Appeal No: SC/32/2005
Date of Hearing:13-21 Feb,
17/18 April 2007
Date of Judgment: 14 May 2007

SPECIAL IMMIGRATION APPEALS COMMISSION

Before:

THE HONOURABLE MR JUSTICE MITTING (CHAIRMAN)
SENIOR IMMIGRATION JUDGE MACKEY
MR J MITCHELL

'U'

APPELLANT

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

For the Appellant: Mr H Southey
Instructed by Birnberg Peirce and Partners

For the Respondent: Mr S Wilken and Ms C Neenan
Instructed by the Treasury Solicitor
For the Secretary of State

Special Advocate: Mr A Nicol QC and Mr T de la Mare
Instructed by the Special Advocates' Support Office

National Security

1. On 7 November 2006 'U' gave written notice that he waived his right to contest the Secretary of State's national security case. Although he did so without accepting its truth, the fact of his waiver means that this part of the judgment can be much shorter than it otherwise would have been. There is also no need for a closed national security judgment.

2. 'U' is an Algerian national, born under a name different from those used by him in recent years, on 8 February 1963 in Constantine, Algeria. On 29 November 1994, claiming to have fled ill-treatment at the hands of the Algerian State, 'U' arrived in the United Kingdom, via France. In late 1996, he went to Afghanistan, where he remained until the Spring of 1999. He remained in the United Kingdom from then until his arrest in February 2001. He has since been detained in custody.

3. It is the Secretary of State's case that from 1996 until February 2001, 'U' was a leading organiser and facilitator of terrorist activity aimed mainly at overseas targets. To that end, it is claimed that he formed and led a terrorist group bearing one of the names which he had assumed in Afghanistan. Several of its members have been the subject of appeals to SIAC, against decisions by the Secretary of State to deport them on national security grounds. Claimed membership of the group formed part of the Secretary of State's case against each of them.

4. On 23 March 2006, FCO officials handed over to the Algerian Embassy a note which summarised the security service's view of 'U' in the following terms:

> "Senior position in Mujahedin training camp in Afghanistan. Direct links to UBL (Usama Bin Laden) and other senior AQ (Al Qaeda) figures. Involved in supporting terrorists including those involved in the planned attack on the Strasbourg Christmas Market in 2000, and an earlier plan to attack Los Angeles Airport. US sought his extradition but withdrew request August 2005 … DETAINED".

   There are credible grounds for believing each of these assertions.

5. In an unsigned witness statement dated January 2006, the appellant admits that, while in Afghanistan, he attended Khalden Camp (paragraph 16), at which individuals received training for "resistance" in their own countries (paragraph 16). He stated that he "was obliged, or felt obliged, to have some form of rudimentary military training" (paragraph 15). He admits attending the guest house in Jalalabad, at which others, suspected of terrorist activity, claimed to have met him (paragraph 26).

6. Some of the information about 'U's specific contacts and activities at both places was provided by Ahmed Ressam, who was arrested on 14 December 1999, in Port Angeles, Washington State, driving a van laden with explosives, which he said were destined for Los Angeles Airport. On 6 April 2001, Ressam was convicted of engaging in an act of terrorism and placing an explosive in proximity to a terminal and other offences, for which he was sentenced on 27 July 2005 to twenty-two years imprisonment – a substantial reduction on the sixty-five years minimum required by sentencing guidelines. He received that discount because he had provided information judged by the United States authorities to be true about others, including, in particular 'U'. He said that he had received training in weapons handling and bomb making in Afghanistan, as part of a cell which included 'U' as leader or trainer. Plans to bomb US targets were discussed at the training camps. Ressam understood that 'U's responsibilities included facilitating travel to and from the countries in which operations were to be carried out. (See paragraph 8 of the long form sealed complaint against 'U' by the United States of America dated 2 July 2001.)

7. Ressam also stated that the proposed bombing of Los Angeles Airport was discussed with 'U' in Afghanistan (paragraph 9) and that, as the date of the operation approached, 'U' arranged that he would meet him in London when he had left the United States and assist him with travel to Algeria (Paragraph 11).

8. On the basis of Ressam's statements, the United States of America sought 'U's extradition from the United Kingdom. The application was withdrawn after, in April 2003, Ressam refused to testify against 'U'. At a minimum, this calls into question the reliability of Ressam's statements about 'U'.

What cannot be gainsaid, however, is that Ressam was engaged in a serious attempt to commit a major act of terrorism in the North West of the United States; and what is uncontradicted by the appellant is that a telephone number attributed to him – 7714620952 – was noted on a business card in Ressam's possession. Further, the appellant admits that he met Ressam at the guest house in Jalalabad (paragraph 26 of his statement of January 2006). At a minimum, a significant connection between a man caught in the act of furthering a major terrorist operation and 'U' is established, with its origin in Afghanistan. Other information demonstrates that this was not just an unfortunate coincidence.

9. The appellant states that the "sole purpose for returning to the United Kingdom was to mobilise support in this country for the Chechen people" (Paragraph 30 of his statement). He admits "accessing" false documents to this end. Significantly, if euphemistically, he states that "this related to the arranging of volunteers for Chechnya to go to Afghanistan to acquire some basic training" (Paragraph 36). The training was clearly military. Further, there is clear and credible evidence that, between March 2000 and February 2001, a group of three Algerians, led by him, purchased 230,000 pounds worth of high frequency radios, satellite telephones and airtime. (See the undated witness statement of Stuart Castell, Technical Manager of Integrated Communications Solutions Ltd.) This activity is wholly consistent with the role which Ressam said that 'U' played at the camps in Afghanistan and in connection with his own operation.

10. On 10 March 2003, the High Court in Frankfurt convicted four Algerian men of planning an attack on the Christmas Market in Strasbourg in December 2000. The court stated "connections to the Al Qaeda network could not be proven. However it was not contested that all four in the years 1999 and 2000 had received military training in Afghanistan. In the opinion of the court encouragement to carry out the attack, if not the actual direct order, came from fellow muslims surrounding (U)." This finding of the German Court, after a trial, deserves considerable weight; and is, again, consistent with the information about 'U's activities already referred to.

11. All of this material, taken together, satisfies us, on balance of probabilities, that the appellant has been involved in facilitating terrorist activity overseas; and, so, in consequence poses a significant risk to national security. We agree with the assessment of the Security Service, summarised in the note given to the Algerian Embassy on 23 March 2006. Further, despite the fact that the appellant has been detained continuously for six years, we share the Security Service's assessment that he remains a risk to national security. He has shown no sign of disavowing his former beliefs or associates. Indeed, his most recent witness statement dated January 2006 maintains that the accusations against him are false and that his purposes and actions were wholly benign. Only a credible and radical change in outlook could demonstrate that the risk has been eliminated or reduced to an acceptably low level. There has been none.

Safety on Return

12. On 2 August 2006 the Algerian Ministry of Justice gave the following written assurances to the British Government in relation to 'U'.

> "Should the above-named person be arrested in order that his status may be assessed, he will enjoy the following rights, assurances and guarantees as provided by the Constitution and the national laws currently in force concerning human rights:
>
> (a) The right to appear before a court so that the court may decide on the legality of his arrest or detention and the right to be informed of the charges against him and to be assisted by a lawyer of his choice and to have immediate contact with that lawyer;
>
> (b) He may receive free legal aid;
>
> (c) He may only be placed in custody by the competent judicial authorities;
>
> (d) If he is the subject of criminal proceedings, he will be presumed to be

innocent until his guilt has been legally established;

(e) The right to notify a relative of his arrest or detention;

(f) The right to be examined by a doctor;

(g) The right to appear before a court so that the court may decide on the legality of his arrest or detention;

(h) His human dignity will be respected under all circumstances."

13. Three divisions of SIAC have now considered the state of affairs in Algeria and the reliability of assurances given by the Algerian State. We adopt them and do not intend to repeat them. In summary they are that: Algeria is making a sincere, broadly supported and generally successful attempt to transform itself from a war-torn authoritarian state to a normally functioning civil society; solemn diplomatic assurances given by the Algerian State to the British Government about individual deportees are reliable and can safely be accepted. (See 'Y', 'BB' and 'G'). In 'BB' SIAC formulated yardsticks by which the reliability of assurances should generally be assessed, which were adopted with a qualification which is academic for present purposes in 'G'. We adopt that approach to the assurances given in respect of 'U'.

