Appeal No: SC/15/2005
Hearing Date: 10th – 17th October 2012
Date of Judgment: 12th November 2012

**SPECIAL IMMIGRATION APPEALS COMMISSION**

Before:

**THE HONOURABLE MR JUSTICE MITTING (Chairman)**
**UPPER TRIBUNAL JUDGE PETER LANE**
**DAME DENISE HOLT**

# MOHAMMED OTHMAN
# (ABU QATADA)

APPELLANT

and

# SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

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| For the Appellant: | Mr E Fitzgerald, QC & Mr D Friedman |
| Instructed by: | Birnberg Peirce & Partners Solicitors |
| For the Respondent: | Mr R Tam QC, Mr T Eicke, QC & Ms J Wells |
| Instructed by: | The Treasury Solicitor |
| Special Advocates: | Mr A McCullough, QC, Mr M Chamberlain |
| Instructed by: | The Special Advocates' Support Office |

OPEN JUDGMENT

**MR JUSTICE MITTING :**

**Procedural background**

1. On 18th February 2009 the Secretary of State signed and served a deportation order against the appellant. She did so on the same date as the House of Lords handed down its decision finally dismissing his challenges to the Secretary of State's decision to make a deportation order notified to him on 11th August 2005. No step was taken to enforce the order, pending final determination of the appellant's application to the European Court of Human Rights. By a judgment handed down on 17th January 2012 which became final on 9th May 2012, the fourth section of the Strasbourg Court unanimously held that the appellant's deportation to Jordan would not violate Articles 3 and 5 of the Convention, but that it would violate Article 6, "on account of the real risk of the admission at the applicant's retrial of evidence obtained by torture of third persons".

2. On 17th April 2012, in the erroneous belief that the judgment of the Strasbourg Court had become final on the previous day, the Secretary of State notified the appellant that it was her intention to deport him on or about 30th April 2012. On 20th April 2012, the appellant requested the Secretary of State to revoke the deportation order of 18th February 2009. On 18th May 2012, the Secretary of State notified her refusal to revoke the order. The appellant had a right of appeal against that decision under section 82(2)(k) of the Nationality Immigration and Asylum Act 2002. Because the Secretary of State's decision was based in part on material that it was not in the public interest to disclose,

his right of appeal was to SIAC: section 97(3). He exercised that right by giving notice of appeal, in time, on 24th May 2012.

3. We heard the appeal in the two weeks beginning 8th October 2012. This is our open judgment on that appeal. There is a closed judgment, in which we have set out our closed reasons for reaching the same conclusions as those set out in this judgment.

**The decision of the Strasbourg Court**

4. The court set out a brief history of the circumstances of the case, gleaned from the original open decision of SIAC on 26th February 2007 and additional materials which were publicly available and/or were submitted by the parties. It dealt with four topics, of which three are relevant for present purposes: Articles 3, 5 and 6.

**Article 3**

5. The court described the parties' acceptance that without assurances from the Jordanian government there would be a real risk of ill-treatment of the appellant if returned to Jordan as "unremarkable": §192. It noted and considered in detail the assurances given by the Jordanian government to the British Government in the Memorandum of Understanding (MOU) signed by the two governments on 10th August 2005. Despite international criticism of the propriety of accepting assurances from governments with a questionable record of complying with international human rights standards, the court said that "its only task is to examine whether the assurances obtained in a particular case are sufficient to remove any real risk of ill-treatment": §186. It set out a

non-exhaustive list of the factors to which it would have regard in §189. The basic test was set out in §187:

> "…assurances are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment. There is an obligation to examine whether assurances provide, in their practical application, a sufficient guarantee that the applicant will be protected against the risk of ill-treatment. The weight to be given to assurances from the receiving state depends in each case on the circumstances prevailing at the material time…"

Put more shortly, the test is whether or not they "remove any real risk of ill-treatment of the applicant": §192.

6. In reaching its conclusion that the assurances removed that risk, the court took into account the following factors: their detail and formality: the fact that they were given in good faith and had been approved at the highest levels of the Jordanian government; the high profile of the appellant which would make the Jordanian authorities careful to ensure he was properly treated; and the existence of adequate arrangements for verification by the Adaleh Centre: §194 – 205.

**Article 5**

7. Article 5 applied in an expulsion case if a person removed "was at real risk of a flagrant breach of that article": §233. It gave two examples of a flagrant breach: arbitrary detention for many years without any intention of bringing an individual to trial; and imprisonment for a substantial period on conviction after a flagrantly unfair trial: ibid. On the facts, the court held that there would be no real risk of a flagrant breach in respect of the appellant's pre-trial detention.

**Article 6**

8. The court's case law established "that an issue might exceptionally be raised under Article 6 by an expulsion or extradition decision in circumstances where the fugitive had suffered or risked suffering a flagrant denial of justice in the requesting country": §258. The test was a stringent one and required a breach of the principles of a fair trial guaranteed by Article 6 "which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that article": §260.

9. The court then dealt with the standard and burden of proof in an expulsion case in § 261. It drew on the test laid down in Article 3 expulsion cases in *Saadi v. Italy* [2009] 49 EHRR 30 §129:

> "…It is for the appellant to adduce evidence capable of proving that there are substantial grounds for believing that, if he is removed from a contracting state, he would be exposed to a real risk of being subjected to a flagrant denial of justice. Where such evidence is adduced, it is for the government to dispel any doubts about it."

The words "it is for the government to dispel any doubts about it" are open to misunderstanding. On one reading, they might be taken to mean that, once substantial grounds for believing that a real risk had been established, it was for the government to demonstrate that no risk whatever existed. This is not how the court interprets the *Saadi* test in Article 3 expulsion cases, as is demonstrated by its approach to the assurances given in relation to Article 3 in the MOU in §186 and 187, in which it described its task as follows: to examine whether the assurances "are sufficient to remove any real risk of ill-treatment" and "to examine whether assurances provide, in their practical application, a sufficient guarantee that the applicant will be protected against

the risk of ill-treatment". What a government must do when substantial grounds have been shown, is to demonstrate that there is not a real risk of a flagrantly unfair trial, not that there is no risk at all.

10. The court identified the central issue as "the real risk that evidence obtained by torture of third persons will be admitted at the applicant's retrial": §263. Given the international consensus and its own jurisprudence (see *Gafgen v. Germany* [2011] 52 EHRR 1) there would be a flagrant denial of justice if evidence obtained by torture were admitted in a criminal trial: §267. On the basis of SIAC's findings and additional material adduced by the appellant, it concluded that there was, at least, "a real risk" that the statements of two men, Abu Hawsher and Al-Hamasher had been obtained by torture: §269 – 272. (The proposition would be better expressed as a real "possibility" or "chance", because a risk can only exist as to a future, not past, event).

11. In §273 the court concluded that it would be "unfair to impose any higher burden of proof" on the appellant than showing that there was "a real risk" that the evidence against him had been obtained by torture, for the reasons it set out in §274 – 280. The reasons include a sustained criticism of the approach of the prosecutor and the State Security Court to allegations of torture and emphasize the difficulties which the appellant would face in proving that the impugned statements had been obtained by torture,

> "Thus, while on any retrial of the applicant, it would undoubtedly be open to him to challenge the admissibility of Abu Hawsher and Al-Hamasher's statements and to call evidence to support this, the difficulties confronting him in trying to do so many years after the event and before the same court which has already rejected such a claim (and routinely rejects all such claims) are very substantial indeed": § 279.

Despite that observation, which looks forward to the difficulties which the appellant might experience at a retrial, it is plain that the court was dealing with the burden of proof imposed upon him in his application to the court. Hence, the conclusion which immediately follows the cited words in § 280,

> "The applicant has discharged the burden that could be fairly imposed on him of establishing the evidence against him was obtained by torture" (our emphasis).

12. The court dealt with the risk that the impugned statements would be admitted at the retrial briefly in §281. It stated its agreement with SIAC's findings that there was a high probability that the "evidence" of Abu Hawsher and Al-Hamasher would be admitted at his retrial. Accordingly, it concluded that there was a real risk that the retrial would amount to a flagrant denial of justice.

13. In the light of that conclusion, it considered it unnecessary to examine the appellant's remaining complaints about his prospective retrial.

