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Case No: HQ03X03052

IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL
30 July 2004

B e f o r e :

THE HONOURABLE MR JUSTICE FIELD

Between:

Hani El Sayed Sabaei Youssef	**Claimant**
- and -	
The Home Office	**Defendant**

Mr. Rick Scannell (instructed by Birnberg Peirce and Partners) for the Claimant.
Mr. Philip Sales and Mr. Jonathan Swift (instructed by Treasury Solicitor) for the Defendant.
Hearing dates : 5, 6, 7 and 12 July 2004

Mr Justice Field:

Introduction

1. The claimant, Mr. Hany El Sayed Sabaei Youssef ("Mr. Youssef"), was detained under powers contained in the Immigration Act 1971 ("the 1971 Act") from 27 September 1998 to 9 July 1999. In this action he claims that he was falsely imprisoned in the period 14 January 1999 to 9 July 1999.

2. On 18 September 2003 it was ordered that the claim be transferred from the Central London County Court to the High Court (Queen's Bench Division) and on 19 November 2003 Master Fontaine ordered that the issue of liability be tried separately from the issue of damages. This judgement is concerned only with the issue of liability.

3. The Facts

4. It is necessary to set out the facts in some detail. Mr. Youssef is an Egyptian national. On 6 May 1994 he arrived in the UK and claimed asylum on arrival on the ground that he had been harassed and tortured by the Egyptian Security Forces because of his involvement with the Muslim Brotherhood and his work as a lawyer representing Muslim groups and Muslim political activists in proceedings brought by and against the Egyptian Government. He was granted temporary admission. It took over four

years for his asylum application to be determined. On 23 December 1998 his claim for refugee status was rejected. Although the Secretary of State for the Home Department ("the Home Secretary") acknowledged that Mr. Youssef's was a case where he might ordinarily have granted asylum, he refused to do so citing Article 1F of the UN Convention relating to the Status of Refugees which excludes from the protection otherwise conferred by the Convention a person as to whom there are serious grounds for considering that he has been guilty of acts contrary to the purposes and principles of the United Nations, in this case, acts, methods and practices of terrorism. The Home Secretary made this determination on the basis of the UK Security Services' assessment that: (a) Mr. Youssef was a senior member of Egyptian Islamic Jihad ("EIJ"), an organisation which had mounted a number of high profile terrorist attacks in the last twenty years and whose leader had signed a document declaring that the killing of Americans and their civilian and military allies was the duty of every Muslim; and (b) Mr. Youssef's activities on behalf of the group were likely to have included supporting the entry to the UK of EIJ activists and their travel overseas, including the movement of operational members, Mr. Youssef having the ability to acquire high quality false documentation.

5. By the time of this determination, Mr. Youssef was in custody. He had been detained along with three other Egyptian nationals on 23 September 1998 by the Metropolitan Police's Anti-Terrorism Branch under the Prevention of Terrorism (Temporary Provisions) Act 1989. On 27 September 1998 he was released from detention under the Prevention of Terrorism legislation but was immediately re-arrested under powers contained in the Immigration Act 1971 ("the 1971 Act") following certification on 26 September 1998 by the Home Secretary, Mr. Jack Straw, under s. 3 (2) (a) of the Special Immigration Appeals Act 1997 that Mr. Youssef's detention pending a decision of his asylum claim was necessary in the interests of national security. On 3 December 1998 Mr. Youssef was refused bail by HHJ Pearl sitting as a judge of the Special Immigration Appeal Commission ("SIAC"). The judge refused bail on the ground that there was a likelihood that Mr. Youssef would abscond; he also took into account the fact that he had been told that Mr. Youssef's asylum application would be decided within 3 weeks.

6. Even before the Human Rights Act 1998 came into force, it was Government policy that no-one should be removed or deported to a country where there was a real risk that the returnee/deportee would be treated in a manner that breached article 3 of ECHR. Article 3 ECHR provides: *"No one should be subjected to torture or to inhuman or degrading treatment or punishment."* From the moment that Mr. Youssef was detained in September 1998 the Home Secretary was of the view that there was a strong case (in the absence of criminal proceedings) for removing him on national security grounds to Egypt or a third country. On 14 January 1999 a submission was put to the Home Secretary by his advisers that since there was no safe third country to which Mr. Youssef could be removed, the possibility of returning Mr. Youssef to Egypt should be explored. It was appreciated from the outset that given the evidence that detainees were routinely tortured by the Egyptian Security Service it would not be possible to remove Mr. Youssef to Egypt unless satisfactory assurances were obtained from the Egyptian Government that he would not be tortured or otherwise physically mistreated if he were sent back.

7. On 21 January 1999 the Principal Private Secretary in the Foreign and Commonwealth Office ("FCO"), Mr. John Grant, wrote to the Private Secretary at the Home Office about whether assurances concerning the treatment of Mr. Youssef and the two other Egyptians arrested with Mr. Youssef who remained in custody should be sought from the Egyptian Government. Mr. Grant advised that seeking assurances was not risk-free, since the court might dismiss any assurances as insufficient, which in turn would give rise to negative media coverage and some discomfort in the UK's bilateral relations with Egypt. And, depending on what was sought, the Egyptians might react negatively and refuse to provide the assurances. Mr. Grant also stated that it would be helpful if Home Office officials could provide detailed advice on the

type of assurances which would be most acceptable to a UK court and the European Court of Human Rights.

8. By a memorandum dated 5 February 1999, Ms. Mary Statham, an official at the Home Office, sought advice from an in-house lawyer, Mr. Parker, as to whether there was at least an arguable case for seeking undertakings from the Egyptian Government and, if there were, what form they should take. The relevant parts of this memorandum read:

   We are satisfied that the Home Secretary will wish to pursue these cases as far as it is reasonable for him to do but there are a number of factors which suggest assurances would do little or nothing to diminish the Article 3 risk. First that the assurances given in Chahal by the Indian Authorities were not accepted. The ECHR found that " despite the efforts of the government to bring about reform, the violation of human rights by certain members of the security forces … is a recalcitrant and enduring problem".

   And, in contrast to the Egyptians, Chahal's asylum application had been refused on the basis that he did not have a well-founded fear of persecution in India and the assurances were seen as reinforcing our assessment that Chahal would not be at risk, even at the lower refugee convention threshold. The Egyptians, on the other hand, have had their asylum applications refused by virtue of the refugee clauses in the refugee convention. All three submitted plausible claims of harassment and torture at the hands of the Egyptian authorities. In refusing their applications we acknowledged that theirs were cases where the Secretary of State *might ordinarily have granted asylum.*

   The main problem is that the Egyptian authorities (sic) record in the treatment of political opponents is, by any standards not good (please see the attached extracts from the US State Department Report 1997 and the Amnesty International Annual Report 1998). In particular as you will see, abuse and torture are widespread despite the prohibition by the constitution of infliction of physical harm upon those arrested or detained. My first question therefore is whether in the face of this evidence, the Home Secretary might reasonably conclude that assurances from the Egyptians could be sufficiently authoritative and credible to diminish the Article 3 risk sufficiently to make removal to Egypt a realistic option.

   If your advice is that there is at least an arguable case for seeking undertakings the next question is what form they should take. We think it likely that the Egyptian authorities would detain and question the group on their activities in the UK so this suggests that the undertakings should cover, inter alia, safeguards against unlawful detention, humane treatment if lawfully detained and the requirement for a fair trial should charges be pressed. In addition, we should maybe obtain a view from the FCO on how far any subsequent assurances could be depended upon, and seek clarification on whether the undertakings would remain in force should there be a change of regime in Egypt.

9. On 19 February 1999 the Home Office also sought advice from the Common Law Treasury Junior on the assurances that should be requested.

10. On 2 March 1999, Mr. Youssef applied to Sullivan J. for a writ of habeas corpus, contending, inter alia, that any assurances from the Egyptian Government concerning his treatment would be worthless. Upon being informed that the Home Secretary would be considering information concerning possible assurances in the near future Sullivan J. adjourned the application for two weeks.

