

Appeal No: SC/15/2005  
Date of Judgment: 26 February 2007

**SPECIAL IMMIGRATION APPEALS COMMISSION**

Before:

THE HONOURABLE MR JUSTICE OUSELEY (Chairman)  
SENIOR IMMIGRATION JUDGE ALLEN  
MR J K LEDLIE

**OMAR OTHMAN (aka ABU QATADA)**

APPELLANT

and

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

RESPONDENT

For the Appellant Mr E Fitzgerald QC, Mr D Friedman, Mr R Husain  
Instructed by Birnberg Peirce and Partners

For the Respondent Mr Ian Burnett QC, Mr R Tam, Mr A O'Connor  
Instructed by the Treasury Solicitor for the  
Secretary of State

Special Advocate: Mr A McCullough, Mr M Chamberlain  
Instructed by the Treasury Solicitor Special  
Advocate Support Office

Hearing Dates: 9<sup>th</sup>–11<sup>th</sup> May, 18<sup>th</sup> and 19<sup>th</sup> May 2006

1. On 11<sup>th</sup> August 2005, the Appellant, also known as Abu Qatada, was served by the SSHD with a Notice of Intention to Deport him to Jordan, the country of which he is a national. The SSHD deemed it conducive to the public good that the Appellant be deported. The Appellant was placed in immigration detention under Schedule 3 to the Immigration Act 1991, where he remains pending the actual making of the deportation order, or success in this appeal.
2. The appeal route lies in this instance to SIAC rather than to the AIT because the SSHD certified under s97(1)(a) of the Nationality, Immigration and Asylum Act 2002 that his decision was taken in the interests of national security. Thus SIAC is fulfilling the role which it was originally set up to fulfil: determining immigration and removal appeals in which national security issues are involved.
3. SIAC was set up in 1997 by Act of Parliament, with its specific national security remit, restrictions on the disclosure of national security or other public interest material, and the special advocate system to deal with material not disclosed to an appellant. SIAC was the means chosen to remedy the want of fairness in challenges to national security based immigration decisions, found by the ECtHR in *Chahal v United Kingdom* (1996) 23 EHRR 413. The Court contemplated the sort of arrangements which were to be made by the SIAC Act as fair, accommodating legitimate security considerations and according a substantial measure of protection to the individual.
4. The grounds of appeal against this decision are those set out in s84 of the 2002 Act, as for a decision not made on national security grounds. Here, the appeal was made on the grounds that the removal of the Appellant would breach his rights under the ECHR; his removal would breach the United Kingdom's obligations under the Refugee Convention; the decision was not in accordance with the law; and the SSHD's discretion under the Immigration Rules should have been exercised differently. The ECHR rights relied on were those set out in Articles 2, 3, 5, 6 and 8. The Appellant had been recognised as a refugee under the Refugee Convention; he could not be excluded under Article 1F, nor could he be returned to a country where he had a well-founded fear of persecution. The decision was not in accordance with law because, following the Appellant's detention under Part 4 of the Anti-Terrorism Crime and Security Act 2001 and the later Control Order under the Prevention of Terrorism Act 2005, it was an abuse of power to subject him to deportation.

### **Immigration history**

5. The Appellant was born in 1960 near Bethlehem, at that time in Jordan. He arrived in the UK on 16<sup>th</sup> September 1993 on a forged UAE passport. He claimed asylum on arrival for himself, his wife and his then three children. He had been living in Peshawar in Pakistan

teaching Afghan children, he said, for two years but was forced to leave Pakistan and travelled via the Maldives and Singapore to London. The basis of his claim, from his application and interview, was that he feared that he would be tortured if returned to Jordan, as he had been tortured in the past by the Jordanian intelligence services. They had objected to his Islamist political activities, his ideological leadership of an Islamist reform group which, as he put it, looked to return Jordan to Islamic government, controlled by Islamic law and with no King, and they had objected in particular to his publicly expressed views against Saddam Hussein's invasion of Kuwait and against Jordan's support for him. He would be tortured on return because he had left Jordan illegally and in breach of the terms of his house arrest.

6. On 30<sup>th</sup> June 1994, the Appellant was recognised as a refugee and was granted leave to remain until 30<sup>th</sup> June 1998. He applied for indefinite leave to remain on 8<sup>th</sup> May 1998, but that application remains undetermined. Nevertheless, because he applied for ILR before the expiry of his leave, that leave continues in force by virtue of a sequence of statutory provisions now to be found in s3C of the Immigration Act 1971.
7. Shortly before the coming into force of the Anti-Terrorism, Crime and Security Act 2001 in December 2001, an Act which the Appellant now saw as being aimed at him, he went into hiding. In October 2002, he was located and detained pursuant to Part 4 of the Act. His appeal against the SSHD's certification, that his presence in the UK was reasonably believed to be a risk to national security and that he was reasonably suspected of being an Al Qa'eda linked international terrorist, was dismissed by a panel of this Commission chaired by Collins J in March 2004. The Appellant did not pursue the permission to appeal which he had been granted.
8. Following the decision of the House of Lords in *A and Others* in December 2004 on the derogation appeal, the 2001 Act was not renewed, and the Appellant was released by SIAC on bail on terms which were very similar to those which were imposed on the Appellant by a Control Order made very shortly afterwards, under the Prevention of Terrorism Act 2005. He appealed against that Order to the High Court, but that appeal had not been dealt with by the time he was served with the Notice of Intention to Deport with which SIAC is now concerned. The Control Order then ceased to have effect.

### **The National Security case: SIAC's Part 4 ATCSA determination**

9. Mr Burnett QC for the SSHD submits that the requirements under s3(5) of the Immigration Act 1971 for the deportation of someone as a risk to national security and for certification under s21 of the ATCSA 2001 are very similar, and that SIAC concluded in March 2004 that that risk had been made out.

10. We are of course not bound by that decision nor does it create *res judicata* or issue estoppel. There is an implicit contention from the SSHD that we can properly give it great weight, certainly in the absence of fresh countervailing material. That implicit contention requires caution for the reasons we come to, though it would be in line with the AIT approach to human rights appeals, where earlier asylum appeals have considered all or part of the same ground, as set out in *Devaseelan v SSHD* [2002] UKIAT 00702, [2003] Imm AR 1, approved in *Djebbar v SSHD* [2004] EWCA Civ 804.
11. First, s21 of the 2001 Act permitted the SSHD to issue a certificate if he “reasonably believes that the person’s presence in the United Kingdom is a risk to national security.” S25(2) required SIAC to cancel the certificate if it considered that there were no reasonable grounds for that belief. It is not necessary now to rehearse the debate about that in SIAC’s open generic judgment in *Ajouaou, A and Others* 29th October 2003, or in *A and Others (No.2) v SSHD* [2004] EWCA Civ 1123 [2005] 1 WLR 414.
12. However, it is not disputed but that the burden is on the SSHD to make out his chosen ground for deportation, namely that the Appellant’s presence is not conducive to the public good in the interests of national security. That burden is discharged by proving to SIAC that he is a danger or risk to national security. It is not discharged simply by satisfying SIAC that the SSHD had reasonable grounds for the s97 certificate. The strength of the language used in SIAC’s Part 4 conclusions may suggest that the evidence went beyond the proof of reasonable grounds, but there is now a more demanding test and SIAC must decide whether it is met. It cannot adopt a previous decision given under a different Act simply because there has been no further evidence to contradict that earlier decision.
13. Second, there is also further evidence from both sides which may cast light on activities which are relevant to the national security issue, which may make simple adoption of the previous decision impossible. SIAC has also to consider the effect of evidence upon which the SSHD might no longer rely as a result of the decision of the House of Lords in *A and Others (No. 2) v SSHD* [2005] UKHL 71, [2005] 3 WLR 1249. It has to do that even though the Appellant did not pursue his appeal on any ground against the decision in the Part 4 case. The consideration of the admissible evidence is best done by looking at the totality of the evidence relied on, rather than by seeing what difference any deletions might make to an existing conclusion.
14. Third, we also take the view that the significance of our national security conclusions for the way in which an individual may be perceived or treated on return, and for the way in which other issues may have to be considered, requires us to reach our own conclusions on the material. We have therefore considered and reached our own conclusions rather than adopting, with or without variation, the Commission’s previous decision.

15. That said, it is notable that the grounds of appeal did not take issue with the national security case. The Appellant gave no oral evidence as he could have done. Although the Appellant's short statement disputed that he was a risk to national security, it did not deal with the numerous and quite detailed allegations against him, nor with his activities in this country. Neither Mr Fitzgerald QC nor Mr McCullough and Mr Chamberlain, his Special Advocates, sought to cross-examine the Security Service witness.
16. Nonetheless, Mr Fitzgerald on his behalf asked SIAC to consider the previous statements which he or his family had made in relation to the Part 4 ATCSA appeal, or in his bail application made more recently and unsuccessfully to SIAC. His written statement for the Part 4 appeal referring to his views or associates raised many questions, and was silent about many matters, including most of the detailed allegations against him. He did not give oral evidence at that appeal either, as he could have done.
17. We shall consider those statements later and the reasons for Mr Fitzgerald's stance, from which the Special Advocates took their cue, but it is right to record that the Special Advocates did make full submissions about what closed material should be made open under Rule 38 of the SIAC Procedure Rules, about what further material should have been made available by the SSHD to the Special or to the Open Advocates, and about what evidence had to be considered in the light of the House of Lords decision in *A and Others (No.2)*, on torture.

