OUTER HOUSE, COURT OF SESSION

[2023] CSOH 23

P644/22

OPINION OF LORD RICHARDSON

In the cause

AK

Petitioner

against

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Petitioner: Winter; Drummond Miller LLP (as agents for McGlashan MacKay Solicitors)
Respondent: Crabb; Office of the Advocate General

31 March 2023

Introduction

[1] The petitioner is a citizen of Algeria. He arrived in the UK on 28 January 2019. Prior to coming to the UK, the petitioner was a university student.

[2] The petitioner entered the UK on a valid visitor's visa. He subsequently claimed asylum on 18 May 2020. He did so on the basis that he was at real risk on return because of his ethnicity as a Berber and his political activity whilst a student. Officials acting on behalf of the Secretary of State accepted the petitioner's nationality; that he was Berber; and, that he was a member of student group at university. The officials also accepted that he had taken part in a number of demonstrations. However, the officials did not accept that the

petitioner had come to the adverse attention of the Algerian authorities because of his political activities. Accordingly, the Secretary of State refused the petitioner's claim on 25 January 2021.

[3] The petitioner's appeal against the Secretary of State's refusal was dismissed by the First-tier Tribunal in a decision dated 7 February 2022 (the "Decision"). The petitioner's subsequent requests for permission to appeal to the Upper Tribunal were refused both by the First-tier Tribunal, on 3 March 2022, and the Upper Tribunal, on 18 May 2022.

[4] In the present proceedings, the petitioner challenges the decision of the Upper Tribunal.

The decision of the First-tier Tribunal

[5] The Secretary of State was not represented at the hearing of the petitioner's appeal on 17 December 2021.

[6] In advancing his appeal, the petitioner produced and relied, among other things, upon an expert report prepared by Dr Hasan Hafidh, a visiting research fellow at King's College, London and a senior teaching fellow at the School of Oriental and African Studies.

[7] There was no dispute before me that, in the Decision, the judge of the First-tier Tribunal had correctly identified the correct legal issue - namely, whether the petitioner had demonstrated that he faced a real risk of persecution for one of the five reasons set out in the 1951 Refuge Convention.

[8] Thereafter, the judge had set out a summary of the petitioner's position. The following passages are material to the present proceedings:

> "In November 2018, the Appellant attended a meeting of his group at the University. However, the meeting was interrupted by security staff who contacted the Head of Faculty who called the police. The Appellant was taken to the police station along

> with the other members who were at the meeting and was then questioned by the Commissioner and was later released. Around 10 days later, the group organised another demonstration at the University. The police came and the Appellant was arrested, along with some other protesters. He was detained for 3 days and questioned on the last day by the Commissioner. The Appellant was then told that he would be formally charged for organising the protests and he was told he would receive formal citation from the Court and, thereafter, was released.
>
> During this time, the Appellant applied for a visit visa to travel to the UK to visit his uncle. The Appellant's father paid a bribe to an officer working at Algiers airport and the Appellant was able to leave Algeria and arrived in the UK on 28th January 2019. After arriving in the UK, the Appellant was contacted by his family who advised him that the police were looking for him. The Appellant eventually told his uncle about his fears about returning to Algeria and his uncle advised him to claim asylum. The Appellant instructed his representative in March 2020 and, due to the start of lockdown, was only able to attend a screening interview in May 2020. His asylum application was refused by the Respondent by way of a decision dated 25th January 2021 which is the subject of this appeal."

[9] The judge identified that the principal issue of contention between the parties was whether the petitioner had come to the adverse attention of the Algerian authorities as a result of his political activities. Among the reasons for which the Secretary of State disputed this was that the petitioner had left Algeria on his own passport and visa. The Secretary of State inferred from this that there was no risk to the petitioner from the Algerian authorities on his return. The judge noted further that the Secretary of State considered the claim that the petitioner's father had bribed a member of airport staff to be unsubstantiated.

