Appeal no: SC/98/2010
Hearing Dates: 14th – 17th June 2011
Date of Judgment: 11th July 2011

SPECIAL IMMIGRATION APPEALS COMMISSION

OPEN JUDGMENT

Before:

THE HONOURABLE MR JUSTICE MITTING (Chairman)
SENIOR IMMIGRATION JUDGE ESHUN
MR S PARKER

(J1)

APPELLANT

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

For the Appellants:	Mr T Otty, QC & Ms S Harrison Birnberg Peirce & Partners Solictors
For the Respondent:	Mr S Kovats, QC, Ms K Grange & Ms R Davidson Instructed by the Treasury Solicitor for the Secretary of State
Special Advocate:	Ms A Dhir, QC & Ms C McGahey Instructed by the Special Advocates Support Office

Mr Justice Mitting :

Safety on return – Article 3

1. Our starting point is the analysis of this issue in paragraphs 13 to 23 inclusive of SIAC's open judgment in XX of 10 September 2010 and of the passages in the confidential and closed judgments which deal with the issue in the same case. Subject to the updating and qualifications referred to below, we adopt and reiterate that analysis. It does not compel a finding that J1's appeal should be either allowed or dismissed. The outcome of his appeal turns on our assessment of the risks of prohibited ill-treatment to him, given what is known about him and will be known or perceived by the Ethiopian authorities about him in the circumstances which now exist and are likely to occur in Ethiopia.

2. The starting point in such an assessment is our assessment of the threat to the national security of the United Kingdom posed by J1, set out in the open and closed judgments on the issue of national security of 15 April 2011. For present purposes, the most significant finding is that set out in paragraph 6: the appellant was an associate of three men who left the United Kingdom for terrorism related purposes, for Somalia in October 2009, Bilal Berjawi, Mohamed Sakr and Walla Eldin Rahman; and that between October 2009 and his detention on 25 September 2010, J1 was an important and significant member of a group of Islamist extremists in the United Kingdom which provided support to them. Media reporting identifies Bilal Berjawi as a close associate of Harun Fazul who, until his death on 7 June 2011, was a, if not the, leader of Al Qaeda in East Africa and himself a close associate of the leaders of Al Shabaab. Contrary to the reservation previously expressed by SIAC, it is now generally accepted that the claim by Al Shabaab of responsibility for the twin bombings in Kampala on 11 July 2010 was well-founded. A claimed associate, and second in command to Harun Fazul, Omar Awadh Omar awaits trial in Uganda for complicity in that attack. Both Al Shabaab and Al Qaeda are regarded by the government of Ethiopia as enemies of Ethiopia. As Debebe Hailegabriel, Honorary Legal Advisor to the British Embassy in Addis Ababa, said in his oral evidence, on 14 June 2011 the Ethiopian Parliament designated Al Shabaab as a terrorist organisation, like AQEA, the Oromo Liberation Front and the Ogaden National Liberation Front. As he said, an individual believed by the Ethiopian authorities to be a member or associate of Al Shabaab/AQEA would be of interest to the Ethiopian authorities and, in consequence, at risk of detention, interrogation and possible prosecution under the Anti-terrorism Proclamation of 28 August 2009.

3. J1 is such an individual. The period during which the group of which he was an important and significant member provided support to Berjawi, Sakr and Rahman spanned the period during which they were actively associated with Al Shabaab in Somalia. Dr Love, who prepared a well-informed report dated 6 June 2011 (but did not give oral evidence in support of it) noted Berjawi's "apparent involvement" in planning the Kampala bombing. On the basis of that observation and of newspaper articles in Ugandan newspapers (16/C/17 and 19 and 16/D/4) Mr Otty QC went so far as to submit that by reason of J1's perceived complicity in the Kampala bombings, he faced the possibility of

prosecution for a capital crime in Ethiopia. This proposition is not only far fetched, but also fundamentally ill-founded. For reasons set out in the closed judgment, we are satisfied that Berjawi had no involvement in the Kampala bombings.

4. Nevertheless, even when hyperbole and ill-founded allegations are set aside, it remains the case that J1 is, and would on return be, of interest to the Ethiopian authorities because of his association with Berjawi, Sakr and Rahman. The Secretary of State acknowledges that Her Majesty's Government has a moral obligation, which it will discharge, to tell the Ethiopian authorities the gist of what it knows about J1 so far as is necessary to enable it, as receiving government, to make its own assessment of the risk, if any, posed by him to Ethiopia. It is very highly likely that discharge of that obligation will cause the Ethiopian authorities to detain and interrogate him, for two purposes: to find out from him what he knows about the activities of Berjawi, Sakr and Rahman between October 2009 and September 2010 and to assess for themselves the threat, if any, which J1 might pose to Ethiopia. Articles 19 and 20 of the Anti-terrorism Proclamation give them ample powers to do so. He could be arrested, without court warrant, under Article 19(1). Article 19(2) requires that he be brought before a court within 48 hours of his arrest. Article 20(3) permits court-approved detention for successive periods of 28 days, up to a maximum of four months. Mr Debebe, whose evidence we accept on this point, said that those time limits were respected. Mr Otty did not submit that detention in those circumstances would amount to a flagrant breach of Article 5 ECHR. He was right not to do so. Nevertheless, it is self-evident that the opportunity to detain for up to four months, without charge, would afford ample opportunity to the investigators to ill-treat or torture J1, if so minded. The investigators would be members of NISS – the Ethiopian immigration agency and security service – acting as such, or as officers seconded to the specialised task force set up under Article 29 of the Anti-terrorism Proclamation to investigate terrorism cases.

