Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/04728/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 11 March 2019	**On 9 April 2019**

Before

UPPER TRIBUNAL JUDGE KEKIĆ

Between

A A A
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms V Laughton, of Counsel, instructed by Charles Douglas Solicitors
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This appeal comes before me following the grant of permission to appeal to the respondent by First-tier Tribunal Judge Lever on 31 October 2018. For convenience, the parties are referred to as they were before the First-tier Tribunal.

2. The appellant is a Kuwaiti national born in September 1977. He last entered the UK as a visitor in April 2015 and on 22 October 2015

claimed asylum. He claims that he had been the victim of politically motivated prosecutions in Kuwait, Jordan and Switzerland as a result of his involvement in exposing corruption amongst politicians and the judiciary in Kuwait and that if returned there he would be imprisoned, subjected to breaches of his article 3 rights and be deprived of his citizenship with the result that he could be removed to Jordan where he faces charges which, he claims, are politically motivated. He is also the subject of a Swiss extradition order in respect of a crime involving sham litigation over videotapes that purported to show the former Kuwaiti Prime Minister, former Speaker and senior members of the Kuwaiti judiciary involved in bribery, the manipulation of sovereign wealth and Iranian money laundering.

3. The respondent's case was that the appellant fell to be excluded from the protection of the Refugee Convention under article 1F(b) on account of his crime in Switzerland because his crimes were not politically motivated, and that he had shown a pattern of offending by other crimes even though they did not engage 1F(b). The respondent was not satisfied that there was sufficient evidence to show an article 3 risk upon return to Kuwait or that he would be deprived on his citizenship or forcibly removed to Jordan.

4. The appeal came before First-tier Tribunal Judge Hodgkinson at Harmondsworth and was heard over a period of three days in September 2018. It was allowed by way of a determination promulgated on 5 October 2018. The respondent challenged the determination on 9 grounds and permission to appeal was granted by First-tier Tribunal Judge Lever on 31 October 2018.

The Hearing

5. The matter came before me on 11 March 2019. The appellant attended, and I heard submissions from Mr Clarke and Ms Laughton.

6. Mr Clarke relied on his grounds and his skeleton argument. He set out the background to the case and the respondent's response to it as summarized in his skeleton argument (at 3-4 and 26-27) and then took me through each of his grounds.

7. Ground 1 argued that the judge's approach to the standard of proof and the test to be applied was flawed. Rather than looking at the wording of the Convention, he had looked at the certification through the lens of the balance of probabilities and considered whether the respondent had established that the appellant had committed crimes, not whether there were serious reasons for considering that a crime had been committed. He failed to appreciate that there was no requirement under article 1(F) for an appellant to have been prosecuted or convicted and it was wholly erroneous to take those matters into account. He also misconstrued the respondent's case as put at paragraph 130 of the determination; that was not what the

respondent had asked the Tribunal to do. Mr Clarke also submitted that the judge had failed to first consider the issue of the certificate before going on to consider the asylum issue and his use of the phrase *"reasonably likely"* when considering the certification confirmed that error. Mr Clarke pointed out that extradition proceedings were outstanding.

8. Ground 2 argues that irrelevant matters were taken into account. The judge found that it was not irrelevant to consider the fact that the appellant had asked to go to Switzerland without his appeal being treated as abandoned. However, as the abandonment of the appeal upon departure was a statutory provision and not dependent upon the respondent's discretion, that was an irrelevant matter for consideration. Also irrelevant was the argument that the appellant's willingness to face the charges in Switzerland undermined the case against him. Mr Clarke argued that the judge had made findings on the impending prosecution in Switzerland without having all the evidence before him.

9. Ground 3 argues that there was a failure to adequately reason and engage with the seriousness issue (at 143-153). The solicitors' notes of submissions made at the hearing were not verbatim notes as they missed out matters made in submissions by the respondent as could be seen by what the judge had recorded in his determination. The judge relied heavily on the opinion of the appellant's Swiss lawyer as regards sentencing as opposed to the contradictory view taken by the prosecutor and no reasons were given by the judge for why he preferred to rely on the former rather than the latter view. Nor did the judge engage with the test of seriousness as set out in AH (Algeria) [2012] EWCA Civ 395 and which he cited in his determination (at 144). Mr Clarke submitted that all the circumstances had to be considered before a decision was made on the deprivation of protection; it was not a prescriptive matter. At paragraph 152 the judge once again referred to the balance of probabilities test. He failed to grapple with the reasoning of the Court of Appeal in relation to the crime itself. Fraud was a serious crime and the publication of what the respondent maintained were sham videos had serious consequences for the impugned parties. This was not a victimless crime. This matter was specifically argued in paragraph 6 of Mr Clarke's skeleton argument and was recorded at p.8 of the note of hearing prepared by the representatives. The crime was such that it was justified to withhold the grant of protection and if established that it was a serious crime, it did not matter whether it was established that it had actually been committed. The sentencing issue was not relevant.