11. Mr. Youssef's habeas corpus application came back before Sullivan J on 12 March 1999. In the meantime, on 9 March 1999 the Home Secretary authorised officials to

attempt to obtain adequate assurances from the Egyptian Government and on 10 March 1999 a draft of a proposed letter to be addressed to the Egyptian authorities was sent to the British Embassy in Cairo for their comments. At the resumed habeas corpus hearing, the Home Office relied on an affidavit sworn by Mr. Thomas Wood of Treasury Solicitor's Department in which he deposed that it was envisaged that a formal request would be sent to the Egyptian Ministry of Justice seeking assurances shortly and that he could not say how long negotiations might take before either a satisfactory outcome was reached or it became clear that it would be impossible to remove Mr. Youssef without breaching Article 3 ECHR. Mr. Wood also explained that the discussions concerning Mr. Youssef had involved a large number of departments and that while no one involved doubted the importance of dealing with the case of a detained individual in as timely manner as possible the serious nature of this case had meant that extensive consultation had had to take place between the various departments which had necessarily contributed to the time it had taken to deal with the matter.

12. In the light of the evidence from Mr. Wood, Sullivan J. declined to grant Mr. Youssef's habeas corpus application which was dismissed.

13. On 17 March 1999 the request for assurances that was to be served on the Egyptian Government was sent by FCO to the British Embassy. The request was in these terms:

    The British Government requests that the Egyptian Government provide written assurances for the safety and well being of [four Egyptian nationals] who we are seeking to deport from the United Kingdom. We request that these assurances provide the following specific guarantees should the above named be arrested and or charged with a criminal offence in Egypt:

    -- They shall receive no ill treatment whilst in detention.

    --They shall receive a fair and public hearing by an independent and impartial judiciary -- and any trial would take place in a civilian court.

    --They should be informed promptly and in detail of the nature of accusations against them.

    -- They shall have adequate time and facilities to prepare for their defence.

    -- They shall be able to examine or have examined witnesses against them and to obtain the attendance and examination of witnesses on their behalf.

    -- They shall have the ability to appoint legal representation of their own choice.

    --That, should the defendants be convicted of a capital offence, the death sentence would be commuted.

    -- That, during any term of imprisonment, arrangements would be agreed for regular (at least monthly) access by British Government officials and independent medical personnel.

    -- In the event of a failure by the British Government to meet their visiting obligations the defendants would have telephonic access to a United Kingdom based lawyer who could pursue their visiting obligations.

14. On 21 March 1999, at a meeting with the Egyptian Interior Minister HM Ambassador Cairo sought written assurances in the above terms. The following day the

Ambassador raised the issue of assurances with other relevant Departments within the Egyptian Government, including the Ministry for Foreign Affairs. The initial reaction of the Interior Minister was negative. By letter dated 22 March 1999 (received on 23 March 1999) he rejected the request for assurances of access by British Government officials to Egyptians in prison, access to a UK based lawyer and commutation of the death sentence on the ground that they would constitute an interference in the scope of the Egyptian judicial system and an infringement of national sovereignty. However, the Ambassador had discussions in the afternoon of 23 March 1999 with the Minister's First Assistant at which it was suggested that a revised version of the assurances might be acceptable.

15. On 1 April 1999 FCO provided the British Embassy Cairo with clarification of the requested assurances and on the same date the Private Secretary at the Home Office, Ms. Hilary Jackson, wrote to the Private Secretary at 10 Downing Street, Mr. John Sawyers, informing him of the initial reaction of the Egyptian Government to the assurances request. This letter was read by the Prime Minister who wrote across the top of it "Get them back". He also wrote next to the paragraph that set out the assurances objected to by the Interior Minister "This is a bit much. Why do we need all these things?"

16. The British Ambassador discussed the assurances with the Adviser to the Egyptian President, Mr. Al Baz, on 3 April 1999; and on 5 April 1999 the Egyptian Government asked for and was given clarification on certain issues. Also on 5 April 1999, the British Embassy Cairo confirmed to FCO that President Mubarak was aware of the request for assurances.

17. There was then a lull in negotiations because the Egyptian President, Mr. Mubarak, was on an official visit overseas with the Egyptian Prime Minister, the Foreign Minister and the Presidential Adviser, Mr. Al Baz.

18. By letter dated 19 April 2004, the Prime Minister's Private Secretary wrote to the Private Secretary at the Home Office, inter alia, in these terms:

    The Prime Minister thinks we are in danger of being excessive in our demands of the Egyptians in return for agreeing to the deportation of the four Islamic Jihad members. He questions why we need all the assurances proposed by FCO and Home Office Legal Advisers. There is no obvious reason why British Officials need to have access to Egyptian nationals held in prison in Egypt, or why the four should have access to a UK- based lawyer. Can we not narrow down the list of assurances we require?

    In general the Prime Minister's priority is to see these four Islamic Jihad members returned to Egypt. We should do everything possible to achieve that. I should be grateful for a further report, allowing time for the Prime Minister to intervene himself, if necessary, before any action is taken to release the four from custody.

19. Also on 19 April 1999, HM Ambassador Cairo informed FCO that it had been announced the day before that Mr. Youssef had been sentenced by an Egyptian Military Court to life imprisonment with hard labour *in absentia.*

20. In light of the Egyptian Government's difficulty with agreeing that the British Government should have access to the four Egyptians if they were returned, British officials asked the International Committee of the Red Cross ("the ICRC") if they would agree to have access to the returnees, but this request was declined. On 26 April 1999 the Ambassador met again with the Egyptian Presidential Adviser. He told Mr. Al Baz of the ICRC's reaction. Mr. Al Baz was still keen to proceed, however. He thought there were obvious benefits for both countries in having the four men returned to Egypt. He telephoned the Egyptian Minister of Justice who said that the Egyptian Government could not give an assurance that a death sentence on a

particular person would be commuted; nor could they interfere in the courts – even military courts – to urge or instruct them not to pass a death sentence. However, they could give an assurance that on return to Egypt a person would be tried for a specified offence or offences, the maximum sentence for which would be a specified number of years in prison. They could also give an assurance that if someone had been sentenced *in absentia*, his sentence on return to Egypt and retrial (which was thought to be the normal procedure) would be no more severe than that already imposed. The Ambassador asked whether the Egyptians could also give an assurance that if after a returnee was sentenced for a specified offence new information emerged implicating him in further offences carrying the death penalty committed before his return to Egypt, he would not be tried for such offences. Mr. Al Baz consulted the Minister of Justice again, and said that it was difficult and that they would have to reflect. He promised to come back to the Ambassador within 48 hours.

21. Mr. Al Baz also raised the question of access with the Minister of Justice who thought a formula could be found whereby a third country lawyer, or other acceptable person of repute could have access to the returnees on a continuing basis. The Ambassador re-emphasised to Mr. Al Baz that even if agreement could be reached on a set of assurances, the English courts might not accept them. Mr. Al Baz said that he understood this though others in Egypt brought up in the French legal tradition might not. He still wanted to proceed.

22. In light of the report that Mr. Youssef had been sentenced in absentia, FCO and the Home Office were anxious to find out whether Mr. Youssef had a right to a re-trial if he were returned. An enquiry was made of Egyptian State Security but they were slow to respond. The British Embassy Cairo therefore tried to find out the position the best it could and reported to FCO on 5 May 1999 that the charges of which Mr. Youssef had been convicted were belonging to an illegal group which aims to overthrow the regime using terrorism and plotting attacks, possession of weapons and explosives, and planning to assassinate important state officials. It also reported that when a person has been tried *in absentia* and then returns to Egypt, he is arrested and handed over to the authority that brought the case, in this instance, State Security. The returnee had two options. He could oppose the verdict or appeal it. If he opposed it, he had to act within a few days. If he appealed, he had several months. In either case there would be a retrial in a military or state security court at the end of which any sentence handed down must be no more severe than that handed down *in absentia*.

23. On 5 May 1999 the Home Secretary wrote to the Prime Minister concerning the possible deportation of Mr. Youssef and the three other suspected Islamic Jihad Members. The relevant parts of this letter read :

    [W]hen I took this decision [to detain the four men under immigration powers] I did so in the knowledge that there were some significant obstacles which would need to be overcome and that the chances of effecting deportation were not good. There is, unfortunately, ample evidence from a range of sources of serious human rights abuses in Egypt. The risk to Islamic activists, in particular, is well documented. Indeed three of the four men submitted plausible claims of harassment and torture at the hands of the Egyptian authorities…

    The difficulty which was evident from the outset was Article 3 of the ECHR. There are no exclusion clauses in Article 3. The ECHR confirmed in its judgment in the case of Chahal, a Sikh extremist the previous administration sought to deport to India, that the protection offered by Article 3 is absolute. Deportation will represent a breach of Article 3 if an individual has shown substantial grounds for believing that he would face a real risk of being subjected to inhuman or degrading treatment, regardless of any risk he may pose. On the facts we are clear that it would be unreasonable to argue, without assurances, that the four would not face an Article 3 risk if returned to Egypt.

