Neutral Citation Number: [2008] EWCA Civ 290

Case No: T1/2007/9502

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SPECIAL IMMIGRATION APPEALS COMMISSION
The Hon Mr Justice Ouseley, Senior Immigration Judge Allen and Mr J K Ledlie
SC/15/2005

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/04/2008

Before :

SIR ANTHONY CLARKE MR
LORD JUSTICE BUXTON
and
LADY JUSTICE SMITH

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Between :

OTHMAN (Jordan)	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

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- -

Mr Edward Fitzgerald QC, Mr Raza Husain and Mr Danny Friedman (instructed by Messrs Birnberg Peirce and Partners) for the Appellant
Mr Philip Sales QC, Mr Robin Tam QC, Mr Tim Eicke and Mr Andrew O'Connor (instructed by the **Treasury Solicitor**) for the Respondent
Special Advocates for OO: Mr Angus McCullough and Mr Martin Chamberlain (instructed by the **Special Advocates Office)**

Hearing dates : 26 & 27 February and 3,4,5 & 6 March 2008

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Judgment

Lord Justice Buxton

This is the judgment of the court

Introduction

1. The Secretary of State wishes to deport Mr Othman to his native Jordan on the ground, not challenged before us, that he is a danger to the national security of the United Kingdom. Before SIAC, Mr Othman unsuccessfully challenged his deportation, on the ground that it would be inconsistent with the United Kingdom's obligations under the European Convention on Human Rights [ECHR]. The history of Mr Othman's previous engagement with the authorities of the Kingdom of Jordan; the evidence as to the respect paid in that country to human rights; the particular ways in which Mr Othman fears a breach of his rights; and the conclusions reached by SIAC; are all set out in comprehensive detail in the 541 paragraph determination from which this appeal is brought. In this judgment we say no more than is necessary to understand the arguments before this court and our conclusions upon them. Anyone who wishes to know more can safely refer to SIAC's, 'open', determination, which is publicly available, for instance on the SIAC web-site.

2. Mr Othman was born in 1960 in Bethlehem, then administered as part of the Kingdom of Jordan. Mr Othman is described by SIAC, §116, as an Islamist extremist, who advocates changing the present regime in Jordan from a monarchy to an Islamist regime governed by Islamist law. He has clear links to many terrorist groups and individuals, and as such is seen as a threat to the stability of the state of Jordan. Mr Othman arrived in the United Kingdom in 1993, having previously fled Jordan and gone to Pakistan. He made a (successful) application for asylum on the basis that he had been tortured by the Jordanian authorities, a claim that SIAC accepted may well be true.

3. In April 1999 Mr Othman was convicted in Jordan in his absence of conspiracy to commit terrorist activities, and sentenced to life imprisonment. At its §238 SIAC reported the evidence of an Arabic-speaking barrister who had visited Amman to investigate the trial process. We did not understand this account to be challenged. Her understanding was that

> the majority of defendants had complained that they were subjected to torture and as a result had made false confessions of involvement in four planned bombings with five separate bomb devices. No doctor saw the detainees during the period of interrogation and at the end of the period of interrogation during which they claimed to have been tortured, the prosecutor took a statement which each signed. No defence lawyers were present during the period of interrogation.

4. In the autumn of 2000 Mr Othman, still absent from Jordan, was one of some 28 defendants in the "Millenium" conspiracy trial, relating to a conspiracy to cause explosions. Mr Othman was convicted, and again sentenced to fifteen years imprisonment. The evidence against him included that of a co-conspirator called Abu Hawshar, who alleged during his own trial that his evidence had been extracted by torture. Other defendants, seen as more fully involved than Mr Othman, including

Abu Hawshar, were sentenced to death. It was alleged in the cases of those who had been present at the trial that the evidence against them had been extracted by torture, during a period of fifty days pre-trial detention when they were denied access to lawyers; and that some of that evidence had been used to convict Mr Othman.

5. It was accepted before SIAC, including by the witness for the Secretary of State, Mr Oakden, that Jordan's general human rights record is poor, not least in respect of the use of torture. With that in mind, the Foreign and Commonwealth Office concluded a Memorandum of Understanding [MoU] with the Kingdom of Jordan, which offered various safeguards in relation to the treatment of persons returned to Jordan, such as Mr Othman would be.

This appeal

6. Mr Othman's first complaint was that he fears renewed ill-treatment should he be returned to Jordan. SIAC rejected that claim, relying on the effectiveness of the MoU. The objection taken to that conclusion in the present, open, appeal, was that as a matter of principle a state could not rely on an MoU when returning a person to a country where they were prima facie threatened with ill-treatment.

7. That argument, as put, has to fail, for the same reason as the same argument failed before this court in *MT(Algeria) v SSHD* [2008] 2 WLR 159 [127]. Mr Fitzgerald submitted that the present case is different, because in *MT* SIAC had satisfied itself that, unlike in the case of Jordan, gross violations of human rights no longer took place in Algeria. It was therefore, but only for that reason, permissible in that case to rely on assurances. That is not a correct reading of *MT*, and in particular of §127 of that judgment, where we stated, in entirely general terms, and on the basis of *Chahal*, that it is a matter for SIAC's judgement whether assurances can be relied on in any given case. And in any event, even if we failed to make that principle clear in *MT*, so as to bind us in this case, it is nonetheless the principle that we apply in this appeal.

8. That conclusion is not affected by the judgment of the ECtHR in *Saadi v Italy* (application no 37201/06, judgment of 28 February 2008). At its §148 the ECtHR said that diplomatic assurances did not absolve the Court from the obligation to examine whether such assurances provided, in their practical application, a sufficient guarantee that the applicant would be protected against the risk of treatment prohibited by the Convention. That has never been questioned. It is that necessary examination that is carried out by SIAC in this and other similar cases.

9. So far as it was alleged in the present case, including in the closed proceedings, that that examination had been inadequate to the extent of involving the commission of an error of law in terms of irrationality by SIAC, for reasons that include those set out in our closed judgment of today we were unpersuaded. SIAC was well aware of the objections to the general situation in Jordan, and the need to have reliable assurances to protect persons returning to that country. The assessment of that balance was a matter for SIAC's judgement, and we do not lengthen this judgment by setting out how the balance was struck.

10. It will be convenient also to record here two further grounds of appeal that the applicant recognises are closed to him at this level by the decision in *MT(Algeria)*, but which he wishes to keep open for possible pursuit elsewhere. First, the appellant

criticises the decision in §§ 6-23 of *MT(Algeria)* that it was open to SIAC as a matter of principle to place reliance on closed material in considering the issue of safety on return. Second, he criticises the decision in §§ 77-90 of *MT(Algeria)* that the exclusion from protection provided for by Article 1F(c) of the Refugee Convention extends to acts committed after the claimant's recognition as a refugee.

11. That leaves the substantial matter that arises on this appeal. If the applicant is returned to Jordan he will be retried on the matters in respect of which he was convicted in his absence. He also fears that other charges may be brought against him. He alleges that in that process there will be committed serious breaches of article 5 of the ECHR, during his pre-trial detention, and of article 6 in relation to the trial itself. At least the latter complaint was pursued before us in formidable detail, the appellant's skeleton argument in relation to article 6 extending to some 130 pages. The Secretary of State responded in a mere 45 pages, albeit written in notably small type.