***El Haski v. Belgium*** **App No. 649/08 25th September 2012**

14. The applicant was a Moroccan national accused in Belgium of taking part in the activities of a terrorist group, the Moroccan Islamic Combat Group (GICM). He was tried by the Brussels Criminal Court between 3rd November 2005 and 16th February 2006, on which date he was sentenced to seven years imprisonment and a fine. Part of the evidence contained in the case file and admitted against him was the statement made to a prosecutor or investigating judge (it is not clear which) on 14th January 2004 by a man identified as "A" who said that he had encountered El Haski in jihadist training camps in Afghanistan in 1998, 2000 and 2001 and that he had accompanied him to

Morocco in 2001 where he participated in gatherings of the GICM: §24. He appealed against his conviction to the Brussels Court of Appeal on the basis that the statement made in Morocco should not have been admitted against him because it was obtained by torture. The Court of Appeal noted that he had not put forward any concrete evidence ("element concret") of a kind to give rise to a reasonable doubt about the violation by the police or the judicial authorities in Morocco of Moroccan law about the conduct of the preliminary inquiry ("proces-verbaux") in which the statements had been made: §36. It rejected his appeal. His further appeal to the Court of Cassation was also rejected.

15. The second section of the Strasbourg Court stated the principles which should have been applied in strict terms,

> "85…Particular considerations apply in respect of the use in criminal proceedings of evidence ("elements de preuve") on a basis judged contrary to Article 3. The use of such evidence secured by a violation of one of the core and absolute rights guaranteed by the Convention always raises serious issues as to the fairness of the proceedings, even if the admission of such evidence was not decisive for the conviction of the suspect…. Thus, the use in criminal proceedings of statements ("declarations") by means of a violation of Article 3 – whether or not classified as torture or inhuman or degrading treatment – makes the proceedings as a whole automatically unfair and in breach of Article 6 (*Gafgen v. Germany* [GC] No. 22978/05 §166 -167 and 173, ECHR 2010)."

The court went on to draw a distinction between the use of real evidence obtained by torture, the admission of which is prohibited, and by treatment in breach of Article 3, which is only contrary to Article 6 if it is shown that it had a bearing on the outcome of the proceedings, for which it again cited *Gafgen* as authority. The prohibition on the use of statements obtained in violation of

Article 3 applied to statements made by third persons as well as those made by an accused himself. In a case in which the judicial system in the state in which a statement was obtained does not offer effective guarantees of the independent, impartial and conscientious ("serieux") examination of allegations of torture or of inhuman or degrading treatment it is sufficient to establish a "real risk" that the statement was thus obtained: §88,

> "The judge of the national court cannot admit such evidence without first ("prealablement") examining the arguments of the accused relating to that evidence and satisfying himself that notwithstanding those arguments, there is no such risk".

(The original text of the judgment is in French. The cited passages are our translation of the original, aided by a translation produced by the FCO).

16. Thus in any criminal proceedings before a national court in a contracting state in any case in which the prosecution seeks to rely on statements alleged to have been produced by torture, made to the judicial authorities of a third country, which do not subject them to independent, impartial and conscientious examination, the judge must first satisfy himself that there is not a "real risk" that the statements were obtained by torture, before admitting them in evidence. If he does not, the trial will be unfair and in breach of Article 6.

**The test to be applied in "foreign" Article 6 cases**

17. It is now common ground that we should apply the test laid down by the Strasbourg Court and not that laid down by the House of Lords in *Othman v. SSHD* [2010] 2AC 110. The decision of the Secretary of State to refuse to revoke the deportation order expressly stated that she "does not seek to bypass

the decision of the ECHR". The tenor of the decision letter is that in the light of developments occurring and further information gathered since the decision of the Strasbourg Court, its conclusion that the deportation of the appellant to Jordan would be in violation of Article 6 is no longer valid. In his opening skeleton argument, Mr. Tam QC for the Secretary of State, stated that the decision letter was expressly drafted on the basis of the judgment of the Strasbourg Court and by reference to the test laid down by it. In consequence, the Secretary of State accepts that if we were to find that the test identified by the Strasbourg Court has not been satisfied, we could or should allow the appellant's appeal on the basis that her discretion should have been exercised differently under section 86(3)(b) of the Nationality Immigration and Asylum Act 2002. His proposition is both sensible and right and we will apply it.

18. The Strasbourg Court's test involves the assessment of three "risks":

i) The risk that the appellant will be retried for two offences of conspiracy to cause explosions.

ii) The "risk" that statements made by Abu Hawsher and Al-Hamasher to the public prosecutor which implicate him were obtained by torture.

iii) The risk that those statements will be admitted against him at his retrial(s).

19. It is common ground and beyond doubt that if returned to Jordan he would be retried on both charges. He was convicted in his absence of both offences and sentenced to life imprisonment with hard labour for life and 15 years

respectively. Neither term has yet expired. On his surrender or arrest on return to Jordan, his convictions will be null and void and he "shall be retried": Article 254 of the Code of Criminal Procedure No. 9 of 1961.

20. It is now common ground that it is impossible to prove that there is not a real "risk" that the impugned statements were obtained by torture, for the reasons set out in §272 and 278 of the judgment of the Strasbourg Court. Although there is now some evidence to contradict the claim that Abu Hawsher and Al-Hamasher were tortured, to which we refer below, Mr. Tam realistically accepts that it is insufficient to demonstrate that there was no "real risk" that they were.

21. For those reasons, this appeal has proceeded on the footing that both of the first two "risks" exist. The focus of the case has been on the third.

22. Because the Strasbourg Court found, on the basis of SIAC's findings, that there was a high probability that the impugned statements would be admitted at the appellant's retrial, it was unnecessary for it to examine or identify the factors which would give rise to such a risk. We have heard and read a good deal of evidence not available to SIAC and to the Strasbourg Court about that risk which requires that judgment to be revisited. To do so, it is first necessary to identify the factors which should be taken into account in evaluating that risk. The following is a non-exhaustive list.

i) The history of the two trials in which the appellant was convicted.

ii) Relevant provisions of the Jordanian constitution and criminal procedures law.

iii) Jordanian case law, in particular that of the Court of Cassation.

iv) The attitude of the Jordanian authorities to the appellant's return and prospective retrial.

v) The nature and composition of the court which will retry him and, insofar as it can be ascertained, the attitude of its judges.

23. Mr Fitzgerald submitted that, exceptionally in Strasbourg case law, the same standard as that set out in *El Haski* should be applied in a foreign, as in a domestic, case: that there would be a real risk of a flagrantly unfair trial unless the law of the foreign state in which the trial would take place unequivocally requires its courts to satisfy themselves before or at the outset of any trial that there is no "real risk" that a statement inculpatory of the accused was obtained by torture. Put in language familiar to a common lawyer, his submission would require the prosecution to prove to the court so that it is sure that a statement was not obtained by torture before it could be adduced in the trial. We do not accept that proposition. The Strasbourg Court has always been careful not to seek to impose Convention standards on foreign states, for the obvious reason that the Convention only binds contracting states: *Drozd & Janousek v. France and Spain* [1992] 14 EHRR 745 at §110. To require of a foreign state that its laws replicate, in detail and with precision, those imposed on contracting states would be contrary to that approach. It would also go beyond the express requirement of Article 15 of the 1984 United Nations Convention against Torture and other Cruel Inhuman or Degrading Treatment or Punishment which requires that,

> "Each state party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made."

It would also contradict the Strasbourg Court's own observation in §276 that in a truly independent criminal justice system where cases are prosecuted impartially and allegations of torture conscientiously investigated, "one might conceivably require a defendant to prove to a high standard that the evidence against him had been obtained by torture". In our judgment, the provisions of the law of the receiving state as to the burden of proof and the stage at which a determination must be made whether evidence has been obtained by torture and so can or cannot be admitted or relied upon, are important factors in determining whether there is a real risk that such evidence would be admitted but are not by themselves determinative of the question. We do, however, accept that, in the words of Buxton LJ, cited by the Strasbourg Court in §51, a "high degree of assurance" is required before a person may lawfully be deported to face a trial that may involve evidence obtained by torture: [2008] EWCA Civ 290 §49.

24. Mr. Fitzgerald further submitted that it was inevitable that the impugned statements would be "admitted" at the pre-trial stage. It is undisputed that Jordanian law requires the original case file to be sealed until a defendant convicted in his absence surrenders or is arrested. He must then be detained by the public prosecutor and can only be released on bail by the State Security Court. Mr. Fitzgerald submits that, in consequence, the appellant will inevitably be detained on the basis of a case file which includes the impugned statements. Mr. Thaer Najdawi explained that Jordanian law requires that a

person charged with a felony is to be detained by the public prosecutor and may only be released by order of the court. His evidence is consistent with Article 123 of the Code of Criminal Procedure. On this point, it is unchallenged by any other evidence, expert or documentary, and we accept it. It follows that the appellant will be detained because he has been charged with two felonies, not because he has been convicted at a trial in which the impugned statements were admitted against him. Even if that were so, it would not make his retrial flagrantly unfair. It is only the existence of a real risk that the impugned statements will be admitted probatively at his retrial which would do so. Apart from this discrete submission, which we do not accept, we understand Mr. Fitzgerald, like Mr. Tam, to accept that the test which we must apply is whether or not there is a real risk that the impugned statements will be admitted at the appellant's trial as proof of his guilt.