### **National Security: the evidence**

18. The stance of the Appellant towards the national security evidence notwithstanding, we now set out and evaluate the national security evidence. The SSHD's first open statement summarised his case as follows:

*"7. Abu QATADA has been involved in terrorism-related activity and is a significant international terrorist, with extensive extremist contacts. He has engaged in conduct which facilitates and gives encouragement to the commission, preparation and instigation of acts of terrorism.*

*8. Abu Qatada is a leading spiritual advisor with extensive links to, and influence over, extreme Islamists in the UK and overseas. Abu QATADA preached as the imam at the Four Feathers mosque in north London and at other venues in the London area (including Stowe Club and the Fatima Centre), as well as disseminating spiritual advice by personal contact, telephone, letters and the Internet. His speeches and sermons are distributed to his supporters world-wide via videos and tapes. Whilst he was in hiding from December 2001 until his*

*detention under the ATCSA in October 2002, Abu QATADA made more use of the Internet, reaching a wide audience through postings on websites.*

*9. Abu QATADA's followers recognise him as an expert on Islamic law who is authorised to issue fatwas. For example, fatwas issued by Abu Qatada include one justifying the killing of women and children and one justifying suicide attacks.*

*10. Abu QATADA has also raised funds for terrorist groups.*

*11. Since his release from detention, Abu QATADA has associated or sought to associate with known Islamist extremists.*

*12. The presence of Abu QATADA in the UK poses a continuing threat to national security and a significant terrorism-related risk to the public. He has engaged in conduct which facilitates and gives encouragement to the commission, preparation and instigation of acts of terrorism. He provides advice which gives religious legitimacy to those who wish to further the aims of extreme Islamism and to engage in terrorist attacks, including suicide bombings. A number of individuals arrested or detained in connection with terrorism have acknowledged his influence upon them."*

19. His statement then provided nineteen pages supporting and detailing those allegations. We make that point lest it be thought that the Appellant was generally unaware of the case against him; and though there was closed material as well, he had a great deal of open material which he could have answered, if answer he had. We now turn to the detail, drawn largely from the SSHD statement and Counsels' opening note. Much of what is analysed under one sub-heading is relevant to other topics as well.

### **Provision of spiritual advice and religious legitimacy for terrorist activity overseas**

20. Since at least 1995, the Appellant has given encouragement to the commission, preparation and instigation of terrorism overseas by providing spiritual and religious advice to a number of extreme Islamists prepared to carry out terrorist attacks. This has either been directly, in response to a request for advice or authority to carry out an attack, or indirectly, when individuals in terrorist cells have been motivated by his speeches and writing. These groups and networks include the Al Qa'eda network, the Armed Islamic Group (GIA), the Salafist Group for Call and Combat (GSPC), and the Egyptian Islamic Jihad (EIJ).

21. He also provided advice to individuals, such as Rachid Ramda, the former leader of the GIA in the UK who was arrested for his involvement in the 1995 Paris Metro bombings, and has been extradited to France.
22. In March 1995, the Appellant issued an influential *fatwa* that justified the killing of the wives and children of “apostates” in order to stop the oppression of Muslim women, prisoners and “brothers” in Algeria. This *fatwa* provided a religious justification for the slaughter of women and children, and would have been used to justify terrorist acts in Algeria. He has twice publicly defended this *fatwa* – during a television debate in November 2000 and again in November 2001 in an interview with CNN. We believe that “apostates” extended, at least in that *fatwa*, to all the Algerian authorities in the broadest sense.
23. A Security Service assessment in 1997 had concluded that he was not then a proponent of the Takfiri school of thought (an ideology espoused by various extremist groups promoting the idea of a wider struggle against non-believers and apostate Muslims), and that he did not believe in the international jihad movement to which Zouabri, the leader of the GIA, adhered.
24. The SSHD considered that in recent years the Appellant’s attitudes towards global jihad had hardened, so that his speeches and activities now indicated his support for extremist groups whose activities transcend national boundaries. In September 1999, he gave a jihad sermon which he concluded by asking God to bless Muslims in their knowledge and jihad and to help mujahedin in their jihads around the world. He asked God to help against America, Russia, the Jews and their helpers. In December 1999, he announced that the time had come for the enemies of Islam to be destroyed and that the jihad had begun, citing as an example, Chechnya. Reporting in October 2001 indicated he had stated that he had received a special message from Afghanistan and that his followers should expect the worst to happen over there. He said that it was now a good opportunity to declare holy war.
25. Press reporting in January 2002 stated that numerous videos of the Appellant’s sermons were found in the flat in Hamburg, Germany, used by Mohammed Atta, one of the 11 September 2001 hijackers. The Security Service believes that the reports are accurate, and we accept that they are.
26. Press reporting in 2002 stated that Islamic texts written by the Appellant had been found among the effects of Al Qa’eda members in Pakistan. We accept that that is correct.
27. Press reporting in April 2004 asserted that videotapes featuring the Appellant urging his supporters to attack targets in Rome had been found in Italy. He said “*Rome is a cross. The West is a cross and Romans are the owners of the cross. Muslims’ target is the West. We will split Rome open. The destruction must be carried out by the*

*sword*'. The Security Service assessed it is likely that a large number of such tapes are in circulation, which we accept. Indeed, the Appellant so asserts.

### **Provision of support for terrorist activity in the UK**

28. The Appellant, over his years here, has constructed a support base within the United Kingdom for terrorism-related activities abroad and in the UK. Prior to the UK's involvement in military action in Afghanistan in the aftermath of the 11 September 2001 attacks, the UK was largely used by the Islamist terrorist networks as a base from which to support terrorist networks or groups engaged in terrorist actions in countries other than the UK. For a while, the Appellant appears to have viewed the UK as a comparatively benign environment in which the motivation for carrying out attacks may have been outweighed by the opportunities for carrying out fundraising, recruitment and procurement, although, even in December 1996, the Appellant was already proclaiming that it was acceptable to fight Jews within the UK.
29. The Security Service interviewed the Appellant on three occasions in 1996-7, when he agreed to use his influence to minimise the risk of a violent response to the possible extradition of Ramda, the UK leader of the GIA. But he provided no information enabling attacks to be prevented, warned his congregation to be wary of MI5's approaches and provided them with physical descriptions and names of MI5 officers approaching Muslims.
30. In September 1998, the Appellant expressed the view that it was legitimate for GIA followers to break Western laws, to steal and cheat "kaffirs" (unbelievers or infidels), and to take their women for sex or sale, but as they were living in a predominantly "kaffir" society, they had to be careful to conceal their activities to avoid a backlash, and should wait one month from the seizure of women before having sex with them.
31. In October 1999, the Appellant made a speech at the Four Feathers mosque in which he effectively issued a *fatwa* authorising the killing of Jews, including Jewish children. He told the congregation that Americans should be attacked wherever they were, that in his view they were no better than Jews and that there was no difference between English, Jews and Americans.
32. In a sermon given by the Appellant, apparently in the UK in 2002, he stated that if a Muslim killed a non-believer for the sake of Islam, it was not a sin and Allah looked well upon it. In response to a question about suicide bombings, the Appellant said that they were legitimate if undertaken for the benefit of Islam, causing damage to an enemy.
33. There is sound evidence that the Appellant, through a *fatwa* in 1995/6, had made permissible, in the eyes of his followers, fraud on

“unbelievers”. He did not raise money himself that way. Similar *fatwas* were issued in 2000 for GSPC credit card fraud.

34. It is the belief of the Security Service, which is borne out by the evidence, that the Appellant’s attitude towards the UK has hardened following his detention and the subsequent pressure being applied to the terrorist support infrastructure in the UK. The language of his support for terrorist attacks, here or abroad, has become more disguised so that support and threats are more couched as actual or predicted responses justified by perceived aggression against Islam or his version of it.

35. Much of what we set out next in relation to links to Osama Bin Laden is also of immediate relevance to the Appellant’s role in providing the crucial radical Islamist religious underpinning for extremist activities, including violence in the UK and abroad, regardless of the precise nature of his links to Bin Laden.

### **Contact with Al Qa’eda and other proscribed organisations**

36. The Appellant has long-established connections with Osama Bin Laden and Al Qa’eda. He was in close contact with Khaled Al Fawwaz, Bin Laden’s representative in the UK prior to his arrest in the UK in 1998, who is now in detention pending extradition to the US for his alleged involvement in the East African bombings in 1998. In 1998 it was reported that the Appellant had in the past received funding directly from Bin Laden.

37. The Appellant has repeatedly associated himself with, and expressed his support for Bin Laden: in a television discussion broadcast on the *Al-Jazeera* network in January 2000, the Appellant stated that he would support anyone, be it Bin Laden or any other, who stood in defence of the Arab nation. In an interview with CBC in December 2001 the Appellant was asked whether he agreed with the 1998 *fatwa* issued by Bin Laden against the US and replied that, “*any Muslim feels this hatred against the US*”. When asked his opinion of Bin Laden, the Appellant stated that Bin Laden was not a demon, but a human being who had reacted to the unjust way Muslims have been treated. He added that the US government had not provided any proof that Bin Laden was involved in terrorism.

