IN THE SPECIAL IMMIGRATION APPEALS COMMISSION

Appeal No: SC/61/2007
Hearing date: 13th – 19th April, 21st & 22nd July 2010
Date of Judgment: 10th September 2010

Before:

THE HONOURABLE MR JUSTICE MITTING
MISS E ARFON-JONES, FTTIAC PRESIDENT
MR S PARKER

Between:

'XX'

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Mr T Otty QC, Ms K Markus, and Mr A Gask (instructed by Birnberg Peirce & Partners) appeared on behalf of the Appellant

Mr R Tam QC and Mr S Kovats QC (instructed by the Treasury Solicitor) appeared on behalf of the Respondent

Ms A Dhir QC, and Mr M Chamberlain (instructed by the Special Advocates' Support Office) appeared as Special Advocates

(OPEN JUDGMENT)

The Hon. Mr Justice Mitting :

Background

1. XX is a 32 year old Ethiopian National. He is the son of Christian parents and was educated at Christian schools. His father held a position in the Ethiopian National Security Service under the Derg and in 1987, he was appointed Third Secretary at the Ethiopian Embassy in Rome, a position which he lost when the Derg was overthrown in May 1991. His parents had separated in 1985 and subsequently divorced. His mother did not accompany his father to Rome, but remained in Ethiopia, until she came to the United Kingdom in 1992. She brought her children, including XX, then aged 14, with her. They were all granted indefinite leave to remain on 6th October 1999. He had an unsettled adolescence. He was sentenced to a term of detention for offences of robbery and assault. He took drugs. He formed a relationship with a British woman, who bore his child in October 2000.

2. At about this time, he began to develop an interest in Islam, which he shared with his mother, who had converted to Islam at the time of her separation from his father. In April 2001, at her suggestion, he travelled to Ethiopia, to stay with Muslim relatives for two months. He states that he then decided to put his unsettled past behind him. He became a committed Muslim. In each of the next four years, he travelled to stay with his relatives in Ethiopia, for periods ranging from a fortnight to just under three months. During his 2002 trip, he met his future wife, an Ethiopian national, a Muslim and a teacher. They were married in Addis Ababa during his 2004 trip to Ethiopia, between 14 June and 8 September. He returned to the United Kingdom to start a computer science course at South Bank University, leaving his wife, who was by then pregnant, in Ethiopia. He returned to visit her from 16 March until 8 April 2005. On 26 May 2005, he went to Somalia. In September 2005, he flew from Somalia to Dubai and then to Ethiopia, where he learnt that one of his brothers and his two sisters, and the husband of one of them, had been arrested and were still detained in connection with the failed attacks in London on 21 July 2005. He did not return to the United Kingdom, but remained in Ethiopia, he says, with his wife and the daughter who was born during his trip to Somalia. He decided to return to the United Kingdom in December 2006, but was prevented from doing so when detained at Bole airport and transferred into the custody of the Ethiopian Security Service (NISS). He was detained for two weeks, and questioned about his trip to Somalia, the failed attacks of 21 July 2005 and those involved in them. He says that although the questioning was aggressive, he was not ill-treated. He was released and returned to his family in Addis Ababa. He then flew to the United Kingdom on 27 December 2006.

3. On 22 December 2006, a decision was taken on behalf of the Secretary of State to exclude XX from the United Kingdom. He was detained on arrival on 27 December and refused leave to enter on the ground that his presence in the United Kingdom would not be conducive to the public good. His indefinite leave to remain was cancelled on 28 December 2006. On 5 January 2007, he was arrested under the Terrorism Act 2000, questioned by Metropolitan Police

officers and released without charge into immigration detention on 9 January. On 11 January, he filed a notice of appeal to SIAC against the decision to exclude him from the United Kingdom. He was granted bail on 16 March 2007 on stringent conditions, but not in fact released until July 2007 because of difficulties in identifying suitable accommodation for him. On 11 January 2008, he was again granted indefinite leave to remain in the United Kingdom. His appeal was therefore treated as abandoned under section 104(4A) Nationality Immigration and Asylum Act 2002. On the same day, he was served with a non-derogating control order. On 12 August 2008, Keith J handed down a judgment in which he held that the statutory test for making and upholding a control order – that there were reasonable grounds to suspect that XX had been involved in terrorism-related activity and that it was necessary for the protection of the public from a risk of terrorism that he should be subjected to a control order – were satisfied. He held, however, that the cumulative effect of the terms imposed upon him by the control order were such as to deprive him of liberty and so were unlawful. No order was made by Keith J, pending an appeal by the Secretary of State against that finding. In the event, the Secretary of State's appeal succeeded in the Court of Appeal on 15 July 2009. The Court of Appeal's judgment was reversed by the Supreme Court on 16 June 2010.

4. On 14 August 2008, XX was arrested for and charged with threatening to cause criminal damage. On 26 February 2009, he was convicted at Nottingham Crown Court of threatening behaviour and, on 24 April, sentenced to 12 months imprisonment. On 21 May 2009, the Secretary of State decided to deport XX on conducive grounds for reasons of national security and served notice of intention to deport on 26 May. XX was by then held in immigration detention. He appealed to SIAC. He was granted bail on 24 June and released on bail on 20 July. Meanwhile, the control order (which had been renewed on 7 January 2009) was revoked on 2 July.

5. On 30 September 2009, XX's solicitors told SIAC that, for the purpose of this appeal only, he would not be challenging the national security case against him. The grounds of his appeal are that the Secretary of State cannot deport him to Ethiopia without breaching the United Kingdom's obligations to him under articles 3, 5 and 6 and protocol 13 of the ECHR. Mr Otty QC, for XX, also contends that the Secretary of State's approach to the appeal and the issues which underlie it amounts to an abuse of process and that, in consequence, the notice of intention to deport should be set aside. We will deal with this proposition in the confidential, but not closed, judgment.