**The history of the two trials**

25. Since the judgment of the Strasbourg Court was handed down, Major General Military Judge Yousef Al-Faouri, Attorney General of the State Security Court, has provided copies of the judgments in the two cases of the State Security Court and of the Court of Cassation. In consequence, we now know more about the cases than the SIAC panel which heard the original appeal and the Strasbourg Court.

**The Reform and Challenge trial**

26. There were 13 defendants, of whom three, including the appellant, were tried in their absence. There were five charges: unauthorised possession of explosives, unauthorised manufacture of explosive substances, unauthorised

transportation of explosives, membership of an illegal organisation and conspiracy to commit terrorist acts. All defendants charged with specific offences were discharged because they were covered by General Amnesty 6 of 1999. Four defendants were acquitted of the conspiracy count. Nine defendants, including Al-Hamasher and the appellant, were convicted of the conspiracy count. All were sentenced to hard labour for life. Judgment was handed down by the State Security Court on 27th April 1999. The court comprised three military judges presided over by (then) Colonel Yousef Al-Faouri.

27. It was undisputed and amply proved that four explosions had occurred, in succession at the American school on 28th March 1998, at the Highway Patrol Department Centre on 22nd April 1998, under the car of Mohammed Rasoul Al-Kailani's wife on 29th April 1998 and in the garage of the Jerusalem Hotel on 30th April 1998. Traces of the explosives used were recovered from the scene of each explosion. The first 10 defendants were arrested on 5th May 1998 and detained by the GID. Each made statements to the public prosecutor on 11th, 12th or 13th May 1998. The first defendant, Al-Hamasher, was alleged to be the organiser of the conspiracy to cause explosions. The second defendant, Samer Mohammed Ismail Amer, was alleged to be the bomb-maker. The third and fourth defendants, Raed Abdel Karim Abdel Fattah Al-Kafafi and Ahmed Hussein Shehadeh Abdullah, were alleged to have supplied the bomb-making materials to the second defendant. The fifth defendant, Samir Said Ahmed Shabayeh, was alleged to have undertaken reconnaissance and been a look-out. The twelfth defendant, the appellant, was alleged to have suggested, by telephone, to the first defendant, the targets of the explosions

and to have congratulated him when they were carried out. It is unnecessary to describe the roles allegedly played by the other defendants. The statements made to the public prosecutor by the first to fifth defendants inclusive incriminated themselves and other defendants, in detail. Under Jordanian law, as discussed below, statements made to a public prosecutor, which cannot be made under oath, may only be relied upon to convict another defendant if supported by other evidence. The court stated that it had found, in its view, abundant supporting evidence, including the following: the voluntary re-enactment of the explosions by the first to fifth defendants: the seizure from the third defendant's house of a precursor to explosive materials, urea, and the explosive material aluminium nitrate, similar to that found at the scene of the explosions by expert investigators; the seizure at the houses of the first, third and fifth defendants of a book written by the appellant entitled "Between two Methodologies"; explanatory drawings given to the public prosecutor by the first defendant (Al-Hamasher) and the second defendant, which conformed to the expert evidence about the manufacture of explosives. The court also heard evidence from Dr. Moumin Al-Hadidi, who examined the defendants in September 1998, between four and five months after their detention, and determined that he had detected no marks or signs of injury other than those left by shackles. The court also noted that in relation to the four acquitted defendants that statements made about their involvement by the convicted defendants were unsupported by any other evidence. Neither they nor two other defendants (the sixth and seventh) confessed to involvement in the conspiracy.

28. All convicted defendants other than those convicted in their absence, appealed to the Court of Cassation. A principal ground of appeal was that their confessions had been obtained by torture. The court rejected that ground of appeal, finding that there was no evidence of physical or mental coercion and that they had failed to discharge the burden of proving that their confessions to the state prosecutor were the result of physical or mental duress. The appeal was, however, allowed on a question of law. Article 148.3 of the Penal Code (not to be confused with Article 148 of the Code of Criminal Procedure) specifies a maximum sentence of life imprisonment with hard labour for sabotage which causes the destruction, even partially, of a public building or other installation. The court concluded that the State Security Court had only found that four small saloon cars had been destroyed. This was in fact correct: the State Security Court had found that damage had been caused to a public building, the Highway Patrol Department, but not that it had been destroyed, even partially. The State Security Court did not see it that way and on 22nd July 2001 affirmed its original conviction. On 13th June 2002 the Court of Cassation held that the State Security Court was not entitled under Jordanian law to reinstate its original judgment once it had been referred back by the Court of Cassation. This caused the State Security Court on 2nd October 2002 to acquit all of the defendants convicted in their presence. The prosecutor appealed to the Court of Cassation which, on 29th May 2003, allowed the appeal and remitted the case again to the State Security Court. Matters came to an effective end on 10th December 2003 when the State Security Court amended the charge to one of conducting terrorist operations contrary to Articles 147 and 148.2 of the Penal Code and substituting a sentence of five

years imprisonment with hard labour in the case of all but one convicted defendant, whose sentence was reduced to four years imprisonment. In each case, the period spent in detention between their arrest on 5th May 1998 and their release upon their acquittal by the State Security Court on 2nd October 2002 was to count towards their sentence. That judgment became final on 20th January 2004.

29. Major General Al-Faouri played no part in the State Security Court proceedings after the original trial.

**The Millennium plot**

30. Twenty-eight defendants were prosecuted for some or all of eight offences: unauthorised possession of explosives, of an automatic weapon, unauthorised sale of an automatic weapon, involvement in the manufacture of explosive substances, conspiracy to commit acts of terrorism, to commit felonies, membership of an illegal organisation and forgery. Sixteen defendants were present and twelve absent. (One of them was later arrested and prosecuted as we set out below). The offences for which the appellant was prosecuted were conspiracy to commit acts of terrorism and membership of an illegal organisation. All defendants were acquitted of the latter offence, because the objects of the illegal organisation were found to be acts of terrorism against Jews and not the overthrow of the constitution or government of Jordan or the destruction of government property, as required by the paragraph of the Penal Code under which they were charged. The offence of forgery was not triable before the State Security Court and so was referred to the civil courts. Twenty-two defendants were convicted of some offences. Abu Hawsher was

convicted of five offences, for the first two of which (unauthorised possession of explosives and of an automatic weapon) he was sentenced to death. The fifth defendant Hussein Mohammed Ahmed Touri, an Algerian national, was convicted of one offence, conspiracy to commit acts of terrorism, and sentenced to imprisonment with hard labour for seven years. The sentence imposed on the appellant was imprisonment with hard labour for fifteen years, to be calculated from the day on which he is arrested. Precise details of the offences for which other defendants were convicted and their sentences are not material to this appeal.

31. There were two principal categories of evidence against the convicted defendants. First, the detailed and incriminating statements made to the public prosecutor by the first ten defendants, including Abu Hawsher and Touri. They described how they had agreed to attack Jewish tourists in Jordan and to that end had obtained weapons, ammunition and explosive precursors; and planned to undertake acquisitive criminal activity, including robbery and kidnapping, to finance the plot. Nine defendants, including two who were acquitted, claimed at their trial or led evidence from relatives or both that their statements had been obtained by beatings and torture. Abu Hawsher was one of them, but Touri was not. The second plank of the prosecution case was the recovery from the homes of some of the defendants of weapons, ammunition, communications equipment, explosive precursors and tourist maps of Jordan: at the home of the third defendant or premises rented by him, pistols, Kalashnikovs, silencers, electric explosive charges, ammunition, containers filled with nitric and sulphuric acid and communications equipment; from Abu Hawsher's house, silencers, an electric shock apparatus and seven tourist maps

of Jordan; from the house of the sixth and absent sixteenth defendants, two artillery shells. Several of the defendants', including Abu Hawsher, gave detailed accounts in their statements to the public prosecutor about the acquisition and movement of these items.

32. The evidence implicating the appellant was as follows. In his statement to the public prosecutor, Abu Hawsher said that he knew him, had been sent 800 Jordanian dinars by him in 1998 with which he bought a computer for propaganda purposes and, by inference, in about June 1999, had spoken to him by telephone and corresponded with him about the issue of jihad. He said that he did not speak to him about any operation against Jews on Jordanian soil. In his statement, Touri said that in 1998 he had asked the appellant for financial assistance – two thousand dollars – for his marriage to Abu Hawsher's sister which Abu Hawsher told Touri he had received from the appellant. Touri, however, did not receive the money and so telephoned the appellant to ask for financial assistance to travel to Europe. The appellant advised him not to come to London. He understood from a conversation which Abu Hawsher had with another man that five thousand dollars had been sent by the appellant to Abu Hawsher. He was also told by the second defendant that the appellant had sent Abu Hawsher one thousand dollars to buy a computer for his organisation.

