HOUSE OF LORDS

SESSION 2008–09

[2009] UKHL 10

on appeal from: [2007]EWCA Civ 808
[2008] EWCA Civ 290

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

RB (Algeria) (FC) and another (Appellants) *v* Secretary of State for the Home Department (Respondent)
OO (Jordan) (Original Respondent and Cross-appellant) *v* Secretary of State for the Home Department (Original Appellant and Cross-respondent)

Appellate Committee

Lord Phillips of Worth Matravers
Lord Hoffmann
Lord Hope of Craighead
Lord Brown of Eaton-under-Heywood
Lord Mance

Counsel

Appellant (RB):
Rabinder Singh QC
Hugh Southey
(Instructed by Fisher Meredith LLP)

Respondent: (RB):
Robin Tam QC
Robert Palmer
(Instructed by Treasury Solicitors)

Appellant: (U):
Richard Drabble QC
Raza Husain, Hugh Southey
(Instructed by Birnberg Peirce & Partners)

Original Respondent (OO):
Edward Fitzgerald QC
Guy Goodwin-Gill
Raza Husain, Danny Friedman
(Instructed by Birnberg Peirce & Partners)

Original Appellant (OO):
Michael Beloff QC
Robin Tam QC
Time Eicke, Andrew O'Connor, Alan Payne
(Instructed by Treasury Solicitors)

Special Advocates Counsel:
Martin Chamberlain (RB &U)
Angus McCullough (OO)
(Instructed by Treasury Solicitors' Special Advocates Support Office)

Interveners (Justice & Human Rights Watch) (RB & OO)
David Pannick QC
Helen Mountfield, Tom Hickman
(Instructed by Herbert Smith LLP)

Interveners (Liberty) (RB)
Ian Macdonald QC
Mark Henderson, Michelle Butler
(Instructed by Liberty)

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LORD PHILLIPS OF WORTH MATRAVERS

My Lords,

Introduction

1. These appeals relate to three men whom the Secretary of State for the Home Department wishes to deport on the ground that each is a danger to the national security of the United Kingdom. Each contends that the Secretary of State cannot do so because deportation will infringe his rights under the European Convention on Human Rights ('the Convention'). RB and U are Algerian nationals. They contend that deportation to Algeria will infringe their rights under article 3 of the Convention in that it will expose them to a real risk of torture or inhuman or degrading treatment. Mr Othman is a Jordanian national. He contends that if he is deported he will face a real risk of torture or inhuman or degrading treatment contrary to article 3 of the Convention, a real risk of a flagrant breach of his right to liberty under article 5 of the Convention and a real risk of a flagrant breach of his right to a fair trial under article 6 of the Convention, so that his deportation will infringe those three Convention rights.

2. An unsuccessful appeal against the order for his deportation was made by each to the Special Immigration Appeals Commission ('SIAC'). Appeals by RB and U against SIAC's decisions were made to the Court of Appeal. Insofar as is material to the present appeals they were dismissed. Mr Othman's appeal to the Court of Appeal was

allowed on the single ground that his deportation would infringe his right to a fair trial under article 6 of the Convention. I shall describe RB, U and Mr Othman collectively as 'the appellants', this being the status that each had before SIAC. RB and U's appeals to the House were heard immediately before the Secretary of State's appeal in relation to Mr Othman and a cross-appeal brought by Mr Othman. Liberty intervened in support of RB and U. The House received interventions on behalf of Justice and Human Rights Watch. There are common issues, which include issues as to the legitimacy of SIAC's procedures, and it is convenient to deliver a single judgment.

3. In each case closed material was put before SIAC, which gave open and closed judgments. The Court of Appeal considered the closed material and also gave open and closed judgments. The Secretary of State invited us to consider the closed judgments and some closed material. We decided that it was not necessary or appropriate to do so.

Background

4. The obligations imposed by the Convention relate primarily to the manner in which signatories treat those who are within their jurisdictions. The ECtHR has, however, made it clear that the act of deportation or extradition is capable of infringing Convention obligations by reason of the treatment that the individual is likely to receive in the country to which he is deported or extradited. In *Soering v United Kingdom* (1989) 11 EHRR 439 the court held:

> "90. It is not normally for the Convention institutions to pronounce on the existence or otherwise of potential violations of the Convention. However, where an applicant claims that a decision to extradite him would, if implemented, be contrary to article 3 by reason of its foreseeable consequences in the requesting country, a departure from this principle is necessary, in view of the serious and irreparable nature of the alleged suffering risked, in order to ensure the effectiveness of the safeguard provided by that article.
>
> 91. In sum, the decision by a contracting state to extradite a fugitive may give rise to an issue under article 3, and hence engage the responsibility of that state under the

> Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country."

The court went on to observe:

> "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."

5. In *R (Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 AC 323 at para 9 Lord Bingham of Cornhill coined the phrase "foreign cases" to describe those cases in which it is claimed that the conduct of a state in removing a person from its territory to another territory may lead to a violation of the person's Convention rights in that other territory. In this opinion I shall use that phrase in the same way.

6. *Chahal v United Kingdom* (1996) 23 EHRR 413 was another foreign case. Like *Soering* the Convention right that was engaged was article 3. Article 3 is an absolute right. The ECtHR made it plain that the question of whether Article 3 prevented deportation was not influenced by the ground of deportation, even if this were that the individual under threat of deportation ('the deportee') posed a threat to national security:

> "79. Article 3 enshrines one of the most fundamental values of democratic society. The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from

> it is permissible under Article 15 even in the event of a public emergency threatening the life of the nation.
>
> 80. The prohibition provided by Article 3 against ill-treatment is equally absolute in expulsion cases. Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion. In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration. The protection afforded by Article 3 is thus wider than that provided by Articles 32 and 33 of the United Nations 1951 Convention on the Status of Refugees."

7. In *Ullah* the question was raised whether deportation of an alien could infringe the Convention because of the risk of violation of a Convention right in the receiving country where that right arose not under article 3 but under some other Convention article. The ECtHR had stated in *Soering* that this possibility could not be excluded in the case of article 6. This House held that it could not be ruled out not merely in relation to article 6 but in relation to articles 2, 4, 5, 7, 8 and 9. The speeches emphasised that it was only in extreme cases that it was possible to envisage these rights being successfully invoked in foreign cases. Lord Steyn ended his speech with this comment:

> "It will be apparent from the review of Strasbourg jurisprudence that, where other articles may become engaged, a high threshold test will always have to be satisfied. It will be necessary to establish at least a real risk of a flagrant violation of the very essence of the right before other articles could become engaged."

8. This comment would seem well justified by the fact that, so far as I am aware, the ECtHR has not upheld a claim in any foreign case involving articles 4, 5, 6, 7, 8 or 9. Recently, however, this House upheld a claim in a foreign case where the right engaged was that arising under article 8 – *EM (Lebanon)(FC) v Secretary of State for the Home*

Department [2008] UKHL 64; [2008] 3 WLR 931. By invoking articles 5 and 6 Mr Othman invites the House to break further new ground.

9. In *Chahal* the ECtHR held that the possibility of judicial review of the Secretary of State's decision did not constitute the "effective remedy" required by Article 13 of the Convention. This was because the Secretary of State had based his decision on matters of national security that had not been disclosed to the deportee. The court accepted that disclosure that would harm national security could not be expected. It commented at para 142 that, where questions of national security were in issue, an "effective remedy" meant " 'a remedy that is as effective as can be', given the necessity of relying upon secret sources of information". At para 144 the court commended what it understood to be a procedure introduced in Canada:

> "…a Federal Court judge holds an *in camera* hearing of all the evidence, at which the applicant is provided with a statement summarising, as far as possible, the case against him or her and has the right to be represented and to call evidence. The confidentiality of security material is maintained by requiring such evidence to be examined in the absence of both the applicant and his or her representative. However, in these circumstances, their place is taken by a security-cleared counsel instructed by the court, who cross-examines the witnesses and generally assists the court to test the strength of the State's case. A summary of the evidence obtained by this procedure, with necessary deletions, is given to the applicant."

10. SIAC was created by the Special Immigration Appeals Commission Act 1997 ('the 1997 Act') in response to these observations. The object of that Act was to provide as effective a remedy as possible for those challenging immigration decisions that involved information which the Secretary of State considered should not be made public because disclosure would be contrary to the public interest. Amendments have been made to the Act by, among others, the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act').

11. Section 82 of the 2002 Act gives those adversely affected by immigration decisions, including decisions to deport, the right to challenge the decisions by an appeal to the Asylum and Immigration Tribunal ('AIT'). Section 84 sets out the grounds of appeal that may be

advanced. These include that removal of the appellant would be incompatible with the appellant's Convention rights. The right of appeal to the AIT is, however, subject to the provisions of section 97 of the Act. These preclude an appeal to the AIT where the Secretary of State's decision was taken wholly or partly on grounds of national security or wholly or partly in reliance on information which in the Secretary of State's opinion should not be made public in the interests of national security, the interests of the relationship between the United Kingdom and any other country, or otherwise in the public interest.

12. Where an appeal against a decision is precluded by these provisions a right of appeal lies instead, under section 2(1) of the 1997 Act, to SIAC. Schedule 1 to the Act provides for the appointment of members to SIAC by the Lord Chancellor. SIAC is deemed to be duly constituted if it consists of three or more members, at least one of whom holds or has held high judicial office, and at least one of whom is or has been a legally qualified member of the AIT. In practice SIAC customarily sits in a panel of three and the third member appointed is a person with experience in security matters.

13. Section 5 of the 1997 Act gives the Lord Chancellor the power to make rules. The following subsections of that section are of particular relevance:

> "(3) Rules under this section may, in particular –
>
> (a) make provision enabling proceedings before the Commission to take place without the appellant being given full particulars of the reasons for the decision which is the subject of the appeal,
>
> (b) make provision enabling the Commission to hold proceedings in the absence of any person, including the appellant and any legal representative appointed by him,
>
> (c) make provision about the functions in proceedings before the Commission of persons appointed under section 6 below, and
>
> (d) make provision enabling the Commission to give the appellant a summary of any evidence taken in his absence….

(6) In making rules under this section the Lord Chancellor shall have regard, in particular, to –

(a) the need to secure that decisions which are the subject of appeals are properly reviewed, and

(b) the need to secure that information is not disclosed contrary to the public interest."

14. The Lord Chancellor has made the Special Immigration Appeals Commission (Procedure) Rules 2003 ("the 2003 Rules") pursuant to section 5. These Rules have been amended, but at the time that the appeals of RB, U and Mr Othman were heard the original Rules were in force. Rule 4, which was headed "General duty of Commission", provided as follows:

"4(1) When exercising its functions, the Commission shall secure that information is not disclosed contrary to the interests of national security, the international relations of the United Kingdom, the detection and prevention of crime, or in any other circumstances where disclosure is likely to harm the public interest.

(2) Where these Rules require information not to be disclosed contrary to the public interest, that requirement is to be interpreted in accordance with paragraph (1).

(3) Subject to paragraphs (1) and (2), the Commission must satisfy itself that the material available to it enables it properly to determine proceedings."

15. The Rules go on to provide machinery to enable SIAC to give effect to these duties. Rule 34 provides for the appointment of Special Advocates. Rule 35 provides for the manner in which the Special Advocate is to perform his function of representing the interests of an appellant to SIAC. Rule 36 provides that the Special Advocate may communicate with the appellant or his representative up to the time that he is served with 'closed material' but not thereafter unless authorised so to do by SIAC. "Closed material" is defined by Rule 37(1) to mean material upon which the Secretary of State wishes to rely in any proceedings before the SIAC, but which the Secretary of State objects to disclosing to the appellant or his representative. Such material may only be relied upon if a special advocate has been appointed to represent the appellant's interests: Rule 37(2). When serving closed material upon the special advocate, the Secretary of State must also serve a statement of

the material in a form which can be served on the appellant, if and to the extent that it is possible to do so without disclosing information contrary to the public interest: Rule 37(3)(c).

16. Rule 38 provides for the procedure by which the Special Advocate may challenge the Secretary of State's objections to disclosure of the closed material. SIAC may uphold or overrule the Secretary of State's objection. If it overrules the objection, it may direct the Secretary of State to serve on the appellant all or part of the closed material which he has filed with the SIAC but not served on the appellant. In that event, the Secretary of State shall not be required to serve the material if he chooses not to rely upon it in the proceedings.

17. The procedures laid down by these rules have been supplemented by the Secretary of State by practices which were established at the time of the appeals with which your Lordships are concerned and which have since been inserted, by amendment, into the Rules. A wide search is carried out for 'exculpatory material', that is, material that will advance the case of an appellant or detract from the case of the Secretary of State. Exculpatory material is disclosed to the appellant save where this would not be in the public interest. In that event it is disclosed to the special advocate. Rule 38 applies to such material.

18. Section 7 of the 1997 Act confers a right of appeal to the Court of Appeal against a final determination of an appeal made by SIAC in England and Wales "on any question of law material to that determination".

SIAC's decision in relation to RB

19. RB left Algeria in 1992, but did not arrive in the United Kingdom until 4 May 1995. He was granted 6 months leave to enter. Contact with him was lost until February 1999 at which point he made a claim to asylum. This had not been resolved by September 2003 when he was arrested on charges that included offences under the Terrorism Act 2000. These charges were later withdrawn. He pleaded guilty to offences in relation to a false passport and was sentenced to three months imprisonment. On release in July 2004 on the expiration of his sentence he was granted temporary admission. On 15 September 2005 he was served with notice of the decision of the Secretary of State for the Home Department to deport him to Algeria on grounds of national

security, pursuant to section 3(5) of the Immigration Act 1971. He appealed against this decision to SIAC on the ground, among others, that if he returned to Algeria he faced a real risk of ill-treatment contrary to article 3 of the Convention ('article 3').

20. RB was arrested on 15 September 2005 after he was served with notice of the intention to deport him and remained detained until 22 April 2008 when SIAC ordered his release on conditional bail, which was not opposed by the Secretary of State.

21. SIAC held both open and closed hearings. Their decision was delivered by Mitting J on 5 December 2006 in open and closed judgments. SIAC's first finding was that RB was a threat to national security so that it would be in the public good for him to be deported. No reasons were given for this in the open judgment. SIAC explained that the reasons could only be discerned from the closed decision.

22. SIAC then turned to deal with the issue of 'safety on return'. Mitting J set out the test to be applied, based on *Chahal*: "whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to article 3 if removed to another state, the responsibility of the contracting state to safeguard him or her against such treatment is engaged in the event of expulsion". He commented that the assessment of risk was fact-specific and had to be related to the individual applicant. He then posed the question of what part assurances given by the receiving state could play in the evaluation of the risk. This, he said, was not a question of law but he none the less observed that the ECtHR had twice taken assurances into account in answering the basic question and once attached significance to the lack of such assurances (paragraph 4).

23. Mitting J stated that assurances given by the Algerian Government were central to the issue of safety on return. He then set out four conditions that had to be satisfied if the assurances were to carry the credibility necessary to permit RB's return to Algeria:

i) the terms of the assurances had to be such that, if they were fulfilled, the person returned would not be subjected to treatment contrary to Article 3;

ii) the assurances had to be given in good faith;

iii) there had to be a sound objective basis for believing that the assurances would be fulfilled;

iv) fulfilment of the assurances had to be capable of being verified.

The first two conditions were axiomatic. The third required a settled political will to fulfil the assurances allied to an objective national interest in doing so. It also required the state to be able to exercise an adequate degree of control over its agencies, including its security services, so that it would be in a position to make good its assurances. As to verification, this could be achieved by a number of means, both formal and informal, of which monitoring was only one. Effective verification was, however, an essential requirement. An assurance the fulfilment of which was incapable of being verified would be of little worth.

24. Mitting J then turned to consider the general situation in Algeria. This had been exhaustively summarised by SIAC in its open decision in the case of Y delivered on 24 August 2006 and SIAC accepted and adopted this in relation to RB. SIAC had found a general amelioration of a situation of insurgency in Algeria. On 14 August 2005 President Bouteflika had presented a Charter for Peace and National Reconciliation, which was implemented by an Ordonnance of 27 February 2006. Pursuant to this 2,500 detainees, including persons convicted of terrorist offences committed within Algeria, had been released. On 11 July 2006 the UK and Algeria had signed four conventions on extradition, judicial co-operation in civil and commercial matters, the circulation and readmission of persons and mutual legal assistance in criminal matters. President Bouteflika had acknowledged and approved a letter from the Prime Minister which included the statement that "this exchange of letters underscores the absolute commitment of our two governments to human rights and fundamental freedoms…" By longstanding diplomatic convention this amounted to a commitment on the part of the Algerian government to respect those rights.

25. Nonetheless, SIAC found that there was a residual risk that RB would be at risk of treatment at the hands of the security services that infringed article 3 were it not for assurances given by the Algerian authorities. The decisive issue was the worth of the Algerian Government's assurances in relation to RB. It was thus necessary to

consider the four conditions. As to the first SIAC referred to the relevant assurances, which were as follows:

> "By a note signed by Mohammed Amara, an Algerian High Court Judge seconded as personal advisor to the Minister of Justice, and under the seal of that Ministry, the Algerian authorities gave the following assurance:
>
> > "Should the above named person (RB) 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 this 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 detection;
> > h. his human dignity will be respected under all circumstances."

SIAC held that this last assurance, couched in universally understood diplomatic language, constituted an express assurance not to torture or ill-treat RB, so that the first condition was satisfied.

26. As to the second condition, SIAC held that the assurances were given in good faith, indeed there had been no assertion to the contrary.

27. Turning to the third condition, SIAC was satisfied that it was in the long term interest of the Algerian state to comply with the assurances given in respect of RB for the following reasons:

> "(i) For the reasons set out in Y, Algeria wishes to become, and to be accepted by the international community as, a normally-functioning civil society. To give and to break a solemn assurance given to another state would be incompatible with that ambition. So, too, would be a failure on the part of Central Government to ensure that its security services, at lower levels, did not frustrate them.
>
> (ii) There are significant and strengthening mutual ties between Algeria and the United Kingdom: UK investment in Algeria, said to be the largest of any foreign state; the supply and purchase of gas; the exchange of security and counterterrorism information; the assistance which the United Kingdom can give Algeria in its turn towards free enterprise and the use of the English language. Very considerable efforts have been made at the highest political levels on both sides to strengthen these ties. It is barely conceivable, let alone likely, that the Algerian Government would put them at risk by reneging on solemn assurances. Nor is there any reason to suppose that the British Government would turn a blind eye if they did. The safe and lawful return of persons found to be a threat to national security to their countries of origin is a high political priority of the British Government. If there were real grounds for believing that the assurances of the Algerian Government had been breached, the subsequent deportation of a person on national security grounds would be problematic or impossible. Further, the actions of the British Government would be undertaken in the knowledge that they would be scrutinised, in any subsequent case, by SIAC.

(iii) RB is, as Mr Tam puts it in his written closing submissions, a "small fish", by comparison with others who have been released by the Algerian authorities or allowed to return. He will return under the watchful gaze of the British Government, the British media and of non-governmental organisations such as Amnesty International. It would make no sense for the Algerian Government to renege on its assurances or even to fail to take steps to ensure that government agents at a lower level complied with them in the case of a man such as RB."

28. SIAC were also reassured by the absence of ill-treatment of two other Algerians who had been deported by the United Kingdom. One of these, in respect of whom similar assurances had been given, was alleged to have had involvement in terrorism (I shall refer further to these when describing SIAC's decision in relation to U). For these reasons SIAC were satisfied that the third condition was satisfied.

29. So far as the fourth condition was concerned, the United Kingdom government had sought to persuade the Algeria Government to agree to monitoring, but had not succeeded. For reasons given in the decision in relation to Y, SIAC concluded that there was nothing sinister in this. There were other ways in which the performance of the Algerian assurances could be verified. British Embassy officials would be permitted to maintain contact with RB, if not in detention, and prolonged detention would itself be indicative of a breach of the assurances. Amnesty International and other non-governmental agencies could be relied upon to find out if the assurances were breached and to publicise the fact. Accordingly SIAC found that the fourth condition was satisfied.

SIAC's decision in relation to U

30. U arrived in the United Kingdom on 29 November 1994 and claimed asylum. In late 1996 he went to Afghanistan, where he remained until the spring of 1999, when he returned to the United Kingdom. Asylum was refused on 27 June 2000. In February 2001 he was arrested and charged with an offence in the United Kingdom. That prosecution was discontinued in May 2001. He was released but re-arrested on immigration grounds. Within two months he was released on immigration bail but rearrested following an extradition request made by

the United States of America. That request was discontinued in June 2005. On 11 August 2005 he was served with notice of the Secretary of State's decision to deport him to Algeria on the grounds of national security, pursuant to section 3(5) of the Immigration Act 1971. Like RB, he appealed to SIAC on the ground, among others, that if he were deported to Algeria he would face a real risk of ill-treatment contrary to article 3. He was granted bail on 15 April 2008 and has remained on bail, subject to conditions.

31. SIAC was once again chaired by Mitting J and held both open and closed hearings. Their decision was delivered on 14 May 2007 in an open judgment and a closed judgment on the issue of safety on return.

32. On 7 November 2006 U waived his right to contest the Secretary of State's case that he posed a threat to national security without, however, making any admissions. This enabled SIAC to deal with the question of national security without the need for a closed judgment. It suffices to say that SIAC held that there were credible grounds for concluding that U had held a senior position in a Mujahedin training camp in Afghanistan, that he had had direct links with Usama Bin Laden and other senior Al Qa'eda figures and that he had been involved in supporting terrorist attacks including the planned attack on the Strasbourg Christmas market in 2000 and an earlier plan to attack Los Angeles airport. SIAC concluded that he posed a significant risk to national security.

33. Turning to the issue of safety on return, SIAC referred to assurances given in relation to U on 2 August 2006 by the Algerian Ministry of Justice that were in identical terms to those given in the case of RB. SIAC stated that they adopted the findings made in respect of Y and RB and one other Algerian applicant, G, in respect of the state of affairs in Algeria and the reliability of assurances given by the Algerian State. They went on to explain why evidence that had been adduced on behalf of U in relation to events that had occurred in Algeria since the decision in RB did not cause them to take a different view.

34. These events related to four Algerians who had been deported to Algeria in January 2007, each of whom had withdrawn appeals against deportation. Assurances identical to those given in relation to RB and to U had been given in relation to two of them and somewhat different assurances in relation to a third. Two of the men were detained pursuant to criminal proceedings that were brought against them on their return to

Algeria. Their lawyers reported to the lawyers acting for U that they had, while in their cells, heard noises that appeared to be caused by others being tortured in the vicinity. This evidence conflicted with other reports about the experience of the two men while in prison. SIAC accepted that if they had been deliberately exposed to the sounds of others actually being tortured, or pretending to be being tortured, that would be capable of amounting to inhuman or degrading treatment. SIAC were unable, however, on balance of probabilities, to conclude that such events had occurred.

35. SIAC concluded that the Algerian State had fulfilled to the letter those parts of its assurances that could be conclusively verified. While there was a possibility that two of the men might have heard the noises of others being tortured, or pretending to be being tortured, information had been available about them from a number of sources and this did not establish that there were substantial grounds for believing them to have been ill-treated. In these circumstances there were no substantial grounds for believing that U would be ill-treated if deported. His appeal was dismissed.