5. The Foreign and Commonwealth Office and Mr Layden accept that for substantially those reasons J1 would face a real risk of prohibited ill-treatment if returned to Ethiopia without the protection afforded by assurances given by the government of Ethiopia. They are right to do so. As Mr Layden accepted, the political and human rights situation in Ethiopia has not improved since July 2010 (when SIAC heard XX's appeal). If anything, it has continued to deteriorate. The reporting of internationally respected organisations is unanimous: torture and ill-treatment have been used by Ethiopia's police, military and other members of the security forces to punish and obtain confessions from political opponents, supporters of insurgent groups and terrorist suspects (see, by way of example only, the report of 2 November 2010 by Human Rights Watch (16/B/8), the US State Department's Human Rights Report for Ethiopia 2010 (1/7) and the United Nations Committee against Torture, considering the government of Ethiopia's belated – by fourteen years – submission in November 2010 (1/6)). Mr Layden accepted the Committee's statement of its concerns, in paragraph 10 of its report of 20 January 2011, with one potentially significant reservation:

> "The Committee is deeply concerned about numerous, ongoing and consistent allegations concerning the routine use of torture by the police, prison officers and other members of the security forces as well as the military, in particular against political dissidents and opposition party members, students, alleged terrorist suspects and alleged supporters of insurgent groups such as the Ogaden National Liberation Front (ONLF) and the Oromo Liberation Front (OLF)."

Mr Layden's reservation applied only to "alleged terrorist suspects". For reasons which are set out in the closed judgment in XX and in this case, we are satisfied that, for what it is worth, Mr Layden's reservation has merit. If it is suggested that it is the invariable practice of NISS officers to torture or ill-treat terrorist suspects in their detention, the suggestion would, in our view, be ill-founded. We are satisfied that they do not. Nevertheless, we accept that there is a real risk that they might, in a particular case, do so. It is a risk which must be addressed and could not be taken to be removed or sufficiently diminished without credible and reliable assurances; but the assurances would be given against a background in which torture and ill-treatment was not the invariable norm.

6. It is the view of the Foreign and Commonwealth Office, accepted by Mr Layden, that there is a strong likelihood of an attack or attempted attack by Al Shabaab/AQEA in Addis Ababa. Al Shabaab has declared the ambition of establishing a caliphate in the Horn of Africa which includes the Ogaden. There are reports of military assistance given by Ethiopia to forces in Somalia opposed to Al Shabaab. It is readily conceivable that, in the distorted perception of the leaders of Al Shabaab, an attack on a government facility or on civilians in Addis Ababa would serve its purpose. Dr Love considers that, in those circumstances, J1 would be included in a "round up" of suspects. We do not accept this analysis. J1's knowledge of Berjawi et al will, by then, be historic. Further, he will already have been interrogated about it. No sensible purpose would be served by interrogating him again unless NISS officers had reason to believe that he had resumed active association with Berjawi while in Ethiopia. In that event, the United Kingdom could not be held responsible under the Convention for the conduct of agents of the receiving state arising out of activities of a deported individual after deportation.

7. By a note verbale dated 6 October 2010 the British Government gave notice to the Ethiopian Government that it proposed to deport J1 to Ethiopia and requested the Ethiopian Government to accept him for return under the terms of the memorandum of understanding signed on 12 December 2008. The terms of that memorandum, and of side letters accompanying it, are set out in paragraph 20 of the open judgment of XX and need not be repeated. The response was slow in coming, despite repeated efforts at official level to procure one. On the British side, those efforts included the handing over of a copy of an expired passport issued in 1991 in London (with the original note verbale), and on 27 April 2011, a copy of the open national security judgment in J1's case. The response was disappointing: on 10 May 2011, the Director General of the Ministry of Foreign Affairs told the Deputy Head of Mission

