Neutral Citation Number: [2008] EWHC 2619 (Admin)

Case No: CO/9640/2008
CO/9591/2008

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT
IN A MATTER OF AN APPLICATION
FOR HABEAS CORPUS AD SUBJICIENDUM

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/10/2008

Before :

LORD JUSTICE KEENE
&
MR JUSTICE OWEN

- -

Between :

(1) Habib IGNAOUA,	**Claimants**
(2) Mohamed Salah Ben Hamadi KHEMIRI	
& (3) Ali Ben Zidane CHEHIDI	
- and -	
(1) The Judicial Authority of the Courts of Milan	**Defendants**
(2) The Serious and Organised Crime Agency	
(3) The Secretary of State for the Home Department	

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Richard Gordon QC, & Ben Cooper (instructed by **Birnberg Peirce & Partners**) for the **Claimants (1) & (2)**
Clair Dobbin (instructed by **Birnberg Peirce & Partners**) for **Claimant (3)**

James Lewis QC & Marcus Thompson (instructed by **Treasury Solicitor**) for **Defendant (2)**

Jonathan Swift & Joanne Clement (instructed by **Treasury Solicitor**) for **Defendant (3)**

Hearing date: Tuesday 28 October 2008

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Judgment

Lord Justice Keene:

Introduction:

1. These are applications for writs of habeas corpus ad subjiciendum by Habib Ignaoua, Mohamed Salah Ben Hamadi Khemiri and Ali Ben Zidane Chehidi, all three of whom are currently detained in prison awaiting extradition to Italy following the issuing of European Arrest Warrants duly issued and certified under section 2 of the Extradition Act 2003 ("the 2003Act"). The warrants were issued by a judge attached to the Court of Milan. The applicants, who are Tunisian nationals, were arrested in the United Kingdom in 2007. They are accused of membership of a criminal organisation for the purposes of terrorism.

2. An extradition hearing took place at the City of Westminster Magistrates Court before District Judge Evans, who on 20 May 2008 decided that the extradition of the applicants would be compatible with their rights under the European Convention on Human Rights ("ECHR"), an issue which he was required to determine under section 21(1) of the 2003 Act. He ordered their extradition to Italy pursuant to section 21(3) of that Act. An appeal was then brought against the judge's order to a Divisional Court by all three applicants under section 26 of the 2003 Act. By a decision dated 28 July 2008 the Divisional Court (Pill LJ and Rafferty J) dismissed the appeal: the decision bears the neutral citation (2008) EWHC 1988. The issue which the Divisional Court was called upon to decide was whether, on the return of the applicants to Italy, there was a real risk of their onward transmission to Tunisia, in breach of Article 3 of the ECHR. As I have indicated, the Divisional Court held that there was not. An application for a certificate of a point of law of general public importance was dismissed by the same court on 30 September 2008.

3. On that same date the applicants made an application to the European Court of Human Rights under rule 39 of the Rules of Court, for an order preventing their extradition to Italy, on the ground that, if extradited, they would be at real risk of onward removal to Tunisia where they would be subjected to treatment contrary to Article 3 of the ECHR. The United Kingdom's Serious Organised Crime Agency ("SOCA") undertook not to return the applicants to Italy pending the determination of the rule 39 application. On 7 October 2008 the Strasbourg Court refused that application. In decision letters of that date to the applicants' solicitors and to the Agent of the Italian Government, the Registrar of the 4th Section of the Court stated that the Court found that it would be open to the applicants to make an application, including one under rule 39, against Italy, if it appeared that they would be surrendered from Italy in breach of their rights under the ECHR. The letters also referred to the Court's express understanding:

> "… that Italy as a Contracting State would abide by its obligations under Articles 3, 13 and 34 of the Convention and in particular the obligation to respect the terms of any interim measure which the Court might indicate in respect of Italy at the request of the applicants."

4. At 11.30pm on 7 October 2008, a telephone application was made ex parte without notice to King J, seeking injunctive relief preventing the applicants' extradition. He granted an injunction preventing their removal until determination of habeas corpus applications, which were in fact issued on 9 and 10 October. On 10 October 2008 a Divisional Court continued the injunction and directed that the habeas corpus applications be listed for a two day hearing before 3 November 2008. That is the hearing which has taken place before us. The matter is of considerable urgency, not merely because it involves issues of personal liberty. We are told, and it has not been challenged, that because of the law as to custody time limits in Italy, the applicants Khemiri and Chehidi will have to be released from custody if not returned to Italy by 5 November 2008, that is to say next Wednesday. If that happens, the sheer passage of time will have rendered all the arguments about a risk of Article 3 treatment academic. For that reason we are giving our judgments as soon as possible after the conclusion of the hearing. Inevitably those judgments may be less detailed than would otherwise have been the case and we may not have dealt in them with every

nuance of the arguments addressed to us. However, we have taken into account each and every submission and all the evidence to which our attention has been drawn, whether we expressly refer to it or not, and we are confident that we have dealt with the main issues.

