



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal no: PA/01287/2017

THE IMMIGRATION ACTS

Heard at Field House
On 09.05.2018

Decision & Reasons Promulgated
On 24.05.2018

Before:

Upper Tribunal Judge
John FREEMAN

Between:

David JOSEPH (previously known as Abdulla GANISHEV)

appellant

and

Secretary of State for the Home Department

respondent

Representation:

For the appellant: *Andrew Eaton* (counsel instructed by Fadiga & Co)

For the respondent: *Daniel Sternberg* (counsel instructed by GLD)

DECISION AND REASONS

This is an appeal, by the respondent to the original appeal, against the decision of the First-tier Tribunal (Upper Tribunal Judge Donald Conway, and Judge John Pullig), sitting at Hatton Cross on 9 - 10 May 2017, to allow an asylum appeal by a Chechen citizen of the Russian Federation, born 1980. The issue is whether the panel were entitled to regard the appellant as not excluded from protection by article 1F (c) of the Refugee Convention, as someone guilty of 'acts contrary to the purposes and principles of the UN'. For present purposes, I shall replace this unwieldy expression with 'antithetical activities'. I shall refer to the Chechen forces, under Ruslan Gelayev, fighting for independence as 'rebels', without intending to take sides in that conflict. The appellant took his present name by deed poll in 2015.

*NOTE: (1) no anonymity direction made at first instance will continue, unless extended by me.
(2) persons under 18 are referred to by initials, and must not be further identified.*

HISTORY**2. (descriptions of appellant's rôle as given by him)**

1994 - 1996	first Chechen war: appellant, 14, joins rebels as 'son of the regiment' (porter, cook and medical orderly)
1996	joins rebel customs unit
1999 – 2009	second Chechen war
1999	wounded in skirmish with Russian forces
2000	joins Gelayev as lieutenant
2002	taken prisoner by Russian forces – escapes
2003	rejoins Gelayev as 'senior lieutenant' – leaves overland to Georgia/Azerbaijan
2006	leaves by air for the Ukraine, then overland to Belarus/Lithuania
2007	granted asylum in Lithuania
2009	leaves Lithuania overland for Belgium
2010	Lithuanian court revokes refugee status, under article 1F (c)
2012	comes to UK: wife and four children remain in Belgium claims asylum: screening interview [RB (S)]; first asylum interview (T)
2015	second asylum interview (U)
2017	asylum refused, under article 1F (c) (GG)

DECISION UNDER APPEAL**3. Chechnya** In an impressively clear decision, written by Judge Pullig, the panel reached the following crucial conclusions, first on what happened while the appellant was in Chechnya :

75. We conclude in respect of events in Chechnya that the Respondent has failed to provide any independent evidence of the Appellant's individually carrying out acts that may bring himself within the scope of Article 1F (c). The case in that regard appears to be based on a culpability by association with Gelayev.
76. Regarding the Appellant's role under Gelayev, far from being a commander, all the evidence points to him being a staff officer after having worked in the customs service. There is nothing to suggest he was involved in front-line attacks (as distinct from defending positions) on Russian troops. Given his ranks even as a senior lieutenant we do not find he was involved in planning. As for encouraging or supporting Gelayev we find his position to have been simply to carry out orders within the context of his role.
77. Whilst we find he may have been a fervent supporter of Chechen independence, the wars in which he was under Gelayev's command were no more than a resistance against Russia's military action, regardless of the rights and wrongs of it. What has emerged since and largely due to [*Dokka*] Umarov's espousal of militant Islam and the declaration of an emirate is wholly different.
78. It seems clear from the refusal letter that the Respondent while she flagged the Appellant's membership of Gelayev's forces as an act that would bring him into the scope of Article 1F (c), the main reliance is on later events. ... the letter relied heavily on the Vilnius [*Lithuanian*] decision ...