As our aim is to deport the men from the United Kingdom, not to deport them to Egypt we considered whether it would be possible to remove the group to a country other than Egypt. However after careful consideration of the possibilities, FCO advice was that it would not be feasible to identify a country willing to accept the group to which it would be reasonable to consider sending them. This option was therefore discounted.

I am satisfied that we will only have a chance of satisfying the courts - in the first instance the Special Immigration Appeals Commission (SIAC) – of the safety of the four if returned to Egypt, if we have the strongest possible assurances. Any weakening of what we request from the Egyptian authorities would reduce still further the slim chance we have of effecting the group's removal.

If the Egyptians indicate that they are likely to be unwilling to accede to our request, in whole or in part, we will consider whether there is anything else we can do. Realistically however there is probably very little scope of pursuing the deportations any further. I have noted your wish to have an opportunity to intervene before any action is taken to release the men and will ensure that you are provided with a report on the position.

24. On 7 May 1999 Mr. Youssef made a second habeas corpus application which was heard by Andrew Collins J. The Home Office relied on an affidavit sworn on 6 May 1999 by Mr. Andrew Allen, the Head of North Africa Section of FCO. Mr. Allen exhibited no documents because the relevant documents were secret and some were highly sensitive. This meant that the Egyptian Interior Minister's letter of 22 March 1999, the Home Office Private Secretary's letter to the Private Secretary at 10 Downing Street dated 1 April 1999 and the reply thereto dated 19 April 1999, the letter from the Home Secretary to the Prime Minister dated 5 May 1999 and the telegrams from the Cairo Embassy to FCO dated 19 and 26 April 1999 and 5 May 1999 were not before the court. Mr. Allen summarised the steps that had been taken to obtain satisfactory assurances and the response to date of the Egyptian authorities. He went on to say:

I am satisfied from communications I have received from the British Embassy in Cairo that the Egyptian Government is seriously considering whether to offer assurances and that they have undertaken to respond promptly. If the assurances sought are forthcoming, then the FCO's assessment is that the Egyptian Government would abide by the assurances given and that it would be entirely reasonable for the UK Government to rely on them. The Egyptian Government will be conscious that, in the event that the assurances in question are not adhered to, its reputation within the international community would be seriously compromised.

I have been given to understand by officials at the Home Office that the Home Secretary continues to be of the view that it remains proper to maintain the applicant in detention pending the continuing discussions with the Egyptian authorities on the issue of assurances. By reason of the level at which the assurances are being sought and the delicate nature of the discussions being pursued, it is not possible for me to indicate any definitive time limit in which either a satisfactory outcome will be reached or it will become evident that there is no reasonable prospect of returning the applicant to Egypt without breaching Article 3 of the European Convention on Human Rights. The issue of assurances is being pursued with as much despatch as is reasonably possible in the circumstances, and the Egypt Government has undertaken to respond promptly.

25. Andrew Collins J. refused Mr. Youssef's application, adjourning it *sine die*. He held that there was still a realistic prospect of compliance with Article 3 ECHR but added that there must come a time when it could be said that the Home Secretary had had long enough to obtain satisfactory assurances from the Egyptian Government and that point was coming close. He expressed the hope that the matter of assurances could be dealt with in a matter of weeks rather than months.

26. In a letter dated 13 May 1999 to the Prime Minister's Private Secretary, the Private Secretary at FCO, Mr. Tim Barrow, set out why it was thought at FCO that there was no scope to offer the Egyptian Government flexibility on the assurance about access to the four Egyptians should they be removed to Egypt and detained there. In the FCO's view there was no alternative to access by British officials. The ICRC had a permanent presence there but had been refused access to prisoners; it would not visit particular prisoners without a general agreement allowing it access to all prisoners and would not get involved in any process which could in any way be perceived to contribute to, facilitate, or result in the deportation of individuals to Egypt. It was likely that other human rights NGOs would take the same line. FCO had failed to identify any other acceptable impartial third party that could undertake regular visits and the Egyptian Government had not been asked for an assurance that would allow access by a mutually acceptable, impartial third party of international repute because such a third party would be difficult to identify and compared with a specific assurance of access by British officials, an unspecific assurance (access by a party to be identified later) would provide a much weaker argument.

27. The Prime Minister's Private Secretary replied by letter dated 15 May 1999 in which he asked if there were anything more that could usefully be done to persuade the Egyptian Government to provide minimum assurances needed to allow the deportation of the four to go ahead. On 20 May 1999 Ms. Lesley Craig, an official in the Counter Terrorism Policy Department in the Home Office, sent a memorandum to the Home Office Assistant Private Secretary on the issue of whether anything more could be done to persuade the Egyptian Government to provide the assurances that had been sought. In this memorandum Ms. Craig stated that the assurances sought were those that the Home Office had been advised a UK court would expect if a case for deportation were to be reasonably argued. Her preferred option was that "we write to Number 10 explaining that there is nothing more that we can usefully do to persuade the Egyptians to offer assurances on the treatment the four men would receive if returned to Egypt. We should inform Number 10 that we intend to instruct HM Embassy Cairo to seek a final written response from the Egyptian Government upon the issue of assurances". Ms. Craig also pointed out that at the 7 May 1999 habeas corpus "[T]he judge made clear that HMG should reach a conclusion on the issue of assurances within a matter of weeks, rather than months. HMG remains open to possible judicial review on the grounds that decisions had not been expeditious enough in this case: the men had been detained since September 1998".

28. On 24 May 1999 the Principal Private Secretary at FCO, Mr. Sherard Cowper-Coles, replied to the Prime Minister's Private Secretary's letter of 15 May 1999. He stated that the Egyptian Government had been offered flexibility wherever possible on the assurances: there was no scope for further flexibility. There was nothing more that could be usefully done to make the Egyptians provide the assurances. On 26 April 1999, the Egyptians had undertaken to respond within 48 hours but despite several opportunities, they had not yet done so and HM Ambassador Cairo now believed that the Egyptians were unlikely to offer the assurances that were being sought. FCO therefore intended to instruct HM Embassy Cairo to seek a final response from the Egyptians on the request for assurances.

29. Mr. Cowper-Coles's letter was read by the Prime Minister who wrote across the top of it: "This isn't good enough. I don't believe we shld (sic) be doing this. Speak to me." On 28 May 1999, the Prime Minister's Private Secretary wrote to Mr. Cowper-Cowles telling him that the Prime Minister remained very keen for the UK Government to be able to deport the four Egyptians to Egypt. The Prime Minister understood the dangers of the Court overturning a Government decision if the necessary assurances had not been obtained. The Prime Minister believed that the next step should be for him to write to President Mubarak setting out the Government's willingness to deport the four, and the assurances needed to achieve that. The Egyptians knew the position, but the Prime Minister thought it would be helpful if he reiterated it at the highest level and made it clear that the issue of the assurances was not an obstacle that the UK Government had willingly created.

30. On 27 May 1999 HM Ambassador Cairo met Mr. Al Baz once more. He emphasised the Prime Minister's personal interest and concern. Mr. Al Baz checked again with the Ministry of Justice on the question of possible flexibility for British Embassy access to the detainees returned to Egypt and confirmed that it was very difficult. He asked for a few more days to think things over and to consult and on 1 June 1999 he passed a message to HM Ambassador Cairo to the effect that these soundings had made no progress: the position remained as set out in the Interior Minister's letter of 22 March 1999.

31. On 2 June 1999, Ms. Craig sent a minute to, inter alios, the Private Secretary at the Home Office on how to respond to No.10's letter of 28 May 1999. Ms. Craig's preferred option was that the Prime Minister did not press President Mubarak for assurances. On 23 March 1999 the Egyptian Interior Minister had rejected the formal request for assurances. HMG had offered flexibility where it could and made clear where it could not, i.e. the issue of access to the four if detained. After consultation with No. 10 a final formal response had been sought from the Egyptian Government on 27 May 1999 but this had been rejected. To press President Mubarak now would have policy, legal and bilateral implications. At the moment it was an Egyptian decision which had caused the case against the four to fail. If HMG were to pressurise the Egyptians into providing assurances they would expect something in return and it was not in HMG's gift to effect a deportation: that was for the courts to decide.

