Appeal No: SC/38/2005

Date of Hearing: 1-5 March 2010

Date of Judgment: 26th March 2010

SPECIAL IMMIGRATION APPEALS COMMISSION

Field House
Breams Buildings
London
EC4A 1WR

Before :

THE HONOURABLE MR JUSTICE MACKAY
SENIOR IMMIGRATION JUDGE D. GILL
MR J. DALY

- -

Between :

MOLOUD SIHALI	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

For the Appellant	Mr M. Muller QC, Ms S. Harrison and Mr C. Grieves (instructed by Tyndallwoods, Solicitors)
For the Respondent	Ms L. Giovannetti and Mr R. Palmer (instructed by The Treasury Solicitor)
Special Advocates	Mr M. Supperstone QC and Mr R Pardoe (instructed by the Special Advocates' Support Office)

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OPEN JUDGMENT

Summary

1. This is the second hearing of Mr Sihali's appeal against the Respondent's notice of intention to deport him to Algeria. A previous SIAC hearing from 27 to 30 March 2007 considered whether he was not entitled to claim the protection of Article 33(1) of the Refugee Convention as there were said by the Respondent to be reasonable grounds to regard him as a danger to the security of the UK. In its judgment dated 14 May 2007 SIAC held that whatever risk to national security he may have posed in 2002 "the risk is now insignificant". Accordingly, it did not dismiss his asylum appeal under section 55(4) and allowed his appeal against the decision to deport him on national security grounds (only) notified to him on 15 September 2005.

2. The issue in the hearing before us is safety on return. On this issue SIAC heard full evidence and argument and expressed certain views at [22-27]. We approach this question taking into account both the evidence previously available to this Commission and new evidence relating to events which have occurred since the first hearing. We deal below with the approach we consider we should adopt to previous SIAC findings of fact.

Background

3. The Appellant's relevant history is fully set out at [1-15] of the first judgment in this appeal. This has not been the subject of challenge or dispute and we therefore adopt it for the purpose of this renewed hearing.

4. The Appellant is now 32 and a citizen of Algeria. He left his native country in 1997 to avoid military service and travelled to England via Italy and France. He entered the UK illegally with a false Italian identity card and went to London. He befriended certain members of the Algerian community. His association with two in particular, K. and Meguerba, more particularly set out in the section of the first judgment which we have identified, led to his arrest on 19 September 2002 and, in due course, to his standing trial charged with conspiracy to murder and conspiracy to cause a public nuisance. He contested those charges and was acquitted on both on 8 April 2005. He did, however, plead guilty on 10 November 2003 to two counts of possessing a false instrument with intent contrary to section 5(1) of the Forgery and Counterfeiting Act 1981, namely two French passports in the names of Omar Naitatmane (his cousin) and Christophe Riberro. He received a sentence of 15 months' imprisonment on each count concurrently. Had the provisions of the UK Borders Act 2007 section 32 been in force he would, therefore, have been liable to automatic deportation, albeit he could not have been removed if the deportation order would have breached his Convention rights or the United Kingdom's obligations under the Refugee Convention.

5. He had made an application for asylum on 2 October 2003 and received notice of the Secretary of State's intention to deport him on 15 September 2005. That asylum claim was overtaken by the Secretary of State's certificate dated 24 August 2006 under section 55 of the Immigration Asylum and Nationality Act 2006 which led to the first hearing we have described above. Following that hearing, on 16 January 2009 the Secretary of State notified the Appellant

of his decision to give directions for his removal from the United Kingdom as an illegal entrant without leave to remain and it is against that decision that the Appellant now appeals.

Safety on Return

6. In his amended Notice of Appeal against the decision to remove him the Appellant relies on two principal grounds. The first, referred to in argument by Mr Muller QC under the heading of "validity", has not been argued in any previous Algerian appeal concerning proposed deportations to Algeria in reliance on assurances given by the Algerian government, sometimes called the DWA (for "deportation with assurances") Programme. The second which has been called "reliability" in this appeal contains arguments familiar from the previous decided cases on this issue.

7. The first of these grounds attacks the validity or lawfulness of the Respondent's decision to rely on the assurances given in Mr Sihali's particular case. He is the first appellant to be the subject of a decision to remove to whom the DWA Programme has been applied but who has been found not to constitute a threat to UK national security. Because of the nature of the submissions supporting this ground, it will be necessary to set out at some length the events which led to the giving of assurances in Mr Sihali's case because it is argued on his behalf that to have sought them in the way that was done was "not in accordance with law" and, therefore, SIAC should decide his appeal as if they did not exist and had never been given. If that is the course taken there could only be one result of this appeal, since it is and always has been the position of the Respondent that it could not discharge its obligations under the ECHR and the Refugee Convention by returning him to Algeria without the protection of such assurances.

8. On 8 April 2005 the Appellant was acquitted of the very serious charges he had faced in the so-called "Ricin" trial. He was released from prison having already been remanded in custody for such a period that he had in effect already served the 15 month sentences he received under the Forgery and Counterfeiting Act charges. On 15 September 2005 he was given notice of intention to deport him and was detained pending deportation, but was later bailed.

9. The account which follows is heavily dependent on the evidence of Mr Anthony Layden who has given evidence in the majority of the Algerian cases heard by this Commission to date. He has provided ten generic witness statements on the DWA Programme, its origins and development and three witness statements specific to the Appellant. Much has been said about Mr Layden as a witness before, but for two members of the Commission this was their first experience of him. In our view, he was a highly impressive witness of great experience and integrity. It cannot be said that he is an independent expert (he himself readily accepts that this is so); he is employed under a contract by the FCO having retired after 38 years in the diplomatic service. His last posting was as HM Ambassador to Libya between 2002 and 2006. He is now the FCO's special representative responsible for the DWA Programme. His expertise lies in his knowledge of the Maghreb region and, in

particular, of the recent history and policy of the Republic of Algeria. He has built up a close and trusting relationship with Maitre Amara, a senior Algerian Judge on secondment as Director General of the Algerian Ministry of Justice. Mr Layden impressed us as a candid and reliable witness, and a man of the greatest experience in the ways of diplomacy, particularly in the Maghreb,

10. On 23 March 2006 the FCO sent to the Algerian government details of seventeen Algerians who had received Notice of Intention of Deportation and whose cases were before SIAC. The document summarised the British government's state of knowledge of their respective activities. So far as the Appellant was concerned, the note read as follows:-

> "17. Moloud Sihali born in Boudouaou, 12 March 1976.
>
> Another of the accused in the Ricin trial. One of the four who were acquitted in April. Believed to be involved in providing logistical support to members of proscribed organisations belonging to Al Qaida. Connected with Djedid … Khadri (aka Toufiq) currently detained pending extradition to France on terrorist charges, and Meguerba (currently detained in Algeria). On bail."