14. Since those appeals were determined, four Algerian citizens have withdrawn their appeals to SIAC and been deported to Algeria: 'Q' on 20 January 2007, 'K' on 24 January, 'H' on 26 January and 'P' on 27 January. No individual assurance was given in the case of 'Q'. Assurances in almost identical terms to those given in the cases of 'BB', 'G' and 'U' were given in respect of 'K' and 'P'. A differently worded assurance was given in the case of 'H'. Events after their return provide valuable information about both the reliability and the limits of the assurances given in respect of them; and, by extension, in respect of 'U'.

15. 'Q' was returned on 20 January 2007 and detained under Article 51 of the Criminal Procedure Code on 25 January 2007. Article 51 permits the judicial police to detain in custody a person suspected of a

major offence classified as a terrorist or subversive act for twelve days, on written authorisation from the Public Prosecutor. DRS officers are given the powers of judicial police officers. He was detained by DRS officers. On 26 January 2007 Amnesty International expressed publicly its concern that 'Q' was at risk of torture. On 28 January a British Embassy official spoke personally to Mohammed Amara, a High Court Judge and senior official in the Algerian Ministry of Justice, to discuss 'Q's case. Mr Amara told him that 'Q' had been detained by the DRS. Later that day, he telephoned to say that 'Q' had spoken to his family by telephone. On 31 January Mr Amara telephoned to say that 'Q' was still in detention, but had spoken directly to his family and had been visited by a doctor. On 5 February Mr Amara stated that 'Q' had been brought before a judge and charged. He did not then know the nature of the charges, but said that 'Q' now had access to a lawyer. By a Note Verbale, the Algerian Ministry of Justice informed the British Embassy that 'Q' had been arrested on 25 January 2007 and brought before a court which ordered that he be detained pending trial after being charged by an investigating judge with two offences: membership of an armed terrorist group active abroad under Article 87(a)(vi) of the Criminal Code and assumption of the name of a third party under Article 249.

16. On 9 March 2007, sixteen days after the hearing ended, we received from the Appellant's solicitors a witness statement made by Ronald Graham, a French and Arabic speaking trainee solicitor in that firm, which reports the substance of a discussion with Mrs Mehadjre Daoudi, one of 'Q's lawyers on 5 March 2007. We accept that Mr Graham has accurately summarised what he has been told by Mrs Daoudi. We have given permission for this additional material to be adduced.

17. Mrs Daoudi is one of at least two lawyers who represent 'Q' (she reports that he was met at the airport by another lawyer Amine Sidhoum). He told her that, while he was detained in DRS custody, he heard the screams of people being tortured around him. Mrs Daoudi explained, and, it can be assumed, believes, that this was a "scaring tactic". During the initial period (of his detention) he admitted travelling to Afghanistan, Switzerland, Greece and London and to knowing certain unnamed individuals.

He signed a statement to that effect which, he says was added to later. Despite that, he signed a statement before the Juge d'Instruction on 5 February, approving it. Mrs Daoudi had visited him on more than one occasion (the precise number is not stated). Her last visit was on 4 March. She describes him as generally in decent health.

18. We have given the Secretary of State permission to rely upon two further statements of Mr Layden (the experienced former diplomat charged with supervision and implementation of the DWA ("Deportation with Assurances") programme) and exhibits dated 15 March and 16 April 2007. They paint a different picture. Although 'Q' had not taken up the offer to establish a regular pattern of telephone calls for him or for a nominated next of kin to the British Embassy, the Embassy wrote on 8 March 2007 to his family to invite them to do so. In response, 'Q's sister, Djazia, telephoned a British Embassy official on 12 March 2007. She told him that his family had been able to visit him at Serkadji prison every Saturday for thirty minutes and that she had seen him most recently on 10 March 2007. She said that he was well, but not happy about his detention.

19. By a Note Verbale dated 5 April 2007, sent after an unsuccessful application to the Administrative Court for an injunction to restrain the Secretary of State from sending it, the British Government notified the Algerian Ministry of Justice of the gist of the claims reported by Mr Graham. A prompt reply was given by Note Verbale dated 10 April 2007. The terms of the note suggest that the author obtained a copy of the court file, but did not speak to any DRS officer responsible for 'Q's detention or interrogation. It stated that "on their (ie 'Q' and 'H's) release from custody, the above named persons stated that they had been treated with respect and that they had not received any inhumane or degrading treatment. The statements by these persons were included in the case file and are corroborated by medical certificates issued by the doctor who examined them in accordance with Article 51(a) of the Code of Criminal Procedure". Further, neither had made any mention of the allegations to the Public Prosecutor or the examining magistrate. The suggestion that the statement made by 'Q' had been added to was dealt with obliquely, by pointing out that the reports prepared during this stage of the

proceedings do not constitute irrefutable evidence under Algerian law.

20. 'K' was returned to Algeria on 24 January and detained on arrival. Amnesty International expressed the same concern about him as they had about 'Q'. On 28 and 31 January, Mr Amara gave identical information about 'K' as he had given to the same British Embassy official about 'Q'. On 5 February, he said that 'K' was still detained. This information was incorrect, because, as Mr Amara confirmed on 6 February 2007, he had been released on 4 February. He was not charged with any offence. He, like 'Q', was suspected of terrorist involvement (as Mr Amara reported on 28 January). His detention was, accordingly, lawful under Article 51. There is no evidence that he was tortured or ill-treated or otherwise treated unlawfully under Algerian and international law. In his case, a specific assurance was given in respect of his right to notify a relative of his arrest or detention. If the information given by Mr Amara to the British Embassy official was correct – and there is no reason to doubt it – this assurance was fulfilled.

21. 'P' was returned to Algeria on 27 January and detained on the same day. On 31 January, Mr Amara told the British Embassy official that he had been detained since his return on 26 January, that his family had been informed and that he would be able to speak to them. On 5 February Mr Amara reported that he was still detained. On 6 February, he stated that he had been freed on 30 January. This appears to have been correct. 'P' did not feature in any Amnesty International Report, as he would have done if he had been detained for any significant period. As in the cases of 'K' and 'H', we are satisfied that Mr Amara's error on 5 February was due to muddle. There is no evidence, or even suggestion, that the assurances given to the British Government in respect of 'P' were breached or that his rights under Algerian or international law had been violated.

22. 'H' was returned to Algeria on 26 January and detained on 30 January. The British Embassy had arranged with one of 'H's brothers to speak to him once weekly and to be available to be called by him at any time. On the morning of 30 January, 'H's brother told the British Embassy official that the police had asked 'H' to go to a police station in

Algiers that morning. He had accompanied him there and had been told by three men that 'H' would be released early that afternoon. The British official telephoned the brother later that day. He was told that 'H' was on his way to join him. On 31 January, Mr Amara told the British official that 'H' was at home with his family. This was incorrect: he was in detention. On 5 February, the British official telephoned 'H's brother, who told him that he had not returned home, as expected and that he had heard nothing from him since. Later that day, Mr Amara told the British official that his information was that 'H' was then in detention. On 6 February, Mr Amara told the British official that 'H' would be able to contact his family that day. On 7 February, the British official spoke by telephone to 'H's brother who told him that 'H' had telephoned his mother on 6 February from detention. He had reported that he was well and expected to be released in two days. On 8 February, Amnesty International published reports that he had been allowed to make one phone call to a member of his family. On 11 February, Mr Amara told the British official that 'H' had been brought to court on 10 February, charged and remanded in custody. He said that he was now being held at Serkadji Prison, Algiers. The note verbale of 14 February informed the British Embassy that he had been brought before a court which had ordered that he be detained pending trial after being charged by the investigating judge with an offence of membership of an armed terrorist group active abroad under Article 87(a)(vi) of the Criminal Code.

23. 'H's solicitor, Ms Peirce, and Ronald Graham, were also in touch with 'H's family by telephone. They learnt that the first time that he was seen by a lawyer was on 17 February. He told them that 'H' appeared before a judge for a second time on 17 February and that his family was able to see him for the first time in Serkadji Prison on the same day. Ms Peirce says that the combined reports of the members of his family and his lawyer are that 'H' has told them that he does not understand for what he is being held; that he has not been tortured, but has been held in a place in which he could hear the sounds of apparent ill-treatment of others. His family and his lawyer report his clear distress at being prosecuted, despite his clear understanding that he would not be if he returned. Ms Peirce reports that she has contacted all (unnamed) who

were present at meetings between officials of the Algerian Embassy and 'H', each of whom witnessed oral assurances that 'H' was not wanted by the Algerian authorities and would be released after a few days detention. It was also reported to Ms Peirce that 'H' had signed a document at the request of the DRS. Its contents were unknown.