that NISS had examined the passport and concluded that it was false. This prompted the provision of further biographical details on 13 May and 7 June 2011, including details of his travel to Ethiopia in 2002, 2005 and 2006. Further questions about J1's nationality were raised by the Ethiopian Ministry of Foreign Affairs on 2 June 2011. This was a stalling device. The impasse was broken at a meeting between the Foreign Secretary, attended by Mr Layden, and the Ethiopian Deputy Prime Minister in London on 8 June 2011. J1's case was the first topic of discussion and was debated for 15 to 20 minutes. During the discussion, My Layden outlined the threat which it was considered J1 posed to the United Kingdom and to Ethiopia. His summary was criticised by Mr Otty for overemphasising the risk to the United Kingdom and underselling that to Ethiopia. For reasons substantially explained in the closed judgment, we do not accept that criticism. Further, as already noted, the British Government will, before removal, give a fuller and more precise explanation of what it knows or believes about J1's activities in 2009 and 2010 to the Ethiopian Government. Mr Layden emphasised to the Deputy Prime Minister that it would be for the Ethiopian authorities themselves to establish what, if any, threat he might pose to them on his return. There can be no doubt that, in the light of the material so far disclosed to the Ethiopian authorities, they would, for certain, have realised that they were being asked to give assurances in relation to an individual who might pose a threat to them and could, if he chose to do so, provide information to them about the threat which might be posed by others.

8. By a note verbale dated 10 June 2011, the Ethiopian Ministry of Foreign Affairs confirmed that J1 was an Ethiopian national and agreed to accept his return to Ethiopia under the terms of the memorandum of understanding signed on 13 December 2008. The reasons for delay in accepting J1's return under the memorandum are analysed in the closed judgment. We are satisfied that they do not cast doubt on the good faith of the Ethiopian Government in giving the assurances. Mr Layden was of the opinion, stated in his open evidence, that once given, the assurances will be binding – by which we understand him to mean that the government of Ethiopia will regard itself as bound by them. As in the case of XX, and for very much the same reasons, we agree with his assessment.

9. Mr Otty accepts that the first of the four yardsticks identified in BB are satisfied: the assurances given in respect of J1 will, if fulfilled, ensure that he will not be subjected to treatment contrary to Article 3. The remaining three are in issue.

10. Mr Otty challenges the good faith of the Ethiopian Government on a number of grounds: its poor and deteriorating political and human rights record; the delay in giving the assurances requested and the specious reasons for avoiding doing so; and the untrue representations made by Ethiopia in its report to the Committee against Torture of 28 July 2009 and in the evidence given by its officials to the committee on 3 November 2010, about access to its detention facilities by international organisations and impunity. We have dealt with the first two points in the open judgment in XX and above. As to the third, the representations made by and on behalf of the Ethiopian Government would be

comical, if the subject were not serious. In paragraphs 21 and 56 of its report, it flatly asserted that international organisations such as the ICRC and interested NGOs were allowed to inspect prisons and detention centres. They were not. Even the ICRC was prohibited from investigating federal detention centres, in which the great majority of those about whom accusations of ill-treatment have been made are detained. The evidence of an official that Ethiopia "had zero tolerance for impunity" can hardly have been given with a straight face. The two examples chosen were that the government had brought to justice officials of the Derg and the establishing of an independent commission of inquiry into the post-election violence of 2005. (As we noted in paragraph 14 of the open judgment in XX, the judge in charge of the commission, having been instructed to reverse its findings by the Prime Minister, fled Ethiopia). Mr Layden accepted that these representations were clearly false – and bound to be found out. Nevertheless, he maintained that, in giving the assurances to the British Government, the Ethiopian Government did act in good faith. This was not just, or even mainly, his personal opinion. It is the opinion of the Foreign and Commonwealth Office and of other agencies which deal with the Ethiopian authorities. Their perception of relations with the Ethiopian Government is that they are at the top of a scale of openness and friendliness in which Burma represents the bottom element of the scale. The reasons are partly historical – the British Empire liberated Abyssinia from Italian rule in 1941 – and partly based on more recent experience of inter-government dealings. A consistent and significant example illustrates the point: Ethiopia is, in the opinion of the British Government, one of the most reliable users of foreign aid. It is distributed to the people it was intended to benefit. It does not go into the pockets of the rulers. Criticisms made by Human Rights Watch about politically-biased distribution have been investigated and found to be true only to a very limited extent, since believed to have been corrected. Mr Otty submits, correctly, that the Ethiopian Government has no track record of fulfilment of bilateral assurances of the type in issue here. That is because no other government has negotiated such assurances and those given to the British Government have not yet been put to the test. Nevertheless, we accept, as we did in XX, the evidence of Mr Debebe as well as that of Mr Layden that the Ethiopian Government has an excellent track record of complying with bilateral agreements. That is a significant factor in favour of accepting that it has acted in good faith in this instance.