4. **Lithuania** Next the panel turned to the Lithuanian decision (by the Vilnius Regional Administrative Court: English translation at BB). This was on an application by the State Security Department against the Migration Department, with the appellant named as ‘third concerned party’. The Lithuanian panel accepted evidence that, while in Lithuania, the appellant
- (a) ‘according to data available to State Security Department’ had been engaged in recruitment and transportation of fighters to Dokka Umarov: these were Chechens who had asylum in Lithuania, or in one case Germany, and the appellant’s involvement was said to be as a leader of a group which promoted such activities, as well as the raising of funds;
 - (b) was under investigation for terrorist offences in Russia, where his brother Abdulgani Ganishev had been sentenced to 14 years’ imprisonment for similar offences;
 - (c) ‘according to data available to State Security Department’ had repeatedly used mental and physical violence against other persons as well as other illegal measures in order to obtain funds to support the Islamists of North Caucasus. He is linked to illegal arms trafficking ... [details follow of an incident involving what is said to be the appellant’s use of someone else’s driving licence: I am not concerned with that, except to note that, when the appellant was stopped, a gas pistol was found in his car, as well as a hunting knife, for which there might have been some innocent explanation].
5. Mr Sternberg had referred the panel to *AH* (Article 1F(b) – ‘serious’) Algeria [2013] UKUT 382, and they noted its effect at 83. They went on to give their views about the Lithuanian decision at 89 – 93, which once again are worth setting out more or less in full.
89. None of the evidence submitted to the Vilnius court has been submitted to this Tribunal. There is no material from any source as to the allegations put to the court in Vilnius, other than from the security department, that lends credence to what was alleged or found ... No particularised evidence appears to have come from Russian sources. It could not have come from any other source.
 90. In that regard we note the considerable evidence of politicised prosecutions of Chechen separatists. We find it troubling that the decision of the Vilnius court accepted entirely uncritically the assertions made in relation to those matters in Russia without any apparent regard to the likely and obvious conclusion that they may be in part or entirely politically motivated.
 91. As for the evidence about his brother and another travelling to Russia there is nothing to suggest that the Appellant is responsible or complicit in either of those individuals deciding to go to Russia. Moreover the only evidence of actions by either of these two individuals that would suggest that they may have carried out actions that would have brought them into contravention of Article 1F (c) is that they appeared in a video at a meeting with Umarov and other Islamists.
 92. We, of course, accept that while a degree of respect must be given, it is a matter of weight. The Vilnius document is of a wholly different nature to that found in **AH**. In that case the person was represented, appeared and gave evidence. None of these factors applied to this

Appellant. The evidence does not indicate that a summons was served on him. There is no indication that any attempt was made to locate him via the Chechen community. There was no intent to proceed in his presence. His absence is not considered or discussed. There is no indication that he is even a defendant. As indicated the defendant is named as the Department of Migration.

93. We would add that we find to be a matter of concern the Home Office inaction over five years (the Vilnius decision having been brought to their attention by the Appellant in 2012). We find surprising the failure to take any steps to verify the allegations or obtain even a summary, let alone a copy of the evidence submitted to the Vilnius court or ascertain its provenance.
6. The panel's decision on events in Chechnya is challenged on the basis that the appellant's 'plainly undisputed activity' [*because the evidence about it had all come from him*] about training for and taking part in armed combat, whether offensive or defensive in character, necessarily amounted to 'antithetical activities' under primary legislation in force in this country, to which I shall now turn, before considering the challenges to their decision on the Lithuanian point.

STATUTE LAW

7. The first statute to be considered is the Immigration, Asylum and Nationality Act 2006

54 Refugee Convention: construction

- (1) In the construction and application of Article 1(F)(c) of the Refugee Convention the reference to acts contrary to the purposes and principles of the United Nations shall be taken as including, in particular—
- (a) acts of committing, preparing or instigating terrorism (whether or not the acts amount to an actual or inchoate offence), and
 - (b) acts of encouraging or inducing others to commit, prepare or instigate terrorism (whether or not the acts amount to an actual or inchoate offence).

- (2) In this section—

“the Refugee Convention” means the Convention relating to the Status of Refugees done at Geneva on 28th July 1951, and

“terrorism” has the meaning given by section 1 of the Terrorism Act 2000 (c. 11).

8. The effect of s. 55 is that where, as in this case, the Secretary of State issues a certificate that the appellant is not entitled to protection because article 1F applies to him, the Tribunal must begin by considering that question; and, if it agrees with the Secretary of State's view, dismiss the asylum appeal before doing anything else. In this case the panel duly noted Mr Sternberg's submissions on the point at 57 – 58; but they did not go on expressly to consider the evidence in terms of the 2006 Act s. 54, or of s. 1 of the Terrorism Act 2000, to which I shall now turn.