The Issues:

5. The principal issues arise from the applicants' contention that there is fresh evidence now available which demonstrates that, contrary to the findings of the District Judge and the Divisional Court, the removal of the applicants to Italy would give rise to a real risk of them being deported to Tunisia. Before setting out those issues in more detail, it is helpful to record certain matters not in dispute. In particular, there is no challenge to the proposition that the applicants would be at risk of treatment contrary to Article 3 if they were to be removed to Tunisia: see paragraph 14 of the Divisional Court decision of 28 July 2008. Secondly, as the Divisional Court recorded at paragraph 7 of that judgment:

> "It is also accepted that the respondent's application to the English court was a genuine exercise of the power conferred by the Framework Decision with a view to bringing criminal proceedings against the appellants in Italy. It was not a device to achieve deportation to Tunisia."

6. Thirdly, the risk of removal to Tunisia is not said to arise because of the possibility of extradition from Italy, where it is agreed that there is effective judicial oversight of extradition proceedings. The risk is said to arise because of possible deportation of the applicants by Italy to Tunisia. As it was put by the Divisional Court at paragraph 9:

> "In summary, the appellants' case is based on the alleged absence in Italian law of sufficient safeguards for a person at risk of deportation to Tunisia and the likely conduct of the Italian Government if and when it is given an opportunity to deport the appellants to Tunisia."

7. It was, therefore, the question of whether there was a real risk of the applicants being deported to Tunisia if they were sent to Italy under the 2003 Act which was addressed and answered negatively by the District Judge and the Divisional Court in the present case. I refer to the Divisional Court, because of course an appeal to that court under section 26 lies both on questions of law and on questions of fact: see section 26(3).

8. The issues which now arise can conveniently be summarised as follows: first, does this court have jurisdiction to entertain an application for habeas corpus based upon the same ground as that decided by the District Judge and the Divisional Court on appeal, because it is asserted that there is fresh evidence on that ground? Secondly, if there is jurisdiction of any kind under which this court can consider fresh evidence, does the material now put forward qualify as such? Thirdly, if it does, does it, together with the evidence put before the District Judge and Divisional Court, demonstrate that the Divisional Court's decision was arrived at on some fundamentally erroneous basis? Fourthly, does it make any difference that Ignaoua

has made an asylum claim in this country which has not yet been determined by the Secretary of State for the Home Department and that Khemiri has refugee status?

(i) The Jurisdiction Issue:

9. The starting point for consideration of this issue is section 34 of the 2003 Act. That provides:

> "A decision of the judge under this Part may be questioned in legal proceedings only by means of an appeal under this Part."

In that section "the judge" clearly refers to the designated District Judge (Magistrates Court), and the decision of District Judge Evans on 20 May 2008 to order the extradition of the applicants was on the face of it a decision to which section 34 applies. If so, only by an appeal under Part I of the 2003 Act can his decision be challenged.

10. But Mr Gordon QC on behalf of Ignaoua and Khemiri contends that section 34 provides no bar to habeas corpus proceedings when new evidence has become available which was not before the District Judge or the Divisional Court and which, in a case like this, demonstrates that to extradite a person would involve a breach of the United Kingdom's obligations under the ECHR. Miss Dobbin on behalf of Chehidi supports this line of argument, and I mean no disrespect to either if I treat their submissions as one entity. It is said that habeas corpus proceedings in such circumstances would not amount to questioning the judge's decision, which was not wrong on the material before him, but would merely assert that his decision had been "undermined" by new material which has become available.

11. Reliance is placed upon the Divisional Court decision in *Hilali v. Governor of Whitemoor Prison* [2007] EWHC 939, where an application for habeas corpus was both entertained and allowed on the basis of fresh evidence, namely the acquittal in Spain of the man alleged to be the central figure in the conspiracy to which Hilali was said to be a party. This was regarded by the Divisional Court as a "fundamental change in the case" in which the extradition order had been made. Giving the judgment of the court Smith LJ said this at paragraph 35:

> "We do not consider that, in the kind of circumstances that we postulate (the undermining of the factual premise of the judge's decision) the further proceedings would amount to the questioning of the judge's decision. Indeed, the proceedings would be based on the acceptance that the judge's decision had been correct at the time but an assertion that the facts had changed to such an extent that the judge's decision was undermined. Accordingly, such further proceedings would not be ousted by section 34."

