Neutral Citation Number: [2015] EWCA Civ 9

Case No: T2/2013/0503, 0504, 0506 & 0513

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE SPECIAL IMMIGRATION APPEALS COMMISSION**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/01/2015

**Before :**

**LORD JUSTICE AIKENS**
**LADY JUSTICE RAFFERTY, DBE and**
**SIR MAURICE KAY**

- - - - - - - - - - - - - - - - - - - - -

**Between :**

| | |
|---|---|
| **BB, PP, W, U and Others** | **Appellants** |
| **- and -** | |
| **Secretary of State for the Home Department** | **Respondent** |

- - - - - - - - - - - - - - - - - - - - -

**Dinah Rose QC, Stephanie Harrison QC, Amanda Weston, Anthony Vaughan, Charlotte Kilroy**
Instructed by **Birnberg Peirce & Partners** for **U, Y and Z**
Instructed by **Fountain Solicitors** for **PP**
Instructed by **The Public Law Project** for **BB and W**
**Robin Tam, Robert Palmer and Caroline Stone** (instructed by **The Treasury Solicitor**) for the **The Secretary of State**

Hearing dates : 28 and 29 July, 2014

- - - - - - - - - - - - - - - - - - - - -

# JUDGMENT

**Sir Maurice Kay:**

1. The appellants are Algerian nationals who have been found by the Special Immigration Appeals Commission (SIAC) to constitute a threat to the national security of the United Kingdom. For some years, successive Home Secretaries have been endeavouring to deport them to Algeria. This has given rise to protracted litigation. Although appeals to SIAC have failed on the ground that deportation to Algeria would not infringe the human rights of the appellants because of assurances given by the Algerian government about safety and treatment on return, the appellants have had some success in appeals against the decisions of SIAC. Briefly, SIAC dismissed the original appeals in a series of decisions between September 2006 and May 2007. Y, U and BB appealed successfully to the Court of Appeal which remitted their cases to SIAC: MT (Algeria) –v- Secretary of State for the Home Department [2007] EWCA Civ. 808 – MT in that appeal is the same person as Y in the present appeal. In November 2007, SIAC dismissed the remitted appeals. At the same time, U and BB appealed to the House of Lords on grounds which had been rejected by the Court of appeal. The House of Lords dismissed those appeals in RB (Algeria) v SSHD [2010] 2 AC 110 (RB is the same person as BB in the present appeal).

2. The decisions of SIAC in the remitted cases were again appealed to the Court of Appeal, where their appeals were consolidated with those of W, Z, G and PP (who were appealing initial adverse decisions of SIAC in their cases). The Court of Appeal dismissed all the appeals in W (Algeria) v SSHD [2010] EWCA Civ. 898. However, the appellants' further appeal to the Supreme Court succeeded in W (Algeria) –v- SSHD [2012] UKSC 8. The cases were remitted to SIAC for a second and third hearing. On 25 January 2013, SIAC again dismissed the appeals of all appellants except for G whose appeal was allowed on suicide risk and mental health grounds. His case is not before us.

3. On 25 January 2013, SIAC produced three judgments: an open judgment; a confidential judgment dealing with protected material to which both parties had access but the public did not; and a closed judgment of the kind familiar in SIAC cases. Permission for a further appeal to this Court was granted by Maurice Kay LJ and Sullivan LJ following an oral hearing on 15 January, 2014.

4. The issues at the heart of this appeal relate to the conditions in which the appellants would or would be reasonably likely to be held for up to twelve days on arrival in Algeria. The controversial period is known as garde à vue detention. It is now the subject of more specific evidence than was available at the previous SIAC hearings. The evidence includes the protected material to which I have referred.

5. These are essentially the grounds of appeal:

   i) SIAC reached a legally unsustainable conclusion when holding that the treatment to which the appellants may be subjected would not violate Article 3 of the European Convention on Human Rights and Fundamental Freedoms (ECHR);

   ii) SIAC erred in law by finding that there are adequate safeguards to enable verification of observance by the Algerian authorities of the assurances which have been given by the Algerian government.

iii) SIAC erred in law in referring to the fact that DRS officers were present during discussions about the assurances and have subscribed to them, there being no open evidence to support such a conclusion.

I shall refer to these three grounds as (1) the Article 3 issue; (2) the verification issue; and (3) the closed evidence issue.

**The evidence and the facts found by SIAC**

6. Garde à vue detention is carried out at the Antar barracks by the DRS. During a period of up to twelve days detainees are interrogated. It is not disputed that the purpose is to obtain material which might be used in subsequent proceedings. At the end of the period, the detainee, unless released, is handed over to the civilian authorities. If they proceed to detain him, it is within a general custodial institution and in conditions of a kind which are not criticised in these proceedings. The open judgment of SIAC includes these findings:

> "31….many…of the holding cells in the Antar barracks are primitive in the extreme. Most people would find the experience of being confined in such conditions disorientating and alarming. They are hardly the conditions in which a detained man can prepare himself to deal adequately with interrogation."