33. It can safely be assumed that the second strand of the prosecutor's case against the appellant relied on to support or corroborate the statements of Abu Hawsher and Touri was the discovery of items connected with the appellant at properties associated with other defendants. The record of the evidence

produced at the trial does not clearly support the prosecutor's case, but it is likely that in the case file there will be statements of investigators which do. Items connected with the appellant were recovered in two places: books written by him at a house rented by the third defendant; and messages between Abu Hawsher and him at Abu Hawsher's house or place of work. One such message, addressed to the appellant, of unknown content, was found by a handwriting expert to have been written by Abu Hawsher.

34. The State Security Court rejected the allegations that the statements of defendants had been procured by beatings and torture, for three reasons: it was satisfied that they were made voluntarily; it did not accept the evidence of relatives, and in one case a colleague, of defendants that they had witnessed the results of beatings and torture, because it was based purely on what they heard from the defendants; and none of the defendants had produced medical evidence to support their claims.

35. The ten defendants convicted in their presence appealed to the Court of Cassation. The grounds of appeal included the contention that the statements they had made to the public prosecutor were made under duress, as the record of the Court of Cassation and the defence statement presented to it by Professor Mihiar, for the fourth defendant and Touri (not for Abu Hawsher as Mr. Tam stated in his opening skeleton: his advocate was Salah Badr) make clear. The court rejected that ground on the basis that statements made to the public prosecutor were legal evidence and there was no legal evidence that they had been obtained under duress. They allowed Abu Hawsher's appeal on a single ground: that, contrary to the provisions of Jordanian law governing

the trial of a person accused of a capital crime, he had not been represented by a lawyer on two of the dates of the trial, because his lawyer had been suspended by the Jordanian Bar Association and, in consequence, his substitute had no standing. The court also reversed the judgment in respect of all defendants on the four substantive offences on the basis that they may have been covered by General Amnesty Law no. 6 of 99 and remitted the case to the State Security Court for further consideration.

36. The case then shuttled back and forth between the State Security Court and the Court of Cassation. On 23rd June 2004, the State Security Court reaffirmed its judgment. On 16th December 2004, the Court of Cassation again remitted the case to the State Security Court to reconsider the amnesty point. On 4th April 2005 the State Security Court again reaffirmed its decisions. On 26th June 2005 the Court of Cassation again remitted the cases to the State Security Court for it to consider the amnesty point in all of the cases. On 16th January 2006, the State Security Court reaffirmed its previous ruling. Matters finally came to an end on 31st May 2006 when the Court of Cassation upheld the judgment of the State Security Court, but commuted the death sentences imposed on Abu Hawsher and three other defendants and substituted imprisonment with hard labour for twenty years. The reason given was that they did not carry out their unlawful aim and their confessions had facilitated the investigation process.

37. In consequence, Abu Hawsher was not, as the Strasbourg Court noted in §19 of its judgment, still under sentence of death at the time of its ruling. In fact, by that date he had been pardoned and released.

**Raed Mohammed Hassan Hijazi**

38. He was the sixteenth defendant in the millennium trial and was convicted in his absence of unauthorised possession of explosives and an automatic weapon, of manufacturing explosive substances and of conspiracy to commit acts of terrorism. He was arrested in Syria and transferred to Jordan on 31st October 2000, six weeks after the conclusion of the trial. The evidence against him fell into three categories. First, his own statement to the public prosecutor, in which he made a detailed confession about his role in the substantive offences and the conspiracy. The court rejected the defence case that the confession had been produced by physical and mental duress. Although it accepted that there were abrasions on the body of Raed Hijazi, it concluded that they were the result of him being subjected to beating during his detention in Syria, as he had confirmed in his statement to the public prosecutor. It concluded that he had failed to produce any legal evidence which could challenge the validity of the statement. The second strand of evidence was the items recovered from the houses of four of those convicted in the millennium trial, together with tourist maps found at his own house. The third strand was the statements made by four of the defendants in the millennium trial, including Abu Hawsher, to the public prosecutor. It seems that one of them, his brother, Saed, attended his trial and was cross-examined. For reasons which will be explained below, it is of note that in the English translation of the record of proceedings, each of the defendants is described as "convict".

39. Raed Hijazi was sentenced to death.

40. He appealed to the Court of Cassation on manifold grounds. Three of them are of interest for present purposes: the State Security Court was mistaken in relying on the statements "of one accused against another"; the statements were "illegal and completely invalid"; the statement made by Raed Hijazi was the result of physical and mental duress, beatings and torture. As to the first ground, it found that Article 148.2 of the Code of Criminal Procedure permitted reliance on the statement given by one "accused" (in the English translation) against another if evidence exists to support it. Support was provided by the confession of Raed Hijazi. As to the second and third grounds, Raed Hijazi had not produced any conclusive legal evidence to demonstrate the duress that he claimed and the statements made to the public prosecutor were in keeping with the provisions of the law. The court nonetheless set aside the judgment of the State Security Court on the basis that it had not set out the basis upon which it had convicted Raed Hijazi of the substantive offences of possession of an automatic weapon and of possession and manufacture of explosive materials.

41. As in the principal millennium case, this case then went back and forth between the State Security Court and the Court of Cassation. On 5th January 2003 the State Security Court issued a new judgment, which was set aside by the Court of Cassation on 15th June 2003. On 8th December 2003 the State Security Court reconfirmed its conviction and sentence on the three substantive counts. On 16th January 2005 the Court of Cassation brought matters to an end by dismissing the appeal against conviction, but overturning the death sentence and substituting a term of imprisonment with hard labour for fifteen years on the ground that the defendant had failed to achieve the

illegal purpose intended and had facilitated the investigation by making a clear confession to the public prosecutor.

42. We deal below with the conclusions which can be drawn which are relevant to the current state of Jordanian law and practice and a prospective retrial of the appellant.

**Re-trial**

43. In §§ 276 – 278 the Strasbourg Court made a number of trenchant criticisms of the State Security Court: the criminal justice system was complicit in practices which it existed to prevent; its investigations into allegations of torture were "at best questionable"; and it lacked independence. In consequence, the difficulties confronting the appellant in discharging the burden of proving that the statements of Abu Hawsher and Al-Hamasher had been obtained by torture were "very substantial indeed".

44. The judgment of the court prompted extensive discussions between ministers and officials of the British and Jordanian governments up to and including the highest levels of government. Mr. Layden has been involved in these discussions from the outset. His evidence, together with the minutes of meetings, permit us to reach a clear and confident conclusion about the attitude of the Jordanian government to a prospective retrial. With the significant qualification that all members of the executive government have made it clear to their British interlocutors that they cannot interfere in judicial decision-making, they will do everything within their power to ensure that a retrial is fair. The appellant's case has attracted and will continue to attract considerable international attention. Accordingly, it gives to the Jordanian

authorities the opportunity to show that their legal system is capable of trying a notorious individual with scrupulous fairness; and by doing so, to demonstrate that the criticisms of the Strasbourg Court of their legal system are not, or at least are no longer, justified.

45. The first concrete proposal to achieve that end was made by Ayman Odeh, Minister of State for the Prime Minister's Office on 15th and 16th February 2012: for the purpose of the appellant's retrial, the court would be made up of three civilian judges. This is permissible under Article 2 of the State Security Court Law No. 17 of 59. On 13th May 2012, the then Prime Minister Fayez Tarawaneh confirmed that the retrial would be before three civilian judges. By a formal letter to the Secretary of State for Foreign and Commonwealth Affairs dated 4th July 2012, the Minister for Foreign Affairs Nasser Judeh gave a formal assurance that the Prime Minister would act to form a court of three civilian judges. Given these assurances and the good and close relationship which exists between the British and Jordanian governments, we have no doubt that, although a retrial would take place in the State Security Court, it would be conducted by three civilian judges. They would not be hand-picked by the Prime Minister, but appointed by the Council of Judges, as two senior lawyers, Rateb Wazani and Abdallah Khalil, Honorary Legal Adviser to the British Embassy in Aman, explained on 29th May 2012.

46. The appointments would be to a court whose reputation may be improving. Two small surveys of the opinions of defence lawyers practising before the State Security Court were conducted by the British Embassy and by Mr. Najdawi. A total of eleven were interviewed (two, Taleb Al Saqqaf and Rateb

Al Nawaysieh were interviewed by both). A range of responses was elicted. The majority had noticed a significant improvement in recent years. A minority remained convinced that the court was a tool of the executive. It is of some significance that all gave answers unreservedly and in their own names. We will refer in greater detail to some of the answers directed to questions of Jordanian law and practice below. For present purposes, all that need be noted is that a substantial majority expressed the opinion that the appellant would receive a fair retrial, not least because of the international focus upon it and the publicity which it will attract.