10. Ground 4 dealt with whether the crime was political or not. The test was set out in T v IO [1996] UKHL 8. The impugned parties had had no political links since 2011 and the appellant's involvement did not commence until 2013. The judge should have considered that nexus

and engaged with the argument made. The appellant's own evidence was that he had never been involved in politics and had been motivated by financial gain. If it was the test that the purpose of the crime was to overthrow or change a government, then it was not made out as those named in the litigation were not involved in government or politics. The judge set out the very detailed arguments made on this matter but then simply found at paragraph 161 that it had not been established that any crimes had been committed in Switzerland. There was no engagement with the legal test and he had misunderstood the nexus point. One of the two impugned emirs may go on to succeed the Crown Prince but only then would they be in politics. There was no sufficiently close and direct link as things stood between the crime and the alleged political purpose.

11. Ground 5 related to the findings made by the judge on the KRIC litigation. He went behind the appeal at the Federal Court and impugned the court and the arbitrator solely on the basis of the evidence from a lawyer and without any evidence on corruption in Swiss courts. This view of the Swiss courts undermined the Judge's findings which were also contradictory and perverse.

12. Ground 6 related to the Trekell arbitration and whether it was open to the arbitrator to make the findings he made. Mr Clarke submitted that it had not been open to the arbitrator to make the finding that the videos were genuine. The evidence before the arbitrator addressed only one aspect of the Tanveer Ahmed test. The expert reports did not even suggest that the voices heard were those of the impugned people. Nor was it known whether the transcripts were the same as those before the experts and it was unclear whether anyone was even seen speaking in the videos. It was difficult to see how, in those circumstances, the judge could have found that the arbitrator was entitled to find that the video tapes were genuine. Mr Clarke pointed out that he had argued that the reports were not complete and that there was no audit trail; the reports did not deal with the impugned people. It was not enough for the judge to state that the respondent had not maintained that the reports were false when all these other objections had not been addressed. One could not infer from a report something that it did not contain. Furthermore, there was no suggestion that the police had even seen the tapes. They only saw the CY4OR reports but those had the numerous failings which had been identified in submissions. A further problem was that the judge found the appellant to be right in his contention that the reports had been validated by French intelligence, a point relied on by the expert. That was however a factual error. The expert had relied solely upon what the appellant said and taken it at face value that the videos had been validated. He had gone beyond his jurisdiction in giving evidence on the Fintas prosecution, finding the videos were genuine and political. In assessing the expert evidence, the judge gave no reasons why this did not invalidate the conclusions reached. In fact, the judge made no finding on whether the videos were genuine or not

and this was a core issue. Such a finding was necessary and key to the intent of the parties and to credibility. The genuineness of the tapes impacted upon the prosecution in Kuwait, the arbitration, the pending prosecution and the appellant's claim that they were genuine.

13. Ground 7 concerned the article 3 findings. The judge dealt both with the article 3 risk on return and to the matter of prison conditions. He relied on the expert evidence but the criticisms of that evidence had been made. Essentially, the expert had misdirected himself in relation to evidence regarding matters of French intelligence and he had failed to cite his sources. The judge found it was unnecessary for the expert to do so but in making that finding he did not address the other problems that had been identified. There were also issues with the figures cited and conflicting evidence regarding overcrowding. The judge failed to engage with jurisprudence on this issue and gave no reasons for the conclusions that article 3 would be breached.

14. Ground 8 related to the findings on the deprivation of citizenship. No members of the Fintas group had been deprived of their nationality and there was no basis to indicate that the appellant would be. The judge relied heavily on the expert report but problems with that had been identified. It was not open to the judge to find that the appellant would be stripped of his nationality.

15. In respect of ground 9, Mr Clarke pointed out that no argument was made for the appellant that there would be an article 6 breach on return yet the judge found that there would be.

16. Finally, Mr Clarke urged that I be mindful of the extradition proceedings and the impact that the judge's findings in impugning the Swiss court proceedings might have on those proceedings.

17. I then heard submissions from Ms Laughton for the appellant. She reminded me that the appeal had been heard over three days and that the appellant and several witnesses had given evidence. She pointed out that the determination was very lengthy and that complex matters had been addressed. She submitted that findings could not be made in a vacuum and so all the issues were considered before the conclusions were reached.

18. Ms Laughton submitted that the judge had not made a finding that the Swiss prosecution was corrupt. He took account of the fact that the complainants were the same people who had been behind the Kuwaiti proceedings and of the fact that the respondent had not produced any evidence that a crime had been committed in Switzerland and concluded on that basis that the Swiss prosecution was not well founded (at 448(vi)). It was wrong to suggest that he found that the prosecution was corrupt or that he had impugned the courts.