9. This is s. 1 of the 2000 Act, in full, so far as relevant, and as amended by the Terrorism Act 2006 and the Counter-Terrorism Act 2008: s. 1 (4) simply makes it clear that it extends to actions, people, property and governments outside the United Kingdom.
- (1) In this Act “terrorism” means the use or threat of action where—
 - (a) the action falls within subsection (2),
 - (b) the use or threat is designed to influence the government or an international governmental organisation or to intimidate the public or a section of the public, and
 - (c) the use or threat is made for the purpose of advancing a political, religious, racial or ideological cause.
 - (2) Action falls within this subsection if it—
 - (a) involves serious violence against a person,
 - (b) involves serious damage to property,
 - (c) endangers a person’s life, other than that of the person committing the action ...
 - (3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.

AUTHORITIES

10. That was the statutory basis on which the panel, like any other court or tribunal in this country, had to consider what ‘antithetical activities’ were, and whether there were serious reasons for considering that this appellant had been guilty of them. This is the standard of proof set out at paragraph 75 of *al-Sirri* [2012] UKSC 54. What the panel took from *al-Sirri* besides that can be seen at their paragraphs 60 – 61: for clarity’s sake, I have very much shortened the extracts, and given the principles my own numbering. They apply to the points involved in both grounds 1 and 2, except for (e), which is relevant mainly to 2.
- (a) (*al-Sirri* 16) Article 1F “... should be interpreted restrictively and applied with caution. There should be a high threshold “defined in terms of the gravity of the act in question, the manner in which the act is organised, its international impact and long-term objectives, and the implications for international peace and security””.
 - (b) (16) “... there should be serious reasons for considering that the person concerned bore individual responsibility for acts of that character.”
 - (c) (38) “ ... the appropriately cautious and restrictive approach would be to adopt para 17 of the UNHCR Guidelines:

“Article 1F(c) is only triggered in extreme circumstances by activity which attacks the very basis of the international community’s coexistence. Such activity must have an international dimension. Crimes capable of affecting international peace, security and peaceful relations between states, as well as serious and sustained violations of human rights would fall under this category.”
 - (d) (39) “... The essence of terrorism is the commission, organisation, incitement or threat of serious acts of violence against persons or property for the purpose of intimidating a population or compelling a government or international organisation to act or not to act in

a particular way ... It is ... very likely that inducing terror in the civilian population or putting such extreme pressures upon a government will also have the international repercussions referred to [*at 38*].

- (e) (40) Acts done in one country to destabilize another have to be judged according to whether they "... have the requisite serious effect upon international peace, security and peaceful relations between states."

11. The other authority referred to by the panel potentially relevant to both grounds is (at 63) *JS (Sri Lanka)* [2010] UKSC 15: this, unlike *al-Sirri*, was not an article 1F (c) case, but one under article 1F (a), and the Supreme Court set out (at 30) the following main factors to be considered:

- (i) the nature and (potentially of some importance) the size of the organisation and particularly that part of it with which the asylum-seeker was himself most directly concerned,
- (ii) whether and, if so, by whom the organisation was proscribed,
- (iii) how the asylum-seeker came to be recruited,
- (iv) the length of time he remained in the organisation and what, if any, opportunities he had to leave it,
- (v) his position, rank, standing and influence in the organisation,
- (vi) his knowledge of the organisation's war crimes activities, and
- (vii) his own personal involvement and role in the organisation including particularly whatever contribution he made towards the commission of war crimes.

CHECHNYA: DISCUSSION

12. The definition of 'antithetical activities' has become a complicated question in this country, despite the attempts to simplify it in the 2000 and 2006 Acts. The two Supreme Court decisions between them gave the panel a great deal to think about, and these were their conclusions on events in Chechnya (ground 1), at paragraphs 64 – 78. They began by noting Mr Sternberg's points on the facts: the appellant had served with Gelayev, training and fighting with firearms against Russian forces. He had been a deputy to Gelayev, and in charge of 30 – 50 men when the commander was not there. They noted Mr Sternberg's argument that these activities on their own provided serious reasons for the appellant's exclusion; but they took the view that the only actions that might have brought Gelayev (and so potentially members of his force) within article 1F (c) were 'the execution of Russian prisoners of war and the helicopter incident'; but "The Respondent does not say what acts the Appellant did".

