

Case No: C 2000/2669

**IN THE SUPREME COURT OF JUDICATURE**  
**COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM IMMIGRATION APPEAL TRIBUNAL**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Wednesday 6 December 2000

Before:

**LORD JUSTICE SCHIEMANN**  
**LORD JUSTICE TUCKEY**  
and  
**SIR SWINTON THOMAS**  
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**SOUAD NOUNE**  
- and -  
**THE SECRETARY OF STATE FOR THE**  
**HOME DEPARTMENT**

**Appellant**  
  
**Respondent**

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(Transcript of the Handed Down Judgment of  
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Official Shorthand Writers to the Court)  
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**Nicholas BLAKE Q.C.** (instructed by Glazer Delmar for the Appellant)  
**Rhodri THOMPSON** (instructed by Treasury Solicitor for the Respondent)

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**Judgment**  
**As Approved by the Court**

## LORD JUSTICE SCHIEMANN:

1. This is the judgment of the Court.

### Introduction

2. The appellant is a citizen of Algeria, she claimed asylum here on 10th September 1996. That was refused by the Secretary of State. She appealed to the Special Adjudicator who found her to be a thoroughly credible witness in all respects, but dismissed her appeal. She appealed to the Immigration Appeal Tribunal who dismissed her appeal. She now appeals to us. There is no dispute as to the facts nor, as we understood matters, is the law substantially in dispute. The substance of the point made on appeal is that, accepting as it did the reliability of the appellant's evidence, the IAT's conclusion was one to which, if it had correctly applied the law, it could not have come. In those circumstances, we propose first to set out the law, then the Tribunal's decision, then the evidential material before the Tribunal, then the parties' submissions and finally our conclusion.

### The Law

3. A refugee is defined by the Geneva Convention as a person who  
Owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion is outside the country of his nationality and is unable, or, owing to such fear, is unwilling to avail himself of the protection of that country<sup>1</sup>

4. In the paradigm case the persecutor is the Government or its agents. That is not the present case. We are concerned with a case where the persecution is by forces hostile to the government. It is established law that a person can qualify as a refugee in such circumstances only if there is an insufficiency of protection by the state against the hostile forces. But what is sufficient in this context?

5. The Tribunal approached the case by applying the test to be found in Horvath v Home Secretary [2000] INLR 15, a decision of this court subsequently affirmed on appeal [2000] 3 W.L.R. 379. In that case Stuart-Smith L.J. said at paragraph 22....

“There must be in force in the country in question a criminal law which makes the violent attacks by the persecutors punishable by sentences commensurate with the gravity of the crimes. The victims as a class must not be exempt from the protection of the law. There must be a reasonable willingness by the law enforcement agencies, that is to say the police and the courts, to detect, prosecute and punish offenders. It must be remembered that inefficiency and incompetence is not the same as unwillingness, unless it is extreme and wide-spread.”

On the appeal, Lord Hope of Craighead said at page 383

“As Professor James C. Hathaway in *The Law of Refugee Status* (1991) page 112 has explained, “Persecution is most appropriately defined as the sustained

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<sup>1</sup> Article 1(A)(2)

or systemic failure of state protection in relation to one of the core entitlements which has been recognised by the International Community”.

At p. 135, he refers to the protection which the Convention provides as “surrogate or substitute protection”, which is activated only upon the failure of protection by the home state. On this view the failure of the state protection is central to the whole system. It also has a direct bearing on the test that is to be applied in order to answer the question whether the protection against persecution which is available in the country of his nationality is sufficiently lacking to enable the person to obtain protection internationally as a refugee. If the principle of surrogacy is applied, the criteria must be whether the alleged lack of protection is such as to indicate that the home state is unable or unwilling to discharge *its* duty to establish and operate a system for the protection against persecution of its own nationals.”