19. Ms Laughton submitted that a grant of refugee status would not prevent the appellant's extradition and pointed out that he had always been keen to stand trial to clear his name. The advantage of having a travel documents, however, meant that he could travel voluntarily to Switzerland with a lesser chance of being remanded in custody than if he were extradited. She submitted that it would also always be open to the respondent to revisit the issue of exclusion at a later date if the appellant were to be convicted in Switzerland as his status could be revoked under article 14 of the Qualification Directive. At the moment, however, the respondent did not even know what the evidence against the appellant in Switzerland was.

20. The appellant's case, as put, was that the charges in Switzerland were instigated by those who had persecuted and prosecuted him in Kuwait because of his involvement with the Sheikh and in a bid to silence and punish him.

21. Although the judge had to consider the issue of the certificate first, he had to consider the events in Kuwait on which the appellant relied, before he could do so. The matter was considered holistically and the determination was well structured starting off with the preliminary facts, the standard and burden of proof, the matter of exclusion, a detailed overview of the credibility of the appellant and the witnesses, the issues raised by the respondent in the decision letter, the assessment of the evidence of the appellant and witnesses and the concluding findings. The judge overwhelmingly found in the appellant's favour. This was not a borderline case. In those circumstances, the respondent's arguments had to fall away. The judge was not required to make a finding on whether or not the tapes were genuine. He accepted that the appellant had not become involved for personal profit. He also accepted that the Swiss prosecution was instigated by the appellant's political enemies and was entitled to find that he would not receive a fair trial and would be deprived of his citizenship. It was not incumbent upon the judge to make a finding on every issue, to provide reasons for every matter or to address every argument made.

22. Ms Laughton relied on several authorities to support her submissions: R (Iran) [2005] EWCA Civ 982, Haleemudeen [2014] EWCA Civ 558, JR (Jamaica) [2014] EWCA Civ 477 and AH (Sudan) [2007] UKHL 49. She relied on MA (Somalia) [2010] UKSC 49 for the issue of self direction and on her skeleton argument for arguments on exclusion. She made four submissions before turning to the respondent's grounds. She submitted that the respondent was attempting to re-argue a case that he had lost and pointed out that on granting permission the First-tier Tribunal Judge had only found merit in one ground. She pointed to the care and detail with which the determination had been prepared and submitted that it was not reasonable to assume that having properly self directed, the judge would then go on and forget how the evidence should be assessed. Secondly, she submitted that adequate reasons

had been given. Third, she submitted that some of the points now made had not been made at the hearing. Fourth, she submitted that as the appellant's credibility had not been challenged the errors of law alleged by the respondent had to fall away.

23. Ms Laughton then addressed me on each of the respondent's grounds. On the point of mis-direction, she maintained that the correct test on the issue of exclusion was as set out in Al Sirri [2012] UKSC 54, and as cited in paragraph 100 of the determination. She said that following that test, it was difficult to see how the reference to the balance of probabilities meant that he had misdirected himself. She argued that the judge had followed the guidance in AH (Algeria) [2013] UKUT 00382; he was aware of the wording of the Refugee Convention which had to be interpreted on the balance of probabilities. It was not correct that the criminal standard had been applied, as argued by the respondent (in paragraph 5 of the grounds). Although the grant of permission suggested that the judge might have misapplied the test, those words only showed where the burden lay and did not go to the standard of proof. The reference to "*established*" had to be read in the context of the case law and the judge's previous self direction and should be interpreted as meaning "*established to the required standard*". If it was considered ambiguous then that was taking one word out of the rest of the determination and looking at it in isolation. That was not what was recommended in AH (Sudan).

24. With regard to the issue of the Swiss prosecution, Ms Laughton pointed out that the Tribunal did not have any of the evidence concerned. The respondent had relied only on the arrest warrant and the extradition proceedings. There had been no trial and no conviction and these were matters the judge had to consider. The appellant had denied all charges and given the absence of evidence to the contrary, the judge was entitled to rely on that lack of evidence. She also submitted that the judge was entitled to have regard to the Fintas Group convictions and the proceedings in Jordan when assessing whether the alleged crimes in Switzerland were political. The respondent was wrong to argue that only the motivation for the Swiss crimes should have been considered. They were all relevant matters and had to be considered holistically but even if the judge had erred in so doing, it would have made no difference to the outcome as the judge accepted the evidence of the appellant and the witnesses.

25. Ms Laughton argued that the appellant's request for permission to go to Switzerland was initially made whilst his asylum application was pending and then again during the course of the appeals process. She submitted that it would not have been necessary for the respondent to have treated the asylum claim as having been abandoned by the appellant's departure but the respondent failed to reply to the request. In any event, this was not a point relied on by the respondent

at the hearing and he was not now entitled to criticize the judge for failing to have regard to a submission which had not been made.

