COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

GRAND CHAMBER

CASE OF A. AND OTHERS v. THE UNITED KINGDOM

(Application no. 3455/05)

JUDGMENT

STRASBOURG

19 February 2009

This judgment is final but may be subject to editorial revision.

In the case of A. and Others v. the United Kingdom,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Jean-Paul Costa, *President*,
Christos Rozakis,
Nicolas Bratza,
Françoise Tulkens,
Josep Casadevall,
Giovanni Bonello,
Ireneu Cabral Barreto,
Elisabeth Steiner,
Lech Garlicki,
Khanlar Hajiyev,
Ljiljana Mijović,
Egbert Myjer,
David Thór Björgvinsson,
George Nicolaou,
Ledi Bianku,
Nona Tsotsoria,
Mihai Poalelungi, *judges*,

and Michael O'Boyle, *Deputy Registrar*,

Having deliberated in private on 21 May 2008 and on 4 February 2009,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 3455/05) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by eleven non-United Kingdom nationals ("the applicants"), on 21 January 2005. The President acceded to the applicants' request not to have their names disclosed (Rule 47 § 3 of the Rules of Court).

2. The applicants were represented by Birnberg Pierce and Partners, a firm of solicitors practising in London. The United Kingdom Government ("the Government") were represented by their Agent, Mr D. Walton, Foreign and Commonwealth Office.

3. The applicants alleged, in particular, that they had been unlawfully detained, in breach of Articles 3, 5 § 1 and 14 of the Convention and that they had not had adequate remedies at their disposal, in breach of Articles 5 § 4 and 13.

4. The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). On 11 September 2007 a Chamber of that Section, composed of the following judges: Josep Casadevall, Nicolas Bratza, Giovanni Bonello, Kristaq Traja, Stanislav Pavloschi, Lech Garlicki, Liliana Mijović and also of Lawrence Early, Section Registrar, relinquished jurisdiction in favour of the Grand Chamber, neither of the parties having objected to relinquishment (Article 30 of the Convention and Rule 72).

5. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24 of the Rules of Court.

6. The applicants and the Government each filed written observations on the merits. In addition, third-party comments were received from two London-based non-governmental organisations, Liberty and Justice, which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 2).

7. A hearing took place in public in the Human Rights Building, Strasbourg, on 21 May 2008 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*
Mr D. WALTON, *Agent*,
Mr P. SALES, QC
Ms C. IVIMY, *Counsel*,
Mr S. BRAVINER-ROMAN,
Ms K. CHALMERS,
Mr E. ADAMS,
Mr J. ADUTT,
Mr L. SMITH, *Advisers;*

(b) *for the applicants*
Ms G. PIERCE,
Ms M. WILLIS STEWART,
Mr D. GUEDALLA, *Solicitors*,
Mr B. EMMERSON, QC,
Mr R. HUSAIN,
Mr D. FRIEDMAN, *Counsel.*

The Court heard addresses by Mr Emmerson and Mr Sales and their answers in reply to questions put by the Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The facts of the case, as submitted by the parties, may be summarised as follows.

A. The derogation

9. On 11 September 2001 four commercial aeroplanes were hijacked over the United States of America. Two of them were flown directly at the Twin Towers of the World Trade Center and a third at the Pentagon, causing great loss of life and destruction to property. The Islamist extremist terrorist organisation al'Qaeda, led by Osama Bin Laden, claimed responsibility. The United Kingdom joined with the United States in military action in Afghanistan, which had been used as a base for al'Qaeda training camps.

10. The Government contended that the events of 11 September 2001 demonstrated that international terrorists, notably those associated with al'Qaeda, had the intention and capacity to mount attacks against civilian targets on an unprecedented scale. Further, given the loose-knit, global structure of al'Qaeda and its affiliates and their fanaticism, ruthlessness and determination, it would be difficult for the State to prevent future attacks. In the Government's assessment, the United Kingdom, because of its close links with the United States, was a particular target. They considered that there was an emergency of a most serious kind threatening the life of the nation. Moreover, they considered that the threat came principally, but not exclusively, from a number of foreign nationals present in the United Kingdom, who were providing a support network for Islamist terrorist operations linked to al'Qaeda. A number of these foreign nationals could not be deported because of the risk that they would suffer treatment contrary to Article 3 of the Convention in their countries of origin.

11. On 11 November 2001 the Secretary of State made a Derogation Order under section 14 of the Human Rights Act 1998 (“the 1998 Act”: see paragraph 94 below) in which he set out the terms of a proposed notification to the Secretary General of the Council of Europe of a derogation pursuant to Article 15 of the Convention. On 18 December 2001 the Government lodged the derogation with the Secretary General of the Council of Europe. The derogation notice provided as follows:

"Public emergency in the United Kingdom

The terrorist attacks in New York, Washington, D.C. and Pennsylvania on 11th September 2001 resulted in several thousand deaths, including many British victims and others from 70 different countries. In its resolutions 1368 (2001) and 1373 (2001), the United Nations Security Council recognised the attacks as a threat to international peace and security.

The threat from international terrorism is a continuing one. In its resolution 1373 (2001), the Security Council, acting under Chapter VII of the United Nations Charter, required all States to take measures to prevent the commission of terrorist attacks, including by denying safe haven to those who finance, plan, support or commit terrorist attacks.

There exists a terrorist threat to the United Kingdom from persons suspected of involvement in international terrorism. In particular, there are foreign nationals present in the United Kingdom who are suspected of being concerned in the commission, preparation or instigation of acts of international terrorism, of being members of organisations or groups which are so concerned or of having links with members of such organisations or groups, and who are a threat to the national security of the United Kingdom.

As a result, a public emergency, within the meaning of Article 15(1) of the Convention, exists in the United Kingdom.

The Anti-terrorism, Crime and Security Act 2001

As a result of the public emergency, provision is made in the Anti-terrorism, Crime and Security Act 2001, *inter alia*, for an extended power to arrest and detain a foreign national which will apply where it is intended to remove or deport the person from the United Kingdom but where removal or deportation is not for the time being possible, with the consequence that the detention would be unlawful under existing domestic law powers. The extended power to arrest and detain will apply where the Secretary of State issues a certificate indicating his belief that the person's presence in the United Kingdom is a risk to national security and that he suspects the person of being an international terrorist. That certificate will be subject to an appeal to the Special Immigration Appeals Commission ('SIAC'), established under the Special Immigration Appeals Commission Act 1997, which will have power to cancel it if it considers that the certificate should not have been issued. There will be an appeal on a point of law from a ruling by SIAC. In addition, the certificate will be reviewed by SIAC at regular intervals. SIAC will also be able to grant bail, where appropriate, subject to conditions. It will be open to a detainee to end his detention at any time by agreeing to leave the United Kingdom.

The extended power of arrest and detention in the Anti-terrorism, Crime and Security Act 2001 is a measure which is strictly required by the exigencies of the situation. It is a temporary provision which comes into force for an initial period of 15 months and then expires unless renewed by the Parliament. Thereafter, it is subject to annual renewal by Parliament. If, at any time, in the Government's assessment, the public emergency no longer exists or the extended power is no longer strictly required by the exigencies of the situation, then the Secretary of State will, by Order, repeal the provision.

Domestic law powers of detention (other than under the Anti-terrorism, Crime and Security Act 2001)

The Government has powers under the Immigration Act 1971 ('the 1971 Act') to remove or deport persons on the ground that their presence in the United Kingdom is not conducive to the public good on national security grounds. Persons can also be arrested and detained under Schedules 2 and 3 to the 1971 Act pending their removal or deportation. The courts in the United Kingdom have ruled that this power of detention can only be exercised during the period necessary, in all the circumstances of the particular case, to effect removal and that, if it becomes clear that removal is not going to be possible within a reasonable time, detention will be unlawful (*R. v Governor of Durham Prison,* ex parte *Singh* [1984] All ER 983).

Article 5(1)(f) of the Convention

It is well established that Article 5(1)(f) permits the detention of a person with a view to deportation only in circumstances where 'action is being taken with a view to deportation' (*Chahal v United Kingdom* (1996) 23 EHRR 413 at paragraph 112). In that case the European Court of Human Rights indicated that detention will cease to be permissible under Article 5(1)(f) if deportation proceedings are not prosecuted with due diligence and that it was necessary in such cases to determine whether the duration of the deportation proceedings was excessive (paragraph 113).

In some cases, where the intention remains to remove or deport a person on national security grounds, continued detention may not be consistent with Article 5(1)(f) as interpreted by the Court in the *Chahal* case. This may be the case, for example, if the person has established that removal to their own country might result in treatment contrary to Article 3 of the Convention. In such circumstances, irrespective of the gravity of the threat to national security posed by the person concerned, it is well established that Article 3 prevents removal or deportation to a place where there is a real risk that the person will suffer treatment contrary to that article. If no alternative destination is immediately available then removal or deportation may not, for the time being, be possible even though the ultimate intention remains to remove or deport the person once satisfactory arrangements can be made. In addition, it may not be possible to prosecute the person for a criminal offence given the strict rules on the admissibility of evidence in the criminal justice system of the United Kingdom and the high standard of proof required.

Derogation under Article 15 of the Convention

The Government has considered whether the exercise of the extended power to detain contained in the Anti-terrorism, Crime and Security Act 2001 may be inconsistent with the obligations under Article 5(1) of the Convention. As indicated above, there may be cases where, notwithstanding a continuing intention to remove or deport a person who is being detained, it is not possible to say that 'action is being taken with a view to deportation' within the meaning of Article 5(1)(f) as interpreted by the Court in the *Chahal* case. To the extent, therefore, that the exercise of the extended power may be inconsistent with the United Kingdom's obligations under Article 5(1), the Government has decided to avail itself of the right of derogation conferred by Article 15(1) of the Convention and will continue to do so until further notice."

The derogation notice then set out the provisions of Part 4 of the Anti-Terrorism Crime and Security Bill 2001.

12. On 12 November 2001 the Anti-Terrorism Crime and Security Bill, containing the clauses which were to eventually become Part 4 of the Anti-Terrorism Crime and Security Act 2001 ("the 2001 Act": see paragraph 90 below), was introduced into the House of Commons. The Bill was passed by Parliament in two weeks, with three days of debate on the floor of the House of Commons set aside for its 125 clauses in a restrictive programming motion, prompting both the Joint Committee of Human Rights and the Home Affairs Select Committee to complain of the speed with which they were being asked to consider the matter.

13. The 2001 Act came into force on 4 December 2001. During the lifetime of the legislation, sixteen individuals, including the present eleven applicants, were certified under section 21 and detained. The first six applicants were certified on 17 December 2001 and taken into detention shortly thereafter. The seventh applicant was certified and detained in early February 2002; the ninth applicant, on 22 April 2002; the eighth applicant, on 23 October 2002; the tenth applicant, on 14 January 2003; and the eleventh applicant was certified on 2 October 2003 and kept in detention, having previously been held under other legislation.

B. The derogation proceedings

14. In proceedings before the Special Immigration Appeals Commission ("SIAC": see paragraphs 91-93 below), the first seven applicants challenged the legality of the derogation, claiming that their detention under the 2001 Act was in breach of their rights under Articles 3, 5, 6 and 14 of the Convention. Each, in addition, challenged the Secretary of State's decision to certify him as an international terrorist.

15. On 30 July 2002, having examined both open and closed material and heard submissions from special advocates in addition to counsel for the parties and for the third party, Liberty, SIAC delivered its ruling on the legality of the derogation. It held that, on the basis of the open material, it was satisfied that the threat from al'Qaeda had created a public emergency threatening the life of the nation, within the meaning of Article 15 of the Convention, and that the closed material confirmed this view.

SIAC further held that the fact that the objective of protecting the public from international terrorists could possibly have been achieved by alternative methods did not demonstrate that the measures actually adopted were not strictly necessary. Moreover, since the purpose of the detention was the protection of the United Kingdom, the fact that the detainee was at liberty to leave demonstrated that the measures were properly tailored to the state of emergency.

SIAC rejected the applicants' complaints under Article 3 of the Convention. It held that, insofar as they related to conditions of detention, the applicants should bring proceedings in the ordinary civil courts, and that SIAC had no jurisdiction to determine such a complaint as it was not a "derogation issue". It further saw no merit in the applicants' argument that detention for an indefinite period was contrary to Article 3. On this point, SIAC held that the detention was not indefinite, since it was governed by the time limits of the 2001 Act itself and since the 2001 Act provided that each applicant's certification was subject to automatic review by SIAC every six months. In any event, the mere fact that no term had yet been fixed for preventive detention did not give rise to a breach of Article 3.

SIAC did not accept that Article 6 applied to the certification process. The certification of each applicant as a suspected international terrorist was not a "charge" but instead a statement of suspicion and the proceedings before SIAC were not for the determination of a criminal charge. Furthermore, there was no relevant civil right at issue and Article 6 did not apply in its civil limb either.

SIAC did, however, rule that the derogation was unlawful because the relevant provisions of the 2001 Act unjustifiably discriminated against foreign nationals, in breach of Article 14 of the Convention. The powers of the 2001 Act could properly be confined to non-nationals only if the threat stemmed exclusively, or almost exclusively, from non-nationals and the evidence did not support that conclusion. In paragraphs 94-95 of its judgment SIAC held:

> "94. If there is to be an effective derogation from the right to liberty enshrined in Article 5 in respect of suspected international terrorists - and we can see powerful arguments in favour of such a derogation - the derogation ought rationally to extend to all irremovable suspected international terrorists. It would properly be confined to the alien section of the population only if, as [counsel for the appellants] contends, the threat stems exclusively or almost exclusively from that alien section.
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> 95. But the evidence before us demonstrates beyond argument that the threat is not so confined. There are many British nationals already identified - mostly in detention abroad - who fall within the definition of 'suspected international terrorists', and it was clear from the submissions made to us that in the opinion of the [Secretary of State] there are others at liberty in the United Kingdom who could be similarly defined. In those circumstances we fail to see how the derogation can be regarded as other than discriminatory on the grounds of national origin."

SIAC thus quashed the derogation order of 11 November 2001 and issued a declaration of incompatibility in respect of section 23 of the 2001 Act under section 4 of the 1998 Act (see paragraph 94 below).

It adjourned the first seven applicants' individual appeals against certification (see paragraphs 24-69 below) pending the outcome of the Secretary of State's appeal and the applicants' cross-appeal on points of law against the above ruling.

16. On 25 October 2002 the Court of Appeal delivered its judgment (*A. and Others v. Secretary of State for the Home Department* [2002] EWCA Civ 1502).

It held that SIAC had been entitled to find that there was a public emergency threatening the life of the nation. However, contrary to the view of SIAC, it held that the approach adopted by the Secretary of State could be objectively justified. There was a rational connection between the detention of non-nationals who could not be deported because of fears for their safety, and the purpose which the Secretary of State wished to achieve, which was to remove non-nationals who posed a threat to national security. Moreover, the applicants would be detained for no longer than was necessary before they could be deported or until the emergency was resolved or they ceased to be a threat to the country's safety. There was no discrimination contrary to Article 14 of the Convention, because British nationals suspected of being terrorists were not in an analogous situation to similarly suspected foreign nationals who could not be deported because of fears for their safety. Such foreign nationals did not have a right to remain in the country but only a right, for the time being, not to be removed for their own safety. The Court of Appeal added that it was well established in international law that, in some situations, States could distinguish between nationals and non-nationals, especially in times of emergency. It further concluded that Parliament had been entitled to limit the measures proposed so as to affect only foreign nationals suspected of terrorist links because it was entitled to reach the conclusion that detention of only the limited class of foreign nationals with which the measures were concerned was, in the circumstances, "strictly required" within the meaning of Article 15 of the Convention.

The Court of Appeal agreed with SIAC that the proceedings to appeal against certification were not "criminal" within the meaning of Article 6 § 1 of the Convention. It found, however, that the civil limb of Article 6 applied but that the proceedings were as fair as could reasonably be achieved. It further held that the applicants had not demonstrated that their detention amounted to a breach of Article 3 of the Convention.

17. The applicants were granted leave to appeal to the House of Lords, which delivered its judgment on 16 December 2004 ([2004] UKHL 56).

A majority of the Law Lords, expressly or impliedly, found that the applicants' detention under Part 4 of the 2001 Act did not fall within the exception to the general right of liberty set out in Article 5 § 1(f) of the Convention (see Lord Bingham, at paragraphs 8-9; Lord Hoffman, at paragraph 97; Lord Hope, at paragraphs 103-105; Lord Scott, at paragraph 155; Lord Rodger, at paragraph 163; Baroness Hale, at paragraph 222). Lord Bingham summarised the position in this way:

> "9. ... A person who commits a serious crime under the criminal law of this country may of course, whether a national or a non-national, be charged, tried and, if

convicted, imprisoned. But a non-national who faces the prospect of torture or inhuman treatment if returned to his own country, and who cannot be deported to any third country, and is not charged with any crime, may not under article 5(1)(f) of the Convention and Schedule 3 to the Immigration Act 1971 be detained here even if judged to be a threat to national security".

18. The House of Lords further held, by eight to one (Lords Bingham and Scott with considerable hesitation), that SIAC's conclusion that there was a public emergency threatening the life of the nation should not be displaced. Lord Hope assessed the evidence as follows:

"118. There is ample evidence within [the open] material to show that the government were fully justified in taking the view in November 2001 that there was an emergency threatening the life of the nation. ... [The] United Kingdom was at danger of attacks from the Al Qaeda network which had the capacity through its associates to inflict massive casualties and have a devastating effect on the functioning of the nation. This had been demonstrated by the events of 11 September 2001 in New York, Pennsylvania and Washington. There was a significant body of foreign nationals in the United Kingdom who had the will and the capability of mounting co-ordinated attacks here which would be just as destructive to human life and to property. There was ample intelligence to show that international terrorist organisations involved in recent attacks and in preparation for other attacks of terrorism had links with the United Kingdom, and that they and others posed a continuing threat to this country. There was a growing body of evidence showing preparations made for the use of weapons of mass destruction in this campaign. ... [It] was considered [by the Home Office] that the serious threats to the nation emanated predominantly, albeit not exclusively, and more immediately from the category of foreign nationals.

119. The picture which emerges clearly from these statements is of a current state of emergency. It is an emergency which is constituted by the threat that these attacks will be carried out. It threatens the life of the nation because of the appalling consequences that would affect us all if they were to occur here. But it cannot yet be said that these attacks are imminent. On 15 October 2001 the Secretary of State said in the House of Commons that there was no immediate intelligence pointing to a specific threat to the United Kingdom: see Hansard (HC Debates, col 925). On 5 March 2002 this assessment of the position was repeated in the government's response to the Second Report of the House of Commons Select Committee on Defence on the Threat from Terrorism (HC 348, para 13) where it was stated that it would be wrong to say that there was evidence of a particular threat. I would not conclude from the material which we have seen that there was no current emergency. But I would conclude that the emergency which the threats constitute is of a different kind, or on a different level, from that which would undoubtedly ensue if the threats were ever to materialise. The evidence indicates that the latter emergency cannot yet be said to be imminent. It has to be recognised that, as the attacks are likely to come without warning, it may not be possible to identify a stage when they can be said to be imminent. This is an important factor, and I do not leave it out of account. But the fact is that the stage when the nation has to face that kind of emergency, the emergency of imminent attack, has not been reached".

Lord Hoffman, who dissented, accepted that there was credible evidence of a threat of serious terrorist attack within the United Kingdom, but considered that it would not destroy the life of the nation, since the threat

was not so fundamental as to threaten "our institutions of government or our existence as a civil community". He concluded that "the real threat to the life of the nation ... comes not from terrorism but from laws such as these".

19. The other Law Lords (Lords Bingham, Nicholls, Hope, Scott, Rodger, Carswell and Baroness Hale, with Lord Walker dissenting) rejected the Government's submission that it was for Parliament and the executive, rather than the courts, to judge the response necessary to protect the security of the public. Lord Bingham expressed his view as follows:

> "42. It follows from this analysis that the appellants are in my opinion entitled to invite the courts to review, on proportionality grounds, the Derogation Order and the compatibility with the Convention of section 23 [of the 2001 Act] and the courts are not effectively precluded by any doctrine of deference from scrutinising the issues raised. It also follows that I do not accept the full breadth of the Attorney General's submissions. I do not in particular accept the distinction which he drew between democratic institutions and the courts. It is of course true that the judges in this country are not elected and are not answerable to Parliament. It is also of course true ... that Parliament, the executive and the courts have different functions. But the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself. The Attorney General is fully entitled to insist on the proper limits of judicial authority, but he is wrong to stigmatise judicial decision-making as in some way undemocratic. It is particularly inappropriate in a case such as the present in which Parliament has expressly legislated in section 6 of the 1998 Act to render unlawful any act of a public authority, including a court, incompatible with a Convention right; has required courts (in section 2) to take account of relevant Strasbourg jurisprudence; has (in section 3) required courts, so far as possible, to give effect to Convention rights and has conferred a right of appeal on derogation issues. The effect is not, of course, to override the sovereign legislative authority of the Queen in Parliament, since if primary legislation is declared to be incompatible the validity of the legislation is unaffected (section 4(6)) and the remedy lies with the appropriate minister (section 10), who is answerable to Parliament. The 1998 Act gives the courts a very specific, wholly democratic, mandate".

20. The majority therefore examined whether the detention regime under Part 4 of the 2001 Act was a proportionate response to the emergency situation, and concluded that it did not rationally address the threat to security and was a disproportionate response to that threat. They relied on three principal grounds: first, that the detention scheme applied only to non-nationals suspected of international terrorism and did not address the threat which came from United Kingdom nationals who were also so suspected; secondly, that it left suspected international terrorists at liberty to leave the United Kingdom and continue their threatening activities abroad; thirdly, that the legislation was drafted too broadly, so that it could, in principle, apply to individuals suspected of involvement with international terrorist organisations which did not fall within the scope of the derogation.

On the first point, Lord Bingham emphasised that SIAC's finding that the terrorist threat was not confined to non-nationals had not been challenged. Since SIAC was the responsible fact-finding tribunal, it was unnecessary to

examine the basis for its finding, but there was evidence that "upwards of a thousand individuals from the UK are estimated on the basis of intelligence to have attended training camps in Afghanistan in the last five years"; that some British citizens were said to have planned to return from Afghanistan to the United Kingdom; and that the background material relating to the applicants showed the high level of involvement of British citizens and those otherwise connected with the United Kingdom in the terrorist networks. Lord Bingham continued:

> "33. ... It is plain that sections 21 and 23 of the 2001 Act do not address the threat presented by UK nationals since they do not provide for the certification and detention of UK nationals. It is beside the point that other sections of the 2001 Act and the 2000 Act do apply to UK nationals, since they are not the subject of derogation, are not the subject of complaint and apply equally to foreign nationals. Yet the threat from UK nationals, if quantitatively smaller, is not said to be qualitatively different from that from foreign nationals. It is also plain that sections 21 and 23 do permit a person certified and detained to leave the United Kingdom and go to any other country willing to receive him, as two of the appellants did when they left for Morocco and France respectively .... Such freedom to leave is wholly explicable in terms of immigration control: if the British authorities wish to deport a foreign national but cannot deport him to country 'A' because of *Chahal* their purpose is as well served by his voluntary departure for country 'B'. But allowing a suspected international terrorist to leave our shores and depart to another country, perhaps a country as close as France, there to pursue his criminal designs, is hard to reconcile with a belief in his capacity to inflict serious injury to the people and interests of this country. ...
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> 35. The fifth step in the appellants' argument permits of little elaboration. But it seems reasonable to assume that those suspected international terrorists who are UK nationals are not simply ignored by the authorities. When [the fifth applicant] was released from prison by SIAC on bail ..., it was on condition (among other things) that he wear an electronic monitoring tag at all times; that he remain at his premises at all times; that he telephone a named security company five times each day at specified times; that he permit the company to install monitoring equipment at his premises; that he limit entry to his premises to his family, his solicitor, his medical attendants and other approved persons; that he make no contact with any other person; that he have on his premises no computer equipment, mobile telephone or other electronic communications device; that he cancel the existing telephone link to his premises; and that he install a dedicated telephone link permitting contact only with the security company. The appellants suggested that conditions of this kind, strictly enforced, would effectively inhibit terrorist activity. It is hard to see why this would not be so.
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> 36. In urging the fundamental importance of the right to personal freedom, as the sixth step in their proportionality argument, the appellants were able to draw on the long libertarian tradition of English law, dating back to chapter 39 of Magna Carta 1215, given effect in the ancient remedy of habeas corpus, declared in the Petition of Right 1628, upheld in a series of landmark decisions down the centuries and embodied in the substance and procedure of the law to our own day. ... In its treatment of article 5 of the European Convention, the European Court also has recognised the prime importance of personal freedom. ...
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> 43. The appellants' proportionality challenge to the Order and section 23 is, in my opinion, sound, for all the reasons they gave and also for those given by the European

Commissioner for Human Rights and the Newton Committee. The Attorney General could give no persuasive answer."

