REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO. 74540

AT AUCKLAND

Before:	E M Aitken (Chair) V J Shaw (Member) C M Treadwell (Member)
Counsel for Appellant:	D Manning and R McLeod
Appearing for NZIS:	M Woolford
Date of Hearing:	31 March - 4 April, 22 - 23 April, 3 - 6 June and 9 - 11 June 2003
Date of Decision:	1 August 2003

DECISION

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[1] This is an appeal against a decision of a refugee status officer of the Refugee Status Branch (the RSB) of the New Zealand Immigration Service (the NZIS) declining the grant of refugee status to the appellant, a national of Algeria.

INTRODUCTION

[2] The appellant is a former *Imam* and university lecturer in Algeria who stood as an FIS candidate in the first round of the November 1991 legislative elections. Following the January 1992 military coup, the FIS was banned. The appellant was sentenced *in absentia* to death and, in August 1993, fled to Europe. In Belgium, he sought refugee status but was declined on the grounds that he was excluded from the protection of the Refugee Convention because of links to the GIA and other armed groups.

[3] In March 1995, the appellant was charged with heading a criminal association and related offences. He was initially acquitted by the Brussels

County Court but was convicted by the Brussels Court of Appeal in November 1995. He and his family left for Switzerland in November 1997, where he again sought refugee status. Shortly after his arrival, he learned that an Algerian Military Court had sentenced him *in absentia* to death. With his refugee application still unresolved, he and his family were deported by the Swiss authorities to Burkina Faso in October 1998.

[4] While in Burkina Faso, the appellant learned that a total of six life sentences had been entered against him *in absentia* in Algeria since his departure, for various terrorist offences. In January 2000, the appellant and his family left Burkina Faso for Malaysia. There, he learned that he had been convicted *in absentia* in France in September 2001 of participation in a criminal group, with a view to preparing terrorist acts. In December 2002, fearing that the Algerian authorities were planning a move against him, he left for New Zealand.

HISTORY OF PROCEEDINGS

[5] The appellant arrived in New Zealand on 4 December 2002 from Malaysia, TEXT DELETED He sought refugee status at Auckland airport and was interviewed. After being processed by Customs, the appellant was detained in custody on the grounds that his identity needed to be confirmed.

[6] The appellant was then detained in custody. Initially, he was kept for some days at the Papakura Police Station. He was then transferred to maximum security at Paremoremo Prison, where he has been kept in isolation ever since.

[7] Paul Coates, barrister, was appointed by the Legal Services Agency as the appellant's counsel. A written statement of claim was submitted to the RSB, together with submissions and some documentary evidence. The appellant was interviewed by a refugee status officer on 19 December 2002.

[8] Following that interview, the appellant was given the opportunity to comment on the resulting report, before a decision was made on 30 January 2003, declining his application.

[9] Our jurisdiction is *de novo* and the reasons for the decision of the RSB are not strictly germane to our findings. However, we record briefly that the RSB found that the appellant had a well-founded fear of being persecuted in Algeria, in

terms of Article 1A(2) of the Refugee Convention, but was nevertheless excluded from the Convention by virtue of Article 1F(b), on the grounds that there were serious reasons for considering that he has committed serious terrorist or non-political crimes.

[10] On 31 January 2003, the appellant lodged an appeal to the RSAA.

Venue

[11] It is our practice to interview appellants at our premises in Auckland, where we have specialised hearing rooms and facilities. *Prima facie*, the taking of the appellant's evidence would have followed this course. However, the Police (responsible for the appellant's security) raised concerns as to the use of our premises on the grounds that they are not sufficiently secure. The appellant was described by the Police as a "security risk" but the only grounds advanced (through Mr Woolford) were that the appellant was the subject of an Algerian arrest warrant arising from convictions there and that he had allegedly admitted, on arrival in New Zealand, to being a member of the *Groupe Islamique Armé* (the GIA).

[12] We were not, initially, inclined to accede to the views of the Police. The grounds advanced were unremarkable in this jurisdiction. However, we were then informed that, if the hearing was to proceed at our premises, the remainder of our building would have to be evacuated and the street closed off for the duration. The duty of fairness to the appellant includes ensuring that the hearing is as confidential as possible and it was clear that such a level of security would attract significant media attention. Added to this, no other appeal hearings would be able to proceed at the same time. We were then notified, on 27 March 2003, that a Security Risk Certificate had been issued against the appellant by the New Zealand Security Intelligence Service (the SIS).

[13] Accordingly, arrangements were made to interview the appellant at the Manukau District Court. Even there, the hearing took place in high security, with up to 6 security personnel present in the hearing room and others patrolling outside.

[14] At an adjournment of the hearing after seven days, the appellant requested that we reconvene at Paremoremo Prison. He was finding the daily process of being transferred to the Court (the very early start, being strip-searched and being

handcuffed) to be stressful. Once we were satisfied that appropriate facilities could be made available there, the remainder of the hearing took place at the prison.

Change of counsel

[15] It will be recalled that Mr Coates had been appointed as counsel shortly after the appellant's arrival. Following the decline of the appellant's refugee application, he engaged Mr R Chambers as senior counsel.

[16] On the fourth day of the hearing, on 4 April 2003, Mr Chambers withdrew as counsel, following concern expressed by us as to the inadequate preparation of the appellant's claim by senior counsel. Mr Coates agreed to continue to represent the appellant until other counsel could be instructed. The hearing was then adjourned because of the unavailability of the hearing room. Shortly before it resumed, Mr Chambers wrote to the Authority to advise that he was resuming his representation of the appellant.

[17] The hearing resumed on 22 April 2003. The next morning, however, Mr Chambers again withdrew, together with Mr Coates. The appellant confirmed the withdrawal of his instructions and that he wished to appoint new counsel. Ms Manning and Mr McLeod were instructed that afternoon and appeared briefly, to seek an adjournment to enable them to familiarise themselves with the appellant's case. The circumstances clearly required this.

[18] We acknowledge the strenuous efforts by Ms Manning and Mr McLeod. In spite of their late appointment as counsel, they obtained and submitted a substantial quantity of relevant documentary evidence from numerous witnesses in many countries to support the appellant's claim. We are in no doubt as to the many hours that have gone into their comprehensive presentation of the appellant's case.

Delay

[19] We accord urgency to the hearing of appeals for appellants in custody. We regret the delay in finalising this appeal. However, we were delayed in setting the appeal down for hearing because the NZIS file did not include information which was critical to the determination of the appeal - in particular the Belgian immigration file and the judgments of French and Belgian courts, convicting the

appellant of criminal activity, which had been relied on by the RSB to exclude the appellant. There was considerable delay in obtaining this information and having it translated. Some key documents were not received until well into the hearing.

[20] Further delay was then caused by the withdrawal of the appellant's original counsel and the need for new counsel to take instructions.

Counsel for the NZIS

[21] Mr Woolford has appeared throughout as counsel for the NZIS, primarily to assist the Authority in the course of its inquiry. We are grateful for that assistance, which has been substantial, particularly in terms of securing much official documentation from foreign jurisdictions.

Interpretation - Arabic

[22] The appellant's English is limited. The taking of his oral evidence in the course of the appeal hearing has been through an Arabic interpreter.

Translations

[23] Many documents we have reviewed in the course of this appeal has been either in Arabic or in French. We have had those documents translated into English. Where documents have been provided to us by counsel, they were also accompanied by translations.

Breaches of Confidentiality

[24] We are concerned at the inappropriate coverage of the appellant's presence in New Zealand as a refugee status claimant. It is a criminal offence, pursuant to section 129T of the Immigration Act 1987, to disclose information relating to a refugee claim, even to the point of disclosing the existence of the claim itself. Yet there has been a disquieting stream of information about the appellant leaked to the New Zealand media. As early as 13 December 2002, the *New Zealand Herald* had disclosed the appellant's name, photograph and presence here and were speculating wildly on his background. By 16 December, the *New Zealand Herald* had disclosed that he had applied for refugee status. He was even allowed to be filmed in the course of a District Court hearing on the renewal of a committal warrant. Such media coverage has continued throughout the last six months.

[25] As will be apparent from our decision, the conduct of New Zealand officials and the media, in direct contravention of section 129T, has contributed to the risk of persecution faced by the appellant, should he return to Algeria.

SECURITY RISK CERTIFICATE

[26] On 23 March 2003 the Minister of Immigration issued a Notice pursuant to section 114G(1) of the Immigration Act 1987 that she had made a preliminary decision to rely on a Security Risk Certificate made by the Director-General of Security in accordance with section 114D(1) of the Act.

[27] In the documents which accompanied the Notice, the appellant was advised that the Security Risk Certificate was issued on the basis of "classified security information" from which the Director-General had determined that "the appellant's continued presence in New Zealand constitutes a threat to national security in terms of section 72 of the Immigration Act 1987 and there are reasonable grounds for regarding [him] as a danger to the security of New Zealand in terms of Article 33.2 of the 1951 United Nations Convention relating to the status of refugees".

[28] Section 114F of the Act provides that the existence of a Security Risk Certificate is evidence of sufficient grounds for the conclusion or matters certified, subject only to a decision of the Inspector-General on review.

[29] The effect of the Notice is far-reaching. Section 114G provides that the processing of all immigration applications in respect of the individual against whom the Security Risk Certificate has been issued and all proceedings before any Authority, Tribunal, District Court, or High Court be suspended. Proceedings before the RSAA are not affected. (section 114G(3)(b)).

[30] The appellant received the Notice on 27 March 2003 and, the same day, applied to the Inspector-General of Intelligence and Security for a review of the decision.

[31] The review proceedings have not yet been determined. Further, the Authority was advised by the appellant's (former) counsel early in the hearing that the Inspector-General had indicated that he would delay the hearing and determining of the review application at least until we had concluded the taking of the appellant's evidence. Later in the proceedings we were advised by counsel

that the Inspector-General would not be commencing the review proceedings until we had delivered our decision in respect of this appeal.

[32] The Authority's jurisdiction to determine whether an appellant is a refugee within the meaning of Article A(2) of the Refugee Convention 1951 is not affected by the Security Risk Certificate. Nor would the position be any different if the Certificate had been confirmed – see section 114Q.

HISTORICAL OVERVIEW OF ALGERIA

[33] We will shortly turn to the appellant's account. So as to better understand the historical and political environment which has shaped his experiences, it is necessary to first consider Algerian political developments of the last 15 years. What follows is, of necessity, a very brief summary taken from academic sources. The focus is on providing the necessary background to certain key aspects of the appellant's refugee claim.

[34] France's colonial rule of Algeria came to an end in 1962, following eight years of bitter war, the independence struggle having been spearheaded by the Algerian *Front de Libèration Nationale* (FLN). The following years saw the consolidation of authoritarian rule coupled with an ambitious programme of radical socialist reform. Though nominally an FLN one party state, up until 1989 real power continued to reside in the armed forces:

> Within the FLN's state since 1962 it has always been the army, not the Party which has been the principal locus of power, the task of the Party being to explain decisions taken elsewhere, not to reason why. And this primacy of the army within the state has reflected the very important fact that the distinction between the political sphere and military sphere, which is taken for granted in modern Western democracies … is yet to be fully established in Algeria and has been conspicuous by its absence in Algerian political history since 1954.[1]

[35] Following President Boumediène's death in late 1978 his successor, President Chadli, embarked on a programme of economic liberalisation. The resultant rise in prices and burgeoning youth unemployment, exacerbated by a collapse in oil and gas revenues on which the Algerian economy was dependent, alienated large sections of the population, especially the urban poor. The dictatorial regime's resulting loss of legitimacy culminated in massive rioting in October 1988 which was brutally suppressed, causing the death of at least 500

[1] Roberts, Hugh, "*The Battlefield Algeria 1988-2002*", p. 109

people. The Chadli regime responded with the introduction of a pluralist constitution in March 1989 which paved the way for the creation of the Islamist political party, the *Front Islamique du Salut* (FIS), and its spectacular successes in subsequent local and legislative elections in 1990 and 1991.

The Algerian Islamist Movement

[36] The following extracts are taken from a report presented to the RSAA by Professor Emile George Joffé an academic specialist in North African affairs[2].

> Political Islam in Algeria has a long and honourable history. It developed as a consequence of the wider Islamic response to European colonialism and technological superiority that had to be confronted in the nineteenth century, as the Ottoman empire decayed. By the 1860s, this response had become codified into the *Salafiyya* movement, promoted by Jamal al-Afghani, which argued that Muslims should look into the traditions of early Islam, typified by the Rashidun caliphate, to find the inspiration through which to meet the intellectual and technological challenge of the West. His ideas, which were inherently a modernist response to the shock of European intervention in the Islamic world, were immensely influential and were popularised throughout the Arab world by individuals such as Mohammed Abduh in Egypt and Chekib Arslan in Lebanon. In Algeria, they inspired the first wave of the use of Islam as a rallying point in trying to rebuild a sense of political and moral autonomy within the context of French settler colonialism there, in the wake of the visit by Mohammed Abduh to Algeria in 1903.
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> ...The nascent Islamist movement in Algeria… was also an expression of Algerian particularity. In this respect it differed from the very similar Islamic reform movement created in Egypt in 1928 by Hassan al-Banna, the *Ikhwan Muslimin* (Muslim Brotherhood) which also drew its doctrines from the earlier Salafiyya movement but now set them within a specific political context.
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> The movement sought to re-Islamise Algerian society through social work and reviving religious practice, rather than through active political commitment – which would have been impossible in the colonial context. However, …the Algerian reform movement soon became caught up in more overtly political activity as Algerian nationalism came ever more openly into conflict with the French colonial authorities. After the Sètif massacres in 1945, which marked the beginning of the overt struggle against French colonialism, secular nationalist movements filled the political arena and the Islamic movement was marginalized, but it continued to enjoy a wider dimension of support throughout Algeria as the natural vehicle for the expression of Algerian collective Muslim identity. Thus, although marginal in political terms, its significance for nationalist ideology was paramount and the *Front de Libèration Nationale* (FLN) that became the vehicle of the war against France explicitly claimed to be an Islamic movement as well as a movement for national liberation.
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> In the wake of the war for independence, which ended in 1962, socialist ideas dominated inside Algeria's new collective political life. However the role of Islam was never far behind and the new ruling elite, particularly after the 1965 coup, which brought the army commander, Houar Boumediènne, to power, made space for a formal Islamic role within the state…. At the same time, the slightest hint of

[2] See paras. 309-12 for Professor Joffé's academic qualifications and positions held.

> Islamic political interest was stamped on and a formal political role for Islamic thinkers was marginalized.[3]

[37] Nevertheless, as Professor Joffé explains, the 1980s witnessed the growing strength of the Algerian Islamists:

> "[A]s popular discontent mounted with the Algerian experiment in political and economic development towards the end of the 1970s, the Islamist movement received ever-greater support, in part augmented by the relative leniency shown to it by successive governments. At the same time, its popularity was increased by the Arabization programme undertaken in the late 1970s and early 1980s to counter the persistence of French as the major language and culture for Algeria. However, those who were Arabophone in terms of education and training found themselves disadvantaged in terms of employment and isolated in terms of culture because of the continued dominance of French as a commercial language and because of the role France continued to enjoy in Algeria's wider cultural context. They were therefore drawn towards the authenticity of an Islamic alternative – something which was encouraged by the fact that many of the teachers employed in the Arabization programme were Egyptian and linked to the *Ikhwan Muslims* [Muslim Brotherhood] as mentioned above.
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> During the 1980s and particularly between 1984 and 1988, government ambivalence towards the Islamist movement allowed the movement to garner more popular support, particularly in poor urban areas where the level of youth unemployment was as high as 30 per cent of the youth labour force (and 70 per cent of the Algerian population were below the age of thirty).
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> At the same time, the more extreme members of the Islamist movement began to question the legitimacy of the Algerian state on the grounds that the FLN had originally capitalized on Algeria's Islamic heritage to justify its call to arms against French colonialism. Yet this legacy and source of legitimacy had been abandoned, once Algeria became independent, so that the FLN had no right to claim revolutionary legitimacy that properly belonged to their version of the Islamic movement in their eyes. They also had the experience of the struggle in Afghanistan against Soviet occupation in the 1980s, which had been led by extremist Islamist groups with American and Saudi support. In the mid-1980s, therefore, a clandestine group, led by Mustapha Bouyali – a former FLN militant during the war for independence and subsequently a gendarme – emerged in the Blida-Boufarik area and launched attacks on the security apparatus of the Algerian state. Although the group was eliminated in 1987 and Mustapha Bouyali himself was killed, whilst his supporters went to prison, they were released in 1989 and some became, not only members of the FIS … but also founder-members of the armed clandestine Islamist resistance after the army-backed coup in 1991-92.
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> By 1988, therefore, although the Islamists were as surprised as the government when the riots that brought Algeria's single-party state to an end exploded, they were ready to garner the fruits. Some leaders… were determined to avoid direct political involvement…. Others, however, led by Abbassi Madani, who had been an FLN activist during the war for independence, were determined to seize the opportunity. One of the results was the creation of the FIS in 1989.[4]

[38] Commenting on the FIS, Professor Joffé writes:

> The FIS was, however, something more than an Islamist party, although it was certainly concerned with political action. Unlike these others, it sought to create a

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[3] Joffé, Report of 3 June 2003 prepared for RSAA, pp. 8-9
[4] Joffé, *ibid*, pp. 10-1

> movement that brought together as many members as possible, whatever their specific political platforms, and which, furthermore, challenged the claim of the FLN to embody the legitimate inheritance of the Algerian revolution. As was often said in Algeria, 'Le FIS est le fils de l'FLN'-'The FIS is the son of the FLN'. As part of this catholic appeal, it attracted adherents of three major Islamist currents to its banner: the *Salafiyyists* who had been the backbone of the original Islamic movement; the *Djazara'a* group, sympathizers with the ideas of Malek Bennabi who sought a specifically Algerian Islamist solution, unlike the universalism of the *Salafiyyists:* and the *Afghanistes*, Algerians who had fought with the *Mujahidin* in Afghanistan during the war against the Soviet Union, as well as a much larger number who sympathized with the *Mujahidin* and their neo-Salafiyyist ideas.
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> Since each of these groups had a different agenda, it is not surprising that the FIS found it very difficult to evolve a specifically Islamist political programme. No detailed economic programme was ever suggested; much of the platform as put forward for the 1990 municipal and 1991 legislative elections was concerned with public order and public morality – a theme which brought together a wide measure of public support. Otherwise it was devoted to a sustained attack on the corrupt values and practices of the old FLN regime and on the consequences of secularism and French influences in Algeria.[5]

[39] With respect to the magnitude of the FIS victories in the electoral arena, Professor Joffé records:

> …its wide political base ensured that it rapidly became a mass movement claiming for itself the revolutionary legitimacy that had, until then, been the prerogative of the FLN and the Algerian army. In municipal elections in June 1990 it won a crushing victory, gaining control of 856 of Algeria's 1,541 municipal councils and 31 of 48 provincial assemblies. It gained 55 per cent of the vote, completely humiliating the FLN, which gained only 32 per cent of the vote and won control of 487 municipal councils and 14 provincial assemblies.
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> This success was to be repeated, albeit less convincingly, eighteen months later when much-delayed legislative elections were held. The FIS won 188 of the available 232 seats in the National Assembly outright in the first stage of a two-stage election, and was expected to win eventual control of the Assembly, but its share of the… votes… had dropped significantly and its share of the overall available votes had fallen to only 25 per cent of the total. Nonetheless, it was clear that the FIS would be able to form a government and, much to the anxiety of the regime, it threatened, too, to call for an Islamic state in Algeria. And it would have more than the necessary two-thirds majority in the Assembly necessary to legislate changes to the constitution to achieve this. This situation immediately brought it into head-on collision with the fundamental tenets on which the Algerian state had been based and revived fears among the country's military leadership that Algeria's revolutionary ideals, and their vested interests in the status quo, would be threatened.[6]

The army's response to the FIS electoral victory

[40] The first crackdown on the FIS followed FIS demonstrations in June 1991 in response to a proposed new electoral law aimed at gerrymandering electoral boundaries in favour of the FLN. Along with other FIS representatives, senior

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[5] Joffé, *ibid*, p. 12
[6] Joffé, *ibid*, p. 13

leaders Abbassi Madani and Ali Belhadj[7] were arrested on trumped-up charges at the end of June 1991. Both were later sentenced to 12 years' imprisonment.[8] However, it was the fear of the FIS's imminent electoral victory that propelled the army, supported by the most staunchly secular elements within the political arena, the Berberist party, the Rally for Culture and Democracy (RCD) and the Socialist Vanguard Party (PAGS), to intervene directly to abort the election, force the resignation of the President and appoint its own collective five-man Presidency (the HCE). Simultaneously, the army turned on the FIS, utilising the repressive powers afforded by the declaration of a state of emergency announced on 9 February 1991:

> Ignoring appeals from the remaining leadership of the FIS to halt the arrests and the repression of the party, the regime moved swiftly to defeat and dismember the FIS in the wake of the 9 February announcements. Making full use of the extensive extra-ordinary powers the state of emergency granted the security forces, which included wide-ranging powers of arrest and curtailment of rights of association, the military began large-scale arrests of FIS militants. Five new "detention centres" were set-up on 17 February in the Sahara to house the between 5,000 (the official figure) and 30,000 (the FIS's estimate) Islamists arrested in the security swoops as clashes continued to occur across the country. In response, the remains of the FIS leadership attempted to regroup support for the party by organising a rally for 14 February but evidence of the intent of the military to prevent this occurring forced the plan to be abandoned to avert a bloodbath. It proved to be the last major act of the party. The FIS was formally dissolved, following the completion of the procedures instituted by the Interior Ministry, by an Algiers court on 4 March 1992. It was found guilty of multiple violations of the law. However, as Abderrahim Lamchichi remarked, by this state there was not much left of the FIS to dissolve:
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> > …its seat in Algiers had been shut, its newspapers banned, its 250 town halls confiscated, its principal leaders imprisoned, its militants interned in security camps.[9]

Development of armed resistance

[41] There have been allegations that the appellant was involved in armed Islamist groups. Such allegations form the basis of criminal convictions entered against him in Algeria, Belgium and France. It is therefore relevant to identify the various Algerian armed groups which came into being after January 1992 and the nature of the ensuing violence which still continues.

[42] The resort to arms during 1992 was a strategy adopted initially by groups outside the FIS. Three elements can be identified:

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[7] Sometimes spelt Benhadj

[8] Both were released on 2 July 2003 and are now subject to a total ban on all political activity. "Algeria frees Islamist leaders", *BBC News* (2 July 2003) http//newsvote.bbc.co.uk, and "Algeria releases leaders of banned Islamic party after 12 years" *Agence France Presse* (July 2, 2003)

[9] Willis, Michael "*The Islamist Challenge in Algeria: A Political History*" pp. 256-7

a) A grouping consisting of the *Takfir wa Hijra*, a shadowy Islamist group and various veterans of the Afghan war. This grouping was quickly decimated by the security services forcing their retreat to the rural *maquis* where they were quickly overshadowed by a more important group, the *Mouvement Islamique Armé* (MIA).[10]

b) The MIA was the successor to Boyali's movement from the 1980s of which FIS senior figure Ali Belhadj had also been a member. Leading figures included Abdelkader Chebouti and Mansour Miliani. Following the January 1992 coup, the small groups making up the MIA began to launch attacks on the security forces and, by mid-1992, it had become the main source of organised armed resistance to the regime.

c) A third important grouping was Said Makhloufi's *Mouvement pour un Etat Islamique* (MEI).

[43] Although various attempts at unification proved unsuccessful, the three groupings largely pursued a similar strategy characterised predominantly by guerrilla warfare against the security services and by sabotage and bomb attacks against state-run and related institutions with relatively few civilian casualties.[11] The official death toll given for 1992 was around 600, comprised largely of police and army personnel.[12]

[44] Early 1993 saw the emergence of another grouping, the *Groupe Islamique Armé* (GIA), under the leadership of Abdelhak Layada. Largely Algiers based and drawing its recruits predominantly from the radicalised urban poor, the GIA quickly gained notoriety because of its radical ideology and campaign of assassinations and terror:

> Encouraged by the prominent role enjoyed by Omar El-Eulmi a radical ideologue who became the GIA's 'spiritual guide' on its creation, the new GIA exhibited an extremely radical ideology from the outset. Central to its ideology was a fundamental and unequivocal rejection not only of constitutional Islamism but of the whole idea of democracy itself.[13]

[45] The GIA targeted politicians, the security services and their families, government servants, school teachers, intellectuals who allegedly supported the

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[10] Willis, *ibid,* p. 268
[11] Willis, *ibid,* p. 282
[12] Willis, *ibid,* p. 301
[13] Willis, *ibid,* p. 281

regime and, from September 1993 onwards, foreigners. Commenting on the justification proffered for its unrelenting attacks on civilians, Professor Joffé notes:

> In essence the group has carried on the tradition of the extremist groups that go back to 'Afghanise' an extreme neo-Salafiyyist tradition of one branch of the Islamist opposition created in Afghanistan in the 1980s. The original GIA had argued that the Algerian state was irredeemably tyrannical (*taghut*) and corrupt (*hughra*) and had to be replaced by force through its destruction, an attitude that was easily distorted to authorise a programme of indiscriminate killing.
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> …The GIA also went on to argue that many Algerians themselves were corrupted by their own history and that it was legitimate to eliminate such corruption because they were apostate.[14]

[46] At first the GIA attracted much support, particularly amongst the poorer segments of the population. Its apparent success drew other autonomous groups such as the MEI and *Front Islamique du Djihad Armé* (FIDA) under its wing, while a number of FIS activists joined the GIA, most prominent being Mohamed Said and Abderrazak Rejam who joined in May 1994.

[47] As well as its campaign against the regime and many in the civilian population, the GIA increasingly employed violence against the FIS and the MIA. Fearful of being sidelined by the GIA and afraid that indiscriminate violence would preclude any hope of reaching an accommodation with the regime, a concerted attempt to unify those groups most loyal to the FIS leadership began. This led to the announcement in July 1994 of the creation of the Armé Islamique du Salut (AIS), formed from elements of the old MIA and a number of other formerly independent groupings, the most significant being those under the leadership of Madani Merzak in the east and Ahmed Ben Aicha in the west.[15]

[48] The AIS, in contrast to the GIA:

> …has publicly proclaimed its allegiance to the FIS, has been willing to countenance negotiations between the FIS and the regime, has largely concentrated its own attacks on the security forces and state employees and has regularly condemned the killing of innocent civilians and foreigners.[16]

[49] Casualty figures for 1993 remained relatively low (the official figure for 1992-1993 was 1,768 deaths – 324 civilians, 1,017 Islamists and 427 members of the security forces).[17] However, from 1994 there was a rapid escalation of violence as reflected in the official death figure of 10,000 up to October 1994. This

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[14] Joffé, *ibid,* p. 16-7
[15] Willis, *ibid,* p. 326-8
[16] Roberts, *ibid,* p. 164
[17] Human Rights Watch *Human Rights Abuses in Algeria: No One is Spared* (January 1994) p. 51

official figure was thought by others to be a gross under-estimate with other sources estimating as many as 40–50,000 deaths by the end of 1994.[18]

[50] During 1994 and early 1995 various attempts were made to negotiate a political settlement of the crisis. We will save our overview of this process until we come to consider events affecting the appellant in Belgium to which they directly relate.

[51] Summarising from the report of Professor Joffé, the violence attributed to the GIA then intensified during 1995 under its new leader Djamal Zitouni who took over following the death of Cherif Gousmi in November 1994. Zitouni was himself killed in July 1996 and succeeded by Antar Zouadri (himself killed in February 2002) under whose leadership the violence became even more indiscriminate and gruesome, culminating in a series of horrific massacres in 1997-1998. The GIA increasingly targeted the FIS, including claiming responsibility for the murder in Paris on 11 July 1995 of Abdelbaki Sahraoui, a highly respected founding member of FIS, and the assassination of most of the FIS leaders such as Said and Redjam who had rallied to the GIA. This led to:

> …intense suspicions that the GIA was heavily infiltrated by the DRS and that most of its high-profile operations were directed by the regime to discredit the Islamist movement overall. Indeed, in the past two years there have been several accounts from participants in the regime's anti-terrorist operations, suggesting that the GIA had been "turned" and was effectively now a counter-terrorist operation, integrated into the military strategy of the regime.[19]

[52] In consequence a number of groups that had previously allied themselves with the GIA broke away in disgust at its internecine violence and at the increasing extremism of its rhetoric. Some of these groups such as the Ligue Islamique pour la Dawa et le Djihad (LIDD) sought links with the AIS.

[53] In October 1997 the AIS leadership, following negotiations with the military, declared a unilateral ceasefire and other groups such as the LIDD and the FIDA20 followed suit and later took advantage of the Civil Concord law promoted by President Bouteflika to disband in January 2000, thereby ending their armed struggle against the regime.

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[18] Human Rights Watch *Six Months Later Cover Up Continues* (1 August 1995) p. 3. See also Amnesty International *Algeria*: *Repression and Violence Must End* (1 October 1994) p. 4

[19] Joffé, *supra* p. 16

[20] Statement of Ali Ben Hajar (appellant's documents No. 4). For additional evidence on this point see "Algerian Armed Faction declares ceasefire" *Toronto Star* (17 October, 1997). CCFIS Communiqué No. 7, and *Al Hayat*, Issue No. 12651 (19 October 1997)

The current violence

[54] Following the exit of the AIS and associated groups from the armed conflict, the field was left principally to the old GIA and the *Groupe Salafiyyiste pour la Prédication et le Combat* (GSPC), a group that split from the GIA in December 1997 and adopted, with some success, the former AIS agenda of targeting the security forces. With respect to the current levels of violence, Professor Joffé notes that the GSPC (and the *Groupe Salafiyyiste de Prédication* (GFP), its associated ally), has begun to penetrate the Mitidja plains around Algiers. There are fears that it could unite with the GIA which, after an apparent period of quietism, appears to have adopted new tactics targeting the security forces and paramilitary units, although occasional massacres still do occur. Such an eventuality Professor Joffé believes would seriously challenge the security forces; January 2003 saw the ambush of a team of 60 elite commandos which left 49 men dead, the greatest loss suffered by the army in a single day.

[55] Professor Joffé further notes that apart from the organised violence of the armed groups, the last year has also seen a nationwide outbreak of spontaneous violence reflecting the appalling conditions in which most Algerians live. Additionally, there has been ongoing violence in Kabylia where the population is demanding administrative autonomy.

The role of the army and security forces

[56] According to Professor Joffé:

> The sad fact is that the majority of the civilian losses in this conflict have been caused by security force action. The 180,000-strong armed forces themselves are backed up by a 25,000-strong gendarmerie which comes under military authority and a mass of paramilitary militias, the *Gardes Communales* and the *Gardes légitimes d'auto-défense*, also known as the "*patriotes*" which include some 200,000 men under the control of local authorities. The intelligence function is provided primarily by the ubiquitous *securité militaire* service (more correctly now known as *Direction des Renseignements de Securité* – DRS), formally under the control of the interior ministry but in reality under the control of General Mohamed 'Tawfiq' Mediène, which is completely unaccountable for its actions and has always been so. The regime, too, is dominated by the army, with three generals – Mohamed Lamari (the chief of staff), Mohamed Mediène and Mohamed Touati (presidential military adviser and the so-called "intellectual" of the military) – controlling the civilian government, with the support of the grandees of the regime, retired generals Khalid Nezzar (former defence minister and responsible for the 1992 coup) and Larbi Belkhair (former interior minister and suspected of responsibility for the assassination of President Boudiaf in 1992).
>
> The importance and arbitrary power of the military and the security services cannot, therefore, be under-estimated. The quintumvirate mentioned above have made and broken presidents ever since 1991 (Chadli Bendjedid (1979-1992),

Mohamed Boudiaf (1992), Liamine Zerouel (1994-1998) and Abdelaziz Bouteflika (1999 until the present)) and have, at will, redrawn Algeria's constitutional system. Until recently, they had been contemplating a further reconstruction of the political scene, involving a suspension of all political activity for three years and then a managed restructuring of the political parties within a secular governmental system. Now, however they claim that they do not want to be involved in the day-to-day management of the past and will withdraw to the barracks. Nobody really believes this but there may be less direct meddling in political decisions. The reality of power, however, will remain with the army command. This absolute power is at its most acute within the security services who are notorious for the habitual, continuous and severe abuse of human rights that they practice.[21]

[57] Commenting on the activities of the DRS, Professor Joffé notes:

"The situation is complicated by the fact that there is considerable evidence that the original GIA was infiltrated by the Algerian army's military security service, under the command of General Mohamed "Tawfig" Mediène. This is the most occult part of the army structure and the least accountable and has, virtually since its creation by Abdelhafidh Ben Tobbal during the war of independence between 1954 and 1962, exercised a dominant and sinister influence over the political process in Algeria. The result has been that, since the mid-1990s, many of the GIA's activities have been indirectly controlled by the security services and have been used to discredit the movement overall. There has also been evidence of direct exploitation of these Islamist groups, often for personal advantage. This was particularly evident after 1994, when land privatisation proposals, required by the IMF economic restructuring programme, resulted in violent land clearances especially on the edges of major towns where land values increased because of potential building demand. There is also growing evidence that the army was engaged in counter-intelligence operations that involved the killing of civilians, camouflaged as killings by Islamist groups, as well as punishment killings of large numbers of civilians. The worst massacres occurred in 1997 and 1998 in the outer suburbs of Algiers – Beni Messous and Bentahla being perhaps the best-known – and around and within the town of Blida.

Many foreign governments, including the British government are aware of these unsavoury links and, as was revealed during the *Regina versus Sofiane Kebilene, Farid Boukemiche and Sofiane Souidi* case in February 2000, the army has been massively implicated in human rights abuses against the civilian population. Evidence of its activities has now been published in France, in a book written by a former Algerian army officer, Habib Souaidia, entitled *La Sale Guerre* and which was published in February 2001 by Editions La Découverte in Paris. This study confirms the arguments of the many independent witnesses, including the author of *Qui a tué à Bentahla*?, Nesroulah Yous in 2000 also published by Editions La Découverte, and the contributors to *An inquiry into the Algerian massacres,* published by Hoggar Press in Geneva in 1999, who have made similar claims over the years, as well as evidence provided by a group of former army officers based in Madrid who have repeatedly warned of the army's culpability for such actions over the past five years, the *Mouvement Algérien des Officers Libres* (MAOL). Further information has emerged from a new book by Hisham Aboud, a former *Securité Militaire* officer – *La mafia des généraux*, published by Editions J.C. Lattès in Paris in February 2002.[22]

[21] Joffé, *ibid,* p. 5
[22] Joffé, *ibid,* pp. 19-20

Attitudes towards political Islam and the current impasse

[58] The Algerian authorities maintain an acute and intransigent hostility towards the Islamist movement. The FIS continues to be banned and has virtually disappeared as an organised party, although it still has a skeletal organisational structure and massive informal support. Its proposed replacement, the *Wafa* party, was banned, even though, according to Professor Joffé, it met every requirement of the latest electoral law at the start of 2001 and was led by a highly respected former minister of education and foreign affairs, Ahmed Talib Ibrahimi.

> …the unwillingness of the regime to compromise with its political opponents reflects the hallmark of the crisis in Algeria. That is that the regime and, behind it the army, has been quite unwilling to consider any compromise that hinders its own hegemony over the political scene. It is this consideration that made the oft-quoted distinction between "conciliateurs" and "éradicateurs"" within the regime – between those who apparently sought compromise and dialogue with the Islamic opposition and those, supported by secular political parties, who rejected any idea of dialogue – a false one. In the final analysis, neither side was really prepare to compromise the regime's hegemony of power for the sake of a negotiated political solution. This was, of course, the factor that also ensured that violence was the ultimate test of political power – and the reason why there is still no solution.[23]

Human rights abuses

[59] The actual number of deaths as a result of the conflict since January 1992 is not able to be stated with certainty. In 1999 President Bouteflika acknowledged an official death toll of some 100,000 persons, although this figure is thought by some to be a considerable under-estimate. In subsequent years the rate of killing has subsided though continues around 1-200 per month.[24]

[60] Amnesty International maintains a dossier on 4,000 persons who have disappeared after being taken into custody. It acknowledges that the true figure may be substantially higher.[25] Concerning estimates of the number of disappeared, Human Rights Watch in its February 2003 report states:

> A human rights commissioner appointed by President Bouteflika in late 2001, Moustapha Farouk Ksentini, has been speaking with disarming candor on state responsibility for the "disappeared." "My conviction is that the majority of the 'disappeared' had nothing to do with armed groups," he told *El-Watan,* rejecting one of the claims often made by officials to deflect security force responsibility. "I think there are 7,000 to 10,000 cases total, maybe as many as 12,000," Ksentini told Human Rights Watch in November 2002. He made clear he was referring to cases for which the security forces and their allies were responsible. To date, said

[23] Joffé, *ibid,* pp. 22
[24] Amnesty International *Algeria: Truth and Justice Obscured by the Shadow of Impunity* (November 2000) p. 15
[25] *ibid,* p. 23

> Ksentini, the government had elucidated no cases of "disappearances" and the justice system "had not done its job" in a single case.[26]

[61] Arbitrary detention and summary executions of those suspected of being linked to armed groups has been widespread, while torture and ill-treatment of detainees by the security forces remains endemic. Such abuses continue to this day, albeit on a reduced scale, in what appears to be a climate of almost total impunity. According to Amnesty International:

> Despite the urgent need, no independent and impartial investigations have taken place into the thousands of killings, massacres, "disappearances", abductions, instances of torture, extra-judicial executions and deliberate and arbitrary killings of civilians which have occurred in recent years – and which, though on a lesser scale, continue to occur.[27]

[62] Amnesty reports that the regime's record of blocking scrutiny of the crisis from outside (including imposing serious restrictions on access for independent international observers) remains unchanged as does its use of the "counter terrorism" argument to justify massive human rights violations.[28]

The relationship with France

[63] Algeria's relationship with France is critical to an understanding of the Algerian crisis and has direct relevance to the appellant's situation. As Hugh Roberts has noted:

> Power in any situation includes the power to define the situation. By this yardstick, it cannot be disputed that France has exercised a very great deal of power over Algeria's painful evolutions since 1988. For it has unquestionably been the definitions of the situation which have enjoyed Paris's *imprimatur* and which have been circulated by the French media which have determined the perceptions of most onlookers. The fact that French definitions have agreed in essential respect with the official sources in Algiers should deceive no one.[29]

[64] In Roberts' view, official French policy is conditioned by a number of, questionable assumptions: the perception of the conflict as a simple dichotomy between the revolutionary Islamist movement (especially the FIS) and the modernist, secular state; that an Islamic state would be a catastrophe for Algeria and for French interests in Algeria; that it would precipitate an exodus of Algerians to France and destabilise neighbouring Arab states; and that it would disrupt the integration of France's own Muslim community. With these assumptions, there is

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[26] Human Rights Watch *Time for Reckoning: Enforced Disappearances and Abductions in Algeria* (February 2003) p. 15
[27] *ibid,* p. 1
[28] Amnesty International Report *Algeria: When token gestures are not enough*: *human rights in the Algeria* EU accord (April 2002)
[29] *Supra* p. 160

thought to be no alternative but to support both militarily and economically the present regime, despite its manifest imperfections, as the lesser evil.[30]

[65] Roberts also draws attention to the re-subordination of Algeria's economic future to French economic influence that has followed the retreat from Boumediène socialist policies in favour of capitalist economics. France remains Algeria's main creditor and foremost commercial partner. It has been a key player in mobilising the European Union and Paris Club grouping of creditor nations, as well as the IMF to provide Algeria with much-needed debt relief. It also provides military aid to the new regime (much of which is believed to be covert) and there is reportedly extensive intelligence sharing between Algiers and Paris.[31]

[66] There are also many links between the army officer group behind the 1992 coup and currently in charge in Algeria and the French army. Senior officers such as Generals Khaled Nezzar, Larbi Belkheir, Mohamed Lamri, Abdel Malek Guenaizia, Mustapha Chelloufi, Mohammed Touati and Benabbas Ghezaiel were all members of the French colonial army during the war of independence, defecting to the FLN only at a very late stage. The Francophone background of this group has given rise to popular accusations that the regime is the *Hizb-fransa* (party of France)[32].

[67] Commenting on the network of informal linkages that members of the Algerian regime enjoy with their French counterparts, Professor Joffé notes:

> One has to understand that in the case of the relationship between France and Algeria, the relationship is not merely at a government to government level. There are many other links. There are particularly links between the army officer group in charge in Algeria at the moment and the French army… But what is important is that those people still maintain their old contacts inside France. They still have contacts inside the French army, inside the French security service, they still receive French pensions which is quite an extraordinary thing when you think of the relationship between France and Algeria and they still communicate with those people. So a large part of the interaction between France and Algeria does not take place at a formal government level at all.[33]

[68] The depth of French officialdom's antipathy towards the FIS and France's seminal role in shaping European Union policies towards Algeria is illustrated by

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[30] *Ibid*, pp. 161-2

[31] Human Rights Watch *World Report 1995: Algeria*, p. 260 and *World Report 1996*, p. 267. See also the FFI (Norwegian Defence Research Establishment) Report, *Islamist Insurgencies, Diasporic Support Networks and Their Hosts Dates: On the Case of the Algerian GIA in Europe 1993-2000*. p. 37 (p. 499 NZIS file).

[32] Willis, *ibid,* pp. 318-9 and, "Reactions of the Algerian Army to the Massacres" in *An Inquiry into the Algeria Massacre*, Lalioui M S p. 496

[33] Professor Joffé, oral evidence to RSAA

the events surrounding the visit of an ad-hoc delegation of European Members of Parliament to Algeria on 12 February 1998. The delegation, under the chair of a French member, Andrè Soulier (who chaired the Human Rights Subcommittee of the Parliament's Foreign Affairs Committee) had nine MEPs, five of whom were French. Soulier actually refused to accept a letter from the FIS delivered by Abdennour Ali Yahia. His report was notable for its sympathetic portrayal of the Algerian authorities, including his dismissal of any possibility of security force involvement or even failures in respect of the recent massacres and his rejection of "outside interference in Algeria" or an international committee of inquiry.[34]

[69] It is also relevant to note the commentary on French policy towards Algeria contained in the Human Rights Watch annual reports over the last decade. Human Rights Watch has frequently commented that although France has vigorously and repeatedly condemned Islamic terrorism it has said little publicly on human rights abuses committed by the Algerian government.

Algerian Media

[70] Finally, mention needs to be made of the structure of the Algerian media and its role in furtherance of the regime's objectives.

[71] Cancellation of the elections in January 1992 and the subsequent dissolution of the FIS was soon followed by the banning of FIS newspapers, severe constraints imposed on the reporting of security matters, the intimidation of journalists, the regular suppression of newspapers and restrictions on visits by foreign journalists. Additionally, the Government exploited its control over public sector enterprises on which newspapers relied, such as printing presses and the distribution of newsprint, so as to deter independent reporting. State-owned television, radio and the state news agencies all reverted to their former role as state mouthpieces.[35]

[72] Moreover, from mid-1993 an increasing number of journalists themselves became victims of the violence – up to 70 had been killed by the end of 1996[36] - largely, though not exclusively, at the hands of armed Islamist groups. In consequence, fear and self-censorship became prevalent.

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[34] For a discussion of this delegation and EU policy towards Algeria in this period refer to Roberts, *ibid,* pp. 332-7. See also the discussion in Human Rights Watch *World Report 1999*, p. 339

[35] Human Rights Watch *Human Rights Abuses in Algeria: No One is Spared* (January 1994) pp. 39, 43

[36] Amnesty International *Algeria: Fear and silence: a hidden human rights crisis* (November 1996) p. 23

[73] The plethora of restrictions on the media in Algeria has led to:

> …the conspicuous absence of reporting about issues of central importance to the civil conflict, specifically, the activities of the Islamist opposition; attempts at dialogue between the government and Islamists, corruption in the military, criticism of the 1990 coup, and state human rights violations.[37]

[74] The effect has been to distort Algerian's perceptions of the conflict and the activities of the security forces:

> The reader of independent and party controlled newspapers in Algeria does not get a remotely accurate impression of the extent or brutality of the security force's repression of Islamists.[38]

[75] However, this distortion can also be attributed to another important characteristic of the Algerian independent press, namely, its extreme hostility towards the Islamist movement. That journalists have regularly come into conflict with the authorities over restrictions on the reporting of security matters and criticism of government figures and policies should not obscure the convergence of their perspectives on the critical issue of political Islam. The independent press (especially Francophone) remains implacably hostile to the FIS, to its potential rehabilitation or to any programme of dialogue and reconciliation.

[76] This ideological convergence is further reinforced by the fact that, according to Willis, most of the main Francophone papers have close links with individual senior military figures within the upper echelon of the regime who are not averse to using the newspapers to further their own ends.[39]

[77] The links between individual papers and certain army officers is also noted by Latif:

> Between the censorship dictated by the anti-terrorist law and the self-censorship imposed by the journalists themselves lie struggles between the factions in power, of which every newspaper is made the spokesperson. Without patronage from within the army, no newspaper can survive, and to exist, it has to tow the patron's line of conduct. One false step can lead to a ban whether legal or financial. Thus, practically all the newspapers with an editorial line advocating reconciliation and dialogue between protagonists and political parties have been banned.[40]

[78] Latif refers to the prevailing discourse in the Algerian press which demonises the FIS as the principal enemy of the Republic and democracy and as

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[37] *Seige Mentality: Press Freedom in the Algerian Conflict*, Committee to Protect Journalists (CPJ) Special Report (March 1999) p. 13 www.cpj.org

[38] Human Rights Watch, *ibid,* p. 42

[39] Willis, email to RSAA (7 May 2003)

[40] "Media Commandos in Algeria" in *An Inquiry into the Algerian Massacres*, I. Latif p. 652

a "terrorist" party. Any dissenting outlook or analysis, he suggests, is stifled or censored as "support for terrorism".

[79] Dr Francois Burgat, in his statement[41] (see paragraphs 336-7) also makes a similar observation:

> The entire range of the so called "independent" press in Algeria, including the so called independent "El Watan", lies firmly in the control of the diverse sections of the military power in the country. Even when some "real" evidence does happen to be published, it is usually only the result of one of the military "clans" hoping to take advantage of it for use against another. But the Algerian media network is mainly used to spread the official version of the violence, that is, to criminalise its political opposition and to make all political "resistance" fit into a mere security and "terrorism" agenda.

[80] The aim of the media's portrayal of the FIS as an enemy of the state is not only to shape domestic perceptions and public debate but also, just as importantly:

> The aim is to persuade Algeria and, above all, foreign opinion of the necessity and effectiveness of the fight against the insurrection, and in particular to conceal the extent of popular resistance, whether passive or active.[42]
>
> The Algerian government and the eradicator press go to great lengths daily to show Europeans that in Algeria one is fighting for the same values: a free and democratic Algeria, and against obscurantism and barbarism. This common public enemy must be fought.[43]

[81] The diligence with which the production of misinformation is pursued as a deliberate strategy by the Algerian regime, enlisting, directly or indirectly, the services of the independent Francophone press, should not be underestimated.

> One might think that to speak of 'industry' in Algerian would be a mistake. However, the intelligence services, press industry, and government experts are adept in propaganda activities, a legacy of the one party system, but the government monopoly on information (banning any interference that might disturb the dominant discourse) allows it to substitute itself as the sole source of information, at home as much as abroad.[44]

[82] The process is assisted by the restrictions placed on foreign journalists.

> Limitations of the foreign media deepen the murkiness of coverage from Algeria. To date, only one Western news agency – Agence France-Presse (AFP) – maintains an Algeria bureau. As a result, foreign media rely heavily on local accounts. According to a BBC correspondent, "this has made it increasingly difficult to know what is going on inside Algeria. News organizations are forced to take unconfirmed reports from Algerian newspapers at face value, even if they do it with a touch of scepticism." Even APS's staff in Algeria attributes much of its news to local papers.

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[41] Dr Burgat's qualifications are set out in para. 336.
[42] Latif, *ibid,* p. 659
[43] Latif, *ibid*, p. 662
[44] Latif, *ibid,* p. 673

> Foreign journalists who visit Algeria encounter government prohibitions on travel around the country without escorts, which severely inhibits investigative reporting.[45]

[83] All of the above point to the need for great caution when considering Algerian news reports and other reports sourced from them.

[84] We turn now to the appellant's case.

THE APPELLANT'S CASE

[85] The account which follows is that given by the appellant at the appeal hearing. For reasons which are addressed at length under the heading 'Credibility' hereafter, the appellant's account is accepted as truthful. We indicate this at this early juncture simply to facilitate the understanding of what is a complex life history.

The early years - family and education

[86] The appellant was born in El Idrissia, in Djelfa Wilaya, Algeria into a tolerant *Sunni* Muslim family. His father (now retired) was an *Imam* - as was the appellant's maternal grandfather and one of his uncles. The appellant's great-grandfather, grandfather and father were *suffi*[46], and were supporters of the Algerian independence movement in the 1950's.

[87] During the appellant's childhood, his father was the *Imam* at a mosque, first in El Idrissia and then, from 1972, in Médéa. The appellant describes him as non-confrontational and moderate. TEXT DELETED

[88] The appellant is one of 10 children. All of his siblings - and his parents - reside in Algeria, save for one brother in France and another in Malaysia. They have diverse interests. The appellant's elder brother eschews religion and the mosque and, prior to leaving for France, was a supporter of the Algerian

[45] CPJ Special Report, supra, p. 13
[46] Suffism is a spiritualist approach to Islam.

Communist Party. His other brother, now living in Malaysia, is married to an Australian resident and is seeking permanent residence in that country.

[89] The appellant went to high school in Médéa. On matriculating in 1978, he was encouraged by a local sheikh to study religion and he received approval to attend Mohamed Ibnsaoud University in Riyadh, Saudi Arabia. There, he studied religion from 1980 to 1985, gaining a Bachelor of Arts degree.

[90] At that time, students who attended university in Saudi Arabia were viewed with suspicion. As a student abroad, the appellant would be searched at the airport for illegal books. He was kept under surveillance by the then-regime while on trips home and he was regularly summoned to the police station to be questioned about his activities. During his visits home the appellant's father gave him minor lessons to teach in the mosque in Médéa and he became known for his political opinion, denouncing the regime and calling for equality and democracy.

[91] In 1983, during a trip home, the appellant became engaged. He and his wife were married in 1984, shortly before the appellant graduated. The first of their four children was born in 1985.

Employment and duties at the mosque

[92] On the appellant's return to Algeria from Saudi Arabia in 1985, he undertook a post-graduate course in Islamic studies at the University of Algiers, and taught Arabic at local schools and mosques. Through his father, he continued to teach at the mosque and also secured occasional duties instructing local *Imams* in the *Qu'ran* for some four or five hours a week.

[93] The appellant continued to experience difficulties with the Algerian authorities. Twice, he was summoned to the police station to be interrogated. On one occasion, he had given a speech at the mosque in which he had hinted that the policies of the then-government were rooted in the revolution, preventing the country from moving forward. As a result, he was summoned to be questioned. He was held for an hour and interrogated in an intimidating manner.

[94] In 1986, the appellant was detained at the airport while travelling to France with his wife for a holiday. He was accused of supporting Bouyali, the leader of the MIA and of opposing the government. He was questioned as to his activities and his studies in Saudi Arabia. He was held for 7 days and was interrogated and

tortured. He carries visible scars on his arms from blowtorch burns received during this mistreatment.[47]

[95] In 1988, on the conclusion of his post-graduate studies, the appellant was appointed as a teacher at the University of Algiers. At about this time, he also became a *sheikh* at a new mosque in Ain El Boniam, some 60kms from Médéa. There, his duties included giving the Friday speech and three open-class lessons a week. He also established at the mosque a boarding school for troubled youths who had failed to cope in ordinary schools. In Ain El Boniam, the appellant and his wife stayed initially with a friend in the police force, T.