12. The court took the view that, in exceptional circumstances, habeas corpus was available as a remedy in addition to the statutory appeals procedure, though it recognised (paragraph 28) that there was no authority dealing with its availability after the statutory appeal process had been completed.

13. As for the circumstances in which habeas corpus would be available, the Divisional Court stated at paragraphs 39 and 40:

> "39. In what kind of circumstances should the remedy be available? We are grateful for Mr Hardy's helpful submissions on this subject. He suggested that the threshold for habeas corpus will only be passed where there is some development which subverts either the basis on which the EAW was issued by the IJA or the basis on which the decision was made either at first instance or on the statutory appeal. Further, an application for habeas corpus would never be appropriate if it would have been possible for the relevant point to have been raised in the course of the statutory proceedings. He stressed that applications for habeas corpus must not be allowed to become a re-run of the statutory proceedings. The court must be vigilant to ensure that such applications do not become a tactical device to disrupt the scheme underlying the legislation or a means of extending the period before return
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> 40. We do not understand Mr Jones to disagree with those submissions and we accept them. The occasions when habeas corpus will be available will be very rare. It appears to us that the remedy itself provides the answer to the question when it should be available. Habeas corpus will only be appropriate where the continued detention of the applicant pursuant to the extradition process has become unlawful. That presupposes a fundamental change to the circumstances in which the (ex hypothesi) lawful order of the court had been made."

It then added that the test would only be satisfied by something which went to the root of the case.

14. There was then an appeal to the House of Lords, whose decision, *In re Hilali (application for a writ of habeas corpus)* [2008] UKHL 3; [2008] 1AC 805 reversed that of the Divisional Court. The leading opinion, with which all members of the House agreed, was given by Lord Hope of Craighead. The SOCA and the Secretary of State contend that the House of Lords ruled that habeas corpus is not available where a statutory appeal lies under the 2003 Act. The applicants argue that that was not what was decided. Mr Gordon points out that the basis for the House of Lords decision was that the Divisional Court should not have been concerning itself with the strength of the evidence against Hilali and how that had been affected by the acquittal in Spain of the central figure. Under the Council Framework decision to which the 2003 Act gives effect, the European Arrest Warrant procedure does not allow a member state to question whether there is a case to answer in terms of the evidence available. As Lord Hope said at paragraph 15:

> "The question whether there is a case to answer on the conduct that is alleged in the European arrest warrant is not one that can be examined in the requested state. An inquiry into that

> question is contrary to the principle of mutual recognition on which the Framework Decision is founded. It was not for the Divisional Court, any more than it would have been for the senior district judge, to say that the conduct that was alleged against the respondent was incapable of being proved because the grounds on which Yarkas had been acquitted of the conspiracy removed all the evidence narrated in the European arrest warrant from which it could be inferred that the respondent was involved in it."

15. Thus far I agree with Mr Gordon. That part of their Lordships' decision had nothing to do with the possibility of habeas corpus proceedings. But the House of Lords went on to deal with that latter topic. Lord Hope pointed out that the statutory appeal provisions in sections 26 and 28 of the 2003 Act only apply to certain of the judicial decisions which may be made during the extradition process. As he said at paragraph 21:

> "One of the features of the provisions about appeals in Part 1 is that not every decision that the judge is required to take can be appealed against under the statute: see, for example, section 4(5) which requires the judge to order the discharge of a person arrested under a Part 1 warrant who is not brought before him as soon as practicable."

But he then went on to say this at the end of that same paragraph:

> "Section 34 must receive effect where the decision was one against which there was a right of appeal under the statute. In the case of those decisions, the remedy of habeas corpus must be taken to have been excluded by the clear and unequivocal wording of section 34."

16. Lord Hope then observed in paragraph 22 that the decision by the senior District Judge to make the extradition order was a decision against which a right of appeal was provided by section 26. He briefly summarised the views of the Divisional Court and then added at the start of paragraph 23:

> "I do not think that it is necessary to identify circumstances in which, notwithstanding section 34 of the 2003 Act, the remedy of habeas corpus may be available."

17. Mr Gordon and Miss Dobbin argue that Lord Hope's statements do not amount to a rejection of the Divisional Court's reasoning on this particular issue. Mr Gordon emphasises the phrase "notwithstanding section 34."