[10] One issue identified by the judge was the lack of any documentation relating to the petitioner's claimed difficulties with the police and the alleged referral to court. This was addressed at paras [27] and [28] of the Decision.

> "27. Another matter of concern is the lack of any documentation relating to the Appellant's claimed difficulties with the police and referral to the court. In his expert report, Dr Hafidh says that the Appellant's account is plausible and it is common practice not to serve papers on detained individuals. Pre-trial detention remains an issue in light of the most recent protest movements. The expert confirms that arrested individuals have reported that the authorities have held them for a number of hours before releasing them without formal charges. The expert notes that it is commonplace for activists to be charged and provisionally released, as well as

> arbitrary arrests taking place. It is plausible in the expert's opinion that initial charges are laid with no paperwork. In his asylum interview the Appellant states that after his most recent detention he was told he would be referred to the court and that the police had told him he should not travel anywhere until he got the letter of summons. Yet this letter never arrived and instead the Appellant claims that the police repeatedly visited his family home continuing now nearly two years after he departed. I find it difficult to accept that if the Appellant was under legal jeopardy or court proceedings in Algeria he, or his parents, would be served with no documentation despite the matter continuing for nearly two years. I take account of what is said by the expert above but this appears to relate to initial periods of arbitrary detention followed by release. Indeed my reading of the sources cited by the expert confirm that recourse to the courts for protestors in Algeria is commonplace, and that formal procedures are normally followed (according to the US Department of State 2020 Country Reports on Human Rights Practices: Algeria which is cited by the expert). One report cited by the expert states that arbitrary arrests had decreased significantly in recent years, thought this source is from 2008.
>
> 28. The Home Office CPIN which has been provided also cites the US Department of State report and notes: '5.1.1 The USSD Country Report for 2019 described the procedures for arrest and treatment of detainees: 'According to the law, police must obtain a summons from the prosecutor's office to require a suspect to appear in a police station for preliminary questioning. With this summons, police may hold a suspect for no more than 48 hours. Authorities also use summonses to notify and require the accused and the victim to attend a court proceeding or hearing. Police may make arrests without a warrant if they witness the offense. Lawyers reported that authorities usually carried out procedures for warrants and summonses properly.' The objective evidence lodged by the Appellant is replete with references to activists being taken to court and accounts of court proceedings. Whilst I accept that arbitrary detentions can occur, the absence of any formal papers did not seem to me to square with the available background evidence in the context of the Appellant's account."

[11] In considering the issue of how the petitioner managed to effect his exit from Algeria and his claim that a bribe had been paid on his behalf, the judge stated as follows at para [30]:

> "I am cognisant that corroboration is not a requirement in a claim for protection. Nevertheless I must be satisfied that the Appellant has made a genuine effort to substantiate his claim, that all material factors at the person's disposal have been submitted, and that a satisfactory explanation has been given for a lack of supporting material. In my judgement, given the Appellant's very frequent contact with his parents it would have been a simple matter to ask them to provide further information on the important matter of his father paying a bribe to an airport official. In my judgement the failure to do so damages the Appellant's credibility. The Appellant's parents would be able to comment in detail on the police visits which

> had occurred, including what precisely was said by the police, and most importantly the nature of the bribe and arrangements which were made for the Appellant to leave Algeria. The Appellant has been a notice of these matters since claiming protection and I do not regard his explanation that he simply did not ask them to comment, or ask about them, as being credible, or in keeping with the obligation upon him to make a genuine effort to substantiate his claim."