32. Also on 2 June 1999, Ms. Susan Hadland, an official in the Security and Special Cases Unit at the Home Office, sent a minute to the Home Secretary on the likely need to release the four Egyptian detainees in light of the Egyptian Government's decision that there was no future in further discussion about assurances. Ms. Hadland advised that the four men would have to be released as soon as the possibility of getting assurances from the Egyptian Government had been ruled out. The only outstanding issue was whether the Prime Minister would decide to write to President Mubarak encouraging him to provide the assurances despite the recent affirmation of the Egyptians' unwillingness to give them. Home Office officials understood that officials at No. 10 continued to see some advantage in sending a final letter, although FCO advice was against this approach. The minute went on:

    Once the possibility of assurances is finally ruled out we shall have, given the information we have about human rights abuses in Egypt, no option but to accept that the men would face Article 3 ECHR risk if returned to Egypt. We will then need to grant them exceptional leave to enter.

33. On the same day that Ms. Craig's and Ms. Hadland's minutes were written, HM Embassy Cairo sent a telegram to FCO reporting on what had happened on 27 May and 1 June 1999 and stating that it was HM Ambassador Cairo's private view that unless the question of assurances had miraculously become easier, the best course now might be to accept that the gap could not be bridged. In HM Embassy Cairo's view, the rejection of the assurances request communicated on 1 June 1999 was the clearest possible indication that the Egyptian Government did not want to pursue the idea of assurances further.

34. The next day (3 June 1999), the Home Secretary wrote to the Prime Minister in the following terms:

    Prime Minister

    POSSIBLE DEPORTATION FROM THE UK OF FOUR EGYPTIAN JIHAD MEMBERS

    Summary

The Egyptian Government has now confirmed that they do not see a future in discussions on assurances. Advice from the Foreign Office is that you should now write to President Mubarak; but that you should not press him further about assurances. I support that advice.

2 Once there is no possibility of receiving assurances the men will have to be released as there would be no longer any basis for their continued detention or deportation. I can continue to detain the men while you consider the Foreign Office advice although an early decision – within forty eight hours – would be appreciated.

3 I wrote to you on 5 May setting out the background to the deportation process as it effects this group and my view on taking the cases forward. I am aware that there also has been further correspondence between your private secretary and the FCO.

4 It is now clear that the Egyptians see no future in discussions on assurances; and that this is a decision that has been reached after consideration at the highest levels.

5 I understand that the Foreign Office are recommending that it would be helpful if you were to write to President Mubarak about the importance of UK/Egypt co-operation in the fight against terrorism and confirming your commitment to working closely with the Egyptians in this area in the future. But the FCO does not recommend writing to President Mubarak in an attempt to change the Egyptian response as to the giving of assurances in these cases.

6 I am clear that, without any assurances, the men would face an Article 3 risk if they were returned to Egypt. As we have already ruled out the possibility of removing the men to anywhere other than Egypt this means that there is no longer a basis for detaining them under immigration powers. I will therefore have no option other than to agree to their very early release. In my letter of 25 May, I did, however, make clear that I would provide you with a report before any action was taken to release the men. I am doing that now. If you decide to write to President Mubarak in the terms advised by FCO (ie making general points but not raising the issue of assurances) we will need to make arrangements to release the men as a matter of urgency. I will therefore be grateful if your officials could let mine know, if possible, within the next forty-eight hours, how you would prefer to proceed. Although the habeas corpus hearing I mentioned in my last letter was adjourned *sine die* we may need to explain our actions to a court at a future date. We are, in any event, required to account for our actions since the habeas hearing to the representatives of one of the four by Monday of next week at the latest.

35. Also on 3 June 1999, the Private Secretary at FCO (Mr. Barrow) wrote to the Prime Minister's Private Secretary (with a copy to the Home Office Private Secretary) on the whether the Prime Minister should write to President Mubarak expressly seeking the assurances from the Egyptian Government for a third time. He said that there were attractions in seeking the assurances from the Egyptian President, but there were also disadvantages: the Interior Minister (who was also head of Egyptian Intelligence) had said that the Egyptians would not change their minds; the list of assurances posed genuine legal problems for the Egyptians – HMG would have difficulty in giving such assurances with regard to British nationals; and even if the assurances were provided there was no guarantee that the four would ultimately be deported.

36. The following day (4 June 1999), the Prime Minister's Private Secretary wrote to the Home Office Private Secretary (with a copy to the FCO Principal Private Secretary) stating that the Prime Minister had considered the advice from the Home Secretary and the Foreign Secretary and had not yet taken a decision on whether to write to President Mubarak, and if so in what terms. As the issue was still under consideration, he requested that no action should be taken for the present to release the four detainees. He hoped to write further the following week.

37. Seven days later (June 11 1999) Ms Hadland in the Home Office sent a minute to the Home Secretary informing him of recent developments in respect of the possible deportation of the four men. It had become clear that deliberations at No. 10 were no longer confined to making one last request of the Egyptian Government at Prime Ministerial level. A factor that complicated the position was that it was now understood that the men sentenced *in absentia* would not be entitled to a retrial if returned to Egypt. The decision in these cases remained for the Home Secretary although he would clearly want to take into careful account any views expressed by FCO and No. 10.

38. The Prime Minister's decision on whether to write to President Mubarak was communicated by letter dated 14 June 1999 from his Private Secretary in the following terms:

    The Prime Minister has reflected further on this difficult issue. He is also aware of the strong advice from our Embassy in Cairo, yourselves and SIS that we should not revert to President Mubarak to seek a full set of assurances from the Egyptians.

    However, the Prime Minister is not content simply to accept that we have no option but to release the four individuals. He believes that we should use whatever assurances the Egyptians are willing to offer, to build a case to initiate the deportation procedure and to take our chance in the courts. If the courts rule that the assurances we have are inadequate, then at least it would be the courts, not the government, who would be responsible for releasing the four from detention. The Prime Minister's view is that we should now revert to the Egyptians to seek just one assurance, namely that the four individuals, if deported to Egypt, would not be subjected to torture. Given that torture is banned under Egyptian law, it should not be difficult for the Egyptians to give such an undertaking. He understands that additional material will need to be provided to have a chance of persuading our courts that the assurance is valid. One possibility would be for HMG to say that we believed that, if the Egyptian government gave such an assurance, they would be sufficiently motivated to comply with it. We would need some independent expert witness to back that up.

    You and the Embassy are best placed to advise the best route to securing such an assurance. I should be grateful if you were to put that in hand. Assuming that you choose a route other than a letter from the Prime Minister to President Mubarak, we can hold that card in reserve until we see how the Egyptians respond to our simplified request.

    Meanwhile, we should continue to take action to keep the four Egyptians in detention. The Prime Minister will wish to know if there is an imminent risk of the courts obliging us to release them.

39. In the afternoon of 14 June 1999, the Home Secretary's Private Secretary contacted the Private Secretary at FCO asking him not to take action with the Egyptian Government until she had had a chance to consult with the Home Secretary who had lead responsibility for the policy on whether the four should be deported.

40. The next day (15 June 1999), an official at FCO sent a minute to Mr. Allen, the Head of the North Africa Section in FCO's Near East and North Africa Department ("NENAD"), alerting him to possible political embarrassment if an assurance on the death penalty was not sought from the Egyptian Government since during the current year HMG had co-sponsored a successful EU resolution at the Commission on Human Rights concerning the reservation of the right to refuse an extradition request in the absence of effective assurances that capital punishment will not be carried out.

41. On 16 June 1999, the UK Director of MENA, Mr. Plumbly, met with the Egyptian Foreign Minister and also Mr. Al Baz and the Head of Egyptian Intelligence, Mr. Sulaiman. Both Mr. Al Baz and Mr. Sulaiman said that they could give no further assurances. Egyptian legal advisers were adamant that formal assurances were unacceptable. Also on 16 June 1999, Mr. Martin Cronin, an official in the Counter-Terrorism Policy Department of FCO, wrote to Ms. Hadland in the Home Office saying that on the question of confirming the credibility of any assurances given by the Egyptian Government, "[W]e (sc. the FCO) could probably offer a very carefully circumscribed view that we accepted the specific Egyptian assurances as far as they went i.e. that we believed that if the Egyptians assured us that they would not torture these four men, then they would not. But we cannot vouch for other aspects of their treatment or the treatment of other prisoners generally." Mr. Cronin also informed Ms. Hadland that NENAD advised that there was no realistic possibility of finding a credible independent expert witness to back up the Egyptian assurances and that the Human Rights Policy Department had expressed doubts about the wisdom of dropping the need for a specific assurance on the use of the death penalty.

42. A yet further memorandum was written on 16 June 1999, in this instance by Mr. Gareth Bayley of HM Embassy Cairo to Mr. Allen of NENAD stating that anyone sentenced *in absentia* in Egypt may not appeal the sentence in any circumstances but could only appeal to the President not to ratify the sentence.