21. In addition, the majority held that the 2001 Act was discriminatory and inconsistent with Article 14 of the Convention, from which there had been no derogation. The applicants were in a comparable situation to United Kingdom nationals suspected of being international terrorists, with whom they shared the characteristics of being irremovable from the United Kingdom and being considered a threat to national security. Since the detention scheme was aimed primarily at the protection of the United Kingdom from terrorist attack, rather than immigration control, there was no objective reason to treat the applicants differently on grounds of their nationality or immigration status.

22. Although the applicants' appeal had included complaints under Articles 3 and 16 of the Convention, the House of Lords did not consider it necessary to determine these complaints since it had found the derogation to be unlawful on other grounds.

23. It granted a quashing order in respect of the derogation order, and a declaration under section 4 of the Human Rights Act (see paragraph 94 below) that section 23 of the 2001 Act was incompatible with Articles 5 § 1 and 14 of the Convention insofar as it was disproportionate and permitted discriminatory detention of suspected international terrorists.

C. The certification proceedings: the "generic" judgment and appeals

24. Meanwhile, SIAC's hearing of the applicants' individual appeals against certification commenced in May 2003, after the Court of Appeal had given judgment in the derogation proceedings but before the above judgment of the House of Lords.

25. For the purposes of each appeal to SIAC, the Secretary of State filed an "open statement" summarising the facts connected to the decision to certify each applicant and as much of the supporting evidence which the Secretary of State considered could be disclosed without giving rise to any risk to national security. A further, "closed" statement of facts and evidence was also placed before SIAC in each case.

26. On 29 October 2003 SIAC issued a "generic" judgment in which it made a number of findings of general application to all the appeals against certification.

As regards preliminary issues, it found, *inter alia*, that it had jurisdiction to hear an appeal against certification even where the person certified had left the United Kingdom and the certificate had been revoked. It held that the tests whether reasonable grounds existed for suspicion that a person was a "terrorist" and for belief that his presence in the United Kingdom was a risk to national security, within the meaning of section 21 of the 2001 Act,

fell “some way short of proof even on the balance of probabilities”. It further held that “reasonable grounds could be based on material which would not be admissible in a normal trial in court, such as hearsay evidence of an unidentified informant”. The weight that was to be attached to any particular piece of evidence was a matter for consideration in the light of all the evidence viewed as a whole. Information which might have been obtained by torture should not automatically be excluded, but the court should have regard to any evidence about the manner in which it was obtained and judge its weight and reliability accordingly.

SIAC held that the detention provisions in the 2001 Act should be interpreted in the light of the terms of the derogation. The threat to the life of the nation was not confined to activities within the United Kingdom, because the nation's life included its diplomatic, cultural and tourism-related activities abroad. Moreover, attacks on the United Kingdom's allies could also create a risk to the United Kingdom, given the interdependence of countries facing a global terrorist threat. The derogation identified the threat as emanating from al'Qaeda and its associates. It was therefore necessary, in respect of both the “national security” and the “international terrorist” limbs of section 21 of the 2001 Act, to show reasonable grounds for suspicion that the person certified was part of a group which was connected, directly or indirectly, to al'Qaeda. Even if the main focus of the group in question was a national struggle, if it backed al'Qaeda for a part of its agenda and the individual nonetheless supported the group, it was a legitimate inference that he was supporting and assisting al'Qaeda.

SIAC also made a number of findings of fact of general application concerning organisations alleged by the Secretary of State to be linked to al'Qaeda. These findings were based on both “open” and “closed” material. Thus, it held, for example, that the GSPC, or Salafist Group for Call and Combat, which was formed in Algeria in 1998, was an international terrorist organisation linked to al'Qaeda through training and funding, but that the earlier Algerian organisation, Armed Islamic Group (GIA), was not. The Egyptian Islamic Jihad (EIJ) was either part of al'Qaeda or very closely linked to it. The Chechen Arab Mujahaddin was an international terrorist group, pursuing an anti-West agenda beyond the struggle for Chechen independence, with close links to al'Qaeda. SIAC also identified as falling within the terms of the derogation a group of primarily Algerian extremists centred around Abu Doha, an Algerian who had lived in the United Kingdom from about 1999. It was alleged that Abu Doha had held a senior role in training camps in Afghanistan and had many contacts in al'Qaeda, including a connection with the Frankfurt cell which had been accused of plotting to bomb the Strasbourg Christmas market in December 2000. Abu Doha was arrested in February 2001, following an extradition request from the United States of America, but his group remained active.

27. The applicants appealed against SIAC's ruling that evidence which might have been obtained by torture was admissible. For the purposes of the appeal, the parties agreed that the proceedings before SIAC to challenge certification fell within Article 5 § 4 of the Convention and as such had to satisfy the basic requirements of a fair trial. It was not therefore necessary to decide whether Article 6 also applied and the issue was left open.

On 11 August 2004 the Court of Appeal, by a majority, upheld SIAC's decision ([2004] EWCA Civ 1123).

On 8 December 2005 the House of Lords held unanimously that the evidence of a suspect or witness which had been obtained by torture had long been regarded as inherently unreliable, unfair, offensive to ordinary standards of humanity and decency and incompatible with the principles on which courts should administer justice. It followed that such evidence might not lawfully be admitted against a party to proceedings in a United Kingdom court, irrespective of where, by whom and on whose authority the torture had been inflicted. Since the person challenging certification had only limited access to the material advanced against him in the proceedings before SIAC, he could not be expected to do more than raise a plausible reason that material might have been so obtained and it was then for SIAC to initiate the relevant enquiries. The House of Lords therefore allowed the applicants' appeals and remitted each case to SIAC for reconsideration ([2005] UKHL 71).

28. SIAC's conclusions as regards each applicant's case are set out in paragraphs 29-69 below. Of the sixteen individuals, including the eleven applicants, detained under Part 4 of the 2001 Act, one had his certificate cancelled by SIAC.

D. The certification proceedings: the individual determinations

1. The first applicant

29. The first applicant was born in a Palestinian refugee camp in Jordan, is stateless, and was granted indefinite leave to remain in the United Kingdom in 1997. On 17 December 2001 the first applicant was certified by the Secretary of State as a suspected international terrorist under section 21 of the 2001 Act. On 18 December 2001 a deportation order was made on the same grounds.

30. The first applicant was taken into detention on 19 December 2001. He subsequently appealed to SIAC against certification and the decision to make a deportation order. On 24 July 2002 he was transferred to Broadmoor Secure Mental Hospital.

31. The first applicant and his representatives were served with the Secretary of State's “open” material, including a police report which showed that large sums of money had moved through the four bank accounts in his

name. SIAC and the special advocate instructed on behalf of the first applicant were in addition presented with "closed" evidence. The first applicant gave oral evidence to SIAC, assisted by an interpreter and called one witness to testify to his good character. He also filed four medical reports concerning his mental health. SIAC observed in its judgment of 29 October 2003:

> "We are acutely aware that the open material relied on against the applicant is very general and that the case depends in the main upon assertions which are largely unsupported. The central allegation is that he has been involved in fund raising and distribution of those funds for terrorist groups with links to Al Qa'eda. It is also said that he has procured false documents and helped facilitate the movement of jihad volunteers to training camps in Afghanistan. He is said to be closely involved with senior extremists and associates of Osama Bin Laden both in the United Kingdom and overseas. His case is and always has been that he is concerned and concerned only with welfare projects, in particular a school in Afghanistan for the children of Arab speakers there and projects such as construction of wells and provision of food to communities in Afghanistan. He has also raised money for refugees from Chechnya. Any contact with so-called extremists has been in that context and he had no reason to believe they were terrorists or were interested in terrorism.
>
> We recognise the real difficulties that the Appellant has in making this appeal. We have made appropriate allowance for those difficulties and his mental problems. We note [his counsel's] concerns that there has been gross oversimplification by the Security Service of the situation which is, he submits, highly complex and a tendency to assume that any devout Muslim who believed that the way of life practised by the Taliban in Afghanistan was the true way to follow must be suspect. We note, too, that initially the Respondent asserted that all the Appellant's fund raising activities were for the purpose of assisting terrorism and that it was only when evidence was produced by the Appellant to show that there were legitimate charitable objectives that he accepted that at least some money was raised for those purposes. Insofar as connections with named individuals are relied on, we bear in mind that some of them, who are alleged to be involved in terrorism, have appeals pending ... and that allegations against others have not been tested nor have alleged links been able to be explained.
>
> ...
>
> [The first applicant's counsel] accepted, as he had to, the unreliability of the Applicant's evidence about his movements in the 1990s, but asked us not to hold it against him because of his mental state. We do not accept that we can do that. The lies were a deliberate attempt to rebut the allegation that he had been a mujahid in Afghanistan, saying that he spent three years in a Jordanian prison. There was an overstatement by the police of the amount involved through the bank account. This we accept, but there was still a substantial sum of money going through them. And [the applicant's counsel] submitted that the allegation was that he had provided false documents for others not for himself. Thus his false Iraq passport was not material. It does however show an ability to obtain a false passport. [The applicant's counsel] attacked the reliability of the intelligence relied on against the Appellant since it was only belatedly accepted that he had been involved in genuine charitable work and that some of the money going through his account and raised by him was for such a purpose. We recognise the danger that all activities by one who is under suspicion

> may be regarded as themselves suspicious and that there may not be a fair consideration of all material to see whether it truly does support the suspicion. We have considered all the material, in particular that which is closed, with that danger in mind.
>
> As we have said, the open evidence taken in isolation cannot provide the reasons why we are dismissing this appeal and we sympathise with [the first applicant's counsel's] concerns that he had a most difficult task. We were not impressed with the appellant as a witness, even making all allowances for his mental state and the difficulties under which he was labouring. He was often evasive and vague and has admittedly told lies in relation to his movements in the 1990s. His explanations about some of the transactions recorded in his bank accounts we have found difficult to follow or accept. We should say that we do not consider that the Respondent's case is significantly advanced by what has been said about the Appellant's involvement with Algeria or Chechnya; the case depends essentially on the evidence about the Appellant's dealings with Afghanistan and with terrorists known to have links with Al Qa'eda.
>
> It is clear that the Appellant was a very successful fundraiser and, more importantly, that he was able to get the money to Afghanistan. Whatever his problems, he was able to and was relied on to provide an efficient service. His explanations both of who were the well known terrorists whose children were at the school and of the various of the more substantial payments shown in the bank accounts are unsatisfactory. He was vague where, having regard to the allegations made against him, we would have expected some detail.
>
> ...
>
> We have considered all the evidence critically. The closed material confirms our view that the certification in this case was correct. There is both a reasonable belief that the Appellant's presence in the United Kingdom is a risk to national security and a reasonable suspicion that he is a terrorist within the meaning of section 21 of the 2001 Act. This appeal is accordingly dismissed."

32. In accordance with the terms of the 2001 Act, the first applicant's case was reviewed by SIAC six months later. In its judgment of 2 July 2004 SIAC found that:

> "The updated open generic material ... continues to show that there is a direct terrorist threat to the United Kingdom from a group or groups of largely North African Islamic extremists, linked in various ways to Al Qa'eda.
>
> Although some of his contacts have been detained, the range of extremists prominent in various groups was such that he would have no difficulty and retains the will and ability to add his considerable experience of logistic support to them in pursuit of the extremist Islamic agenda in the UK. The certificate is properly maintained."

33. SIAC reviewed the case again on 15 December 2004 and again found that the certificate should be maintained.

2. The second applicant

34. The second applicant is a citizen of Morocco born on 28 February 1963. He entered the United Kingdom as a visitor in 1985 and was granted leave to remain as a student. On 21 June 1988 he was granted indefinite leave to remain on the basis of his marriage to a British citizen, which marriage subsequently broke down. In 1990 and again in 1997 he applied for naturalisation, but no decision was made on those applications. In 2000 he remarried another British citizen, with whom he has a child.

35. On 17 December 2001 the second applicant was certified by the Secretary of State as a suspected international terrorist under section 21 of the 2001 Act. A deportation order was made on the same date. The second applicant was taken into detention on 19 December 2001. He appealed against the certification and deportation order but, nonetheless, elected to leave the United Kingdom for Morocco on 22 December 2001. He pursued his appeals from Morocco.

36. The "open" case against the second applicant was summarised by SIAC in its judgment of 29 October 2003 as follows:

> "(1) he has links with both the GIA and the GSPC [Algerian terrorist groups: see paragraph 26 above] and is a close associate of a number of Islamic extremists with links to Al Qa'eda and/or Bin Laden.
>
> (2) he has been concerned in the preparation and/or instigation of acts of international terrorism by procuring high-tech equipment (including communications equipment) for the GSPC and/or Islamic extremists in Chechnya led by Ibn Khattab and has also procured clothing for the latter group.
>
> (3) he has supported one or more of the GIA, the GSPC and the Ibn Khattab faction in Chechnya by his involvement in fraud perpetrated to facilitate the funding of extremists and storing and handling of propaganda videos promoting the jihad.
>
> The Secretary of State's open case expands on those allegations and further indicates the use of at least one alias and a pattern of association with individuals known or assessed to be involved in terrorism [five individuals were identified]. All these were described by [counsel for the Secretary of State] as 'known Algerian Islamic extremists'.
>
> Witness B [for the Secretary of State] confirmed that the allegation against [the second applicant] is that he is a member of a network, rather than a member of any particular organisation such as the GSPC or the GIA".

SIAC continued by explaining the findings it had made against the applicant:

> "Like the other Appellants, [the second applicant] is not charged in these proceedings with a series of individual offences. The issue is whether, taking the evidence as a whole, it is reasonable to suspect him of being an international terrorist (as defined). When we look at the material before us, as we do, we treat it cumulatively. It might be that the material relating to fraud alone, or to clothing alone, or to videos alone, or to associations, would not by itself show that a person was in

any way involved in terrorism or its support. But we need to assess the situation when various factors are found combined in the same person. Those factors are as follows. First is his involvement in acts of fraud, of which he must be aware but of which he seeks to provide no explanation, excusing himself apparently on the ground that he is not aware which particular act or acts the Secretary of State has in mind. Secondly, he has been involved in raising consciousness (and hence in raising money) about the struggle in Chechnya, and has been doing so in a specifically Islamic (rather than a merely humanitarian) context, using and distributing films which, according to the evidence before us, tend to be found in extremist communities. In the generic evidence, we have dealt with the Chechen Arab Mujahaddin and the significance of support for it which we accepted is given in full knowledge of its wider jihadist agenda. ... [He] has done so as a close associate of Abu Doha. Given the information we have about Abu Doha which, as we have said, we have no reason to doubt, we regard [the second applicant's] claim that Abu Doha was doing nothing illegal (save that he was hiding his activities from the Russians) as entirely implausible. ... [He] has had associations with a number of other individuals involved in terrorism. They are for the most part specified by name in the open case but are not mentioned in his own statement. ...

These are the five features which meet in [the second applicant]. No doubt the Secretary of State could have made his case by demonstrating various combinations of them in a single person. With all five, we regard the case as compelling. We are entirely satisfied that the Secretary of State is reasonable in his suspicion that [the second applicant] supports or assists the GIA, the GSPC, and the looser group based around Abu Doha, and in his belief that at any time [the second applicant] is in the United Kingdom his presence here is a risk to national security."

3. The third applicant

37. The third applicant is of Tunisian nationality, born in 1963 and resident in the United Kingdom from about 1994. He was certified by the Secretary of State on 18 December 2001 and detained the following day.

38. In its judgment of 29 October 2003, dismissing the third applicant's appeal against certification, SIAC observed:

"The case against the Appellant, as framed in the open material, is that he is a key member of an extreme Islamist group known as the Tunisia Fighting Group (TFG). It is said that this group was formed during 2000 and had its origins in the Tunisian Islamic Front (known as the FIT since the name is in French). Its ultimate aim is said to be to establish an Islamic State in Tunisia. It is further asserted that the Appellant has been in regular contact with a number of known extremists including some who have been involved in terrorist activities or planning. Both the FIT and the TFG are said to have links with Al Qa'eda.

The open material deployed against the Appellant is not at all substantial. The evidence which is relied on against him is largely to be found in the closed material. This has meant that he has been at a real disadvantage in dealing with the case because he is not aware of those with whom he is alleged to have been in contact.

...

> In his statement the Appellant says that he has never heard of the TFG and is certainly not a member of it. ... We have no doubts that the TFG exists ... [and] also that it has links to Al Qa'eda. Our reasons for so concluding must be given in the closed judgment.
>
> In May 1998 the Appellant and some 10 others were arrested in a joint Special Branch and Security Service operation pursuant to warrants under the Prevention of Terrorism Act. The Appellant was released without charge and in due course received £18,500 compensation for wrongful arrest. The arrests were in connection with allegations of involvement in a plot to target the World Cup in France. We of course give weight to the absence of any admissible evidence to support the Appellant's involvement in the alleged conspiracy, but it is not and cannot be the answer to this appeal. We have to consider all the material to see whether there are reasonable grounds for a belief or suspicion of the kind referred to in section 21(a) or (b) of the 2001 Act.
>
> ...
>
> We are satisfied that the Appellant is a member of the TFG, itself an international terrorist organisation within the scope of the 2001 Act, and that he has links with an international terrorist group. We appreciate that our open reasons for being so satisfied are sparse. That is because the material which drives us to that conclusion is mainly closed. We have considered it carefully and in the context of knowing the appellant denies any involvement in terrorism or any knowing support for or assistance to terrorists. We have therefore been careful only to rely on material which cannot in our judgment have an innocent explanation."

39. SIAC reached similar conclusions in its periodic reviews of the case on 2 July and 15 December 2004.

4. The fourth applicant

40. The fourth applicant was born in Algeria in 1971 and first entered the United Kingdom in 1994. In May 1997 he was arrested and charged with a number of offences, including a conspiracy to export to Algeria material which it was alleged was to be used for the purposes of terrorism. It was alleged that he was a member of GIA. The case against the applicant was abandoned in March 2000 when a key witness, a Security Service agent, who was to give evidence concerning the need for civilians to defend themselves against atrocities allegedly committed by the Algerian Government, decided that it was too dangerous for him to give evidence.

41. In 1998 the fourth applicant married a French national. He became a French citizen in May 2001, although he did not inform the United Kingdom authorities of this. The Secretary of State certified him under section 21 of the 2001 Act on 17 December 2001 and he was detained on 19 December 2001. On 13 March 2002 he left for France, where he was interviewed on arrival by security officials and then set at liberty. Since he had left the United Kingdom, the certificate against him was revoked and the revocation was back-dated to 22 March 2002.

42. In its judgment of 29 October 2003, SIAC held that the back-dating of the revocation meant that the fourth applicant could not be regarded as having been certified at the time he lodged his appeal and that, therefore, he had no right of appeal. It nonetheless decided to consider the appeal on the basis that this conclusion might be wrong. Since the Secretary of State could not reasonably have known at the time the certificate was issued that the applicant was a French citizen and could safely be removed to France, it could not be said on that ground that the certificate should not have been issued. SIAC therefore continued by assessing the evidence against him:

> "In reaching our decision, we will have to consider not only the open but also the closed material. The Appellant appears to have suspected that he was the subject of surveillance over much of the relevant period.
>
> We are conscious of the need to be very careful not to assume guilt from association. There must be more than friendship or consorting with those who are believed to be involved in international terrorism to justify a reasonable suspicion that the Appellant is himself involved in those activities or is at least knowingly supporting or assisting them. We bear in mind [his solicitor's] concerns that what has happened here is an attempt to resurrect the prosecution with nothing to add from his activities since. Detention must be regarded as a last resort and so cannot be justified on the basis of association alone and in any event the guilt of the associates has never been established. ...
>
> Nonetheless, continued association with those who are suspected of being involved in international terrorism with links to Al Qa'eda in the light of the reasonable suspicion that the Appellant was himself actively involved in terrorist activities for the GIA is a matter which can properly be taken into account. The GSPC, which broke away from the GIA, has links to Al Qa'eda and the Appellant has continued to associate with those who took to the GSPC rather than the GIA. We are in fact satisfied that not only was the Appellant actively involved initially with the GIA and then with the GSPC but also that he provided false documentation for their members and for the Mujahaddin in Chechnya as is alleged in the open statement. But we accept that his activities in 2000 and 2001 justify the use of the expression that he had been maintaining a low profile, and we make that observation having regard to both open and closed material. Nonetheless, a low profile does not mean that he is not properly to be regarded as an international terrorist within the meaning of section 21. An assessment has to be made of what he may do in the light of what he has done and the fact that he has shown willingness and the ability to give assistance and support in the past and continues the associations and to provide some help (e.g. the use of his van) is highly relevant.
>
> We have not found this aspect of the Appellant's case at all easy. We have given full weight to all [his solicitor's] submissions which were so persuasively put before us but in the end have reached the view that, looking at the evidence as a whole, the decision to issue a certificate was not wrong. Accordingly, we would not have allowed the appeal on the facts."

5. The fifth applicant

43. The fifth applicant was born in Algeria in 1969. In his statement to SIAC he claimed to have developed polio as a child which left him with a permanently weak and paralysed right leg. He was arrested and tortured by the Algerian Government in 1991, whereupon he left Algeria for Saudi Arabia. In 1992 he moved to Pakistan and travelled to Afghanistan on several occasions. In August 1995 he entered the United Kingdom and claimed asylum, alleging in the course of that claim that his leg had been injured by a shell in Afghanistan in 1994. His asylum claim was refused and his appeal against the refusal was dismissed in December 1999. The applicant married a French citizen and had a child with her.

44. He was certified by the Secretary of State under section 21 of the 2001 Act on 17 December 2001 and detained on 19 December 2001. In its judgment of 29 October 2003, dismissing the fifth applicant's appeal against certification, SIAC observed:

> "The open statements provided to justify the certification do not refer to a great deal of source material and so consist mainly of assertions. As with most of these appeals, the main part of the evidence lies in closed material and so, as we are well aware, the Appellants have been at a disadvantage in that they have not been able to deal with what might be taken to be incriminating evidence. The Special Advocates have been able to challenge certain matters and sometimes to good effect. That indeed was the case in relation to a camp in Dorset attended by a number of those, including the Appellant, of interest to the Security Service. ...
>
> The case against the Appellant is that he was a member of the GIA and, since its split from the GIA, of the GSPC. He is associated with a number of leading extremists, some of whom are also members of or associated with the GSPC, and has provided active support in the form of the supply of false documents and facilitating young Muslims from the United Kingdom to travel to Afghanistan to train for jihad. He is regarded as having undertaken an important role in the support activities undertaken on behalf of the GSPC and other Islamic extremists in the United Kingdom and outside it. All this the Appellant denies and in his statement he gives innocent explanations for the associations alleged against him. He was indeed friendly with in particular other Algerians in the United Kingdom and, so far as [the fourth applicant] was concerned, the families were close because, apart from anything else, their respective wives were French. He attended [the eighth applicant's] mosque. He was an impressive preacher and the appellant says he listened but was never involved. Indeed he did not know [the eighth applicant] except through Chechen relief, which the Appellant and many hundreds of other Muslims supported, and he had never spoken to him on the telephone. He had on occasions approached [the eighth applicant] at Friday prayers at the mosque if he wanted guidance on some social problem."

SIAC referred to "open" surveillance reports which showed the applicant to have been in contact with other alleged members of GIA and the GSPC, including at a camp in Dorset in July 1999. Further "open" evidence concerned his "unhelpful" and "not altogether truthful" responses to

questioning by officers of the Security Service in July and September 2001. SIAC continued:

> "Reliance is placed on various articles found in his house when he was arrested. These include a copy of the fatwa issued by Bin Laden. The Appellant says he had never seen it and could not explain its presence. A GSPC communiqué was, he says, probably one handed out at the mosque. Analysis of the hard drive of his computer showed it had visited an internet site that specialised in United States military technology. This was not something which could be relevant to the Appellant's studies. And a hand drawn diagram of a missile rocket he has not seen before. It might, he thinks, have been in a book about Islam he had bought second hand from the mosque.
>
> We note the denials, but we have to consider all the evidence. As will be clear from this judgment, we have reason to doubt some of the Appellant's assertions. But the closed material confirms our view that there is indeed reasonable suspicion that the Appellant is an international terrorist within the meaning of section 21 and reasonable belief that his presence in the United Kingdom is a risk to national security. We have no doubt that he has been involved in the production of false documentation, has facilitated young Muslims to travel to Afghanistan to train for jihad and has actively assisted terrorists who have links with Al Qa'eda. We are satisfied too that he has actively assisted the GSPC. We have no hesitation in dismissing his appeal."

45. On 22 April 2004, because of concerns about his health, the fifth applicant was released from prison on bail on strict conditions, which amounted to house arrest with further controls. In its review judgment of 2 July 2004, SIAC held:

> "... in granting bail, [SIAC] did not revise its view as to the strength of the grounds for believing he was an international terrorist and a threat to national security. The threat could be managed proportionately in his case in view of his severe mental illness. That however is no reason to cancel the certificate. There might be circumstances in which he breaches the terms of his bail or for other reasons it was necessary to revoke it. The need for the certificate to continue must depend on whether the terms of the statute and of the derogation continue to be met.
>
> A number of his contacts remain at large including some who are regarded as actively involved in terrorist planning. There is nothing to suggest that his mental illness has diminished his commitment to the extremist Islamic cause; he has the experience and capacity to involve himself once more in extremist activity. The bail restraints on him are essential; those are imposed pursuant to his certification and the SIAC dismissal of his appeal against it. The certificate is properly maintained."