Lord Hope said at page 388:-

“The primary duty to provide the protection lies with the home state. It is its duty to establish and to operate a system of protection against the persecution of its own nationals. If that system is lacking the protection of the international community is available as a substitute. But the application of the surrogacy principle rests upon the assumption that, just as the substitute cannot achieve complete protection against isolated and random attacks, so also complete protection against such attacks is not to be expected in the home state. The standard to be applied is therefore not that which would eliminate all risk and would thus amount to a guarantee of protection in the home state, rather it is a practical standard which takes proper account of the duty which the state owes to all its own nationals..... We live in an imperfect world. Certain levels of ill-treatment may still occur even if steps to prevent this are taken by the state to which we look for our protection.”

Lord Clyde at page 398 put it this way:

“There must be in place a system of domestic protection and machinery for the detection, prosecution and punishment of actings contrary to the purposes which the Convention requires to have protected. More importantly there must be an ability and a readiness to operate that machinery. But precisely where the line is drawn beyond that generality is necessarily a matter of the circumstances of each particular case.”

He then went on to approve the formulation of Stuart-Smith L.J. which I have already quoted.

6. Our attention was drawn to the following helpful statements of the law:-

“.... the issue whether a person or a group of people have a “well-founded fear.... of being persecuted for ( Convention reasons) -..... raises a single composite question. It is .... unhelpful and potentially misleading to try to reach separate conclusions as to whether certain conduct amounts to persecution, and as to what reasons underlie it. Rather the question whether someone is at risk of persecution for a Convention reason should be looked at in the round and all the relevant circumstances brought into account”, per Simon Brown L.J. in Sandralingham and Ravichandran v Home Secretary [1996] Imm A.R. 97, at 109:

“While..... it may well be necessary to approach the Convention questions themselves in discrete order, how they are approached and evaluated should henceforth be regarded .... as a unitary process of evaluation of evidential material of many kinds and qualities against the Convention’s criteria of eligibility for asylum.” *Karanakaran v Home Secretary* [2000] INLR122 per Sedley L.J. at page 155.

7. We were shown a collection of United States and Commonwealth authorities – in particular *Canada (Attorney General) v Ward* (1993) 2 SCR 689 and [1997] INLR 42, *Singh v Ilchert* 63 F. 3<sup>rd</sup>. 1501 and *INS v Elias Zacarias* 502 US 478 - dealing with the circumstances in which a person can legitimately claim to have been persecuted for reasons of a political opinion which is imputed to him by reason of his actions or inaction. Many of them are discussed in a useful starred Tribunal decision *Gutierrez Gomez v Home Secretary* which had not yet been handed down at the time of the argument before us. The Tribunal has helpfully adopted the system of starring decisions in order to indicate those cases in which it seeks, after a careful review of the law, to lay down broad principles, which are intended to guide adjudicators and others.

8. The principles of law relevant to the present case are as follows:-

1. The general purpose of the Convention is to enable a person who no longer has protection against persecution for a Convention reason in his own country (“the home state”) to turn for protection to the international community<sup>2</sup>.
2. A claim cannot succeed under the Convention unless a person can show that he has a well-founded fear of persecution because of a Convention reason.
3. The motives of the persecutor may be mixed and they can include non-Convention reasons: it is not necessary to show that they are purely political<sup>3</sup>.
4. Political opinion may be express or imputed.
5. It follows that in order to show persecution on account of political opinion it is not necessary to show political action or activity by the victim : in some circumstances mere inactivity and unwillingness to co-operate can be taken as an expression of political opinion<sup>4</sup>
6. If it is shown that there is a reasonable likelihood that the persecutor will attribute a political opinion to the victim and persecute him because of it, the fact, if it be a fact, that the persecutor would be in error in making that attribution does not disqualify the victim from refugee status.
7. The persecution may be directly by the agents of the home state or by third parties.
8. So far as injury at the hands of third parties is concerned, the international refugee protection regime is meant to come into play only in situations when the home state fails to provide for the potential victim the degree of protection (“practical protection”) which the international community expects a state to provide for its citizens<sup>5</sup>.
9. A state is not obliged to provide complete protection against isolated and random attacks but it is under a duty to provide protection up to a practical standard<sup>6</sup>.