This passage came at the end of a summary of the evidence of a British citizen known as AB and his wife which SIAC accepted as "true, without reservation".

7. AB (who is deaf) and his wife had travelled to Algeria in May 2012 for the wholly innocent purpose of attending a wedding. SIAC referred to aspects of this evidence in these passages:

> "27…AB was detained by the DRS and taken to the Antar barracks. There he was required to change into prison uniform and put into an unlit cell of which the door was locked. The cell was damp and dusty. There was no bed. He suffered an asthma attack but, despite his requests, medical assistance did not arrive until the following morning. He was then seen by a doctor and later given an inhaler and other medication. He was also transferred to another cell with an open door. He was allowed to go to the lavatory under escort, but not permitted to shower. He was allowed to pray, but mocked when doing so. He was well fed.
>
> 28. AB was questioned by a number of men who simply referred to themselves by name: 'the boss' or 'major'. He was questioned about Pakistan and Afghanistan and terrorist attacks in Mumbai. Questions were in French or Arabic and by gesture. On Sunday morning – after three nights in detention – his wife was summoned. AB was allowed to wear his own clothes and she was told to come back on Monday morning, when he would be released. She did so. On her return, she

> translated questions by sign language for AB, who is deaf, on the same topics as those about which he had been questioned before. He was then required to sign a document in Arabic, which he could not read. It was explained that there had been a misunderstanding and an apology was made to him. He was taken to a hotel and the price paid."

I infer that the Algerian authorities had realised that they had committed a mistake of identity.

8. The accepted evidence of AB and his wife or from other sources also included these features:

   i) incommunicado detention for up to twelve days, without access to a lawyer or any visits (apart from a single fifteen minute telephone call to family);

   ii) the requirement to wear prison uniform which AB found humiliating and discriminatory;

   iii) captors not telling AB that he was under arrest and not disclosing their real names, giving rise to feeling of fear and inferiority;

   iv) solitary confinement;

   v) Detention in a dark cell, with no light - AB's words, "when they locked me in there I didn't know what was happening or where I was. It was a horrifying feeling to be in that place not knowing if it was night or day."

   vi) cell infested with mosquitoes – AB's wife noticed that he was "bitten all over with mosquito bites".

   vii) no bed or mattress in the cell. AB had to sleep on a concrete floor with only a blanket on two cloths.

   viii) AB was unable to sleep at all because of the conditions;

   ix) there was no furniture in the cell.

   x) there were no toilet facilities, not even a bucket, in the cell.

   xi) the cell was "filthy …very dusty and damp".

   xii) AB experienced breathing difficulties, including AB's asthma attack.

   xiii) lack of, or very tardy medical attention.

   xiv) AB's hearing aid was removed, causing sensory deprivation and feelings of fear and insecurity;

   xv) AB was not permitted to shave for the duration of his detention, notwithstanding the heat, the filthy conditions of the cell, the lack of a bed or adequate toilet facilities;

xvi) mockery and humiliation by the guards, including being "heavily mocked" while praying;

xvii) intimidating and intensive repeated interrogation by groups of men;

xviii) pressure to sign documents, including documents AB did not understand: "It was made clear to me that if I didn't sign the document that they asked me to sign that I would not be released. I feared the consequences of not signing the documents. I did not want to sign them because I did not understand them but I had no choice and anyway by that stage I would have done anything".

9. To put all this into context, the Home Secretary's witness, Mr Anthony Layden, accepted that the purpose of DRS detention is the interrogation of suspects with specific purposes including the extraction of confessions (true or false). He also agreed that some of the treatment of AB had been "degrading", although, of course, the question whether it, or any treatment, amounts to a violation of Article 3 is for judicial determination.

**The conclusion of SIAC on Article 3**

10. The assurances given by the Algerian government to the United Kingdom government included an assurance that any detainee would have "the right to respect, in any circumstances, for his human dignity". The first question considered by SIAC was whether the DRS officers who would detain and question the appellants would regard "conditions of detention comparable to that experienced by AB as consistent with their human dignity". It made the important finding that they would. In other words, it assumed that the appellants would or might not be treated any better than AB was, not least because DRS officers considered such treatment to be consistent with respect for human dignity (open judgment, paragraphs 33-34).

11. Turning to the central question of whether a real risk of such treatment would put the United Kingdom in breach of its obligations under Article 3, SIAC concluded that there would be no such breach, adding (at paragraph 36):

> "In reaching that judgment, we have had principally in mind the facts referred to in paragraph 31."