[12] In the final paragraphs of the Decision, paras [32] and [33], the conclusions of the judge are summarised as follows:

> "The Respondent has accepted that the Appellant has been involved in political protests in Algeria, as have a significant proportion of the population there, whilst arrests have occurred, this is against a backdrop of many thousands of protestors across multiple cities. However, the Respondent has not accepted that the Appellant has personally come to the adverse attention of the authorities and would be at risk on return for that reason. In my judgement the Appellant has not made out his claim that he is personally at risk of ill treatment from the authorities on return. That he was able to leave the country on his own passport through the airport is a matter of some importance. Such an act, in the absence of the claimed bribe, would be indicative of a lack of interest from the authorities, a matter implicitly accepted by the Appellant, who says that without the bribe he would not have been able to depart Algeria. He has failed, in my judgement, to substantiate that important aspect of his claim, without a reasonable explanation.
>
> For these reasons I am not satisfied that the Appellant has made out his claim to have a well-founded fear of persecution on return to Algeria because of his political opinion and ethnicity. For the same reasons I am unable to conclude that the Appellant is at real risk of serious harm on return. I accept that the Appellant in common with many other young Algerians has been involved in political protesting. <u>However I do not accept that he personally is at risk of further adverse attention from authorities on return, primarily because in my judgement he has failed to make a genuine effort to substantiate his claim on a matter of central importance, namely how he was able to leave Algeria if sought by the authorities and warned not to leave.</u>" (Emphasis added)

The decision of the Upper Tribunal

[13] Before the Upper Tribunal, the petitioner relied upon two grounds of appeal.

Ground 1 was as follows:

> "The FTT erred in law at paragraphs 23-26 in relation to whether a bribe was paid to allow the appellant to leave Algeria. In assessing the plausibility/ credibility of the appellant paying a bribe to leave Algeria the FTT has failed to take account of the expert report anent the bribery issue. Such an error is material: where the expert is

of the view, at paragraphs 24-25, that the payment of a bribe as a means of exiting is plausible/credible; where if the appellant did pay a bribe the expert is of the view that that would make the appellant liable to questioning on return and thus ill-treatment on return; where the FTT, at paragraph 33, treat the bribe issue as a matter of central importance and the expert report does show genuine effort to substantiate his claim. If it is said that the FTT did take the expert report into account, the informed reader is left in real and substantial doubt as to how the expert report is analysed when the FTT is assessing the plausibility/credibility of a bribe being paid. The appellant is prejudiced where his appeal has been refused. The FTT was wrong to refuse permission where the reasons given by the FTT at first instance are vitiated by this ground. The findings at first instance were made on a legally erroneous basis for the reasons set out in this ground."

[14] Ground 2 was in the following terms:

"The FTT erred in law at paragraphs 27-28 when placing reliance on the lack of documentation demonstrating that there were ongoing proceedings against the appellant. The informed reader is left in real and substantial doubt as to why the police would issue formal documentation when the appellant is not in the country and hence the police carrying out checks with his parents. The difference between the country information referred to by the FTT and the appellant is that the individuals referred to in the country information all remained in Algeria. Such an error is material where if the appellant is still of interest to the authorities then there is a real risk to him. The FTT was wrong to refuse permission. This ground is not an attempt to re-argue the case. The ground is a reasons challenge. In light of this ground there is a material error of law."

[15] The Upper Tribunal refused permission for the following reasons:

"1. In the FtT, Judge Stevenson dismissed this appeal, giving clear and comprehensive reasons, and Judge Pickering refused permission to appeal to the UT.

2. Ground 1 is that the FtT did not take account of an expert report showing it to be plausible that a bribe was paid, and would lead to questioning on return. Ground 2 is that in founding on absence of documentation of proceedings against the appellant, the FtT overlooked that he was out of the country.

3. These grounds do not fairly represent the reasoning in the decision, either on those chosen points or as a whole. The Judge gave several good reasons for not accepting the account of a bribe, or an impending summons, or the appellant's credibility in general, which go unchallenged. Those reasons include the lack of any good explanation for the delay in his claim, and the absence of evidence which might reasonably have been expected; not only documentary, but from his parents and his uncle.

4. The grounds do not arguably amount to more than selective probing for disagreement on the facts. They do not show that the decision, read fairly and as a

> whole, might arguably be set aside as a less than legally adequate explanation of why the appeal was dismissed."

Petitioner's submissions

[16] In the present proceedings, the petitioner seeks reduction of the Upper Tribunal's decision dated 18 May 2022.