47. Mr. Najdawi told us that in a discussion with him, two judges – by inference, eligible to sit in the State Security Court – were very explicit about being "helpful" to the appellant in his retrial: they wanted to bring Jordanian law to another level or layer of international standards and to change the way the world was looking at Jordan. Mr. Fitzgerald dismissed this evidence as "tittle tattle". We do not agree. It illustrates that the Jordanian judiciary, like their executive counterparts, are determined to ensure that the appellant will receive, and be seen to receive, a fair retrial.

48. Finally, it is now clear beyond doubt that the GID (the Jordanian Intelligence Service) would have nothing to do with the arrest, questioning or detention of the appellant: as Ayman Odeh and Major General Al-Faouri have expressly stated, he would have the opportunity of making a statement to the public prosecutor and would be detained in a civilian prison. Further, for reasons set out in the closed judgment, we are satisfied that the GID would not seek to

influence a retrial by backstairs means. The pre-trial process and retrial will be conducted by judicial authorities alone.

49. If the only question which we had to answer was whether or not, in a general sense, the appellant would be subjected to a flagrantly unfair retrial in Jordan, our unhesitating answer would be that he would not. That answer is not, however, sufficient to dispose of the principal ground of appeal under Article 6. Although criticisms of the State Security Court formed a significant part of the reasoning of the Strasbourg Court, the determinative question for it and for us is whether or not there is, under Jordanian law, a real risk that the impugned statements of Abu Hawsher and Al-Hamasher would be admitted as probative of the appellant's guilt at his retrial. To answer that question it is necessary to analyse Jordanian law and to attempt to forecast how it would be applied by the three civilian judges in the State Security Court.

**Jordanian law**

50. Article 148 of the Code of Criminal Procedure, in the translation provided by Major General Al-Faouri, states,

> "1. The judge may only rely on evidence that is produced during the trial and deliberated upon publicly by the litigants.
>
> 2. The statement of a defendant against another defendant shall be admissible if there is other evidence to support it and the other defendant or his lawyer shall have the right to cross-examine the defendant concerned."

In the translation provided by Mr. Najdawi, Article 148.2 states,

> "The statement of an indicted person against another indicted person can be depended on provided that there is evidence which supports such statement. The other indicted person or his/her representative has the right to examine such statement."

51. SIAC and the Strasbourg Court were satisfied that the impugned statements would be admitted at any retrial of the appellant and could be relied upon probatively against him. He could attempt to rebut the contents of the statements and call the makers to do so: but the court would nonetheless be entitled to rely upon them probatively if it thought fit.

52. The wording of Article 148.2 is not straightforward; but two potential ambiguities can be resolved easily. First, there is no real difference between the phrase "shall be admissible" and "can be depended upon" in the two translations. We are satisfied that both signify the same in Jordanian law: a statement which is not "admissible" or which cannot be "depended on" would not be treated as "legal evidence" by a Jordanian Court. Although the court is unlikely to exclude such a statement at the start of a trial, it will take no account of it in reaching its conclusion. This has the same effect as treating it as inadmissible. Declining to treat the statements as "legal evidence" would satisfy the foreign Article 6 test.

53. Secondly, we do not accept Mr. Fitzgerald's proposition that all that Article 148.2 requires is that the appellant will have the opportunity to comment upon and challenge the impugned statements, rather than to cross-examine the makers. It may well have been the practice of the State Security Court not to require accomplices who had made statements incriminating a defendant to be available for cross-examination. For example, the evidence against Raed Hijazi included statements made by four accomplices only one of whom, his brother, was cross-examined. No point appears to have been taken about their absence from the trial in the Court of Cassation, which held, on another point,

that reliance on the statements was permitted by Article 148.2. We are satisfied in any retrial of the appellant that Abu Hawsher and Al-Hamasher would be made available for cross-examination. Article 226 of the Code of Criminal Procedure empowers the court to call any person as a witness and to issue a summons or warrant to secure his attendance if necessary. Nasser Judeh's letter dated 4th July 2012 contained an unequivocal statement that the appellant was "fully and absolutely entitled to cross-examine and question the prosecution witnesses brought by the public prosecution…" and that Article 148.2 gave to an accused or his representative "the right to cross-examine" an accused who had made a statement against him. At his meeting with Mr. Layden and others on 29th May 2012, Major General Al-Faouri stated that the co-defendants would attend a retrial and would be questioned about their statements. The whereabouts of Al-Hamasher are known to the Jordanian authorities. We have no reason to doubt that the whereabouts of Abu Hawsher are similarly known. We have no doubt that at any retrial arrangements would be made for both to attend and be cross-examined by or on behalf of the appellant.

**The critical questions**

54. The answers to two critical questions will determine whether there is a real risk that the impugned statements will be admitted probatively:

i) Irrespective of the means by which they were obtained, are the impugned statements now admissible at all under Article 148.2 of the Code of Criminal Practice?

ii) If they are, is there a real risk that they will be admitted even though there is a "real risk" that they have been obtained by torture?

**The first question**

55. All criminal proceedings against Al-Hamasher in respect of the reform and challenge plot were concluded years ago. He has served the five year sentence imposed upon him for the amended charge. Having served just under twelve years of the twenty year sentence imposed on him, Abu Hawsher was pardoned and released on 26th November 2011. All criminal proceedings against him have, likewise, concluded.

56. The Secretary of State's principal contention is that, because of these events, neither man is a "defendant" or "indicted person" so that their statements are not admissible under Article 148.2. Nobody has suggested that the impugned statements would be admissible under any other provision of Jordanian law. Accordingly, if Abu Hawsher and Al-Hamasher are no longer defendants or indicted persons, there can be no question of admitting their statements probatively at a retrial. If they were called to give evidence as witnesses and denied the truth of the impugned statements, differences between their evidence and the statements are required to be noted, by Article 219.5 of the Code of Criminal Procedure; but it is only their testimony, given on oath, which may be taken into account: Article 219.3.

57. There is a stark difference of opinion between Mr. Najdawi and others whom he and the British government have consulted and Major General Al-Faouri and other knowledgeable Jordanian lawyers about the issue. Mr. Najdawi and those who support his view are of the opinion that neither Abu Hawsher nor

Al-Hamasher are now defendants, so that they could only give evidence on oath as witnesses. Major General Al-Faouri and those who support his view are of the opinion that, for the purposes of Article 148.2, they remain defendants whose statements to the public prosecutor are admissible against the appellant; and although they may be cross-examined they may not give evidence on oath.

58. We have read Mr. Najdawi's reports and the written evidence that he has collated and have heard him give live evidence. He is a knowledgeable and impressive witness. Although he no longer practises in the State Security Court, he did so extensively in high profile cases from 1993 to 2003 and has a detailed and extensive knowledge of the Code of Criminal Procedure. He fulfilled his duty as an expert witness to give independent and impartial evidence about Jordanian law and practice. We would have been happy to accept his opinion had it not been contradicted by other equally impressive written material.

59. We did not hear live evidence from Major General Al-Faouri or from any of the other individuals who supported his views. We are, however, satisfied that he is a man whose views command respect. He was President of the State Security Court in the late 1990's and is now the most senior member of the judicial branch in that court. He impressed Mr. Layden, who had an extensive discussion with him on 29th May 2012:

> "He was pleasant, direct, open, competent, business-like, helpful and forthcoming. At no point in our discussion did he seem in any way guarded, reserved or evasive."

He has provided what Mr. Layden describes as "unstinting assistance" to the British government in its efforts to deal with the consequences of the Strasbourg Court's judgment.

60. Mr Najdawi's view is in the first instance based upon the language of Article 148, which refers to a "defendant" or "indicted person". In latinised Arabic, the word used is "motoham". By contrast, when a person is convicted, he is referred to as a convicted person or, in latinised Arabic, "mahkoom alih": see, for example, chapter 8 of the Code of Criminal Procedure which deals with the rights of appeal of a convicted person. Once an indicted person is convicted, he ceases to be an indicted person. There are difficulties with this interpretation. As Mr. Najdawi accepted, in a case in which the statement of one defendant was admitted probatively at the trial of another, in a joint trial, and only one appealed successfully to the Court of Cassation, on the retrial of that person, the original statement would be admitted against him. Mr. Najdawi's answer was that that was because the defendant who appealed had had the opportunity of cross-examining the other defendant at the first trial. By that answer, Mr. Najdawi accepted implicitly that the language used in the Code did not provide a conclusive answer. Further, as the case of Raed Hijazi demonstrates, statements made by convicted persons ("convict") have been treated as admissible against a former fugitive at his retrial, even though, at the trial in which he was convicted in his absence, he had no right to cross-examine them. (Under Article 246.1, an indicted person tried in his absence may not have a representative to represent him before the court).