24. The written assurances given to the British Government in respect of 'H' included the statement that he was not being sought or investigated, but was suspected of belonging to an armed terrorist organisation operating abroad; but would be examined by the competent police department under the supervision of the State Prosecutors Office in order to assess his status. The assurances went on to repeat his basic rights under Algerian law. Whatever may have been said to him orally by Embassy officials, the written assurances given to the British Government were not breached. The incorrect information given to the British Embassy official by Mr Amara was, we are satisfied, the product of muddle rather than deceit, just like the erroneous information that 'K' was still in detention on 5 January.

25. Since the hearing, Mr Graham has reported what he has been told by one of the (unnamed) lawyers acting for 'H'. He stated that 'H' had said that he could hear the screams of people being tortured in other cells and had heard the cries of pain from a woman being "stretched" in a cell near his. He saw the guards carrying the woman unconscious past his cell. He, too, signed a statement, which he confirmed before the investigating judge. His lawyers had visited him on several occasions in prison. One (unnamed) said that his responses were "consistent with those given during the period of detention by detainees who have been tortured".

26. Documents exhibited to Mr Layden's two statements paint a different picture. On 7 March 2007 'H's brother told a British Embassy official that his parents had visited him in Serkadji prison and reported that he was well, had no problems which they wished to report and had access when required to his lawyer. On 14 March 2007, a British Embassy official called on Mohammed Tahri, one of the two lawyers representing 'H'. He was asked about 'H's condition, to which his reply was that he had been taking medication for depression for some years, and

was continuing to receive it. He said that his family were able to visit him every Saturday. He (Mr Tahri) had been instructed on 14 February 2007, four days after his first appearance before the Juge d'Instruction, a delay which may well have been explained by the fact that 'H' declined the assistance of a lawyer on 10 February 2007, because he thought, mistakenly, that his release would be a formality. Mr Tahri does not suggest that he did not have adequate access to 'H' as his lawyer. The Note Verbale of 10 April 2007 contained the same statements about 'H's condition as were made in the case of 'Q'.

27. The evidence summarised above about the treatment of 'Q' and 'H' raises difficult questions of law as to the standard and burden of proof by which it is to be assessed; and of the approach which the Commission must take to the risk, if any, to 'U' to which it may give rise. Before we address those questions, we can deal shortly with the following issues:

(i) In neither case was any individual assurance given to the British Government broken, because no assurance was given in the case of 'Q' and no relevant assurance in the case of 'H'.

(ii) In each case the time limit prescribed for detention by Algerian law was respected.

(iii) We dismiss the implied suggestion that 'H' was tortured. It is inconsistent with what he was reported to have said to his family and lawyer, as recorded by Ms Peirce and Mr Graham and with what his brother told the British Embassy official on 7 March 2007. The unnamed lawyer referred to in Mr Graham's statement of 9 March 2007 does not explain what about his "responses" was consistent with those given by detainees who have been tortured; nor how he knows that such detainees were tortured. There is no reference in any of the evidence to any sign of physical injury. His distress is readily explained as distress at being detained and prosecuted.

(iv) We also dismiss as implausible the report that 'H' heard the screams of a woman being "stretched" in a nearby cell and carried past

his own, unconscious. None of the reports of methods of torture claimed still to be in use include "stretching". The references are all to the "chiffon" method (in which liquids are forced through a cloth stuffed into the mouth of the detainee, producing the symptoms of suffocation). Further, we do not see how 'H', locked in one cell, could perceive by his senses precisely what was occurring, and to whom, in another cell.

28. Mr Graham also states that he has been "prohibited from disclosing further details on the treatment of ('H') and ('Q') to SIAC unless a cast iron assurance is provided that such details would not be passed to the Algerian authorities". We decline to take into account the implied hint that there are allegations of ill-treatment of 'H' and 'Q', to which reference cannot be made, without endangering them or their Algerian lawyers. We can only reach a decision on evidence or information (which may be given at several removes from its original source), not the refusal to provide it.

29. There remains the reported claims of 'Q' and 'H' that they heard the sounds of ill-treatment of others while in detention. The underlying question is not in doubt: it is, have substantial grounds been shown for believing that 'U', if deported, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country?: *Chahal v United Kingdom 23 EHRR 413, paragraph 74.* When, as here, the outcome of the application of that test may depend upon the occurrence or non-occurrence of a single event in the recent past, it is far from easy to apply. Where, as here, the allegation is that a person or persons were subjected to torture or ill-treatment, we would, but for binding authority, have decided the issue in conformity with the principle laid down in *A (No 2) v SSHD 2006 2AC 221*, in particular as explained by Lord Hope at paragraphs 119 to 121: to consider by such inquiry as it is practicable to carry out whether or not it has been proved on balance of probabilities that the event occurred. In that way, the test to be applied would be the same whether or not the question was whether torture had occurred or whether it had produced evidence. The application of a different test is, at least anomalous. Further, the test which we are required to apply does not conform to that applied by the

Strasbourg Court to proof of a breach by a Convention State of its obligations under Article 3. It requires such an accusation to be proved "beyond reasonable doubt": *Ireland v UK 1978 2 EHRR 25, paragraph 161*. The court requires the "existence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact" to establish a breach: *Jasar v Macedonia 69908/01 15 February 2007, paragraph 48.*

30. All parties agree, and we accept with one qualification, that we are bound to follow the approach approved by the Court of Appeal in *Karanakaran v SSHD 2000 IMM AR 271.* In particular, we must not exclude from consideration in the assessment of future risk to 'U' matters which we believe probably did not occur: page 293. The qualification which we make is that, in an Article 3 case, we are not bound to follow the rule applicable in a refugee case that the decision maker "must not exclude any matters from its consideration when it is assessing the future unless it feels that it can safely discard them because it has no real doubt that they did not in fact occur": page 293. We are required by Section 2(1)(a) Human Rights Act 1998 to take into account judgments of the Strasbourg Court. When assessing the future risk of ill-treatment, "a mere possibility of ill-treatment … is not in itself sufficient to give rise to a breach of Article 3": *Shamayev v Georgia and Russia 36378/02 12 April 2005, paragraph 352.* We do not regard ourselves as bound by *Karanakaran* to take into account matters which give rise to a "mere possibility" of risk, even if we cannot say that, without doubt, they did not occur.

31. Mr Southey submits that *Shamayev* establishes that the removal of a person to a State with a history of torture can amount to a violation of Article 3 if there has been at least one previous removal and the fate of the person or persons removed is not sufficiently clear because the receiving State prevents information from being obtained about his or their treatment. We do not accept this submission, for two reasons: it seeks to set up findings of fact about an assessment of risk in an individual case as a proposition of law; and, in any event, it is based upon a misreading of *Shamayev*. For present purposes, the court had to consider two relevant questions:

(i) whether, when the Georgian authorities decided to extradite five of the applicants to Russia in October 2002, "there were real or well founded grounds to believe that extradition would expose the applicants to a real and personal risk of inhuman or degrading treatment": paragraph 353;

(ii) whether, in the light of evidence about events subsequent to November 2002, "the assessments on which the decision to extradite Mr Gelogayev (an applicant who remained in Georgia at the date of the court's consideration in April 2005) had been based two years before no longer suffice to exclude all risk of ill-treatment prohibited by the Convention being inflicted on him": paragraph 367.

It answered both questions in the negative and, so, concluded that the enforcement of the decision to extradite Mr Gelogayev would be a violation of Article 3. The reasons for its decision are set out in paragraphs 362 to 366: in summary, there had been an alarming deterioration in the attitude of the Russian authorities to the applicants. Their lawyers had not been permitted to visit them, despite specific requests made by the court. The Russian authorities were "seriously hampering" international monitoring of Chechen prisoners' rights and refused to renew the mandate of the OSCE assistance group in Chechnya. Finally, Chechen applicants to the court had been subjected to persecution and murder: a report of the International Helsinki Federation for Human Rights described a sudden rise in 2003 and 2004 in the number of cases of persecution (from threats up to murder) of persons who had lodged applications before the court. What had not changed were conditions in the places of detention in which extradited Chechens were and would be held, graphically illustrated by the heading of a Human Rights Watch report of October 2000, "Welcome to hell": paragraph 268. *Shamayev* is, accordingly support for the obvious proposition that a marked deterioration in the behaviour of the Government of a receiving state may make a decision, lawful when taken, unlawful to execute in the changed circumstances.