6. For the second time in a SIAC appeal (the first was the Operation Pathway case *Naseer and others v SSHD* SC/77/2009) the Secretary of State inadvertently disclosed a number of confidential Foreign and Commonwealth Office documents which should have been considered only in closed session in the interest of the international relations of the United Kingdom. But for the inadvertent disclosure, it would have been SIAC's duty to ensure that the information contained in them was not disclosed to XX's Open Advocates. The circumstances in which inadvertent disclosure was made are fully explained in the witness statements of an anonymous UK Border Agency

official and of Oliver Gilman both dated 19 April 2010. In short, the documents were disclosed because, mistakenly, clearance was only sought from within the Home Office. Because the documents concerned relations with the Government of Ethiopia, it should have been obvious that clearance should also have been sought from the Foreign and Commonwealth Office. Arrangements have now been put in place to ensure that there should be no recurrence. Because the error was not discovered until after Mr Otty had read and considered the documents, an ad hoc solution had to be found to deal with the problem it created. For reasons briefly explained in the confidential (but not closed) judgment, we rejected Mr Otty's submission that the documents should be treated as fully open. That left two alternatives: to require the open advocates to hand back the documents to the Secretary of State and to make no reference to them in questions or submissions in the open session; or, as happened with the consent of all parties in the Operation Pathway case, to deal with the Secretary of State's case on the issue of safety on return and with the submissions of the open advocates (and of the Secretary of State on open matters) on that issue in a private session from which the public and XX were excluded. The power to conduct part of the hearing in private is contained in rule 43(2) of our procedural rules. We are satisfied that it was right to exercise it, to achieve the least bad solution to the problems created by the error. It would not have been fair to Mr Otty or to XX to require him, a short notice, to put out of mind everything which he had learnt from the inadvertently disclosed documents. Fairness required that he should be able to deploy, in questions and submissions, all of the information helpful to XX's case which he had properly acquired. Conducting part of the hearing in private permitted him to do this. It also permitted SIAC to fulfil its duty to secure that information was not further disclosed contrary to the interests of the international relations of the United Kingdom provided that appropriate undertakings from the open advocates and those who instruct them were given, which they were. The price to be paid was the exclusion of the public, and in particular the press, from parts of what would otherwise have been open sessions on the issue of safety on return. That is regrettable, but it is a price which has to be paid to permit XX to have as fair a hearing as possible. It is in part alleviated by the contents of this open judgment and by the fully open sessions in which the expert witnesses called for XX gave evidence by television link from New York and California and for the Secretary of State, from Addis Ababa. The exclusion of XX from the private session had no effect upon him, because he has shown no interest in attending any part of the hearing and has not done so. (He would have required a variation in his bail terms to attend the hearing and did not apply for it.)

National Security

7. Because XX is not challenging the national security case against him in these proceedings, we can deal with this issue shortly. The Secretary of State's case is based on four propositions:

    i) XX attended what the Security Service strongly assesses to have been a terrorist training camp in Cumbria in May 2004.

ii) XX regularly associated with known extremists in the United Kingdom.

iii) XX is assessed by the Security Service to have participated in terrorist training in Somalia between May and September 2005.

iv) On 14 August 2008, XX threatened to burn down the house in which he was living under the terms of his control order (the offence for which he was sentenced to 12 months imprisonment on 24 April 2009).

In consequence, the Security Service assesses that XX is an Islamist extremist who posed, and continues to pose, a threat to the national security of the United Kingdom.

8. It is not disputed that XX attended an organised camp in Cumbria over the May bank holiday in 2004. We are satisfied on balance of probabilities that the event was organised by Muhammed Hussein Sa'id Hamid, who was convicted in February 2008 of soliciting to murder and providing terrorism training including training at camps similar to that attended by XX. It is undisputed that the individuals who attended the camp included four of those convicted of conspiracy to murder on 9 July 2007 (arising out of their participation in the failed attacks of 21 July 2005): Saeed Muktar Ibrahim, Yassin Omar, Hussain Osman and Ramzi Mohammed; and another man convicted in November 2007 of collecting information useful to a person committing or preparing an act of terrorism, Adel Yahya. XX also admitted that two men who travelled with him to Somalia, who were subsequently excluded from the United Kingdom for reasons of national security, Joseph Kebide and Dawit Semeneh, also attended the camp. The Security Service assesses that they were extremists. For reasons set out in the closed judgment, we accept that assessment. XX also accepts that another man convicted in February 2008 of attending terrorist training and possessing information likely to be useful to a terrorist, Al Figari, attended the camp. Police observations – of individuals in combat fatigues who appeared to be led by an instructor or leader – are consistent with the Security Service assessment. We are satisfied on balance of probabilities that it was not a coincidence that XX attended the camp with a group of men which included a significant number of subsequently convicted terrorists. Whether or not the activities undertaken at the camp included rudimentary military-style training, as the Security Service assesses, or amounted to no more than a bonding session for extremists, as has been assessed about other gatherings, we are satisfied that the camp had an extremist purpose, known to and shared by XX.

9. That conclusion is reinforced by the second of the Secretary of State's grounds: his attendance at Muhammad Hamid's home on a number of occasions – she puts it at about five – for dinner on Friday night when the five participants in the 21 July 2005 attacks were present.

10. We are satisfied on balance of probabilities that XX's explanation for his visit to Somalia between May and September 2005 – that it was to undertake "Dawa" (to receive and disseminate the teachings of Islam) – is untrue. The three Ethiopians in the group (XX, Kebide and Semeneh) – could not reasonably have expected to receive a warm, or even safe, welcome in a

lawless state traditionally hostile to Ethiopia; nor could they have hoped to disseminate the teachings of Islam in a language, Somali, which they did not speak. We are satisfied that Kebide and Semeneh were Islamist extremists. There were training camps in Somalia, albeit not on the scale of those in the Federally Administered Tribal Areas of Pakistan, probably organised by Adnan Haashi Ayro, then leader of the military wing of the Islamic Courts Union. We have read the closely reasoned analysis of the material considered by Keith J in his open and closed judgments in the control order review and agree with his reasoning and conclusion. The material which we can take into account about Kebide and Semeneh, but which he did not (because it had not been disclosed or gisted to XX), together with the material which he considered, satisfies us on balance of probabilities that the group which included XX went to Somalia for an extremist purpose.

11. Those three factors, taken together, satisfy us, on balance of probabilities, that XX was, in 2004 and 2005, closely associated with individuals who went on to carry out terrorist acts in and against the United Kingdom; that he shared and supported their views; and that he then posed, and continues to pose, a threat to the national security of the United Kingdom.

12. We do not regard his threat to cause damage to the house in which he lived, on 14 August 2008, as signifying anything other than intemperate frustration at the position in which he found himself. It does not add anything significant to the national security case.