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<sup>2</sup> Horvath at p.383 per Lord Hope of Craighead

<sup>3</sup> Harpinder Singh v Ilcherlt 63 F 3rd at 1501

<sup>4</sup> UNHCR Handbook paragraph 80

<sup>5</sup> ibid

<sup>6</sup> Horvath at p.388 per Lord Hope of Craighead

### **The Tribunal's determination**

9. The Tribunal's determination went as follows:-

In her statement, made at the time that she claimed asylum, she said that she had worked for many years for the Telegraphic Department in Algiers and achieved the rank of Inspector. She had led a peaceful existence until an incident occurred in November 1992.

She had then been confronted by masked men, who had tried to recruit her to make use of her position with the Telegraphic Department in order to pass messages to and from Japan and the Soviet Union. They had offered her "protection" if she assisted in this way and had given her 48 hours to consider. The appellant was understandably very frightened by this but continued to work normally.

There was another incident 2 weeks later when there was a confrontation in a taxi. She was told that she would be given 2 messages to send; to Moscow and Tokyo. She was indirectly threatened with violence if she did not comply. She did not do as she had been asked but took leave from work in a state of great fear. She saw a doctor because of her nervous condition, and took sick leave until June 1993.

She then went to Tunisia where she stayed for a year and four months, returning to Algiers in November 1994 after the death of her father.

She spent time in Cyprus and in Tunis, paying several visits to Algiers to visit her mother who was sick.

After her [10 day] visit to the U.K. in September 1995 she returned to Algiers and resumed her work. Not long after that she started to receive threats. These culminated with a serious threat made over the telephone and the appellant, as a result, went to Tunis. She stayed there for three months on this occasion, returned to Algiers for a week, then went back to Tunis. She then was in a state of near nervous breakdown, staying only a few days before returning to Algiers. She remained in Algiers for a month before travelling to the United Kingdom [and claiming asylum]."

The Tribunal continued

We have proceeded on the basis that there was at least a reasonable likelihood that the people threatening the appellant were proponents of the fundamentalist cause.

The Tribunal, after referring to the decision of the Court of Appeal in *Horvath v Home Secretary*, said that the appellant's counsel had submitted that:

"There had to be in place a justice system that provided reasonable protection in practical terms. We agree with this proposition."

10. The Tribunal decision letter continues with the following passages which we have numbered for the sake of ease of reference:

“1. The Algerian State has, according to much evidence, not been able to prevent massacres of very large numbers of people..... [counsel] referred us to a report by Professor Seddon which detailed extreme brutality both on the part of the Islamists and Government forces. Professor Seddon in his report states that :

“The State security forces are over-stretched and quite incapable of providing protection to most of those at risk”.

2. There is evidence of much social break-down and wide-spread violence and danger within Algeria. However, we do not find that the background evidence shows a total collapse of the State’s protective machinery, albeit it is over-stretched. And we of course have to consider whether there is a sufficiency of protection specifically in the appellant’s case. The appellant’s own account of events is relevant. It is significant that she returned to Algeria on a number of occasions from Tunisia and she has never experienced any violence herself.

3. The appellant, after the frightening incidents, chose not to tell her superiors at the Telegraphic Department about the threats she had received. She told the police, but did not persist with her complaint, believing that they would do nothing to help her because she could not identify the people involved.

4. We are not persuaded that the appellant’s own experience shows an insufficiency of protection; she has, we think, made no real effort to engage protection by the Government authorities, and as a Government employee herself there is no reason to suppose that there would be any lack of will to help her.

.....

5. The appellant herself related the threats she received to her non-co-operation with requests by her tormentors to help them. There is no suggestion that [the appellant] was the subject of these threats because of her “Westernised” appearance or attitude. And there is nothing to suggest she was herself threatened because she was a public servant; it was, as she understood it, because she was not co-operating by sending messages for her tormentors.

6. In our opinion the appellant has failed to establish the Convention reason argued for by [counsel] for the harassment she suffered. While we accept that there is evidence that “westernised” women have been targeted within Algeria, and that public servants may be targeted as such by people hostile to the Government; we find nothing in the evidence to suggest that the appellant was threatened for those reasons.”