RB and U's appeals to the Court of Appeal

36. These appeals were heard together with that of a third similar appellant, Y or MT. Open and closed judgments of the court were delivered on 30 July 2007: *MT (Algeria), RB (Algeria), U (Algeria) v Secretary of State for the Home Departmen*t [2007] EWCA Civ 808; [2008] QB 533. The determinations of SIAC were quashed and the appeals remitted to them on closed grounds of appeal identified by the Special Advocates. SIAC rejected the remitted appeals on 2 November 2007 and applications for permission to appeal have been stayed pending the decision of your Lordships in the current appeals. In those appeals your Lordships are concerned with issues dealt with by the Court of Appeal in the open judgment in respect of which RB and U were unsuccessful.

37. The first such issue was whether it had been open to SIAC to use closed, as well as open, material in reaching their conclusions on safety on return. The court rejected the argument that article 3 imposed a procedural requirement that the appellants and their (open) advocates should see all the relevant material. They also rejected the argument that such a requirement was imposed by principles of legality and fairness under domestic law, observing that the statutory scheme made it quite

plain that Parliament intended that the particular procedure of SIAC, including the use of Special Advocates, should be employed in relation to the assessment of safety on return.

38. The second relevant issue related to the jurisdiction of the Court of Appeal. At the heart of RB and U's appeals was the contention that SIAC had erred in the significance that they had attached to the assurances of the Algerian Government. The Court of Appeal raised the question of whether they had jurisdiction to entertain this argument, having regard to the fact that the appellants only enjoyed a right of appeal on a question of law. Having heard argument the court concluded that the submissions advanced in relation to assurances went not to a question of law but to the issue of fact of whether there was a real risk that deportation would render the appellants subject to treatment proscribed by article 3. It followed that the court had no jurisdiction to entertain the attack made by the appellants on SIAC's findings.

39. Despite this finding, the Court of Appeal considered the attack made on the weight attached by SIAC to the assurances given by the Algerian government and rejected that attack. RB and U have sought to renew that attack before your Lordships.

SIAC's decision in relation to Mr Othman

40. SIAC's decision in relation to Mr Othman is 136 pages in length and it will be necessary to refer to parts of it in more detail in due course. At present I shall restrict myself to the short summary that is necessary to understand the issues raised before your Lordships.

41. Mr Othman, who is also known as Abu Qatada, was born in 1960 in Bethlehem, then administered as part of the Kingdom of Jordan. He arrived in the United Kingdom in 1993, having fled from Jordan and spent some time in Pakistan. He made an application for asylum on the ground that he had been tortured by the Jordanian authorities, a claim that SIAC accepted may well be true. His claim was successful and he was granted refugee status in 1994.

42. In April 1999 Mr Othman was convicted in Jordan in his absence of conspiracy to cause explosions, in a trial known as the 'Reform and Challenge' case. He was one of 13 defendants. He was sentenced to life

imprisonment. The case involved an alleged conspiracy to carry out bombings in Jordan which resulted in successful attacks on the American School and the Jerusalem Hotel. The trial took place before the State Security Court ('SSCt'), a military tribunal. Evidence against Mr Othman included an incriminating statement made to the State Prosecutor by a co-defendant, Mr Abdul Al Hamasher. Mr Al Hamasher was convicted and sentenced to life imprisonment. At the trial Mr Al Hamasher and a number of other defendants sought, unsuccessfully, to have reliance on their statements excluded on the ground that they had been obtained by torture.

43. In the autumn of 2000 Mr Othman was convicted in Jordan, again in his absence, in a case known as the 'Millennium Conspiracy', of conspiracy to cause explosions. The case against him included an incriminating statement made by a co-defendant, Mr Abu Hawsher to the State Prosecutor. Mr Othman was sentenced to 15 years imprisonment. Mr Abu Hawsher and other defendants alleged to be more deeply implicated in the conspiracy were convicted and sentenced to death. Once again he and other defendants sought unsuccessfully to have reliance on their statements excluded on the ground that they had been obtained by torture.

44. On 17 December 2001, pursuant to section 33 of the Anti-terrorism, Crime and Security Act 2001 ('the 2001 Act'), the Secretary of State certified that Mr Othman was not entitled to the protection of article 33(1) of the Refugee Convention because article 1(F) or article 33(2) applied to him and that his removal from the United Kingdom would be conducive to the public good. In October 2002 he was detained under the 2001 Act. He was released on bail by SIAC on 11 March 2005 and made subject to a control order, under the Prevention of Terrorism Act 2005, on the following day. That order remained in force until 11 August 2005.

45. On 10 August 2005 a Memorandum of Understanding ('MoU') was signed between the United Kingdom and Jordan. This contained the following assurances:

> "7. A returned person who is charged with an offence following his return will receive a fair and public hearing without undue delay by a competent, independent and impartial tribunal established by law. Judgment will be pronounced publicly, but the press and public may be

> excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
>
> 8. A returned person who is charged with an offence following his return will be allowed adequate time and facilities to prepare his defence, and will be permitted to examine or have examined the witnesses against him and to call and have examined witnesses on his behalf. He will be allowed to defend himself in person or through legal assistance of his own choosing, or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require."

An express undertaking was given that, if Mr Othman were deported to Jordan, the MoU would be applied in his case.

46. On 11 August 2005 Mr Othman was served with a notice of the Secretary of State's intention to deport him to Jordan on the ground that he was a threat to national security. He was detained pending deportation and remained detained until granted bail on 17 June 2008.

47. On 24 October 2005 the Adaleh Centre for Human Rights ('Adaleh') signed an agreement with the United Kingdom government under which it would monitor the due performance of the obligations undertaken by Jordan under the MoU.

48. Mr Othman's appeal to SIAC was heard over 5 days in May 2006 and the decision of SIAC, under the chair of Ouseley J, was delivered on 26 February 2007. SIAC held both open and closed hearings, the latter relating both to whether Mr Othman posed a danger to national security and to whether he could safely be returned to Jordan. SIAC delivered both open and closed judgments, but stated that the closed evidence and SIAC's conclusions on it were reflected in the open judgment.

49. Mr Othman advanced a number of grounds of appeal before SIAC. He challenged the Secretary of State's finding that his

deportation was justified on the grounds of national security, although he did not advance a positive case in relation to this issue. He contended that he was protected from deportation by his status as a refugee and, in particular, that article 1F of the Refugee Convention had no application on the facts of his case. He contended that his deportation would infringe his rights under articles 2, 3, 5, 6 and 8 of the Human Rights Convention and that it was an abuse of power to subject him to deportation. Not all of these contentions are pursued before your Lordships.

50. SIAC dismissed Mr Othman's appeal against deportation. So far as concerned the question of whether his deportation was justified by interests of national security they made findings of relevance not only to that issue but to the interest that the Jordanian authorities would pay to him on his deportation. Their conclusion was that he

> "… has given advice to many terrorist groups and individuals, whether formally a spiritual adviser to them or not. His reach and the depth of his influence in that respect is formidable, even incalculable. It is not a coincidence that his views were sought by them. He provides a religious justification for the acts of violence and terror which they wish to perpetrate; his views legitimised violent attacks on civilians, terrorist group attacks more generally, and suicide bombings. He may have spoken against some grosser excesses, but that does not go very far. Even if his views are sometimes couched in careful language, their import is clear to those who take notice of what he says and know how to interpret it. His views, scholarly in any conventional sense or not, are important to extremists seeking to justify violence."

51. This led SIAC to conclude that article 33(1) of the Refugee Convention, if it was applicable, could afford Mr Othman no protection against refoulement because he was a danger to the security of the United Kingdom and therefore fell within the exception in article 33(2). In the event, however, SIAC held that article 1F(c) had deprived Mr Othman of refugee status by reason of his terrorist activity since he was recognised as a refugee. Quite apart from these considerations, SIAC found, for reasons that I shall shortly explain, that there was no real risk that Mr Othman would be persecuted if he was returned to Jordan.

52. SIAC made the following findings in relation to those arguments based on the Convention that remain relevant to this appeal. So far as article 3 was concerned, in the absence of special circumstances there would have been a risk that Mr Othman's deportation would infringe his rights under article 3. There would have been a real risk that he would be ill-treated in custody. As it was, the fact that he would have a very high profile coupled with the MoU, and the diplomatic capital invested in it, meant that the Jordanian authorities were likely to make sure that he was not ill-treated in custody or when he emerged from it.

53. So far as article 5 was concerned, Mr Othman had argued that he would be exposed to the real risk of being detained without charge for as long as 50 days, for under Jordanian law detention without charge could be extended for that period. The MoU provided, however, that any individual detained had to be brought 'promptly' before a judge or other person authorised by law to determine the lawfulness of his detention. SIAC held that, in the case of Mr Othman, the likelihood was that this provision would result in Mr Othman being brought before a judicial authority within 48 hours. It was unlikely that the full 50 day period would be used. It followed that there was no real risk of a flagrant breach of Mr Othman's right to liberty under article 5.

54. The article that caused SIAC most concern was article 6. If deported Mr Othman faced a re-trial in respect of both charges on which he had been convicted in his absence. He made two objections to the trial process that he would face. The first was that he would be tried by the SSCt and that this was not an independent and impartial tribunal nor one before which the prosecutor would be independent and impartial. The second objection was that he would be at real risk of being convicted on the basis of the statements made by Mr Al Hamasher and Mr Abu Hawsher and that these statements had been obtained by torture.

55. SIAC accepted the submission that the SSCt and the prosecutor would not be independent. The judges and the prosecutor, while legally qualified, held military rank. They were appointed by and subject to removal by the executive. The fact that the prosecutor and the majority of the judges were part of the same military hierarchy did not add to the appearance of justice or independence.

56. So far as the incriminating statements were concerned, SIAC found that there was "at least a very real risk", albeit that they could not find that this was a probability, that these were obtained as a result of

treatment by officers of the General Intelligence Directorate ('GID') which "breached Article 3 ECHR" and which may or may not have amounted to torture. There was "a high probability" that such evidence would be admitted against Mr Othman and that it would be of considerable, perhaps decisive, importance against him.

57. SIAC found that Jordanian law did not permit evidence obtained involuntarily to be admitted, but that the onus lay on a defendant to prove that statements made to a State Prosecutor were other than voluntary. Mr Othman would be unlikely to discharge this onus for the following reasons:

> "Its judges have legal training and are career military lawyers. There is a very limited basis beyond that for saying that they would be partial, and that has not been the gravamen of the complaint. Their background may well make them sceptical about allegations of abuse by the GID affecting statements made to the Prosecutor. They may instinctively share the view that allegations of ill-treatment are a routine part of a defence case to excuse the incrimination of others. The legal framework is poorly geared to detecting and acting upon allegations of abuse. The way in which it approaches the admission of evidence, on the material we have, shows no careful scrutiny of potentially tainted evidence."

58. SIAC concluded that these matters had the result that Mr Othman's trial would be unfair by the standards of Article 6:

> "To us, the question comes back to whether or not it is unfair for the burden of proof in Jordan to lie where it does on this issue; we do not think that to be unfair in itself. However, this burden of proof appears to be unaccompanied by some of the basic protections against prior ill-treatment or means of assisting its proof eg video or other recording of questioning by the GID, limited periods of detention for questioning, invariable presence of lawyers, routine medical examination, assistance from the Court in calling relevant officials or doctors. The decisions are also made by a court which lacks independence and does not appear to examine closely or

> vigorously allegations of this nature. It is taking these points in combination which leads us to conclude that the trial would be likely to be unfair within Article 6 because of the way the allegations about involuntary statements would be considered."

59. SIAC held, however, that the authorities established that this was not enough to render the United Kingdom in breach of Article 6 by deporting Mr Othman to Jordan. The test was whether there was a real risk of a "total denial of the right to a fair trial". They concluded that when the picture of the trial was looked at as a whole this test was not satisfied. Aspects of the judicial system that weighed against a finding that there would be a total denial of a fair trial included the following:

> "The retrial would take place within a legally constructed framework covering the court system, the procedural rules and the offences. The civil law system contains aspects anyway which may seem strange to eyes adjusted to the common law, but which do not make a trial unfair. The charges relate to offences which are normal criminal offences rather than, as can happen, offences of a nature peculiar to authoritarian, theocratic, or repressive regimes. There is some evidence, if admitted, which would support the charges."

> "The Appellant would be present at the retrial. The trial would be in public and would be reported. Even with local media restrictions, its progress would be reported on satellite channels. He would be represented by a lawyer and at the public expense, if necessary. He would know of the charges and the evidence; indeed he already knows some of it. There would probably be a shortfall in time and facilities for the preparation of the defence on the general background evidence but the particular position of the Appellant would probably obtain for him better facilities and time than most Jordanian defendants."

> "The civil law system dossier or file does not mean that evidence cannot be challenged. It can be. The Appellant could give evidence and call witnesses, including those whose statements were in the dossier and who claim that they were involuntary. The fact that one possible witness has been executed for other offences, (not to prevent his

> giving evidence for he gave evidence at the first trial), does not show the trial system or the retrial to be unfair. His evidence could impact only tangentially, it would appear, on the Appellant's involvement. The difficulties which other witnesses may face, notably Abu Hawsher, would not make the retrial unfair."
>
> "The existence of a legal prohibition on the admissibility of such evidence cannot be ignored, nor the fact that the SSCt would hear evidence relating to the allegations. The role of the Court of Cassation in reviewing and at times overturning the conclusions of the SSCt on this issue is material."

Mr Othman's appeal to the Court of Appeal

60. Mr Othman's appeal to the Court of Appeal [2008] EWCA Civ 290; [2008] 3 WLR 798 succeeded on one point alone. The Court of Appeal, in a judgment delivered by Buxton LJ, held that deportation of Mr Othman to Jordan would involve a breach by the United Kingdom of Mr Othman's rights under article 6 of the Convention. SIAC had rightly held that such a breach would only arise if Mr Othman faced a real risk of a flagrant denial of a fair trial in Jordan, by which was meant the complete denial or nullification of the right to a fair trial. SIAC had, however, erred in law in concluding that this test was not satisfied. The critical factor was that the unfairness in issue related to the possible use of evidence obtained by torture. The Convention imposed a "fundamental, unconditional and non-derogable prohibition" against torture. A "high degree of assurance" was required in relation to proceedings in a foreign state before a person could lawfully be deported to face a trial that might involve evidence obtained by torture. Once there was "a very real risk" of evidence in breach of a fundamental prohibition of the Convention being adduced, it was necessary for SIAC to satisfy itself that there could be excluded the further risk that such evidence would be acted upon by the Jordanian court (paragraphs 48 to 51).

Issues in relation to Mr Othman

61. The issue raised before your Lordships by the Secretary of State's appeal is whether SIAC's conclusion in relation to Article 6 was correct.

Mr Othman has, however, raised by cross-appeal a number of further issues, namely:

> (i) Would Mr Othman's deportation to face a trial by a military court lacking institutional independence constitute a "flagrant denial of justice" so as to be prohibited by article 6?
>
> (ii) Would Mr Othman's deportation in the face of a power to detain him for 50 days incommunicado and without access to a lawyer constitute a "flagrant denial of the right to liberty" so as to be prohibited by article 5?
>
> (iii) Can individual assurances of a receiving state be relied upon where there is a pattern of human rights violations in the receiving state?
>
> (iv) Is it permissible for SIAC to rely on closed material when considering the issue of 'safety on return'?
>
> (v) Has article 1F(c) of the Refugee Convention any application to acts of a person after he has been granted refugee status?

The third and fourth issues are common to both appeals. There is a fifth common issue, raised by the appellants in the first appeal and by submissions advanced by Justice and Human Rights Watch in relation to both appeals. This is whether compatibility with the Convention is itself a question of law, so that on each appeal the Court of Appeal had an unrestricted jurisdiction to review the conclusion on that question reached by SIAC. I propose to consider the common issues before turning to the additional issues that arise in Mr Othman's case. It is logical to begin by addressing the jurisdiction issue.

The common issues

The jurisdiction of the Court of Appeal

62. The right to appeal to the Court of Appeal from a final determination of an appeal made by SIAC is stated by section 7 of the 1997 Act to be "on any question of law material to that determination". SIAC's determination involved the following stages. (1) SIAC had to direct themselves as to the appropriate test for a breach of the relevant article. (2) SIAC had to determine the relevant primary facts. (3) SIAC

had to determine whether those facts satisfied the appropriate test. There is no doubt but that the first stage involved a question of law. It is common ground that the second stage involved questions of fact against which there is no right of appeal. The dispute relates to the third stage. The appellants contend that the third stage involved determining a question of law. The Secretary of State contends that the relevant question was one of fact.

63. The following arguments were advanced by Mr Drabble QC and Mr Singh QC on behalf of the appellants and Mr Pannick QC, on behalf of the interveners Justice and Human Rights Watch. A broad approach must be adopted to the definition of what amounts to a 'question of law' in order to give effect to both the object and the express requirements of the Human Rights Act 1998. The object of the Act was to 'bring human rights home'; to ensure that human rights issues were determined within this jurisdiction rather than by the ECtHR in Strasbourg. In order to achieve this object the Court of Appeal must adopt the same approach to human rights issues as the Strasbourg Court. This obligation is also imposed by section 6(1) of the Act, which provides that "it is unlawful for a public authority to act in a way which is incompatible with a Convention right". The Court of Appeal is a public authority and thus has a statutory duty, when considering the proposals to deport the appellants, to ensure that their deportation does not involve any infringement of Convention rights. The judgment of the ECtHR in *Saadi v Italy* (application 37201/06) delivered on 28 February 2008 lays down the appropriate approach:

> "In determining whether substantial grounds have been shown for believing that there is a real risk of treatment incompatible with Article 3, the Court will take as its basis all the material placed before it or, if necessary, material obtained *proprio motu*….In cases such as the present the Court's examination of the existence of a real risk must necessarily be a rigorous one."

Your Lordships were referred to a number of authorities in support of this submission.

64. Neither the Convention nor the Human Rights Act requires the Court of Appeal to adopt the approach suggested. The requirement of the Convention is the same as that where a breach of the Convention has occurred, namely "an effective remedy before a national authority" – see

article 13. This was made plain by the ECtHR in *Chahal*, which had this to say about the requirements of article 13 in the present context:

> "151. In such cases, given the irreversible nature of the harm that might occur if the risk of ill-treatment materialised and the importance the Court attaches to Article 3, the notion of an effective remedy under Article 13 requires independent scrutiny of the claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3. This scrutiny must be carried out without regard to what the person may have done to warrant expulsion or to any perceived threat to the national security of the expelling State.
>
> 152. Such scrutiny need not be provided by a judicial authority but, if it is not, the powers and guarantees which it affords are relevant in determining whether the remedy before it is effective."

65. Thus the scrutiny that is required by the national authority does not have to be done by a court. Even less does it have to be subject to an appeal to a court. The United Kingdom has gone further to protect those facing deportation than the Convention requires. In SIAC it has instituted a specialist tribunal that by its composition is peculiarly well equipped to resolve the issues of fact that arise in the context of immigration decisions that involve issues of security and to apply the relevant law to the facts found. In addition a right to the Court of Appeal has been granted in relation to questions of law.

66. By restricting appeals to questions of law Parliament has deliberately circumscribed the review of SIAC's decisions that the Court of Appeal is permitted to undertake, so that it falls well short of the review that will be carried out if the case reaches the ECtHR, as described in *Saadi*. There is good reason for this. The length of SIAC's decision in *Othman's* case, and the time that it took to deliver, evidences the size of the task that a rigorous scrutiny of the material facts in a case such as this can involve. It makes sense to reserve such a task to a specialist tribunal without providing for a full merits review by an appellate court. That does, of course, mean that decisions of SIAC may be reversed at Strasbourg, either because the ECtHR makes a different assessment of the relevant facts or because additional relevant facts have come to that court's attention. This is a possibility that Parliament has chosen to accept.

67. The submission that section 6(1) of the Human Rights Act imposes a positive duty on the Court of Appeal to carry out a full review of SIAC's decision in order to ensure that there is no breach of Convention rights is unsound. The Court of Appeal is a creature of statute and its powers are those conferred by statute. Section 6(1) cannot be so interpreted as to require public authorities to act beyond their powers. Were there any doubt as to this it would be resolved by section 6(2).

68. This part of the appellants' case was founded in part on the following observations of Lord Bingham of Cornhill in *Huang v Secretary of State for the Home Department* [2007] UKHL 11; [2007] 2 AC 167:

> "In the Human Rights Act 1998 Parliament not only enabled but required the Convention rights set out in Schedule 1 to the Act (including article 8) to be given effect as a matter of domestic law in this country. It did so (section 2) by requiring courts or tribunals determining a question which had arisen in connection with a Convention right to take into account any relevant Strasbourg jurisprudence, by requiring legislation, where possible, to be read compatibly with Convention rights (section 3) and, most importantly, by declaring it unlawful (section 6) for a public authority to act in a way incompatible with a Convention right. Thus immigration officers, the appellate immigration authority and the courts, as public authorities (section 6(3)), act unlawfully if they do not (save in specified circumstances) act compatibly with a person's Convention right under article 8. The object is to ensure that public authorities should act to avert or rectify any violation of a Convention right, with the result that such rights would be effectively protected at home, thus (it was hoped) obviating or reducing the need for recourse to Strasbourg."

69. The appellants make far too much of these general observations. More pertinent is a subsequent passage in the speech of Lord Bingham where he draws a distinction between the role of the appellate immigration authority, which can be likened to the role of SIAC, and the role of a reviewing body:

> "These provisions, read purposively and in context, make it plain that the task of the appellate immigration authority, on an appeal on a Convention ground against a decision of the primary official decision-maker refusing leave to enter or remain in this country, is to decide whether the challenged decision is unlawful as incompatible with a Convention right or compatible and so lawful. It is not a secondary, reviewing, function dependent on establishing that the primary decision-maker misdirected himself or acted irrationally or was guilty of procedural impropriety. The appellate immigration authority must decide for itself whether the impugned decision is lawful and, if not, but only if not, reverse it."

The role of the Court of Appeal is, expressly, a secondary, reviewing, function limited by statute to questions of law.

70. The appellants sought to draw a parallel between assessing whether, on the facts, there is a real risk of a flagrant breach of a Convention right and applying a test of proportionality. As to the latter, Lord Bingham in *A v Secretary of State for the Home Department* [2005] 2 AC 68 had to determine whether the Court of Appeal could properly review, as a question of law, the conclusion reached by SIAC on the proportionality of the Derogation Order that permitted the detention of alien terrorist suspects. He remarked that the Court of Appeal had treated SIAC's decision as involving findings of fact and commented:

> "The European Court does not approach questions of proportionality as questions of pure fact: see, for example, *Smith and Grady v United Kingdom* 29 EHRR 493. Nor should domestic courts do so. The greater intensity of review now required in determining questions of proportionality, and the duty of the courts to protect Convention rights, would in my view be emasculated if a judgment at first instance on such a question were conclusively to preclude any further review."

71. Lord Bingham went on to hold that SIAC had erred in law. The reasons for this holding were, however, that "the reasons given by SIAC do not warrant its conclusion…I do not consider SIAC's conclusion as one to which it could properly come" (para 44). Lord Bingham was

reviewing not the weight that SIAC had given to primary facts, but the rationality of their conclusions. The Secretary of State has rightly not challenged the proposition that the question of whether SIAC's conclusions were irrational is open to review as involving a question of law.

72. The appellants further submitted that a principle advanced by Lord Bridge of Harwich in relation to the risk to life in *R v Secretary of State for the Home Department, Ex p Bugdaycay* [1987] AC 514 at p 531 was equally applicable to a risk of violation of article 3:

> "the resolution of any issue of fact and the exercise of any discretion in relation to an application for asylum as a refugee lie exclusively within the jurisdiction of the Secretary of State subject only to the court's power of review. The limitations on the scope of that power are well known and need not be restated here. Within those limitations the court must, I think, be entitled to subject an administrative decision to the more rigorous examination, to ensure that it is in no way flawed, according to the gravity of the issue which the decision determines. The most fundamental of all human rights is the individual's right to life and when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny."