Safety on Return – Article 3

13. Ethiopia has a long and proud history as an independent African nation. Famously, its army, under Menelek II defeated and annihilated an invading Italian force at Adowa in 1896. Except for the period from 1936 until May 1941, when it was forcibly incorporated into the Italian North African Empire and 6 years' British military administration from then until 1947, it has never been under direct European rule. It has a long history of internal strife, continuing to the present day. Emperor Haile Selassie was overthrown by the Marxist Derg in 1974. They were in turn overthrown by the Ethiopian People's Revolutionary Democratic Front (EPRDF), a Tigrayan-led coalition, in May 1991. The EPRDF has been in power ever since. It has been beset by external and internal strife: the secession of Eritrea, its outlet to the sea, in 1993; the war with Eritrea from May 1998 until June 2000; the invasion of Somalia in 2006/7; political and irregular military opposition in Oromia by the Oromo Liberation Front, since the mid-1990's; and more recently violence in, and emanating from, Arab elements in the Ogaden, a region of vital interest to Ethiopia because of its potential for oil and gas production. The EPDRF government is authoritarian, but not a dictatorship. The long serving Prime Minister, Meles Zenawi, is the leading figure in the government, but its decisions do not depend on his will alone. The government is in command of its security forces and bureaucracy. Dr Reid observes in his undated report, prepared for the purpose of these proceedings, that the government has maintained power through "a deft combination of armed force and political guile". Further, as Ms Lefkow, the Senior Researcher and Horn of Africa team leader at Human Rights Watch, who gave impressive evidence by television

link from New York, accepted, government decision making is generally rational, even if its responses to political opposition and foreign criticism can be extreme.

14. There are extensive, well documented and well founded criticisms of the government's record on political and human rights. The following is not an exhaustive catalogue of those criticisms, simply a statement of the most striking. Disturbances after the 2005 parliamentary elections led to the killing by the security forces, of 193 demonstrators and the arrest of up to 30,000 political opponents. When the commission set up to inquire into the use of force, human rights violations and damage to life and property reported, on 3 July 2006, that excessive force had been used to control the protests, it was, according to its Deputy Chairman, Judge Wooldemichael Meshesha, summoned to see the Prime Minister, who instructed it to reverse its findings. Judge Wooldemichael felt so intimidated that he fled Ethiopia and later addressed the European Parliament about his experiences. A leading opposition figure, Birtukan Mideska, was prosecuted, convicted and sentenced to life imprisonment and then pardoned; but her pardon was revoked when she stated, truthfully, that she had not asked for it. She remains in prison. Independent international and national human rights organisations have all been excluded, cowed or compulsorily merged into state-dominated organisations. A few examples will suffice: the International Committee of the Red Cross has been denied access to federal detention facilities and its activities in the Ogaden region have been suspended. The only effective nationwide independent organisation, the Ethiopian Human Rights Council, has been effectively closed down and two of its members prosecuted and convicted. A newly proclaimed law – the Charities and Societies Proclamation of January 2009 - effectively prohibits internal activity by any human rights organisation which receives more than ten percent of its income from outside Ethiopia. The Government's motives and justification for the measure were persuasively analysed by Debebe Hailegebriel in an article published in ICNL on 3 May 2010: the belief that NGOs, especially those which are advocacy-based, are funnels for political discontent and mouthpieces for the opposition. Mr Debebe believes that the government's actions reflect its view that it is the sole genuine actor in public life and xenophobic hostility to the involvement of foreigners in Ethiopian affairs. The effect of the measure is to leave only the Ethiopian Human Rights Commission (EHRComm) (of which more below) able to operate within Ethiopia in this field. The US Department of State Human Rights Report of 2009 pulls no punches:

> "Human rights abuses reported during the year included unlawful killings, torture, beating, abuse and mistreatment of detainees and often opposition supporters by security forces, often acting with evident impunity; poor prison conditions; arbitrary arrest and detention, particularly of suspected sympathisers or members of opposition or insurgent groups; police administrative and judicial corruption; detention without charge and lengthy pre-trial detention…"

Examples are given, in which the authors express no reservations about the truth of the reports upon which those observations were made. Mr Debebe, an impressive witness, confirmed that torture of detainees by the police was a common practice because, as he put it, of the lack of modern technology available to them. He also confirmed shortcomings in the legal system which we analyse in more detail below.

15. The fate of a number of individuals transferred, via Somalia, from Kenyan custody, to Addis Ababa in January 2007 is particularly relied upon by Mr Otty, to illustrate the risks which he contends would be faced by XX if returned to Ethiopia. Following the invasion of Somalia by Ethiopian forces, a number of individuals of varying nationalities fled or were driven across the Somalia/Kenya border in January 2007. They were detained by Kenyan police. Arrangements were made with the Ethiopian Government to transfer them to Addis Ababa, via Somalia. According to the authors of a Human Rights Watch letter to the British Foreign Secretary dated 17 September 2009, many of those transferred were released from Ethiopian custody by mid 2007, but at least two were not. One of them is identified as a Kenyan citizen. Despite the statement in the HRW letter that he was still in detention, he appears to have been Salim Awadh Salim, who has described his experiences in a witness statement produced in support of XX's appeal dated 18 December 2009. He says that he was released on 2 October 2008 and driven to the Kenyan border the following day. The other man was a dual Canadian and Ethiopian citizen, Bashir Makhtal, who was prosecuted, convicted and, in August 2009, sentenced to life imprisonment. HRW noted that the trial "has been characterised as deeply flawed". We have a good deal of information available to us about these matters including a statement by his Canadian lawyer Lorne Waldman of 12 July 2010, whose probity and honesty as a witness we have no reason to doubt. We can express our conclusions about them, but not the reasons which support them, in this open judgment. We accept that the transfers occurred and that the individuals transferred were detained and interrogated in Addis Ababa. No legal basis for the transfer or detention has been identified to us. We do not accept the statements made in paragraphs 31 to 49 of Salim's witness statement – that he was questioned daily for about 2 months in an aggressive manner by Ethiopian interrogators in the presence of British personnel and/or repeatedly questioned by British personnel in this environment during the same period. We accept that Bashir Makhtal was tried, convicted and sentenced to life imprisonment in August 2009 and have no reason to believe that the conditions of his pre-trial detention fulfilled the requirements of Ethiopian law. We do not accept that he was tortured or deliberately ill-treated during his detention. Mr Waldman's belief that he may have been is not satisfactorily explained in his statement: in paragraph 18 it is based on the fact that he was held incommunicado, or at least without Consular access, for 18 months; in paragraph 26 he says that he did not accept the assurances indirectly given by EHRComm that he had been well treated because of what he had learned from other sources. Subsequent correspondence provides some clarification: Mr Waldman's concerns were initially based on incommunicado detention. "Later specific allegations relating to abuse were also made." The source of the allegations has not been identified, nor whether they were based on direct or indirect reporting. On the

whole of the material which we have considered, we remain unconvinced that there are reasonable grounds to believe that he was tortured or ill-treated. We deal with Mr Waldman's criticisms of his trial below. For reasons which are partly explained below and more fully explained in the closed judgment, we do not find that the experience of these individuals supports XX's case that, if he were to be returned to Ethiopia, he would face a real risk of inhuman or degrading treatment or worse at the hands of NISS or the new unit set up to investigate terrorist offences to which NISS officers have been seconded.