### **The Evidence**

**11.** The crucial evidence before the IAT consisted of the appellant’s asylum application, the notes of her asylum interview, an expert report by Professor David Seddon and a letter from the Deputy Representative of the UNHCR. We set this

material out fairly fully because there is no reason to believe that the Tribunal found it unreliable and because, while the Tribunal's summary is accurate, it does not convey the full flavour of life in Algeria as portrayed in the evidence.

**12.** The asylum application contained the following passages which amplify the Tribunal's recitation of the facts:-

In November 1992 [I was stopped on the way to work and ] found myself confronted with three large men ... wearing masks of transparent stockings .... One of the men spoke first and said: "You are Miss Noune Souay working in the Central Telegraphic, living at 159, Avenue Ali Khudju el (Brai)." He said: "You can see that I know you quite well. We do not intend to harm you or rob you or ask you for money. We are an organisation working hard for Algeria and its people that we well love". I replied: "Every citizen loves his country". He followed my reply saying : "We need the help of persons such as yourself, serious, competent and above all vigilant". I replied: "In what way can I be of use, brother?" The three men exchanged glances and while one of them looked away the first said: "We have some very important messages to be sent to Japan and the Soviet Union: it is something you can do quite easily, perhaps one day like Friday when you are settled in. It is a task that is going to be very easy for you and will be of great help to us. You will send these messages yourself and you will receive the replies the same way..." I replied naively, "But you can post your messages in the post-office..." One of them spoke up to say: "Stop playing the innocent. When I give you a job you must do it, we know our job you must know yours. We offer you our protection and you will also get a good reward". I replied: "It is because I know my work that you make approaches to me to send your messages". The last to speak said finally: "You have exactly 48 days (sc. hours) in which to consider, and they left as quickly as they appeared .....

Two weeks later I stopped a taxi and gave my destination; after a short distance the driver said, "well sister have you had enough time to consider the noble mission?" It took my breath away. I began to tremble all over; I had been trapped again by the unknown stranger. I said: "Brother, you know I am the same as you, an Algerian citizen; I work legally and honestly for my country; I do not belong to any organisation and have no intention of joining one; my life is peaceful and I have no need for any other means to improve it. Brother, be understanding and forget me please." He replied without feeling: "We have got to help one another"<sup>7</sup>. He was quiet for a moment before he stopped for a veiled woman [who] got in beside him. She was dressed with a veil and religious clothes. I knew at once she was an accomplice. He started the car again and after a few metres this woman spoke to me in a man's voice.... "This time, sister, you have no time to consider: tomorrow is Friday and you are on duty in the morning. When you come out of your house a person will hand you this packet; two messages are in it, one to Moscow and the other for Tokyo, all is fully described, with numerical and alphabetical codes." The man turned to me as if to treat me like a sister. He looked at my face, which was wet with sweat and tears. He reached out his hand to caress my head and to say - I was in good hands and

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<sup>7</sup> This is our translation of "nous devons s'entraider" which is translated in our bundle as "this is where you get out".

that my tasks would be noble in the history of Algeria. I replied: "I am not that sort of person, and leave me in peace. I shall not change my mind..." The messages remained with them however, and he stopped and said: "Until tomorrow, sister, alright?..."

I took my annual leave .... And spent this in a town in Algeria (Batna) with .. my mother's parents, staying in the house.... (In my absence my parents received visits from unknown callers pretending to be friends and colleagues from work, as well as anonymous phone calls asking for news of me and wanting to see me. .... At the end of my annual leave I took another risk and disguising myself with a veil I made a visit to a psychiatrist. ....I renewed my sick leave as far as June 1993. I spent these months at home, at my sister's house, at my uncle's house ... and with my friends. Then at the end of June 1993 I took leave on half pay (renewable) and went to Tunisia..... In November 1994 I learned of the death of my father so I returned to Algiers. .... My aim was to see my mother in her sad situation. On landing at Algiers airport I was met by my sister ... who advised me not to return to my family house. My sister's parents-in-law were able to put me up. My sister told me there were many strangers at home and not to risk a return. I stayed a couple of weeks with this family, closeted in my room before returning to Tunis. I made several visits to and from Algiers to see my mother who was very ill after my father's death.