46. On 15 December 2004, SIAC again reviewed the case and decided that the certificate should be maintained.

6. The sixth applicant

47. The sixth applicant was born in Algeria in 1967 and was resident in the United Kingdom from 1989. The Secretary of State issued a certificate against him on 17 December 2001 and he was taken into detention on 19 December 2001.

48. In its judgment of 29 October 2003 SIAC observed as follows:

> "Although we have to make our decision on the basis both of the open and of the closed material, it is important to indicate the case against [the sixth applicant] as it has been set out by the Secretary of State in open material, because that is the case that [the sixth applicant] knows that he has to meet. In assessing his statement and the other evidence and arguments submitted on his behalf, we remind ourselves always that he is not aware of the Secretary of State's closed material, but nevertheless that he is not operating entirely in a vacuum because of the open allegations; and we may test the Appellant's own case by the way he deals with those allegations.
>
> The Secretary of State's case against [the sixth applicant] is summarised as follows:
>
> (1) he belongs to and/or is a member of the GSPC, and previously was involved with the GIA;
>
> (2) he has supported and assisted the GSPC (and previously the GIA) through his involvement in credit card fraud which is a main source of income in the United Kingdom for the GSPC;
>
> (3) from about August 2000, [the sixth applicant] took on an important role in procuring telecommunication equipment for the GSPC and the provision of logistical support for satellite phones by way of purchase and allocation of airtimes for those phones;
>
> (4) he has also played an important part in procuring telecommunications equipment and other equipment for the Mujahedin fighting in Chechnya – that is to say the faction which until 2002 was under the command of Ibn Khattab."

SIAC then reviewed the open evidence before it regarding the purchase by Abu Doha, assisted by the sixth and seventh applicants, of a number of satellite telephones and other telecommunications equipment to the value of GBP 229,265 and the nature and extent of the connection between the sixth and seventh applicants. It concluded:

> "In the circumstances we have set out, it appears to us that the Secretary of State has ample ground for suspicion that [the sixth applicant's] procurement activities were directed to the support of the extremist Arab Islamist faction fighting in Chechnya. That support arises from [the sixth applicant's] connexions with and support of the GSPC. We emphasise, as is the case with other appeals as well, that it is the accumulation of factors, each lending support to the others rather than undermining other points, providing colour and context for the activities seen as a whole which is persuasive; it would be wrong to take a piece in isolation, thereby to diminish its significance and to miss the larger picture. The generic judgment supports these conclusions. These are activities falling centrally within the derogation. [The sixth applicant] has provided only implausible denials and has failed to offer credible alternative explanations. That is sufficient to determine his appeal, without making any further reference to the Secretary of State's other allegations which, as was acknowledged in the open statement and in open evidence before [SIAC], can be properly sustained only by examination of the closed material."

49. SIAC reviewed the case on 2 July 2004 and 28 February 2005 and, on each occasion, decided that there were still grounds for maintaining the certificate.

7. The seventh applicant

50. The seventh applicant was born in Algeria in 1971 and apparently entered the United Kingdom using false French identity papers in or before 1994. On 7 December 2001 he was convicted of a number of driving offences and sentenced to four months' imprisonment. He was certified by the Secretary of State on 5 February 2002 and taken into detention pursuant to the certificate as soon as his prison sentence ended on 9 February 2002.

51. In its judgment of 29 October 2003, SIAC noted that the allegations against the seventh applicant were that he had been a member of the GSPC since 1997 or 1998, and before that a member of the GIA; that his contacts with leading GSPC members in the United Kingdom showed that he was a trusted member of the organisation; and that he had been involved with Abu Doha and the sixth applicant in purchasing telecommunications equipment for use by extremists in Chechnya and Algeria. It further noted that:

> "[The seventh applicant] did not give evidence before [SIAC] and, indeed, chose not to attend the hearing of his appeal. His statement, which we have of course read, is in the most general terms, and, perhaps not surprisingly, [his counsel's] submissions, both oral and written, were similarly general. [The seventh applicant's] approach to the present proceedings of themselves and the fact that he did not give oral evidence or make any detailed written statement are not matters to be put in the scale against him. We well understand the difficulty that Appellants have in circumstances where the allegations against them are only summarised and where much of the evidence on which those allegations are based cannot, for reasons of national security, be communicated to the Appellants themselves. However, [the seventh applicant] is in the best position to know what his activities and motives have been in the relevant period. Nothing prevents him from giving a full description and account of those activities if he wishes to do so. The fact that he has chosen to provide no detailed account of his activities means that he has provided no material to counter the evidence and arguments of others".

SIAC concluded that the open and closed material supported the allegations against the seventh applicant and it dismissed his appeal.

52. In its review judgments of 2 July and 15 December 2004 SIAC decided that the certificate should be maintained.

8. The eighth applicant

53. The eighth applicant is a Jordanian national, born in Bethlehem in 1960. He arrived in the United Kingdom on 16 September 1993 and claimed asylum. He was recognised as a refugee and granted leave to remain until 30 June 1998. On 8 May 1998 he applied for indefinite leave to remain but the application had not been determined at the time of the coming into force of the 2001 Act.

54. The eighth applicant was convicted *in absentia* in Jordan for his involvement in terrorist attacks there and in relation to a plot to plant bombs to coincide with the millennium. He was investigated in February 2001 by anti-terrorism police officers in connection with a plot to cause explosions at the Strasbourg Christmas market in December 2000, but no charges were brought against him. When the 2001 Act was passed he went into hiding. He was arrested on 23 October 2002 and was immediately made the subject of a section 21 certificate and taken into detention. On the same date a deportation order was made against him.

55. In its judgment of 8 March 2004, dismissing the eighth applicant's appeal against certification, SIAC observed as follows:

> "[The eighth applicant's counsel], on instructions from the appellant, informed us that his client had chosen not to attend the hearing or to participate in any way. He had read the decisions relating to the appellants who had been certified when the 2001 Act came into force and the generic judgment and so felt certain that the result of his appeal was a foregone conclusion. There had been many references to his role in the other appeals and some had been certified and detained, at least in part, on the basis that they associated with him. Since that association was regarded as sufficient to justify their continued detention, he considered that the decision on his appeal had, in effect, already been taken. He had chosen not to play any part precisely because he has no faith in the ability of the system to get at the truth. He considered that the SIAC procedure had deliberately been established to avoid open and public scrutiny of the respondent's case, which deprived individuals of a fair opportunity to challenge the case against them.
>
> Having said that, [the eighth applicant's counsel] made it clear that the appeal was not being withdrawn. It was accordingly necessary for us to consider it and to take into account the statement made by the appellant. [His counsel] emphasised a number of matters which, he suggested, should be regarded as favourable to the appellant's contention that he was not and never had been involved in terrorism within the meaning of the 2001 Act. Furthermore, the allegations showed that a distorted and over-simplified view was being taken by the security services of the appellant's activities and his role as a respected teacher and believer in the rights of Islamic communication throughout the world.
>
> We should make it clear that we have considered the case against the appellant on its merits. We have not been influenced by any findings made in other appeals or the generic judgments. One of the reasons why this judgment has taken a long time to be prepared was the need for us to read through and consider the evidence, both open and closed, that has been put before us. There is much more of it than in most of the other appeals. That is a reflection of the fact that the appellant has been associated with and had dealings with many of the others who have been certified and with individuals and groups themselves linked to Al Qa'ida. We see no reason to dissent from the views expressed in the generic judgment of the significance of the various individuals and groups referred to in it. But that does not mean we have therefore automatically accepted its views. We draw attention to the fact that the panel which produced the generic judgment was not the same constitution as this panel and that such input as there was by the chairman of this panel to the generic judgment was limited to issues of law. We have considered the case against the appellant on the material put before us in this appeal. ...

When it came to the closed session, the Special Advocates informed us that after careful consideration they had decided that it would not be in the appellant's interests for them to take any part in the proceedings. We were very concerned at this, taking the view that the decision was wrong. The appeal was still being pursued and the appellant did not know what was relied on against him in the closed material. We were unable to understand how in the circumstances it could not be in his interests for the Special Advocates, at their discretion, to elicit or identify matters favourable to the appellant and to make submissions to us to seek to persuade us that evidence was in fact unreliable or did not justify the assessment made. When we asked [one of the two Special Advocates appointed on behalf of the eighth applicant] to tell us why he had decided as he had he told us that he could not do so since to do so would not be in the appellant's interest. We adjourned to enable the Special Advocates to seek to discover from the appellant through his representatives whether he did wish them to do what they could on his behalf and we also contacted the Solicitor General who had appointed the Special Advocates to seek her help in trying to persuade them to assist us. The appellant's representatives indicated that they had nothing to say on the subject and the Solicitor General took the view that it would be wrong for her to intervene in any way. Our further attempts to persuade the Special Advocates to change their minds were unsuccessful and since we could not compel them to act in any particular way we had to proceed without them. [Counsel for the Secretary of State], at our request, identified various matters which might be regarded as possibly exculpatory and we ourselves raised other matters in the course of the closed hearing.

We are conscious that the absence of a Special Advocate makes our task even more difficult than it normally is and that the potential unfairness to the appellant is the more apparent. We do not doubt that the Special Advocates believed they had good reasons for adopting the stance that they did and we are equally sure that they thought long and hard about whether they were doing the right thing. But we are bound to record our clear view that they were wrong and that there could be no reason for not continuing to take part in an appeal that was still being pursued. ... As it happens, the evidence in this case against the appellant is so strong that no Special Advocates, however brilliant, could have persuaded us that reasonable suspicion had not been established so that the certification was not justified. Thus the absence of Special Advocates has not prejudiced the appellant. ...”

56. SIAC then summarised the open case against the applicant, which was that he had associated with and acted as spiritual adviser to a number of individuals and groups linked with al'Qaeda. He held extreme and fundamentalist views and had been reported as having, in his speeches at a London mosque, given his blessing to the killing of Jews and Americans, wherever they were. SIAC concluded:

“We are satisfied that the appellant's activities went far beyond the mere giving of advice. He has certainly given the support of the Koran to those who wish to further the aims of Al Qa'ida and to engage in suicide bombing and other murderous activities. The evidence is sufficient to show that he has been concerned in the instigation of acts of international terrorism. But spiritual advice given in the knowledge of the purposes for which and the uses to which it is to be put provides assistance within the meaning of s.21(4) of the 2001 Act.

...

> There are a large number of allegations made. We see no point in dealing with them seriatim. We have indicated why we have formed the view that the case made against the appellant is established. Indeed, were the standard higher than reasonable suspicion, we would have had no doubt that it was established. The appellant was heavily involved, indeed was at the centre in the United Kingdom of terrorist activities associated with Al Qa'ida. He is a truly dangerous individual and these appeals are dismissed."

9. The ninth applicant

57. The ninth applicant is Algerian, born in 1972. In 1991 he left Algeria for Afghanistan, where he taught Arabic in a refugee camp. He claimed asylum in the United Kingdom in 1993. In 1994 he was granted leave to remain for four years and in 2000 he was granted indefinite leave to remain, on the basis that he was to be regarded as a refugee. On four occasions, the last in May 1998, the applicant was arrested and released without charge. The first three arrests related to credit card fraud. The arrest in May 1998 related to alleged terrorist activities and the applicant was subsequently paid compensation by the police for false arrest.

58. The ninth applicant was certified by the Secretary of State and made the subject of a deportation order on 22 April 2002. He was detained on the same day. According to the evidence of one of the witnesses for the Secretary of State, he was not certified, with the other applicants, in December 2001 because one of his files had been lost.

59. In its judgment of 29 October 2003, SIAC noted that the allegations against the ninth applicant were that he was an active supporter of the GSPC and had raised considerable sums of money for it through fraud. There was evidence that the applicant had in the past been found, by customs officers, attempting to enter the United Kingdom by ferry with large amounts of cash and that he had close links with others who had been convicted of credit card fraud. SIAC held that evidence of involvement in fraud did not establish involvement in terrorism. However, it noted that the applicant had been present at a camp in Dorset in the company of the fifth applicant and a number of others suspected of being GSPC supporters and that a telephone bill had been found at his house at the time of his arrest in the name of Yarkas, who had been arrested in Spain in November 2001 due to his alleged links with al'Qaeda. The applicant had given evidence but had not been a convincing witness and had not given a credible explanation for the foregoing. The closed evidence supported the Secretary of State's allegations and SIAC therefore dismissed the applicant's appeal against certification.

60. In its review judgments of 2 July 2004 and 15 December 2004, SIAC held that the certificate was properly maintained.

10. The tenth applicant

61. The tenth applicant is an Algerian national. Following a bomb explosion in Algeria, his left hand was amputated at the wrist and his right arm was amputated below the elbow. In 1999 he travelled to the United Kingdom, via Abu Dhabi and Afghanistan, and claimed asylum. His claim was refused on 27 February 2001. He was then in custody, having been arrested on 15 February 2001 and charged with possession of articles for suspected terrorist purposes, conspiracy to defraud and conspiracy to make false instruments. At the time of his arrest he was found to have in his possession approximately 40 blank French driving licences, identity cards and passports, a credit card reader, laminators and an embossing machine. The charges were not, however, proceeded with and he was released on 17 May 2001.

62. On 14 January 2003 the Secretary of State issued a certificate against him under section 21 of the 2001 Act and he was taken into detention. A deportation order was made against him on the same day.

63. In its judgment of 27 January 2004 SIAC noted that the essence of the case against the tenth applicant was that since his arrival in the United Kingdom he had been closely associated with a network of extremists formerly led by Abu Doha (see paragraph 26 above). In particular, it was alleged that he had provided logistical support in the form of false documentation and money raised through credit card fraud. He had spent a lot of time at the Finsbury Park Mosque, a known centre of Islamist extremism, and was alleged to have attended a meeting there in June 2001 at which threats were made against the G8 summit in Genoa.

The applicant submitted a written statement on 28 June 2003 in which he denied the allegations against him. He did not, however, participate in the hearing of his appeal, as SIAC explained in its judgment:

> "He was, said [his counsel], a genuine refugee, a member of no organisation or group and not involved in terrorism or in advocating terrorism. He had no knowledge of any planned terrorist attacks and could not understand why the accusations had been made against him. He had seen none of the underlying material and had no means of challenging it. In effect, he could do no more than assert that it could not justify the conclusion that he was an international terrorist within the meaning of the Act since he was not. He had had read to him the decisions of [SIAC] in the previous appeals. Given the relevance which was placed on the closed material and the statutory test applicable, he felt that the result was a foregone conclusion. He did not wish in participating in the appeal to give an impression which was false that he could deal with the matters which were being relied on against him. He had no confidence in the proceedings. Accordingly he would take no active part in them beyond the statement which [his counsel] made on his behalf.
>
> He did not withdraw his appeal. While we appreciate the handicap under which he and indeed all the appellants labour, we wish to make it clear that no appeal is a foregone conclusion. We have to and we do consider the evidence put before us, whether open or closed, with care because we recognise that the result is detention for

> an unspecified period without trial. While we recognise that the Special Advocate has a difficult task when he has and can obtain no instructions on closed material, he is able to test evidence from the Security Service and to draw our attention to material which assists the appellant's case."

SIAC found that there was ample evidence to support the view that the applicant was involved in fraudulent activities. The evidence before it, most of it closed, was sufficient to establish that he was doing it to raise money for terrorist causes and to support those involved in terrorism. It therefore dismissed the appeal against certification.

64. SIAC reached similar decisions in its review judgments of 4 August 2004 and 16 February 2005. In the latter judgment, it noted that although the applicant had been transferred to Broadmoor Secure Mental Hospital because of mental health problems, that made no difference to the assessment of the risk to national security which he would pose if released.

11. The eleventh applicant

65. The eleventh applicant is an Algerian national. He entered the United Kingdom in February 1998, using a false Italian identity card, and claimed asylum the following week. While his claim was pending, in July 2001, he travelled to Georgia using a false French passport and was deported back to the United Kingdom, where he was informed that his travel outside the United Kingdom had terminated his asylum claim. He made a second claim for asylum, which was refused on 21 August 2001. The applicant absconded. He was arrested on 10 October 2001 and held in an Immigration Detention centre, from which he absconded in February 2002. He was rearrested on 19 September 2002 and detained at Belmarsh Prison under immigration law provisions.

66. On 2 October 2003 the Secretary of State certified him as an international terrorist under section 21 of the 2001 Act and made a deportation order against him on grounds of national security.

67. In its judgment of 12 July 2004, dismissing the eleventh applicant's appeal against certification, SIAC set out the open case against him. It was alleged that he was an established and senior member of the Abu Doha group (see paragraph 26 above). In July 2001 he had attempted to travel to Chechnya and, when arrested by the Georgian police, he had been found in possession of telephone numbers associated with a senior member of the Abu Doha group and a named member of the GSPC, who was known to be involved in fundraising for the Chechen Mujahaddin. He was alleged to have provided money and logistical support to a North African extremist Islamist network based in Pakistan and Afghanistan, with links to al'Qaeda, and to have assisted members of the Abu Doha group in travelling to Afghanistan, Pakistan and Chechnya. He had lived at the Finsbury Park Mosque for over a year in 1999/2000. He was very security conscious and during a trip to St Albans in September 2001 he had taken measures to

avoid being followed. When he was arrested in September 2002 he was found in possession of a false Belgian passport bearing the photograph of a senior member of the Abu Doha group. He was alleged to have been heavily involved in the supply of false documents and the fraudulent use of cheque books and credit cards.

68. The applicant filed a written statement in which he denied being an international terrorist. He admitted that he had travelled to Afghanistan in 1999 and that he had attempted to go to Chechnya in 2001, but claimed that his interest in these countries was no more than that shown by many devout Muslims. He refused to participate in the hearing of his appeal or to be represented by a lawyer, in protest at the fundamental unfairness of the procedure. In view of the applicant's position, the Special Advocates decided that his interests would best be served if they refrained from making submissions on his behalf or asking questions of the witnesses in the closed session.

69. In dismissing the applicant's appeal, SIAC held as follows:

> "We recognise the difficulties faced by an Appellant who only sees only the open material and can understand [the eleventh applicant's] perception that the procedures are unfair. However, each case will turn upon its own individual facts, and it would be wrong to give the impression, which [his solicitor] sought to do, that this particular appellant had been placed in a position where he was prevented by reason of the procedures under the Act from mounting an effective defence in response to the case made against him.
>
> We have summarised the information made available to [the eleventh applicant] at the various stages of the procedure ... and [his] response to this information in his Written Statement. While some of the assessments in the open material can fairly be described as general assertions unsupported by any documentary evidence, in response to which [the eleventh applicant] would not have been able to give any more than an equally general denial, it is clear that in respect of other assessments [he] was provided with a great deal of detailed information: names, dates, places and supporting documents.
>
> [The eleventh applicant] is in the best position to give an account of his whereabouts and activities since he first claimed asylum in 1998. His written statement is significant not so much for what it says, as for what it does not say. To take one example: the visit to St Albans and the photo-booth where [the eleventh applicant] says that the Respondent's specific assertion is 'completely wrong' ... [The eleventh applicant] has not denied that he went to St Albans. He knows who accompanied him and why they went there. He has not explained why they went there, nor has he identified his companion, despite having been provided with the photographs taken during the surveillance operation. ..."

SIAC continued by noting the inconsistencies in the applicant's various accounts of his trips to Afghanistan, Georgia and Dubai and his failure to deal with the Secretary of State's allegations that he had associated with various members of the Abu Doha group, identified by name. SIAC continued:

"The matters referred to ... are not an exhaustive list, merely the most obvious examples of the way in which [the eleventh applicant's] written statement fails to deal with the open case made against him. Given the unsatisfactory nature of the statement we do not feel able to give any significant weight to the general denials contained within it ... We have dealt with these matters in some detail because they are useful illustrations of the extent to which [the eleventh applicant] would have been able to answer the case against him, if he had chosen to do so. While we do not draw any adverse inference from [his] failure to give evidence, or otherwise participate in the hearing of his appeal, we do have to determine his appeal on the evidence and we are left with the position that there has been no effective challenge by way of evidence, cross-examination or submission to the open material produced by the Respondent.

...

The standard of proof prescribed by section 25(2) of the 2001 Act is relatively low: are there reasonable grounds for belief or suspicion. As explained above, we are satisfied that this low threshold is easily crossed on the basis of the open material alone. If the totality of the material, both open and closed, is considered, we have no doubt that [the eleventh applicant] was a senior, and active, member of the Abu Doha group as described in the Respondent's evidence."

E. The conditions of detention and the effect of detention on the applicants' health

70. The detained applicants were all initially detained at Belmarsh Prison in London. The sixth applicant was transferred to Woodhill Prison and the first, seventh and tenth applicants were transferred to Broadmoor Secure Mental Hospital.

71. They were held in prison under the same regime as other standard risk Category A prisoners, which was considered the appropriate security classification on the basis of the risk they posed. They were allowed visitors, once those visitors had been security-cleared, and could associate with other prisoners, make telephone calls and write and receive letters. They had access to an imam and to their legal representatives. They had the same level of access to health care, exercise, education and work as any other prisoner of their security ranking.

Following a recommendation of the inspector appointed under the 2001 Act to review the detention regime, the Government created a Special Unit at Woodhill Prison to house the 2001 Act detainees. The Unit, which was refurbished in consultation with the detained applicants and their representatives and had a specially selected and trained staff, would have allowed for a more relaxed regime, including more out-of-cell time. The applicants, however, chose not to move to the Unit, a decision which the inspector found regrettable.

72 The first applicant, who alleged a history of ill-treatment in Israeli detention and who had first been treated for depression in May 1999, suffered a severe deterioration in his mental health while detained in

Belmarsh Prison. He was transferred to Broadmoor Secure Mental Hospital in July 2002.

73. The seventh applicant reported a family history of psychiatric disorder and had experienced depression as an adolescent. He claimed to suffer increasingly throughout his detention from depression, paranoia and auditory hallucinations. He attempted suicide in May 2004 and was transferred to Broadmoor Secure Mental Hospital on 17 November 2004.

74. The tenth applicant, a double amputee, claimed to have been detained and tortured in Algeria. He suffered a deterioration in his physical and mental health in Belmarsh Prison. He went on hunger strike in May/June 2003 and refused to use the prostheses which had been issued to him or to cooperate with his nurses. Early in November 2003, the prison authorities withdrew his nursing care. His legal representatives applied for judicial review of this decision and in December 2003 nursing care was resumed following the order of the Administrative Court. On 1 November 2004 the tenth applicant was transferred to Broadmoor Secure Mental Hospital.

75. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("CPT") visited the detained applicants in February 2002 and again in March 2004, and made a number of criticisms of the conditions in which the detained applicants were held. The Government rejected these criticisms (see paragraphs 101-102 below).

76. In October 2004, at the request of the applicants' legal representatives, a group of eight consultant psychiatrists prepared a Joint Psychiatric Report on the detained applicants, which concluded:

> "The detainees originate from countries where mental illness is highly stigmatized. In addition, for devout Muslims there is a direct prohibition against suicide. This is particularly significant given the number who have attempted or are considering suicide. All of the detainees have serious mental health problems which are the direct result of, or are seriously exacerbated by, the indefinite nature of the detention. The mental health problems predominantly take the form of major depressive disorder and anxiety. A number of detainees have developed psychotic symptoms, as they have deteriorated. Some detainees are also experiencing PTSD [post-traumatic stress disorder] either as a result of their pre-migration trauma, the circumstances around their arrest and imprisonment or the interaction between the two.
>
> Continued deterioration in their mental health is affected also by the nature of, and their mistrust in, the prison regime and the appeals process as well as the underlying and central factor of the indefinite nature of detention. The Prison Health Care system is unable to meet their health needs adequately. There is a failure to perceive self harm and distressed behaviour as part of the clinical condition rather than merely being seen as manipulation. There is inadequate provision for complex physical health problems.
>
> Their mental health problems are unlikely to resolve while they are maintained in their current situation and given the evidence of repeated interviews it is highly likely that they will continue to deteriorate while in detention.

> The problems described by the detainees are remarkably similar to the problems identified in the literature examining the impact of immigration detention. This literature describes very high levels of depression and anxiety and eloquently makes the point that the length of time in detention relates directly to the severity of symptoms and that it is detention per se which is causing these problems to deteriorate."