26. Further, Ms Laughton argued that the respondent had not made submissions about the different views to sentencing held by the appellant's lawyer and the prosecutor as set out in the lawyer's report. In any event, the prosecutor's view, taken at its highest was that some appellants would be referred to a higher court. The appellant was not mentioned by name as one of those and there were eight appellants in the case. The lawyer had reached her view not just on the basis of the appellant being a first time offender but also on the relevant facts of the case and the nature of the offence. The term of imprisonment was relevant to the judge's consideration; to argue that it was not would be contrary to AH (Algeria) 1.

27. Ms Laughton submitted that the judge was very conscious that the alleged crime had to reach a level of seriousness and she maintained that a sham arbitration which would not result in imprisonment could not reach that level. If the judge had found that the crimes were not serious, then any other errors were not relevant. The correct test was set out and it was not reasonable that he would have then promptly forgotten it.

28. The appellant had acted with political interests in mind by exposing corruption and the warrant itself referred to political figures. With respect to the KRIC arbitration, the judge heard the evidence of the lawyer and his concerns about the arbitration; the bribery of an expert and the conduct of the arbitrator. He found the evidence to be credible. Moreover, if it was the respondent's case that the arbitration was a sham then he could not also argue that proceedings in Switzerland could not be corrupt.

29. Ms Laughton also addressed the charges in Jordan and submitted that the problem there was that these had been based on the torture of a co-defendant and were therefore unreliable.

30. The judge had been well aware of the respondent's arguments as these were set out in full in the determination and were addressed. The judge had the arbitration letter and the expert reports and no issue was taken with them in the decision letter. If the evidence was not challenged by the parties, it would be very rare for a judge to find that it was not up to scratch. It was not the case that the reports relied solely on the videos. They also took into account information from various sources as clear from the evidence at Tab 16 of Bundle 10.

31. On the issue of the expert evidence, the judge was aware of the criticisms made and the complaint that he had taken on role of the Tribunal. Nevertheless, the judge found that this did not invalidate the rest of the report or the evidence of the other expert. Despite the

limitations of the report, he found the witness to be impressive. His findings could not, therefore, reach the perversity threshold.

32. On the matter of whether the tapes were genuine, the judge could not make a finding. The most he could do was to find whether or not the appellant believed them to be genuine.

33. The appellant feared that on return to Kuwait he would be ill treated whilst he was being processed and then again during any period of custody. In assessing the risk to the appellant, the expert explained that he was in the unusual situation of having already been convicted and sentenced and that was why there was limited evidence on the risk of ill treatment. He had, however, given evidence on how he obtained his figures. It was only in cross examination that he was asked for evidence of his sources and so he had no opportunity to produce them. In any event, this was unrealistic given that he had relied on over 3000 documents. It should have been sufficient that he provided details of his methodology. His findings on ill treatment were consistent with the background evidence as set out in the skeleton argument. When the available space in prisons was calculated, it could be seen to be well below the minimum requirements. Other reasons were also provided. The respondent had essentially expressed disagreement with the findings and was looking for reasons for reasons. There had been no material errors of law.

34. Mr Clarke responded. He submitted that it was wrong to say that the grounds did not challenge credibility as they plainly did and credibility had to be considered holistically. It was also not correct that the respondent had provided limited evidence as the respondent's case was based on the evidence provided by the appellant, the expert reports and witness statements as well as material served by the respondent. Omissions in the evidence from the appellant had been pointed out. The video tapes were historical and those persons said to be implicated in them were no longer involved in politics. There was no nexus and the T test had not been met. The KRIC litigation was peripheral and in any event if there was more evidence available, it had been for the appellant to provide it and not for the respondent to seek it. There was a lack of evidence as to whether the persons accused were those heard on the tapes. No findings had been made on that matter. Any removal to Jordan would involve an agreement between the governments of the UK and Jordan as to the standard of treatment. Whilst Ms Laughton had calculated the minimum space requirements, the judge had not done so. If an error of law were to be found, the case should be retained by the Upper Tribunal as it was complicated, could be dealt with faster than by the First-tier Tribunal and the extradition proceedings had already been delayed.

35. Ms Laughton submitted that if the determination were to be set aside then the matter should be remitted to the First-tier Tribunal. She suggested that a case management review hearing might be

advisable and that a decision on the future conduct of the appeal could be made at that stage.

36. That completed the hearing. I reserved my determination which I now give with reasons.

Discussion and Conclusions

37. I have considered all the evidence before me and have had regard to the submissions made before reaching a decision. I am mindful of the potentially serious consequences of my decision and I have made it with care. I have also endeavoured to make it as promptly as possible given the substantial amount of evidence relied on.

38. I would state at the outset that this has been a difficult and complex case. It is plain that it took Judge Hodgkinson several days to hear the appeal and the length of the determination (133 pages) is indicative of the substantial evidence adduced, the complicated issues raised and the care with which the decision was made. Notwithstanding the criticisms levelled at the decision, I have concluded that it was properly made and that whilst there are some minor areas where the judge might have used a tighter turn of phrase (such as in matters pertaining to ground 1), overall, the determination is sound and there are no errors of law which would require the decision to be set aside. I now give reasons for my conclusion.