32. Mr Tam QC invites us to make findings on balance of probabilities about what has happened to ‘Q’ and ‘H’. We will do so, but will, ultimately, apply the *Karanakaran* test, subject to the qualification stated.

33. ‘Q’ and ‘H’ are reported to have claimed that, during their period of interrogation, stated to have lasted about three days, they heard the sounds of ill-treatment of others in the detention centre (Antar Barracks) at which they were held. We accept that the exposure of a detained person to the sounds of actual or pretended torture of others over the course of three days, for the purpose of breaking their moral resistance under interrogation or with that consequence, is capable of amounting to inhuman or degrading treatment which, if it occurred at the hands of agents of a Convention state would put that state in breach of its obligations under Article 3. Although such facts fall significantly short of those established in *Selmouni v France 2000 29 EHRR 403* and such a case would be close to the threshold, below which no such breach would have occurred, the combination of the means, duration and purpose or effect of such acts would, in our view, cross the threshold.

34. The evidence that ‘Q’ and ‘H’ heard such sounds, for that purpose or with that effect, is, in Mr Tam’s word (derived from an observation of Brooke LJ in *Karanakaran*) ”fragile”. The claim is said to have been made by two men whose credibility has not been the subject of a reasoned judgment by a British court. It is reported via campaigning lawyers in Algeria, whose views are clearly hostile to those of the Algerian Government. Without criticising the good faith of their reporting, there is no indication that they subjected ‘Q’s and ‘H’s claims to critical analysis. Of great significance is the fact that other reports of the treatment of Q’ and ‘H’ contradict the spirit, if not the letter, of the claims. ‘H’s claim was first reported by Ms Peirce in her witness statement of 19 February 2007. She does not state the sources of her information, save that it or they were within ‘H’s family or the lawyers who represented him. As far as we can tell, the only lawyer who had seen ‘H’ by then was Mr Tahri, who saw him on 17 February 2007. He said nothing of the kind to the British Embassy official at their meeting on 14 March 2007. We see no reason to believe that he would not have done so, even if

in confidence, if he was the source of the information. If family members were the source, their reporting is inconsistent, in spirit, with the reports of 'H's brother on 7 February 2007 and 7 March 2007 that he was well. This is inconsistent with a serious, let alone successful, attempt to break his moral resistance by arousing in him feelings of fear or anguish. The first report of 'Q's claim was made in Mr Graham's witness statement dated 9 March 2007. Its source is also unclear. One of his lawyers, Mrs Daoudi is said to have commented on it later – hence her explanation that it was a "scaring tactic". 'Q's sister's statement to the British Embassy official on 12 March 2007 that he was well, but not happy about his detention, is inconsistent with a serious or successful attempt having been made to break his moral resistance. Further the information given in the Note Verbale of 10 April 2007 should not be discounted. It includes a credible report that both men signed statements saying that they had been treated with respect and had not received any inhuman or degrading treatment. We acknowledge that such statements would be of little value by themselves; but, combined with the medical certificate, also on the court file, and the statements to British Embassy officials by close relatives that they were well, they do provide some evidence that, whatever happened to them in pre-charge detention, they had not been seriously ill-treated.

35. That evidence does not satisfy us on balance of probabilities that 'Q' and 'H' were exposed to the sounds of actual or pretended ill-treatment of others with the intention or effect of breaking their moral resistance. We cannot exclude the possibility that they heard such sounds, but that is all. We reject Mr Southey's submission that because the truth cannot be established with certainty, in circumstances in which the Algerian State does not provide access to independent monitors to DRS facilities, the conclusion should be drawn that 'U' would be at risk of treatment similar to that claimed to have occurred if he were to be deported to Algeria. The situation in Algeria is far removed from that rightly condemned by the Strasbourg Court in *Shamayev* in Russia. Mr Layden states, and we accept, that the speed and degree of cooperation with the Algerian Ministry of Justice has improved, not deteriorated since he first met Mr Amara in August 2006. He is right to trust Mr Amara's good

faith and commitment to ensuring that the Algerian Government's assurances are fulfilled.

36. A number of miscellaneous matters need to be considered before a final judgment on the impact of recent events on the worth of the assurances is stated:

(i) Article 51(a)(i) of the Algerian Criminal Procedure Code requires a judicial police officer (including for this purpose an officer of the DRS sworn in as such) to make available to a person in custody means of enabling him to communicate immediately with his family and to receive visits, subject to the proviso that "the secrecy of the investigation" must be secured. If it required a family visit during the period of garde a vue detention, it may have been breached, because no such visit occurred. But a breach cannot be assumed, because the Algerian authorities could reasonably contend that the secrecy of the investigation – into suspected international terrorism, probably with an Algerian consequence – required that a visit from his family should be postponed to protect "the secrecy of the investigation".

(ii) In an undated statement Natalia Garcia reported that both 'V' and 'I' had described their period of detention (of five and six days respectively) as "very hard". They may have found it so, but neither have suggested that they were subjected to torture or ill-treatment and one of them has, since his release, made enquiries of the Algerian authorities about how to obtain a passport – hardly the actions of a man who now fears ill-treatment at the hands of the Algerian State.

(iii) On 11 April 2007 bombs exploded at the office of the Prime Minister and of the Minister of Interior and at a Police Station in Central Algiers, killing thirty-three and injuring many others. As far as is known, the reaction of the Algerian State has not been to instigate mass arrests of known opponents or any other act typical of a lawless authoritarian state. The occurrence of the attacks, claimed to have been perpetrated by Al Qaeda of the Islamic Mahgreb (as the GSPC now wishes to be known) is

likely to mean that anyone linked to the GSPC, especially at a high level, such as 'U', will be of interest to the Algerian authorities. The consequences of that, we discuss below. It does not mean that there is a real risk that the DRS will resort to torture or ill-treatment of 'U'.

(iv) On 26 February 2007 Ms Peirce submitted a written request to Mr Amara for permission to visit 'H' in Serkadji Prison. He replied on 7 March 2007, stating that permission to visit could be given only by the competent judge, ie the Juge d'Instruction with responsibility for the case). On 15 March 2007, she applied to the Algerian Consulate in London to ask what type of visa she must apply for to gain entry to Algeria for the purpose of visiting both 'H' and 'Q'. She received no response, and so wrote again on 5 April 2007. She sought the assistance of the Foreign Office, via the Treasury Solicitor, on 11 April 2007. She has been assured that assistance will be provided. We do not regard the difficulty which she has so far experienced in travelling to Algeria and visiting 'H' and 'Q' as sinister. It is unfortunate, in hindsight, that she did not first seek the assistance of the British Government, which, we accept, will readily be given.

37. The events which have occurred since 'BB' and 'G' were decided demonstrate the following:

(i) The clear view of Mr Layden that there was absolutely no reason to believe that 'H' would be arrested or detained for a prolonged period of time if deported to Algeria has shown to be mistaken.

(ii) However, the Algerian State has fulfilled to the letter, those parts of its assurances to the British Government which can be conclusively verified: in particular, no deportee has been detained beyond the limit prescribed by Algerian law; all have claimed, and appeared to be, well, on release from garde a vue detention; and the two who have been charged have been afforded access to lawyers to defend them and regular family visits.

(iii) It is necessary to obtain such assurances in relation to an individual deportee for his safety on return to be reasonably assured.

(iv) The British Government has fulfilled its implied promise to take sufficient active steps to ensure that the assurances of the Algerian Government are fulfilled.

(v) The fact that the possibility that 'Q' and 'H' may have heard the noises of actual or pretended ill-treatment of others during their detention cannot be wholly excluded does not mean that verification of the fulfilment by the Algerian State of its assurances has not occurred. As we have recited, information about their treatment and condition in detention has been provided to SIAC from a variety of sources. Taken together, they do not establish that there are substantial grounds for believing that they have been ill-treated. What verification (like monitoring) can achieve is confidence, but not complete certainty that ill-treatment has not occurred. Provided that it does, the fourth condition identified in 'BB' will be fulfilled.