11. The note then continued to give details of his parents and last known address in Algeria. Mr Layden accepted that this information would make the Appellant a person of interest to those who were concerned to protect Algeria against terrorists, although he added that SIAC's later assessment put him somewhere near the bottom of the scale. But that would not, of course, be known to the reader of this note in March 2006 when it was sent.

12. By a Note Verbale 073/2006 the Algerian government was formally asked for information relating to the Appellant in these terms:-

> "- Confirmation that Mr Sihali is an Algerian national;
>
> - Whether there are any outstanding convictions, criminal penalties or criminal charges pending against him in Algeria or whether the Algerian authorities envisage bringing any such charges against him on his return, and, if so, details of the penalties imposed or maximum penalties applicable to the offences in question;
>
> - Whether he would be detained on arrival in Algeria and, if so, for how long, by whom and where;
>
> - Whether the government of Algeria intends to extradite or transfer him to any third country following his return to Algeria (for example, has any third state submitted an extradition request in respect of Mr Sihali);
>
> - Whether and, if so, how the Charter of Peace and Reconciliation might be applied to Mr Sihali."

The Charter referred to was extensively described in Ouseley J's SIAC judgment in *Y* dated 24 August 2006 as being the instrument through which the head of state and government of Algeria sought to address and bring an end to the problems that country had experienced as a result of the extensive violence which had occurred in the 1990s.

13. On 11 July 2006 as a result of and indeed the culmination of extensive diplomatic discussions, an exchange of letters took place between Prime Minister Blair and the Algerian head of state, President Bouteflika, declaring their shared intent to strengthen co-operation between the two countries, their shared commitments to human rights and fundamental freedoms and concluding:-

> "Finally, the British government notes that, in particular in cases relating to questions of internal security, it may, depending on the circumstances, wish to request special assurances from the competent authorities of the Algerian government".

14. On 5 August 2006 by a Note Verbale 105/DGAJJ/06 the Algerian government responded to the British requests in these terms, having confirmed the identity of the Appellant:-

> "Criminal status in Algeria:
>
> … Investigations concerning him carried out by the Interpol NCB in Algiers have revealed that he was reported by the British authorities for irregular residence.
>
> Should the above named person be arrested in order that his status may be assessed he will enjoy the following rights, assurances and guarantees as provided by the Constitution and the national laws currently in force concerning human rights:
>
> (b) (sic) The right to appear before a court so that the court may decide on the legality of his arrest or detention and the right to be informed of the charges against him and to be assisted by a lawyer of his choice and to have immediate contact with that lawyer;
>
> (b) He may receive free legal aid;
>
> (c) He may only be placed in custody by the competent judicial authorities;
>
> (d) If he is the subject of criminal proceedings he will be presumed to be innocent until his guilt has been legally established;
>
> (e) The right to notify a relative of his arrest or detention;
>
> (f) The right to be examined by a doctor;

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

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

We will call these the "original assurances" given in Mr Sihali's case.

15. Mr Layden was initially concerned for Article 6 reasons that there was an absence of an unequivocal statement in this note that there were no outstanding charges recorded against the name of Mr Sihali. He told us he took the matter up with Me Amara, with whom he has had numerous contacts over the period covered by this appeal, who explained that, because of the system of recording convictions in Algeria, it was very difficult to make such a statement. Mr Layden said that he, for his part, was only interested in the sort of charges that would carry heavy sentences and would be relevant to the kind of activities that they were thinking about. He satisfied himself that the agreed form of words – subsequently repeated in the Note Verbale of 5 February 2007 – did not represent any attempt by Algeria to conceal anything, but rather to say what they knew. It is not suggested that there were any such convictions in point of fact.

16. In February 2007 Mr Amara visited the UK and was given a revised version of the national security case that the Secretary of State was intending to present in the upcoming hearing of Mr Sihali's appeal.

17. This was confirmed and summarised in a further Note Verbale in March 2007 which, in its relevant parts, read as follows:-

> "The Embassy have been instructed to bring it to the attention of the Ministry of Foreign Affairs and Ministry of Justice that the national security case relating to Mr Sihali which the British government is presenting in this hearing is slightly different from the case of which the Algerian authorities were informed in March 2006."

[The Note then referred to and summarised the previous Note of 17 March 2006 and continued]

> "Following further consideration of the evidence available to it, however, the case the British government is presenting against Mr Sihali in the proceedings due to begin on 27 March 2007 is slightly different. It is that he:-
>
> (a) Has been involved in financial fraud and has been convicted of offences relating to false documentation, namely two counts of possessing a false instrument with intent contrary to section 5(1) of the Forgery and Counterfeiting Act 1981 ….

(b) Is associated with several Islamist extremists in the UK including members of a network formerly led by Abu Doha (Amar Makhlulif) involved in terrorist planning, including in the UK; and

(c) Has provided support in the form of facilitation to members of the Abu Doha network. This including fraudulent activity (e.g. helping Omar Djedid and Mohammed Meguerba with financial applications under alias names), documentation and accommodation which were used for attack planning."

18. In cross-examination of Mr Layden exception was taken to the adverb "slightly" in the passage set out above. We were not seriously concerned any more than was Mr Layden by suggestions that this was other than a fair and reasonable summary of the case the government was intending to put forward at the hearing given in order to keep their Algerian counterparts as fully in the picture as could be done.