[17] As a starting point, Mr Winter submitted that, in this case, it was necessary for the court to look at the Decision of the First-tier Tribunal in order to determine whether the Upper Tribunal had erred in failing to recognise that there had been an arguable error of law in the Decision of the First-tier Tribunal. Mr Winter advanced this submission on the basis of the two grounds of appeal which had been advanced by the petitioner before the Upper Tribunal.

[18] The first ground turned on the way in which the First-tier Tribunal had dealt with the expert report prepared by Dr Hasan Hafidh which had been relied upon by the petitioner. In particular, Mr Winter submitted that the First-tier Tribunal had arguably erred in its treatment of what Dr Hafidh had said about the petitioner's exit from Algeria. It was clear from the final paragraph of the Decision that the First-tier Tribunal considered that the petitioner's claims as to how he was able to leave Algeria to be of "central importance". It was the alleged failure by the petitioner to substantiate these claims which was the principal reason for dismissing the appeal.

[19] Against that background, Mr Winter drew my attention specifically to paragraphs 23, 24 and 25 of Dr Hafidh's report where his opinion was as follows:

> "**Comment on the plausibility of the client's claim that he was told by authorities that he was not allowed to leave Algeria and that he should wait for a formal citation from court in respect of these charges.**
> 23. It is important to note that emigration has increased since the state criminalised it in 2009. Any citizen or resident of Algeria who tries to leave the country illicitly is

subject to a fine and prison term of two to six months. From this perspective and on the basis that he has been arrested, this makes it all the more plausible that he was told he is not allowed to leave the country. To clarify, and by his account, the client would have therefore left illegally which is consistent with the need to then leave the country by means of bribery to ensure he could get through the airport using his passport (which is plausible in the Algerian context). Under this context, it is almost inevitable that the client would be subject to further prosecution upon return for attempting to evade the existing charges brought against him.

Comment on the question of bribery at the airport – whether it is possible that the client's father would have been able to pay someone to ensure that the client was able to travel from Algiers airport.

24. The issue of corruption and bribery is a pervasive issue within developing states and Algeria is no exception. In October 2018, the General Manager who deals with customs in Algeria spoke in a public press conference of new measures to try combat bribery and corruption within his department. Further to this, the managing director of the Airport Systems and Infrastructure Management Company (SGSIA) known as Tahar Allache is said to be one of the most corrupt officials within Algeria, and has been charged for overbilling, squandering of public funds, corruption, attribution of undue advantages for the award of public contracts, influence peddling, favouritism, procurement in violation of legislative and regulatory provisions and abuse of office during his time as Algiers airport chief.

25. Suffice to say if someone of his rank and public profile can be charged with corruption and was in charge of overseeing the airport's general operations, then it is not outside the realms of plausibility for someone working within the airport to be able to facilitate the client's movement in exchange for a monetary sum."

[20] Mr Winter also referred me to some general references to corruption in Algeria which were contained in the Home Office Country Policy and Information Note.

[21] Mr Winter submitted that, fairly read, the paragraph from Dr Hafidh's report bore directly on the petitioner's claims as to how he was able to leave Algeria and, in particular, the alleged bribe made by his father. Dr Hafidh's opinion was not generic - it related to the airport which the petitioner used at or around the time that he departed Algeria.

[22] However, Dr Hafidh's evidence on this crucial issue had simply not been referred to at all in the Decision of the First-tier Tribunal. The Decision did contain some reference to Dr Hafidh's report but not in relation to the petitioner's claims concerning his exit from

Algeria and the issue of the alleged bribe. In this regard, Mr Winter drew my attention to para [30] of the decision:

> "I am cognisant that corroboration is not a requirement in a claim for protection. Nevertheless I must be satisfied that the Appellant has made a genuine effort to substantiate his claim, that all material factors at the person's disposal have been submitted, and that a satisfactory explanation has been given for a lack of supporting material."