11. Our conclusion on the second yardstick is informed by that on the third, to which we now turn. Ethiopia is a poor, but populous, country. It has approximately 80 million inhabitants, with an average per capita income estimated at $187 in 2006. Total government expenditure in 2010 was just over £4 billion. Allowing for further rapid growth since 2006, a back of envelope calculation suggests that this represents a little less than 30% of Ethiopia's current GDP. Of that sum, the British Government contributed £239 million – 6% of total government expenditure. That sum is expected to rise to £400 million this year – a fraction under 10%. Further, the United Kingdom is the lead government in the group of western donors to Ethiopia. Both governments have something to gain from fulfilment of the assurances and much to lose by their breach. As SIAC observed in XX, if the Ethiopian Government were to go back on its word, it would at a stroke wreck the

deportation with assurances programme on which the British Government relies to deal with non-citizens who are believed to pose a threat to national security. There would be severe consequences for bilateral relations. Mr Layden obtained the Foreign Secretary's assurance that severe consequences would follow in the event of a breach. No sensible diplomat would set out, in advance, precisely what those consequences would be; but the Ethiopian Government can be in no doubt that serious consequences would flow. As SIAC observed in XX on the basis of the evidence which it considered then, the Ethiopian Government, for all its faults, does act rationally in its perceived national interest. It would simply make no sense for it to put at risk good relations with a well-disposed Western state which happened to be a major donor (its second largest after the United States) for the sake of obtaining out of date information from a middle ranking and (when the events occurred) geographically remote individual about a possible threat to Ethiopian interests and people.

12. The national self interest of Ethiopia provides powerful support for a finding that the assurances finally given were given in good faith as well as a firm basis for concluding that they will be fulfilled. We are satisfied that both the second and third yardsticks are fulfilled.

13. The fourth yardstick is in issue. The only means by which fulfilment of the Ethiopian Government's assurances can be verified is inspection and reporting by the European Human Rights Commission (EHRComm). The deliberate narrowing of political space, the partial exclusion of international human rights organisations and the neutering of domestic human rights organisations remove the possibility that entities genuinely independent of the government can be relied upon to sound the alarm if assurances are breached. As SIAC observed in XX, EHRComm could not be relied upon to sound the alarm about, or even report upon, deliberate breaches by the Ethiopian Government of its assurances. What it can do is, with government support, ensure that its intentions are carried out – ie that they are not breached by unauthorised junior officials. That depends upon the intention being genuine and settled. For the reasons explained above, we are satisfied that it is – and, further, that the British Government, through its embassy, will emphasise to their Ethiopian counterparts the importance of ensuring that it is. Mr Otty submits that there would be nothing to prevent the Ethiopian Government from coercing the EHRComm to suppress information about breaches of the assurances – for example, prohibited ill-treatment of J1 or the refusal of access to him. This is, of course, a theoretical possibility; but it could only result from bad faith, at that stage, on the part of the Ethiopian Government. If the assurances are given in bad faith, they are worthless. If they are given in good faith and it is in the national interest of Ethiopia that they should be fulfilled, monitoring by EHRComm will in principle provide an adequate method of verification against the only real risk which would then exist: unauthorised breach by junior officials.

14. Mr Otty makes a further, well-founded, criticism of EHRComm: that it does not yet have the capacity fully to carry out its tasks under the memorandum. Mr Layden accepts that EHRComm is a work in progress. There are three

particular shortcomings which require to be rectified, as reports from the independent consultants retained by the British Government, Adroit Consultants, make clear. The most important of them is the lack of trained medical expertise. As at October 2010, EHRComm had 19 members, two of whom were doctors. Four worthwhile training courses were provided, but not all members attended each course. In particular, the two doctors failed to attend the session on forensic medical trainings – obviously critical for the detection of signs of torture or ill-treatment. This gap in medical expertise has now been addressed. Ten new doctors have been recruited. Dedicated training has been provided for them. A second training course at the end of June 2011 will be conducted by Jordanian medical experts on the signs of torture, including the Istanbul Protocol. The number of non-medical monitors needs to be expanded (Adroit recommended an additional five by December 2010). The steering group set up under the aegis of the British Embassy was required to be reconvened to oversee the monitoring body. Finally, and outside the capacity of the EHRComm, the Ethiopian Government had to take effective steps to ensure that junior officials who might have dealings with returned deportees know what was required of them. Mr Layden's view, which seemed to us to be reasonable, was that it was best to leave that step until nearer the time of removal, to ensure that the message would not be ignored or forgotten. J1 will not be deported until the British Embassy is satisfied that it has been taken.