12. We will first address in general terms the ECHR as it relates to decisions of a state party to the Convention to send persons to a third country. We will call those "foreign" cases, adopting the, with respect, helpful distinction between foreign and domestic cases formulated by Lord Bingham of Cornhill in §9 of his speech in *R(Ullah) v Special Adjudicator* [2004] 2 AC 323. We will then in the light of the ECHR jurisprudence assess the evidence that was before SIAC as to the trial process in Jordan, and SIAC's handling of that evidence. We then as a separate issue deal with the complaints under article 5.

Article 6 in "foreign" cases

Introduction

13. Convention jurisprudence has trod warily in cases where the complaint against a state party to the Convention is not that the domestic acts of that state are in breach of the Convention; but rather that if the state uses its powers in domestic law to expel a party to a third country, that party will in that third country suffer conduct that if committed by a member state would be in breach of the Convention. That diffidence springs from the need to respect the right of signatory states to control their own borders and the entry and residence rights of aliens. As the ECtHR put it in §124 of its judgment in *Saadi v Italy*:

> It is the Court's settled case-law that as a matter of well-established international law, and subject to their treaty obligations, including those arising from the Convention, Contracting States have the right to control the entry, residence and removal of aliens (see, among many other authorities, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, judgment of 28 May 1985, Series A no. 94, § 67, and *Boujlifa v. France*, judgment of 21 October 1997, *Reports of Judgments and Decisions* 1997-VI, § 42). In addition, neither the Convention nor its Protocols confer the right to political asylum (see *Vilvarajah and Others v. the United Kingdom*, judgment of 30 October 1991, Series A no. 215, § 102, and *Ahmed v.*

> *Austria*, judgment of 17 December 1996, *Reports* 1996-VI, § 38).

14. However, in the case of articles of the Convention that enshrine absolute rights, such as articles 2 (in particular in relation to the prohibition of capital punishment) and 3, that principle has to yield to the imperative need to protect individuals from such treatment. Accordingly, and as further discussed in §§ 22ff of our judgment of today in *AS & DD (Libya)*, the signatory state cannot expel an alien to a country where he will face a risk, in the terms defined by the ECtHR, of inhuman or degrading treatment. The ECtHR explained the basis of this part of the law in §127 of *Saadi v Italy*:

> Article 3, which prohibits in absolute terms torture and inhuman or degrading treatment or punishment, enshrines one of the fundamental values of democratic societies. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15, even in the event of a public emergency threatening the life of the nation (see *Ireland v. the United Kingdom*, judgment of 8 January 1978, Series A no. 25, § 163; *Chahal*, cited above, § 79; *Selmouni v. France* [GC], no. 25803/94, § 95, ECHR 1999-V; *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 59, ECHR 2001-XI; and *Shamayev and Others v. Georgia and Russia*, no. 36378/02, § 335, ECHR 2005-III). As the prohibition of torture and of inhuman or degrading treatment or punishment is absolute, irrespective of the victim's conduct (see *Chahal*, cited above, § 79), the nature of the offence allegedly committed by the applicant is therefore irrelevant for the purposes of Article 3 (see *Indelicato v. Italy*, no. 31143/96, § 30, 18 October 2001, and *Ramirez Sanchez v. France* [GC], no. 59450/00, §§ 115-116, 4 July 2006).

15. What, however, of those articles that unlike article 3 are not absolute and may be derogable? While there is no case in which the ECtHR has recognised a breach of the Convention where, as here, extradition or expulsion is resisted on the basis of conduct inconsistent with article 6 in the receiving state, the Court has uniformly recognised that such a complaint is maintainable. The Court first so said, obiter, in §113 of its judgment in *Soering* 11 EHRR 439:

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

That formula has been repeated by the Court on a number of occasions: for instance, *Einhorn v France* (admissibility decision of 16 October 2001), §32; *Razaghi v Sweden* (admissibility decision of 11 March 2003), p9; *Tomic v United Kingdom* (admissibility

decision of 14 October 2003), p12; *Mamatkulov and Askarov v Turkey* 41 EHRR 25[88]. We proceed on that basis.

Soering in the United Kingdom

16. The problem of assessment of Convention standards in third party states was addressed by the House of Lords in *R(Ullah) v Special Adjudicator* [2004] 2 AC 323. That was an article 9 case, but it was recognised that at least broadly the same principles applied to all of what might be called the non-article 3 articles. In that spirit the House referred to all of the article 6 authority cited above, and adopted it in terms of a need to establish a flagrant denial of a fair trial. How that general formula was to be understood was explained by Lord Bingham of Cornhill at §24F, citing an observation of the Asylum and Immigration Tribunal (Mr CMG Ockleton presiding) in relation to the article 6 problem in *Devaseelan v SSHD* [2003] Imm AR 1[111]:

> The reason why flagrant denial or gross violation is to be taken into account is that it is only in such a case-where the right will be completely denied or nullified in the destination country-that it can be said that removal will breach the treaty obligations of the signatory state however those obligations might be interpreted or whatever might be said by or on behalf of the destination state.

That same analysis, in terms of complete denial or nullification of the Convention right in the destination country, was adopted by Lord Carswell at §69 of his speech. Both speeches were agreed in full by Lord Steyn and by Baroness Hale of Richmond. And Mr Sales reminded us that Lord Carswell had repeated that analysis when speaking for a unanimous House of Lords in *Government of the United States v Montgomery (No2)* [2004] 1 WLR 2241[26].

17. We do not think it possible to say, as Mr Fitzgerald was minded to argue, that Lord Bingham and Lord Carswell intended the language of complete denial of Convention rights to be limited to the particular cases before them. Rather, the language is part of a general exposition of the House of Lords' understanding of the meaning of the *Soering* formula. SIAC at its §454 adopted that same analysis. It referred further to the decision in this court in *EM(Lebanon) v SSHD* [EWCA] Civ 1531, but we do not need to pursue that case further because in the leading judgment Carnwath LJ at §40 confirmed that Lord Bingham's adoption of the *Devaseelan* formula had been intended to provide a single authoritative approach to the treatment of article 6 in foreign cases.

18. There was some inclination before us to suggest that the House of Lords' formulation was inconsistent with authority in the ECtHR. It was not easy to elucidate that argument, but in any event it was not open to the appellant. It is well recognised, for instance in the principle stated by this court in *Leeds City Council v Price* [2005] 1 WLR 1825, that in the event of an inconsistency (which in this case in our view does not exist) between a decision of the House of Lords and authority in the ECtHR, this court must follow the decision that is binding within the national legal order. That is what SIAC correctly did in the present case.

19. We may also add, though only as a footnote, that the House of Lords' understanding is consistent with the only further elucidation in the ECtHR that we have been shown of the general concept of "flagrant" denial of article 6 rights. In an opinion dissenting as to the assessment of the facts in *Mamatkulov*, Judges Sir Nicolas Bratza, Bonello and Hedges said at §11:

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

Alternative formulations

20. Having reached that position, SIAC then went on to suggest two further or other ways in which the *Soering* formula might be applied. It is important to stress that these formulations were not necessary for the SIAC decision under appeal, because the conclusions reached by SIAC that are set out in §27ff below were based on the law as already stated, and not on the alternative formulations. However, although what follows in this section of this judgment is strictly obiter, we find it necessary to say something on these points because as we shall later indicate some elements of them reappeared in the Secretary of State's argument before us.