19. The first judgment of SIAC in Mr Sihali's case was handed down on 14 May 2007 after having been circulated in advance in the normal way. Its conclusion on the issue of national security was in these terms:-

> "Whatever the risk to national security which he may have posed in 2002, the risk is now insignificant".

20. Because of the conclusion reached on the national security issue it was not strictly necessary to consider safety on return, but SIAC did proceed to give its views having heard full evidence and argument on this issue. It reached the same conclusion as previous SIAC decisions in *Y, BB* and *G* , having taken into account events since those judgments as dealt with in *U* . It concluded, having set out the information which had been originally given in March 2006 by the British government describing the role of the appellant in the Ricin affair:-

> "That description would now have to be supplemented by a copy or summary of SIAC's open judgment in these proceedings. There is no reason to believe that the British government will not modify its view of the appellant's activities in the light of this judgment; but even if it were not to do so or the Algerian government were to choose to prefer the original assessment, there is no reason to believe that he would be detained, with a view to charging him, charged and prosecuted for an offence under Article 87(a)(6) of the Algerian Criminal Code. In the hierarchy of those so far returned, even on the Secretary of State's original case, put at its highest, he fell below *V* and *K* neither of whom have been charged."

20. In direct response to that judgment, the FCO lost no time in sending a Note Verbale 04/07 on 14 May to the Algerian Embassy in London, to which note a copy of the SIAC judgment was attached. This document was disclosed late

in the course of the hearing. Before it emerged Mr Layden, when he first gave evidence, did not believe a copy of the judgment had in fact been sent, but his recollection was plainly at fault as he accepted when he saw it. After an introduction summarising the progress in SIAC appeals so far, the Note read:-

> "In the case of Moloud Sihali ("*AA*") heard in March this year SIAC has concluded that the appellant could be deported to Algeria without risk of ill treatment but found insufficient proof of terrorist activity in the United Kingdom to order removal. A copy of SIAC's open determination in Sihali's case is attached to this Note Verbale. The British government is considering whether to appeal against Judges' conclusion on national security. In the interim you may wish to pass a copy of the judgment to the relevant services in Algiers."

We consider this an accurate and sensible summary of what had happened. The raw and unedited judgment may have presented difficulties of comprehension even to a lawyer, if trained in the civil law tradition, as would have been the case had the roles been reversed.

21. On 22 May 2007 the Secretary of State received advice from his officials not to appeal the first SIAC judgment and no appeal has in fact been lodged.

22. There then took place on a date not established meetings between officials from the FCO and the Home Office together with legal advisers. No minute of this meeting has been found, though Mr Layden is of the belief that there would have been one. It may have been the case that it was simply incorporated into a submission to a minister. Mr Layden said the Home Office took the lead and the purpose of the meeting was to consider whether it was "proper or was going to be successful" to put a proposition requesting the Algerians to renew the assurances in respect of someone no longer a threat to national security. Mr Layden's own view was that it was "sensible and appropriate" to ask them because Algerians tended to be a bit legalistic about things and on occasions had been reluctant to go beyond what had been strictly agreed initially. He accepted that to extend an agreement in a Note Verbale requires bilateral consent. To the extent that there was any reflection on the part of the FCO before supporting the Home Office suggestion we think it was solely caused by their overriding concern not to disturb their good relations with the Algerians by making excessive demands

23. As Mr Layden put it, the view at the time based on the developing relationship with the Algerians was that they would not consider it inappropriate or improper "and therefore it was okay for us to ask, provided we made it clear that we were asking for them to renew the assurances on a different basis". It was the Home Office who were making the case for removal and his role, as he saw it, was to "advise on how it would go down with the Algerians". The position the Home Office were in then was that here was somebody the British government still wished to remove, who could not have been removed because of his antecedents without a risk of ill treatment, but in respect of whom assurances had been given by the Algerian authorities of a type which SIAC had held were valid and reliable; so, as Mr Layden put it, "the question

[was] whether it was appropriate for us to ask the Algerians to renew the assurances on a different basis". He concurred with the proposition in the light of his experience of the Algerians and his perception of their willingness to assist the UK in matters of this kind. He thought it was worth asking them.

24. He also met with his interlocutor, Maitre Amara, on his next visit which was not an occasion he could put a date to and, again, we have seen no notes or minutes of that meeting. It seems to us that whatever its exact date, this meeting must have come after the joint FCO/Home Office meeting described above. He brought Amara up-to-date with the SIAC hearing and told him that the Appellant's QC had expertly cross-examined the security service witness, as a result of which there was no evidence they could point to to confirm that the Appellant had knowledge that those he was assisting were engaged in terrorist activities, in the light of which it was held that he posed no threat or a negligible threat to the security of the UK in the future. Although there was no record, he described his recollection of this meeting as "very strong and clear".

25. In cross-examination Mr Layden was taken to task in respect of a witness statement he had provided as a witness for the Algerian government in the extradition proceedings in London concerning an Algerian named Khalifa whom the Algerian government was very anxious to see returned to them to face charges of large-scale fraud. In his witness statement Mr Layden had included Mr Sihali's name as one of seven terrorist suspects. This was after the first SIAC judgment. The context in which he included him was in a passage designed to show in the extradition proceedings that six terrorist suspects deported under the DWA Programme by Britain to Algeria had experiences which showed that the Algerian government had honoured the assurances given in each case. Mr Layden accepted he should have said that the seventh (Mr Sihali) had been held not to be a national security threat and he was inaccurate to that extent. We were satisfied that this was understandable given the context in which the statement was made and, more importantly, cannot see that it would as a mistake have damaged the reputation of the Appellant in the eyes of the Algerian government in a way that was contrary to the SIAC judgment. At all events, on 13 February 2008 Note Verbale 08/08 was sent to the Algerian Ministry of Foreign Affairs reciting that:-

> "The Embassy informed the Algerian government on 15 May 2007 that the appeal hearing of Mr Moloud Sihali against deportation to the People's Democratic Republic of Algeria was dismissed by the Special Immigration Appeals Commission on safety of return grounds and upheld on national security grounds."

Having recited earlier Notes Verbales, the Note continued:-

> "The United Kingdom would be grateful if the Algerian government would confirm that the assurances provided in the Ministry of Justice Note Verbale 105/DGAJJ/06 remain valid -

notwithstanding the changed basis on which Mr Moloud Sihali would be deported."