[96] The appellant's nomination as a *sheikh* required ratification from the appropriate government Ministry. An application was submitted by the Mosque Committee but no response was ever received. The Mosque Committee simply told the appellant to continue teaching in the interim.

[97] The appellant's mosque was situated in a predominantly Berber area. As a result, the appellant found much of his work to be of a social nature, addressing cultural tensions. He was well-accepted by the Berber community. Although by this point the appellant had become supportive of the FIS, he saw it as inappropriate, in the context of his community, to use the mosque as a platform for any political views, including his own.

[98] Mention should also be made of the nature of the appellant's work at the University of Algiers. Although his own speciality was the history of Islamic tradition, the appellant lectured at the university in *Fikh*, the study of religious regulations and law, especially in relation to family law.

[99] During this time, the appellant undertook a short period of compulsory military service of 45 days. It involved a few days of barracks training, with some weapons handling, after which he spent the rest of his service doing administrative duties.

Appointment to the FIS National Advisory Council and the 1991 elections

[100] By early 1991, the appellant's father had become a member of the FIS and was the chair of the FIS Advisory Council at the provincial level. He was arrested at the same time as Abbassi Madani and Ali Belhadj (the FIS leaders), following

[47] See medical report dated 28 May 2003 by Dr L Beltowski (appellant's documents No. 74).

the May-June 1991 general strike, and was detained for several weeks. Abbassi Madani and Ali Belhadj were later sentenced to twelve years imprisonment.

[101] Although the appellant joined the FIS In June 1991, he was not initially active and was not even present when he was himself elected to the National Advisory Council (the *Shura* Council) of the party in about September 1991. The appellant was appointed Vice Chair of the *Daw'a* and *Irshad* Committee - the body responsible for advising on the correct religious approach to policy.

[102] Of the senior FIS leadership, the appellant already knew Abbassi Madani, Abdelbaki Sahraoui (a member of the National Advisory Council, later to be assassinated in Paris by the GIA), Mohammed Said (a fellow university lecturer, also on the National Advisory Council but later to defect to the GIA in 1994) and Anwar Haddam (another university colleague - a physics teacher - later to become a key figure in the FIS in exile in the United States).

[103] The appellant did not devote much time to the FIS in the lead-up to the campaigning for the January 1992 elections. He was busy with his school and attended only a small number of political gatherings. Further, he saw his role as religious and somewhat removed from politics, needing to appear impartial on sensitive issues, so that he was available to give advice. Once the campaign for the first round of elections started, however, he attended a number of meetings and rallies, in parks and stadia, where thousands would attend.

[104] At such rallies, the appellant spoke of democracy as the policy of the FIS. He cautioned against the bias of the Francophone press and once went so far as to publicly disagree with Ali Belhadj. Belhadj, known for his more 'firebrand' politics, had responded to a journalist's observation that many Algerians were filling the ships heading for France by retorting that there were other ships filling with Algerians wanting to return. The appellant saw Belhadj's response as divisive and criticised him publicly, urging that the FIS be seen as accepting of everyone.

[105] The FIS secured a strong majority of the vote in the first round of elections (188 of 344 seats), with the appellant himself taking 42.8% of the votes for the predominantly Berber district (*Wilaya*) of Tipaza.

The 1992 Military Coup

[106] Following the intervention of the military and the resignation of President Chadli Ben Ghedide (replaced by Mohammed Boudiaf), the second round of the elections were suspended.

[107] On 17 January 1992, the appellant made a speech at a rally. He stated that the military regime was illegitimate, in particular the appointment of Boudiaf. He spoke for approximately half an hour.

[108] Late that evening, the appellant was arrested from his home by the police, who took him to Cheraga police station, then to the army camp at Blida. He was held for 24 hours and questioned, without being mistreated. He was released after a friend in the gendarmerie and a representative of the Mosque Committee arrived and pleaded for his release.

[109] Abdelkader Hachani, the interim leader of the FIS (appointed after the arrest of Abbassi Madani and Ali Belhadj), was arrested on 22 January 1992, followed by the detention of many thousands of FIS supporters and other Islamists, at camps in the desert. The appellant's father was detained for five months in such a camp, before being released on the intervention of Bouteflika and others.

[110] Following his release, the appellant's father was held under house arrest for a short period. Thereafter, he would go into hiding for months at a time throughout the 1994-1995 period. Apart from his fear of the military, the appellant's father had received threats from one of the appellant's cousins, who had joined the GIA. The appellant's older brother, who supported the Communist Party, left Algeria for France following similar threats from the cousin. In the next few years, a number of members of the appellant's wider family would be killed in massacres.

[111] Following his own release, the appellant began leading a low-key existence. He would stay with a sister in Médéa and stopped attending the mosque. He continued to work for one or two days a week at the university because it was the vacation period and work was light in any event.

[112] In April 1992, the appellant was sentenced *in absentia* to 3 months imprisonment on a charge of 'insulting a government institution' during his speech

on 17 January 1992. He had been aware of the charges but did not attend the hearing because he was afraid that he would not receive a fair trial.

[113] Shortly after his conviction, political tensions in Algeria eased briefly, when President Boudiaf publicly invited dialogue with the Islamists. Through friends, the appellant met with the Minister of Justice and the state prosecutor and was able to secure an assurance that the conviction would be set aside. In reliance, the appellant instructed his lawyer to lodge an appeal. He attended the brief hearing with his lawyer, and the conviction was set aside.

[114] As to the FIS, at the last meeting of the National Advisory Council of the FIS before the first-round of the elections, there had been discussion of the possibility of a military coup and of the likely detention of the FIS leaders. It was resolved that, in such circumstances, a Crisis Committee of 7 to 9 persons nominated by Abdelkader Hachani was to be formed.

[115] As noted, Hachani was arrested on 22 January 1992, but the Crisis Committee had already been established. Although operating in secret, it did succeed in issuing a number of communiqués. It did not, at that time, include the appellant. In mid-summer 1992, however, he was contacted by Ikhlef Cherrati, the Chair of the *Daw'a* and *Irshad* Committee and was asked to join the Crisis Committee.

[116] In mid-1992, the appellant TEXT DELETED met with the Catholic Archbishop Tissier, to explain the position of the FIS and to seek whatever assistance might be available, as well as to demonstrate a commitment to maintaining an open dialogue with the Christian community.

[117] In mid-1992, the appellant moved from Médéa to Algiers, where he stayed with a friend. Although he discussed his concerns with the Dean of the Faculty (a fellow FIS candidate, Kassoum) with a view to securing a sabbatical, he was not in a position to explain his circumstances and eventually simply stopped attending work. A certificate issued by the University, recording his employment history, discloses his last day of work to have been 17 October 1992, following which he is recorded as having quit "without reason".

[118] The appellant attended only one meeting of the Crisis Committee, which he himself organised. At that meeting, he sought permission to leave the country.

That request was granted because the FIS was anxious to establish senior representatives overseas, with access to international media and opinion.

Flight to Morocco

[119] Following the meeting of the Crisis Committee, a student FIS sympathiser gave the appellant a false passport in the name of Zenati, together with a driver's licence and personal identity card in the same name. Fearful of passing through the border, however, the appellant found smugglers to take him into Morocco in January 1993. The smugglers put a false entry stamp into the passport. He did not take his wife with him, intending to send for her later.

[120] In Morocco, the appellant stayed at a hotel in Ouijida, with the hope of finding a route to Europe. He was recognised from press photographs, however, and arrested by the Moroccan Security Service, and taken to its headquarters, where he was treated courteously. He was questioned and then released.

[121] Thereafter, the appellant was picked up a number of times by the Security Service. He was shown photographs and asked to confirm whether or not the subject was a member of the FIS. At all times, he was constantly under surveillance.

[122] The appellant remained in Morocco for one and a half months. He did not succeed in arranging a visa for Europe and so returned to Algeria. He did not remain there long and returned to Morocco again, where he stayed for a further month. Again, he tried to arrange safe passage to Europe but he was unsuccessful and so returned to Algeria on 24 July 1993.

[123] Not long after his return, the appellant learned through friends that, on 27 July 1993, he was convicted *in absentia* by the Algerian courts of, *inter alia,* carrying arms, attacking national security and forming armed groups and was sentenced to death. He had been unaware of the charges. In view of the convictions, which he knew were specious, he realised that it would be dangerous for him to remain and he returned to Morocco on 1 August 1993, travelling on the Zenati passport.

[124] The appellant's subsequent travel to Europe was arranged by an FIS member, Ali Ammar, an Algerian living in France, whom he had known previously. Ali Ammar secured two Algerian passports from a third party unknown to the

appellant, in the names of Zouani and Daoud for the appellant, as well as other documents such as identity cards. The first (Zouani) was the genuine passport of a doctor residing in France who, the appellant understood, had agreed to lend it. The appellant, however, rejected it because he doubted his ability to pass himself off as a French doctor, especially given his poor French. The second passport (Daoud) had a six-month visa for Schengen[48] countries.

[125] Because they arise later in connection with the appellant's 2001 conviction *in absentia* in France, it is necessary to chronicle the fate of those passports and other related documents. The appellant recalls that he left both the Zenati passport (and drivers licence and identity card) and the Zouani passport with relatives of an Algerian friend in Casablanca, as well as (inadvertently) a letter from the FIS, certifying his membership. He asked that the Zenati passport be kept at hand in case he later needed it. On the Daoud passport, he travelled with Ali Ammar by car ferry to Spain. From there, they drove to Ali Ammar's house in Orleans.

Transit through France

[126] The appellant stayed with Ali Ammar for a few days. He was taken by Ali Ammar to visit Ali Ammar's friend Abdelhak Boudjaadar, a teacher in Orleans who lived across the road. The appellant recalls meeting Boudjaadar several times during this period. The appellant had in fact known Boudjaadar slightly in Algeria. Although Boudjaadar had lived in France since about 1987, he had attended the appellant's mosque on occasion, when he had been visiting Ali Ammar.

[127] After a few days, the appellant moved to stay with one of Ali Ammar's friends, Mohamed Djeffal, a student in Paris, where there was more room. Although the appellant did not know Djeffal, he was from the Médéa region and knew the appellant's father.

[128] In Paris, the appellant learned of an FIS meeting about to be held in Albania by exiled FIS members. He was invited to attend and used the Daoud passport to fly to Albania. By that time, the appellant had been in France for about ten days.

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[48] The Schengen agreement was signed on 14 June 1985 by seven (now 15) European countries governing the movement of people between them. A single 'Schengen' visa is obtainable.

Albania - formation of the FIS Executive Committee Abroad

[129] At the meeting in Albania, the appellant met with a number of FIS members including Anwar Haddam (who had also been an FIS parliamentary delegate), Abdelbaki Sahraoui, Abdelkarim Gammati (an FIS member and associate of Rabah Kebir, then in Germany) and Mourad Dhina (currently the President of the FIS Temporary National Executive Council, now living in Switzerland where he works as a nuclear physicist).

[130] The outcome of the meeting in Albania was the establishment of the FIS Executive Committee Abroad ("the Executive Committee"). It was headed by Rabah Kebir, and the appellant was to lead the *Dhawa* and *Irshad* subcommittee. He was asked to take charge of organising further conferences and seminars.

[131] Anwar Haddam was opposed to the formation of the Executive Committee. As Vice President of the FIS Parliamentary Delegation while still in Algeria after the coup, he preferred that structure to be adopted overseas. The majority voted, however, for the Executive Committee and Haddam accepted a place on that Committee, while still retaining his position as head of the Parliamentary Delegation. The appellant was not a member of the Parliamentary Delegation.

Brief Return to France

[132] The appellant returned from Albania by air on the Daoud passport to France, where he stayed for a few days with Djeffal in Paris before travelling by train to Lilles, where he stayed with friends of Djeffal. In Paris, the appellant had been advised to go to Belgium to seek refugee status. France was not considered an option because of the close relationship between the French military and the Algerian regime.

[133] As to the fate of the Daoud passport, he is confident that he took it as far as Lilles, in case he was asked for identification on the train. He is uncertain now if Djeffal accompanied him. If so, he would have given it to Djeffal. Otherwise, he would have left it with Djeffal's friends. He did not require one to cross into Belgium.

Arrival in Belgium - first application for refugee status

[134] On reaching Belgium on 2 November 1993, the appellant stayed initially with a former colleague he had known in the FIS *Da'wah* and *Irshad* Committee in Algeria, F. While staying there, he came into contact with some 10 to 20 Algerian refugee claimants who would gather at the mosque. Some were FIS sympathisers, such as Ahmed Benfrika, who had also been staying with F . Others were "jidadists", including Boudkhili Moulay (an Algerian Belgian citizen), to whom the appellant was introduced. Moulay, who impressed him as a gentle family man, edited and distributed a small Islamist magazine.

[135] Two days after his arrival, the appellant applied for refugee status. He had no income and, until his application was accepted for consideration (some five or six months later), he was not entitled to any form of benefit. He survived during this period by living frugally on his savings, on funds from the FIS and assistance from new friends.

[136] A particular friend was Mohamed Kassoul, an Algerian refugee claimant and FIS member, with whom the appellant stayed in Brussels for (he thinks) some 5 or 6 months in early 1994. While staying at Kassoul's house, the appellant came into contact with a wider circle of Algerian exiles, including one Benbrahim Boudriah (known as Yassin), and one Rachid Abdelli (known as Zakaria), who also came to stay briefly with Kassoul.

[137] The appellant also met there one Abdallah Nasr, a destitute Algerian. Eventually, Kassoul's house became too crowded for the appellant and he found his own accommodation in the town of Liege.

Work for the FIS in Belgium

[138] The appellant was issued with temporary identity papers by the Belgian authorities. He understood that he was entitled to move about freely within the 'Schengen' countries in Europe and he made short trips to Germany (where he stayed with Ikbal and Salim Abbassi, the sons of Abbassi Madani) and Holland to meet with other FIS members. The appellant estimates that he attended four or five Executive Committee meetings in 1994, during such trips. On these trips the appellant got into the habit of leaving his cell phone with various friends and colleagues, after incurring a bill of over $400 when he failed to realise the cost of using it outside Belgium.

[139] He would speak at mosques and to groups of the exiled Algerians, explaining the FIS' role in exile and promoting dialogue in the hope of a negotiated return to democracy in Algeria. On occasion, he wrote articles in an FIS periodical, *Al Kadia* (La Cause).

Conflict with Rabah Kebir

[140] During this period, the appellant began to disagree with the policies and approach of Rabah Kebir. After the second Executive Committee meeting, Kebir asked the appellant to attend a meeting with a representative of Sheikh Mahfoud Nahnah, the leader of the moderate Algerian Islamist party, HAMAS. The appellant did so, only to find that the representative had been given the impression by Kebir that it had been the FIS who had called the meeting. Unprepared, the appellant was embarrassed, but Kebir persuaded him to attend a further meeting, this time with Nahnah himself. The appellant duly travelled to Küln, only to find that Kebir had unilaterally postponed the meeting to that evening, leaving the appellant alone and without resources in Küln all day.

[141] In early 1994, the appellant's relationship with Rabah Kebir continued to deteriorate. On the Executive Committee, the appellant was concerned to establish internal procedures that would provide consistency and transparency. He was particularly concerned that the income and expenditure of the Committee be disclosed to the Committee members and that there be established guidelines for public statements made in the name of the Committee. The appellant raised both these issues with Kebir in early 1994, without resolution.

[142] Matters came to a head in April/May 1994, at a meeting of the Executive Committee. Several key figures were absent, including Mourad Dhina, and the appellant was isolated in his views on whether there should be an armed wing of the FIS. The appellant was firmly opposed to such a move and insisted that the FIS should remain a purely political party. The appellant's view did not prevail. Kebir was in favour of an alliance with the *Armé Islamique du Salut* ("the AIS"), with the AIS to act as the armed wing of the FIS.

[143] In protest, the appellant informed Kebir that he was suspending his membership of the Executive Committee, though he would remain a member of the FIS. He wrote privately to Anwar Haddam in the United States, who was also disenchanted with Kebir's leadership, informing him of his self-suspension. He

and Haddam had been in regular contact throughout the first half of 1994 and he hoped that Haddam would be able to bring some pressure to bear on Kebir.

[144] The appellant's action in suspending himself backfired. Instead of dissuading Kebir, it left the appellant vulnerable to being marginalised. At the same time, the rift between Haddam and Kebir also continued to deepen. Haddam took similar steps to distance himself from Kebir's leadership.

Press Release by Rabah Kebir

[145] On 2 August 1994, Rabah Kebir issued a press statement in the name of the FIS. It was reported in the *Mideast Mirror* [49]and elsewhere. The *Mideast Mirror* of that date noted:

> The rift within Algeria's underground Islamist opposition movement has grown a little wider with an announcement by the Islamic Salvation Front (FIS) that two of the 12 members of its leadership in exile had defected to another group.
>
> In a statement faxed to news media Monday, the FIS said Anwar Haddam and Ahmed Zaoui had split off from the FIS "preferring to work within another framework," and announced they were no longer authorized to speak for the Front.
>
> Haddam is the U.S.-based head of the FIS's parliamentary caucus, composed of legislators elected in the December 1991 ballot, which was cancelled by the regime after the FIS scored an unassailable first-round lead. Zaoui is an academic currently living in Belgium.
>
> The FIS statement did not name the rival group the pair had joined, but it was clearly referring to the Armed Islamic Group (GIA), the militant organisation challenging the FIS for leadership of the Islamist camp and led by Abu-Abdallah Ahmad. Haddam had earlier endorsed the "dissolution" of the FIS and its "merger" into the GIA, as announced by two FIS leaders in hiding in Algeria last month. However, the German-based head of the FIS leadership in exile, Rabeh Kebir, insisted there had been no such merger and that the individuals concerned had merely left the FIS and joined the GIA.…[50]

[146] Kebir's statement was also reported by the Islamic Republic News Agency, on 4 August 1994:

> The [Executive Committee] announced the removal of two of its 12 members, Anouar Haddam and Ahmed Zaoui, because "they preferred to work outside the FIS framework". It said any statement issued "by these two brothers will not represent the official position of [the] FIS"….

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[49] "Algeria: Rift grows within Islamist opposition group" *Mideast Mirror* 2 August 1994. See NZIS file, p. 632

[50] A reference to Mohammed Said and Abdelrazzak Redjam, former FIS members who allegedly left the FIS for the GIA in 1994 but who were both later killed by Zitouni.

> It said it welcomes the recent announcement by Islamic groups in Algeria towards uniting the ranks of the Mujahidin in the framework of an Islamic salvation army….[51]

[147] The first to respond to Kebir's press release was Anwar Haddam. For the appellant as well as himself, he issued a press release in Washington DC on 9 August 1994, as head of the FIS Parliamentary Delegation, commencing:

> We, the elected members of Parliament of Algeria, as representatives of a lawfully Elected Institution, have the moral, legal, and historical responsibility to stand by the rights of all people to defend themselves against any usurper of any of their constitutional rights.
>
> We are not Armed Islamic Jama'a (GIA) members nor have we ever been. We are FIS members, members of the FIS delegation abroad, and I am the President of the FIS Parliamentary Delegation to Europe and U.S.
>
> The FIS has not merged into any armed movement, because it has been mandated by the Algerian people to represent it in its political struggle. The FIS is still a political party committed to a just political solution of the Algerian's crisis. …

[148] On *Radio France Internationale* on 4 August 1994, Haddam confirmed:

> We still belong to the FIS. Both of us - Cheikh Ahmed Zaoui and I - are members of the FIS delegation abroad and I am still chairman of the parliamentary delegation.[52]

[149] *Al Hayat* also recorded on 4 August 1994 that it had interviewed Anwar Haddam, and noted:

> [Haddam] … On the "Overseas Executive Committee" declaration of his expulsion with another colleague, Ahmed Zaoui, from the Front, said:
>
> > *We are still in the Islamic Front and I remain the head of the Parliamentary Committee that belongs to the Islamic Salvation Front Abroad…. We acknowledge one authority that is represented by the Front president Sheikh Abbassi Madani and his deputy Sheikh Ali Ben Haj …*

[150] Lacking Anwar Haddam's ability to speak through the Parliamentary Delegation, the appellant's own response to Rabah Kebir's press release was to send Kebir a message. He condemned Kebir, pointing out that he was not himself authorised to make any public statement in response and that, in any event, it was unhelpful for the FIS to air its internal difficulties in public. The appellant demanded that Kebir provide him with an official FIS certificate so that, if necessary, he could establish his *bona fides*.

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[51] "FIS statement welcomes steps to unite mujahedin", Islamic Republic News Agency (broadcast on 2 August 1994 at 1001 gmt), *BBC Summary of World Broadcasts*, 4 August 1994

[52] *Radio France Internationale*, Paris (broadcast on 3 August 1994 at 630 gmt), *BBC Summary of World Broadcasts*, 4 August 1994

[151] Kebir duly sent the appellant a certificate dated 21 August 1994, in the name of the FIS Executive Committee Abroad, stating:

> I, the undersigned RABAH KEBIR, President of the FIS Executive Committee Abroad confirm the suspension of brother AHMED ZAOUI at this time.
>
> He remains, nevertheless, a member of the national *madjliss-ech-choura* (the national consultative council) of the FIS.
>
> This certificate is given in accordance with existing law.

[152] The appellant also wrote to Abbassi Madani, who had been briefly released to house arrest, expressing concern about Rabah Kebir.

The Refugee Application Declined

[153] In the meantime, the appellant's refugee application in Belgium had been declined. On 10 August 1994, the *Commissariat General aux Refugies et aux Apatrides* (the CGRA) wrote to the appellant advising him that his application had been declined because "information available to the General Committee" indicated that he had "rejoined the *Groupe Islamique Armé* in May 1994". Because of the GIA's wish to seize power "through the use of intimidation and terror", the appellant was excluded from the protection of the Convention pursuant to Article 1F(b).

[154] The appellant had not been aware that such an allegation was under consideration by the CGRA. He was not given an opportunity to comment on it or produce evidence to rebut it. The first he knew of it was when he received a copy of the CGRA's decision. He lodged an appeal.

The 'GIA Caliphate' Communiqué

[155] Shortly after the decline of the appellant's refugee application, a further press release appeared in the French media. On 27 August 1994, the *Agence France Presse* received a statement, ostensibly from the GIA, announcing its intention to form a 'Caliphate' government. Among a list of proposed ministers, Ali Belhadj, Anwar Haddam and the appellant were all named.

[156] Anwar Haddam issued an immediate denial, stating that he had not been approached and knew nothing of it.

[157] The appellant dismissed the 'GIA' announcement as a fabrication, viewing it as "just another poisonous statement". He took no steps to publicly refute it, assuming that its falsity would be obvious. Further, at the time, his French was limited and he was not confident about speaking to the media.

[158] The true authorship of the 'GIA Caliphate' press release is a subject to which we will return.

Sant'Egidio and The Rome Conference

[159] Towards the end of 1993, the Sant'Egidio Community, an international lay Catholic movement based in the Vatican, began to explore the possibility of convening a colloquium on Algeria, in the hope of achieving some consensus on a solution to the crisis. The Sant'Egidio Community had earlier been instrumental in the successful 1992 General Peace Agreement for Mozambique.

[160] As to Algeria, it considered that it was essential that the FIS be involved, given its electoral success in the 1991 elections. Enquiries were made in Algeria to identify senior members of the FIS who could be approached and the appellant's name was suggested.

[161] In December 1993, the appellant was approached on behalf of the FIS by Father X representative of the Sant'Egidio Community. Father X TEXT DELETED explained the Community's interest in a forum for dialogue towards resolving the Algerian crisis and that he had been asked to contact appropriate invitees.

[162] Because of the appellant's limited French, a friend, Omar Ouallah, interpreted. In a statement dated 23 May 2003, made in support of the appellant's current refugee appeal, Father X records that the appellant:

> … was very interested in a political solution and greeted the interest of Sant'Egidio in the Algerian case. [53]

[163] In September 1994, the appellant had a second meeting with Father X to discuss the possibility of a conference in Rome, attended by all the Algerian political parties. According to Father X:

[53] Appellant's documents No. 3.

> Mr Zaoui was in favour of such an initiative and gave several suggestions and recommendations for such a meeting. He expressed his wish to participate at such a meeting …. [54]

During their discussions, the appellant advised Father X to involve all political parties as well as the military regime and representatives of human rights organisation and civil associations within Algeria. The appellant put Father X in contact with Anwar Haddam who, along with Rabah Kebir, was chosen to represent the FIS at the conference in Rome and with other members of the FIS, from whom advice could be sought.

Brief visit to Switzerland

[164] Shortly after, in October 1994, the appellant made a brief trip to Switzerland to meet with a number of FIS members, including Mourad Dhina. Because Switzerland is not a 'Schengen' country, the appellant travelled on false papers. For his return trip to Belgium, he accepted a lift in a car. By chance, Rachid Abdelli (Zakaria) had also accepted a lift in the same vehicle. Although the appellant Abdelli's company, he had no other way of returning home. At the German border, the Swiss authorities discovered Abdelli had no travel document, which led to a closer inspection of the appellant's false travel document. Both men were detained. The appellant disclosed his true identity and was released after a few days, returning to Belgium without further incident. He understands that Abdelli was detained for a week.

The Rome Conference

[165] In November 1994, the first Conference in Rome took place, under the aegis of the Sant'Egidio Community. Approximately a dozen Algerian political parties and groups were represented at the Rome Conference. Militant groups, such as the GIA and the AIS were expressly not invited and did not attend. The Algerian regime was invited but refused to recognise the Conference and did not participate.

[166] The appellant did not attend the conference in Rome in November 1994. He had no travel document and did not wish to jeopardise his refugee appeal by leaving Belgium without one. However, he and Father X met again in December 1994, to work on the outcome of the Rome conference.

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[54] *Ibid.*

[167] In late 1994, the appellant received an invitation from Sant'Egidio to visit Rome to discuss the Algerian initiative. Keen to attend, the appellant sought permission from the Belgian authorities for permission to travel. His application was supported by a report from Father X, outlining his involvement in the process at the time. There was no response and he was therefore unable to attend. No explanation was ever given by the Belgian authorities for their failure to respond to the appellant's request.

[168] Towards the end of 1994, western Europe was under a heightened security alert against North African militancy. On 24 December 1994, GIA terrorists hijacked an Air France aircraft and flew it to Marseilles. There, it was stormed by the French police and the hijackers were killed in the process. Anwar Haddam telephoned the appellant from the United States to ask him to try to locate any GIA statements on the matter, so that the FIS could properly respond.

[169] Father X and the appellant met again in early January 1995, regarding the launch of the Conference resolutions, *A Platform for a Peaceful Political Solution of the Algerian crisis* (known as the 'Rome Platform'), on the 13th of that month. According to Father X, the appellant:

> … gave his agreement with that document and declared himself in favor of a political solution to the Algerian crisis. He even recognized the necessity of giving certain guarantees to the army and to the military government. [55]

[170] The appellant is aware that the Rome Platform was signed on 13 January 1995, providing a blueprint for constitutional reform and national reconciliation. It was signed by the FIS, the FFS, the FLN, the MDA (Movement for Democracy in Algeria), the PT (Workers Party), the JMC (Muslim Young People's Movement), the Nahda Movement and the human rights organisation, the Algerian League for the Defence of Human Rights.

[171] The refusal of the Algerian regime to recognise the resolutions of the Rome Platform prevented their implementation.

[172] Before turning to the arrest of the appellant in March 1995, it may be helpful to briefly record the appellant's movements and personal circumstances during 1994.

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[55] *Ibid.*

[173] It will be recalled that the appellant lived with his friend Mohamed Kassoul for the first half of 1994. In mid-1994, however, the appellant moved to Liege, a town some 60kms from Brussels. Throughout 1994 he mingled widely in the Algerian community in Belgium, speaking and preaching at mosques and at gatherings and maintaining an 'open house' policy for exiled Algerians to visit him. He accepts that some of those he would have met during this period would have been GIA sympathisers. Y a fellow FIS member and close friend, visited the appellant in Belgium and warned him in early 1994 to be careful about "offering cups of tea" to all and sundry, because not all Algerians in exile shared the same political philosophy. We will return later to the account of Y who gave evidence in support of the appellant.

[174] In January 1995, the appellant's wife and children arrived in Belgium, having travelled from Algeria on false passports. Their arrival caused the appellant to move from Liege to a house at 2 Masui Street in Brussels.

The Arrest of the Appellant

[175] On 1 March 1995, Belgian police officers arrived unexpectedly at the appellant's house in the evening and arrested him. He was alone with his family at the time. The police searched the house and seized three passports (one false and two blank), some foreign currency and various documents, including the appellant's copy of his letter to Abbassi Madani concerning Rabah Kebir. They declined to tell the appellant what they were doing. He was taken to the police station where he found that his friend Omar Ouallah, who had acted as interpreter for Father X, had also been arrested.

[176] The appellant was not told of the reason for his arrest. He was refused access to a lawyer or an interpreter and was interviewed for about half an hour in French, concluding at about 1.30am. He was asked about his movements, the money and the passports. These were the passport that his wife and children had used as well as two blank passports he had obtained from a fellow Algerian to help his father and father-in-law out of Algeria. He was not asked about his political affiliations or about the GIA though, at the end of the interview, he was asked whether he was aware that arms had been found at the house of Boudkhili Moulay. The appellant knew Moulay slightly from his days at F's house but did not know of any such arms, and said so.

[177] The appellant was transferred to Saint-Gilles Prison. On 2 March 1995, he was brought before an investigating magistrate (*juge d'instruction)* and again interviewed for half an hour. Again, the nature of the questions was perfunctory. Again, no interpreter or lawyer was present.[56]

[178] As time passed, he became aware that a total of thirteen persons had been arrested and charged with a variety of offences. He was assigned counsel, Gilles Vanderbeck. While in prison, with time on his hands, the appellant set himself to learning French.

[179] The appellant was briefly interviewed on three further occasions - again without an interpreter or lawyer. He was asked about his co-defendants and identified Boudriah and Abdelli as GIA supporters. He later retracted this when the two men in question challenged him in prison and threatened him. Fearing for his safety, the appellant told the police that his poor French had led to a misunderstanding.

[180] It was not until the appellant arrived at Court on the first day of the trial that he became aware of the full implications of the charges and that, along with Boudriah and Abdelli and one Tarek Maaroufi, he was accused of heading a criminal association.

The 'GIA' Demand for the Appellant's Release

[181] Before turning to the trial, it is necessary to record that, shortly after the appellant's arrest, a 'GIA' communiqué appeared in the media. It was reported by *Le Soir* newspaper on 6 March 1995.

[182] The communiqué called for the immediate release of the arrested men, particularly "brothers Abou Houdhafa Ahmed Ezzaoui (apparently a reference to the appellant, though he has never used such a name)[57] and Cheikh Abdneaccer", failing which the GIA threatened unspecified acts of retribution against Belgium. According to *Le Soir*, the statement had originally been published in *El Watan*, a Francophone newspaper published in Algeria. The appellant told his interrogators that he believed it was not genuine and that he had no links to the GIA. His interrogators led him to believe that they were aware that it was false.

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[56] See the "*Pro Justitia* Examination of Accused" by investigating magistrate Paul Staes-Polet, dated 2 March 1995 (appellant's documents No. 76).

[57] Some translations of this document which we have seen do give the appellant's name (ie, Ahmed Zaoui), see for example appellant's documents No. 72.

[183] No acts of retribution against the Belgians appear to have ever occurred, notwithstanding that no-one was released as a consequence of the demand. We will address later the authenticity of this 'GIA' communiqué.

[184] On 9 March 1995, the appellant's wife lodged her own application for refugee status. The appellant was concerned as to her position in Belgium if he was deported and he asked her to do so to protect herself and the children.

[185] In the interim, considerable media publicity had surrounded the arrest of the men. Because he was in custody, the appellant was unaware of most of it (most of the articles relating to it have been seen by the appellant for the first time during the course of this appeal). In particular, *Le Soir*, the main Brussels daily newspaper, described the arrests as the dismantling of a GIA cell and the appellant as the "chief" or the "head" of the GIA in Europe.

The First Refugee Appeal

[186] While in custody awaiting trial, the appellant was interviewed by the *Commission Permanente de Recours des Réfugiés* (the CPRR) on 12 April 1995, in respect of his appeal against the decline of his refugee application. On 18 May 1995, his refugee appeal was also declined.

[187] The CPRR accepted the appellant's role in the FIS but took the view that the borders between the FIS and the GIA were often blurred. The CPRR found the appellant's fear of being persecuted in Algeria to be well-founded but it excluded him from the protection of the Convention pursuant to Article 1F. The appellant's counsel on the refugee appeal, Mr Xavier Magnee, applied to the Council of State for an annulment of the decision of the CPRR but that application was not pursued and eventually dismissed.

[188] We will return later to an assessment of the decision of the CPRR.

[189] We also record that the appellant's wife's refugee application would be declined by the General Commissariat three months later, on 4 August 1995, on the grounds that she had not explained why she had not applied for refugee status within eight working days of arriving in Belgium.

The Criminal Trial in Belgium

[190] The trial began in the *Tribunal de Premiere Instance de Bruxelles (the* Brussels County Court [58]) on 4 September 1995 before three judges and took five days. Those charged with the appellant included a number of people known to him, such as his friends Mohamed Kassoul and Omar Ouallah. He also knew a number of the others but not closely, including Boudkhili Moulay. Two of his co-defendants were known by the appellant to be GIA supporters - Benbrahim Boudriah and Rachid Abdelli.

[191] The appellant had learned in late 1994 that Abdelli was an active GIA supporter, distributing pamphlets. The appellant had not seen him since their shared return trip from Switzerland in October 1994. He also knew Boudriah to be a GIA supporter. The two men had stayed at Kassoul's home for a short period in early 1994, during which time Boudriah did not appear to the appellant to be involved in the Algerian cause. Sometime later, he learned that Boudriah was actively promoting violence as a solution to the Algerian crisis, causing the appellant to distance himself from Boudriah.

[192] After the appellant had been arrested, he learned that another defendant, Tarek Ben Habib Maaroufi, was also a GIA supporter.

[193] Other defendants were unknown to the appellant, including three brothers, Ali El Majda, Youssef El Majda and Abdelfadel El Majda and a Libyan, Mohamed Feers.

[194] The charges arose from the seizure by the Belgian police of weapons and explosives together with other items such as foreign currency, military-style publications and materials promoting the "radical Algerian cause", including armed struggle through terrorism. The weapons and explosives had been found in Moulay's house (stored there by Boudriah and Abdelli, who Moulay was said to have met through the appellant), in a vehicle being used by Boudriah, Maaroufi and Abdelfadel El Majda and also in a garage at 157 Masui Street (not the appellant's house, at No 2). The publications and related materials, together with weapons and ammunition, had also been found in a house in Avenue Dubrucq, rented by Abdelli and where Boudriah was living.

[58] Variously referred to in translated documents we have seen as "County Court" and "Magistrates Court".

[195] Against this background, the charges against the appellant were:

(a) that from 30 September 1993 to 2 March 1995, together with Boudriah, Abdelli, and Maaroufi, he was the “instigator” or “head” of an association formed for the purpose of perpetrating crimes against people or properties, carrying the death penalty and hard labour;

(b) of having in his possession, or receiving, or assisting in the attaining of, a Danish identity card and two blank Belgian passports;

(c) at several instances between 30 September 1993 and 2 March 1995, together with Boudriah, Abdelli, Maaroufi, Moulay and Abdelfadel El Majda, having had or co-operated in the obtaining of firearms without a licence;

(d) on different occasions between 30 September 1993 and 2 March 1995, directly incited crimes of violence through speeches or written publications;

(e) at an undetermined date between 26 February 1995 and 2 March 1995 having obtained or assisted in obtaining a fraudulent Danish passport (being the Danish passport altered to include the name of the appellant’s wife).

[196] Similar charges were brought against the other defendants, though others such as Boudriah, Abdelli, Moulay and Abdelfadel El Majda were also charged with possession of weapons and ammunition.

[197] The appellant was not provided with an interpreter, except when he was speaking or being spoken to. For the rest of the time, his limited French was insufficient to enable him to keep up with the proceedings.

[198] The appellant was given an opportunity to address the Court. He denied being a member of the GIA and described himself as a religious man, opposed to terrorism as a solution to the problems in Algeria. He asked others present, such as Moulay, to confirm that they had not asked him to store arms. Moulay confirmed that this was correct and Kassoul also gave evidence that the appellant was not a member of the GIA.

[199] In its decision delivered on 3 October 1995, the County Court dismissed all the charges against the appellant. It recorded that, although a report from *le*

Brigade Spéciale de Recherche (the Belgian State Security Service, known as the BSR) referred to the appellant as "being high up in the GIA", this was not substantiated.

[200] The Court found that there was no conclusive proof that the appellant had participated in any criminal association. As to the possession of the blank and false passports, the Court found that the appellant's plea of necessity was "not entirely without foundation".

[201] As to the other defendants, the appellant's friends Kassoul and Omar Ouallah were acquitted, as was Ahmed Benfrika and Ali El Majda. Boudriah and Abdelli were held to have "taken the initiative" regarding the weapons and Maaroufi and Moulay were also strongly implicated in terms of "logistical and intellectual support". Boudriah and Abdelli were each sent to prison for five years. Maaroufi and Moulay were each sent to prison for three years, suspended beyond eighteen months. Abdelfadel El Majda was sentenced to four years imprisonment, Mohamed Feers to one year (suspended) and Mohamed Abdallah Nasr to three months.

The Prosecutor's Appeal Against Acquittal

[202] In spite of the appellant's acquittal, he was not released from prison. An appeal against the findings of the County Court in respect of eight of the defendants, including the appellant, was lodged by the State Prosecutor immediately. Again, Gilles Vanderbeck acted for the appellant at the appeal hearing, which took three days. No new evidence was adduced by the prosecution. The appellant was given the opportunity to speak (again, the interpreter only interpreted when he himself was speaking or being spoken to).

[203] The Belgian *La Wallonie* newspaper of 13 November 1995, records the appellant's statement to the Court of Appeal as follows:

> Ahmed Zaoui's remarks are noteworthy. He challenged the counsel for the prosecution to find evidence that he is calling for violence or did so in the past. *"What evidence is there that I am advocating violence, even though the gendarmerie holds all my papers and documents? These actually show that I still belong to the FIS. The counsel for the prosecution had collected rumours that do not amount to evidence"*, declared Zaoui.
>
> He reminded the audience that he had always attempted to dialogue, that he does not belong to the GIA, and that he does not share the group's views. *" I am not afraid of being deported to a country that respects freedom if my honour can be protected from all the slander I have been subjected to. But deportation would*

> *represent a refusal to dialogue on the part of the Belgian government"*, added Zaoui.

[204] The appellant was convicted of being "the head of the association of criminals" and on the two passport charges. He was sentenced to four years imprisonment, suspended for five years. In spite of the suspended sentence, he was not released from prison and continued to be held on administrative grounds.

[205] A further effort by his wife to have her refugee application substantively considered was turned down by the General Commissariat on 27 November 1995 and a day later, on 28 November 1995, the Belgian authorities issued a deportation decree against the appellant. On 12 December, the appellant lodged an appeal with the Court of Appeal against the administrative order allowing his continued detention.

[206] Before addressing the outcome of the appeal against detention, however, it is necessary to refer to three intermediate events - first, the issue of a GIA Communiqué threatening the appellant; second, an appeal by him against deportation; and, third, his second refugee application.

The GIA "Burning Thunderbolts" Communiqué

[207] In January 1996, the GIA published a communiqué in its London-based newspaper *Al Ansar*. Entitled "Burning Thunderbolts in the Statement of the Apostate Al-Jazaara Authority", it runs to 7 pages (as translated). No useful purpose would be served by setting it out in full. For the most part, it is religious tracts justifying death sentences against a list of people the GIA considers apostates and traitors. It reflects the internal fracturing of the GIA at the time.

[208] Of significance to the appellant was a paragraph accusing him of having betrayed one of the former leaders of the GIA, Abdelhaik Layada. Layada had been arrested in Morocco at about the time the appellant was passing through that country on his way to Europe in 1993. For reasons unknown to the appellant, the GIA now claimed that:

> … Ahmad Zaoui was behind [Layada's] arrest in Morocco as an attempt to distort the method of the Jihad and Mujahideen.

[209] The appellant was fearful of the GIA, which had become increasingly violent and erratic throughout the second half of 1994 and 1995, assassinating a number of persons overseas. Under the leadership of Zitouni, who had announced in

March 1995 that anyone who did not support the GIA was an apostate and should be killed, the GIA had also been identified as responsible for a series of bombings in Paris in mid 1995, culminating in Zitouni assassinating many other senior GIA members in the last few months of that year.

[210] The publication of the "Burning Thunderbolts" communiqué in *Al Ansar* prompted the appellant to lodge a second refugee claim on 18 April 1996. The outcome of that application will be recorded shortly. To maintain the chronology, however, it is necessary first to address the outcome of the appeal against deportation made to the Foreigners' Consultative Committee.

The Appeal to the Foreigners' Consultative Committee against deportation

[211] The Foreigners' Consultative Committee interviewed the appellant in prison in respect of his appeal. In a decision dated 26 April 1996, it concluded that the appellant should not be deported. Balanced against the fact of his conviction, the Committee noted that:

(a) the facts leading to the appellant's conviction were not sufficient proof of behaviour in breach of public security;

(b) in particular, the 'passports' convictions did not reflect behaviour in serious breach of public security but simply the difficult and clandestine circumstances under which he and his family had fled to Belgium;

(c) any contact the appellant had had with members of other groups had been in the context of the Rome Platform;

(d) no weapons or ammunition had been found at the appellant's house;

(e) a BSR Report in fact supported the view that the appellant was in favour of a peaceful solution, citing a witness who had heard the appellant speak at a conference in January 1994, in which he had sought dialogue with the regime;

(f) for someone supposedly the head of a criminal organisation, it was surprising that the appellant was only sentenced to a little more than nine months term of imprisonment.

[212] The Committee concluded by recording the appellant's advice of the GIA "Burning Thunderbolts" communiqué, but observing that it did not have a copy and could not speculate on the significance of it without one.

[213] Following the decision of the Foreigners' Consultative Committee, the appellant remained in custody, though the deportation decree was not acted upon.

[214] On 26 May 1996, shortly after the decision of the Foreigners' Consultative Committee (but unbeknown to the appellant at the time), the Algerian Court convicted him *in absentia*, this time of "establishing a terrorist organisation to destabilise state institutions and terrorise the population".

[215] We return now to the appellant's second refugee claim, lodged after publication of the GIA "Burning Thunderbolts" communiqué.

The Decision on the Second Refugee Claim

[216] On 7 June 1996, the appellant's second refugee claim was declined by the CGRA on the papers on the grounds that it was 'manifestly unfounded'. It adopted the findings of the CPRR on the first refugee appeal. As to the "Burning Thunderbolts" communiqué, the CGRA doubted its authenticity and noted:

a) the appellant had not produced a copy;

b) his name was not in any event in the actual list of those sentenced by the GIA to death;

c) there was a suspicious delay between the publication of the "Burning Thunderbolts" communiqué in January 1996 and the lodgement of the second refugee application on 18 April 1996;

d) there was a suspicious delay between the arrest of Layada in Morocco in 1993 and the accusation against the appellant more than two years later.

The Appeal Against Loss of Liberty

[217] On 19 September 1996, a further appeal was lodged with the Court of Appeal by Mr Vanderbeck, against the appellant's continued detention (nothing

had happened to the first such appeal and the appellant, in any event, was now being held under a more recent administrative order).

[218] The decision of the Court of Appeal, dated 11 October 1996, held that there were no grounds for maintaining the appellant's loss of liberty. The Court noted the procedural error in the failure to consider the appeal against loss of liberty which had been filed on 12 December 1995, which meant that the Government order of 19 April 1996 (the one the appellant was now being held under) was of no effect. On that procedural basis, the Court:

> …without examining the reasons invoked in the appellant's statement of the case…

quashed the arrest order, effectively ordering the appellant's release.

[219] On his release on 20 November 1996, the appellant was confined to the street in which he lived. *La Lanterne* newspaper of 25 September 1997, records that there was a prohibition on the appellant moving more than 100 metres from his house, that his house arrest would be reviewed monthly and that the authorities would try to find another country to take him.[59]

[220] Coinciding with his release, the appellant was again convicted *in absentia* in Algeria on 12 December 1996, this time charged with "acts of aggression to destabilise state institutions and inciting armed rebellion to carry out assassinations and to destroy property". He was sentenced to life imprisonment. Again, he had not been served with any summons nor notified of any charge, or of the trial in Algeria and was unaware of the conviction.

The Appellant's Release

[221] The appellant was picked up from prison by Welidda and Gammati, both of whom were close associates of Rabah Kebir. They attempted to persuade the appellant to accede to Kebir's leadership. The appellant disagreed, though (at Abbassi Madani's request) he travelled surreptitiously to Germany in about May 1997 to meet with Rabah Kebir. The two discussed the then-current proposal by the Algerian regime for a truce with the AIS. It was apparent to the appellant that Kebir was prepared to agree to the truce, on the terms offered.

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[59] "Ahmed Zaoui under house arrest for an unspecified length of time" *La Lanterne* (25 September 1997) (Appellant's documents No. 25)

[222] The appellant tried to persuade Kebir that the proposed truce would not be a negotiated political agreement but simply a surrender by the Islamists, in particular the FIS, and that the regime was conceding nothing. The appellant proposed instead that the truce should be negotiated within the context of a political settlement. Unable to move Kebir, the appellant asked him what he saw as the role of Abbassi Madani after such a truce. There was no clear answer. The appellant points to the fact that Kebir himself still resides in Germany today, and not in Algeria, as evidence of the real failure of the truce and the subsequent Civil Concord.

[223] On 2 February 1997, the Algerian Court again convicted the appellant *in absentia*. The charges against him on this occasion were "plotting against the state, criminal conspiracy, inciting armed rebellion and assassinations [and] destruction of property] . The appellant was again sentenced to life imprisonment. Again, he was not made aware of the charge, the conviction or the sentence at the time.

The Creation of CCFIS

[224] Shortly after he was released from prison, the appellant became aware that FIS members in Belgium were considering issuing a statement declaring that they would not obey any instruction or policy from Rabah Kebir. The appellant interceded and instead organised a consultative process. It was the appellant's intention to establish a "Consultative Committee of the FIS" (CCFIS). It was apparent to him that the FIS in exile suffered from an inability to make binding decisions at an international level and that an early project of CCFIS would need to be a Convention to allow for genuine international representation.

[225] The appellant hoped to bring Kebir into the fold and, to this end, in mid 1997, he and others in Belgium issued a document entitled “The Call of the 40”, signed by 43 FIS members. The “Call of the 40” called for the unification of the disparate FIS elements under one banner. It was sent to Rabah Kebir. He did not respond. At a meeting attended by some 40 to 50 people, CCFIS was publicly launched on 5 October 1997. Y who was visiting the appellant in Belgium, was present. Four FIS members, Moussa Karouche, the appellant, Qamar Ed’Deen Kharban (in England) and Abdullah Annas were duly elected to share the leadership.

[226] The first act of CCFIS was to issue a press release, Communiqué No 1, which set out its broad aims. To the Authority, the appellant explained that he had changed his approach to the media following his release from prison. In 1994, still naïve about European culture, the appellant had unwittingly allowed the media to be used against him. He regards his greatest mistake as having been to remain silent in 1994. Kebir's press release of 2 August 1994, insinuating that he had joined the GIA, and the 'GIA Caliphate' Communiqué were documents to which he now believes, with hindsight, he should have issued through the media an immediate, vigorous response.

[227] Following his release from Saint-Gilles Prison, the appellant determined that he would not repeat the mistake. A website was established for CCFIS and, over the next four years, it issued a steady stream of communiqués, many of the earlier ones signed by the appellant himself. They were faxed to press agencies and broadcasting services.

[228] Throughout late 1996 and 1997, the appellant was interviewed by foreign television companies, about his house arrest and about the formation of CCFIS. He gave interviews to the press condemning the daily massacres in Algeria. Through CCFIS, he wrote to the Swiss Minister of Foreign Affairs on 8 October 1997, expressing concern that Switzerland was to reopen its embassy in Algiers.

[229] The appellant was also interviewed by CNN( ) about Mohamed Larbi Zitout's claim that the GIA had been infiltrated and manipulated by the Algerian government. Zitout, a former Algerian diplomat in Tripoli, who defected to England and sought refugee status, had been interviewed by *Al Jazeera* television in 1997, in which he stated that the Algerian regime had in fact been behind the massacres and also the bombings in Paris in mid-1995. [60]

[230] While under house arrest, the appellant was twice visited by Belgian immigration officials who treated him courteously, notwithstanding his continuing lack of any legal status in Belgium. He was assured that he would not be forcibly removed from the country but was told that if he did happen to find somewhere else, it would help them.

[231] Throughout 1997, the appellant and his family lived in decrepit conditions in the street to which the appellant was confined. With the appellant unable to work,

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[60] "Algeria regime was behind Paris bombs" John Sweeney and Leonard Doyle, Observer (9 November 1997). See also the affidavit of Mohamed Larbi Zitout of 3 July 2003.

they would not have survived without charity from friends. After a period, the stress of their circumstances began to tell on the family. Even after one month of house arrest, *La Lanterne* newspaper was reporting (25 September 1997) that:

> This situation presents enormous difficulties for his family, most of all his children, the youngest of whom (aged 6) suffers from psychological problems. [61]

[232] As time passed, the family found the strain unrelenting. The appellant's wife told the children not to let their father out of their sight if they went for a walk and they would scream if he moved too far from them. The appellant's eldest son, then aged 11, became obsessed with security concerns. The appellant himself was suffering severe back trouble as a result of his time in prison but could not get to a physiotherapist. One night, the appellant's wife broke her leg. Without a telephone he could not take her to hospital and help did not arrive until the morning, when he was able to get to a shop to buy a phone-card.

[233] On 2 November 1997, without permission, the appellant and his family left Belgium for Switzerland, the most accessible 'non-Schengen' country.

Switzerland

[234] The appellant and his family arrived in Switzerland on 4 November 1997. The appellant reported to the Swiss authorities the following morning and lodged an application for refugee status. He and his family were given accommodation in the small Valais village of St-Gingolph, on the Swiss/French border and were confined to the village by order of the Swiss authorities.

[235] On 25 November 1997, *Arabic News* reported that the appellant (and 19 others, including Anwar Haddam) had been sentenced *in absentia* to death for "belonging to armed groups and for weapons trafficking". The date of those convictions is uncertain but was, presumably, shortly before the *Arabic News* article.

[236] Mention should be made at this point that, on 17 November 1997, 62 people - 35 of them Swiss nationals – were killed in an attack by Islamic militants at Luxor in Egypt. The Luxor attack was unrelated to Algeria in any way[62] but Switzerland was deeply affected by the scale and savagery of the incident. The

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[61] Appellant's documents No. 25

[62] *El-Gamaa El-Islamiya*, militant fundamentalists allied to Osama bin Laden, claimed responsibility for the attack, apparently to force the release of Sheik Omar Abdul Rahman, serving a life sentence in the United States for the 1993 bombing of the World Trade Centre in New York.

appellant believes that the climate of fear and insecurity surrounding Islamic politics which arose after the Luxor massacre played a part in the later decision of the Swiss to deport him.

[237] The appellant's presence in Switzerland was the subject of considerable media attention. He was interviewed on television. *Le Nouvelliste* published a lengthy interview with him on 29 November 1997.[63]

[238] On 1 December 1997, the Swiss government decided to expel the appellant, as soon as a safe third country could be found, which would give an assurance not to deport the appellant to Algeria.