38. The Appellant declared in a sermon on 14 September 2001 that the 11 September 2001 attacks were part of a wider battle between Christendom and Islam and were a response to America’s unjust policies. In September/October 2002, a poem attributed to the Appellant appeared on the website of *Al-Quds*, an Arabic language newspaper. The poem praised Bin Laden and glorified the 11 September 2001 attacks. In October 2001, the *Observer* reported that intelligence sources in Pakistan claimed to have proof that the Appellant had been consulted by Al Qa’eda, which had commissioned

him to write a pamphlet on “holy war” to help resolve a dispute it was having with another extremist terrorist group.

39. In January 2002, it was reported that Muslims attending the Fatima Centre mosque (where the Appellant was, by that time, based) believed the Appellant to be the head of the Al Qa’eda organisation in Europe. We accept that the reported beliefs were held by those attending the mosque, and whether those beliefs were precisely accurate or not, they indicate the stature and extremism of the Appellant. They also believed that he was responsible for organising trips to Afghanistan for military training. We accept that the Appellant encouraged and raised funds for individuals to go to Afghanistan; he may not have gone further as an organiser.
40. Press reporting has suggested that the Appellant had links with the Kurdish Islamist group Ansar-Al-Islam, that the Appellant had given the group money and had suggested to them that they seek more support from Al Qa’eda. That is probably correct.
41. The Security Service assesses that the Appellant is not formally a member of Al Qa’eda though their interests overlap to a high degree. He has carefully avoided being drawn into the Al Qa’eda structure, in order to maintain his independence, to reflect possible different target priorities and in an effort to avoid jeopardising either his refugee status or his fundraising activities.
42. The Appellant has links with the Egyptian Islamic Jihad (now rightly assessed to be part of the Al Qa’eda network) through Ayman Al-Zawahiri, its sometime leader who then became, in effect, Bin Laden’s number two. The EIJ was responsible for the attacks in 1998 on the US Embassies in East Africa. The Appellant knew Al-Zawahiri in Afghanistan, and there is good evidence that the Appellant was inspired by the EIJ’s ideologist. In 2002 the Appellant had praised Al-Zawahiri in the extremist foreign press, but being cautious in the language he used to express his judgement on major terrorist attacks.
43. The Appellant has significant and long-standing connections with Algerian terrorist organisations: the Armed Islamic Group (GIA) and the Salafist Group for Call and Combat (GSPC), which was formed in 1998 as a splinter group of the GIA. The GIA was a major terrorist organisation in Algeria in the 1990s, and also outside Algeria, notably in France. The background to the splintering off of the GSPC is set out in the SIAC Part 4 ATCSA generic judgment. The Appellant was a spiritual adviser to the GIA until 1996. He saw himself as the GIA’s representative in London and allied himself to the more violent elements of the organisation denouncing its more “*moderate elements*”. The Sunday Times reported in 1996 that the Appellant had written an article in the GIA publication *Al-Ansar* praising “*the miracle of the martyrdom of our brothers in their suicide operations in Algeria, Palestine, Libya and everywhere.*” It also reported that the Appellant had told another newspaper in 1995 that the killing of

foreigners in Algeria was justified because they held entry visas issued by an illegal regime. He sent money to the GIA from London.

44. In late 1997/early 1998, however, the Appellant distanced himself from the GIA and, as he lost influence, denounced it because of its policy of killing "apostate" women and children who were not related to the authorities. There is some doubt about how sincere he was in his denunciation. He became a spiritual leader for the GSPC, as well as an adviser to Moroccan, Tunisian and Libyan extremist groups. His influence and standing in London grew.
45. The Appellant was a close associate of the Algerian Islamist extremist usually known as Abu Doha, until the latter's arrest in February 2001. Four members and associates of Abu Doha's group were arrested in Frankfurt in December 2000 in possession of chemicals, firearms and explosives. Intelligence has shown that the Appellant has links to K (SIAC appeal letter) a senior member and financier of the Doha group, who himself has links to other international terrorist networks associated with Al Qa'eda.
46. The Tunisian Fighting Group (TFG) was formed in the summer of 2000 to send volunteers for training and some members of the TFG had ties with the GSPC. A founder of the TFG had been based in the UK until June 2000 when he left for Afghanistan, and it was assessed in October 2000 that the Appellant had links with the TFG. In May 2001, five Tunisians were arrested in Italy in connection with terrorist offences including associating with the TFG. There had been reporting in January 2001 that a terrorist cell linked to the TFG would target the US embassy in Rome. The TFG is reasonably believed to have been involved in the assassination of the leader of the Afghan Northern Alliance.
47. The Appellant was a significant spiritual leader to the Al-Tawhid movement, whose leader was Abu Musab Al-Zarqawi. Its aim was to replace the Jordanian monarchy with an Islamist regime. It was involved in the movement of people to training camps in Afghanistan. Its European headquarters were in the UK from where it had links to other groups and individuals, including the Appellant. Eleven members of the Al-Tawhid group were arrested in Germany in 2002. One of the men, Mustafa Abdallah, was subsequently charged with plotting terrorist attacks in Germany on behalf of Al-Tawhid. Such attacks included a plan to shoot members of the public in a busy square and to detonate a grenade near Jewish and American targets. During his trial, Abdallah admitted that he had attended a training camp in Afghanistan and claimed to have worked for Bin Laden.
48. Al-Zarqawi was suspected of heading a network which was planning to conduct chemical and biological attacks against Western interests in 2002 and he has also been linked to the Millennium Plot in Jordan. During 2004, and until his death, his Sunni extremist network carried out a series of terrorist acts in Iraq, including the beheading of Kenneth

Bigley and his two US colleagues. At the end of 2004, Bin Laden backed Al-Zarqawi and praised him for having carried out attacks against US troops and Iraqi officials. In 2005, the Appellant's links to Al-Zarqawi and Al Qa'eda were described in an article in an Islamic newspaper, apparently written by the former head of the Libyan Islamic Fighting Group, who referred to a statement by an identified Egyptian extremist leader who attributed Al-Zarqawi's links to Al Qa'eda to an introduction effected by the Appellant. He would not have been mentioned at all if he were not a prominent man, respected by extremists.

49. The Appellant converted Djamel Beghal into an Islamist extremist; he became involved with a group around the Appellant in the UK, distributing propaganda material. He went to Afghanistan, at the Appellant's inspiration, and then to the UAE. He was convicted in France in March 2005 of criminal association in relation to a terrorist enterprise (a possible suicide attack on the US embassy) and was sentenced to 10 years' imprisonment. It has not been possible to ascertain whether the French Court used the confession which Beghal made to the UAE authorities but which he alleged had been obtained by torture. It has therefore not been relied on by the SSHD.
50. He also had contact with a Swedish based extremist who came to London to meet and pray with the Appellant, and he also had influence with Milan based suspected terrorists.
51. The Appellant is alleged by Spanish authorities to be an associate of Abu Dahdah, the leader of a group of 11 extremists arrested in Spain on 13 November 2001 and accused of recruiting volunteers to carry out attacks on behalf of Al Qa'eda and providing fake documents and refuge for terrorists in transit. Spanish judge Baltasar Garzon, who questioned the suspects in Madrid, described the Appellant as the "*spiritual head of the mujahedin in Britain*" and claimed that Abu Dahdah had regularly sent him money. The Appellant and Abu Dahdah were in contact, and Abu Dahdah visited the UK regularly. The Appellant has admitted contact with him. However, the Security Service regarded as unsound press reports that the Appellant had played a leading role in orchestrating or approving the Madrid train bombings.
52. In mid October 2002, the Appellant gave an interview to the *Al-Sharq-Al-Aswat* newspaper. In the interview, the Appellant expressed admiration for Ayman Al-Zawahiri and described himself as an enemy of the United States. Despite appearing to give strong support to Al Qa'eda, the Bali attack and the 11 September 2001 attacks, the Appellant chose his language carefully, making judgments rather than any explicit statements that would link him to the attacks.

## **Fundraising and recruitment for international terrorism**

53. In 1997, it was reported that the Appellant was actively recruiting for Afghan training camps.
54. In the period 1999-2001 the Appellant played a leading role in the UK in raising funds and providing logistic support and recruits for the Arab mujahedin in Chechnya. For example, at a meeting at the Four Feathers mosque in October 1999, a letter had been read out from a Chechen commander asking the Appellant for men and money. The Appellant had responded by saying that men had already been sent, but he asked for a collection to be made at the mosque, which raised at least £13,000. There is evidence which we accept that in May 2000 a propaganda video was for sale at the Four Feathers mosque showing Ibn Khattab executing a Russian soldier, with all proceeds to go to support the brothers in Chechnya. In the SIAC Part 4 ATCSA generic judgment, we dealt with the significance of the Al Qa'eda linked Ibn Khattab group of Arab Mujahedin, a group which was distinct from other Chechnyan fighting groups.
55. In February 2001, the Appellant was arrested and his addresses were searched in connection with an investigation by the Metropolitan Police into UK links to the Abu Doha Frankfurt cell. These searches and interviews of the Appellant failed to produce sufficient admissible evidence against him to sustain a prosecution, and so charges were not brought against him. However, during the searches of his addresses, UK and foreign currency with a total value of £170,000 was found. £805 was found attached to a note indicating that it was bound for the mujahedin in Chechnya. The Security Service assessed, and we agree, that this money was collected from Islamists around Europe, that the Appellant was responsible for its safekeeping and distribution and that the money seized was destined for both legitimate causes, such as the families of the political prisoners, and illegal causes, including funding for training camps, international terrorists and "*jihad*" groups in countries such as Jordan and Chechnya.
56. The Security Service assessed that the Appellant was also involved with providing funds and spiritual guidance to extreme Islamists in Iraqi Kurdistan. There is also evidence that the Appellant was involved in funding individuals involved in the *jihad* in Indonesia. His influence extends to extremists in Australia.