Lord Bridge went on to hold, however, at p 532, that it was for the Secretary of State to decide as a matter of degree whether the danger posed to an asylum seeker, if returned, was sufficiently substantial to involve a potential breach of Article 33 of the Refugee Convention. Provided that he had asked himself that question and answered it negatively in the light of all the relevant evidence, the court could not interfere. That statement was made in the context of judicial review in a case that predated the Human Rights Act. It does, however, underline the fact that the assessment of whether a danger is sufficient to involve an infringement of a Convention right, albeit that the Convention was there the Refugee Convention, is a question of fact.

73. The significance of this conclusion in the context of these appeals is considerable. The Court of Appeal had no general power to review SIAC's conclusions that the facts that they had found did not amount to

a real risk of a flagrant breach of the relevant Convention rights. SIAC's conclusions could only be attacked on the ground that they failed to pay due regard to some rule of law, had regard to irrelevant matters, failed to have regard to relevant matters, or were otherwise irrational. Their decisions could also be attacked on the ground that their procedures had failed to meet requirements imposed by law. Such an attack raises the next issue that is common to both appeals.

The use of closed material

74. In this part of my judgment I shall refer to the 'use of closed material' as shorthand for the procedure by which SIAC hears evidence and submissions in closed session in which the interests of the deportee are represented by a special advocate. In *Secretary of State for the Home Department v MB and AF* [2007] UKHL 46; [2008] 1 AC 440 (see paras 26 and 27) two men who were subject to control orders attacked the use by the court of closed material in the hearings in which those orders were confirmed. The closed material had been used pursuant to rules of court introduced pursuant to the Schedule to the Prevention of Terrorism Act 2005 which provided by paragraph 4(2)(a) that such rules might

> "make provision enabling control order proceedings or relevant appeal proceedings to take place without full particulars of the reasons for decisions to which the proceedings relate being given to a relevant party to the proceedings or his legal representative (if he has one)…"

Your Lordships' House held, by a majority, that the proceedings were subject to the civil limb of article 6(1) of the Convention and that there were circumstances where the application of this provision and the rules made pursuant to it would not satisfy the requirements of that article. Accordingly it was necessary to 'read down' the provision and the rules by adding to them the qualification "except where to do so would be incompatible with the right of the controlled person to a fair trial".

75. Where an appeal against deportation is made to SIAC closed material may be considered in relation to a number of different issues. There may be an issue as to whether bail should be granted. There may be an issue as to whether the decision to deport can properly be justified on the ground of national security. There may be an issue as to safety on return. These issues engage different articles of the Convention which

may carry with them differing requirements as to procedural fairness. No issue arises on these appeals in relation to refusal of bail. Counsel for RB and U briefly sought before your Lordships to challenge the use of closed material in relation to the issue of whether there was good reason to deport each appellant on grounds of national security. No such challenge was made before SIAC or before the Court of Appeal. The challenge raises discrete issues, in respect of which your Lordships heard no argument. Not least of these is the implication of the fact that a decision to deport an alien does not, of itself, engage the Convention. In the case of U the challenge would also involve consideration of the facts of his case. Again no relevant submissions were made in respect of these. For these reasons I do not consider that your Lordships ought to entertain this challenge.

76. The challenge to the use of closed material that has properly been developed before your Lordships has related to the use of such material in relation to the issue of safety on return. It was submitted that the rule-making power conferred by section 5 of the 1997 Act authorised rules that permitted the use of closed material in the interests of national security but not in the wider public interest. Disclosure of evidence relating to safety on return would not be likely to affect national security. Rule 4 of the 2003 Rules, which had been relied upon to justify the admission of closed material in relation to safety on return, was *ultra vires*. A number of points were made in support of this submission. The first two were narrow points of statutory interpretation. First it was urged that the SIAC procedure was devised specifically to address the problem of sensitive material that related to national security. Secondly it was submitted that Parliament had been given an assurance that closed material would not be used save where this was necessary for national security. The final point ranged more widely. It was that, where article 3 was involved, the use of closed material was unfair, contrary to the principle of legality and incompatible with the Convention. Accordingly section 5 of the 1997 Act should be given a restrictive interpretation or 'read down' so as to preclude making a rule in the terms of Rule 4.

Is Rule 4 Ultra Vires?

77. The first point made on behalf of the appellants was founded on the decision of the ECtHR in *Chahal*, for it is common ground that the 1997 Act was a response to that decision. Mr Chahal had two different complaints. One was that he was detained pending deportation on grounds of national security and that he had no effective means of challenging this that complied with article 5(4) because material relating

to national security was not disclosed to him. The other was that he was being deported in circumstances where he would be likely to suffer torture and had no effective means of challenging that either.

78. As to the complaint in relation to article 5, the ECtHR held that, while the United Kingdom was under no obligation to justify its decision to expel Chahal, it could not lawfully detain him with a view to deportation, rather than grant him bail, without good reason. Where, as in his case, the United Kingdom sought to justify his detention on grounds of national security, article 5(4) required that he should be able to challenge his detention before a court. In relation to such proceedings the ECtHR said this:

> "The Court recognises that the use of confidential material may be unavoidable where national security is at stake. This does not mean, however, that the national authorities can be free from effective control by the domestic courts whenever they choose to assert that national security and terrorism are involved. The Court attaches significance to the fact that, as the intervenors pointed out in connection with Article 13, in Canada a more effective form of judicial control has been developed in cases of this type. This example illustrates that there are techniques which can be employed which both accommodate legitimate security concerns about the nature and sources of intelligence information and yet accord the individual a substantial measure of procedural justice."

79. So far as concerns Chahal's complaint in relation to article 3, I have already referred to the nature of the proceedings that the ECtHR stated would satisfy article 13. Significantly, the ECtHR commented: "The requirement of a remedy which is 'as effective as can be' is not appropriate in respect of a complaint that a person's deportation will expose him or her to a real risk of treatment in breach of Article 3, where the issues concerning national security are immaterial."

80. It thus seems clear that the ECtHR did not, in *Chahal*, envisage that there might be a need to cater for sensitive material in relation to the question of whether someone would, if deported, be exposed to treatment that would infringe article 3. The promoters of the 1997 Act in response to *Chahal* appear to have envisaged that closed material would only be used where national security required this. In the course of the

third reading of the Bill in the House of Commons, Mr O'Brien MP. junior Home Office minister said, in answer to a question from Mr Humfrey Malins :

> "The Hon. Gentleman asked for an assurance that matters not involving national security would not be heard in camera. I am sorry about the double negative there, but I give him that assurance. It is envisaged that matters would be heard in camera only when there is a need for secrecy for reasons of national security. Other matters would not be heard in camera."

81. It was submitted that this undertaking was admissible as an aid to the construction of section 5 of the 1997 Act under the principle in *Pepper v Hart* [1993] AC 593. The House in that case approved recourse to Hansard as an aid to construction only where legislation is ambiguous. I have been unable to detect any ambiguity in the terms of section 5. The wording of subsections (3) and (6) is clear and contains no hint that rules providing for closed hearings can only be made insofar as this is necessary in the interests of national security. It was suggested that there is a conflict between subsection (6)(a) and (6)(b) but I can see no incompatibility between them.

82. Rule 4 falls fairly and squarely within the power to make rules granted by section 5 of the 1997 Act. Neither the fact that the ECtHR in *Chahal* envisaged that it would only be necessary to use closed material where the interests of national security required this nor the assurance given to Parliament by the Junior Minister can have the effect of rendering Rule 4 *ultra vires.*

83. This conclusion makes it unnecessary to consider the implications of the fact that the terms of section 97 of the 2002 Act, coupled with section 2(1) of the 1997 Act, appear to show a clear intention on the part of Parliament that SIAC's procedures should be available to protect information that in the Secretary of State's opinion should not be made public not merely in the interests of national security but "in the interests of the relationship between the United Kingdom and another country, or otherwise in the public interest".

84. The third point founded on the statement of Lord Hoffmann in *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115 ('*Simms*') at 131E:

> "the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual."

It was submitted that article 3 of the Convention recognised a fundamental right that was not qualified or derogable. The use of closed material where this right was at stake was contrary to fundamental principles of fairness and was not acceptable. Section 5 of the 1997 Act should be so interpreted as to preclude this. One way of achieving this would be to adopt the approach of your Lordships' House in *MB and AF* and qualify rule 4, or alternatively section 5(3), by adding the following words "save where to do so would be incompatible with an appellant's Convention rights, or unfair". This submission is best considered in the context of the more general attack that was made of the use by SIAC of closed material, to which I now turn.

85. Mr Rabinder Singh QC submitted on behalf of RB and U that the use that SIAC had made of closed materials in this case was in conflict with the relevant requirements of procedural fairness. As to the precise nature of those requirements he advanced a number of different submissions. First he submitted that the appellants were taking proceedings to determine their civil rights, so that Article 6 entitled them to a fair hearing, applying the standard relevant to civil proceedings. Secondly he submitted that the proceedings were, in part, to determine the lawfulness of the appellants' detention, so that the requirements of article 5(4) applied. Thirdly he submitted that the right to liberty was itself a civil right, so that Article 6 applied for this reason also. Fourthly he submitted that the appellants' reputation was at stake and that this was a further reason why Article 6 applied.

86. For the Secretary of State Mr Tam QC submitted that Strasbourg authority established that immigration proceedings did not engage article 6. The applicable article of the Convention was article 13 which simply required the appellants to have "an effective remedy". This requirement was less exacting than that of either article 6 or article 5(4).

87. This last submission is supported by the statement of the ECtHR in *Chahal* that what article 13 requires in the context of deportation is independent scrutiny of the human rights claim, which need not be provided by a judicial authority. Article 13 is not, however, an article that has been incorporated into English law. No doubt those drafting the Human Rights Act considered that the remedies provided under the Act were enough to satisfy the obligation imposed by article 13.

88. In *In re S (Minors) (Care Order: Implementation of Care Plan*) [2002] UKHL 10 [2002] 2 AC 291 at paragraph 71 Lord Nicholls of Birkenhead held that the effect of the Human Rights Act was to convert Convention rights (in that case article 8) into civil rights. It would seem to follow from this that claims brought under the Human Rights Act attract the procedural standard of fairness that article 6 requires in relation to civil proceedings. For myself I have no difficulty with the argument that such a standard should apply in the case of someone who is resisting extradition or deportation on the ground that this will violate fundamental human rights. I would expect no less a standard to be required under the duty of fairness that arises at common law in relation to legal proceedings.

89. In the light of this finding, the question of whether article 5(4) applied to the appellants' claims would seem of only academic interest. The basis upon which Mr Singh sought to rely on article 5(4) was that at the time of the hearing before SIAC the appellants were detained with a view to deportation, as permitted by article 5(1)(f), and that, if their deportation was held to be unlawful, the right to detain them would fall away. I do not consider that this argument is sound. In *Chahal* the ECtHR held that the lawfulness of the detention of a person against whom action was being taken with a view to deportation did not depend upon whether the underlying decision to deport him could be justified nor upon whether it was reasonably considered necessary to prevent the person detained from committing an offence or fleeing. The court added that the lawfulness of detention required that the deprivation of liberty should be in keeping with the purposes of article 5 and that there had to be proceedings available to challenge the lawfulness of Mr Chahal's detention and to seek bail. Because the United Kingdom had sought to

justify Mr Chahal's detention on grounds of national security, the proceedings had to enable him to make an effective challenge of that alleged justification.

90. In the proceedings before SIAC neither of the appellants made an independent challenge of his detention as opposed to the decision to deport him. For this reason I do not consider that the procedural requirements of article 5(4) applied to those proceedings. For the same reason there is no merit in the argument that the appellants' right to liberty was in issue and that, in consequence, article 6 was engaged.

91. There is no need to say anything of Mr Singh's fourth point, not strenuously advanced, that because the appellants' reputations were in issue Article 6 applied.

92. I must confess to some unease at the exercise of attempting to identify, by reference to articles 5, 6 and 13, different tests for the procedural fairness to be looked for in the case of these appellants. In *MB* Lord Bingham discussed at some length whether the criminal or the civil limb of article 6(1) applied to control order proceedings. He concluded that the civil limb applied, but went on to observe that the civil limb should give rise to an entitlement to such measure of procedural protection as was commensurate with the gravity of the potential consequences – para 24. This seems to me to be the appropriate approach to the use of closed material in deportation proceedings. But it is not merely the potential consequences of deportation to which one must have regard. One must have regard to the justification for the use of closed material, the potential consequences of the use of closed material on the result of the proceedings and the potential consequences of the decision in those proceedings.

The justification for closed material

93. It was submitted on the part of the appellants that, while there might be justification for the use of closed material where its disclosure would be contrary to the interests of national security, there could be no justification for not disclosing material where disclosure would be contrary to the interests of the relationship between the United Kingdom and another country. I do not accept this submission. Where what is at issue is the safety on return of a deportee, the United Kingdom is likely to have a substantial body of information about conditions prevailing in

the country in question, including personal information about public figures and other individuals in that country, that has been obtained in circumstances, or in terms, that could, if made public, cause serious prejudice to relations between the United Kingdom and that country. It is in the public interest that diplomats should be free to make frank reports in the confidence that these will not be put into the public domain. It is also in the public interest that Ministers and officials in this country should be able to exchange information in confidence with their counterparts in other countries. For these reasons I consider that there are cogent considerations of policy that are capable of justifying the use of closed material provided that these considerations are not outweighed by the other relevant factors.

The potential consequences of the use of closed material on the result of the proceedings.

94. There may be two reasons why the use of closed material is open to objection. The first is that it is objectionable if a party to judicial proceedings is unaware of the case that he has to meet. The second is that it is objectionable if this ignorance prevents that party from meeting the case against him. Both objections are likely to be in play where closed material is used in control order proceedings. The reason for seeking a control order will be that the person affected – I shall call him the suspect – is suspected of being involved in terrorist activity. The closed material is likely to relate to the reasons for this suspicion. The consequence of not disclosing this information may be that the suspect has no idea of the case that is made against him. Insofar as he is the person to whom the information relates, he it is who is likely to be best placed to rebut it if it is untrue. His ability to defend himself will be seriously impaired, if not totally destroyed, if he is not told the case against him, and his special advocate may well be in no position to rebut the case made against him without obtaining the suspect's response to the closed material.

95. The same is not true of the position of a deportee. It is true that, if that deportee will be at real risk of a violation of his human rights on return to his own country, this is likely to be because of facts that are personal to him. The difference is that he will normally be aware of those facts and indeed he will be relying on them to establish the risk that he faces on his return. His situation is not that of an individual who is unaware of the case that is made against him. Indeed, so far as safety on return is concerned, the State does not have to make out a case against the deportee.

96. There may of course be circumstances in which the State does have information personal to the deportee of which the deportee is unaware that bears on the question of whether he will be safe on his return. The security services of the receiving State may have informed the security services of this country, in confidence, of reasons why they are anxious to get their hands on the deportee. If this is the case, however, it cannot be said that it is of critical importance to the result of the deportation proceedings that the deportee be aware of the suspicions of the receiving state so that he can rebut them. Whether those suspicions are well-founded or ill-founded will not be of much relevance when considering the safety of the deportee on return to his own country. Even if he is in a position to demonstrate that suspicions held about him by the receiving state are groundless, this will not have significant bearing on the risk that he will face on his return.

97. For these reasons no close comparison can be made between a deportee and a person who has been made subject to a control order. The same is true of another situation in which the propriety of the use of closed material has been an issue – where consideration is being given to the release of a prisoner on licence. Here what is in issue is the risk that the prisoner will pose if released. Once again, however, the facts that will be critical to that risk will be facts personal to the prisoner himself. If he is not aware of factual allegations about himself that bear on the risk that he poses he will not be in a position to rebut them.

98. In short, where safety on return is in issue it is not likely to be critically important for the advocate advancing the case of the deportee to be able to obtain input from the deportee in relation to the evidence that the deporting state wishes to remain closed. Your Lordships heard submissions from Mr Martin Chamberlain, as special advocate, and from Mr Pannick on the prejudice that is caused to a deportee by the use of closed material. So far as safety on return was concerned it was not submitted that it was essential that the deportee should himself be aware of this material in order to be able to respond to it. Rather the point was made that the closed material was likely to include evidence in respect of which the input of an appropriate expert witness was desirable. Because it was not practical to obtain such a witness with security clearance to see the material, the special advocate was not able adequately to counter the material relied on by the Secretary of State.

The consequences of the proceedings

99. A non-derogating control order places severe constraints on the ability of the person subject to it to enjoy the freedoms normally open to those who live in this country. It interferes seriously with his civil rights, albeit not to the extent of depriving him of his liberty. In contrast the deportation of a person who has no right to remain in this country involves, of itself, no interference with his civil rights. Where, however, the deportee alleges that there is a real risk that his rights under article 3 will be infringed if he is returned, the treatment that he alleges he faces will be more serious than that experienced by the person subject to the control order, and this may also be the case where a deportee alleges that he will be subject to a real risk of a flagrant breach of his right to a fair trial. Certainly Mr Othman faces a lengthy prison sentence if he is convicted on either of the charges that he faces.

100. When the relevant factors are weighed in the balance they do not persuade me that the use of closed material in relation to the issue of safety on return will necessarily render the process unfair or in breach of the principles of legality. Of most significance is the fact that ignorance on the part of the deportee of the closed material is unlikely to prejudice the conduct of his case. Accordingly I do not accept that the use of closed material in relation to the issue of safety on return is automatically precluded and that Rule 4 is *ultra vires*.

Must Rule 4 be read down?

101. It was argued on behalf of the appellants that, if the use of closed material in relation to the issue of safety on return was not always unfair and unlawful, in some cases it would be and that, in consequence, it was necessary to follow the example of this House in *MB* and read down Rule 4 so that it would not apply where incompatible with the right of the deportee to a fair trial. This submission requires consideration of why it was that in *MB* the House found it necessary to read down the relevant provisions of the Prevention of Terrorism Act 2005. The opinions in that case have given rise to difficulties that have led the Court of Appeal to give permission to appeal in another series of control order cases – *Secretary of State for the Home Department v AF and others* [2008] EWCA Civ 1148. The critical issue in those appeals was whether, applying *MB*, it was always essential that the gist, or irreducible minimum, of the case against the person subject to the control order should be disclosed to him. The Court of Appeal concluded that it was not. I make no comment on that conclusion. It was based, however, on the premise that the most important question was whether disclosure was necessary to enable the subject of the order to

meet the case against him. I have considered *MB* and reached the conclusion that it supports that premise. Thus Lord Bingham at para 35 said that SIAC's procedures were not a panacea because it did not enable the person subject to the order to brief his advocate on the weaknesses and vulnerability of adverse witnesses and indicate the evidence available by way of rebuttal. Baroness Hale concluded that it was necessary to read down the relevant provisions in order to deal with those few cases where it would otherwise be impossible to disclose to the controlled person the basis of the Secretary of State's suspicions against him in a way that would enable that person to give such answer as he might have – para 68. Lord Carswell referred to the extreme situation where the sole evidence adverse to the controlled person was closed material, so that his advocate could not take sufficient instructions to mount an effective challenge to the adverse allegations – para 85, and Lord Brown made observations to the same effect – para 90.

102. Is it possible to conceive of a situation where the use of closed material will conceal from the deportee the gist of the Secretary of State's case on safety on return with the result that it may not be possible to meet that case? I have already referred to the fact that the deportee is unlikely to have information to impart that will be critical to meeting the case of the Secretary of State in relation to safety on return. Quite apart from this, when SIAC's procedure is considered it is hard to conceive of a situation in which the deportee will not be well aware of the issues that relate to safety on return. The significant matters identified by Mr Chamberlain in relation to the appeals before us were the assurances upon which the Secretary of State relied in concluding that the appellants would not be subjected to inhuman treatment on return. This is an area that Ouseley J dealt with expressly in a lengthy interlocutory judgment delivered on 12 July 2006 dealing with applications by Mr Othman and another appellant, Y, in relation to the use of closed material:

> "Nonetheless, we wish to make one point clear, which emerged more clearly during the substantive appeals. It is our view that the SSHD cannot rely on any substantive assurance unless it is put into the open. It may be the case that encouraging or supportive comments, even if described as assurances by the Government's interlocutors, should remain in closed if for example they are steps en route to an agreement. But the key documents or conversations relied on to show that an Appellant's return would not breach the UK's international obligations

> or put him at risk of a death sentence or death penalty have to be in the open evidence. SIAC could not put weight on assurances which the giver was not prepared to make public; they would otherwise be deniable, or open to later misunderstanding; the fact of a breach would not be known to the public and the pressure which that might yield would be reduced. They must be available to be tested and recorded."

It follows that an appellant will be informed in some detail of any assurances relied upon by the Secretary of State as establishing that the appellant will be safe on return.

103. Submissions were made to SIAC at this interlocutory hearing that were similar to those that have been made to the House. SIAC dealt at some length with the submission that the use of closed material was unfair. SIAC pointed out that the 2003 Rules, to which I have referred earlier in this judgment, afford a substantial degree of protection to the deportee and are, in one respect, more favourable than those governing discovery in civil and criminal proceedings. The whole of the wide range of exculpatory material is disclosed, though some of it may only be disclosed to the special advocate, whereas in civil and criminal proceedings material protected by public interest immunity is not disclosed at all. Having considered all the relevant procedures I have concluded that they strike a fair balance between the public interest, to which SIAC is required to have regard, and the need to ensure that the hearing is fair.

104. These appeals have been conducted on the basis of the open evidence alone. The open evidence in relation to safety on return that was before SIAC gave detailed information to the appellants as to the Secretary of State's case in relation to that matter. I have considered the point made by Mr Chamberlain and Mr Pannick that there were practical problems in the way of obtaining expert witnesses to comment on the closed material. I do not consider that this rendered the procedure unfair. As Mr Tam pointed out, the Rules make provision for the special advocate to draw SIAC's attention to shortcomings in the evidence and invite the Commission to call for additional evidence. SIAC is an expert Tribunal and could be expected to make a realistic appraisal of the closed material in the light of the special advocate's submissions.

105. For all these reasons I would reject the appellants' contention that they have been denied a fair trial by reason of the use of closed material. Furthermore no requirement has been demonstrated to read down Rule 4 in order to accommodate situations where the use of closed material in relation to safety on return will conflict with the procedural requirements of the Convention.

Reliance on assurances

106. This part of the case is concerned with what are sometimes described as 'diplomatic assurances'. That phrase is capable of misleading if applied to inter-governmental discussions at the highest level and I shall refer simply to assurances.

107. The Secretary of State accepted that neither Algeria, in the case of RB and U, nor Jordan, in the case of Mr Othman, was a country to which the appellants could safely have been returned had the United Kingdom not received assurances from the respective Governments as to the way in which they would be treated. In the case of RB and U SIAC held that, having particular regard to the assurances that had been given, the individual appellants would not face a real risk of treatment of a kind covered by article 3 (I shall refer to this hereafter as inhuman treatment) if returned to his own country. Before the Court of Appeal RB and U sought to challenge this finding, but the court held that it had no jurisdiction to reconsider it as the finding was one of fact, not law. Nonetheless the Court of Appeal considered the merits of the challenge and expressed the view that the criticism of SIAC's decision was unfounded.