[239] At the time, the appellant's wife was pregnant with their third child and needed specialist attention. In late December 1997, the family were given permission to move to the city of Sion where, following an appeal by the appellant, his children were released from any restrictions. The appellant and his wife, however, were required to report to the Sion police station three times a day, later reduced to twice a week. *La Liberté* newspaper reported on his living conditions on 22 April 1998 and recorded that he was being kept under surveillance[64]. It stated that his visitors were being monitored by the police and added that "none had been identified that were not welcome in Switzerland". Y visited the appellant three times from Australia, once with his own wife and children, to discuss CCFIS policy and to keep social contact.

Application for refugee status in Switzerland

[240] On 30 December 1997, the appellant was interviewed by the Federal Office for Refugees in respect of his refugee application. The interview was thorough and searching. The translated transcript of it runs to 19 pages and is beyond recounting in full here. Nevertheless, we record that the appellant gave an account substantially consistent with that given here on appeal and maintained his firm denial of any support for or membership of the GIA or any other armed group and pointed out that he would not have been invited to attend the Rome Platform if he was in any way linked to the GIA.

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[63] "Who are you, Ahmed Zaoui?" Antoine Gessler, *Le Nouvelliste* (29 November 1997) (Appellant's documents No. 31)

[64] "Right of Asylum, Zaoui's political activities are of concern to Valais authorities" *La Liberté* (22 April 1998) (Appellant's documents No. 33)

[241] The appellant's refugee application in Switzerland was never determined.

[242] In January 1998, the appellant issued CCFIS Communiqué No 2. It explained that CCFIS was not opposed to the principle of a truce with the Algerian regime, but only properly negotiated and as a basis for future meaningful dialogue. Communiqué No 3 (dealing with conditions necessary to achieve the strategic goal of a political settlement) and Communiqué No 4 (addressing the massacres at Relizane and Jdiouia and calling for an independent inquiry) followed.

[243] In response, the appellant was attacked by a journalist, Salima Tlemçani, in the Algerian newspaper *El Watan*. In all article entitled "Terrorist Propaganda, the GIA Squats the Internet" on 26 April 1998, Tlemçani complained that an Islamist asylum-seekers' support group in Geneva, *El Hidjra*, had published the appellant's CCFIS communiqués. [65]

[244] The next day, the Swiss Federal Council issued an order forbidding the appellant from "promoting extremist and terrorist organisations" and from "involving himself in plots with the object of overthrowing a political regime by violent means", confiscating his fax machine and banning him from all access to the Internet (in fact, he had no personal access to it and was, at the time, just starting lessons on how to use it at the public library).

[245] In a press release dated 27 April 1998, the Swiss Federal Justice and Police Department justified the order of the Federal Council on the grounds that:

> The Federal Council feels that Zaoui's activist escalation constitutes a possible threat to Switzerland's internal security….
>
> The intrigues by the head of the FIS in Switzerland are of a kind which damage our relations with other countries and thus endanger our external security as well. [66]

[246] The appellant responded by sending an open letter, dated 4 May 1998, to the Federal Council. He pointed out that his communiqués had been vetted by the Head of Public Services in Valais, who had agreed that the contents were not excessive. He re-stated his commitment to the FIS' call for dialogue[67].

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[65] "Terrorist Propaganda, the GIA Squats the Internet" Salima Tlemçani, *El Watan* (26 April 1998) (Appellant's documents No. 32)
[66] NZIS File, p. 748
[67] Appellant's documents No. 30

[247] The appellant appealed to the European Court of Human Rights against the restrictions placed on his communications but the appeal was dismissed, in a short decision dated 18 January 2001. It is addressed in more detail later.

Interview by French Investigating Magistrate

[248] In early 1998, the Swiss authorities informed the appellant that they had received a request from the French government that the appellant be interviewed by a French *juge d'instruction* (investigating magistrate) Mr Le Loire, in connection with an enquiry following 'Operation Chrysanthemum', a 1993 police operation in which 88 North African Islamists had been arrested in France.

[249] The appellant had no objection to being interviewed and, in May 1998, he met with Mr Le Loire.

[250] The appellant did not understand that he was himself the subject of the enquiry and he did not see the need for a lawyer. He assumed he was a witness only. The investigating magistrate explained that the enquiry was a minor matter and that he was simply in the process of "closing the file". No charges were discussed at any stage.

[251] The interview took approximately an hour. Though he asked for an interpreter, one was not provided. By this time, the appellant's French had improved to the point where he had reasonable understanding of what was said and the interview proceeded in that language.

[252] The questions asked by the investigating magistrate related to the appellant's own brief time in France in 1993. He was asked whether he knew certain persons. Some, such as Ali Ammar, Mohamed Djeffal and Abdelhak Boudjaader, he knew. Others he did not. He agreed he had travelled under the name of Zenati. He was asked about the Zenati, Zouani and Daoud passports, the FIS certificate he had left in Morocco and whether he had left anything at Boudjaadar's house. The appellant explained where and why he had had the passports and other documents. He told him he had left nothing at Boudjaadar's. He was asked about his relationship with Anwar Haddam and his activities while in France in 1993 - with whom he had met and where he had been. The appellant related his history of having travelled from Morocco to France.

[253] At the conclusion of the interview, nothing further was said to the appellant by Mr Le Loire and the appellant assumed the matter was at an end.

Deported From Switzerland

[254] On 28 October 1998, pursuant to the earlier Federal Decree, but without any prior notice or warning, the appellant and his family were detained by the Swiss police and taken to a military base. They were told that the Swiss government had made arrangements for the family to live in Burkina Faso, where the Swiss would pay for their living expenses. They were warned that, if they resisted, they would be handcuffed. They were flown by helicopter from Sion to Geneva where they were transferred to a charter flight. One police officer and eight security personnel accompanied them on the flight to Burkina Faso.

Arrival in Burkina Faso

[255] In Burkina Faso, the family was met by the head of the Burkina Faso State Security Department and was taken to a house rented for them by the Swiss. They also received an allowance from the Swiss of US$1100 per month. For the first month, they were closely watched by the Burkina Faso police, but thereafter they were left to their own devices.

[256] Although the Burkina Faso government had acceded to the request by the Swiss to take in the appellant, they told him that he was not compelled to stay. The appellant therefore invoked their assistance in obtaining Portuguese passports and air tickets for England. In May 1999, the family left by air, travelling via Ghana.

Transit in Ghana

[257] In transit in Ghana, the appellant attempted to get visas for the family to England. Before they could travel, however, the Ghanaian authorities discovered their true identities and, after detaining them for several days, ordered them to return to Burkina Faso.

[258] On the Ghana Airways flight back to Burkina Faso, the appellant was surprised to be visited by the pilot, who informed him that he had been contacted by radio and had been asked to let the appellant know that the Ghanaian

authorities had changed their minds. If he cared to stay on board the aircraft in Burkina Faso, he could continue the round trip through Mali and back to Ghana.

[259] The implausibility of this and the pilot's obvious discomfort made the appellant suspicious. Fearing that the plan was for the Algerian authorities to seize him in Mali, the appellant made sure that the other passengers heard him tell the captain firmly that they would be disembarking in Burkina Faso.

[260] On landing at Ouagadougou, the appellant and his family left the aircraft quickly. In the VIP lounge, the appellant saw the Security Attaché of the Algerian embassy watching him and speaking into his telephone. When the appellant attempted to approach him, the man hastened away.

Telephone Discussions

[261] On 2 July 1998, the appellant's father made a trip from Algeria to Burkina Faso to visit the appellant. While there, the appellant's father called Z on incidental matters and happened to mention that he was in Burkina Faso, visiting the appellant.

[262] The following day, the appellant received a call TEXT DELETED

[263] The two spoke again two days later. TEXT DELETED

Z told the appellant that, in fact, he had six life sentences against him in Algeria (all of which were news to the appellant). TEXT DELETED

[264] Their third telephone discussion took place a few days later, on 8 July 1999. TEXT DELETED

. He did, however, ask his father to pass on the message that, “if the regime would take just one step, the FIS would take ten”.

[265] The appellant did allow two of his children to return to Algeria with his father. The schooling and living conditions in Burkina Faso were primitive and the appellant and his wife felt the two older children would benefit from living with the appellant’s parents in Algeria. TEXT DELETED

the two older children returned to Algeria with the appellant’s father on 8 July 1999. TEXT DELETED

[266] The appellant and his wife had also been offered Algerian passports. The appellant declined one, on the ground that it would validate the legitimacy of the regime, but also on the ground that, with Algerian convictions, travel anywhere on an Algerian passport would result in his immediate arrest. His wife did obtain one. When she did not use it, the embassy demanded it back and it was duly returned.

The French criminal charges

[267] In mid-1999, while in Burkina Faso, the appellant received a letter from a French lawyer, Mr Petillault. He advised that criminal proceedings had been laid against the appellant, arising from events in France in 1993. The appellant had been charged, along with seven others, and Mr Petillault had been retained by the FIS to represent him.

[268] Mr Petillault did not suggest the appellant travel to France for the trial and he himself assumed it was not possible. There was no request by the French authorities for his extradition. The appellant had some correspondence with Mr Petillault but he does not now recall the details. He acknowledges that the distance and his circumstances meant that he felt removed from the whole proceedings.

[269] In about September 1999, the appellant stopped receiving an income from the Swiss government. He approached the Burkina Faso authorities, who denied

any knowledge. Without work, the appellant discussed his dilemma with the authorities. They arranged Burkina Faso and Portuguese passports for the family, in their names. They also bought air tickets to Malaysia and gave the appellant some US$6000.

[270] The appellant's father had returned from Algeria with the two children and he escorted the appellant's wife and family to Malaysia in late December 1999. In January 2000, the appellant also left Burkina Faso for Malaysia.

Travel to Malaysia

[271] In Malaysia, the appellant's wife and children stayed with Q TEXT DELETED , who was there at the time, studying law. He has since returned to Germany. When the appellant arrived, he devoted his time to academic pursuits, writing articles and beginning an encyclopaedia he had planned for some time. He and the family lived on money they had saved in Burkina Faso, donations from friends and family and occasional funding from the FIS.

[272] The appellant did not attend the mosque regularly. He avoided other Algerians – some of whom were his former students from Algiers University. Such contact might lead to his presence being leaked to the Malaysian authorities, with the risk of deportation.

[273] The French were aware that the appellant was in Malaysia. A friend in Burkina Faso informed him that officials from the French embassy had asked the Burkina Faso government where he was and were told he had gone to Malaysia.

The French Criminal Conviction

[274] In Malaysia, the appellant learned through the media that, on 13 September 2001, he had been convicted in France of a number of offences at the 'Operation Chrysanthemum' trial. Mr Petillault did not contact him, nor did he see a copy of the judgment.

[275] We have obtained a copy of the decision of the 16th Criminal Chamber of the *Tribunal de Grande Instance* (The High Court) of Paris, dated 13 September 2001, a copy of which we have provided to the appellant.

[276] A detailed assessment of the French conviction follows hereafter. For present purposes, it is sufficient to record that he was convicted of falsification of administrative documents (three passports), possession of stolen goods (the same passports) and participation in an association with criminals with intent to prepare a terrorist act. He was sentenced to three years imprisonment, suspended. He was also banned from entering France for a period of eight years.

[277] On learning of the sentence against him the appellant became despondent and depressed. He felt isolated and impotent in Malaysia. He discussed the conviction with others, but did not see that he could take any steps to counter it.

The August 2002 FIS Conference

[278] Prior to his assassination in November 1999, Abdelkader Hachani had sought a global FIS conference, to bring the disparate FIS elements together. After his death, the idea was continued by others, with August 2002 being set as the date. The appellant was not heavily involved in the conference. He had been "in a vacuum" since 1998 and was out of touch with events in Algeria. He had published only one CCFIS communiqué (No. 33) in his own name in Malaysia. Even that was not directed at the Algerian issues but at the Israeli/Palestinian conflict.

[279] Because many participants would be unable to attend the conference in person (it was in Europe), Internet 'chat-rooms' were set up. Y flew from Australia to join the appellant in logging in. All FIS groups had been invited, including Rabah Kebir, to whom Abbassi Madani wrote personally. In an *Algeria Interface* interview on 19 September 2002, it was pointed out that Kebir had called the conference organisers "usurpers", to which Mourad Dhina responded:

> Abbassi Madani will show where the truth lies. In his letter he said the congress had the power to replace him, while other members have refused to give up positions to which they believe they are historically entitled. Rabah Kebir, for example, refuses to recognize any congress that he doesn't convene. Abbassi wrote to Kebir asking him to attend, but Kebir just dismissed the request.[68]

[280] Kebir did not attend the conference.

[281] At the conference on 3 August 2002, all existing FIS structures were dissolved, including the Executive Committee, the Parliamentary Delegation and

[68] "Interface Interviews Mourad Dhina", *Algeria Interface* (19 September 2002) www.algeria-interface.com

CCFIS. One single "FIS Temporary National Executive Council" of twelve persons was agreed to. In voting after the conference, Mourad Dhina was elected Head of the Council, with 57% of the vote. The appellant is not a member of the National Executive Council. He did not feel himself to be in a position to contribute because of his circumstances and did not seek office.

Departure from Malaysia

[282] The appellant enrolled at the International Islamic University in Kuala Lumpur, doing post-graduate Islamic Studies. The application was accepted on 29 May 2002. After some months, however, he became aware that he was in danger and his studies ceased.

[283] In mid-2002, the head of National Security in Algeria, Ali Tounsi, visited Malaysia, to study the Malaysian police. The appellant learned through a friend that there had been discussions with Tounsi at the Algerian embassy about detaining him. He already knew that the Algerian regime knew where he was, TEXT DELETED

[284] The appellant went into hiding. He discussed his situation with X who counselled against going to Australia, where he would be held in detention and recommended that he come to New Zealand. The appellant had read of the New Zealand Prime Minister's humanitarian response to the *Tampa* crisis and felt encouraged to approach the New Zealand authorities.

[285] Mourad Dhina recommended that the appellant go to England. The appellant disagreed because of the many Algerians there and the impossibility of knowing whether someone at the mosque was a terrorist or associated with a militant group. The appellant was not inclined to repeat his Belgian experience. New Zealand, however, seemed detached from any Algerian influence.

[286] The appellant no longer had his Burkina Faso passport, it having been through the wash accidentally. Accordingly, he purchased a South African passport on the black market and, after making arrangements for his family, he travelled via Thailand, Laos, Vietnam and Korea to New Zealand, arriving here on 4 December 2002.

New Zealand

[287] As we noted at the commencement of this decision, the appellant is alleged to have admitted to a Customs officer on arrival that he is a member of the GIA. The seriousness of that allegation is such that we will address the evidence of the appellant and of the Customs Officer (whom we heard at length), as a discrete topic later.

[288] For present purposes, it is sufficient to record that the appellant arrived at about 10 or 11am. After posting a letter to his wife, to let her know he had arrived, he then found a police officer and indicated that he wished to seek asylum. The police officer took him to the Immigration Service where, through an Arabic interpreter, he applied for refugee status. After much waiting, the appellant was seen by Customs and, at about 2.30am, he was taken to the police station at the airport, where he spent the night.

[289] The following morning, the appellant was transferred to Papakura Police Station. On the 6th day there, he was interviewed by the police with a French interpreter. The following day, he was interviewed again for seven hours. Again, there was a French interpreter - a police officer. He was returned to the police station for a further one or two nights, before being transferred to Paremoremo Prison, where he is currently held.

OTHER EVIDENCE ADDUCED BY THE APPELLANT

Oral evidence

[290] The appellant produced three witnesses:

(a) Y TEXT DELETED

(b) Dr Emile Joffé, Director of the Centre for North African Studies at the Centre for International Studies in the University of Cambridge;

(c) Marie Dyhrberg, criminal barrister and former President of the Criminal Bar Association of New Zealand;

Y

[291] Y TEXT DELETED

[292] Y first met the appellant in Algeria in the late 1980's. As a student, he recalls the appellant as the *Imam* at the mosque in Ain El Boniam, where Y TEXT DELETED and the appellant ran a boarding school at the mosque.

[293] Y was highly politicised in his youth, making speeches at his own mosque by the time he was 17. He jointed the FIS as soon as it was founded in 1989, TEXT DELETED

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[294] Y was nominated by Hachani to the post-coup Crisis Committee. He was arrested on TEXT DELETED held for seven days and was tortured. On his release, he acted as liaison with senior FIS members in the east of the country, including Rabah Kebir, then under house arrest. After a period, Y's contact in Constantine was arrested. The man's notebook contained Y's name and the police began searching for him. Y's brother was detained and tortured and his sister was also interrogated.

[295] The FIS told Y that he would now be more use outside the country and, after a brief period in Morocco, he made his way to Egypt. TEXT DELETED . On arrival, X sought refugee status, which was granted to him in 1994.

[296] TEXT DELETED

[297] TEXT DELETED

[69] TEXT DELETED

[298] TEXT DELETED

[299] In October 1994, Y travelled to Europe for four months, to see many FIS colleagues (including the appellant). He was aware that the appellant had suspended his membership of the Executive Committee because of Kebir and he rang Kebir to discuss the division with Haddam and the appellant. He pointed out the "huge responsibility" which lay on them to speak for the people being killed in Algeria. He asked to meet Kebir but was always told he was not available. He even went by train to his town but Kebir refused to see him.

[300] Later, Y wrote a letter to Hachani about Kebir. Hachani had been a supporter of Kebir but, on learning of events during his five years in prison in Algeria, wrote an angry letter to Kebir himself, criticising his destructive conduct.

[301] Y describes Kebir as autocratic and unwilling to defer to the leadership of the detained FIS leaders in Algeria. Kebir had met, for example, with the United States ambassador in Germany, without any prior discussion with the FIS leaders as to what should be said. Y attributes Kebir's attitude in part to pre-FIS links Kebir had with the Muslim Brotherhood in Egypt – a group which believes that all Islamic movements should be run in the same manner.

[302] When le learned of Haddam's press conference in Washington on 9 August 1994, denying Kebir's press release (insinuating that he and the appellant had left the FIS), Y gave a copy of Haddam's press statement[70] to the appellant's lawyer in Belgium. Knowing the appellant's religious and political beliefs, he did not believe the allegations at all.

[303] As to the 'GIA Caliphate' communiqué of 27 August 1994, Y did not consider it genuine. It was inconceivable to him that the GIA would offer posts in any sort of government to senior FIS opponents such as Anwar Haddam and the appellant. Y's belief is that the communiqué was the work of the Algerian authorities to sow dissent among the Islamic groups.

[70] See para. 70 above

[304] Y further points out that the notion of a 'Caliphate' government runs counter to GIA policy. The GIA is headed by a self-appointed Emir. By Islamic tradition, a Caliph can only derive from a particular race and background and is approved by the majority. The restrictions are such that there has not been a Caliph anywhere in the Islamic world since 1924. The concept is inconsistent with any government which the GIA would be interested in forming.

[305] As to the appellant's arrest in Belgium, Y confirmed the appellant's evidence that he (the appellant) had mixed with a wide range of Algerians and others in Belgium. He told the Authority that he had raised with the appellant in 1994 the imprudence of his 'open-door' policy with visitors, because it was impossible "to tell who was who". Further, after the arrival of the appellant's wife, Y noticed an increase in the number of single young men calling in, as a way of getting meals. The appellant accepted Y's warning but told him that it was hard to change his habits.

[306] In March 1996, the "Burning Thunderbolts" GIA communiqué was published in the GIA newspaper *Al Ansar*, proclaiming death to all apostates and non-supporters. ASIO took the communiqué seriously and were concerned for Y's safety. They offered to put his family into a safe-house. Grateful for their concern, Y nevertheless declined the offer. He did not want to hide and was planning a trip to Europe with his family in 1997 in any event.

[307] TEXT DELETED

[308] Y confirmed that he attended the FIS Conference in 2002 by travelling to Malaysia, where he and the appellant participated via the Internet. As to the appellant's departure from Malaysia, he recalled that he had discussed options with him, following the information about Ali Tounsi's discussions at the embassy. He had advised the appellant not to go to Australia.

Professor Joffé

[309] Professor Joffé has specialised in North African affairs for twenty years, taking a particular interest in Algeria since 1986. Until February 2000, he was the Director-of-Studies at the Royal Institute of International Affairs and is now attached to London and Cambridge Universities. He is also the Director of the Centre for North African Studies at the Centre for International Studies in the

University of Cambridge, where he also holds a research fellowship and teaches a post-graduate course on contemporary North Africa and the Modern Middle East component of the History Tripos degree.

[310] Professor Joffé is also the visiting professor in the Geography Department at King's College in London University, as well as having held a visiting fellowship at the Centre for International Studies in the London School of Economics and Political Science until October 2001. He is an associate fellow of the Royal United Service Institute of Strategic Studies and is a visiting scholar in the History Department at the University of Melbourne in Australia.

[311] As to his published works, Professor Joffé was a founding member of the editorial board of the *Journal of Algerian Studies* and founder and co-editor of the *Journal of North African Studies*. Until 2001, he was co-editor of *Mediterranean Politics*. He has written widely on Algerian matters in both the media and academic journals. Among his many publications on Algeria are to be noted:

(a) "Democracy in the Maghrib" *The Middle East and the New World Order* (ed H Jawad) 1994, MacMillans (London) and St Martin's Press (New York)

(b) "Algeria: the failure of dialogue" *The Middle East and North Africa 1995* (ed S Chapman), Europa Publications (London)

(c) "Algeria's foreign policy and the New World Order: the tragic loss of a revolutionary ideal" *The Journal of Algerian Studies, 1*, 1 (1996)

(d) "Algeria: Army and government" *Islamic World Report* Summer 1997

(e) "Crisis in Algeria; not over yet", E Joffé, L Martinez and A Abderrahim, 2000 International Crisis Group (Brussels)

(f) "The Role of Violence within the Algerian Economy" *Journal of North African Studies 7*, 1 (Spring 2002)

[312] Professor Joffé produced a written report dated 3 June 2003 on aspects of Algerian history and politics, already referred to in the "Historical Overview of Algeria" section above. Additionally, he also provided oral evidence elaborating on his report.

Marie Dyhrberg

[313] Marie Dyhrberg is a criminal barrister with over 20 years experience in New Zealand. From 1992 to 1994, she was the President of the Criminal Bar Association of New Zealand and is currently the secretary of Committee 6, Section of Legal Practice of the International Bar Association. From 1990 to 1996, Ms Dyhrberg was a member of the Crown Solicitor's Panel in Auckland and from 1990 to 1994 was the NZLS representative on the Chief Justice's Criminal Practice Committee.

[314] Ms Dyhrberg traversed the provisions of the New Zealand Crimes Act, and other legislation, which best corresponds to the Belgian charge of criminal association and the pre-trial rights and protections which exist for accused in New Zealand and the New Zealand rules of admissibility of evidence. In light of those laws, Ms Dyhrberg provided a commentary on the conclusions of the Belgian Court of Appeal.

[315] In respect of the French proceedings, Ms Dyhrberg provided an opinion on the competency and admissibility of evidence from a co-defendant under New Zealand law.

Affidavits and statements submitted by the appellant

[316] In the course of the appeal hearing, the appellant has obtained and submitted a large number of statements and affidavits by various persons in other countries. We record:

Gilles Vanderbeck, Advocate, Brussels, Belgium

Statement, by way of letter dated 22 May 2003 to counsel for the appellant

[317] Mr Vanderbeck provides a detailed account of the appellant's various legal proceedings in Belgium. We will refer to it in detail later, in the course of our assessment of the Belgian criminal proceedings.

Mourad Dhina, Head of the FIS National Executive Bureau, Switzerland

Statements dated 12 December 2002 and 10 April 2003

[318] Dr Dhina confirms the appellant's account of events in 1994, including his conflict with Rabah Kebir, his self-suspension from the Executive Committee (though Dr Dhina uses the term "quit") and says that twelve founding members of the Executive Committee subsequently left it. He adds that Hachani was later compelled to announce that Kebir did not represent the FIS any more. He confirms that the appellant did not leave the Executive Committee to join another group "and certainly not any other armed group".

[319] Dr Dhina also confirms other aspects of the appellant's history of which he had knowledge, including his work towards the Rome Platform, and that he has been condemned to death by the GIA, along with many other FIS leaders.

Supplementary Affidavit, dated 27 May 2003

[320] Here, Dr Dhina addresses the relationship between the FIS and the armed groups. He explains that the FIS had no organisational links with either the AIS or the GIA and that, if FIS members chose to join such groups, they would be excluded from the FIS. He expressly confirms that the FIS has never considered that the appellant had joined the GIA, adding:

> I can also confirm that Mr. Abbassi Madani spoke directly with Mr. Zaoui in the summer of 1997, and I reiterate that within the FIS the question of whether Mr. Zaoui was a member of FIS or of the GIA was not even asked, which should be sufficient confirmation of what has always been our view in this regard.

[321] As to the GIA, Dr Dhina stresses the widespread belief that that group was infiltrated by the Algerian secret services and used for counter-insurgency against the genuine opposition groups such as the FIS. 'GIA' killings of many prominent FIS members such as Sheikh Saharaoui in Paris point to the GIA's "true mission".

[322] As to the AIS, Dr Dhina confirms that Abbassi Madani, Ali Belhadj, Abdelkader Hachani, the FIS Parliamentary Delegation and CCFIS all rejected Kebir's adoption of it as the 'armed wing' of the FIS. The rejection of the AIS or any armed wing was endorsed unambiguously at the 2002 FIS Conference.

[323] Dr Dhina notes that the RSB in New Zealand relied on a media report[71] claiming that CCFIS included two members of an armed group, the Islamic League for *Da'wa* and *Jihad* (the LIDD), which suggested that CCFIS was not a purely

[71] "FIS 'dissidents' abroad set up new group", *Al-Sharq al-Awsat* (8 October 1997), see NZIS file p. 823

political organisation. Dr Dhina records that he was CCFIS spokesman from 1999 to 2002 and that no LIDD members were ever members of CCFIS.

[324] As to Algerian media misinformation about the FIS, he points out that, in 1994, a Swiss security officer, in contact with an Algerian agent working in Switzerland, wrote a report describing Dr Dhina as an "arms dealer supplying guerrilla groups in Algeria with weapons". The Swiss authorities prosecuted both men, who were convicted and damages ordered to be paid to Dr Dhina. Dr Dhina attaches a copy of that judgment[72], as well as copies of the FIS statutes and an FIS Paper on Democratization.

Second Supplementary Affidavit, dated 24 June 2003

[325] Dr Dhina further explains his knowledge of the efforts of the Algerian regime to destabilise the FIS. Following his election as Head of the FIS Temporary National Executive Council in November 2002, the Algerian ambassador to Switzerland, Mr Dembri, lodged a formal complaint with the Swiss authorities about his presence in Switzerland, calling him a terrorist. The Swiss, declined to remove him, pointing out that he had broken no Swiss law. They did, however, request that Dr Dhina not engage in "any action, support or propaganda for any violent or terrorist acts", an assurance Dr Dhina gave. Copies of both the request and Dr Dhina's assurance in response are annexed to his affidavit.

[326] Dr Dhina records that the pressure put on the Swiss government to expel or jail him "has been enormous and continuous".

Father X

Statement dated 23 May 2003

[327] Father X is a Catholic priest, TEXT DELETED

He has been a member of the Rome-based Sant'Egidio Community since 1977 TEXT DELETED

[328] Father X records his four meetings with the appellant during 1993-1994. He describes the appellant as "very interested in a political solution" and the

[72] See the decision of *Le Tribunal Fédéral Suisse* at Lausanne (5 November 1997), in *Le Ministère Public de la Confédération* v *Leon Jobé and Abdelkader Hebri*, Ref X.1/1996/ROD

appellant's willingness and assistance in locating suitable people to attend the Rome Conference. He confirms that he discussed the proposed resolutions with the appellant in December 1994 and that the appellant "gave his agreement with this document and declared himself in favour of a political solution".

[329] Aware of the appellant's convictions in Belgium, Father X says that he did not believe then, and does not believe now, that he was "the European Chief of the GIA as he was represented". While he was surprised at the appellant's arrest, he notes that, on the other hand, it was not surprising given:

> …the efforts of the Algerian military government to undermine the Roman attempt for a peaceful and democratic solution for the Algerian civil war.[73]

[330] Having followed the appellant's trial at the time, Father X gives his view that it was obvious to him "that the Belgian authorities were not able to find anything concrete against Mr Zaoui at all" in spite of the fact that the appellant's presence in Belgium was well-known to the Belgian authorities. Even the media, he adds, commented on the lack of any evidence.

K

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[331] K TEXT DELETED

[332] K TEXT DELETED

Jean Lob, Advocate, Lausanne, Switzerland

Statement by way of letter dated 10 March 2003 to counsel

[73] Appellant's documents No. 3.

[333] Mr Lob confirms that he was the appellant's lawyer in Switzerland and that, from his own knowledge, the appellant did nothing in Switzerland to "employ any real or virtual harm to the federation's security". He cites an Amnesty International report of 5 November 1998 which strongly condemned the appellant's arbitrary deportation from Switzerland and the violation of his rights as a refugee claimant.

Ali Ben Hajar, former Prince of the LIDD

Statement, dated 18 May 2003

[334] Ali Ben Hajar confirms that the LIDD did not have any representatives in CCFIS, the former being a military organisation and latter the a political one, with "each of them … founded for the purpose of retrieving the Front's extorted right and defend it, each one individually and by its own means".

[335] Ali Ben Hajar also confirms that FIDA merged with the LIDD when the latter entered into the truce with the Algerian regime in 1997.

Dr Francois Burgat, academic, France

Statement, dated 10 July 2003

[336] Dr Burgat is a researcher at the French National Centre for Scientific Research (CNRS). Since September 1997, he has worked for the French Ministry of Foreign Affairs as the Director of the French Centre for Archaeology and Social Sciences in Sanaa (Yemen). He was, for eight years, assistant professor at the University of Constantine in Algeria, from 1973 to 1980. Since then, he has worked extensively in the field of Arab and Islamic studies for various French and other institutions, including the *l'Institut d'Etudes Politiques*, the *Institut de recherches et d'etudes sur le monde arabe et musulman* and *le Centre d'etudes et de documentation juridique, economique et sociale* in Cairo. He is the author of eleven works on Islam and North Africa and has been a visiting lecturer at 37 universities in 15 countries.

[337] Dr Burgat recalls meeting the appellant in Belgium in 1994. He is aware of the accusations that the appellant has had links to the GIA but describes those accusations as "baseless statements". It is his firm view that the appellant was "criminalised" by the Algerian regime. He documents the subversion of the GIA by the Algerian secret service in the early to mid 1990s, as well as the manipulation of the Algerian media by the regime, before recording that he attended a hearing in the United States concerning Anwar Haddam (presumably the refugee appeal hearing), at which he (Dr Burgat) discovered evidence that accusations against Haddam by supposedly independent NGO's and Algerian sources had in fact been forged. Dr Burgat records that, in his experience, that the use of misinformation is a common tactic of the Algerian secret service, particularly the demonisation of opponents by branding them "terrorist" or "militant".

W medical practitioner

Affidavit, dated 16 May 2003

[338] W confirms having known the appellant since 1988 as a neighbour, patient, *Imam* and politician in Algeria. She describes him as “very kind, wise, generous and peaceful”.

Michael McColgan, solicitor, Sheffield, England

Statement (undated but received 24 June 2003)

[339] Mr McColgan is a practitioner in the fields of criminal and prison law, human rights and miscarriages of justice. He was a Director of the National Council of Civil Liberties for several years and for nine years has been a member of the lawyers panel for the International Federation for Human Rights (FIDH), based in Paris. As such he has undertaken missions of inquiry to a number of countries.

[340] As regards France, Mr McColgan has been a member of two missions, one in 1998/99 and the other in 2002. The mission in 1998/99 was to investigate the application of anti-terrorist legislation in France. He is the joint author of the resulting January 1999 FIDH report *France: Paving the Way for Arbitrary Justice*. Mr McColgan's observations on the Belgian criminal trials in 1995 and the French trial of the appellant *in absentia* in 2001, will be referred to in detail later.

T

Affidavit, dated May 2003

[341] T TEXT DELETED

he was arrested and tortured by the Algerian secret service. He then fled to Syria, where the office of the United Nations High Commissioner for Refugees gave him refugee status TEXT DELETED.

[342] He records that he has known the appellant for 17 years TEXT DELETED. He recalls the appellant as an *Imam* at the mosque and attests that his sermons and preachings were of tolerance and peace. He does not recall the appellant ever calling for violence or criminal conduct. He notes that the appellant was a 'conciliator' in the suburb, helping people to resolve disputes.

H

TEXT DELETED

[343] H TEXT DELETED

[344] H TEXT DELETED

[345] H TEXT DELETED

Mustapha Habes, Algerian national, resident in Switzerland

Statement by letter dated 20 May 2003

[346] Mustapha Habes records knowing the appellant, an "exemplary man", well in Switzerland. The appellant presided over his marriage to a Christian woman in June 1998. His wife became a close friend of the appellant's wife thereafter.

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[347] Q TEXT DELETED

[348] Q TEXT DELETED

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[352] Q TEXT DELETED

[353] Q TEXT DELETED

Anwar Haddam, former Head of the FIS Parliamentary Delegation, now resident in the United States

Statements dated 6 January 2003 and 14 April 2003

[354] Anwar Haddam was a nuclear physicist who graduated in the United States, before returning to Algeria to preach Islam and to teach as Professor of Physics at a university in Algiers. He confirms that, in 1991, he was among the successful FIS candidates in the first round of the elections and that, in early 1992, he left Algeria to work overseas for the FIS Parliamentary Delegation.

[355] Haddam left Algeria on 3 March 1992 and applied for refugee status in the United States on 7 April 1993. He was detained in December 1996 for two years, pending determination of his refugee claim and concurrent 'security risk' issues. At first instance, his refugee claim was declined on the grounds that he was excluded as he had "engaged in terrorist activity" and "there were grounds for regarding him as a danger to the United States". Both findings were overturned by the Board of Immigration Appeals.

[356] Haddam confirms that the appellant was only ever a member of the FIS and not the GIA, and discusses their joint involvement in the Sant'Egidio Rome Platform. He states at length that the appellant is a man committed to peace and to dialogue, who strives for the right of his people to achieve self-determination and basic freedom and the right to choose freely their political authority.

[357] Haddam also addresses their falling-out with Rabah Kebir in 1994 and Kebir's nomination of the AIS as an armed wing of the FIS. He adds that a further disagreement was that both the appellant and Haddam believed that the power of the FIS lay with the detained leadership in Algeria and that the Executive Committee Abroad was not entitled to act autonomously. Kebir did not agree.

[358] Haddam also notes that Kebir's 2 August 1994 press statement had its origins in a statement Haddam himself had made in July 1994. He had discussed

the theory that the various armed groups should combine under one independent banner, the GIA. That statement was distorted by Kebir into an accusation that Haddam was trying to merge the FIS into the GIA. The press release of 2 August 1994 followed, with the appellant being dragged unknowingly into this aspect of the clash between Haddam and Kebir.

Dr Abbass Aroua, medical practitioner, Switzerland

Statement, dated July 2003

[359] Dr Aroua is a Director of the Hoggar Institute for Human Rights Studies in Switzerland. He was a participant at the Sant'Egidio Conference and Rome Platform. He is also a founding member of the Rehab organisation for the recovery of torture victims, the Movement for Truth, Justice and Peace in Algeria in 1998, and the *Justitia Universalis* organisation in the Hague in 2001 and spokesperson for the International Bureau of Humanitarian NGO's in Paris 2003.

[360] For the Hoggar Institute, Dr Aroua met the appellant in Switzerland on several occasions. They had regular discussions on Algeria and exchanged views in writing. Dr Aroua was at that time part of the panel preparing the Institute's work *An Inquiry into the Algerian Massacres*, published in 2000. He expressly sought the appellant's views, as head of CCFIS, on the nature of the GIA. Dr Aroua gives no credence to the claim that the appellant was a member of the GIA.

[361] The Hoggar Institute later published a further report, entitled *What is the GIA?*[74]. It concluded that the GIA had become a counter-guerrilla organisation, fielded by Algerian military intelligence. That finding is supported, according to Dr Aroua, by subsequent admissions by exiled former army officers (including Colonel Samraoui and Colonel Benali), both in the media and in Court, in the libel trial of General Khaled Nezzar against Lt Souaidia in Paris in July 2002.

[362] As to the appellant's 2001 conviction in France, he points out that, at that time "Charles Pasqua was Minister of Home affairs and the Algerian and French services were collaborating very closely" but that, even so, "they could not even convince the French judiciary to seek his extradition".

[363] Finally, Dr Aroua records his view, based upon his experience in the preparation of *An Inquiry into the Algerian Massacres*, that the convictions *in*

[74] NZIS file, pp. 295-353

absentia against the appellant in Algeria over the years are based on fabricated charges engineered by the Algerian military.

Mohammed-Larbi Zitout, former Algerian deputy Ambassador in Tripoli,

Affidavit dated 3 July 2003

[364] Mr Zitout records his background as deputy ambassador and his flight to exile in 1995 because he could no longer accept the destruction of democracy in Algeria. In England, Mr Zitout made public his knowledge of the involvement of the regime in the massacre of civilians in Algeria and the infiltration of the GIA.

[365] Mr Zitout records that he first met the appellant in the summer of 1997, and was later to tell the Swiss newspaper *24 Heures*:

> When one talks to him, one realises the extent to which the propaganda of the generals, through its embassies and press, has succeeded in demonising their political opponents, especially the Islamists. I know that Mr Zaoui belongs to a Muslim nationalist political trend known as 'Algerianism'. This political trend is very well known in Algeria for its moderation and pragmatism, and for the intellectual sophistication of its members. I do not believe that he has any links with terrorism….

[366] Mr Zitout concludes by observing that the convictions against the appellant in Algeria were engineered by the one of the "special courts" which, he explains, were modelled directly on the legal code of the French Special Courts under the Vichy regime in France during the Second World War. The convictions are baseless and, if the appellant is returned to Algeria, there is no doubt at all, in Mr Zitout's mind, that he will be tortured by the security services to extract all possible information, before being executed.

[367] Mr Zitout offers his support for the belief that the allegations against the appellant by the 'eradicator' press in Algeria, notably *El Watan*, are inspired by the regime and are no more than an attempt to demonise him.

[368] Of particular note, Mr Zitout confirms having read the report of Professor Joffé to the RSAA. He endorses Professor Joffé's conclusions, adding only that the role of France in defending and upholding the Algerian regime is *"plus Royaliste que le roi"* - more zealous than the regime itself.

Documentary evidence submitted by the appellant

[369] The appellant has provided the Authority with a substantial quantity of documentary evidence. It would be prolix to record it all. However, mention must be made of the following:

a) The decision of 26 April 1996, of the Belgian Foreigners' Consultative Committee;

b) The transcript of the appellant's interview on 30 December 1997, on his refugee application in Switzerland;

c) The decision of the United States Board of Immigration Appeals, dated 20 November 2000, granting refugee status to Anwar Haddam[75];

d) The transcript of a French documentary *Attentats de Paris: On pouvait les empecher* ("Attacks of Paris: We Could Stop Them"), by J B Rivoire and R Icard, broadcast in France by *Canal +* on 4, 7 and 8 November 2002, exploring the 1995 Paris bombings and the possible involvement of the Algerian Security Service. Its sources were, in the main, French intelligence officers;

e) Numerous newspaper articles chiefly from Algerian, Belgian, Swiss and French newspapers. In particular, the appellant has provided a CD-Rom of the archives of *Al Hayat*.

Evidence obtained by the Authority

[370] In view of the allegation that the appellant had admitted to a Customs officer on arrival in New Zealand that he was a member of the GIA, Mr Woolford arranged, at our request, for the Customs Officer to be called to give evidence after the appellant had given evidence on the same point himself. As with that of the appellant, Officer AB's evidence is addressed later, in the context of our consideration of the 'GIA' admission allegation.

[75] *In re Anwar Haddam*, Board of Immigration Appeals (20 November 2000), File: A22 751 813 – Arlington

Requests for information to the chief executive of the Department of Labour

[371] We are indebted to both Mr Woolford and to the chief executive of the Department of Labour (from whom we sought assistance under section 129P(4) of the Act), who have located many important documents.

[372] The documentary evidence secured by Mr Woolford and the chief executive includes:

a) The Belgian immigration file;

b) The judgments of the Belgian County Court and Court of Appeal on the appellant's criminal convictions in 1995; and

c) The judgment of the French High Court on the appellant's criminal conviction in 2001.

[373] It also includes the following relevant documents from overseas:

a) The '*El Watan*' document which the Belgian Permanent Commission had relied on in excluding the appellant.

b) The 21 August 1994 Certificate from Rabah Kebir. This had been given to the Permanent Commission by the appellant in 1995.

c) The 21 December 1994 invitation to the Rome Platform. This had been also been given to the Permanent Commission by the appellant.

[374] On 14 March 2003, the Authority wrote to the chief executive, invoking his further assistance under section 129P(4) of the Act. *Inter alia*, we sought:

a) all Interpol and Police communications regarding the appellant since his arrival in New Zealand; and

b) all information about the appellant held by the New Zealand Security Intelligence Service (the SIS).

[375] The material received from Interpol and the Police was reports regarding the appellant's travel and use of a false South African passport and information

from Interpol Algeria, setting out warrants against him, issued by the Algerian authorities, namely:

a) Warrant 727/01-p and 160/01-INS, issued on 10 November 2001, for "belonging to and setting up a terrorist group abroad";

b) Criminal conviction No 89.96, dated 26 May 1996, for "establishing a terrorist organisation to destabilise state institutions and terrorise the population";

c) A sentence of life imprisonment, No 173.1997, dated 2 February 1997, for "plotting against the state, criminal conspiracy, inciting armed rebellion and assassinations and destruction of property";

d) A sentence of life imprisonment, No 263/96, dated 12 December 1996, for "acts of aggression to destabilise state institutions and inciting armed rebellion to carry out assassination and destroy property".

[376] The information received from the SIS was:

a) A report by the Belgian Security Service to the SIS, recording the appellant's conviction in that country;

b) A report by the Swiss Security Service (the SAP) to the SIS, recording the appellant's time in that country;

c) An SIS-compiled chronology of the appellant's background;

d) SIS-compiled reports on the both the GIA and the FIS.

[377] On 8 April 2003, the Authority wrote again to the chief executive, under section 129P(4) of the Act. *Inter alia*, the Authority sought:

a) Copies of all communications between Interpol Wellington and Interpol Algeria regarding the appellant;

b) Confirmation that the only outstanding warrants against the appellant are those issued by the Algerian authorities.

[378] On 9 April, the New Zealand Police confirmed that the appellant is the subject only of the four arrest warrants, all issued by the Algerian authorities, as above and that he is not wanted by any other jurisdiction.

ADDITIONAL INFORMATION CONSIDERED BY THE AUTHORITY

[379] As well as the above documentation submitted by counsel on behalf of the appellant a considerable amount of documentation was contained on the NZIS file. Additionally, the Authority undertook its own research, in the course of which it considered a very large amount of material. The material falls into several categories.

Academic Writing

[380] A number of works by academic specialists on Algeria have been considered. These include:

- Faksh, Mahmud, *The Future of Islam in the Middle East: Fundamentalism in Egypt, Algeria and Saudi Arabia* (1977) USA, Praeger

- Quandt, William B, *Between Ballots and Bullets, Algeria's Transition from Authoritarianism* (1998) Washington DC, The Brookings Institution

- Roberts, Hugh, *The Battlefield Algeria 1988-2002: Studies in a Broken Polity* (2003) London, Verso

- Roy, Oliver, *The Failure of Political Islam* (1994) USA, Harvard University Press

- Volpi, Frèdèric, *Islam and Democracy: The Failure of Dialogue in Algeria*, *1988-2001* (2003) London, Pluto Press

- Willis, Michael, *The Islamist Challenge in Algeria: A Political History* (1996) UK, Ithaca Press

- Youcef Bedjaoui, Abbas Aroua and Meziane Ait-Larbi, (eds) *An Inquiry into the Algerian Massacres* (1999) Geneva, Hoggar Books

Human Rights and other Reports

[381] The Authority has consulted most of the major reports concerning Algeria that have been published by Amnesty International, Human Rights Watch and the International Crisis Group and other organisations during the last decade. Of particular relevance are:

Amnesty International:

- *Algeria: Executions after unfair trials: a travesty of justice* (October 1993)
- *Algeria: Repression and violence must end (August 1994)*
- *Algeria: Fear and Silence: a hidden human rights crisis* (November 1996)
- *Algeria: "Disappearances": the wall of silence begins to crumble* (March 1999)
- *Algeria: Truth and justice obscured by the shadow of impunity* (November 2000)
- *Algeria: When token gestures are not enough: human rights and the Algeria-EU accord* (April 2002)

Human Rights Watch:

- *Human Rights Abuses in Algeria: No One is Spared* (January 1994)
- *Algeria: Elections in the Shadow of Violence and Repression* (June 1997)
- *Time for Reckoning: Enforced Disappearances and Abductions in Algeria* (February 2003)

International Crisis Group:

- *The Algerian Crisis: Not Over Yet* (20 October 2000)
- *The Civil Concord: A Peace Initiative Wasted* (9 July 2001)

- *Algeria's Economy: The Vicious Circle of Oil and Violence* (26 October 2001)

[382] Additionally we have noted the Amnesty International and Human Rights Watch annual reports and the US Department of State *Country Reports on Human Rights Practices* in respect of Algeria, for the years 1993-2002 and the UK Home Office *Country Report on Algeria* (October 2002).

[383] Mention should also be made of the report *Algeria: Country Report* prepared by Francois Burgat for the UNHCR/ACCORD: 7th European Country of Origin Information Seminar, Berlin, 11-12 June 2001.

[384] A report from the International Federation of Human Rights Leagues (FIDH) on the subject of French anti-terrorist trials, *France: paving the way for arbitrary justice* (March 1999), was also considered.

Newspaper Reports

[385] The Authority has considered literally hundreds of newspaper reports covering the period 1993 to the present and gathered from a variety of sources. Topics include political events in Algeria, GIA activities in Algeria and Europe, the French trials of Islamic terrorists, the appellant's Belgian criminal trial and the activities of the appellant and other FIS leaders in exile.

[386] Most reports sighted were in English and sourced from www.nexis.com, a news database. Where www.nexis.com was not the source, we have cited the reference. *Agence France Presse* reports formed a sizeable percentage of the total. The Authority also sighted a small number of reports from Algerian French-language newspapers – the most recent accessed on www.algerieinfo.com.

[387] Also obtained from the FIS Co-ordination Counsel (CCFIS) website (www.ccfis.org) were 33 communiqués, published in French.

[388] Additionally, various political/economic reports prepared by private information services have been perused, along with odd editions of intelligence newsletters accessed from the internet, that have either made mention of the appellant or Algerian armed groups, (Intelligence Online, Terrorism Update,

Executive Intelligence Review, FAS Intelligence Resource Programme, CDI Terrorism Project).

[389] As well as the above three broad categories of information, the Authority has considered the US Department of State, *Patterns of Global Terrorism – 2001* (21 May 2002), *Terrorist Exclusion List*, (15 November 2002), and *Foreign Terrorist Organisations* (30 January 2003), and a number of British judgments concerning either extradition proceedings or criminal charges in respect of terrorism offences brought in respect of Algerians residing in the United Kingdom. Also noted were recent New Zealand anti-terrorism regulations, United Nations Sanctions (Terrorism Suppression and Afghanistan) Regulations 2001.

THE ISSUES

[390] The Inclusion Clause in Article 1A(2) of the Refugee Convention relevantly provides that a refugee is 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; or who, not having a nationality and being outside the country of his former habitual residence, as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

[391] In terms of *Refugee Appeal No 70074/96* (17 September 1996), the principal issues are:

(a) Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to the country of nationality?

(b) If the answer is yes, is there a Convention reason for that persecution?

ASSESSMENT OF THE APPELLANT'S CASE

CREDIBILITY

[392] Before considering the issues raised by the Refugee Convention, it is necessary to address the question of the appellant's credibility. It was evident from the outset that credibility would be a significant issue in this appeal, because

of the chasm between the 'armed group' allegations against the appellant and his emphatic denial of them. The seriousness of the allegations against him is such that we have approached every aspect of his claim with caution.

[393] Of the total hearing, the appellant's evidence took over 11 days. We have examined him on every relevant aspect of his background and have endeavoured to fully research every issue which arose. We have heard from other witnesses and we have been able to assess the appellant's account against a wide array of information from other sources. His evidence is corroborated at every material point.

Detail

[394] The appellant's evidence has been detailed to an extraordinary degree. Even allowing for the passage of time and the strictures of the last decade, he has consistently answered every enquiry in remarkable depth.

[395] As an academic, the appellant is predictably both erudite and coherent. His knowledge of events in Algeria is such that we have been able to question him at length on every relevant aspect of Algerian politics, society and history. Having ourselves read widely in those fields in anticipation of the appeal hearing we have, without fail, found his detailed evidence to be consistent and reliable.

[396] The few occasions on which the appellant's account was vague were explicable. He could not, for example, recall the detail of his correspondence with Mr Petillault regarding the French trial because, as he explained, the distance and his personal circumstances were such that the letters did not engage his attention sufficiently at the time.

[397] On other occasions, he has lacked knowledge. His account of some aspects of the Belgian trials is a case in point. With only limited access to an interpreter, his description of the proceedings could hardly be complete. The aspects of which he *was* aware, however, he has described in detail.

Consistency

[398] In 11 days of questioning, the appellant's evidence has been internally consistent in every respect. The late emergence of documents or the evidence of other witnesses meant that some areas of the appellant's claim needed to be

revisited with him at a later point. On no occasion, even in such circumstances, did he give evidence inconsistent with what he had already said.

[399] It has also been consistent with his evidence at prior interviews. From his interview on his first refugee application in Belgium on 14 April 1994, his 1995 statement to the investigating magistrate at his criminal trial, his 1997 Swiss refugee interview to his interview with the RSB in New Zealand, the appellant has been remarkably consistent.

[400] We have received both the transcript of the Belgian 2 March 1995 "*Pro Justitia* Examination of Accused" and the 18 pages of the transcript of his 30 December 1997 interview on his refugee application with the Swiss Federal Office for Refugees. These documents only became available to us (and the appellant) well after the appellant had given oral evidence on the events covered therein. He had not seen them since 1995 and 1997 respectively and he had no forewarning that the documents would be seen by us. Yet his evidence, in all respects, is consistent with those records made eight and six years ago. He told us, for example, that his interviews with the Belgian police and the examining magistrate had each lasted only half an hour, that he had had no lawyer there and that he had not been asked any questions on the serious charge of being the head of a criminal organisation or in respect of any weapons. We were initially cautious about such surprising evidence. On later reading the *Pro Justitia*, however, it is confirmed in every detail.

[401] His account is also consistent with information from reliable third parties, including numerous people of varying political and religious persuasions, including members of the Roman Catholic Sant'Egidio Community, senior FIS personnel now protected by western countries such as Mourad Dhina, Anwar Haddam and Y and former political opponents such as Mohammed-Larbi Zitout.

[402] Almost none of this information was before us when he began to give his oral evidence. Most of it did not emerge until his current counsel were instructed and they put enquiries in train. Some was still arriving on the last day of the hearing and it has continued to arrive. With the appellant in maximum security, and not knowing what we would see, he has had no opportunity either to tailor his own evidence, or to conspire about the evidence of others. Even so, his evidence on the complex events spanning more than a decade is corroborated by this wealth of information from other sources in every material detail.