43. The following day (17 June 1999), Ms. Hadland wrote to Mr. Youssef's solicitors stating inter alia, that:

    Although it was clear at this stage [1 June 1999] that there remained difficulties with obtaining assurances from the Egyptians the Government did not take the view that Mr. Al Baz's comments on progress yet ruled out a realistic possibility of obtaining appropriate assurances and therefore of removing Mr. Youssef. Considerable consultations therefore continue to be necessary with the Government at the highest levels.

    I can confirm that we do see a realistic possibility that the Egyptian authorities will provide reliable assurances within a reasonable time. I am not able to give a timetable for the receipt of such assurances, but I can assure you that the matter continues to be given the highest priority.

44. On 18 June 1999 an application for habeas corpus made by another of the four Egyptian detainees came on before Hooper J. who adjourned it for four weeks and directed that the Home Office should serve their evidence in reply in three weeks. He also suggested that Mr. Youssef's adjourned application should be heard at the same time and be subject to the same directions. Mr. Youssef's solicitors objected to this proposal, however, and applied on 28 June 1999 to re-list his application for hearing before Andrew Collins J. on 9 July 1999.

45. Also on 18 June 1999, Ms. Hadland sent a further minute to the Home Secretary on the question of how to proceed in the light of the Prime Minister's views as outlined in the letter of 14 June 1999. This document has been heavily redacted. It is clear, however, that Ms Hadland advised the Home Secretary that he would need to consider whether in the light of the further comments of FCO he was satisfied that it would be reasonable to continue with the pursuit of assurances. She also informed the Home Secretary that following the directions given by Hooper J. that day, the Home Office had three weeks to put in further evidence.

46. On 23 June 1999 the new HM Ambassador Cairo sent a telegram to FCO in which he reported that the discussions he had had with Egyptian officials had left them in no doubt of HMG's determination to find some means by which the detainees could be returned to Egypt but the private assessment of those officials, for example Mr. Al Baz, was that the most likely outcome to the current legal process was that the four

would be released and given leave to remain in the UK. In the Ambassador's view the worst scenario for the Egyptian Government would be a public hearing in which the way in which the four would be treated if they were returned to Egypt became a matter of debate and controversy. The Egyptian Government would not believe that HMG could not have prevented what they would see as a humiliating public discussion of their internal affairs and this argued strongly in terms purely of the UK's interests in Egypt against further court hearings on assurances. The best way to handle the Egyptians now would be to tell President Mubarak that while the four were being released (for reasons both sides understood), their cards had been marked and HMG would not hesitate to act against them again if necessary.

47. On 24 June 1999, Mr. Vincent Fean, an official in the Counter-Terrorism Policy Department in FCO, sent a memorandum to numerous addressees, including the Private Secretary at the Home Office and Ms. Hadland, reporting on a visit he had made to Egypt two days earlier. In this memorandum Mr. Fean stated that the Egyptians were not now expecting HMG to revisit the issue of assurances and he had taken the view in discussions with HM Ambassador Cairo that it would be counter-productive to seek a simplified assurance from Egypt.

48. On 5 July 1999, prompted by a requirement on the Home Office to provide information in the habeas corpus applications by 5 pm Friday 9 July 1999, Ms. Hadland sent a further minute to the Home Secretary which contained, inter alia, the following advice:

    The position is very difficult; particularly as it is far from clear what Number 10 believe will be gained from pursuing the matter further. All the evidence from FCO is that the Egyptians are not interested in pursuing the idea of assurances (regardless of the nature of the assurances being requested); and that losing the cases in the courts here would not assist our bilateral relationship.

    [W]e have gone back to FCO at official level to explore with them what they might be able to say on the subject; and also whether there would be any prospect of identifying a prominent and respected academic who would be prepared to say that a single assurance would be worthwhile. FCO have made clear to us that they would at best be able to offer a "very carefully circumscribed" view that they accepted the specific assurance as far as it went. However it seems clear that while this would cover the torture of the men on direct orders of the Egyptian Government it would not go to the far more significant question of free-lance behaviour on the part of members of the security forces. As FCO have informed us that they see no possibility of identifying a prominent and respected academic who would be prepared to say something helpful on the matter of assurances you would be left with in the uncomfortable position of having to balance an Egyptian assurance on torture (if forthcoming), and a carefully circumscribed FCO statement as to it's reliability, against the information available as to the behaviour of the Egyptian forces.

    Number 10's view seems to be that the Egyptians would have no difficulty in giving an assurance as to torture. It may be that this is the case in principle. However the FCO view is that the Egyptians have discounted the idea that these cases should be continued on the basis of assurances given by the Egyptian Government – whatever the nature of those assurances. This is a perfectly understandable position given that it has been made clear to the Egyptians that we could not be certain that a court would accept any assurances they gave as being satisfactory. FCO therefore think it highly unlikely that the Egyptians would give the single torture assurance even if we ask for such an assurance.

    You will wish to reach your own view as to the way ahead. It is, however, important that decisions are made at as early a stage as possible because of the requirement for us to state our case for maintaining detention in renewed Habeas Corpus proceedings. A statement of our progress in obtaining satisfactory assurances would

be required by 5pm on Friday; and may be required a day earlier if the representatives of two of the men are successful in obtaining an earlier hearing than that directed for the other two. There has, of course, been no progress in our discussion with the Egyptians since 2 June (when they indicated that assurances remained difficult) because of the need to consult Number 10, parliamentary counsel and FCO. This leaves us in a particularly vulnerable position. The fact that in earlier proceedings we were warned that the question of assurances should be resolved in a matter of "weeks not months" increases that vulnerability now that two months have passed without demonstrable progress being made.

49. On 6 July 1999, Ms. McAlister of the Security and Special Cases Unit in the Home Office responded to a request from the Home Secretary to provide him with further information from FCO, inter alia, on Egypt's record under scrutiny by the UN Committee on Torture by sending him a copy of a letter from Mr. Allen of NENA. In this letter Mr. Allen said that the last examination of Egypt's record on torture by the UN Committee on Torture undertaken in May 1995 had resulted in a number of recommendations including that Egypt undertake expeditiously a thorough investigation into the conduct of its police forces. Following a complaint against Egypt from Amnesty International in May 1998 charging that, amongst other things, there was no evidence of any independent investigative body being set up and that reports of torture continued, the Committee had exceptionally decided to request the prompt submission of Egypt's third five yearly report. FCO were unaware, however, of any submission having been received.

50. By a memorandum dated 8 July 1999, the Private Secretary at FCO informed the Private Secretary at the Home Office of the assessment that FCO would be willing to give of an assurance from the Egyptian Government that the four detainees would not be subject to torture. It was in these terms:

    The Foreign and Commonwealth Office assess that if the assurance sought from the Egyptian government is forthcoming, then the Egyptian government will make every possible effort to ensure that the assurance is abided by.

51. On the same day (8 July 1999), the Home Secretary decided to release Mr. Youssef and the other three detainees the following day. He explained his decision in a letter dated 8 July 1999 to the Prime Minister which, inter alia, was in these terms:

    Prime Minister

    POSSIBLE DEPORTATION FROM THE UK OF FOUR EGYPTIAN JIHAD MEMBERS

    Summary

    You suggested that we should ask the Egyptians for a single assurance on torture. I am not satisfied that an assurance of that sort, even if forthcoming, would be sufficient for me to proceed to issue notices of intention to deport in these cases. In the circumstances I consider that I have no basis for the continuing detention of these men. I, therefore, intend to release them tomorrow. We will otherwise be required tomorrow, to justify in writing to the court their further detention, in anticipation of a habeas corpus hearing next Friday. Advice from the Foreign Office is that you should now write to President Mubarak as previously proposed. The Foreign Office will ensure that the Egyptians are informed of the release.

    2. I wrote to you on 3 June explaining that in my view in the light of the Egyptian decision that there was no future in discussions on assurances, it was now necessary for me to release the four men, unless you wish to make a personal approach to President Mubarak.

3. Your Private Secretary indicated in his letter of 14 June that your view was that we should pursue the question of assurances further – and in particular that we should ask the Egyptians for a single assurance on the issue of torture. Having explored with the Foreign Office what support they could reasonably indicate for such an assurance, and having considered the available material on the human rights situation in Egypt, I am unable to conclude that an assurance of the kind you propose would be sufficient, even if it were forthcoming.