Like the Strasbourg Court in *Shamayev,* we cannot wholly exclude the possibility that the assurances will be breached in future in the cases of 'U' or others or that they will be subjected to treatment which would infringe Article 3; but that is no more than a "mere possibility". There are no substantial grounds for believing that there is a real risk that that will occur in the case of 'U'.

38. Mr Southey makes a further, separate, submission in relation to Article 3: that the prison conditions in which 'U' is likely to be held if charged are such that the United Kingdom would be in breach of his Article 3 rights if he were to be exposed to them. The submission is based upon the claimed treatment of 'H' and 'Q'. In Mr Graham's statement of 9 March 2007, he notes 'H's parents' report that his beard has been shaved off by the prison authorities and that he looked very distressed. He also notes 'Q's claim to Mrs Daoudi that he shared a cell with 'H' and two others which was "very small and very dirty" with shared toilet facilities. He accepts that there is no Strasbourg decision in

which prison conditions in the receiving state have, in a removal case, been held to cause the removing state to be in breach of Article 3. Conditions in Russia, in *Shamayev* and in Uzbekistan in *Mamatkulov* seem to have been appreciably worse than those claimed here. Nevertheless, because there is Strasbourg jurisprudence on prison conditions in Convention states, the issue must be addressed. The approach which an English court or tribunal should adopt to this question was considered, and in our view, decided, by the Court of Appeal in *Batayav v SSHD 2003 EWCA Civ 1489.* To establish that there are substantial grounds for believing that a deportee would face a real risk of treatment infringing Article 3 by reason of prison conditions in the receiving state, the risk can be established either by evidence specific to an appellant's own circumstances or by reference to evidence applicable to a class of which he is a member. In the latter case, he will only succeed "if he can point to a consistent pattern of gross and systematic violation of rights under Article 3": paragraph 7.

39. The Algerian Government acknowledges that conditions in Serkadji jail are not ideal. In the Note Verbale of 10 April 2007, they note that it was built in the 19th Century and "has undergone and continues to undergo upgrading and refurbishment in order to bring it up to standards required by the new policy on prisoner retraining and rehabilitation". Exercise periods vary between one and five hours depending on the internal classification of the prisoners and their criminal law status. There is an establishment of qualified prison officers and medical staff, responsible for ensuring compliance with the rules (unstated) on health and hygiene and for providing health care for prisoners. The prison is subject to internal checks and inspections and visited by representatives of non-governmental organisations. Serkadji Prison was last visited by the ICRC on 26 February 2007. The latest US Department of State Country Report on Algeria dated 6 March 2007 notes that the UN Development Programme described prison conditions as "difficult but improving" and that the ICRC, the UN DP and the Red Crescent Society were permitted to visit non-military prisons (a description apt to include Serkadji Prison). There were approximately 51,000 inmates in 127 prisons. Overcrowding was a problem in some and the quality of medical care was uneven; but independent human rights observers reported that

conditions in prisons generally improved during the year.

40. In the light of that material, it cannot sensibly be claimed that there is a consistent pattern of gross and systematic violation of the rights which would be guaranteed by Article 3 if Algeria were a Convention State, of prisoners detained pending trial for offences, including terrorist offences. Nor is there any basis for concluding that 'U' would face a risk of such treatment by reference to evidence specific to his own case. The conditions in which it is reported that 'Q' and 'H' are detained do not approach the deplorable conditions condemned by the Strasbourg Court in, *Kalashnikov v Russia 2003 36 EHRR 34* and *Peers v Greece 2002 33 EHRR 51.* Further, the precise conditions in which 'U' (or any other deportee) would be detained cannot be assumed to be the same as those in which 'Q' and 'H' are, for the time being, detained. It is not clear from Mr Graham's statement whether 'Q' claims that his cell is grossly overcrowded. There is no suggestion (as, for example, in *Kalashnikov)* that the four prisoners in his cell have to share a bed. It is no answer for the appellant to contend that the British Government has not made more detailed enquiries into the conditions of detention of 'Q' and 'H'. It is a striking fact that, by contrast with the difficulties sometimes experienced by the Strasbourg Court in dealings with recalcitrant governments, it was 'U' and a member of 'H's family who sought an injunction from SIAC and then the High Court restraining the Secretary of State from asking the Algerian Government about 'Q' and 'H's claims of ill-treatment, including the conditions in which they were held in Serkadji Prison. It is for 'U' to demonstrate that there are substantial grounds for believing that he will be subjected to treatment contrary to Article 3 which are specific to him exist. He has not done so.

41. There is nothing sinister in the shaving of 'H's beard, by the prison, ie Serkadji, authorities. There is no evidence that this was done to intimidate or humiliate him or done for any purpose other than to fulfil the requirements of prison hygiene.

42. The conclusion which we draw from the events which have occurred since 'BB' and 'G' were determined is that there are no substantial grounds for believing

that in ‘U’s case there is a real risk that he will be subjected to treatment contrary to Article 3 if he were to be deported to Algeria, by reason of the conditions in which he is likely to be detained.

Article 6

43. Mr Layden’s initially stated view was that it is significantly more likely than not that ‘U’, after a short period of detention, will be released without charge. We do not share that view.

44. We conclude that it is more likely than not that ‘U’ will be detained on arrival, for up to twelve days, and charged with an offence under Article 87(a)(vi). It is then more likely than not that he will be detained for a prolonged period, pending his trial. We analyse the provisions of the Criminal Procedure Code which will govern his detention and trial below. Our reasons for reaching that conclusion are as follows:

    (i) As the brief analysis of the national security case undertaken above demonstrates, there are credible grounds for believing that ‘U’ has been, and could again become, a senior organiser and facilitator of Islamic international terrorism. He was so described in the thumbnail sketch given to the Algerian Embassy in March 2006.

    (ii) The GSPC is still active. The death toll from its activities remains at about 50 per month. It has formally linked itself with Al Qaeda to the point of changing its name to “Al Qaeda of the Islamic Mahgreb”. The bombings of 11 April 2007 demonstrate its continued capacity to strike at the heart of the Algerian State.

    (iii) Accordingly, a person with ‘U’s history is likely to be of interest to their Security Services. His presence in Algeria will also be a problem for them. If, like the British Security Service, they assess his potential for renewed activity as considerable, it is most unlikely that they would be content that he should be at liberty.

    (iv) As the brief analysis of the national security case demonstrates, ‘U’ has been of considerable

interest to the Security Services of the United States, Germany and Italy. The United States is, at least, likely to take a keen interest in his whereabouts and activities in Algeria. Diplomatic pressure to detain and prosecute 'U' is not unlikely. What can be discounted as fanciful is the suggestion that the United States will procure the unlawful "rendition" of 'U' to a state other than Algeria or his extradition to the United States or his torture or ill-treatment by agents of the Algerian state. There is no history of "rendition" of Algerian citizens to Algeria by or at the instigation of the United States. Article 698 of the Algerian Code of Criminal Procedure prohibits extradition of an Algerian national. The interest of the United States in 'U' was to procure his extradition from the United Kingdom to stand trial for activities alleged to have occurred in 1999. He has been detained in the United Kingdom since February 2001. Unless he resumes such activities, the interest of the United States in him is historical. No useful purpose would be served by encouraging Algerian State agents to mistreat him.

(v) It is very likely that the Algerian Security Services and Prosecuting Authority have got and can supplement information sufficient to charge and try 'U' for an offence or offences under Article 87(a)(vi). The nature of the evidence is discussed in more detail below.

For all of those reasons, the Algerian State is likely to deal with 'U' in a way which protects its own security and interests, without violating its laws or the assurances given to the British Government, by detaining, charging and prosecuting him for an offence or offences under Article 87(a)(vi). The only circumstance which we can envisage under which he would be permitted his liberty would be if he were to recant his former views and provide valuable intelligence to the Algerian Security Services about his former associates. Nothing in the material which we have seen suggests that he will do that.