26. On 17th February 2008 the Ministry of Justice of Algeria sent a Note 37/DGAJJ/2008 confirming the assurances in terms identical to those in the original assurances.

27. Mr Layden was taken to task for saying that the appeal had been dismissed on safety on return grounds which he accepted was an inaccuracy. We do not regard it as a material mistake since SIAC had gone out of its way to express an opinion on this topic, but it was not the reason for its operative determination. What matters is that otherwise, in our judgment, the note did not do any violence to the terms of and the impact of the first decision. The vital words are in the fourth paragraph, set out in the preceding quotation. It was also objected by Mr Muller that the Note continued to assert that Mr Sihali's continued presence in the UK "would not be conducive to the public good" (in the original French "… ne contribuerait pas á l'intérêt générale"). In our judgment, there was no material misrepresentation of the case in this document. The Algerians would not have been familiar with or interested in the niceties of UK immigration law, but would have received a clear message that he was no longer viewed as a threat to the UK national security and that it was proposed to return him on some different and less serious basis. What mattered was that the Algerians should not get the impression that they had been materially misled about the type of person for whom they were being asked to provide assurances. The effect of [25-26] of the first judgment (as Mitting J. plainly intended it to be understood) was to re-assure the Algerian Government that Mr Sihali was neither a terrorist nor a knowing accessory to acts of terrorism and that, in terms of the hierarchy of those Algerians in London allegedly implicated in terrorism, he was to be placed lower than *V* and *K* whose returns had already been effected (respectively on 17th June 2006 and 24th January 2007). No charges of any sort had been brought against either of these men.

<u>Validity</u>

28. Mr Muller, for the Appellant, says that the Respondent has ridden roughshod over the DWA Programme and has applied and extended it to the Appellant unlawfully, arbitrarily and indiscriminately with no intellectual justification for so doing. He attacks the decision to seek and rely on new assurances, as he describes them, in February 2008 which he says is an integral part of the underlying immigration decision to refuse the Appellant's asylum and human rights claims, as witness the refusal letter of 16 January 2009 which makes express reference to the Note Verbale 08/08. He asserts that there existed a positive policy not to seek such assurances in the case of an ordinary asylum seeker who was not a national security suspect. The Secretary of State has deviated from the publicly understood position he previously held, not to seek assurances in asylum cases in the absence of a threat to national security "or other major public interest", as Mr Muller put it. There is jurisdiction in SIAC to consider what he calls the unlawful actions set out above by virtue of the "not in accordance with the law" grounds of appeal found in section 84(e) of

the Nationality Immigration and Asylum Act 2002, which are among the grounds applicable to SIAC appeals by virtue of the SIAC Act 1997 section 2.

29. This line of argument is developed in three further ways by Mr Muller. First he argues that the new assurances, as he categorises them, needed to be sanctioned by a person in Algeria competent to do so and there is no evidence that Maitre Amara was such a person. We see no force in this line of attack. Mr Layden accepted in his evidence that Maitre Amara would have had to obtain the Minister of Justice's approval on matters of principle. He accepted that he did not have any direct knowledge of his having in fact consulted the Minister about the Note Verbale of 17th February 2008 but, as he put it, he was "pretty sure" that that was the case. All the Algerian assurances so far relied on in other cases have been given over Me Amara's signature and have been properly observed; none has been disowned or reneged upon. As Mr Layden said, he had no reason on earth to suppose that Maitre Amara would have behaved improperly over this particular Note. The Commission is aware that the Note Verbale is the most formal means of communication used by governments to deal with each other. The requesting party here would not expect to see any internal paper trail within the Algerian Government evidencing Maitre Amara's notification to his Minister or to other ministries. For Mr Layden to have asked to see proof of it would have been a diplomatic faux pas in our view. He knew his man and had been dealing with him on a number of occasions over the last three years or so. We see no merit in this particular line of attack.

30. Secondly, it is argued that if the Respondent has unlawfully relied on new or renewed assurances obtained otherwise than in accordance with law then they cannot be relied upon by him in this appeal. Depending on the circumstances, one possible consequence of a Respondent's reliance on a decision made not in accordance with a stated policy would be an order re-submitting the question of the application of a policy to the decision-maker for him to review it – see *Abdi* [1996] Imm AR at page 160. There is also a helpful discussion of this proposition in *AG & Others* [2007] UKAIT 00082 [50] – a judgment of the Deputy President of the AIT. This option is not appropriate in the instant case because there is a substantive appeal which raises the question of whether there is a real risk of ill treatment and/or persecution, an issue with which we must deal. Mr Muller invites us , if we are persuaded by his argument on validity, to take the course of deciding this appeal, ignoring any assurances and on the basis that there were none in existence at all. The result of that exercise would be to require us to allow the appeal, since all accept that, absent assurances, it would not be safe to return Mr Sihali to Algeria. We are, therefore, invited to determine future risk knowing that we are making it on a false factual basis, if we decide that the assurances are in fact reliable.

31. Thirdly, on a more narrow view, if we were to believe that the parties to the assurances were not, as Mr Muller put it, "ad idem" then even if the unlawfulness argument fails there may be a point which goes to undermine the reliability of the assurances, with which topic we deal below. This is because the Algerians might be able, once Mr Sihali is returned, to argue that he lay outside what they understood to be the category of persons envisaged in the

original DWA Programme. This argument also fails, in our judgment, for the reasons we will give.

32. Mr Muller also argues that Mr Sihali's appeal should succeed on asylum grounds because the very fact that assurances were sought indicates that the Algerian Government, by definition, is not prepared to provide him with the necessary protection and he, therefore, must be entitled to surrogate protection within the terms of the Refugee Convention. However, the premise of Article 1A(2) defining a refugee for the Convention purposes requires there to be a person who "owing to a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion is outside the country of his nationality ….". If we are satisfied that the assurances are valid and reliable it must be the case that Mr Sihali does not meet that definition in that there are no objective grounds for that fear and the assurances indicate that he is not in need of surrogate protection, as it has been called in this appeal, since the Algerian Government has assured him that they will protect him.