[403] Two such documents illustrate the point. Early on, the appellant told us that a certificate he had obtained from Rabah Kebir in August 1994 stated he was still a member of the FIS and that the December 1994 invitation from the Sant'Egidio Community was addressed to him personally. Such evidence would be significant. The appellant said he had given both documents to the Belgian authorities in the course of his refugee claim there.

[404] Our efforts to acquire those documents proved fruitless initially. Eventually, the Belgian authorities sent to us a November 1993 certificate signed by Rabah Kebir. We considered the possibility that the appellant's evidence had been wrong. The appellant, however, maintained that an August 1994 certificate did exist. On the last day of the appeal hearing, we received from the Belgian authorities both the 21 August 1994 certificate and the personal invitation to the Rome Platform. They matched the appellant's description in every respect.

[405] Finally, the appellant's evidence has been consistent with general country information on Algeria and expert opinion evidence considered by us.

Spontaneity and candour

[406] The appellant has given approximately 50 hours of evidence. At no point has he prevaricated or hesitated. His answers have been spontaneous and uncontrived. He has disagreed with us where we have erred or misunderstood and he has not hesitated to be candid, even where the evidence might prove to be disadvantageous.

[407] There were many opportunities when the appellant might have embellished his claim. He did not do so. Neither has he been evasive. To the contrary, from the outset he has urged us to approach anyone, anywhere about any aspect of his case. He volunteered signed authorities for the release of information from anyone we saw fit to ask.

[408] All of the above satisfies us that the appellant's account is truthful.

Y

[409] We also accept the evidence of Y as truthful.

[410] Y TEXT DELETED . The appellant's former counsel had not obtained a detailed brief of his evidence – nor had the prison authorities allowed the appellant to see or contact him before the hearing. It is clear that there had been no opportunity for any collaboration between them since the appellant had arrived in New Zealand. Even so, the corroborative detail of Y's evidence has been convincing.

[411] We found Y to be a careful and measured witness. Clearly intelligent and articulate, he provided corroborative evidence in extraordinary detail. At the same time, where his evidence might appropriately diverge from the appellant's (as, for example, with information to which they were not both privy) it did so.

[412] Nor did he hesitate to disagree with or be critical of the appellant. His description of the appellant's lack of judgment about having an 'open-house' policy in Belgium cast light on the crucial issue of the appellant's familiarity with the Algerian community there, in a way that we could not have drawn from the appellant himself. Yet the account of his remonstrations with the appellant over his 'cups of tea' with all and sundry was palpably honest, as was his aside that he had seen the appellant's wife cook three lunches in a row for young Algerian men desperate for a meal.

IS THERE A REAL CHANCE OF THE APPELLANT BEING PERSECUTED IF RETURNED TO ALGERIA?

[413] The determination of whether a fear is well-founded requires the application of an objective test. The focus is not on the subjective feelings and perceptions of a refugee claimant but on the objective facts as found by the decision maker. A fear is not well-founded unless there exists a real or substantial basis for it. Conjecture and surmise have no part to play in determining whether a fear is well-founded.[76]

[414] The meaning of persecution has been the subject of much discussion in previous decisions of the Authority. A helpful summary is contained in *Refugee Appeal No. 72558/01* (19 November 2002) at paras. 87 and 88:

[76] For further detailed discussion see *Refugee Appeal No. 72668/01* [2002] NZAR 649 at paras. 116-154

> Underlying the Refugee Convention is the commitment of the international community to the assurance of basic human rights without discrimination. See the Preamble (first and second recitals) to the Refugee Convention and *Canada (Attorney General) v Ward* [1993] 2 SCR 689, 773 (SC:Can). But the Convention does not protect persons against any and all forms of even serious harm: James C Hathaway, *The Law of Refugee Status* (Butterworths 1991) 103. There must be a risk of a type of harm that would be inconsistent with the basic duty of protection owed by a state to its own population: Hathaway *op cit* 103-104. The dominant view is that refugee law ought to concern itself with actions which deny human dignity in any key way, and that the sustained or systemic denial of core human rights is the appropriate standard: Hathaway *op cit* 108 approved in *Ward* at 733. Persecution is most appropriately defined as the sustained or systemic failure of state protection in relation to one of the core entitlements recognised by the international community. See Hathaway, *op cit* 104-105, 112 approved in *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489, 495F, 501C, 512F, 517D (HL); *Refugee Appeal No. 71427/99* [2000] NZAR 545; [2000] INLR 608 at [51] and *DG v Refugee Status Appeals Authority* (High Court Wellington, CP213/00, 5 June 2001, Chisholm J) at [19] and [22].
>
> Whether an individual faces a risk of persecution requires identification of the serious harm faced in the country of origin and an assessment of the state's ability and willingness to respond effectively to that risk. Persecution is the construct of two separate but essential elements, namely risk of serious harm and failure of protection. This can be expressed in the formula that: Persecution = Serious Harm + The Failure of State Protection: *R v Immigration Appeal Tribunal; Ex parte Shah* [1999] 2 AC 629, 653F (HL); *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489, 515H (HL); *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 187 ALR 574 at [120] (HCA) per Kirby J approving *Refugee Appeal No. 71427/99* [2000] NZAR 545; [2000] INLR 608 at [112].

[415] In determining whether the appellant has a well-founded fear of persecution should he be returned to Algeria, regard must be had to:

(a) his FIS activities;

(b) his criminal record in Algeria; and

(c) the demonstrated interest of the Algerian authorities in him and those similarly situated.

Human Rights Abuses by the Algerian Regime

[416] Numerous human rights and other reports of the last decade have documented an extensive and appalling record of human rights abuses by the Algerian security forces as part of the regime's repression of the FIS and its supporters (see the materials listed in paragraphs 381-382). We have summarised these abuses in paragraphs 59-62. They include arbitrary detention, systemic torture of detainees, extrajudicial killings and disappearances. Although there has been some reduction in the level of abuse in recent years, systemic

abuse, in an environment of impunity, remains. The assessment of whether the appellant faces a real chance of persecution must be carried out in this context.

The Appellant's FIS activities

[417] There is no doubt that the evidence establishes that the appellant has been a prominent member of the FIS leadership in exile. This is demonstrated by his membership of Rabah Kebir's Executive Committee, the founding of and his activities in support of CCFIS, and his close personal relationship with the FIS senior leadership.

[418] He has been an outspoken critic of the regime, challenging the pre-eminent role of the military in Algerian political life, and accusing the regime of systematic and atrocious human rights abuses against the Algerian population.

[419] The regime's vested interest in maintaining the status quo is self-evident. Should the appellant return to Algeria, he will almost certainly be imprisoned on arrival and tortured. The 'eradicator' press, as it has always done, will brand him a 'terrorist', responsible with others in the FIS for the murderous conflict of the past 12 years. Even if he is eventually released to house arrest or even into the community, there is a real chance it will be with stringent conditions, effectively preventing him from engaging in any sort of political activity or public life.

[420] In this regard we observe that Abbassi Madani and Ali Belhadj were released from prison on 2 July this year, having served their 12 year sentences. Their release comes with conditions which amount to "a total ban on all political and public activity". They cannot "vote, express political views in public or private, or belong to any associations".[77] Such conditions are clear breaches of Articles 19, 21 and 22 of the International Covenant on Civil and Political Rights (ICCPR) (freedom of expression, the right to peaceful assembly and freedom of association). In the context of the Algerian conflict, these restrictions arguably amount to further persecutory treatment.

[421] Furthermore, we consider there must be a real chance that the appellant will be the victim of an extrajudicial killing at the hands of, or at the direction of, the Algerian security services of which there are numerous cases every year in

[77] "Algeria frees Islamist leaders" *BBC News* (2 July 2003) http://newsvote.bbc.co.uk; "Algeria releases leaders of banned Islamic party after 12 years" *Agence France Presse* (2 July 2003) http://www.nexis.com

Algeria.[78] We are reminded of the fate of Abdelkader Hachani, third in the FIS hierarchy at the time, who was assassinated in November 1999, some time after his release from custody.[79]

[422] The regime's determination to eradicate the FIS remains as resolute as ever. In keeping with this is its harassment of the FIS leadership in exile, of which the appellant is a member. It continues to call for the extradition of the most prominent FIS spokesmen, all of whom have been convicted *in absentia* of terrorist charges. Its reaction to the announcement of the October 2002 election of Mourad Dhina to head the FIS is typical. Mohammed Falah Dembri, the Algerian Ambassador to the United Nations in Algeria, expressed his "incomprehension" at the Swiss decision to permit the election of Mourad Dhina, describing it as "a perversion of the rules of international humanitarian law" and warned the Swiss that Algeria "will be very attentive to the measures the Swiss government will take" in the matter.[80]

[423] Within days of this announcement appearing in the European press, the Algerian authorities were fiercely and publicly critical of the Swiss government for permitting Dhina to live and speak openly in Switzerland, and for refusing its oft-made request to extradite him to Algeria.[81] The Swiss authorities refused, restating their position that the offences with which Dhina was charged in Algeria were not punishable under Swiss law.

[424] In summary, the Algerian regime continues to regard as a threat any member of the FIS who assumes a leadership role and voices political opposition to the current regime. Professor Joffé has made the point that the appellant, because of his background, has the moral authority and the ability to articulate the values that the FIS embodies (see paragraphs 974-975). There can therefore be no real doubt that he is regarded as a threat by the regime.

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[78] See for example "Algeria told to rein in security forces" *BBC News* (16 September 1998) http://nexis.com; United Kingdom Home Office *Country Assessment: Algeria* (April 2003) at para 5.3.5

[79] United States Department of State *Country Reports on Human Rights Practices for 1999: Algeria* (April 2000) Washington, U.S. Government Printing Press, section 1a

[80] "Switzerland refuses Algerian request to extradite newly-elected FIS leader" *BBC Monitoring International Reports* (12 October 2002) http://www.nexis.com; and see second affidavit of Mourad Dhina 24 June 2003

[81] "Swiss Government bans Algerian FIS figure from making inciting statement" *BBC Monitoring International Reports* (25 October 2002) http://www.nexis.com; and see also "Algerians cry foul" *Intelligence On-Line* (24 October 2002) http://www.intelligenceonline.com and "Switzerland refuses Algerian requests to extradite newly elected FIS leader" *BBC Monitoring International Reports* (12 October 2002) http://www.nexis.com

[425] The Algerian regime's attitude to the appellant is not new. It is clear that he has been targeted by the regime, at least from July 1993 when the first death sentence was issued against him. Since then, convictions have been entered against him for a number of serious offences and he has been sentenced to life imprisonment. We will deal with these in some detail before considering the most recent display of any state interest in the appellant: the 2001 arrest warrant.

The Algerian convictions

[426] That the appellant has been convicted in Algeria of a number of offences is without doubt. What is less clear is the nature of the charges and, in particular, the penalties imposed.

[427] It is the appellant's evidence, corroborated by independent material, that he has twice been sentenced to death – at the beginning of August 1993 and in November 1997.

[428] He has also been sentenced to life imprisonment. He first learned of this in a telephone conversation in mid-1998, while in Burkina Faso. At that time he was told that he faced six sentences of life imprisonment. No mention was made of any death sentences. Nor was the appellant advised of the charges that led to the imposition of the sentences of life imprisonment, nor whether the sentences were in addition or substitution to the death penalty. In this regard, we note that there has been a moratorium on the enforcement of the death penalty since December 1993 and sentences of death (which are still passed) seem to be either commuted to prison terms by presidential decree, or on appeal.[82]

[429] The communiqué from Interpol Algeria to Interpol Wellington refers to the imposition of two sentences of life imprisonment but it is clearly not a complete record of the penalties recorded against the appellant. (We doubt, for example, that he escaped punishment on the May 1996 conviction.) Further, it is reasonable to rely on the information provided to the appellant while he was in Burkina Faso that there were six life sentences. Accordingly we find that the appellant has been convicted of a number of serious terrorist-related offences and sentenced to life imprisonment on six occasions, and on two occasions to death. All convictions were entered *in absentia* following trials before either the Special Court or the Military Tribunal.

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[82] United Kingdom Home Office *County Assessment: Algeria* (1 April 2003) paras. 5.23-4; *Amnesty International Annual Report 2002*: *Algeria* (2002) p. 3

[430] As for the charges on which the appellant has been convicted, these include a range of terrorist offences – the establishing of terrorist organisations, inciting armed rebellion, carrying out assassinations, and criminal conspiracy.

[431] We have undertaken an analysis of the trial procedures before both the Special Court and the Military Tribunal in Algeria in paragraphs 469-483. It is our conclusion that all charges brought against the appellant were politically motivated and that the judicial system by which he was judged "serves more as a 'rubber stamp' of the regime than a legitimate independent body".[83] We place no weight on these convictions as evidence of criminal conduct by the appellant. However, we have no doubt that the Algerian regime regards the appellant as a serious criminal, as the communiqué from Interpol Algeria illustrates.

[432] Given our findings in paragraph 497 that the convictions have been entered against the appellant in a total absence of due process and in breach of fundamental rights, we find that enforcement of these penalties would amount to persecutory conduct. These life sentences are not punishment resulting from a legitimate prosecution.[84] Rather, they form an essential part of the Algerian regime's strategy of discrediting the FIS, particularly its leadership, both domestically and internationally.

[433] TEXT DELETED

Amnesties and exemptions from prosecution have been granted to some of those involved in the Algerian civil conflict to date, pursuant to both the Civil Harmony law (in force from 13 July 1999) and the Presidential decree of 10 January 2000.[85] Further, the appellant's father was able to secure an amnesty for one of those sentenced to death *in absentia* with the appellant in the July 1993 trial, although that individual was not a prominent member of the FIS.

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[83] "Courts: sentencing *in absentia*" in Sadiki, L. *Algeria: Conscription; exit procedures, passports, national identity cards; courts – sentencing in absentia* (October 1997) Centre for Middle Eastern and Central Asian Studies, ANU (CISNET CX26071)

[84] As to the Authority's jurisprudence on the prosecutions/persecution dichotomy see further *Refugee Appeal No. 29/91* (17 February 1992).

[85] Amnesty International *Algeria: Truth and justice obscured by the shadow of impunity* (8 November 2000) pp. 3-4

[434] Second-guessing the President's possible future action is fraught with difficulty.[86] The appellant is entitled to the benefit of any doubt. In any event, there are other factors which must be considered and which point clearly to a real chance of persecution. TEXT DELETED

Current interest in appellant from Algerian regime

[435] We recap the nature of the regime's interest in the appellant over the years.

[436] We are in no doubt that the Algerian government has actively monitored the appellant's activities since his arrival in Belgium. Indeed, the Algerian Foreign Minister came to Belgium in March 1995 only days before the appellant's arrest – a matter which we do not readily dismiss as pure coincidence. As our findings will make clear, the Algerian security services liaised with the Belgian and French security services and provided information to prosecute the appellant.

[437] In May 1996, shortly after the decision of the Foreigners' Consultative Committee that there were no grounds for deporting the appellant from Belgium, he was convicted in Algeria of serious terrorist offences and, presumably, sentenced to a lengthy term of imprisonment, or life imprisonment.

[438] Further convictions and a sentence of life imprisonment were entered in December 1996, after the appellant was released from prison in Belgium.

[439] When the "Call of the 40" document was published in early March 1997 it was followed ten days later by an announcement from the Algerian regime that arrest warrants had been issued for a number of prominent FIS figures, including the appellant.[87] This led ultimately to the second sentence of death on the appellant in absentia passed shortly after his arrival in Switzerland.

[440] It is also clear from the evidence before us that the Algerian regime, again through Mohammed Falah Dembri, exerted substantial pressure on the Swiss

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[86] The position of the Algerian President has always been a tenuous one and Bouteflika's is no exception. In its report on the recent release of Abbassi Madani and Ali Belhadj, the BBC made the following observation: "Presidential elections are due next year amid signs that the army, the real power-broker in the country, may have withdrawn its support from the incumbent Abdul Aziz Bouteflika". *BBC News* (2 July 2003) http://news.bbc.co.uk "Algeria frees Islamist leaders". *BBC News* (2 July 2003) http://news.bbc.co.uk

[87] "Algeria releases lists of people wanted for terrorist acts" *Al Hayat* (26 March 1997) Issue 12445

authorities in respect of the appellant. Dembri is a prominent ‘eradicator‘ and is a "very hard-line gentleman indeed" according to Professor Joffé’s oral evidence. He has vigorously campaigned against Mourad Dhina, the appellant's colleague in the CCFIS.[88]

[441] That Dembri and others in the regime were making representations to the Swiss to prevent the appellant from using the internet to publish CCFIS material is mirrored in an article appearing at the time in *El Watan* by journalist Salima Tlemçani.[89] She complained that 'Islamist' groups used the internet to spread propaganda.

[442] The appellant is in no doubt that Mr Dembri used his very best endeavours at that time to make available to the Swiss authorities the Algerian “file” on him. What is clear is that, within a short time after Mr Dembri's representations to the Swiss government, the appellant was prevented from operating a fax machine and accessing the Internet. A year after his arrival in Switzerland he was deported to Burkina Faso.

[443] Once in Burkina Faso, his presence was immediately notified to the Algerian Embassy. The appellant is convinced that, on one occasion, the Algerian authorities almost succeeded in forcibly removing him to Algeria during his attempts to flee to England. Had he and his family returned to Ghana, and disembarked in Mali as suggested, the appellant speculates that they would have been forcibly detained and returned across the Algerian border into the hands of the Algerian security services.

[444] An international warrant for the appellant's arrest was issued on 10 November 2001. It records the appellant as living in Malaysia. This and the time of which raises the possibility that it was in preparation for approaches to the Malaysian government. The offences for which the warrant was issued are effectively the same as the terrorist offences with which he had earlier been charged and convicted in Algeria.[90]

[445] The following year, during the appellant’s time in Malaysia, the head of National Security in Algeria, Ali Tounsi, visited the country ostensibly to observe

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[88] “Algeria delivers protest over Swiss-based FIS leader” *Agence France Presse* (9 October 2002) http://www.nexis.com; and see paras. 449-500

[89] Terrorist propaganda: “The GIA squats the internet” *El Watan* (26 April 1998) (appellant’s documents No. 33)

[90] See para. 472 which sets out details of the charge.

Malaysian police practices. The appellant remains highly sceptical of such an explanation, pondering what the Algerian police might learn from the Malaysian police that they do not know already. He believes instead that this official visited Malaysia at least in part to liaise with the Malaysian authorities about his presence there. His fears were reinforced by information passed to him by a friend to the effect that the authorities were planning to detain him. This caused the appellant to make plans and ultimately to depart from Malaysia.

[446] Within a short time of the appellant's arrival in New Zealand, Interpol Algeria responded to Interpol Wellington's advice that the appellant had entered New Zealand and sought refugee status. That response included details of the 10 November 2001 international arrest warrant.

[447] It was clear from the Algerian regime's communiqués that they were following the New Zealand media reports of the appellant's detention. They specifically sought from Interpol Wellington details of any prosecution of the appellant, the outcome of his refugee claim and "in particular, the membership network [or] links with Algerian nationals established either in your countries or in ours".

[448] As the above amply demonstrates, the appellant remains of interest to the Algerian authorities.

Summary on Well-Founded Fear of Algerian authorities

[449] We are in no doubt that the appellant will be persecuted if returned to Algeria. On arrival, he will be detained and almost certainly tortured. While we can only speculate on whether the appellant would even survive the torture, Mohamed-Larbi Zitout (the former Algerian Deputy Ambassador to Libya), has no doubts:

> In my view, should Mr Zaoui be returned to Algeria, the Generals would definitely have him tortured savagely to extract every scrap of information possible from him. They would then have him executed.[91]

[91] Affidavit of Mohamed-Larbi Zitout sworn in these proceedings on 3 July 2003. The regime's interest in obtaining information about the appellant's contacts is demonstrated in its communiqué of 8 February 2003 in which Interpol Algeria asked Interpol Wellington for all relevant information on the appellant's "membership network" [and] links with Algerian nationals established either in your countries or ours…"

[450] Even assuming the appellant survives his torture and is put on trial for terrorist offences, it will be a trial lacking in all the fundamental tenets of due process. Like so many of the trials before it of FIS leaders and supporters (including the appellant) its outcome will be no more than a 'rubber stamp' of the Algerian government's decision to persecute the appellant.[92]

[451] Should it perceive a need for any public endorsement of the harsh penalty that will inevitably be imposed, the regime need look no further than the appellant's criminal convictions in Belgium and France, and the expulsion orders in respect of France and Switzerland.

[452] In the highly unlikely event that the appellant would be permitted to remain in the community (under house arrest or otherwise) he would certainly be subject to strict conditions preventing him from speaking publicly, and participating in any political forum or any social public activity.[93] We have no confidence that the appellant would remain silent even if subject to such conditions. He is an articulate, intelligent, committed and principled individual who, despite the hurdles placed before him over the last ten years, remains a passionate advocate for peace through democracy in Algeria, and for bringing to justice those guilty of the human rights abuses of the past decade.

[453] TEXT DELETED

Convention ground

[454] As is clearly apparent, the regime's persecutory treatment will be for reasons of the appellant's political opinion arising from his membership of the FIS and his prominent role in the FIS leadership in exile.

Well-Founded Fear Of The GIA

[455] The appellant also claimed before us to have a well-founded fear of persecution at the hands of the GIA. Given our findings in respect of the Algerian

[92] See our discussion of the Algerian court processes at paras. 491-494

[93] See para. 420

state, it is unnecessary for us to determine this issue. We observe though that the GIA issued a death threat against the appellant in 1996 (the "Burning Thunderbolts" communiqué)[94] and that it has effectively carried out such threats against other FIS leaders in the past, although the communiqué is now somewhat remote. Notwithstanding the GIA's much reduced capability at the present time, we do not rule out the possibility of the appellant coming to harm at its hands. He has been a critic of the GIA over the years and has actively pursued a path of political settlement through dialogue which is diametrically opposed to the political stance of the GIA. Whatever its current form, the GIA may well regard him as a legitimate target.

CONCLUSION ON WELL-FOUNDED FEAR

[456] The Authority is satisfied that the appellant has a well-founded fear of persecution for a Convention reason should he be returned to Algeria. However, before we can find him to be a refugee, we must be satisfied that he is not excluded from the protection of the Refugee Convention pursuant to Article 1F.

INTRODUCTION TO EXCLUSION

Jurisdiction

[457] In the course of considering whether the appellant is excluded, we must have regard to:

(a) the appellant's Algerian convictions for terrorist offences;

(b) the decision of the CPRR, declining him refugee status in Belgium on the grounds that he is excluded;

(c) the conviction of the appellant in Belgium for heading a criminal association;

(d) the deportation of the appellant from Switzerland on the grounds of national security;

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[94] We note Professor Joffé's evidence to us that, from its style and content, this communiqué appears to be genuine.

(e) the conviction of the appellant in France for participation in a criminal group with a view to preparing terrorist acts;

(f) newspaper reports linking the appellant to the GIA and other armed groups;

(g) information provided to the RSAA by the New Zealand SIS;

(h) an alleged admission made by the appellant on arrival in New Zealand that he is a member of the GIA.

[458] The appellant was convicted by the 14th Chamber of the Brussels Court of Appeal and on 13 September 2001 by the 16th Criminal Chamber of the Paris High Court. Both bodies are superior Courts of western democracies which respect the rule of law. We presume the findings of such bodies to be, *prima facie*, probative evidence of the acts alleged. Further, we recognise that we do not have before us all of the evidence which would have been before those Courts at the time the convictions were entered.

[459] At the outset of our enquiries, we had been able to obtain only a bare list of the appellant's convictions in Belgium and one newspaper report of his conviction in France. These did not assist us in understanding the nature of the offences or what the appellant was alleged to have done that led to the convictions. We were therefore compelled to obtain the full judgments of the Courts, being the decisions of the Brussels County Court (which acquitted the appellant at first instance), the Brussels Court of Appeal and the Paris High Court.

[460] By the time we received the decisions of the Courts, our research had revealed that there had been a number of 'terrorist' trials in France and Belgium throughout the 1990s, of which the appellant's was typical. Such trials had raised criticism in a number of quarters, such criticism including the vague nature of the charges, issues of procedural fairness and the nature of the evidence relied on to secure convictions.

[461] Once we received the Belgian judgments, it was clear that the evidence relied on to convict the appellant was described in general terms. We had expected that there would be detailed evidence against him, given that he was convicted of being one of the heads of a criminal organisation. We found, however, that it lacked the detail that was relied on in convicting his co-defendants. Particularly problematic, in terms of our Article 1F analysis, was the

Court's failure to identify the objects and intentions of the criminal association and, specifically, whether they were in furtherance of the aims of the FIS, the GIA or the FIDA.

[462] As to the French judgment, we were struck by the minimal evidence relied on to convict the appellant. Again, the judgment failed to clearly identify the objects and intentions of the criminal organisation. There was the additional problem for us that the conviction had been entered in absentia.

[463] Once the hearing commenced, we were confronted with the appellant's emphatic denial of each and every point relied on to convict him in both Courts. He put reliable evidence before us which was *prima facie* inconsistent with the findings of, in particular, the Belgian Court of Appeal. He also raised substantial issues of procedural fairness in both the Belgian and French proceedings.

[464] Against this background, and in light of the jurisprudential issues that we are required to consider in the application of Article 1F, we had no alternative but to look behind the convictions and consider both the procedures adopted and the evidence relied on.

[465] We now turn to our assessment of the various exclusion issues set out in paragraph 457 as they fall in chronological order, commencing with the appellant's Algerian convictions.

ALGERIAN CONVICTIONS

[466] The appellant has been convicted in Algeria on a number of occasions, and sentenced both to death and to life imprisonment. All the convictions were entered in his absence. His first convictions were entered in August 1993 by a Special Court of Algeria, while his subsequent convictions, recorded in both 1996 and 1997, were entered in a Military Court after the Special Court was abolished.

[467] Before determining what weight we can place on this evidence, we briefly examine the procedures of both courts.

1993 Convictions and the Special Courts

[468] On 1 August 1993, the appellant was convicted of a number of offences, including attacks on state security, criminal association and bearing arms (being offences under the Penal Code and Articles 3, 4 and 7 of Legislative Decree 92-03). He was sentenced to death by the Special Courts operating in Algeria at that time.

[469] In general terms, the Algerian courts system is based both on the 1989 Constitution and the Code of Penal Procedure. In 1992, Legislative Decree 92-03 was passed. Under this decree, the Special Courts were created to try those accused of "subversion" or "terrorism". The decree included a very broad definition of both subversion and terrorism, and it doubled the penalties previously available for such offences under the Penal Code.[95]

[470] Decree 92-03 took effect from September 1992, at which time thousands of Algerians were detained, including approximately 2800 who had been held since the extensive round-ups of FIS supporters in February and March 1992. Many others had been arrested thereafter. The stated aim of the Decree was "to facilitate quick trials of defendants suspected of participating in, or supporting political violence, and to mete out tough sentences to those who were convicted".[96]

[471] The creation of the Special Courts, the scope of the offences of "subversion" and "terrorism" and the practices and procedures that attached to the Special Courts have been the subject of substantive criticism and condemnation by a number of human rights bodies. The concerns have been comprehensively reviewed by both Human Rights Watch (*Human Rights Abuses in Algeria: No One is Spared* January 1994) and by Amnesty International (*Algeria: Executions after unfair trials: a travesty of justice*, October 1993 and in *Algeria: Repression and violence must end*, 28 August 1994). The most salient concerns can be summarised as follows:

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[95] "Courts sentencing *in absentia*" in Sadiki L, *Algeria: Conscription; Exit procedures, passports, national identity cards; Courts – sentencing in absentia,* (October 1997) Centre for Middle Eastern and Central Asian Studies, ANU (CISNET CX26071)

[96] Human Rights Watch *Human Rights Abuses in Algeria: No One is Spared* (January 1994) p. 22

The scope of the offences

[472] Article 1 defined the key offence of "a subversive or terrorist act". Given its relevance in these proceedings, Article 1 is set out in full:

> A subversive or terrorist act in the meaning of the current Legislative Decree is any offence directed at state security, territorial integrity, the stability and normal functioning of institutions through any action whose purpose is to:
>
> (a) sow terror in the population and create a climate of insecurity by causing harm to persons or placing their lives, liberty or security in danger, or causing harm to their property;
>
> (b) obstruct traffic or freedom of movement in public thoroughfares and places;
>
> (c) cause harm to the environment, means of communication or transport, public or private property, seize possession of these or occupy them unduly, desecrate burial places or attack the symbols of the Republic;
>
> (d) obstruct the actions of the public authorities or the free exercise of worship and of public freedoms, or the functioning of establishments that form part of public services;
>
> (e) obstruct the functioning of public institutions or harm the life or property of their agents, or impede the application of laws or regulations.

[473] Thus a "terrorist or subversive" act could include a wide range of non-violent actions, including public speeches, sermons in Mosques, and associations between individuals and between groups.

[474] Article 2 includes as part of the definition of "subversive or terrorist" act all the offences that are defined by the subsequent articles. Article 3 includes association with "subversive or terrorist" groups; Article 4 prohibits praise or encouragement of any of the Article 1 offences;[97] and Article 5 makes it an offence to reproduce or distribute documents, publications or recordings that endorse Article 1 acts.

[475] The vague wording of these relevant provisions not only gives little or no advance notice of what conduct is prohibited but also allows for a wide and equally vague interpretation and application by both prosecutors and the courts. Further, it is difficult to reconcile these provisions with the rights to freedom of expression and association as enshrined under Articles 19 and 22 of the ICCPR.

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[97] The Decree contains no definition of what praise or encouragement might mean, provoking one commentator to note that it could include news coverage, commentary or sermons critical of the government (Human Rights Watch *Human Rights Abuses in Algeria: No One is Spared,* p. 26)

Pre-trial abuses

[476] These were such that many Algerian lawyers refused to appear before the Special Courts in protest. In general terms, the most significant pre-trial abuses included:

(a) the *in communicado* detention of suspects for up to 12 days, although there are reliable accounts of the period exceeding that and lasting up to several weeks or even months;

(b) the widespread use of torture during the period of detention to extract confessions which became the sole or the main evidence against an accused in the subsequent trial;

(c) defence counsel being regularly denied access to an accused until after an examination by the Investigating magistrate;

(d) the complete failure by the Magistrate or any other state official to investigate allegations of torture;

(e) the prosecution rarely, if ever, disclosing to defence counsel the case against the accused – at best counsel would be given a copy of an accused's confession. Adjournments were not granted, nor was the defence given an opportunity to call witnesses.

The trial process

[477] The trial process too was drastically compromised by a series of abuses:

(a) hearings were not public and judges were appointed anonymously, thus preventing any public oversight;

(b) there was no right of appeal from a conviction but only a limited right of review to the Supreme Court on grounds of procedural error, the Supreme Court almost never upholding the review grounds;

(c) trials featuring multiple accused were completed within days. (In this regard it is to be noted that speedy trials was one of the primary purposes for the introduction of Decree 02-03.)

In absentia convictions

[478] Convictions and sentences were routinely entered *in absentia*, including the majority of those sentenced to death. This is illustrated by the rather stark figures that exist for the relevant time: between February 1993 and June 1994, 10,194 people were tried by three Special Courts. Of these, 1127 were sentenced to death (964 *in absentia*, including the appellant) and 6507 to terms of imprisonment (including life). 2500 were acquitted. Before executions were suspended by moratorium at the end of 1993, 26 people had been executed.[98]

[479] Article 14 of the ICCPR (being one of the provisions from which the Algerian government did not derogate at the time the state of emergency was announced) provides:

> 1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law…
> 2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
> 3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
>
> a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
>
> b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
>
> c) to be tried without undue delay;
>
> d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing;
>
> e) to be informed, if he does not have legal assistance, of this right;
>
> f) to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
>
> g) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> h) to have the free assistance of an interpreter if he cannot understand or speak the language used in court;
>
> i) not to be compelled to testify against himself or to confess guilt.
>
> …

[98] In its January 1994 report, Human Rights Watch noted that the Algerian Supreme Court had not set aside a single Special Court conviction by that time, p. 32. See further Amnesty International *Algeria: Repression and violence must end* (28 August 1994)

[480] Clearly the procedures before the Special Courts breached Article 14 in a significant and material way – in particular, the right of an accused to a fair and public hearing by a competent, independent and impartial tribunal (Article 14(1)).

[481] It is also clear that the Special Court routinely relied on admissions obtained under torture, in effect condoning the use of torture which is itself specifically prohibited under Article 7 of the ICCPR.

[482] Further, under the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (the Torture Convention), to which Algeria is a signatory, the state has an obligation to investigate allegations of torture (Article 13) and to ensure that statements made as a result of torture are not invoked as evidence against their maker (Article 15).

[483] As Amnesty International concluded in its 28 August 1994 report:

> The consistent failure of the judiciary in the Special Courts at all levels to ensure that the rights of defendants under national and international law are respected at all stages of proceedings, their failure to investigate serious allegations of human rights violations and breaches of procedures committed by the security forces, and their willingness to accept as evidence confessions allegedly extracted under torture and police statements fraught with irregularities, seriously calls into question their independence and impartiality. In particular, the participation of judges in Special Courts which do not use regular procedures is inconsistent with their obligations of independence and impartiality. (at page 16)

[484] Turning now specifically to the 1993 trial at which the appellant was convicted and sentenced *in absentia*, we find it breached his rights guaranteed by Article 14(1), (3)(a) and (3)(d). The only glimpse we have of the trial is an article from the Algerian state-owned *El Moudjahid* newspaper of 28 July 1993. 13 people were tried, five *in absentia*, including the appellant. The report of the case makes no mention of any evidence at all against the appellant and three of the others sentenced *in absentia*. Whatever evidence was used to convict them was seemingly deemed unnewsworthy by the writer of the *El Moudjahid* article. The article does, however, refer to a confession from one accused who was injured when being arrested and too unwell to attend the trial. This confession seems central to the prosecution case. That accused was sentenced to death. Others accused sought to withdraw their confessions at trial, but all were convicted, save one.

[485] Finally, we note the affidavit evidence of Mohamed-Larbi Zitout, the Algerian Deputy Ambassador in Tripoli until August 1995 when he defected to the United Kingdom where he was granted refugee status. As part of the Algerian

regime until that time, he is well-placed to comment. It is his evidence that the framework for the Special Courts was taken directly from the French Special Courts set up under Nazi occupation. As to the charges of which the appellant was convicted – of creating and belonging to a terrorist group – Mr Zitout views them as "baseless".[99]

1996 and 1997 Convictions and the Military Courts

[486] According to a communiqué from Interpol Algeria to Interpol Wellington dated 21 January 2003, the appellant was convicted of three offences in the 1996-1997 period. These are:

1. Criminal conviction no. 89/96 dated 26 May 1996 "for establishing a terrorist organisation to destabilise state institutions and terrorise the population". No sentence is noted in the communiqué.
2. Criminal conviction no. 263/96 dated 12 December 1996 "for acts of aggression to destabilise state institutions and inciting armed rebellion to carry out assassinations and destroy property" for which he was sentenced to life imprisonment.
3. Criminal conviction no. 173/1997 dated 2 February 1997 "for plotting against the state, criminal conspiracy, inciting armed rebellion and assassinations, destruction of property" for which he was also sentenced to life imprisonment.

[487] The appellant was unaware of these or any convictions and sentences until he learnt of them in a telephone call from Algeria in mid-1999. On that occasion he was advised that he had received six life sentences.

[488] The Authority has found no country material to corroborate any of the convictions or sentences. The appellant was unable to produce any information himself as he and his family had no knowledge of them. They received no notice prior to any trial, no notice of the trial itself, and no notice of the subsequent penalties that appear to have been imposed. Notwithstanding this, we have no reason to doubt the advice received by the appellant that he faces six sentences of life imprisonment.

[489] Not included in any communiqué from Interpol Algeria to Interpol Wellington (at least not any communiqué of which the Authority is aware) is any reference to

[99] Affidavit of Mohamed-Larbi Zitout sworn on 3 July 2003 in support of this appeal

the conviction and death sentence imposed by the Algerian courts against the appellant in November 1997. The appellant became aware of this conviction from newspaper reports published at the time in Switzerland. One article obtained by the RSB (at page 696 of the file) is from Arabic News.com and appears to be a summary of various news reports. This article is entitled "*Algeria sentences 20 terrorists to death*" and is dated 25 November 1997.[100] It notes that an Algerian court (which is not specified) "condemned 20 radical Islamist leaders to death *in absentia* for smuggling weapons from Europe to supply militant groups in Algeria". The article goes on to report that the 20 were also convicted of "belonging to armed groups". Citing from *Le Matin*, the Algerian daily newspaper, the article notes that among the 20 were Anwar Haddam and the appellant. Prior to reading it in the newspaper, the appellant was totally unaware of the charge against him.

Legal process after abolition of the Special Courts

[490] With the abolition of the Special Courts in February 1995, jurisdiction for crimes proscribed by the anti-terrorist laws of 1992 was transferred to the Military Courts. Like the Special Courts, the Military Courts have been the subject of extensive condemnation due to their flagrant breaches of due process.

[491] A succinct, albeit damning, summary of the Algerian justice system as it operated at that time is provided by Dr Larbi Sadiki from the Centre for Middle-Eastern and Central-Asian Studies at the Australian National University.[101] Dr Sadiki's comments are worth setting out in some detail:

> Following the abolition of the Special Courts in 1995, the Military Courts have continued in their expanded capacity in trying non-military personnel. The continuing conflict between the government and the rebels has had an especially adverse affect on the judicial system. In the context of the war, the Courts do not serve as a place of impartial judgement or justice, but rather as another means by which the Islamist rebels, and other political opponents of the regime, can be persecuted. In Algeria, the letter, or theory, of the law set down in the Constitution or CPP [Code of Penal Procedure], and the practice of the law within the Courts and by the Authorities are two distinctly different things. As a result, the Algerian processes of the Algerian judicial system cannot be understood through its written framework, but rather through its practice and the abuses against its written framework.
>
> According to the Constitution and the CPP, defendants are presumed innocent until proven guilty, and they have the right to confront their accusers and appeal their convictions. Furthermore, trials are to be public and the defendants have the

[100] At www.arabicnews.com

[101] "Courts sentencing *in absentia*" in Sadiki, L. *Algeria: Conscription; Exit procedures, passports, national identity cards;* Courts – sentencing *in absentia* (October 1997) *Centre for Middle Eastern and Central Asian Studies*, ANU (CISNET CX26071)

right to legal counsel. The judiciary is to be independent of the Executive and, therefore, in no way influenced by political consideration.

In practice, however, the Algerian legal system differs greatly from the framework set out for it. For instance:

- The Executive in Algeria influences widespread influence on the judiciary and on judicial procedures. Particularly understood is the regime's wish for a "hard-line" against those suspected of being Islamists and against other opponents – exemplified through the large number of death penalties which are handed down each year.
- A large number of cases do not make it to trial – many are in prison for long periods without trial; many are held for excessive periods pending trial, often without having charges laid against them, with no outside contact and with no information given out by the authorities as to the prisoner's location or condition; substantial numbers of civilians, opponents to the regime, and Islamists are killed extra-judicially by the Security Forces or by the government-backed militias, often in highly suspicious circumstances.
- Of those cases that make it before the Courts, very often defendant's rights are violated (prosecution's refusal to share information it has used against the accused; widespread torture to obtain confessions; refusal by lawyers to accept "security" related cases for fear of retaliation by the security forces; harassment, death threats and arrest of defence lawyers).

In effect, with routine subversion of codified trial procedure, the Algerian legal system serves more as a rubber stamp of the regime than a legitimate independent body entrusted with dispensing impartial justice.

[492] Commenting specifically on *in absentia* convictions, Dr Sadiki notes:

> *In absentia* convictions are commonplace within Algeria's legal system. Most attention is focused by international and state human rights organisations on the numbers of *in absentia* convictions that have resulted in the death penalty. For instance, Amnesty International's Report on Algeria for 1997 states that, according to official figures, of the 336 death sentences handed down in 1995, 277 were made *in absentia*…
>
> Most crimes considered *in absentia* deal with issues of security, and acts of "subversion and terrorism"… In practice, the processes by which Algeria's legal system/courts operate have been undermined by political considerations, a *modus operandi* complicated and aggravated by the conflict against the Islamist rebels and by the regime's pursuit of legitimacy and control. In cases *in absentia*, decisions are made arbitrarily, with little regard for any due process, and the affected individual is rarely informed… The trials are highly political, often with military courts hearing no defence on behalf of the absentee. Over the five past years, the practice has been to give these trials wide media coverage, the aim of which is to drum up public hysteria over those labelled as "agents provocateurs" or "foreign agents" and "terrorists". Accordingly, for those who get eventually caught, no mechanisms of appeal exist for redress of the harsh courts' decisions. Decisions by martial courts are final and no retrial by civil courts is allowed.
>
> The arbitrariness for those affected by the military courts' decisions reside in the fact that not only do they get to be tried harshly and unjustly, sometimes for alleged crimes that are exaggerated because of the political atmosphere in the country, but [they] also get to have their names and sometimes pictures widely publicised in the state-owned print and electmic [sic] media. This is, unfortunately, how many affected persons get to find out about their cases.

[493] Such an account, particularly the lack of notification to accused persons, corroborates the appellant's account. Dr Sadiki's comments are endorsed by a

range of organisations and bodies as diverse as the US State Department,[102] the FIDH, and Amnesty International.[103]

[494] The Algerian judicial system is further roundly condemned by Dr Abbas Aroua in his report to the Authority, who comments that the system is "another instrument controlled and used by the Algerian Junta in the repression of all forms of political opposition".[104]

Timing of the Algerian convictions

[495] To recap, since the appellant left Algeria he has faced at least four different proceedings from which convictions have been entered. The timing of these is too coincidental to ignore:

(a) the 26 May 1996 conviction was entered after the Foreigners' Consultative Committee found that there were no grounds to deport the appellant;

(b) the 12 December 1996 conviction was entered shortly after the appellant was released from prison in Belgium;

(c) the 2 February 1997 conviction was entered while the Belgian authorities were looking for other countries which might accept the appellant;

(d) the arrest warrant issued for the appellant in March 1997 came just days after the publication of the 'Call of the 40' document which was a call to redefine the FIS in exile;

(e) the conviction entered *in absentia* on this warrant was entered in late November 1997, a short time after the appellant arrived in Switzerland; and

(f) the most recent arrest warrant was issued in November 2001, in the post-September 11 climate and appears to have laid the groundwork for an approach to the Malaysian authorities to extradite the appellant.

[496] We tend to the view that the laying of these charges is part of a well-orchestrated campaign by the Algerian regime to discredit the appellant and other FIS leaders in exile and to place further pressure on those governments who allow them to reside in their countries. In this regard we note the speed with which

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[102] By way of example see US Department of State Country *Reports on Human Rights Practices for 1993: Algeria*, and Reports from subsequent years

[103] See in particular Amnesty International *Algeria: Truth and justice obscured by the shadow of impunity* (2 November 2000); and Amnesty International *Algeria:* "*Disappearances*"*: the wall of silence begins to crumble* (1 March 1999)

[104] Report July 2003 by Dr Abbas Aroua, at p. 4

Interpol Algeria responded to Interpol Wellington's request – not only with reference to the arrest warrant but with evidence of his "convictions".

CONCLUSION ON THE APPELLANT'S ALGERIAN CONVICTIONS

[497] We have reached the conclusion that it would be unsafe to rely on the appellant's Algerian convictions as evidence of his involvement in any acts of terrorism. In reaching this conclusion we have taken into account the following:

(a) the vague nature of the offences charged;

(b) the failure to notify the appellant of the charges against him;

(c) the failure to defer any trial and determination of guilt until he was present;

(d) the failure to notify him once the conviction was entered;

(e) the reliance by the courts on evidence obtained under torture;

(f) the lack of a transparent process of appointment of judges independent of the Executive;

(g) the overt political interference in the judicial process; and

(h) the timing of the convictions entered against the appellant.

[498] We are reinforced in our conclusions when regard is had to the fact that State parties (including France) have consistently refused to extradite individuals back to Algeria to stand trial, despite repeated requests by the Algerian government. In this regard, we note that the Algerian government sought to extradite both Rabah Kebir and Oussama Madani (one of Abbassi Madani's sons) to stand trial for the Algiers airport bombing of which they were convicted *in absentia* in 1993.[105] Given that neither man was extradited, it is clear that the German Supreme Court which is the final arbiter, refused the request.

[499] The Algerian government has at least twice demanded the extradition of Dr Mourad Dhina from Switzerland – in late 2001 and again in October 2002 – not surprisingly after his election as head of the FIS Temporary Executive Council.

[105] "Noose tightens around Algeria's exiled fundamentalists" *Associated Press* (19 June 1993) http://www.nexis.com

Dhina was sentenced *in absentia* to 20 years imprisonment in 1997 for criminal offences. In the preceding year an international warrant was issued for his arrest.

[500] Despite the Algerian government's forceful and public demands, the Swiss government has consistently refused to extradite Mourad Dhina.[106] In general terms, Switzerland "has never extradited an Algerian Islamist".[107]

[501] In considering Anwar Haddam's refugee claim, the United States Board of Immigration Appeals (BIA) referred to a United States Department of State advisory opinion prepared in January 1997. That opinion "states that the Algerian government has provided no evidence to support the allegations in the warrant it has issued for Mr Haddam's arrest and imprisonment". While it is not immediately clear from the text of this decision what allegations were made in the warrant issued by the Algerian government in respect of Anwar Haddam, this statement simply confirms that, as with the appellant and other FIS leaders, Anwar Haddam was also the subject of unsuccessful efforts by the Algerian government to have him extradited.[108]

[502] We therefore find that the appellant's convictions in Algeria do not provide us with serious reasons for considering that he has committed Article 1F crimes such that he is excluded from the protection of the Refugee Convention.

The Failure of Dialogue - 1994-1995

[503] In our discussion of the decision of the Belgian CPRR and the Belgian trial, we will analyse in some detail a number of news reports concerning the appellant and find that, in all probability, these were generated by the Algerian military security in order to discredit the appellant and other FIS leaders. Understanding of this discussion, as well as certain of our conclusions concerning the appellant's Belgian convictions, will be assisted by consideration of political developments in Algeria in the year prior to the appellant's arrest in March 1995.

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[106] "Algeria delivers protest over Swiss-based FIS leader" *Agence France Presse* (9 October 2002) http://www.nexis.com; "Algeria protests to Swiss authorities over FIS meeting in Geneva" *BBC Worldwide Monitoring* (9 October 2002) http:/www.nexis.com; and see Second Affidavit of Dr Mourad Dhina sworn on 24 June 2003

[107] "Switzerland refused Algerian request to extradite newly-elected FIS leader" *BBC Monitoring International Reports* (12 October 2002) http://www.nexis.com

[108] *In re Anwar Haddam* Board of Immigration Appeals (20 November 2000) File A22 751 813

[504] Summarising Willis, Liamine Zeroual's elevation from Defence Minister to the Presidency in February 1994 marked the beginning of a series of initiatives throughout the following year to institute dialogue involving all political forces, including the FIS, with a view to finding a political solution to the crisis.

[505] Approaches were made to the FIS's imprisoned leadership and there was cautious optimism that an agreement might be imminent. However, by the end of March 1994, the initiative had collapsed in mutual recrimination. Not only was it a set back for Zeroual's political strategy but, as Willis explains, it exposed serious rifts within the regime and amongst its supporters:

> *El Watan*, a daily newspaper highly critical of Islamism and firmly opposed to dialogue with the FIS, argued on 1 March that the release of Ali Djeddi and Adbelkader Boukhamkham had struck a hard blow at the morale of "troops and other Algerians who believe in democracy in this country". Opposition to Zeroual's initiative also came from more weighty sources within the regime itself. … it was strongly suspected that important elements within the military were similarly hostile to discussions with *any* Islamists.
>
> Secret meetings of army chiefs held in mid-March 1994 saw the growing strength of a dissident pole within the military, led by Mohammed Lamari, the Chief of Staff, which believed that the only solution to the Islamist threat to the regime was eradication, as opposed to the conciliation proposed by Zeroual and his supporters. Lamari's stance also had powerful allies within the civilian administration including Redha Malek, the Prime Minister (who had replaced Belaid Abdessalem in August 1993) and Selim Saadi, the Interior Minister, both known for their hardline anti-Islamist views.[109]

[506] Opposition to any idea of a negotiated settlement came not just from regime hard-liners but also from the GIA.

> The most vehement Islamist opposition to the idea of dialogue with the government came from the GIA. From its creation the GIA had never hidden its total hostility to any means other than armed Jihad to achieve the goal of an Islamic state. The opening of its campaign of assassinations against intellectuals and members of the CCN in the Spring of 1993 coincided with the beginning of the HCE's first real attempts at multi-party dialogue and was clearly designed to halt this process.[110]

[507] The enhanced prestige of the GIA following the collapse of Zeroual's February 1994 initiative saw the defection of some FIS leaders to the GIA. The creation of the AIS, in turn, represented an attempt by leaders of armed groups loyal to the FIS leadership to counteract the challenge of the GIA and its capacity to threaten the credibility of any commitment the FIS might make in negotiations with the regime. The GIA responded with renewed attacks on foreigners and increasingly extreme violence against the ordinary population.

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[109] Willis, *supra*, p. 321
[110] *Ibid*, p. 323

[508] After a reshuffle of government and military posts, Zeroual launched a new dialogue initiative in August 1994, building on earlier approaches from FIS leaders, Abbassi and Belhadj, in letters written from prison.

> That the letters contained moderate and clearly serious proposals that did not fundamentally conflict with conditions set out by Zeroual for parties wishing to participate in elections encouraged the President and the conciliators in the regime.[111]

[509] In a gesture of goodwill Abbassi and Belhadj were moved to house arrest in September 1994 and three other detained senior FIS leaders released. The releases served to galvanise the opposition of the 'eradicator' faction and its allies, as well as the opposition of the GIA which remained implacably opposed to the idea of negotiation.

> On 14 September, the day after the releases, the GIA condemned all compromise with the "apostate regime" and restated their established credo of "Neither reconciliation, nor truce, nor dialogue". As a more tangible indication of the GIA's attitude towards events, Islamist violence demonstrably increased in the aftermath of the releases, culminating in the detonation of a car bomb in Algiers on 12 October as dialogue began.[112]

[510] Inevitably the violence played into the hands of the 'eradicator' faction. Indeed, Roberts notes the strong correlation between escalating violence and any proposal for negotiations during this period.

> It was at this point that an abrupt escalation of the violence occurred such that it proved impossible for Abbassi to consult, even indirectly, with leaders of the armed rebellion disposed to consider a settlement and the whole process ground to a halt. This escalation began *immediately* on 13 September and within a week it was clear that the deal which had seemed so close was in terrible trouble, with prominent "eradicators" speaking out against it and previous supporters of the talks slipping off the "dialogue" bandwagon.[113]

[511] Roberts also comments on the peculiar character of the violence.

> Five people had been beheaded on the night of 8-9 September, the first reported beheading since the violence began, but on the night of 13-14 September no fewer than 16 civilians were beheaded in eastern, central and western Algeria, certainly a co-ordinated affair and the most spectacular of several incidents which poisoned the atmosphere and sabotaged the dialogue.[114]

[512] After several meetings between the FIS leaders and government representatives during September and October 1994, the dialogue collapsed in another round of mutual recrimination. A major source of disagreement was the long-standing demand of the FIS senior leaders that they be able to consult widely

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[111] *Ibid,* p. 334
[112] *Ibid,* p. 336
[113] Roberts, *supra*, p. 328
[114] *Ibid,* p. 343

within a reunited FIS leadership, including consultation with the leaders of armed groups.