15. Mr Otty submitted that the fact that those steps still required to be taken meant that J1's appeal had to be allowed on safety on return grounds: if J1 were to be deported tomorrow, the British Government would be in breach of its obligations under Article 3 ECHR, because necessary steps to ensure the effectiveness of verification would not then be in place. The practical answer is that given by Mr Layden: it is unlikely that, whatever the outcome if this appeal, J1 will be deported very soon. The principled answer is that it is not necessary that everything must be in place at the date on which the appeal is decided. SIAC is engaged in an exercise in forecasting: that it will, or will not, be possible for the United Kingdom to deport J1 to Ethiopia without breaching its obligations to him under Article 3 ECHR. The steps which remain to be taken are substantially under the control of the British Government: it has commissioned the consultancy which is overseeing the training of monitors and contributes substantially towards the cost of doing so. Its officials, in particular its embassy staff, will make a judgment about two significant matters: whether the Ethiopian Government has taken effective steps to ensure that junior officials know about and will comply with the assurances given by the government; and whether or not the members of EHRComm have been sufficiently trained to perform their monitoring and reporting tasks effectively. As a matter of law, SIAC is entitled to make its decision on the premise that both of those conditions will be fulfilled. If they are not – or, more accurately, if there are credible grounds for believing that they have not been – J1 could request the Secretary of State to reconsider her intention to deport him under paragraph 353 of the Immigration Rules. If, without good reason, she refused to treat the representations as giving rise to a fresh claim, her decision would be open to challenge by judicial review. On a successful challenge or a decision by the Secretary of State that failure to fulfil those obligations gave

rise to a fresh claim, a fresh appeal on the merits would lie to SIAC. In practice, it is extremely unlikely that such a situation would arise, because it is in the interests of the British Government, as much of that of J1 and of the Ethiopian Government, that effective monitoring arrangements should be in place at the point of removal. To ensure that J1 has an adequate opportunity to challenge the facts at that point, the Secretary of State has, by Mr Kovats QC, stated (ie undertaken) that removal directions will be notified at least five working days before the intended day of removal, together with an explanation of the steps taken to ensure that everything is in place for effective monitoring of the carrying out of the Ethiopian Government's assurances.

16. For the reasons given, we are satisfied that the fourth yardstick in BB is satisfied.

17. In reaching those conclusions, we have not accepted Dr Love's view that there is a reasonable likelihood that breaches of the assurances could occur unnoticed until too late because of delays and inefficiencies in the Ethiopian bureaucracy. (Paragraphs 19.6 and 19.7 of his report). The possibility that he raises cannot wholly be excluded; but it is in our view so unlikely that it can be discounted as a real possibility. The principal reason is that, as the unanimous evidence of the experts in XX established, the central government of Ethiopia is a rational decision making body in effective command of its security service, NISS. It would not do the career prospects of a junior officer in NISS any good to flout assurances which he had been told by his superior officers to fulfil. For that reason, and for reasons which are set out in the closed judgment, we do not agree with Dr Love's view that there is a real likelihood of ill-treatment, notwithstanding the assurances. Nor are we persuaded that there is by the anonymous evidence, reported by Mr Graham, J1's solicitor, of abuse by Ethiopian security forces in combating insurgent groups and/or of torture of the "Ginbot 7" in custody. Those cases are very different from that of J1. They simply confirm that which is accepted by all independent observers about the malign performance of elements of the Ethiopian state in combating insurgency and political threats. They cast no light on the reliability of assurances given at the highest levels of the Ethiopian Government about an individual of middling interest to it.

18. We are required to have regard to decisions of the Strasbourg Court. The only decisions not hitherto considered are Trabelsi v Italy, 13 April 2010 and Toumi v Italy, 5 April 2011. In both cases, Italy deliberately deported an individual convicted in Italy of a terrorism-related offence to Tunisia in defiance of a rule 39 request by the Strasbourg Court. In each case, assurances about the treatment of the applicant were given by the Tunisian authorities. In the first case, they were given after deportation and only by the Advocate General. At the date of the hearing before the Strasbourg Court, the applicant remained in Tunisia, out of contact with his Italian lawyers. In the second case, assurances were obtained from the Tunisian Ministry of Foreign Affairs before the applicant was deported. At the date of the hearing before the Strasbourg Court, he was at liberty and in contact with his Tunisian and Italian lawyers. It was common ground that, soon after his deportation, he was detained, but there was a dispute as to the length of detention and its

circumstances. He maintained that he had been detained for ten days, during which time he had been tortured. The Tunisian authorities maintained that he had been detained for three days, under the supervision of a Juge d'Instruction and had not been ill-treated. In both cases, the Court held that Italy had violated Articles 3 and 34 of the Convention and awarded the applicant €15,000 compensation. It is not known whether that sum has been paid to either applicant or, if not, whether the Council of Europe has taken enforcement action against Italy in respect of it. In both cases, the Court reaffirmed the principle – a more accurate description would be truism – that the weight to be given to assurances given by the receiving state depends, in each case, on the circumstances prevailing at the relevant time (see paragraph 51 of Toumi). The second principle is that the Court should examine whether the assurances gave a sufficient guarantee as to the protection of the application against the risk of prohibited treatment (ditto). Again, the general statement provides no practical guidance to domestic courts, such as SIAC, as to what amounts to a "sufficient" guarantee and how to determine whether a guarantee is "sufficient". Nothing in the Strasbourg Court's recitation of its principles suggests that our own yardsticks are an impermissible guide to the answer. Finally, and astonishingly, in Toumi, the Court abandoned any attempt to determine what had happened to the applicant after his arrival in Tunisia, contenting itself with the observation that the parties' accounts diverged, so that its task was simply to consider whether the assurances provided by the Tunisian Government sufficed at the moment of expulsion (paragraph 57). These decisions of the Strasbourg Court give no assistance to us.