33. The Respondent argues that, as at the time the original assurances were sought and given, no possible question of illegality arose or could arise. Ms Giovannetti points out that these assurances are open-ended and have no expiry date. There is no written policy, she argues, restricting the use to which they can be put, albeit current practice is to confine their application to persons presenting a risk to national security and not to what Mr Muller calls ordinary asylum claims. That this is the case seems to us to be likely to be the result of two factors:-

    (i) As Mr Layden says in his written evidence, each one of these DWA cases involves a significant expenditure of UK diplomatic time and effort. It also must draw from the well of Algerian diplomatic and political goodwill. We consider; the Algerians are likely, indeed entitled, to hold the view that these particular arrangements are primarily if not exclusively for the benefit of the UK and not them .

    (ii) An "ordinary" illegal entrant who is a failed asylum seeker will not, of course, usually need such assurances for his protection, by virtue of the fact that his claim has failed.

34. To deploy DWA in the case of Mr Sihali is neither unfair nor contrary to the purpose of the Refugee Convention, but rather is designed to ensure that he can be returned compatibly with the United Kingdom's ECHR's obligations and the terms of the Refugee Convention thus enabling him to return to the country of his nationality. That seems to us an answer to the allegations of general unfairness that Mr Muller says stem from the Respondent's actions. The so-called "*Eurostar* point" advanced by him - that the Appellant could move to a European country without a DWA Programme, and have an unanswerable asylum claim - does not indicate that his treatment in the UK has been unfair. He is only entitled to international surrogate protection if he is at a real risk on return, and subject to the assurances themselves passing the *BB* test considered below, he will not be.

35. As to unlawfulness itself, after the first SIAC judgment there was, as it seems to us, no "policy" available to the UK authorities covering the situation Mr Sihali was then in. He was an applicant for asylum in respect of whom assurances had been given and were still open, but these were based on grounds of national security and he had been found authoritatively not to pose more than a negligible risk on that score. The fact relied on by the Appellant that one other successful Ricin defendant (Khalef) was not made the subject of assurances so that his asylum claim went through the AIT cannot in any way constitute evidence of some new policy as was suggested. In any case the comparison with Khalef is not like for like; he had never been the subject of assurances and had never been said by the UK to be a threat to its national security. Mr Sihali, after the SIAC judgment, subject to his asylum arguments, was vulnerable to deportation merely on the grounds that he was an illegal entrant. SIAC acknowledged this [22] and canvassed the possibility that he could be subject either to administrative removal or alternatively that his deportation could be viewed as "conducive to the public good on grounds other than national security". We believe that SIAC was there using the language of English immigration law, but we do not think the Algerian readers of that judgment, or indeed of the UK Note Verbale 08/08, would have understood or even been interested in its precise implications or nice distinctions. What they would have taken from the judgment and from the Note was that he was not now being deported on national security grounds, but on some other and less serious basis.

36. Therefore, the correct analysis of what happened in this case, in our judgment, is that, absent any specific policy as to what should be done, Mr Layden and the Home Office team decided that the "proper and appropriate" course was to seek confirmation from Algeria of its position, for, in effect, the avoidance of doubt. They sought no new assurances, for none were needed, nor did they need to renew the old ones, for they were still live. They told the Algerians what had happened, made it clear that the risk posed by Mr Sihali had been downgraded and asked them to confirm that the original assurances still applied. The response in terms confirmed that they did. There is no difference whatever between the operative assurances contained in 37/DGAJJ/2008 and 105/DGAJJ/06 and the former is said in terms to be a reiteration of the latter.

37. For these reasons, the appeal grounds based under the heading of validity must all fail.

Safety on Return

38. The authorities are clear and to the effect that this is a question of fact not law – see, for example, Lord Hoffmann in *RB (Algeria)* at [184-5]. The test to be applied is that set out in *Chahal v UK* [1997] 23 EHRR 413 in these terms:-

> "… 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 any State, the responsibility of the Contracting State to safeguard

> him or her against such treatment is engaged in the event of expulsion."

In *Saadi v Italy* [2008] ECHR 179 the ECtHR said that in making its determination its examination of the existence of a real risk "must necessarily be a rigorous one".

39. In *RB* Lord Phillips said at [114] that the Strasbourg jurisprudence did not establish a principle that assurances must eliminate all risk of inhuman treatment before they can be relied upon and continued:-

> "if … 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."

40. This issue, therefore, being one of fact for our decision raises immediately the question of the status of previous SIAC decisions on the self-same issue. Ten previous cases have considered the reliability of Algerian assurances starting with the very extensive judgment of the then President in *Y* given on 24th August 2006 and running through to *QJ* on 14th December 2009. The decision of *BB* on 5th December 2006 founded itself in large part on *Y* (*BB* at [7]) as did the third determination in *G*. dated 8th February 2007 (see at [23)]. Ms Giovannetti submits that while these and subsequent decisions are not binding on us in this appeal, in a *stare decisis* sense, they constitute a body of specialist decisions from which we should only depart if developments in the law have changed the appropriate test to be applied or where significant new evidence demonstrates a change in conditions in Algeria or places evidence previously considered in a different light. Though these decisions are not the equivalent of the Country Guidance cases in the old IAT, SIAC is an expert tribunal assessing future risk and it is strongly desirable and in the interests of justice that appellants should know where they stand. The findings have not been tentative but are confidently expressed; in *RB*, which it is to be remembered was approved by the House of Lords, Mitting J when considering the key question of the reliability of the Algerian Government, given the high level political impetus to strengthen ties between it and the UK, said:-

> "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".

41. We accept the thrust of these submissions. While it remains incumbent upon us to look with care at the issue of safety in all its aspects and not merely to rubber stamp previous decisions, the plain fact is that they constitute a continuum of developing understanding and appreciation of the relations between the two countries in this regard which simply cannot be ignored and can safely be built on, in the absence of new evidence which undermines it or calls for a new assessment to be made.