12. I have already set out the earlier part of paragraph 31 which accepted that the conditions in Antar barracks are "punitive in the extreme" and "hardly the conditions in which a detained man can prepare himself to deal adequately with interrogation". That part is hardly exculpatory. The reference back to paragraph 31 in paragraph 37 must therefore be a reference to the remainder of paragraph 31 which states:

> "Nevertheless, AB was not threatened or struck. No pressure was put upon him to make a false confession. Questions were put, in the only way they could be put to a deaf man without a sign language interpreter, in writing. There was no attempt to deprive him of sleep by leaving the bright light on or playing loud music in his cell. When medical help finally arrived, he was prescribed appropriate medication and given an inhaler and transferred to a cell with an open door. When his interrogator

> realised that a mistake had been made, they arranged for his wife to visit him and told him he would be released the next day. These do not seem to be the actions of interrogators seeking to break down the moral resistance of a subject by unacceptable means. Physical violence has, at least in the past, been the means by which DRS interrogators have attempted to achieve that end. The deplorable conditions in which AB was detained indicate rather a lack of care for the welfare of persons detained for questioning."

13. Elsewhere in the judgment (for example, paragraph 25), SIAC referred to others who have been detained pursuant to assurances given to the United Kingdom or the United States governments in respect of whom the assurances about treatment in detention were substantially believed. However, there is nothing to suggest that, in their cases, there was evidence equating to that of AB in the present case, coupled with a finding of real risk of treatment similar to that received by AB. Two other points about AB should be borne in mind. First, the mistaken identity was realised when he was only about a quarter of the way through the maximum period of twelve days' DRS detention. Secondly, he was particularly susceptible to trauma because he was a wholly innocent deaf man with no expectation of anything like DRS detention. The present appellants, on the other hand, would be returning involuntarily as suspected terrorists.

## The Article 3 Appeal

14. The case for the appellants is that SIAC's judgment in relation to Article 3 contains a number of material legal errors (as between which there is a degree of overlap), which may be summarised as (1) misdirection in relating to the requisite minimum level of severity needed to breach Article 3; (2) taking into account irrelevant considerations, in particular the absence of risk of other forms of mistreatment such as actual or threatened physical violence; and (3) perversity.

(1) Misdirection

15. In paragraph 35 of its judgment, SIAC referred to authorities, especially Peers -v- Greece (2001) 33 EHRR 51, Babar Ahmad –v- United Kingdom (2013) 56 EHRR 1 and Batayav –v- SSHD [2003] EWCA Civ. 1489. From Peers, it took the propositions that the minimum level of severity "depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim" (paragraph 67); and that, in considering whether treatment is "degrading", the court "will have regard to whether its object is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Article 3" (paragraph 68). It then referred to Babar Ahmad for the observation that "the Convention does not purport to be a means of requiring the contracting states to impose Convention standards on other states …..This being so, treatment which might violate Article 3 because of an act or omission of a contracting state might not attain the minimum level of severity which is required for there to be a violation of Article 3 in an expulsion or extradition case" (paragraph 176). Finally, it relied on Batayav for the proposition that unlawful conditions of detention in a

receiving state can only be established by "a consistent pattern of gross and systematic violation of rights under Article 3" (paragraph 7).

16. It is apparent from paragraph 35 of SIAC's judgment that it directed itself to the law by reference to the Strasbourg judgment in Babar Ahmad and the decision of this Court in Batayav. The question for us is whether its analysis of those cases was correct.

17. I do not consider that the present case is on all fours with Batayav. The issue identified and addressed there is apparent from paragraph 7 of the judgment of Munby J:

> "… an applicant may be able to meet this (viz the Chahal) test either by referring to evidence specific to his own circumstances or by reference to evidence applicable to the class of which he is a member. The present case falls into the latter category …. In this latter category of case an applicant will only be able to demonstrate substantial grounds for believing that there is such a real risk if he can point to a consistent pattern of gross and systematic violation of rights under Article 3."

18. I do not think that the "gross and systematic violation" test can now live easily with the decision of the Supreme Court in R (EM (Eritrea)) –v- SSHD [2014] 2 WLR 409, in which Batayav was not cited, and which rejected a "systemic" requirement: see Lord Kerr at paragraphs 42, 48, 50 and 58. Moreover, the striking and unusual feature of the present case is the availability and unequivocal acceptance of AB's evidence and the assumption by SIAC that the appellants would be kept in similar conditions (on the basis that DRS officers would consider that to be consistent with their human dignity).