45. Mr Southey submits that if 'U' were to be returned to Algeria there would be a real risk that he would suffer a "flagrant denial of a fair trial" so that the United Kingdom would be in breach of its

obligations under Article 6 ECHR if it removed him. The origin of this submission is the observation of the Strasbourg Court in *Soering v United Kingdom 11 EHRR 439 at 479, paragraph 113:*

> "The right to a fair trial in criminal proceedings, as embodied in Article 6, holds a prominent place in a democratic society. The court does not exclude that an issue might exceptionally be raised under Article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country."

Acknowledgement that, in such circumstances "a question may arise" under Article 6 is not the same as laying down a rule that, in the event that there is such a risk, removal is prohibited. The nearest that the Strasbourg Court has come to acknowledging the existence of a test is in paragraph 90 of *Mamatkulov v Turkey 2005 41 EHRR 25 at 494*, in which, having reminded itself of its observations in Soering, impliedly acknowledged the existence of a test:

> "The court considers that, like the risk of treatment proscribed by Article 2 and/or Article 3, the risk of a flagrant denial of justice in the country of destination must primarily be assessed by reference to the facts which the contracting state knew or should have known when it extradited the persons concerned."

Even so, it did not set out what the test implied by those words was. In *R (Ullah) v Special Adjudicator 2004 2AC 323*, the House of Lords went no further. Lord Bingham of Cornhill observed at paragraph 24 "While the Strasbourg jurisprudence does not preclude reliance on articles other than Article 3 as a ground for resisting extradition or expulsion, it makes it quite clear that successful reliance demands presentation of a very strong case … Where reliance is placed on Article 6 it must be shown that a person has suffered or risks suffering a flagrant denial of a fair trial in the receiving state …". Lord Steyn observed in paragraph 44 "It can be regarded as settled law that where there is a real risk of a flagrant denial of justice in the country to which an individual is to be deported Article 6 may be engaged." In none of the cases

cited is it explained how Article 6 is engaged or what the consequence of engagement is.

46. It is easy to identify circumstances in which extradition or removal of a person to a country in which he was to be tried would be prohibited by the Convention: in former times, to stand trial for his life in a Stalinist show trial; in modern times, to stand trial for his life in a Syrian court in the circumstances described in paragraph 47 of *Bader v Sweden 8 November 2005*. In such cases, removal will infringe other Convention rights: those under Articles 2, 3 and 5. Commonly, the trial will simply be a thin veneer of legality to cover arbitrary execution or deprivation of liberty and will often be preceded by torture.

47. Save in such extreme circumstances, a test of "flagrant" denial of a fair trial" is elusive and difficult to apply. It stops far short of requiring full compliance with Article 6. The Strasbourg Court does not interpret Article 1 ("The high contracting parties shall secure to everyone within their jurisdiction the rights and freedoms defined in section 1 of this Convention") as requiring Convention states to secure compliance by states outside their territory with the Convention. To attempt to do so would be futile; and, in any event, would infringe the sovereignty of other states: "a form of European imperialism", per Maurice Kay *LJ in Okendeji v Australia 2005 EWHC 471 Admin paragraph 33.* The Strasbourg Court accepted this limitation in Soering in paragraph 86: "The Convention does not govern the actions of states not parties to it, nor does it purport to be a means of requiring the contracting states to impose convention standards on other states. Article 1 cannot be read as justifying a general principle to the effect that notwithstanding its extradition obligations, a contracting state may not surrender an individual unless satisfied that the conditions awaiting him in the country of destination are in full accord with each of the safeguards of the Convention.". This coherent statement of principle preceded and did not exclude, as logically it should, the acknowledgement of an issue being "exceptionally" raised under Article 6 in paragraph 113.

48. From this opaque jurisprudence, the following propositions can be safely stated:

(i) In a removal case in which trial in a non Convention state is anticipated, an Article 6 issue can only arise "exceptionally".

(ii) Failure to comply in all, or even in several, respects, with the requirements of Article 6 by the receiving state will not amount to a "flagrant denial of a fair trial" or of justice.

(iii) The trial in the receiving *state* must result in or accompany acts which would, if they were to occur in a Convention state, put that state in breach of its obligations under Articles 2, 3 or 5.

These considerations still do not amount to a workable test. Mr Wilken suggests that, by analogy with the observations of the Immigration Appeal Tribunal in *Devaseelan v SSHD*, cited with approval by Lord Bingham in *Ullah* at paragraph 24, the test should be whether the right to a fair trial "will be completely denied or nullified". This is less precise and less helpful than it seems, because it begs the question of what elements of a fair trial must be absent before the right to it is completely denied or nullified. We are driven to the conclusion that there is no coherent, definable, test. All that we can do is to examine Algerian trial procedures, in the light of evidence about how they are operated, so as to determine whether this appellant will, if tried, be subjected to a process that, in our judgment, will amount to a flagrant denial of justice.

49. Mr Southey submits that, if prosecuted for an offence under Article 87(a)(vi) of the Algerian Criminal Code, he will suffer a flagrant denial of justice, for the following reasons:

(i) He will be detained for a lengthy period before trial.

(ii) The court which tries him will not be independent or impartial.

(iii) The evidence which may be deployed against him may be tainted and/or be incapable of proper challenge by him.

(iv) He will be denied access to a lawyer during the first twelve days of his detention.

50. Article 51 of the Algerian Criminal Procedure Code permits the judicial police (which includes members of the DRS sworn in as such) to detain a person for the purposes of an investigation into major offences classified as terrorist or subversive acts for a maximum of twelve days, on the written authority of the Public Prosecutor. Detention for such a period, without judicial supervision, if it occurred in a Convention state might well amount to a breach of Article 5(1)(c) and (3) ECHR; but it would be an abuse of language to describe it as a flagrant denial of those rights or, by extension, of the right to a fair trial. It would only have significance in that context if accompanied by conduct of the kind prohibited by Article 3.

51. It is common ground that at the end of the initial period of detention, the detained person must be brought before a Juge d'Instruction who is responsible for conducting investigations: Article 38 of the Criminal Procedure Code. He will then also be entitled to a medical examination, on request: Article 51(a)(i). The Juge d'Instruction must establish his identity, inform him of the acts with which he is charged and caution him that he is at liberty to refrain from making any statement; and that he has the right to retain legal counsel: Article 100. Once charged, the person detained may communicate freely with his legal counsel: Article 102. In the case of trans-national crime, the Juge d'Instruction may, by reasoned order based on evidence and upon reasoned application by the Public Prosecutor, extend pre-trial detention for up to forty-eight months: Article 125(a) and 125-1, first paragraph. A natural reading of the last two paragraphs of Article 125(a) suggests that a further extension of up to twelve months may be ordered, on the application of the Juge d'Instruction, by the Indictments Division of the Court of Appeal, making a total maximum period of pre-trial detention of five years and twelve days. There is some reason to doubt that interpretation of the last two paragraphs of Article 125(a) because Mr Amara, who should know, considers that the maximum period of detention is forty-eight months; and Mohammed Mentalechta, an Algerian lawyer who has provided a short report in response to a request from the Secretary of State,

states that the maximum period is fifty-six months. Within that total period, whichever it may be, no period of detention may be ordered to run for more than four months at a time. Thus, detention must be the subject of a reasoned order by a judge at least every four months. In a Convention state, such a long period of pre-trial detention, even under judicial supervision, might well be held to infringe Article 5(3), even though the Strasbourg Court recognised in *Chahal v UK 23 EHRR 413* that a lengthy period in custody when the interests of national security were at stake may be justified: paragraph 117. Despite Mr Layden's belief that 'U' would be brought to trial more quickly, there is evidence that the full period of detention available to the Algerian authorities may have been used in terrorist cases. The question should, accordingly, be addressed on the footing that 'U' may well be detained for up to sixty months plus twelve days. In our judgment, detention for such a period, under regular review by the Juge d'Instruction and Indictments Division, if appropriate, would not amount to a flagrant denial of the rights protected by Article 5 or to a flagrant denial of justice. At most, it will be a component in the overall assessment which must be made of the trial process to which 'U' is likely to be subjected.

52. Magistrates, judges of the High Court and Juges d'Instruction are appointed by the President: Articles 78 and 85.5 of the Constitution of Algeria and Article 39 of the Criminal Procedure Code. The Algerian Constitution provides, in relation to judges, that the judicial power is independent and exercised within the framework of the law: Article 138; that the judge obeys the law only: Article 147; and that he is protected against any form of pressure, interventions or manoeuvres which prejudice his mission or the respect of his free will: Article 148.