19. The US State Department's Human Rights Report for Ethiopia 2010 describes prison conditions as harsh and in some cases life threatening. Mr Debebe accepted that they were poor for remand prisoners but said that they were better for convicted prisoners. On any view, they fall far below first world standards. If, therefore, J1 were to be detained for a long time pending trial and/or sentenced to a significant term of imprisonment, he would be required to spend a substantial period in prison in poor, even in harsh, conditions. Deportation to a Convention state could only give rise to a breach of Article 3 on the part of the deporting state if the deportee "can point to a consistent pattern of gross and systematic violation of rights under Article 3": Batayav v SSHD (2003) EWCH Civ 1489 paragraph 7. No less must be established in relation to a non-Convention state, such as Ethiopia. The argument that, by reason of Ethiopian prison conditions alone, the deportation of J1 would put the United Kingdom in breach of its obligations to him under Article 3, was not at the forefront of Mr Otty's submissions. Understandably, therefore, little attention has been paid to this aspect of the case. For reasons considered in the closed judgments in XX and in this case, and relying on the evidence of Mr Debebe, which appears to be both frank and well-informed, we are not satisfied that that high threshold has been crossed. Further, if there were substantial grounds for believing that it might be, we are satisfied that the assurances given in the memorandum, coupled with inspection by EHRComm of the prisons in which J1 might be detained, while he was there, would provide an adequate safeguard against prohibited ill-treatment arising from prison conditions. EHRComm have shown, by their 2008 report, that they are

not afraid to report adversely on poor prison conditions. We have no reason to believe that they would not do so in J1's case or that, once justified complaint was made, the Ethiopian Government would not take effective steps to see that the first of its assurances was fulfilled.

Safety on return - Articles 2, 5 and 6

20. Mr Otty submits that there are substantial grounds for believing that J1 will be subjected to a flagrantly unfair trial, the end result of which will be a lengthy sentence of imprisonment. The shortcomings of the Ethiopian criminal justice system were summarised in paragraphs 29 and 30 of the open judgment in XX. The difference between his case and that of J1 is that, as Mr Debebe acknowledged, there are "some possibilities" for J1 to be prosecuted. We accept his opinion that if the Ethiopian authorities could obtain evidence that he had rendered support to, or participated in, a terrorist organisation, he could be prosecuted for an offence, punishable with up to 15 years rigorous imprisonment under Articles 5(1) and 7(1) of the Anti-terrorism Proclamation. Al Shabaab and AQEA are terrorist organisations, designated as such by the parliamentary resolution of 14 June 2011. We have found that J1 was a significant and important figure in a group of UK based individuals who, between October 2009 and September 2010, provided support to close associates of J1 while they were in Somalia for a terrorism-related purpose. The Ethiopian authorities are aware of that allegation and finding, because the open judgment has been provided to them. Nevertheless, they do not have, and will not be provided, with, the evidence upon which they were based. Article 23 of the Anti-terrorism Proclamation provides that an intelligence report prepared in relation to terrorism, even if the report does not disclose the source or the method by which it was gathered, is admissible in terrorism cases. Because this raised the possibility that something like the open national security statement might found the prosecution and conviction of J1, we asked Mr Debebe an open question about the use to which such a statement might be put. His answer was that it could be relied upon, but only as an allegation. It would be necessary for it to be proved by evidence. If there was none, he did not see how J1 could be convicted of an offence under the Anti-terrorism Proclamation. Mr Debebe is a frank and well-informed witness. When pressed by Mr Otty, he stuck firmly to his opinion. It is unchallenged by other evidence. From all that we know about the sources of information available to the Ethiopian authorities, the only means which we can discern by which they might be able to adduce evidence against J1 of an offence under Articles 5.1 or 7.1 of the Anti-terrorism Proclamation is by obtaining a confession from him. Mr Graham's anonymous confidential source speaks in general terms of the obtaining of "a vast amount of illegally gathered or secret evidence" and "information from co-opted witnesses who in many cases fabricate information" without giving any example of such activity. The observation supports Mr Debebe's conclusion that evidence is required for a conviction – otherwise, why bother to obtain the tainted material of which the anonymous source speaks? We can attach little if any weight to generalised accusations of this kind. Further, what matters more is the approach which the court will take to proof of guilt. Mr Otty secured Mr Debebe's agreement to the proposition that cases involving terrorism can have a political element and that there was