39. I note that in granting permission to appeal, Judge Lever indicated that only one ground put forward by the respondent had arguable merit and that was the first matter which pertained to the legal tests and standards applicable in the consideration of whether the appellant should be excluded form the protection of the Refugee Convention. I deal with that point first.

40. It is the respondent's case that the judge materially misdirected himself in that, at paragraph 110, having correctly set out the test under article 1F(b) as considered in Al-Sirri [2012] UKSC 54, he then failed to apply it in the subsequent paragraphs. It is argued that the judge imported domestic standards instead and erroneously found that it was for the respondent to show, on the balance of probabilities, that the test had been made out (at 119, 130 and 153). Additionally, he found at paragraphs 161 and 162 that it had not been established that the appellant had committed a crime in Switzerland and that he had taken into account politically motivated charges brought against the appellant in Kuwait and Jordan when assessing the appellant's rebuttal of the s.55 certificate. It is argued that the Tribunal was required to consider the certificate first and that the asylum claim should only have been considered if the certificate was not upheld.

41. The judge set out the burden and standard of proof with respect to article 1F and paragraph 339C, CA and D at paragraphs 104-111 of

the determination. He cited the Qualifications Regulations 2006, the Immigration Rules, the Refugee Convention, s. 55 of the Immigration, Asylum and Nationality Act 2006 and the authorities of JS v SSHD (Sri Lanka) [2010] UKSC 15 and Al-Sirri v SSHD [2012] UKSC 54. It is accepted by the respondent that there are no errors with respect to any of those paragraphs. Having then acknowledged that the respondent has to show that "there are serious reasons for considering that...he has committed a serious non-political crime outside the country of refuge prior to admission...", the judge is accused of forgetting what he has set out at length and finding instead that the respondent had failed to show, on *the balance of probabilities*, that such a crime *had been committed*.

42. In the judge's defence, Ms Laughton relied on the authorities of AH (Sudan) v SSHD [2007] UKHL 49 and MA (Somalia) v SSHD [2010] UKSC 49 and the guidance on self direction given therein as set out below:

> "*This is an expert Tribunal charged with administering a complex area of law in challenging circumstances....[T]he ordinary courts should approach appeals from them with an appropriate degree of caution; it is probable that in understanding and applying the law in their specialised field the Tribunal will have got it right....They and they alone are judges of the facts...Their decisions should be respected unless it is quite clear that they have misdirected themselves in law. Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently*"(at paragraph 30 of AH and cited at 43 of MA).
>
> "*In the light of the clear and impeccable self-direction set out only a few paragraphs earlier ..., and having regard to the need for restraint to which we have referred, the court should surely have been very slow to reach the conclusion that it did...It is often easy enough to find some ambiguity or obscurity in a judgment or determination, particularly in a field as difficult and complex as immigration, where the facts may be difficult to unravel and the law difficult to apply. If...a tribunal articulates a self-direction and does so correctly, the reviewing court should be slow to find that it has failed to apply the direction in accordance with its terms. All the more so where the effect of the failure to apply the direction is that the tribunal will be found to have done precisely the opposite of what it said it was going to do*"(at 46)

43. In JS (Sri Lanka), the Supreme Court confirmed that the phrase "*there are serious reasons for considering*" in the Refugee Convention and the Qualification Directive, set a standard above mere suspicion. That was confirmed in Al-Sirri where the Supreme Court held that (i)

serious reasons is stronger than reasonable grounds, (ii) the evidence from which those reasons are derived must be clear and credible or strong, (iii) considering is stronger than suspecting, (iv)the decision maker need not be satisfied to the criminal standard and (v) that although it is unnecessary to import domestic standards of proof into the question, if the decision maker was satisfied that it was more likely that not that the appellant had not committed the alleged crimes, then the serious reasons test had not been met (at 75). The court then stated: "*The reality is there are unlikely to be sufficiently serious reasons for considering the applicant to be guilty unless the decision maker can be satisfied on the balance of probabilities that he is*". In AH (Algeria) [2013] UKUT 00382 (IAC), the Al-Sirri standard of proof was interpreted as indicating a standard of "*more probable than not*", i.e. the balance of probabilities, so that the issue was whether it was more probable than not that an appellant had personally participated in a crime (at 82). In AH (Algeria) [2015] EWCA Civ 1003, "*serious reasons for considering*" was found to impose "*a demanding hurdle for the application of article 1F(b)...*" (at 26).