53. The appointment, rights and duties of judges and the means by which they may be subjected to disciplinary procedures are governed by two statutes made on 6 September 2004: the Magistracy Statute and the Statute establishing the Supreme Council of the Magistracy. As is common in civil law jurisdictions, the judiciary is a full time career. There is a hierarchy of judges: Article 47 of the Magistracy Statute; and promotion is on merit: Article 51. Appointment is until 60 years of age:

Article 88. Chapter III deals with discipline. "Grave discipline faults", of which unexceptionable examples are given in Article 61, can give rise to the range of disciplinary measures set out in Article 68. The most serious are removal from office or compulsory retirement. Less serious sanctions are suspension for twelve months, the withdrawal of some functions, demotion and a reprimand. Any sanction is decided upon by the Superior Council of the Magistracy, which must make its decision within six months: Article 66. Removal from office or compulsory retirement must be sanctioned by the President; any lesser sanction must be sanctioned by the Minister of Justice. The Supreme Council of the Magistracy comprises twenty-eight voting members and one non-voting member (representing the Ministry of Justice): Article 3. The President of the Supreme Court and the Procurator General are ex officio members. Twenty members are judges elected by their peers. Six other persons are appointed by the President. The judges and such persons are appointed for non-renewable four year terms: Article 5. The Council must meet twice a year. It is quorate if attended by two thirds of its members: Article 14. Decisions are by majority vote, with the President having a casting vote: Article 15. In addition to its sole responsibility for disciplinary measures against judges, the Council is also solely responsible for their promotion and transfer: Article 19.

54. On any reasonable view, Algerian law provides adequately, and in detail, for the independence and impartiality of the judiciary. Although we have not had expert evidence on the point, it is likely that judicial independence has been more fully safeguarded since 6 September 2004 than it was before. In August 2000, President Bouteflika removed 80% of lower court judges and all but three high court judges. He did so, because of perceived failings in their independence and impartiality. Self evidently, by that act he demonstrated that the judiciary was then ultimately subject to executive control, and so, not independent. The changes in Algerian law have removed that power. Even so, President Bouteflika was reported to have said in a speech in March 2006 that the judicial system was still seriously dysfunctional and required a revolution in both written codes and attitudes. He was reported to have said that independence of the justice system hinges on the impartiality of the

judge, who should be above corruption and not swayed by pressure from the military or politicians; and that change would not be achieved overnight, but that the choice made by the state was irrevocable.

55. Mohammed Tahri, who has prepared a report at the request of the Appellant's solicitors, states that there is no true separation of powers between the executive and judiciary in Algeria and that judges may be open to external pressures in "sensitive" or "special" cases. He considers that 'H's case "is considered both by the court and by the detention centre as a 'special' case requiring a specific kind of treatment." However, the example that he gives of special treatment relates to the management of Serkadji Prison, which is not a judicial office or function. His opinion adds little to the material already recited.

56. The US Department of State in its Country Report of 6 March 2007 notes that the Superior Council of Judges dismissed a judge in February 2005 at a disciplinary hearing "that did not afford full due process". It was reported that he was accused of criticising the politicisation of the judges. Mr Southey submits that this demonstrates that, even now, the judiciary are not truly independent. We do not agree. It is highly significant that it was the Superior Council of Judges, not the President or Minister of Justice, who dismissed the judge. Because proceedings of the Superior Council of Judges are in secret, neither the nature of the charge nor the process by which it was established can have been known reliably to those who made the reports. There is far too little information about this matter for any secure conclusion to be reached beyond the fact that it was not the executive who dismissed the judge.

57. The conclusion which we draw from this material is that the Algerian judiciary is both formally and effectively independent of the executive, but that not all of its members have developed the robust independence of mind which is the norm in countries where the rule of law is long established.

58. The Criminal Court which would try 'U' comprises three professional judges and two lay jurors, drawn by lot from a panel of twelve: Articles 258 and 266 of the Criminal Procedure Code. Serving police officers and members of the armed forces are not

eligible to be jurors: Article 263. The Criminal Court cannot refuse jurisdiction to try criminal cases. The trial is in public unless disclosure is dangerous to public policy or morals: Article 258. It is now common ground that, if prosecuted for an offence under Article 87(a)(vi), 'U' would be tried by a civilian criminal court.

59. Amnesty International criticises Algerian judges for their reluctance to enquire into claims of torture by detained persons; but in none of the reports, both Governmental and non-Governmental, to which we have been referred, has any other criticism been made of the impartiality or conduct of currently serving judges. There is no evidence, or even suggestion, that civilian criminal courts conduct trials, even of offences under Article 87(a)(vi), in a manner which amounts to a flagrant denial of justice. The focus of Amnesty International's criticisms has always been the arbitrary exercise of state power, including the use of torture, by the DRS; and of the difficulties which lawyers experience in criticising its officers. Ms Peirce in paragraph 4 of her witness statement of 20 February 2007 speaks in general terms save as to numbers, in the same vein. These criticisms do not persuade us that there is a real risk that, by reason of the claimed lack of independence of the professional judges who would try him, 'U' is at real risk of a flagrantly unfair trial. Indeed, there is a credible report (in the FCO Research and Analytical Paper dated August 2005) that, despite criticisms of the attitudes of Algerian courts, they do regularly acquit defendants in terrorist and national security cases: 5A/79.

60. A constant theme of Amnesty reports, supported by Mr Tahri, is that campaigning human rights lawyers are subjected to prosecution or the threat of prosecution in consequence of their activities. We have no reason to doubt that their activities are unwelcome to elements within the Algerian State, notably the military. But there is no report, and no suggestion by Mr Tahri, that they are subjected to pressure merely for conducting their cases in court. We accept Mr Tahri's statement that "as a general rule lawyers are free to plead in cases in which they are entitled to appear …" A defendant to a criminal charge will, accordingly, be entitled to and will receive the services of a lawyer of his choice to represent him in pre-trial procedures and

at trial; and his lawyers will not be deterred by external pressure from doing so.

61. Mr Southey advances five criticisms of the evidence which may be adduced against 'U'. He suggests that the prosecutor may rely on:

    (i) Statements made by Meguerba, an Algerian national implicated in the "ricin" plot (and found, by necessary inference, to have been a party to it, by the jury which convicted Bourgass) which may have been procured by torture.

    (ii) Statements by other Algerian nationals similarly obtained.

    (iii) Statements obtained from witnesses who, although not tortured themselves, may have been questioned, in the absence of a lawyer, about what Meguerba has stated – which may contaminate their evidence.

    (iv) Statements made to American officials by Ressam, which cannot be the subject of questioning by or on behalf of 'U'.

    (v) Statements from deceased persons, obtained in dubious circumstances, like that relied on in unsuccessful extradition proceedings in the case of Ait Haddad.

62. The first (and in principle the second) of these submissions raises a question of some importance. Evidence proved to have been obtained by the use of torture is inadmissible in the courts of the United Kingdom: *A v SSHD (No 2) 2006 2AC 221*. We accept Lord Bingham's observation that, if complaints of coercion and torture in *Harutyunyan v Armenia* been substantiated, a finding that Article 6(1) had been violated would have been inevitable: paragraph 26 p254 g –h. There are reported allegations, from three sources, that Meguerba was tortured: see The Times on line report May 9th 2005: his own reported complaint to his family; the report by an unnamed Algerian man that his face was bruised, cut and swollen; and an unsourced observation that, when he appeared in an Algiers court in May 2005, he appeared frail and with many teeth missing.

63. We have no means of assessing whether the reports of torture of Meguerba are true; nor of knowing what, if any, use might be made by an Algerian prosecutor of his statements; nor of how an Algerian criminal court would treat them. At the time when Meguerba made his statements, the Algerian criminal code prohibited the use of torture by a civil servant or agent, Article 110(a). Article 263(a)(b) and(c), introduced on 10 November 2004, defined torture and increased the penalties for its use. We have not been shown any provision of the Algerian Criminal Procedure Code which deals with the approach which a court might take to evidence said to have been obtained by torture. A question directly on the point by Mr Graham to the Algerian lawyer with whom he was in contact produced no direct answer: the lawyer clearly treated the question as relating to a confession obtained from an accused person by torture. Mr Tahri states that it is for a lawyer who submits to the court "a case of torture" must support it with proof, of which the essential element is a certificate provided by a medical examiner. Absent such proof, the claim will be declared inadmissible by the judge. We have no reason to doubt that if the prosecutor were to rely on Meguerba's statement, without calling him to give oral evidence, it would be very difficult for a defence lawyer to demonstrate that the statement had been obtained by torture.