16. In reaching that conclusion we have considered and rejected a discrete legal submission made by Mr Otty: that we are not entitled to take into account any evidence or information adverse to XX's case arising out of or to do with the unlawful detention of these individuals. The consequence would be that we would be required to accept as true evidence about matters which other evidence or information might convincingly disprove. An example will illustrate the point. Salim says that he was interrogated for 2 months in the presence of British personnel. If Mr Otty is right, we would not be able to take into account at all evidence or information from or about the British personnel referred to by Salim, which contradicted his account, even if we believed it to be true. This would be a surprising conclusion. Unless mandated by binding authority we are not willing to reach it. The authorities on which Mr Otty relies are *A (No 2) v SSHD* [2005] UKHL 71 and *Kurt v Turkey* [1998] 513 HRC 1. *A (No 2)* establishes unequivocally that evidence procured by torture is not admissible, except to prosecute the torturer: cf Article 15 of UNCAT. *Kurt* establishes that unacknowledged detention of an individual, at least of significant duration, is "a complete negation" of the rights protected by Article 5 ECHR. We accept that it is. But it does not follow that no evidence can be given about it except to prosecute the jailor – the effect of the application of the rule in torture cases. There is no internationally acknowledged principle – or jus cogens – prohibiting detention except in circumstances prescribed by internationally accepted laws, nor any international agreement that unlawful detention is a crime of such gravity that no evidence resulting from it – still less any evidence about it – should be admitted in proceedings before an English court. If there were such a rule, it could not be one-sided. In the illustration considered, Salim's account of his interrogation would be inadmissible as well. For the reasons explained, Mr Otty's submission is both unfounded in authority and unsound in principle.

17. To demonstrate that Ethiopia was under attack from Islamist extremists, Mr Otty produced a list of "reported terrorist attacks in Ethiopia since December 2006". The incidents are unnumbered in the document. We have numbered them from 1 to 38 in chronological order. With the qualification that, because the reporting in the source material is not detailed and that we may have misunderstood geographic details, we draw the following tentative conclusions from the list. Twenty incidents occurred in the Ogaden/Somali region and probably involved the ONLF (1-3, 5-12, 25-26, 31, 31-38). Twelve occurred in Somalia (4, 13, 14, 16, 17, 20, 22, 24, 27, 29, 30 and 32). Most of those did not involve Ethiopian targets, unless the references to African Union forces are to be treated as references to Ethiopian forces. In any event, all occurred during the time that Ethiopian troops were deployed in Somalia. Two

occurred in Oromia (15 and 21). Four occurred in Addis Ababa (18, 19, 23 and 28). Thus analysed, the pattern does not show that for which Mr Otty contends: a growing Islamist threat to the security of Ethiopia and its inhabitants. What they show is that conflict is occurring in the Ogaden/Somali region, that Ethiopian troops and interests were attacked in Somalia while they were there and that the low-intensity conflict in Oromia continues. It is not unlikely that the four incidents in Addis Ababa (the last of which occurred on 15 January 2009) are related to the Ogaden and/or Oromia conflicts. The US State Department report noted that incident 19 was attributed to the OLF. What the material appears to show is that the Ethiopian Government faces a continuing threat from its traditional internal and external enemies – the ONLF, the OLF, Eritrea and Somalia (or at least significant armed groups in Somalia). We unreservedly accept Dr Reid's opinion that the Government of Ethiopia has reacted and is likely to continue to react to such opponents in an authoritarian and forceful manner. If the British Government wish to deport an individual to Ethiopia who fell into that category, we readily accept that, assurances apart, there would be substantial grounds to believe that he would face a real risk of inhuman or degrading treatment at the hands of state agencies of a kind which, if it were to occur in a Convention state, would put that state in breach of its obligations under article 3.

18. In every case in which that question has been examined by the Strasbourg Court, it has carefully examined the profile of the putative deportee. Two examples suffice to make the point. In *Chahal v United Kingdom* 23 EHRR 413, the Court noted the parties' submission about factors specific to him in paragraphs 92 to 94 and expressed its own conclusions in paragraphs 98 and 106. More recently, in *Daoudi v France* 19576/08 3 December 2009 the Court analysed what the Algerian Government would know and believe about Daoudi in paragraphs 69 and 71. In each case, the Court was concerned with the risk to the individual applicant in the light of what the security forces of the receiving state would know or believe about him.

19. By a Note Verbale dated 23 June 2009, number 195/09, the British Embassy formally notified the Ethiopian Ministry of Foreign Affairs that it proposed to deport XX to Ethiopia. It gave the reasons as follows:

> "Mr XX is believed to have attended a training camp in the United Kingdom run by a person who has subsequently been charged with offences under the Terrorism Act in relation to the provision of terrorist training.
>
> Mr XX is also assessed to have participated in terrorist training in Somalia and is linked to individuals involved in the failed terrorist attacks in London on 21 July 2005.
>
> Given his participation in terrorist training activity and his links to extremist individuals it is considered that there is a real risk that Mr XX will become involved in terrorist activity in the United Kingdom. Her Britannic Majesty's Government therefore wishes to deport Mr XX from the United Kingdom on the grounds of national security."

From that description, it is self-evident that, apart from the irrelevant threat to damage his house on 14 August 2008, the British Government told the Ethiopian Government, in summary terms, exactly what we have found that XX has done – and nothing else. From all of the material which we have seen, we are sure that the British Government has no reason to believe that XX has been involved in any other activity which might pose a threat to the national security of the United Kingdom or Ethiopia and has not made any further relevant allegation about XX to the Ethiopian authorities. XX's witness statement makes it clear that, when he was questioned by NISS in December 2006, the questions were about exactly the same topics:

> "360. …the question that I was asked again and again was why I had gone to Somalia, who had sent me to Somalia and what I did know about the London bombings. They claimed that they had pictures of me with Hamdi (Hussain Osman) in the mountains in the UK. They accused me of having extremist conversations with Hamdi in the bushes at night on that occasion.
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> 367. There were many references made by the Ethiopian MI5 to an interview that had taken place with Dawit (Semeneh).
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> 368. They said to me that Dawit had stated that we were carrying out terrorist activities. I told him that was nonsense and that either Dawit was talking nonsense or they were.
>
> 369. They referred to him as Dawit which is what people in the UK had called him, whereas I normally referred to him as Daoud. I assume therefore that they had liaised with Mi5.
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> 370. I believe that the Ethiopian authorities were actively liaising with British Intelligence. For example, the photos that the Ethiopian authorities had of me that I glimpsed whilst I was in detention were photos that had been taken of me whilst I was in the UK."