44. The judge correctly and at length set out the correct approach, the correct standard and burden of proof and the correct legal test to be applied. To accept the respondent's submission that the judge misdirected himself, would mean making a finding that having fully and properly directed himself over several paragraphs, he then promptly forgot what he had said and what he had used case law to support. Bearing in mind the guidance provided by the Supreme Court (above), and the fact that Judge Hodgkinson is an experienced judge of many years' standing, who plainly devoted a great deal of time and effort in preparing a thorough and comprehensive determination, it is difficult for this Tribunal to find that he would have made such a basic error. The reference to the balance of probabilities as the standard the respondent had to meet is in accordance with the guidance given by the Supreme Court in Al-Sirri and the Upper Tribunal in AH (Algeria). There is nothing in the determination to support the contention that the criminal standard of proof was applied.

45. Whilst it is accepted that the judge refers to the respondent not having *established* that a serious crime *had been committed*, rather than having serious reasons for considering that a crime had been committed, I do not consider this is anything more than a matter of format. Given the care with which the determination has been prepared, it is inconceivable that the judge would have forgotten his lengthy self direction and misdirected himself. Further, as Ms Laughton argued in her submissions, the judge's reference to the respondent not having established certain matters, may well point to where the burden lies and be meant to refer to not having established them to the required standard or proof. It is also not helpful to take a phrase out of context and criticize it in isolation. To show how easily a phrase which attracts criticism can occur, I would point to the respondent's own grounds (at 39) where there is use of the same

phrase - "*whether the appellant committed a crime*" - the judge is criticized for using.

46. On the issue of whether the judge wrongly considered matters pertaining to the asylum claim when he should only have been considering the appellant's rebuttal to the s.55 certificate, I accept Ms Laughton's submissions that he had to analyse the respondent's evidence in order to form a view of whether it was clear, credible and strong. It is difficult to see how he could have made any findings on the issue of exclusion without looking at matters which touched upon the asylum claim. Whilst it is not disputed that a conviction is not necessary to demonstrate "*serious reasons for considering*", the lack of a conviction, the absence of any evidence, the appellant's vehement denial of the charges brought against him in Switzerland, his willingness to face them and clear his name, and his unchallenged evidence that the prosecution was initiated at the request of those who held personal enmity against him for political and economic reasons, were all matters the judge was entitled to take into account. Exclusion could not have been considered in a vacuum. The judge considered the issue of whether there was evidence to support the contention that the appellant had committed a sufficiently serious crime in Switzerland, using the correct standard of proof, at 123-142. It follows that I find that there were no errors with respect to the first ground.

47. Ground 2 overlaps to some extent with ground 1 in arguing that irrelevant matters were taken into account when the judge considered whether crimes had been committed. Specifically, Mr Clarke argued that the request to travel to Switzerland without abandoning his appeal was irrelevant. He submitted that the abandonment of the appeal was a matter of statute and not one which the respondent had any authority over. Ms Laughton points out that the first request made by the appellant was well before a decision was made on his claim and when the respondent would have had discretion. That chronology is confirmed by the judge (at 74 and 131). Whilst not considered as a primary factor, the appellant's co-operation with the Swiss proceedings, as opposed to avoidance of them, was a matter the judge was entitled to have regard to. It is also of note that this was not an objection raised at the hearing before the First-tier Tribunal either in the form of the respondent's skeleton argument or oral submissions.

48. Ground 3 concerns the issue of whether the crime was sufficiently serious to meet the article 1F(b) test, whether irrelevant matters had been relied on in making this assessment and whether adequate reasons were provided for the judge's findings. The appellant has been accused of taking part in a sham arbitration. This is the offence which the respondent relies on to exclude him from protection.

49. In making findings as to whether the offence was serious enough to meet the threshold, the judge had referred to the statement of the appellant's lawyer in Switzerland (C) and the view expressed therein that the appellant was unlikely to serve a prison sentence even if convicted (at 37 of the statement). He was aware that C was the appellant's lawyer. Ms Laughton argued that whilst the respondent had referred to the statement at the hearing, there had been no disagreement with the contents of that particular paragraph. It is the case that C's view disagreed with the view of the prosecutor, also set out in the statement (at 32 and 36). The prosecutor said that he intended to send the defendants to the criminal court and that he would ask for *some* of the accused (there are eight of them) to be handed down a custodial sentence if convicted. The appellant was not mentioned as one of those. It was Ms Laughton's submission that this conflict of views had not been put to the judge as a reason for rejecting C's view and so could not now be used as a reason for criticizing the judge.

50. I accept Mr Clarke's submission that the transcript provided by the appellant's solicitors is not a verbatim record of the arguments he made to the court. I note that certain matters identified in his submissions to me demonstrate that not everything he said was recorded and indeed, it would be a difficult task for that to have been done. However, it does appear that this particular conflict of opinions was not a matter the respondent had relied on with the judge specifically finding that there had been no challenge to her statement (at 152). In any event, the prosecutor did not specifically include the appellant as one of those in respect of whom he would seek a custodial sentence. Nor is it the case, as argued, that C only relied on the fact that the appellant was a first time offender to opine that there would be no custodial sentence. She also relied on other factors including the good will shown and the appellant's willingness to co-operate. Given the lack of specifics in the prosecutor's view, it was open to the judge to prefer the opinion given by C.