61. Mr. Najdawi's opinion may be more securely founded on a different proposition which does not depend upon the text of the Code. Because neither Abu Hawsher nor Al-Hamasher are any longer susceptible to criminal proceedings in respect of the two plots of which they were convicted, neither can sensibly be described as defendants. This appears to be the basis for the support which Mr. Najdawi has received from experienced sources. At a meeting on 29th February 2012 with Home Office and FCO lawyers, Rateb Wazani a former Minister of Justice and judge of the Supreme Court, Ahmad Najdawi, Thaer Najdawi's father, a very experienced criminal practitioner and Mr. Al-Khalil, Honorary Legal Adviser to the British Embassy, stated unequivocally that both men would be brought to court to testify under oath as witnesses. Four of the lawyers interviewed by Mr. Najdawi as part of his anecdotal survey, Abdul Ghaffar Abu Khalaf, Yousef Faouri (not Major General Al-Faouri), Professor Mihiar (Touri's counsel) and Majid Al Liftawi, stated that the two men were witnesses and would have to make fresh statements and give evidence on oath. One of them, Yousef Faouri, had experienced such a situation in a trial, of which he was unable or unwilling to give further details, when Mr. Najdawi's view was upheld.

62. Mr. Najdawi and Mr Al-Khalil, in the joint report of 6th September 2009 submitted by the UK government to the Strasbourg Court made no reference to Mr. Najdawi's proposition. Although in evidence he was unable to give any explanation for the omission, the likelihood is that it is an opinion which he has formed relatively recently. It is none the worse for that but, as he acknowledges, it remains a proposition untested at any level in the Jordanian court system upon which reliance can securely be placed. He acknowledges

that the State Security Court, and above it, the Court of Cassation retain the ultimate power to determine the issue. He was closely questioned about this. The answers which he gave, carefully and honestly though he gave them, were not always easily understood. His final position was that in the general run of cases, the State Security Court would prefer to follow what he described as "the conservative way of interpretation" – i.e. that supported by Major General Al-Faouri. Nevertheless he believed that in this exceptional case, which would reflect upon the fairness of the Jordanian criminal justice system, the court would adopt his view. He could not say what the Court of Cassation would do, but was convinced that they would be interested by the question.

63. Major General Al-Faouri has consistently asserted to British interlocutors that the impugned statements are admissible as statements made to the public prosecutor by a co-defendant, provided that they are supported by evidence other than the unsworn statements of other defendants: see his answers to FCO and Home Office legal advisers on 1st March 2012, his formal response to the questions of the Attorney General sent under cover of a letter of 20th February 2012, dated 29th February 2012 and the explanation given to Mr. Layden and others on 29th May 2012. The latter is particularly clear: the prosecution will ask Abu Hawsher and Al-Hamasher to attend and they will do so as co-defendants. They will not give their statements on oath. They will be asked whether they stand by what they said in their statements to the public prosecutor. Three situations may arise: if they say they were true, the prosecution will have to support them with other evidence; if they say they were not true, they will be asked the reason for changing their statements and

they will be able to say that they gave them under duress. If that was not the reason, they will be asked what the reason was.

64. Because of the importance of the question and to avoid any possible misunderstanding, on the first day of the hearing, 10th October 2012, SIAC asked that Mr. Najdawi's opinion be explicitly stated to Major General Al-Faouri, for him to say whether he agreed with it or not. This was done. His response was unequivocal:

> "Pursuant to Article 148 of the Code of Criminal Procedure the statements of the convicted (Abu Qatada's co-defendants) cannot be legally heard under oath, whether as defence witnesses or prosecution witnesses. However their respective statements can be heard without taking oath by questioning them in relation to Abu Qatada of the content of their statements, since they are convicted in the same case and such statements cannot be considered as evidence unless there is evidence to support them, subject to review by the Court of Cassation. This is contrary to what the lawyer (Najdawi) said because his opinion conflicts with the provisions of the law and the established case law of the Jordanian Court of Cassation."

He then cited, by number, five Court of Cassation Cases. We have summaries of four of them and a full report of one. They do not support Major General Al-Faouri's proposition, beyond confirming that, at a joint trial, the evidence of one co-defendant may not be given on oath against another.

65. Major General Al-Faouri's opinion is supported, at least impliedly, by the then legal adviser at the Ministry of Foreign Affairs, Bisher Khasawneh, in his answers to questions posed by the Secretary of State in the original appeal to SIAC and by unavoidable implication by the then Prime Minister and distinguished jurist Awn Khasawneh in his discussions with Mr. Brokenshire, Minister of Crime and Security, on 16th February 2012. One of the lawyers approached by Mr. Najdawi, Mohannad Jalamdeh, agreed with this view.

Two of the lawyers who thought that new evidence, given on oath, was required, nevertheless envisaged that the statements might be admitted by the State Security Court (Khalaf and Mihiar). One, Liftawi, may also have been of the same view, though his answer that the decisions of the State Security Court about evidential rules relating to co-defendant statements "are philosophical and incapacitating" is not entirely clear.

66. Unless and until the Court of Cassation gives an authoritative ruling on the question, it must remain open. Both views are tenable. Major General Al-Faouri's "conservative" opinion is supported by past precedent (see the *Hijazi* case). Mr. Najdawi's view accords with the underlying rationale for the rule that one defendant's statement may be admitted against another at a joint trial. Both will then be on level terms. Under Jordanian law, neither would be able to give sworn evidence and both could cross-examine the other about any statement incriminating them. Both would have the same incentive to cast blame on the other. By contrast, once one is no longer under any threat of criminal proceedings, he should be required to give evidence incriminating another person on oath. It is simply impossible for us to resolve these differences. Confronted with two tenable views of what Jordanian law provides, all that we can do is to return to the basic Strasbourg test: has the Secretary of State established that there is not a real risk that the impugned statements will be admitted probatively? To that question there can be only one answer: unless we can be confident that the court would not admit the impugned statements because they were tainted by the "real risk" of torture, the answer must be negative.

67. We must therefore examine and attempt to forecast the approach which the State Security Court would take to statements made by co-defendants to the public prosecutor when allegations that they were obtained by torture have been made.

**The second question**

68. The case law of the Court of Cassation has established the settled legal principle that a statement made by a defendant must be made freely and not as a result of duress for it to be admissible against the maker or a co-defendant. In relation to statements made to a person other than the public prosecutor, Article 159 of the Code of Criminal Procedure provides (in Mr. Najdawi's translation),

> "The testimony of the indicted or the accused or the defendant in the absence of the public prosecutor's presence, where he confesses the crimes committed shall only be accepted if the prosecution submit evidence on the conditions in which the testimony was obtained, and the court is satisfied that the indicted, accused or defendant had given such testimony out of free will and choice."

Case law of the Court of Cassation establishes that which is implicit in Article 159: a statement made by a person to the public prosecutor is "legal evidence" and, by necessary implication, treated as made freely and not under duress unless the contrary is established by "legal evidence". If it is, the court must rule it inadmissible, as the Court of Cassation did in a high profile case 74/1994, *Alouhuah & Others*, in which the defendants were convicted of a conspiracy against the life of the King. As far as we can tell from the cases cited to us, to satisfy the test of adducing "legal evidence", a defendant must, in practice, produce independent medical evidence of injuries or the signs of

ill-treatment and/or detention for a period not permitted by Jordanian law. Both were present in that case. Complaints by a defendant, whether or not supported by the evidence of his relatives and friends do not appear to suffice, as the trials and appeals in the two cases in which the appellant was convicted demonstrate. In common law language, the burden of proving that a statement made to a public prosecutor was obtained by duress or worse is on the maker of the statement and has, historically, been difficult to discharge.

69. In 2011 a significant amendment was made to Article 8 of the Jordanian Constitution. Article 8.2 now provides (in the translation cited in Mr. Layden's fourth statement),

> "Every person who is arrested, imprisoned or whose freedom is restricted must be treated in a way that preserves his/her human dignity. It is forbidden for him/her to be tortured (in any form) or harmed physically or mentally, as it is forbidden to detain him/her in places other than those designated by the laws regulating prisons. Any statement extracted from a person under duress of anything of the above or the threat thereof shall neither be taken into consideration or relied on."

This was the second of two amendments to Jordanian law prohibiting torture. The first was made in 2006 by an amendment to Article 208 of the Penal Code which classified torture as unlawful and provided severe penalties for its commission.