21. First, in a lengthy exposition at its §§ 456-472 SIAC picked up the passage from *Devaseelan* approved by Lord Bingham (see §16 above), and suggested (§ 459) that the reference to there being a complete denial of article 6 rights irrespective of what might be said by the receiving state required, or permitted, consideration of whether the acts complained of would amount to a breach of article 6 by the receiving state were that state a party to the ECHR. That, in particular, would require consideration of whether the receiving state could or would defend itself by derogating from the application of article 6 in the particular case in issue (§ 460). That meant (§461) that since the court could not know the answer to that question, it could not conclude with the certainty required that transfer of Mr Othman to Jordan would entail a breach of his article 6 rights.

22. There are a significant number of objections to this analysis. First, there is no support for it in the determination of the Ockleton tribunal, and much less in the approval by Lord Bingham of that tribunal's conclusion. That tribunal did refer, in §§ 108-109 of *Devaseelan*, to the fact that the receiving state will not be party to the ECHR, and thus not to any proceedings in the ECtHR, and accordingly will not be able to adduce any of the defences or explanations available to a signatory state, including derogation. But that was said as part of a (with respect, very valuable) exposition of why it was not possible simply to apply article 6 jurisprudence in an expulsion case, and why some more demanding standard had to be adopted. That was a denial, not an affirmation, that the (hypothetical) article 6 position of the receiving state is dispositive.

23. Second, the argument infringes the principle that the enquiry is limited to the responsibility of the expelling state. Thus the ECtHR at §67 of *Mamatkulov*:

> There is no question of adjudicating on or establishing the responsibility of the receiving country, whether under general international law, under the Convention or otherwise. In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment.

24. Third, by allowing the court to act on uncertainty as to whether the hypothetical Convention party would derogate, the argument effectively prevents any case ever succeeding. That is because these issues are likely to arise in the case of persons, such as Mr Othman, in respect of whom and of the activities of persons associated with him it may well be thought that the receiving country regards there as being an emergency threatening the life of the nation: the context that article 15 requires for a valid act of derogation. Once the hypothesis of a receiving state having Convention powers is launched, a court, like SIAC in our case, cannot know the answer to a hypothetical question about that hypothetical signatory state; so the impossibility of excluding derogation is a complete answer to any claim. That is, with deference, plainly not what the Convention jurisprudence contemplates.

25. The other possibility suggested by SIAC but not acted on is to be found in § 473 of its determination. There SIAC acknowledged in relation to the position under article 3, as set out in *Chahal* and now confirmed in *Saadi v Italy*, that once a breach of article 3 was established no factors could be put in the balance in favour of expulsion. But SIAC suggested that the position might be different in respect of less intense rights such as those arising in connexion with article 6. It might therefore be possible to argue that the threat that Mr Othman posed to the safety of persons in the United Kingdom outweighed any ill-treatment that he was likely to receive in Jordan.

26. It is quite right that the structure and assumptions of article 6 are different from those of article 3. We would however be hesitant before accepting this argument. The very reason why the ECtHR has imposed an extremely stringent test for article 6-related breaches is precisely because of the need to respect the interests of the signatory state in protecting itself from, amongst others, dangerous aliens: see §9 above. If a claimant is nonetheless able to surmount that demanding hurdle, it seems very unlikely that he needs to, or should, pass a further test into which the state's interest in expelling him can be reintroduced.

The complaints in this case and SIAC's findings of fact

27. The appellant raised two major objections to the trial process that would await him in Jordan. Those were [Ground 3(1) of the Grounds of Appeal] that the trial before the State Security Court would not be conducted by an independent and impartial tribunal or by an independent or impartial investigating prosecutor; and [Ground 3(2)] that the appellant would be under a real risk of being convicted only on the basis of third-party out-of-court evidence that had been obtained by torture.

28. SIAC conducted an elaborate investigation of the evidence relating to those two matters, and made substantial findings on them. Although that evidence was gone through again in great detail in the appellant's skeleton, we did not understand the appellant significantly to challenge SIAC's findings of fact, even if it had been open

to him to do so. Rather, the appellant argued that the findings of fact were in his favour, SIAC's error of law lying in the conclusions that it had reached on the basis of those facts.

29. It will therefore be convenient, in order to set the scene for the discussion that follows, to set out, rather than to try to summarise, SIAC's conclusions of fact. That significantly extends the length of this judgment, but these conclusions are so important that they need to be seen as a whole.

30. First, as to the independence of the Jordanian court. SIAC said, at §§ 391-394 and 432-434:

> 391. We now turn to the trial itself, and first to the nature of the court. We consider first what would or might happen, then whether that would breach Article 6. We then draw the threads together in examining whether there would be a real risk of a total denial of a fair trial. The SSCt would consist of three judges, two at least of whom, including the presiding judge, would be military officers with the rank of Brigadier or Lt Colonel. One would probably be a civilian. The military officers would have law degrees, and would be lawyers in the armed forces rather than officers with other functions drafted in or seconded to the Court. Their legal work is in Courts but includes work as prosecutors, who are seen as judges within the civil law system of Jordan and the Middle East. The judges would be appointed by the Prime Minister on the recommendations of the Head of the Joint Chiefs of Staff or the Minister of Justice, for military and civilian judges respectively. Appointment by the Prime Minister is not said to be a real problem as such. They have no security of tenure in the Court and can be replaced by executive decision.
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> 392. The state prosecutors in the SSCt are also military officers of the rank of Lt Colonel or Major. They are part of the same military hierarchy as the military judges. They work from the same buildings as are used for detention and questioning by the GID. Ultimately, they are all answerable to the same executive power.
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> 393. The Court of Cassation is a civilian court. It sits in panels of various sizes, and for some of the appeals, these have been as large as nine. It is not a Court which normally rehears all the evidence when an appeal is made to it. But its remit extends beyond errors of law or procedure and it can review the factual conclusions which the SSCt has reached. Neither Court would hear argument that a trial before the SSCt was unfair or violated the Constitution because the composition of the SSCt made it unfair, whether for want of independence, or because it was unfair for a civilian on these charges to be tried before a Court dominated by military judges. It is the Court provided for

by the Constitution and they would also regard themselves as independent as declared by the same Constitution.

394. The fact that the executive is responsible for the budget of the judiciary and its training is of lesser concern. The general reputation of the Jordanian judiciary for providing fair trials is of no real weight in relation to judging the fairness of trial before a Court such as the SSCt. Similarly the suggestion that judges may be open to family influence is of no real weight here either. The concern is rather of the power and influence of the executive. The evidence supports the conclusion that the executive has the power and has exercised it at times to promote or move civilian judges who reached decisions of which they approved or disapproved. This could encourage "weak" judges. That factor must be the more present for a military court with its ranked hierarchy. There is no clear evidence that the executive has tried to pick judges for specific cases, although we assume that it could do so were it so minded.

432. Although a military court can be an independent judicial body, even when trying a civilian, such a trial process calls for a "particularly careful scrutiny"; *Ergin v Turkey (N0 6)* ECtHR 4 May 2006 Case 47533/99. But the more common emphasis is on the lack of independence of a military court by the nature of its composition; see e.g. *Incal v Turkey* (2000) EHRR 32. The objectionable features normally inherent in a military court are the holding of a military rank which puts the judge under the control of the executive, subject to military discipline and assessment, appointed and removable by the executive. Those features are present here: the judges hold military rank; they are appointed by the executive on the recommendation of the Head of the Joint Chiefs of Staff; they are removable by the executive. We have no information on their security of tenure. Although we accept that they are career military lawyers, legally trained, and that they are not ordinary officers seconded to a judicial post, their appointment, its duration, and promotion prospects are subject to the decision of the executive in which the Head of the Joint Chiefs of Staff has a powerful say. We do not know how panels are selected. The minority civilian judge is also subject to executive appointment in circumstances which say nothing about his security of tenure or the duration of any posting to the SSCt. The Higher Judicial Council which deals with assignments is under Ministry of Justice control.