## **Association with extremists following release from detention in March 2005**

57. Since his release from detention in March 2005, the Appellant has associated or has sought to associate with known Islamic extremists. His release was greeted with joy by his supporters as evidence that the Government had gone soft and had been outwitted by human rights activists.

58. There was some debate about the activities of the Appellant after his release and before his re-arrest during the course of his unsuccessful bail application. The SSHD said that he “*may have*” breached the terms of the Control Order, but was not more specific in open evidence. There was no prosecution. The SSHD also accepted that the terms of the Order did not prohibit the Appellant from talking to those whom he encountered as he went about his day to day life, although pre-arranged meetings were prohibited. The Appellant had in his house a computer and modem which were revealed on a search in June 2005; he said that they had been in the house already when the Control Order was made and so did not contravene its prohibition on bringing such items into the house. We did not conclude that that had breached the Control Order.

### **The Appellant’s statements**

59. The reason for the Appellant’s stance towards the national security case was said to be that his Part 4 appeal had been pre-judged because of the conclusions which had been reached in other cases in which he featured, and the unfair reliance upon closed material. Both those factors were said to continue to apply. The Appellant also believes that some evidence against him was obtained by torture.

60. His Part 4 ATCSA appeal statement said that he had been singled out and publicly vilified in the UK, whereas until about 2001/2 he had only been well known in the Arab world, known as an Islamic scholar, consulted by hundreds of people weekly over the telephone and in person on all sorts of topics covering all aspects of life. He had not been led by the police to believe that any of the activities which he was carrying on up to 2001 were illegal, quite the reverse; he had carried them on openly. None of the money he raised was for him or for any purpose which he thought was or was regarded as illegal. In 1996-8, the Security Service had been asking him to act as a restraint on GIA, and more generally Algerian refugee activities in the UK. He condemned the killing of “*innocents*” and the actions of the GIA.

61. The Appellant complained strongly about the change of attitude towards him on the part of the UK authorities. He would not do anything to threaten UK national security and had exerted influence to restrain hot heads. Resistance to the brutal and corrupt regimes of the Middle East was legitimate within Islam and UN principles; the awakening of oppressed peoples to Islamic principles as a better way of life over the last thirty years had also led to their being oppressed for those views. He was not focused on what the western press called “*jihad*”, but rather on self-defence and resistance. He was not an affiliate of any group, nor a spiritual adviser appointed or otherwise to any; he had condemned Al Qa’eda, Bin Laden and the GIA. The SSHD’s statements had failed to understand the context within which he

operated as a Muslim scholar and in which the rebirth of interest in Islam was taking place.

62. In the context of the Part 4 ATCSA appeal, he rejected what he saw as the unreal view held by the SSHD of Al Qa'eda as an organisation with linked groups; it was he said a small group. He had disagreed with actions of both Al Qa'eda and Bin Laden. There was no equation between the Taliban whose leader he had admired and Al Qa'eda; the Taliban had felt constrained from asking their guest Bin Laden to leave their country.
63. The Appellant's *fatwa* on killing civilians in Algeria had been misunderstood: it simply reflected what he understood to be the internationally accepted law of war which was that in self defence and to prevent greater danger it was necessary and permissible to take steps which might lead to the unavoidable risk of civilian casualties. Hundreds of videotapes of his sermons would have been made, and that they should be found in the possession of people was neither surprising nor a reason for attributing to him any allegiances.
64. Whether it was ever permissible for a Muslim to take his own life was a question which a number of scholars had considered and had come to similar answers to his, reflected in his views. But he put the question in the context of resistance to and self defence against religious oppression worldwide and in Palestine and Israel in particular.
65. The Appellant's solicitor's statement on his behalf in response to the SSHD's case on national security in this appeal pointed out correctly that the bail and Control Order terms imposed on the Appellant after his release in March 2005 were not more onerous than those imposed on others, but wrongly suggested that the SSHD immediately could have sought or imposed terms akin to "house arrest".
66. The statement also suggested that the Appellant was not the danger assessed by the SSHD, because there was evidence that the SSHD had known of his whereabouts while he was in hiding after Part 4 ATCSA came into force, through an individual detained in Guantanamo Bay, and had not taken steps to arrest him.
67. The solicitor's statement also said that this same individual had reported that the Appellant had said that, if asked, he would have disapproved of the 11 September attacks. It is perfectly possible that the Appellant has made comments to that effect, but not necessarily to that individual. However, we consider that such remarks were more probably made for the benefit of particular audiences rather than because they reflected any true belief. We do not believe that he did disapprove of the attacks in the light of the evidence about his attitudes and any disapproval related to the impact which the attacks had on disrupting life for extremists in the UK rather than any moral or religious opposition to them.

68. The Appellant has not been prosecuted for any offence in this country, and his solicitor's statement says that he has not been formally questioned about any offences. His earlier Part 4 ATCSA appeal statement refers to one arrest for questioning in 2001 in relation to terrorist offences, which led nowhere quickly.
69. The Appellant also issued a voluntary statement while in immigration detention in December 2005, asking the so-called "Brigades of the Swords of Righteousness" in Iraq to release four members of the Christian Peace Team whom it held hostage. He argued that those four had no link to their "criminal governments". The request was not successful. But it shows that there is another aspect to his views in addition to that which the SSHD has set out. The bail statements add nothing.

### **Conclusions on national security**

70. We accept the summary and detail of the SSHD's case against the Appellant, including the reports and assessments which we have set out above. In the light of the Appellant's stance, that is scarcely surprising. He had plenty of opportunity to refute that evidence and has declined to try to do so. It was open to him to put forward his evidence in response to the case against him both on the Part 4 ATCSA appeal and here. Had he done so, his evidence would have been considered fairly. He has chosen not to do so on each occasion. We have considered his case afresh for the reasons we have given.
71. The arrangements made for dealing with closed evidence, which is inevitable in a national security case, represent as the ECtHR suggested, a fair balance between the competing interests. In any event, the open allegations against him are sufficiently extensive for his failure to answer them on the grounds that there is closed material to be no more than a convenient excuse. The simple fact is that he has provided no answer and we believe that he has provided no answer because in essence he has none.
72. We have omitted two matters from the SSHD's case, as originally formulated. These relate to the Appellant's concern that some of the evidence relied on against him may have been obtained by torture.
73. We have examined all the evidence, including that in closed, with the help of the Special Advocates. Although the terms of the judgment in *A and Others (NO.2)* envisages that SIAC will carry out an investigation into whether or not evidence was obtained by torture, the SSHD has adopted, in this case as in others, what he calls a "pragmatic approach". This means that he withdraws reliance on material which the Special Advocates argue, or may argue, may have been obtained in that way, generally from detainees in countries where there is arguably a real possibility that what they are reported to have said may have been the result of torture. So it has not been necessary for SIAC to carry out any

actual investigation. To the best of our knowledge therefore, there is no such potentially tainted evidence, open or closed, which we rely on here.

74. The SSHD originally placed some reliance in his national security case upon the Appellant's two convictions in absentia in Jordan. In 1999, he was convicted before the State Security Court of a conspiracy with twelve others to carry out terrorist acts with the Reform and Challenge Group. He was sentenced to life imprisonment with hard labour for the conspiracy. He was acquitted of belonging to the group. The SSHD withdrew reliance upon the conviction because of his pragmatic approach to evidence which featured in the case against the Appellant, which was alleged to have been obtained by torture. The conviction is nonetheless still relevant to the assessment of the risks which the Appellant would face upon return. We shall return to it in that context.
75. The SSHD continued to rely upon the fact of the Appellant's second conviction in absentia, for alleged involvement in the "Millennium plot", in which he was said to have provided financial and other support to the cell in Jordan which was planning attacks on western and Israeli targets in Jordan, coinciding with the Millennium celebrations. There were twenty seven other defendants. He was sentenced to 15 years hard labour. Although there may be material which links the Appellant to the conspiracy other than the confession of co-defendants or others, such confessions played a part, perhaps a crucial part, in the conviction. We do not consider that reliance can be placed on that second conviction as evidencing the risk to UK national security, consistently with the SSHD's pragmatic approach and in the absence of any further investigation. This conviction is also of course very relevant to safety on return and we return to it in that context.
76. There is other material which was relied on against the Appellant which did not come from confessions, e.g. in the form of correspondence or books written by the Appellant and found in one or two co-defendants' properties which provides a link to the individuals, but not necessarily to the conspiracy, and there is some material evidencing the conspiracy. It is not clear how far that material can go by itself. We could not conclude that the Appellant was probably involved in the conspiracy. Although the non-confession material could evidence further a risk to national security, we make no assessment of any involvement of the Appellant in the plot, and place no reliance on the non-confession material which could suggest that he was involved. It is not clear how readily that and the confessions can be separated and separately evaluated. If returned, the Appellant would be tried in relation to it. There is no need to express a view and it would be wiser not to do so. We discount from consideration the SSHD's case in relation to the "Millennium plot" conviction and underlying facts.
77. Subject to those points, the SSHD's case is fully and strongly made out. Although for convenience, the material has been presented under

various headings, much of it could be presented under several headings. The evidence has to be viewed as a whole. Each part lends support to the picture or conclusions which emerge from another. The total picture then has to be viewed as a whole.