77. For the purposes of the present proceedings, the Government requested a Consultant Psychiatrist, Dr. J., to comment on the above Joint Psychiatric Report. Dr J. was critical of the methodology and conclusions of the authors of the Joint Report. In particular, he wrote (references to other reports omitted):

> "I would comment that I find many of the assertions made do not bear close inspection. For example in the case of [the first applicant] it was my finding after a careful and detailed assessment that his mental state after imprisonment and then detention in Broadmoor Hospital was, overall, no worse and arguably no better than it had been before he was arrested. Nor do his records suggest initial improvement followed by deterioration in Broadmoor Hospital. I found he deteriorated in HMP Belmarsh because he chose to go on hunger strike and that he had a fluctuating course in Broadmoor Hospital despite agreeing to eat, his histrionic behaviour in both places being essentially the same. In his case I found the diagnosis to be one of Personality Disorder, diagnoses of Major Depressive Disorder, psychosis and PTSD not being sustainable. Moreover, it was my finding that his frequent self-harming was indeed manipulative.
>
> ...
>
> I am not alone in finding the diagnoses claimed by the authors of this report to be mistaken and have drawn attention in my own report to the scepticism of some others who have reported on [the first and seventh applicants]. It is not the case therefore that there is the consensus of opinion claimed in the report and I note that in both the cases I assessed [the first and seventh applicants], their so-called psychotic symptoms claimed by some reporters and said not to be present before they were detained, were in fact present before they were arrested.
>
> An issue I find to be of the greatest concern relates to the tacit acceptance of information gained by self-report. It appears to be accepted by the authors of the report, for example, that three of the detainees had been the victims of detention and torture and all felt themselves seriously threatened prior to migration. Nowhere have I seen any evidence to corroborate these claims or indeed any attempt to check them. As it is the case that immigrants and asylum-seekers need to justify their attempts to gain entry to another country, is it not possible or even probable that some may not always be entirely truthful in what they claim about their past experiences or their current symptoms? Where alleged terrorists are concerned it should be borne in mind that they have denied such allegations in spite of the open and closed evidence against them, which has been considered at the highest level. Surely this should raise doubts about their truthfulness?"

F. The release of the fifth applicant on bail

78. On 20 January 2004, SIAC decided that it should, in principle, grant bail to the fifth applicant. The Secretary of State attempted to appeal against this decision but was informed by the Court of Appeal in an interim decision dated 12 February 2004 that it had no jurisdiction to entertain an appeal.

79. SIAC explained its reasons for granting bail in greater detail in a judgment dated 22 April 2004. It held that under the 2001 Act it had a power to grant bail only in an exceptional case, where it was satisfied that if bail were not granted the detainee's mental or physical condition would deteriorate to such an extent as to render his continued detention a breach of Article 3 of the Convention, because inhuman, or Article 8, because disproportionate.

80. SIAC noted that there had been concerns about the fifth applicant's mental health amongst prison staff from May 2002, although these concerns had not been communicated to his legal representatives. In December 2003 he had suffered a serious relapse into severe depression with psychotic symptoms, including auditory hallucinations and suicide ideation. A number of psychologists and psychiatrists had examined him, at the request of his legal representatives and at the initiative of the Home Office, and had agreed that he was seriously ill and that his mental health would be likely to improve if he were allowed to go home. SIAC concluded:

> "We do not think that the threshold has been crossed so that there is a breach of [the fifth applicant's] human rights. The jurisprudence of the [European Court of Human Rights] emphasises the high threshold which must be crossed and that detention is unlikely to be regarded as disproportionate unless it at least verges on treatment which would constitute a breach of Article 3. But we are satisfied that, if he were not released, there would be such a breach. To permit someone to reach a state whereby he requires treatment in a special hospital or continuous care and attention to ensure he does not harm himself can constitute a breach of Article 8, unless perhaps there is no possible alternative to detention, and probably of Article 3. As we have said, we do not have to wait until that situation exists. Provided that we are persuaded, as we are, that the conditions we impose are sufficient to minimise the risk to the security of the state if [the fifth applicant] is released, we can act as we have.
>
> We must emphasise that the grant of bail is exceptional. We are only doing so because the medical evidence is all one way and the detention has caused the mental illness which will get worse. ..."

81. The fifth applicant was, therefore, released on bail on 22 April 2004 on conditions amounting to house arrest. He was not permitted to leave his home address and had to wear an electronic tag at all times. He had no internet access and a telephone link to the Security Service only. He was required to report by telephone to the Security Service five times a day and allow its agents access to his home at any time. He was not permitted contact with any person other than his wife and child, legal representative

and a Home Office approved doctor or see any visitor except with prior Home Office approval.

G. Events following the House of Lords' judgment of 16 December 2004

82. The declaration of incompatibility made by the House of Lords on 16 December 2004, in common with all such declarations, was not binding on the parties to the litigation (see paragraph 94 below). The applicants remained in detention, except for the second and fourth applicants who had elected to leave the United Kingdom and the fifth applicant who had been released on bail on conditions amounting to house arrest. Moreover, none of the applicants were entitled, under domestic law, to compensation in respect of their detention. The applicants, therefore, lodged their application to the Court on 21 January 2005.

83. At the end of January 2005, the Government announced its intention to repeal Part 4 of the 2001 Act and replace it with a regime of control orders, which would impose various restrictions on individuals, regardless of nationality, reasonably suspected of being involved in terrorism.

84. Those applicants who remained in detention were released on 10-11 March 2005 and immediately made subject to control orders under the Prevention of Terrorism Act 2005, which came into effect on 11 March 2005.

85. The Government withdrew the notice of derogation on 16 March 2005.

86. On 11 August 2005, following negotiations commenced towards the end of 2003 to seek from the Algerian and Jordanian Governments assurances that the applicants would not be ill-treated if returned, the Government served Notices of Intention to Deport on the fifth, sixth, seventh, eighth, ninth, tenth and eleventh applicants. These applicants were taken into immigration custody pending removal to Algeria (the fifth, sixth, seventh, ninth, tenth and eleventh applicants) and Jordan (the eighth applicant). On 9 April 2008 the Court of Appeal ruled that the eighth applicant could not lawfully be extradited to Jordan, because it was likely that evidence which had been obtained by torture could be used against him there at trial, in flagrant violation of his right to a fair trial. At the date of adoption of the present judgment, the case was pending before the House of Lords.

B. RELEVANT DOMESTIC LAW AND PRACTICE

A. Detention pending deportation before the passing of the 2001 Act

87. Under section 3(5) of the Immigration Act 1971 the Secretary of State could make a deportation order against a non-national, on the ground that the deportation would be conducive to the public good, for reasons of national security, *inter alia.* A person who was the subject of a deportation order could be detained pending deportation (1971 Act, Schedule 3, paragraph 2). However, it was held in *R. v. Governor of Durham Prison* ex parte *Hardial Singh* [1984] 1 WLR 704 that the power to detain under the above provision was limited to such time as was reasonable to enable the process of deportation to be carried out. Detention was not, therefore, permissible under the 1971 Act where deportation was known to be impossible, whether because there was no country willing to take the person in question or because there would be a risk of torture or other serious ill-treatment to the proposed deportee in his or her country of origin.

B. The Terrorism Act 2000

88. In July 2000 Parliament enacted the Terrorism Act 2000. As Lord Bingham noted in his judgment in the present case, "this was a substantial measure, with 131 sections and 16 Schedules, intended to overhaul, modernise and strengthen the law relating to the growing problem of terrorism". "Terrorism" was defined, in section 1 of the Act, as:

> "... the use or threat of action where—
>
> (a) the action falls within subsection (2),
>
> (b) the use or threat is designed to influence the government or to intimidate the public or a section of the public, and
>
> (c) the use or threat is made for the purpose of advancing a political, religious or ideological cause.
>
> (2) Action falls within this subsection if it—
>
> (a) involves serious violence against a person,
>
> (b) involves serious damage to property,
>
> (c) endangers a person's life, other than that of the person committing the action,
>
> (d) creates a serious risk to the health or safety of the public or a section of the public, or

(e) is designed seriously to interfere with or seriously to disrupt an electronic system.

(3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.

(4) In this section—

(a) 'action' includes action outside the United Kingdom,

(b) a reference to any person or to property is a reference to any person, or to property, wherever situated,

(c) a reference to the public includes a reference to the public of a country other than the United Kingdom, and

(d) 'the government' means the government of the United Kingdom, of a Part of the United Kingdom or of a country other than the United Kingdom.

(5) In this Act a reference to action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organisation".

For the purposes of the Act, an organisation was "proscribed" if:

3. (1) ...

(a) it is listed in Schedule 2, or

(b) it operates under the same name as an organisation listed in that Schedule.

(2) Subsection (1)(b) shall not apply in relation to an organisation listed in Schedule 2 if its entry is the subject of a note in that Schedule.

(3) The Secretary of State may by order—

(a) add an organisation to Schedule 2;

(b) remove an organisation from that Schedule;

(c) amend that Schedule in some other way.

(4) The Secretary of State may exercise his power under subsection (3)(a) in respect of an organisation only if he believes that it is concerned in terrorism.

(5) For the purposes of subsection (4) an organisation is concerned in terrorism if it—

(a) commits or participates in acts of terrorism,

(b) prepares for terrorism,

(c) promotes or encourages terrorism, or

(d) is otherwise concerned in terrorism."

89. Part II of the Act created offences of membership and support of proscribed organisations; it created offences of fund raising, use and possession of terrorist funds, entering into an arrangement for the transfer of terrorist funds, money laundering and failing to disclose suspect money laundering. There were a number of further substantive offences in Part IV, including offences of weapons training; directing terrorism; possession, without reasonable excuse, of items likely to be useful to person committing or preparing an act of terrorism; and collection, without reasonable excuse, of information likely to be useful to a person committing or preparing an act of terrorism. By section 62, the Act had extra-territorial scope, in that a person within the jurisdiction of the United Kingdom might be prosecuted for any of the above offences regardless of where the acts in furtherance of those offences were committed.

C. The Anti-Terrorism, Crime and Security Act 2001

90. Part 4 of the 2001 Act (see paragraph 12 above), which was headed "Immigration and Asylum", set out powers which enabled the detention of non-nationals suspected of being international terrorists, even where their deportation was for the time being impossible. The 2001 Act provided, so far as material:

"PART 4

IMMIGRATION AND ASYLUM

Suspected international terrorists

21. Suspected international terrorist: certification

(1) The Secretary of State may issue a certificate under this section in respect of a person if the Secretary of State reasonably-

(a) believes that the person's presence in the United Kingdom is a risk to national security, and

(b) suspects that the person is a terrorist.

(2) In subsection (1)(b) 'terrorist' means a person who-

(a) is or has been concerned in the commission, preparation or instigation of acts of international terrorism,

(b) is a member of or belongs to an international terrorist group, or

(c) has links with an international terrorist group.

(3) A group is an international terrorist group for the purposes of subsection (2)(b) and (c) if—

(a) it is subject to the control or influence of persons outside the United Kingdom, and

(b) the Secretary of State suspects that it is concerned in the commission, preparation or instigation of acts of international terrorism.

(4) For the purposes of subsection (2)(c) a person has links with an international terrorist group only if he supports or assists it.

(5) In this Part—

"terrorism" has the meaning given by section 1 of the Terrorism Act 2000 (c. 11), and

"suspected international terrorist" means a person certified under subsection (1).

(6) Where the Secretary of State issues a certificate under subsection (1) he shall as soon as is reasonably practicable-

(a) take reasonable steps to notify the person certified, and

(b) send a copy of the certificate to the Special Immigration Appeals Commission.

(7) The Secretary of State may revoke a certificate issued under subsection (1).

(8) A decision of the Secretary of State in connection with certification under this section may be questioned in legal proceedings only under section 25 or 26.

(9) An action of the Secretary of State taken wholly or partly in reliance on a certificate under this section may be questioned in legal proceedings only by or in the course of proceedings under-

(a) section 25 or 26, or

(b) section 2 of the Special Immigration Appeals Commission Act 1997 (c. 68) (appeal).

22. Deportation, removal, etc.

(1) An action of a kind specified in subsection (2) may be taken in respect of a suspected international terrorist despite the fact that (whether temporarily or indefinitely) the action cannot result in his removal from the United Kingdom because of-

(a) a point of law which wholly or partly relates to an international agreement, or

(b) a practical consideration ...

(2) The actions mentioned in subsection (1) are –

...

(e) making a deportation order ...

(3) Action of a kind specified in subsection (2) which has effect in respect of a suspected international terrorist at the time of his certification under section 21 shall be treated as taken again (in reliance on subsection (1) above) immediately after certification.

23. Detention

(1) A suspected international terrorist may be detained under a provision specified in subsection (2) despite the fact that his removal or departure from the United Kingdom is prevented (whether temporarily or indefinitely) by-

(a) a point of law which wholly or partly relates to an international agreement, or

(b) a practical consideration

(2) The provisions mentioned in subsection (1) are—

(a) paragraph 16 of Schedule 2 to the Immigration Act 1971 (c. 77) (detention of persons liable to examination or removal), and

(b) paragraph 2 of Schedule 3 to that Act (detention pending deportation)."

Part 4 of the 2001 Act included a provision that the legislation would remain in force for five years only and was subject to an annual affirmative resolution by both Houses of Parliament.

D. The Special Immigration Appeals Commission

91. The Special Immigration Appeals Commission ("SIAC") was set up in response to the Court's judgment in *Chahal v. the United Kingdom* [GC], judgment of 15 November 1996, *Reports of Judgments and Decisions* 1996-V). It is a tribunal composed of independent judges, with a right of appeal against its decisions on a point of law to the Court of Appeal and the House of Lords.

By section 25 of the 2001 Act:

"(1) A suspected international terrorist may appeal to the Special Immigration Appeals Commission against his certification under section 21.

(2) On an appeal [SIAC] must cancel the certificate if –

(a) it considers that there are no reasonable grounds for a belief or suspicion of the kind referred to in section 21(1)(a) or (b), or

(b) if it considers that for some other reason the certificate should not have been issued."

SIAC was required to carry out a first review to ensure that the certificate was still justified six months after the issue of the certificate or six months after the final determination of an appeal against certification, and thereafter at three-monthly intervals.

Under section 30 of the 2001 Act, any legal challenge to the derogation under Article 15 of the Convention had also to be made to SIAC.

92. SIAC has a special procedure which enables it to consider not only material which can be made public ("open material") but also material which, for reasons of national security, cannot ("closed material"). Neither the appellant nor his legal advisor can see the closed material. Accordingly, one or more security-cleared counsel, referred to as "special advocates", are appointed by the Solicitor General to act on behalf of each appellant.

93. In the certification appeals before SIAC at issue in the present case, the open statements and evidence concerning each appellant were served first, and the special advocate could discuss this material with the appellant and his legal advisors and take instructions generally. Then the closed material would be disclosed to the judges and to the special advocate, from which point there could be no further contact between the latter and the appellant and/or his representatives, save with the permission of SIAC. It was the special advocate's role during the closed sessions to make submissions on behalf of the appellant, both as regards procedural matters, such as the need for further disclosure, and as to the substance of the case. In respect of each appeal against certification, SIAC issued both an "open" and a "closed" judgment. The special advocate could see both but the detainee and his representatives could see only the open judgment.

E. Declarations of incompatibility under the Human Rights Act 1998

94. Section 4 of the 1998 Act provides that where a court finds that primary legislation is in breach of the Convention, the court may make a declaration of incompatibility. Such a declaration does not affect the validity of the provision in respect of which it is made and is not binding on the parties to the proceedings in which it is made, but special arrangements may be made (section 10) to amend the provision in order to remove the incompatibility (see further *Burden v. the United Kingdom* [GC], no. 13378/05, §§ 21-24 and 40-44, ECHR 2008).

F. The Terrorism Act 2006

95. The Terrorism Act 2006 came into force on 30 March 2006, creating a number of offences to extend criminal liability to acts preparatory to the terrorist offences created by the Terrorism Act 2000. The new offences were encouragement, dissemination of publications, preparation and training. The offences were designed to intervene at an early stage in terrorist activity and

thus prevent the development of more serious conduct. They were also designed to be easier to prove.

G. Consideration of the use of special advocates under the Prevention of Terrorism Act 2005

96. On 31 October 2007 the House of Lords gave judgment in *Secretary of State for the Home Department (Respondent) v. MB (FC) (Appellant)* [2007] UKHL 46, which concerned a challenge to a non-derogating control order made by the Secretary of State under sections 2 and 3 (1)(a) of the Prevention of Terrorism Act 2005. The House of Lords had to decide, *inter alia*, whether procedures provided for by section 3 of the 2005 Act, involving closed hearings and special advocates, were compatible with Article 6 of the Convention, given that, in the case of one of the appellants, they had resulted in the case against him being in its essence entirely undisclosed, with no specific allegation of terrorism-related activity being contained in open material.

The House of Lords was unanimous in holding that the proceedings in question determined civil rights and obligations and thus attracted the protection of Article 6. On the question of compliance, the majority (Baroness Hale of Richmond, Lord Carswell and Lord Brown of Eaton-under-Heywood) held that although in many cases the special advocate procedure would provide a sufficient counterbalance where the Secretary of State wished to withhold material upon which she wished to rely in order to establish the existence of reasonable grounds for suspecting that the controlee was or had been involved in terrorism-related activity, each case had to be considered individually. Baroness Hale put it as follows:

> "65. ... It would all depend upon the nature of the case; what steps had been taken to explain the detail of the allegations to the controlled person so that he could anticipate what the material in support might be; what steps had been taken to summarise the closed material in support without revealing names, dates or places; the nature and content of the material withheld; how effectively the special advocate had been able to challenge it on behalf of the controlled person; and what difference its disclosure might have made. All of these factors would be relevant to whether the controlled person had been 'given a meaningful opportunity to contest the factual basis' for the order.
>
> 66. I do not think that we can be confident that Strasbourg would hold that every control order hearing in which the special advocate procedure had been used, as contemplated by the 2005 Act and Part 76 of the Civil Procedure Rules, would be sufficient to comply with article 6. However, with strenuous efforts from all, difficult and time consuming though it will be, it should usually be possible to accord the controlled person 'a substantial measure of procedural justice'. Everyone involved will have to do their best to ensure that the 'principles of judicial inquiry' are complied with to the fullest extent possible. The Secretary of State must give as full as possible an explanation of why she considers that the grounds in section 2(1) are made out. The fuller the explanation given, the fuller the instructions that the special advocates

will be able to take from the client before they see the closed material. Both judge and special advocates will have to probe the claim that the closed material should remain closed with great care and considerable scepticism. There is ample evidence from elsewhere of a tendency to over-claim the need for secrecy in terrorism cases: see Serrin Turner and Stephen J Schulhofer, The Secrecy Problem in Terrorism Trials, 2005, Brennan Centre for Justice at NYU School of Law. Both judge and special advocates will have stringently to test the material which remains closed. All must be alive to the possibility that material could be redacted or gisted in such a way as to enable the special advocates to seek the client's instructions upon it. All must be alive to the possibility that the special advocates be given leave to ask specific and carefully tailored questions of the client. Although not expressly provided for in CPR r 76.24, the special advocate should be able to call or have called witnesses to rebut the closed material. The nature of the case may be such that the client does not need to know all the details of the evidence in order to make an effective challenge.

67. The best judge of whether the proceedings have afforded a sufficient and substantial measure of procedural protection is likely to be the judge who conducted the hearing. ..."

Lord Carswell observed:

"There is a very wide spectrum of cases in which closed material is relied on by the Secretary of State. At one extreme there may be cases in which the sole evidence adverse to the controlee is closed material, he cannot be told what the evidence is or even given its gist and the special advocate is not in a position to take sufficient instructions to mount an effective challenge to the adverse allegations. At the other end there may be cases where the probative effect of the closed material is very slight or merely corroborative of strong open material and there is no obstacle to presenting a defence. There is an infinite variety of possible cases in between. The balance between the open material and the closed material and the probative nature of each will vary from case to case. The special advocate may be able to discern with sufficient clarity how to deal with the closed material without obtaining direct instructions from the controlee. These are matters for the judge to weigh up and assess in the process of determining whether the controlee has had a fair trial. The assessment is ... fact-specific. The judge who has seen both the open and the closed material and had the benefit of the contribution of the special advocate is in much the best position to make it. I do consider, however, that there is a fairly heavy burden on the controlee to establish that there has been a breach of article 6, for the legitimate public interest in withholding material on valid security grounds should be given due weight. The courts should not be too ready to hold that a disadvantage suffered by the controlee through the withholding of material constitutes a breach of article 6."

Lord Brown held as follows:

"There may perhaps be cases, wholly exceptional though they are likely to be, where, despite the best efforts of all concerned by way of redaction, anonymisation, and gisting, it will simply be impossible to indicate sufficient of the Secretary of State's case to enable the suspect to advance any effective challenge to it. Unless in these cases the judge can nevertheless feel quite sure that in any event no possible challenge could conceivably have succeeded (a difficult but not, I think, impossible conclusion to arrive at ...), he would have to conclude that the making or, as the case may be, confirmation of an order would indeed involve significant injustice to the suspect. In short, the suspect in such a case would not have been accorded even 'a substantial measure of procedural justice' (*Chahal* [cited above] § 131)

notwithstanding the use of the special advocate procedure; 'the very essence of [his] right [to a fair hearing] [will have been] impaired' (*Tinnelly & Sons Ltd and McElduff and others v United Kingdom* [cited below] § 72).

Lord Bingham did not dissent but employed different reasoning. He held that it was necessary to look at the process as a whole and consider whether a procedure had been used which involved significant injustice to the controlee; while the use of special advocates could help to enhance the measure of procedural justice available to a controlled person, it could not fully remedy the grave disadvantages of a person not being aware of the case against him and not being able, therefore, effectively to instruct the special advocate.

Lord Hoffmann, dissenting, held that once the trial judge had decided that disclosure would be contrary to the public interest, the use of special advocates provided sufficient safeguards for the controlee and there would never in these circumstances be a breach of Article 6.

97. In *Secretary of State for the Home Department v. AF* [2008] EWCA Civ 1148, the Court of Appeal (Sir Anthony Clark MR and Waller LJ; Sedley LJ dissenting), gave the following guidance, based on the majority opinions in *MB*, regarding compliance with Article 6 in control order cases using special advocates (extract from the head-note):

(1) In deciding whether the hearing under s 3(10) of the 2005 Act infringed the controlee's rights under art 6 the question was whether, taken as a whole, the hearing was fundamentally unfair to the controlee, or he was not accorded a substantial measure of procedural justice or the very essence of his right to a fair hearing was impaired. More broadly, the question was whether the effect of the process was that the controlee was exposed to significant injustice. (2) All proper steps ought to be taken to provide the controlee with as much information as possible, both in terms of allegation and evidence, if necessary by appropriate gisting. (3) Where the full allegations and evidence were not provided for reasons of national security at the outset, the controlee had to be provided with a special advocate. In such a case the following principles applied. (4) There was no principle that a hearing would be unfair in the absence of open disclosure to the controlee of an irreducible minimum of allegation or evidence. Alternatively, if there was, the irreducible minimum could, depending on the circumstances, be met by disclosure of as little information as was provided in AF's case, which was very little indeed. (5) Whether a hearing would be unfair depended on all the circumstances, including the nature of the case, what steps had been taken to explain the detail of the allegations to the controlled person so that he could anticipate what the material in support might be, what steps had been taken to summarise the closed material in support without revealing names, dates or places, the nature and content of the material withheld, how effectively the special advocate was able to challenge it on behalf of the controlee and what difference its disclosure would or might make. (6) In considering whether open disclosure to the controlee would have made a difference to the answer to whether there were reasonable grounds for suspicion that the controlee was or had been involved in terrorist related activity, the court had to have fully in mind the problems for the controlee and the special advocates and take account of all the circumstances of the case, including what if any information was openly disclosed and how effective the special advocates were able to be. The correct approach to and the weight to be given to any particular factor

would depend upon the particular circumstances. (7) There were no rigid principles. What was fair was essentially a matter for the judge, with whose decision the Court of Appeal would very rarely interfere."

III. DOMESTIC AND INTERNATIONAL COMMENT ON PART 4 OF THE 2001 ACT

A. The Newton Committee

98. Part 4 of the 2001 Act provided for the creation of a Committee of Privy Counsellors to review its operation. The Committee, under the chairmanship of Lord Newton, reported in December 2003. Having recorded the Home Office's argument that the threat from al'Qaeda terrorism was predominantly from foreigners, the Newton Committee's report drew attention to:

> "accumulating evidence that this is not now the case. The British suicide bombers who attacked Tel Aviv in May 2003, Richard Reid ('the Shoe Bomber'), and recent arrests suggest that the threat from UK citizens is real. Almost 30% of Terrorism Act 2000 suspects in the past year have been British. We have been told that, of the people of interest to the authorities because of their suspected involvement in international terrorism, nearly half are British nationals."

Given this evidence, the Newton Committee observed that not only were there arguments of principle against having discriminatory provisions, but there were also compelling arguments of limited efficacy in addressing the terrorist threat. The Newton Committee therefore called for new legislation to be introduced as a matter of urgency which would deal with the terrorist threat without discrimination on grounds of nationality and which would not require a derogation from Article 5 of the Convention.

99. In February 2004 the Government published its response to the Newton Committee's report. It continued to accept that the terrorist threat "came predominantly, but not exclusively from foreign nationals" and made the following observation about the Newton Committee's suggestion that counter-terrorist measures should apply to all persons within the jurisdiction regardless of nationality:

> "While it would be possible to seek other powers to detain British citizens who may be involved in international terrorism it would be a very grave step. The Government believes that such draconian powers would be difficult to justify. Experience has demonstrated the dangers of such an approach and the damage it can do to community cohesion and thus to support from all parts of the public that is so essential to countering the terrorist threat".