13. At 70 – 73 the panel went on to review the evidence on these incidents. Before me, Mr Sternberg did not challenge the way they dealt with each of them on its facts; but he did argue that they had gone wrong in law by effectively considering the respondent's case on the basis that these were the only actions which might have led to the appellant's exclusion. At 74 the panel referred to a raid on Grozny, the capital of Chechnya: the point here is that they went on to refer to one of the appellant's witnesses (Akhmed Zakaev, the

Chechen ‘prime minister in exile’) as having been in overall command of sectors in both wars, and nevertheless having asylum in this country. Perhaps significantly, they added “The Respondent does not appear to say that all those Chechens who participated in the war should be excluded”.

14. The panel’s main conclusions on this point are set out at 3. Mr Sternberg’s main case on this point (leaving aside for the moment whatever leadership rôle the appellant may have had), was that, merely by carrying firearms and taking part in military action against the forces of an internationally recognized state (the Russian Federation), he was guilty of ‘antithetical activities’. His argument was based on the provisions of s. 54 of the Immigration, Asylum and Nationality Act 2006 (see 7), taken together with s. 1 of the Terrorism Act 2000 (at 9).

15. At the very least, Mr Sternberg suggested, even taking at face-value the appellant’s assertion that he had only carried arms in pursuit of necessary defensive action against Russian forces, that fell within the definition of ‘terrorism’ and so came within that of ‘antithetical activities’ because of the inclusion of action which

(2) (c) endangers a person’s life, other than that of the person committing the action ...

and the provision that

(3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.

16. Mr Eaton referred (perhaps needless to say) to the principles in *al-Sirri* to be seen at 10 (a) – (d). He also mentioned the appellants’ argument at paragraph 13 of *al-Sirri*, to the effect that

... article 1F(c) is applicable to acts which, even if they are not covered by the definitions of crimes against peace, war crimes or crimes against humanity as defined in international instruments within the meaning of article 1F(a), are nevertheless of a comparable egregiousness and character, such as sustained human rights violations and acts which have been clearly identified and accepted by the international community as being contrary to the purposes and principles of the United Nations.

This ‘egregiousness’ requirement had been adopted by the Supreme Court at 16, as well as the one for individual responsibility, noted by the panel.

17. Next Mr Eaton made further reference to *JS (Sri Lanka)* (see 11). At paragraphs 98 – 99 of the Court of Appeal’s decision, they (Toulson LJ writing for the court) had said this

Everyone agrees that mere membership of an organization committed to the use of violence as a means to achieve its political goals is not enough to make a person guilty of an international crime. ... The tribunal went on to say that, if the organization has become one whose aims, methods and activities are predominantly terrorist in character, very little more will be necessary. But it did not identify what more is necessary.

18. At 100 the Court of Appeal approved a statement in another decision of the Asylum and Immigration Tribunal, to the effect that the additional element required “... could not be participation in activities which did not involve or promote the commission of international crimes”. At 109 they had contrasted “... assisting or encouraging and mere

acquiescence”. At 112 they had warned against the subjective attitude that might be taken by ‘somebody wedded to the ideals of western liberal democracy’, apparently no longer to be encouraged. At 114 they had set out what had to be shown as ‘serious reasons for considering the applicant to have committed the actus reus of an international crime with the requisite mens rea’. All this had been approved by the Supreme Court: see *per* Lord Hope of Craighead at 48 “Had Toulson LJ stopped at paragraph 115, I would not have been disposed to find fault with his judgment”.

19. As I pointed out to Mr Eaton, *JS (Sri Lanka)* is direct authority only on what is required in an article 1F (a) case: it may however be indirectly relevant, because of the principles set out at paragraph 113 of *al-Sirri* (see 16). It now seems high time to leave the authorities on the nature of ‘antithetical activities’, and return to the facts of the case in hand, on the Chechnya point for now.