19. The real issue, however, is as to the correct analysis of the Strasbourg authorities in the light of Babar Ahmad. The extract from the judgment of the ECtHR set out in paragraph 35 of SIAC's judgment has to be seen in context. The Court rejected (at paragraph 168) a distinction between extradition and removal cases and (at paragraph 170-171) a comprehensive binary distinction between torture and inhuman or degrading treatment cases. It then turned to the question whether "a distinction can be drawn between the assessment of the minimum level of severity required in the domestic context and the same assessment in the extra-territorial context" (paragraph 172). This is the question under consideration by SIAC in the extract to which I have referred. The following passages in the judgment in Babar Ahmad are relevant:

> "173. … in the 22 years since the Soering judgment, in an Article 3 case the Court has never undertaken an examination of the proportionality of a proposed extradition or other form of removal from a contracting state. To this extent, the Court must be taken to have departed from the approach contemplated at [89] and [110] of the Soering judgment.
>
> ….

> 176. The Court therefore concludes that the Chahal ruling (as reaffirmed in Saadi) should be regarded as applying equally to extradition and other types of removal from the territory of a contracting state and should apply without distinction between the various forms of ill-treatment which are proscribed by Article 3."

20. The Court then set out in paragraph 177 (which was cited in full by SIAC), including the reference to the "health" cases of Aleksanyan and N. However, it did not stop there. It went on to consider specifically "prison" cases.

> "178. Equally, in the context of ill-treatment of prisoners, the following factors, among others, have been decisive in the Court's conclusion that there has been a violation of Article 3:
>
> - the presence of premeditation:
> - that the measure may have been calculated to break the applicant's resistance or will;
> - an intention to debase or humiliate an appellant, or if there was no such intention, the fact that the measure was implemented in a manner which none the less caused feelings of fear, anguish or inferiority;
> - the absence of any specific justification for the measure imposed;
> - the arbitrary punitive nature of the measure;
> - the length of time for which the measure was imposed; and
> - the fact that there has been a degree of distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention.
>
> The Court would observe that all of these elements depend closely upon the facts of the case and so will not readily be established prospectively in an extradition or expulsion context.
>
> 179. Finally, the Court reiterates that as was observed by Lord Brown, it has been very cautious in finding that removal from the territory of a Contracting State would be contrary to Article 3 of the Convention. It has only rarely reached such a conclusion since adopting the Chahal judgment. The Court would further add that, save for cases involving the death penalty, it has even more rarely found that there would be a violation of Article 3 if an applicant were to be removed to a state which had a long history of respect of democracy, human rights and the rule of law."

21. Later in the judgment, the Court expounded the following "general principles" in relation to Article 3 and detention.

> "201. In order to fall under Article 3, ill-treatment must attain a minimum level of severity. The assessment of this minimum level is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the state of health of the victim. Although the question whether the purpose of the treatment was to humiliate or debase the victim is a factor to be taken into account, the absence of any such purpose cannot conclusively rule out a finding of violation of Article 3.
>
> 202. For a violation of Article 3 to arise from an appellant's condition in detention, the suffering and humiliation involved must go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment. Measures depriving a person of his liberty may often involve an element of suffering or humiliation. However, the state must ensure that a person is detained under conditions which are compatible with respect for his human dignity, that the names and method of the execution of the measure do not subject him to distress or hardship exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured.
>
> 203. When assessing conditions of detention, account has to be taken of the cumulative effects of these conditions, as well as of specific allegations made by the applicant. The length of the period during which a person is detained in the particular conditions also has to be considered."

22. The Court then went on to make more specific observations about such things as solitary confinement, recreation and exercise which were relevant in the case before it, which concerned potential detention in an American "supermax" detention facility.

23. I have set out the above passages at length because it seems to be common ground that they are authoritative. They amount to an approach which is both nuanced and holistic. When they are considered in the context of the present case, they seem to me to justify the following observations. First, although the final sentence of paragraph 178 acknowledges the difficulty of establishing a violation prospectively, it is necessary to keep in mind the unusual feature of the present case, namely the acceptance of AB's evidence and the assumption that the appellants are at significant risk of suffering similar conditions. Secondly, although the Court considered it to be appropriate to refer to the "health" cases such as Aleksanyan and N in the context of not imposing Convention standards on non-contracting States, that has to be seen in context. The "deplorable conditions" in which AB was detained (SIAC judgment, paragraph 31) were and are not the result of scarcity of resources in an impoverished country. The general conditions in Algerian prisons withstand international scrutiny.

Conditions in Antar barracks are, or at least seem to be, unique and it is not seriously disputed that, although detention there is of limited (albeit not insignificant) duration, they have a purpose, namely the building of a case against the detainee before he is transferred to less inhospitable conditions and greater protections. This raises the question, not fully confronted by SIAC, of whether the regime of Antar barracks is part of a deliberate attempt to diminish the resistance and morale of detainees so as to render them more likely to confess, whether truthfully or not. This is a potentially important point in the context of differential standards. On behalf of the Secretary of State, Mr Robin Tam QC is unable to point to any case in which an intentional use of deplorable conditions for such a purpose has been upheld, whether on the basis of Convention standards being inapplicable in a "foreign" case or otherwise.