The Government also indicated that work was under way to try to establish framework agreements with potential destination countries for the purposes of deportation of terrorist suspects.

B. The Joint Parliamentary Committee on Human Rights

100. The Joint Committee has constitutional responsibility in the United Kingdom for scrutinising legislation to ensure that it is compatible with Convention rights. In its Second Report of the Session 2001-2002, drawn up very shortly after publication of the Bill which became the 2001 Act, the Joint Committee expressed concern at the potentially discriminatory effect of the proposed measure, as follows:

> "38. Second, by relying on immigration legislation to provide for the detention of suspected international terrorists, the Bill risks discriminating, in the authorization of detention without charge, between those suspected international terrorists who are subject to immigration control and those who have an unconditional right to remain in the United Kingdom. We are concerned that this might lead to discrimination in the enjoyment of the right to liberty on the ground of nationality. If that could not be shown to have an objective, rational and proportionate justification, it might lead to actions which would be incompatible with Article 5 of the ECHR either taken alone or in combination with the right to be free of discrimination in the enjoyment of Convention rights under Article 14 of the ECHR. It could also lead to violations of the right to be free of discrimination under Article 26 and the right to liberty under Article 9 of the ICCPR.
>
> 39. We raised this matter with the Home Secretary in oral evidence. Having considered his response, we are not persuaded that the risk of discrimination on the ground of nationality in the provisions of Part 4 of the Bill has been sufficiently taken on board."

In its Sixth Report of the Session 2003-2004 (23 February 2004), the Joint Committee expressed deep concern "about the human rights implications of making the detention power an aspect of immigration law rather than anti-terrorism law" and warned of "a significant risk that Part 4 violates the right to be free of discrimination under ECHR Article 14." Following the Report of the Newton Committee and the Secretary of State's discussion paper published in response to it, the Joint Committee returned to this subject in its Eighteenth Report of the Session 2003-2004 (21 July 2004), paragraphs 42-44:

> "42. The discussion paper rejects the Newton Report's recommendation that new legislation replacing Part 4 [of the 2001 Act] should apply equally to all nationalities including British citizens. It states the Government's belief that it is defensible to distinguish between foreign nationals and UK nationals because of their different rights and responsibilities.
>
> 43. We have consistently expressed our concern that the provisions of Part 4 [of the 2001 Act] unjustifiably discriminate on grounds of nationality and are therefore in breach of Article 14 ECHR. Along with Lord Newton, we find it extraordinary that the discussion paper asserts that seeking the same power to detain British citizens would be 'a very grave step' and that 'such draconian powers would be difficult to justify.'

44. The interests at stake for a foreign national and a UK national are the same: their fundamental right to liberty under Article 5 ECHR and related procedural rights. Article 1 of the ECHR requires States to secure the Convention rights to everyone within their jurisdiction. Article 14 requires the enjoyment of Convention rights to be secured without discrimination on the ground of nationality. The Government's explanation in its discussion paper of its reluctance to seek the same powers in relation to UK nationals appears to suggest that it regards the liberty interests of foreign nationals as less worthy of protection than exactly the same interests of UK nationals, which is impermissible under the Convention."

C. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("CPT")

101. The CPT visited the detained applicants in February 2002 and again in March 2004. In its report published on 9 June 2005, the CPT was critical of the conditions in which the applicants were held in Belmarsh Prison and Broadmoor Hospital and reported allegations of ill-treatment by staff. It found the regime in Woodhill Prison to be more relaxed. The CPT found that the health of the majority of the detained applicants had declined as a result of their detention, in particular its indefinite character. The CPT stated in its report:

"In fact, the information gathered during the 2004 visit reveals that the authorities are at a loss at how to manage this type of detained person, imprisoned with no real prospect of release and without the necessary support to counter the damaging effects of this unique form of detention. They also highlight the limited capacity of the prison system to respond to a task that is difficult to reconcile with its normal responsibilities. The stated objective, in the response to the CPT's report on the February 2002 visit, of formulating a strategy to enable the Prison Service to manage most appropriately the care and detention of persons held under the 2001 Act, has not been achieved.

Two years after the CPT visited these detained persons, many of them were in a poor mental state as a result of their detention, and some were also in poor physical condition. Detention had caused mental disorders in the majority of persons detained under the [2001 Act] and for those who had been subjected to traumatic experiences or even torture in the past, it had clearly reawakened the experience and even led to the serious recurrence of former disorders. The trauma of detention had become even more detrimental to their health since it was combined with an absence of control resulting from the indefinite character of their detention, the uphill difficulty of challenging their detention and the fact of not knowing what evidence was being used against them to certify and/or uphold their certification as persons suspected of international terrorism. For some of them, their situation at the time of the visit could be considered as amounting to inhuman and degrading treatment."

102. The Government published their response to the CPT's 2004 report on 9 June 2005. The Government strongly disputed the allegations of ill-treatment by prison staff and pointed out that the detained applicants had at their disposal the remedies provided by administrative and civil law to all

prisoners to complain of ill-treatment. The Government's response continued:

> "Although the Government respects the conclusions reached by the delegates of the [CPT] based on the observations on the day of visit, it categorically rejects the suggestion that at any point during their detention the [2001 Act] detainees were treated in an 'inhuman or degrading' manner that may have amounted to a breach in the United Kingdom's international human rights obligations. The Government firmly believes that at all times the detainees received appropriate care and treatment in Belmarsh and had access to all necessary medical support, both physical and psychological, from medical support staff and doctors. The Government accepts that the individuals had difficult backgrounds prior to detention, but does not accept that 'detention had caused mental disorders'. Some of the detainees had mental health issues prior to detention, but that did not stop them engaging in the activities that led to their certification and detention. Mental health issues do not prevent an individual from posing a risk to national security.
>
> ...
>
> The Government does not accept that those certified under [the 2001 Act] were detained without any prospect of their release. ...
>
> ...
>
> On no occasion did SIAC, or any other court, find that the conditions of detention breached the absolute obligation imposed upon the Government by Article 3 of [the Convention]. It is the Government's view that, given the extensive judicial safeguards available to the detainees, the government would not have been able to maintain the detention of these individuals had the powers breached the detainees' Article 3 rights in any way. To suggest otherwise would be to ignore the extensive contact the detainees had with the British judicial system and the absolute obligation upon the judiciary to protect against any such breach."

D. The European Commissioner for Human Rights

103. In August 2002 the European Commissioner for Human Rights to the Council of Europe published his opinion on certain aspects of the United Kingdom's derogation from Article 5 of the Convention and Part 4 of the 2001 Act. In that Opinion he expressly criticised the lack of sufficient scrutiny by Parliament of the derogation provisions and questioned whether the nature of the al'Qaeda threat was a justifiable basis for recognising a public emergency threatening the life of the nation:

> "Whilst acknowledging the obligations of the governments to protect their citizens against the threat of terrorism, the Commissioner is of the opinion that general appeals to an increased risk of terrorist activity post September 11 2001 cannot, on their own be sufficient to justify derogating from the Convention. Several European states long faced with recurring terrorist activity have not considered it necessary to derogate from Convention rights. Nor have any found it necessary to do so under the present circumstances. Detailed information pointing to a real and imminent danger to public safety in the United Kingdom will, therefore, have to be shown."

The Commissioner continued, with reference to the detention scheme under Part 4 of the 2001 Act:

> "In so far as these measures are applicable only to non-deportable foreigners, they might appear, moreover, to be ushering in a two-track justice, whereby different human rights standards apply to foreigners and nationals."

104. On 8 June 2005 the Commissioner published a report arising out of his visit to the United Kingdom in November 2004. He specifically referred to the House of Lords decision in the applicants' case and noted the fact that the Government had not sought to renew the relevant provisions of the 2001 Act in March 2005. He welcomed the decision of the House of Lords, which corresponded with his own previously published opinion, and also welcomed the release of the applicants, emphasising that as a result of his visit he was in a position personally to testify to "the extremely agitated psychological state of many of them". As a result of interviews which he had conducted with, amongst others, the Home Secretary, the Lord Chancellor, the Attorney General, the Lord Chief Justice and the Director of Public Prosecutions, the Commissioner also expressed a conclusion about the availability under the law of the United Kingdom of alternative measures to combat the threat of terrorism:

> "Terrorist activity not only must but can be combated within the existing framework of human rights guarantees, which provide precisely for a balancing, in questions concerning national security, of individual rights and the public interest and allow for the use of proportionate special powers. What is required is well-resourced policing, international cooperation and the forceful application of the law. It is to be noted, in this context, that in the Terrorist Act 2000, the United Kingdom already has amongst the toughest and most comprehensive anti-terror legislation in Europe."

E. The United Nations Committee on the Elimination of All Forms of Racial Discrimination

105. The Committee's Concluding Observations on the United Kingdom, dated 10 December 2003, stated at paragraph 17:

> "17. The Committee is deeply concerned about provisions of the Anti-Terrorism Crime and Security Act which provide for the indefinite detention without charge or trial, pending deportation, of non-nationals of the United Kingdom who are suspected of terrorism-related activities.
>
> While acknowledging the State party's national security concerns, the Committee recommends that the State party seek to balance those concerns with the protection of human rights and its international legal obligations. In this regard, the Committee draws the State party's attention to its statement of 8 March 2002 in which it underlines the obligation of States to 'ensure that measures taken in the struggle against terrorism do not discriminate in purpose or effect on grounds of race, colour, descent, or national or ethnic origin.'"

IV. OTHER RELEVANT COUNCIL OF EUROPE MATERIALS

A. Council of Europe Parliamentary Assembly Resolution 1271 (2002)

106. On 24 January 2002 the Council of Europe's Parliamentary Assembly passed Resolution 1271 (2002) which resolved, in paragraph 9, that:

> "In their fight against terrorism, Council of Europe members should not provide for any derogations to the European Convention on Human Rights."

It also called on all Member States (paragraph 12) to:

> "refrain from using Article 15 of the European Convention on Human Rights (derogation in time of emergency) to limit the rights and liberties guaranteed under its Article 5 (right to liberty and security)."

Apart from the United Kingdom, no other Member State chose to derogate from Article 5 § 1 after 11 September 2001.

B. The Committee of Ministers of the Council of Europe

107. Following its meeting on 14 November 2001 to discuss "Democracies facing terrorism" (CM/AS(2001) Rec 1534), the Committee of Ministers adopted on 11 July 2002 "Guidelines on human rights and the fight against terrorism", which provided, *inter alia*:

> "**I. States' obligation to protect everyone against terrorism**
>
> States are under the obligation to take the measures needed to protect the fundamental rights of everyone within their jurisdiction against terrorist acts, especially the right to life. This positive obligation fully justifies States' fight against terrorism in accordance with the present guidelines.
>
> **II. Prohibition of arbitrariness**
>
> All measures taken by States to fight terrorism must respect human rights and the principle of the rule of law, while excluding any form of arbitrariness, as well as any discriminatory or racist treatment, and must be subject to appropriate supervision."

C. The European Commission against Racism and Intolerance ("ECRI")

108. In its General Policy Recommendations published on 8 June 2004, ECRI considered it the duty of the State to fight against terrorism; stressed that the response should not itself encroach on the values of freedom, democracy, justice, the rule of law, human rights and humanitarian law;

stressed that the fight against terrorism should not become a pretext under which racial discrimination was allowed to flourish; noted that the fight against terrorism since 11 September 2001 had in some cases resulted in the adoption of discriminatory legislation, notably on grounds of nationality, national or ethnic origin and religion; stressed the responsibility of member States to ensure that the fight against terrorism did not have a negative impact on any minority group; and recommended States:

> "to review legislation and regulations adopted in connection with the fight against terrorism to ensure that these do not discriminate directly or indirectly against persons or group of persons, notably on grounds of 'race', colour, language, religion, nationality or national or ethnic origin, and to abrogate any such discriminatory legislation."

V. THE NOTION OF A "PUBLIC EMERGENCY" UNDER ARTICLE 4 OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS ("ICCPR")

109. Article 4(1) of the ICCPR states as follows:

> "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin."

In Spring 1984, a group of 31 experts in international law, convened by the International Commission of Jurists, the International Association of Penal law, the American Association for the International Commission of Jurists, the Urban Morgan Institute for Human Rights and the International Institute of Higher Studies in Criminal Sciences, met in Siracusa, Italy to consider the above provision, *inter alia*. Paragraphs 39-40 of the resulting "Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights" declare, under the heading "Public Emergency which Threatens the Life of the Nation":

> "39. A state party may take measures derogating from its obligations under the International Covenant on Civil and Political Rights pursuant to Article 4 (hereinafter called 'derogation measures') only when faced with a situation of exceptional and actual or imminent danger which threatens the life of the nation. A threat to the life of the nation is one that:
>
> (a) affects the whole of the population and either the whole or part of the territory of the State, and
>
> (b) threatens the physical integrity of the population, the political independence or the territorial integrity of the State or the existence or basic functioning of institutions indispensable to ensure and protect the rights recognised in the Covenant.

40. Internal conflict and unrest that do not constitute a grave and imminent threat to the life of the nation cannot justify derogations under Article 4."

The Siracusa Principles continue, in paragraph 54:

"54. The principle of strict necessity shall be applied in an objective manner. Each measure shall be directed to an actual, clear, present, or imminent danger and may not be imposed merely because of an apprehension of potential danger."

110. The United Nations Human Rights Committee, in "General Comment No 29 on Article 4 of the ICCPR (24 July 2001), observed in paragraph 2 that:

"Measures derogating from the provisions of the Covenant must be of an exceptional and temporary nature."

VI. OTHER MATERIALS CONCERNING NON-DISCLOSURE OF EVIDENCE IN NATIONAL SECURITY CASES

111. In *Charkaoui v Minister of Citizenship and Immigration* [2007] 1 SCR 350, McLachlin CJ, for the Supreme Court of Canada, observed (§ 53):

"Last but not least, a fair hearing requires that the affected person be informed of the case against him or her, and be permitted to respond to it."

That right was not absolute and might be limited in the interests of national security (§§ 57-58) but (§ 64):

"... The judge is therefore not in a position to compensate for the lack of informed scrutiny, challenge and counter-evidence that a person familiar with the case could bring. Such scrutiny is the whole point of the principle that a person whose liberty is in jeopardy must know the case to meet. Here that principle has not merely been limited; it has been effectively gutted. How can one meet a case one does not know?"

112. In *Hamdi v Rumsfeld* 542 US 507 (2004), O'Connor J, writing for the majority of the Supreme Court of the United States, said (p. 533):

"We therefore hold that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decision-maker [authority cited]. 'For more than a century the central meaning of procedural due process has been clear : Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified ...' These essential constitutional promises may not be eroded."

113. The Council of Europe's Commissioner for Human Rights, in paragraph 21 of his report of 8 June 2005 (see paragraph 104 above), and the Joint Parliamentary Committee on Human Rights (see paragraph 100 above), in paragraph 76 of its Twelfth Report of Session 2005-2006, (HL Paper 122, HC 915) had difficulty in accepting that a hearing could be fair if an adverse decision could be based on material that the controlled person has no effective opportunity to challenge or rebut.

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLE 3 OF THE CONVENTION AND ARTICLE 13 TAKEN IN CONJUNCTION WITH ARTICLE 3

114. The applicants alleged that their detention under Part 4 of the 2001 Act breached their rights under Article 3 of the Convention, which provides:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

They further complained that they were denied an effective remedy for their Article 3 complaints, in breach of Article 13 of the Convention, which states:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

A. The parties' submissions

1. The applicants

115. The applicants stressed that each was in the United Kingdom because the opportunity of a safe haven in his own country or elsewhere was denied to him. The first applicant was a stateless Palestinian and had nowhere else to go. Several had experienced torture before coming to the United Kingdom. Under the 2001 Act they were put in the position of having to choose between conditions of detention which they found intolerable and the risk of whatever treatment they might have to suffer if they consented to deportation. Moreover, their previous experiences and pre-existing mental and physical problems made them particularly vulnerable to the ill effects of arbitrary detention. The discrimination they suffered, since only foreign nationals were subject to detention under the 2001 Act, compounded their anguish.

116. The high security conditions of detention, in Belmarsh Prison and Broadmoor Hospital, were inappropriate and damaging to their health. More fundamentally, however, the indeterminate nature of the detention, with no end in sight, and its actual long duration gave rise to abnormal suffering, in excess of that inherent in detention. This was compounded by other unusual aspects of the regime, such as the secret nature of the evidence against them. The fact that the indifference of the authorities to the applicants' situation was sanctioned by Parliamentary statute did not mitigate their suffering.

117. Taken cumulatively, these factors caused the applicants an intense degree of anguish. The medical evidence and reports of the CPT and group of consultant psychiatrists (see paragraphs 101 and 76 above) demonstrated that the detention regime also harmed or seriously risked harming all of them and, in the case of the first, fifth, seventh and tenth applicants, did so extensively.

118. The applicants claimed that SIAC's power to grant bail did not effectively function during the period when they were detained: first, because the scope of the remedy was jurisdictionally unclear; secondly, because the procedure was subject to delay; thirdly, because the threshold for granting bail was too high. An applicant for bail was required to demonstrate an "overwhelming likelihood" that his continued detention would lead to a physical or mental deterioration, such as to constitute inhuman and degrading treatment contrary to Article 3. The jurisdiction was described as "exceptional", requiring the "circumstances to be extreme". Even then, the only available remedy was to substitute house arrest for detention (see paragraph 78 above).

2. The Government

119. The Government denied that the applicants' rights under Article 3 had been infringed. They pointed out that SIAC and the Court of Appeal had rejected the applicants' complaints under Article 3 and that the House of Lords had not found it necessary to determine them (see paragraphs 15, 16 and 22 above).

120. Detention without charge was not in itself contrary to Article 3 and in many instances it was permitted under Article 5 § 1. The detention was indeterminate but not indefinite. The legislation remained in force for only five years and was subject to annual renewal by both Houses of Parliament. Each applicant's detention depended on his individual circumstances continuing to justify it, including the degree of threat to national security which he represented and the possibility to deport him to a safe country, and was subject to review every six months by SIAC. Each applicant was informed of the reason for the suspicion against him and given as much of the underlying evidence as possible and provided with as fair a procedure as possible to challenge the grounds for his detention. Moreover, SIAC was able to grant bail if necessary. The applicants were not, therefore, detained without hope of release: on the contrary there was the opportunity to apply for release together with mandatory review by the court to ensure detention remained both lawful and proportionate in all the circumstances. It also remained open to the applicants to leave the United Kingdom, as the second and fourth applicants chose to do.

121. The applicants were judged to pose a serious threat to national security and were accordingly held in high security conditions, which were not inhuman or degrading. Each was provided with appropriate treatment

for his physical and mental health problems and the individual circumstances of each applicant, including his mental health, were taken into account in determining where he should be held and whether he should be released on bail. A special unit was created at HMP Woodhill of which the applicants refused to make use (see paragraph 71 above).

122. To the extent that the applicants relied upon their individual conditions of detention and their personal circumstances, they had not exhausted domestic remedies because they had not made any attempt to bring the necessary challenges. Any specific complaint about the conditions of detention could have been the subject of separate legal challenge. The prison authorities were subject to the requirements of the 1998 Act (see paragraph 94 above) and had an obligation under section 6(1) to act compatibly with the Article 3 rights of the applicants in their custody. Insofar as the applicants' complaints under Article 3 were based on the indeterminate nature of their detention, this was provided for by primary legislation (Part 4 of the 2001 Act), and Article 13 did not import the right to challenge in a domestic court a deliberate choice expressed by the legislature.

B. The Court's assessment

1. Admissibility

123. The Court observes that the second applicant was placed in detention under Part 4 of the 2001 Act on 19 December 2001 and that he was released on 22 December 2001, following his decision voluntarily to return to Morocco (see paragraph 35 above). Since he was, therefore, detained for only a few days and since there is no evidence that during that time he suffered any hardship beyond that inherent in detention, his complaint under Article 3 is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention.

Since Article 13 requires the provision of a domestic remedy in respect of “arguable complaints” under the Convention (see, for example, *Ramirez Sanchez v. France* [GC], no. 59450/00, § 157, ECHR 2006-IX), it follows that the second applicant's complaint under Article 13 is also manifestly ill-founded.

Both these complaints by the second applicant must therefore be declared inadmissible.

124. The Court notes the Government's assertion that there was a remedy available to the applicants under the 1998 Act, which they neglected to use. However, since the applicants complain under Article 13 that the remedies at their disposal in connection with their Article 3 complaints were ineffective, the Court considers that it is necessary to consider the

Government's objection concerning non-exhaustion together with the merits of the complaints under Articles 3 and 13.

125. The Court considers that, save those of the second applicant, the applicants' complaints under Articles 3 and 13 of the Convention raise complex issues of law and fact, the determination of which should depend on an examination of the merits. It concludes, therefore, that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground of inadmissibility has been raised and it must be declared admissible.

2. The merits

a. General principles

126. The Court is acutely conscious of the difficulties faced by States in protecting their populations from terrorist violence. This makes it all the more important to stress that Article 3 enshrines one of the most fundamental values of democratic societies. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 § 2 notwithstanding the existence of a public emergency threatening the life of the nation. Even in the most difficult of circumstances, such as the fight against terrorism, and irrespective of the conduct of the person concerned, the Convention prohibits in absolute terms torture and inhuman or degrading treatment and punishment (*Ramirez Sanchez*, cited above, §§ 115-116).

127. Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim (see *Kafkaris v. Cyprus* [GC], no. 21906/04, § 95, ECHR 2008). The Court has considered treatment to be "inhuman" because, *inter alia*, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical or mental suffering. It has deemed treatment to be "degrading" because it was such as to arouse in the victims feelings of fear, anguish and inferiority capable of humiliating and debasing them (see, among other authorities, *Kudła v. Poland* [GC], no. 30210/96, § 92, ECHR 2000-XI). In considering whether a punishment or treatment was "degrading" within the meaning of Article 3, the Court will have regard to whether its object was 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. However, the absence of any such purpose cannot conclusively rule out a finding of a violation of Article 3. In order for a punishment or treatment associated with it to be "inhuman" or "degrading", the suffering

or humiliation involved must go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment (*Ramirez Sanchez*, cited above, §§ 118-119).

128. Where a person is deprived of his liberty, the State must ensure that he is detained under conditions which are compatible with respect for his human dignity and that the manner 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 (see *Kudła*, cited above, §§ 92-94). Although Article 3 cannot be construed as laying down a general obligation to release detainees on health grounds, it nonetheless imposes an obligation on the State to protect the physical and mental well-being of persons deprived of their liberty, for example by providing them with the requisite medical assistance (see *Hurtado v. Switzerland*, judgment of 28 January 1994, § 79 opinion of the Commission, Series A no. 280-A; *Mouisel v. France*, no. 67263/01, § 40, ECHR 2002-IX; *Aerts v. Belgium*, judgment of 30 July 1998, § 66, *Reports of Judgments and Decisions* 1998-V; *Keenan v. the United Kingdom*, no. 27229/95, § 111, ECHR 2001-III). When assessing conditions of detention, account has to be taken of the cumulative effects of those conditions, as well as the specific allegations made by the applicant (*Ramirez Sanchez*, cited above, § 119). The imposition of an irreducible life sentence on an adult, without any prospect of release, may raise an issue under Article 3, but where national law affords the possibility of review of a life sentence with a view to its commutation, remission, termination or the conditional release of the prisoner, this will be sufficient (*Kafkaris*, cited above, §§ 97-98).

b. Application to the facts of the present case

129. The Court notes that three of the applicants were held approximately three years and three months while the others were held for shorter periods. During a large part of that detention, the applicants could not have foreseen when, if ever, they would be released. They refer to the findings of the Joint Psychiatric Report and contend that the indefinite nature of their detention caused or exacerbated serious mental health problems in each of them. The Government dispute this conclusion and rely on Dr J.'s Report, which criticised the methodology of the authors of the Joint Report (see paragraphs 76-77 above).

130. The Court considers that the uncertainty regarding their position and the fear of indefinite detention must, undoubtedly, have caused the applicants great anxiety and distress, as it would virtually any detainee in their position. Furthermore, it is probable that the stress was sufficiently serious and enduring to affect the mental health of certain of the applicants. This is one of the factors which the Court must take into account when assessing whether the threshold of Article 3 was attained.

131. It cannot, however, be said that the applicants were without any prospect or hope of release (see *Kafkaris*, cited above, § 98). In particular, they were able to bring proceedings to challenge the legality of the detention scheme under the 2001 Act and were successful before SIAC, on 30 July 2002, and the House of Lords on 16 December 2004. In addition, each applicant was able to bring an individual challenge to the decision to certify him and SIAC was required by statute to review the continuing case for detention every six months. The Court does not, therefore, consider that the applicants' situation was comparable to an irreducible life sentence, of the type designated in the *Kafkaris* judgment as capable of giving rise to an issue under Article 3.