42. That being so, in an appeal where the evaluation of governmental assurances is critical, we propose to consider them in the light of the tests or yardsticks suggested in *BB* at [5] and cited with apparent approval in *RB* by the House of Lords [23] in this form:-

(i) The terms of the assurances must be such that if they are fulfilled the person returned will not be subjected to treatment contrary to Article 3;

(ii) The assurances must be given in good faith;

(iii) There must be a sound objective basis for believing that the assurances will be fulfilled;

(iv) Fulfilment of the assurances must be capable of being verified.

43. We should consider these in turn.

<u>The terms of the assurances</u>

44. SIAC has considered that this position is fulfilled in *BB* and *G*. and the Court of Appeal has rejected an argument to the contrary as "fanciful" – see *MT (Algeria) v SSHD* [2007] EWCA Civ 808 at [129]. The House of Lords took a similar view in *RB* – see particularly Lord Hoffmann at [192].

<u>Good faith</u>

45. Hitherto SIAC has always accepted that these were given in good faith – see *BB* at [16] and *QJ* at [17]. There has been no significant attack on the good faith of the Algerian Government in the instant appeal and we agree with the previous views expressed.

46. As to the UK's motivation and good faith in seeking confirmation that the original assurances (themselves the subject of no form of attack), we have, we hope, made it clear in our assessment of the evidence relating to the exchange of Notes in 2008 that there is no room for any argument that the UK Government was seeking to deceive or mislead the Algerians in any way. We have also dealt above with the competence issue which immediately distinguishes this appeal from the very different case of *Ben Khemais v Italy* (application number 246/07).

47. We are, therefore, entirely satisfied, particularly as on 1st April 2008 the UK Government notified the Algerian Government of its intention to rely on the 2008 Note and there was no form of protest in response to that notification, that it is fanciful to suppose that the Algerian Government will at any future stage jeopardise its developing relationship of trust with the UK by seeking to argue that it was not bound by the assurances for these reasons.

<u>A sound objective basis for believing that the assurances will be fulfilled</u>

48. SIAC has found that it has been and remains in the national interest of Algeria to comply with these assurances and that it has the ability to deliver them by controlling the lower levels of its security forces. This, as it seems to us, is a

key consideration when considering this issue. The Appellant rightly argues that he will not benefit from the terms of the Charter of Peace and Reconciliation. The passages in *Y*, however, analyse (particularly at [340-350]) the importance of the Charter in the evolution of the political direction in which Algeria is now travelling as part of its aim to become a normal and fully-functioning civil state. We note the way it was dealt with at [374-5] and [390-397] in that appeal.

49. There is new evidence in this appeal which goes to that issue. Mr Layden's tenth generic witness statement of 22nd January 2010 recorded that President Bouteflika was now some nine months into his third five-year term as President having been democratically granted an extension to the normal two terms. The UK Secretary of State for Defence had made a formal visit on 27th October 2009, the first visit by a British Cabinet Minister for three years, and had had discussions with his opposite number and with the President.

50. Other matters of relevance covered in Mr Layden's latest statement were the readiness with which he was granted the right to visit and inspect El Harrach Prison (a visit with which we will deal below). He noted that in November 2009 two Guantánamo Bay returnees had been tried and acquitted of charges of belonging to a terrorist organisation.

51. In general, there continue to be frequent violent clashes in Algeria principally involving elements of AQIM and Algerian forces and Mr Layden did not shrink from the position that this state of affairs is likely to continue for the foreseeable future, as SIAC itself concluded in *QJ* at [22]. There is, however, some evidence that the level of fatalities resulting from such incidents is on the decline at the present time. Mr Joffee's evidence is now 9 months old and has not been updated; it remains open to the comments made on it by SIAC in *QJ*.

52. Political will apart, it seems to us that the best indicator of whether these assurances will be fulfilled is the experience of those who have been returned to Algeria to date. Again, this is a topic which has been exhaustively considered in earlier judgments. We consider first the cases of *Q* and *H*. These two were returned to Algeria on 20th and 26th January 2007 respectively. *Q* was not the subject of any assurances, but *H* was. The evidence relating to them is set out in SIAC's decision in *U* at [22-26] and its conclusions at [33-36]. Those conclusions were that the Commission was not satisfied on balance of probabilities that they had been exposed to the sounds of actual or pretended ill treatment of others with the intention or effect of breaking their moral resistance when in detention. The Commission set out their contacts with family and lawyers throughout their pre-trial period. *Q* was charged five days after he was first detained and was sentenced to eight years' imprisonment on 22nd November 2007. *H* was charged 15 days after his initial detention and sentenced to three years' imprisonment on 10th November 2007. The decision in *U* and the first SIAC decision in this appeal were both handed down formally on 14th May 2007.

53. While those decisions were in preparation Mr Sihali's solicitors received two handwritten letters on 23rd April apparently in *Q*'s handwriting which included

the claim that he had been tortured, beaten and humiliated "in police station" presumably referring to his initial detention in the hands of the DRS. The solicitors delayed sending that to SIAC until 2nd May. This elicited an addendum to the first Sihali judgment which noted the inconsistencies between this claim and the description of *Q* by his lawyer, that he was generally in decent health and was not claiming that he personally had been harmed, with his sister's statement to the Embassy on 10 March that he was well but not happy about his detention and with her statement to an Embassy official on 23 April that he had not been mistreated apart from being placed in a dormitory in the prison and made to take sleeping pills at night. The conclusion was that the new allegation did not persuade the Commission that there existed a real possibility of torture or ill treatment in the cases that they were considering.

54. There is now before us a new witness statement from Gareth Peirce, a former solicitor of Mr Sihali. She has made two previous witness statements on 19th February 2007 and a second on 13th July 2009 in which she said both *Q* and *H* had reported severe ill treatment during interrogation.

55. On the third day of the hearing before us a third witness statement was produced by her. This hearing was the third adjourned hearing of this appeal and the last adjournment was granted in July 2009 to enable further evidence to be adduced. Not unreasonably, the Respondent complains about the inability to investigate the new feature in her evidence.