51. On the matter of a lack of adequate reasoning, the respondent argues that the judge failed to apply the reasoning in AH (Algeria) [2012] EWCA Civ 395. The judge did, in fact, cite and quote AH at paragraph 144 and 145. Although that authority found that it was not helpful to determine the level of seriousness by the precise sentence imposed, the Court of Appeal accepted that it was still a material factor and indeed placed weight on the fact that AH had only received a two year sentence (at 40).

52. At paragraphs 145-146 and 152, the judge reminded himself that the crime must be of similar equivalence to "*a crime against peace, a war crime, or a crime against humanity*" or "*acts contrary to the purposes and principles of the United Nations*". He took full account of Mr Clarke's skeleton argument (at 149), even correcting a error therein (at 150). At 152-153 he then summarized his reasons for finding that

the threshold had not been reached for the allegation of a sham arbitration. His reasoning is adequate. In so finding, I have regard to the guidance in R (Iran) [2005] EWCA Civ 982 (at 13-16), Haleemudeen [2014] EWCA Civ 558 (at 32-35), JR (Jamaica) [2014] Civ 477 (at 9-10) and AH (Sudan) 2007 UKHL 49 (at 19 and 30). Not every argument has to be addressed and one must avoid a situation where reasons for reasons are sought. It is also important to note that there has been no direct challenge to the evidence of the appellant and his witnesses who were found to be impressive, credible and consistent.

53. In his fourth ground, the respondent argues that the judge was wrong to find that the offence was not a political crime and that he applied the wrong legal test. I have already dealt with the matter of the judge's self directions and in so far as this pertains to the test on a further matter, it is evident that the judge properly directed himself at paragraph 155 and correctly sets out the test in T [1996] UKHL 8. Mr Clarke argued that there could have been no object of overthrowing or subverting or changing the government of a state of inducing it to change its policy because the two main protagonists had resigned from office and were no longer political figures thereby disproving the close and direct link between the crime and the alleged political purpose. The judge rejected that argument and so do I. It is not disputed that the complainants in the Swiss proceedings are the same as the alleged persecutors in Kuwait and indeed they are named in the arrest warrant which itself makes it plain that the alleged offence had a political motive. There was also no misunderstanding as to the succession process in Kuwait. The judge was entitled to find that both Sheikh Nasser and Sheikh Ahmed were the top contenders to succeed the Emir and become the next Crown Prince, thereby demonstrating the on going political nature of the conflict. The evidence before the judge was that notwithstanding the resignation of Sheikh Nasser from the position of Prime Minister in 2011, he still controlled the government both due to his position in the ruling family and because his deputy took over his position (at 34). Until his death in 2015, Jassem Al Kharafi, who had resigned as Speaker, also remained extremely important being a member of one of the richest families in the world and having controlling interests in companies across the Middle East (ibid). The Fintas prosecution resulted in the conviction in absentia of the appellant to ten years imprisonment for deliberately circulating false or malicious news abroad to weaken the prestige of the state (at 68). The respondent argued that the appellant was motivated by personal profit but that submission was rejected by the judge; that finding is unchallenged.

54. In ground 5, the respondent maintains that the judge's reasons for accepting the evidence of the KRIC lawyer, T, were perverse. Needless to say, the threshold for perversity is extremely high. Here, the judge set out T's evidence, both written and oral, at length in paragraphs 247-272, took account of the respondent's arguments and

concerns (at 273) and then concluded that he found T to be wholly credible and persuasive (at 274). That finding was open to him on the evidence set out and does not denote any elements of perversity. Whilst the respondent maintains that such a finding goes behind the decision of the Swiss court and that there was no evidence of any corruption or impropriety in Swiss arbitration procedures, this does not sit well with the respondent's main argument against the appellant which is that the arbitration proceedings in respect of the videotapes was a sham. The respondent cannot have it both ways. In any event, as Ms Laughton submits in her skeleton argument, this is immaterial. Whether the Swiss arbitration proceedings were correctly decided, has no relevance to the question of whether the appellant is at risk or persecution in Kuwait, or at risk of transfer to Jordan, or at a real risk of torture upon transfer in circumstances where it is accepted that one of the appellant's co-defendants in Jordan was tortured.