4. The Foreign Office have made clear to us that they would at best be able to offer a "very carefully circumscribed" view that they accepted a specific " torture" assurance as far as it went. Whilst this could cover the torture of the men on the direct orders of the Egyptian Government, it would not go to the far more significant question of free-lance behaviour on the part of members of the security forces. As the Foreign Office have advised us that they see no possibility of identifying a prominent and respected academic who would be prepared to say something helpful on the matter of assurances I would be left in the well–nigh impossible position of having to balance an Egyptian assurance on torture (if forthcoming), and a carefully circumscribed Foreign Office statement as to its reliability, against the information available as to the behaviour of the Egyptians Security Forces. (In addition to the torture issue there are also some difficult questions raised by the trial in absentia of three of the four men. These would have been dealt with had we obtained the original assurances requested from the Egyptians.)

5. In the event I am not convinced that the Egyptians would be willing to give even the single assurance proposed. I have been advised by the Foreign Office that the Egyptians are uncomfortable with the whole idea of assurances rather than with the details of particular assurances. They are certainly not interested in a potentially public discussion of their internal affairs in our courts.

6. In all the circumstances I cannot see that there is any prospect of removing the men from the United Kingdom. I therefore have no alternative but to order their release from detention and intend to do so tomorrow (9/7/99). We would otherwise be required tomorrow to justify to the court their further detention in anticipation of a Habeas Corpus hearing next Friday. I appreciate that this is not your preferred option. Nor is it mine. I only reached this conclusion after very careful consideration of all the available material.

7. You may now wish to write to President Mubarak about the importance of UK/Egypt co-operation in the fight against terrorism and confirming your commitment to working closely with the Egyptians in this area in the future. I understand that the Foreign Office previously provided an appropriate draft to this effect. The Foreign Office will ensure that the Egyptians are made aware of the releases before they take place.

52. The following day, 9 July 1999, Mr. Youssef and the other three Egyptian detainees were released. On 29th November 1999 Mr.Youssef was granted exceptional leave to enter for one year which was subsequently extended to 28 June 2004.

The applicable legal approach

53. False imprisonment is established on proof of: (1) the fact of imprisonment; and (2) the absence of lawful authority to justify that imprisonment. The claimant must prove that he was imprisoned but once he has done this, the onus then lies on the defendant of proving a justification; see *Hicks v Faulkner* (1881) 8 QBD 167 at 170 (affirmed (1882) 46 LT 127 C.A.).

54. The power under which Mr. Youssef was detained on 27 September 1998 is conferred by paragraph 16 (1) of Schedule 2 to the 1971 Act which provides:

A person who may be required to submit to examination under paragraph 2 above may be detained under the authority of an immigration officer pending his examination and pending a decision to give or refuse him leave to enter.

55. It is common ground that the limits on the power to detain under paragraph 2 (3) of Schedule 3 to the 1971 Act identified by Woolf J. in *R v Governor of Durham Prison, ex parte Hardial Singh* [1984] 1 WLR 704 apply equally to the power conferred by paragraph 16 (1) of Schedule 2. *Hardial Singh* was a habeas corpus case. The applicant was made subject to a deportation order whilst serving a prison sentence and was being detained after his sentence had been served pending the obtaining of a travel document, which was proving to be difficult. In the course of giving judgement Woolf J. said:

    Although the power which is given to the Secretary of State in paragraph 2 to detain individuals is not subject to any express limitation of time, I am quite satisfied that it is subject to limitations. First of all it can only authorise detention if the individual is being detained in one case pending the making of a deportation order and, in the other case, pending his removal. It cannot be used for any other purpose. Secondly, as the power is given to enable the machinery of deportation to be carried out, I regard the power of detention as being impliedly limited to a period which is reasonably necessary for that purpose. The period which is reasonable will depend upon the circumstances of the particular case. What is more, if there is a situation where it is apparent to the Secretary of State that he is not going to be able to operate the machinery provided in the Act for removing persons who are intended to be deported within a reasonable period, it seems to me that it would be wrong for the Secretary of State to exercise his power of detention.

    In addition, I would regard it as implicit that the Secretary of State should exercise all reasonable 'expedition' to ensure that the steps are taken which will be necessary to ensure the removal of the individual within a reasonable time.

56. Mr. Sales submitted that the standard by which the legality of the detention should be judged is the same in both habeas corpus and false imprisonment proceedings and that standard is a *Wednesbury* standard. Mr. Scannell submitted that it was the court that was the primary decision-maker, not the Home Secretary. In support of his submission Mr. Sales contended that the lawfulness of Mr. Youssef's detention depended on an assessment by the Home Secretary of what assurances could be obtained from the Egyptian Government and on an evaluation of the weight and reliability of such assurances. These, argued Mr. Sales, were sensitive matters and the court should recognise the superior expertise and resources of the Executive in these areas: the organs of Executive government should accordingly be given a wide margin of appreciation, although the court could take into account the importance of protecting the liberty of the subject in deciding whether the decision was *Wednesbury* unreasonable.

57. Mr. Sales relied on the judgement of Sullivan J. in the habeas proceedings brought by Mr. Youssef and on the approach taken by Andrew Collins J. when determining the application heard on 7 May 1999.

58. At the hearing before Sullivan J. on 12 March 1999, Mr. Scannell, for Mr. Youseff advanced two contentions. First, that there had been a failure to exercise to all reasonable expedition to ensure removal took place within a reasonable time. Second, that there was no realistic prospect of Mr. Youssef being returned to Egypt otherwise than in breach of Article 3. In refusing Mr. Youssef's application Sullivan J. said:

    In deciding whether all reasonable expedition has been exercised one has of course to have regard to all the circumstances of the case. In this case it is right to have regard to the complexity and sensitivity of the case: for example, it is plain that the

decisions were not able to be taken by civil servants. Matters have to be referred up to Ministers. There is the problem of ensuring that information on security matters is kept secure, and in terms of liaising with other authorities the liaisons have to be taken at the very highest level. Moreover there is the need to consult with other government departments who have a legitimate interest, given the security implications.

Quite apart from delay, it may of course become clear at a relatively early stage that removal is not a realistic possibility. In such a case continued detention would not be justified.

It is clear that the Secretary of State is not entitled to keep the applicant in detention under the 1991 Act on what might be called the off chance that it might be possible against the odds to return him to Egypt. Nevertheless, the question whether there is or is not a realistic prospect of being able to obtain satisfactory assurances from the Egyptian authorities is for the Secretary of State to decide in the first instance. Potentially, of course, any such decision by him would be susceptible to judicial review on conventional Wednesbury grounds…

[A]s things stand at the moment it cannot be said in the light of Mr Wood's affidavit that the department are being inactive or that they or not taking all reasonable steps in exercising all reasonable expedition, given the particular difficulties that are inherent in this case. It is understandable that steps were not taken prior to 23 September. That would have been premature pending a decision on the asylum application.

Following 23 December the possibility of return to a safe third country was examined and that has now been found to be not possible. Therefore the possibility of returning the applicant to Egypt is under active consideration. The discussions are necessarily complex and delicate and they are bound to take some time. It is understandable that a precise timetable cannot be given. One can well understand, for example, that legal advice was sought before papers were laid before the Home Secretary. Thus I am not satisfied, given the particular difficulties inherent in this case that the first limb of Mr Scannell's submissions is made out. Turning to his second proposition, I regard that as unduly simplistic. I am simply not able to say that the Secretary of State would inevitably be Wednesbury perverse in concluding that an assurance, the text of which is not yet available, from the Egyptian authorities, would in effect be worthless. Nor can I say that the Secretary of State is Wednesbury perverse in adhering to the view that there is some realistic prospect at being able to return the applicant to Egypt. If the assurances are given it would be for the Secretary of State to decide whether they can be relied on. No doubt in doing so he will bear in mind the observations of the European court of Human Rights in Chahal .

As I have indicated, if he concludes that the assurances can be replied upon then it may well be that his decision would be susceptible to challenge upon the basis that it was Wednesbury perverse in the light of the available evidence, but I am not prepared to pre-empt what the Secretary of State's decision might be or what view might be taken of it, given that the approach has yet to be made to the Egyptian authorities, and so we do not know whether they would be prepared to give an assurance and if so what the form of that assurance might be….

At the moment the Secretary of State considers that there is a realistic prospect that it may be capable of being overcome. At this stage I cannot say that his conclusion is Wednesbury perverse and, therefore, the detention is still within the ambit of Schedule 2 to the 1971 Act… There is no power to detain the applicant simply on the basis that the Secretary of State would like to be able to remove him to Egypt but cannot really see any practical means of doing so at the moment. Detention for that purpose would be outside the ambit of Schedule 2 to the Act…

As I indicated, the Secretary of State must be satisfied there is a realistic possibility of removing the applicant. He cannot be detained until it is clear that it is impossible to remove him. That would be detaining him on the basis that there was merely an off chance that he might be able to be removed. In my judgement, such detention would not be authorised under Schedule 2.