24. In my judgment, by emphasising the "differential" approach in the "health" cases and the "inconsistent pattern of gross and systematic violation" words of Batayav, SIAC failed to apply the full, nuanced and holistic approach of Babar Ahmad to the unusual circumstances of these cases. In short, it misdirected itself as to what Babar Ahmad requires by way of approach. I do not feel able to say that, properly self-directed, SIAC would necessarily have found a violation. I think that, by reason of the misdirection, SIAC may not have made all the findings, one way or the other, which the correct approach would have required. In any event, whether or not a violation had been established is essentially a matter for SIAC, upon proper self-direction. On the genuine Article 3 issue I simply conclude that the ground of appeal should succeed to the extent of remittal to SIAC for redetermination.

25. In these circumstances, it is not strictly necessary to consider the appellants' second complaint about SIAC's treatment of the Article 3 issue, namely its negative findings in paragraph 31 of its open judgment in relation to forms of ill-treatment of which there was no evidence. For my part, I do not consider that SIAC was taking the view that violence, express threats and direct pressure are prerequisites of an Article 3 violation. Plainly they are not. It seems to me that SIAC intended to convey no more than that evidence of such matters may have taken these cases across a threshold whereas the available evidence did not. The problem with SIAC's judgment relates to what I have described as the misdirection points.

26. Similarly, so far as the wider perversity challenge is concerned, it is said on behalf of the appellants that SIAC erred by limiting its positive findings of risk to matters described by AB and his wife and by apparently rejecting the evidence of other protected witnesses except to the extent that it repeated the evidence of AB and his wife. The submission is essentially that, as the evidence of those other witnesses was mainly consistent with that of AB and his wife and the "additional" matters were explicable, there was no rational basis for rejecting them. There may be some force in aspects of this submission (it is inappropriate to say more in this open judgment) but it is not necessary to involve ourselves in it if the appeals are being allowed on a more fundamental legal basis.

## Verification

27. It is an essential feature of the Home Secretary's case that a previously acknowledged risk of ill-treatment on return to Algeria has been averted as a result of the assurances given by the Algerian Government. In BB –v- SSHD, SC/39/2005, SIAC considered

the yardstick against which assurances should be judged. It said, per Mitting J at paragraph 5:

> "Without attempting to lay down rules which must apply in every case, we believe that four conditions must, in general, be satisfied.
>
> (i) the terms of 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."

28. We are here concerned with condition (iv). As in BB, the evidence is that the Algerian Government has refused to accept monitoring by external bodies of the conditions of detention in Antar barracks. However, SIAC considered in BB and in the judgment presently under appeal that the absence of external monitoring was not fatal to compliance with condition (iv). It concluded in BB (paragraph 21) that, "even in the absence of monitoring, practical verification is feasible and will occur." This statement of the law as to verification in the absence of external monitoring was approved by the House of Lords in RB (Algeria), in which Lord Hoffman said (at paragraph 193):

> "… there is no rule of law that external monitoring is required. It all depends upon the facts of the particular case … SIAC was quite right to say … that although fulfilment of assurances must be capable of being verified, external monitoring is one possible form of verification."

29. We are now considering an appeal from a judgment of SIAC when the evidence has moved on since BB and RB (Algeria). SIAC again considered that condition (iv) was satisfied. The attack on that finding in this Court is on the basis that it is perverse in the light of the totality of the current evidence. In these circumstances, we are correctly reminded by Mr Tam that an appellant has to surmount a particularly high hurdle when running a perversity submission on appeal from SIAC, particularly in relation to a situation such as this, where SIAC was looking at the issue as to safety on return of these appellants to Algeria for the third time in seven years. It is important for us to keep in mind the particular expertise and experience of SIAC: see, for example, RB (Algeria), per Lord Phillips (paragraphs 65-66) and Lord Hope (paragraphs 214-216). In MA (Somalia) –v- SSHD [2011] 2 All ER 65, which concerned an appeal from the Asylum and Immigration Tribunal, Lord Dyson referred to the well-known judgment of Baroness Hale in AH (Sudan) –v- SSHD [2008] 1 AC 678 (at paragraph 30) and added:

> "45. But the court should not be astute to characterise as an error of law what, in truth, is no more than a disagreement with the AIT's assessment of the facts. Moreover, where a relevant point is not expressly mentioned by the tribunal, the court should be slow to infer that it has not been taken into account."

All this is well trodden ground but it is appropriate to reference it in this case.