XX's account of his interrogation confirms that which we know from other sources: that the Ethiopian authorities had precisely the same information about him in December 2006 as they were told in summary form in the Note Verbale in June 2009. The British Government has not made any further allegation against him, either in these proceedings or to the Ethiopian Government. It is, accordingly, possible to establish, with confidence, what the Ethiopian Government knows and believes about him: that he is an Islamist extremist, assessed to have attended a training camp in the United Kingdom and to have received terrorist training in Somalia, who was associated with individuals who attempted to carry out the failed London attacks on 21 July 2005. He has done nothing directly to threaten the interests or security of the government and inhabitants of Ethiopia. He did not do so, while at liberty in Ethiopia from September 2005 to December 2006 and has had no opportunity to do so since then. He is not associated with any of the groups which pose an active internal threat to the Ethiopian Government or

state. The principal circumstance in which the Ethiopian Government might have believed that he posed a threat to Ethiopians – fighting against the Ethiopian troops in Somalia – no longer exists, following the withdrawal of Ethiopian troops from Somalia. Mr Otty submits that because the Security Service has asserted that XX attended a camp in Somalia in 2005 run by Adnan Ayro, the Ethiopian police and Security Service would regard him as a serious current threat to Ethiopian interests. We do not agree. In 2007 Adnan Ayro became the first acknowledged leader of a group which has now achieved notoriety by its claim (which may be false) of responsibility for the double suicide bombings in Kampala on 11 July 2010 – Al Shabaab. He was killed by an American missile strike in May 2008. Al Shabaab fought against the Ethiopian forces in Somalia until their withdrawal in January 2009. It claims to have driven them out and has, in Mr Debebe's words, "declared war" on Ethiopia. It is a potential source of support for the ONLF. We readily accept that if XX were to be perceived as an active member or supporter of Al Shabaab, he might be regarded as a threat to Ethiopian interests; but that perception would be based on a chain of reasoning so stretched as to be fanciful – because he was trained at a camp which was run by a man who later became the declared leader of a group which later fought against Ethiopian troops and which might now support another group which threatens Ethiopian interests, so he must be regarded as a current threat. That might provide an *excuse* for detaining and prosecuting him (as to which see below) but it could not provide a sensible *reason* for doing so. XX was not ill-treated when detained and interrogated in December 2006 (at a time of particular concern for the Ethiopian authorities, because that was when Ethiopian forces were first deployed in Somalia). There is no reason to believe that, as far as prohibited ill-treatment goes, he would be treated any differently now. When he had considered closed material which he had not previously seen, Mr Layden stated that, in his view, if XX were to be detained on being returned to Ethiopia, he would not be at risk of prohibited ill-treatment. We had, by then, provisionally reached the same view, and for the same reasons. Nothing which we have heard since has caused us to change that view. We are satisfied that there is not a real risk that he would be subjected to inhuman or degrading treatment during or for the purposes of interrogation about the allegations made against him by the British Government. There is no reason to believe that he would face such a risk in relation to interrogation about any other topic.

20. On 12 December 2008, the British and Ethiopian Governments signed a memorandum of understanding and on the same day and 16 and 27 December exchanged side letters. The memorandum provides for assurances by each state to the other, but for present purposes we are only concerned with requests by the British Government to the Ethiopian Government. Under the heading "Application and Scope" provision is made for written requests to be submitted by the British Embassy to the Ministry of Foreign Affairs for assurances "in respect of any citizen of the receiving state who is suspected or convicted of activities which may constitute a threat to national security". Receipt of the request was to be acknowledged within five working days and "a final response to such a request will be given promptly in writing…by the

Minister of Foreign Affairs…". Provision is made for what should logically precede the request:

> "To assist a decision on whether to request assurances under this memorandum the receiving state will inform the sending state of any penalties outstanding against the person, and of any outstanding convictions or criminal charges pending against him and the penalties which could be imposed".

Both governments agreed to comply with "their human rights obligations under international law regarding a person in respect of whom assurances are given under this memorandum". Eight numbered assurances would apply to such a person, together with any further specific assurances provided by the receiving state. Provision was made for an independent monitoring body, whose responsibilities were to include monitoring the return of, and any detention, trial or imprisonment of, the person. The eight numbered assurances were:

> "1. If arrested, detained or imprisoned following his deportation, the person will be afforded adequate accommodation, nourishment, and medical treatment, and will be treated in a humane and proper manner, in accordance with the national and international obligations of the receiving state.
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> 2. If the person is arrested or detained, he will be informed promptly by the authorities of the receiving state of the reasons for his arrest or detention, and of any charge against him. The person will be entitled to consult a lawyer promptly.
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> 3. If the person is a civilian and is arrested or detained, he will be brought promptly before a civilian judge or other civilian official authorised by law to exercise judicial power in order that the lawfulness of his detention may be decided.
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> 4. Any person who is detained but who at the end of a court-supervised investigation is not charged with an offence, or is found not guilty of any offence, will be released promptly.
>
> 5. The person will have unimpeded access to the monitoring body unless they are arrested, detained or imprisoned. If the person is arrested, detained or imprisoned within 3 years of the date of his return, he will be entitled to contact promptly, and in any event within 48 hours, a representative of the monitoring body. Thereafter he will be entitled to regular visits from a representative of the monitoring body and, in the event of an allegation of ill-treatment, the monitoring body will have access to the person without delay.
>
> 6. The person will be allowed to follow his religious observance following his return, including while under arrest, or while detained or imprisoned.

> 7. If the person is a civilian and is charged with an offence he will receive a fair and public hearing without undue delay by a competent, independent and impartial civilian tribunal established by law. The person 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, to be given legal assistance free when the interests of justice require.
>
> 8. Any judgment against the person 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."

The side letters concerned the death penalty and the terms of reference for the monitoring body. The response of the State Minister for Foreign Affairs dated 27 December 2008, acknowledging the side letters in non-committal terms does, by universally understood diplomatic code accept them (thereby wholly removing the already non-existent risk that a death sentence would be pronounced on XX, or, if pronounced, carried out).