78. It is clear that the Appellant has a certain standing among Islamist extremists as a religious scholar. This is not due to any discernable level of formal and generally acknowledged theological training. His views are sought by extremists and given to them. When he speaks privately or publicly, what he says carries weight in those groups. His religious views, the way he expresses them and the way in which they are interpreted, as we believe he knows and intends they will be, are of great importance to understanding the threat which he poses. They link all his activities from preaching, to his advice to groups of extremists, sought or unsought, through to his fundraising.
79. He has given advice to many terrorist groups and individuals, whether formally a spiritual adviser to them or not. His reach and the depth of his influence in that respect is formidable, even incalculable. It is not a coincidence that his views were sought by them. He provides a religious justification for the acts of violence and terror which they wish to perpetrate; his views legitimised violent attacks on civilians, terrorist group attacks more generally, and suicide bombings. He may have spoken against some grosser excesses, but that does not go very far. Even if his views are sometimes couched in careful language, their import is clear to those who take notice of what he says and know how to interpret it. His views, scholarly in any conventional sense or not, are important to extremists seeking to justify violence.
80. He may see his views as simply laying down the boundaries for self-defence and legitimate resistance to oppressive regimes or ill-deeds done to Muslims, but his application of those concepts encompasses legitimising aggressive violence against civilians, western, Middle East and North African states, and other religions or ethnic groups: those who are seen as a threat to Islam or rather to his view of Islam. His request that the four hostages in Iraq be released does not show a new tenderness for civilians but rather for those who were actively hostile to western intervention there, albeit that we recognise that the request had to be couched in language which might appeal to the kidnappers.
81. The assessment that the target of his views has broadened a long way beyond the regime in Jordan is correct. It covers what can usefully be termed global jihad. The groups and individuals whom he has advised cover many countries. The attitude and language of his advice and preaching evinces a global outlook covering Muslim and non-Muslim countries and people; his rejection of the Jordanian regime is based on views which makes him regard non-Islamist regimes more generally as illegitimate, impious and tyrannical, and their supporters as hostile to true Islam.

82. His views on the use of violence in the UK have, we accept, hardened, and his expressions of them do encompass the legitimacy of attacking people in the UK. He may have exercised restraint in the mid/late 90s on occasions, but that we consider, was for tactical reasons, to enable his preaching, fund-raising and other activities in support of extremists to continue. He may have expressed later concern about attacks in the UK for similar tactical reasons, or for the benefit of particular people to whom he was speaking. We do not regard him as seriously seeking to exercise restraint, while the authorities take counter-measures against Islamist extremists. The effect of any restraint would have been only that all the actions which support the operations and activities of jihadist groups continued unabated.
83. His preaching in the mosque, his dissemination of violent propaganda and the advice he has given, would have been important in radicalising his hearers, making them more susceptible to or enthusiastic for the overtures of those who recruit and train individuals for acts of violence, often initially be recruiting them for training abroad, originally in Afghanistan. Of course, in one sense the Appellant is not directly responsible for the purchase of his many books and videos by those who are terrorists. But this is to miss or evade the point. Those purchases are not coincidental or made out of intellectual curiosity. They are intended to provide supportive religious advice for those who seek religious legitimisation for acts of violence to defend or advance Islam as they see it, or to encourage a radicalising of those not yet so converted, or to seek support for radical Islamist causes. Those are the purposes of their widespread dissemination.
84. In short, his views are to be found linked to many terrorist groups and their actions, providing the religious cover they seek; he propagates radicalising views, and his fund-raising is aimed at advancing the Islamist extremist cause.
85. The Appellant makes the point that the Security Service knew the sort of views which he was expressing and took no steps to stop or warn him, to prosecute him or to prevent his fund raising for groups which are regarded as terrorist groups, notably the former Khattab faction fighting in Chechnya, or for training in Afghanistan. However, that inaction, based upon an erroneous assessment of the damage which the preaching and propagating of radical views could do within this country and elsewhere, does not begin to undermine the assessment, based on the allegations which we find well- proved, that he is a risk to national security. He may disagree with some of what Bin Laden says or does, he may have condemned the wholesale slaughter of some but clearly not of all the civilians which his *fatwa* led the GIA to perpetrate, but these points, even if correct, are nuances which do nothing to diminish the significance of the threat which he poses. His statement for the Part 4 appeal couches his views in language so studiously understated as to be wholly deceitful as to the true virulence and extremism of his views.

86. There is scope for debate as to how Al Qa'eda is structured or, if "structured" suggests an inappropriately high degree of organisation, how it relates to other groups or individuals. But it is an influential body, the outlook, contacts or links of which reach widely. Other groups may seek links of varying degrees with it. Association with Al Qa'eda which may not involve hierarchical subservience to Bin Laden, or any formal advisory role, reinforces the power and influence of both parties to the relationship. Differences of degree of view are not of the essence in judging risk to national security. So, for example, we agree with the SSHD that the Appellant is wrong to suggest that the Taliban was at real odds with Bin Laden or felt unable to ask him to leave Afghanistan; rather the Taliban did not like the increasing western attention that Bin Laden was bringing to them.
87. We reject as entirely ill-founded the suggestion that the SSHD knew of the Appellant's whereabouts while he was in hiding after the introduction of Part 4 ATCSA. There were also false pretences by Omar Bakri, an extremist Islamist preacher, that the Appellant had chosen to communicate through him while in hiding from Part 4 ATCSA arrest, which suggest that the Appellant had a certain standing in Islamist circles.
88. The Appellant has been in custody under Part 4 ATCSA and then in immigration detention since October 2002, except for a short period in 2005. There is no evidence that his views have moderated nor his desire to propagate them and to offer advice as he has done in the past. His Control Order did not remove the threat which he posed, although it controlled him to some extent. The suggestion that terms akin to house arrest could have been imposed is incorrect, because that would have required derogation from Article 5 ECHR. The SSHD could have imposed more severe terms than he did without derogation, though the precise boundaries were far from clear then. His deportation would reduce the risk further, and remove his presence as an adviser and preacher in this country, making the lives and well being of those resident here safer. His deportation is necessary in the interests of national security, by which we mean here that it is necessary as a measure of defence for the rights of those who live here. The national security basis for the deportation is well proved.
89. We have reached that conclusion on the basis of the material which we have set out above. There is however also closed evidence which materially supports those conclusions.

### **The Refugee Convention**

90. The Appellant was recognised as a refugee in 1994 by the SSHD. In a separate letter of the same date, his wife and their then three children were also recognised as refugees. Neither decision letter gives any reasons for the decisions; they do not normally do so anyway. We assume that the SSHD accepted the basis for the claim as summarised

in paragraph 5 above, and that the recognition of the other family members as refugees involved acceptance that they would be at risk because of their relationship to him rather than merely being a grant of leave to remain in line with that granted to the Appellant.

91. In dealing with this issue, we adopt but repeat for convenience what the Commission decided in the case of Y, an Algerian. The SSHD contends first that the Convention no longer applies to protect the Appellant from deportation because the circumstances in connection with which the Appellant was recognized as a refugee have ceased to exist, as it is now safe for the Appellant to return to Jordan in the light of the Memorandum of Understanding between the UK and Jordan; Article 1C(5). Secondly he contends that the Appellant's terrorist actions cause him to be excluded from its protection under Article 1F (c), and thirdly that the Appellant cannot claim the protection of the non-refoulement obligation in Article 33 (1) because, under Article 33(2), there are reasonable grounds for believing him to be a danger to the security of the UK.

92. The Appellant contends that it is for the SSHD to show, in view of his recognition as a refugee, that the circumstances which led to that grant have changed, and have changed in a sufficiently profound and enduring a way for the hitherto accepted need for international protection to have ceased. The SSHD contended that the circumstances had changed sufficiently. Those submissions are best dealt with after consideration of the evidence in relation to safety on return.

93. The Appellant next contends that it is not open to the SSHD to rely upon Article 1F (c), the exclusion provision, because the acts which the SSHD relies on occurred after he had been granted ILR in the UK, conferring recognition of his status. Article 1F(c) of course does not prevent reliance on matters occurring before a grant of refugee status but which come to light afterwards.

94. The relevant provisions of the Convention are as follows:  
Article 1F:

*“The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:*

- (a) he has committed a crime against peace, a war crime, or a crime against humanity as defined in the international instruments drawn up to make provision in respect of such crimes;*
- (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;*
- (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.”*

95. The Appellant relied upon the decision of the Canadian Supreme Court in *Pushpanathan v. Canada (MC1)* [1999] INLR 36, at para 58:

*“...the general purpose of Article 1F is not the protection of society of refuge from dangerous refugees, whether because of acts committed before or after the presentation of a refugee claim; that purpose is served by Article 33 of the Convention. Rather, it is to exclude ab initio those who are not bona fide refugees at the time of their claim for refugee status... The relevant criterion here is the time at which refugee status is obtained. In other words, Article 1F(C) being referable to the recognition of refugee status, any act performed before a person has obtained that status must be considered relevant pursuant to Article 1F(C).”*

96. Although *Pushpanathan* was considered in general terms by the Court of Appeal in *A (Iraq) v SSHD* [2005] EWCA Civ 1438 at para.24, it did not consider the time issue raised in this case.