30. I turn to SIAC's conclusions on verification. They are set out in these paragraphs:

> "39. If there had been a history of breaches of assurances given in respect of these deportees, the lack of access by British Embassy personnel to those detained would, in my view, be fatal to reliance on the assurances. However, given the strength and reliability of the assurances and the past history of good compliance noted in previous SIAC judgments, we are satisfied that this provision is not required …
>
> 40. We are satisfied that the means of verification, although largely informal, are adequate to ensure that its principal purpose is fulfilled. The first and most basic fact which requires verification is that an individual has been released or brought before a judge within the time limit prescribed by Algerian law. This has not proved problematic in the case of any of the 14 men deported by the UK and the US. The medical examination required by Algerian law at the end of the garde à vue detention provides some, but very far from complete, reassurance that a detainee has not been physically ill-treated. British Embassy contact with Maître Amara affords a formal and contemporaneous means of enquiry, both during and after detention, which, as past experience has shown, is of value, even if mistakes are sometimes made. British Embassy contact with the detainee and family members, before, during and after release, if facilitated by them, is effective, as the case of Benmerzouga demonstrated. We do not accept Ms Rose's submission that family members will be deterred from contact with the British Embassy or may not tell the truth out of fear of the Algerian authorities. Two striking open examples demonstrate why that proposition is erroneous. [The examples are Q and Benmerzouga, as to whom, see below] …
>
> 41. In addition to direct and personal means of verification, there are indirect means of some value. The first is the francophone press and the Algeria Watch website, in both of which reports of torture are freely made…
>
> 42…. The final indirect means is NGO reporting … It is … a fact that Amnesty International does take a keen interest in those deported to Algeria with the benefit of assurances … If they have evidence that they have been flouted in any

> individual case, they can be relied upon to say so and have done so … in the past."

31. Ms Dinah Rose QC submits that, whilst the authorities do not require the participation of an independent monitoring body, verification must require some means by which compliance with the assurances can be corroborated both independently of the Algerian authorities and reliably. Without that, it would not be verification at all. Her submissions are wide-ranging but she concentrates on three of the matters which loomed large in the open judgment of SIAC: (i) medical examinations; (ii) the role of Maître Amara; and (iii) the involvement of family members. Some of Ms Rose's criticisms include references to the protected judgment of SIAC. I shall endeavour to say as much as possible in this open judgment, but if counsel consider that some of what follows should be confined to a protected judgment, I shall gladly consider their representations prior to hand down.

(i) Medical examinations

32. SIAC considered that the medical examination required by Algerian law at the end of a garde à vue detention provides "some, but very far from complete reassurance that a detainee has not been physically ill-treated". The first point to note is that, to the extent that the examination provides any reassurance, SIAC confined it to the issue of physical ill-treatment. Ms Rose's criticism is that even partial reliance on these medical examinations as a means of verification is unsustainable for reasons that are set out in the Protected Judgment.

33. Mr. Tam's answer to this is that SIAC only placed "some", that is to say limited, reliance on the medical examinations, and that, in order to sustain the perversity challenge the appellants would need to establish that SIAC could not reasonably place any reliance at all on any medical examination.

34. As SIAC observed in paragraph 39 of its open judgment, the principal purpose of verification is to ensure that promises are fulfilled. In my judgment, no reasonable decision maker could derive any assurance from medical examination as a means of verification in the light of the totality of the accepted evidence. However, SIAC also relied on other matters and, as the reliance on medical examination was admittedly limited, it will be necessary to consider whether the overriding requirement of verification is still satisfied when medical examination is taken out of the equation – in other words, did SIAC commit a material error of law.

(ii) Maître Amara

35. Maître Amara is an Algerian government official and therefore not an institutionally independent source of verification. He had a liaison function with the British Embassy. SIAC considered that this provided "a formal and contemporary means of enquiry, both during and after detention, which, as past experience has shown, is of value, even if mistakes are sometimes made". It seems likely that "of value" was intended to convey a message of limited value. However, quite apart from the fact that Maître Amara lacks institutional independence, it is of relevance that, of the "mistakes" referred to, the one documented in the protected judgment concerned an occasion when a person who had been returned to Algeria pursuant to identical

assurances was said by Maître Amara, when speaking to the British official, to be at home with his family when he was in fact detained in Antar barracks.

36. I accept Mr. Tam's submission that earlier SIAC judgments provide illustrations of liaison between Maître Amara and British officials being a useful channel of communication. I also accept that SIAC seems to have considered and was entitled to consider, that any "mistakes" were the result of error rather than deceit. However, there remain the facts that Maître Amara is not a truly independent source of verification and, in view of the fact that "mistakes are sometimes made", nor is he a wholly reliable source. This casts significant doubt on whether he can properly be treated as a factor in satisfying the requirement of verification.