It was difficult to reconcile what was said about corroboration with any consideration having been given to Dr Hafidh's opinion on the issue of bribery. It appeared that the immigration judge considered that there was simply no evidence which supported the petitioner's claims concerning his exit from Algeria. This reading of the First-tier Tribunal decision was consistent with what was said in the final two paragraphs of the decision.

[23] On this basis, Mr Winter advanced two alternative submissions. Either, the First-tier Tribunal had arguably simply failed to have regard to Dr Hafidh's evidence on what the Tribunal itself regarded as a matter of central importance. Alternatively, if it was to be contended that the First-tier judge must have considered this evidence, as it was not addressed let alone referred to in the Decision, an informed reader was arguably left in a real and substantial doubt as to what had been made of it.

[24] Mr Winter submitted that his argument could not and should not be characterised as being a microscopic search for errors in the First-tier Tribunal's decision. In this regard, he drew my attention to what was said by Lord Justice Sedley in *NH (India)* v *Entry Clearance Officer* [2007] EWCA Civ 1330 at para [28]:

> "Since that decision was handed down, the House of Lords in *AH (Sudan*) [2007] UKHL 49 has stressed that appellate courts should not pick over AIT decisions in a microscopic search for error, and should be prepared to give immigration judges credit for knowing their job even if their written determinations are imperfectly expressed. This is no more than a paraphrase of a decision which, I respectfully think, is intended to lay down no new principle of law (cf, for example, *Retarded Children's Aid Society* v *Day* [1978] IRLR 128, §19, per Lord Russell) but to ensure that

> appellate practice is realistic and not zealous to find fault. Their Lordships do not say, and cannot be taken as meaning, that the standards of decision-making or the principles of judicial scrutiny which govern immigration and asylum adjudication differ from those governing other judicial tribunals, especially when for some asylum seekers adjudication may literally be a matter of life and death. There is no principle that the worse the apparent error is, the less ready an appellate court should be to find that it has occurred."

[25] Finally, in respect of the first ground, Mr Winter submitted that the arguable error of law in the First-tier Tribunal's treatment of Dr Hafidh's evidence was material. In this regard, Mr Winter drew my attention to a passage from *R (Ganesabalan)* v *Secretary of State for the Home Department* [2014] EWHC 2712 which was referred to with approval in *Khan* v *Secretary of State for the Home Department* [2015] CSIH 29 at para [13]:

> "It matters that the Secretary of State approaches decisions lawfully, asking herself the legally relevant questions, having regard to legally relevant considerations and giving legally adequate reasons. It matters, in my judgment, that the Secretary of State is the front-line decision-maker entrusted with addressing these considerations, and, on the face of it, the claimant was entitled, in my judgment, to a decision which demonstrably did so. The decision in this case demonstrably did not do so and I am not prepared to refuse judicial review on the basis that the decision would inevitably have been the same had the discretion been addressed."

[26] In respect of the second ground, the petitioner founded on the way in which the First-tier Tribunal dealt with the absence of documentation produced by the petitioner to evidence ongoing proceedings against him. This issue was dealt with at paras [27] and [28] of the First-tier Tribunal's decision.

[27] In support of this ground, Mr Winter took me to passages from the Home Office country Policy and Information Note in respect of Algeria which was before the First-tier Tribunal. Mr Winter submitted that these passages illustrated that the Algerian authorities frequently arrested and detained individuals without previously serving legal paperwork on them. Furthermore, the information did not give any indication of how the Algerian

authorities dealt with individuals, like the petitioner, who were no longer present in the country.

[28] Against the background of this information, he submitted that the decision of the First-tier Tribunal arguably represented an error. Mr Winter again advanced two arguments in support of this ground which mirrored the petitioner's position in respect of the first ground. The first was that the First-tier Tribunal had failed to take account of or address the information available to it on this issue from the Home Office's Country Policy and Information Note. This information gave no indication that the Algerian authorities sought to serve papers on individuals who, like the petitioner, were outside Algeria. Second, alternatively, Mr Winter submitted that an informed reader was left in a real and substantial doubt as to how the First-tier Tribunal has analysed the information regarding the arrest and detention of individuals by the authorities without the service of paperwork on them.