In September 1995 .... I returned to Algiers collecting my courage to make the decision to stay and return to work. I put in a request to be reinstated.... it was two days after my return to work, when I was alone in my house, there came a knock at the door.... there stood a boy ... who asked me to go down [and said] that there were two young girls below who wanted to see me... I told the boy that I was coming. I looked out of the window to see the boy going towards a car and get in. I watched the car.... Ten minutes later it drove away. I managed to see that there were four women in religious clothes and the boy who remained inside. Half an hour later the telephone rang and when I answered it, it was a man's voice which began to threaten and curse. He said - this time there would be no running away and I should hear from them tonight".

**13.** At her asylum interview the following took place.

She was asked who were the people in 1992 she replied she didn't know, they had their faces covered with tights. She was asked did she tell the police or her superiors and replied: "I didn't approach my superiors but I reported the approach to the police. It was useless. The police are asking me to name these people who had approached me and give the evidence. I got the impression they didn't believe me. The police wouldn't even listen to me. They wouldn't care about what would happen to me". She was asked - "why didn't you tell your superiors about the operation?" she replied: "It's forbidden to talk about politics in that centre", and later said: "Why should I tell my superiors? It was something that concerned me only. I also worked in a mixed centre with people of different tendencies. I wouldn't know whom to trust. How would you expect me to talk about something as serious as this at work?... Some of my colleagues were terrorists who support a different



Islamic organisation. I have been working in that centre for 14 years so I knew most of the people. They have changed, they suddenly decided to wear the Islamic dress and to have beards. They used to say “You should stay at home or you should cover yourself”. My superiors themselves had a bad impression about me personally... So I preferred to keep silent and I believed it would be better for me to report to the police”.

When asked what she believed would happen to her if she went back to Algiers she replied:

“Certainly I will be killed. Some people are looking for me. I may be raped. Anything may happen to me. You may not be aware enough of the situation in Algeria. They sometimes would send a friend of yours to you. You would disappear if you followed this person. There is nothing but death there.”

**14.** In Professor Seddon’s report we find the following paragraphs which we have numbered for ease of reference:

“1. The progressive break-down of law and order, and growing insecurity, over the last 8 years in Algeria has been widely recognised by Human Rights lawyers and others familiar with the situation in the country. The inability of the Government and State Security Forces to guarantee ordinary civilians effective protection from the brutality of the armed Islamist Groups if they are even suspected by members of such groups of being “in opposition” to the Islamist Movement and their inability to detect those employed in the service of the state (in the police, army or other branch of the state) against terrorism, is also widely recognised.

2. Of the hundred thousand deaths that have resulted from the conflict, the majority have involved the civilian population and/or persons engaged in legitimate activities. It is evident that violent and brutal acts of terrorism and killing have been widely and systematically perpetrated by armed para-military Islamist groups against sections of the civilian population and, particularly, against those employed in the state security forces, and that the Algerian authorities have been unable to offer these people effective protection.... The very fact that some hundred thousand individuals have lost their lives and that literally millions live in constant fear and uncertainty, is one critical general indicator of the inability of the state to provide effective protection. It also shows that whatever formal legal provision exists, and whatever “protection” the police and security forces may offer, in theory, in practice there is no deterrent to the armed Islamist opposition groups.

3. More specifically, it is well known and well documented that certain para-military Islamist groups... have tended to target, in addition to members of the state security forces, those identified as professionals, with a tendency to be “secular” and non-co-operative (with the Islamist movement). Women who fail to adopt the dress code are also vulnerable. All of these categories of persons have been subject to particular harassment and persecution - ranging from abuse and death threats to assassination. The state security forces are over-stretched and quite incapable of providing protection to most of those at

risk. That is to say, that all but a very small number cannot expect any form of protection. While the police and/or security forces maybe willing, in principle, to provide protection, such measures are only in fact available for small numbers of high-profile individuals, usually political figures. But, even among these “high-profile” individuals given some formal protection by the police, several have been assassinated, throwing serious doubt on the capacity of the police and security services to provide effective protection to **any** of those at risk.