132. The applicants further contend that the conditions in which they were held contributed towards an intolerable level of suffering. The Court notes in this respect that the Joint Psychiatric Report also contained criticisms of the Prison Health Care system and concluded that there was inadequate provision for the applicants' complex health problems. These concerns were echoed by the CPT, which made detailed allegations about the conditions of detention and concluded that for some of the applicants, "their situation at the time of the visit could be considered as amounting to inhuman and degrading treatment". The Government strongly disputed these criticisms in their response to the CPT's report (see paragraphs 101-102 above).

133. The Court observes that each detained applicant had at his disposal the remedies available to all prisoners under administrative and civil law to challenge conditions of detention, including any alleged inadequacy of medical treatment. The applicants did not attempt to make use of these remedies and did not therefore comply with the requirement under Article 35 of the Convention to exhaust domestic remedies. It follows that the Court cannot examine the applicants' complaints about their conditions of detention; nor can it, in consequence, take the conditions of detention into account in forming a global assessment of the applicants' treatment for the purposes of Article 3.

134. In all the above circumstances, the Court does not find that the detention of the applicants reached the high threshold of inhuman and degrading treatment.

135. The applicants also complained that they did not have effective domestic remedies for their Article 3 complaints, in breach of Article 13. In this connection, the Court repeats its above finding that civil and administrative law remedies were available to the applicants had they wished to complain about their conditions of detention. As for the more fundamental aspect of the complaints, that the very nature of the detention scheme in Part 4 of the 2001 Act gave rise to a breach of Article 3, the Court recalls that Article 13 does not guarantee a remedy allowing a challenge to primary legislation before a national authority on the ground of

being contrary to the Convention (*James and Others v. the United Kingdom*, judgment of 21 February 1986, § 85, Series A no. 98; *Roche v. the United Kingdom* [GC], no. 32555/96, § 137, ECHR 2005-X).

136. In conclusion, therefore, the Court does not find a violation of Article 3, taken alone or in conjunction with Article 13.

II. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

137. The applicants contended that their detention was unlawful and incompatible with Article 5 § 1 of the Convention.

138. In their first set of written observations, following the communication of the application by the Chamber, the Government indicated that they would not seek to raise the question of derogation under Article 15 of the Convention as a defence to the claim based on Article 5 § 1, but would leave that point as determined against them by the House of Lords. Instead, they intended to focus argument on the defence that the applicants were lawfully detained with a view to deportation, within the meaning of Article 5 § 1(f).

However, in their written observations to the Grand Chamber, dated 11 February 2008, the Government indicated for the first time that they wished to argue that the applicants' detention did not in any event give rise to a violation of Article 5 § 1 because the United Kingdom's derogation under Article 15 was valid.

139. Article 5 § 1 of the Convention provides, so far as relevant:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> ...
>
> (f) the lawful arrest or detention of a person ... against whom action is being taken with a view to deportation or extradition."

Article 15 of the Convention states:

> "1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under [the] Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
>
> 2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (§ 1) and 7 shall be made under this provision.
>
> 3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefore. It shall also inform the Secretary General of the

Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed."

A. The parties' submissions

1. The applicants

140. The applicants objected that before the domestic courts the Government had not sought to argue that they were detained as "person[s] against whom action is being taken with a view to deportation or extradition", but had instead relied on the derogation under Article 15. In these circumstances, the applicants contended that it was abusive and contrary to the principle of subsidiarity for the Government to raise a novel argument before the Court and that they should be stopped from so doing.

141. In the event that the Court considered that it could entertain the Government's submission, the applicants emphasised that the guarantee in Article 5 was of fundamental importance and exceptions had to be strictly construed. Where, as in their case, deportation was not possible because of the risk of treatment contrary to Article 3 in the receiving country, Article 5 § 1(f) would not authorise detention, irrespective of whether the individual posed a risk to national security. Merely keeping the possibility of deportation under review was not "action ... being taken with a view to deportation"; it was action, unrelated to any extant deportation proceedings, that might make the deportation a possibility in the future. Detention pursuant to such vague and non-specific "action" would be arbitrary. Moreover, it was clear that during the periods when the applicants' cases were being considered by SIAC on appeal (July 2002-October 2003), the Government's position was that they could not be deported compatibly with Article 3 and that no negotiations to effect deportation should be attempted with the proposed receiving States. As a matter of fact, therefore, the Government were not keeping the possibility of deporting the applicants "under active review".

142. The applicants further contended that it was abusive of the Government, so late in the proceedings before the Grand Chamber, to challenge the House of Lords' decision quashing the derogation. In the applicants' view, it would be inconsistent with Article 19 and the principle of subsidiarity for the Court to be asked by a Government to review alleged errors of fact or law committed by that Government's own national courts. The Government's approach in challenging the findings of its own supreme court about legislation which Parliament had chosen to repeal aimed to limit the human rights recognised under domestic law and was thus in conflict with Article 53 of the Convention. Since the legislation had been revoked and the derogation withdrawn, the Government were in effect seeking to

obtain from the Court an advisory opinion to be relied on potentially at some later stage. To allow the Government to proceed would impact substantially on the right of individual petition under Article 34 by deterring applicants from making complaints for fear that Governments would try to upset the decisions of their own supreme courts.

143. In the event that the Court decided to review the legality of the derogation, the applicants contended that the Government should not be permitted to rely on arguments which they had not advanced before the domestic courts. These included, first, the contention that it was justifiable to detain non-national terrorist suspects while excluding nationals from such measures, because of the interest in cultivating loyalty amongst Muslim citizens, rather than exposing them to the threat of detention and the risk that they would thereby become radicalised and, secondly, the argument that the use of detention powers against foreign nationals freed up law enforcement resources to concentrate on United Kingdom nationals (see paragraph 151 below). Since the Government was seeking to introduce these justifications for the derogation which were never advanced before the domestic courts, the Court was being asked to act as a first-instance tribunal on highly controversial matters.

144. Again, if the Court decided to examine the legality of the derogation, there was no reason to give special deference to the findings of the national courts on the question whether there was an emergency within the meaning of Article 15. In the applicants' submission, there were no judicial precedents for recognising that an inchoate fear of a terrorist attack, which was not declared to be imminent, was sufficient. All the examples in the Convention jurisprudence related to derogations introduced to combat ongoing terrorism which quite clearly jeopardized the entire infrastructure of Northern Ireland or the South-East of Turkey. The domestic authorities were wrong in interpreting Article 15 as permitting a derogation where the threat was not necessarily directed at the United Kingdom but instead at other nations to which it was allied.

145. In any event, the enactment of Part 4 of the 2001 Act and the power contained therein to detain foreign nationals indeterminately without charge was not "strictly required by the exigencies of the situation", as the House of Lords found. The impugned measures were not rationally connected to the need to prevent a terrorist attack on the United Kingdom and they involved unjustifiable discrimination on grounds of nationality. SIAC – which saw both the closed and open material on the point – concluded that there was ample evidence that British citizens posed a very significant threat. There could be no grounds for holding that the fundamental right of liberty was less important for a non-national than a national. Aliens enjoyed a right of equal treatment outside the context of immigration and political activity, as a matter of well established domestic, Convention and public international law. There were other, less intrusive, measures which could

have been used to address the threat, for example, the use of control orders as created by the Prevention of Terrorism Act 2005; the creation of additional criminal offences to permit for the prosecution of individuals engaged in preparatory terrorist activity; or the lifting of the ban on the use of material obtained by the interception of communications in criminal proceedings.

2. The Government

146. The Government contended that States have a fundamental right under international law to control the entry, residence and expulsion of aliens. Clear language would be required to justify the conclusion that the Contracting States intended through the Convention to give up their ability to protect themselves against a risk to national security created by a non-national. As a matter of ordinary language, "action being taken with a view to deportation" covered the situation where a Contracting State wished to deport an alien, actively kept that possibility under review and only refrained from doing so because of contingent, extraneous circumstances. In *Chahal*, cited above, a period of detention of over six years, including over three years where the applicant could not be removed because of an interim measure requested by the Commission, was held to be acceptable under Article 5 § 1(f).

147. Each applicant was served a Notice of Intention to Deport at the same time as he was certified under the 2001 Act. The second and fourth applicants elected to go to Morocco and France, respectively, and were allowed to leave the United Kingdom as soon as could be arranged, so no issue could arise under Article 5 § 1 in their respect. The possibility of deporting the other applicants was kept under active review throughout the period of their detention. This involved monitoring the situation in their countries of origin. Further, from the end of 2003 onwards the Government were in negotiation with Algeria and Jordan, with a view to entering into memoranda of understanding that the applicants who were nationals of those countries would not be ill-treated if returned.

148. The Government relied upon the principle of fair balance, which underlies the whole Convention, and reasoned that sub-paragraph (f) of Article 5 § 1 had to be interpreted so as to strike a balance between the interests of the individual and the interests of the State in protecting its population from malevolent aliens. Detention struck that balance by advancing the legitimate aim of the State to secure the protection of the population without sacrificing the predominant interest of the alien to avoid being returned to a place where he faced torture or death. The fair balance was further preserved by providing the alien with adequate safeguards against the arbitrary exercise of the detention powers in national security cases.

149. In the alternative, the detention of the applicants was not in breach of the Convention because of the derogation under Article 15. There was a public emergency threatening the life of the nation at the relevant time. That assessment was subjected to full scrutiny by the domestic courts. The evidence in support, both open and closed, was examined by SIAC in detail, with the benefit of oral hearings at which witnesses were cross-examined. SIAC unanimously upheld the Government's assessment, as did the unanimous Court of Appeal and eight of the nine judges in the House of Lords. In the light of the margin of appreciation to be afforded to the national authorities on this question, there was no proper basis on which the Court could reach a different conclusion.

150. The Government explained that they accorded very great respect to the House of Lords' decision and declaration of incompatibility and that they had repealed the offending legislation. Nonetheless, when the decision was made to refer the case to the Grand Chamber, they decided that it was necessary to challenge the House of Lords' reasoning and conclusions, bearing in mind the wide constitutional importance of the issue and the ongoing need for Contracting States to have clear guidance from the Grand Chamber as to the measures they might legitimately take to try to prevent the terrorist threat from materialising. They submitted that the House of Lords had erred in affording the State too narrow a margin of appreciation in assessing what measures were strictly necessary; in this connection it was relevant to note that Part 4 of the 2001 Act was not only the product of the judgment of the Government but was also the subject of debate in Parliament. Furthermore, the domestic courts had examined the legislation in the abstract, rather than considering the applicants' concrete cases, including the impossibility of removing them, the threat each posed to national security, the inadequacy of enhanced surveillance or other controls short of detention and the procedural safeguards afforded to each applicant.

151. Finally, the House of Lords' conclusion had turned not on a rejection of the necessity to detain the applicants but instead on the absence of a legislative power to detain also a national who posed a risk to national security and was suspected of being an international terrorist. However, there were good reasons for detaining only non-nationals and the Convention expressly and impliedly recognised that distinction was permissible between nationals and non-nationals in the field of immigration. The primary measure which the Government wished to take against the applicants was deportation, a measure permitted against a non-national but not a national. The analogy drawn by the House of Lords between “foreigners [such as the applicants] who cannot be deported” and “British nationals who cannot be deported” was false, because the applicants at the time of their detention were not irremovable in the same way that a British citizen is irremovable. Furthermore, at the relevant time the Government's assessment was that the greater risk emanated from non-nationals and it was

legitimate for a State, when dealing with a national emergency, to proceed on a step-by-step basis and aim to neutralise what was perceived as the greatest threat first, thereby also freeing resources to deal with the lesser threat coming from British citizens. In addition, it was reasonable for the State to take into account the sensitivities of its Muslim population in order to reduce the chances of recruitment amongst them by extremists.

3. The third party, Liberty

152. Liberty (see paragraph 6 above) submitted that, by reserving before the domestic courts the issue whether the detention was compatible with Article 5 § 1, the Government had deprived the Court of the benefit of the views of the House of Lords and had pursued a course of action which would not be open to an applicant. In any event, the detention did not fall within the exception in Article 5 § 1(f), since Part 4 of the 2001 Act permitted indefinite detention and since there was no tangible expectation of being able to deport the applicants during the relevant time. If the Government were unable to remove the applicants because of their Article 3 rights, they could not properly rely on national security concerns as a basis for diluting or modifying their Article 5 rights. Instead, the proper course was either to derogate from Article 5 to the extent strictly required by the situation or to prosecute the individuals concerned with one of the plethora of criminal terrorist offences on the United Kingdom's statute books, which included professed membership of a proscribed organisation, failure to notify the authorities of suspected terrorist activity, possession of incriminating articles and indirect encouragement to commit, prepare or instigate acts of terrorism (see paragraphs 89 and 95 above).

B. The Court's assessment

1. The scope of the case before the Court

153. The Court must start by determining the applicants' first preliminary objection, that the Government should be precluded from raising a defence to the complaints under Article 5 § 1 based on the exception in subparagraph 5 § 1(f), on the ground that they did not pursue it before the domestic courts.

154. The Court is intended to be subsidiary to the national systems safeguarding human rights. It is, therefore, appropriate that the national courts should initially have the opportunity to determine questions of the compatibility of domestic law with the Convention and that, if an application is nonetheless subsequently brought before the Court, it should have the benefit of the views of the national courts, as being in direct and continuous contact with the forces of their countries (see *Burden*, cited

above, § 42). It is thus of importance that the arguments put by the Government before the national courts should be on the same lines as those put before this Court. In particular, it is not open to a Government to put to the Court arguments which are inconsistent with the position they adopted before the national courts (see, *mutatis mutandis*, *Pine Valley Developments Ltd and Others v. Ireland*, judgment of 29 November 1991, § 47, Series A no. 222; *Kolompar v. Belgium*, judgment of 24 September 1992, §§ 31-32, Series A no. 235-C).

155. The Court does not, however, consider that the Government are estopped from seeking to rely on sub-paragraph (f) of Article 5 § 1 to justify the detention. It is clear that the Government expressly kept open, in the text of the derogation and during the derogation proceedings before the domestic courts, the question of the application of Article 5. Moreover, the majority of the House of Lords either explicitly or impliedly considered whether the detention was compatible with Article 5 § 1 before assessing the validity of the derogation (see paragraph 17 above).

156. The applicants further contended that the Government should not be permitted to dispute before the Court the House of Lords' finding that the derogation was invalid.

157. The present situation is, undoubtedly, unusual in that Governments do not normally resort to challenging, nor see any need to contest, decisions of their own highest courts before this Court. There is not, however, any prohibition on a Government making such a challenge, particularly if they consider that the national supreme court's ruling is problematic under the Convention and that further guidance is required from the Court.

158. In the present case, because a declaration of incompatibility under the Human Rights Act is not binding on the parties to the domestic litigation (see paragraph 94 above), the applicants' success in the House of Lords led neither to their immediate release nor to the payment of compensation for unlawful detention and it was therefore necessary for them to lodge the present application. The Court does not consider that there is any reason of principle why, since the applicants have requested it to examine the lawfulness of their detention, the Government should not now have the chance to raise all the arguments open to them to defend the proceedings, even if this involves calling into question the conclusion of their own supreme court.

159. The Court therefore dismisses the applicants' two preliminary objections.

2. Admissibility

160. The Court considers that the applicants' complaints under Article 5 § 1 of the Convention raise complex issues of law and fact, the determination of which should depend on an examination of the merits. It concludes, therefore, that this part of the application is not manifestly ill-

founded within the meaning of Article 35 § 3 of the Convention. No other ground of inadmissibility has been raised and it must be declared admissible.

3. The merits

161. The Court must first ascertain whether the applicants' detention was permissible under Article 5 § 1(f), because if that subparagraph does provide a defence to the complaints under Article 5 § 1, it will not be necessary to determine whether or not the derogation was valid (see *Ireland v. the United Kingdom*, judgment of 18 January 1978, § 191, Series A no. 25).

a. Whether the applicants were lawfully detained in accordance with Article 5 § 1(f) of the Convention

162. Article 5 enshrines a fundamental human right, namely the protection of the individual against arbitrary interference by the State with his or her right to liberty (*Aksoy v. Turkey*, judgment of 18 December 1996, § 76, *Reports* 1996-VI). The text of Article 5 makes it clear that the guarantees it contains apply to "everyone".

163. Sub-paragraphs (a) to (f) of Article 5 § 1 contain an exhaustive list of permissible grounds on which persons may be deprived of their liberty and no deprivation of liberty will be lawful unless it falls within one of those grounds (*Saadi v. the United Kingdom* [GC], no. 13229/03, § 43, ECHR 2008). One of the exceptions, contained in subparagraph (f), permits the State to control the liberty of aliens in an immigration context (idem., § 64). The Government contend that the applicants' detention was justified under the second limb of that subparagraph and that they were lawfully detained as persons "against whom action is being taken with a view to deportation or extradition".

164. Article 5 § 1(f) does not demand that detention be reasonably considered necessary, for example to prevent the individual from committing an offence or fleeing. Any deprivation of liberty under the second limb of Article 5 § 1(f) will be justified, however, only for as long as deportation or extradition proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible under Article 5 § 1(f) (*Chahal*, cited above, § 113). The deprivation of liberty must also be "lawful". Where the "lawfulness" of detention is in issue, including the question whether "a procedure prescribed by law" has been followed, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of national law. Compliance with national law is not, however, sufficient: Article 5 § 1 requires in addition that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness. It is a fundamental principle that no detention which is

arbitrary can be compatible with Article 5 § 1 and the notion of "arbitrariness" in Article 5 § 1 extends beyond lack of conformity with national law, so that a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the Convention (*Saadi v. the United Kingdom*, cited above, § 67). To avoid being branded as arbitrary, detention under Article 5 § 1(f) must be carried out in good faith; it must be closely connected to the ground of detention relied on by the Government; the place and conditions of detention should be appropriate; and the length of the detention should not exceed that reasonably required for the purpose pursued (see, *mutatis mutandis*, *Saadi v. the United Kingdom*, cited above, § 74).

165. The first, third, and sixth applicants were taken into detention under the 2001 Act on 19 December 2001; the seventh applicant was detained on 9 February 2002; the eighth applicant, on 23 October 2002; the ninth applicant, on 22 April 2002; the tenth applicant, on 14 January 2003; and the eleventh applicant, on 2 October 2003. None of these applicants was released until 10-11 March 2005. The fifth applicant was detained between 19 December 2001 and 22 April 2004, when he was released on bail subject to stringent conditions. The second and fourth applicants were also detained on 19 December 2001 but the second applicant was released on 22 December 2001, following his decision to return to Morocco, and the fourth applicant was released on 13 March 2002, following his decision to go to France. The applicants were held throughout in high security conditions at either Belmarsh or Woodhill Prisons or Broadmoor Hospital. It cannot, therefore, be disputed that they were deprived of their liberty within the meaning of Article 5 § 1 (see *Engel and Others v. the Netherlands*, judgment of 8 June 1976, Series A no. 22).

166. The applicants were foreign nationals whom the Government would have deported from the United Kingdom had it been possible to find a State to receive them where they would not face a real risk of being subjected to treatment contrary to Article 3 of the Convention (*Saadi v. Italy* [GC], no. 37201/06, §§ 125 and 127, ECHR 2008). Although the respondent State's obligations under Article 3 prevented the removal of the applicants from the United Kingdom, the Secretary of State nonetheless considered it necessary to detain them for security reasons, because he believed that their presence in the country was a risk to national security and suspected that they were or had been concerned in the commission, preparation or instigation of acts of international terrorism and were members of, belonged to or had links with an international terrorist group. Such detention would have been unlawful under domestic law prior to the passing of Part 4 of the 2001 Act, since the 1984 judgment in *Hardial Singh* entailed that the power of detention could not be exercised unless the person subject to the deportation order could be deported within a reasonable time (see paragraph 87 above). Thus, it was stated in the derogation notice

lodged under Article 15 of the Convention that extended powers were required to arrest and detain a foreign national "where removal or deportation is not for the time being possible, with the consequence that the detention would be unlawful under existing domestic law powers" (see paragraph 11 above).

167. One of the principal assumptions underlying the derogation notice, the 2001 Act and the decision to detain the applicants was, therefore, that they could not be removed or deported "for the time being" (see paragraphs 11 and 90 above). There is no evidence that during the period of the applicants' detention there was, except in respect of the second and fourth applicants, any realistic prospect of their being expelled without this giving rise to a real risk of ill-treatment contrary to Article 3. Indeed, the first applicant is stateless and the Government have not produced any evidence to suggest that there was another State willing to accept him. It does not appear that the Government entered into negotiations with Algeria or Jordan, with a view to seeking assurances that the applicants who were nationals of those States would not be ill-treated if returned, until the end of 2003 and no such assurance was received until August 2005 (see paragraph 86 above). In these circumstances, the Court does not consider that the respondent Government's policy of keeping the possibility of deporting the applicants "under active review" was sufficiently certain or determinative to amount to "action ... being taken with a view to deportation".

168. The exceptions to this conclusion were the second applicant, who was detained for only three days prior to his return to Morocco, and the fourth applicant, who left the United Kingdom for France on 13 March 2002, having been detained for just under three months (see paragraphs 35 and 41 above). The Court considers that during these periods of detention it could reasonably be said that action was being taken against these applicants with a view to deportation, in that it appears that the authorities were still at that stage in the course of establishing their nationalities and investigating whether their removal to their countries of origin or to other countries would be possible (see *Gebremedhin [Gaberamadhien] v. France*, no. 25389/05, § 74, 26 April 2007). Accordingly, there has been no violation of Article 5 § 1 of the Convention in respect of the second and fourth applicants.

169. It is true that even the applicants who were detained the longest were not held for as long as the applicant in *Chahal* (cited above), where the Court found no violation of Article 5 § 1 despite his imprisonment for over six years. However, in the *Chahal* case, throughout the entire period of the detention, proceedings were being actively and diligently pursued, before the domestic authorities and the Court, in order to determine whether it would be lawful and compatible with Article 3 of the Convention to proceed with the applicant's deportation to India. The same cannot be said in the

present case, where the proceedings have, instead, been primarily concerned with the legality of the detention.

170. In the circumstances of the present case it cannot be said that the first, third, fifth, sixth, seventh, eighth, ninth, tenth and eleventh applicants were persons "against whom action [was] being taken with a view to deportation or extradition". Their detention did not, therefore, fall within the exception to the right to liberty set out in paragraph 5 § 1(f) of the Convention. This is a conclusion which was also, expressly or impliedly, reached by a majority of the members of the House of Lords (see paragraph 17 above).

171. It is, instead, clear from the terms of the derogation notice and Part 4 of the 2001 Act that the applicants were certified and detained because they were suspected of being international terrorists and because it was believed that their presence at liberty in the United Kingdom gave rise to a threat to national security. The Court does not accept the Government's argument that Article 5 § 1 permits a balance to be struck between the individual's right to liberty and the State's interest in protecting its population from terrorist threat. This argument is inconsistent not only with the Court's jurisprudence under sub-paragraph (f) but also with the principle that paragraphs (a) to (f) amount to an exhaustive list of exceptions and that only a narrow interpretation of these exceptions is compatible with the aims of Article 5. If detention does not fit within the confines of the paragraphs as interpreted by the Court, it cannot be made to fit by an appeal to the need to balance the interests of the State against those of the detainee.

172. The Court recalls that it has, on a number of occasions, found internment and preventive detention without charge to be incompatible with the fundamental right to liberty under Article 5 § 1, in the absence of a valid derogation under Article 15 (see *Lawless v. Ireland (No. 3)*, judgment of 1 July 1961, §§ 13 and 14, Series A no. 3; *Ireland v. the United Kingdom*, cited above, §§ 194-196 and 212-213). It must now, therefore, consider whether the United Kingdom's derogation was valid.

b. Whether the United Kingdom validly derogated from its obligations under Article 5 § 1 of the Convention

i. The Court's approach

173. The Court recalls that it falls to each Contracting State, with its responsibility for "the life of [its] nation", to determine whether that life is threatened by a "public emergency" and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle better placed than the international judge to decide both on the presence of such an emergency and on the nature and

scope of the derogations necessary to avert it. Accordingly, in this matter a wide margin of appreciation should be left to the national authorities.

Nonetheless, Contracting Parties do not enjoy an unlimited discretion. It is for the Court to rule whether, *inter alia*, the States have gone beyond the "extent strictly required by the exigencies" of the crisis. The domestic margin of appreciation is thus accompanied by a European supervision. In exercising this supervision, the Court must give appropriate weight to such relevant factors as the nature of the rights affected by the derogation and the circumstances leading to, and the duration of, the emergency situation (*Ireland v. the United Kingdom*, cited above, § 207; *Brannigan and McBride v. the United Kingdom*, judgment of 26 May 1993, § 43, Series A no. 258; *Aksoy*, cited above, § 68).