55. Ground 6 challenges the judge's finding that, contrary to the respondent's position that the Trekell arbitration (a paper hearing) was a sham, the arbitrator was entitled to find that the videotapes were genuine and that the appellant believed them to be genuine. The grounds essentially repeat submissions that were made and rejected by the judge. The expert reports had not been criticized in the decision letter and concerns over their reliability were first raised in the respondent's skeleton argument and subsequently in submissions at the hearing before the First-tier Tribunal. The judge set out these concerns at paragraph 377, 379, 387-397, 399-400 noting the respondent's case was that the Trekell arbitration was a sham. He properly identified the issue as one where he had to determine not if the tapes were genuine but whether the arbitrator had could have reached the decision he did on the evidence available to him (at 378). At paragraphs 402-427 he gave detailed reasons for finding that it was open to the arbitrator to rely on the unchallenged expert reports before him without picking them apart and to find as he did. He did so specifically noting the respondent's submissions and the specific argument that the expert reports were limited in their scope and analysis (at 407). He concluded that even if the reports had the shortcomings argued by Mr Clarke, it would be too much of a leap to then find that the arbitrator acted fraudulently or that the arbitration was a sham. He also found that the arbitrator was entitled to take note of the police report, despite the shortcomings identified by Mr Clarke in that document (at 408-9). It was not for the judge to re-make the decision made by the arbitrator by reassessing all the evidence and taking into account the arguments now made about the lack of an audio trail in the reports. He had to make a finding on whether the arbitrator was entitled to find as he did on the evidence he had which had been unchallenged at the time. There is no perversity in the judge's conclusion that the arbitrator reached a decision open to him on the material he had.

56. Criticism was also made of the judge's findings on the report of the appellant's expert (identified at 134 of the determination) and to whom I shall refer to E1. I refer to the second expert (identified at paragraph 314) as E2. as well as his written report, E1 also gave oral testimony at the hearing. E2 declined to give oral evidence for fear of repercussions. The respondent complains that E1 went beyond his remit in making a finding that that the tapes were not fabricated and that in so doing he had stepped into the shoes of the Tribunal. The judge, in fact, concurred with that criticism (at 419). However, he found that the fact that E1 had overstepped the mark with respect to the authenticity of the tapes, did not invalidate the remainder of his findings and analysis nor the conclusions of E2. Quite properly, this was, however, a matter the judge took into account when assessing the report and the evidence and the reliability of E1 as a witness. I see nothing erroneous in that approach. E1 was found to be an impressive witness with extensive expertise (at 343).

57. Ground 7 challenges the judge's findings on article 3 and attempts to pick holes in the statistics cited in E1's report pertaining to police brutality in Kuwait. E1 was cross examined extensively on his figures and he gave detailed evidence as regards his methodology and his sources. The judge was entitled to find that the statistics were properly referenced and sourced, that it would be unrealistic for the expert to produce all his underlying data, that he was experienced and authoritative and that the evidence was accurate and properly researched. In so far as the respondent points to K not being ill treated in detention, the judge properly found that he was distinguishable from other defendants as he was a member of the royal family. Furthermore, the judge's conclusions on the risk of ill treatment were entirely consistent with other country evidence, including the US State Department report, UN observations on Kuwait, an Amnesty International report and a report from the Gulf Centre for Human Rights. Overcrowding in prisons was only one factor considered by the judge (at 432). In any event there being no errors with respect to the judge's conclusions on asylum, any issues raised on article 3 are immaterial.

58. Ground 8 relates to the judge's findings on the risk of deprivation of citizenship (at 351-362). It is not the case, as the respondent has argued, that the judge's findings were inadequately reasoned. The judge relied upon the expert evidence and other background material. He concluded that there was a propensity to deprive citizens of their nationality on political grounds and that it was unlikely that the decision would be taken before the individual was actually returned as otherwise he would be non-removable. There was no argument made to the judge that because the other Fintas defendants had not been deprived of their citizenship, the appellant would not be so deprived.

59. Finally it is argued that the judge should not have allowed the appeal under article 6 without inviting submissions. This is immaterial to the outcome as the appeal was allowed both under the Refugee Convention and article 3 but it is worth pointing out that this was one of the limbs of the case as put by the appellant at the outset and set out by the judge as an issue (at paragraph 5(4)). It being a limb of the appellant's case, the judge did not err in addressing it. There was no need to invite submissions on an issue which had already been identified by the appellant as part of his case.

60. I was urged by Mr Clarke to keep in mind that there were ongoing extradition proceedings against the appellant. Those can of course now continue to resolution. As Ms Laughton submitted, a grant of refugee status does not prevent extradition and nor does it prevent the respondent at a later date, if the appellant were to be convicted, to raise the possibility of revoking his status.

61. I do not find that the judge's decision impinges in any way on the case the Swiss proceedings shall deal with. The judge made it very clear that he was not seeking to make any findings on that matter and that, indeed, in the absence of any evidence of the alleged crime, he was unable in any event to express a view on the outcome of that case. His findings were made on the evidence before him and, I reiterate, that he did not have access to any of the material pertaining to the Swiss proceedings.

62. In conclusion, therefore, I find that the judge's determination does not contain any errors of law which would require it to be set aside for re-making.

Decision

63. The decision of the First-tier Tribunal to allow the appellant's appeal on all grounds is upheld.

Anonymity

64. I continue the anonymity order made by the First-tier Tribunal.

Signed

Upper Tribunal Judge

Date: 29 March 2019