Respondent's submissions

[29] Mr Crabb began by inviting me to sustain the respondent's second and third pleas in law and to dismiss the petition.

[30] Mr Crabb explained that the respondent took no issue with the petitioner's characterisation of the test which the court required to apply. The critical question was whether the Upper Tribunal had erred in law in failing to recognise that there had been an arguable error of law in the Decision of the First-tier Tribunal.

[31] In respect of the first ground of appeal advanced before the Upper Tribunal, Mr Crabb submitted that it was important to appreciate the background to the issue of the petitioner's claims of bribery. He drew my attention to para [58] of the respondent's decision letter to the petitioner dated 25 January 2021 which stated as follows:

> "Furthermore, it is not considered reasonable that the police would have an interest in you, on the basis of your involvement with the demonstrations given that you travelled to the United Kingdom with use of your own passport and visa. It has been noted that you claim that your father bribed a member of airport staff, in order to facilitate your travel to the United Kingdom, however you were unable to provide any evidence in support of this (AIR145-148). It is not considered to be reasonable that you would be able to travel through the airport with the aid of one employee, and not be aware of details about this employee. This aspect of your claim has not been accepted, thus casts doubt on your overall credibility."

[32] As to the Decision of the First-tier Tribunal, he accepted that there was no specific reference to the passages from Dr Hafidh's report which dealt with the "plausibility" of the petitioner's claims in respect of his exit from Algeria. However, the Decision did address what the petitioner had himself put forward in respect of the issues of bribery and corruption. In relation to the point that the petitioner had made in respect of para [30] of the Decision and the Tribunal's reference to corroboration, Mr Crabb accepted that the wording used was not well expressed and created a difficulty for his argument.

[33] However, he submitted that I required to consider the Decision as a whole. Passages from Dr Hafidh's report had been referred to in the Decision. It was fanciful, Mr Crabb suggested, that, as a specialist Tribunal, the First-tier Tribunal had not considered the whole of Dr Hafidh's report. Mr Crabb argued that I should adopt a similar approach to that taken by the Inner House in *SA* v *Secretary of State for the Home Department* 2019 SC 451. In that case, the appellants had relied upon the report of a child psychologist, Dr Boyle, and, in rejecting the appeal, the First-tier Tribunal had not referred to the report. In dealing with this ground, the Inner House said (at para [31]):

> "There is little substance in the remaining grounds. Although the expression of certain matters might, as in many decisions, have been better, it is clear, when reading the decision of the FTT as a whole, that it took in all the relevant considerations, including the length of the child's residence. Although Dr Boyle's report was not specifically referred to, its content was alluded to. The short point is that, although not specifically stated, it was clear that it would have been in the best interests of the third petitioner to have remained in the United Kingdom with the

> first and second petitioners. Nevertheless, when the other factors in sec 117B of the 2002 Act were taken into account, the FTT was entitled to refuse the appeal for the reasons which it gave."

[34] Mr Crabb submitted that, when an informed reader considered the Decision, taking into account the background set out in the Secretary of State's letter, that reader would conclude that the First-tier Tribunal had considered all the material before it, including the entirety of Dr Hafidh's report.

[35] Mr Crabb submitted further that any error in law was not material. As had been noted by the Upper Tribunal, the First-tier Tribunal had given several reasons for rejecting the petitioner's claim. First, the petitioner had failed to provide more than brief details about the bribe and his departure from Algeria. The petitioner had not supplemented this during the course of the hearing before the First-tier Tribunal. Second, the petitioner had failed to obtain any further information from his parents about these matters notwithstanding the fact that the petitioner apparently spoke with his parents at least every week. Third, the First-tier Tribunal had also highlighted the fact that the petitioner had not produced a supportive statement from his uncle with whom the petitioner was living in the UK. Finally, the First-tier Tribunal had rejected the petitioner's explanation for delaying making a claim for asylum for 15 months after his arrival in the UK. The petitioner's position was that that he had delayed making this application because he had been concerned that he would be deported. The First-tier judge did not accept this explanation and this was a conclusion he was entitled to come to. Viewed against the background of these reasons, any error highlighted by the petitioner was immaterial.