20. **Respondent’s case on the facts** This was set out in the detailed reasons attached to the refusal letter of 31 January 2017 [RB GG]. Under the heading ‘Act contrary to the principles and purposes of the United Nations’ can be seen paragraphs 13 – 24. These begin with a summary of the conclusions in *al-Sirri*, and go on:

15. It has therefore been considered whether the act of your membership with ... Gelayev’s forces was an act that attacked the very basis of the international community’s co-existence, whether it had an international dimension and whether the crime was capable of affecting international peace, security and peaceful relations between states.

21. The decision-maker went on at 16 – 19 to consider the Lithuanian part of the case, including the alleged involvement of the appellant’s brother Abdulgani in murder, and possession of explosives with intent to endanger life. They concluded at 20 that “... your above mentioned involvement was an act of terrorism of such gravity and international impact, committed by a terrorist group of worldwide notoriety”. Despite Mr Sternberg’s best attempts to persuade me otherwise, there was clearly no charge in this part of the decision that the appellant’s own activities, while in Chechnya, had amounted to terrorism, or to ‘antithetical activities’ under any other name; nor (under ‘Serious reasons for considering that you bear individual responsibility for an act contrary to the principles and purposes of the United Nations’) do paragraphs 21 – 23 add anything on this point.

22. The section ends with the following paragraph:

24. The evidence contained in the attached ... report as well as the [Lithuanian] court document has been considered and its evidence and conclusions support the conclusions set out in this letter. Its findings are not repeated here.

This [CC] was a report by the Home Office Special Cases Unit: there is no need for a general summary here either, since clearly the decision-maker took their own conclusions on the facts from it.

23. These appear at paragraph 10 of the decision:

You claim to have joined the Chechen Army under ... Gelayev. You claimed that you have been falsely accused of recruiting fighters and raising funds for the Islamic rebels in Northern Chechnya whilst in Lithuania for ... Umarov. The following factors are noted:

- You claimed to have joined the Chechen army at the age of 14 following your father's death and considered your participation as low level.
- You went on to hold the position of a commander under ... Gelayev.
- Exclusion from Lithuania due to assessment of previous involvement and support of terrorist-related activity

The above gives serious reasons for considering that you are guilty of ['antithetical activities'] ...

24. It was not suggested at any stage that the appellant's service as a 'son of the regiment' in the first Chechen war amounted to 'antithetical activities'; so the written case against him in the decision under appeal amounted, so far as events in Chechnya were concerned, to his rôle as a commander under Gelayev. It may now be worth setting out in full Mr Sternberg's case before the panel, as set out by them:

65. ... it was accepted that the Appellant had served with Gelayev. He had been trained in the use of guns and heavy weapons and he had fought. He had clearly assisted in the struggle against Russian forces. Moreover he had at later stages been a deputy to Gelayev in command of 30 to 50 men when the commander was not present.
66. It was apparent that the actions of Gelayev and his forces met the definition of terrorism, in particular in respect of threatening and carrying out the execution of Russian prisoners of war and being involved in conflict with Russian forces, including in 2002 when Gelayev's forces shot down a Russian helicopter and a British cameraman was killed. Such incidents precluded a just armed conflict and any claims of self-defence.
67. In light of such activities the Appellant's role as a trusted confidant [*sic*] and deputy and his direct support for Gelayev and carrying out his commands evidenced serious reasons for exclusion.
68. We do not find Mr Sternberg's submissions on the consequence of the Appellant's activities in Chechnya to be persuasive. As indicated two actions that may have brought Gelayev within the remit of Article 1F (c) are particularised, namely the execution of Russian prisoners of war and the helicopter incident. We note the comments in Al-Sirri that the exclusion clauses should be '*restrictively interpreted and cautiously applied*' and the '*individual responsibility*' for the acts should be shown.
69. The Respondent does not say what acts the Appellant did.

25. At this point (paragraphs 70 – 74) the panel go on to deal with the specific incidents relied on, in a way which, as already noted, was not, and could not have been challenged, so far as their decision on the facts was concerned. There follow the conclusions on this part of the case at 75 – 78 (see 3), and it is these which are under attack, for the reasons already given.