433. The Prosecutor is not independent for the same reasons. The fact that the Prosecutor and the majority of the judges are part of the same military hierarchy does not add to the appearance of justice or independence.

> 434. This lack of independence cannot be cured by the independence of the Court of Cassation. We do not have specific evidence about the appointments to that Court but it has not been the subject of complaint about its independence in the same way. However, it cannot hear submissions about the independence of the SSCt. It can correct errors of law, approach and procedure and it can review findings of fact but it does not hear the cases afresh apart from prosecution appeals. The precise boundaries of its factual review are not wholly clear. Mr Fitzgerald is right that the lack of independence of the SSCt, as the trial court, cannot be cured by the availability of a right of appeal*; De Cubber v Belgium* 7 EHRR 236*; Findlay v UK* 24 EHRR 221. Other defects might be cured by appeal however.

31. Second, as to the potential use of evidence obtained by torture. We will have later in the judgment to revert to some more detailed passages, but SIAC said in summary at §§ 436-439:

> 436. As we have explained, there is no real risk that any confession from the Appellant himself would be obtained by treatment which breached Article 3 or gave rise to any concerns about unfairness. The concern relates to the statements which have already been obtained from the other defendants and possibly which might yet be obtained from other witnesses. We have expressed the view that there is a high probability that evidence which may very well have been obtained by treatment which would breach Article 3 ECHR would be admitted, because the SSCt would probably not be satisfied that there had been such treatment or that it made the maker of the statement to the Prosecutor say what he did. But that is not the finish of the argument over whether the admission of the statements in question would breach Article 6, again on the same hypothesis. Whilst it is unfair for statements obtained by ill-treatment to be admitted, the first question is whether there is legal provision for its exclusion, and second, whether that provision is adequately effective. There is always scope for disagreement about the correctness of a judicial decision on a factual issue related to admissibility in this area.
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> 437. Jordanian law does not permit evidence found to have been obtained involuntarily to be admitted, but it does require the defendant to prove that the statements which are most likely to be at issue here, those given before the Prosecutor, have been obtained in that way. A statement which may possibly have been given to a prosecutor as a result of prior GID duress is thus not excluded if the burden of proof is not discharged. We do not regard a legal prohibition on the admissibility of tainted material framed in that way as itself a factor which would make a trial unfair. The fact that under Jordanian law,

statements to a Prosecutor which might have been obtained by prior duress are not excluded, because they have not been shown to have been so obtained, does not make the trial unfair. So to hold would mean that a fair trial required the Prosecutor/judge, in a civil law system, always to disprove an allegation that a confession made to him was obtained by prior ill-treatment; or it would involve the Courts of the deporting country holding that the Courts of the receiving country would not endeavour to apply its own laws. However, as to the first, the ECtHR treats the regulation of the admissibility of evidence as essentially a matter for the domestic legal system. The burden of proof in Jordan is reversed anyway where the statement at issue was made to the GID. The majority decision in *A and Others (No 2)* supra, did not regard it as unfair, albeit with caveats, for evidence said to have been obtained by torture to be excluded only if that had been proved on a balance of probabilities by an appellant. We cannot conclude, particularly in the light of the incomplete information we inevitably have, that the evidence was probably obtained by treatment breaching Article 3. We can only conclude that that was a very real risk. The Jordanian Courts might agree.

438. We do not conclude either that for all the deficiencies of independence the SSCt, and Court of Cassation, did not or would not endeavour to apply its law reasonably conscientiously. We cannot conclude that the Jordanian Courts did or would probably err in their application of Jordanian law to the facts, or had or would reach decisions which were manifestly unreasonable or arbitrary. And after all, whatever the burden or standard of proof, Courts can always disagree on the application of law to fact without the outcome being legally unfair. It might be said of any Court, including a UK Court, especially on incomplete information, that there is a real risk that it might appraise the evidence wrongly. If the UK were applying its law to the exclusion of such evidence, on the material which we have although that is necessarily incomplete, the evidence would be excluded. But that cannot be the test for a fair trial.

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

> vigorously allegations of this nature. It is taking these points in combination which leads us to conclude that the trial would be likely to be unfair within Article 6 because of the way the allegations about involuntary statements would be considered. But again, we do not know how Jordan would put the case and with what factual material were it a party to the ECHR, nor what impact any derogation might have.

SIAC's conclusions under article 6

32. SIAC at §§ 442-452 set out the conclusions that it had reached on the basis of those facts.

> 442. However, although there are ways in which the retrial would probably not comply with Article 6 ECHR, the question is whether the retrial would be a complete denial of those rights. It is our view that the retrial would not involve a complete denial of the right to a fair trial before an independent and impartial body.
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> 443. The retrial would take place within a legally constructed framework covering the court system, the procedural rules and the offences. The civil law system contains aspects anyway which may seem strange to eyes adjusted to the common law, but which do not make a trial unfair. The charges relate to offences which are normal criminal offences rather than, as can happen, offences of a nature peculiar to authoritarian, theocratic, or repressive regimes. There is some evidence, if admitted, which would support the charges.
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> 444. The Appellant would be present at the retrial. The trial would be in public and would be reported. Even with local media restrictions, its progress would be reported on satellite channels. He would be represented by a lawyer and at the public expense, if necessary. He would know of the charges and the evidence; indeed he already knows some of it. There would probably be a shortfall in time and facilities for the preparation of the defence on the general background evidence but the particular position of the Appellant would probably obtain for him better facilities and time than most Jordanian defendants.
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> 445. The civil law system dossier or file does not mean that evidence cannot be challenged. It can be. The Appellant could give evidence and call witnesses, including those whose statements were in the dossier and who claim that they were involuntary. The fact that one possible witness has been executed for other offences, (not to prevent his giving evidence for he gave evidence at the first trial), does not show the trial system or the retrial to be unfair. His evidence could impact only tangentially, it would appear, on the Appellant's

involvement. The difficulties which other witnesses may face, notably Abu Hawsher, would not make the retrial unfair.

446. We accept the lack of institutional independence in the SSCt. The lack of independence for SSCt Judges is in the structure and system. There is no evidence as to why particular judges might be chosen for particular cases, or that they are "*leaned on*". But the SSCt is not a mere tool of the executive: there is sound evidence that it appraises the evidence and tests it against the law, and acquits a number of defendants. It has reduced sentences over time.

447. Its judges have legal training and are career military lawyers. There is a very limited basis beyond that for saying that they would be partial, and that has not been the gravamen of the complaint. Their background may well make them sceptical about allegations of abuse by the GID affecting statements made to the Prosecutor. They may instinctively share the view that allegations of ill-treatment are a routine part of a defence case to excuse the incrimination of others. The legal framework is poorly geared to detecting and acting upon allegations of abuse. The way in which it approaches the admission of evidence, on the material we have, shows no careful scrutiny of potentially tainted evidence. There would be considerable publicity given to the retrial and public trials can encourage greater care and impartiality in the examination of the evidence. This would not be a mere show trial, nor were the first trials; nor would the result be a foregone conclusion, regardless of the evidence.