18. I can see that taken by itself, that single sentence at the beginning of paragraph 23 may appear to leave the position somewhat uncertain. But Lord Hope's opinion must be read as a whole. He had by that point in it already emphasised two things: first, that there were judicial decisions in the extradition process which did not attract a statutory right of appeal; and secondly, that where there was a statutory right of appeal, habeas corpus was excluded by the clear and unequivocal wording of section

34. That was a quite explicit statement. In those circumstances, his statement at the beginning of paragraph 23 cannot be taken to be saying that, in some cases where the statutory right of appeal existed, habeas corpus might still lie. It would contradict the final sentence of paragraph 21, quoted above at paragraph 15.

19. I am fortified in that conclusion by what seems to me, with all due respect, to be a fallacy in the reasoning of the Divisional Court in *Hilali.* That court drew a distinction between questioning the judge's decision, banned by section 34 save via a statutory appeal, and it being "undermined" by a change of factual circumstances. The problem with that distinction lies in the nature of the habeas corpus remedy, as Mr Swift for the Secretary of State has submitted. It lies to challenge the legal validity of a person's detention. But in the present case the order of District Judge Evans provides the authority for the detention of the applicants. Section 176(6) of the 2003 Act states:

> "(6) An order for a person's extradition under this Act is sufficient authority for an appropriate person-
>
> (a) to receive him;
>
> (b) to keep him in custody until he is extradited under this Act;
>
> (c) to convey him to the territory to which he is to be extradited under this Act."

20. What this demonstrates is that the applicants are indeed seeking to challenge the order of the judge, and to do so by way of collateral challenge. Indeed, Mr Gordon expressly accepted during argument that the applicants were seeking the quashing of the extradition order made by the district judge. That is prohibited by section 34, save by way of statutory appeal.

21. I entirely see the force of the submissions made on behalf of the applicants that, in the period between the decision on the statutory appeal and the execution of the extradition order, some dramatic alteration in circumstances may occur. It is possible to postulate various scenarios which would give rise to concern that the court's finding that extradition would not involve a breach of rights under the ECHR was no longer valid – a change of regime in the State to which the person is to be extradited might potentially give rise to such a concern. That would fall within what the Divisional Court in *Hilali* meant by "the undermining of the factual premise of the judge's decision": paragraph 35. One has also to bear in mind that this court is by virtue of the Human Rights Act 1998 section 6(3) a public authority and that it is therefore unlawful for it to act in a way which is incompatible with a Convention right, unless primary legislation prevents it from acting differently: section 6(1) and (2) of the 1998 Act. One would in any event strive to find a remedy if it was clear that there was a real risk that extradition would lead to treatment in breach of Articles 2 or 3 of the ECHR.

22. There is, however, a course of action and a remedy which is available in such circumstances and which would not be prevented by section 34 of the 2003 Act, and that is by way of an application to re-open the determination of the Divisional Court

under CPR 52.17, the rule which embodies the principles set out in *Taylor v. Lawrence* [2002] EWCA Civ. 90; [2003] QB 528. The Civil Procedure Rules undoubtedly apply to appeals to a Divisional Court under the 2003 Act. They are the "rules of court" referred to in section 31 of that Act: see CPR 52 PD 120. CPR 52.17(1) provides that the Court of Appeal or the High Court will not re-open a final determination of any appeal unless:

> "(a) it is necessary to do so in order to avoid real injustice;
>
> (b) the circumstances are exceptional and make it appropriate to re-open the appeal; and
>
> (c) there is no alternative effective remedy."

23. The Divisional Court in *Hilali* was not enamoured of this procedure, but it did not rule out its use. Its objections, to be found at paragraph 38, are not ones that I find persuasive. Thus, the House of Lords can regulate its own procedure, and the fact that the Civil Procedure Rules do not apply there does not matter. Then, if I am right, habeas corpus does not provide an alternative remedy. Thirdly, CPR 52.17 is no less effective than habeas corpus: if an applicant can show that his detention is unlawful, it would be very remarkable if his detention were not regarded as "a real injustice", in the language of CPR 52.17(a)

24. Under that provision, the circumstances have to be exceptional. But that accords with the Divisional Court's approach in *Hilali*, where the circumstances where it suggested habeas corpus would be available were described as 'very rare' (paragraph 40) and "exceptional" (paragraph 38). Clearly, as the Divisional Court said in that case, paragraph 39, one cannot allow a re-run of the earlier appeal. That would be contrary to the whole spirit of the Framework Decision, which was intended to provide a speedy and more efficient procedure in extradition cases between the states involved. One does not need to regard the principles set out in *Ladd v. Marshall* [1954] 1 WLR 1489 as being directly applicable in order to recognise that, whether one is using the CPR 52.17 procedure or applying the Divisional Court's approach in *Hilali* to habeas corpus applications, the court should be reluctant to receive fresh evidence which could with reasonable diligence have been put before the Divisional Court on a section 26 appeal. Indeed, in *Hilali*, the Divisional Court endorsed the approach suggested by counsel, that the threshold for habeas corpus will only be passed where there is some development which subverts the basis for the decision, which seems to emphasise the need normally not merely for fresh evidence, in the *Ladd v. Marshall* sense, but for some event to have occurred since the appeal decision.