[36] In respect of the second ground of appeal, Mr Crabb submitted that the petitioner's position was no more than a disagreement with the reasoning of the First-tier Tribunal. As was apparent from the Decision, the First-tier judge had considered the petitioner's evidence

and the evidence of Dr Hafidh. The Judge had also considered information available from the Home Office's Country Policy and Information Note. Based on this evidence, the First-tier Tribunal had concluded that the fact that the petitioner had apparently not received any formal papers did not square with his account. Mr Crabb submitted that this was a conclusion which was open to the Tribunal. The fact that another judge might have reached a different conclusion did not mean that the First-tier Tribunal had arguably erred in law.

Petitioner's reply

[37] In a short reply, Mr Winter highlighted the fact that Dr Hafidh's report post-dated the Decision letter issued by the respondent. In other words, in response to the criticism of the absence of evidence supporting the petitioner's claims as to how he left Algeria, he had obtained the report of Dr Hafidh which, among other issues, specifically addressed that point.

[38] Responding to Mr Crabb's submissions in relation to the materiality of any error by the respondent, Mr Winter argued that the question of whether an error was material was linked to the need for "anxious scrutiny" in the treatment of asylum claims such as that of the petitioner. In this regard, he drew my attention to what had been said by Lord Carnwarth in *R(YH)(Iraq)* v *Secretary of State for the Home Department* [2010] EWCA Civ 116 at para [24]. Mr Winter submitted that insofar as Dr Hafidh's evidence had not been addressed, it was arguable that every factor that might tell in favour of the petitioner had not been properly taken into account and, accordingly, that the appropriate level of scrutiny had not been applied to his case.

Decision

[39] The question which I require to consider is whether the Upper Tribunal erred in law by failing to recognise that there was an arguable error of law in the Decision of the First-tier Tribunal.

[40] On the basis of the helpful submissions with which I was provided, I am quite satisfied that the Upper Tribunal has so erred in relation to the petitioner's first ground - namely, the treatment by the First-tier Tribunal of Dr Hafidh's evidence.

[41] As a starting point, it is apparent from the Decision of the First-tier Tribunal that the primary reason why the First-tier judge did not consider that the petitioner had made out his claim to have a well-founded fear of persecution on return to Algeria was the judge's view that the petitioner:

> "had failed to make a genuine effort to substantiate his claim on a matter of central importance, namely how he was able to leave Algeria if sought by the authorities and warned not to leave."(at para [33]).

The First-tier judge dismissed the petitioner's appeal on this basis.

[42] In reaching this conclusion, it is notable that the First-tier judge placed particular emphasis on the apparent failure by the petitioner to substantiate his claim. The judge repeats this on two occasions before reaching his concluding paragraph. At para [30], the First-tier judge started by noting that corroboration was not a requirement in a claim for protection and then went on to state that he required to be satisfied that the petitioner has made a "genuine effort" to substantiate his claim. At para [32], the judge again noted his view that the petitioner had failed to substantiate this important aspect of his claim without a reasonable explanation.

[43] It is striking that the First-tier judge adopted this approach without having referred to the evidence of Dr Hafidh on this very issue. As Mr Winter stressed in his submissions

(noted above), Dr Hafidh specifically addresses the petitioner's claims in relation to his departure from Algeria at paras [24] and [25] of his report. In that part of his report, in addressing the "plausibility" of the petitioner's claims about leaving Algeria, Dr Hafidh cited evidence relating to corruption at the airport concerned, Algiers, only a matter of months before the petitioner's departure. As I understand it, Dr Hafidh's opinion on this matter was unchallenged before the First-tier Tribunal.