.....

4. As a single (unmarried) woman of 43 years, normally wearing “western style” clothing and having a responsible position in a Public Service Department where women are normally in secretarial or other menial positions, Ms. Noune would stand out as a potential target under any circumstances. Her specific position in the P.T.T. makes it credible to suppose that her access to international telegraphic facilities was what initially attracted this organisation to pursue her. Her failure to conform to “Islamic dress” codes and her job, combined with her refusal in effect to collaborate with members of this organisation, make it highly likely that she would be targeted for further harassment and persecution were she to be returned to Algeria and to return to Algiers.”

**15.** The letter from the Deputy Representative of the United Nations High Commissioner for Refugees indicated that claims by Algerian asylum-seekers exclusively based on the fear of becoming a victim of indiscriminate violence are not deemed sufficient by U.N.H.C.R. to recognise refugee status. That letter also indicated that civil servants who may be perceived to support a secular form of Government might be regarded as potential targets for persecution by radical Islamic groups. It suggested that a well-founded fear of persecution must be established on a case-by-case basis and that there was no automatism (sic) according to which the above persons should be recognised as refugees.

### **The Appellant’s submissions**

**16.** Mr Nicholas Blake Q.C. submitted that the critical question was whether there was a reasonable degree of likelihood that the appellant would be persecuted for a Convention reason. He accepted that if the appellant were to be merely in the same situation as the generality of the population of Algeria and thus exposed to risk of terrorist outrages she would not fall within the definition of refugee in the Convention. But he submitted that the appellant was in a particularly vulnerable group because she wore Western dress which caused her to stand out from the generality of the population, that this would draw attention to her, that this would lead to her activities being scrutinised, that this would disclose that she was a civil servant and had in the past refused to co-operate with the Islamists. There was a real risk that they would attribute a political opinion to her and would persecute her because of that opinion.

**17.** He made various specific criticisms of the Tribunal’s decision based on its wording and then went on to submit that the Tribunal had wrongly compartmentalised various questions instead of asking themselves the composite question : is there a real risk that the appellant will be harmed by the Islamists by reason of what they take

to be her political and religious opinions and that this will be the result of the failure of the Algerian State to provide that degree of protection for its citizens which the international community expects? Although the main thrust of his attack was related to this latter point it is convenient at this juncture to indicate the specific criticisms.

**18.** He submitted that it appeared from paragraph 2 of its decision that the Tribunal had worked on the basis that “total collapse of the State’s protective machinery” must be shown before someone could successfully claim to be a refugee, whereas the Tribunal should have asked itself “Given that we have found that there is widespread violence and danger in Algeria and that the State’s protective machinery is overstretched, is there a reasonable likelihood that someone in the appellant’s position would be particularly vulnerable to that violence and danger by reason of what might be perceived to be her political opinion?”

**19.** He submitted that the Tribunal erred in concluding that she had made no real effort to engage protection by government authorities. It had fallen into that error by overlooking her efforts to engage the police who were the obvious protection agency and her reasons for not asking for protection from her governmental department. He submitted that there was evidence of “lack of will to help her” on the part of the police and if the Tribunal thought otherwise they had fallen into error.

**20.** He submitted that the Tribunal, having found that “westernised” women and public servants had been targeted in Algeria by the Islamists, erred in concluding that this finding was irrelevant to the appellant’s case. The Tribunal said in paragraph 5 of its decision that there was nothing to suggest that these were the reasons for her having been threatened. He submitted that there was no rational basis for excluding those elements in the assessment of the reasons why she had been picked on in the past and he suggested that all the references by the Islamists to messages might have been merely to see whether she was prepared to co-operate with them or whether she was on the Government side. If all that was intended was to find a willing transmitter of messages then the Islamists would, he submitted, not have persisted after the initial refusal. Even if co-operation had been genuinely expected and even if there were messages which required sending the Tribunal’s view did not address the future. She risked being identified by her dress and work and, having been identified, being punished for past refusal to co-operate and not sharing the Islamists political opinions.