108. The picture in relation to Mr Othman is more complex. The assurances in his case, which were contained in a Memorandum of Understanding ('MOU') covered all human rights but dealt specifically with treatment if detained, promptness of judicial process and fairness of any trial. SIAC's judgment extends to some 130 pages in length. SIAC referred repeatedly to the influence of the MOU and found this significant, but it does not seem that this was critical to reducing the risk of inhuman treatment to an acceptable level, for SIAC expressed the following conclusion in relation to the effectiveness of the MOU

> "It is in this context that we examine the effect of the MOU and the monitoring provisions. First, the conclusions

> which we have reached about the treatment which the Appellant would experience on return, and the lack of a real risk of a breach of Article 3 at that stage, are reinforced by their existence. We expect the MOU to have some influence on the way in which the legal procedures pre-trial are carried out. The MOU and monitoring reinforce our conclusions about other risks, although we have not relied on them as the crucial components which make what would otherwise be a real risk of a breach of Article 3 into something less."

109. Mr Othman sought to challenge before the Court of Appeal the reliance that SIAC had placed on the assurances given by Jordan that he would not be subjected to inhuman treatment. The court followed the decision in *RB and U* in holding that SIAC's decision was not open to attack as a matter of principle and also summarily dismissed the suggestion that SIAC's decision was irrational.

110. Before the House counsel for RB and U submitted that it was irrational and unlawful for SIAC to rely on assurances for two independent reasons: first because Algeria had not been prepared to agree to independent monitoring of the manner in which the appellants would be treated; secondly because, on their true construction, the assurances did not promise that the appellants would not be subjected to inhuman treatment. Counsel for Mr Othman submitted that, as a matter of principle, assurances could not be relied upon where there was a pattern of human rights violations in the receiving State coupled with a culture of impunity for the State agents in the security service and the persons who perpetrated these violations. It was further submitted that in all the circumstances SIAC's reliance on the assurances that had been given was irrational.

111. These submissions were supported by all three interveners. They advanced a further argument of principle. They submitted that once it was accepted that there was a continuing risk of inhuman treatment in a country, assurances could not be relied upon unless their effect was to remove all risk of ill-treatment. I propose to deal at the outset with the submissions that there are principles of law that govern whether reliance can be placed on assurances in relation to safety on return.

112. The starting point is *Chahal.* In that case the ECtHR referred to the relevant test for ascertaining whether expulsion will violate article 3,

namely whether there are substantial grounds for believing that the person in question, if expelled, will face a real risk of being subjected to treatment contrary to article 3. In contending that there was no such risk the United Kingdom had relied on the fact that they had sought and received assurances from the Indian Government. The court referred to the fact that despite the efforts of the Government and the courts the violation of human rights by the security forces remained prevalent and commented that it was not persuaded that the assurances "would provide Mr Chahal with an adequate guarantee of safety". The court did not specify what it meant by an "*adequate* guarantee". Counsel for the appellants equated the phrase to an absolute guarantee. Counsel for the Secretary of State submitted that it was enough if the guarantee removed the substantial grounds that might otherwise exist for believing that there was a real risk of inhuman treatment. In *Mamatkulov v Turkey* (2005) 41 EHRR 494 the ECtHR was not satisfied that Turkey had violated article 3 in permitting the extradition of the applicant to Uzbekistan and, in reaching that conclusion, had regard to the fact that the Government of Uzbekistan had given assurances against ill-treatment. In this case the existence of assurances was treated by the court as part of the matrix that had to be considered when deciding whether there were substantial grounds for believing in the existence of a real risk of inhuman treatment. The ECtHR applied a similar approach in *Shamayev v Georgia and Russia (*application 36378/02 judgment of 12 April 2005) as did the United Nations Committee Against Torture in *Hanan Attia v Sweden* (17 November 2003, Communication No. 199/2002).

113. Counsel for RB and U relied on *Saadi v Italy*, where at para 129 the ECtHR spoke of the requirement of the deporting Government to "dispel any doubts" about the safety of the deportee. They also referred to two recent claims against Russia where the court spoke of the need for diplomatic assurances to "ensure adequate protection against the risk of ill-treatment where reliable sources had reported practices resorted to or tolerated by the authorities which were manifestly contrary to the principles of the Convention" *–Ismoilov and others v Russia* (application no 2947/06) paragraph 127 and *Ryabikin v Russia* (application no 8320/04) paragraph 119.

114. I do not consider that these decisions establish a principle that assurances must eliminate all risk of inhuman treatment before they can be relied upon. It is obvious that if a State seeks to rely on assurances that are given by a country with a record for disregarding fundamental human rights it will need to show that there is good reason to treat the assurances as providing a reliable guarantee that the deportee will not be

subjected to such treatment. If, however, after consideration of all the relevant circumstances of which assurances form part, there are no substantial grounds for believing that a deportee will be at real risk of inhuman treatment, there will be no basis for holding that deportation will violate article 3.

115. That said, there is an abundance of material that supports the proposition that assurances should be treated with scepticism if they are given by a country where inhuman treatment by State agents is endemic. This comes close to the 'Catch 22' proposition that if you need to ask for assurances you cannot rely on them. If a State is unwilling or unable to comply with the obligations of international law in relation to the avoidance and prevention of inhuman treatment, how can it be trusted to be willing or able to give effect to an undertaking that an individual deportee will not be subject to such treatment?

116. Much of the material to which I have referred is summarised in the decision of de Montigny J, sitting in the Federal Court of Canada, in *Sing v Canada (Minister of Citizenship and Immigration)* 2007 FC 361. He referred to the joint report of Amnesty International, Human Rights Watch and the International Commission of Jurists of December 2 2005; Tribunal Record, vol 1, pages 179-223, which stated that diplomatic assurances were not an effective safeguard against torture, and to the report to the UN General Assembly of September 1 2004 of the UN Special Rapporteur on Torture (UN Document A/59/324). The latter urged the importance of verification of assurances, including effective monitoring, something that is particularly difficult as a person in detention may be understandably reluctant to complain to a monitor of torture or inhuman treatment. These are matters that counsel for the appellants urged before your Lordships.

117. *Sing* was a claim for judicial review and, when considering the standard of review, Montigny J remarked that the evaluation of the reliability of a diplomatic assurance was a question of fact reviewable on the standard of patent unreasonableness. He referred to the following passage in the judgment of the Supreme Court in *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3 at paragraph 39:

> "As mentioned earlier, whether there is a substantial risk of torture if Suresh is deported is a threshold question. The threshold question here is in large part a fact-driven

> inquiry. It requires consideration of the human rights record of the home state, the personal risk faced by the claimant, any assurances that the claimant will not be tortured and their worth and, in that respect, the ability of the home state to control its own security forces, and more. It may also involve a reassessment of the refugee's initial claim and a determination of whether a third country is willing to accept the refugee. Such issues are largely outside the realm of expertise of reviewing courts and possess a negligible legal dimension."

This passage expresses my reaction to the suggestion that SIAC's conclusions in relation to assurances give rise to issues of law. The only ground upon which those conclusions can be attacked on an appeal restricted to questions of law is irrationality.

Was SIAC's decision in relation to RB and U irrational?

118. In considering this question it is right to bear in mind the material to which I have referred that emphasises the reasons why assurances are unlikely to be reliable. With article 3 rights in issue SIAC could be expected to scrutinise with great care the Secretary of State's contention that assurances from the Algerian Government sufficed to remove the substantial grounds that would otherwise exist for believing that the appellants would be at real risk of inhuman treatment if sent back to Algeria. It is also right, however, to bear in mind the following comments of Baroness Hale in relation to an appeal on questions of law from an expert Tribunal – in that case the Asylum and Immigration Tribunal - in *AH (Sudan) v Secretary of State for the Home Department (UNHCR intervening)* [2007] UKHL 49; [2008] 1 AC 678:

> "This is an expert tribunal charged with administering a complex area of law in challenging circumstances. To paraphrase a view I have expressed about such expert tribunals in another context, the ordinary courts should approach appeals from them with an appropriate degree of caution; it is probable that in understanding and applying the law in their specialised field the tribunal will have got it right: see *Cooke v Secretary of State for Social Security* [2002] 3 All ER 279, para 16. They and they alone are the judges of the facts. It is not enough that their decision on those facts may seem harsh to people who have not heard

> and read the evidence and arguments which they have heard and read. Their decisions should be respected unless it is quite clear that they have misdirected themselves in law. Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently."

119. That passage was cited by the Court of Appeal when rejecting an appeal by the Secretary of State from the decision of SIAC in *AS and DD (Libya) v Secretary of State for the Home Department (Liberty intervening)* [2008] EWCA Civ 289. SIAC had allowed appeals by AS and DD against deportation to Libya for reasons of national security. The ground of appeal that succeeded was that there were substantial grounds for believing that they faced a real risk of inhuman treatment if sent back to Libya. The Secretary of State had sought, unsuccessfully, to rely upon assurances in a memorandum of understanding concluded between the United Kingdom and Libya. A witness, whose experience and integrity SIAC commended, had given evidence that it was "well nigh unthinkable" that Libya would break that undertaking. Notwithstanding this SIAC concluded that the memorandum of understanding was not sufficiently reliable. Applying the approach of the ECtHR in *Saadi* the Court of Appeal held that:

> "Consistently with that approach, it was for SIAC to examine whether the assurances given by Libya, in their practical application, were a sufficient guarantee that the respondents would be protected against torture. The weight to be given to the assurances depended upon the facts of this particular case. It can thus be seen that the exercise upon which SIAC was embarking was an investigation of fact, leading to a conclusion of fact. In our judgment, if SIAC made any error (and we do not divine one), it was an error of fact and not an error of law."

120. In *AS and DD* SIAC applied with care the test originally laid down in *Chahal.* Are RB and U correct to contend that the results that SIAC reached in their cases were irrational? The weight to be attached to assurances was a question that different divisions of SIAC had to consider four times in relation to Algeria, once in respect of Y, once in respect of RB, once in respect of G and once in respect of U. The later decisions built on the earlier ones and in the final case of U SIAC had

regard to the experience of four Algerians who had been repatriated to Algeria.

121. When considering RB and U's appeals the Court of Appeal considered the individual attacks that had been made on SIAC's findings of fact and found them without merit. I have none the less considered SIAC's decisions to see whether, having regard to the obligation on the Secretary of State to show good reason for treating Algeria's assurances as reliable, SIAC's conclusions are irrational.

122. The foundation of SIAC's decisions in relation to RB and U is to be found in their judgment, delivered by Ouseley J, in the case of Y on 24 August 2006 (Appeal No. SC/36/2005). This judgment extended to 416 paragraphs and it dealt in detail with the obtaining of assurances by the British Government. The context in which these were obtained was the desire of the Government to establish a means of returning terrorist suspects to their countries of origin without violation of the requirements of Article 3 of the Convention. In the case of Algeria this led to negotiations at the highest level, including discussions between the Prime Minister and President Bouteflika of Algeria. These negotiations ultimately resulted in assurances being given in relation to Y and also the assurances given in respect of RB and U that I set out earlier in this opinion. As I have already observed, the phrase 'diplomatic assurances' does not accurately reflect assurances obtained in such circumstances. That phrase more adequately describes routine assurances offered as a matter of course by State authorities seeking extradition, such as those considered by the ECtHR in *Ismoilov* and *Ryabikin.*

123. I have described earlier in this opinion the consideration given by SIAC to the reliance that could be placed on the Algerian assurances. This had particular regard to the general conditions in Algeria at the time that the assurances were given, the attitude of the Algerian authorities to the observance of human rights, the degree of control exercised by the Algerian authorities over the DRS, the internal security service, and the manner in which the performance of the assurances could be verified. SIAC paid careful regard to all relevant matters and applied to them the proper test of whether they amounted to substantial grounds for believing that RB and U would be at real risk of inhuman treatment if returned to Algeria.

124. SIAC gave consideration to the reasons why Algeria was not prepared to agree to monitoring and concluded that this was not indicative of bad faith and that there were alternative ways of ascertaining whether there was compliance with the assurances. These conclusions were not irrational. The contention that the assurances did not, on their true construction, protect against inhuman treatment was not well founded.

125. For these reasons the irrationality challenge to SIAC's conclusions does not succeed. I would reject the appeals brought by RB and U.

Was SIAC's decision in relation to Mr Othman's article 3 challenge irrational?

126. The attack made by counsel for Mr Othman on SIAC's conclusions in relation to article 3 was essentially founded on the weight that SIAC had given to the assurances in the MOU. Just as in the case of Algeria, these assurances were agreed in principle at the highest level in discussions between the Prime Minister and the King of Jordan and between the Foreign Secretary and the Jordanian Foreign Minister. SIAC considered in depth the way that Mr Othman was likely to be treated before his trial, during the trial process and after it. The conclusion reached was that there were not substantial grounds for believing that there was a real risk that Mr Othman would be subjected to inhuman treatment. The MOU was not critical to this conclusion. SIAC commented that the political realities in Jordan and the bilateral diplomatic relationship mattered more than the terminology of the assurances. The former matters, and the fact that Mr Othman would have a high public profile, were the most significant factors in SIAC's assessment of article 3 risk. Study of SIAC's lengthy and detailed reasoning discloses no irrationality.

The additional issues raised in the Othman appeal.

The ambit of article 1F(c) of the Refugee Convention

127. Article 1F of the Refugee Convention provides:

> "The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
> (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
> (c) he has been guilty of acts contrary to the purposes and principles of the United Nations."

The Secretary of State has determined that the provisions of the Convention ceased to apply to Mr Othman when, subsequent to his admission to this country as a refugee, he committed acts contrary to the purposes and principles of the United Nations. Mr Othman challenged this finding before SIAC on the ground that article 1F(c) of the Convention applied only to acts committed before his admission to this country. He relied upon the decision of the Canadian Supreme Court in *Pushpanathan v Canada* (MC1) [1998] 1 SCR 982, at para 58:

> "…the general purpose of Article 1F is not the protection of the society of refuge from dangerous refugees, whether because of acts committed before or after the presentation of a refugee claim; that purpose is served by Article 33 of the Convention. Rather, it is to exclude ab initio those who are not bona fide refugees at the time of their claim for refugee status… The relevant criterion here is the time at which refugee status is obtained. In other words, Article 1F(c) being referable to the recognition of refugee status, any act performed before a person has obtained that status must be considered relevant pursuant to Article 1F(c)."

128. SIAC dealt with this issue at paragraphs 94 to 103 of its judgment. They declined to follow *Pushpanathan.* SIAC held that the fact that the words "prior to his admission to that country", which qualify article 1F(b), were not included in article 1F(a) or (c) was deliberate and that there was no reason of policy for extending them to (a) or (c). In so holding they applied the decision of the Immigration and Appeal Tribunal in *KK (Turkey) v Secretary of State for the Home Department* [2004] UKIAT 00101. They held that Mr Othman's conduct

since coming to this country deprived him of the protection afforded by the Refugee Convention.

129. I am persuaded by SIAC's reasoning and, accordingly, find against Mr Othman on this point. The point is, however, academic. As SIAC went on to find, had Mr Othman been entitled to invoke the provisions of the Refugee Convention in general he would have been prevented from relying upon the prohibition of refoulement imposed by article 33(1) by reason of the proviso in article 33(2).

Risk of violation of article 5

130. In resisting deportation on the ground that his article 5 right will be threatened in Jordan Mr Othman, through Mr Fitzgerald QC, has accepted that he must establish that there are substantial grounds for believing that, if deported, he will face a real risk of a flagrant breach of that article. He argued that SIAC erred in law in not finding that there were substantial grounds for believing that such a real risk would exist. SIAC found at para 373 that although Jordanian law requires that the police notify the legal authorities of an arrest within 48 hours, and that formal charges be brought within 15 days of arrest, those time limits are regularly and lawfully extended by courts at the request of the prosecutor, in stages of up to 15 days, up to a maximum of 50 days. It would not be incompatible therefore with Jordanian law for the appellant to be held in detention for 50 days without being physically brought before a Court before being charged. Mr Fitzgerald submitted that the risk of being detained without charge for 50 days constituted a real risk of a flagrant violation of article 5.

131. There is a short answer to this point. SIAC found as a fact that it was unlikely that the Jordanian authorities would seek to exercise the power to detain Mr Othman for 50 days before charge. The likelihood was that he would be charged within 48 hours. On this finding there did not exist substantial grounds for believing that Mr Othman would, if deported, be held without charge for 50 days.

132. Even if there were substantial grounds for such a belief, 50 days detention would not constitute a "flagrant breach" of article 5 within the meaning of that phrase as used in foreign Convention rights cases. In that context a "flagrant breach" is a breach whose consequences are so severe that they override the right of a state to expel an alien from its

territory. In describing such a breach of article 5 in *Ullah* at para 43 Lord Steyn gave by way of example arbitrary detention for many years. The risk of detention for 50 days falls far short of satisfying the "flagrant breach" test. Article 5 has, as I shall show, greater relevance in the context of the Secretary of State's appeal against the Court of Appeal's finding that SIAC erred in law in failing to hold that article 6 precluded Mr Othman's deportation.

"Flagrant breach of article 6"

133. I have described earlier the origin of the phrase "flagrant breach" in relation to foreign Convention cases and expressed the view that, where article 5 is engaged, the potential consequence of a breach of that article must be severe before the breach can properly be described as flagrant. This approach to the meaning of "flagrant breach" should pose little difficulty where the right engaged is substantive. It is not so easy where the right arises under article 6, for that right is not substantive but procedural. As there is no reported foreign case where article 6 has successfully been invoked, there is a lack of authoritative guidance as to what will amount to a "flagrant breach" of that article. In *Mamatkulov* a minority of the Grand Chamber consisting of judges Bratza, Bonello and Hedigan dissented from the majority on the question of whether the extradition of the applicants had violated article 6(1). The majority found that the test, namely "the risk of a flagrant denial of justice in the country of destination", had not been satisfied. The minority considered that it had and, without dissenting as to the test, formulated it in somewhat greater detail at para O-III 14:

> "While the court has not to date found that the expulsion or extradition of an individual violated, or would if carried out violate, article 6 of the Convention, it has on frequent occasions held that such a possibility cannot be excluded where the person being expelled has suffered or risks suffering a flagrant denial of a fair trial in the receiving country. What constitutes a 'flagrant' denial of justice has not been fully explained in the court's jurisprudence but the use of the adjective is clearly intended to impose a stringent test of unfairness going beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of article 6 if occurring within the Contracting State itself. As the court has emphasised, article 1 cannot be read as justifying a general principle to the effect that 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. In our view, what the word 'flagrant' is intended to convey is a breach of the principles of fair trial guaranteed by article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that article."

134. In *EM* at para 34 Lord Bingham of Cornhill referred to this passage with approval in the context of a claim founded on article 8. He went on in para 35 to commend the way that the Attorney General for the Secretary of State had put the test in argument in *Ullah* at p. 337D:

> "If other articles can be engaged the threshold test will require a flagrant breach of the relevant right, such as will completely deny or nullify the right in the destination country: see *Devaseelan v Secretary of State for the Home Department* [2003] Imm AR 1. A serious or discriminatory interference with the right protected would be insufficient."

135. SIAC adopted this test when considering Mr Othman's case. They held that to succeed under article 6 he needed to establish "a real risk of a total denial of the right to a fair trial" para 451. The Court of Appeal also held at paragraphs 15 to 19 of the judgment in Mr Othman's appeal that the test was whether there had been a "complete denial or nullification of the Convention right."

136. This is neither an easy nor an adequate test of whether article 6 should bar the deportation of an alien. In the first place it is not easy to postulate what amounts to "a complete denial or nullification of the right to a fair trial" That phrase cannot require that every aspect of the trial process should be unfair. A trial that is fair in part may be no more acceptable than the curate's egg. What is required is that the deficiency or deficiencies in the trial process should be such as fundamentally to destroy the fairness of the prospective trial.

137. In the second place, the fact that the deportee may find himself subject in the receiving country to a legal process that is blatantly unfair cannot, of itself, justify placing an embargo on his deportation. The

focus must be not simply on the unfairness of the trial process but on its potential consequences. An unfair trial is likely to lead to the violation of substantive human rights and the extent of that prospective violation must plainly be an important factor in deciding whether deportation is precluded.

138. A conviction that results from a flagrantly unfair trial cannot be relied upon under article 5(1)(a) as justifying detention.

> "It is the Convention organs' case law that the requirement of Art.5(1)(a) that a person be lawfully detained after "conviction by a competent court" does not imply that the Court has to subject the proceedings leading to that conviction to a comprehensive scrutiny and verify whether they have fully complied with all the requirements of Art.6 of the Convention. However, the Court has also held that if a "conviction" is the result of proceedings which were a "flagrant denial of justice", that is were "manifestly contrary to the provisions of Article 6 or the principles embodied therein", the resulting deprivation of liberty would not be justified under Art.5(1)(a)."– *Stoichkov v Bulgaria* (2005) 44 EHRR 276.

Nor can such a conviction justify the imposition and execution of the death penalty. In either case the breach of the procedural rights guaranteed by article 6 will result in a breach of a substantive right. If an alien is to avoid deportation because he faces unfair legal process in the receiving state he must show that there are substantial grounds for believing that there is a real risk not merely that he will suffer a flagrant breach of his article 6 rights, but that the consequence will be a serious violation of a substantive right or rights. Quite how serious that violation must be has yet to be made clear by the Strasbourg jurisprudence. Plainly a sentence of death will be sufficient but the ECtHR has expressed doubts as to whether the risk of violation of article 5 can suffice to prevent the expulsion of an alien. In *Tomic v United Kingdom* (application no. 17837/03) an admissibility decision of 14 October 2003, the court commented:

> "The Court does not exclude that an issue might exceptionally be raised under Article 6 by an expulsion decision in circumstances where the person being expelled has suffered or risks suffering a flagrant denial of a fair

> trial in the receiving country, particularly where there is the risk of execution (see, *mutatis mutandis*, *Soering v United Kingdom*, [(1989) 11 EHRR 439], § 113; *Ocalan v Turkey*, [(2005) 41 EHRR 985], §§ 199-213). Whether an issue could be raised by the prospect of arbitrary detention contrary to Article 5 is even less clear."

A similar comment was made in *Z and T v United Kingdom* (application no. 27034/05) decision of 28 February 2006.

139. In *Mamatkulov* the Grand Chamber was prepared to contemplate, and the minority to find, a violation of article 6 in circumstances where the extradition of the applicants had resulted in lengthy prison sentences. A different approach will, however, be appropriate in an extradition case. There it is the prospective trial that is relied on to justify the deportation. If there is a real risk that the trial will be flagrantly unfair, that is likely to be enough of itself to prevent extradition regardless of the likely consequences of the unfair trial.

140. In *Bader v Sweden* (2005) 46 EHRR 1497 the applicant successfully resisted deportation on the ground that if sent back to Syria he would be at risk of being executed pursuant to a trial that had been held in his absence. He relied on articles 2 and 3, but did not expressly aver a breach of article 6. Such a breach was, however, a necessary element in his case in relation to articles 2 and 3. At para 42 the ECtHR observed that to implement a death sentence following an unfair trial would violate article 2 and continued:

> "Moreover, to impose a death sentence on a person after an unfair trial would generate, in circumstances where there exists a real possibility that the sentence will be enforced, a significant degree of human anguish and fear, bringing the treatment within the scope of Art.3 of the Convention.
>
> In this connection it should also be noted that the Court has acknowledged that an issue might exceptionally be raised under Art.6 of the Convention 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.

> It follows that an issue may arise under Arts 2 and 3 of the Convention if a contracting state deports an alien who has suffered or risks suffering a flagrant denial of a fair trial in the receiving State, the outcome of which was or is likely to be the death penalty."