70. The amendment to the Constitution may have the effect of making it easier to challenge confessions allegedly procured by torture. That was the opinion of the three eminent lawyers consulted by Home Office and FCO lawyers on 29th February 2012; but they acknowledged that the proposition had not been tested and they did not know how it would actually work in practice. Major General Al-Faouri told the same legal advisers on 1st March 2012 that the

amendment to Article 8 had made a practical difference and obliged the prosecutor to look more closely into allegations of ill-treatment. He had himself given a lecture to that effect to all of the kingdom's judges on the day on which the new provision came into force, 1st October 2011. The Minister of State for the Prime Minister's Office, Ayman Odeh, went further in his discussions with the Secretary of State and her officials on 6th March 2012: the change to Article 8 meant that the burden of proof had transferred to the prosecutor to demonstrate the integrity of the evidence.

71. Major General Al-Faouri does not agree. At his meeting with Mr. Layden and others on 29th May 2012, he reiterated the conventional position:

> "When a statement is made to the prosecution, the assumption is that the defendant has received good treatment. If the defendant claims otherwise, it is for him to substantiate what he is saying."

Four of the defence lawyers consulted by Mr. Najdawi appear to share General Al-Faouri's view: Rateb Nawaiseh, Taleb Saqqaf, Abdul Ghaffar Abu Khalaf and Mohannad Jalandeh. So does Dr. Mohammed Khaled Al-Mousa, associate professor of International Human Rights at the World Islamic University in Amman, a former member of the Adaleh Centre and a legal consultant to NGOs in Jordan. Mr. Najdawi and Mr. Al-Khalil, in their report of 6th September 2009, accepted that it was for a defendant who alleged that a confession or statement to a public prosecutor made by another defendant against him had been obtained by duress or torture to prove that it had been. He was not asked to comment upon the change, if any, likely to result from the amendment of Article 8 of the Constitution. Awn Khasawneh who, as a jurist and senior politician, may be the best placed person of those consulted to

express an opinion, told his British interlocutors on 16th February 2012 that it would be for the appellant to prove that the statements were made by torture.

72. Any view expressed by us about this issue must necessarily be tentative. We can do no better that the three eminent lawyers who expressed their opinion on 29th February 2012: it is not known what effect the amendment will have in practice. There must remain at least a real risk that the three civilian judges of the State Security Court will accept the "conservative" proposition for which Major General Al-Faouri contends. It is likely to require a definitive ruling by the Court of Cassation or the newly established Constitutional Court to overturn that approach and place the burden of proof that the statements were not obtained by torture on the state prosecutor.

73. If the burden of proving that the impugned statements were obtained by torture is imposed on the appellant, it will be difficult to discharge. They were made over fourteen years and nearly twelve years ago respectively. The only medical evidence available is that given by Dr. Al-Hadidi in the Reform and Challenge trial. Evidence from relatives in the Millennium trial will be on file and they may be able to give oral evidence. The same is true of co-defendants in both trials. All of that evidence may, however, be discounted or disbelieved, as it was before. Even if, as we believe would be the case, the three judges who try him will be independent and impartial and will evaluate the evidence conscientiously, it may simply be too late and too difficult for the appellant to discharge the burden of proof, especially if the judges do not accept the general truthfulness of Abu Hawsher and Al-Hamasher as they may well not, for good reason. The Strasbourg Court's observation in § 276, which

envisages the possibility that the burden of proof might legitimately be cast upon a defendant will not apply, even if the prosecutor at the retrial is impartial and the court independent and impartial because, in the view of the Strasbourg Court, the damage was done when the statements were taken by a prosecutor who was not impartial. The only means of eliminating a real risk that statements which may well have been obtained by torture will be admitted probatively at the appellant's retrial would be for the burden of proving, to a high standard, that they were not, to be placed upon the prosecutor. Anything less gives rise to a real risk that they will be.

**Miscellaneous issues**

74. It is common ground that Jordanian law requires that the impugned statements be supported by evidence other than other statements not made under oath by co-defendant. There is, in each case, some supporting evidence, as we have set out above. The support provided by that evidence is not strong, but no-one has suggested that it would not, in principle, be sufficient to permit the impugned statements to be admitted and relied upon.

75. Mr. Fitzgerald submitted that, even if Abu Hawsher and Al-Hamasher were to attend a retrial, their evidence would be likely to be tainted, either by fear of reprisal or offer of inducement. We regard this suggestion as far fetched. While it is true that Al-Hamasher has been arrested and detained on four occasions in 2011 and 2012, there is no evidence, or even ground to suspect, that this has anything to do with evidence which he might give at a retrial of the appellant. We are satisfied that it has resulted from his own activities, including participation in a disturbance in Zarqa, which has given rise to the

prosecution of a large number of defendants before the State Security Court. By its action in pardoning Abu Hawsher and others, the Jordanian state has demonstrated that it has no current concern about the events which gave rise to the two trials. Finally, the state prosecutor likely to have charge of the prosecution, Colonel Al Atoum, assured Mr. Layden during his most recent visit to Jordan in early October 2012 that they would be free to say what they wished in evidence. Mr. Layden found what he said convincing. So do we.

76. Further, even if there was substance in Mr. Fitzgerald's point, it would not make the retrial flagrantly unfair. The reservations of the Strasbourg Court concern the "real risk" that statements made by them had been procured by torture. There is no evidential foundation for the proposition that there is any risk that live evidence given by them at a retrial would be the result of future torture.

77. Mr. Tam submitted in his closing remarks that because of the number of possible outcomes of a retrial – he identified seven – the risk that the impugned statements would be admitted probatively was "vanishingly small". While we acknowledge that there are a number of possible outcomes which would not involve the admission of the impugned statements probatively, that fact does not determine the narrow questions which we have to answer.

**Conclusion on the Article 6 issue**

78. The Secretary of State has not satisfied us that, on a retrial, there is no real risk that the impugned statements of Abu Hawsher and Al-Hamasher would be admitted probatively against the appellant. Until and unless a change is made to the Code of Criminal Procedure and/or authoritative rulings are made by the

Court of Cassation or Constitutional Court which establish that statements made to a public prosecutor by accomplices who are no longer subject to criminal proceedings cannot be admitted probatively against a returning fugitive and/or that it is for the prosecutor to prove to a high standard that the statements were not procured by torture, that real risk will remain.

**Article 3**

79. In the light of our conclusions on the Article 6 issue, we can deal with the Article 3 issue more briefly than would otherwise have been required. SIAC has had to consider the history and circumstances of Jordan and the reliability of the assurances given by it to the United Kingdom in two judgments, handed down respectively on 26th February 2007 and 2nd November 2007 – *Othman* and *VV*. In both, SIAC concluded that the United Kingdom could safely accept solemn assurances given by the Jordanian state; and that those assurances removed the real risk that either appellant would suffer inhuman or degrading treatment at the hands of state agents in Jordan, for two fundamental reasons: the close and friendly relations which have existed at all levels in the governments of both countries for many decades; and the general coincidence of interests of the two countries in those aspects of international affairs which affect them both. The Strasbourg Court came to the same view for essentially the same reasons.

80. The appellant's case is that events in the Arab world since the conclusion of the hearing before the Strasbourg Court on 14th December 2010 have undermined that conclusion. He also relies on the opinion of Beverley Milton-Edwards, Professor of politics at Queens University Belfast, who concludes

that the Secretary of State has overstated the importance to Jordan of the relationship with the United Kingdom; that the political situation in Jordan is sufficiently unstable to give rise to a risk of ill-treatment of opponents of the current order; and that the Jordanian authorities might deal with the appellant by subjecting him to long term administrative detention, an issue which we address below.

81. In cross-examination and in his closing written submissions, Mr. Tam has subjected Professor Milton-Edwards's opinion to sustained and trenchant criticism. Some of it is justified. Her report of 20th September 2012, prepared as she accepts, under pressure of time, is in significant parts unbalanced and inadequately researched. Two examples illustrate that observation. In paragraph 15, she dealt with an issue which SIAC had to consider in detail in *VV*. (Our conclusions are set out in paragraph 15 and 16 of the judgment of 2nd November 2007): the "frankly horrific" (Mr. Layden's words) events which occurred at Swaqa Prison between two visits to the prison by Mr. Wilcke and two colleagues from Human Rights Watch on 21st and 26th August 2007. In between those visits, prison guards systematically assaulted the prisoners, three hundred and fifty of whom slashed themselves to draw attention to their plight on the day of the second visit. They learnt that the prison director whom they had seen on 21st August had been replaced by a new director on 22nd August. Once the facts were known, he was immediately removed from office. As the written case presented to the Strasbourg Court in this case states, he was then prosecuted and fined. Professor Milton-Edwards dealt with the incident as follows,

> "I think it is important to emphasise, with regard to the safety of Othman, his family, witnesses coming to his trial, or even judges who might contemplate acquitting him, that we are not just talking about the Mukhabarat (her shorthand for the GID) but we are talking about a variety of formal and informal state actors who are engaged in or at least alleged to have been engaged in human rights abuses. On this there is some parallel with the violence that took place inside the Jordanian prison estate, as documented by Human Rights Watch and the previous special rapporteur on torture. (A footnote identified this as the incident to which we have referred). In my view, it served the purposes of the regime in the period after the terrorist attacks in late 2005, to unleash terrible abuse on Salafist prisoners in Jordan as a policy of counter-terrorism."