59. Andrew Collins J. did not deliver a judgement, but it appears that he proceeded on the basis that it was the *Wednesbury* standard that applied.

60. Mr. Sales also relied on *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Butt* (116) ILR 608 and *R v Secretary of State for the Home Department, ex parte Launder* [1997] 1 WLR 839 (HL). Neither of these cases was a claim for habeas corpus or false imprisonment; both were applications for judicial review. In *Butt* the applicant sought an order that FCO should make representations to the President of Yemen that a flawed criminal trial be halted and a retrial ordered. The Court of Appeal dismissed the application holding that it involved a policy decision relating to the relations of the UK Government with foreign states and such a decision was not justiciable. In *Launder* the application was to quash an order made by the Home Secretary under s. 12 of the Extradition Act ordering that the applicant be returned to Hong Kong to face corruption charges. The applicant submitted that there was a real risk that after the handover of sovereignty to the PRC he would be faced with a real risk that he would receive an unfair trial, and if convicted, inhumane punishment. The House of Lords rejected the application. Mr. Sales relied in particular on that part of the speech of Lord Hope at pp. 857-858 where he emphasised that the decision ordering the applicant's extradition rested with the Home Secretary and not with the court, the court's function being to exercise its supervisory jurisdiction and not to conduct an appeal of the Home Secretary's decision on the facts. The decision depended not only on the framework of law constituted by the Joint Declaration and the Basic Law but also on the hearts and minds of those who will be responsible for the administration of justice in Hong Kong, which involved an exercise of judgement of a kind that lies beyond the expertise of a court.

61. Mr. Sales argued that the effect of his submission was simply that when assessing the legality of Mr. Youssef's detention the court should recognise the superior experience, expertise and resources available to the government when considering the practice of diplomatic negotiations and assessing the outcome of them at each stage of the process. Thus (so he submitted) in substance his contention did no more than identify the specific circumstances that are material to the issue of reasonableness on the facts of the case.

62. Whilst it is a necessary condition to the lawfulness for Mr. Youssef's detention that the Home Secretary should have been reasonably of the view that there was a real prospect of being able to remove him to Egypt in compliance with Article 3 ECHR, I do not agree that the standard by which the reasonableness of that view is to judged is the *Wednesbury* standard. I say this both because I can find nothing in the judgement of Woolf J. in *Hardial Singh* that points to this being the standard and because where the liberty of the subject is concerned the court ought to be the primary decision-maker as to the reasonableness of the executive's actions, unless there are compelling reasons to the contrary, which I do not think there are. Accordingly, I hold that the reasonableness of the Home Secretary's view that there was a real prospect of being able to remove Mr. Youssef to Egypt in compliance with Article 3 ECHR is to be judged by the court as the primary decision-maker, just as it will be the court as primary decision-maker that will judge the reasonableness of the length of the detention bearing in mind the obligation to exercise all reasonable expedition to ensure that the steps necessary to effect a lawful return are taken in a reasonable time.

63. It follows that I respectfully disagree with the approach taken by Sullivan J. and apparently also by Andrew Collins J; and I do so in the realisation that if the challenge is not to the lawfulness of detention but to the decision to remove or deport, it will be by judicial review and the reasonableness of the Home Secretary's view will indeed be assessed on *Wednesbury* principles. In most false imprisonment and habeas corpus proceedings the difference between the two approaches is likely to be more apparent than real because when applying the approach I hold to be the correct one, the court ought in my opinion to have regard to all the circumstances and in doing so should make allowance for the way that government functions and be slow to second-guess the Executive's assessment of diplomatic negotiations. However, there may be cases, albeit few in number, where the liberty of the subject will depend on which approach is applied.

Res judicata

64. Until the hearing before me, the defendant's position was that the determinations by Sullivan J. and Andrew Collins J. on Mr. Youssef's habeas corpus applications gave rise to cause of action estoppels that precluded a claim for false imprisonment in respect of any part of the period of detention down to 7 May 1999. If this contention were correct the consequence would be that the many documents that were not exhibited to the defendant's affidavits in the habeas proceedings but which have been disclosed in this action would count for nothing. At the prompting of the court the defendant, without prejudice to its primary contention, agreed to proceed on the basis that the court was concerned with issue, rather than cause of action estoppel. The court took this step in light of the difference between the nature of habeas corpus proceedings– which tend to come on quickly and where disclosure is not automatic but depends on a specific request – and the nature of proceedings for false imprisonment – which come on at a more stately pace and where disclosure is automatic.

65. There is an exception to issue estoppel where there has become available further material relevant to the correct determination of the point in the earlier proceedings which could not by reasonable diligence have been adduced in those proceedings; see *Arnold v National Westminster Bank plc* [1991] 2 AC 93 per Lord Keith at p 109 A-B. In my judgement the documents disclosed by the defendant in this action but not exhibited to the defendant's affidavits in the habeas proceedings fall within this exception. I accordingly propose to determine Mr. Youssef's claim by reference to all the documents that are before the court.

Was Mr. Youssef unlawfully detained in the period 14 January 1999 to 9 July 1999?

66. Although Mr. Youssef denies that he has ever been a threat to the UK's national security, his claim for false imprisonment has proceeded on the basis that the Home Secretary was entitled to seek to remove him to Egypt. Mr. Youssef also accepts that his detention was lawful down to 14 January 1999, after which date the Home Office ceased to consider removing him to a safe third country. Thus, the questions I have to decide are: (1) whether throughout the period 14 January 1999 to 9 July 1999 the Home Secretary was reasonably of the view that there was a real prospect of removing Mr. Youssef to Egypt in compliance with Article 3 ECHR; and/or (2) whether after 14 January 1999 Mr. Youssef was detained for a period longer than was reasonably necessary having regard to the necessity of the exercise of reasonable expedition in determining whether arrangements could be put in place that would allow for it to be reasonably contended that Mr. Youssef could be removed to Egypt in compliance with Article 3 ECHR.

67. Mr. Scannell's first submission was that Mr. Youssef was unlawfully detained throughout the whole of the relevant period because there was never a realistic prospect that adequate assurances would be obtained from the Egyptian government for his removal to be in compliance with Article 3 ECHR. In support of this submission

he pointed to the evidence that was available to the Home Office of the prevalence of torture in Egypt and contended that no assurances, even if they were forthcoming, would have been sufficient for the Home Secretary reasonably to have concluded that Mr. Youssef could be removed to Egypt in compliance with Article 3. The evidence in question consisted of a 1997 US State Department report which in turn referred to a 1998 Amnesty International report and a May 1998 report of the UN Committee against Torture, all of which painted a convincing picture of systematic torture in Egypt of political detainees by the Egyptian Security Services notwithstanding that Egypt had signed the UN Convention against Torture in 1987

68. The assurances sought from the Egyptian Government were those that the Home Office had been advised would afford a reasonable prospect of being held to be sufficient by an English court and the European Court of Human Rights. Of particular importance from the point of view of Article 3 ECHR were the requested assurances that the men would receive no ill treatment whilst in detention and that during any term of imprisonment, arrangements would be agreed for regular access by British Government officials. The purpose of the latter assurance was to provide a means of policing the former, and, given the evidence of systematic torture, it was very important that it (or something close to it) was obtained if there was to be a reasonable chance of removing the men in compliance with Article 3.

69. In my judgement, if the assurances sought from the Egyptian Government on 21 March 1999 had been forthcoming, there would have been at the very least a reasonable prospect that an English court would not have quashed the removal of Mr. Youssef to Egypt. I am also quite satisfied that it was reasonable to seek the assurances from the Egyptian Government and that the time taken in seeking advice on assurances, formulating the assurances, and making the first request of the Egyptian Government was reasonable in all the circumstances, given the importance of pursuing the possibility of removing Mr.Youssef and the number of departments of government that had to be consulted.

70. Mr. Scannell's next submission was that since Mr. Youssef would not have had a right of retrial on being returned there was never a prospect that Mr. Youssef could have been removed in conformity with Article 6 ECHR. It was irrelevant, submitted Mr. Scannell, that HMG did not know that there was no right of retrial until 4 June 1999. In the alternative, Mr. Scannell argued that if HMG's knowledge was relevant, Mr. Youssef's detention was unlawful either from 26 April 1999 when it was first thought that he had a right of retrial but such a retrial would have been unfair because it would have been by a military court; or from 4 June 1999 by when it had become clear that Mr. Youssef would not be entitled to a retrial of any sort.