political interference in the decisions of judges in political cases. We invited Mr Debebe to consider the particular case of J1. He said that there was no political undercurrent in his case. He could see no reason why J1 would be denied his substantial rights, whether in detention or at trial. When Mr Otty returned to the question and suggested to him that a prosecution for support for Al Shabab would involve political interference with the judiciary by the executive, including the Prime Minister, his response was forthright: "I doubt it – the Prime Minister would not be interested in J1's case and would not be involved in it or the giving of instructions to court officials for the outcome of the case". He accepted that, assurances apart, there was the risk that general problems within the Ethiopian criminal justice system could apply to J1, including the lack of private access to a lawyer and late disclosure of evidence. His conclusion was, however, that the Ethiopian Government would not risk ruining its relationship with the United Kingdom Government by reneging on the assurances: "this gives me confidence that the government of Ethiopia will respect the memorandum of understanding".

21. Our conclusion is that, while the memorandum of understanding may not suffice to remove all of the shortcomings of the Ethiopian criminal justice system in any prosecution of J1, his trial, including antecedent procedures, will not fall so far short of acceptable standards as to amount to a flagrant denial of his right to a fair trial, unless a confession is extracted from him by torture or prohibited ill-treatment – an issue which we have dealt with already under Article 3.

22. For what it is worth, we doubt that it is possible to frame a workable Article 6 test in a foreign case. The Strasbourg Court has got no further than observing that a question might arise if there were substantial grounds for believing that a deported individual would be subjected to a flagrantly unfair trial. It has never attempted to answer the question, let alone to define what a flagrant or unfair trial might be. Lord Phillips' attempt to define the question in paragraphs 133 to 142 of RB v SSHD (2010) 2 AC 110 appears to require that there must be substantial grounds of believing not only that there is a real risk that there will be "a fundamental breach of the principles of a fair trial guaranteed by Article 6", but also that "this failure will lead to a miscarriage of justice that itself constitutes a flagrant violation of the victim's fundamental rights". This suggests that he had in mind that the trial must result in the conviction of an innocent man. It is unsatisfactory that first instance courts, such as SIAC, should have to struggle with an undefined test of uncertain foundation and application which the court charged with interpretation of the Convention has resolutely declined to define.

23. Similar, if not quite so acute, problems apply in relation to Article 5 in foreign cases. Imprisonment following upon a flawed trial which does not amount to a "flagrant denial of the right to a fair trial" in a receiving state would not put a deporting state in breach of its obligations under Article 5. Removal to a state in circumstances in which there were substantial grounds for believing that the individual would be subjected to arbitrary detention for a lengthy period might do so. On general principles, detention might be arbitrary if effected without a trial or the possibility of judicial intervention. Mr Otty suggests that J1 might

simply be detained (more accurately, re-detained after apparently lawful treatment immediately after return) incommunicado and without trial at an unacknowledged detention centre. While nothing is impossible, this would involve a flagrant breach by the Ethiopian Government of its promises to the United Kingdom, in circumstances in which it would have no rational incentive to break them. We regard the possibility as wholly fanciful. If J1 is to be detained, for more than the four months permitted under the Anti-terrorism Proclamation, it can only be pending trial or as a result of a sentence lawfully imposed by an Ethiopian court. It will not be arbitrary and could not put the United Kingdom in breach of its obligations to him under Article 5.

24. Mr Otty canvassed the possibility with Mr Debebe that J1 might be prosecuted for and convicted of an offence which carries the death sentence under Articles 3 or 4 of the Anti-terrorism Proclamation. These offences require proof of the Commission, planning or encouragement of an act of terrorism. Mr Otty's hypothesis is that J1 may be prosecuted for encouraging Berjawi, and through him those who actually carried out the terrorist act, to plot the Kampala bombing. The hypothesis is utterly far-fetched, for the reasons explained in paragraph 3 above. Further, as we explained in paragraph 21 in the open judgment in XX, the possibility that the death penalty might be applied to J1 is excluded by the side letters exchanged between the two governments on 16 and 27 December 2008. For the same reason, the possibility that J1 might be extradited to Uganda is also utterly far fetched – even if Ethiopian law permits the extradition of its citizens, about which the only evidence is that of Mr Debebe: that he has never heard of such a case.