174. The object and purpose underlying the Convention, as set out in Article 1, is that the rights and freedoms should be secured by the Contracting State within its jurisdiction. It is fundamental to the machinery of protection established by the Convention that the national systems themselves provide redress for breaches of its provisions, with the Court exercising a supervisory role subject to the principle of subsidiarity (*Z. and Others v. the United Kingdom*, no. 29392/95, § 103, ECHR 2001-V). Moreover, the domestic courts are part of the "national authorities" to which the Court affords a wide margin of appreciation under Article 15. In the unusual circumstances of the present case, where the highest domestic court has examined the issues relating to the State's derogation and concluded that there was a public emergency threatening the life of the nation but that the measures taken in response were not strictly required by the exigencies of the situation, the Court considers that it would be justified in reaching a contrary conclusion only if satisfied that the national court had misinterpreted or misapplied Article 15 or the Court's jurisprudence under that Article or reached a conclusion which was manifestly unreasonable.

ii. Whether there was a "public emergency threatening the life of the nation"

175. The applicants argued that there had been no public emergency threatening the life of the British nation, for three main reasons: first, the emergency was neither actual nor imminent; secondly, it was not of a temporary nature; and, thirdly, the practice of other States, none of which had derogated from the Convention, together with the informed views of other national and international bodies, suggested that the existence of a public emergency had not been established.

176. The Court recalls that in *Lawless*, cited above, § 28, it held that in the context of Article 15 the natural and customary meaning of the words "other public emergency threatening the life of the nation" was sufficiently clear and that they referred to "an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed". In the

Greek Case (1969) 12 YB 1, § 153, the Commission held that, in order to justify a derogation, the emergency should be actual or imminent; that it should affect the whole nation to the extent that the continuance of the organised life of the community was threatened; and that the crisis or danger should be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, were plainly inadequate. In *Ireland v United Kingdom*, cited above, §§ 205 and 212, the parties were agreed, as were the Commission and the Court, that the Article 15 test was satisfied, since terrorism had for a number of years represented "a particularly far-reaching and acute danger for the territorial integrity of the United Kingdom, the institutions of the six counties and the lives of the province's inhabitants". The Court reached similar conclusions as regards the continuing security situation in Northern Ireland in *Brannigan and McBride*, cited above, and *Marshall v. the United Kingdom* (dec.), no. 41571/98, 10 July 2001. In *Aksoy*, cited above, it accepted that Kurdish separatist violence had given rise to a "public emergency" in Turkey.

177. Before the domestic courts, the Secretary of State adduced evidence to show the existence of a threat of serious terrorist attacks planned against the United Kingdom. Additional closed evidence was adduced before SIAC. All the national judges accepted that the danger was credible (with the exception of Lord Hoffmann, who did not consider that it was of a nature to constitute "a threat to the life of the nation": see paragraph 18 above). Although when the derogation was made no al'Qaeda attack had taken place within the territory of the United Kingdom, the Court does not consider that the national authorities can be criticised, in the light of the evidence available to them at the time, for fearing that such an attack was "imminent", in that an atrocity might be committed without warning at any time. The requirement of imminence cannot be interpreted so narrowly as to require a State to wait for disaster to strike before taking measures to deal with it. Moreover, the danger of a terrorist attack was, tragically, shown by the bombings and attempted bombings in London in July 2005 to have been very real. Since the purpose of Article 15 is to permit States to take derogating measures to protect their populations from future risks, the existence of the threat to the life of the nation must be assessed primarily with reference to those facts which were known at the time of the derogation. The Court is not precluded, however, from having regard to information which comes to light subsequently (see, *mutatis mutandis*, *Vilvarajah and others v. the United Kingdom*, judgment of 30 October 1991, § 107(2), Series A no. 215).

178. While the United Nations Human Rights Committee has observed that measures derogating from the provisions of the ICCPR must be of "an exceptional and temporary nature" (see paragraph 109 above), the Court's case-law has never, to date, explicitly incorporated the requirement that the

emergency be temporary, although the question of the proportionality of the response may be linked to the duration of the emergency. Indeed, the cases cited above, relating to the security situation in Northern Ireland, demonstrate that it is possible for a "public emergency" within the meaning of Article 15 to continue for many years. The Court does not consider that derogating measures put in place in the immediate aftermath of the al'Qaeda attacks in the United States of America, and reviewed on an annual basis by Parliament, can be said to be invalid on the ground that they were not "temporary".

179. The applicants' argument that the life of the nation was not threatened is principally founded on the dissenting opinion of Lord Hoffman, who interpreted the words as requiring a threat to the organised life of the community which went beyond a threat of serious physical damage and loss of life. It had, in his view, to threaten "our institutions of government or our existence as a civil community" (see paragraph 18 above). However, the Court has in previous cases been prepared to take into account a much broader range of factors in determining the nature and degree of the actual or imminent threat to the "nation" and has in the past concluded that emergency situations have existed even though the institutions of the State did not appear to be imperilled to the extent envisaged by Lord Hoffman.

180. As previously stated, the national authorities enjoy a wide margin of appreciation under Article 15 in assessing whether the life of their nation is threatened by a public emergency. While it is striking that the United Kingdom was the only Convention State to have lodged a derogation in response to the danger from al'Qaeda, although other States were also the subject of threats, the Court accepts that it was for each Government, as the guardian of their own people's safety, to make their own assessment on the basis of the facts known to them. Weight must, therefore, attach to the judgment of the United Kingdom's executive and Parliament on this question. In addition, significant weight must be accorded to the views of the national courts, who were better placed to assess the evidence relating to the existence of an emergency.

181. On this first question, the Court accordingly shares the view of the majority of the House of Lords that there was a public emergency threatening the life of the nation.

Iii Whether the measures were strictly required by the exigencies of the situation

182. Article 15 provides that the State may take measures derogating from its obligations under the Convention only "to the extent strictly required by the exigencies of the situation". As previously stated, the Court considers that it should in principle follow the judgment of the House of Lords on the question of the proportionality of the applicants' detention,

unless it can be shown that the national court misinterpreted the Convention or the Court's case-law or reached a conclusion which was manifestly unreasonable. It will consider the Government's challenges to the House of Lords' judgment against this background.

183. The Government contended, first, that the majority of the House of Lords should have afforded a much wider margin of appreciation to the executive and Parliament to decide whether the applicants' detention was necessary. A similar argument was advanced before the House of Lords, where the Attorney General submitted that the assessment of what was needed to protect the public was a matter of political rather than judicial judgment (see paragraph 19 above).

184. When the Court comes to consider a derogation under Article 15, it allows the national authorities a wide margin of appreciation to decide on the nature and scope of the derogating measures necessary to avert the emergency. Nonetheless, it is ultimately for the Court to rule whether the measures were "strictly required". In particular, where a derogating measure encroaches upon a fundamental Convention right, such as the right to liberty, the Court must be satisfied that it was a genuine response to the emergency situation, that it was fully justified by the special circumstances of the emergency and that adequate safeguards were provided against abuse (see, for example, *Brannigan and McBride*, cited above, §§ 48-66; *Aksoy*, cited above, §§ 71-84; and the principles outlined in paragraph 173 above). The doctrine of the margin of appreciation has always been meant as a tool to define relations between the domestic authorities and the Court. It cannot have the same application to the relations between the organs of State at the domestic level. As the House of Lords held, the question of proportionality is ultimately a judicial decision, particularly in a case such as the present where the applicants were deprived of their fundamental right to liberty over a long period of time. In any event, having regard to the careful way in which the House of Lords approached the issues, it cannot be said that inadequate weight was given to the views of the executive or of Parliament.

185. The Government also submitted that the House of Lords erred in examining the legislation in the abstract rather than considering the applicants' concrete cases. However, in the Court's view, the approach under Article 15 is necessarily focussed on the general situation pertaining in the country concerned, in the sense that the court - whether national or international - is required to examine the measures that have been adopted in derogation of the Convention rights in question and to weigh them against the nature of the threat to the nation posed by the emergency. Where, as here, the measures are found to be disproportionate to that threat and to be discriminatory in their effect, there is no need to go further and examine their application in the concrete case of each applicant.

186. The Government's third ground of challenge to the House of Lords' decision was directed principally at the approach taken towards the

comparison between non-national and national suspected terrorists. The Court, however, considers that the House of Lords was correct in holding that the impugned powers were not to be seen as immigration measures, where a distinction between nationals and non-nationals would be legitimate, but instead as concerned with national security. Part 4 of the 2001 Act was designed to avert a real and imminent threat of terrorist attack which, on the evidence, was posed by both nationals and non-nationals. The choice by the Government and Parliament of an immigration measure to address what was essentially a security issue had the result of failing adequately to address the problem, while imposing a disproportionate and discriminatory burden of indefinite detention on one group of suspected terrorists. As the House of Lords found, there was no significant difference in the potential adverse impact of detention without charge on a national or on a non-national who in practice could not leave the country because of fear of torture abroad.

187. Finally, the Government advanced two arguments which the applicants claimed had not been relied on before the national courts. Certainly, there does not appear to be any reference to them in the national courts' judgments or in the open material which has been put before the Court. In these circumstances, even assuming that the principle of subsidiarity does not prevent the Court from examining new grounds, it would require persuasive evidence in support of them.

188. The first of the allegedly new arguments was that it was legitimate for the State, in confining the measures to non-nationals, to take into account the sensitivities of the British Muslim population in order to reduce the chances of recruitment among them by extremists. However, the Government has not placed before the Court any evidence to suggest that British Muslims were significantly more likely to react negatively to the detention without charge of national rather than foreign Muslims reasonably suspected of links to al'Qaeda. In this respect the Court notes that the system of control orders, put in place by the Prevention of Terrorism Act 2005, does not discriminate between national and non-national suspects.

189. The second allegedly new ground relied on by the Government was that the State could better respond to the terrorist threat if it were able to detain its most serious source, namely non-nationals. In this connection, again the Court has not been provided with any evidence which could persuade it to overturn the conclusion of the House of Lords that the difference in treatment was unjustified. Indeed, the Court notes that the national courts, including SIAC, which saw both the open and the closed material, were not convinced that the threat from non-nationals was more serious than that from nationals.

190. In conclusion, therefore, the Court, like the House of Lords, and contrary to the Government's contention, finds that the derogating measures were disproportionate in that they discriminated unjustifiably between

nationals and non-nationals. It follows there has been a violation of Article 5 § 1 in respect of the first, third, fifth, sixth, seventh, eighth, ninth, tenth and eleventh applicants.

III. ALLEGED VIOLATION OF ARTICLE 5 § 1 TAKEN IN CONJUNCTION WITH ARTICLE 14 OF THE CONVENTION

191. The applicants complained that it was discriminatory, and in breach of Article 14 of the Convention, to detain them when United Kingdom nationals suspected of involvement with al'Qaeda were left at liberty.

Article 14 provides:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

192. In the light of its above reasoning and conclusion in relation to Article 5 § 1 taken alone, the Court does not consider it necessary to examine these complaints separately.

IV. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION

193. The applicants contended that the procedure before the domestic courts to challenge their detention did not comply with the requirements of Article 5 § 4, which states:

> "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

The Government denied that there had been a violation of Article 5 § 4.

A. The parties' submissions

1. The applicants

194. The applicants advanced two main arguments under Article 5 § 4. First, they emphasised that although it was open to them to argue before SIAC, the Court of Appeal and the House of Lords that their detention under Part 4 of the 2001 Act was unlawful under the Convention, the only remedy which they were able to obtain was a declaration of incompatibility under the 1998 Act. This had no binding effect on the Government and the detention remained lawful until legislative change was effected by Parliament. There was thus no court with power to order their release, in breach of Article 5 § 4.

195. Secondly, the applicants complained about the procedure before SIAC for appeals under section 25 of the 2001 Act (see paragraph 91 above) and in particular the lack of disclosure of material evidence except to special advocates with whom the detained person was not permitted to consult. In their submission, Article 5 § 4 imported the fair trial guarantees of Article 6 § 1 commensurate with the gravity of the issue at stake. While in certain circumstances it might be permissible for a court to sanction non-disclosure of relevant evidence to an individual on grounds of national security, it could never be permissible for a court assessing the lawfulness of detention to rely on such material where it bore decisively on the case the detained person had to meet and where it had not been disclosed, even in gist or summary form, sufficiently to enable the individual to know the case against him and to respond. In all the applicants' appeals, except that of the tenth applicant, SIAC relied on closed material and recognised that the applicants were thereby put at a disadvantage.

2. The Government

196. The Government contended that Article 5 § 4 should be read in the light of the Court's established jurisprudence under Article 13, of which it was the *lex specialis* as regards detention, that there was no right to challenge binding primary legislation before a national court. This principle, together with the system of declarations of incompatibility under the Human Rights Act, reflected the democratic value of the supremacy of the elected Parliament.

197. On the applicants' second point, the Government submitted that there were valid public interest grounds for withholding the closed material. The right to disclosure of evidence, under Article 6 and also under Article 5 § 4, was not absolute. The Court's case-law from *Chahal* (cited above) onwards had indicated some support for a special advocate procedure in particularly sensitive fields. Moreover, in each applicant's case, the open material gave sufficient notice of the allegations against him to enable him to mount an effective defence.

3. The third party, Justice

198. Justice (see paragraph 6 above) informed the Court that at the time SIAC was created by the Special Immigration Appeals Commission Act 1997, the use of closed material and special advocates in the procedure before it was believed to be based on a similar procedure in Canada, applied in cases before the Security Intelligence Review Committee (“SIRC”), which considered whether a Minister's decision to remove a permanently resident foreign national on national security grounds was well-founded. However, although the SIRC procedure involved an in-house counsel with access to the classified material taking part in *ex parte* and *in camera*

hearings to represent the appellant's interests, it differed substantially from the SIAC model, particularly in that it allowed the special advocate to maintain contact with the appellant and his lawyers throughout the process and even after the special advocate was fully apprised of the secret information against the appellant.

199. In contrast, the SIAC procedures involving closed material and special advocates had attracted considerable criticism, including from the Appellate Committee of the House of Lords, the House of Commons Constitutional Affairs Committee, the Parliamentary Joint Committee on Human Rights, the Canadian Senate Committee on the Anti-Terrorism Act, and the Council of Europe Commissioner for Human Rights. Following the judgment of the House of Lords in December 2004, declaring Part 4 of the 2001 Act incompatible with Articles 5 and 14 of the Convention, the House of Commons Constitutional Affairs Committee commenced an inquiry into the operation of SIAC and its use of special advocates. Among the evidence received by the Committee was a submission from nine of the thirteen serving special advocates. In the submission, the special advocates highlighted the serious difficulties they faced in representing appellants in closed proceedings due to the prohibition on communication concerning the closed material. In particular, the special advocates pointed to the very limited role they were able to play in closed hearings given the absence of effective instructions from those they represented.

B. The Court's assessment

1. Admissibility

200. The Court notes that Article 5 § 4 guarantees a right to "everyone who is deprived of his liberty by arrest or detention" to bring proceedings to test the legality of the detention and to obtain release if the detention is found to be unlawful. Since the second and fourth applicants were already at liberty, having elected to travel to Morocco and France respectively, by the time the various proceedings to determine the lawfulness of the detention under the 2001 Act were commenced, it follows that these two applicants' complaints under Article 5 § 4 are manifestly ill-founded within the meaning of Article 35 § 3 of the Convention (see *Fox, Campbell and Hartley v. the United Kingdom*, judgment of 30 August 1990, § 45, Series A no. 182) and must be declared inadmissible.

201. The Court considers that the other applicants' complaints under this provision raise complex issues of law and fact, the determination of which should depend on an examination of the merits. It concludes, therefore, that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground of inadmissibility has been raised and it must be declared admissible.

2. The merits

a. The principles arising from the case-law

202. Article 5 § 4 provides a *lex specialis* in relation to the more general requirements of Article 13 (see *Chahal*, cited above, § 126). It entitles an arrested or detained person to institute proceedings bearing on the procedural and substantive conditions which are essential for the "lawfulness" of his or her deprivation of liberty. The notion of "lawfulness" under paragraph 4 of Article 5 has the same meaning as in paragraph 1, so that the arrested or detained person is entitled to a review of the "lawfulness" of his detention in the light not only of the requirements of domestic law but also of the Convention, the general principles embodied therein and the aim of the restrictions permitted by Article 5 § 1. Article 5 § 4 does not guarantee a right to judicial review of such a scope as to empower the court, on all aspects of the case including questions of pure expediency, to substitute its own discretion for that of the decision-making authority. The review should, however, be wide enough to bear on those conditions which are essential for the "lawful" detention of a person according to Article 5 § 1 (*E. v. Norway*, judgment of 29 August 1990, § 50, Series A no. 181). The reviewing "court" must not have merely advisory functions but must have the competence to "decide" the "lawfulness" of the detention and to order release if the detention is unlawful (*Ireland v. the United Kingdom*, cited above, § 200; *Weeks v. the United Kingdom* judgment of 2 March 1987, § 61, Series A no. 114; *Chahal*, cited above, § 130).

203. The requirement of procedural fairness under Article 5 § 4 does not impose a uniform, unvarying standard to be applied irrespective of the context, facts and circumstances. Although it is not always necessary that an Article 5 § 4 procedure be attended by the same guarantees as those required under Article 6 for criminal or civil litigation, it must have a judicial character and provide guarantees appropriate to the type of deprivation of liberty in question (see, for example, *Winterwerp v. the Netherlands*, judgment of 24 October 1979, § 57, Series A no. 33; *Bouamar v. Belgium*, judgment of 29 February 1988, §§ 57 and 60, Series A no. 129; *Włoch v. Poland*, no. 27785/95, § 125, ECHR 2000-XI; *Reinprecht v. Austria*, no. 67175/01, § 31, ECHR 2005).

204. Thus, the proceedings must be adversarial and must always ensure "equality of arms" between the parties (*Reinprecht*, § 31). An oral hearing may be necessary, for example in cases of detention on remand (*Nikolova v. Bulgaria* [GC], no. 31195/96, § 58, ECHR 1999-II). Moreover, in remand cases, since the persistence of a reasonable suspicion that the accused person has committed an offence is a condition *sine qua non* for the lawfulness of the continued detention, the detainee must be given an

opportunity effectively to challenge the basis of the allegations against him (*Becciev v. Moldova*, no. 9190/03, §§ 68-72, 4 October 2005). This may require the court to hear witnesses whose testimony appears *prima facie* to have a material bearing on the continuing lawfulness of the detention (*Becciev*, cited above, §§ 72-76; *Ţurcan and Ţurcan v. Moldova*, no. 39835/05, §§ 67-70, 23 October 2007). It may also require that the detainee or his representative be given access to documents in the case-file which form the basis of the prosecution case against him (*Włoch*, cited above, § 127; *Nikolova*, cited above, § 58; *Lamy v. Belgium*, judgment of 30 March 1989, § 29, Series A no. 151; *Fodale v. Italy*, no. 70148/01, 1 June 2006).

205. The Court has held nonetheless that, even in proceedings under Article 6 for the determination of guilt on criminal charges, there may be restrictions on the right to a fully adversarial procedure where strictly necessary in the light of a strong countervailing public interest, such as national security, the need to keep secret certain police methods of investigation or the protection of the fundamental rights of another person. There will not be a fair trial, however, unless any difficulties caused to the defendant by a limitation on his rights are sufficiently counterbalanced by the procedures followed by the judicial authorities (see, for example, *Doorson v. the Netherlands*, judgment of 26 March 1996, § 70, *Reports* 1996-II; *Van Mechelen and Others v. the Netherlands*, judgment of 23 April 1997, § 58, *Reports* 1997-III; *Jasper v. the United Kingdom* [GC], no. 27052/95, §§ 51-53, ECHR 2000-II; *S.N. v. Sweden*, no. 34209/96, § 47, ECHR 2002-V; *Botmeh and Alami v. the United Kingdom*, no. 15187/03, judgment of 7 June 2007, § 37).

206. Thus, while the right to a fair criminal trial under Article 6 includes a right to disclosure of all material evidence in the possession of the prosecution, both for and against the accused, the Court has held that it might sometimes be necessary to withhold certain evidence from the defence on public interest grounds. In *Jasper*, cited above, §§ 51-53, it found that the limitation on the rights of the defence had been sufficiently counterbalanced where evidence which was relevant to the issues at trial, but on which the prosecution did not intend to rely, was examined *ex parte* by the trial judge, who decided that it should not be disclosed because the public interest in keeping it secret outweighed the utility to the defence of disclosure. In finding that there had been no violation of Article 6, the Court considered it significant that it was the trial judge, with full knowledge of the issues in the trial, who carried out the balancing exercise and that steps had been taken to ensure that the defence were kept informed and permitted to make submissions and participate in the decision-making process as far as was possible without disclosing the material which the prosecution sought to keep secret (ibid., §§ 55-56). In contrast, in *Edwards and Lewis v. the United Kingdom* [GC], nos. 39647/98 and 40461/98, §§ 46-48, ECHR

2004-X, the Court found that an *ex parte* procedure before the trial judge was not sufficient to secure a fair trial where the undisclosed material related, or may have related, to an issue of fact which formed part of the prosecution case, which the trial judge, rather than the jury, had to determine and which might have been of decisive importance to the outcome of the applicants' trials.

207. In a number of other cases where the competing public interest entailed restrictions on the rights of the defendant in relation to adverse evidence, relied on by the prosecutor, the Court has assessed the extent to which counterbalancing measures can remedy the lack of a full adversarial procedure. For example, in *Lucà v. Italy*, no. 33354/96, § 40, ECHR 2001-II, it held that it would not necessarily be incompatible with Article 6 § 1 for the prosecution to refer at trial to depositions made during the investigative stage, in particular where a witness refused to repeat his deposition in public owing to fears for his safety, if the defendant had been given an adequate and proper opportunity to challenge the depositions, either when made or at a later stage. It emphasised, however, that where a conviction was based solely or to a decisive degree on depositions that had been made by a person whom the accused had had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence would be restricted to an extent incompatible with the guarantees provided by Article 6.

208. Similarly, in *Doorson*, cited above, §§ 68-76, the Court found that there was no breach of Article 6 where the identity of certain witnesses was concealed from the defendant, on the ground that they feared reprisals. The fact that the defence counsel, in the absence of the defendant, was able to put questions to the anonymous witnesses at the appeal stage and to attempt to cast doubt on their reliability and that the Court of Appeal stated in its judgment that it had treated the evidence of the anonymous witnesses with caution was sufficient to counterbalance the disadvantage caused to the defence. The Court emphasised that a conviction should not be based either solely or to a decisive extent on anonymous statements (and see also *Van Mechelen*, cited above, § 55). In each case, the Court emphasised that its role was to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair (*Doorson*, cited above, § 67).

209. The Court has referred on several occasions to the possibility of using special advocates to counterbalance procedural unfairness caused by lack of full disclosure in national security cases, but it has never been required to decide whether or not such a procedure would be compatible with either Article 5 § 4 or Article 6 of the Convention.

210. In *Chahal*, cited above, the applicant was detained under Article 5 § 1(f) pending deportation on national security grounds and the Secretary of State opposed his applications for bail and *habeas corpus*, also for reasons of national security. The Court recognised (§§ 130-131) that the use of

confidential material might be unavoidable where national security was at stake but held that this did not mean that the executive could be free from effective control by the domestic courts whenever they chose to assert that national security and terrorism were involved. The Court found a violation of Article 5 § 4 in the light of the fact that the High Court, which determined the *habeas corpus* application, did not have access to the full material on which the Secretary of State had based his decision. Although there was the safeguard of an advisory panel, chaired by a Court of Appeal judge, which had full sight of the national security evidence, the Court held that the panel could not be considered as a "court" within the meaning of Article 5 § 4 because the applicant was not entitled to legal representation before it and was given only an outline of the national security case against him and because the panel had no power of decision and its advice to the Home Secretary was not binding and was not disclosed. The Court made reference (§§ 131 and 144) to the submissions of the third parties (Amnesty International, Liberty, the AIRE Centre and the Joint Council for the Joint Council for the Welfare of Immigrants; and see the submissions of Justice in the present case, paragraph 198 above) in connection with a procedure applied in national security deportation cases in Canada, whereby the judge held an *in camera* hearing of all the evidence, at which the proposed deportee was provided with a statement summarising, as far as possible, the case against him and had the right to be represented and to call evidence. The confidentiality of the security material was maintained by requiring such evidence to be examined in the absence of both the deportee and his representative. However, in these circumstances, their place was taken by a security-cleared counsel instructed by the court, who cross-examined the witnesses and generally assisted the court to test the strength of the State's case. A summary of the evidence obtained by this procedure, with necessary deletions, was given to the deportee. The Court commented that it:

> "attaches significance to the fact that, as the intervenors pointed out in connection with Article 13, ... in Canada a more effective form of judicial control has been developed in cases of this type. This example illustrates that there are techniques which can be employed which both accommodate legitimate security concerns about the nature and sources of intelligence information and yet accord the individual a substantial measure of procedural justice".