21. Mr Layden's view, which we accept, is that the course of negotiations was smooth when compared with similar negotiations with other governments. The idea was proposed to the Prime Minister Meles Zenawi by Lord Malloch-Brown on 31 January 2008. The Prime Minister indicated that the British Ambassador should take the matter forward with the Ethiopian Foreign Minister Seyoum Mesfin. He authorised his officials to discuss the details of the memorandum, which was done in a serious of bilateral meetings between May and September 2008. The only significant difficulty concerned the death penalty (as to which see above). Detailed criticisms of the negotiating stance of the British Government and of the final outcome were made by Mr Otty, but, for the reason given by Lord Hoffmann in *RB (Algeria) v SSHD* [2009] UKHL 10 paragraph 192, the differences between the text originally proposed and that finally agreed are not really material: "the precise language of the assurance was less important than the effect which both sides knew it was intended to have". No participant in the discussions, from the Ethiopian Prime Minister downwards, can have been under any misapprehension about the purpose of the memorandum: to ensure that any Ethiopian citizen deported to Ethiopia by the United Kingdom for reasons of national security would not be ill-treated and, if detained and prosecuted, would be lawfully detained and fairly tried. The concern of reputable and experienced international human rights organisations, such as Human Rights Watch, is not that the letter of the assurances may in some way be marginally inadequate or that perfect compliance will not ensue. It is that the assurances will be disregarded or

flouted if the Ethiopian Government thinks that it is in its interests to do so. It is that concern which we must now address.

22. As we have already observed, Ms Lefkow was a knowledgeable and impressive witness. Although she approached the issue from a stance different from that of Mr Layden, we do not believe that she has in any way tailored her evidence to advance campaigning views of the organisation for which she works. Her premise is that a government of a country with a poor human rights record, which has deliberately narrowed the political and civil space available to its citizens cannot be relied on to fulfil a bilateral promise made to the British Government about the treatment of individuals deported home for reasons of national security. This is a widely shared view. As we have explained, there is ample evidence that the Government of Ethiopia has deliberately narrowed the political and civil space open to its citizens in the manner described by her. She acknowledges that the United Kingdom is, and is seen by the Ethiopian Government to be, an important international partner: it is the second largest provider of budget support and has the most access of all Western governments because it conducts its diplomacy with Ethiopia privately and in a conciliatory manner. Nevertheless, she considers that its approach has not worked. She gave a significant example: a Human Rights Watch delegation, which included her, was told by a senior UK official in Addis Ababa in June 2009 that "we received a promise - to which we propose to hold the government – not to implement the CSO legislation (the Charities and Societies Proclamation already noted)". The legislation has been implemented, with the results noted – a drastic reduction in human rights activity in Ethiopia. Further, representations by the British Government, like those of other Western states, have not secured the release of Birtukan Mideksa. We believe that the explanation for the lack of leverage on these questions is that they concern internal political matters upon which the Ethiopian Government is unwilling to submit to external pressure, even from well-disposed states such as the United Kingdom. This is all of a piece with its hostility to criticism, whether internal or external, as to which we refer to one example in the confidential judgment. Her analysis leads Ms Lefkow to the conclusion, expressed in paragraph 122 of her report, that against the backdrop described, "the government is unlikely to treat the UK's concerns any more seriously than previous assurances". In cross-examination by Mr Tam QC, she said that she could not rule out the very serious risk that XX would be ill-treated if deported. She did, however, acknowledge that her view was not founded on circumstances particular to XX. She accepted that she did not know details of what happened on the last occasion that he was detained (in December 2006). When asked whether he was more at risk now than then, her answer was that it was very hard to answer, but that changes in the context since then were a worry. She cited as a possible cause of the Ethiopian Government going back on its promises the possibility of a fundamental change in the political context in Ethiopia resulting from the likely transfer of power from those who overthrew the Derg to their successors. We found this to be the weakest part of her otherwise cogent analysis. Our analysis of XX's circumstances is set out above, together with our conclusion: that he does not, and could not rationally be thought to, pose any threat to the security of the Ethiopian Government or its inhabitants. As Ms Lefkow accepts, the

Government is in control of its security forces and, if it wants something to be done, it will be done. She also accepts that it is generally rational in its decision making. It simply has no interest in causing or permitting XX to be ill-treated. The political cost to the British Government of the Government of Ethiopia going back on its word would be significant: it would, at a stroke, wreck the deportation with assurances programme upon which it relies to deal with non-citizens who are believed to pose a threat to national security. The British Government has already made clear to the Government of Ethiopia the high priority which it gives to this issue. The giving of the assurances has been expressly authorised and approved at the highest levels of the Ethiopian Government. By a Note Verbale dated 6 April 2010, the Ministry of Foreign Affairs confirmed that it agreed to accept XX's return to Ethiopia under the terms of the memorandum. The circumstances in which that assurance was given, which are set out in the confidential and closed judgments, confirm the commitment of the Government of Ethiopia and of all necessary elements within it to fulfilment of the assurances in the specific case of XX. We are satisfied that it is, and will be perceived by the Government of Ethiopia to be, in its interests to ensure that the assurances are fulfilled. It would have nothing to gain and much to lose if it did not do so. So would any government dominated by the successors of those now in office. It is primarily for that reason, rather than because of the arrangements which have been put in place for monitoring compliance, which we discuss below, that we are satisfied that there is no real risk that he would be subjected to prohibited ill-treatment by NISS or any other interrogator.

23. Without that confidence, we would not have held that the monitoring body, the EHRComm, could, simply by reason of its existence and the rights given to it under the memorandum, have prevented or deterred state agencies from ill-treating XX. It is not an independent body. It was set up in 2004 under a law passed in 2000. It is funded by and responsible to the Ethiopian Parliament. Its trustees and officers are appointed by the Parliament. As the Parliament is dominated by the EDPRF, it is, effectively, beholden to the government. It has produced only one report since it was founded: on conditions in prisons and detention facilities in 2007-2008. The report described prison conditions as poor and noted concerns about more sensitive topics, including allegations of torture and ill-treatment of detainees by officials. Ms Lefkow said that the inclusion of these politically sensitive issues was "both surprising and encouraging". Mr Layden met the then Chief Commissioner and members of an investigative team with prison visiting experience in March 2009. He was impressed by them. Further, there does not appear to have been any adverse reaction by the Government of Ethiopia to the critical report on prison conditions. It is possible that, in due course, the Commission might evolve into a respected and reasonably independent-minded body. That possibility would have been enhanced if it had been operating alongside or as well as other independent national and international human rights organisations – which , as already explained, is not the case. Our judgment is that it offers a reasonable partial safeguard against breaches of the memorandum. It could not, and would not, challenge a deliberate breach by the government, but could detect and would report upon unauthorised breaches by lower ranking officials. Its usefulness in the case of XX, accordingly, depends upon the

reasons stated above for believing that the Government will fulfil its promises: that it is in its interests to do so.