CHECHNYA: CONCLUSIONS

26. I can now give my conclusions on this part of the case. If the law went no further than the provisions of the Immigration, Asylum and Nationality Act 2006, including those referred to in the Terrorism Act 2000, then Mr Sternberg would have been right in saying that, merely by taking part in armed action, whether offensive or defensive, against the internationally-recognized government of the Russian Federation, the appellant was guilty of ‘antithetical activities’. However, that legislation was considered in the authorities, and particularly in *al-Sirri*, and the panel were bound to deal with the case, as they did, in the light of what was said there.
27. First, the panel were fully justified in taking the view that no individual actions were alleged against the appellant, so far as events in Chechnya were concerned, apart from simply acting as a commander for, and deputy to Gelayev from time to time as required. While that evidence might have made it much easier to show that he did have individual responsibility for any actions coming within principles (d) and (e) in *al-Sirri* (see 10), it could not in itself amount to ‘antithetical activities’, if the actions of the forces concerned did not do so themselves.
28. The question as to whether or not they did so was presented to the panel (see their paragraph 67, beginning “In light of such activities ...”) in terms of two significant atrocities (the murder of Russian prisoners of war, and the shooting down of the helicopter), on each of which they found in the appellant’s favour, for unassailable reasons. They went no further than that on the Chechnya part of the case, and did not need to; but at paragraphs 77 – 78 they drew a clear distinction between that and later events.
29. It would I think in any case have been open to the panel to reject the suggestion that merely taking part in armed action against the forces of the state concerned necessarily amounted to ‘antithetical activities’, bearing in mind (see *al-Sirri* (a)) “... its international impact and long-term objectives, and the implications for international peace and security”. There are clear international implications, where cross-border activities are concerned, as in the Lithuanian part of the case; but it is entirely arguable that armed resistance to state authority, within one’s own country, only involves the international community if it also involves crimes against peace, war crimes, or crimes against humanity, within article 1F (a) of the Refugee Convention. However there is no need to decide that point for present purposes.

LITHUANIA: DISCUSSION AND CONCLUSIONS

30. At 79 – 80 the panel give Mr Sternberg’s summary of the findings of the Lithuanian court: the applicant had, while in Lithuania,
- (a) spread and promoted the ideas of Islamist theology by Umarov, justifying violence and violent jihad;
 - (b) recruited fighters for Umarov, sending them to the North Caucasus, including his brother (who, as already noted, was sentenced to 14 years’ imprisonment in Russia in 2009 for terrorist offences); and
 - (c) used psychological and physical violence to obtain funds for North Caucasus Islamists.
31. So far as this part of the case is concerned, there can be no question but that each of these accusations, if established by the decision of the Lithuanian court, did amount to ‘antithetical activity’, bearing in mind (see *al-Sirri* (a)) “... [their] international impact and long-term objectives, and the implications for international peace and security”. Nor, realistically, did Mr Eaton argued that such activities would not be ‘egregious’, within the meaning given to that mildly bizarre expression in *al-Sirri*. The panel however found that they were not made out, and it is their reasons for doing so which are under challenge.
32. The leading authority on the respect to be given to decisions of this kind from other jurisdictions is *AH* (Article 1F(b) – ‘serious’) Algeria [2013] UKUT 382 (Blake P, Gleeson and King UTJJ). While that was an article 1F (b) case, the guidance in the judicial head-note is also relevant to article 1F (c), and appears below, so far as relevant for present purposes:
3. *In the absence of some strikingly unfair procedural defect, United Kingdom courts and tribunals should accord a significant degree of respect to the decision of senior sister Courts in European Union legal systems; there is a particular degree of mutual confidence and trust between legal systems that form part of the same legal order within the European Union. However, the ultimate question of whether the conduct of which the United Kingdom court or Tribunal is satisfied is sufficiently serious to justify exclusion is a matter for the national court or tribunal.*
33. The panel gave their general views on the Lithuanian decision at 92:
- ... while a degree of respect must be given, it is a matter of weight. The [Lithuanian decision] is of a wholly different nature to that found in AH. In that case the person was represented, appeared and gave evidence. None of these factors applied to this Appellant. The evidence does not indicate that a summons was served on him. There is no indication that any attempt was made to locate him via the Chechen community. There was no intent to proceed in his presence. His absence is not considered or discussed. There is no indication that he is even a defendant. ... the defendant is named as the Department of Migration.
34. Though Mr Sternberg was inclined to criticize the panel for not specifying ‘a *significant* degree of respect’ for the Lithuanian decision, their attitude to it has to be judged, not in terms of whether they correctly repeated a formula, but on the basis of their own conclusions. Of course these were for them to draw (see the last sentence of the passage

from *AH*, cited at **32**; but starting from a right understanding of the status of the Lithuanian decision.