448. Reasons are given for the decisions, and an appeal to the Court of Cassation is available. The fact that such an appeal cannot cure the want of structural independence in the SSCt is not a reason for discounting its existence in the overall assessment of whether there would be a complete denial of Article 6 rights. This Court is a civilian court and the evidence of undue executive influence through appointment or removal is quite sparse. There is no evidence again as to how its panels are chosen, nor that they are "*leaned on*" by the executive. It plainly operates as a corrective to the rulings of the SSCt on law and procedure, and is of some relevance to factual matters, even though it does not hear the evidence all over again or have a full factual jurisdiction except on Prosecutors' appeals. The probable sentences are not wholly disproportionate to the offences.

449. We have discussed at length the approach of the SSCt to the admission of statements to a prosecutor allegedly given as a result of prior ill-treatment. Although we take the view that a contribution of factors would probably make the retrial unfair in that respect, they do not constitute a complete denial of a fair

> trial. The existence of a legal prohibition on the admissibility of such evidence cannot be ignored, nor the fact that the SSCt would hear evidence relating to the allegations. The role of the Court of Cassation in reviewing and at times overturning the conclusions of the SSCt on this issue is material. The want of evidential or procedural safeguards to balance the burden of proof, and the probable cast of mind towards statements made to a prosecutor/judge in a civil law system, all within a security court dominated by military lawyers, does not suffice for a complete denial of justice.
>
> 450. There is a danger, given the inevitable focus on what is said to be potentially unfair about the retrial, in focussing exclusively on deficiencies when deciding whether there would be a total denial of the right to a fair trial, rather than looking at the picture of the trial as a whole. That is what has to be done however and it is that picture as a whole which has led us to our conclusion on this issue.
>
> 451. The various factors which would be likely to cause the retrial to breach Article 6 are to a considerable degree interlinked. Taking them in the round does not persuade us that there is a real risk of a total denial of the right to a fair trial.
>
> 452. Of course, the nature or gravity of the deficiencies required to show a total denial of a fair trial is not capable of precise definition. But the concept conveys a sense of a trial which overall is largely or essentially indefensible, affronting any true sense of justice or fairness, even though that affront does not have to be so grave as a mere show trial or facade for a pre-determined conclusion. To us, the retrial would be some distance overall from that concept, and does not satisfy the stringent test which, if Article 6 were engaged, the ECtHR would apply. The difficulties of satisfying this test are exemplified by *Einhorn v France* ECtHR Reports 2001-xi and *Bader v Sweden* (app.no. 13284(04) in which respectively the absence of the accused, his lawyer and evidence showed a flagrant denial of justice, whereas, and closer to here, in *Mamatkulov and Ashkarov v Turkey* (2005) 41 EHRR 25, the irregularities did not constitute a flagrant denial of justice.

The appellant's case

33. As we have seen, the appellant criticised SIAC's conclusions in two respects. First, SIAC had not properly applied Convention law as to the need for the case to be tried by an independent and impartial tribunal. Second, it had not properly dealt with the risk that at the forthcoming trials in Jordan there would be used evidence obtained by torture. The latter of these objections was by far the more substantial, and worrying, part of the appellant's case, and we deal with it in a separate section of the judgment.

First, however, we address SIAC's findings as to whether the Jordanian State Security Court would be an independent and impartial tribunal in the relevant ECHR terms.

An independent and impartial tribunal

34. In the passage quoted above SIAC indicated a significant number of ways in which the State Security Court lacked impartiality in the Convention sense. That, argued Mr Fitzgerald, was enough to remove the possibility of expulsion, since under the ECHR Mr Othman had an "unqualified right" to be tried by an independent tribunal. SIAC had erred in law in not treating the tribunal's lack of independence as conclusive, rather than treating the nature of the tribunal as only one element in the assessment of whether in Jordan there would be a total denial of article 6 rights. The argument was put thus on pp 52-53 of the appellant's skeleton in this court:

> The right to be tried by an independent and impartial tribunal: see *De Cubber v Belgium* (1984) 7 EHRR 236 and *Findlay v United Kingdom* (1997) 24 EHRR 221; *Ex parte Hammond* [2005] 3 W.L.R. 1229; *Millar* v. *Dickson* [2002] 1 W.L.R. 1615 and *Brown v. Stott* [2003] 1 AC 681. PC. The breach in Mr. Othman's case is foreseeable and fundamental because his trial will be before a panel of military judges in the State Security Court. This cannot in any circumstances satisfy the right in question. The injustice cannot be corrected by a civilian appellate procedure and there is no separate remedy to declare the jurisdiction of the State Security Court unlawful under Jordanian law. On this very issue there is a clear and unequivocal line of Convention case law which would recognise a conviction in these circumstances to be unfair, regardless of whether the tribunal otherwise treated the appellant fairly: see *Incal v. Turkey* (2000) 29 E.H.R.R. 449; *Öcalan v. Turkey* (2005) 41 E.H.R.R. 45; and *Circalar v. Turkey*, (2001) 32 E.H.R.R. 32, and *Haci Özen v. Turkey*, unreported, 12 July 2007, EctHR, para. 45. [emphasis in original]

35. The difficulty of this argument is that all the citations are of domestic cases, addressing the obligations of the signatory state in relation to the legal system for which it is responsible. None of them address the different question that is before us, of the inhibitions placed on an expelling signatory state by the structure of the legal system in the receiving, non-signatory, state. Mr Fitzgerald necessarily agreed that that was so, but said that in both domestic and Convention law the independence and impartiality of the court is regarded as fundamental. The clearest statement that he quoted to that effect was that of Lord Brown of Eaton-under-Heywood at §42 of his speech in *R(Hammond) v Home Secretary* [2006] 1 AC 603, where he said on the basis of *Findlay* that such a defect may be quite simply irremediable. This is a strong position, but it was taken in a case that did not address the present problem, of whether there will be a complete denial or nullification of the right to a fair trial in the receiving state. It was in our view open to SIAC to proceed as it did in addressing that question, by carefully analysing the actual position and procedure of the State Security Court in §§ 442-448 of its determination, as set out in §32 above. SIAC's conclusion was that although that court was not in domestic terms independent and

impartial, trial before it would not amount to a complete denial of justice. SIAC did not act irrationally in reaching that conclusion, which was based on a correct statement of the issue and which was open to it on the evidence.

36. Both parties sought to improve on that conclusion by arguing that the jurisprudence of the ECtHR has passed beyond the general test expressed in *Soering* to more precise indications of when an expulsion would be open to objection on article 6 grounds that related to the impartiality of the tribunal in the receiving state. Neither of those submissions was correct, for reasons that, because of the weight placed on the submissions, we must now explain.

37. Mr Sales said that the absence in this case of any breach of article 6 went beyond mere deduction from Convention principles and authority, and had been positively decided in favour of the approach of SIAC in *Drozd and Janousek v France and Spain* 14 EHRR 745. That was an unusual case, to the extent that Lord Bingham, at §17 of *Ullah*, said that he did not regard it as a foreign case at all. D and J were imprisoned in France on the basis of a sentence imposed in Andorra by a court that included the acting head of the police force. The ECtHR declined jurisdiction under article 6 in the domestic sense, holding that the Andorran court was not part of the French legal order. However, it did consider a complaint that the detention in France had been in breach of article 5. The French Republic claimed, under article 5.1(a), that the detention had been lawfully pursued after conviction by a competent court. In considering whether the Andorran court so constituted fulfilled that description the, bare, majority of the ECtHR, at its §110, reminded itself that a signatory state was not obliged to verify whether the proceedings which resulted in the conviction that it was enforcing were compatible with article 6, but noted, adopting the language of *Soering*, that a signatory state was obliged to refuse such co-operation if it emerges that the conviction is the result of a flagrant denial of justice.