64. Article 212 of the Criminal Procedure Code provides that offences may be established "by any means of proof", provided that it is furnished during the trial and discussed in the presence of the parties. Thus, in principle, there would appear to be nothing to prevent the use of a written statement by a witness who was tortured before he made it. Articles 88 – 99, however, suggest strongly that, where a witness is available to give evidence, he will be called before the Juge d'Instruction, required to give evidence on oath, to answer any questions which the judge may have and to read over and sign the record of his statement: Articles 88, 89, 94 and 96. Articles 222 and 225 and 233 provide for the summoning of witnesses to the hearing, the giving of evidence by them and their questioning by the presiding judge. These provisions suggest to us that, in the case of a witness such as Meguerba, who claims to speak from personal knowledge of an event involving him and the defendant, he would be

required to attend before the Juge d'Instruction and at trial if his evidence were to be relied on. If he did so, he would either not be doing so under the impact of recent torture or if it was suggested that he was, he could be questioned about it and the court could form its own opinion about whether his evidence should be admitted as proof. Further, according to the summary of Meguerba's evidence provided for the information of the defence in the "ricin" trial, the evidence which he could give against 'U' is extremely limited: that 'U' arranged, on one occasion, for two false passports to be provided for Meguerba's use to permit him to travel to Afghanistan. There is an abundance of material contained in the open national security case against 'U' upon which an Algerian prosecutor could rely, to the complete exclusion of Meguerba's evidence. It is also not unlikely that "repentis" who had visited camps in Afghanistan attended by 'U' could be summoned, without unlawful coercion, to give evidence about him before the Juge d'Instruction. Accordingly, even if the prosecutor were to rely on Meguerba's written statement without his oral evidence, there is no reason to believe that it would play any significant part in the proceedings or their outcome.

65. For all of those reasons, we conclude that the possibility that Meguerba's written statement alone would be deployed against 'U' or would have any material bearing on the outcome of any trial is remote and would not create a real risk of flagrant injustice.

66. Mr Southey's remaining points can be dealt with briefly. The risk in relation to statements by unknown "repentis" is even more remote. The possibility of contamination of untortured witnesses by questions based on Meguerba's statements is fanciful. There is no reason why the statements of Ressam should not be admitted under Article 212. It will be for the Algerian Court to give what weight it thinks right to them. Even in a Convention country, such issues would be matters for national law: *Schenk v Switzerland 1988 13 EHRR 242 paragraph 46.* The same comments apply to the evidence of deceased persons.

67. Mr Southey is right to state that Algerian law does not require a detained person to have access to a lawyer until he is brought before a Juge

d'Instruction: Article 100 of the Criminal Procedure Code. The risk that a defendant will be induced to make self-incriminating statements during initial detention is thereby significantly increased. Even though there is nothing in the words of Article 6 which requires a state to afford a detained person access to a lawyer before he is questioned, failure to do so may infringe Article 6: *Murray v UK 1996 22 EHRR 29.* By itself, that would not make the proceedings flagrantly unfair. It would simply be another component in the assessment of the fairness of the proceedings overall.

68. Whether or not 'U' would, if prosecuted for an offence under Algerian law, be subjected to a flagrantly unfair trial or to flagrant injustice is ultimately a question of judgment. We have identified respects in which criminal proceedings brought against him under Algerian law might be deficient by the standards of Article 6. We are, however, unpersuaded that those shortcomings would create a real risk that he would be subjected to a flagrantly unfair trial or to flagrant injustice if he were to be deported to Algeria. Put more positively, we are satisfied that the proceedings will reach a minimum threshold of fairness. After initial detention, all proceedings and evidence-gathering will be under the control of a judge or court. 'U' will be entitled to be represented by a lawyer of his choice, who will be able to represent him effectively throughout. Evidence against him can be challenged, by questioning, if possible, and by evidence given by or for him. Guilt or innocence will be determined by a court, applying its own collective mind to the facts. There is no evidence which persuades us that there is a real risk that the court will allow itself to be influenced by extraneous factors in reaching its verdict.

69. For those reasons we are satisfied that the United Kingdom will not act in breach of 'U's rights under Aticle 3, 5 and 6 ECHR if it deports him to Algeria, and this appeal is dismissed.

MR JUSTICE MITTING

ADDENDUM

On 2nd May 2007 SIAC received, by fax, a letter from Sihali's solicitors Tyndallwoods, enclosing a witness statement by Natalia Garcia of the same date, which exhibited 2 letters said to be in the handwriting of Q, a former client of Ms Garcia. All advocates for the 4 appellants in whose cases judgment has been handed down today submit that SIAC should take the letters into account in reaching its judgments.

The Secretary of State also submitted, by letter from the Treasury Solicitor dated 2nd May 2007, further notes of discussions between a British Embassy official and Q's sister Djazia on 23rd April 2007; and between a British Embassy official and Maitre Tahri (one of H's lawyers) on 26th April 2007.
Ms Garcia states that she recognises Q's handwriting and that the 2 letters are from him. We have no reason to doubt that they are.

The first is to Ouseley J and reads:

"Dear Sir Osliy. To SIAC court my name [Q] former long lartin detainee I rhite you this wourd to let you no that my life here in Algeria in danger first I was torture betaine humilition in police station.
Second here in Serkadji prison life here like slave. Algerian otority thay give a garanty but thay brook the agreement. So Mr judj Osly stop deportation to Algeria in end I wont let you no that eneythink happen to ..... here in Algeria Britich otority responssable for life
Thank you
Detainee Q."

The second letter is to Miss Garcia and adds nothing relevant to the first.
The first letter is dated 10th April 2007. Miss Garcia states that both letters were received by fax at her office on 23rd April 2007 at about 12.30pm from Q's sister. This is consistent with the fax imprints on each page which bear that date and are timed between 12.11pm and 12.17pm. Miss Garcia does not explain why it took until 2nd May 2007 to refer them to SIAC. She states that she is not at liberty to provide full details of the provenance of the first letter because of "serious concerns for the safety of third parties".

She also refers to statements made to her by Djazia about the circumstances in which Q is now being held in Serkadji prison: in a dormitory with 25 others; and that he is required to take a sleeping pill each night, against his will. This information is entirely consistent with what the British Embassy official records Djazia as having told him on 23rd April 2007. It does not alter the view which all four panels of SIAC which have considered these cases have formed about the "prison conditions" issue under Article 3.

Q's claim in the first letter can be broken down into 3:

1. He has been tortured, beaten and humiliated "in police station" (which we take to be a reference to DRS custody in Antar barracks).
2. His life in Serkadji prison is like that of a slave.
3. The Algerian authorities have broken a guarantee in respect of him.

(i) is inconsistent with the description of him by one of his lawyers, Mrs Daoudi, as being "generally in decent health"; with her statement that what he complained of was hearing the sounds of apparent ill-treatment of others, not harm to himself; with Djazia's statement to a British Embassy official on 12th March 2007, that following a family visit on 10th March 2007, he was well, but not happy about his detention; and with her statement to a British Embassy official on 23rd April 2007 that he had not been mistreated (otherwise than being removed to a dormitory in Serkadji prison and made to take sleeping pills at night). This allegation is also entirely unspecific and made very late in the day. While the possibility that he was ill-treated cannot wholly be dismissed it is no more than a mere possibility. This new allegation does not persuade us that there exists a real possibility that any of the 4 appellants with whose cases we are concerned will be tortured or ill-treated on return. Put in the language used by the Strasburg Court, this material does not give rise to substantial grounds for believing that there is a real risk that they would be subjected to treatment which would infringe Article 3 if it were to occur in a Convention state.

(ii) Adds nothing to the "prison conditions" issue already considered.

(iii) Cannot refer to any assurance given to the British Government in relation to Q, because none was given. It must refer to the promises said to have been given at the Algerian Embassy orally to individuals. We have already dealt with this issue in the judgment in U. This adds nothing to it.