97. The SSHD relied upon a decision of the IAT in *KK v SSHD* [2004] UKIAT 00101 in which it had held :

*“86... In Pushpanathan, as we have seen, the Supreme Court of Canada distinguished between Articles 32 and 33 and Article 1F(b). But it does not in our view follow that the mere fact that a person satisfies the requirements of Article 1 before he commits the act identified as causing exclusion under Article 1F(c) enables him to say that he continues to be a refugee. Article 1F(c) does not contain the words ‘Outside the country of refuge prior to his admission to that country as a refugee’, which are found in Article 1F(b). There is no reason at all to suppose that that difference is accidental. Acts which merit the condemnation of the whole international community must lead to exclusion from the benefits of the Refugee Convention when ever they occur.*

*87.... Article 1F (c) is not limited to acts committed before obtaining refuge. If he had been recognised as a refugee earlier, it would make no difference now.*

*88... Where, therefore, there are serious reasons for considering that an act contrary to the purposes and principles of the United Nations has been committed, it does not matter when or where it was committed, or whether it is categorised by municipal law as a crime. It leads to exclusion from the Refugee Convention.....*

*89... This interpretation of the relevant clauses of the Refugee Convention is entirely coherent and sensible. It identifies what acts will lead to exclusion despite their being ‘political’. A person whose acts (at any time) are contrary to the purposes and*

*principles of the United Nations disqualifies himself from protection under the United Nations' Refugee Convention."*

98. We do not find assistance in the SIAC decision of *C v SSHD SC/7/2002*, an ATCSA appeal, because the principal issue to which the remarks there were addressed was recognition as a refugee in ignorance of facts which would have led to his exclusion if known. That is not this case.
99. We prefer the reasoning in *KK* to the dicta in *Pushpanathan*. It is far from clear that, in the comments relied on by the Appellant, it was addressing the issue with which we are concerned. Its language is more apt for the position where prior conduct only becomes known after recognition as a refugee. The language is what might have been expected if the issue were being considered more generally, rather as in *C v SSHD*.
100. It is clear to us that the exclusion or disapplication provisions of Article 1 contain no principle whereby they are dependant on events which precede the decision as to whether or not a person is a refugee, except where the language is clear. Article 1C is only applicable after recognition as a refugee. Article 1E appears equally applicable to events which occur before and after recognition. Article 1F(b) is specifically limited to events before admission as a refugee. That is particularly important because it stands in clear contrast to the lack of any such limit in 1F (a) and (c); it would have been easy to include it as a general proviso had it been intended. It also contains a geographical proviso that the crime be committed outside the country of refuge, which is not included in 1F (c); that too is relevant to the argument about the temporal relationship between acts before or after entry to the country of refuge.
101. Being or becoming a "refugee" as defined in the Convention does not require or start with a formal state act of recognition of status. A person simply is or is not a refugee within Article 1A. They may be excluded from that definition in circumstances in which they would otherwise fall within the definition. Emphasis upon the point in time at which an individual receives formal recognition by a state as falling within the definition, usually with an associated immigration status, will tend to obscure the true issue.
102. There is no reason within the structure of the Convention or in the policy behind the exclusion provisions for treating someone who commits war crimes or acts of terror before the formal recognition by a state of the fact that he falls within Article 1, differently from someone who does the same acts afterwards. That attributes overmuch weight to formal recognition and not enough to the scope of the definition provision. Rather, the emphasis in *Pushpanathan* is on the rationale that those who are responsible for acts which create refugees, or for other acts seen as equally serious by the Convention, should not benefit

from it at all. In a similar vein, a person may become a refugee surrogate as a result of events which have happened since leaving the country of nationality, even if previously an asylum claim failed.

103. Reliance was placed on the existence of Article 33(2) as the sole post-recognition removal power. Article 33(2) permits someone to be removed notwithstanding that he would be persecuted on return, in circumstances which may overlap with those in Article 1F (c). But they are not expressed in the same way and may not cover the same facts in any particular case. Nor is the possibility of removing someone who is a refugee on that basis the same as the obligatory exclusion of someone from being a refugee, formally recognised or not. True it is that almost all of the Convention is about the position of those who are refugees, but that does not mean that their position cannot change or that the exclusion provisions cannot apply to exclude someone from being a refugee before or after formal state recognition as such. The focus of those provisions remains on acts in the past rather than on future risk.
104. The Appellant did not really seek to take issue with the SSHD's contention that, if the Appellant were wrong on the time point, the acts which the SSHD relied on showed that the Appellant had been guilty of acts contrary to the purposes and principles of the UN. We accept the general submissions of the SSHD that terrorism is contrary to those purposes and principles. This is borne out by the decision of SIAC in *Mukhtiar Singh and Paramjit Singh v SSHD* 31.7.00 and of the IAT in *KK*, above, paragraphs 85, 93 and 96. It is not necessary to set them out here. That decision was approved in *AA (Palestine) (Exclusion Clause) v SSHD* [2005] UKIAT [00104].
105. This exclusion provision requires that there be serious grounds for thinking that an individual is guilty of acts which, to use the language of *KK*, "are the subject of intense disapproval by the governing body of the entire international community". Merely characterising them as "terrorist" is neither necessary nor sufficient. We have largely accepted the Secretary of State's case on national security. It is clear that the Appellant's actions legitimise and provide a religious justification for acts of serious violence and terrorism against all manner of persons including ordinary civilians. His views are sought by terrorist groups for that purpose. He preaches violence and seeks to radicalise his audience to an extremist Islamist point of view in which aggressive violence is justified as defence. He is guilty of acts which exclude him from the protection of the Refugee Convention.
106. The exclusion of the Appellant from the protection of the Refugee Convention is not to be balanced against other considerations such as the risks of persecutory treatment which he might face on return to Jordan. The Convention contains no such balancing provision and in any event, s34(1) ATCSA 2001 would exclude any such balance. It is in these terms:

*“Articles 1(F) and 33(2) of the Refugee Convention (exclusions: war criminals, national security, &c.) shall not be taken to require consideration of the gravity of-*

*events or fear by virtue of which Article 1(A) would or might apply to a person if Article 1(F) did not apply, or*

*a threat by reason of which Article 33(1) would or might apply to a person if Article 33(2) did not apply.”*

107. We turn to the third Refugee Convention issue: (‘refoulement’).

Article 33: Prohibition of expulsion or return (‘refoulement’)

*1. No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories, where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.*

*The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particular serious crime, constitutes a danger to the community of that country.”*

108. The non-refoulement obligation in Article 33(1) is subject to the exception in Article 33(2). The third contention of the SSHD was that the Appellant fell within the exception. This issue would arise if the Appellant were to remain a refugee because there had been an insufficient change in circumstances for Article 1C(5) to apply, and if he were not excluded under Article 1F (c). It is obvious from our conclusions about national security that it is our view that there are “reasonable grounds” for regarding him as a danger to the security of the UK. As with Article 1F(c), there is no balancing provision within the Convention, weighing the degree of risk and the severity of any persecutory treatment which he might face against the danger to the security of the UK which he poses and the benefit to it which removal would bring.

109. This issue was considered by the IAT in *SB (Haiti- cessation and exclusion) [2005] UKIAT [00036]* at paragraphs 81 -83. This case referred to the decision in *T v SSHD [1996] AC 742* which concerned the return to Algeria of a terrorist excluded under Article 1F. It had been suggested to their Lordships that there was a clearer case for a balance to be struck under Article 1F than under Article 33(2), and that support for a balancing exercise in the latter could be extracted from the reasoning of the Court of Appeal in *R v SSHD ex parte Chahal [1995] 1 WLR 526*. Their Lordships gave short shrift to the argument

that there was a balance to be struck. The position is now settled by s34 ATCSA which precludes any such balance being struck.

110. The position is therefore clear: the Appellant is a danger to national security and the Refugee Convention provides him with no protection against removal.