**21.** He submitted that the present was not a case of a random encounter resulting from being in the wrong place at the wrong time but of specific targeting.

### **The Respondent’s submissions**

**22.** Mr R. Thompson submitted that the Tribunal had identified the right legal principles to apply. He submitted that when an expert Tribunal has correctly identified the law and has gone on to apply that law to undisputed facts this court should be slow to come to the conclusion that the judgment of the Tribunal has not correctly evaluated the significance of those facts.

**23.** He reminded us that Algeria was a state where there was in effect a civil war going on. Citing passages from pages 135-7 of Professor Hathaway’s book he submitted that the Convention was intended to protect those who had been marginalised in their own society rather than pillars of that society. He submitted that

the appellant did not belong to a group which had been marginalised in Algerian society but that she lay somewhere on the continuum between the President at one end and the marginalised at the other. He submitted that to suggest, as Professor Seddon in effect did at the end of the paragraph we have numbered 3, that the Prime Minister and President of a state which is involved in a civil war could claim refugee status while they were still in charge of the Government, was not tenable. The Convention was not intended to allow for refugee status to be given to conscientious government employees in good standing with their own government.

**24.** He submitted that it was not at all clear from the facts which Convention reason was relied on and this showed how ill founded the claim was.

**25.** He submitted that the Tribunal had been entitled to take into account the fact that the appellant had spent a considerable period of time in Algeria after the admittedly frightening events in 1992 and 1995 without suffering physical violence and to come to the conclusions to which it had come namely

1. that she had not shown that there was an insufficiency of protection for her given that she had not made serious and sustained efforts to obtain that protection which, the Tribunal considered, she could have had as a government servant and which, the Tribunal considered would have been up to the practical standard which the international community requires of a state.

2. that the reason why she had been threatened was because she was not co-operating with her tormentors and this was not a Convention reason.

## **Conclusion**

**26.** First a preliminary point. We would reject what we understood to be Mr Thompson's submission that senior members of a government in a state which is either invaded or subjected to substantial internal insurrection can never claim refugee status. Once one accepts that a person can be a refugee because of fear of non-state actors - and this is now indisputably the law - it follows that a member of a government can fall within the definition of refugee. A brief consideration of the position of many Frenchmen in this country at various points during the last war would illustrate the variety of situations in which a fleeing minister might legitimately claim to be a refugee. The same applies to conscientious government employees in good standing. It is a commonplace of history that governments are changed as a result of internal insurrection and it is clear that a minister can be a refugee once the insurgents have taken over the government. We see nothing in the Convention which denies a perceptive, if perhaps not brave, minister international protection if he leaves a little early. The same must apply to civil servants.

**27.** We pass now to the substance of our conclusions. We start off from the fact that the Tribunal is an expert tribunal with specific knowledge and experience which this court does not have. Faced with a case where there is no allegation of a substantial misunderstanding of the law and where the past facts are agreed and where in consequence all that is at issue is the degree of likelihood of harm to an appellant, this court is reluctant to interfere with the evaluation of risk made by the expert tribunal.

**28.** However, there are a number of considerations in the present case which, giving it the most anxious scrutiny which the law requires<sup>8</sup>, make us reluctant to affirm the decision of the Tribunal and agree that this appellant should be sent to Algeria without more ado.

1. The Tribunal had to decide this case before the decision of the House of Lords in Horvath. As a study of the many judgments and speeches in that case shows, the law in relation to persecution by non-state actors was unsettled and difficult to understand. It may be that the Tribunal, applying the test formulated by Stuart-Smith L.J. which we have quoted (which was approved by Lord Clyde but not by the majority in the House of Lords), considered that where the law enforcement agencies are doing their best and are not being either generally inefficient or incompetent (as that word is generally understood, implying lack of skill rather than lack of effectiveness) this was enough to disqualify a potential victim from being a refugee. That is certainly a possible reading of the Lord Justice's words. If that was the reading adopted by the Tribunal, we consider that it erred as a matter of law. Unfortunately, although wholly understandably, the acceptance by the Tribunal of the test formulated by the appellant before it - that there had to be in place a justice system that provided reasonable protection in practical terms - does not clearly indicate whether it had indeed read Stuart-Smith L.J.'s words in the manner indicated above.