This decision exemplifies the approach of considering in combination the risk of a violation of Article 6 and articles guaranteeing substantive rights, the articles in question being 2 and 3. Although there is no authority that establishes this, I think that it is likely that the Strasbourg Court would hold article 6 and article 5 to be violated if an applicant were to be deported in circumstances where there were substantial grounds for believing that he would face a real risk of a flagrantly unfair trial and that the defects in the trial would lead to conviction and a sentence of many years imprisonment.

141. In summary, the Strasbourg jurisprudence, tentative though it is, has led me to these conclusions. Before the deportation of an alien will be capable of violating article 6 there must be substantial grounds for believing that there is a real risk (i) that there will be a fundamental breach of the principles of a fair trial guaranteed by article 6 and (ii) that this failure will lead to a miscarriage of justice that itself constitutes a flagrant violation of the victim's fundamental rights. I turn to consider, having regard to this test, whether SIAC erred in law in concluding that Article 6 posed no bar to Mr Othman's deportation.

142. The potential consequences to Mr Othman of conviction of the offences for which he will be tried have already been established by the trials that took place in his absence: life imprisonment in the first instance and fifteen years imprisonment in the other. These consequences are, I believe, sufficiently severe to satisfy the second limb of the test. The vital issue that SIAC had to address was whether there were substantial grounds for believing that Mr Othman faced a real risk of a fundamental breach of the principles of a fair trial as recognised by the Strasbourg court.

SIAC's findings

143. I have summarised SIAC's relevant findings of fact earlier in this opinion. There were two aspects of Mr Othman's prospective trial in Jordan that they found would, in a domestic context, be likely in

combination to result in an unfair trial under article 6. The first was the composition of the court. The second was the approach of the court to the admission of evidence that might have been induced by inhuman treatment or even by torture.

The composition of the court

144. As to the composition of the court, the SSCt, it would consist of three judges, of whom the presiding judge and at least one other would be senior military officers, serving in the army as lawyers. The third judge would probably be a civilian. The state prosecutors would also be military officers, part of the same military hierarchy. In Jordan, as in other countries, the prosecutors are considered to be part of the judiciary. The judges would have no security of tenure and would be subject to being replaced by executive decision. They would be subject to the influence of the executive. While not independent there was no reason to suspect them of partiality. Convictions were not a foregone conclusion before the SSCt. There had in the past been a number of acquittals and successful appeals to the Court of Cassation. That was a civil court with jurisdiction to review the decisions of the SSCt on both law and fact.

145. Such a court would not have satisfied the article 6 requirement of an "independent and impartial tribunal". The approach of the ECtHR to such tribunals is apparent from the following passage from the judgment in *Ergin v Turkey (No 6)* (application no. 47533/99) decision of 4 May 2006 (citations excluded):

> "42.The Court observes that it cannot be contended that the Convention absolutely excludes the jurisdiction of military courts to try cases in which civilians are implicated. However, the existence of such a jurisdiction should be subjected to particularly careful scrutiny.
>
> 43. Moreover, the Court has attached importance in numerous previous judgments to the fact that a civilian has had to appear before a court composed, if only in part, of members of the armed forces…. It has held that such a situation seriously undermined the confidence that courts ought to inspire in a democratic society.

> 44. That concern, which is all the more valid when a court is composed solely of military judges, leads the Court to affirm that only in very exceptional circumstances could the determination of criminal charges against civilians in such courts be held to be compatible with article 6."

146. While in a domestic case the composition of the SSCt would violate article 6, it does not follow that this would, of itself, constitute a flagrant breach of article 6 sufficient to prevent deportation in a foreign case. The Court of Appeal considered this question at paragraphs 33 to 42 of its judgment and, in agreement with SIAC, concluded that it would not. I have reached the same conclusion and would endorse the reasoning on this point of the Court of Appeal.

The admission of evidence that may have been obtained by torture

147. SIAC found that Mr Othman would be tried on the basis of the dossiers that had been placed before the court on the two occasions when he was convicted in his absence. These included confessions made by others that had incriminated Mr Othman. The confessions were made to the Public Prosecutor, but the makers alleged that they had been made consequent upon coercion of the makers and their families when detained by the GID that took the form of torture and inhuman treatment.

148. SIAC made the following findings in relation to the admission of confessions under Jordanian criminal procedure. It is illegal to obtain evidence by coercion. The Public Prosecutor cannot adduce confessions made to others unless he proves that they were made willingly. Where, however, confessions are made to the Public Prosecutor they can be admitted in evidence unless the makers prove that they were made as a consequence of prior coercion. The admission of the confessions that implicated Mr Othman had been challenged, unsuccessfully, before both the SSCt and the Court of Cassation in the previous trials.

149. SIAC made the following findings about these confessions. There was a real risk that the confessions were obtained by treatment that breached article 3, possibly amounting to torture. It would be open to Mr Othman to challenge the admission of these confessions, but the high probability was that the challenge would not succeed and that the

confessions would be admitted. If so, they would be of considerable, perhaps decisive, importance against him.

150. SIAC did not consider that the fact that the burden of proof would be on Mr Othman to prove that the confessions were obtained by coercion was itself unfair. I have summarised earlier at paragraph 58 the features that SIAC considered amounted, cumulatively, to unfairness of the trial. They were the absence of precautions of a type common in this jurisdiction against obtaining evidence by duress and the fact that the court, lacking independence, might be reluctant to accept the possibility that the confessions had been obtained by coercion and would not examine such allegations closely or vigorously.

151. SIAC referred to the evidential difficulties of proving that the confessions were obtained by torture or inhuman treatment and summarised the position as follows at para 422:

> "However, with whatever deficiencies the legal system may have in terms of the burden of proof, the availability of evidence or in terms of judicial attitude towards such allegations, whether correct, sceptical, naïve or even indifferent, the admission of that evidence would be the consequence of a judicial decision, within a system at least on its face intended to exclude evidence which was not given voluntarily. We cannot say that that decision, on that burden of proof, would probably be wrong; still less that it would be manifestly unreasonable or arbitrary. Nor can we say that the original decisions on the admissibility of the evidence were wrong or manifestly unreasonable or arbitrary."

The conclusions of the Court of Appeal

152. SIAC concluded that the shortcomings that I have summarised, when viewed in the context of the trial process as a whole, did not amount to a "total denial of the right to a fair trial". The Court of Appeal held that, in so concluding, SIAC erred in law. The reasoning of the Court of Appeal appears from the following key passages in the judgment of Buxton LJ:

"45…. Counsel for the Secretary of State said that it was no part of his submission to say that if it is clear that a trial will take place on the basis of evidence obtained under torture, whether of the individual themselves, or third parties, that that would not involve flagrant denial of justice.

. . .

48. The use of evidence obtained by torture is prohibited in Convention law not just because that will make the trial unfair, but also and more particularly because of the connexion of the issue with article 3, a fundamental, unconditional and non-derogable prohibition that stands at the centre of the Convention protections. As the ECtHR put it in §105 of its judgment in *Jalloh v Germany* 44 EHRR 667:

> Incriminating evidence-whether in the form of a confession or real evidence-obtained as a result of acts of violence or brutality or other forms of treatment which can be characterised as torture-should never be relied on as proof of the victim's guilt, irrespective of its probative value. Any other conclusion would only serve to legitimate indirectly the sort of morally reprehensible conduct which the authors of Art.3 of the Convention sought to proscribe or, as it was so well put in the US Supreme Court's judgment in the *Rochin* case 342 US 165, "to afford brutality the cloak of law."

That view, that the use of evidence obtained by torture of ill-treatment is prohibited not just, or indeed primarily, because of its likely unreliability, but rather because the state must stand firm against the conduct that has produced the evidence, is universally recognised both within and outside Convention law. What is, with respect, a particularly strong statement to that effect, citing a multitude of equally strongly worded authorities, is to be found in §17 of the speech of Lord Bingham in *A v Home Secretary (No2)* [2006] 2 AC 221.

49. SIAC was wrong not to recognise this crucial difference between breaches of article 6 based on this ground and breaches of article 6 based simply on defects

> in the trial process or in the composition of the court. Rather, in its conclusions in §§ 442-452 of its determination, that are set out in § 32 above, it treated the possible use of evidence obtained by torture *pari passu* with complaints about the independence of the court: see in particular SIAC at §§449-450. That caused it not to recognise the high degree of assurance that is required in relation to proceedings in a foreign state before a person may lawfully be deported to face a trial that may involve evidence obtained by torture."

Conclusions

153. No criticism can be made of Buxton LJ's statement of the fundamental prohibition of the admission of evidence obtained by torture and the reasons for this. I do not accept, however, the conclusion that he has derived from this, namely that it required a high degree of assurance that evidence obtained by torture would not be used in the proceedings in Jordan before it would be lawful to deport Mr Othman to face those proceedings. As Buxton LJ observed, the prohibition on receiving evidence obtained by torture is not primarily because such evidence is unreliable or because the reception of the evidence will make the trial unfair. Rather it is because "the state must stand firm against the conduct that has produced the evidence". That principle applies to the state in which an attempt is made to adduce such evidence. It does not require this state, the United Kingdom, to retain in this country to the detriment of national security a terrorist suspect unless it has a high degree of assurance that evidence obtained by torture will not be adduced against him in Jordan. What is relevant in this appeal is the degree of risk that Mr Othman will suffer a flagrant denial of justice if he is deported to Jordan. As my noble and learned friend Lord Hoffmann said in *Montgomery v H M Advocate* [2003] 1 AC 641, 649

> "…an accused who is convicted on evidence obtained from him by torture has not had a fair trial. But the breach of article 6(1) lies not in the use of torture (which is, separately, a breach of article 3) but in the reception of the evidence by the court for the purposes of determining the charge".

154. The issue before SIAC was whether there were reasonable grounds for believing that if Mr Othman were deported to Jordan the

criminal trial that he would there face would have defects of such significance as fundamentally to destroy the fairness of his trial or, as SIAC put it, to amount to a total denial of the right to a fair trial. SIAC concluded that the deficiencies that SIAC had identified did not meet that exacting test. I do not find that in reaching this conclusion SIAC erred in law.

155. For these reasons I would allow the Secretary of State's appeal.

LORD HOFFMANN

My Lords,

156. In these appeals the Secretary of State has made orders for the deportation of three aliens on the ground that it would be conducive to the public good (sections 3(5)(b) and 5(1) of the Immigration Act 1971). Two are Algerians who have been identified in these proceedings as RB and U. The third is Mohammed Othman, also known as Abu Qatada, who is of Jordanian nationality. When speaking of all three, I shall call them the aliens. They have challenged the deportation orders by appeal to the Special Immigration Appeals Commission ("SIAC").

The Aliens

157. RB entered the country in 1995 as a visitor with leave to stay for 6 months and claimed asylum when arrested in 1999. The Secretary of State's decision letter alleges that he has been closely associated with Islamist extremists in Algeria and a terrorist cell in London. U arrived via France in 1994 and claimed asylum, which was refused in 2000. Meanwhile, he had gone to Afghanistan, where the Secretary of State alleges that he held a high position in training camps for Mujahedin volunteers and had direct links to Al Qa'eda leaders. He is said to have been directly implicated in supporting terrorist plots, including a planned attack on the Strasbourg Christmas market in 2000. Abu Qatada arrived in the United Kingdom in 1993, when he was granted asylum on the ground that he had been tortured in Jordan. The decision letter alleges that he is a leading spiritual adviser and fundraiser for Islamist terrorist cells including the Al Qa'eda network. He has been twice

convicted in his absence by a Jordanian court of participation in terrorist conspiracies to cause explosions in that country.

The grounds of challenge

158. All three aliens claim that deportation to their respective countries of nationality would violate their rights under article 3 of the European Convention on Human Rights (not to be subjected to torture or inhuman or degrading treatment) because there is a real risk that they would be tortured by the Algerian and Jordanian authorities respectively. Abu Qatada, who is likely to be retried in Jordan for the terrorist offences for which he has already been convicted in his absence, also claims that he would be deprived of his liberty by unreasonably lengthy detention incommunicado pending trial, contrary to article 5, and would not receive a fair trial, contrary to article 6, because the Jordanian military court which tries him will not be independent of the government and is likely to receive the evidence of witnesses who had been tortured. He also claims that his deportation would be contrary to the UN Convention relating to the Status of Refugees. The Secretary of State's position is that although the records of both Algeria and Jordan might ordinarily suggest that there is a substantial risk that terrorist suspects would indeed be tortured, Her Majesty's Government has been given specific assurances on the point which makes it unlikely that these three aliens will suffer ill treatment. SIAC dismissed all three appeals. As for the complaints under articles 5 and 6, the Secretary of State submits that these are relevant to the question of deportation only so far as there would be a "flagrant denial" of the rights in question and that any departure in Jordan from the standards required by articles 5 and 6 would not be sufficiently extreme. The Refugee Convention argument raises a short point of construction. SIAC dismissed all three appeals.

159. The Court of Appeal affirmed the decisions of SIAC under article 3 but upheld the appeal of Abu Qatada on the sole ground that evidence obtained by torture was likely to be used against him at his trial. His other grounds of appeal were dismissed. The Algerian aliens appeal to your Lordships' House and the Secretary of State appeals against the decision in favour of Abu Qatada, while he cross-appeals against the dismissal of his case under article 3 and the rejection of his other complaints under articles 5 and 6 and the Refugee Convention.

SIAC: The use of closed material

160. In addition to the points raised before SIAC and the Court of Appeal, all three aliens submit to your Lordships that SIAC was not entitled to rely upon closed material, that is to say, material which the aliens and their advisers were not allowed to see. This is a radical submission because SIAC was set up as a court which could rely upon closed material. The 1997 Act was passed in response to the decision of the European Court of Human Rights (ECHR) in *Chahal v United Kingdom* (1997) 23 EHRR 413. At the time that case was decided, there was no appeal against a deportation order made on the ground that it was conducive to the public good, or against detention pending deportation pursuant to such an order: see section 15(3) of the 1971 Act. The alien could only make representations to the Secretary of State's advisory committee. The ECHR held that the absence of any appeal or other effective remedy by an alien who was held in detention pending deportation on national security grounds infringed his rights under articles 5(4) ("Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court") and 13 ("Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy") of the Convention.

161. Although the ECHR recognised that "the use of confidential material may be unavoidable where national security is at stake" (paragraph 131) it said that techniques could be employed which accommodated legitimate security concerns and yet accorded the individual "a substantial measure of procedural justice" (*ibid*.) As an example of such a technique, it commended the procedure which had been developed by the Canadian Security Intelligence Review Committee, in the exercise of its supervisory powers over deportation on grounds of national security. This procedure, sketched in paragraph 144 of the judgment in *Chahal*, is more fully described in paragraphs 71-74 of the judgment of McLachlin CJ in *Charkaoui v Minister of Citizenship and Immigration* [2007] SCC 9.

162. The Canadian procedure is clearly recognisable as a prototype of the procedure created by the 1997 Act and the Special Immigration Appeals Commission (Procedure) Rules 2003 SI No 1034 ("the rules") made under powers conferred upon the Lord Chancellor by section 5 of the Act. By subsection (3), such rules may —

> "(a) make provision enabling proceedings before the Commission to take place without the appellant being given full particulars of the reasons for the decision which is the subject of the appeal,
>
> (b) make provision enabling the Commission to hold proceedings in the absence of any person, including the appellant and any legal representative appointed by him…

163. Section 6 enables the Attorney-General to appoint "a person to represent the interests of an appellant in any proceedings" before SIAC and the Lord Chancellor may under section 5(3)(c) make rules about the functions of such person, who is referred to in the rules as a "special advocate".

164. Rule 4, under the heading "General duty of Commission", makes its priorities clear:

> "4. –(1) When exercising its functions, the Commission shall secure that information is not disclosed contrary to the interests of national security, the international relations of the United Kingdom, the detection and prevention of crime, or in any other circumstances where disclosure is likely to harm the public interest.
>
> (2) Where these Rules require information not to be disclosed contrary to the public interest, that requirement is to be interpreted in accordance with paragraph (1).
>
> (3) Subject to paragraphs (1) and (2), the Commission must satisfy itself that the material available to it enables it properly to determine proceedings."

165. Rule 35 says that the functions of the special advocate are to cross-examine witnesses and make submissions to the Commission at any hearings from which the appellant and his representatives are excluded. If the Secretary of State wishes to object to disclosure to the appellant of any material upon which he proposes to rely ("closed material") he must give notice to the special advocate (rule 37) and, after hearing submissions, the Commission must then decide whether disclosure would be contrary to the public interest and, if so, uphold the objection (rule 38). After being served with closed material the special advocate cannot communicate with the appellant except with the leave

of the Commission (rule 36(2)) and the closed material is put before the tribunal in a private session from which the appellant and his advisers are excluded (rule 43).

166. In all three cases SIAC relied to a greater or lesser extent upon closed material, both in relation to the question of whether the deportation was conducive to the public good ("the national security issue") and the question of whether the alien was at risk of suffering torture or degrading or inhuman treatment ("the safety on return issue"). Indeed, in the case of RB the decision of SIAC on the national security issue was founded entirely on closed evidence (see paragraph 1 of the judgment of Mitting J of 5 December 2006).

167. The arguments of the aliens against the use of closed material in their cases take two forms. First, it is submitted by RB and U that a decision based on closed material, whether as to national security or safety on return, may be inconsistent with their right to a fair hearing under article 6 of the Convention. Whether it is or not depends on the facts of the case. They say that their cases should therefore be remitted to SIAC to decide whether, in each case the use of the closed material denied them a fair hearing. Secondly, it is submitted for Abu Qatada that, as a matter of domestic law and on the true construction of the 1997 Act and the rules, SIAC may rely upon closed material only in relation to the national security issue and not on the safety on return issue.

Deportation and article 6

168. The first argument is founded upon the recent decision of the House in *Secretary of State for the Home Department v MB* [2008] 1 AC 440. The question in that case was whether the procedure established by and under the Prevention of Terrorism Act 2005 for judicial supervision of non-derogating control orders complied with article 6. That procedure mirrors in all relevant respects the procedure followed by SIAC under its rules, including a provision in paragraph 4(3) of the Schedule requiring the applicable rules to ensure —

> "(d) that the relevant court is required to give permission for material not to be disclosed where it considers that the disclosure of the material would be contrary to the public interest".

169. The Court of Appeal ruled that in principle this procedure complied with article 6: see [2007] QB 415. That was the state of the law when the present cases came before SIAC. In the House of Lords, however, Baroness Hale of Richmond said that although a procedure modelled on that of SIAC would usually provide the "substantial measure of procedural justice" which the *Chahal* case required, there might be some cases in which it did not. To enable the courts in such cases to comply with article 6, paragraph 4(3)(d) of the Schedule should (pursuant to section 3 of the Human Rights Act 1998) be read subject to an exception in cases in which the use of closed material would be incompatible with the right to a fair trial. The best judge of whether the procedural protection had been adequate was the judge who presided at the hearing. Lord Carswell and Lord Brown of Eaton-under-Heywood agreed.

170. In the present cases, SIAC was bound by the Court of Appeal decision and made no finding as to whether its procedure had enabled these aliens to obtain a fair trial. So the aliens submit that their cases should be remitted to SIAC for such a finding to be made.

171. The difficulty for the aliens is that in *Secretary of State for the Home Department v MB* it was conceded by the Secretary of State that a control order affected civil rights and that article 6 was therefore engaged. The question of whether the order was lawful had therefore to be decided by an independent and impartial court and in accordance with a judicial procedure.

172. No such concession is made here. On the contrary, the judgment of the ECHR Grand Chamber in *Maaouia v France* (5 October 2000) Application no 39652/98, 33 EHRR 1037 affirmed (in paragraph 35) that "the decision whether or not to authorise an alien to stay in a country of which he is not a national does not entail any determination of his civil rights". In a concurring opinion, Sir Nicolas Bratza agreed that —

> "proceedings which exclusively concern decisions of administrative authorities to refuse leave to an alien to enter, to impose conditions on an alien's leave to stay or to deport or expel an alien, do not involve the determination of the "civil rights and obligations" of the alien."

173. Likewise in *Chahal v United Kingdom* (1997) 23 EHRR 413, the ECHR decided that an alien who was detained pending deportation was entitled by virtue of article 5(4) to "a substantial measure of procedural justice" in proceedings to determine the lawfulness of his detention (paragraph 131) but not to a judicial tribunal "to review whether the underlying decision to expel could be justified under national or Convention law": paragraph 128.

174. Faced with this obstacle, the aliens claim that issues about various other Convention rights which may arise *incidentally* in connection with the making of the deportation order (such as whether return to the country of nationality would infringe rights under articles 3, 5, 6 or 8) require the procedure for the determination of the validity of the deportation order to conform to the requirements of article 6. In particular, they rely upon the alien's right under article 3, as interpreted in *Chahal*, not to be deported to a country where he will be at risk of being subjected to torture. The question of whether article 3 would be infringed should, they say, be determined by a procedure which satisfies article 6.

175. The weakness in this argument, as SIAC pointed out in its ruling in *OO v Secretary of State for the Home Department* (27 June 2008), is that the ECHR has consistently said not only that proceedings concerning the validity of a deportation order do not engage article 6 but that it makes no difference that the order for deportation has an incidental effect upon rights under other articles of the Convention. Even in cases based upon detention pending deportation, where the power of detention is wholly ancillary to the power of deportation and the requirements of article 5(4) are pretty much indistinguishable from those of article 6 (both require the decision to be made by a court, with appropriate procedures), the ECHR has been punctilious in insisting that article 6 is not engaged: see for examples *CG v Bulgaria* (13 March 2007) Application no 1365/07 and *Mamatkulov and Askarov v Turkey* (2005) 41 EHRR 25, paragraphs 81-83. In the *Chahal* case and *Al-Nashif v Bulgaria* (2002) 36 EHRR 655, claims under article 5(4) succeeded but complaints under article 6 were either not mentioned or held inadmissible. It is clear that the criterion for the ECHR in deciding whether article 6 is engaged is the nature of the proceedings and not the articles of the Convention which are alleged to be violated. If the proceedings concern deportation, article 6 is not engaged, whatever might be the other articles potentially infringed by removal to another country.

176. The requirements of article 5(4) are, as I have said, little different from those of article 6. The legality of detention must be determined by a court and must be accompanied by appropriate judicial procedures. In this case, however, the aliens are on bail and no question about the legality of their detention arises. That leaves only their complaints that deportation would infringe their rights under articles 3, 5 and 6 by virtue of the risks of torture, detention and an unfair trial in the receiving country and that it would cause damage to their reputations, contrary to article 8. In respect of these rights, the aliens are entitled under article 13 to an "effective remedy".

177. In *Chahal*, however, the ECHR made it clear that the determination of whether a deportation order might infringe article 3 does not require the full judicial panoply of article 6 or even 5(4). An "effective remedy" to protect one's rights under article 3 need not be a judicial remedy compliant with article 6. What is required, said the Court in *Chahal*, is "independent scrutiny of the claim" (paragraph 151), not necessarily by a judicial authority. The only scrutiny available at that time in the United Kingdom was by the advisory panel, which the ECHR for various reasons considered inadequate. But its commendation of the Canadian system suggests that it would have had little difficulty in accepting the SIAC procedure as adequate. I therefore agree with the reasoning of Mitting J in *OO v Secretary of State for the Home Department* (27 June 2008) and his conclusion that the SIAC procedure satisfies the requirements of article 13 for determining whether deportation would infringe an alien's rights under article 3.