(iii) Family Members

37. SIAC considered that British Embassy contact with family members can be "effective". It rejected Ms Rose's submissions that family members will be deterred from contact with the British Embassy or may not tell the truth out of fear of the Algerian authorities. In so doing, it referred specifically to Benmerzouga and Q. It also described Ms Rose's submissions that no Algerian will dare to speak on the telephone about DRS malpractice as "far-fetched". I have found it difficult to assess the submission that reliance on family members as an effective source of verification was not open to SIAC on the totality of the evidence.

38. Although, as Ms Rose points out, SIAC's reference to Q in paragraph 40 of the open judgment is limited to a letter written by Q himself and does not include any reference to communication between his family members and British officials, it is not right to say that there was no such communication. There was quite a lot. On the other hand, in the case of Bermerzouga, the relevant communication came not from a family member but from the detainee following his release. Some of the other evidence referred to by Ms. Rose in support of this submission referred not to family members but to inhibited Algerian lawyers – not a source of verification relied upon by SIAC.

39. It seems to me that we can only begin to question the reliance by SIAC upon family members as an effective source of verification if Ms Rose can persuade us that the "far-fetched" comment cannot be justified because the evidence established that family members are significantly deterred from complaining about the ill-treatment of detainees and the conditions in which they are held because they fear that their telephone conversations with British officials will be intercepted by the DRS and they will thereafter be at risk of reprisals. In this connection, Ms Rose relies principally on the evidence of Mr Anthony Layden. I have read again the transcript of his cross-examination by Ms Rose. Although it took place in protected conditions, I consider that the following edited extracts can be included in this open judgment:

> "Q: Do you accept that it is correct that telephone calls in Algeria are routinely monitored or are believed to be monitored by the DRS?
>
> A: Yes. I do not think that the monitoring is universal but the DRS probably ….that will be one of the main ways they access information.

> Q: So if people are afraid that information that they are giving would lead to adverse attention from the DRS, they will not be prepared to give that information by telephone, will they?
>
> A: I agree.
>
> ……
>
> Q: You have accepted … that telephone calls are often monitored in Algeria.
>
> A: Yes.
>
> Q: The assurances that you have with the Algerian state do not protect family members, do they?
>
> A: They do not. They only protect the detained deportee
>
> …..
>
> Q: Will you accept that the fear of members of the family may be particularly great when other members of the family, not just the person in detention, have themselves been harassed or abused by the DRS?
>
> A: That is a reasonable point to make, yes.
>
> …..
>
> A: It is a fair point to make that they might be afraid to talk to the British Embassy. On the other hand, and I have to say this, again and again I come to the and yet question ….documented allegations of ill-treatment of people in Algeria have consistently come out, even in times when the situation was much more terrifying than it is today, so the Algerian authorities must calculate, if they did that to one of our people, we would get to know about it."

40. At the very least, this evidence established both that the DRS do monitor telephone calls (which were the means of communication encouraged by the British Embassy) and that people, including family members, may consequently feel inhibited about saying anything in the course of such conversations which might lead to reprisals. It would be a subjective fear with an objective justification. Of course, the evidence does not establish that all such calls are monitored. On the other hand, the resources point made by SIAC at the end of paragraph 40 of the open judgment seems to be limited to the calls of detainees, rather than those of family members.

41. It is important to keep in mind the reason why all this is relevant. It is not so as to determine whether any particular person's telephone conversations would be monitored or whether any particular person would be inhibited by fear. It is whether the risk of such monitoring and the inhibiting fear of it (as to both of which there was undisputed evidence) must lead inexorably to the conclusion, apparently rejected by

SIAC, that the effectiveness of relying on telephone conversations with family members as a significant source of verification is diluted.

42. In addition to the three areas upon which Ms Rose focuses, other sources relied upon by SIAC have attracted some criticism. I do not need to go further into that. The picture which emerges in relation to verification is that, faced with an absence of external monitoring, which is not in itself fatal, SIAC satisfied itself as to the adequacy of verification on the basis of an accumulation of sources, some of which were not considered to constitute adequate verification in itself, but all of which, taken together, fulfilled the requirement. In my judgment, Ms Rose has successfully removed some of the bricks from that edifice. Her ultimate submission on this issue is that, on that basis the perversity challenge on verification must therefore succeed to the extent that there would be no point in remitting this case to SIAC because there would be only one possible outcome: it would be bound to quash the decisions to remove on the grounds of an absence of adequate verification. I do not feel able to go that far. Whilst I am satisfied that SIAC erred in law by placing reliance on some sources of verification when the evidence did not permit it to do so, there remain other points which have not been attacked. It is really a matter for SIAC and not for this Court to revisit the issue of verification with the tainted sources removed. Accordingly, whilst I find merit in this ground of appeal, I am not convinced that there would be nothing on the issue of verification for SIAC to reconsider. I say this whilst mindful of the fact that, given the importance of the case, the evidence on verification does lack some of the features which would usually be considered satisfactory and, as is apparent from what I have said in relation to Article 3, it is now common ground that the conditions in which the appellants would be held at Antar barracks are known to be deplorable.