56. That new feature is a document described as a report of *Q*'s trial by a lawyer present at the trial. He has asked to be anonymous and is not stated to have been one of the two lawyers known to be acting for *Q*. This has not been produced before despite the fact that it appears to have been in the hands of Miss Peirce's firm for over two years. It describes the trial and says that *Q* told the Judge that he had been tortured during his initial detention period and he had signed confessions having been led to believe that that would enable him to return home otherwise he would be returned to the torture centre at Hydra.

57. This new evidence is confronted by the same problems as were faced by the handwritten letters from *Q*, namely its inconsistency with the detailed and, to an extent, documented evidence that does not include any evidence that he made any contemporaneous complaints of such treatment, and that as late as 10th March he was well but not happy about his detention. We reach no different conclusion from that expressed in the addendum to the first decision. This is not evidence which constitutes substantial grounds for any conclusion that there is a real risk of ill treatment of Mr Sihali if he is returned.

58. As to other persons returned to Algeria, *I* and *V* can be considered together. *V* had no assurances. They were returned on 16th and 17th June respectively and both were released well within the twelve-day limit on 22nd June. The British Government believed that *I* was a senior figure in the Abu Doha terrorist group and that he had committed fraud to obtain funds for terrorist purposes. *V* was one of the accused in the Ricin trial against whom proceedings had been discontinued. Amnesty International spoke to both men on release and neither

made any complaint of torture or ill treatment, though Amnesty considered this could have been "for fear of reprisals". Both were offered the opportunity to contact the British Embassy in Algiers and neither availed themselves of that offer. Amnesty said it would continue to monitor their situation and take further action as necessary. It has not reported that any such action has become necessary.

59. *K* had attempted, without success, to fight with the Mujaheddin in Chechnya and was another associate of Meguerba involved in terrorist activity in London which included an attempt by him to raise a five figure sum with the assistance of Mr Sihali for terrorist activity. He was held for eleven days and released. Mr Sihali has been found to have provided various services for *V* and *K* by taking the lease on premises, helping *K* make his fraudulent loan application, setting up a company and a bank account for Meguerba and *K* and letting *V* use his bank account. SIAC has accepted that there is no evidence that Mr Sihali knew these acts were intended to support terrorist activity. The Algerians now have that judgment and will have read it. On any view, he is much smaller fry than either of *V* and *K* and of significantly less interest to the Algerians as a result. That in itself reduces the chances of a breach of the assurances in his case.

60. *P* was deported on 27th January and released three days later. Maitre Amara reported that his family was informed of his detention and were going to be permitted to speak with him. There is no evidence of any breach of assurance in his case.

61. *X* was deported on 6th June 2007 and released ten days later. He spoke to Amnesty on his release and said he had been treated well and that his interrogation had been conducted in a dignified manner.

62. *A* had been deported on 3rd July and was released five days later. He was allowed, exceptionally, to speak to his brother for 15 minutes during his *garde a vue* detention and there is no evidence of breach of assurance in his case.

63. Finally, *Ben Merzouga* was returned on 26th January 2010 and released nine days later being returned to his family home.

64. We have dealt at some length with the experience of returned persons, as have other constitutions of this Commission in the past, because they seem to us to be useful objective evidence indicating that Mr Sihali's assurances are likely to be fulfilled in the future. The Appellant puts up little by way of response to this evidence save to say that the experiences of other returnees are peculiar to them, there are difficulties of verification (with which we will deal below) and the experience of *Q* and *H* suggests that the process is inadequate. We do not agree and consider that it has been fully ventilated and explored in this and other SIAC judgments.

Verification

65. The Appellant's argument is that a proper verification system acts as a deterrent to would-be rogue DRS officers tempted to torture or ill treat the

applicant on return. We agree with this proposition. It is the case, as Mr Layden agreed, that his opposite number, Maitre Amara, has consistently denied at their meetings that the DRS ever used torture, though Mr Layden himself and most independent observers believe that they do and moreover that it is a widespread problem.

66. Mr Layden accepted in cross-examination that the FCO's original position was that independent monitoring akin to the OPCAT principles was the appropriate verification system, as with all other DWA programmes. Algeria consistently refused to countenance this in negotiations and in about 2006 the UK withdrew its insistence on an independent system. The factors in that decision were or included the fact that the Charter had released a very large number of terrorist suspects from detention, many of whom were hard to distinguish from the proposed returnees, and there was a growing trust between the two countries. But we believe that the Appellant's argument is right; the main reason was pragmatic in that the Algerians simply refused to move.

67. SIAC's decision in *Y* at [335-6] considered this issue and concluded that Algeria's position was not sinister, but was the reaction of a "sensitive rather prickly state" seeing the requirement as a slur on its record by a former colonial power. This construction was followed in *BB* at [21] and we agree with it.

68. In place, therefore, of independent monitoring the current system relies on contact between families and Algerian lawyers with the British Embassy. Embassy staff do not routinely visit prisons or attend trials of non-UK nationals, but are in touch with NGOs such as Amnesty International and Human Rights Watch. Mr Layden said that if there was a credible allegation that a returnee had been ill treated they would treat that as good reason to ask the Algerians to see the person concerned and he believed they would be allowed to do so. If they did not and there was an apparent breach of the assurances the first step would be to take the matter up with the Algerian authorities at the level of Maitre Amara and, if his response was unhelpful or unsatisfactory, it would be taken up at a higher ministerial level, if necessary to the President himself. He has had discussions with the current Foreign Secretary on this topic and understands him to support the principle that the assurances should be supported, if necessary, by such action.

69. The contemporaneous documents dealing with the cases of *Q* and *H* and the members of their family who were in contact with the Embassy show, in our judgment, that there was a system in place which worked tolerably well even if other returnees declined to use it. The Embassy staff appears to have been in fairly regular contact with *H*'s second brother, his mother visited him in prison and *Q*'s sister also availed herself of the system. At the Embassy end, staff were briefed and prepared for calls. When *Q*'s sister raised complaints about the conditions in which he was held and his being forced to take medication the matter was raised in a proportionate way with the Algerian authorities and a response was obtained.