[513] The collapse of Zeroual's second attempt at a negotiated settlement of the conflict was a blow to his own credibility. In response he reverted to the familiar discourse of redoubling the "fight against terrorism" and announced his intention to hold Presidential elections in 1995 in an endeavour to bolster his own standing.

[514] According to Willis, hard-liners utilised Zeroual's failure to strengthen their own position, and the promotion of Chief of Staff Mohammed Lamari to the rank of Lieutenant General saw the reinvigoration of the military campaign against the armed groups. The level of violence escalated sharply from November 1994 onwards.

[515] At this stage the initiative for a national dialogue moved to the political parties who, in November 1994, met for the first of the Rome conferences sponsored by the Sant'Egidio Community. Invitations went to all the main political parties and the Algerian government who refused to attend, along with the fiercely anti-FIS RCD and Ettaharddi (the former Communist Party). The final agreement, *A Platform for a Peaceful Political Solution of the Algerian crisis,* which emerged after five days of discussions, was signed on 13 January 1995 by seven of the Algerian political parties (representing some 80% of the votes cast in the 1992 legislative elections)[115] and also the leader of the Algerian League for the Defence of Human Rights (LADDH). The appellant's role, as representative of the FIS, in the preliminary discussions leading to the Rome conference is discussed in his account at paragraphs 159-163 and 165-170.

[516] The signatories to the Rome Platform committed their political parties to the "rejection of violence as a means of exceeding to or maintaining power" and acceptance of *inter alia* "political pluralism", the "alternation of power through universal suffrage", the guarantee of "fundamental liberties, individual and collective, irrespective of race, sex, religion or language" and "freedom of and respect for confessions of faith".[116]

[517] The Platform was widely considered to provide a constructive basis for a resolution of the political crises. It met, however, with immediate condemnation from the regime, which condemned the Rome conferences as "interference in

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115 *Ibid,* p.174
116 *Ibid*, p. 173

internal Algerian affairs".[117] The 'eradicator' press also unleashed a vitriolic campaign against the Rome Platform, *El Watan* characterising it as "a blank cheque for the FIS"[118] and *Le Matin* denouncing the two FIS representatives Rabah Kebir and Anwar Haddam as members of the GIA and terrorists:

> …Rabah Kebir and Lounici are full members of the GIA. They were planning an attack on the Algerian Embassy in Paris in August 1993. Moreover, they are preparing along with Oussama Madani, an alliance with the Shi'ite movements in Iran and with Hezb-e-Islami of the Afghan Hekmatyar.[119]

And also

> Yesterday, while Ahmed Ben Bella was warmly embracing Anouar Haddam, a member of the caliphate of the GIA, at Rome, under the benevolent gaze of the Catholic Church representatives, several of whose members have been assassinated by the men of the same Anwar Haddam in Algeria, a seven-year-old child had his throat cut in Tazoult in the Wilaya of Batna.[120]

[518] Reports also circulated of the appellant's role in the Rome Platform as the "GIA European Representative". [121]

[519] On the defensive, the regime sharpened its attacks on the FIS leadership in exile, renewing accusations that they were behind the killing in Algeria and organising arms trafficking from Europe. Foreign governments were exhorted to take action against FIS personalities living in their jurisdiction.[122]

THE DECISION OF THE BELGIAN PERMANENT COMMISSION FOR REFUGEE APPEALS – CPRR – 18 MAY 1995

[520] The *Commission Permanente de Recours des Réfugiés* (CPRR), in its decision of 18 May 1995, rejected the appellant's refugee appeal on the grounds that he was excluded from the protection of the Refugee Convention pursuant to Article 1F. It is necessary to analyse this decision in some detail, to explain why we decline to follow its reasoning.

[521] The appellant also filed a second refugee claim on 18 April 1996 based on his claims of having received a death threat from the GIA. This was considered by

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[117] Willis, *supra* p. 342
[118] *Ibid,* p. 343
[119] *Le Matin* (18-19 November 1994) quoted in Latif "The Media Commandos in Algeria", in *An Inquiry into the Algerian Massacres*, *supra*, p. 660
[120] *Ibid*, p. 656
[121] "Urgent" *Agence France Presse* (18 January 1995)
[122] *Latif*, *ibid*, pp. 660-1 and *Al Hayat* Issue No. 31160 (24 November 1994) (appellant's documents No. 117), Issue No. 41160 (25 November 1994) (appellant's documents – unnumbered) and Issue No. 11614 (5 December 1994) (appellant's documents No. 119)

the Belgian Commissioner for Refugees and Stateless Persons and declined in June 1996. The decision does not require independent analysis as it essentially reproduced the findings of the CPRR.

[522] At the time of the CPRR's decision, the appellant was in custody awaiting trial on charges of being a member of a criminal group and associated offences. For unknown reasons the CPRR chose to determine his refugee appeal before rather than after the criminal trial. The three page decision, which consists largely of the procedural and factual background and a legal analysis of Article 1F, commenced by noting the criminal charges against the appellant and the report prepared by the Gendarmerie Special Branch (BSR) dated 6 April 1995:

> …which mentions the applicant's contacts with leading members in the GIA, notwithstanding the lack of convincing evidence as to his membership of this group.

[523] The decision goes on to state:

> …that as far as the Applicant is concerned, it notes on the one hand, that there are indications that he was, notwithstanding his denials, directly involved in acts outlined above;
>
> that it notes in this sense, apart from the condemnation mentioned above by the High Court of Algeria, journalistic evidence describing the Applicant as organiser of a resistance movement in the Medea region and the author of a sermon in which he promised death and imprisonment to all communist and Algerian democrats if the FIS won in the second round of the legislative elections (ref. *El Watan*, fax copy included in the file).

[524] The appellant's presentation of himself "as a humanist and pacifist" and denials of involvement with the GIA are then noted along with his claim to support, in contrast to the GIA, the concept of national dialogue according to the Rome Platform. However, in the opinion of the CPRR:

> …the question of the applicant's membership of the GIA is of secondary importance;
>
> > that in fact all informed observers are agreed in considering that the borders between this group and the FIS are often blurred, both movements using violence and sheltering in reality nebulous groupings of a variety of allegiances;
> >
> > that an indicator of this ambiguity may be perceived in the fact that the applicant and other leaders of the FIS have been included in the caliphate governing ministry that the GIA intends to set up;
> >
> > that another such indicator is supplied by concurrent communiqués of the FIS and the GIA calling for the Applicant's liberation;
>
> Considering that, on the other hand, the committee attaches a determining nature to the Applicant's senior responsibilities within the FIS:
>
> > that it recognises that this organisation which constitutes the main Islamic fringe movement has, principally, via its own branch, the Armée Islamique du Salut, opted for violent actions whose goals and

> procedures even in Algeria do not differ from any real degree from those of the GIA and other various small armed groups claiming to be in the same movement;
>
> that these groups organised and claim attacks, murders and other crimes carried out on a wide scale.

[525] The CPRR concluded that there were indications that the appellant, notwithstanding his denials, was directly involved in crimes against humanity or serious crimes against the common law. Further, the CPRR considered that the appellant's important position in the FIS gave rise to his responsibility for acts that were carried out in the name of that organisation whatever his direct implication in any specific act.

[526] We turn now to discuss the evidence relied on by the CPRR. First there is the BSR report dated 6 April 1995. This brief, one and a half page report noted that the appellant had "been watched and followed, leading to his links with the GIA in Belgium and Germany". It then lists six matters as evidence for the appellant belonging to the GIA about which the report is fairly conclusive.

[527] The first point is that the appellant agreed that some amongst his co-defendants were members of the GIA – obviously a reference to the appellant telling the police that he believed two of the accused were indeed members of the GIA, (see paragraph 179). This is hardly evidence of his own involvement in that organisation given the appellant's evidence that the radical pro-GIA stance of these two individuals was well known in the Algerian émigré community in Brussels.

[528] Four of the remaining points concern extremist literature and GIA and FIDA communiqués allegedly found at the appellant's house, Koranic citations, allegedly written by the appellant, which had been sent to the GIA magazine *Al Ansar*, and the fact that when stopped at the Swiss border in 1994 the appellant had in his possession a document issued by the GIA listing its emirs and their assigned territories in Algeria. If these allegations are true (and they are all denied by the appellant who also said he was never shown the BSR report), they are highly prejudicial evidence against him.

[529] It is striking therefore that in neither the judgment of the County Court of Brussels (which acquitted the appellant) or that of the 14th Chamber of the Court of Appeal (which convicted him) was there mention of any of these highly prejudicial matters, although both judgments itemise the evidence against the appellant. It is not plausible that such prejudicial matters would have been overlooked by both courts, and in particular the Court of Appeal which overturned the appellant's

acquittal. We conclude that the allegations in the BSR report are misleading and/or inaccurate.

[530] As well as the BSR report, the CPRR also relied on five additional matters:

(a) The appellant was convicted in the High Court in Algeria;

(b) The appellant, in a sermon during the electoral campaign, promised death and imprisonment to all communist and Algerian democrats if the FIS won the second round of the legislative elections – the *El Watan* article;

(c) Journalistic evidence describing the appellant as the organiser of a resistance movement in Medea;

(d) The appellant was included as a member of the GIA Caliphate;

(e) A communiqué from the GIA (in addition to one also received from the FIS) called for the appellant's release from custody.

The appellant's Algerian conviction

[531] Starting with the appellant's Algerian conviction, we have already set out in paragraphs 469-502 the reasons for our finding the July 1993 convictions, after a trial *in absentia,* to be unsafe. The CPRR's superficial treatment of these convictions is difficult to explain when considered alongside the extensive international condemnation of the abuses of the Special Courts.

[532] It is worth noting that the CPRR had before it an account of the appellant's conviction which appeared in the Algerian state owned newspaper *El Moujahid* on 28 July 1993 (a copy of which is in the material provided to the RSAA by the CPRR). Curiously, although the article records in some detail the evidence concerning the alleged activities of certain of the accused and their relationship to each other, there was no mention at all of the appellant, his role in the alleged terrorist acts or his links to any other of the 12 co-defendants. Yet, unlike most of the other accused who appeared at the trial, the appellant and the other four accused tried *in absentia*, received the death sentence. There is no sign the CPRR questioned the peculiarity of this or entertained any other misgivings about the appellant's convictions.

The El Watan article

[533] This is an intriguing document. It was included in the material provided to the RSAA by the CPRR. The document is not a photocopy of a newspaper article as such in that its layout is not that of a newspaper page. The document is written in French and consists of two typed A4 pages bearing the title Ahmed Zaoui/*Chef du GIA en Europe*. The printed name Lyè S Abdelmalek appears at the end followed by the hand-written words *El Watan*.

[534] *El Watan* is an Algerian French language paper. It has consistently espoused the 'eradicator' line[123] and, according to Professor Joffé, the writing of certain *El Watan* journalists such as Salima Tlemcani indicates excellent contacts in the security forces.

[535] The document is a copy of a fax bearing a fax address across the top, namely:

> From: JOURNAL EL WATAN PHONE no.: 213 2 66 90 45 Mar. 04 1995 6:47 PM

[536] In response to our enquiry as to where it obtained this document, the CPRR advised that it was on the file received from the General Commission for Refugees and Stateless Persons (CGRA) and that its origin was unknown. An inquiry addressed to the CGRA resulted in the reply that the CGRA had no copy of this document on its file so that it could not be certain it had ever received the *El Watan* article or forwarded it to the CPRR.

[537] As certain claims in the BSR reports which formed part of the prosecution case against the appellant match the *El Watan* claims, it seems likely that the BSR provided the copy of the *EL Watan* document to the CPRR or the CGRA. However, an article which appeared in *Le Soir* on 6 March 1995 reproduced part of the *El Watan* material.[124] The journalist responsible, Alain Guillaume refers to "two journalists from the Algerian media whom we contacted yesterday" so it is possible that it was Guillaume who was the first recipient of the *El Watan* fax which he then handed on to the BSR.

[538] The *El Watan* article consists of a potted biography of the appellant covering his early education, his appointment to a teaching position and as Imam at the new Ain Benian mosque, his nomination as an FIS electoral candidate and his unexpected electoral success, his clandestine activities post-January 1992 and

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[123] See para 505

[124] "Le Chef du GIA en Europe parmites islamistes arêtes", *Le Soir en ligre* (6 March 1995) http:\\doc.lesoir.be

his subsequent death sentence and flight abroad. It portrays the appellant as a fervent Islamic extremist, an important leader of armed groups in Algeria during 1992-1993, and involved in the international Islamist movement through his contact and visits to Saudi Arabia and an important GIA leader:

> During his electoral campaign he held a rally on the square in front of the Grande-Poste right in the heart of Algiers and in front of the gathered crowd he promised death and imprisonment to all Algerian communists and democrats if the FIS were to win the second round of the ballot. After the elections were annulled the young preacher went into such depths of secrecy so as not to give any sign of being alive even to his family. In several months he manages to raise an underground group in the Media region which he knew well.
>
> Several armed elements arrested by the security services acknowledged his leadership over the entire region. This caused a search warrant and death penalty to be issued against him in his absence by the Special Court in Algiers in August 1992. Sensing the danger he left the country to set himself up in the first instance in Saudi Arabia in order to win over his numerous acquaintances to the jihad of the FIS. At the beginning of 1994 the Imam of Ain Benian was reported to be in Belgium where he was regularly domiciled whilst continuing to make frequent journeys to Mecca. In the summer of this same year his name figured close to that of Anouar Haddam as minister of the Caliphate, ordered by the Armed Islamic Group (GIA), the most violent faction of the Algerian Islamic rebel movement.

[539] The appellant claims that he was not shown the *El Watan* article by the CPRR or given the opportunity to comment on it – like other prejudicial documents such as the BSR report. His claim is corroborated by the complete absence from the CPRR decision of any reference to what was before us – the appellant's immediate, insightful, and compelling criticisms of the article.

[540] In summary, the appellant contends that the claims in the *El Watan* article are obvious fabrications aimed at smearing him in the eyes of the Belgian authorities. He points out that it is inconceivable that, in the course of a December 1992 election rally held in the square outside the Central Post Office "right in the heart of Algiers" – and, as he points out, some 200 metres from Government House – he could have, as alleged, "promised death and imprisonment to all Algerian communists and democrats if the FIS were to win the second round of the ballot" and *not* have been arrested and imprisoned. We agree.

[541] The crackdown on the FIS commenced from the time of the May-June 1991 demonstrations and official harassment and intimidation of the FIS continued unabated thereafter. Senior leaders Abbassi and Belhadj were arrested in June 1991 and charged before a military tribunal in Blida with, amongst other things, organising a rebellion, obstructing the economy and incitement to armed violence against the state. Six other senior leaders were arrested around the same time. Abdelkader Hachani, who stood in for the leadership, was himself arrested in

September 1991. Additionally, the FIS's two main newspapers were banned between August and November 1991.[125]

[542] In such a hostile climate, when, in the words of the appellant, "the government was just waiting to jump on you", the appellant's arrest and imprisonment for subversion would have been assured if the *El Watan* allegations were true. At the very least, the appellant could have expected to have been targeted in the immediate post-coup period. Instead, at a time when literally thousands of FIS members, including his own father, were being rounded-up and detained in the desert, the appellant, in February 1992, was merely arrested and released the following day. A conviction and sentence of three months' imprisonment entered in March 1993 was subsequently overturned on appeal after personal representations to the Minister of Justice and the state prosecutor.

[543] This record strongly suggests that, in this period at least, the appellant was not seen as having any significant profile by the regime nor was he perceived as a troublemaker. This is consistent with the appellant's claims to have always been a political moderate.

[544] That the appellant had a reputation as a political moderate is also reinforced by the fact that, as the *El Watan* article acknowledges, his electoral success occurred in an FFS (Socialist Forces Front) stronghold. The secular FFS, led by Ait Ahmed, had its powerbase in the Kabyle Berbers who generally opposed the government's (and the FIS's) policy of Arabisation.[126] That the appellant trounced the FFS (42% of the vote compared to the FFS's 28%) in what *El Watan* described as "an impregnable bastion of the Socialist Forces Front" is surely testimony to the electorate's perception of him as a religious and cultural moderate.

[545] It must also be remembered that the appellant was a popular *Imam* at the Ain Benian mosque with a predominantly Kabyle congregation – an unlikely position to be held by an Islamist political extremist. In this regard we also note the affidavit filed in support of the appellant by T TEXT DELETED He states he attended the mosque where the appellant was a respected *Imam* who never in any speeches called for violence or criminal behaviour. The appellant's reputation, according to T was that of a conciliator.

[546] A further reason for our rejection of the "death and imprisonment to all communists and democrats" allegation is the suspiciously late surfacing of the allegation some three years after the alleged event; an unreal scenario given the

[125] Willis, *supra*, pp. 181, 224, 226
[126] *Ibid,* pp. 208-9, 234

circumstances. This and the matters discussed above satisfy us that the allegation is patently untrue.

Leader of resistance movement

[547] As for the allegations of the appellant's overall leadership of the armed groups in the Medea region which is denied by the appellant, we have already commented on the oddity of the *El Moujahid* report of the appellant's conviction along with his 12 co-defendants in July 1993 (not August 1992 as stated by *El Watan*). Although the appellant received the death sentence there was no mention of any evidence against him, let alone any acknowledgement from his co-defendants or anyone else of his membership and/or leadership of any armed group. If such evidence existed it is surprising not to see it mentioned in such a detailed report of the trial.

[548] Linked to the allegations concerning the appellant's activities with armed groups during 1992 is the assertion that following the annulment of the elections in January 1992, the appellant commenced a life of secrecy "so as not to give any sign of being alive even to his family". The appellant's evidence on the other hand is that throughout most of 1992, while he exercised a certain prudence so as not to draw any official attention to himself, he was nevertheless not living in hiding. He says that during this period he actually visited his father in detention in the Sahara camp as part of his efforts to obtain his release, regularly (although not exclusively), stayed at his home with his family and continued with his teaching at the university up until the end of 1992. These claims are supported by a certificate from the Religious Faculty of Algiers University dated 10 March 2001, concerning the positions held by the appellant as assistant tutor and lecturer, and that he quit his employment from 17 October 1992.

[549] The notes of the appellant's interview with Belgian immigration authorities in respect of his refugee claim on 3 May 1994 relevantly record the appellant stating that he was living almost a normal life during this period although he was going secretly to Tipaza where his home was situated. Similarly the interview report in respect of the appellant's wife, dated 24 April 1995, records her statement that during 1992 her husband lived in semi-clandestinity with friends in Algiers but that he would come to visit them every three or four days. The "life of secrecy" allegation is clearly suspect.

[550] The appellant also rejects the allegation that after fleeing Algeria he travelled frequently to Saudi Arabia, including in the period after taking up residence in Belgium, in order to win over support for the jihad of the FIS. His denial, we find, should be accepted. The appellant claimed refugee status soon after his arrival in Belgium in 1993. He held no Algerian passport, or other legitimate documents on which he could have travelled to Saudi Arabia. Even if he had been able to do so using a false passport, it must be assumed that this would have become known to the Belgian authorities who, for at least part of that period, had the appellant under surveillance. Even if such frequent travel had escaped their attention, if it had happened as alleged, the Belgians would surely have been informed about it (and thereby able to intercept him) by the Algerian security service which would have to have known of the journeys in order to have briefed an *El Watan* journalist. There is no evidence of any of this ever happening. (See also paragraphs 728-729.)

[551] Apart from the date and time of the fax the *El Watan* article itself is not dated. The appellant, on studying the article, formed the opinion that it was written soon after of his arrest on 1 March 1995. He also suggested that stylistically the article appeared to have been written for a non-Algerian audience as indicated by such superfluous information as:

> …the town of Medea situated 100 kms to the south of Algiers.
>
> …Ain Benian, a place on the coast situated 20 kms to the west of Algiers.
>
> …the Armed Islamic Group (GIA), the most violent faction of the Algerian Islamic rebel movement.

[552] The appellant suggested no Algerian journalist, writing for an Algiers daily newspaper would include such references. Further, the oddity of the format of the article and the absence of any date of publication caused the appellant to even doubt that it was a genuine article which had been published in *El Watan*. Examination of the *Le Soir* article of 6 March 1995 (which was only located by us after the completion of the appeal hearing) confirmed the correctness of the appellant's assessment. The article incorporates much of the *El Watan* material and leaves no doubt that it had been specifically written for use by *Le Soir*.

[553] The appellant contended that the *El* Watan article was written for the purpose of discrediting him in the eyes of the Belgium authorities and formed part of an orchestrated campaign against him by the security services in conjunction with the 'eradicator' press. We conclude from our assessment of the article's contents, the circumstances of its appearance and the evidence overall that this proposition is correct.

The GIA Caliphate

[554] Two further matters relied upon by the CPRR and which are sourced from newspaper reports also bear close scrutiny. The first is the appellant's inclusion in the GIA Caliphate. This is a reference to an announcement by the GIA, reported in the press, that it had formed a 12 member Caliphate (religious government) to be headed by GIA leader Cherif Gousmi and including such FIS figures as Ali Belhadj (in an unspecified portfolio), Anwar Haddam as Foreign Minister and the appellant as Minister for Islamic Relief.[127]

[555] The appellant, who has always maintained both his non-involvement with and complete rejection of the GIA, stated in evidence that he learned of this communiqué from media reports at the time but never saw an actual full text. As far as he was concerned the Caliphate communiqué was "just another poisonous statement" and irrelevant to his personal situation. Anyone with a fax, he pointed out, could put out a communiqué. Mr Y who in his evidence also disputed the communiqué's authenticity, made the same point commenting that it was even known for 'GIA' communiqués to carry fax numbers that had been traced back to army barracks.

[556] The appellant thought it possible the communiqué was put out by the GIA, perhaps with a view to trying to involve himself, but he thought it more likely to be a fabrication from the security services. It was, he believed, most suspicious that the communiqué did not initially appear in *Al Ansar*, the GIA magazine, which he thought the most appropriate vehicle for such a communiqué while, beyond the initial announcement, nothing was heard of the Caliphate again.

[557] The Authority also notes that Anwar Haddam, with whom the appellant was in regular contact, and who made a point of issuing press statements, immediately denied all knowledge of the Caliphate.[128] Further, his denials followed a press statement issued some two weeks earlier firmly denouncing speculation that, following the split with Rabah Kebir, he and the appellant had left the Executive Committee Abroad to join the GIA.[129]

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[127] *Arab Press Service Diplomat Recorder* "GIA Forms Caliphate as Alternative Govt" (27 August 1994)

[128] "Divisions wrack the Algerian fundamentalists" *Agence France Presse* (29 August 1994) and "Mehkloufi Movement in between the 'Salvation' and the Group", *Al Hayat* Issue No. 11517 (30 August 1994). (Appellant's documents No. 79.)

[129] "Anwar Haddam denies being dismissed from FIS" *BBC Summary of World Broadcasts* (4 August 1994), and "Who will France deal with once the FIS wins power?" *Middle East Mirror* (10 August 1994)

[558] Said Makhloufi, leader of the MEI which had earlier in 1994 aligned itself with the GIA and who had been included in the Caliphate as Minister for the Interior, also immediately issued a denunciation and announced the MEI's withdrawal from the GIA.[130]

[559] Relevantly the London-based Arabic language newspaper *Al Hayat,* in an article published in Issue No. 11518 of 31 August 1994,[131] reported receiving a communiqué from the GIA *denying* having proclaimed the establishment of a Caliphate.

[560] An interesting comment from Kamil Tawil, an *Al Hayat* journalist, on the subject of GIA communiqués during this period was included in the French television channel *Canal +* documentary broadcast during the first week of November 2002. The transcript records Tawil stating:

> At that time the GIA sent weekly two to three communiqués. How would you verify their origin? That was impossible.[132]

[561] An assessment of the Caliphate communiqué, as with most claims made by the parties to the Algerian conflict, must take into account the political context in which it occurred.

[562] We have provided in paragraphs 503-519 a brief summary of the failure of the various initiatives during 1994 to reach a political settlement through dialogue. The period was marked by intense factional manoeuvring within the regime and the strategic intensification of the violence as both the 'eradicators' and the GIA sought to head off President Zeroual's attempts to reach an agreement with the FIS leadership. In this context the Caliphate communiqué (which was announced just as Zeroual's negotiations with Abbassi and Belhadj were at their most delicate) could equally have served the purposes of the GIA or the 'eradicators' within the regime. Willis suggests the communiqué might be explicable in terms of the GIA's attempt to present itself as a credible alternative to the FIS leadership.[133] However the 'neat' fit with the 'eradicator' strategy of discrediting the FIS leadership as terrorists linked to the GIA is perhaps the better indicator of its origins.

[563] While we cannot make a definitive finding as to the source of the Caliphate communiqué we are in no doubt that it should be treated with extreme scepticism.

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[130], "Alternative fundamentalist government hit by withdrawal" *Agence France Presse* (27 August 1994) and *Al Hayat supra*.

[131] "The Armed Group: No Caliphate Government in Algeria." (Appellant's documents No. 81.)

[132] Appellant's documents – unnumbered.

[133] Willis, *supra,* p. 329

It would be dangerous to rely on it as evidence of the appellant's membership of the GIA and accordingly we reject it is such.

GIA Communiqué

[564] We turn now to consider a second GIA communiqué that followed the appellant's arrest in Belgium on 1 March 1995 that featured in the CPRR decision and was published on the front page of the Belgium newspaper *Le Soir* of 6 March 1995.[134] The one page communiqué in the Arabic language includes the following:

> The infidel government of Belgium has arrested a number of brothers who support the Jihad in the name of God and confiscated a quantity of arms, ready to be despatched to the land of Jihad and martyrdom in Algeria.
>
> The Armed Islamic Group, who declared war against apostates and non-believers and effectively proved it on the ground, warns the Christian Belgian Government and demands the immediate release of our detained brothers particularly Brother Ahmed Al Zaoui and Sheikh Abd En Nasser,[135] and if our demands are not favourably addressed, then the Armed Islamic Group shall react in accordance with the legitimate interest, so those infidels will find what sort of destiny awaits.

[565] In his evidence, the appellant mentioned having been questioned about this communiqué by the Belgium police when interviewed in custody. He recalled telling the officers, after studying the communiqué, that in his view it was not authentic, as neither the style nor the layout of the seal conformed with the religious conventions about which the GIA was usually most particular. Nor did he think it likely that in such a document he would not be referred to by his proper title "Sheikh", especially when the other person referred to was so named. He recalled the police officers actually stating that they too believed the communiqué to be false.

[566] Professor Joffé, during the course of his evidence, also examined the communiqué. He expressed very strong reservations as to its authenticity. Based on his experiences of GIA communications, this communiqué lacked the normally long and complicated opening justification, usually with Koranic quotations, which provided doctrinal grounds for the condemnation and acts proposed. He also thought the reference in the body of the *Le Soir* article to the communiqué having originally been sent to *El Watan,* an almost certain give-away that it was a fabrication.

[567] Finally we note a report from the Belgium BSR Interpreter and Islamologist which was amongst documents received from the CPRR. The Islamologist expressed the view that the communiqué conformed with the typical format of the

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[134] "Belgium Confronts the Menace of the Algerian GIA". (Appellant's documents No. 72.)

[135] Also spelt Abd El Nacer

GIA although the oddity of the appellant not being referred to by the proper title of "Sheikh" which his "unquestionable religious authority grants him" was noted, along with what is referred to as the "paradox of finding the appellant associated with various of the other co-defendants such as Boudriah and Maaroufi". In conclusion the Islamologist noted that it was always possible that the communiqué was a fabrication from the Algerian Information Services.

[568] We consider that the communiqué is almost certainly a fabrication. We are reinforced in this finding by the way in which the communiqué appears to dovetail so neatly with other claims that surfaced at the time of the appellant's arrest and which were extensively reported in the Belgium media. Of at least nine men arrested, the communiqué refers only to the appellant and Abd En Nasser, the same two names that feature in the media reports at the time of the arrests – the appellant being described as the "chief" or "boss" of the GIA in Europe and one Abdennacer alias Abdel Nasser as the "No. 2".[136] As will be discussed in paragraphs 713-719 the claims surrounding Abdennacer, in which the Algerian security had an undoubted hand, reveal a bizarre episode of mistaken identity. That the 'GIA' communiqué should also contain the same mistake suggests it originated from the same source.

[569] The use made of forged and false evidence by the Algerian security services is a topic commented on by Dr François Burgat in his statement (see paragraph 337). Dr Burgat is a French academic, currently a researcher with the French National Centre for Scientific Research and Director of the French Centre for Archaeology and Social Sciences in Yemen. He has written extensively on the various Islamic movements in the Arab world[137]. He states:

> Through my work in research I am very familiar with the means by which Algerian official media networks and foreign journalists have been influenced and sometimes manipulated by the very efficient Algerian military secret services. These services constantly attach the label of "militant" or "terrorist" or any resistance to their brutal and entirely-illegal campaign of repression.
>
> I am deeply convinced that forged reports by Algerian secret services (including press and NGO's) are a very common means of their action abroad.
>
> I have personally attended a US Court case of another FIS executive member, Mr Anwar Haddan. In that case I discovered that evidence of forged and fraudulent accusations found in "reports" that had been presented by so-called "independent" non-governmental organisations and official Algerian informers were forged.
>
> Providing forged reports is the most common means used by the Algerian authorities in their attempt to influence courts.

[136] *Le Soir* (8 March 1995) CPRR material
[137] Dr Burgat's qualifications, positions held and publications are set out in para. 336

Differences between FIS and GIA

[570] Finally, mention must be made of the CPRR's failure to discriminate between the FIS, the AIS and the GIA. In fairness to the CPRR, the task of understanding the complex security of the Algerian scene in the period 1992 to 1995 was complicated by the Algerian regime's stranglehold on information about the security situation and its determined campaign to shore up its own legitimacy by deriding the FIS as Islamic 'terrorists' responsible for all violence in Algeria.

[571] Even so, there were fundamental differences between the perspectives and practices of the FIS and the GIA.

[572] The FIS was a political organisation which opted to participate in the constitutional project whose leadership sought through negotiation with the regime to achieve a return to the electoral process. The GIA was an armed guerrilla group, avowedly anti-constitutionalist and opposed to dialogue with the regime and aimed to install an uncompromising Islamic state through the overthrow of the Algerian state by force. Ideological and strategic considerations similarly distinguished the AIS from the GIA. The AIS was specifically created in opposition to the GIA in order "to structure the guerrilla movement with a view to a negotiated solution to the Islamic insurrection".[138] Integral to this was the AIS's disavowal of the GIA's strategy of indiscriminate violence against civilians.

[573] Such distinctions are crucial to any analysis of the application of Article 1F(b) which is premised on the distinction between political and non-political crimes or to determining whether a group has a "limited and brutal" purpose so that membership alone justifies exclusion.

[574] Moreover the CPRR's characterisation of the FIS as a violent organisation on a par with the GIA deprived it of the basis on which to realistically assess the appellant's claims about his own political philosophy and actions. In consequence the appellant's attempt to exonerate himself by invoking his membership of the FIS and his role in the Rome Platform served only to implicate him or compound his guilt in the eyes of the CPRR.

[575] An open appeal to international opinion and the Belgian government, dated 2 April 1995, was similarly misinterpreted. The appeal affirmed the appellant's membership of the FIS and decried his arrest. It was signed by 16 FIS personalities including the respected Shiek Abdelbaki Sahraoui, one of the founders of the FIS whose assassination in Paris a few weeks later was attributed

[138] Volpi, *supra,* p. 72

to the GIA. The CPRR equated this with the GIA communiqué calling for the appellant's release and thereby found it to be a further "indicator of the ambiguity" that existed between the two organisations.

[576] The same approach, as will be seen, featured in the Belgian and French criminal trials and to some extent underlay the Swiss response to the appellant. In all probability it reflected European states' perceptions of the Algerian conflict and in particular an overriding concern, especially in France, that the violent struggle in Algeria might spill over into their own communities. As the report of the BSR provided to the CPRR concluded:

> …Zaoui is "without doubt an Islamic activist which [sic] role is immensely harmful to the immigrant Muslim community living in Belgium".

[577] The appellant's counsel applied to the Council of State for an annulment of the CPRR's decision. The CPRR advised that this was dismissed by the Council of State on 21 January 1998 on the grounds that the application had lapsed for want of prosecution.

Conclusions on the Decision of the Belgian CPRR to decline to grant refugee status to the appellant pursuant to Article 1F Refugee Convention

[578] A decision of the CPRR is not binding on the RSAA. However, a prior decision concerning the same issues before us, from an appellate tribunal in a western country with a developed system of refugee determination justifies our close consideration.

[579] With respect to the CPRR we are not persuaded by its finding that there are "serious reasons for considering" that the appellant has committed Article 1F(a) crimes against humanity or Article 1F(b) serious non-political crimes.

[580] In particular we decline to follow the conclusion of the CPRR that the appellant had both a direct and indirect involvement in violent actions in Algeria because of:

(a) the minimal account of the reasoning behind the finding (3 page decision much of which was taken up with background and discussion of Article 1F);

(b) the failure to disclose to the appellant prejudicial material including the *El Watan* article and the BSR report of 6 April 1995;

(c) the superficial treatment of the appellant's July 1993 convictions in the Algerian Special Court despite extensive international condemnation of the abuses of this court;

(d) the reliance on erroneous and suspect information including fabricated material; and

(e) the failure to make any meaningful distinction between the FIS, the AIS and the GIA which resulted in the unreasonable rejection of evidence in the appellant's favour.

BELGIAN CRIMINAL CONVICTIONS

[581] As noted earlier, in commencing our inquiry into the appellant's case, we took steps to obtain both decisions from the Belgian courts as, while we had received a copy of the convictions recorded against the appellant in Belgium, as translated they did not of themselves assist us in determining whether the appellant fell within the exclusion provisions of Article 1F of the Refugee Convention.

[582] We received the two Belgian judgments just prior to the commencement of the hearing. It was apparent that they contained generalisations and, with respect, little detail. But most significantly for our purposes was the decision of both courts (just as the CPRR had done some months earlier) to fail to determine whether the co-defendants were acting in furtherance of the aims of the FIS or of the GIA, or even what those aims were. Failing to identify the identity, objectives and/or targets of the criminal association raised the issue of whether the convictions could be relied on as evidence of their facts.

[583] The problem is particularly acute with regard to the application of Article 1F. Without knowing the nature of the criminal association central to the appellant's convictions, we could not determine whether there were serious reasons for considering whether his leadership of such a group might bring him within Article 1F(a) or whether mere membership of that group alone was sufficient. Article 1F (b) raises the issue of whether he had committed a *serious* crime, and if so, whether it was non-political in nature. If, for example, the aim of the criminal association was to obtain false passports for the sole purpose of assisting the plight of FIS members or supporters and their families from Algeria, could we say

this was non-political? Assuming they were under immediate or imminent threat of harm, and had no lawful means to escape, we do not think so. While the Belgian courts considered, in terms of their domestic jurisprudence, that they could effectively ignore the political context in which this claimed offending took place, consideration of Article 1F does not permit us to take a similar course.

[584] From our assessment of the decision, we find that procedural flaws significantly tainted the evidence before the Court of Appeal to the point where, at best, it would be unsafe to rely on these convictions. When we go further and consider the evidence before the Court, together with our own findings of fact and the objective evidence available, we have concluded that neither the evidence relied on by the Court nor the convictions entered against the appellant in Belgium provide serious reasons for considering that he has committed Article 1F offences.

Chronology of Events – Arrest to Conviction

[585] The appellant was arrested during the night of 1 March 1995. At the time, his house was searched and, as far as he recalls, two blank Belgian passports were found, together with a Danish passport on which his wife had travelled from Algeria. The prosecution claimed at the trial that "numerous" photographs were also seized from the appellant's home, together with a photograph of Ali Chami.

[586] Upon arrest the appellant was taken to the offices of the Special Investigative Brigade of the Belgian police (the BSR) where he was interviewed and a statement taken from him. According to the *Pro Justitia* examination of the accused by the investigating magistrate (*juge d'instruction*), this first interview took place between 1 and 1.30 a.m. on the morning of 2 March 1995.

[587] At 4.10pm on the afternoon of 2 March 1995, the appellant was placed before the investigating magistrate. In a 30 minute appearance, he was advised of the charges against him and asked a limited number of questions. The proceedings were in French. A record of his responses purportedly appears in the *Pro Justitia* document.[139] At the conclusion of this appearance he was transferred to a local prison.

[588] The appellant was interviewed on three further occasions by the BSR. Unfortunately, we have been unable to obtain a copy of the interview

[139] "*Pro Justitia* Examination of Accused" by investigating magistrate, Paul Staes-Polet, (2 March 1995). (Appellant's documents No. 76.)

transcripts.[140] During these interviews there was discussion of a communiqué ostensibly issued by the GIA on 5 March 1995 which demanded the release of the appellant and one "Sheikh Abden Nasser". The appellant told the BSR that he did not believe the document to be a genuine GIA communiqué, and he was led to believe that the police agreed with him.

[589] He was pressed for any links to the GIA, to which he responded (according to his lawyer's records):

> …because of my position, I have contacts with most of the Algerians in Belgium and, on occasion, I met people from the GIA…

[590] He did advise the BSR that two of his co-defendants – Abdelli and Boudriah – were known to him to be members of the GIA. He subsequently retracted this evidence – not because it was untrue, but because he had come under threats and pressure from these two men.

[591] All four police interviews were around 30 minutes each. They were all conducted in French, a language in which the appellant was not fluent at that time. No lawyer was present at any interview despite his request for one at his first interview. He was not questioned in detail regarding his relationship with his co-defendants, his knowledge of the weapons that had been found, or any other details regarding the charges. He formed the impression that the BSR accepted that he was not a member of the GIA and that he was not connected to the weapons found. As a consequence, he fully expected to be acquitted of all charges at the conclusion of the trial, save those relating to the false passports.

[592] In respect of his French language proficiency, it was the appellant's evidence that, on arrival in Belgium, his French language skills were limited to what he learnt at school. He could not communicate to any great extent, but could read a certain amount. At the time of the police interviews, he could carry on a limited conversation, which enabled him to participate in what were relatively straightforward interviews. However, he said his French language skills were inadequate to either understand or explain anything of a reasonably complex nature, including the proceedings before the Belgian courts.[141] Consistent with

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[140] The appellant's lawyer, Mr Vanderbeck, also advised that, due to the passage of time, he had not retained his complete file, but he was able to refer specifically to some of the appellant's statements. See letter from Gilles Vanderbeck dated 22 March 2003 commenting on the appellant's Belgian trials. (Appellant's documents No. 9.)

[141] At his trial he is described as speaking "broken French": "Ahmed Zaoui, the innocent" *Le Figaro* (5 September 1995)

this is that, when he met Father X he insisted on an interpreter being present to enable him to participate in a meaningful dialogue.

[593] The hearing before the County Court of Brussels[142] spanned 4-8 September 1995 (inclusive). Of the 13 defendants, four chose not to appear and were dealt with *in absentia*. One was sent for a separate trial because of drugs charges. The appellant faced five charges:

(a) that from 30 September 1993 to 2 March 1995, together with Benrahim Boudriah, Rachid Abdelli, and Tarek Maaroufi, he was the "instigator" or "head" of an association formed for the purpose of perpetrating crimes against people or properties, carrying the death penalty and hard labour;

(b) of having in his possession, or receiving, or assisting in the attaining of, a Danish identity card and two blank Belgian passports;

(c) at several instances between 30 September 1993 and 2 March 1995, together with Boudriah, Abdelli, Maaroufi, Boudkhili Moulay and Abdelfadel el Majda, having had or co-operated in the obtaining of firearms without a licence;

(d) on different occasions between 30 September 1993 and 2 March 1995, directly incited crimes of violence through speeches or written publications;

(e) at an undetermined date between 26 February 1995 and 2 March 1995 having obtained or assisted in obtaining a fraudulent Danish passport (being the Danish passport altered to include the name of the appellant's wife).

[594] The appellant was present throughout the five-day hearing. He does not recall the presence of any witnesses giving direct evidence in person, nor any exhibits presented to the court. Much of the hearing was by way of legal comment and submissions. While an interpreter was available to the appellant, this was only to interpret questions put to him directly by the Court, or to interpret his evidence when he was given the opportunity to comment. As a consequence, the appellant said he did not understand much of the proceedings.

[142] The 54th Chambre du Tribunal Correctionel de Bruxelles, which has been variously translated as the County Court or Magistrate's Court. We shall refer to it as the County Court.

[595] During the course of the hearing, the charge of inciting violence was "extinguished".[143] The Court reserved its decision but delivered a written judgment on 3 October 1995 in which the appellant was *acquitted* of the remaining charges. His co-defendants, Boudriah and Abdelli, were convicted as being the heads of the criminal association. The fourth person charged in that regard, Tarek Maaroufi, was acquitted of that offence, but convicted on an amended charge (which we assume amounted to membership of the association).

[596] Unlike the New Zealand criminal justice system, the Belgian system allows a prosecutor to lodge an appeal against acquittals on criminal charges and this is what happened in this case. The matter came before the 14th Chamber of the Court of Appeal of Brussels in November 1995, with a decision being delivered on 20 November 1995. In that decision the appellant was *convicted* of being the head of a criminal association, two blank Belgian passports, and possession of the false Danish passport in his wife's name. He was sentenced to four years imprisonment with the sentence being suspended, the effect of which would have been to have him immediately released from custody (where he had been since his arrest on 1 March 1995). However, he was detained thereafter on immigration matters and not released until October the following year, 1996.

The case against the co-defendants

[597] It was the discovery of weapons in a vehicle driven by Boudriah, accompanied by Maaroufi and Abdelfadel el Majda, that triggered the arrest of all the accused in this trial. Weapons were also located in three places in Brussels, specifically at a garage in Masui Street, at the home of Moulay, and at an apartment in Avenue Dubrucq.

[598] The weapons found consisted of explosive substances, three grenades, 16 silencers, several rifles, 20 electric guns, and 6000 rounds of ammunition.[144] Abdelli, Boudriah, Abdelfadel el Majda, and Moulay faced charges relating specifically to possession of these weapons without a licence. Additionally, these four were charged, together with the appellant and Tarek Maaroufi, with acting together in obtaining and possessing unspecified weapons.

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[143] Unlike the other charges on which the appellant was acquitted, this charge is recorded as being "extinguished". We assume this is akin to the charge being withdrawn or the judge's ruling of no case to answer. Certainly there is no discussion of the charge or any evidence to support it. See further our discussion at footnote 153.

[144] The judgments do not specify the precise location where each of the various weapons and the ammunition were found.

[599] GIA manifestos, other "written publications, and militant video and audio material promoting the radical Algerian cause" were also found in the various police searches, together with false and/or stolen identity documents and passports, and various miscellaneous items, including sums of foreign money. These items were subsequently introduced as evidence allegedly linking the accused to the various Algerian opposition groups operating at that time, including the armed groups, or establishing alleged allegiances to those various groups.

[600] In general terms the evidence established links between Boudriah, Abdelli, Moulay, Maaroufi, and Abdelfadel el Majda, and between each of them and the weapons. It also established that these five had regular contact with each other and with the premises where the weapons were found. Specifically, Boudriah and Abdelli lived at Avenue Dubrucq, and Abdelfadel el Majda rented the garage at Masui Street. It was at Moulay's home that weapons were also found. To the core group of Abdelli, Boudriah, Abdelfadel el Majda, Moulay and Maaroufi, the appellant and the seven other co-defendants were linked through alleged connections of one sort or another.

[601] In establishing those connections, the prosecution relied on not just what was found and where, but on the evidence obtained from a surveillance operation that appears to have covered at least the six months prior to the arrests.

[602] At the conclusion of the County Court trial, Boudriah, and Abdelli were convicted of being the instigators or heads of the criminal association. Maaroufi, Abdelfadel el Majda and Moulay were convicted of membership of the association. All other defendants, including the appellant, were acquitted of charges connecting them to the association.

[603] Boudriah, Abdelli, Abdelfadel el Majda and Moulay were all convicted on the weapons charges.

[604] Boudriah, Abdelli and Abdelfadel el Majda did not appeal. In the Court of Appeal, the appellant was convicted as head of the association. Maaroufi and Moulay's convictions as members of the association were upheld, as was Moulay's conviction on the weapons charge. The acquittals of all others charged with membership were also upheld.

[605] In short, the only decision reversed on appeal was that relating to the appellant.

The case against the appellant before the Court of Appeal

[606] In convicting the appellant as one of the heads of the criminal association the Court relied on:

(a) his "numerous" contacts with his co-defendants and those suspected of adherence to terrorist organisations

(b) his connection with the apartment at which weapons, ammunition and subversive literature was found

(c) items found at his home – specifically false documents, photographs and foreign money

(d) his "undoubted prestige and moral authority" which allowed him to assume a leadership role and attracted members to him.

[607] Although not articulated by the Court of Appeal, the overarching allegation made by the prosecutor (through the production of the BSR reports) was that the appellant had a leadership role within the GIA and, in that capacity, acted in concert with his co-defendants. Mr Vanderbeck's comments: "Everbody concerned [knew] perfectly well that, at bottom, what these people were being charged with was that they had formed an association i.e. a network for logistical support with the intention of carrying out acts of terrorism".[145]

[608] It was the appellant's claim (to the Court of Appeal and to us) that the allegations against him were either wrong or could be explained in terms of his role within the FIS. He specifically denied to the Court that he was, or ever had been, a member of the GIA. To us he added that relevant corroborative evidence was not put before the Court and that he was not given a fair or proper opportunity to answer the charges.

[609] We turn now to discuss the substantial and procedural issues, starting with the latter.

Procedural Issues

[610] Three opportunities arose prior to the trial in which the appellant's case could and should have been fully investigated:

[145] Vanderbeck's letter of 22 May 2003, p. 4

(a) in police interviews;

(b) by defence counsel, and;

(c) by the investigating magistrate.

Police interviews

[611] It is the appellant's evidence that each of the four interviews by the police was brief, in French, and in the absence of his solicitor and an interpreter. None of the interviews sought detailed explanations from him as to his contact with his co-defendants, the nature of his role within the FIS, or any contact he had had with the GIA. In respect of the weapons found, he was told in the first interview of the discovery of these in Moulay's home and responded that he knew nothing of them. He was never told that other weapons had been located, or where. No other potentially adverse information was put to him for comment.

[612] We do not have records of the police interviews, but we do have a copy of the investigating magistrate's interview received subsequent to the appellant's oral evidence on this point.[146] It corroborates the appellant's memory of the first police interview which is clearly recorded as being for no more than 30 minutes. With minor exceptions, the Court judgments make no reference to any statement made by the appellant during the course of the police interviews which corroborates his evidence that he was not asked anything material and did not make any admissions of wrongdoing.

Difficulties faced by defence counsel

[613] We understand that Mr Vanderbeck was appointed by the State to represent the appellant. However, state funding was limited and the appellant had no money to contribute to the costs of his own defence. As Mr Vanderbeck explains:

> I feel as well bound to inform you that Belgian criminal procedure does not make it obligatory to send a copy of the file to each of the accused.
>
> Only through a request for judicial assistance or the payment of €0.50 per page is it possible to obtain a copy of the file documents.
>
> At the time, [the appellant's] file was particularly large and [the appellant] was poor, so it was not possible for us to request a copy of the file.

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[146] "*Pro Justitia* Examination of the Accused" dated 2 March 1995. (Appellant's documents No. 76.)

> Also at that time, Belgian criminal procedure did not require the reporting authorities to transmit a copy of the notes of the hearing of the accused.[147]

[614] The lack of funding also meant that the appellant was unable to obtain the services of an Arabic-speaking interpreter through whom to instruct counsel. Thus, in the already limited circumstances – the appellant not knowing the full extent of the case against him – he was required to instruct his defence counsel in a language in which he was not proficient.

[615] In his commentary Mr McColgan notes that the absence of public funding prevents counsel in both Belgium and France "from undertaking his or her own investigation… and generally mounting a defence in a manner compatible with Article 6(3) of the European Convention on Human Rights"[148]. This provision is equivalent to Article 14 (3) of the International Covenant on Civil and Political Rights (ICCPR)[149] and informs Sections 24 and 25 of the New Zealand Bill of Rights Act. These articles guarantee certain minimum rights to all accused facing criminal charges, including the right to be informed promptly and in detail, in a language which one understands, of the nature and the cause of the charges against one, and to have adequate time and facilities for the preparation of one's defence and to communicate with counsel.

[616] It is illustrative of the lack of opportunity to adequately prepare a defence that, on the fourth day of the trial, the proceedings were briefly adjourned (for a matter of hours only) after defence counsel objected to the prosecution being allowed to rely on documents which had been in their possession since March.[150]

The Investigating Magistrate

[617] In his commentary, Mr McColgan observes that, irrespective of the ability of counsel to take instructions and properly prepare a defence, the chances of a miscarriage of justice are theoretically minimised in the inquisitorial system, given that the investigating magistrate is "duty-bound" to uncover both inculpatory and exculpatory evidence. Nonetheless, there are indicators that the investigation in this particular case was deficient.

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[147] Vanderbeck's letter of 22 May 2003, p. 1

[148] Commentary of Michael McColgan.

[149] Set out earlier in our decision at 479

[150] See "Slack day at the Islamists trial on Wednesday" *La Libre Belgique* (7 September 1995)

[618] The record of the interview by the investigating magistrate is contained in the "*Pro Justitia* Examination of Accused".[151] This document indicates that the duration of the interview was 30 minutes and conducted in French. It is clear that this document is in part a reconstruction of the interview, and not a verbatim record. It commences by recording the appellant's biographical details and advising him of his right to a lawyer, but significantly not for the purposes of the interview.

[619] The investigating magistrate is recorded as having informed the appellant of the charges (being those noted in the indictment) and that a warrant had been issued for his arrest. There is, however, no actual record of how the charges were explained to the appellant – a point of some concern given they were being described in French (a language of which he had an incomplete understanding) and both the RSAA translators' difficulties, not to mention our own, in gaining a clear understanding of the charges as described in the court judgments.

[620] It appears the appellant was asked a number of questions (none of which are recorded). The record attributes the following statements to him:

> I confirm the statement made at the Brussels Gendarmerie (Central Police Station) this day between 0100 and 0130 hours.
>
> I have been in Belgium since early October 1993. I came here to request political asylum. No decision has yet been taken with respect to my application. As a representative of the FIS (Islamic Salvation Front) I have engaged in political activity here in Belgium.
>
> For this reason, I have had occasion to speak in the mosques.
>
> I know people from the GIA but there are differences of opinion between us.
>
> I am able to live thanks to the generosity of some of my friends. All the money was given to me as gifts by friends, apart from $4300, which are intended to buy a vehicle for someone I know in Algeria.
>
> I recognise that I possess a false Danish passport found in my wife's name.
>
> The two passports found in my house were acquired by me from Ali Ammar Nourradine. He lives in Denmark. He is a political refugee.
>
> I am aware that I am accused of possessing forged documents, of the use of forged documents, and of consorting with criminals.
>
> …I duly acknowledge that the above is a true and accurate record of the facts.

[621] It is notable from this record that the appellant was not asked any questions about the weapons, their location, or his relationship with any of the co-defendants, particularly those clearly linked to the weapons (i.e. Abdelli, Boudriah, Maaroufi, Moulay, and Abdelfadel el Majda). It is also notable that no effort appears to have been made to explore who he knew from the GIA, in what

[151] "*Pro Justitia* Examination of the Accused", dated 2 March 1995 (appellant's documents No. 76)

capacity he knew them, or what the differences of opinion between him and them might have been.

[622] It would appear that this is the only occasion on which the investigating magistrate interviewed the appellant. No effort was made then, or at any other time, to test or go behind the generalisations and the misleading and/or inaccurate claims about the appellant in the BSR reports.