38. But the majority held that no such flagrant denial had taken place. That, said Mr Sales, showed that a defect in the composition of the court such as occurred in *Drozd*, arguably even more open to objection in article 6 terms than the military nature of the State Security Court in Jordan, did not bring the case under the *Soering* principle; or at least, contrary to Mr Fitzgerald's argument, did not necessarily attract the *Soering* principle. We would approach that argument with some caution. It is true that *Drozd* has been cited in subsequent cases, but for its statement of principle rather than for its result. It was also open to Mr Fitzgerald to point out that *Drozd* was, in Convention terms, a fairly early case, when this issue may not have been so clearly in the court's mind as it was after, for instance, the decision in *Findlay* in 1997. More fundamentally, however, the ECtHR does not seem to have treated the composition of the sentencing court as a separate and conclusive issue, but rather to have assessed the general practice of the French Republic in treating Andorran judgments in a critical light. And the issue was further blurred by the fact that the objection now relied on was available in relation to the sentencing court but not in relation to the court of conviction.

39. We would agree with Mr Sales that if it were the case that any element at all of lack of independence of a foreign court attracted the *Soering* principle then it would be very difficult to see how *Drozd* could have been decided as it was. But for the reasons that we have given we cannot regard *Drozd* as conclusive and fully reasoned authority to that effect.

40. Mr Fitzgerald in his turn claimed to have conclusive authority in his favour, in the shape of a decision of the ECtHR that became available after the date of SIAC's determination, *Al-Moayad v Germany* 44 EHRR SE22. The USA sought the extradition of the applicant from Germany. He was a person who would or might fall within the terms of the President of the USA's Military Order of 13 November 2001, which provided for the holding of prisoners on a long-term basis, without access to lawyers or to judicial review, and for any trial that eventually took place to be before a military court. The case was resolved by assurances by the government of the USA, which the ECtHR found that the German government had been entitled to rely on, that the applicant would not be held in a special detention centre without access to legal advice, and would be tried before the orthodox criminal courts. However, the ECtHR, after referring to the importance of the principle of a right to a fair trial even in conditions of international terrorism, continued, at §§ 101-102:

> A flagrant denial of a fair trial, and thereby a denial of justice, undoubtedly occurs where a person is detained because of suspicions that he has been planning or has committed a criminal offence without having any access to an independent and impartial tribunal to have the legality of his or her detention reviewed and, if the suspicions do not prove to be well-founded, to obtain release…..Likewise, a deliberate and systematic refusal of access to a lawyer to defend oneself, especially when the person concerned is detained in a foreign country, must be considered to amount to a flagrant denial of a fair trial with the meaning of Art 6(1) and (3)(c)….The extradition of the applicant to the United States would therefore raise an issue under Art 6 of the Convention if there were substantial grounds for believing that following his extradition he would be held incommunicado without having access to a lawyer and without having access to and being tried in the ordinary US criminal courts.

41. Mr Fitzgerald says that this passage demonstrates that trial by anything other than an orthodox criminal court, and certainly trial by a military tribunal, amounts to a flagrant breach of article 6 in *Soering* terms. However, it is plain from the first part of the extract cited above that a very strong element in the ECtHR's concern was the prospect of persons merely suspected of terrorist offences being held without legal advice for long periods in places such as Guantanamo Bay (specifically addressed in §66 of the ECtHR's judgment), where there were strong reasons for thinking that the holding authorities did not exclude the use of torture (specifically addressed in §§ 41-42 of the ECtHR's judgment). It is not clear how far the holding of a subsequent trial, if indeed any trial ever took place, before a military tribunal would, if that had been the only complaint against the USA process, have been seen as a sufficiently flagrant breach of article 6 rights. *Al-Moayad* cannot be read as deciding that the prospect of a trial in any tribunal other than the orthodox civil courts of itself renders an expulsion unlawful under article 6.

Conclusion on the issue of an independent and impartial tribunal

42. Neither of these authorities accordingly causes us to depart from the reasoning or the conclusion that we set out in §35 above. If the complaints as to the independence and

impartiality of the State Security Court stood alone they would not suffice to put the United Kingdom in breach of the *Soering* principle. We take a different view in respect of the complaints as to the use in those courts of evidence obtained by torture, a conclusion that we need to explain in some detail in the next section of the judgment.

Evidence obtained by the use of torture

Introduction

43. Our decision is that in this respect it was not open to SIAC to conclude that the deportation of Mr Othman to Jordan would not breach his rights under the ECtHR; and therefore that SIAC's decision dismissing his appeal against that deportation order must be quashed and an order allowing the appeal be substituted for it.

44. We are very conscious that we can only so decide if SIAC can be shown to have erred in law. We are also conscious that both SIAC and ourselves are engaged in an area in which there is no conclusive authority in the ECtHR; and that we have to tread warily in view of the warning sounded by Lord Bingham in §20 of his speech in *Ullah*:

> It is of course open to member states to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national courts, since the meaning of the Convention should be uniform throughout the states party to it.

We accordingly start by setting out the errors of law committed by SIAC, which we explain further in the rest of the judgment.

Errors of law committed by SIAC

45. SIAC understated or misunderstood the fundamental nature in Convention law of the prohibition against the use of evidence obtained by torture. Counsel for the Secretary of State said that it was no part of his submission to say that if it is clear that a trial will take place on the basis of evidence obtained under torture, whether of the individual themselves, or third parties, that that would not involve flagrant denial of justice. Accordingly, once SIAC had found as a fact that there was a high probability that evidence that may very well have been obtained by torture [SIAC §436]; or in respect of which there was a very real risk that it had been obtained by torture or other conduct breaching article 3 [SIAC §437]; would be admitted at the trial of Mr Othman; then SIAC had to be satisfied that such evidence would be excluded or not acted on. The grounds relied on by SIAC for not finding a threatened breach of article 6 in that respect were insufficient.

46. We emphasise that that is not or not primarily a criticism of SIAC's reasoning in terms of rationality, though we do consider additionally that SIAC's conclusions did not follow rationally from its findings of fact. Rather, our principal finding is that SIAC erred by applying an insufficiently demanding test to determine the issue of whether article 6 rights would be breached.

47. In addition to that general, and fundamental, error, SIAC erred in the following further respects, which contributed to, but taken by themselves did not cause, its failure to find a breach of article 6 in this case:

i) SIAC was wrong, in assessing the rules as to the admissibility of evidence in a foreign case, to give weight to the domestic principle that admissibility is a matter for the domestic legal system [SIAC, § 437]

ii) The effect of the speeches in the House of Lords in *A and others (No 2)* was wrongly stated, with the result that SIAC wrongly relied on that case for support for its conclusions [ibid]

iii) In its analysis in its §439 SIAC wrongly allowed itself to be influenced by the potential for derogation on the part of a signatory state: see §§ 21-24 above.