71. I reject these submissions. In this pre-Human Rights Act era the UK Government had not committed itself to observing Article 6 ECHR in removals and deportations as it had to observing Article 3 ECHR. As a matter of domestic law, therefore, a removal or deportation in breach of Article 6 would not have been unlawful, and the lawfulness of Mr. Youssef's detention is to be judged solely by reference to domestic law. It is true that some of the assurances sought reflected Article 6 concerns but that was because Mr. Youssef could challenge his removal in the ECtHR. Further, given my holding below that the time taken in trying to negotiate the package of proposals was no longer than was reasonable, the inclusion of the Article 6 assurances cannot lead in any way to a finding that Mr. Youssef's detention was unlawful.

72. Next, Mr. Scannell submitted that Mr. Youssef's detention was unlawful from 23 March 1999 following the rejection by the Egyptian Government of the policing assurances by letter dated 22 March 1999, since after that date there was no realistic prospect that adequate assurances would be obtained.

73. This submission I also reject. The only way open to the Government of protecting the state against the danger it thought Mr. Youssef posed was to continue to seek

assurances of the kind that had been submitted to the Egyptian Government, and contact with the relevant officials between 23 March 1999 and the end of April 1999 suggested that there was more than a remote (that is to say a real) chance of the required assurances being given. Thus, on the very day that the letter of rejection was received (23 March 1999) the Interior Minister's First Assistant suggested that a revised version of the assurances might be acceptable and I infer that this remained the position when HM Ambassador Cairo met Mr. Al Baz on 3 April 1999 and when the Egyptian Government asked for and was given clarification on certain issues on 5 April 1999. There was then an enforced pause in the negotiations because of the Egyptian President's state visit abroad, which brings us to 26 April 1999 when, although the possibility of access being given to ICRC had now to be discounted, the Egyptian President's Adviser, Mr. Al Baz, was still keen to proceed and the Egyptian Minister of Justice thought that a formula could be found whereby a lawyer from a third country or another acceptable person of repute could have access to the detainees on a continuing basis. Delicate negotiations of the sort that were being conducted cannot be rushed. The Government did not have unlimited time but in my judgement it was reasonable to continue the negotiations at the level at which they were being conducted until 1st June 1999 when Mr. Al Baz passed a message to HM Ambassador Cairo that the soundings he had said on 27 May 1999 he would take had made no progress.

74. It is clear that when the Home Secretary wrote to the Prime Minister by letter dated 3 June 1999 (see para. 34 above) he had come to the view that unless the Prime Minister decided to raise the level of the negotiations by writing himself to President Mubarak with a request for assurances, the end of the road had been reached and Mr. Youssef and the other three detainees would have to be released. He asked the Prime Minister for a response within 48 hours but did not hear from him for eleven days. Was it reasonable for him to have continued Mr. Youssef's detention down to 14 June 1999? Mr. Scannell submits that it was not. He says that throughout this period Mr. Youssef was being detained merely on the off chance that a way would be found to remove him in conformity with Article 3 ECHR and that therefore his detention was unlawful. In my judgement Mr. Youssef's detention during this period was not unlawful for the following reasons: it had been entirely reasonable to begin the negotiations with the Egyptian Government at Minister and Presidential Adviser level; those negotiations had now failed; there was a real prospect that despite discouraging views from FCO the Prime Minister would decide personally to seek assurances from President Mubarak; there was also a real chance that negotiations at President and Prime Minister level would lead to the giving of adequate assurances – apart from anything else, President Mubarak had made it forcefully clear that he wanted the four men returned as part of his government's campaign against international terrorism; the only way in the circumstances of protecting the state against the threat posed by Mr. Youssef was to remove him to Egypt; and notwithstanding his request for a response within 48 hours the Home Secretary was entitled to conclude that the decision whether to raise the level of the negotiations was one that required time to consider.

75. The Prime Minister responded through his Private Secretary's letter of 14 June 1999 (see para. 38 above). This letter must have come as a considerable shock to both the Home Office and FCO. Rather than addressing the narrow question of whether he should raise the level of negotiations in an attempt to obtain the assurances already sought, these being the minimum that the Home Office thought were necessary, the Prime Minister came up with an entirely new strategy that involved seeking just one assurance – that the four would not be subjected to torture – around which a case for removal was to be built with the assistance of an expert witness and/or a statement from HMG that it believed that the Egyptian Government would comply with the assurance.

76. Mr. Scannell argued that the letter of 14 June 1999 was concerned not with a genuine attempt to obtain adequate assurances for the removal of Mr. Youssef but with how to package the communication of the release of the four to the Egyptian Government.

Accordingly, so he submitted, the Home Secretary should have repudiated it more or less instantly and proceeded to have released Mr. Youssef. I do not accept this characterisation of the letter. In my judgement, the Prime Minister is to be taken as having advanced his strategy in the belief that the proposed single assurance could be obtained and a case constructed around it that stood a reasonable prospect of success in the courts.

77. However, the decision whether to release Mr. Youssef or continue his detention was the Home Secretary's not the Prime Minister's. It was accordingly for the Home Secretary to consider whether the proposed strategy offered a realistic chance of achieving within a reasonable period of time a case for Mr. Youssef's removal that stood a reasonable prospect of surviving the scrutiny of an English court.

78. In my opinion it should not have taken at all long for the Home Secretary to see that the proposed strategy was extremely problematic. The Home Office knew that there was strong evidence that the Egyptian Security Forces systematically tortured political detainees, despite the fact that Egypt had signed the UN Convention Against Torture in 1987. The Home Office accordingly knew that the evidence strongly suggested that elements in the Egyptian Security Forces were a law unto themselves. This after all was why the policing "access" assurances had been insisted on in the negotiations down to 1 June 1999. It ought therefore to have been readily apparent that even if a single non-torture assurances was actually given, there were going to be very serious difficulties in persuading an English court that such an assurance was sufficient. Then, on 17 June 1999, a day or two after receipt of the 14 June 1999 letter, Ms. Hadland of the Home Office was informed by Mr. Cronin's letter of 16 June 1999 that FCO could only offer the very carefully circumscribed view that if the Egyptian Government gave the non-torture assurance the Egyptian Government would not torture the detainees, a view that did not address at all convincingly the problem of the Egyptian Security Forces acting independently of other parts of the Egyptian Government. On the same date and by the same letter Ms. Hadland was also informed that there was no realistic possibility of finding a credible independent expert witness who would say that assurances from the Egyptian Government could be relied on. Thus by 18 June 1999 the Home Office knew that the chances of persuading a court as to the adequacy of a single non-torture assurance were bleak indeed.

79. And it was on 18 June 1999 that Ms. Hadland sent her minute of that date to the Home Secretary advising him that he would need to consider whether in the light of the further comments of FCO he was satisfied that it would be reasonable to continue with the pursuit of assurances. In my view, if she did not say in the redacted parts of her minute that given what she had learned from Mr. Cronin's letter of 16 June 1999 the game was almost certainly up and advised the Home Secretary that he should quickly decide whether there was now a real prospect of satisfying an English court with a single non-torture assurance, she should have done. What she did say was that the Home Office had three weeks in which to put in further evidence in the habeas corpus proceedings, a statement that I think may have induced the Home Secretary to believe that he had about three weeks in which to come to a decision. In fact, given: (a) the over all length of time Mr. Youssef had been in custody; (b) the length of time that had elapsed between the Home Secretary's letter of 3 June 1999 and the Prime Minister's reply on 14 June 1999; (c) the failure to obtain the assurances that the Home Office had been advised to seek, including in particular the "access" assurances; and (d) what the Home Office knew on 18 June 1999 about the FCO's "very circumscribed view" and the unavailability of an expert witness, the Home Secretary had in my opinion a good deal less than 3 weeks to come to a final decision. Indeed, I am of the view that he should have concluded no later than Friday 25 June 1999 that there was no real prospect of removing Mr. Youssef in compliance with Article 3 ECHR.

80. I should add that even if I were applying a *Wednesbury* standard of reasonableness I would have reached the same conclusion. In other words, I am of the opinion that the Home Secretary's view that there remained after 25 June 1999 a real prospect of being able to remove Mr. Youseff in compliance with Article 3 ECHR was a view that was beyond the range of responses of a reasonable Secretary of State.
81. Accordingly, I hold that Mr. Youssef was unlawfully detained for the period 25 June 1999 to 9 July 1999, a period of 14 days.