25. The applicants argue that CPR 52.17 imposes an unjustifiably high hurdle in cases where a risk of Article 3 treatment is involved. Mr Gordon refers to the decision of the Court of Appeal in *In re Uddin (A Child)* [2005] EWCA Civ 52; [2005] 1 WLR 2398, where the court said that if the discovery of fresh evidence were to justify re-opening a concluded appeal, the injustice had to be so grave as to overbear the pressing claims of finality in litigation. The fresh evidence had to show not merely that there was a real possibility that an erroneous result had been arrived at but that there existed a powerful probability that it had. Adopting that approach, submits Mr Gordon, could put the United Kingdom in breach of its international obligations under the ECHR.

26. It needs to be remembered, in my view, what the case of *Uddin* was dealing with. It was a family law case, where it was sought to re-open a finding that the threshold criteria for a care order had been met. The court in its decision emphasised that the boundaries of the *Taylor v. Lawrence* jurisdiction were not rigid. It acknowledged that the

> "ultimate rationale of *Taylor v. Lawrence* is the correction of injustice.": paragraph 20.

It was not applying its mind to cases such as the present where there is an issue as to whether the applicant would be at risk of torture or inhuman or degrading treatment or punishment if the earlier decision stands, and any court dealing with an application under CPR 52.17 will bear that context in mind. Having said that, it is to be observed that the approach advocated by Mr Gordon, namely that preferred by the Divisional Court in *Hilali* of using the writ of habeas corpus, would itself require the applicants to demonstrate that there had been a "fundamental change in the circumstances" since the earlier decision: paragraph 40. I am not persuaded that there is any significant difference in the height of the hurdle to be surmounted by such an applicant, whether one assumes that habeas corpus is available or one uses CPR 52.17. The advantage of the latter is that it respects the terms of section 34 of the 2003 Act.

27. Miss Dobbin in her reply sought at one point to argue that fresh evidence need not demonstrate any fundamental change in circumstances, and that all that is required is that there should be evidence showing *some* difference in the circumstances. Her submission was that, since the court is dealing with an Article 3 issue, it should simply consider afresh whether the new evidence together with the earlier evidence showed, in its judgment, a real risk of Article 3 treatment, irrespective of whether the new evidence went to the root of the earlier Divisional Court decision. That approach was not adopted by Mr Gordon and it seems to me to be quite wrong. It means that the proceedings, habeas corpus ones on her argument, would indeed amount to a re-run of the earlier appeal with a bit of extra evidence, and that is exactly what section 34 of the 2003 Act is intended to prevent. One has, whether in habeas corpus proceedings or under CPR 52.17, to take the Divisional Court's decision on the appeal under section 26 as the starting point.

28. There are certain procedural differences between those two procedures, and Mr Lewis for SOCA has emphasised those. In particular, the habeas corpus route would mean that an applicant could appeal to the House of Lords from a Divisional Court decision without the need for a certificate that a point of law of general public importance was involved. Thus the extradition process could be prolonged in the way which used to happen prior to the 2003 Act being passed. That, submits Mr Lewis, is what Parliament sought to avoid by that legislation. Mr Swift tells us that the Secretary of State shares those concerns. I see the force of that point, but it is primarily because of section 34 itself and the interpretation which I place upon the House of Lords' decision in *Hilali* that I reject the possibility of a habeas corpus application which seeks to overturn the extradition order made by the district judge. A statutory appeal is the only means of challenge to that, and if there is fresh evidence to demonstrate that the appeal decision was wrong in some fundamental aspect, then the proper course is to apply under CPR 52.17.

29. To a very large degree it seems to me to make very little difference whether one is using CPR 52.17 or adopting the Divisional Court's approach in *Hilali* if that were permissible. I have approached the fresh evidence on the former basis, but my conclusions would have been the same, had I adopted the latter approach. Out of an abundance of caution, the applicants seek permission to make an application under CPR 52.17. We grant permission and treat this as the hearing of the application.

(ii) Is there now fresh evidence?