2. The crucial question before the Tribunal was whether there was a reasonable likelihood of her being persecuted for a Convention reason if she were to be returned to Algeria in the future. The failure by the appellant in 1992 and 1995 to do more by way of endeavouring to secure protection from the police or the Post Office who employed her is not as such relevant to that question. The Tribunal appears to have concentrated exclusively on the past rather than on the time of any return to Algeria by the appellant. We observe that there was nothing before the Tribunal to suggest either that the appellant would, if she were returned by this country, be welcomed back to her former job in the Post Office or that former Post Office employees were likely to be given an enhanced measure of protection.

3. The evidence before the Tribunal supported its view that there was not a total collapse of the state's protective machinery. What there was, was better than nothing. But this does not answer the question which the Tribunal had to answer, namely, whether there was a reasonable likelihood that the Appellant would be persecuted for a Convention reason. There seems to us to be a danger that the Tribunal considered the total collapse of the state's protective machinery to be a prerequisite for a successful claim to refugee status. If it did adopt that view, it was in error.

4. The Tribunal clearly put a lot of weight on the undoubted fact that the appellant had not been physically injured and had returned a number of times to Algiers. It is clear law, and we have no doubt that the Tribunal understood this, that the suffering of physical injury is not a pre-requisite to refugee status. However, we are troubled as to three matters.

- a) Whether the Tribunal applied its mind clearly to the future which is what is crucial in these cases. It is perfectly possible that the Islamists in the past threatened her in order to obtain her co-operation (which would arguably not be a Convention reason) but would, in the future, inflict injury or death on her

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<sup>8</sup> R v Home Secretary, ex p. Bugdaycay [1987] 1 A.C. 514 at 531

because of a belief that her refusal to join the Islamists in their fight against the government evidenced political convictions in her of which they disapproved (which might well be a Convention reason).

b) It does not appear from the Tribunal's reasoning that they considered whether her ability to escape physical injury was attributable in whole or in part to her being in hiding.

c) Whether the Tribunal gave undue significance to her returning and remaining in Algeria. When, as here, there is a father's death and a widow's distress, to return to comfort the mother may well be evidence of filial bravery and affection rather than evidence of the lack of danger or fear of danger.

5. It is important to examine whether this is a case, to use Lord Hope's words in Horvath, of "isolated and random attacks" with which citizens in any state must expect to put up or whether, in the context of Algeria, there is a reasonable likelihood that an unwillingness by the appellant to aid the Islamists in their fight against the Government and indeed to wear the veil might very well be taken as an expression of political opinion and lead to persecution. It was relevant to consider whether the uncontentious material before the IAT showing the substantial death toll in Algeria inflicted by Islamists indicated that the law enforcement agencies were ineffective to prevent Islamists inflicting death and injury on those who were perceived by them to be opposed to their cause or whether the infliction of death or injury was in general because of a desire by the killers to obtain money or drugs or something of that kind.

**29.** We therefore allow this appeal. Mr Blake submitted that in that eventuality we should substitute our decision for that of the Tribunal and allow her appeal to the Adjudicator so as to secure finality in this prolonged litigation. We consider that this course is inappropriate. We are reluctant to substitute a different view of the facts from that expressed both by the Special Adjudicator and the IAT and would only do so in the clearest of cases of which this is not one. We consider it appropriate that the case should be remitted to a differently composed IAT which will then be in a position to apply the current law to the current factual situation in Algeria.

**Order:           Appeal allowed with costs. To be remitted to the Immigration  
                          Appeal Tribunal-House of Lords application refused.**

(This order does not form part of approved judgment)