70. When SIAC in *QJ* asked that inquiries be made to ensure that those responsible for prisons understood the importance of the assurances,

Mr Layden was readily granted facilities in January of this year, as we have already noted, to inspect El Harrach Prison where he and an FCO legal adviser were given a comprehensive tour accompanied by the Prison Director, the Director for Prison Security at the Ministry of Justice and the Resident Judge. Mr Layden's tenth statement describes conditions in this old and overcrowded prison. The impression he formed was, on balance, an encouraging one. Full access was granted to all parts bar the womens' section and the buildings though old were clean and well maintained. Prisoners were engaged in constructive activities, mainly education and training, and did not appear cowed in the presence of senior staff. There were 6 doctors and 3 dentists on the staff and well equipped treatment rooms. The Director and his colleagues expressed what appeared to be sincere enthusiasm for the ICPS programme and the political commitment of their government to improving prison conditions and respect for detainees' human rights The Minister of Justice had recently instituted a new system for inspecting and monitoring prisons. An allegation of torture against a member of staff (at a different prison) had led to an investigation and the conviction and imprisonment of the man concerned; the Minister was reported as affirming that no one whatever his rank could mistreat prisoners and those who did would be punished by the law.

71. Mr Muller pointed out that there are methods of torture which cannot be detected as they leave no visible trace which is undoubtedly true. That, of course, poses a problem for any system of monitoring or verification, even by independent inspection. The possibility, as was canvassed, that perceived human rights abuses in the wider region which have been well publicised and laid at the door of the UK or its close allies might result in returnees' next of kin having less confidence in the British officials' desire or ability to prevent ill treatment does not strike us as a real risk. The DRS officers on the ground and those who are responsible for their discipline and behaviour would not, in our judgment, take such matters into account when deciding whether or not to breach the assurances their Government have given.

72. In *RB* Lord Hoffmann said at [193] that there is no rule of law that external monitoring is required; the question depends upon the facts of the particular case, and that SIAC was entitled to say in *RB*'s case that though there must be a capacity to verify fulfilment of the assurances:-

> "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."

73. The position in this appeal on this topic is no different from that which prevailed in *RB*'s case and our judgment is the same. We are satisfied that verification of the fulfilment of these assurances is capable of being achieved by the means currently in place and by the determination of Mr Layden to

ensure that significant breaches do not go unreported, but are pursued in a vigorous manner.

Articles 5 and 6

74. The first SIAC judgment said that there was no reason to believe that, if returned, Mr Sihali would be detained with a view to charging and prosecuting him under Article 87(a)(6) of the Algerian Criminal Code. There is no new evidence or argument on this point which inclines us to revise that finding or that such prosecution, if brought, would contravene the double-jeopardy principle.

75. There is no record of any charges or convictions recorded against him in Algeria. As already noted, his position in contradistinction to *H, Q, K* and *V* suggests that he will be of considerably less interest to the Algerian authorities than were any of them.

76. The test set out by Lord Phillips in *RB* at [140-141] was that there must be substantial grounds for believing that there is a real risk, first ,that there will be a fundamental breach of the principles of a fair trial guaranteed by Article 6 and, secondly, that this will lead to a miscarriage of justice that itself constitutes a flagrant violation of the victim's fundamental rights in that the defects in the trial would lead to conviction and a sentence of many years' imprisonment.

77. We, therefore, consider that there is no real risk of an Article 5 or 6 breach principally because it is highly unlikely that Mr Sihali will be prosecuted at all upon return. If he is, the risk of double-jeopardy which is relied on by the Appellant is no different from that considered in *QJ* at [31-37] and leading to the conclusion, with which we agree, that:-

> "If Algerian law permits a person acquitted abroad to be prosecuted for and convicted of a similar offence in Algeria his trial there would not be flagrantly unfair… If as a result of his conduct in another State he has made himself liable to deportation from that State he cannot resist deportation on the ground that it may have that consequence".

In any event the evidence that might be obtained from Meguerba, even if extracted under torture, is unlikely to incriminate or imperil Mr Sihali for the reasons given in the first judgment. All that he could say is that he and K were allowed by the Appellant to live at the flat he obtained in Elgin Road, which is already well known to the Algerian authorities,.

Military service

78. No separate argument has been directed at the hearing or in the written final submissions on this issue. There is, in our judgment, no probability that his claimed failure to have completed military service will lead to ill treatment or persecution. Mr Layden was not asked about this matter, in respect of which there is some evidence that he might now be able to take advantage of an

amnesty but, at worst, he would suffer up to two years' imprisonment as a consequence.

Article 8

79. Again, we have received no separate argument on this issue. The Appellant in his witness statement of 14 July 2009 says he has been living in the UK for some 12 years. He has, however, spent the last seven years or more either remanded in custody or on stringent bail conditions. He has given no evidence about the quality or strength of his private life in the UK. For example he has not described any links to the community and the only family he has of which we are aware is in Algeria. Such medical evidence as there is comes from Drs Kelland and McKeith and is now well over four years old. If he needs medication we are satisfied he will get it in Algeria as did *H*, according to his lawyer Mr Tahri.

80. We are prepared to accept that removal would interfere with his right to private life, given the low threshold for the second step of the five-step approach explained by Lord Bingham in *Razgar [2004] IAR 381* at [17]. We have rejected the argument that the decision is not in accordance with the law. The fourth and fifth questions (taken together) involve conducting a balancing exercise (*EB (Kosovo) [2008] UKHL 41*). The legitimate aim in this case is the maintenance of immigration control. We take into account the lack of any evidence about the nature of the Appellant's private life in the UK and the fact that he would be entitled to some private life in Algeria, which possibly (we put it no higher than that) may be enhanced by his being reunited with his family. In all the circumstances we find that Mr Sihali can reasonably be expected to enjoy private life in Algeria. In any event and for the same reasons we find, balancing the factors in his favour against the state's interests, that removal would not prejudice the private life of Mr Sihali in a manner sufficiently serious so as to amount to a breach of the fundamental rights protected by Article 8.

Conclusions

For all the above reasons we are satisfied that the Respondent's decision in this case was in accordance with the law and that if he is removed to Algeria there is no real risk that he will suffer a breach of his rights under Articles 5, 6 or 8 of the ECHR or treatment amounting to persecution, or of treatment in breach of Article 3. This appeal is therefore dismissed.