30. Much of the material filed in support of this present application cannot by any stretch of the English language be regarded as material which could not with reasonable diligence have been put before the Divisional Court at the end of July 2008. Much of it is dated well before that hearing and was publicly available. In the end, there are only three documents which are relied on by the applicants as ones undermining the Divisional Court's decision. These are a letter of 11 June 2008 from a representative of the Italian government at the Strasbourg Court to a clerk at that court, responding to a request to state whether a Mr Ben Khemais had been removed to Tunisia, plus an enclosure which was a letter from the Italian Interior Ministry bearing the same date. I shall come to Mr Ben Khemais case very shortly. These documents obviously came into existence some weeks before the Divisional Court hearing in this case, but there is evidence that they were not known to the applicants at or before that hearing, and the respondents do not argue that the applicants should have been aware of them. Secondly, there is a note from the Italian Embassy in Tunisia, dated 25 July 2008, referring to a meeting between representatives of the Italian and Tunisian authorities the day before. That post-dates the hearing in the Divisional Court and it is not suggested that it is material which the applicants could with reasonable diligence have obtained before the judgment was delivered. Thirdly, there are the formal Observations of the Italian Government in response to questions sent to it by the Strasbourg Court about its conduct in the Ben Khemais case. Those are dated 3 September 2008.

31. All this is new material which was not before the Divisional Court in July this year and in respect of which the applicants cannot be said to be at fault. To that extent it constitutes fresh evidence. What then matters is its significance.

(iii) The effect of the fresh evidence:

32. To consider this issue, it is necessary to refer, as briefly as possible, to the evidence put before the Divisional Court in these proceedings. That court, like the District Judge, had before it evidence about Italian law on deportation, in particular what is known as the "Pisanu law". There was evidence that in the past the Italian government had adopted the practice of expelling foreign nationals believed to threaten national security, even if they might suffer treatment contrary to Article 3 in their own state. Such had been the practice up to the date of the Strasbourg Court's decision in *Saadi v. Italy* (Application no. 37201/06), a judgment dated 28 February 2008. The District Judge had heard evidence orally from three Italian lawyers on behalf of the applicants, in addition to receiving written reports from them, and he had also had two written opinions from the Italian liaison magistrate in the United Kingdom. The District Judge had stated:

> "I consider there is no reason to suppose that any future deportation proceedings would be anything other than in accordance with the Convention and the case of Saadi v Italy. I do not regard what has undoubtedly happened in the past as providing evidence that such an approach will be repeated in the future. Saadi v Italy will cause the Italian authorities to rethink its approach to this issue. "

33. Before the Divisional Court on appeal, particular reliance was placed by the applicants on the treatment, subsequent to the *Saadi* decision and to the District Judge's decision, of a Mr Ben Khemais, a Tunisian national who was expelled from Italy in early June this year, despite an interim measure under Regulation 39 by the Strasbourg Court requesting a stay on his deportation to Tunisia. So the Divisional Court had that material before it. Indeed, it spelt out the details of the case over paragraphs 21 to 23 inclusive of its judgment. At the end of paragraph 23 it referred to a report that a representative of the Italian Ministry of Justice had said about the case:

> "In legal terms, judgments by the European courts (sic) are executive in all European Union countries …. But it is up to all competent authorities to assess whether there are higher State needs that should prevail."

The Divisional Court summarised how the appellants, as they then were, relied on that material, referring to Mr Ben Khemais as "BK":

> "Counsel for the appellants rely on the treatment of BK, first, as showing the inadequacy of judicial safeguards when the executive in Italy makes a deportation order, and secondly, the continued determination of the executive, Saadi notwithstanding, to deport people such as the appellants."

It also noted that no assurance had been received from the Italian government about the deportation of these three men.

34. Nonetheless it held that the risk of deportation of these applicants to Tunisia within any predictable timeframe was too remote. The court emphasised that they would be extradited to Italy under the Framework Decision, which added an additional dimension, requiring as it did co-operation between judicial authorities on the basis of trust and a high level of confidence. The court regarded that Framework Decision as providing a safeguard and a disincentive to the Italian authorities not to act in breach of Article 3 of the Convention. It said at paragraphs 47 and 48:

> "47. This is bilateral action premised on the existence of a high degree of confidence. Courts in a returning state would be likely to have a real sense of grievance, having regard to the contents of the Framework Directive, if a receiving state subsequently ignored its duty under Article 3 of the Convention. The Italian government had not hitherto deported in an Article 3 case a person received under the Framework Directive and had not deported in the case of Saadi.