The use of evidence obtained by torture

48. The use of evidence obtained by torture is prohibited in Convention law not just because that will make the trial unfair, but also and more particularly because of the connexion of the issue with article 3, a fundamental, unconditional and non-derogable prohibition that stands at the centre of the Convention protections. As the ECtHR put it in §105 of its judgment in *Jalloh v Germany* 44 EHRR 32:

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

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

49. SIAC was wrong not to recognise this crucial difference between breaches of article 6 based on this ground and breaches of article 6 based simply on defects in the trial process or in the composition of the court. Rather, in its conclusions in §§ 442-452 of its determination, that are set out in § 32 above, it treated the possible use of evidence obtained by torture *pari passu* with complaints about the independence of the court: see in particular SIAC at §§449-450. That caused it not to recognise the high degree of assurance that is required in relation to proceedings in a foreign state before a person may lawfully be deported to face a trial that may involve evidence obtained by torture.

The evidence likely to be used in Mr Othman's trials, and SIAC's approach to it

50. Concern was expressed about two types of evidence. First, statements that had been made before the public prosecutor. Second, evidence given *viva voce* in the course of proceedings. The former category is the more relevant to this case, and the more difficult, and we will concentrate upon it. Such evidence had been deployed against Mr Othman in his trials *in absentia*, in the circumstances described in §§ 3-4 above, and was expected to be used in his retrials on return.

51. As to that evidence, SIAC said, at its §§ 436-437, already set out in §31 above:

> We have expressed the view that there is a high probability that evidence which may very well have been obtained by treatment which would breach Article 3 ECHR would be admitted because the SSCt would probably not be satisfied that there had been such treatment or that it made the maker of the statement to the Prosecutor say what he did….We cannot conclude, particularly in the light of the incomplete information we inevitably have, that the evidence was probably obtained by treatment breaching Article 3. We can only conclude that there was a very real risk. The Jordanian courts might agree.

Mr Sales seised on the latter finding, that SIAC could not conclude that the evidence was probably obtained by torture, to say, as we understood him, that this case could not in any event pass the *Soering* threshold. We do not agree. Once there was "a very real risk" of evidence in breach of a fundamental prohibition of the Convention being adduced, it was necessary for SIAC to satisfy itself that there could be excluded the further risk, that such evidence would be acted on by the Jordanian court.

52. SIAC approached that task not by reliance on anything in the MoU, or other undertakings specific to this case, nothing of that sort having been sought or given; but by relying on the normal operation of the Jordanian legal system. We have already set out what it said in that discussion, but for ease of reference we repeat SIAC's final conclusion in §§449-450 of its determination:

> 449. We have discussed at length the approach of the SSCt to the admission of statements to a prosecutor allegedly given as a result of prior ill-treatment. Although we take the view that a contribution of factors would probably make the retrial unfair in that respect, they do not constitute a complete denial of a fair trial. The existence of a legal prohibition on the admissibility of such evidence cannot be ignored, nor the fact that the SSCt would hear evidence relating to the allegations. The role of the Court of Cassation in reviewing and at times overturning the conclusions of the SSCt on this issue is material. The want of evidential or procedural safeguards to balance the burden of proof, and the probable cast of mind towards statements made to a prosecutor/judge in a civil law system, all within a security court dominated by military lawyers, does not suffice for a complete denial of justice.

> 450. There is a danger, given the inevitable focus on what is said to be potentially unfair about the retrial, in focussing exclusively on deficiencies when deciding whether there would be a total denial of the right to a fair trial, rather than looking at the picture of the trial as a whole. That is what has to be done however and it is that picture as a whole which has led us to our conclusion on this issue.

53. Paragraph 450, we have to say, shows exactly SIAC's error in approaching the question of evidence obtained by torture as just one element in the overall issue of whether the trial as a whole would be fair; rather than as a separate question that raised fundamental Convention issues reaching beyond the boundaries of article 6. It was that mischaracterisation of the issue that led SIAC to undervalue the importance of the risk that the impugned evidence would in fact be used at the retrials; and thus not to address at the level required the risk of an outcome that would constitute a total denial of justice in *Soering* terms.

54. As we have seen from its § 449, SIAC reached its conclusion that there would not be a complete denial of justice in relation to the use of evidence obtained by torture by relying on the process, admittedly not wholly satisfactory, before the SSCt and the Court of Cassation. That view sits very ill with SIAC's own findings about that process. Leaving aside the evidence of the appellant's own experts (which, however, SIAC showed no sign of having rejected), there is set out in §149 of the determination a damning verdict by Amnesty International:

> The Amnesty International Report of 4 May 2006, *"Jordan: Amnesty International calls for investigation into alleged torture and ill-treatment of detainees"*, called on the Jordanian Government to establish immediately an impartial and independent investigation into continuing reports of torture and ill-treatment of political suspects for the GID, in response to what it described as persistent complaints of torture in incommunicado detention by the GID in its detention centre near Wadi Sir in Amman; such allegations about GID detention had been made for many years. It continued to receive reports of detainees being forced to sign "*confessions"* which were then used against them in trials before the State Security Court, which frequently failed to investigate complaints by defendants that they were tortured in pre-trial detention or failed to reject evidence allegedly obtained under torture. Although lawyers reported that some defendants had had convictions and sentences overturned by the Court of Cassation because of "*improper methods of investigation"*, the court still was said to give inadequate attention to torture allegations even where the death penalty was involved.

55. And that evidence was mirrored in SIAC's own conclusions. At §§ 412-416 SIAC said:

> 412. In our judgment, at the retrial, the SSCt would not dismiss out of hand the allegations that incriminating evidence had

> been obtained by torture, even though they have been the subject of a previous ruling. But, it is extremely unlikely that the Appellant would succeed in showing, and it would be for him to do so, that that earlier ruling should be changed in the absence of further very strong evidence, which now would itself be unlikely to be available.
>
> 413. There is therefore a high probability that the past statements made to the Prosecutor which incriminated the Appellant will be admitted at the retrial, as they were at the original trials. The Court would listen to evidence and argument that they had been obtained by torture or ill-treatment or threats beforehand by the GID. We do not regard it as likely that the Appellant would succeed in excluding them from the trial, either because of an earlier judicial ruling which could not in practice be controverted by new evidence, or because of the evidential difficulties of proving to the SSCt that the confessions had been obtained as a result of such treatment.
>
> 414. If there were an incriminating statement made before the Prosecutor which had not been the subject of earlier judicial ruling, which was alleged to be the result of threats or past acts done by the GID, the SSCt would consider the evidence about how it was obtained, and its finding could be reviewed by the Court of Cassation. It would again be for the Appellant or defendant to prove this point, and we accept that he would find that difficult. It would appear that the bar in practice is set high, and any records which would support such an allegation are unlikely to exist or to be kept. The SSCt may be very unwilling to accept that the procedure before the Prosecutor could realistically and demonstrably be tainted by prior ill-treatment.
>
> 416…..the SSCt does not enjoy a good reputation for concern about evidence that might have been obtained by torture.

SIAC's concern about the difficulty for a party in proving that evidence had been obtained by torture was amply justified by the litany of lack of the basic protections against prior ill-treatment or means of assisting its proof that is set out in §439 of SIAC's determination, quoted in § 31 above.

56. It was not open to SIAC to conclude on that evidence that the risk of the total denial of justice that is represented by the use of evidence obtained by torture had been adequately excluded. SIAC could not have so concluded if it had properly understood the status in Convention law of this aspect of article 6.

57. That conclusion suffices to require us to reverse SIAC's decision, but we mention also a number of other respects in which we think that SIAC was led into error.