Safety on return – Articles 5 and 6

24. During the first five days of this hearing, it became clear to us that we did not have enough information about Ethiopian law and the Ethiopian criminal justice system to be able to determine whether or not the United Kingdom would be in breach of its obligations to XX under Articles 5 and 6 if he were to be deported to Ethiopia. We accordingly invited both parties to adduce further evidence about these issues. As a result, we now have English translations of the relevant parts of Ethiopian statutes and have heard live expert evidence, from Mr Debebe, for the Secretary of State, and from Semeneh Assefa, for XX. The evidence of Mr Debebe has been illuminating, not only on the issues of law upon which he was called to give expert evidence, but also on the state of affairs in Ethiopia and on the reliance which can be placed upon bilateral assurances given by its government. Mr Debebe is an Ethiopian lawyer who has been in independent practice since October 2007. For the last eleven months, he has been the honorary legal adviser to the British Embassy in Addis Ababa. He obtained an LLB at the Faculty of Law at Addis Ababa University in July 1996. He has supplemented it by an LLM at the University of Pretoria, awarded in December 2003. He has undertaken extensive research into human rights issues and was, between September 2004 and December 2006, an Executive Director of an Ethiopian human rights organisation. Of greatest significance for our purposes is his judicial career. From September 1996 to November 1998 he was an Assistant Judge at the Federal First Instance Court. From November 1998 to March 2000, he was a Judge of the Federal First Instance Court, assigned to hear civil cases. From March 2000 until September 2004, he was a Judge of the Federal High Court of Ethiopia, assigned to the 6th and then 1st Criminal Benches, which tried high profile and political cases. He belongs to no political party and has never done so. Mr Semeneh said that Ethiopian prosecutors and judges were not independent and were members of the ruling party. Mr Debebe is living disproof of that proposition. He is a lawyer of probity and a man of courage. As we have already noted, he published an article in May 2010 critical of his government's motives in enacting the Charities and Societies Proclamation of January 2009. In another article on 13 January 2009, published in a local newspaper, he criticised the failure of judges to apply international conventions – which are incorporated into Ethiopian law – due to their limited knowledge. The evidence which he has given to us, by television link from Addis Ababa, has pulled no punches about deficiencies in the Ethiopian criminal justice system. He does fear that the government of Ethiopia might harass him or make false allegations against him if critical of his views. He displayed an encyclopaedic knowledge of Ethiopian law and practice. He was a very impressive witness. We accept, without hesitation, what he says about Ethiopian law and practice. Our reliance on his evidence is not, however, limited to the field in which he is clearly expert. He was able to express well-informed opinions about wider Ethiopian political questions, such as the reliability of bilateral assurances given by the government of Ethiopia.

25. Mr Semeneh gave evidence from California, where he now resides, having successfully claimed asylum in the United States. He, too, obtained an LLB at the Faculty of Law at Addis Ababa University and is an LLM of Pretoria University and of Kyushu and San Francisco Schools of Law. He has never practised as a lawyer or served as an Ethiopian Judge. He was a Lecturer at the Ethiopian Civil Service College and later at Addis Ababa University, from September 1998 until October 2005. For seven months in 2007, he was Chief Executive Officer of the Ethiopian Human Rights Council. He left Ethiopia, for the United States, when he refused to change the contents of a critical report. He has not returned since. His knowledge of current circumstances in Ethiopia is, therefore, necessarily at some remove. On matters of Ethiopian law, there was little difference between his opinion and that of Mr Debebe. On issues of current practice – for example, the length of time likely to be taken between charge and trial and the recent efforts to reduce delays in the criminal justice system, he was less well informed than Mr Debebe. Further, he was prone to some overstatement. We have already referred to his comment about the political partiality of Ethiopian Judges, which the example of Mr Debebe at least requires to be qualified: he said, and we accept, that he had, in his seven years as a Judge, never faced any challenge or external pressure. We do not accept that Mr Semeneh is qualified to speak about the interest which the Ethiopian authorities might have in XX on his return and, so, about what would happen to him. We do not have the same confidence in Mr Semeneh's opinions as we do in those of Mr Debebe.

26. Mr Otty invited us to take into account the trial of Bashir Makhtal, about which Mr Waldman made trenchant criticisms in paragraphs 28 and 29 of his witness statement. We infer from their wording that Mr Waldman did not attend the trial and that his observations are based on what he has learnt from other sources. We are not in a position to judge whether evidence obtained by the torture of others was presented and can make no finding about that; but we are prepared to accept that the public part of the trial was perfunctory and that Bashir Makhtal may not have been able to call live evidence in his defence. We accept that it is highly likely that the trial fell far short of Western standards. Our view is that it is an egregious example of the serious shortcomings in the Ethiopian criminal justice system identified, and described below, in the evidence of Mr Debebe.

27. Until the Anti-Terrorism Proclamation of 28 August 2009, it was not a crime under Ethiopian law to receive or participate in terrorist training in another country unless the activity was in some way directed against the constitution or state of Ethiopia. By reason of the definition of "government" as including a foreign government in Article 2.9 of the Anti-Terrorism Proclamation, such activities became a crime under Ethiopian law on 28 August 2009. It is common ground that the Anti-Terrorism Proclamation is not substantively retrospective. Mr Debebe is of the opinion that on the facts known to the United Kingdom Government and communicated to the Ethiopian authorities, summarised in paragraph 19 above, XX has committed no offence under Ethiopian law. He could only successfully be prosecuted if there were evidence that he had, by his activities, participated in some way in acts directed at and hostile to Ethiopia. Mr Debebe accepted that if XX had

associated with senior members of Al Shabaab and had undertaken training to advance the aims of Al Shabaab which were hostile to Ethiopia, he could face prosecution and conviction for crimes against the national state, set out in Articles 238-241 and 254, 255 and 257 of the Ethiopian Criminal Code. On all of the information which we have, there is, as of now, no such evidence available to the Ethiopian authorities. Accordingly, we share Mr Debebe's expressed view that the prosecution of XX would be both very difficult and very unlikely.