> 48. Moreover, when the Italian authorities receive a person under the Framework Directive, the entire judiciary, including the Justices of the Peace, is likely to be alerted to its duties under Article 3. That is certainly so in the current cases. As Mr Guedalla's statement demonstrated they have received very considerable publicity in Italy and elsewhere."

35. The Divisional Court stated that it was not prepared to hold, on the basis of a single post-*Saadi* case, that the Italian State would in the present cases ignore its duties under Article 3 of the Convention as confirmed in *Saadi*. That "single case" was obviously a reference to what had happened to Mr Khemais. In addition, the court was evidently also influenced by the fact that these applicants, are sought by Italy with a view to their prosecution, with a prison sentence being likely on any conviction. If that happened, any prospect of deportation receded into the future and the court was not prepared to speculate about risk in the long-term or even medium-term future: see paragraphs 38, 41, 51 and 52.

36. That then was the basis for the Divisional Court's decision and it is not for this court to sit in judgment on its reasoning. The Divisional Court took on board (a) the pre-*Saadi* practice of the Italian government as to deportation; (b) the deportation since *Saadi* of Mr Khemais, contrary to the Strasbourg Court's interim measure under rule 39; (c) the reported statement of an Italian Ministry of Justice representative that there might be "higher State needs" that should prevail over judgments by European courts (paragraph 23); (d) the absence of any undertaking by the Italian government about deportation in respect of these applicants. What we need therefore to ask ourselves is whether the fresh evidence goes significantly beyond these facts already reflected in the Divisional Court's decision, and in particular whether it undermines that court's reliance on the Framework Decision context.

37. The thrust of the applicants' case is that the three documents referred to earlier show that the deportation of Mr Ben Khemais to Tunisia cannot be seen as an isolated incident, as the Divisional Court regarded it, but was in fact consistent with an attitude on the part of the Italian government which is prepared to deport suspected terrorists irrespective of Article 3 risks, especially if it has received undertakings from the Tunisian authorities that Article 3 treatment will not occur. Mr Gordon submits that this evidence now shows a serious possibility of more cases like that of Mr Ben Khemais. It demonstrates a willingness to rely on Tunisian assurances, which the Strasbourg jurisprudence has established is not a reliable basis for rejecting the risk of Article 3 treatment. Miss Dobbin adopts the same arguments, emphasising that at the time of the Divisional Court hearing it was not known that Italy would try to justify the deportation of Mr Ben Khemais on the basis of diplomatic assurances.

38. Taking the three documents in a little more detail, it is argued that the letter and enclosure of 11 June 2008 confirms the fact that Mr Ben Khemais was expelled because he was seen as a threat to the security of the Italian State. The enclosed letter from the Interior Ministry refers to him being judged "to be a threat to state security" and says in effect that that was why he was expelled.

39. That is true. But that does not amount to anything significantly different from what the Divisional Court knew in this case. It referred in its judgment to the report of a Ministry of Justice representative saying that authorities had to assess "whether there are higher State needs that should prevail" (paragraph 23). That patently was a reference, given the circumstances, to state security, Mr Ben Khemais having already been convicted of terrorism-related offences. This piece of new evidence adds nothing to the case.

40. The second document is the record of the meeting of Italian and Tunisian officials on 24 July 2008. That begins as follows:

> "A technical meeting was held at the Tunisian Justice and Human Rights Ministry yesterday, 24 July, to consider and agree on the assurances that Italy can provide to the Strasbourg Court of Justice (sic) on the well-known case of Essid Sami Ben Khemais."

One of the Tunisian officials spoke of his country's willingness to co-operate with Italy on the case of Mr Ben Khemais as well as on other cases likely to arise in the future. There follows a discussion about the treatment of Mr Ben Khemais in Tunisia, though Tunisia was unwilling to give specific guarantees about his case or to take part in the proceedings before the Strasbourg Court. The meeting ended with the Italian delegations promising to provide a list of requests about the Ben Khemais case and the Tunisians agreeing to reply as quickly as possible, "not only on this case but also on future similar cases".

41. Mr Gordon stresses that and the earlier reference to the possibility of future cases. Moreover, this document shows, it is said, that a subsequent statement by the Italian government that Mr Ben Khemais had only been expelled to Tunisia because that country had given effective guarantees was wrong. That statement does indeed appear in the third document, the Italian Government's Observations of 3 September 2008 to the Strasbourg Court, to which it is convenient to turn before considering the applicants' submissions.