[623] In this regard it is relevant to note that the appellant's evidence to us was that, right up until the commencement of the trial, he was confused about the nature of the charges against him and did not appreciate that he had been charged with being the instigator or head of a criminal association linked to weapons found in four different locations. Given the brevity of this interview, and the lack of any mention of weapons or his co-defendants, coupled with the lack of opportunity he had to glean the full extent of the case against him from his lawyer, we find his confusion understandable.

[624] We consider that clarification of such important matters as his involvement in the Rome Platform, the real nature of his dispute with Rabah Kebir, and his FIS activities, would have raised with the investigating magistrate at least the possibility that the appellant's activities were incompatible with the GIA or other armed opposition groups. This in turn would have suggested further relevant lines of investigation that the magistrate should have pursued.

[625] We are not alone in our criticism of the investigating magistrate. Mr Vanderbeck's view was that the investigating magistrate's role was one of form only, with the inquiry being directed not by the magistrate but by the terrorist sector of the BSR. In his letter he criticises the magistrate for failing to collate and expertly evaluate the evidence, being content instead to rely on numerous "impressions and interpretations" of the police officers' contained in the BSR reports. He also expressed his concern that all translations of relevant Arabic documents were done by a sergeant of the terrorist sector, rather than an independently certified translator.

[626] In its detailed report into the French terrorist trials of the late-1990s, the FIDH raises concerns as to the role of the investigating magistrate (*juge d'instruction*) which include:

> …the formulaic character of the interview; the apparent and uncritical reliance on information provided by Intelligence and police sources; the reluctance to take seriously evidence and explanations put forward by the defence and to accede to

> their [requests to take action]; the use of prejudicial but often unsubstantiated assertions and asides in the dossiers….[152]

[627] The same criticisms can be levelled at the investigating magistrate's inquiry into the case against the appellant.

Summary of pre-trial procedures

[628] The deficiencies within the pre-trial process were, in our view, serious and require us to approach the evidence before the Belgian courts with caution. As will become apparent from the following discussion of that evidence, these pre-trial deficiencies allowed evidence to go before the courts which was factually inaccurate, misleading and prejudicial.

Evidence against the appellant before the Court Of Appeal

[629] In convicting the appellant, the Court of Appeal relied on the following evidence:

(a) the appellant's contact with several co-defendants;

(b) his contact with "persons suspected abroad for their adherence to terrorist associations …";

(c) his contact with Avenue Dubrucq – where weapons and subversive literature were found;

(d) items found at his home – being a false passport in the name of his wife, two blank stolen Belgian passports, identity photographs and "foreign money";

(e) his personal circumstances – specifically that he had "scarcely any means of existence" and relied on gifts and help from others (including his co-defendants);

(f) the appellant's personality and background which "conferred an undoubted prestige and moral authority on him" enabling him to lead this criminal association; and

[152] FIDH report, *supra* at para. 384

(g) the appellant's "clandestine" existence which was incompatible with his claimed FIS activities.

[630] We will analyse the evidence in respect of each claim in some detail.

The appellant's contacts with co-defendants

[631] Evidence before the Court included direct contact between the appellant and six of his co-defendants, although as the following analysis illustrates, the level of contact varied.

Boudriah

[632] Boudriah was convicted by the County Court of being one of the heads of the association and on the weapons charges. He did not appeal. In reciting the evidence against him the County Court noted he lived in the apartment at Avenue Dubrucq to which he brought GIA literature, false documents and other incriminating items and in which arms and ammunition were found. He rented the garage in Masui Street with Abdelfadel el Majda, where weapons were also found, and, with Abdelli, persuaded Moulay to store other weapons at his home. Further, he acted as the group's treasurer, managing sums in excess of two million Belgian francs.

[633] Clearly Boudriah was at the heart of the criminal association. Contact between him and the appellant would be particularly relevant in determining the extent of the latter's involvement. Yet despite the lengthy surveillance operation, the only evidence of contact relied on by the Court was the appellant's introduction of Boudriah to Moulay. Even then there was no evidence or finding that this "introduction" was for any specific purpose, or that the appellant knew of the subsequent decision to store weapons.

[634] Mr Vanderbeck records the appellant's evidence that he knew Boudriah, having met him when he lived with Kassoul after his arrival in Belgium. At that time Boudriah was not involved in the Algerian cause but later changed "which led Mr Zaoui to distance himself from [Boudriah] as he was finding that by then [Boudriah's] speeches were becoming too violent".

[635] The appellant confirmed this in evidence before us. As noted earlier in this decision (paragraph 134), on arrival in Belgium he stayed for a month with a

friend, F , at whose home he met many Algerians, including Boudriah and Moulay. After a month, the appellant moved to live with Kassoul, where he stayed for six to nine months. Towards the end of this time, Boudriah moved in – thus the two men shared the same house for a short time. Thereafter, the appellant rarely saw him and they had no direct contact from that time. At the time of his arrest, the appellant knew Boudriah to be a member of the GIA. It is to be recalled that the appellant told the police in his third interview that both Boudriah and Abdelli were members of the GIA, later retracting this evidence after receiving threats from the two men.

[636] At best, therefore, the Court had evidence that the appellant had met Boudriah, disagreed with some of his views, and introduced him to Moulay. However, the absence of any evidence in the judgments of any other contact between the appellant and Boudriah corroborates the appellant's account to us that they had no ongoing relationship after the appellant left Kassoul's home in mid-1994.

Abdelli

[637] Abdelli was also convicted by the County Court as head of the criminal association and on weapons charges. Like Boudriah, he did not appeal. He rented the apartment on Avenue Dubrucq, and, with Boudriah, stored weapons at Moulay's home. He also paid rent for the garage in Masui Street. Again, like Boudriah, Abdelli was clearly at the centre of the association and thus any contact between him and the appellant deserved scrutiny.

[638] The Court referred to Abdelli being introduced to Moulay by the appellant. Abdelli denied any association with Moulay but his denial was rejected – the Court preferring the admissions of Moulay that Abdelli and Boudriah had stored weapons at his home. The Court found that the appellant had introduced Abdelli to Moulay but rejected, without explanation, Moulay's evidence that the appellant was unaware that weapons were being stored with him.

[639] Beyond this introduction the Court is silent as to actual evidence of the nature of the relationship between the appellant and Abdelli except for one incident. Both judgments refer to the two men being together on the Swiss-German border in October 1994. The Court does not elaborate in any way on the circumstances.

[640] The appellant confirmed in his evidence to us that he was stopped at the German-Swiss border in the presence of Abdelli Rachid and explained that the travel was a matter of expedience and coincidence only (see para 164). His evidence was that he had met Abdelli when he was staying with Kassoul. At that time, Abdelli was a refugee claimant like many others who passed through Kassoul's home. Their relationship was one of social acquaintance only. After the appellant moved out of Kassoul's home, he heard that Abdelli had become an active member of the GIA, distributing its literature. The last time the appellant saw Abdelli (before they appeared in court) was when they were stopped on the Swiss-German border.

[641] Again, the appellant's evidence to us of the absence of any significant, regular or ongoing contact with Abdelli is corroborated by the lack of such evidence in the Court judgments.

Maaroufi

[642] The only reference by the Court of Appeal to contact between Maaroufi and the appellant, is the finding that "it appears that Maaroufi knows Zaoui…". This statement is not further explored – specifically the Court points to no evidence as to how, when, or from where Maaroufi and the appellant knew each other.

[643] Mr Vanderbeck records that Maaroufi gave evidence that he only knew the appellant by "sight". The County Court rejected this evidence without giving reasons, nor does its judgment articulate what the Court found to be the nature of the relationship between the two men. In his evidence to us the appellant said he did not know Maaroufi prior to the trial, but learnt after he was arrested that Maaroufi was a teacher who openly endorsed the GIA in speeches in the mosque.

[644] The complete absence of any details gives us no confidence that the Court of Appeal had any direct or reliable evidence of any significant relationship between the appellant and Maaroufi. Had there been such evidence, we are confident it would have been clearly articulated – given both were charged with being heads of the criminal association, and given the detailed evidence of other relationships articulated in the judgments.

Moulay

[645] Moulay was convicted of membership of the association, and weapons charges.

[646] As noted, the Court found that the appellant knew Moulay and that it was through the appellant that Moulay met Abdelli and Boudriah, who subsequently left weapons at Moulay's house for storage. The Court did not go further and find that the appellant introduced Abdelli and Boudriah to Moulay for this purpose, or even that the appellant knew what transpired between the three men – we assume because there was no reliable evidence of this.

[647] Mr Vanderbeck advises that Moulay confirmed to the Court that the appellant knew nothing of the weapons which he (Moulay) admitted had been stored at his home for approximately eight months prior to his arrest. No reference is made to this in the judgments. This is surprising given that the County Court, in convicting Abdelli and Boudriah, clearly relied on Moulay's admission that he agreed to store weapons for them. However, the fact that the weapons charges against the appellant was "extinguished"[153] corroborates Moulay's evidence and the appellant's denials.

[648] In evidence before us the appellant confirmed that he knew Moulay, having met him in the first month after his arrival in Belgium when he stayed at F's home. He confirmed that he did introduce Abdelli and Boudriah to Moulay, but not for any specific purpose – rather it was an informal introduction in a casual social environment.

Kassoul

[649] Kassoul was acquitted of membership of the criminal association. This was despite him being an FIS colleague with whom the appellant had lived for six to nine months after his arrival in Belgium.

[650] According to Mr Vanderbeck, in Kassoul's statement to the County Court he confirmed their relationship, stating specifically that he regarded the appellant as a "high-ranking person in the FIS in Europe, in touch with Madani".

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[153] We assume that a charge being "extinguished" is equivalent to either the prosecution withdrawing the charge or the court concluding there was no case to answer. It is clearly a different outcome from an acquittal and the meaning we have attributed to it follows from our interpretation of the judgments. See further footnote 143.

[651] Given Kassoul's acquittal, and the lack of evidence against him, it is difficult to understand why any weight was given by the Court to the appellant's connection to him.

[652] The acquittal of Kassoul would seem to reflect an acceptance by the Court of the innocent association between the appellant and someone with whom he clearly had contact. This is difficult to reconcile with the weight placed by the Court of Appeal on the much more limited contact between the appellant and Abdelli and Boudriah.

Ouallah

[653] The Court of Appeal records that Ouallah had contact only with the appellant and none of the other co-defendants. The judgments make little reference to Ouallah. He was acquitted of membership of the association and convicted only of possession of false documents (which he claimed he had to assist his brother's departure from Algeria).

[654] The appellant's evidence to us (which was confirmed by Mr Vanderbeck) was that Ouallah was a member of the local Algerian community who was supportive and generous to him. He had also acted as interpreter in the meetings between the appellant and Father X of the Sant'Egidio Community.

[655] The Court's finding that Ouallah was not involved in the criminal association again makes it difficult to understand why any weight was attached to this relationship by the Court of Appeal.

The appellant's contact with "persons suspected abroad for their adherence to terrorist organisations"

[656] Despite this statement appearing in both judgments, neither judgment defines nor identifies the "terrorist organisations" and it is not clear from the judgments who or what the Courts were referring to in this regard, although it is clear that the County Court (the source of the phrase) was quoting directly from a BSR report.

[657] Both judgments, shortly after introducing this claim, turn to discuss (albeit briefly) links between the appellant and two men being investigated by the German authorities. We assume that this is the evidence upon which the Court relied in

linking the appellant to "persons suspected abroad for their adherence to terrorist organisations". Those two men were Ali Chami and Salim Abbassi.

[658] Both judgments record that the appellant had been found in possession of a photograph of Ali Chami, and that his mobile phone and GSM SIM card were obtained for him by Salim Abbassi. In respect of Ali Chami, the Court noted that German authorities "had *made enquiries* [of him] concerning the purchase of explosives". In respect of Salim Abbassi, he was "*suspected* by the German authorities of belonging to the same criminal association as Ali Chami" (emphasis added). Both judgments refer specifically to the statement of a witness in the German investigation, Kantour Brahim, that Abbassi and Chami had delivered weapons from Belgium to Algeria on several occasions between 1993 and 1994. The Court also noted three calls from Ali Chami to the appellant and 17 calls to Ali Chami from one of the appellant's co-defendants, Kassoul, (who was acquitted of membership of the association).

[659] Two points must be made with regard to this evidence:

(a) The fact that Ali Chami was someone "about whom the German authorities had made enquiries" and that Salim Abbassi was "suspected" of belonging to the same criminal association as Ali Chami was, with respect, highly prejudicial evidence of little probative value. Clearly, at the time, they were suspects only.

(b) That such evidence was in fact of little probative value is evident by the outcome of the German investigation:[154]

(i) Ali Chami was *not* charged with any offences.

(ii) Salim Abbassi and his brother Ikbal were charged with arms trafficking for the AIS and the GIA, together with membership of a criminal association and falsifying documents. No weapons were ever found[155] and the arms charge was dropped during the course of the trial. The brothers were convicted of membership of a

[154] See "FIS leader's sons jailed" *Agence France Presse* (23 June 1997 and "Germany jails Algerian pair" *The Guardian* (24 June 1997)

[155] TEXT DELETED

criminal association and of charges of falsifying documents to which they had pleaded guilty.[156]

(iii) TEXT DELETED . He explains that the prosecution, in bringing the charge of arms trafficking, relied on evidence supplied by the Algerian authorities. It included a statement from an Algerian, Kentour Brahim, in which he claimed that the Abbassi brothers had delivered weapons to him on many occasions.[157] However, the prosecution abandoned the charge during the trial when it was revealed that Kentour Brahim's statement had been obtained in Algeria under torture and was subsequently retracted by him.[158]

(iv) It was not claimed by the prosecution (or in the media) that the brothers were members of the GIA.[159] TEXT DELETED in part, to the publication of the GIA "Burning Thunderbolts" communiqué in early 1996 condemning to death several members of the FIS, including him and his brother.

[660] In light of this evidence, we are satisfied that the Court of Appeal took into account evidence which subsequently proved to be without any proper evidential foundation. In New Zealand, such evidence would have been inadmissible – it being highly prejudicial and with little or no probative value.[160]

[661] We find nothing criminal or sinister in the appellant's possession of a photograph of Ali Chami, nor in Salim Abbassi's provision to him of a mobile phone. The appellant told us of regular and close contact with Abbassi's sons and Ali Chami, who all lived in Germany in the same house. When he was in Germany the appellant would visit them, and on occasion stayed with them. Such contact we find unremarkable given their ongoing high level involvement with the FIS as it struggled to continue its existence in exile. Specifically, we reject the suggestion

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[156] See "Abbassi sons deny involvement in armed struggle" *Agence France Presse* (28 August 1996); "FIS leader's sons jailed" *Agence France Presse* (23 June 1997)

[157] The Belgian Court of Appeal referred specifically to the statement made by Kentour Brahim in assessing the evidence against the appellant, p. 16

[158] TEXT DELETED

[159] *Ibid*, paras. 9-10

[160] See expert opinion of Marie Dhryberg, Barrister, dated 10 June 2003, pp. 20-1, submitted in support of this appeal

that the appellant's link to these men was evidence from which the court could safely draw adverse inferences.

Other possible contacts

[662] As noted the decision makes no reference to any specific terrorist organisations or persons. Mr Vanderbeck, however, refers to evidence before the Court of the appellant's contacts with Rabah Kebir, Anwar Haddam, and Abbassi Madani, all senior members of the FIS. If the Court of Appeal considered the FIS to be a "terrorist organisation" or any of these three named individuals to be "terrorists", it would surely have said so, given the appellant's repeated statements of membership of the FIS at a high level, and his well-known contact with these people.

Contacts with the apartment in Avenue Dubrucq

[663] It was in this apartment that a substantial amount of weapons and GIA and other "subversive literature" was found. The relevant contact, as articulated by the Court, comprised phone calls made by the appellant and his (unexplained) "close contact".

[664] The judgment refers to the appellant's "phone calls to Avenue Dubrucq, where he himself phoned on many occasions". No specific number of calls was given, nor any dates of calls or details of who the appellant is alleged to have spoken with, the length of any conversations or their content. This is surprising given that evidence of telephone records was produced to the Court, including the precise number of calls between the appellant's phone and Ali Chami (3 calls) and between Kassoul's phone and Ali Chami (17 calls).

[665] Mr Vanderbeck notes that the majority of the calls logged to the appellant's cell phone came *from* the apartment with very few calls going to it. The appellant told us he had no memory of ever telephoning the apartment as he had no cause to do so. This is apart from one occasion after the GIA hijacking of a French plane in late December 1994 when Anwar Haddam asked him to try and locate any GIA statements relating to the hijacking so that he could prepare his own press release. In an effort to locate this information, the appellant thinks he asked Kassoul to make contact with the apartment as it was known to be frequented by GIA supporters, and that Kassoul may have used his cell phone to do this. Apart from this, he is unaware of any specific calls made from his cell phone and

assumes those recorded were made by others with whom he regularly left his cell phone when he travelled out of Belgium.[161]

[666] As for the claim that the appellant was otherwise "in contact" with the apartment, neither judgment identifies what this was. There was no mention in the judgments that he ever visited the apartment. [162] This can be contrasted with the evidence that Maaroufi, for example, "frequented" it. If there was evidence against the appellant, we can expect the Court to have referred to it. This paucity of evidence is particularly telling given the period of surveillance that preceded the arrests.

"Numerous" identity photographs found at the appellant's home

[667] The actual number of photographs is not specified. Further, no person is identified in either judgment as appearing in these photographs. It is possible that the photographs were of the appellant's father and father-in-law, for whom he had acquired the blank passports.

[668] Mr Vanderbeck makes no reference to any evidence of the appellant's involvement in obtaining passports or other identity documents for anyone other than his wife, father and father-in-law, and the appellant confirmed this in evidence to us. He also claimed that he was never shown these "numerous" passport photographs either by the Investigating magistrate or the courts, and could not assist us in identifying who they might be of.

[669] In the absence of any explanation by the Court of the photographs, we cannot attribute any weight to this evidence.

False passport in the appellant's wife's name, and two blank Belgian passports

[670] Both courts accepted that two blank Belgian passports had been obtained for use by the appellant's father and father-in-law, and that the false passport in his wife's name had been used by her to leave Algeria. As the judgments make clear, the appellant never denied possession of these documents and claimed that they were essential in securing the flight of his wife from Algeria and for

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[161] See further appellant's evidence at para. 138

[162] Mr Van der Beck did note that the appellant admitted that he went only once to Avenue Dubrucq, although to us the appellant could not recollect even this one visit

subsequent use for his father and father-in-law. The County Court accepted that circumstances in Algeria justified the obtaining and use of the passports and acquitted him of the passport charges; the Court of Appeal convicted him.

[671] Given the circumstances of the appellant's family members, we find it unremarkable that he obtained false travel documents to facilitate their flight from Algeria.

Foreign money found at the appellant's home

[672] A sum of foreign money was found at the appellant's home. The "pro justitia" records an amount of $4300 being found. The interview records the appellant's explanation that this was for the purchase of a car for someone in Algeria. It does not specify the denomination of this money. Neither judgment refers to an exact amount, or the denomination, nor do they specifically reject the appellant's explanation for possession of $4300.

[673] The appellant confirmed in evidence to us that some foreign money of his own was found at his home, approximately $US700.

[674] In the circumstances it is difficult to see why any weight was given by the Court of Appeal to the appellant's possession of these funds.

The appellant's personal circumstances

[675] In convicting the appellant, the Court of Appeal concluded that he and most of the co-defendants "have scarcely any means of existence" and helped each other out with rent and purchases. Specifically, it found that the appellant and his family lived from "gifts". The impecunious state of the appellant and several of his co-defendants was regarded, in some unexplained way, as further evidence of criminal association.

[676] Mr Vanderbeck confirmed that the appellant was "poor" but makes no comment on the evidence of his client's financial circumstances. To the Investigating magistrate the appellant explained that he lived "thanks to the generosity of some of my friends".

[677] To us the appellant confirmed this evidence. He told us he also received some financial assistance from the FIS to cover his travel costs of attending

Executive Committee meetings. He did not receive any financial assistance from the Belgian authorities for at least six months after his arrival.

[678] The appellant clearly had considerable support within the Algerian émigré community as a religious and political figure and it is hardly surprising that he received financial assistance from that community. More specifically, we do not find it at all unusual, nor suspicious, that nationals from the same country should live and socialise together in exile, nor that they would help and support each other. Such behaviour can be found in refugee communities the world over.

The appellant's personality

[679] Significant emphasis was placed by the Court of Appeal on the appellant's personality, the Court noting:

> …there is no doubt that in the eyes of third parties and certainly to the other defendants the personality, culture, diplomas, political activities in Algeria and the titles given to him, confer on Zaoui an undoubted prestige and a moral authority which have allowed him to assume the role of head or agent of the association that he commands and his members gravitate around him….

[680] Having conducted a detailed inquiry into the appellant's personal circumstances, we accept that he is someone who had moral authority, both within Algeria and within the Algerian community in Belgium, particularly at that time. At issue, however, is the use to which the appellant put this undoubted authority. The Court of Appeal relied on it as evidence of leadership of a criminal association. It assumed, without more, that he had to be in a leadership role because of his moral authority. It did not explore in any substantive way the personal opinions and commitments that underpinned that authority.

[681] For all the reasons which follow, we have concluded that the appellant did not lend his 'moral authority' or other leadership traits to leading or supporting a criminal association linked to the violent activities of the GIA or any armed group. On the contrary, it is our conclusion that he was then, and remains, opposed to violence and has instead worked at all times for the peaceful political and constitutional resolution of the Algerian crisis endorsed by the FIS.

The "clandestine" existence

[682] The Court of Appeal does not explain what is meant by the "unacceptably clandestine atmosphere" it claims surrounded the appellant's "life and activities". The finding in itself is surprising given that: the appellant was living openly in

Belgium under his own name; he had declared himself to immigration officials and sought refugee status; he was preaching at mosques; he enjoyed wide social contact, including with Father X ; and he had recently brought his wife and three young children to join him.

The BSR reports

[683] While there is no reference by the Court of Appeal to any other material from the BSR reports upon which it relied in convicting the appellant as being the head of the criminal association, the reports were all part of the prosecution case and provided a context in which the evidence was interpreted. There were at least four reports which contained information about the appellant, his background both in Algeria and Belgium, his political activities and the BSR's perception of him within the wider Algerian opposition movement.

[684] The context provided by the information in these reports clearly contributed to the Court's findings of guilt. Although we do not have copies of all the reports, we can determine some of the claims about the appellant by the BSR from various references to them in Mr Vanderbeck's letter, the judgments of the County Court and the Court of Appeal, the media reports at the time, and the decision of the Foreigners' Consultative Committee. We have also received a copy of the BSR report of 6 April 1995, which was prepared for the CPRR.

[685] It is clear to us that these reports contained supposition, inaccuracies, and misunderstandings. They indicate a shallow appreciation of the appellant's circumstances and the Algerian political landscape. This conclusion follows from the following analysis in which we summarise the reports and then deal separately with their evidence.

[686] Mr Vanderbeck makes a compelling point in his comments on the first BSR report of 1 March 1995 (the day the appellant was arrested):

> This report was sent to the Crown prosecutor and informed us that the State Security police working closely with the French DST had been monitoring for several months a number of militants and activists working for the Algerian cause.
>
> This report stated:
>
> *Following information received on the activities of the GIA in our country and on exchanges with several foreign correspondents, we have learned that a certain Amin[163], an important member of the GIA, is living secretly on the third floor of the Rue du Brocq in Molenbeek …*

[163] Mr Van der Beck informs us that Amin was one of the pseudonyms of Rachid Abdelli.

> *Around Amin, we note several North Africans known from our records to be strong activists for the Algerian cause, to wit, Mr Boudria, alias Yacine, Mr El Majda Abdelfadel, Mr Maroufi Tarek and Mr Azouza Rachid.*
>
> It was somewhat surprising to see that nowhere in this report did the name of Mr Zaoui appear.

[687] Thereafter the reports included various references to the appellant. The following are, in our view, the most significant:

(a) the conflict with Rabar Kebir and its outcome;

(b) the appellant as founder of the FIDA;

(c) the appellant's writing for *El Djihad*;

(d) the appellant "must the considered high-up" in the GIA;

(e) the appellant's arrest with the GIA "No. 2";

(f) the 5 March 1995 communiqué;

(g) the appellant's 1993 arrest with Abdelli;

(h) the appellant's trips and fundraising activities for the GIA;

(i) the appellant's role in the Rome Platform.

[688] Each claim will be discussed in turn.

The conflict with Rabah Kebir and its outcome

[689] We have already set out the evidence relating to this dispute in paragraphs 140-144**.** It will be recalled that, on 2 August 1995, Rabah Kebir issued a statement claiming that the appellant and Anwar Haddam had "split off from the FIS" preferring to work within "another framework".[164] Rabah Kebir's statement did not name the other "framework" but all media reports at the time regarded it as a clear reference to the GIA. One report attributed confirmation of this to Rabah Kebir.[165]

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[164] "Algeria: rift grows within Islamist opposition camp" *Mid-East Mirror* (2 August 1994); see also "FIS statement welcomes steps to unite Mujahidin" *BBC Summary of World Broadcasts* (4 August 1995)

[165] *Mid-East Mirror ibid*

[690] Anwar Haddam immediately issued a press release refuting the claim that he and the appellant had left the FIS.[166] Thereafter he continued to head the FIS Parliamentary Delegation and, only five months later, affixed his signature on behalf of the FIS to the Rome Platform. That he had not left the FIS, but instead remained active within it, is obvious to us.

[691] The appellant did not respond to the innuendo through the media. Instead, he sought and obtained from Rabah Kebir a declaration that he remained a member of the FIS Shura Council. He continued to work for the FIS – indeed at that time and over the next five months he was actively involved as an FIS member in setting up the conferences that produced the Rome Platform. Upon release from prison in Belgium, he set up CCFIS.[167]

[692] There was evidence before the courts that the appellant was, at the time of his trial (September 1995) a member of the FIS. Mr Vanderbeck has confirmed that Rabah Kebir's declaration of the appellant's membership of the FIS Shura Council was in evidence, as was a statement from Anwar Haddam. We assume that this was his 7 March 1995 communiqué expressing his shock at the appellant's arrest and confirming him as "one of the most important people of the FIS who advanced a peaceful solution" to the Algerian crisis.[168] Other letters from "various high representatives of the FIS and its Executive" were also tendered to the Court by Mr Vanderbeck.[169]

[693] No mention is made of any of this evidence in either judgment – nor is there any finding as to why the Court preferred the evidence in the BSR report over the evidence produced by the appellant.

[694] It is clear to us that the appellant has been, since 1991, an active and senior member of the FIS and has never "split off" from it. This is confirmed in the affidavit evidence of TEXT DELETED and in the evidence of Anwar Haddam, Mourad Dhina and others. [170]

[695] It follows that we accept the appellant's explanation that Rabah Kebir's public outburst was the result of an internal dispute over the direction of the FIS

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[166] *Ibid*
[167] See further paras 224-226
[168] Communiqué from Anwar Haddam of 7 March 1995 forwarded at our request by the CPRR
[169] We assume that this included the "Appeal to international public opinion" dated 2 April 1995, a public document again confirming the appellant's membership of the FIS signed by Sheikh Abdel Baki Sahraoui and other FIS leaders and academics.
[170] See paras. 318, 331 and 354

Executive Committee. Rabah Kebir had, at that time, assumed the role of spokesperson for the AIS. The appellant, Anwar Haddam and others opposed the aligning of the FIS with any of the armed groups, preferring to work purely within a political arena. It is ironic, but perhaps not surprising, that in subsequent media discussion and analysis of this "split", the roles have been reversed – in other words, media reports claimed that it was the appellant who advocated a closer relationship with armed groups.[171]

The appellant as founder of the FIDA

[696] We deal with this allegation at paragraphs 898-901. It is baseless. There is no evidence that the appellant has ever been involved in the FIDA.

The appellant's writing for El Djihad

[697] Before the County Court the appellant was charged with inciting violence by speeches or written material. The indictment includes no particulars, alleging only that the appellant did so "on different occasions between 30 September 1993 and 2 March 1995". (The dates are surprising given that the appellant did not arrive in Belgium until 2 November 1993.)

[698] The charge was "extinguished" before the County Court, an outcome confirmed by the Court of Appeal.[172]

[699] Both courts referred to evidence that the appellant had published material in El Djihad since June 1994. This was a French language magazine which, as the County Court noted, was active in the area of GIA propaganda. No specific examples of the appellant's publications are recorded by either Court, nor was any adverse literature specifically attributed to him.

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[171] "The issue behind the expulsions was the view of Haddam and Zaoui that the FIS should merge its forces with more radical groups" *Maghreb Quarterly Report: No. 15* (September 1994)

[172] The translation of the decision is ambiguous. It records (p. 20, Court of Appeal) that the Court "upholds the judgment past where it is declared that charge I4 is established". The Court then sentences the appellant on the three other offences but not on charge I4 which is the charge of inciting violence. The County Court "extinguished" the charge of inciting violence in respect of the appellant. We have concluded that that was equivalent to either the prosecution withdrawing the charge, or the Court's finding of no case to answer (see footnotes 143 and 153). Despite it appearing in the list of charges before it, the Court of Appeal traversed no evidence against the appellant in respect of this charge, and did not sentence him on it. We conclude that the Court of Appeal upheld the County Court's conclusion on the charge of inciting violence.

[700] Some suggestion of the appellant's writing was in the BSR report of 5 April 1995, which claimed that the appellant chose Koranic verses for GIA publications and had GIA material at his home. No mention is made by either Court of this evidence (or any of the other claims in the 5 April 1995 report) which is inconceivable if these claims were correct.[173]

[701] Mr Vanderbeck's letter (at p. 9) provides some insight into the evidence before the Court:

> …The prosecution has never clearly defined what was meant by [incitement to murder through speeches and or writings]. Were they blaming Mr Zaoui for his preaching in the mosques? In this case which bits of evidence in the file demonstrated that Mr Zaoui had made speeches that constituted incitements to crime? The sole witness to one of these sermons mentioned in the file was a certain Mr Derriah Khaled who said in an interview on 21 June 1995 "I encountered Mr Zaoui during a sermon that he made in the mosque in the Rue de la Porte in Liége, I make it clear that in the course of the sermon Mr Zaoui spoke generally about the situation in Algeria without anything more specific ….
>
> As far as the writings are concerned, the only writing that they have been able to find by [the appellant] were published in the official newspapers and set out the moderate position that he takes.
>
> All the evidence cited enabled me to plead for an acquittal at first instance and to obtain it.

[702] The Court of Appeal upheld the County Court's decision to "extinguish" the charge, effectively concluding that there was no evidence that the appellant incited violence through speech or the publication of written material.

The appellant "must be considered high-up in the GIA"

[703] This claim appeared in the BSR report of 9 March 1995 to the Investigating magistrate and appears in the judgment by the County Court (but not by the Court of Appeal). It was central to the prosecution case against the appellant. Yet it was clearly no part of the case on 1 March 1995 as no mention was made of the appellant in the BSR report of that date.

[704] As to how the appellant went from obscurity to "head the GIA" in such a short time, the evidence as articulated in the judgment does not make clear. However, when regard is had to the manner and nature of the media reporting at the time, it becomes clear that this allegation came directly from the Algerian authorities.

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[173] See further our discussion of this report at paras. 526-529

[705] Reporting on 6 March 1995 on the arrest of the appellant and others, the *Le Soir* correspondent, Alain Guillaume wrote:

> Two of these people [who have been arrested] however are of particular interest to the GIA and investigators…
>
> The first, who is known in Belgium by the name Ahmed Zaoui – and in Algeria by the patronymic of Abou Houdhaifa Ahmed Ezzaoui – is a major figure among the vast number of Islamic fundamentalist groups. The "moral support" of a section of Muslim extremists, according to Belgian specialists of the Gendarmerie (state police) and the Criminal Investigation Bureau; and the "head of the GIA" in Europe *according to two journalists from the Algerian media, whom we contacted yesterday.…*(emphasis added)

[706] The report continues with biographical details which appear to be taken directly from the *El Watan* article to which we have previously referred at paragraphs 533-553.

[707] The second person referred to in this report is "Sheikh Abdennacer" to whom we will refer shortly.

[708] Clearly, on 6 March 1995, the Belgian authorities regarded the appellant as providing "moral support" but it was the Algerian media which regarded him as the "head of the GIA".

[709] As we will discuss later in this decision, this was not the first time the Algerian media had made such a claim. It had constantly undermined the Rome Platform initiative by wrongly claiming that leaders of the GIA had been invited to attend the forum and that the appellant had been invited to attend as a GIA leader or representative.[174] The "two journalists from the Algerian media" were simply repeating this claim in response to the *Le Soir* correspondent's enquiry.

[710] We have already discussed the specific evidence adduced by the prosecution in support of the claim that the appellant "must be considered high-up in the GIA" before the courts. It is neither probative nor reliable. In the circumstances we specifically reject it.

[711] Both courts side-stepped this claim by determining that it was unnecessary for them to decide whether the criminal association was affiliated to the GIA, the FIDA or the FIS.

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[174] See further paragraphs 887-889

[712] In our view, this effective blurring of the distinctions between these groups permitted the Court of Appeal to misinterpret the appellant's activities.[175] Notwithstanding this, both courts clearly drew back from endorsing the claim of the BSR that the appellant "must be high-up in the GIA".

The appellant's arrest with the GIA "No. 2"

[713] Breaking what he clearly regarded as sensational news, Alain Guillaume burst into print in *Le Soir* on 8 March 1995:

> …as we revealed on Monday, one of the detainees [appearing before the Investigating Magistrate] is none other than Ahmed Zaoui, alias Abou Houdhaifa Ahmed Ezzaoui, considered by the Special Services and experts on Algeria as one of the bosses or even "the" boss of the GIA, the armed Islamic group, in Europe. Useful fact: his presence in Belgium was reported by the French Intelligence Services more than six months ago [and] [he] has been watched by the *Sûreté* since then.
>
> Moreover, we are in a position to reveal that another of those arrested, whose liberation is equally a topic of a tract attributed to the GIA [the 5 March communiqué] – is the "No. 2" of the organisation in Europe, the direct collaborator with [the appellant]: Sheikh Abdennacer, alias Titraoui Abdenasser, alias Abdelnasr. The arrests have therefore totally decapitated the GIA in Europe….
>
> Titraoui Abdenasser had the responsibility, in Algeria, for the "General Affairs" (of logistics) for the FIS before its dissolution.[176] Before he was condemned to death, he was "an emir" (boss) of a region of East Algiers for the AIS, the Islamic Army for Salvation. Aged 35 or 36 and considered as a "hawk" he moved from the AIS to the GIA when certain strands of the FIS contemplated opening up a dialogue with the Algerian power of the day, in 1994. He was then sent to Europe to deputy to Zaoui in his raising of funds and arms for the Algerian rebels."[177]

[714] This report is startling when considered in context. It claims French Intelligence reported the appellant's presence to the BSR "more than six months ago" – i.e. before September 1994. We know from other evidence that the appellant was under surveillance for at least six months prior to the trial, clearly therefore from the time French Intelligence "tipped off" the Belgians.

[715] Despite this confident announcement, no one bearing the name of Titraoui Abdenasser[178] or in fact either of his two aliases appeared before the Belgian County Court or the Court of Appeal. Nor was the role of "deputy" or "No. 2" in the GIA attributed to any of the co-defendants. One of the co-defendants was Abdallah Nasr Mohamed. He does have a name similar to at least one of the

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[175] In this regard they were assisted by the prosecution who specifically "rejected any nuance between the GIA and the FIS. 'Their aim is armed struggle, not dialogue'." "Paris Attacks: Maître Vérgès Points the finger at Algiers" *Le Soir* (September 1995) (appellant's documents No. 20)

[176] Note this misinformation – the FIS had not "dissolved" at that time – it continues even today.

[177] *Le Soir* on-line "Arrest warrants confirmed the nine Algerians …" 8 March 1995.

[178] Translators have translated this name variously as Abd EN Nasser, Abdennacer, Abdelnasr, and Abdenasser. We have used the last translation, Titraoui Abdenasser.

aliases of Titraoui Abdenasser, but the similarity ends there. He was convicted only of being illegally in Belgium.

[716] Such an outcome is inconceivable if there was any reliable evidence before the court of the matters leaked to the *Le Soir* correspondent.

[717] Before us the appellant was confused by these press releases. The only "Titraoui" he knew had been responsible for the security of Abdelkader Hachani after the coup and was well-known to the FIS at the time. This person was not arrested with the appellant or, to his knowledge, even in Belgium. He believes this misinformation is all part of a campaign to wrongly implicate him in GIA activities, such claims appearing in French and English newspapers in early March.[179] We have located a reference to Titraoui Abdelnacer recording that he was killed by the GIA in 1995.[180]

[718] It appears from Mr Guillaume's report that he had received his information directly from the BSR and the tenor of his reporting doubtless reflects the excitement of the BSR at the arrest of the appellant and one of his co-defendants – whom they clearly believed at that time were the head and deputy head of the GIA in Europe. As our analysis demonstrates, by the end of the trial, there was little evidence against the appellant and the Court of Appeal had drawn back from making any finding as to his alleged leadership of or even affiliation to the GIA, while his "deputy" had effectively disappeared.

[719] In light of the appellant's evidence, the reported death of Titraoui and the outcome of the trial in respect of the co-defendants and Abdallah Nasr Mohammed in particular, we find the claim that the appellant was arrested with the GIA "No. 2" to be baseless. If there had been any truth in it, the Court of Appeal would surely have mentioned it.

[720] It does appear, however, that the Court's effective dismissal of this baseless claim did not deter the Algerian security services from continuing to make use of it as late as January 2000. The same claim surfaced in a story on arms trafficking[181]

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[179] See for example "Islamistes algeriens: six maintiens en detention, trios remises en liberte" *Agence France Presse* (31 March 1995), "Algerians to appear in Belgium court in September" *Agence France Presse* (5 July 1995)

[180] "What is the GIA?" B Izel, JS Wafa and W Isaac *An Inquiry into the Algerian Massacres* at p. 379 (and at p. 347 of the NZIS file)

[181] "Arms trafficking in Europe–the tentacles of the GIA" (www.pourinso.ouvaton.org) 11 January 2000. As an example of such fictitious claims acquiring the status of "truth", refer to the *Executive Intelligence Review* publication of 13 October 1995 (at pp. 592-9 of the NZIS file). In its list of GIA

by a favoured *El Watan* journalist, Salima Tlemçani, who Professor Joffé notes is well-known for her close contacts with the Algerian security forces.

The 5 March 1995 communiqué

[721] For the reasons set out in paragraphs 564-569, we have concluded that this communiqué is a fabrication. The fact that it contains the same error in naming "Sheikh Abdennacr" indicates that it and the information passed to the *Le Soir* correspondent regarding the arrest of the appellant's GIA "Deputy" came from the same source – the Algerian regime.

Arrest in 1993 with Abdelli

[722] Mr Vanderbeck refers to a claim appearing in the third BSR report – that Abdellah Rachid had taken part in attempts to blow up the World Trade Center in the early 1990s and was subsequently arrested in the appellant's presence on 10 November 1993. Mr Vanderbeck states that this claim was "proved to be wrong".

[723] This is corroborated by the lack of any reference in either judgment of the courts to Abdelli and the appellant being together on 10 November 1993 (in contrast to the evidence of them being stopped together on the Swiss-German border). Nor is there any reference to Abdelli being involved in the World Trade Center incident in the early 1990's.

The appellant's contact with "the different heads of Islamic networks and their financial backers"

[724] This broad claim is not supported by any evidence and is given neither explanation nor context in the judgment of the County Court (where it appears). Had there been evidence of meetings between the appellant and relevant individuals, the Court of Appeal would surely have relied on it, given the importance placed on the appellant's "contacts" as evidence of his involvement in a criminal association.

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operatives there is an entry for both the appellant and Titraoui Abdennacer. The appellant is described as someone "identified by the *Algerian Press* as 'GIA chief in Belgium' also mooted to be the head of the GIA in Europe…". The reference to Titraoui Abdennacer mirrors the claims made in the press releases at the time that he too was "suspected of being in the Belgian cell" and had joined the GIA in 1994. This document is blatantly inaccurate and unreliable.

The appellant's trips and fundraising activities

[725] Another *Le Soir* article published during the County Court trial refers to one of the County Court judges reading to the Court from a report by the National Criminal Investigation Department that the appellant "is allegedly one of the GIA leaders in Europe, that he has allegedly organised conferences and fundraising activities in Belgium and in the Netherlands, that he had allegedly been to Saudi Arabia to get funding, and that he allegedly went to Rome in November 1994 to a meeting of the Algerian opposition".[182]

[726] The allegation that the appellant travelled to Rome was erroneous for the reasons which we will articulate shortly. As for the claims of conferences and fundraising in Belgium and the Netherlands, again there is no evidence in support of them referred to in either of the court judgments. Had there been reliable evidence of such prejudicial matters it would have been specifically noted and relied on by the Court.

[727] The only evidence we can find of the appellant attending conferences is in a BSR report of 11 April 1994 referred to by the Foreigners' Consultative Committee. He is described as advocating a political approach through negotiation to solve the Algerian crisis.[183]

[728] The lack of any direct evidence that the appellant travelled to Saudi Arabia to obtain funding is telling. It is extraordinary that the Belgian police, and thereafter the Investigating magistrate, could make such a claim before a court without any supporting evidence.

[729] The claim that the appellant travelled to Saudi Arabia first appeared in the *El Watan* article relied on by the CPRR (see further paragraph 550). In that article, the appellant is reported as making "frequent trips to Mecca" since taking up domicile in Belgium. As we have already demonstrated, the BSR have used the *El Watan* article as a primary source of evidence against the appellant, without undertaking even the most rudimentary investigation to explore its accuracy.

[730] As with other baseless allegations against the appellant, this one has come, in the words of Professor Joffé, "from the heart of the regime". It is palpably false.

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[182] "First tense hours at the media trial" Jean-Pierre Borloo, September 1995

[183] Decision of Foreigners' Consultative Committee of 26 April 1996 at p. 3

The appellant's role in the Rome Platform

[731] It was another of the BSR claims that the appellant had taken part in the Rome Platform meeting in November 1994. The National Criminal Investigation report claimed he actually travelled to Rome "in November 1994 to a meeting of the Algerian opposition".

[732] Reference was made to this claim by the County Court, which appears to have accepted the appellant's evidence that he did not travel to Rome at that time. That was his evidence to us, which we accept. We have independent evidence confirming it. However, we find it inexplicable that the BSR could advance such a claim without any checking, and that the Investigating magistrate failed to verify it. It is indicative of the superficiality of both investigations.

[733] But that the BSR could advance the claim of the appellant's participation in the Rome Platform in the context of its allegation that he was the head of the GIA is even more egregious. It demonstrates a lack of proper inquiry as to the nature of the Rome Platform and a simplistic approach to the Algerian political scene.

[734] The Rome Platform is a document which resulted from a Colloquium on the Algerian crisis organised by the Sant'Egidio Community in Rome. Based within the Vatican, the Community has been involved in a range of activities since its inception in 1968, including charity work and international peace-making.

[735] In its first Colloquium on 21 and 22 November 1994 it invited those regarded as Algeria's significant political and social leaders, including the leaders of the political parties which had polled well in the aborted 1991 elections, to attend a meeting. A number of meetings were held thereafter from which emerged an agreement that a common statement be prepared and published. On 13 January 1995 the statement, which has become known as the Rome Platform, was signed by representatives of the seven parties that had together received more than 80% of the vote in the 1991 election. For the FIS, the Platform was signed by Rabah Kebir and Anwar Haddam. The appellant had been invited by the Community to attend this meeting but was unable to obtain a travel document from the Belgian government.

[736] The Platform is a statement of principles by which the signatories commit their parties to a peaceful resolution of the crisis. It "rejects violence and embraces division of government powers, political pluralism, and freedom of

religion and thought".[184] The Platform was resoundingly rejected by the Algerian government of the day and up until today has received no government endorsement. At times the government has denied the very existence of the dialogue and the Platform. The Community's efforts were rewarded with death threats from the Algerian regime. Those who participated in the dialogue directly have been reluctant to speak publicly for fear of retaliation.[185]

[737] Even before the Platform document was signed, significant and largely effective efforts had been made to undermine the initiative, doubtless at the behest and on the behalf of the Algerian regime.[186] Such efforts impacted profoundly on the appellant given the misinterpretation that has consistently been placed on his involvement.

[738] The appellant played a significant role in the creation of the Rome Platform in his capacity both as a senior member of the FIS, and a respected intellectual and imam. In addition to his own evidence, we have evidence directly from a number of witnesses, including members of the Sant'Egidio Community, who confirmed the appellant's role and who categorically rejected any claim that he was invited to participate as a representative of the GIA.[187] The Community has confirmed to us that none of the armed groups were invited to participate.

[739] We have also received an affidavit from Father X describing the appellant's involvement in the negotiations that preceded the signing of the Rome Platform. This was received after the appellant gave his evidence to us and corroborated it entirely.

[740] Father X approached the appellant at the end of 1993 to explore a peace initiative on the Algerian crisis. The appellant had been recommended to the Community by its contacts in Algeria. His involvement was also endorsed by the

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[184] See "The Sant'Egidio Platform for a Peaceful Solution of the Algerian Crisis" 30 May 1998, www.stegidio.org.

[185] By way of example, we note that, in seeking refugee status in the United States the FIS signatory to the Platform document, Anwar Haddam, called as a witness a member of the Sant'Egidio Community. That witness confirmed to the American Board of Immigration Appeals (BIA) that members of the Community began receiving death threats from the regime from February 1995. He also expressed his concern over publicly supporting the dialogue in the Algerian crisis, as to do so put him in a "very dangerous position". In exercising its wide investigative powers, the Authority made efforts to approach this witness through the appellant's former counsel (before we were able to make contact with other members of the Sant'Egidio Community) but he was again most reluctant to become involved in these proceedings for fear of identification and subsequent retaliation from the Algerian government, some eight years since the signing of the Rome Platform.

[186] See discussion in para. 517

[187] See for example letter from Dr S to RSAA 13 April 2003; and Father X TEXT DELETED

Algerian community in Belgium. As the FIS had secured the most votes in the aborted 1991 election, the Community "felt the need of contacting people who could represent with credibility the FIS". Father X and the appellant initially met for about an hour, during which time the appellant "greeted the interest of Sant'Egidio in the Algerian case".[188] One of the appellant's co-defendants, Ouallah Omar acted as interpreter during this, and all subsequent, meetings.

[741] There were a number of meetings in 1994. The appellant wholeheartedly endorsed the Community's initiative to involve all political parties in the dialogue, and offered suggestions as to the nature of forthcoming meetings. They met after the November 1994 meeting when the appellant again made a number of suggestions for the next meeting – being 13 January 1995, at which the Platform was signed. In early January he was sent an invitation to visit the Community to discuss various issues arising in respect of the process, the Community noting in its invitation "your commitment to Algeria and your knowledge on various elements concerning the present crisis the country is going through and the possibilities of finding a peaceful solution…".[189] In response, the appellant applied to the Belgian authorities for permission to leave the country. In support of the appellant's request, Father X sent a report explaining the nature of the Community's initiative to the Ministry for Foreign Affairs, but permission was not forthcoming and the appellant was unable to attend.

[742] Accordingly, the appellant did not travel to Rome. In discussion between the appellant and Father X in the weeks after the Rome Platform was signed, the appellant "gave his agreement with the document and declared himself in favour of a political solution to the Algerian crisis. He even recognised the necessity of giving certain guarantees to the army and to the military government".[190]

[743] Father X and the Community in general involved the appellant in this peace initiative as a member of the FIS and someone who had the respect of the Algerian community both within and outside Algeria. It was "abundantly obvious" to Father X that the appellant was involved in the leadership of the FIS and he was invited to Rome in that capacity.

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[188] Father X TEXT DELETED

[189] See letter dated 21 December 1994 to the appellant from Dr Mario Giro of the Sant'Egidio Community

[190] Father X TEXT DELETED

[744] We are satisfied that, if the BSR and/or the Investigating magistrate had properly enquired into the nature of the Rome Platform and the appellant's role therein, it would have realised that their perception of him as being involved in the GIA or any other armed group, let alone a leader of the GIA – an organisation implacably opposed to constitutional reform through dialogue – was inherently improbable.

[745] The BSR's approach is illustrative of the widespread failure among Belgian officialdom to appreciate that there were fundamental differences of perspective and practices between the FIS and the GIA. We have already commented on the implications of this approach in our discussion of the decision of the CPRR.

Summary of BSR reports

[746] We find that, in respect of the appellant, the BSR reports contained inaccurate and prejudicial material. Most of the "evidence" in the reports would not be admissible in New Zealand courts – either because it was hearsay or highly prejudicial and of little or no probative value. Acting on information that had come, at least in part, from the Algerian regime, the BSR wrongly determined that the appellant was a senior member of the GIA.

Prejudicial environment

[747] That information was leaked by the BSR to the media is obvious, resulting in what Mr Vanderbeck describes as the "media frenzy" which surrounded this case. There was much speculation in the press both at the time the appellant was arrested that he was the leader of the GIA in Europe. He was described as "undoubtedly the main 'prize' captured by the Belgian police"[191] and one "considered by Special Services and experts on Algeria as one of the bosses or even 'the' boss of the GIA in Europe".[192]

[748] Further, between his arrest and trial there were a series of bombings on the Paris Metro in July which led to a number of deaths and injuries. At the time, these were attributed to the GIA, and widely reported.

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[191] See "The shadows still surrounding the origin of the arrests…" by Baudouin Loos, *Le Soir* (8 March 1995)

[192] See "Arrest warrants confirmed for nine Algerians" by Alain Guillaume *Le Soir* (8 March 1995)

[749] Before the trial had started, the Minister for Internal Affairs publicly spoke of "the GIA terrorists who will be tried" and that "it had been proved that they were preparing an attack".[193]

[750] Of the trial itself, one article observed that "the paranoia of the police and the judiciary crossed an historical threshold" in the "ultra-high security" and "extremely tense atmosphere in the court".[194] It was described in the media as the "GIA trial" in which the appellant was "the undisputed star".[195]

[751] It is clear that the appellant's trial took place within a prejudicial atmosphere.

CONCLUSION ON THE BELGIAN CRIMINAL PROCEEDINGS

[752] We conclude that the Belgian convictions are unsafe and are not probative or reliable evidence of the appellant's involvement in acts of terrorism or any other non-political crimes. In reaching this conclusion we take into account:

In respect of the BSR interviews

a) the appellant was interviewed in French, a language in which he was not fluent;

b) he was interviewed before he had had the opportunity to consult a lawyer and in the absence of a lawyer;

c) he was not told of, or did not fully understand, the nature of the charges against him and therefore had no opportunity to answer them.

Constraints on presenting his defence

d) the appellant was not interviewed by his counsel in Arabic;

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[193] See "On trial: the reason of state" by Alain Guillaume, *Le Soir* on-line September 1994. Further it is to be recalled that neither court determined either the nature of any planned attack, or its target.

[194] *Le Soir* on-line "Ahmed Zaoui: I would have liked to appear before the Belgian Parliament", Jean-Pierre Borloo (September 1995).

[195] See "First tense hours at the GIA trial" by Jean-Pierre Borloo, *Le Soir* (September 1995). (Appellant's documents No. 13.)

e) because of insufficient funds, the appellant's counsel was unable to obtain a copy of the complete prosecution case against the appellant and accordingly the appellant was never informed of all the evidence against him and therefore could not properly instruct his counsel.