28. The evidential gap could only be filled by a confession by XX, first that he had received or participated in terrorist training and secondly that it was in some way directed against the Ethiopian state. Such a confession would be admissible under Article 23.5 of the Anti-Terrorism Proclamation, a procedural provision which, unobjectionably, does have retrospective effect. Mr Semeneh asserts that there is a high probability that a person being investigated by the police will admit to anything that he is expected to admit. If he were to make such a confession, Mr Debebe accepts that it would be likely to be acted upon by an Ethiopian court. The burden of proving that a confession was made under duress lies upon the person who made it. It is a burden which is only infrequently, if at all, discharged. We accept that, because of the allegations made against him by the United Kingdom authorities and because, if he were now to be returned, the Ethiopian authorities would not have the option of allowing him to depart Ethiopia for the United Kingdom, he would be detained and questioned about his associates and activities in the Cumbrian and Somali camps. There is, however, no greater reason now to think that he would be ill-treated, for the purpose of coercing him to make a confession, than in December 2006, for the reasons already explained. He did not confess then, and there is no reason to believe that he would confess now, still less that he would make a confession covering the precise ground which would permit his successful prosecution under the Articles of the Criminal Code identified above. In this context, unless the Government of Ethiopia deliberately went back on its word, paragraphs 1 and 2 of the eight numbered assurances in the Memorandum of Understanding would suffice to protect him from ill-treatment intended to procure a confession. For those reasons, we are satisfied that there are no substantial grounds for believing that there is a real risk that he would be subjected to a trial process so flagrantly unfair that the United Kingdom could not deport him without infringing his rights under Article 6. Mr Otty accepts that Articles 5 and 6 stand together for this purpose, so that that finding would preclude any separate finding that the United Kingdom would be in breach of its obligations to him under Article 5.

29. It is common ground that there are very serious shortcomings in the Ethiopian criminal justice system. They were unhesitatingly identified by Mr Debebe. It falls far below international standards in its upholding of human rights. There are long delays between detention by the police and final disposal of the case (though we accept Mr Debebe's evidence that recent changes have much diminished the delays and do not accept Mr Semeneh's opinion that all that has happened is that trivial cases have been cleared up at police stations in Addis Ababa alone). Except in cases in which an individual can afford to pay

privately for the services of a lawyer, legal representation is usually only available immediately before and during the final stages of the trial process – ie during the one or two days of public hearings. Prison conditions are poor and prison visiting difficult or impossible. Most Judges do not understand and apply human rights law accurately. The independence of the Judiciary is regularly questioned – though his own example suggests that the questioning may not always or even often be justified. In his view, it was the competence of the Judges, rather than their independence, which was the fundamental problem. In some political cases, the police disregard court orders. He did not know the facts of the *Bashir Makhtal* case. If XX were to be prosecuted and convicted of one or more of the identified offences, it is likely that he would spend a substantial period of time in the Ethiopian prison estate. Prison conditions are undoubtedly very poor: see the description on page 3 of the US Department of State 2009 Human Rights Report: "conditions remained harsh and in some cases life-threatening". If a coerced confession were to be secured from XX, the offences of which he would most likely be convicted would be those under Articles 254, 255 or 257 of the Criminal Code (secondary participation in the principal crimes), for which the maximum sentence is up to 5 and up to 10 years imprisonment. If, contrary to our view, there were substantial grounds for believing that there was a real risk that he would be exposed to a trial in a system of justice with those shortcomings, resulting in his imprisonment in the circumstances described, would the United Kingdom be in breach of its obligations to him under Articles 5 and 6? The jurisprudence is tentative and obscure, as Lord Phillips demonstrated in his analysis in paragraphs 138-141 in *RB (Algeria) v SSHD* [2009] UKHL 10. Only Strasbourg could provide a definitive answer. Our view, for what it is worth, is that the United Kingdom would not be in breach of those obligations if it were to deport him to face a trial in those circumstances unless the evidential foundation for his prosecution and conviction was a confession procured by torture or ill-treatment of such severity as would amount to a breach of Article 3 in a Convention state.

30. For the sake of completeness, we acknowledge that article 23 of the Anti-Terrorism Proclamation makes it significantly easier to prove a terrorist crime and increases the risk that tainted or unreliable evidence might be adduced to do so. Mr Otty accepted, rightly in our view, that these changes did not, by themselves, give rise to the risk of a trial so flagrantly unfair that the United Kingdom would be in breach of its obligations to XX under Article 5 & 6 if he were to be deported. We would go a little further: even combined with the shortcomings in the criminal justice system identified by Mr Debebe, there would be no such breach in the absence of a confession extorted by torture or prohibited ill-treatment.

31. Both Mr Semeneh and Mr Debebe were asked for their views on a topic which was not within their expertise as lawyers: would the Government of Ethiopia fulfil its bilateral promises to the United Kingdom? Mr Semeneh said that they would pretend to do so. Mr Debebe said that he was confident they would in fact do so. He acknowledged that the Government of Ethiopia regularly failed to fulfil its obligations under multilateral treaties and conventions, but said that he knew of no instance in which it had breached a bilateral obligation. His

view corresponds with that of Mr Layden. Their joint view carries great weight – Mr Layden's because of his long experience in diplomacy, and Mr Debebe's, because of the depth of his knowledge of Ethiopian affairs and his objectivity and independence. We accept their joint view. (We do not regard the refusal of consular access to Bashir Makhtal, a Canadian citizen, as a breach of a bilateral arrangement with Canada – it was a breach of Ethiopia's obligation under the multilateral Vienna Convention). Accordingly, and for the reasons given, we are satisfied that the Secretary of State can rely securely on the promises made by the Government of Ethiopia in the Memorandum of Understanding.

Conclusion

32. Applying the yardsticks identified in *BB*, we are satisfied that the assurances, if fulfilled, are such that XX will not be subjected to treatment contrary to Article 3, that the assurances have been given in good faith, that there is a sound objective basis for believing that they will be fulfilled and that, by reason of the right guaranteed to XX by paragraph 5 of the Memorandum of Understanding, to contact and receive visits from the EHRComm contained in paragraph 5 of the Memorandum of Understanding, the assurances are capable of being verified. (If he is detained and no contact occurs, it will be obvious that something has gone wrong). For substantially the same reasons, we are satisfied that the United Kingdom would not be in breach of its obligations to XX under Articles 5 and 6. Accordingly, we dismiss this appeal.