35. Beginning from there, the panel said it was "...of a wholly different nature to that found in AH". This was a conclusion they reached on the basis of their analysis of what they saw as its procedural defects, which they went on to specify. Those were of course for them to consider; but on the basis (see again *AH* at **32**) of whether they were 'strikingly unfair'. So far as the status of the Lithuanian decision itself was concerned, it was, again using the words of *AH*, unquestionably that of a sister court forming part of the same legal order within the European Union, and on that basis had to be treated on the basis of "... *a particular degree of mutual confidence and trust*".
36. There is probably nothing to be gained from comparing the place of the Vilnius Regional Administrative Court in the Lithuanian system with that of the French *cour d'appel* (the appellate body concerned in *AH*); but it may be worth noting that the Lithuanian decision was, like *AH* itself, the work of three judges sitting together.
37. It is also worth making the point that, familiar as France and its institutions may be to some of us in this country, the decision of a Lithuanian court cannot be written off as the product, to echo an ill-omened phrase from the past, of 'a far-away country [and] people of whom we know nothing'. This is not of course to accuse the panel of providing any such crude basis for their decision; but to emphasize that the Lithuanian decision was not to be judged by English procedural standards, but treated with the respect indicated in *AH*.
38. While it was perfectly legitimate for the panel to compare the Lithuanian decision with the French one considered in *AH*, it was important for them not to lose sight of the important point that the Upper Tribunal there was giving guidance on general principles, not making the details of that decision a paradigm against which all others had to be judged. Bearing all those things in mind, it is time to turn to what the panel actually said about the basis for the Lithuanian decision.
39. First, at 88 (and partly repeated at 92: see **33**), there is the procedural aspect. The panel note the appellant's evidence that he was unaware of the hearing in 2010, or that any application had been made to cancel his refugee status, but was out of the country at the time, and in consequence unrepresented. This was legitimate; but they go on to draw the conclusion that, having been named as 'the third concerned party', while the claimant is named as the Security Department, and the defendant the Migration Department, he was for that reason less likely to have been given notice of the intended proceedings. The panel reach this conclusion despite conceding that "What this means in procedural terms is not clear".
40. Common sense might suggest that there was no point in the appellant being named as even a third party in the Lithuanian proceedings, unless there were some provision for him to be given an opportunity to take part in them. What that was, or how it might have worked, is a matter for speculation. The panel in their next sentence "There is no reference to the Appellant having been given notice to which there is no response" fell in

my view into the trap of considering the decision of a sister European court with reference to the formal contents of an English one.

41. It is certainly the custom here, and a salutary one, to begin a decision involving an absent party with some such reference; but that may not be so in Lithuania, whether or not notice has been given. There may be some other way for an appellate court to reassure itself on that point. Without any actual evidence of the requirements of Lithuanian administrative law, the panel were entitled to consider the appellant's evidence that he had not had notice of the proceedings; but not to assume that the Lithuanian court's silence on this point did anything to confirm it.
42. Turning to the panel's paragraph 89, they begin by noting that "None of the evidence that was submitted to the Vilnius court has been submitted to this Tribunal." This was only too clearly not treating the Lithuanian decision with the respect to which it was entitled, but requiring it to be justified all over again by evidence produced in this country. The panel go on to criticize the Lithuanian court for not giving their sources, apart from "*data available to state security department*". Without specifying which parts they mean, they then say "Indeed much of the evidence appears to have come from Russian sources. It could not have come from any other source."
43. Clearly the evidence about the appellant's brother Abdulgani's 14-year sentence in Russia is likely to have come from Russian sources, if only because it would have been a matter of public record there. There is however nothing in the panel's decision to show what else must have come from there, still less why they thought so.
44. As for the State Security Department data, this is not a kind of evidence unknown to judges in this country, as those who have sat on the Special Immigration Appeals Commission [SIAC] are well aware; and SIAC's 'open' decisions will give no details of it. While SIAC procedure involves a number of safeguards for the individual, such as the appointment of a special advocate, there was no evidence before the panel as to the requirements of Lithuanian law on this subject, and without it, I do not think they were entitled to assume that the Lithuanian decision was reached without proper consideration of the material before the court.
45. Going on to 90, the panel said this