Lack of proper inquiry by the investigating magistrate

f) there was no interpreter present during the investigation and the appellant's knowledge of the French language was limited to the extent that he did not fully understand the contents of the interview;

g) specifically, he did not understand the charges against him as described by the Investigating magistrate and did not appreciate he was charged as head of a criminal association linked to weapons found in four different locations;

h) the Investigating magistrate did not inform the appellant of the nature of the evidence against him – not just that weapons had been found but the BSR's reliance on his "contact" with his co-defendants and others, thereby preventing the appellant from providing any explanation in his defence;

i) no attempt was made to test the BSR claims in respect of the appellant – specifically that he was the "head of the GIA" and that he participated in the Rome Platform in that capacity;

j) no attempt was made to investigate possible exculpatory evidence – specifically the appellant's actual role in the Rome Platform dialogue and his ongoing role within the FIS; there was a failure to grasp the difference between the FIS and the GIA which, while it may not have been relevant to the actual criminal charges, was relevant in determining the appellant's actual involvement in the case.

The Court proceedings

k) the appellant's "contact" with his co-defendants was either vague and minimal (e.g. with Abdelli, Boudriah and Maaroufi) or could be explained by his role within the FIS (e.g. Kassoul and Ouallah);

l) there was no evidence that the appellant had any knowledge of the weapons found in possession of his co-defendants, nor that he had any role in the obtaining of such weapons;

m) there was no evidence that the appellant had any knowledge of the "subversive" or GIA literature found in the possession of some of his co-defendants, or that he supported the views contained in that literature;

n) the Court relied on highly prejudicial evidence regarding the circumstances of two men with whom the appellant had contact (Ali Chami and Salim Abbassi) and effectively ignored the possibility that the appellant's contact with these two men could also be explained within by his role in the FIS;

o) in convicting the appellant of leading a criminal association the Court placed undue weight on his possession of false travel documents which we find to be explicable in the light of the difficult circumstances faced by his family members in trying to flee Algeria;

p) the Court placed undue weight on the appellant's reliance on friends and associates for financial support which we find unremarkable given his personal circumstances at the time;

q) the Court assumed, without more, that the appellant's "moral authority" was evidence of his leadership of a criminal association without any substantive exploration of the personal opinions and commitments which underpin this "moral authority";

r) by finding that it was unnecessary to determine whether the criminal association was affiliated to the FIS, the GIA or the FIDA, the Court effectively blurred the distinction between these groups, creating an environment in which claims could be made about the appellant which were inherently improbable (for example, that he participated in the Rome Platform as the head of the GIA) and from which the Court could draw inaccurate adverse inferences.

[753] We conclude that neither the evidence before the Belgian Court of Appeal nor the appellant's convictions provide "serious reasons for considering" that he

has committed Article 1F crimes such that he should be excluded from the protection of the Refugee Convention.

FOREIGNERS' CONSULTATIVE COMMITTEE

[754] We note with interest that we are not the only judicial body to reject the evidential findings of the Court of Appeal. Five months after its decision, another Belgian judicial body was required to assess the appellant's circumstances, namely, the Foreigners' Consultative Committee. This is an independent body to whom the appellant had appealed a decision of the Interior Minister to deport him on the grounds that he was a threat to national security.

[755] In concluding that there were no grounds to deport the appellant, the Committee made a number of relevant observations:

(a) That the appellant had appeared before them strongly denying any part in the GIA, rejecting its violent actions and restating his support for the Rome Platform;

(b) That from an examination of all the documents before it, the Committee could find no decisive evidence to counter the appellant's denial – on the contrary, the BSR in its report of 6 April 1995, recorded specifically that it had "no conclusive evidence regarding Zaoui's membership of the GIA;

(c) The appellant was involved with false passports because of the crisis at the time and the need to obtain a safe passage for his wife and children. Such conduct was not evidence of any public security breach;

(d) Regarding his conviction of leadership of the criminal association, the Committee accepted the appellant's contact with others was in furtherance of his role in establishing the Rome Platform, and that the appellant's commitment to the resolution of the Algerian crisis by negotiation was recorded as early as April 1994 in a State Security memorandum;

(e) The Committee noted the inconsistency between the lenient sentence imposed by the Court of Appeal (effectively nine months imprisonment) and that Court's comments that the sentence "must take into account

> the importance of the role he played as head of the criminal association".

[756] In short, therefore, in assessing the evidence against the appellant within six months of his conviction, the Foreigners' Consultative Committee reached the clear conclusion that the appellant's activities were in furtherance of his role within the FIS, and in particular, his role in setting up and supporting the aims of outcomes of the Rome Platform. We concur with those conclusions.

DEPORTATION FROM SWITZERLAND

[757] We have seen that the appellant was placed under house arrest shortly after his arrival in Switzerland on 4 November 1997 and, a year later, deported with his wife and children to Burkina Faso.

[758] The brief report to the New Zealand SIS from the Swiss Service for Analysis and Prevention (SAP) and the press release from the Swiss Federal Justice and Police department dated 27 April 1998 indicate that on 1 December 1997 the Swiss Federal Council ordered the appellant's expulsion as soon as a safe third country could be found.

[759] On 27 April 1998, the Federal Council issued a further order banning the appellant from activities on behalf of extremist and terrorist organisations. He was forbidden to set up or work for organisations which condoned or supported terrorist or violent extremist acts or to issue propaganda on behalf of such organisations. Further, his fax machine was ordered to be seized and his email and internet connections blocked.

[760] The Justice Department press release indicates that the Swiss authorities were concerned that the appellant had:

> …noticeably increased his political activities since March. He has set up a provisional office of the "Islamic Salvation Front Co-ordinating Council Abroad" (CCFIS), of which he is Chairman. This body manages FIS members who have emigrated to France, and co-ordinates their activities. Its aim is to unite FIS members and sympathisers and to go to the aid of the resistance in Algeria. Everything leads us to believe that Islamic Fundamentalist Militants feel that they are being supported by the CCFIS, and that recourse to violence to attain the objective which they have set themselves cannot be ruled out.

[761] The decision to expel the appellant from Switzerland was made on the grounds of Switzerland's national security:

> His polarising and provocative activity may lead to acts of violence, and even attacks in Switzerland…the intrigues by the leader of the FIS in Switzerland are such as to even affect our country's relations with foreign countries and thereby endanger Switzerland's external security.

[762] The Swiss authorities' response to the appellant appears to have been significantly influenced by the fact of his criminal convictions and other events in Belgium. Professor Joffé also expressed the view that the decision to expel the appellant reflected Switzerland's relationship with Belgium and France and, in particular, France's desire not to have the appellant either in France or "on their doorstep". That there was consultation with the Belgium and French authorities is also noted in the material received by us from the SIS.

[763] Whatever the political considerations behind the decision to expel the appellant, our inquiry is concerned with whether there is any objective evidence to support the claims used to publicly justify the appellant's expulsion and, in particular, whether he was engaged in "activities on behalf of extremist and terrorist organisations".

[764] Unlike in Belgium, the appellant was not charged with any criminal offences in Switzerland, nor did he have the benefit of a refugee determination – his refugee claim, in respect of which he had been interviewed on 30 December 1997, was put on hold pending his expulsion and never determined.

[765] As best as we can tell from the press release from the Federal Justice and Police department, Swiss concerns about the appellant focused very much on his role within the CCFIS. In the eyes of the Swiss authorities, the CCFIS supported the militant resistance in Algeria and the appellant's activities were "polarising and provocative". At the time of the 27 April 1998 order, the CCFIS had issued four communiqués, three of which had been written since his arrival in Switzerland.

[766] The SAP report written for the New Zealand SIS also refers to the appellant setting up a provisional office of the CCFIS. CCFIS Communiqué No. 2 is specifically mentioned and the following words underlined, presumably to indicate their significance:

> …he Zaoui called for peace negotiations between Algerian resistance fighters and the government to be broken off.[196]

[767] Swiss concerns about the appellant's activities in the CCFIS were summarised in the decision of the European Court of Human Rights delivered on 18 January 2001, (No. 41615/9)[197] in respect of the appellant's unsuccessful challenge to the legality of the Swiss authorities' confiscation of his fax machine and blocking of his internet and email access. The European Court noted:

> During his stay in Switzerland, he issued three FIS Overseas Coordination Council (CCFIS) propaganda communiqués, besides the one dated the 5th of October 1997 issued while he was still in Belgium. In these communiqués, he announced the founding of the CCFIS, the establishment of its provisional office, declared his abandonment of the FIS line, and revealed the objectives of the CCFIS. He also called upon all supporters of the Islamic cause to rally around the CCFIS, condemned the dictatorial government in Algeria, and defended popular resistance within the country.
>
> Because of these publications, the Federal Council decided in a decree dated the 27th of April 1998 to ban the plaintiff and persons acting on his behalf:
>
> > – from creating organizations which, through their propaganda, condone, promote, encourage or materially assist terrorist or extremist acts of a violent nature or any other acts of violence, or from belonging to organizations which aim in particular to disrupt law and order by violent means in Algeria;
> >
> > – from making propaganda for such organizations, particularly for those which call indirectly for violence or support for it.
>
> In the same decision, the Federal Council ordered, under Articles 70 and 102, paragraphs 8 and 10 of the Federal Constitution of the 29th of May 1874, the seizure by the police of the plaintiff's fax machines, the blocking of his e-mail and Internet connections which had been used for the dissemination of his communiqués, and also the seizure of his telephones if he did not comply with the decision.

[768] We turn therefore to an examination of the CCFIS communiqués written by the appellant during this period. The appellant's account of the establishment of the CCFIS and his role within that organisation up until its dissolution in August 2002 is found in paragraphs 224-228. In all, 33 communiqués were published in French on the CCFIS website between 5 October 1997 and 16 April 2002. At least 10 communiqués were issued in the name of the appellant, mostly within the period up until November 1998. The remainder, with odd exceptions, were signed by Mourad Dhina, also a CCFIS spokesperson, who resided in Switzerland.

[769] The suggestion of the European Court that the first four communiqués reveal the appellant "declaring his abandonment of the FIS line" is to misrepresent an internal factional dispute between, on the one hand, the appellant and others in

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[196] See para. 246 for the appellant's evidence that the Head of Public Services in Vallais had in fact vetted the communiqués and found them "not excessive".

[197] NZIS file 748

the CCFIS and, on the other, what was left of Rabah Kebir's Executive Committee. The appellant, in Communiqué No. 1, accused the Executive Committee of deviating from the FIS line, not truly representing the FIS and asserted the CCFIS' commitment to the leadership of Abbassi and Belhadj.

[770] Kebir's isolation within the FIS leadership is amply demonstrated by his absence from the FIS conference in August 2002 which reconstituted the FIS organisation abroad. It is therefore arguable that the CCFIS line, expounded by the appellant, more properly reflected the views of the majority within the FIS leadership than did that of Rabah Kebir. In any event it was entirely misleading for the European Court to depict the appellant as having "declared his abandonment of the FIS line".

[771] We have also studied the communiqués (particularly numbers 1-4) for evidence of the appellant condoning, promoting or encouraging terrorist or extremist acts. There is one reference in Communiqué No. 1 to "mujaheddin brothers" appealing to them to strengthen their ranks against the GIA but, otherwise, the only references to armed or jihad groups occur in the context of the discussion of the truce agreed between the leaders of certain of the armed groups loyal to the FIS leadership and the military in October 1997.

[772] The SAP report suggests that the appellant's response to the October 1997 truce, as set out in Communiqué No. 2, dated 7 January 1998, was considered to be especially compromising.

[773] In this communiqué the CCFIS called for the freezing of contacts and negotiations between the resistance fighters and the generals until the regime agreed to: establish an international commission of inquiry as well as an independent national commission of inquiry to shed light on the massacres; to declare the whereabouts of Belhadj (who was rumoured to have been assassinated in prison) and to release Abbassi and Belhadj.

[774] Communiqué No. 3, dated 30 March 1998, elaborated further on the position of the CCFIS. It was the prerogative of the armed groups to call a truce, but the truce would not achieve its strategic goals unless it occurred in the context of a *political* agreement. The terms of any such agreement would have to be clear and transparent, and follow negotiations that allowed for the participation of the imprisoned FIS leaders and consultation with leaders of armed groups loyal to the FIS as well as FIS executives. Communiqué No. 3 also repeated what was to

become a familiar CCFIS demand - that any political agreement must include the establishment of an independent commission to investigate the massacres.

[775] The appellant's view that the Algerian crisis could only be solved by a *political*, rather than a *military*, solution, is one he has consistently espoused. The Swiss newspaper *Le Nouvelliste*, for 29 November 1997, reported these comments on the subject of the truce made to journalist Antoine Gessler:

> I am in favour of peace, but against the clauses of this truce. It is not in accordance with the Rome Platform. It is a divisive truce, inasmuch as it renders the FIS's demands meaningless. [198]

[776] When interviewed in respect of his Swiss refugee claim in December 1997, he stated:

> To start with, we accepted a truce with conditions that guaranteed a return to the previous situation, not a peace for the benefit of the generals who do not solve the roots of the crisis. Solving our crisis does not depend on democracy alone; it depends on the government structure that has been in place since 1962. I wish this truce and dialogue had taken place within the context of the Rome Platform.
>
> The problem is that this truce was negotiated between militaries whereas politics should prevail. We have to seek the conditions for a real dialogue. We disagreed on the terms of the truce, not on the truce itself.[199]

[777] In his written comments on the report of his Swiss refugee interview he explained further:

> …conditional dialogue and unilateral truce, if they come with guarantees, are the basic conditions for a political solution. So far, the authorities have always refused any political solution.[200]

[778] Time has confirmed the correctness of the appellant's view that the truce, in the absence of a comprehensive *political* settlement, would not bring about an end to violence, the lifting of the state of emergency or genuine democracy. Further, that the truce (and the Civil Concord law that subsequently formalised it) delivered a "disappointing level of political benefits"[201] is a view shared by most informed commentators on Algeria. [202]

[779] We are unable to agree with the SAP's suggestion that the appellant's desire to broaden the terms of the October 1997 truce was illegitimate or indicative

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[198] "Who are you, Ahmed Zaoui?" *Le Nouvelliste* (29 November 1997) (appellant's documents No. 31)

[199] Appellant's documents No. 70

[200] *Ibid*.

[201] Volpi, *supra,* p. 91.

[202] See, for example, International Crisis Group, "Civil Concord: A Peace Initiative Wasted" (9 July 2001)

of his assisting or promoting terrorist or extremist violence. We find this to be a simplistic misreading of the communiqués, and makes no allowance for the fact that if negotiations to end an ongoing conflict are ever to move forward the terms of any settlement must address substantive issues and be mutually acceptable.

[780] We have already noted the sensitivity of European states to the prospect of Islamic violence in their own communities and the associated tendency for officials and adjudicators to equate the FIS not only with the AIS but also the GIA and any other armed group. It is possible that this viewpoint also conditioned Swiss officials' responses to the appellant. This might explain why the appellant's actions in the name of the CCFIS (such as communicating with FIS colleagues, attempting to reconstitute and strengthen the FIS organisation abroad, protesting at human rights violations by the Algerian regime and promoting discussions about the terms of the October 1997 ceasefire and the appropriate response of the FIS) raised concerns that the appellant was engaged in "activities on behalf of extremist and terrorist organisations".

[781] The point is taken up by François Burgat in his report on Algeria to the UNHCR/ACCORD seminar of 11-12 June 2001:

> Again the role Islam plays in Europe has to be recalled – it is the Other that has to be shunned and fought. The regime succeeds in suggesting to the West that they share a common enemy, the Islamic "fundamentalists" and that the regime represents a lesser evil. The West consequently accepts human rights violations for it is convinced that the regime uses these measures to fight a monster. Historically we Westerners only accept the tiny fringe that is totally acculturated to our vocabulary. This is why the West immediately considers any articulation of political demands in Islamic terms as being outside of rational politics, as being connected to violence.[203]

The appellant's attitude to violence

[782] We have also considered other statements and writings of the appellant from this period. Following his release from prison in November 1996, he was more forthcoming in speaking to the media and in publicly advocating the FIS cause than had been the case during 1993-95: not only are there communiqués written by him dating from 1997 onwards, but also a number of interviews with journalists and open letters written to various Swiss officials. There is also the detailed interview of the appellant in December 1997 by a Swiss immigration official.

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[203] *Algeria: Country Report,* UNHCR/ACCORD: 7th European Country of Origin Information Seminar: Berlin (11-12 June 2001) Final Report p. 24

[783] A consistent theme that emerges from the appellant's written and oral statements from this period is his rejection of violence as a political strategy and his condemnation of both terrorism and the human rights abuses of the Algerian regime – themes that he elaborated on in his evidence before us.

[784] In assessing the genuineness of the appellant's stated position, it is relevant to recall that in the period up until his arrest in March 1995 the Belgian authorities, despite surveillance of the appellant, were unable to find evidence of a single incident of his preaching or otherwise inciting violence during any of his many sermons in Belgian mosques or to point to any published writing by the appellant to this effect.

[785] The appellant's early support for the concept of the Sant'Egidio initiative and his efforts to secure the participation of the FIS is further testimony to his commitment to a strategy of reconciliation and a negotiated political settlement. Indeed, it is our finding that the appellant's Sant'Egidio role is a positive indication that he could not possibly have been a member of, let alone a leader or "chief" of the GIA in Europe as repeatedly alleged; the Sant'Egidio initiative and the resulting Rome Platform being the very antithesis of the GIA's ideology and objectives.

[786] The appellant's openness to people of other religions is also in stark contrast to the religious intolerance of extremist Islamic groups such as the GIA. His liberality is commented on by a number of witnesses. In his statement, Mustapha Habes (an Algerian living in Switzerland) refers to the appellant conducting the June 1998 wedding ceremony for his marriage to a Swiss Christian woman.

[787] TEXT DELETED[204]

[788] When asked by the Swiss immigration officer what place he envisioned for non-Muslims in Algeria the appellant replied:

> I had personal relationships with Christians. I can give you an example. I had the opportunity to meet the monks who were assassinated in Tebherin. I visited them with H who worked together with the San Egidio association that launched the Rome platform. Also, Anne-Marie, our neighbour, a nun, a French national, used to come and visit us every day in Algeria. After the elections were annulled,

[204] TEXT DELETED

> we went to the embassies and even to Cardinal Tissier whom I met three or four months after the coup to explain the Algerian problem. I am in favour of humanity, of people living together, of peace between religions because the world has become a small village.[205]

[789] That the appellant was recommended to the Sant'Egidio Community by their contacts in Algeria, as an appropriate first contact person within the FIS leadership in exile, rather than more well-known personalities such as Rabah Kebir and Anwar Haddam, is consistent with his reputation as a well-respected person of religious standing and a political moderate. Similarly, the appellant's electoral success in an electorate regarded as an FFS/Berberist stronghold is only explicable in terms of the public perception of him as a political and cultural moderate.

[790] TEXT DELETED

[791] The appellant's claimed personal rejection of violence and its use as a political strategy also brought him into conflict with FIS leaders such as Rabah Kebir over the issue of the AIS and its relationship with the FIS. The appellant rejected any formal association between the two, irrespective of individual AIS commanders' personal loyalty to the FIS leadership. As he explained in his evidence before us, "political parties don't have armed wings". He said much the same to journalist Antoine Gessler:

> I have never advocated violence, I have never written anything that I could be blamed for. I am a political man. One of the points of disagreement with the Executive Authority…was my refusal to be part of the Armée Islamique du Salut

[205] Appellant's documents No 70.

> (AIS), the armed wing of the FIS. I belong to a party, not to some military group. I do not want to be associated with a military fighting group. I act exclusively in the realm of ideas. [206]

and to the Swiss immigration officer:

> The FIS is only a political party: we do not claim to have any armed wing. This is one of the points on which we differ with Rabah Kebir. [207]

[792] Although always loyal to the FIS's imprisoned leadership, it is apparent from the same interview that the appellant's affinity lay with Abbassi, and the assassinated Hachani rather than with the more radical Belhadj:

> Even Belhadj has evolved with prison, with the Algerian drama. As for me I have always considered and hated the dialectics of confrontation and this is one of the things I reproach Belhadj with.

[793] Beyond condemning terrorism, the appellant has consistently refused to be drawn into public condemnation of those who took up arms in opposition to the regime following the 1992 coup – an understandable response, he believes, from those suffering brutality and oppression. To his Swiss immigration officer he stated:

> I defend and verbally support any resistance movement defending its right to life.

[794] He also objected to the way in which any statement about the armed opposition that is not couched exclusively in condemnatory terms is misused to imply his support for violence and/or terrorism:

> There is a context for every statement or stand. No one has the right to judge such or such statement by taking it out of its context. This would be misrepresentation. In the case of Algeria, the Algerian authorities are waging a real war against the people. Should there be any doubt about that, the latest massacres carried out in villages that voted for the F.I.S. or at least refused to take up arms, are there to prove it. I am neither a nihilist nor an anarchist nor a Maoist to legitimate any blind violence. I am a sensitive human being, and I am a Muslim. I will never allow myself to legitimise violence for the sake of violence.[208]

[795] The above matters, and our finding as to the appellant's overall credibility, satisfy us that the appellant's statements concerning his personal rejection of violence should be accepted. His written and oral statements are entirely consistent with this. We accept that the appellant is who he claimed to be when he wrote to the Executive Council of the Swiss Federal Government in a letter dated 4 May 1998:

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[206] *Le Nouvelliste*, *supra*.

[207] Appellant's documents No. 70

[208] *Ibid*.

> I have never been a supporter of violence and have never used it as a means or an end. I am a politician. I seek freedom for my people, and security. I seek freedom from unreasonable controls and freedom in the choice of social vision in its leaders. I seek and support any honourable political solution that would fully respect the dignity and complete freedom of choice of the people.

[796] Similarly, we find that far from being a "terrorist", the appellant's statements and his extensive testimony before us, reveal, as so many witnesses have testified, a person of genuine religious and moral sensibilities. This response to his Swiss immigration officer captures him well:

> I come from a very religious family; my grandfather was a sheik, learned in religion, my father was a senior mufti, my uncles are imams and my brother is a communist; he is married to a French woman and has never had any problems at home. …In the koranic tradition, human rights means to honour any human being. He who kills a human kills humanity, he who nurtures a human nurtures humanity.

Conclusion on Swiss Activities

[797] We conclude that the evidence concerning the appellant's CCFIS and other activities in Switzerland do not provide "serious reasons for considering" that he was engaged in or encouraged extremist or terrorist activities so as to bring him within the exclusion provisions of Article 1F of the Refugee Convention.

THE DECISION OF THE EUROPEAN COURT OF HUMAN RIGHTS

[798] Before leaving our consideration of the appellant's activities in Switzerland, brief regard must be had to the January 2001 decision of the European Court of Human Rights.

[799] The appellant, through his Swiss counsel, challenged before the European Court of Human Rights the seizure of his fax machine and the blocking of his email and internet connections as a violation of Articles 9 and 10 of the European Convention on Human Rights (CEDH). Article 9 protects the right to freedom of thought, conscience and religion and Article 10 the right to freedom of expression.

[800] A brief decision was delivered in January 2001, by which time the appellant was living in Malaysia.

[801] The Court found that the appellant's activities "aimed mainly at disseminating propaganda messages on behalf of the FIS" did not constitute an expression of religious conviction within the meaning of Article 9.

[802] As to Article 10, the Court ruled that the Swiss authorities' interference with the exercise of the plaintiff's freedom of expression was a permissible derogation in terms of Article 10(2): the interference was "allowed by law" (namely, Article 102 of the Swiss Constitution), was for the "lawful end" of protecting Swiss national security, public safety and order, and was "necessary in a democratic society".

[803] Discussing the latter, the Court deferred to the Swiss authorities' perception of their national security, the Court recognising that "it is the job of the national authorities in the first place to assess whether there is a 'pressing social need' able to justify this restriction, an exercise for which they enjoy a certain margin of evaluation".

[804] The Court noted the difficulties in evaluating the situation in Algeria and in measuring "the risk and impact of the activities carried out abroad by figures belonging to the Islamic opposition". To the extent that it simply repeats, without elaboration, the concerns of the Swiss authorities (the appellant's connection to the Algerian Islamic opposition, his Belgium convictions, and his propaganda for the FIS in Switzerland) the Court's findings do not call for independent analysis or progress our own enquiry.

THE FRENCH CRIMINAL CONVICTIONS

The Proceedings

[805] On 13 September 2001, the appellant was convicted in the 16th Criminal Chamber of the High Court (*le Tribunal de Grande Instance*) in Paris of the following:

(a) accomplice to falsification of administrative documents (3 passports);

(b) possession of stolen goods (the 3 passports); and

(c) participation in an association of criminals with intent to prepare a terrorist act.

[806] All three convictions were in respect of events during 1993. The appellant was sentenced to three years imprisonment, the entire sentence *suspended* and additionally "forbidden to set foot on French territory for a period of eight years."

[807] The appellant was one of six defendants, five of whom were charged with the offence of participation in an association of criminals with intent to prepare a terrorist act. The other defendants were Abdelhak Boudjaadar, Mohamed Djeffal and Ali Ammar (not present), as well as two people not known to the appellant, Larbi Beddiaf and Salah Sellam. Sellam was also not present and was the only one of the six not to be represented by Phillipe Petillault.

[808] The judgment begins by noting that the charges against the appellant and his co-defendants arose from a security operation by the name "Operation Chrysanthemum", begun on 9 November 1993 which saw 85 authorised searches, interrogation of "numerous people", and the initial detention of several of the accused. According to the judgment "in total eight people were thus implicated in these proceedings". [209]

[809] As for the procedural history, the judgment records that "Rulings to Return before the investigating magistrate" only eventuated on 5 July 2000, followed by the issuing of summonses against the six defendants. Two further people (Anwar Haddam and Moussa Kraouche) were stated to have benefited from a "general no case to answer ruling".

[810] The trial itself commenced on 8 December 2000 and resumed on 22 March 2001, 8 June 2001 and 14-15 June 2001. Three of the defendants, including the appellant, were not present at the trial.

[811] The appellant acknowledged to us that he received notice of the proceedings while in Burkina Faso, through the offices of Paris advocate, Philippe Petillault, who, the appellant understands, was instructed to represent him by Moussa Kraouche, head of the Algerian Brotherhood in France (FAF), an FIS affiliated organisation. He recalled receiving a number of letters from Mr Petillault and authorising him to act on his behalf. The judgment records that in fact Mr Petillault represented five of the six defendants.

[209] There were in fact a total of 88 arrests in 1993, though most were released within a short period. Only six, including the appellant, were eventually brought to trial. See 'French Take a Hammer to Crack a Nut', *Financial Times*, 12 November 1993.

The Evidence

[812] The judgment commences with an introductory, somewhat partial, account of Algerian political events, based, it would seem, on two reports dating from November 1993 – one from the DST and the other from the judicial police.

[813] Summarising from the DST and police reports, the judgment explained that the suspension of the Algerian electoral process in 1992 was followed by violent action in the forefront of which was the MIA and the GIA. There follows details of the campaign initiated in September 1993 to kill and kidnap French nationals and other foreigners living in Algeria. It was noted that responsibility for these acts was claimed by the GIA in various communiqués addressed to Arabic newspapers published in London.

[814] The introduction's portrayal of the FIS was couched in terms of its support for the armed struggle, including mobilising the Algerian community abroad, promoting the legitimacy of FIS combat and obtaining support for the combatants in Algeria. In this regard certain people were said to be sending material to Algeria, including Mourad Dhina who was "looking for weapons"[210] and Ali Ammar and Boudjaadar, who were "passing material intended for secret radio broadcasts by the FIS" and "receiving communiqués from the GIA". Finally, it was noted that:

> …sympathiser members of the FIS in France could have in the terms of the aforementioned reports, prepared or carried out kidnappings of French nationals or even sheltered kidnappers or held information on them.
>
> It is in this context that the judicial inquiry began…

[815] Before moving to its discussion of the evidence in respect of each of the six defendants, the judgment first comments on the situation of Anwar Haddam and Moussa Kraouche who had both benefited from an earlier finding by the Instructing Magistrate of 'no case to answer'.

[816] The discussion concerning Anwar Haddam is not particularly noteworthy. Haddam had earlier featured in the proceedings because of his connection to one of the defendants, Boudjaadar, who acted as his secretary. He had been interviewed in the US where he had been living since 1993 and it seemed his explanations were largely accepted.

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[210] It is surprising that the 1997 decision of *Le Tribunal Fédéral Suisse* in *Le Ministère Public de la Confédération* v *Leon Jobé and Abdelkader Hebri*, Ref X.1/1996/ROD, exonerating Mourad Dhina in respect of allegations of weapons smuggling to Algeria and awarding him damages, is not acknowledged in the 2001 decision of the French High Court.

[817] The commentary on Kraouche, however, is interesting. The investigating magistrate's 'no case to answer' ruling in respect of Kraouche followed from his finding that the GIA communiqués allegedly found in a search of Kraouche's home had been intentionally planted by the security police to incriminate Kraouche. The police inspector concerned was dismissed and the investigating magistrate referred the matter to the Court of Criminal Appeal which upheld the findings.

[818] The evidence against the appellant consisted essentially of a statement made to the police by his co-defendant, Boudjaadar.[211] Following a search of Boudjaadar's Orleans home on 9 November 1993, various items were seized; a computer, 99 diskettes, documents relating to the FIS and the GIA, an envelope containing electronic components and also references for explosives, lists of materials such as torches, walkie-talkies, binoculars and references to works on electronics, a photograph which appeared to be of Anwar Haddam and an Algerian driver's licence and military service certificate in the name of Zenati.

[819] Boudjaadar told the police that the envelope containing the electronic components had been left there some months previous by one Khaled, whom he did not know, but understood lived in Germany. Khaled, he said, had visited his home in the company of the appellant (whom he referred to by the name Zenati) and Ali Ammar – also a co-defendant, and a mutual friend of Boudjaadar and the appellant.

[820] Boudjaadar further stated that he had looked inside the envelope and realised that it contained components of a type used by extremists to make remote controlled detonators and that he therefore concluded that Khaled must belong to an extremist group. Expert evaluation of the components showed that they could be used in the making of trigger mechanisms for home-made bombs but were insufficient on their own for the purpose. Boudjaadar, when interviewed by the examining magistrate claimed the components were to be used in extending the frequency of an FM radio. This apparent conflict in his evidence was not resolved by the Court although it is noted in the introductory section – presumably repeating claims in the DST and police reports – that Boudjaadar and Ali Ammar were passing material for secret radio broadcasts by the FIS.

[821] The Algerian driver's licence and military service card in the name of Zenati were, Boudjaadar stated, left at his home by the appellant.

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[211] The appellant's account of his contact with Boudjaadar, Ali Ammar and Djeffal is at paras 126-127 above.

[822] The passport charges were based on the fact that three Algerian passports in the names of Zenati, Zouani and Daoud, all bearing the photo of the appellant, were found during a search on 9 November 1993 of the Paris home of Djeffal, in whose home the appellant had stayed during the two to three weeks he was in France.

[823] Other relevant items seized from Djeffal's home were a Kuwaiti passport and two French ID cards (all without ID photographs), 900 francs in two envelopes, a piece of paper on which were hand-written the names of various explosives, FIS propaganda, 11 photographs of individuals of *Maghrebin* origin including three of the appellant, a 1992 diary containing references to purchases of materials such as walkie-talkies, binoculars, radios and cables, as well as hotel and train costs, and a "notice" for a transceiver. Djeffal admitted putting the appellant's photograph in the Algerian passports, two of which he said had been given to him by an FIS sympathiser during a trip to Morocco. Further, he said it was his intention to place the photographs of FIS sympathisers in the identity documents in his possession so as to enable them to leave Algeria.

[824] With respect to Ali Ammar, the judgment notes that a search of his Orleans house on 9 November 1993 revealed FIS documentation, some of which was found in a suitcase belonging to Anwar Haddam and a stolen British passport and French driver's licence. A second passport appears to have belonged to his brother.

[825] It is recorded that on 30 August 1994 Ali Ammar was deported to Burkina Faso "by virtue of an urgent ministerial decree".[212] He had, however, later reached the Netherlands where, according to the appellant, he was granted refugee status and continues to reside. An investigating magistrate interviewed him on 30 September 1998. Like the appellant he was tried *in absentia.* Statements attributed to him included his admitting having led the appellant to Boudjaadar, his denial that he was in fact Khaled or that he knew any such person, and his admission that remarks written on documents found at Boudjaadar's house relating to flare type material and binoculars were in his own hand and that he had given the material to a third party for transport to Algeria.

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[212] In August 1994 France deported to Burkina Faso 20 people suspected of supporting Algerian terrorism. They were charged with no crime and not given a hearing prior to deportation. A number of the deportation orders were later overturned by French courts. US Department of State, *Country Reports on Human Rights Practices: France 1994*, section 1d.

[826] It can be seen therefore that the appellant knew the co-defendants Boudjaadar, Ali Ammar and Djeffal who were all FIS members or sympathisers. However, the appellant says he had no knowledge whatsoever of the remaining two co-defendants, Beddiaf and Sellam. Beddiaf, an Algerian had been living in France since 1972. A search of his home in Colombes produced two .22 carbine air-rifles (one with a silencer) and a hunting rifle (only one of the air-rifles actually formed the subject of the charge of possession of an unlicensed firearm). Further items found were an English language military pamphlet on booby traps, four envelopes addressed to the gendarmerie brigades in Algeria, and FIS and FAF bulletins. There is no mention in the judgment of a connection of any sort between Beddiaf and any of the other five defendants.

[827] As far as the defendant Sellam is concerned, the judgment records that he had not been involved in 'Operation Chrysanthemum' on 9 November 1993 but had come to the attention of the authorities because of identity documents in different names, all with the photograph of one Ali Touchent, which were found in his room in a hostel. Ali Touchent, it seemed, had been a room-mate of Sellam. Sellam denied any knowledge of the documents. He said that he had worked as an administrative attaché in the Ministry of the Interior in Algeria, that he was not a member of the FIS or had any sympathy with it, and in fact had left the Ministry of the Interior because of his fear of being targeted by Islamists. A search of his home in Provins relevantly revealed a file of fabricated university documents, apparently used by him and his wife to obtain admittance to academic institutions in France. He admitted that he knew them to be fraudulent and that they had been given to him by Ali Touchent.

[828] Sellam was charged and convicted only in respect of his possession of these documents, as well as a cheque book which he said he had found on the ground in the Metro but had not used (a fact seemingly not disputed in the judgment). It seems that Sellam later left France because the judgment notes that there was no known address for him and that he did not appear at the trial. It was also recorded that he had no previous convictions in France. Like Beddiaf, there is no suggestion in the judgment that he was known to any of the other defendants.

[829] As to the appellant, the Court noted that when interviewed by the investigating magistrate in Switzerland on 7 May 1998, the appellant had stated:

(a) out of necessity he had had to use false passports to leave Algeria;

(b) the Zenati passport had been given to him in Algeria;

(c) the passports in the name of Zouani and Daoud had been given to him in Morocco and that he did not remember who by;

(d) he had not used the passport in the name of Zouani because he had seen that it belonged to a doctor;

(e) he had used the Daoud passport to leave Morocco. This passport included the necessary authorities to leave the country;

(f) he had left the Daoud passport at Djeffal's house;

(g) he had left the Zouani and Zenati passports in Morocco and could not explain how they came to be rediscovered at Djeffal's house. He denied it had been Djeffal who had given him the passports;

(h) he had visited Boudjaadar in Orleans at the end of September 1993, together with Ali Ammar with whom he had travelled to Orleans from Morocco. He had known both Boudjaadar and Ali Ammar in Algeria;

(i) he did not know any Khaled; and

(j) he had not left any electronic components at Boudjaadar's house. The only thing he had left at Boudjaadar's house was a letter signed by Abdelatif Achour Abou who had hoped that the appellant would stay in Morocco as an FIS representative.

[830] The appellant's statement to the investigating magistrate is in broad agreement with his account to us concerning the false passports he utilised to facilitate his travel between Algeria, Morocco and France and his meeting with Boudjaadar during his short stay in France around September/October 1993.[213]

Reasons for convicting the appellant

[831] The section of the judgment which concerns the appellant is relatively brief. It consists primarily of outlining the background and evidence against him as we have set out above. The Court's analysis of the evidence consists of the following:

[213] See paras 124-125

> Faced with this evidence, the Instructing Judge considered that although Anouar HADDAM's role as the person behind ZAOUI's visit to BOUDJAADAR had not been established, the presence of the driver's licence in the name of ZENATI amongst the operational material found at BOUDJAADAR's gave credibility to the latter's statement that they had been brought by ZENATI who turned out to be ZAOUI accompanied by someone called Khaled.
>
> ZAOUI thus had begun to provide logistical support to the extremist movement.
>
> Where BOUDJAADAR stated that ZAOUI had been arrested in Morocco at the start of 1993 together with Khaled, ZAOUI stated that he had been questioned by the Moroccan DST together with three people without stating anything further.
>
> The facts that have been presented in the course of this examination show therefore that ZAOUI was operating in a state of total clandestinity and that numerous forged identity documents, found in various people's homes, were undoubtedly intended for his use.
>
> It has furthermore been established that he was involved in the meeting at BOUDJAADAR's house, with respect to which numerous items of evidence pointing to what could have been a direct link to armed operations, have been given.
>
> Not only has it been clearly established that ZAOUI performed an important role within the FIS, the fact that he was also accused by some opponents should also be taken into consideration in the sequence of events and in the highly significant fact, that at that time at least, the No. 2 of the FIS had insisted on the justification for armed struggle, and attacks had been made against foreign nationals on Algerian soil.
>
> Various points have emerged allowing the Tribunal to conclude that it has good reason to believe that at that time, ZAOUI was providing positive assistance in such activities.
>
> For this reason, the Tribunal will proceed to sentence him for the charges brought against him.
>
> As it has done for the other accused with whom he has been in direct contact, the Tribunal will impose a suspended sentence with an equivalent period of imprisonment.

[832] Our discussion of the evidence relied on to convict the appellant and the Court's reasoning follows.

Delay

[833] The delay between the time of the police investigation and the actual trial is extraordinary. All of the material items which formed the critical evidence against the appellant (three passports and ID documents and the envelope containing electronic components) were found by the police during their searches on 9 November 1993. The statements of Boudjaadar and Djeffal which were relevant to the enquiry were all obtained very soon afterwards. Yet the appellant was *not* questioned about any of these matters until May 1998, at which time he was under house arrest in Switzerland.

[834] This delay can hardly be explained by the appellant's unavailability. His residence in Belgium from November 1993 onwards was well-known to the French authorities and, between March 1995 and his unauthorised departure for Switzerland in November 1997, he had either been in custody or under house arrest.

[835] Even after his interview with the investigating magistrate held in Switzerland in May 1998, no summons eventuated until mid-2000, by which time the appellant was living in Malaysia. The French authorities undoubtedly had been consulted about the appellant's deportation from Switzerland in December 1998 and almost certainly provided advice and/or assistance to Switzerland in the matter, France in 1994 having already established Burkina Faso as a destination for suspect or unwanted Algerians, including the appellant's friend and co-defendant Ali Ammar. While the appellant was in Switzerland, there is no indication at all that the French had any interest in having him brought to France to stand trial. We note in this regard his evidence to us that, when interviewed by the investigating magistrate in Switzerland, the magistrate more than once stated he was wanting to "close the file" and gave no indication to the appellant he was at risk of being charged with any offence.

[836] That the appellant was in Burkina Faso by the time a prosecution was being mooted and in Malaysia when the summonses were issued obviously compromised his ability to appear and properly defend himself at the trial.

[837] The lack of urgency on the part of the relevant French judicial authorities strikes us as unprecedented even by the standards of French "terrorist" criminal trials generally.[214]

[838] We are conscious that the French criminal justice system is very different to our own and that seeming peculiarities of a foreign legal system can be enhanced by the mere fact of unfamiliarity. However, we consider that it is legitimate for us to at least consider procedural features of the criminal proceedings brought against the appellant where these features objectively impact on the fundamental issue of overall fairness, the minimum standards of which are to be found in

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[214] See the report of the International Federation of Human Rights Leagues (FIDH) *France: Paving the way for arbitrary justice* which examines the application of anti-terrorist laws in France. The problems of delay which have afflicted these trials is discussed on pages 11-13. See also the United States Department of State *Country Reports on Human Rights Practices: France* for the years 1998 and 1999 which comment critically on delays in the French criminal justice system and trials under anti-terrorism legislation in particular.

internationally agreed standards which most criminal justice systems aspire to and can be measured against. Of relevance are Articles 9(3) and 14(3)(c) of the International Covenant on Civil and Political Rights (ICCPR) which inform Article 25(b) New Zealand Bill of Rights Act (1990), namely "the right to be tried without undue delay".

[839] Whether the right to be tried without undue delay extends to pre-charge delay, as of yet has not been determined by our Court of Appeal. However, delay is a matter relevant to the exercise of the Court's inherent and statutory jurisdiction to stay proceedings or discharge an accused where delay would preclude a fair trial or result in an abuse of process.[215] The inexcusable tardiness of the authorities once an allegation of criminal conduct has been brought to their attention is recognised as grounds for a finding of an abuse of process.

[840] Commenting on delay in the French criminal justice system, Mr McColgan, in his statement, notes that it took the French criminal justice system over eight years to bring the trial of the six defendants to finality and that, in his view, this was a breach of Article 5(3) and (6) of the European Convention on Human Rights. We make no finding on this point (and have already noted the absence in New Zealand of authoritative case law on the question of pre-charge delay in terms of Section 25(b) New Zealand Bill of Rights Act 1990). However, we find that the delay in bringing the appellant and the other defendants to trial must at the very least raise serious questions as to the fairness of the proceedings which, when considered in conjunction with the following procedural and substantive issues, is a relevant matter of which we are is entitled to take note.

The reliance on the evidence of a co-defendant

[841] Critical to the prosecution case against the appellant was the evidence of the co-defendant, Boudjaadar. Mr McColgan, in his statement notes:

> One of the most disturbing features of the Paris case is the apparent ease with which the Tribunal accepts the word of a co-defendant, Mr Boudjaadar, as persuasive evidence against Mr Zaoui. It is axiomatic in English (and no doubt New Zealand) criminal law that the evidence of a co-defendant, even (or perhaps especially) if given on oath, should be approached with great caution. The danger of such evidence being purely self-serving, the risk that it would be the product of pressure or inducements – it is little wonder that a co-defendant's testimony is regarded as something of a poisoned chalice.

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[215] Rishworth, Hascroft, Optican and Mahoney, *New Zealand Bill of Rights*, Oxford University Press, 2003, pp. 719-721.

[842] This view was echoed by Ms Dyhrberg in both her written and oral evidence. She referred specifically to the evidential rule in New Zealand that an out of court statement made by an accused is admissible only against the party making the statement and is not admissible against a co-defendant. In the case of a joint trial, the jury would be so directed. *R* v *Ngarimu* (19/11/92, Williams J, HC Auckland, T22/92) and *R* v *Morland* (6/9/99, CA149/99; CA218/99).

[843] The electronic components inside an envelope were found in Boudjaadar's house and he admitted having knowledge of their presence. Boudjaadar's conflicting statements, namely, that he knew such items were used to make remote-controlled detonators and that they were for use in extending the range of FM radio transmission were left unresolved. He claimed the envelope had been left some months prior by one Khaled, who came from Germany, (not, it should be noted, the appellant) who had come to his home in the company of the appellant and Ali Ammar.

[844] The appellant, by contrast, admitted visiting Boudjaadar's house in the company of Ali Ammar but denied that a Khaled accompanied them, denied knowing any such person, and denied that he had left the electronic components at Boudjaadar's house. Ali Ammar's statement *supported* the appellant. Ali Ammar admitted taking the appellant to Boudjaadar's house, denied that he himself was Khaled. The judgment omits what Ali Ammar said on the critical point of the electronic components but it can certainly be assumed that he did not claim that they had been left by the appellant.

[845] As best we can tell – and the Court's reasoning is by no means clear – the evidence of Boudjaadar was preferred to that of the appellant solely because of the fact that a driver's licence in the name of Zenati (the name in documents the appellant admitted using to leave Algeria) was amongst the material found in Boudjaadar's home.

Representation and in absentia judgment

[846] It was the appellant's evidence that he received letters from Mr Petillault concerning the criminal charges when in Burkina Faso and that he signed the necessary authorisation for Mr Petillault to act as his counsel. The judgment records that the appellant, though not appearing, was represented by Mr Petillault.

[847] However, it is also recorded that Mr Petillault represented four of the other five defendants, including Boudjaadar – in the words of McColgan, "effectively the state's prize witness!". The appellant had never seen a copy of the French judgment until one was provided to him by us. His dismay was predictable:

> …from the decision it looks like he did not defend me – he chose Boudjaadar.

[848] The appellant's consent to Mr Petillault representing him was hardly, in the circumstances, an informed one.

[849] That Mr Petillault acted as counsel for five of the defendants in circumstances where there was a clear conflict of interest between some of them may well reflect the serious under-resourcing of the defence in many French anti-terrorist trials, a state of affairs extensively commented on in the FIDH report[216].

[850] Commenting on the difficulties facing defence lawyers, Mr McColgan, in his statement prepared for this appeal notes:

> …in France, the defence lawyer does not have a right to obtain free of charge copies of the dossier being compiled on his client. A charge of 0.5E per page…is levied. If the client has no funds and the defence lawyer cannot afford to foot the bill…the inevitable result is that there is no possibility of mounting a proper defence.
>
> At first glance it might appear that defence lawyers in France and Belgium are nonchalant to the point of negligence in respect of their clients' cases. But in neither country is there any proper system of public funding which would allow the lawyer to undertake his/her own investigations, obtain copies of the dossier and generally mount a defence in a manner compatible with Article 6(3) of the ECHR.

[851] However it came about, and we do not wish to imply any criticism of Mr Petillault himself, we agree with Mr McColgan's opinion that:

> To allow two defendants with such contradictory interests to be represented by one and the same lawyer is to countenance a travesty of justice.

[852] We also note the opinion of Ms Dyhrberg that such a situation would almost certainly never be allowed to occur in a New Zealand criminal trial – apart from potential breaches of legal ethics, a trial judge would be bound to intervene.

[853] Another factor identified by Mr McColgan which can adversely affect the presentation of a defence, is the general brevity of some of the anti-terrorist trials and the nature of the hearings themselves. In the present case, the trial consisted of a mere six hearings of which the first was a preliminary hearing and the last

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[216] See in particular pp. 20-21

reserved for the giving of the verdict and sentences. Commenting on the nature of the hearing, Mr McColgan states:

> …it is obvious that the hearings consisted almost exclusively of evidence read to the court by the prosecutor with little or no interruption in the form of live witnesses, cross-examination or testimony given by defence witnesses. In these circumstances it is hardly surprising that the Court's judgment amounts to little more than a re-hash of the prosecution case.

Vagueness of charges

[854] The appellant and four other defendants were charged with "participating in a group or an agreement or understanding, established, with a view to the preparation – characterised by one or more material facts – of one of the terrorist acts mentioned in Article 421 of the Penal Code". The FIDH report notes that in France the majority of those arrested on suspicion of involvement in terrorist activities are charged with participation in such associations.

[855] At page 9 of the FIDH report there is a discussion of this offence, the authors noting that:

> … as long as it is sufficiently realised, the preparation alone is enough to constitute the punishable offence, the investigating and prosecuting authorities thereby being absolved from any duty to link the alleged participation with any actual execution of a terrorist offence or even a verifiable plan for the execution of such an offence.

[856] Concern is expressed that such an open-ended law may too readily lend itself to arbitrary interpretation and implementation. After examining a number of the French anti-terrorist trials held during the 1990s, the authors concluded, at page 10:

> …that failure to concretise the alleged object of the association or conspiracy inevitably allows almost any kind of evidence, "however trivial", to be invested with significance… Evidence, if it is to justify the term, has to be relevant. If there is nothing beyond speculation or innuendo to which it relates, it cannot be relevant and does not therefore merit the designation. What is striking about the cases we have enquired into is the paucity of real evidence about intended acts of terrorism, coupled with questionably relevant evidence as far as large numbers, possibly the majority, of those accused are concerned.
>
> The whole issue of intention and "mens rea" (guilty mind) is one to which both the *juges d'instruction* and the sentencing tribunals seem to have paid far too little attention.

[857] The above, we find, is apt with respect to the judgment under consideration. There was no attempt by the Court to establish the nature of the criminal association or what the various participants were intent on doing. Nor do we find this to be at all clear from the recitation of the evidence. In the case of one defendant, Beddiaf, there is nothing mentioned by the court that connects him

even remotely to any of the other defendants. Yet, he was still convicted of membership of a criminal association – whether of the same association as the other defendants is not certain.

[858] From the historical material set out in the introduction which aims to establish that the FIS was involved in combat in Algeria it seems that membership of or sympathy with the FIS may have been a fact relied on by the Court to establish participation in a criminal association.

Reliance on the appellant's use of false passports

[859] The appellant did not deny using false identity documents to facilitate his travel between Algeria and France. He said this was a matter of necessity and this is surely beyond dispute. The three passports which formed the subject of the two passport-related charges all contained the appellant's own photograph and had been used or intended for his own personal use. Unlike Djeffal, who admitted he was involved in the falsification of documents to assist FIS sympathisers to leave Algeria, there was no evidence connecting the appellant to such an enterprise. His own use of false passports to flee Algeria was therefore relatively innocuous. Yet it was massaged to establish the appellant's involvement in an enterprise with the aim of "seriously endangering public order by intimidation or terror" and to bolster the finding of his participation in a criminal organisation intent on a terrorist act. The evidence does not satisfy us that such a link existed.

Speculation and innuendo

[860] The judgment incorporates highly prejudicial material concerning the killing of French nationals and other foreigners in Algeria, and is laced with innuendo as to the possible involvement of the appellant and the other defendants. There is, in fact, not an iota of evidence that links the appellant or any other defendant to such killings.[217]

[861] As well as the killing of French nationals which featured so prominently in the introductory section of the decision, the court also utilises references to the

[217] Needless to say, press reports of the trial highlighted this aspect of the verdict. For instance, *Agence France Press* reported on 13 September 2001 "Zaoui provided very effective backing for violent actions targeting foreigners on Algerian soil, the verdict concludes". (page 734 NZIS file)

1995 Paris bombings and Ali Touchent[218] to further insinuate that the appellants had links to actual terrorist crimes. Again there is an absence of substantive evidence for the suggested link. Clearly if the French authorities genuinely believed that the appellant was involved in Ali Touchent's network or was able to be connected, even tenuously, to the Paris bombings he would have been included as one of the 40 defendants in the November 1997 trial or as one of the further 24 alleged members of the network tried in June 1996.[219] Not only was the appellant never sought by the French in respect of the Paris bombings, he was not even questioned in this connection.[220]

[862] The judgment leaves the strong impression that the Court was struggling to justify the bringing of the charges. We agree with Mr McColgan's comment:

> It is difficult not to infer…that the verdicts were somewhat political in nature, rather than soundly based on cogent evidence.

[863] Our concerns in this regard are reinforced by the nature of the sentences passed.

Sentences

[864] The appellant received a sentence of three years imprisonment which was deferred or suspended. Obviously, this is a lenient sentence for someone who the Court found it had "good reason to believe" was providing positive assistance to armed struggle and attacks against foreigners in Algeria. As the appellant commented "a suspended sentence to me was no sentence at all". Such a lenient sentence surely belies the Court's claim to believe that a link to the killing of foreigners had been established.

[865] As well as the suspended sentence, the appellant was forbidden to set foot on French territory for a period of eight years.

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[218] Ali Touchent is credited as being one of the masterminds of the GIA's 1995 Paris bombing campaign which killed eight people and wounded more than 170. A trial of 40 alleged members of the Ali Touchent network commenced in November 1997. Ali Touchent was tried *in absentia* and sentenced to 10 years imprisonment. He had, however, apparently escaped France and was later reported to have been killed by the Algerian Security Forces in May 1997. Much speculation surrounds his name, centring on claims that he was in reality an Algerian security agent – a recent discussion of these claims is contained in the French *Canal+* documentary.