211. In *Tinnelly & Sons Ltd and Others and McElduff and Others v. the United Kingdom*, judgment of 10 July 1998, § 78, *Reports* 1998-IVand in *Al-Nashif v. Bulgaria*, no. 50963/99, judgment of 20 June 2006, §§ 93-97 and 137, the Court made reference to its comments in *Chahal* about the special advocate procedure but without expressing any opinion as to whether such a procedure would be in conformity with the Convention rights at issue.

b. Application to the facts of the present case

212. Before the domestic courts, there were two aspects to the applicants' challenge to the lawfulness of their detention. First, they brought proceedings under section 30 of the 2001 Act to contest the validity of the derogation under Article 15 of the Convention and thus the compatibility with the Convention of the entire detention scheme. Secondly, each applicant also brought an appeal under section 25 of the 2001 Act, contending that the detention was unlawful under domestic law because there were no reasonable grounds for a belief that his presence in the United Kingdom was a risk to national security or for a suspicion that he was a terrorist.

213. The Court does not consider it necessary to reach a separate finding under Article 5 § 4 in connection with the applicants' complaints that the House of Lords was unable to make a binding order for their release, since it has already found a violation of Article 5 § 1 arising from the provisions of domestic law.

214. The applicants' second ground of complaint under Article 5 § 4 concerns the fairness of the procedure before SIAC under section 25 of the 2001 Act to determine whether the Secretary of State was reasonable in believing each applicant's presence in the United Kingdom to be a risk to national security and in suspecting him of being a terrorist. This is a separate and distinct question, which cannot be said to be absorbed in the finding of a violation of Article 5 § 1, and which the Court must therefore examine.

215. The Court recalls that although the judges sitting as SIAC were able to consider both the “open” and “closed” material, neither the applicants nor their legal advisers could see the closed material. Instead, the closed material was disclosed to one or more special advocates, appointed by the Solicitor General to act on behalf of each applicant. During the closed sessions before SIAC, the special advocate could make submissions on behalf of the applicant, both as regards procedural matters, such as the need for further disclosure, and as to the substance of the case. However, from the point at which the special advocate first had sight of the closed material, he was not permitted to have any further contact with the applicant and his representatives, save with the permission of SIAC. In respect of each appeal against certification, SIAC issued both an open and a closed judgment.

216. The Court takes as its starting point that, as the national courts found and it has accepted, during the period of the applicants' detention the activities and aims of the al'Qaeda network had given rise to a “public emergency threatening the life of the nation”. It must therefore be borne in mind that at the relevant time there was considered to be an urgent need to protect the population of the United Kingdom from terrorist attack and, although the United Kingdom did not derogate from Article 5 § 4, a strong

public interest in obtaining information about al'Qaeda and its associates and in maintaining the secrecy of the sources of such information (see also, in this connection, *Fox, Campbell and Hartley,* cited above, § 39).

217. Balanced against these important public interests, however, was the applicants' right under Article 5 § 4 to procedural fairness. Although the Court has found that, with the exception of the second and fourth applicants, the applicants' detention did not fall within any of the categories listed in subparagraphs (a) to (f) of Article 5 § 1, it considers that the case-law relating to judicial control over detention on remand is relevant, since in such cases also the reasonableness of the suspicion against the detained person is a *sine qua non* (see paragraph 204 above). Moreover, in the circumstances of the present case, and in view of the dramatic impact of the lengthy - and what appeared at that time to be indefinite - deprivation of liberty on the applicants' fundamental rights, Article 5 § 4 must import substantially the same fair trial guarantees as Article 6 § 1 in its criminal aspect (*Garcia Alva v. Germany*, no. 23541/94, § 39, 13 February 2001 and see also see *Chahal*, cited above, §§ 130-131).

218. Against this background, it was essential that as much information about the allegations and evidence against each applicant was disclosed as was possible without compromising national security or the safety of others. Where full disclosure was not possible, Article 5 § 4 required that the difficulties this caused were counterbalanced in such a way that each applicant still had the possibility effectively to challenge the allegations against him.

219. The Court considers that SIAC, which was a fully independent court (see paragraph 91 above) and which could examine all the relevant evidence, both closed and open, was best placed to ensure that no material was unnecessarily withheld from the detainee. In this connection, the special advocate could provide an important, additional safeguard through questioning the State's witnesses on the need for secrecy and through making submissions to the judge regarding the case for additional disclosure. On the material before it, the Court has no basis to find that excessive and unjustified secrecy was employed in respect of any of the applicants' appeals or that there were not compelling reasons for the lack of disclosure in each case.

220. The Court further considers that the special advocate could perform an important role in counterbalancing the lack of full disclosure and the lack of a full, open, adversarial hearing by testing the evidence and putting arguments on behalf of the detainee during the closed hearings. However, the special advocate could not perform this function in any useful way unless the detainee was provided with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate. While this question must be decided on a case-by-case basis, the Court observes generally that, where the evidence was to a large

extent disclosed and the open material played the predominant role in the determination, it could not be said that the applicant was denied an opportunity effectively to challenge the reasonableness of the Secretary of State's belief and suspicions about him. In other cases, even where all or most of the underlying evidence remained undisclosed, if the allegations contained in the open material were sufficiently specific, it should have been possible for the applicant to provide his representatives and the special advocate with information with which to refute them, if such information existed, without his having to know the detail or sources of the evidence which formed the basis of the allegations. An example would be the allegation made against several of the applicants that they had attended a terrorist training camp at a stated location between stated dates; given the precise nature of the allegation, it would have been possible for the applicant to provide the special advocate with exonerating evidence, for example of an alibi or of an alternative explanation for his presence there, sufficient to permit the advocate effectively to challenge the allegation. Where, however, the open material consisted purely of general assertions and SIAC's decision to uphold the certification and maintain the detention was based solely or to a decisive degree on closed material, the procedural requirements of Article 5 § 4 would not be satisfied.

221. The Court must, therefore, assess the certification proceedings in respect of each of the detained applicants in the light of these criteria.

222. It notes that the open material against the sixth, seventh, eighth, ninth and eleventh applicants included detailed allegations about, for example, the purchase of specific telecommunications equipment, possession of specific documents linked to named terrorist suspects and meetings with named terrorist suspects with specific dates and places. It considers that these allegations were sufficiently detailed to permit the applicants effectively to challenge them. It does not, therefore, find a violation of Article 5 § 4 in respect of the sixth, seventh, eighth, ninth and eleventh applicants.

223. The principal allegations against the first and tenth applicants were that they had been involved in fund-raising for terrorist groups linked to al'Qaeda. In the first applicant's case there was open evidence of large sums of money moving through his bank account and in respect of the tenth applicant there was open evidence that he had been involved in raising money through fraud. However, in each case the evidence which allegedly provided the link between the money raised and terrorism was not disclosed to either applicant. In these circumstances, the Court does not consider that these applicants were in a position effectively to challenge the allegations against them. There has therefore been a violation of Article 5 § 4 in respect of the first and tenth applicants.

224. The open allegations in respect of the third and fifth applicants were of a general nature, principally that they were members of named

extremist Islamist groups linked to al'Qaeda. SIAC observed in its judgments dismissing each of these applicants' appeals that the open evidence was insubstantial and that the evidence on which it relied against them was largely to be found in the closed material. Again, the Court does not consider that these applicants were in a position effectively to challenge the allegations against them. There has therefore been a violation of Article 5 § 4 in respect of the third and fifth applicants.

V. ALLEGED VIOLATION OF ARTICLE 5 § 1 IN CONJUNCTION WITH ARTICLE 13

225. The applicants argued in the alternative that the matters complained of in relation to Article 5 § 4 also gave rise to a violation of Article 13. In the light of its findings above, the Court does not consider it necessary to examine these complaints separately.

VI. ALLEGED VIOLATION OF ARTICLE 5 § 5 OF THE CONVENTION

226. Finally, the applicants complained that, despite having been unlawfully detained in breach of Article 5 §§ 1 and 4, they had no enforceable right to compensation, in breach of Article 5 § 5, which provides:

> "Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

227. The Government reasoned that there had been no breach of Article 5 in this case, so Article 5 § 5 did not apply. In the event that the Court did find a violation of Article 5, Article 5 § 5 required "an enforceable right to compensation", but not that compensation be awarded in every case. Since the Secretary of State was found by the national courts reasonably to suspect that the applicants were "international terrorists", as a matter of principle they were not entitled to compensation from the national courts.

A. Admissibility

228. The Court notes that it has found a violation of Article 5 § 1 in respect of all the applicants except the second and fourth applicants, and that it has found a violation of Article 5 § 4 in respect of the first, third, fifth and tenth applicants. It follows that the second and fourth applicants' complaints under Article 5 § 5 are inadmissible, but that the other applicants' complaints are admissible.

B. The merits

229. The Court notes that the above violations could not give rise to an enforceable claim for compensation by the applicants before the national courts. It follows that there has been a violation of Article 5 § 5 in respect of all the applicants save the second and fourth applicants (see *Brogan and Others v. the United Kingdom*, judgment of 29 November 1988, § 67, Series A no. 145-B and *Fox, Campbell and Hartley*, cited above, § 46).

VII. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

230. The applicants argued in the alternative that the procedure before SIAC was not compatible with Article 6 §§ 1 and 2 of the Convention, which provide:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

231. The applicants contended that Article 6 was the *lex specialis* of the fair trial guarantee. The regime under consideration represented the most serious form of executive measure against terrorist suspects adopted within the Member States of the Council of Europe in the post-2001 period. It was adopted to enable the United Kingdom to take proceedings against individuals on the basis of reasonable suspicion alone, deriving from evidence which could not be deployed in the ordinary courts. That alone warranted an analysis under Article 6. The proceedings were for the determination of a criminal charge, within the autonomous meaning adopted under Article 6 § 1, and also for the determination of civil rights and obligations. The use of closed material gave rise to a breach of Article 6.

232. In the Government's submission, Article 5 § 4 was the *lex specialis* concerning detention and the issues should be considered under that provision. In any event, Article 6 did not apply, because SIAC's decision on the question whether there should be detention related to "special measures of immigration control" and thus determined neither a criminal charge nor any civil right or obligation. Even if Article 6 § 1 did apply, there was no violation, for the reasons set out above in respect of Article 5 § 4.

233. Without coming to any conclusion as to whether the proceedings before SIAC fell within the scope of Article 6, the Court declares these

complaints admissible. It observes, however, that it has examined the issues relating to the use of special advocates, closed hearings and lack of full disclosure in the proceedings before SIAC above, in connection with the applicants' complaints under Article 5 § 4. In the light of this full examination, it does not consider it necessary to examine the complaints under Article 6 § 1.

VIII. APPLICATION OF ARTICLE 41 OF THE CONVENTION

234. The applicants sought compensation for the pecuniary and non-pecuniary damage sustained as a result of the violations, together with costs and expenses, under Article 41 of the Convention, which provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

The Government contended that an award of just satisfaction would be neither necessary nor appropriate in the present case.

A. Damage

1. The applicants' claims

235. The applicants submitted that monetary just satisfaction was necessary and appropriate. When assessing quantum, guidance could be obtained from domestic court awards in respect of unlawful detention and also from awards made by the Court in past cases (they referred, *inter alia*, to *Perks and Others v. the United Kingdom*, nos. 25277/94, 25279/94, 25280/94, 25282/94, 25285/94, 28048/95, 28192/95 and 28456/95, judgment of 12 October 1999, where GBP 5,500 was awarded in respect of six days' unlawful imprisonment, and *Tsirlis and Kouloumpas v. Greece*, judgment of 29 May 1995, *Reports* 1997-III, where the applicants were awarded the equivalent of 17,890 pounds sterling (GBP) and GBP 16,330, respectively, in relation to periods of 13 and 12 months' imprisonment for refusing to perform military service).

236. The first applicant claimed compensation for his loss of liberty between 19 December 2001 and 11 March 2005, a period of three years and 83 days, and the consequent mental suffering, including mental illness. He submitted that the award should in addition take account of the suffering experienced by his wife and family as a result of the separation and the negative publicity. He proposed an award of GBP 234,000 to cover non-pecuniary damage. In addition he claimed approximately GBP 7,500 in

pecuniary damages to cover the costs of his family's visits to him in detention and other expenses.

237. The third applicant claimed compensation for his loss of liberty between 19 December 2001 and 11 March 2005 and the consequent mental suffering, including mental illness, together with the distress caused to his wife and children. He proposed a figure of GBP 230,000 for non-pecuniary damages, together with pecuniary damages of GBP 200 travel costs, incurred by his wife, and a sum to cover his lost opportunity to establish himself in business in the United Kingdom.

238. The fifth applicant claimed compensation for his detention between 19 December 2001 and 22 April 2004, his subsequent house arrest until 11 March 2005 and the consequent mental suffering, including mental illness, together with the distress caused to his wife and children. He proposed a figure of GBP 240,000 for non-pecuniary damages, together with pecuniary damages of GBP 5,500, including travel and child-minding costs incurred by his wife and money sent by her to the applicant in prison.

239. The sixth applicant claimed compensation for his detention between 19 December 2001 and 11 March 2005 and the consequent mental suffering, together with the distress caused to his wife and children. He proposed a figure of GBP 217,000 for non-pecuniary damages, together with pecuniary damages of GBP 51,410, including his loss of earnings as a self-employed courier and travel costs incurred by his wife.

240. The seventh applicant claimed compensation for his detention between 8 February 2002 and 11 March 2005 and the consequent mental suffering, including mental illness. He proposed a figure of GBP 197,000 for non-pecuniary damages. He did not make any claim in respect of pecuniary damage.

241. The eighth applicant claimed compensation for his loss of liberty between 23 October 2002 and 11 March 2005 and the consequent mental suffering, together with the distress caused to his wife and children. He proposed a figure of GBP 170,000 for non-pecuniary damages, together with pecuniary damages of GBP 4,570, including money sent to him in prison by his wife and her costs of moving house to avoid unwanted media attention.

242. The ninth applicant claimed compensation for his loss of liberty between 22 April 2002 and 11 March 2005, and the consequent mental suffering, including mental illness, together with the distress caused to his wife and children. He proposed a figure of GBP 215,000 for non-pecuniary damages, together with pecuniary damages of GBP 7,725, including money he had to borrow to assist his wife with household expenses, money sent to him in prison by his wife and her travel expenses to visit him. He also asked for a sum to cover his lost opportunity to establish himself in business in the United Kingdom.

243. The tenth applicant claimed compensation for his loss of liberty between 14 January 2003 and 11 March 2005 and the consequent mental suffering, including mental illness. He proposed a figure of GBP 144,000 for non-pecuniary damages, together with pecuniary damages of GBP 2,751, including the loss of a weekly payment of GBP 37 he was receiving from the National Asylum Support Service prior to his detention and the cost of telephone calls to his legal representatives.

244. The eleventh applicant claimed compensation for his loss of liberty between 2 October 2003 and 11 March 2005 and the consequent mental suffering. He proposed a figure of GBP 95,000 for non-pecuniary damages but did not claim any pecuniary damages.

2. The Government's submissions

245. The Government, relying on the Court's judgment in *McCann and Others v. the United Kingdom*, judgment of 27 September 1995, § 219, Series A no. 324, contended that, as a matter of principle, the applicants were not entitled to receive any form of financial compensation because they were properly suspected, on objective and reasonable grounds, of involvement in terrorism and had failed to displace that suspicion.

246. The Government pointed out that Part 4 of the 2001 Act was passed and the derogation made in good faith, in an attempt to deal with what was perceived to be an extremely serious situation amounting to a public emergency threatening the life of the nation. The core problem with the detention scheme under the 2001 Act, as identified by SIAC and the House of Lords, was that it did not apply to United Kingdom as well as foreign nationals. Following the House of Lords' judgment, urgent consideration was given to the question what should be done with the applicants in the light of the public emergency and it was decided that a system of control orders should be put in place. Against this background, it could not be suggested that the Government had acted cynically or in flagrant disregard of the individuals' rights.

247. In addition, the Government submitted that no just satisfaction should be awarded in respect of any procedural violation found by the Court (for example, under Article 5 §§ 4 or 5), since it was not possible to speculate what would have happened had the breach not occurred (*Kingsley v. the United Kingdom* [GC], no. 35605/97, ECHR 2002-IV; *Hood v. the United Kingdom*, no. 27267/95, ECHR 1999-I).

248. In the event that the Court did decide to make a monetary award, it should examine carefully in respect of each head of claim whether there was sufficient supporting evidence, whether the claim was sufficiently closely connected to the violation and whether the claim was reasonable as to quantum.

3. The Court's assessment

249. The Court recalls, first, that it has not found a violation of Article 3 in the present case. It follows that it cannot make any award in respect of mental suffering, including mental illness, allegedly arising from the conditions of detention or the open-ended nature of the detention scheme in Part 4 of the 2001 Act.

250. It has, however, found violations of Article 5 §§ 1 and 5 in respect of the first, third, fifth, sixth, seventh, eighth, ninth, tenth and eleventh applicants and a violation of Article 5 § 4 in respect of the first, third, fifth and tenth applicants. In accordance with Article 41, it could, therefore, award these applicants monetary compensation, if it considered such an award to be "necessary". The Court has a wide discretion to determine when an award of damages should be made, and frequently holds that the finding of a violation is sufficient satisfaction without any further monetary award (see, among many examples, *Nikolova*, cited above, § 76). In exercising its discretion the Court will have regard to all the circumstances of the case including the nature of the violations found as well as any special circumstances pertaining to the context of the case.

251. The Court recalls that in the *McCann and Others* judgment, cited above, § 219, it declined to make any award in respect of pecuniary or non-pecuniary damage arising from the violation of Article 2 of the Convention, having regard to the fact that the three terrorist suspects who were killed had been intending to plant a bomb in Gibraltar. It considers that the present case is distinguishable, since it has not been established that any of the applicants has engaged, or attempted to engage, in any act of terrorist violence.

252. The decision whether to award monetary compensation in this case and, if so, the amount of any such award, must take into account a number of factors. The applicants were detained for long periods, in breach of Article 5 § 1, and the Court has, in the past, awarded large sums in just satisfaction in respect of unlawful detention (see, for example, *Assanidze v. Georgia* [GC], no. 71503/01, ECHR 2004-II, or the cases cited by the applicants in paragraph 235 above). The present case is, however, very different. In the aftermath of the al'Qaeda attacks on the United States of 11 September 2001, in a situation which the domestic courts and this Court have accepted was a public emergency threatening the life of the nation, the Government were under an obligation to protect the population of the United Kingdom from terrorist violence. The detention scheme in Part 4 of the 2001 Act was devised in good faith, as an attempt to reconcile the need to prevent the commission of acts of terrorism with the obligation under Article 3 of the Convention not to remove or deport any person to a country where he could face a real risk of ill-treatment (see paragraph 166 above). Although the Court, like the House of Lords, has found that the derogating measures were disproportionate, the core part of that finding was that the

legislation was discriminatory in targeting non-nationals only. Moreover, following the House of Lords' judgment, the detention scheme under the 2001 Act was replaced by a system of control orders under the Prevention of Terrorism Act 2005. All the applicants in respect of whom the Court has found a violation of Article 5 § 1 became, immediately upon release in March 2005, the subject of control orders. It cannot therefore be assumed that, even if the violations in the present case had not occurred, the applicants would not have been subjected to some restriction on their liberty.

253. Against this background, the Court finds that the circumstances justify the making of an award substantially lower than that which it has had occasion to make in other cases of unlawful detention. It awards 3,900 euros (EUR) to the first, third and sixth applicants; EUR 3,400 to the fifth applicant; EUR 3,800 to the seventh applicant; EUR 2,800 to the eighth applicant; EUR 3,400 to the ninth applicant; EUR 2,500 to the tenth applicant; and EUR 1,700 to the eleventh applicant, together with any tax that may be chargeable.

B. Costs and expenses

254. The applicants made no claim for costs in respect of the domestic proceedings, since these had been recovered as a result of the order made by the House of Lords. Their total claim for the costs of the proceedings before the Court totalled GBP 144,752.64, inclusive of value added tax (“VAT”). This included 599 hours worked by solicitors at GBP 70 per hour plus VAT, 342.5 hours worked by counsel at GBP 150 per hour plus VAT and 85 hours worked by senior counsel at GBP 200 per hour plus VAT in preparing the application, observations and just satisfaction claim before the Chamber and Grand Chamber, together with disbursements such as experts' reports and the costs of the hearing before the Grand Chamber. They submitted that it had been necessary to instruct a number of different counsel, with different areas of specialism, given the range of issues to be addressed and the evidence involved, concerning events which took place over a ten-year period.

255. The Government submitted that the claim was excessive. In particular, the number of hours spent by solicitors and counsel in preparing the case could not be justified, especially since each of the applicants had been represented throughout the domestic proceedings during which detailed instructions must have been taken and consideration given to virtually all the issues arising in the application to the Court. The hourly rates charged by counsel were, in addition, excessive.

256. The Court recalls that an applicant is entitled to be reimbursed those costs actually and necessarily incurred to prevent or redress a breach of the Convention, to the extent that such costs are reasonable as to quantum

(*Kingsley*, cited above, § 49). While it accepts that the number of applicants must, inevitably, have necessitated additional work on the part of their representatives, it notes that most of the individualised material filed with the Court dealt with the applicants' complaints under Article 3 of the Convention and their claims for just satisfaction arising out of those complaints, which the Court has rejected. In addition, it accepts the Government's argument that a number of the issues, particularly those relating to the derogation under Article 15 of the Convention, had already been aired before the national courts, which should have reduced the time needed for the preparation of this part of the case. Against this background, it considers that the applicants should be awarded a total of EUR 60,000 in respect of costs and expenses, together with any tax that may be chargeable to the applicants.

C. Default interest

257. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the second applicant's complaints under Articles 3 and 13 of the Convention inadmissible and the first, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth and eleventh applicants' complaints under Articles 3 and 13 admissible (see paragraphs 123-125 of the judgment);

2. *Holds* that there has been no violation of Article 3 of the Convention, taken alone or in conjunction with Article 13, in respect of the first, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth and eleventh applicants (paragraphs 126-136);

3. *Dismisses* the applicants' preliminary objections that the Government should be precluded from raising a defence under Article 5 § 1(f) of the Convention or challenging the House of Lords' finding that the derogation under Article 15 was invalid (paragraphs 153-159);

4. *Declares* the applicants' complaints under Article 5 § 1 of the Convention admissible (paragraph 160);

5. *Holds* that there has been no violation of Article 5 § 1 of the Convention in respect of the second and fourth applicants (paragraphs 162-168);

6. *Holds* that there has been a violation of Article 5 § 1 of the Convention in respect of the first, third, fifth, sixth, seventh, eighth, ninth, tenth and eleventh applicants (paragraphs 162-190);

7. *Holds* that it is not necessary to examine the applicants' complaints under Articles 5 § 1 and 14 taken together (paragraph 192);

8. *Declares* the second and fourth applicants' complaints under Article 5 § 4 of the Convention inadmissible and the first, third, fifth, sixth, seventh, eighth, ninth, tenth and eleventh applicants' complaints under Article 5 § 4 admissible (paragraphs 200-201);

9. *Holds* that it is not necessary to examine the first, third, fifth, sixth, seventh, eighth, ninth, tenth and eleventh applicants' complaints under Articles 5 § 4 that the House of Lords could not make a binding order for their release (paragraph 213);

10. *Holds* that there has been a violation of Article 5 § 4 of the Convention in respect of the first, third, fifth and tenth applicants but that there was no violation of Article 5 § 4 in respect of the sixth, seventh, eighth, ninth and eleventh applicants (paragraphs 202-224);

11. *Holds* that it is not necessary to examine the applicants' complaints under Articles 5 § 1 and 13 taken together (paragraph 225);

12. *Declares* the second and fourth applicants' complaints under Article 5 § 5 of the Convention inadmissible and the first, third, fifth, sixth, seventh, eighth, ninth, tenth and eleventh applicants' complaints under Article 5 § 5 admissible (paragraph 228);

13. *Holds* that there has been a violation of Article 5 § 5 of the Convention in respect of the first, third, fifth, sixth, seventh, eighth, ninth, tenth and eleventh applicants (paragraph 229);

14. *Declares* the applicants' complaints under Article 6 of the Convention admissible (paragraph 233);

15. *Holds* that it is not necessary to examine the applicants' complaints under Article 6 of the Convention (paragraph 233);

16. *Holds* that the respondent State is to pay, within three months, the following amounts, to be converted into pounds sterling at the rate applicable at the date of settlement:

(a) in respect of pecuniary and non-pecuniary damage, EUR 3,900 (three thousand nine hundred euros) to the first, third and sixth applicants; EUR 3,400 (three thousand four hundred euros) to the fifth applicant; EUR 3,800 (three thousand eight hundred euros) to the seventh applicant; EUR 2,800 (two thousand eight hundred euros) to the eighth applicant; EUR 3,400 (three thousand four hundred euros) to the ninth applicant; EUR 2,500 (two thousand five hundred euros) to the tenth applicant; and EUR 1,700 (one thousand seven hundred euros) to the eleventh applicant, plus any tax that may be chargeable;
(b) to the applicants jointly, in respect of costs and expenses, EUR 60,000 (sixty thousand euros), plus any tax that may be chargeable to the applicants;
(c) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points (paragraphs 249-257);

17. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 19 February 2009.

Michael O'Boyle	Jean-Paul Costa
Deputy Registrar	President