178. The same is *a fortiori* true of the claims of a potential violation of articles 5, 6 and 8. It was suggested that the effect of the Human Rights Act 1998 (giving a domestic civil remedy for violations of Convention rights) was to convert all claims of infringement of Convention rights into civil rights within the meaning of article 6. If the proceedings had been an action in tort for a breach or threatened breach of article 3, they would certainly be asserting a civil right and article 6 would be engaged: compare *Tomasi v France* (1993) 15 EHRR 1 at paragraphs 120-122. Similarly for actions for violations of article 8. But these proceedings are not of that nature. They are to challenge the validity of deportation orders. As I have said, it is the nature of the proceedings which decides whether article 6 is engaged or not.

179. Finally on this topic it is submitted that application of a different procedure in deportation proceedings from that which *Secretary of State for the Home Department v MB* [2008] 1 AC 440 held to be required in

challenges to control orders was discriminatory, contrary to article 14. It is said to be discriminatory because only aliens may be deported. It is hard to take this submission seriously. Deportation orders are different from control orders and it is in the nature of deportation is that it applies only to aliens. The ECHR is likely to have been aware of this when it decided in *Maaouia v France* (5 October 2000) Application no 39652/98 that deportation proceedings did not engage article 6.

Closed material in domestic law

180. I can deal fairly shortly with the alternative argument that as a matter of domestic law, SIAC may rely upon closed materials only when it decides the question of national security but not the question of safety on return. This argument is put forward on behalf of Abu Qatada, whose case on safety on return involved the use of closed materials.

181. It seems to me clear that the statutory provisions about disclosure of materials are solely concerned with the ways in which disclosure may damage the public interest and not with the issue to which such evidence may be relevant. Thus section 5(6) of the 1997 Act says that in making procedural rules for SIAC the Lord Chancellor shall have regard in particular to "(b) the need to secure that information is not disclosed contrary to the public interest." This is a perfectly general statement and I find it impossible to construe it as limited to cases in which some particular issue arises. Likewise, rule 4, which I have already quoted, elaborates on the meaning of "contrary to the public interest" but is entirely general in its application. Reference was made to the "presumption of legality" by which general statements in statutes are construed as having a narrower application than their literal meaning might suggest if this would produce an unjust result and in particular would override basic individual rights: see *Stradling v Morgan* (1560) 1 Pl 199; *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115. But this is in the end a rule of construction (which has now been largely superseded, in its application to human rights, by section 3 of the 1998 Act) and cannot displace what appears to me the plain and obvious meaning of the legislation.

Article 3: the risk of torture or inhuman or degrading treatment.

182. Having disposed of the procedural objections, I can now come to the substantive grounds of challenge to the deportation orders. All three

aliens say that there is a substantial risk that the authorities in the receiving country would subject them to torture or inhuman or degrading treatment, contrary to article 3. The Secretary of State admits that there is sufficient evidence of the use of torture in both Algeria and Jordan to suggest that in the absence of special arrangements, there would be such a risk. In both cases, however, Her Majesty's Government has been given specific assurances at a high level that the aliens would be lawfully and properly treated. The aliens say that is not good enough; the assurances are not sufficiently specific and the authorities cannot be relied upon to honour them.

183. In the case of RB, SIAC gave a decision on 5 December 2005 in which it examined the nature of the assurances given by the Algerian government, the ways in which non-compliance could be detected and the government's incentives for complying with the assurances, and came to the conclusion that they removed any real risk that RB would be subjected to torture or other treatment contrary to article 3. On 14 May 2007 it reached a similar decision in relation to U. Mitting J was party to both decisions. On 26 February 2007 in the case of OO SIAC, this time presided over by Ouseley J, examined the assurances given by the Jordanian government and concluded that they could be relied upon.

184. The Court of Appeal dismissed appeals against these findings on the ground that an appeal from SIAC lay only on a question of law (see section 7(1) of the 1997 Act). The question which *Chahal* required to be answered, namely, whether there was a "real risk" that the deportee would be subjected to torture or treatment contrary to article 3, was a question of fact.

185. There is in my opinion nothing in the subsequent jurisprudence of the ECHR to change the question or to convert it into a question of law. In *Saadi v Italy* (28 February 2008) Application no 37201/06 the question was whether the applicant could be deported from Italy to Tunisia, where he had been sentenced in his absence to twenty years imprisonment for membership of a terrorist organisation and incitement to terrorism. The Italian embassy in Tunis sent a note verbale to the Tunisian government asking for an assurance that "fears expressed by Mr Saadi of being subjected to torture and inhuman and degrading treatment on his return to Tunisia are unfounded." The Tunisian Ministry of Foreign Affairs replied that Mr Saadi would be accepted into Tunisia "in strict conformity with the national legislation in force and under the sole safeguard of the relevant Tunisian statutes." A subsequent note verbale confirmed that Tunisian law guaranteed and

protected the rights of prisoners in Tunisia and that Tunisia had acceded to the relevant international treaties and conventions.

186. As there was a good deal of evidence that the relevant Tunisian statutes, international treaties and conventions had not in the past inhibited extensive use of torture by the Tunisian authorities, it is not surprising that the ECHR found these assurances of limited value. The Court said (at paragraphs 147-148):

> "147...[T]he Court observes that the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where, as in the present case, reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention.
>
> 148. Furthermore, it should be pointed out that even if, as they did not do in the present case, the Tunisian authorities had given the diplomatic assurances requested by Italy, that would not have absolved the Court from the obligation to examine whether such assurances provided, in their practical application, a sufficient guarantee that the applicant would be protected against the risk of treatment prohibited by the Convention…The weight to be given to assurances from the receiving State depends, in each case, on the circumstances obtaining at the material time."

187. My Lords, nothing could be clearer than that last sentence. The question of whether assurances obviate the risk is a question of fact, to be decided in the light of all the evidence.

188. It must be remembered that the ECHR itself is not a court of limited jurisdiction like the Court of Appeal under the 1997 Act. It is not a court of appeal from a national court at all. It decides whether, on its own assessment of the facts, there has been or would be a violation of a Convention right. Mr Drabble QC, who appeared for RB and U, said that if *Saadi v Italy* had been decided before the decisions of SIAC and it had "applied" that case, it would have come to a different conclusion. It seems to me, however, that SIAC fully applied the principle laid down

in paragraph 148 of the *Saadi* case. It came to a different conclusion because the facts were different.

189. Mr Drabble even went so far as to submit (as he had done to the Court of Appeal) that the question of whether a Convention right had been or would be violated was always a question of law, even when it involved what would ordinarily be a question of fact. The reasoning was that SIAC is a public body required by section 6(1) of the Human Rights Act 1998 to act in accordance with Convention rights and therefore if it gave a decision contrary to a Convention right it made an error of law. For my part, I cannot see how that conclusion follows. If the ECHR takes a different view of a case from that of the domestic court, it is just as likely to be because it takes a different view of the facts. Mr Drabble referred to the decision of the House in *Huang v Secretary of State for the Home Department* [2007] 2 AC 167, in which it was decided that section 6 of the 1998 Act required immigration officers, the appellate immigration authority and the courts, exercising jurisdiction under the Immigration and Asylum Act 1999, to decide whether a challenged decision was compatible with Convention rights or not. The appellate bodies were not exercising a reviewing function but had to decide the question for themselves. But the 1999 Act made no distinction between appeals on fact or law. It gave a general right of appeal against an immigration officer's decision. The position of the Court of Appeal hearing an appeal from SIAC is quite different.

190. There is nothing in the Convention which prevents the United Kingdom from according only a limited right of appeal, even if the issue involves a Convention right. There is no Convention obligation to have a right of appeal at all. If there is a right of appeal, then of course it must offer a fair hearing before an independent and impartial tribunal in accordance with article 6. But there is no obligation to provide an appeal against the determination of a Convention right. The only concern of the ECHR with the court structure of the Member State is that it should provide a remedy for breach of a Convention right in accordance with article 13. If a SIAC hearing does so, that is an end of the matter and the extent of the right of appeal, if any, is irrelevant.

191. The findings of SIAC on safety on return are therefore open to challenge only if no reasonable tribunal could have reached such a conclusion on the evidence: *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14. Mr Drabble submits that the Court of Appeal should for two reasons have allowed the appeal on this ground. The first is that the assurance from Algeria contained no express reference to standards of

international law as to what counted as torture or inhuman or degrading treatment. The second is that the assurances made no provision for external monitoring of compliance.

192. The arrangements with Algeria were negotiated at the highest level and it was plain to the Algerian authorities that what the United Kingdom required was an assurance which would enable it to comply with its obligations under article 3. On the other hand, the assurances had to be expressed in language which would respect the dignity of a sovereign state. In the cases of RB and U the assurance therefore said that they would enjoy "the following rights, assurances and guarantees as provided by the Constitution and the national laws currently in force concerning human rights…(h) His human dignity will be respected under all circumstances." The main reason why SIAC thought that this assurance would satisfy article 3 was that it was not in the national interest of the Algerians to fail to comply. In those circumstances, the precise language of the assurance was less important than the effect which both sides knew it was intended to have. So far from being irrational, that seems to me an entirely reasonable conclusion which SIAC was entitled to draw from the basic facts it had found to exist about the situation in Algeria.

193. As to external monitoring, a good deal has been written about its importance in enabling a court or other authority to be satisfied that the receiving state is complying with assurances about safety on return. There is no doubt that in the absence of some provision for external monitoring, such assurances may be no more than empty words: see for example *Ryabikin v Russia* (19 June 2008) Application no 8320/04 at paragraph 119. But there is no rule of law that external monitoring is required. It all depends upon the facts of the particular case and in my opinion SIAC was quite right to say (in paragraph 6 of its decision in RB's case) that although fulfilment of the assurances must be capable of being verified, external monitoring is only one possible form of verification. In this particular case the Algerian government regarded external monitoring as inconsistent with its sovereign dignity but SIAC considered that there were other ways in which non-compliance was likely to become known and, given the political incentives, these were sufficiently likely to ensure compliance. This was a carefully balanced finding which I think was open to SIAC on the evidence.

194. For these reasons I would dismiss the appeals of RB and U.

Article 6 and Abu Qatada

195. The Court of Appeal allowed Abu Qatada's appeal on the sole ground that there was a real risk that his rights under article 6 (fair trial) would be infringed if he were returned to Jordan. SIAC had rejected this submission, but the Court of Appeal said that it would not have done so if "it had properly understood the status in Convention law of this aspect of article 6."

196. There was little doubt that upon his return to Jordan, Abu Qatada would be put on trial for the crimes of which he had already been convicted in his absence. The question of whether he would receive a fair trial turned upon the question of whether the court was likely to admit the evidence of witnesses which had been obtained by torture. As to this, SIAC's findings were (a) the court was likely to admit the evidence of the witnesses in question (paragraph 422) (b) it could not say that such evidence had been obtained by treatment in breach of article 3, although there was "a very real risk" that it had been (paragraph 437); (c) it could not say whether the treatment in breach of article 3 had amounted to torture, as opposed to other inhuman or degrading treatment (paragraph 411).

197. I think there is little doubt that on these findings of fact, a trial held in the United Kingdom or another Member State would be in breach of article 6. SIAC so found: see paragraph 431. On the other hand, Member States are not in a position to regulate the conduct of trials in the foreign countries from which aliens come and to which they may have to be deported. Accordingly, a deporting state will be in breach of article 6 only if there is a real risk that the alien will suffer a "flagrant denial of justice" in the receiving state. That is perhaps not a very precise expression but Sir Nicolas Bratza, in *Mamatkulov and Askarov v Turkey* (2005) 41 EHRR 25 at paragraph O-III14 explained that the adjective "flagrant" was intended to convey the notion of —

> "a breach of the principles of fair trial guaranteed by Art 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article."

198. SIAC decided that this standard of unfairness had not been met. In Jordanian law, statements obtained by torture are inadmissible. The

general rule is that the prosecution has to prove that evidence had been given voluntarily. But this rule does not apply to statements to the prosecutor, who is (in accordance with Continental practice) regarded as having judicial status. In the case of such statements, the burden is on the accused to show that they were the result of illegal coercion: paragraph 403.

199. At the earlier trial there had been allegations that statements had been obtained by ill-treatment which the court had rejected. SIAC said that, at a retrial of Abu Qatada, the court "would not dismiss out of hand the allegations that incriminating evidence had been obtained by torture", although it was "extremely unlikely" that they would exclude it, not for any arbitrary or improper reason but because the accused was unlikely to have evidence to displace the conclusion reached at the earlier trial: paragraphs 412 and 413. But the ruling on whether the evidence was admissible would be a judicial decision and SIAC was unable to say that a ruling in favour of admissibility would be wrong, manifestly unreasonable or arbitrary. SIAC summed up its conclusion in paragraph 437:

> "Jordanian law does not permit evidence found to have been obtained involuntarily to be admitted, but it does require the defendant to prove that the statements which are most likely to be at issue here, those given before the Prosecutor, have been obtained in that way. A statement which may possibly have been given to a prosecutor as a result of prior…duress is thus not excluded if the burden of proof is not discharged. We do not regard a legal prohibition on the admissibility of tainted material framed in that way as itself a factor which would make a trial unfair. The fact that under Jordanian law, statements to a Prosecutor which might have been obtained by prior duress are not excluded, because they have not been shown to have been so obtained, does not make the trial unfair. So to hold would mean that a fair trial required the Prosecutor/judge, in a civil law system, always to disprove an allegation that a confession made to him was obtained by prior ill-treatment; or it would involve the Courts of the deporting country holding that the Courts of the receiving country would not endeavour to apply its own laws. However, as to the first, the ECtHR treats the regulation of the admissibility of evidence as essentially a matter for the domestic legal system. The burden of proof in Jordan is reversed anyway where the statement at issue was made to

> the [prosecutor]. The majority decision in *A and Others v Secretary of State for the Home Department (No 2)* [2006] 2 AC 221, did not regard it as unfair, albeit with caveats, for evidence said to have been obtained by torture to be excluded only if that had been proved on a balance of probabilities by an appellant. We cannot conclude, particularly in the light of the incomplete information we inevitably have, that the evidence was probably obtained by treatment breaching Article 3. We can only conclude that that was a very real risk. The Jordanian Courts might agree."

200. The Court of Appeal allowed the appeal on the ground that SIAC had "understated or misunderstood the fundamental nature in Convention law of the prohibition against the use of evidence obtained by torture": paragraph 45. Once SIAC had found that there was a "very real risk" that evidence had been obtained by torture, it was obliged to find that the trial would be a "flagrant denial of justice" unless satisfied that the evidence would be excluded or not acted upon. It cited in support a passage from *Jalloh v Germany* (2006) 44 EHRR 667. But that was a case on the requirements of article 6 in a Member State and not on what amounted to a flagrant denial of justice by a receiving state.

201. In my opinion the Court of Appeal was wrong and SIAC was entitled to find that there was no breach of article 6 in its application to a trial in a foreign state. The finding was that, given the burden of proof in respect of statements to the prosecutor in Jordanian law, evidence would not be excluded only because there was a real risk that it had been obtained by torture. In my opinion it is impossible to say that the application of such a rule would be a "flagrant denial of justice". There is in my opinion no authority for a rule that, in the context of the application of article 6 to a foreign trial, the *risk* of the use of evidence obtained by torture necessarily amounts to a flagrant denial of justice.

202. The effect of the decision of the House of Lords in *A and Others (No 2)* [2006] 2 AC 221 is that a real risk that a statement has been obtained by torture is not enough to make it inadmissible in proceedings before SIAC. The burden is upon the appellant to satisfy SIAC on a balance of probability that the statement was so obtained. Thus the effect of Court of Appeal's decision is that SIAC ought to have held that the Jordanian court would be perpetrating a flagrant denial of justice if it did not exclude evidence which would have been admissible before

SIAC itself. That is too much of a paradox to form part of a rational system of jurisprudence.

203. In addition to the question of using evidence obtained by torture, Abu Qatada also submitted that his trial would be a flagrant denial of justice because it would take place before a military court, which was not for the purposes of article 6 an independent tribunal. SIAC found that although the judges were part of a military hierarchy and the court would therefore not have complied with article 6 in its application to a Member State, they would in fact act judicially and the trial would therefore not be a flagrant denial of justice. The Court of Appeal agreed and on this point I have nothing to add to the reasoning of SIAC and the Court of Appeal.

Article 5

204. That leaves the two points taken by Abu Qatada in his cross-appeal, namely a potential breach of article 5 (deprivation of liberty) and a breach of the Refugee Convention. Jordanian law requires that an arrest be notified to the legal authorities within 48 hours and formal charges brought within 15 days of the arrest. But a judge may extend the period for up to 15 days at a time, up to a maximum of 50 days. During this period there is no right of access to a lawyer.

205. SIAC said that whether 50 day detention would be a breach of article 5 if it occurred in a Member State was "debatable": paragraph 381. But it found that in reality a period of 50 days was unlikely to be sought: paragraph 382 and decided that in any event it would not amount to a flagrant denial of the right: paragraph 453. The Court of Appeal considered that SIAC's finding of fact on the length of detention actually likely to occur was fatal to the complaint under article 5. I agree with both SIAC and the Court of Appeal.

The Refugee Convention

206. Abu Qatada was granted refugee status in 1994. But article 1(F) of the Convention provides that the Convention shall not apply to any person "with respect to whom there are serious reasons for considering" that he has been guilty of various acts, including "(c) …acts contrary to the purposes and principles of the United Nations". There seems little

doubt that encouraging terrorism is contrary to those purposes and principles. But the alien submits that article 1(F)(c) can apply only to acts committed before he was granted refugee status. This argument was rejected by the Court of Appeal and I agree with its reasoning. In fact, the point seems to me to be hopeless. There is nothing in the language of paragraph (c) to suggest that it is confined to events which happened before refugee status was accorded. By contrast, paragraph (b) refers to the commission of a "serious non-political crime outside the country of refuge prior to his admission to that country as a refugee". If the draftsman of the Convention had wanted to confine paragraph (c) to prior events, appropriate language lay readily to hand.

Disposal

207. I would therefore allow the appeal of the Secretary of State in Abu Qatada's case and restore the decision of SIAC.

LORD HOPE OF CRAIGHEAD

My Lords,

208. I accept with gratitude the description of the background to these appeals that has been provided so fully by noble and learned friends Lord Phillips of Worth Matravers and Lord Hoffmann. With that advantage I can confine my remarks to the principal issues. Like Lord Hoffmann, I shall refer to the three men whom the Secretary of State wishes to deport, where a reference to them collectively is appropriate, as "the aliens" and to Othman by his more familiar name which is Abu Qatada.

Background

209. Most people in Britain, I suspect, would be astonished at the amount of care, time and trouble that has been devoted to the question whether it will be safe for the aliens to be returned to their own countries. In each case the Secretary of State has issued a certificate under section 33 of the Anti-terrorism, Crime and Immigration Act 2001 that the aliens' removal from the United Kingdom would be conducive

to the public good. The measured language of the statute scarcely matches the harm that they would wish to inflict upon our way of life, if they were at liberty to do so. Why hesitate, people may ask. Surely the sooner they are got rid of the better. On their own heads be it if their extremist views expose them to the risk of ill-treatment when they get home.

210. That however is not the way the rule of law works. The lesson of history is that depriving people of its protection because of their beliefs or behaviour, however obnoxious, leads to the disintegration of society. A democracy cannot survive in such an atmosphere, as events in Europe in the 1930s so powerfully demonstrated. It was to eradicate this evil that the European Convention on Human Rights, following the example of the Universal Declaration of Human Rights by the General Assembly of the United Nations on 10 December 1948, was prepared for the Governments of European countries to enter into. The most important word in this document appears in article 1, and it is repeated time and time again in the following articles. It is the word "everyone". The rights and fundamental freedoms that the Convention guarantees are not just for some people. They are for everyone. No one, however dangerous, however disgusting, however despicable, is excluded. Those who have no respect for the rule of law – even those who would seek to destroy it – are in the same position as everyone else.

211. The paradox that this system produces is that, from time to time, much time and effort has to be given to the protection of those who may seem to be the least deserving. Indeed it is just because their cases are so unattractive that the law must be especially vigilant to ensure that the standards to which everyone is entitled are adhered to. The rights that the aliens invoke in this case were designed to enshrine values that are essential components of any modern democratic society: the right not to be tortured or subjected to inhuman or degrading treatment, the right to liberty and the right to a fair trial. There is no room for discrimination here. Their protection must be given to everyone. It would be so easy, if it were otherwise, for minority groups of all kinds to be persecuted by the majority. We must not allow this to happen. Feelings of the kind that the aliens' beliefs and conduct give rise to must be resisted for however long it takes to ensure that they have this protection.

The role of the Court of Appeal

212. The aliens accept that SIAC is the fact finding body in relation to the primary facts and that, as the Court of Appeal found in *RB (Algeria) v Secretary of State for the Home Department* [2008] QB 533, para 93, it is their findings in fact that are in issue. In the ordinary case its findings could only be challenged on the ground of an error of law. But the aliens submit that different considerations apply where facts are applied to determine whether a person's removal amounts to a violation of his Convention rights. In such a case, they say, the ambit of what amounts to an error of law is enlarged. An error of law will have been demonstrated if the appellant can establish that the facts show that his Convention rights will be violated by his removal. They invite your Lordships to adopt the approach that the European Court takes to the question whether assurances provide adequate protection, as shown by the decision of the Grand Chamber in *Saadi v Italy*, (Application No 37201/06) (unreported) 28 February 2008.

213. In *Saadi v Italy*, para 128, the Grand Chamber said that in determining whether substantial grounds had been shown for believing that there was a real risk of ill-treatment incompatible with article 3, it would take as its basis all the material placed before it or, if necessary, material obtained by it *proprio motu*. In such cases, it said, the examination of the existence of a real risk must necessarily be a rigorous one: see *Chahal v United Kingdom* (1996) 23 EHRR 413, para 96, where the court said that this degree of scrutiny was necessary in view of the absolute character of article 3 and the fact that it enshrined one of the fundamental values of the democratic societies making up the Council of Europe. The aliens say that the appellate courts must adopt the same approach in such cases in domestic law, as they are public authorities within the meaning of section 6 of the Human Rights Act 1998. Why, asked Mr Drabble QC, when the Strasbourg court carries out its own evaluation, should the United Kingdom courts be powerless to intervene? He referred to *Huang v Secretary of State for the Home Department* [2007] 2 AC 167, para 8 where Lord Bingham of Cornhill, delivering the opinion of the committee, said that the object of the 1998 Act was to ensure that public authorities acted so as to avert or rectify any violation of a Convention right, with the result that such rights would be effectively protected at home, thus obviating or reducing the need for recourse to Strasbourg.

214. I agree with Lord Phillips's analysis of this argument in paras 62 to 73 of his opinion and with the way Lord Hoffmann disposes of it in paras 189-191 of his opinion. The extent of the jurisdiction that the Court of Appeal, and this House in its turn, may exercise in this case has been laid down by Parliament. In *Huang v Secretary of State for the*

Home Department [2007] 2 AC 167, as the committee said in para 11 of its opinion, the legislation made it plain that the immigration appeal authority was not confined to a secondary, reviewing function. It had to decide for itself whether the impugned decision was lawful and, if not, to reverse it. In this case, however, the relevant provision is section 7(1) of the Special Immigration Appeals Commission Act 1997. It provides that where SIAC has made a final determination of an appeal, a further appeal may be brought only on any question of law material to that determination. It was not open to the Court of Appeal under this provision to conduct a rehearing of the questions of fact that the aliens' objections to their removal give rise to, nor is open to your Lordships to do this. For very good reasons Parliament has entrusted an examination of the facts to a tribunal which is specially equipped to examine issues relating to the public good and the interests of national security. It has confined any appeal to a question of law. There is nothing in Convention law or section 6(1) of the 1998 Act that requires SIAC's findings of fact on these issues, contrary to this provision, to be reopened on appeal.