The last sentence is without foundation and not a reasonable interpretation of what occurred. The incident did not serve "the purposes of the regime". It was a severe embarrassment to the Jordanian state. On no reasonable view could it have been thought to have been the result of a decision "to unleash terrible abuse on Salafist prisoners…as a policy of counter-terrorism". The most likely explanation is that which we reached in November 2007 – that it was an attempt by a new governor to impose his stamp on the prison.

82. The second illustration arises from a more recent event: the death, during a demonstration or disturbance in Amman of Khairy Saad Jamil on 25th March 2011. He is, so far, the only person to have died during protests or demonstrations in 2011 or 2012. There are various reports about the circumstances of his death: that he was a protester and had been beaten by the police and died in hospital; or that he was a government supporter and had died of a heart attack when running away when clashes occurred. Professor Milton-Edwards's account in paragraph 67b of her report is as follows,

> "During that period (February to October 2012) the so-called Baltajiyyah "thugs", effectively informal-state actors acting as agents of the security services, were involved in quelling

> protests by extra-judicial means. One person was beaten to death during the March 24 demonstrations."

Regrettably, she either did not know about, or chose not to refer to, the conflicting reports about this event, but implied unequivocally that Mr. Jamil had died as a result of violence by pro-government thugs.

83. Her oral evidence was more balanced. Despite Mr. Tam's suggestion that the real focus of her academic research has been Gaza and the West Bank, we are satisfied that she does have extensive contacts in Jordan and has kept up to date with developments there. She has not, however, visited Jordan since 2010, apart from one daytime visit while staying in the West Bank in 2011. She also does not have the same access as the British Embassy and ministers and officials do to Jordanian ministers and officials and has never met the King.

84. We believe that the following is a reasonable summary of Professor Milton-Edwards's view of the current situation in Jordan. The relationship between the United Kingdom and Jordan, although longstanding and close, is less important to Jordan than the British government claims. Jordan's stability is superficial. The following pressures may upset the existing order: conflict between Palestinians, who comprise a majority of the population, and "East Bankers"; adverse economic conditions; popular discontent with the lack of progress towards the election of a parliament properly representative of the population and of a government responsible to parliament not the King; a power struggle between the GID (whom she refers to as the "Mukhabarat") and the Palace; and the impact of the civil war in Syria. Against this

85. At Mr. Layden's request, the British Embassy in Amman produced a short written response to her report. It is informed both by a long institutional understanding of Jordanian history and by first hand up to date knowledge of conditions there. It is realistic and balanced. It acknowledges that there are internal and external pressures on Jordan – but they are not unprecedented or "regime threatening". Other greater challenges have been surmounted in the past. The Embassy acknowledges that there is dissatisfaction with the pace and depth of political reform, but points out, correctly, that this has not manifested itself in the form of widespread and violent unrest. Economic problems are acknowledged – in the opinion of the Embassy, the principal source of concern of the majority of the population. These problems will be exacerbated by the influx of refugees from Syria. In the Embassy's view, current pressures are not unprecedented. Nor are apocalyptic views about Jordan's future:

> "Commentators have long described Jordan as standing perennially on the precipice. The hypothesis that the kingdom is but one trigger away from implosion has never played out."

The Embassy does not consider that there is a significant risk that the structure of the Jordanian state will be damaged to such an extent that the United Kingdom can no longer rely on the undertakings of the Jordanian government.

86. We accept this conclusion. Further, we doubt that, as a matter of principle, it is necessary or sensible for us to attempt to forecast medium term political developments in Jordan. Professor Milton-Edwards said, in response to

questions from the Commission, that it would only be in the event of revolution or an internal coup d'etat that it would not be safe to rely upon the assurances of the Jordanian government about ill-treatment by state agents. That well-founded concession undermines the basis for contending that the view of SIAC and of the Strasbourg Court that the Jordanian government's assurances can safely be relied upon may be wrong. SIAC must deal with the state and government of Jordan as it exists. If, in the future, the existing order is overthrown by revolution or by coup d'etat and the government of Jordan is unable or unwilling to fulfil assurances given by the Hashemite kingdom, the Secretary of State would have to revisit the decision to deport the appellant to Jordan. It is only the chance that such an upheaval might occur after deportation that could, in theory, give rise to a risk. If the Commission were to attempt to evaluate that risk, it would not be performing the task which it is required to do by Article 3 of the Convention. It would not be evaluating a real risk, but engaging in speculation, pure and simple. That is not our task.

87. We remain convinced that the government of Jordan can and will fulfil its assurances about the treatment of the appellant on return. The government remains in control of the GID. We accept the evidence of Mr. Layden that it is the King who changes the head of the GID and is definitely the person in charge. The relative position of the Palace and the GID is illustrated by the dismissal and trial of its head from 2005 to 2008, Mohammed Dahabi, and the dismissal of his successor soon after his appointment. The strength of the ties between the governments of Jordan and the United Kingdom has been demonstrated by the open, friendly and realistic discussions between ministers and officials on both sides, undertaken to resolve the problem created by the

decision of the Strasbourg Court on the Article 6 issue. Like the Strasbourg Court, we remain satisfied that those assurances provide, in their practical application, a sufficient guarantee that the appellant will be protected against the risk of ill-treatment by or at the behest of Jordanian state agents.

88. For the sake of completeness, we note that Professor Milton-Edwards disclaimed any expertise in Jordanian law. We have not, accordingly, taken her views into account in determining the Article 6 issue.

**Article 5**

89. The Crime Prevention Law 7 of 1954 empowers district administrators, now governors, to take preventative measures against individuals in the three circumstances identified in Article 3: if convinced that the individual was about to commit a crime or assist in its commission; habitual burglars, thieves and handlers; anyone who constitutes "a danger to the people". Mr. Layden explained the historical background of the law: it was designed to nip inter-tribal violence in the bud and to deal with recidivists.

90. Article 3 permits a governor to issue a notice to an individual falling within one of the three categories to appear before him and to explain whether he has reasons not to give an undertaking, with or without a guarantee, to conduct himself well during a period to be specified by the governor, but not to exceed one year. Article 4 permits the governor to issue a warrant for the arrest of a person who does not appear. Article 5 deals with the procedure for obtaining an undertaking and monetary guarantee. Article 7 permits a governor to refuse to accept a guarantee of which he disapproves. Article 8 provides that if a person to whom an order to give an undertaking has been issued under

Article 5 fails to give an undertaking within the time specified he shall be imprisoned until the end of the period specified in the order to give an undertaking, subject to earlier release under Article 9. Articles 12 and 13 deal with alternative preventative measures, in lieu of or in addition to the giving of an undertaking: residence within the borders of a district, prohibition from leaving that district, informing the regional commander about a change in residence, appearing at a police station when required to do so and remaining inside his home from one hour after sunset until sunrise. Detention can be challenged within 60 days under Article 12A of the High Court of Justice Law No. 12 of 1992.

91. In 2009 Human Rights Watch conducted a critical analysis of the use of this law and recommended that it be repealed. The US State Department report for 2011 noted that 11,345 individuals had been detained administratively during 2011.

92. Mr. Fitzgerald suggests that in the event of an acquittal of the appellant after a retrial, there is a real risk that the Jordanian authorities would invoke this law to secure his detention; and that the possibility that they might do so gives rise to a real risk of a flagrant breach of Article 5 ECHR. We are satisfied that that proposition is far-fetched, for one or all of three reasons: there is no evidence that the 1954 law has ever been used to detain individuals such as the appellant – an extremist with a high public profile; the Jordanian government has never stated or even hinted that it might use this law to control any threat perceived to be posed by him; and to use it for the purpose of detaining the appellant would amount to a clear breach of the second assurance in the MOU.

(The use of the 1954 law to impose the restrictions set out in Article 13 would not give rise to a flagrant breach of Article 5 ECHR, but the Jordanian authorities have not suggested that they might apply those provisions to the appellant).

**Conclusion**

93. For the reasons given on the Article 6 issue, we are satisfied that the Secretary of State should have exercised her discretion differently and should not have declined to revoke the deportation order. Accordingly, this appeal is allowed.