[219] *French court sentences Islamic militants to jail,* Associated Press Worldstream (18 February 1998). *Islamist militants linked to 1995 French bombings go on trial,* Agence France Presse (1 June 1999).

[220] Anomalies which, if nothing else, show the hollowness of the highly publicised claims at the time of the appellant's arrest in Belgium in March 1995 that he was the 'Chief of the GIA in Europe'.

[866] All of the appellants received suspended sentences of between one and three years' imprisonment. Those defendants, like the appellant, residing outside France (Ali Ammar and Sellam) were similarly forbidden to enter French territory for a period of five years.

CONCLUSIONS ON FRENCH CRIMINAL CONVICTIONS

[867] We conclude that the appellant's French convictions are unsafe and are not probative or reliable evidence of the appellant's involvement in a criminal association with intent to prepare acts of terrorism. We have taken into account the following matters:

(a) the inordinate delay in finalising the proceedings prejudiced the appellant's ability to present a proper defence;

(b) the charges related to events in November 1993 and the police investigation was largely completed soon thereafter, yet the appellant was not interviewed by an investigating magistrate until May 1998;

(c) by the time summonses were issued in mid-2000 the appellant was living in Malaysia - in consequence he was tried *in absentia*;

(d) there was minimal evidence against the appellant – he was convicted essentially on the statement of a co-defendant Boudjaadar;

(e) the appellant's counsel represented five of the six defendants including the co-defendant Boudjaadar despite there being a clear conflict of interest between the appellant and Boudjaadar;

(f) the vague nature of the charges, in particular, there was no attempt by the court to establish the nature of the criminal association or the intention of the various participants;

(g) the reliance on such innocuous matters as the appellant's use of false passports to flee persecution in Algeria;

(h) the liberal use of prejudicial innuendo;

(i) the incongruity between the convictions and the light sentence, which must throw doubt on the true objective of the proceedings.

[868] We find that the appellant's convictions in France in September 2001 do not provide "serious reasons for considering" that the appellant has committed an Article 1F crime such that he is excluded from the protection of the Refugee Convention.

NEWSPAPER REPORTS

[869] In the course of our discussion of the various Belgian immigration and criminal decisions concerning the appellant, we have already analysed the nature of, and the reliance placed on, various newspaper reports. We have also considered the publicity given to the appellant's arrest and criminal trial in the Belgian press. These reports constitute only a small fraction of the material which, in some capacity or other, makes mention of the appellant and his alleged association with the GIA or other armed groups.

[870] Newspaper reports, unlike the more transitory broadcasting media, are physical entities able to be archived and retrieved. In the age of the internet retrieval is instantaneous, facilitating the speedy repetition and recycling of information. In consequence, the provenance of information becomes ever more obscure.

[871] We have been surprised at the extent of the reliance placed on newspaper and other media reports. For instance, they are consulted and frequently cited by academic writers on Algeria. They are also a basic resource for writers of a wide range of reports especially in the human rights field, including writers from independent organisations such as Amnesty International, Human Rights Watch and the International Crisis Group and from government bodies such as the UK Home Office and the Canadian Refugee and Immigration Board. They are used by other journalists. They are also consulted and relied on by a wide range of officials, most relevantly in the present context, by immigration officials and refugee adjudicators and by police and security intelligence officials.

[872] We accept that newspaper reports are a useful research resource – we ourselves, in the course of determining this appeal, have sighted hundreds of such reports, many of which have proved invaluable. Newspaper and other reports though, should not be treated as raw data. Most are not based on primary research by journalists in the field. Even where that does happen, what the journalist reports and even sees is the product of interpretation, supposition and

information supplied by interested parties. A degree of distortion is inherent in reportage. Like any evidence, therefore, newspaper reports call for careful scrutiny and analysis.

[873] We have a number of concerns about the quality and the use made of newspaper reports in respect of the appellant.

[874] First, there is the problem of the recycling of information. What at first looks like an abundance of corroborating material, on closer examination turns out to emanate from a very limited number of original sources. For instance, many of the references to the appellant's alleged links to the GIA or armed groups can be traced back to the reports of his arrest and convictions in Belgium. The likelihood that anyone beyond the few journalists who covered the trials actually read the two decisions of the Belgium courts and analysed the evidence against the appellant is remote indeed. So, despite the failure of the Belgian Court of Appeal to make any finding as to the identity of the criminal group of which the appellant was the alleged leader, the earlier sensationalist pre-trial claims that appeared in the press to the effect that the appellant was the "head of the GIA in Europe" stuck. Typical is the defiant *Asharq Al-Awsat* headline announcing the appellant's initial *acquittal* in the lower court "*Belgium acquitted the Chief of the Algerian Islamic Group".*[221] With time, the appellant even became "the self-declared head of the GIA – Europe."[222]

[875] References to the appellant being a GIA leader also occur in reputable academic work. For instance, a paper posted on the University of Michigan *Focus on Algeria website* (March–April 1998, Volume 1, No. 1) contains a footnote to this effect.[223]

[876] Naturally, repetition of the description of the appellant as "leader", "chief", "head", "boss" or "No 1" of the GIA in Europe made it inevitable that reports would soon surface linking the appellant to the GIA's 1995 Paris bombing campaign[224] – a logical link in the circumstances, it being somewhat difficult to fathom how the "head" of the GIA in Europe could *not* have been involved in the planning of such a significant GIA European undertaking. The fact that the appellant was not

[221] *Asharq Al-Awsat*, 4 October 1995.

[222] Turkish Daily News, *GIA threatens to launch a 'sea of blood' in Belgium*, 29 June 1999 (www.turkishdailynews.com) NZIS file p. 582

[223] www.umich.edu

[224] "Police release fundamentalist suspects", *Agence France Presse* (12 December 1996)
"French Police Arrest Suspects In '95 Bombing" *The New York Times* (11 December 1996)

amongst the 70-odd persons charged over the years in connection with the GIA's Paris bombing campaign has troubled few.[225]

[877] Second, there is the problem of suspect or dubious sources. We are satisfied from our research that most, if not all, reports about the appellant that emanate from official Algerian news releases[226] or from Algerian newspapers must be treated with *caution*. We have already commented on the regime's tight control of information touching on security and the activities of Islamist armed groups. The vociferous anti-Islamist, anti-FIS, anti-dialogue bias of the Algerian 'eradicator' press must always be taken into account. Similarly the propensity of such papers to act as mouthpieces for factions in the regime, including disseminating fabricated claims and other misinformation as part of the regime's strategy to portray FIS leaders as responsible for terrorist violence and thereby justify their continued exclusion from the political sphere.

[878] This leads to a further problem: the widespread uncritical acceptance of such newspaper reports concerning the appellant. The problem is compounded when ignorance of Algeria occurs in conjunction with a mindset on terrorism governed by a climate of suspicion and anxiety.

[879] In this context we have already commented on the Belgian CPRR's reliance on various Algerian sourced news reports. The problem, though, is even more graphically illustrated by the decision of the New Zealand RSB to decline the appellant's refugee claim. The refugee status officer drew on a large number of news reports in reaching his finding that the appellant was excluded from the protection of the Refugee Convention pursuant to Article 1F. It is apparent from the NZIS file that the research undertaken largely consisted of searching the internet for "hits" on the appellant's name. The decision contains a compilation of often lengthy extracts from many of these media reports, including the most sensationalist. The officer accepted too uncritically much of what emerged from his searches. The results were predictable, if startling nonetheless; the appellant was accepted as having links not only to the FIS, AIS and the GIA, but also FIDA, LIDD, SPGS, the Afghan Taleban, an Egyptian Islamic group and al Qaeda.

[880] Not surprisingly, given the weight of the internet 'evidence', the officer was also content to rely on two newspaper reports (both misleading) as evidence of the

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[225] Para. 861

[226] Often conveyed through French news agencies such as *Agence France Presse*.

appellant's criminal convictions in Belgium and France.[227] The normal practice of the RSB when considering refugee applications from claimants who have been the subject of prior determinations and related proceedings in other jurisdictions is to endeavour to obtain copies of all relevant information from the jurisdiction concerned. In the present case, this practice was not followed.

[881] We record our overall finding that none of the numerous references linking the appellant to the GIA, to be found in the many newspaper reports before us, constitutes reliable or probative evidence of such a link.

[882] With these observations in mind, we now turn to consider the material provided to the RSAA by the SIS much of which, it turns out, is based on newspaper reports.

SIS UNCLASSIFED INFORMATION

[883] The SIS declined, in accordance with Section 114D Immigration Act 1987, to provide to the Authority 'classified' information that was relevant to our determination as to whether or not the appellant had had any involvement in terrorist and/or other violence within the ambit of Article 1F of the Refugee Convention. The logic of the statutory scheme is not entirely clear given that refugee proceedings before the RSAA, in terms of Section 114G, are unaffected by the issuing of a security certificate. Further, although the SIS and RSAA enjoy distinct jurisdictions under the Immigration Act 1987, as the SIS acknowledged "there may be quite considerable areas of overlap".[228]

[884] However, the SIS did disclose a limited amount of 'unclassified' material. This consisted of a press release from the Swiss Federal Justice and Police Department on the subject of restrictions placed on the appellant's activities in

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[227] "Belgium puts Key Islamic military leader under house arrest" *Agence France Press* (20 November 1996) and "Very lenient sentence on the former FIS number three in France" (13 September 2001)

[228] A different approach appears to operate in the USA. See for instance the decision of the US Board of Immigration Appeals, *In re Anwar Haddam*, Board of Immigration Appeals (20 November 2000) A22 751 813. Haddam is a prominent FIS leader in exile. He appealed to the Board of Immigration Appeals against a decision to decline him asylum on the grounds that he was excludable because he had engaged in terrorist acts and was a danger to the security of the US. The Board of Immigration Appeals overturned the earlier findings of the Immigration Judge and granted asylum. The decision indicates that classified evidence was put before both the Immigration Judge at first instance and the Board of Immigration Appeals. The Board's decision contained a heavily censored "classified addendum" marked "secret".

Switzerland. There was also a brief report from the Swiss Service for Analysis and Prevention (SAP) consisting essentially of a chronology of the main events relating to the appellant during his stay in Belgium and Switzerland. These have already been discussed in paragraphs 758-779. There was a similar two and a half page report prepared by the Belgian *Sûreté de L'Etat* that merely outlined the appellant's various immigration applications and the outcome of the criminal proceedings against him in Belgium.

[885] The remainder of the material consisted of what was described as a chronological background on the appellant "based entirely on open-sourced materials" and similar commentaries on the subject of the FIS and the GIA.

The Chronology of the Appellant

[886] The chronology of the appellant, though based on "open-sourced material", is mostly devoid of any citation of the sources relied on. It is, however, apparent that a range of news reports and other internet material have been consulted.[229] Many of the entries consist solely of unsourced extracts from various news reports, with no attempt to excise opinion from fact. Predictably the biases and inaccuracies that characterise so many of the voluminous press reports on the subject of the appellant are reproduced. Three of the more egregious inaccuracies justify mention.

[887] The entry for January 1995 reads:

> The Armed Islamic Group/Groupement Islamique Armée (GIA), an offshoot of the FIS, was invited to attend a forum of Algerian opposition movements that took place in Rome. The invitation, sent to GIA European representative Ahmed Zaoui was received too late for him to attend. The GIA advocates the use of violence against Algerian citizens and there is intense rivalry between the GIA and the FIS.

[888] This statement has been lifted word for word from an unacknowledged *Agence France Presse* report *'Urgent'* of 18 January 1995.[230] It is not only wrong but almost certainly a fabrication aimed at discrediting the appellant. The allegations have to be read in the context of the ferocious campaign launched by the regime and its allies in the 'eradicator' press to undermine the Rome Platform.

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[229] In its covering letter, dated 24 March 2003, the SIS acknowledged that "the Refugee Status Branch have themselves extensively researched this source" and in its letter of 26 May 2003 advised "This information is included in the information listed in the Refugee Status Branch decision of 30 January 2003."

[230] NZIS file p. 729

A key factor was the portrayal of the FIS participants as GIA terrorists. (See discussion in paragraph 517).

[889] The appellant's role in the Rome Platform has been discussed in paragraphs 731-745. We contacted the Sant'Egidio Community concerning the claims made in the *Agence France Presse* report. In his letter to the RSAA of 13 April 2003 S expressly confirmed the appellant's evidence that he was invited to the Rome Conference as a representative of the FIS:

> Mr Zaoui as he rightly points out was not approached as a member of the GIA but as a member of the Shura Council of FIS. We are aware that some newspaper reports have been stating that members or representatives of armed groups (namely GIA or AIS) were present at the meeting. This is however a completely false and biased assertion on which we could elaborate more if needed.

[890] By relying on such erroneous claims, the SIS chronology – besides demonstrating the effectiveness of the regime's propaganda – completely misrepresents the appellant's significant role in laying the groundwork for the Rome conference, an appreciation of which is highly relevant to assessing the contemporaneous claims about his membership of the GIA and promotion of violent armed struggle.

[891] An entry for 1 March 1995 concerns the appellant's arrest in Belgium with 12 others, following information gathered by the Belgium Security Service which, the SIS notes, had itself been briefed by the French DST. Most of the entry concerns the co-defendant Maaroufi. It includes the following statements:

> One other person arrested on that day was Tarek Ben Habib Maaroufi, a Tunisian-born supporter of the GIA. He was with Zaoui when arrested.
>
> Maaroufi was a born actor. On the one hand he was very adept at talking and joking with the media, laughing off any connection with terrorists and on the other he would prove to be one of the increasingly crucial pawns in the European al Qaeda network.

[892] These unacknowledged quotes were clearly taken from an internet website belonging to French publisher Robert Laffont[231] on which can be found extracts from a publication *"Who killed Massoud?: Disclosures of the Islamic Network"* by M Pontaud and M Epstein, stated to have been published in France on 27 May 2002. It is written in a racy, sensationalist style.

[893] We are uncertain as to the background to the authors' inclusion in their book of this sole reference to the appellant – undoubtedly not a coincidence – but in any event the allegation is wrong. When arrested by the Belgian police on 1

[231] http://www.laffont.fr/ForeignRights/extractMassoud.asp (see NZIS file p. 703)

March 1995 the appellant was not with Maaroufi. He was arrested from his home, the only others present being his wife and children. He also says that, prior to his arrest; he had never met or had any dealings with Maaroufi.

[894] Corroboration for this comes from the two Belgian judgments of 3 October 1995 and 20 November 1995. Critical to the prosecution case was evidence that established links between the various co-defendants. In the case of the appellant the evidence was sparse. Maaroufi according to Mr Vanderbeck, claimed to know the appellant "only by sight". The judgments record evidence of links between Maaroufi and other co-defendants but make no mention of his being arrested with the appellant. Similarly there is no mention of such a connection in the discussion of the evidence against the appellant, although it does mention him being arrested on the Swiss-German border on one occasion in the company of one of the *other* defendants. If the appellant and Maaroufi had been together at the time of arrest, it is inconceivable that such highly significant evidence would not have been relied on the Court of Appeal which convicted the appellant.

[895] That the SIS was content to rely on such a self-evidently dubious source to construct its biography of the appellant is most surprising. The consequence was not only to reinforce the chronology's portrayal of the appellant as connected to the GIA but also to import into the biography a suggested al-Qaeda link.

[896] This was also the slant of another news report relied on by the SIS, namely, a report that appeared in a Vancouver newspaper, *Asian Post*, on 26 September 2001, "Osama bin Laden's secret army in South East Asia".[232] The entry in the SIS chronology for the date 26 September 2001 consists of the following quote from *Asian Post*:

> US intelligence sources told *The Asian Post* that Malaysia has come sharply into focus in America's new war against terrorism.
>
> A previously unidentified group called FIDA or Sacrifice is currently being investigated in Malaysia. Police sources told *The Post* that the coordinator for FIDA in Malaysia is a man called [the appellant] and that he works closely with FIDA affiliates in Switzerland and the United States.
>
> The leader of the group in the US was identified as Anouar Haddam while the man in charge of the Swiss office was identified as Murad Dhina.
>
> FIDA, according to intelligence sources operates closely with the Algerian-based GSPC – a coalition of Islamic group – headed by Hacene Hattab.

[897] The writer of the chronology has then added the following description of FIDA:

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[232] www.asianpacificpost.com/sept%2028%202001/osama_page.htm, NZIS file p. 545

> NB: the word "fida" means sacrifice. FIDA stands for Front Islamique pour le Djihad Armé (Islamic Front for Armed Jihad, aka Algerian Jihad Islamic Front). The goal of this group is to turn Algeria into a purely Islamic state like Iran. FIDA is believed to be the armed wing of the Muslim Fundamentalist Group known as al-Djazaraa.)

[898] These claims are confusing. It has been suggested that the appellant, Anwar Haddam and Mourad Dhina (all prominent members of the FIS leadership in exile) are part of the group called FIDA which is operating in South East Asia as well as having a Swiss office manned by Mourad Dhina and links to the USA. The report also acknowledges an Algerian link through the alleged GSPC connection so that the SIS chronology, not unreasonably, goes on to equate the FIDA mentioned in the report with the Algerian FIDA.

[899] The problem though is twofold. First there is an almost complete lack of evidence – objective or otherwise – linking the appellant to FIDA, a small and rather shadowy organisation that claimed responsibility for a number of attacks, particularly assassinations, in the Algiers region in the mid 1990s. According to Willis, like most of the other armed groupings in Algeria at this time, FIDA's origins and orientation were unclear. He believes that it has now disappeared either because of elimination by the authorities or integration into other groups.[233]

[900] Secondly FIDA was one of the armed groups that joined the AIS negotiated truce in October 1997 and actually disbanded in January 2000 as part of President Bouteflika's Civil Concord law. In his statement Ali Ben Hajar, the leader of the LIDD, states that the FIDA actually merged with the LIDD to take advantage of the truce.[234]

[901] The claim that the appellant joined the FIDA appeared in a Belgium BSR report that formed part of the prosecution case against him. The judgment of the Brussels County Court specifically refers to the BSR claim that the appellant, following the conflict with Rabah Kebir and because of his political leanings, "joined the *Front Islamique de Djihad* (FIDA) created officially in January 1994 and which subsequently became part of the GIA". The source of this claim was undoubtedly the Algerian military security. As Professor Joffé noted this will also be the provenance of the *Asian Post* claims.

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[233] Willis, email to RSAA (2 April 2003)

[234] Statement of Ali Ben Hajar (appellant's documents No. 4). For additional evidence on this point see the "Algerian Armed Faction declares ceasefire" *Toronto Star* (17 October 1997) and CCFIS Communiqué No. 7 and *Al Hayat* Issue No. 12651 (19 October 1997)

[902] Commenting on the *Asian* Post article Professor Joffé, in his oral evidence, stressed that reports such as this must be placed in their proper context. The allegation that the FIS is connected with the GSPC[235] as well as the GIA:

> …is a statement that the Algerian government has been repeating since January 2000 to justify its continued refusal to allow the FIS any form of political participation in Algeria itself. …no other source of any kind anywhere that I've ever seen makes that suggestion, it's a suggestion that comes straight from the heart of the regime.

[903] The *Asian Post* report indicates that the appellant's presence in Malaysia was known to both Malaysian and US Intelligence services, at least after September 11 and, we imagine, much earlier. Y's evidence makes clear that the appellant's presence in Malaysia was also known to the Australian ASIO. If there was any objective intelligence as to the appellant's involvement in planning terrorism in the name of FIDA or the GSPC[236] when living in Malaysia, let alone links to al-Qaeda, this would surely have resulted in a move against him by the Malaysian and/or US authorities. This did not happen. We note the response to Interpol Wellington's request for information about the appellant of 5 December 2002 received from Interpol Washington:

> The subject is not wanted by United States authority, however, subject is wanted by the authorities in Algeria.

The Commentary on the FIS

[904] It is unnecessary to analyse in any detail the SIS commentary on the FIS, save to record that it is superficial and, to the extent to that it reflects the official biases of the Algerian regime, contentious. Its attached chronology on the FIS is more interesting for its selective omissions than anything it says about the FIS. For instance, the first entry for February 1992,

> Forty people were killed and 300 wounded nationwide as FIS activists stoned members of the National Gendarmerie and the army.

This is a novel description of what were predominantly civilian deaths and casualties caused by security force gunfire in the demonstrations that followed the cancellation of the January 1992 elections.[237]

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[235] See for example "Election of Dhina as the head of the dissolved FIS" *Le Matin* (10 October 2000)

[236] The GSPC was placed on the US list of Foreign Terrorist Organisations post September 2001. US Department of State Fact Sheet, "Foreign Terrorist Organisations" (30 January 2003)

[237] For a description of these events, in which at least nine police officers also died, see US Department of State *Country Reports on Human Rights Practices for 1992: Algeria*, February 1993, p. 979 and *Human Rights Watch World Report 1993: Algeria*, p. 287

[905] The entry for October 1992 records that four alleged militants of the FIS confessed to the bombing at Algiers airport in August 1992 which killed ten people. No mention is made of the fact that the 'confessions' were all denied in court as having been extracted under torture.[238]

[906] Similarly, an entry for September 1996 referring to two sons of Abbassi Madani being put on trial in Germany on charges of supplying weapons to the FIS omits to mention that the accusations of gun-running were actually dropped during the trial.[239] Q makes it clear that the prosecution was based on information received from Algeria which it transpired was also based on admissions obtained under torture.

The Commentary on the GIA

[907] The SIS-compiled commentary on the GIA consists of standard, unsourced information – three of the five pages are a list of killings, bombings, massacres and other such violent incidents attributed to the GIA between 1994 and 1998.

[908] There is no hint of any familiarity with the extensive material which considers the probable infiltration of the GIA by the Algerian military security particularly during the 1994-1998 period,[240] or the associated difficulty, especially for outsiders, in accurately attributing responsibility for any particular violent incident, killing or massacre, almost all of which are routinely attributed by the regime to the GIA or Islamic terrorists. The resulting distortion is illustrated by these entries for September 1997:

> 98 villagers killed in a GIA massacre at Sidi Youcef – official figures put the death toll at 300.
>
> In the second most bloody attack by Islamic extremists, 200 were killed in an attack on a suburb of Algiers. While not claiming responsibility the GIA were blamed for the attack.

[909] Serious questions remain as to the identity of the perpetrators of the Sidi Youcef and other similar massacres such as that at Bentalha in which more than 200 died on the night of 22-23 September 1997. Amnesty International in its November 1997 report *Algeria: Civilian populations caught in a spiral of violence* summed up the concerns thus:

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[238] For a discussion of the airport bombing trial see Human Rights Watch *Human Rights Abuses in Algeria: No One is Spared* (January 1994) 35-7

[239] "FIS leader's sons jailed", *Agence France Presse* (23 June 1997)

[240] See Professor Joffé, recorded at paras 51 and 56-57 below

> The Algerian authorities claim that "terrorist" groups are responsible for all the killings, abductions, and other human right abuses and acts of violence which have been committed since the beginning of the conflict. They also blame the massacres of the past year on these same groups. Yet, while most of the massacres have been in areas around the capital, in the most heavily militarized region of the country, and often in close proximity to army barracks and security forces outposts, on no occasion have the army or security forces intervened to stop or prevent the massacres or to arrest those responsible.
>
> At the very least, the Algerian authorities are responsible and should account for the consistent failure to provide protection for the civilian population. However, there is growing concern, from testimonies of survivors and eyewitnesses of the massacres, that death squads working in collusion with, and under the protection of, certain units or factions of the army, security forces, and state-armed militias, may have been responsible for some of the massacres."[241]

[910] Specifically in respect of Sidi Youcef, a shanty town on the western outskirts of Algiers next to the residential district of Beni Messous, Amnesty International noted that nearby residents:

> …telephoned the security forces to alert them but were told that they could not intervene as the matter was under the mandate of the *gendarmerie*. They called the *gendarmerie* but received no reply. Beni Messous hosts the largest army barracks and military security centre of the capital, as well as three other *gendarmerie* and security forces centres from which the site of the massacre is clearly visible. The army barracks of Cheraga is also only a few kilometres away. However, as with all the other massacres, there was no intervention by the security forces to stop the massacre and the attackers left undisturbed.[242]

[911] A similar pattern exists in respect of Bentalha:

> In the night of 22/23 September 1997, more than 200 men, women and children were massacred in Bentalha (Baraki), south of Algiers. Bentalha is near five different army and security forces outposts, including the army barracks of Baraki, about three kilometres away, the army barracks of Sidi Moussa, about five kilometres away, the Gaid Kaceri security forces post, less than one kilometre away, the communal guard barracks about one kilometre away, and the security forces posts at the entrance of Bentalha. Survivors have told Amnesty International that at the time of the massacres armed forces units with armoured vehicles were stationed outside the village and stopped some of those trying to flee from getting out of the village. Similar reports have been received from journalists who have interviewed survivors.[243]

[912] The above illustrate the complexity and confusion of the Algerian reality and the dangers that can flow from a superficial reading of unsourced, limited, or decontextualised material.

[913] The SIS bibliography on the appellant links him to the GIA. We assume that the SIS is not suggesting that the appellant has had a hand in any of the killings, including massacres, it has itemised in its GIA chronology. However, the

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[241] Amnesty International *Algeria: Civilian population caught in a spiral of violence* (November 1997) p. 1

[242] *Ibid*, p. 8

[243] *Ibid*, p. 9

juxtaposition of such material has inherent dangers, and in other contexts has resulted in this simplistic link being made. See for example a report in the *NZ Herald* of 14 September 2002 *"All the wrong connections"*[244] which links the appellant to "bombings, beheadings and throat slitting".

[914] In fairness to the appellant, and so as to remove all doubt, we record our finding that there is no objective evidence that implicates the appellant directly or indirectly in any killing in Algeria or elsewhere and certainly not in any massacre. There is, though, ample evidence that he is counted amongst those Algerians and others who have condemned such atrocities and called for an inquiry into the violence and killings in Algeria. Indeed, the appellant, through his role in the CCFIS, has advocated the establishment of an independent commission to inquire into the massacres and other breaches of human rights in Algeria as an essential plank in any political settlement of the Algerian crisis.[245]

[915] In summary, the SIS unclassified material provided little in the way of new information to the Authority. We were surprised at how limited it was and the questionable nature of some of the contents. We wrote to the SIS on two further occasions in the expectation that it was holding additional unclassified material. Nothing was forthcoming.

[916] We conclude that the SIS material does not provide "serious reasons for considering" that the appellant is, or has been, a member of the GIA or any other Algerian armed group. More particularly, it does not provide evidence that he has committed, directed or participated in any act of violence or terrorism that would require his being excluded under Article 1F from the protection of the Refugee Convention.

THE ALLEGED 'GIA' ADMISSION ON ARRIVAL IN NEW ZEALAND

[917] We turn now to the claim that the appellant admitted to a customs officer, on arrival in New Zealand, that he was a member of the GIA. We have heard at length from the customs officer, AB , and will address his evidence shortly. Before doing so, we record the evidence of the appellant, given first, on the point.

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[244] See para 964

[245] See the CCFIS Communiqués 1-4 referred to at paras. 768-781

[918] Arriving at about 10 or 11am, the appellant found a police officer and indicated that he wished to seek asylum. The police officer took him to the NZIS airport office, where an Arabic interpreter was arranged. The interpreter arrived at 5pm and the appellant was interviewed. He was, by this time, very tired and asked if the interview might be delayed. He had been travelling for 48 hours and sitting in the airport for half a day. The request for a delay was declined.

[919] In a one to two hour interview, the immigration officer filled in a refugee status application form, on the information given by the appellant, which he signed (it discloses the same account which the appellant has given to us and need not be repeated).

[920] The appellant resumed waiting. After a further two hours, a customs officer took him to the customs hall, where his luggage was placed on a table in front of an office with mirrored windows. The appellant sat and was left alone there with his luggage for half an hour, before the customs officer returned and began searching his bags.

[921] While his bags were being searched, the customs officer asked the appellant questions. There was no interpreter and the appellant struggled to understand the questions in English. Other people were having their luggage searched at tables around them as flights arrived. The hall was noisy and there were many distractions.

[922] The appellant gathered that the customs officer was asking if he knew of the GIA and he realised that he had been primed to ask such questions. Feeling that he was being "interviewed", he asked (unsuccessfully) for an interpreter.

[923] The appellant was also asked (assisted by the customs officer's hand gestures and body language) if he had ever fired a gun. The appellant replied that, in his life, he had fired perhaps 10 shots with a Kalashnikov and made a "tak-tak-tak" sound for emphasis.

[924] The appellant then understood that he was being asked if he was a member of the GIA, to which he replied "FIS". Habitually, the appellant uses the French term "*FIS*" - to rhyme with "peace", but he knew that this variant would not be known to the Customs officer and expressly used the anglicised manner of spelling it out as the letters "F", "I", "S".

[925] The appellant was also asked why he had left Algeria and replied "political problem". His English did not allow him to explain further. The customs officer then asked if the appellant had ever done military service in Algeria, to which the appellant indicated that he had.

[926] The appellant's laptop was taken and he understood the officer to say that he was taking it to watch "porn". The word was again accompanied by body language to convey the meaning. The appellant took it to be a joke. He was then personally searched. At about 2.30am he was taken to the airport police station, where he spent the night.

The evidence of the Customs Officer

[927] Officer AB's evidence is similar but differs in key respects.

[928] In October 2001, he was employed by New Zealand Customs as a primary processing officer. He became a secondary processing officer (entailing more involved work, including profiling) in October 2002, two months before the appellant arrived in New Zealand. He received standard training, which did not include dealing with asylum-seekers (he cannot recall searching an asylum-seeker prior to the appellant). Neither did the training include interview skills or techniques.

[929] Officer AB confirmed that there is a particular 'profile' which customs officers are trained to look for in terms of suspected terrorists, which includes aspects of race and other indicia.

[930] He was instructed by his superior, Mr Warner, at 11.15pm, to see the NZIS officer who had interviewed the appellant. From the NZIS officer, Officer AB was given an oral résumé of the appellant's refugee application. Officer AB noted noted in his notebook the appellant's claim to be a member of the FIS, the decline of refugee status in Belgium where he was detained for two years, his move to Switzerland, deportation to Burkina Faso and flight to Malaysia. Finally, he noted that the appellant had been convicted of high treason in Algeria.

[931] Deciding that the appellant met the parameters of the 'terrorist' profiling, Officer AB rang the officer in charge of the Customs Anti-Terrorism Unit, Colin Smith. Mr Smith told him to ask the appellant whether he had ever belonged to

any groups such as the FIS or the GIA, whether he had ever had any military training with certain kinds of weapons and how he had come to New Zealand.

[932] Officer AB knew that there had been democratic elections in Algeria "in 1994" which had been overturned in a coup, but had not heard of either the FIS or the GIA. Mr Smith had emphasised that the "GIA" question was important and referred to the GIA being "involved in a certain situation in Paris". He told Officer AB to ask whether the appellant was a member of the GIA, whether he had been helped by the GIA to come to New Zealand and whether he had any stamps in his passport with the GIA emblem.

[933] Officer AB wrote down the questions he was to ask. He then memorised them and shredded the piece of paper. He now regrets having done so and realises that it was a mistake. At the time, Mr Smith had stressed the need for secrecy. It was one of the first times that Officer AB had searched anyone and he concedes that he did not know the proper procedures.

[934] Because the appellant was “important”, Officer AB then decided of his own volition that he should inform the SIS. He telephoned them and gave as much as he knew of the appellant’s background to the SIS officer on duty.

[935] Officer AB then took the appellant to the Customs search hall, where he began searching his bags, asking routine questions as to whether he had packed his own bags and whether he was carrying anything for anyone else. He used hand gestures to confirm his meaning. Receiving "yes" and "no" answers, Officer AB concluded that the appellant's English was adequate. He says that it did not occur to him to use an interpreter and Mr Smith had not raised the point. It was not the practice of Customs to use interpreters. He did add, however, that he had never before asked anyone 'non-standard' questions.

[936] The search took about an hour, during which Officer AB chatted and asked the appellant questions while he worked. He accepts that the hall would have contained other passengers, with their baggage being searched.

[937] Officer AB did not record his own questions and made brief notes only of the appellant's answers. He asked the appellant about his route to New Zealand and noted (the notes here are all set out verbatim):

> Pax stated he stayed in Hanoi, Vietnam one month

[938] As to whether he had used weapons, he recorded:

> Pax has a stated he had ten lessons with a Kalashnikov rifle ….
>
> [there is also a note at the end of the notebook:
>
> Pax has stated he has served in Algerian military]

[939] The appellant was asked if he was a member of the GIA. According to Officer AB , he nodded and said “yes”. Officer AB repeated the question and the appellant again nodded and said "yes". The entry in the notebook records:

> Pax states that he ~~has~~ is member of the GIA

[940] Officer AB asked if the GIA had helped the appellant come to New Zealand. He said no. This was not recorded in the notebook because, as Officer AB explained to us, he felt it necessary to record only the “yes” answers. He did not ask about “GIA” stamps in the appellant's passport, though he inspected the torn remains of the appellant's South African passport, which bore no such stamps. He did not think such stamps would appear in a passport in any event and believes he may have misunderstood Mr Smith's direction.

[941] After personally searching the appellant, Officer AB informed the appellant that he would need to take his laptop. Not wanting to refer to “terrorist images”, he told the appellant that it needed to be examined for possible pornography. Told of the appellant’s belief that he had wanted the laptop to *view* pornography, Officer AB concedes that there was a misunderstanding.

[942] The search concluded at about 2am and the appellant was returned to the Immigration Service. Officer AB reported to Mr Smith, Mr Warner and another Customs officer. He then attended to the search of an aircraft before returning to the office at about 5am where, relying on his notes and memory, he noted on the Customs computerised “Standard Information Report”:

> When questioned as to whether Pax was a member of the GIA, Pax statyed [sic] without any hesitation that he was.
>
> When questioned as to whether he had been in the Military Pax stated that he had only trained in the Algerian military for 24 days.
>
> When questioned as to whether he had any weapons training Pax stated that he had 10 lessons with a Kalashnikov assault rifle.
>
> When questioned as to whether he had been involved in any acts of violence Pax stated that he had not.
>
> When questioned as to who had helped him get to New Zealand Pax stated that he did not understand the question and that he knew nobody in New Zealand.

[943] Three weeks later, on 26 December 2002, Mr Smith asked Officer AB to complete a formal Job Sheet. The Job Sheet is a more narrative version of the computer entry, but also records the appellant stating that he had been convicted of high treason by the Algerian military.

[944] Officer AB accepts that he was remiss in not asking whether the 10 lessons with a Kalashnikov had been in the course of the appellant's military service. He attributes this to his inexperience. He accepts that he conducted the interview of the appellant in the form of a "chat", rather than a formal interview, because he feels that to do so helps to put people at ease.

[945] As to the appellant's evidence that he had said "FIS", not "yes", Officer AB is sure that he did not misunderstand the appellant because he also nodded. As to why the appellant would have just told the Immigration Service, through an interpreter, that he feared returning to Algeria because *inter alia* the GIA wanted to kill him and that he had spent almost 10 years in various countries denying being a member of the GIA, Officer AB could not explain.

[946] As to whether the appellant needed an interpreter that night, Officer AB now believes that he did and that it would have been correct procedure to have arranged one.

Assessment of the 'GIA' Admission to Customs

[947] We are satisfied that the appellant did not say that he was in the GIA. In reaching that conclusion, we take into account the following:

Inherent improbability

[948] It is inherently improbable that the appellant would have made any such admission. The following points must be remembered:

(a) A major part of the appellant's history has been the false allegation of GIA membership - an allegation which has dogged him in the jurisdictions of four countries, Belgium, Switzerland, Algeria and France. It is an accusation which he has consistently rejected, in the media and in Court, for almost a decade.

(b) A few hours before being spoken to by Officer AB, the appellant had made, through an interpreter, a lengthy and detailed application for refugee status in which he recorded that he is a member of the FIS and is in fear of being persecuted by both the Algerian regime and by the GIA who have issued a death sentence against him.

(c) Our own examination of the allegations that the appellant is a member of, or is linked to, the GIA reveal them to be speculative, exaggerated, inaccurate and, in some instances, politically motivated fabrications. He is not, and never has been, a member of the GIA.

[949] Against this backdrop, to suppose that he would suddenly make such an admission to a customs officer, flying in the face of everything he has said in the previous 10 years and against the objective evidence, defies reason. It is inherently improbable.

The weight to be given to the Customs Officer's evidence

[950] We spoke at length with Officer AB . He presented as a sincere but unsophisticated young man, who was left on his own to handle a situation undoubtedly well beyond his limited experience and knowledge. We have no doubt that he tried to do his job to the best of his ability on the night in question. The appellant himself accepts this. However, it is necessary to have regard to the following:

(d) Officer AB was at that time completely inexperienced, both with non-standard interviews and with asylum-seekers. He had had no training in interview skills or techniques, nor in the handling of asylum-seekers. Symptomatic of this was his admission that it did not occur to him to use an interpreter and the conducting of such a serious interview by way of a 'chat'.

(e) The appellant's English is minimal. The Immigration Service had seen the need to use an Arabic interpreter just hours before. There was in fact a clear need for an interpreter. To his credit Officer AB now accepts this. He told us with commendable frankness that, if the same circumstances were to arise, he would not proceed without one.

(f) Officer AB had an almost total lack of knowledge on the subject on which he was questioning the appellant. He had not heard of either the GIA or the

FIS before and Mr Smith gave him no information which might have assisted him to understand the appellant's responses in context. The potential for misunderstanding was significant.

(g) The interview was, in fact, rife with misunderstandings. The appellant's "ten shots" with a Kalashnikov became "ten lessons", a significant difference, no doubt attributable in part to the reliance on body language. Nor was the use of it linked to his military service. There was also obvious confusion (now accepted by Officer AB) over Officer AB's reference to pornography when he confiscated the appellant's laptop.

(h) The appellant was then interviewed on this extremely serious matter by way of a 'chat' while his luggage was searched in the middle of a crowded and noisy hall. The interview took place after midnight, when the appellant had been travelling for 48 hours, had been kept waiting since midday and had already stated that he was too tired to be interviewed.

(i) The combination of Officer AB's inexperience and his anticipation of a "yes" answer, led to a fundamental error. It will be recalled that the appellant says he gave his answer as the three letters "FIS". In the French alphabet (which, we have observed ourselves, he consistently uses), the letter "I" is pronounced "E" (rhyming with "bee"). What Officer AB heard as "Yes" was – phonetically – "efeeyes".

(j) Our conclusion is reinforced by the regular difficulty others have with the aural perception of "FIS" (in either form). Neither the organisation nor the pronunciation of its name are familiar to many outside Algeria. The first draft of the RSAA's own transcript of the evidence of this appeal was littered with the errors "peace" and "piece". Further, transcripts of English court proceedings concerning Algerian defendants that we have seen frequently have the stenographer recording "FIS" as "peace" or "feast".[246]

The written records

[951] Finally on this issue, it is also necessary to address aspects of the written records. They are inadequate to the point that no weight can be given to them.

[246] Appellant's documents 51

(a) There is no contemporaneous record of the questions put to the appellant. The list Officer AB wrote at the direction of Mr Smith was immediately shredded and they were not recorded in his notebook. The computer record was not drawn up until 5am and, even then, does not contain a verbatim record of the questions asked.

(b) The answers given by the appellant are not recorded verbatim, either in the notebook or in the computer entry.

(c) The only contemporaneous record - the notebook - omits a number of answers which later appear for the first time in the subsequent computer entry and Job Sheet.

(d) The Job Sheet drawn up three weeks later establishes that, even by that date, the interview was no longer clear in Officer AB's mind. The Job Sheet records:

> … I questioned him as to why he had left Algeria, to which he stated … that he had been convicted of high treason by the military.

(e) In fact, the reference in his notebook to "convicted of high treason in Algeria" was a record of the information given to him by the Immigration Officer in her résumé of the refugee application, not the appellant.

[952] Taken cumulatively, these deficiencies in the written records are far-reaching. They are such that the written records do not constitute evidence which can be relied upon.

Conclusion on the Custom's Officer's evidence

[953] We have weighed the foregoing concerns carefully. Taken cumulatively, the inherent improbability of the appellant making any such admission and the lack of weight that can be given to the evidence to the contrary, satisfies us that the appellant did not make any admission that he was a member of the GIA. His response of "FIS" ("efeeyes") is so close to the "Yes" that the officer was anticipating that, given the background to the interview and the inadequate surroundings, we are satisfied that the appellant was misheard.

Ongoing Misinformation

[954] Mention should also be made of the regrettable ongoing effect of the Customs Service records. The inherent implausibility of the appellant's 'admission' that he was a member of the GIA seemingly caused few misgivings in New Zealand.

[955] It began life as part of the computerised "Standard Information Report" prepared by Officer AB on 4 December 2002:

> When questioned as to whether Pax was a member of the GIA, Pax statyed [sic] without any hesitation that he was.

[956] Officer AB had also informed both his team leader and another senior customs officer of the 'admission' as well as Colin Smith, of the Counter-Terrorist Unit of the Customs Service. He had also telephoned the SIS to advise of developments. Customs officials quickly passed on advice of the 'admission' to the New Zealand Police, where it surfaced in an email sent on 5 December 2002 by Interpol Wellington to 12 foreign Interpol offices (Pretoria, Algeria, Brussels, Bern, Kuala Lumpur, Hanoi, Seoul, France, Canberra, London, Ottawa, Washington) as the following:

> He is a member of the Armed Islamic Group, which is known by the French acronym G.I.A.

[957] On 26 December 2002, Officer AB , on the instruction of Colin Smith, produced the written, signed "Job Sheet" outlining his interview with the appellant on the night of 4 April 2002. It contained the following:

> After establishing that Zaoui could understand my questions, I questioned him as to whether he was a member of the G.I.A. to which he nodded his head and answered yes. At this point to ensure that he understood my question I stated to him the question "So you are a member of the G.I.A?", to which he nodded his head in the affirmative and answered yes.

[958] The Customs Service inform us that the Job Sheet was distributed to the RSB, the New Zealand police, and the SIS.

[959] The police relied on the appellant's 'admission' when determining the appropriate custodial arrangements for the appellant as well as extreme security measures for his appearances at the Manukau District Court in connection with the renewal of the warrant of committal.

[960] That the appellant had "admitted belonging to a terrorist group" featured in the New Zealand police's "Threat Assessment" made available to Crown Counsel, Mr Woolford, in response to the Authority's request that the police outline the security concerns behind their seeking the transfer of the appeal hearing from the RSAA hearing rooms to the District Court and/or Paremoremo prison. The only other security issue raised in the "Threat Assessment" was the fact that the appellant was the subject of Algerian arrest warrants.

[961] The SIS advised that it was not prepared to disclose whether or not it had communicated the contents of the customs officer's statement to any other foreign intelligence or police service though it did note that it "is very mindful of and adheres to the obligations imposed by s129T of the Immigration Act".

[962] The RSB made use of the customs officer's statement of 26 December 2002 in its determination of the appellant's refugee claim. The refugee status officer noted both the appellant's denial that he had made any such admission, and counsel's warning that the customs officer's evidence was suspect because of the absence of an interpreter. He even acknowledged that the statements attributed to the appellant in regard to the GIA "are totally out of character and that he has consistently denied such a connection in the face of accusations since the early 1990s". However, the officer felt compelled to give credence to the "admission" because it "merely affirms" prior findings based on the accumulated newspaper evidence; suggesting that, through repetition, the appellant's reputation as a GIA terrorist has become self-validating.

[963] That the appellant appears to have become the victim of a self-validating legend is also suggested by the response of the New Zealand media. As has happened in the past, the appellant, following his imprisonment, quickly became a media sensation. The source of the original leak to the media is unknown but it clearly occurred in breach of the confidentiality provisions of s129T of the Immigration Act 1987.

[964] The New Zealand public was alerted to the presence in New Zealand of "a suspected internationally wanted terrorist" now in a secure unit at a maximum security prison whose notoriety justified the use of a police helicopter to monitor his transfer to prison.[247] A New Zealand Herald report of 14 December 2002, *All the Wrong Connections* indicates New Zealand journalists' ready facility with the internet. The report is an extraordinary list of sensationalist and largely inaccurate

[247] "Terror alert as traveller detained" *New Zealand Herald*, 13 December 2002.

claims about the appellant culled from internet sources of the type we have already adversely commented on. Readers were informed that the appellant:

> …is believed to be a terrorist on the run with links to sinister organisations.

whose

> …name is linked to terrorist cells that have carried out bombings, beheadings and throat slitting from Algeria to France.
>
> The name crops up in connection with Osama bin Laden's suspected Southeast Asian army, and a book published this year links the name indirectly to suspects in the assassination of Afghanistan's Northern Alliance leader, Ahmad Shah Massoud.

[965] The emergence of such untruths in New Zealand lends weight to the appellant's contention that many of his problems over recent years stem from Western journalists' and officials' ignorance of Algeria and their preconceptions and fears about Islamic 'terrorists'.

[966] The same untruths also constitute further instances of an important theme that has emerged from our consideration of the evidence, namely the process by which highly prejudicial misinformation concerning the appellant quickly acquires the status of received 'facts' – a process reinforced by the diffusion and recycling of these 'facts' by the media/internet as well as between intelligence services and immigration and other officials in a range of countries.

[967] As we have also seen, the creation of misinformation in respect of the appellant has been an intentional strategy of the Algerian regime and its allies in the 'eradicator' press.

[968] The regime's misinformation has been disseminated through direct contacts with foreign, especially French, security and other officials as well as via the media for nearly a decade. The process remains ongoing. What has changed is the extension of the old "GIA" discourse to include a new post-September 11 "*al-Qaeda*" discourse, the Algerian regime's propaganda, as always, being finely tuned to Western anxieties, and misconceptions, about the 'Islamic threat'.

[969] So *Le Matin*, reporting in Algeria on the appellant's detention in New Zealand, immediately announced:

> This former head of the dissolved FIS is suspected of having links with Al Qaïda.
>
> The list of Algerians arrested abroad during the inquiry on Al Qaïda continues to increase. This time, the problem has struck deeply into the heart of FIS, of which a representative figure has been the subject of questioning in New Zealand where

> the department concerned is trying to verify the existence of links with Oussama Ben Laden's terrorist group.[248]

[970] The article incorporated information acknowledged to be sourced from an *Agence France Presse* report which in turn "bases its information on a newspaper article which appeared in the daily newspaper New Zealand Herald". In true media merry-go-round fashion, *Le Matin* also repeated the dubious *Asian Post* allegations[249] of 26 September 2001:

> He was subsequently forgotten until information published last year in the Canadian press, revealed the existence of links with Al Qaïda networks in Asia.

[971] The *New Zealand Herald* has continued to make mileage from the *Asian Post* claims. On 29 July 2003 just days before the release of this appeal decision it published on its front page a large colour photograph of the appellant above the caption "Terror suspect". Readers were reminded:

> Media reports from Vancouver in 2001 link Zaoui to Osama bin Laden's secret army in Southeast Asia.[250]

[972] The *'al-Qaeda* connection' predictably also featured in the Algerian authorities' response of 8 February 2003 to Interpol Wellington's request for further details about the appellant. Needless to say, they also wanted information about his contacts with Algerian nationals in this country and to be advised on the outcome of his refugee claim.

[973] In the opinion of Professor Joffé, expressed in the course of his oral evidence, the recent suggestions of a link between the appellant and al-Qaeda represent:

> … the latest gambit in the arsenal of weapons that regimes like the Algerian regime use.
>
> … In the wake of September 11 and the elevation of the al-Qaeda movement to the status of being a major threat to Western security there is a common belief held in Europe and America that all groups engaged in violence that also appear to have some kind of Islamic connection are therefore part of the same network. Now for the Algerian government that couldn't be better because now it can argue the local problems it has faced since 1992 are in fact merely a particular case of a general phenomenon … this is the point it has been trying to tell Western governments – of the danger since 1992 – they ignored it and now look what's happened. In other words the purpose of these sorts of connections is to demonstrate to Europe, particularly Europe, that it is responsible for the crisis of terrorism it believes it faces and … in that connection complaints made to Algeria

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[248] "Cet ancien responsable du FIS dissous est soupçonné de liens avec Al Qaïda*" Le Matin*, 14 December 2002, www.lematin-dz.net/14122002/jour/le_quotidien.htm (accessed 18 July 2003).

[249] See discussion in paras. 896-902

[250] "Everyone to lie in unison" *New Zealand Herald* (29 July 2003)

> about abuses of human rights, and undemocratic behaviour are utterly misplaced as they face a common enemy.

[974] Professor Joffé points out that an objective of the regime's domestic and international policies remains "the elimination of the FIS as a political challenge of any kind". In his opinion, while the regime does not seriously regard the FIS leadership in exile as capable of returning to Algeria and dominating the political scene, the FIS is still perceived as a serious threat in that it:

> … represents a set of values that are seen to be a threat.
>
> Many Algerians still resonate to the idea that Islam in some way represents the values that should inform the political process.

[975] For this reason someone such as the appellant "with the intellectual, doctrinal and moral weight", to articulate FIS values in a way "likely to find a resonance inside Algeria" represents a constant threat to the regime and will thereby be targeted. According to Professor Joffé information coming from the Algerian authorities about the appellant, as in the past, will:

> … be couched in terms that indicate a political danger, whereas in fact the Algerian government is much more concerned about his moral weight.

[976] Clearly any *al-Qaeda* claims must be critically assessed, having regard to the political context outlined by Professor Joffé. In the absence of independent, objective evidence any such claims, especially if originating from the Algerian authorities, should be rejected.

NEW ZEALAND POLICE ENQUIRIES

[977] Finally, we record that we have been provided with copies of all communications between Interpol Wellington and the various Interpol agencies with which it has communicated in respect of the appellant, including Algeria.

[978] In a letter of 9 April 2003 to the NZIS, Detective Inspector G C M Knowles, Manager of the National Bureau of Criminal Intelligence, advised that, apart from the international warrant from Algeria, "no other warrants relating to Zaoui were reported to the police through international law enforcement checks".

SUMMARY ON EXCLUSION

[979] We have cumulatively taken into account all the evidence, giving due weight to the decisions of judicial bodies (particularly superior Courts), which must, *prima facie*, be probative evidence of the commission of the acts alleged. We find no probative or reliable evidence sufficient to give rise to the threshold of "serious reasons for considering", which we recognise is lower than the balance of probabilities. The evidence does not meet the threshold by a demonstrable margin.

[980] In particular, we find:

(a) no serious reasons for considering he is a member, let alone a leader, of the GIA or the FIDA or, indeed, any armed group;

(b) no serious reasons for considering he has committed or participated in or directed any act of terrorism, violence or other criminal conduct;

(c) The appellant has only ever been a member of the FIS. The FIS is a political organisation. It cannot be said to be an organisation principally directed to a limited, brutal purpose, of which mere membership alone would be enough to bring the appellant within the exclusion provisions of Article 1F. There is no probative evidence that, as a senior member of the FIS' leadership in exile, that he participated in or directed or encouraged violence. The evidence points clearly to the appellant's FIS activities having been in furtherance of its political goals.

[981] We conclude that there are no serious reasons for considering the appellant has committed Article 1F crimes, in particular neither crimes against humanity nor serious non-political crimes. He is not excluded from the protection of the Refugee Convention.

CONCLUSION

[982] The appellant has a well-founded fear of being persecuted for a Convention reason if returned to Algeria.

[983] The Authority finds that the appellant is a refugee within the meaning of Article 1A(2) of the Refugee Convention. Refugee status is granted. The appeal is allowed.

……	……	……
E M Aitken	V J Shaw	C M Treadwell
Chair	Member	Member