42. Those Observations sought to answer questions put by the Strasbourg Court about the Ben Khemais case. The Observations seek to justify Italy's action in deporting him despite the Rule 39 interim measures. Apart from the statement already referred to, this document argues that there was a need for clarification as to the interrelationship of the ECHR with other international conventions when one is dealing with a suspected terrorist. Thus the Refugee Convention does not allow for refugee status if the applicant represents a danger to the security of the host State or has committed serious crimes. After referring to the diplomatic assurances in the Ben Khemais case, it goes on to draw attention to the fact (as it asserts) that that individual had, according to his lawyer, not been mistreated after his arrival and detention in Tunisia.

43. The applicants submit that this document shows that the Italian government believes that it can safely deport people like Mr Ben Khemais to Tunisia if they receive assurances from that country. If so, why should not the same approach apply in the case of the applicants? This evidence about the Italian government's attitude was not known at the time of the Divisional Court's decision.

44. I do not find these arguments persuasive for four reasons. First, the Observations of 3 September need to be read in context. As both Mr Gordon and Miss Dobbin accept and indeed assert, those Observations were an attempt by Italy to mount a post-facto justification of its action in deporting Mr Ben Khemais. It is hardly surprising, when it has breached interim measures of the Strasbourg Court, that it seeks to rely on an alleged need for clarification in the law and on alleged diplomatic assurances. As the applicants have been at pains to emphasise, it is at the least unclear whether there had been any such assurances in the Ben Khemais case. I do not accept that those Observations provide any reliable guide to Italy's future conduct. More significant would be evidence about its actual conduct, apart from the Ben Khemais case about which the Divisional Court knew. As for the discussions with the Tunisian authorities, it should not cause either surprise or great concern that Italy should be engaged in them. Principally they were directed at the Ben Khemais case, but insofar as they touched more generally on the problem of how to deal with suspected terrorists who might be at risk of Article 3 treatment if returned to their own country, they were recognising a problem which is known to concern a number of European governments, including our own.

45. Secondly, it is not in dispute that there has been no other instance of Italy deporting someone in breach of interim measures or of Article 3 of the ECHR since the *Saadi* decision. The Ben Khemais case remains the sole post-*Saadi* incident. Thirdly, none of this new evidence has any impact upon the reliance placed by the Divisional Court on how Italy can be expected to behave in respect of someone who has been extradited to that country under the Framework Decision and a European Arrest Warrant. There is still no evidence of any willingness on the part of Italy to deport such an extradited person to Tunisia or any other country where his Article 3 rights would be at a real risk of being broken. It follows that the Divisional Court's reliance on that fact and on the trust and confidence between states which underlies the Framework Decision remains intact and unaffected by the new material. As I have indicated earlier, that was a powerful element in the Divisional Court's reasoning. It adds an extra dimension to the Article 3 issue.

46. Fourthly, nothing in the new evidence undermines the point made by the Divisional Court that it was agreed that the applicants were genuinely wanted for trial in Italy and that (in the court's view) there was no risk of deportation while criminal proceedings and any resulting custodial sentence were extant, so that any risk was "to that extent remote from the current situation" (paragraph 51). As Miss Dobbin confirmed to us, it was known that Mr Ben Khemais had both been convicted in the past and faced further criminal charges and the Divisional Court also had evidence about the general length of custodial sentences in such cases. Nothing on those aspects has changed since that court's decision.

47. Consequently, I cannot accept that the fresh evidence meets either the test required for a re-opening of the Divisional Court's appeal decision under the *Taylor v. Lawrence* jurisdiction or that applicable on habeas corpus proceedings if the Divisional Court's approach in *Hilali* were to be followed. The fresh evidence does not show that the appeal decision was reached on some fundamentally erroneous basis of fact. This is not in any sense an exceptional case.

(iv) The asylum issue:

48. I can be very brief on this. Mr Gordon recognised in argument that the asylum claim of Ignaoua and the refugee status of Khemiri really adds nothing of significance to the main arguments. If the Divisional Court's appeal decision stands, as I find it must, it follows that there is not a real risk of these applicants being re-fouled by Italy to Tunisia, which is where the risk of persecution is acknowledged to exist. Consequently their extradition to Italy could not interfere with any of their rights under the Refugee Convention. No procedural bar is said to exist to their extradition on asylum grounds. This is a makeweight to the applicants' case, nothing more.

Conclusion:

49. For the reasons I have set out, I for my part would refuse the applications for habeas corpus, both on the basis that this court has no jurisdiction in the matter and alternatively on the basis that, if there was jurisdiction, the applications should be refused on their merits. For the same reason, I would refuse to re-open the appeal to the Divisional Court which was determined on 28 July 2008.

Mr Justice Owen:

50. I agree.