## **ECHR**

111. The Appellant's appeal therefore depends upon the application of the ECHR to the risks which someone removed from the UK might face in the country to which he is removed, his country of nationality. As Article 1 requires the state parties to secure the rights of those "*within their jurisdiction*", and the ECHR contains nothing on its face to restrict the sovereign right of state parties to control the immigration and removal of non-nationals, it might have been thought that it would have no application to the dangers which someone might face upon removal to their country of nationality, particularly as it is not the ECtHR's jurisprudence that removal is a breach of Convention rights simply because the rights enshrined in the Convention might be breached in a country of nationality which was not a party to it.
112. Indeed, the Refugee Convention, which was signed a year later than the ECHR, specifically provides that refugees may be removed to face a real risk of persecution in the circumstances which apply to the Appellant here. States which were parties to both Conventions could not have supposed that they had agreed in 1951 to permit breaches of their obligations undertaken in 1950. The EU Council Directive of April 2004 on minimum standards for the protection of third country nationals as refugees or otherwise in need of international protection also excludes from its benefits those persons who are a danger to the security of the Member State in which they are present.
113. However, the ECtHR has held, at least in relation to Article 3, and it may be in relation to other Articles as well, that what would be persecutory ill-treatment for the purposes of the Refugee Convention but would nonetheless not prevent return under that Convention, does prevent return under the ECHR. It has held that a real risk of treatment which breaches Article 3, the prohibition on torture and on inhuman or degrading treatment or punishment, suffices to prevent removal. It has also held that no other considerations can be taken into account to be balanced against that risk, whether those other considerations are the risk of non-removal to the human rights of others, or the legitimacy of removal as an act of state protection for individuals, or to put it another way, the risk to the national security of the state. This decision in *Chahal v United Kingdom* (1997) 23 EHRR 413, although bringing in an apparent and significant change from the balance indicated by the ECtHR in *Soering v UK* (1989) 11 EHRR 439, now represents a consistent jurisprudence which UK Courts must apply

and not merely have regard to; *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323.

114. Accordingly, we now examine the evidence about safety on return. The focus of the evidence concerned Article 3, Article 5 which deals with detention, and Article 6 which deals with a fair trial on criminal charges. The evidence also concerns the risk of the Appellant being sentenced to death or executed, although the precise legal framework for consideration of that issue is more debatable. We shall also touch upon Article 8, the right to respect for family life as it is raised in the grounds of appeal and the Appellant has a family here, although no specific submissions were made on it.
115. The relationship between the standard and burden of proof as between Article 1C (5) of the Refugee Convention and Article 3 ECHR can give rise to an issue which we consider after dealing with the evidence. We shall also consider the role of deference in relation to safety on return evidence later.

### **The risk factors**

116. The Appellant is an Islamist extremist who advocates changing the present regime in Jordan into an Islamic one as he would see it, one governed not by a monarchy but by Islamic law, as he would see it. His advocacy, as the national security case shows, contemplates the legitimacy, the religious legitimacy, of violence to that end. He has clear links to many terrorist groups and individuals. This judgment will be available to the Jordanian authorities. Whilst not all Islamists are seen as a threat in Jordan, those of the views of the Appellant would be seen as a threat to the stability of the state. He has been of real interest to the Jordanian authorities in the past and still is, as he would be to the authorities of almost any country where he might reside. Jordan sought his extradition at one time for the Reform and Challenge conspiracy, but did not pursue it for political reasons. We accept that the allegation of torture in his asylum claim may well be true, in the light of the background evidence to which we come, which appears to have been the basis of the SSHD's acceptance of his asylum claim.
117. If returned, he would face retrial for the two serious offences of which he has been convicted in absentia. It is accepted that he would be retried, as is common with convictions in absentia. We shall deal with the detail of those charges later. But he would face the prospect of pre-trial detention, and sentence after conviction to a long term of imprisonment. He was sentenced to life imprisonment after the first trial and to fifteen years in prison after the second trial. The risk of torture or ill-treatment contrary to Article 3 ECHR during those periods, whether to obtain a confession or to obtain information or for other reasons, was at the heart of the appeal. The Appellant contends that he also risks being sentenced to death and executed.

118. The fairness of the trial process itself is a major issue, growing in importance as the appeal progressed: the lack of independence on the part of the judiciary which would try the Appellant in the State Security Court, together with the risk that evidence would be admitted, which might have been obtained by torture either of the Appellant himself or of other defendants or prisoners, are said to constitute a total denial of the right to a fair trial under Article 6 ECHR. If the outcome following conviction after such a trial were to be a long period of imprisonment, or a death sentence or execution, Articles 2, 3 and 5 ECHR would also be breached, on the Appellant's case.
119. There is a risk, claims the Appellant, that he will be tried for other offences as well and will face those same risks on such charges. Moreover, terrorist offences have been committed in Jordan leading to new concerns there about Islamists. The fact that the Appellant is from Palestine, which has had at times an uneasy relationship with the rest of Jordan, may also be unhelpful to him.
120. There would be interest from the USA in interrogating the Appellant, directly or indirectly about alleged terrorist activities, and the Appellant is notorious to the security services of many countries. The USA interest might, says the Appellant, lead to torture by the Americans or by the Jordanians on their behalf, or to his rendition to another country for interrogation and detention, in circumstances which would breach Articles 3, 5 and 6 ECHR.

### **The background material on conditions in Jordan**

121. With those factors in mind, we turn to examine the relevant background material on Jordan. Mr Oakden, the then Director of Defence and Strategic Threats at the Foreign and Commonwealth Office, and since August 2006 Ambassador to the UAE, who gave the Government's evidence on safety on return, made it repeatedly clear that:

*"While not expressing any opinion on or endorsing the published assessments of non-governmental organisations or other governments on the human rights situation in Jordan, it is not the British Government's intention to contest the general thrust of such reports in this litigation."* That remained his position.

122. Nonetheless, the detail of who breached which human rights, and in what circumstances, with what frequency and consequences, is relevant for the assessment of risk and cannot simply be left at a broad acceptance of a general position. The way in which trials would be conducted and the political situation in Jordan also calls for careful consideration.
123. We set out first the more general material from governmental sources, NGOs and the Appellant's experts, and then deal with the more specific

evidence on assurances, monitoring, past experiences, trials, and rendition.

### **The US State Department Reports**

124. There is no Country of Origin Information Service Report on Jordan. The US State Department Report on Jordan for 2004, published in February 2005, is a useful starting point. It describes the Hashemite Kingdom of Jordan as a constitutional monarchy ruled by King Abdullah II bin Hussein. The Constitution concentrates executive and legislative authority in the King. The King appoints the Prime Minister and other members of the Cabinet who manage the daily affairs of the Government. The Parliament consists of the 55 member Senate, appointed by the King, and a 110 member elected lower house, the Chamber of Deputies. In June 2003, multi-party parliamentary elections are described as having been generally free and fair, though the election law significantly under-represented urban areas. The Constitution provides for an independent judiciary, but in practice it remains susceptible to political pressure and interference by the executive.

125. The Public Security Directorate (PSD) controls general police functions. The PSD, the General Intelligence Directorate (GID), and the military share responsibility for maintaining internal security, and have authority to monitor security threats. The PSD reports to the Interior Minister and the GID, which is independent of the PSD, reports directly to the King. The civilian authorities maintain effective control of the security forces. However, *“Members of the security forces committed a number of serious human rights abuses.”*

126. The US State Department Report continued:

*“Although the Government respected human rights in some areas, its overall record continued to reflect many problems. Reported continuing abuses included police abuse and mistreatment of detainees, allegations of torture, arbitrary arrest and detention, lack of transparent investigations and of accountability within the security services resulting in a climate of impunity, denial of due process of law stemming from the expanded authority of the State Security Court (SSC) and interference in the judicial process, infringements on citizens’ privacy rights, harassment of members of opposition political parties and significant restrictions on freedom of speech, press, assembly and association. Citizens did not have the right to change their Government. Citizens may participate in the political system through their elected representatives to Parliament; however, the King has discretionary authority to appoint and dismiss the Prime Minister, members of the Cabinet and upper house of Parliament, to dissolve Parliament and to establish public policy.”*

127. In essence, the same general description is set out in the US State Department Report for 2005, published in 2006. A new cabinet had been appointed; in the wake of the 19 August and 9 November 2005 terrorist attacks, the latter of which killed more than sixty people, *“the Government announced that its priority would be to ensure public security while at the same time respecting civil liberties.”*

128. The Report for 2005 considered torture and other ill-treatment in much the same terms as the Report for 2004. It stated that the law prohibited such practices:

*“however, police and security forces allegedly abused detainees during detention and interrogation and reportedly also used torture.”* The allegations *“were difficult to verify because the police and security officials frequently denied detainees timely access to lawyers. The most frequency reported methods of torture included beating, sleep deprivation, extended solitary confinement and physical suspension. Defendants charged with security related offences before the State Security Court claimed they were tortured to obtain confessions and claimed to have been subjected to physical and psychological abuse while in detention. Government officials denied many allegations of detainee abuse, pointing out that many defendants claimed abuse in order to shift the focus away from their crimes. During the year, defendants in nearly every case before the State Security Court alleged that they were tortured while in custody. At the time, the courts requested prison administrators to treat inmates in accordance with the law.”*

Mr Oakden did not dispute the general thrust of what was said there.

129. The law’s prohibition on arbitrary arrest and detention was not always observed. There was a mechanism in place which considered complaints about the PSD, but not it appears about the GID. Half the complaints were validated and some led to trials or disciplinary measures. Most of those not validated lacked evidence. On arrest and detention, the Report said:

*“The criminal code requires that police notify legal authorities within 48 hours of an arrest and that legal authorities file formal charges within 10 days of an arrest; however, the courts routinely granted requests from prosecutors for 15-day extensions as provided by law. This practice generally extended pretrial detention for protracted periods. In cases involving state security, the security forces arbitrarily arrested and detained citizens. The authorities frequently held defendants in lengthy pretrial detention, did not provide defendants with the written charges against them, and did not allow defendants to meet with their lawyers until shortly before trial. Defendants before the State Security Court usually met with their attorneys only one or two*

*days before their trial. The criminal code prohibits pretrial detentions for certain categories of misdemeanors.”*

130. Instances of abuses were given. Some prisoners were regarded as political detainees. Journalists were sometimes threatened with detention, and in consequence practised self-censorship.
131. There were no reports in 2004 or 2005 of politically motivated disappearance or extra-judicial killings by government agents. There had been a report of the latter in 2003.
132. The US State Department Report for 2005 dealt with trials as follows. The law provided for an independent judiciary and in practice there was independent decision-making. However, the judiciary was not impervious to family and tribal influence.