... we note the considerable evidence of politicised prosecutions of Chechen separatists. We find it troubling that the [Lithuanian] court accepted entirely uncritically the assertions made in relation to those matters in Russia without any apparent regard to the likely and obvious conclusion that they may be in part or entirely politically motivated.

As I have already pointed out, there is nothing to show what this could have applied to, apart from the sentence passed on Abdulgani.

46. At 91, the panel made points about there not being anything to suggest that the appellant was responsible for his brother or another man travelling to Russia, or that they had been involved in any 'antithetical activities', apart from having appeared in a video at a meeting with Umarov and other Islamists. These would have been reasonably open to them, apart

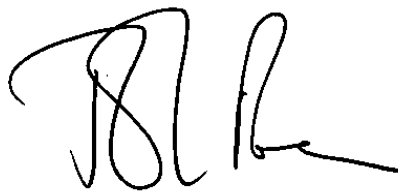
from the reservation already expressed about requiring the Lithuanian decision to be justified by evidence. 92 contains the general points already set out.

47. At 93, the panel criticize the Home Office for failing to do anything about the Lithuanian decision for five years after the appellant gave them a copy in 2012. This was thoroughly justified in terms of administrative sloth or incompetence; but it did nothing to weaken the effect of the decision, without the sentence which followed, effectively requiring the respondent to justify the decision by evidence.
48. At 94 – 95, the panel refer to evidence from three supporting witnesses of the appellant's. Once again, they were fully entitled to do so, and to accept it, so far as they did; but they needed to weigh it against the Lithuanian decision, treated on the right basis.
49. Taking the panel's decision on this part of the case as a whole, they were entitled to consider the appellant's evidence, and that of his witnesses for themselves; but they needed to be aware of
 - (a) the risks attached to free-standing consideration of such evidence, without giving the right degree of respect to the decision of a European sister court to the contrary; and
 - (b) the existence of proper means of challenging the Lithuanian decision, without constituting themselves a court of appeal over it.
50. Turning to the remedies open to the appellant, the decision itself gave him a right of appeal within 14 days to the Supreme Administrative Court of Lithuania: of course he was not in the country when it was issued, and the panel were entitled to deal with his reasons for that as they did at 100. There is no evidence as to what rights to appeal out of time he might have had under Lithuanian law.
51. That however was not the only avenue open to the appellant. If he did have no remedy under Lithuanian law, Lithuania, like this country, is a signatory to the European Convention on Human Rights, and it would certainly have been open to him to apply to the Court for one. The European Court of Human Rights would have been the proper forum, rather than a tribunal of equivalent jurisdiction in this country, for him to raise any complaints he might have against the Lithuanian decision.
52. Failing that, the appellant could at least, advised by experienced specialized solicitors and counsel as he has been all along, have put forward expert evidence of Lithuanian law, if he had wished to show that the decision indicated that he had not been provided with the safeguards he was entitled to expect. Instead, the panel were left to judge the Lithuanian decision for themselves, which they did without any other standard than their own, however expert, knowledge of English or Scots law.
53. I have considered whether the appellant is entitled to another opportunity to have the case decided on a proper basis; but, in the end, it was for him and his advisers to decide how to challenge the Lithuanian decision, and, for the reasons given, nothing in the panel's reasons justified departing from it as they did.

54. The result is that the respondent's appeal fails on ground 1, about events in Chechnya, but succeeds on ground 2, about the Lithuanian decision, and so on that ground the panel's decision is set aside, and replaced with one dismissing the appellant's appeal against refusal of asylum.

Respondent's appeal dismissed on ground 1, but allowed on ground 2

Appellant's appeal against refusal of asylum dismissed

A handwritten signature in black ink, consisting of stylized, cursive letters that appear to be 'JBL' followed by a horizontal line.

(a judge of the Upper Tribunal)

Decision signed: **23.05.2018**