## The closed evidence issue

43. This ground of appeal can be taken shortly. It is focused on a single sentence in paragraph 20 of SIAC's open judgment.

> "As a differently constituted panel noted, at paragraph 31 of its judgment in G of 8 February 2007, DRS officers were present during discussion about the assurances and have subscribed to them."

44. The appellants' complaint is that no open evidence has ever been provided to particularise or substantiate this assertion. They do not know who is said to have been present, at what times and in what terms they are said to have subscribed to the assurances. Their skeleton argument protests that they have thus been "unable to investigate or challenge this central point of the respondent's case".

45. The legal foundation for this submission is said to reside in the judgment of Lord Phillips in RB (Algeria) where he approved (at paragraph 102) the following extract from the judgment of SIAC in the case of Othman (whose case was heard with that of RB in the House of Lords):

> "58. …the SSHD cannot rely on any substantive assurance unless it is put into the open. It may be the case that encouraging or supporting comments, even if described as

> assurances by the Government's interlocutor, should remain in closed if for example they are steps en route to an agreement. But the key documents or conversations relied on to show that an appellant's return would not breach the UK's international obligations or put him at risk of the death penalty have to be in the open evidence. SIAC could not put weight on assurances which the giver was not prepared to make public; they would otherwise be deniable, or open to later misunderstanding; the fact of a breach would not be known to the public and the pressure which that might yield would be reduced. They must be available to be tested and recorded."

46. I have emphasised the sentence upon which Ms Rose places particular reliance.

47. The first question is whether evidence of DRS presence and support at meetings comes within the principle articulated by Lord Phillips. It seems to me that his real concern was that substantive assurances should be in the open evidence. In the present case, the substantive assurances are undoubtedly in the open evidence. The mischief of "confidential assurances" is absent: cf Naseer –v- SSHD, SIAC, SC/77/09, 18 May 2010. If correct, Ms Rose's submission would extend the point made in RB. In my judgment, that would be undesirable.

48. Moreover, I do not accept that the appellants have been materially disadvantaged, or the proceedings have been rendered unfair, by any evidence about DRS presence and support remaining in closed. As Lord Phillips himself observed in an earlier part of paragraph 102.

> "… the deportee is unlikely to have information to impart that that will be critical to meeting the case of the Secretary of State in relation to safety on return."

49. As Mr Tam points out, a similar issue was considered by the ECtHR in Othman –v- United Kingdom (2012) 55 EHRR 1 where the Court observed (at paragraph 224) that there was

> "no reason to suppose that, had the applicant seen the closed evidence, he would have been able to challenge the evidence in a manner that the special advocates could not."

50. In the present case, it is significant that the Home Secretary and the Special Advocates have openly agreed as follows:

> "In previous judgments in Algeria deportation cases, SIAC's closed findings concerning DRS presence at all the negotiations about deportation with assurances, and DRS acquiescence in, acceptance of and/or subscription to the arrangements for deportation with assurances, have not in any material way gone further than SIAC's open findings concerning those matters. In particular, in revealing its conclusions in those judgments, SIAC has not relied on any separate or distict assurances given by the DRS. The reference in paragraph 34 of the open

> judgment in G is not a reference to any such separate or distinct assurances."

51. In view of this open agreement, it is permissible to observe in this open judgment that the Special Advocates do not seek to advance any closed ground of appeal in relation to this issue.

52. In my judgment, this third ground of appeal is unsustainable. Indeed, it is a distraction from the previous grounds of appeal.

## Individual Appellants

53. Thus far I have been addressing the generic grounds of appeal relied upon by all the appellants. In addition, three of the appellants – W, Y & Z – advance a further ground of appeal to the effect that, in their individual cases, the Article 3 case should have succeeded by reason of the detailed evidence relating to their particular vulnerabilities. Submissions on their behalf were made by Ms Stephanie Harrison QC. Mr Robert Palmer responded on behalf of the Home Secretary. It is common ground that what may not amount to an Article 3 violation in relation to one person may nevertheless do so in relation to another, more vulnerable person. SIAC was mindful of that. Having listened to Ms Harrison's submissions, I am of the view that, absent success on one or more of the generic grounds of approval, there would be no basis for interference with SIAC's decisions on any of the individual cases. They are not inherently perverse. The important thing is that the circumstances of all the appellants should be reconsidered on the basis of a correct understanding of what Article 3 requires and of the verification issue.

## Conclusion

54. It follows from what I have said that I would allow these appeals by reference to the Article 3 and verification issues but not otherwise. The cases should be remitted to SIAC for rehearing and redetermination.

**Lady Justice Rafferty:**

55. I agree.

**Lord Justice Aikens :**

56. I also agree