215. The limitation of the grounds on which an appeal may be brought to a question of law only is a well-tried formula. The test which it invites was described by Lord Radcliffe in the context of an appeal on a question of law by way of a case stated by the General Commissioners of the Income Tax. In *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14, 36 he said:

> "When the case comes before the court it is its duty to examine the determination having regard to its knowledge of the relevant law. If the case contains anything ex facie which is bad law and which bears upon the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination. So there, too, there has been error in point of law. I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with and contradictory of the determination, or as one in which the

> true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test."

He added that, for his part, he preferred the last of the three. In short the question is whether, as Lord Hoffmann has stated in para 191, no reasonable tribunal could have come to the same conclusion on the evidence.

216. Lord Phillips says in para 73 of his opinion that SIAC's conclusions could only be attacked on the ground that they failed to pay due regard to some rule of law, had regard to irrelevant matters, failed to have regard to relevant matters or were otherwise irrational. This is the language of judicial review, as stated by Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 228. In *Ashbridge Investments Ltd v Minister of Housing and Local Government* [1965] 1 WLR 1320, 1326, Lord Denning MR said that the grounds on which the court could interfere with the decision of the Minister were identical with the position when the court has power to interfere with the decision of a lower tribunal which has erred in point of law. So, although I prefer the way Lord Hoffmann puts it, I am willing to accept that the word "irrational" that Lord Phillips uses captures the same idea. If SIAC's determination can be shown to have been one which no reasonable tribunal could have reached, or to have been irrational in the *Wednesbury* sense, the appellate court must assume that there has been an error in point of law which entitles it to intervene. That having been said, however, I think that it is preferable, in a statutory appeal from a fact-finding tribunal, to approach the question whether its determination was erroneous in point of law by asking whether it was one that no reasonable tribunal, properly directed, could have reached.

217. The important point is that the submission for the aliens confuses the jurisdiction that the Strasbourg court exercises under the Convention with that of the appellate courts under the domestic system. How the domestic system may deal with such issues is a matter for Parliament, for whose decisions the United Kingdom must answer if the need arises in Strasbourg. Parliament has entrusted the fact-finding function to SIAC. The counterpart of this arrangement is that the function of the appellate courts is confined to one that is essentially supervisory.

218. For the Secretary of State it was submitted that the approach to SIAC's determinations should be that indicated by Baroness Hale in *AH (Sudan) v Secretary of State for the Home Department* [2008] 1 AC 678. In para 30 of her opinion in that case she said that the ordinary courts should approach appeals from expert tribunals with an appropriate degree of caution, as it is probable that in understanding and applying the law in their specialised field they will have got it right. Their decisions should be respected, she said, unless it is quite clear that they have misdirected themselves in law. Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently.

219. I think that careful attention needs to be paid to the context in which she made those observations. The decision that was under appeal in that case was one in which the Asylum and Immigration Tribunal had given reasons for its decision in terms that, when read in isolation, might have suggested that it had misdirected itself: see my opinion at para 19. The point Baroness Hale was making, with which I agreed, was that the reasoning which tended to invite this conclusion should not be subjected to an unduly critical analysis. That, for the reasons she gave, is the proper approach where the ground of complaint is directed to the way in its specialised field the tribunal has expressed itself. An appellate court should not be too ready to assume that it failed to understand and apply the law correctly. But appellate courts would not be performing their task properly if they were to exercise the same self-denying ordinance to decisions by judges sitting in the ordinary courts. Subject to the familiar rules that recognise the advantage that a judge enjoys who has seen and heard the witnesses, his decision is open to the widest scrutiny that is possible within the limits that the law places on the jurisdiction of the appeal court.

220. The statute provides that a sitting by SIAC is duly constituted if at least one of its members holds or has held high judicial office: 1997 Act, Schedule 1, para 5(a). In the present case its sittings were presided over by judges of very considerable skill and experience. It is proper to bear this fact in mind when the conclusions that it drew from the evidence are being scrutinised. But this is best seen as just one of the various factors that are relevant when consideration is being given to the question whether no reasonable tribunal could have come to the same conclusion on the evidence. Furthermore, the questions that the aliens raise in this case are directed not to particular passages in SIAC's reasoning which might be said to raise doubts as to whether it misdirected itself in law, but to the conclusions which it reached on its consideration of all the evidence.

221. The issues in the cases of RB and U were whether there was a sufficient risk of their being tortured or subjected to inhuman or degrading treatment in breach of their rights under article 3 of the Convention on their return to Algeria. In Abu Qatada's case they were whether his deportation would result in detention for an unreasonably long period depriving him of his liberty under article 5 or would infringe his right to a fair trial under article 6. These were all issues of fact which, in view of the fundamental nature of those rights, SIAC was required to subject to anxious scrutiny. This level of scrutiny feeds its way into the appellate process too. The appellate court must apply the same standard when it is contemplating what a reasonable tribunal would have done. As Lord Radcliffe said in *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14, 36 it must be assumed to have been properly instructed as to the relevant law. I would therefore reject any suggestion that SIAC is in a privileged position simply because of the specialised nature of the jurisdiction that it exercises.

The fairness of the procedure before SIAC

222. The aliens challenge the use of closed material in the determination of their cases on the grounds of procedural fairness. Mr Singh QC for RB and U submitted that it was not open to SIAC to rely on closed material as to issues of national security and safety on return because this was unfair to them as they had no opportunity to examine or challenge that material. He accepted that a decision to deport or expel an alien did not involve the determination of his civil rights and obligations within the meaning of article 6(1) of the Convention: *Maaouia v France* (2000) 33 EHRR 1037, para 35. Instead he submitted that there were four other gateways to this argument: (1) that article 6(1) applies because the aliens' rights under articles 3 to 5 were being adjudicated upon; (2) that article 5(4) applies where aliens were being detained for deportation because a substantial measure of fairness was necessary to determine the lawfulness or otherwise of the detention; (3) that SIAC's determination affected the aliens' reputation as part of their rights under article 8, to which article 6(1) applies; and (4) that article 14 applies because the use of closed material in their case was discriminatory in respects that came within the ambit of those Convention rights.

223. Developing these arguments, Mr Singh said that the incorporation of Convention rights such as article 3 into domestic law engaged the civil limb of article 6(1). For example, in *Tomasi v France* (1993) 15 EHRR 1 the Strasbourg court held that a domestic right to

seek compensation for a violation of article 3 meant that article 6 was engaged by the proceedings. The fact that his clients were detained meant that their right to liberty was also infringed, and in *Aerts v Belgium* (1998) 29 EHRR 50, para 59 the court said that the right to liberty was a civil right. So too was their right to reputation for the purposes of article 6(1): *Werner v Poland* (2001) 36 EHRR 491, para 33. Article 5(4), he said, entitled his clients to a review of the legality of their detention, as to which the requirements of fairness were very similar to those required by article 6(1). In *R (Roberts) v Parole Board* [2005] UKHL 45; [2005] 2 AC 738, para 83(vii) Lord Woolf CJ said that in cases where special advocates were used the task of the court was to decide, looking at the process as a whole, whether a procedure had been adopted which involved significant injustice. Lord Bingham relied on this observation in an article 5(4) case in *Secretary of State for the Home Department v MB* [2008] 1 AC 440, para 34 when he said, with reference to the use of closed material to justify control orders and its compatibility with article 6(1), that the concept of fairness imported a core, irreducible minimum of procedural protection. Baroness Hale said in para 61 of her opinion in *MB* that it was not possible to draw a clear distinction between the requirements of article 5(4) and those of article 6(1). In any event a failure to apply the standards of fairness identified in *MB* in the context of these appeals was clearly differential treatment based on nationality.

224. Mr Fitzgerald QC for Abu Qatada, whose objection was directed only to the use of closed material on the issue of safety on return, also invoked what he described as the irreducible minimum of fairness. He said that it was wrong in principle for this issue to be made the subject of an adverse finding against his client on evidence that he had not heard. The European court had affirmed repeatedly the importance of the principle that as a general rule all the evidence must be produced in the presence of an accused, giving him an adequate and proper opportunity to challenge and question witnesses against him: *R (Roberts) v Parole Board* [2005] 2 AC 738, per Lord Bingham at para 17. In *Al-Nashif v Bulgaria* (2002) 36 EHRR 655, paras 123-124, it was recognised that even where national security was at stake there had to be some procedure for allowing the person whose fundamental human rights were at issue to have access to the relevant evidence. If that was so, the issue of safety on return ought to be subject to the same protection.

225. For Liberty, intervening, Mr MacDonald QC submitted that an alternative approach could and should be adopted by SIAC to the disclosure of as much closed evidence as possible in any case where it

was suggested that it was contrary to the public interest for an alien to be allowed to remain in this country. This was to consider whether there could be some other form of limited disclosure of this evidence to the appellant, whether by way of some form of *in camera* disclosure or by way of its disclosure to the appellant's representatives only. This could be done, it was submitted, by reading down rule 4(1) of the SIAC Procedure Rules under section 3 of the Human Rights Act 1998 so as to permit this procedure. Unless the rule was read in this way it was incompatible with the aliens' Convention rights. This submission was the subject of an interlocutory judgment by SIAC in the cases of RB and U dated 14 November 2006, when it was rejected. The Court of Appeal also rejected the submission when it was renewed before it: *RB (Algeria) v Secretary of State for the Home Department* [2008] QB 533, paras 19-22. It held that the disclosure of material central to the issues in the case to an open advocate would put counsel in an impossible position and would seriously undermine the careful division between counsel appearing in the open proceedings and the special advocates. Your Lordships were invited nevertheless to examine the point again, although the submission was confined to circumstances where the feared damage to the public interest related to international relations issues rather than to national security.

226. I am in general agreement, subject to the following comments, with Lord Phillips's analysis of these arguments in paras 74 to 105 of his opinion and with the way Lord Hoffmann deals with them in paras 160 to 181 of his opinion. I would rest my own opinion on three points in particular: first, the jurisprudence of the Strasbourg court; second, the framework for the determination of issues relating to national security that has been laid down by Parliament; and third, the attitude that SIAC itself takes to the use of closed material.

227. The Strasbourg court has emphasised repeatedly that inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirement of the protection of the individual's fundamental rights: see, for example, *Soering v United Kingdom* (1989) 11 EHRR 439, para 89. This principle finds practical expression in the court's approach to issues about the applicability of article 6(1) to procedures for the expulsion of aliens. As the Grand Chamber pointed out in *Maaouia v France* (2000) 33 EHRR 1037, para 35, the Court has not been called on, but the Commission has consistently expressed the opinion that the decision whether or not to authorise an alien to stay in a country of which he is not a national does not entail any determination of his civil rights or obligations or of any criminal charge against him within the meaning of

article 6(1). It endorsed this view in para 37 of its judgment, drawing upon the fact that by adopting article 1 of Protocol 7 containing guarantees concerning proceedings for the expulsion of aliens, the Contracting States clearly intimated their intention not to include such proceedings within the scope of article 6(1). In para 38 it also said that the fact that the exclusion order in that case incidentally had major repercussions on the applicant's private and family life or on his prospects for employment could not suffice to bring the proceedings within the scope of civil rights protected by that article.

228. It seems to me that the Grand Chamber's decision in *Maaouia v France* provides the answer to Mr Singh's argument that the requirement of fairness that is to be found in article 6(1) can be reached through one or other of his four gateways. It cannot be invoked by pointing to the incidental effects that an expulsion order may have on the alien's reputation or of an order for his detention pending expulsion. In *Amrollahi v Denmark*, (Application No 56811/00) (unreported) 28 June 2001, it was argued that articles 2, 3 and 8 prohibited the applicant's deportation. Although the complaint under article 8 was declared admissible, the court applied its decision in *Maaouia* and declared a complaint under article 6 inadmissible. In *Tomasi v France* (1993) 15 EHRR 1, on which Mr Singh relied, article 6 was applied to proceedings for the recovery of damages for a breach of article 3. But it does not follow that it applies to proceedings of a different nature where the question is whether removal may lead to a risk of ill-treatment contrary to article 3. It is the nature of the proceedings that determines whether article 6(1) applies, as that article itself makes clear.

229. The explanatory report on article 1 of Protocol 7, which is quoted in para 36 of the decision in *Maaouia v France*, points out that aliens are entitled to invoke article 13 (the right to an effective remedy before a national authority) to ensure that when faced with expulsion they have the benefit of the guarantee afforded by article 3. What this requires was explained in *Chahal v United Kingdom* (1996) 23 EHRR 413, para 151. The court said that the notion of an effective remedy requires independent scrutiny of the claim that there exist substantial grounds for fearing a real risk of treatment contrary to article 3, and that it must be carried out without regard to what the person may have done to warrant expulsion or to any perceived threat to the national security of the expelling State. Such scrutiny need not be provided by a judicial authority: para 152. The jurisdiction that is given to SIAC, which was introduced in response to the court's judgment in *Chahal*, has been designed to provide this remedy. The Strasbourg court has not yet had the opportunity to say whether or not it meets with its requirements, but

it is hard to see why it should not say that it does. SIAC is an independent judicial body, and its jurisdiction permits it to subject the issue as to whether there is a real risk of treatment contrary to article 3 to the degree of rigorous scrutiny that the court itself said in *Chahal*, para 96, was necessary.

230. There remains however the question whether the use of closed material fails to meet the minimum standard of procedural fairness that is to be expected of any such tribunal in a democratic society. Procedure before SIAC is governed by the 1997 Act and by the rules that have been made under section 5. Section 5(3), which describes what the rules may provide, rule 4 as it was at the time of the aliens' appeals, a description of the rules that provide for the appointment of special advocates and the procedure that is to be adopted where the Secretary of State objects to disclosure are all to be found in paras 13-17 of Lord Phillips's opinion. These procedures are intended to provide a fair balance between the need to protect the public interest and the need to provide the applicant with a fair hearing. As Mr Tam QC for the Secretary of State pointed out, it is inherent that in any forum in which sensitive evidence might be relevant some adjustment will have to be made to normal procedures.

231. In ordinary civil or criminal proceedings an objection to disclosure on public interest grounds may lead to the material not being considered at all, even though the party from whom the material is withheld may be disadvantaged. In an interlocutory determination of 12 July 2006 in *Y and Othman v Secretary of State for the Home Department*, para 50, Ouseley J compared SIAC's procedures with those adopted by the Asylum and Immigration Tribunal, a large part of whose work is the consideration of issues about safety on return. As he put it:

> "The SIAC procedures strike the balance in a different way: full production and restricted disclosure [in SIAC] as opposed to partial production, and unrestricted disclosure of that partial production [in the AIT]."

This is the approach to the problem that has been sanctioned by Parliament. Its effect must be seen in the context of the procedures that SIAC has adopted through the use of the special advocate procedure. Liberty's suggestion, which I would reject for the reasons that the Court of Appeal gave in [2008] QB 533, para 21 and also because it is inconsistent with the clear terms of rule 4, shows how difficult it is to

think of an alternative procedure which will not give rise to greater disadvantages and greater detriment to the applicants.

232. The attitude that SIAC itself takes to closed material is shown by its ruling on 12 July 2006 that the core evidence in the cases of Y and Othman as to the assurances received from the Algerian and Jordanian governments must be publicly disclosed. As Ouseley J explained in para 58, which Lord Phillips has quoted in para 102 of his opinion, it was SIAC's view that the Secretary of State could not rely on any substantive assurance unless it was put out into the open. The key documents or conversations relied on to show that an applicant's return will not breach international obligations had to be in the open evidence, as weight could not be given to assurances that the giver of them was not prepared to make public. In para 59 he said that, because of the role that SIAC is required by statute to perform, it has to be persuaded to uphold the Secretary of State's objections, reaching its own view on the material before it. In *Secretary of State for the Home Department v MB* [2008] 1 AC 440, para 67, Baroness Hale accepted that SIAC was in the best position to judge whether the proceedings accorded a substantial and sufficient measure of procedural protection.

233. The special advocate procedure too provides an opportunity for questions as to the weight to be attached to undisclosed evidence to be tested and for SIAC itself, exercising its substantial experience in these matters, to distinguish between sensitive material the withholding of which will not result in substantial unfairness and core material to which weight cannot be given unless it is made public. This is the kind of approach that the Strasbourg court appears to have had in mind in *Chahal v United Kingdom* (1996) 23 EHRR 413, para 131, when it referred to the Canadian example on which the setting up of SIAC was based as illustrating that there are techniques that can be employed which both accommodate legitimate security concerns and yet accord the individual a substantial measure of procedural justice.

234. Your Lordships' decision not to accept the Secretary of State's request for permission to adduce closed material as background to these appeals can be seen as part of the same process. The question whether SIAC's decisions on the issues of safety on return were decisions that no reasonable tribunal, properly directed, could have reached must be addressed by an examination of the material that SIAC, exercising its judgment, has set out in its open judgments. In my opinion this is as good an approach as can be adopted in the circumstances. There is no reason to think that the aliens' right under article 13 to an effective

remedy is not being afforded by this procedure. I do not overlook the fact that Mr Singh's argument on the issue of procedural fairness extended to the use of closed material on the question whether it was in the interests of national security that his clients should be expelled from the United Kingdom. The basis for SIAC's determination of this issue has not been disclosed to us. But I would hold that, taking the procedure as a whole, this has not resulted in substantial unfairness.

The article 3 assurances

235. I turn now to the issue of safety on return. This is an issue that concerns all three aliens. They all submit that there is a substantial risk that they will be subjected to torture or inhuman or degrading treatment when they are returned, contrary to article 3. The Secretary of State sought to meet this objection by pointing to assurances that were obtained in each case at a high level from the governments of the receiving states by Her Majesty's Government. SIAC was satisfied in all three cases that, in view of the assurances that had been received, there were no substantial grounds for believing that they would face a real risk of being subjected to treatment contrary to article 3 if they were deported. The aliens challenge these decisions. For RB and U it is submitted that the assurances offered by the Algerian authorities were inadequate because they did not expressly engage with the receiving State's obligations under international law and because there was no provision for monitoring. For Abu Qatada it was submitted that assurances were objectionable in principle, and that in any event those that had been given in his case could not be relied upon in the absence of proper monitoring and powers of access to enable this to be done.

236. I agree with Lord Phillips, paras 106-126, and Lord Hoffmann, paras 182-194, that the challenge to the decisions that were reached on this matter by SIAC must be rejected. The question whether the assurances provided a sufficient guarantee that the aliens would be protected against the risk of treatment contrary to article 3 is essentially a question of fact. As an appeal lies from its decisions on a question of law only, the issue as I see it is whether no reasonable tribunal, properly instructed as to the relevant law, could have come to the same conclusion on the evidence. The questions that this test gives rise to are: (1) was SIAC right to accept that assurances were not objectionable in principle; (2) did it subject the issue to a sufficient degree of scrutiny; and (3) taken overall, were the decisions that it reached in each case such that no person acting judicially and properly instructed as to the relevant law could have come to.

237. On the first point, there are grounds for doubting whether it could ever be right to rely on assurances given by the governments of states where treatment contrary to article 3 is generally practised. The fact that it was thought necessary to obtain the assurances is itself a demonstration that, without them, there was a real risk that treatment contrary to article 3 would be resorted to. There was no question of obtaining a general undertaking that the states concerned would abandon such practices. What was sought were assurances specific to each individual. The context in which they were given was one in which it must be assumed that practices that are objectionable because they are in breach of norms that are agreed internationally are still commonplace. Can it ever be said that, in such circumstances, assurances that particular individuals will not be subjected to them may be accepted as reliable? Is realistic to expect that the risk of their being subjected to it can be met by monitoring? What sanctions, if any, can be imposed in the event of it being discovered that the assurances have been breached?

238. In *Sing v Canada (Minister of Citizenship and Immigration)* 2007 FC 361, para 136, de Montigny J in the Federal Court of Canada cited with approval a passage from the report of the Special Rapporteur to the United Nations of 1 September 2004, UN Document A/59/324 which states:

> "in circumstances where there is a consistent pattern of gross, flagrant or mass violations of human rights, or of systematic practice of torture, the principle of *non-refoulement* must be strictly observed and diplomatic assurances should not be resorted to."

It was suggested that this passage showed that assurances were objectionable in principle. But its very language shows, as de Montigny J accepted, that the issue will always be one of fact. As counsel for RB and U accepted, the consistent approach of the Strasbourg court has been to examine any assurances offered in the particular circumstances of the cases before it and to consider whether, in those circumstances, the assurances are sufficient to counter the risk of treatment contrary to article 3.

239. The underlying principle is that expulsion by a Contracting State may give rise to an issue under article 3 if substantial grounds have been shown for believing that the person in question, if expelled, would face a substantial risk of being subjected to treatment in the receiving State

contrary to article 3: *Soering v United Kingdom* (1989) 11 EHRR 439, paras 90-91; *Bader v Sweden* (2005) 46 EHRR 1497, para 41. In *Chahal v United Kingdom* (1996) 23 EHRR 413, assurances that the applicant would not be ill-treated had been received from the Indian Government: para 92. The court did not doubt the good faith of the Indian Government in providing these assurances but, as violation of human rights by certain members of the security forces was a recalcitrant and enduring problem, it was not persuaded that they would provide an adequate guarantee of safety in his case. In *Mamatkulov and Askarov v Turkey* (2005) 41 EHRR 494, on the other hand, an assurance was obtained from the Uzbek Government in the light of which the court said that it was unable to conclude that substantial grounds existed for believing that the applicants faced a real risk of treatment proscribed by article 3: para 77. The Grand Chamber in *Saadi v Italy* (Application No 37201/06) (unreported) 28 February 2008, para 129 said that where evidence capable of proving that there are substantial grounds for believing that he would be exposed to ill-treatment is adduced by the applicant, it is for the government to dispel any doubts about it. The existence of domestic laws and accession to treaties guaranteeing respect for fundamental rights were not in themselves sufficient where practices contrary to the principles of the Convention were resorted to or tolerated by the authorities. Assurances from the receiving State do not absolve the court from examining the question whether, in their practical application, they would provide a sufficient guarantee of protection. The weight to be given to them depends, in each case, on the circumstances obtaining at the material time: paras 147-148.

240. Did SIAC subject the issue to the necessary degree of scrutiny? And were the decisions that it reached in each case such that no person acting judicially and properly instructed as to the relevant law could have come to? I take these questions together, as the exercise that they give rise to is the same. The decisions must be examined with care to see that the necessary degree of scrutiny was resorted to, and whether the findings that were arrived at were such that no reasonable tribunal could have reached them. I need not prolong this opinion by quoting passages from them. All I need say is that, having studied the decisions that were given on SIAC's behalf in RB's case by Mitting J on 5 December 2006, in U's case by Mitting J on 14 May 2007 and in Abu Qatada's case by Ouseley J in very considerable detail on 26 February 2007, I am entirely satisfied that the necessary degree of scrutiny was exercised.

241. In RB's case, para 22, Mitting J said that the assurances by the Algerian Government could safely be accepted. In U's case, para 37, he

said that there were no substantial grounds, in the light of its assurances, for believing that there was a real risk that the assurances would be breached. In Abu Qatada's case, para 516 Ouseley J said that, if without the Memorandum of Understanding between the United Kingdom Government and the Government of Jordan dated 20 August 2005 there were real risks of treatment which breached article 3, the Memorandum would reduce the risk sufficiently for his removal not to breach the United Kingdom's obligations under the Convention. I am unable to detect any grounds for thinking that these conclusions were not open to SIAC on the evidence that was before it. Of course the issues that had to be resolved were far from easy. The terms in which the assurances were given, the opportunities for monitoring and the extent to which the risks would be reduced all required careful evaluation. But these were matters for SIAC to resolve, as it did, on a careful consideration of all the evidence.

