen in the context of the overwhelming evidence adverse to the appellant. It is plain from reading the judgment as a whole that it is simply inconceivable that the outcome would have been any different but for this error.

42. Judge Shaerf considered the evidence and reached the conclusion that there was insufficient evidence as a whole to displace or undermine the findings of the civil courts. That was a conclusion fully and rationally open to him.

43. Judge Shaerf concluded

119. ...I am satisfied that by the standards generally accepted by those States which are signatories to the 1951 Convention the extent, nature and quality of the frauds for which there are serious reasons for considering them to have been perpetrated by the appellant are staggeringly huge and equally unacceptable at the bar of international law and standards....

120. To my mind the frauds for which there are serious reasons for considering the appellant to have perpetrated amount to serious non-political crimes within the meaning of Article 1(F)(b) ....

44. The appellant has not identified any material error of law in the decision of First-tier Tribunal Judge Shaerf. The appeal to the Upper Tribunal is dismissed. The decision of First-tier Tribunal Shaerf is to stand.

Anonymity

The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. UTJ Allen made an order pending the outcome of the appeal before the Upper Tribunal. As I indicated at the hearing, if I dismissed the appeal I would grant an anonymity order to take effect until the date for seeking permission to appeal to the Court of Appeal has expired. Thereafter an application for anonymity would have to be re-made.



Date 4<sup>th</sup> September 2017

Upper Tribunal Judge Coker