[We have since been referred to Article 15 of the Ethiopian Nationality Proclamation 2003 which prohibits the extradition to another state of an Ethiopian national]

Article 8 and s55 Borders Citizenship and Immigration Act 2009

25. The appellant married his wife in January 2003. Both had converted to the Islamic faith. She had a five year old daughter, by another relationship, whom J1 immediately accepted as a child of his. They have four children of their own, twin girls born in 2006, a third girl, born in 2008 and a son born on 24 September 2010. Although his wife is of Ethiopian extraction, she has lived in the United Kingdom since the age of 15 or 16 and is now a British citizen. All five children are British citizens. She revisited Ethiopia in 2006, with her eldest daughter. Neither felt at home there. She has relatives in Ethiopia, but does not maintain regular contact with them. Ethiopia would clearly be an utterly foreign country for the four eldest children. Their material circumstances would be substantially worse than if they remained in the United Kingdom. She gave evidence about her family circumstances and her relationship with J1. She and the oldest three children clearly regard him as the fulcrum of their family life. Understandably, she does not wish, definitively, to face up to the dilemma which she would face if he were to be deported to Ethiopia. To go with him would impose upon her and her children the fact of going to live in uncongenial and straitened circumstances, with no-one at hand to help, especially if J1 were to be detained. There is a risk that her eldest daughter might go to live with her father's side of the family. To remain in England without J1 would be to require the children to grow up without their

father. Her evidence is characterised, correctly in our view, in Mr Otty's skeleton argument as moving. We are satisfied that it was truthful and sincere. It is confirmed, in detail, by the helpful report of Mrs Eleftheriadou, a psychologist and psychotherapist, dated 25 May 2011.

26. Mr Kovats submitted that two answers given by J1's wife should cause us to question her motives. Family life was, in one respect at least, unusual: they maintained separate flats. They discussed living together, but it did not happen because, she said, of (in)security. She also said that they contemplated going to live in a Muslim country – in Medina in Saudi Arabia. Mr Kovats suggested that the dominant element in her life was religion. We have no doubt that it is of great, even supreme importance for her. Nevertheless, its importance does not detract from her love for her family and its claims upon her.

27. The first three of Lord Bingham's questions in Razgar must be answered affirmatively: the deportation of J1 will interfere with the exercise of his and his family's right to respect for their family life. It will have consequences of such gravity as to engage the operation of Article 8. The interference will, however, be in accordance with the law. We take Lord Bingham's fourth and fifth questions together. The interference is necessary in a democratic society in the interests of national security – including the safety of the inhabitants for the time being of the United Kingdom. The various Islamist extremist groups in Somalia, in particular Al Shabaab and AQEA are a potent threat to the lives of those living in the Horn of Africa and neighbouring states, as the Kampala bombings demonstrate. An individual, such as J1, who has, from within the United Kingdom, provided support to such extremists, affords to them part of the means of carrying out terrorism related activity. That activity may not be confined to the Horn of Africa: during the hearing, there was a credible newspaper report of a list found on Harun Fazul, identifying two English targets: the Ritz Hotel in London and Eton College. Although we are not aware of any attack in the United Kingdom having yet been perpetrated by terrorists trained in Somalia (as opposed to Pakistan or Afghanistan), it may only be a matter of time before an attack by such a person is attempted. Cutting off a valuable source of support for those groups is necessary in the interests of national security. Further, there is no means other than deportation which might be as effective. Mr Otty canvasses the possibility of imposing a control order upon J1. Even if the disclosure requirements of Article 6 could be satisfied in J1's case a control order would be time limited. Deportation will permit the Secretary of State to exclude J1 from the United Kingdom for such a time as she considers necessary in the interests of national security – for life, if appropriate. No other method of control of the threat posed by him can have permanent effect. The consequences for his wife and children will, of course, be severe; but our judgment is that any step up to and including the permanent division of this family is justified and necessary to protect the United Kingdom from the threat to its national security posed by him. For the same reasons, although it is plainly not in the best interests of the children that he should be separated permanently from them or, if not, that they should accompany him to Ethiopia, their best interests are decisively outweighed by the requirements of national security.

Articles 20 and 21 of the Treaty on the Functioning of the European Union

28. Mr Otty submits that there is a qualified right, derived from the citizenship of J1's wife and children limiting the right of the United Kingdom to deport J1 if it deprives them of the genuine enjoyment of the substance of the rights conferred by virtue of that status: Zambrano v Office National de L'Emploi 8 March 2011 paragraph 42. We understand him to make that submission, primarily to take advantage of perceived procedural entitlements, principally as to disclosure of the national security case. There are a number of answers, any one of which would suffice to defeat this proposition. First, and fundamentally, to impose upon the United Kingdom procedural or other requirements which inhibit its protection of its national security would contravene Article 4.2 of the Treaty on European Union. Secondly, given that the right is qualified, the same considerations as dictate that the interests of the family must come second to those of national security under Article 8 and/or s55 of the Borders Citizenship and Immigration Act 2009, require their claims as citizens of the Union to take second place as well. Thirdly, their rights to residence and movement are not infringed by deportation of J1. In such circumstances, Article 21 TFEU is not applicable: McCarthy v SSHD 5 May 2011 paragraph 56.

Conclusion

29. For the reasons set out in the open and closed national security judgments and in this judgment, this appeal fails. There is a closed judgment on the issue of safety on return.