242. It may be worth observing, by way of a footnote, that a similar problem arose in *R v Secretary of State for the Home Department, Ex p Launder* [1997] 1 WLR 839. The question in that case was whether it would be unjust or oppressive for the applicant to be returned to face trial in Hong Kong after the transfer of sovereignty to the People's Republic of China. This depended on whether the People's Republic could be relied upon to adhere to its undertakings to observe the Basic Law in Hong Kong after the transfer. The Secretary of State said that he had considered this matter very carefully and that in his view the People's Republic, despite its actions elsewhere and in other circumstances, could be relied upon to respect the Basic Law in the applicant's case: p 859D. The House held that it would not be justified in holding that he had failed to address himself to the right question in reaching the conclusion that he should grant a warrant in that case. Events have shown the soundness of his assessment. In this field there can be no absolute guarantees that assurances, even at the highest level, will be adhered to. But the Strasbourg jurisprudence does not require them to achieve that standard. The words "substantial" and "real risk" show that the court's approach is essentially a practical one that strikes a balance between the interests of the community and the protection of the individual. The aliens' right under article 13 to an effective remedy is satisfied by entrusting this exercise, which requires independent scrutiny of the facts, to SIAC.

Abu Qatada: article 6

243. The Secretary of State accepts that it is likely that, if he were returned to Jordan, Abu Qatada will be put on trial for the crimes of which he has been convicted in his absence. This gives rise to a further objection to removal which is specific to his case. Are there substantial grounds for thinking that in that event his right to a fair trial under article 6(1) will be violated? Two reasons are advanced for thinking that there is a real risk that this will be so. One is that his trial would take place before a military court. The other is that evidence that is led against him may have been obtained by torture. SIAC held against him on both points. In para 451 of its decision of 26 February 2007 Ouseley J said that, taking all the various factors that were likely to cause the retrial to breach article 6 in the round, it was not persuaded that there was a real risk of a total denial of the right to a fair trial. The Court of Appeal reversed its decision, on the ground that it had erred in law in treating the possible use of evidence obtained by torture pari passu with complaints about the court's independence: *Othman v Secretary of State for the Home Department* [2008] 3 WLR 798, para 49.

244. I agree with Lord Phillips, paras 133-154, and with Lord Hoffmann, paras 195-203, that SIAC was entitled to find in favour of the Secretary of State on this issue. Here too the questions that are raised are essentially questions of fact. The issue is whether no reasonable tribunal, properly instructed as to the relevant law, could have come to the same conclusion on the evidence. As to the law, there are two points that must be considered in addition to the need for a sufficient degree of scrutiny. The first is the approach that must be taken, where a person is being removed to a third country which is not bound by the European Convention on Human Rights, to the guarantee of a fair trial. The second is the approach that must be taken where it is suggested that evidence which is to be led against an accused may have been obtained by torture.

245. On the first point, the Strasbourg court has said repeatedly that the possibility of a violation of article 6 cannot be excluded where the person expelled risks suffering a flagrant denial of a fair trial in the receiving country: see the joint partly dissenting opinion of Judges Bratza, Bonello and Hedigan in *Mamatkulov and Askarov v Turkey* (2005) 41 EHRR 494, pp 537-539. In that case political dissidents claimed that they would not receive a fair trial if they were extradited to Uzbekistan because, among other things, torture was routinely used to secure guilty verdicts and because suspects were frequently denied access to a lawyer. Their case was that they ran a real risk of a flagrant denial of justice. In para O-III14 the judges said:

> "In our view, what the word 'flagrant' is intended to convey is a breach of the principles of fair trial guaranteed by Article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article."

In paras O-III17 and O-III19 they used the expression "a real risk" to describe the standard which the evidence has to achieve in order to show that the expulsion or extradition of the individual would, if carried out, violate the article.

246. The test which SIAC applied in para 451 was whether there would be "total denial" of the right to a fair trial, taking these words to be the equivalent of "complete" denial in the decision of the Immigration Appeal Tribunal in *Devaseelan v Secretary for the Home Department* [2003] Imm AR 1, 34, para 111, which the House had approved in *R (Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 AC 323. It did not have the benefit of the House's observations in *EM (Lebanon) v Secretary of State for the Home Department* [2008] UKHL 64; [2008] 3 WLR 931, in which it was recommended that the test as explained in *Mamatkulov* should be adopted. But, as Ouseley J explained in para 454, SIAC understood this concept to involve an analysis of the degree and gravity of the shortfall. So in substance they were applying the same test. In *EM (Lebanon)* the House disapproved of observations in the Court of Appeal [2006] EWCA Civ 1531; [2007] 1 FLR 991, paras 37-38 that suggested that the words "complete denial" and "flagrant breach" indicated different tests. As I said in para 4, there is only one test. For this reason I think that the Court of Appeal was wrong in Abu Qatada's case to say that SIAC erred because it treated the possible use of evidence obtained by torture pari passu with complaints about the court's independence. The proper approach, which SIAC adopted, was to take all the various factors together and to ask whether, when looked at in the round, there was a real risk of a flagrant denial of a fair trial.

247. SIAC examined the issues about the court's independence with great care, accepting that the trial process before a military court called for particularly careful scrutiny: *Ergin v Turkey (No 6)*, (Application No 47533/99) (unreported), 4 May 2006. It took account of the lack of independence of the court and noted that the fact that the prosecutor and the majority of judges were part of the same military hierarchy did not add to the appearance of justice or independence: para 433. As against that, it found that it could not conclude that, for all the deficiencies of

independence, the courts would not endeavour to apply the law conscientiously or would reach decisions which were manifestly unreasonable or arbitrary: para 438.

248. On the issue of evidence obtained by torture, the Strasbourg court has adopted an uncompromising approach to the use at a trial of evidence that is found to have been obtained as a result of torture: see *Harutyunyan v Armenia*, (Application No 36549/03) (unreported) 28 June 2007. In *Gäfgen v Germany*, (Application No 22978/05) (unreported), 30 June 2008, para 99, it held that the use at a trial of real evidence recovered as a direct result of ill-treatment, at least if the acts could be characterised as torture, should never be relied upon as proof of guilt, irrespective of its probative value. But the evidence that was before SIAC did not come up to that standard. There were allegations, but there was no proof. It followed the majority view in *A (No 2) v Secretary of State for the Home Department* [2006] 2 AC 221 that, where it is alleged that the evidence has been obtained by torture, the court should refuse to admit it only if it concludes on a balance of probabilities that it was obtained by torture. The assertion that there is a real risk that it was obtained in this way is not enough. As article 15 of the International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (1990) (Cm 1775) puts it, a statement which "is established" to have been made as a result of torture shall not be invoked as evidence. SIAC noted that Jordanian law does not permit evidence that is found to have been obtained involuntarily to be admitted, but that statements to a prosecutor which might have been obtained by prior duress are not excluded because they have not been shown to have been so obtained. Making the best use of the information that was available it could not conclude that the evidence was probably obtained by torture, although there was a very real risk that it had been: para 437. The question it then asked itself was whether it was unfair for the burden of proof in Jordan to lie where it does, as *(A (No 2))* says it does here, on this issue.

249. Drawing these points together along with the lack of other basic protections, SIAC concluded that the retrial would probably not comply with the requirements of article 6 if Jordan were a party to the Convention. But it would not involve a complete denial of the right to a fair trial before an independent and impartial body: para 442; see also para 451. Its discussion shows beyond question that the importance of the issue has been fully addressed and subjected to a careful and frank analysis. It is plain that in several material respects the circumstances in which the retrial will take place will give rise to the risk of unfairness. In *Öcalan v Turkey* (2005) 41 EHRR 985, para 112 the Grand Chamber

said that the court has consistently held that certain aspects of the status of military judges sitting as members of the State Security Courts made their independence from the executive questionable; see also *Haci Özen v Turkey*, (Application No 46286/99) (unreported) 12 April 2007. But here again, as in the case of the assurances, there is no absolute rule. The question whether or not there will be a flagrant breach must be evaluated. SIAC noted, in paras 443-446, that the retrial will take place within a legally constructed framework and that there was sound evidence that the military court, which is not a mere tool of the executive, appraises the evidence and tests it against the law. I do not think that, looking at the matter overall, SIAC can be faulted on the ground that it failed to subject the issues to anxious scrutiny or that its decision that there would not be a complete denial of a fair trial was one which it was not entitled to reach on the evidence.

Article 5; the Refugee Convention

250. I have nothing to add to what Lord Phillips, paras 127-132, and Lord Hoffmann, paras 205 - 207, have said on these issues, with which I am in full agreement.

Conclusions

251. I would dismiss the appeals of RB and U. I would allow the Secretary of State's appeal in the case of Abu Qatada and restore the decision of SIAC.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

252. I have had the advantage of reading in draft the very full opinions of my noble and learned friends Lord Phillips of Worth Matravers, Lord Hoffmann and Lord Hope of Craighead and, finding myself in substantial agreement with them all readily recognise that there is much to be said for my saying little, little to be said for my saying much. Really my only concern is to give such emphasis as I may to what seemed to me to be the three core holdings which I understand all your

Lordships to be agreed upon in deciding these appeals: first, that SIAC's conclusions on the central issues raised are not merely to be treated with respect but are quite simply unassailable unless it can be shown that the Commission actually erred *in law*; secondly, that the judgment of the majority of the House in *Secretary of State for the Home Department v MB and AF* [2008] 1 AC 440 has no direct application to the very different jurisdiction which SIAC exercise under the Special Immigration Appeals Commission Act 1997; and, thirdly, that the Court of Appeal in *Othman's* case misdirected itself in holding that SIAC's finding that there would be a "very real risk" of evidence procured through torture being adduced to convict Othman upon his proposed retrial for terrorist offences in Jordan necessarily precludes his return there on article 6 grounds. I shall take as read all the basic material set out in Lord Phillips' opinion and confine myself to a very few paragraphs on each of the three points just identified.

(i) Appeal only on a point of law

253. Section 7 of the 1997 Act restricts the right of appeal from SIAC to the Court of Appeal to "any question of law material to [SIAC's] determination". Your Lordships are well familiar with the difficulty in various contexts of determining the precise borderline between questions of fact and points of law. It is, for example, now recognised that questions of proportionality which necessarily arise when striking the balance between private and public interests in cases involving qualified Convention rights cannot be regarded as pure questions of fact. Nothing, however, could be clearer than that in the present context the distinction between fact and law, wherever clearly identifiable, should be faithfully honoured. SIAC is a highly expert and experienced tribunal, custom-built for the challenging and sensitive tasks involved in deciding these expulsion cases, and vested with particular powers and procedures—above all the use of closed material under the special advocate scheme—which make its determinations peculiarly inappropriate for further factual reappraisal and appeal. Take the determinations in these very cases. One (*Othman*) involved a five-day hearing before SIAC and resulted in both open and closed judgments, the former extending to 136 pages. RB's appeal to SIAC lasted 4 days; U's some 7 days. The fact that Strasbourg itself might choose to carry out a close factual re-examination of these cases to reach its own decision upon whether expulsion would involve a Convention breach is simply nothing to the point; I agree entirely with what Lord Phillips says about this at para 66 and Lord Hoffmann at para 190.

254. The most critical question raised in each appeal is whether the proposed deportees would face a real risk of article 3 ill-treatment on return. *Par excellence* this is a question of fact calling for an evaluation of all the evidence and ultimately a single factual judgment. Obviously if SIAC had made the egregious mistake of failing to understand the basic legal principle enshrined in the *Soering, Chahal* and *Saadi* line of Strasbourg authority, its determination would have been open to attack. Such argument as was advanced to that effect, however, was in my judgment hopeless and is comprehensively dealt with by Lord Phillips at paras 111-114. As for the suggestion that SIAC wrongly took account, or took excessive account, of assurances given respectively by Algeria and Jordan that the deportees would not be ill-treated on return, the Strasbourg jurisprudence makes it absolutely plain that the question whether in any particular case the assurances given obviate the risk is a question of fact to be decided in the light of all the circumstances pertaining at the material time. It could hardly be suggested that SIAC failed in these cases to give the fullest and most scrupulous attention to all the relevant considerations raised by these assurances (and, indeed, by the need for them in the first place). The very fact that in *AS* and *DD (Libya) v Secretary of State for the Home Department (Liberty intervening)* [2008] EWCA Civ 289 SIAC (chaired by the same judge as chaired SIAC in *Othman*) *allowed* the aliens' appeals against deportation to Libya on article 3 grounds despite the assurances contained in a Memorandum of Understanding between the UK and Libya is surely some indication of the conscientiousness with which SIAC discharges its responsibilities.

(ii) Closed evidence

255. This is not the occasion to examine the precise scope and application of *Secretary of State for the Home Department v MB and AF*—there will be a full opportunity for that on the hearing of AF's further appeal to the House in March. What is critical for present purposes is to understand the all-important difference between control orders such as were in issue there and deportation orders with which your Lordships are here concerned. The former, although falling short of constituting article 5 detention, in almost every other respect are highly restrictive of the controlees' ordinary rights and freedoms. Moreover such orders are made domestically and can be (and are) made against UK citizens no less than against aliens. (It is, of course, High Court judges alone who exercise this jurisdiction, not SIAC.) Inevitably, therefore, such orders engage article 6 of the Convention. In contrast, the expulsion of aliens involves no determination of civil rights and is therefore beyond the reach of article 6—see the Grand Chamber's

judgment in *Maaouia v France* (5 October 2000, Application No 39652/98); (2000) 33 EHRR 1037. The only exception to this (see *Chahal*) is where the alien is detained pending expulsion, not a problem now arising in either of these appeals. None of that, of course, is to deny an alien such rights as the Convention may give him not to be deported, whether such rights arise under article 3 or under any other Convention provision. As *Chahal* makes clear, however, the independent scrutiny of any such claim which is required to give aliens an effective remedy in this regard need not even be by way of a judicial hearing. Such being the case, it becomes difficult indeed for the proposed deportees here to question the adequacy of the SIAC regime and the legitimacy of its use of special advocates as a means of effectively safeguarding their Convention rights in certain exceptional circumstances not to be deported.

256. Bear in mind too in this regard that the Convention rights sought to be invoked in any expulsion case will necessarily involve, as in the present appeals, the contention that on return the proposed deportee will be at risk of article 3 ill-treatment or be in danger of flagrant violation of some other Convention right. No case is being made *against him*— again, a striking difference from control order appeals where inevitably the central issue arising is the risk posed by the controlee to UK security. Rather the alien is himself making a case against the state to which it is proposed to expel him. That some of the material in response to the case he makes against the foreign state may in the public interest be kept from him is accordingly less prospectively damaging to his cause than where (as in a control order case) he may be left entirely in the dark as to why he is alleged to constitute a terrorist threat.

257. In the light of these various considerations, the attack on the use of closed material in the present context is to my mind wholly unwarranted.

(iii) Article 6 in a foreign case

258. In many parts of the world judicial procedures are markedly different (and to our way of thinking much inferior) to those required by article 6 of the Convention and under other similar constitutional guarantees of due process. No one suggests, however, that people coming from such places are immune from expulsion lest they become subject on return to what we would regard as a defective legal process. True it is that ever since *Soering v UK* (1989) 11 EHRR 439, Strasbourg

has contemplated 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". Not once, however, in the subsequent twenty years has an expulsion or extradition order in fact been held to violate article 6—not even in the somewhat shocking circumstances which arose in *Mamatkulov and Askarov v Turkey* (2005) 41 EHRR 494 where the dissenting minority noted as features of the applicants' terrorist trial in Uzbekhistan that "the applicants were denied the right to be represented by counsel of their own choice, defending counsel being appointed by the public prosecutor; the applicants were held incommunicado until the commencement of their trial in June 1999 [some three months after Turkey had extradited them in the face of a rule 39 order prohibiting such action]; the trial was closed to the general public, to all family members of the applicants and to attorneys hired on behalf of the defence; and the self-incriminating statements used to convict the applicants included those signed during the pre-trial police investigation, while the applicants were in custody and without access to their own lawyers". This, moreover, against the background of an Amnesty International briefing document affording "credible grounds for believing that self-incriminating evidence extracted by torture was routinely used to secure guilty verdicts".

259. Lord Phillips must surely be right (at paras 136-138 of his opinion) in supposing that only where a prospectively unfair trial would be likely to lead to a serious violation of some substantive human right—for example, an unjust conviction involving grave consequences such as capital punishment or a substantial deprivation of liberty—would article 6 fall for consideration in a foreign case. Lord Phillips suggests (at para 139) that a different approach will be appropriate in an extradition case since the very object of extradition is to stand trial and no one should be sent abroad specifically to undergo an unfair trial process. Whilst, however, I agree that in the context of extradition certain considerations may militate against an order—because, for example, such proceedings are subject to whatever express limitations are provided for in the relevant bilateral agreement and, indeed, because extradition may involve the sending country's own nationals or others with rights of residence and not merely aliens—it should be recognised too, and countervailingly, that there may be compelling reasons in favour of extradition rather than that the suspect should enjoy an undeserved safe haven from prosecution—see the recent decision of the House in *R (Wellington) v Secretary of State for the Home Department* [2008] UKHL 72.

260. Fortunately it is unnecessary in the present context to explore these problems further: Mr Othman is being expelled as an undesirable alien rather than extradited to stand trial and, if returned, tried and convicted, he will plainly suffer ample deprivation of liberty to warrant consideration of his case under article 6 before he comes to be expelled. All that said, I find SIAC's judgment on this issue perfectly clear, measured and sensible and the Court of Appeal's criticisms of it misplaced. Essentially the Court of Appeal appears to have held that SIAC's finding that there exists "a very real risk" of evidence obtained by article 3 ill-treatment being used in Jordan to convict the accused of itself necessarily precludes his expulsion. Strikingly, both the authorities principally relied on to support this conclusion—*Jalloh v Germany* (2006) 44 EHRR 667 and *A v Home Secretary (No 2)* [2006] 2 AC 221—were domestic cases which simply never addressed what in this context would be required to constitute a flagrant denial of justice (so fundamental a breach of the principles of fair trial as to destroy the very essence of the right) and thus prevent expulsion. True it is that in cases envisaged by the majority of the House in *A (No 2)*, SIAC, in deciding whether to exclude evidence as probably obtained by torture, would be altogether readier than it appears the Jordanian Court is likely to be to find that the accused has discharged the burden of proof upon him (to this extent I agree with paras 60 and 61 of the Court of Appeal's judgment). It by no means follows, however, that the anticipated process in Jordan is to be characterised not merely as one which domestically would violate article 6 (as SIAC rightly held) but as one so fundamentally inconsistent with the right to a fair trial as to bar the alien's expulsion. One day, no doubt, a case will come before the courts where, however compelling the security interests of the state which proposes to expel an alien, those interests will fall to be sacrificed to the alien's article 6 right not to be returned to face a flagrantly unjust trial. If, however, as the majority of the Grand Chamber held in *Mamatkulov*, extradition was not unlawful even in the circumstances arising there, in my judgment expulsion most certainly is not unlawful here. SIAC's judgment on the article 6 issue is to my mind no less persuasive and sustainable than on all the many other issues which it had to address in Othman's case.

261. I too, therefore, would allow the Secretary of State's appeal and restore SIAC's decision in *Othman's* case and in the other case would reject *RB's* and *U's* appeals.

LORD MANCE

My Lords,

262. I have had the benefit of reading in draft the speeches of my noble and learned friends, Lord Phillips of Worth Matravers, Lord Hoffmann, Lord Hope of Craighead and Lord Brown of Eaton-under-Heywood. I am in agreement with all of your Lordships as to the outcome of these appeals, and, in view of the large measure of my agreement with the reasoning in your Lordships's speeches, there is little that I wish to add.

263. On the issue whether it was open to SIAC to use closed material relating to the issue of safety on return, I share the view that the statute unequivocally permits this. I do not consider that anything said by the European Court of Human Rights or by the junior Home Office Minister on the third reading of the Bill (see Lord Phillips' judgment paras 79 and 80) related to the question whether sensitive material bearing on national security might be relevant to an issue of safety on return, and might require special treatment accordingly. In my view, all that the European Court was concerned to stress in *Chahal v United Kingdom* (and again in *Saadi v* Italy) was that there was no trade-off between the extent of any threat to national security that a person might pose in country A and the extent of any risk that he might be mistreated contrary to article 3 in country B to which country A was seeking to expel him.

264. *Maaouia v France* establishes that deportation proceedings in respect of an alien do not as such engage civil rights or therefore article 6 of the Convention. No question arises in these cases as to the legality of any detention. What is required in this country, in respect of any risk of mistreatment contrary to articles 3, 5, 6 or 8 in the countries (Algeria and Jordan) to which RB, U and Abu Qatada are proposed to be deported, is "independent scrutiny of the claim" which is, in my opinion, provided by SIAC and the statutorily regulated or authorised procedures under which it operates. I do not consider that the use of the closed material in the present context of deportation offends against either Convention or domestic principles of fairness. Assuming that such principles required sufficient disclosure to enable RB, U and Abu Qatada to meet the case against them, I also agree, for reasons given by Lord Phillips and Lord Brown, that nothing in the House's decision in *Secretary of State for the Home Department v MB and AF* [2007] UKHL 46 leads to a conclusion that such disclosure was essential or that

Rule 4 must be read down to permit such disclosure, in the different context of the present cases involving a challenge to deportation.

265. On the issues of reliance on the assurances given by the governments of Algeria and Jordan, I agree with the reasoning and conclusions of Lord Phillips in paragraphs 106-126, Lord Hoffmann in paragraphs 182-194 and Lord Hope in paragraphs 235-242. On the issues as to whether in the case of Abu Qatada there is a real risk that his right to a fair trial under article 6(1) will be violated in Jordan, I agree with their further reasoning and their conclusions (that there is no real risk that his trial in Jordan would be flagrantly unfair in character, course or consequences) contained in paragraphs 133-134, 195-203 and 243-249 respectively, as well as with Lord Brown's further observations in paragraphs 258-260. I note only that, although the European Court of Human Rights' reasoning does not make the connection explicitly, there appears to be a considerable and to my mind unsurprising resemblance, which might in another case be worth exploring further, between the concept of flagrant unfairness adopted by the Court of Human Rights and the concept of denial of justice in public international law generally: see, as to the latter, Jan Paulson: *Denial of Justice in International Law* (C.U.P.; 2005). Paulson at pp 60-61 states "The modern consensus is clear to the effect that the factual circumstances must be egregious if state responsibility is to arise on grounds of denial of justice", while adding, realistically, that "this indispensable line between fundamental violations and others" is easy to draw in some instances, but less clear in others.

266. The issue raised by Abu Qatada with regard to article 5 of the Human Rights Convention is without basis for the reasons given by Lord Phillips in paragraphs 130-132 and by Lord Hoffmann in paragraphs 205-206. The further issue he raises under the Refugee Convention is also without basis for the reasons given by Lord Phillips in paragraphs 127-129 and by Lord Hoffmann in paragraph 207.

267. It follows that I agree that RB's and U's appeals should be dismissed, but that in the case of Abu Qatada the Secretary of State's appeal should be allowed, Abu Qatada's cross-appeal dismissed and SIAC's conclusions on the points considered on these appeals restored.