[44] On this basis, I consider that the First-tier Tribunal's treatment of the evidence of Dr Hafidh was arguably in error. I recognise that the First-tier judge does refer to other parts of Dr Hafidh's report elsewhere in the Decision. However, for present purposes, it is, I consider, fatal to the respondent's position that the First-tier judge has failed even to mention, let alone, address Dr Hafidh's evidence on what the judge considered to be the decisive issue in the case. In these circumstances, I accept Mr Winter's submission that an informed reader of the Decision would arguably be left in real and substantial doubt as to what had been made of Dr Hafidh's evidence.

[45] In this regard, I do not consider that the case of *SA* (above) assists the respondent. The decision of the Inner House on this issue plainly turned on the particular facts of that case. Importantly, unlike in the present case, the question of the evidence produced by the petitioners in that case was not critical. The question was not whether the Tribunal was correct that petitioners had failed to produce evidence in support of their position but rather whether the issues raised in the child psychologist's report had been considered by the Tribunal.

[46] Therefore, in my view, the First-tier Tribunal has arguably erred in its treatment of Dr Hafidh's report and, accordingly, the Upper Tribunal has erred in law in failing to identifying this.

[47] The question which then arises is whether, as the respondent contends, this error is not material. I have little difficulty in rejecting this argument. The beginning and, indeed end, of this argument is a recognition that the First-tier judge considered that this issue was one of "central importance" and provided the primary reason for dismissing the petitioner's appeal. In the circumstances of this case, I accept Mr Winter's submission that it was arguable that the appropriate level of scrutiny, as explained by Lord Carnwarth in *(YH) (Iraq)* (above), had not been applied to the petitioner's case. I consider it worth setting out the paragraph cited in the petitioner's submissions in full:

> "[T]he expression [anxious scrutiny] in itself is uninformative. Read literally, the words are descriptive not of a legal principle but of a state of mind: indeed, one which might be thought an 'axiomatic' part of any judicial process, whether or not involving asylum or human rights. However, it has by usage acquired special significance as underlining the very special human context in which such cases are brought, and the need for decisions to show by their reasoning that every factor which might tell in favour of an applicant has been properly taken into account. I would add, however, echoing Lord Hope [in *R (BA Nigeria)* v *Secretary of State for the Home Department* [2010] 1 AC 444, para 32], that there is a balance to be struck. Anxious scrutiny may work both ways. The cause of genuine asylum seekers will not be helped by undue credulity towards those advancing stories which are manifestly contrived or riddled with inconsistencies."

Dr Hafidh's evidence in respect of the petitioner's claims about his departure from Algeria was, arguably, a factor which might tell in favour of the petitioner on what the First-tier judge considered was the decisive issue in the case and, yet, the reasoning of the Decision did not take this into account.

[48] In relation to the petitioner's second ground, I do not consider that it is well founded. By contrast with the first ground, it appears to me from the Decision that the First-tier judge did consider the information which was presented to him on the issue of the absence of any formal documentation at paras [27] and [28] of the Decision (quoted above). The judge assessed the evidence of both the petitioner and Dr Hafidh together with the Country

Information. The judge concluded that the absence of formal papers did not square with the available background evidence in the context of the petitioner's account.

[49] The petitioner disagrees and urges a different conclusion on the basis that he had left the country. However, I note that none of the information before the First-tier Tribunal assists with the question of whether papers are served on those who have left Algeria. I do not consider that the petitioner's disagreement alone provides an arguable basis for setting aside the Decision of the First-tier Tribunal on this issue.

[50] Accordingly, I do not consider, in respect to the second ground, that there was any error of law by the Upper Tribunal in refusing permission to appeal.

Order

[51] In these circumstances, I will sustain the petitioner's plea in law and reduce the Upper Tribunal's decision dated 7 February 2022. I will reserve all questions of expenses in the meantime.