The role of the domestic legal system in the admissibility of evidence

58. In § 437 of its determination, set out in § 31 above, SIAC referred to the jurisprudence of the ECtHR that treats issues as to the admissibility of evidence as "essentially a matter for the domestic legal system". That point is of course well established, in cases such as *Schenk v Switzerland*, where what is under scrutiny are the orthodox rules of procedure of a signatory state. If those rules make a certain piece of evidence admissible, then the Convention will hesitate long before finding them to be in breach of article 6. But the issue of whether the rules or practice of a non-signatory state can be relied on to ensure that evidence obtained by torture is excluded is not an issue of the rules of that state as to *admissibility*, because the Convention has an absolute rule that such evidence cannot be used. Accordingly, if the foreign state has a rule that admits such evidence, that rule is simply unacceptable in Convention terms.

59. SIAC should therefore not have suggested that in the case of evidence obtained by torture there is some sort of presumption in favour of the domestic law, whether that is the law of a signatory or of a non-signatory state. This error of analysis may have contributed to SIAC's failure to take a sufficiently critical view of what it had found out about the practice of the Jordanian courts.

The burden of proof on the appellant, and A and others (No 2)

60. Equally in its §437 SIAC held that the decision of the House of Lords in *A and others (No2)* placing the burden of proof in relation to the exclusion of evidence allegedly obtained by torture on the applicant was a factor in leading to SIAC's conclusion, in its § 439, that for Jordan to place the burden in relation to that issue on the applicant was not unfair in itself. SIAC seems to have regarded that as a central element in the case. It misdirected itself in thinking that *A and others (No2)* afforded any support for SIAC's position.

61. *A and others (No 2)* was about litigation in front of SIAC, and not about a criminal trial such as that proposed before the State Supreme Court in Jordan. It would therefore in any event provide at best an uncertain parallel. But the House was unanimous in holding that where the applicant raised a plausible reason for thinking that a statement might have been procured by torture it was for SIAC proactively to institute enquiries. The contrast with the merely adjudicatory role of the SSCt, and even more with the way in which that court discharges that role, will be obvious. It is true that the majority then held that the evidence should only be excluded if it were established on the balance of probabilities that it was obtained by torture: see per Lord Hope of Craighead at § 118 of his speech. But we decline to think that the majority would have accepted that any proper duty of enquiry had been discharged when the party on whom the burden rested was placed under the sort of handicaps in making his case that SIAC listed in the rest of its §439.

How Jordan would put its case

62. It will have been noted that SIAC sought to minimise the relevance of the handicaps just referred to by saying at the end of its §439:

> But, again, we do not know how Jordan would put the case and with what factual material were it a party to the ECHR, nor what impact any derogation might have

This observation plainly relates back to the alternative test for liability under the *Soering* jurisprudence that we have discussed in §§ 21-24 above. To the extent that SIAC allowed itself to be deflected from critical assessment of the practices of Jordan and of its courts by hypothesis about the position of Jordan were it a signatory state, SIAC was wrong to take this course. That reference may well have contributed to SIAC's disturbing failure to give proper weight to the findings as to the defects in the process of the SSCt that it set out in its § 439.

63. We have set out a series of errors of law made by SIAC in addressing the issue of evidence obtained by torture, which drive us to the conclusion that SIAC's determination cannot stand. Before leaving this part of the case we must mention three further matters, one adduced by the appellant and two by the Secretary of State, one of the latter being a matter of some significance.

A whole life sentence after an unfair trial

64. SIAC was satisfied that there was no prospect of a capital sentence being passed in Mr Othman's case. There is however every prospect that he will receive a very long, possibly a whole life, sentence if the convictions recorded *in absentia* are upheld at a future trial. He argued that that would represent a separate or further breach of the *Soering* principle.

65. There is nothing in this point, which it is fair to say was not really pressed before us. If the trial is relevantly unfair, the *Soering* principle is infringed whatever, or almost whatever, the sentence that follows. If the trial is fair, there is no authority to support the idea that the imposition of a whole life sentence in itself represents a total denial of justice.

Imposition of Convention standards on non-Convention countries

66. Mr Sales warned us that the Convention structure, and even more so the courts of signatory countries, should not try to impose the particular rules of the Convention upon non-signatory states. He referred to passages to that effect in the judgments of the ECtHR in *Drozd* and in *Mamatkulov*, the latter being cited in §23 above. But the *Soering* jurisprudence does not do that. It treats the ways in which non-signatory countries run their affairs as their own business, but requires signatory countries not to deal with them if that would result in a person subject to the jurisdiction of the signatory country being exposed to the extreme infringement of his article 6 rights to which *Soering* is limited.

67. In the course of advancing this argument Mr Sales reverted to the analysis of SIAC discussed in §§ 21-24 above, as an example of how non-signatory countries should not be deprived of the possibility of acting in a way that was open to signatory countries. He instanced the signatory's right of derogation, and suggested hypothetically that that would enable a signatory state by derogating from article 6 to admit evidence obtained by torture: something that the appellant contended was not open to a non-signatory state if it wished to have citizens of signatory states extradited

or deported to it. That was a startling argument. We cannot think that it was right, because the use of evidence obtained by torture engages not only article 6 but also article 3, from which derogation is not possible. But we mention the point because we think it well illustrates the error that SIAC committed in treating the issue of evidence obtained by torture as one element in the overall article 6 consideration of the fairness of the Jordanian trial, rather than as an issue that engaged distinctly different and even more fundamental Convention values.

SSHD v AH (Sudan) [2007] UKHL 49

68. Mr Sales pressed us very strongly with the guidance given to this court by Baroness Hale of Richmond in §30 of her speech in *SSHD v AH(Sudan)* [2007] UKHL 49. We have addressed that guidance in general terms in §§ 15 ff of our judgment of today in *AS & DD*, to which we would refer. Mr Sales said that we should not interfere with the determination of SIAC, as an expert tribunal, unless we were quite clear that that SIAC had erred in law.

69. We do not underrate the importance of Baroness Hale's guidance, but we have concluded nonetheless that in this case it is our duty to act on the analysis of SIAC's judgment that we have set out above. First, with appropriate diffidence, we think, in Baroness Hale's terms, that it is quite clear that SIAC misdirected itself in law. Second, although we do not undervalue the status of SIAC, the particular question of law with which that tribunal and this court has had to wrestle in the present case is comparatively novel, engaging issues of principle: on which, unlike the position as seen by the House of Lords in *AH(Sudan)*, this court is as well qualified as is SIAC to understand what the law is.

70. Our conclusion on the issue of evidence obtained by torture therefore remains that SIAC misdirected itself in law and its determination cannot stand.

Article 5

71. The ECtHR has expressed doubt as to whether an objection under article 5 can be raised in an expulsion case: see the observations at page 12 of the admissibility decision in *Tomic v United Kingdom* (14 October 2003). On the assumption that the argument was open to him at all, Mr Othman raised various concerns in relation to article 5 in his written submissions. It is however fair to say that before us all that was pressed, and that not with enthusiasm, was the possibility that there might be applied to Mr Othman on his return to Jordan the lengthy period of pre-trial detention, without access to judicial review, that appeared to be available in Jordanian law. That, if it occurred, would certainly infringe article 5 in its domestic application; the position in a foreign case such as the present is much more obscure. However, the issue is precluded in practical terms by SIAC's finding of fact in its §§ 381-382 that Mr Othman would be brought before a judicial authority within 48 hours of arrest, and that exorbitant extensions of that period would not be sought. That is the end of this point, and we say no more about it.