*“The Higher Judiciary Council, a committee led by the Court of Cassation and comprising other high ranking officials from the various courts and the Ministry of Justice, determines judicial appointments, assignments and evaluations. The Higher Judiciary Council remains under the administration of the Ministry of Justice. Unlike allegations in previous years, in this year there were no allegations that judges had been “reassigned” in order to remove them from particular proceedings. However, judges were still temporarily assigned to other courts due to work flow. The judicial system consists of civil, criminal, commercial, security and religious courts. Most criminal cases are tried in civilian courts, which include the Court of Appeal, the Court of Cassation and the High Court of Justice. The State Security Court, which is composed of both military and civilian judges, has jurisdiction over offences against the state and drug-related crimes.”*

It is before that court that the Appellant would be retried.

133. All civilian court trials are open to the public unless the court determines otherwise:

*“Defendants are entitled to legal counsel, may challenge witnesses, and have the right to appeal. Defendants facing the death penalty or life imprisonment must be represented by legal counsel. Public defenders are provided if the defendant is unable to hire legal counsel. All citizens are accorded these rights. Defense attorneys are guaranteed access to Government-held evidence relevant to their clients’ cases.”*

*“The State Security Court consists of a panel of three judges, comprising two military officers and one civilian. More than a dozen cases were tried or were ongoing in the State Security Court during the year. Like the civilian courts, proceedings of the court are open to the public. Defendants tried in this court were often*

*held in lengthy pre-trial detention and refused access to legal counsel until just before the trial. State Security judges enquired into allegations that defendants were tortured and allowed the testimony of physicians regarding such allegations. The Court of Cassation ruled that the State Security Court may not issue a death sentence on the basis of a confession obtained as a result of torture. Defendants in this court have the right to appeal their sentences to the Court of Cassation, which is authorised to review issues of both fact and law, although defendants convicted of misdemeanours in the State Security Court have no right of appeal. Appeals are automatic for cases involving the death penalty. The Press and Publications Law permits journalist to cover State Security Court proceedings unless the court rules otherwise. The press routinely reported on cases before the court, including all cases heard during the year. Such reporting routinely covered defence arguments and allegations of torture.”* The report instances a number of allegations of torture in detention notably by those facing terrorist charges.

134. Prison conditions were said generally to meet international standards, though overcrowded, insanitary and with inadequate food and medical care. The Jordan National Centre for Human Rights (NCHR) was able to visit prisons, and made 11 visits in the year. The International Committee of the Red Cross (ICRC) was likewise permitted access to prisoners and all prison facilities, including those held by the GID and military intelligence, though there were allegations of some incommunicado detentions.
135. More generally, the Report noted that a number of domestic and international human rights groups operated, but within restricting permissions. They investigated and published findings on cases involving allegations of torture and other abuses committed by the security forces. It is unclear how far a change to the Press Law had actually enabled NGO reports of security forces abuses to be published. Within restrictions, government officials were described as co-operative and responsive. The government was reported as generally co-operative with international NGOs. The Report referred to the operations of the local branch of the Arab Organisation for Human Rights and the Jordanian Human Rights Organisation; another body reported harassment, about which it complained to the King, without retaliation. The NCHR began work in 2003; it is part government funded and there were some complaints about its lack of experience. In its first report, it ranked Jordan as “*poor*” in civil and political rights. The Adaleh Centre, the proposed monitoring body, is not mentioned.
136. There were restrictions on the privacy of the home and family life, and significant restrictions in practice on the freedom of the press. Whilst citizens did not hesitate to criticise the government openly, they were cautious about criticising the King and the GID. Instances of these restrictions were given. Some foreign broadcasters, including Syrian, Israeli and international satellite television broadcasts were available

without restrictions, but domestic broadcast media were more restricted than the press.

137. There were limits on academic freedom, partly in an effort to curb the influence of Islamists. Restrictions on freedom of assembly were usually applied to impede, but often not finally to prevent, demonstrations for causes disagreeable to the government. Non-political association was not in practice restricted, but political parties had to be licensed; 31 had been licensed.
138. There was freedom of movement generally within the country, although there were also provisions for house arrest without charge for up to one year. The law prohibited forced exile and it was not used in practice. More than half of the population was estimated to be of Palestinian origin; there are widespread claims of various forms of discrimination against them.

### **The FCO Research Paper 2005**

139. Mr Oakden produced a Research and Analytical Paper by the Foreign and Commonwealth Office Middle East and North Africa Research Group dated August 2005 and entitled "*Jordan: The Human Rights Situation*". Much of it draws on the US State Department Report for 2004, and on reports by Amnesty International and Human Rights Watch. There were additional points in the summary. Jordan lifted the long-standing state of emergency (from 1967) and abolished martial courts in 1991; however military judges continued to try civilians in the replacement State Security Court and its procedures have been criticised for failing to meet international standards for fair trials. New legislation introduced after the terrorist attacks in the United States of America on 11 September 2001 expanded, in a way which AI described as "*extremely vague*", the definition of terrorism and the range of offences punishable by death. Jordan continues to use the death penalty. There had been, according to AI, 14 executions in 2002, 7 in 2003, one in 2004 with at least 16 sentenced to death, 9 in absentia. (Mr Oakden did not dispute that 11 were executed in 2005 and 2 by March 2006.) There are continued reports of torture and ill-treatment in Jordanian detention centres and prisons. Conditions in detention otherwise generally meet international standards but problems of overcrowding and sanitation have been reported; conditions in GID detention centres are considerably better than in police facilities. Jordan generally maintains effective control of its security forces but human rights groups said that there was a significant risk of torture in Jordan for deported terrorist suspects, though a subject deported from the US was generally well-treated in detention. In general the country co-operated with international NGOs and allowed some independent local human rights groups to operate in the country.

140. The FCO Paper referred to the concern of international organisations that torture and ill-treatment of detainees still exists in Jordan. It quoted Amnesty International's reports of 2002 and 2003, though noting that they provided no comment on the frequency of torture and ill-treatment. It referred to 20 confessions allegedly obtained by torture before the SSCt in 2003, and in 6 of at least 18 cases in 2004. The reports of torture mainly related to those held by the GID in connection with terrorism. HRW said that terrorist suspects were targeted for this abuse.
141. Jordan is a party to the six main UN Human Rights Treaties including the International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT). However, Jordan has entered reservations to some of these: Article 22 of CAT relating to the jurisdiction of the Committee Against Torture, and it has not signed the Optional Protocol to CAT (OPCAT). Jordan last reported to the UN Human Rights Committee, which monitors the ICCPR, in May 1992. Three reports are now overdue. The European Union Association Agreement with Jordan came into force in May 2002, and mechanisms in that agreement enable the EU to raise human rights issues at a formal level.
142. The UN Committee against Torture Report of 1995 expressed concerns but also said that Jordan had made "*positive steps*" and that there was a "*trend towards the promotion of human rights in general and towards the implementation of the Convention against Torture, in particular*". The US State Department said that in recent years the Jordanian authorities had been "*more willing*" to conduct transparent investigations; ten Jordanian police were convicted in March 2005 of beating an inmate to death; they received prison sentences of up to two and a half years. There is no offence as such of "*torture*".
143. The State Security Court tries cases relating to state security: "*sedition, armed insurrection, financial crimes, drug trafficking and offences against the Royal Family*". Civilian courts try other criminal cases. Defendants tried in the State Security Court have the right to appeal fully against their sentences on questions of both fact and law. Those tried in absentia by Jordanian courts are entitled to a re-trial if they are apprehended by the authorities. AI and HRW both say that the procedures of the State Security Court fall short of international standards for fair trial. AI said that the court has been used for trying cases of participation in unlicensed demonstrations as well as "*terrorist*" activity. Both AI and the International Federation for Human Rights (FIDH) have alleged that the State Security Court is used for "*political trials*". AI has expressed concern that verdicts issued by the court have been based on confessions reportedly extracted under torture. The US State Department had said that Jordan suffered from a "*denial of due process of law stemming from the expanded authority of the State Security Court and interference in the judicial process*", and that the judiciary was "*not independent in*

*practice*”, because it was financed by the Ministry of Justice and all judges had to be trained by a semi-governmental body. However, it also said that Jordanians generally consider the judicial system to be essentially independent and not subject to Government interference. Opinion polls suggest that most Jordanians are confident that if charged with a crime, they would receive a fair trial.

144. We note here that the UN Human Rights Committee Report in 1994 recommended that consideration be given to the abolition of the State Security Court, and to placing GID detention facilities under the judicial supervision which applied to civilian prisons. CAT in 1995 made the same point about the SSCT.
145. The FCO Paper records human rights groups’ concerns about arbitrary and incommunicado detention, which affected those suspected of links with Islamist groups. Such detention created the conditions for abuses and for their concealment. AI said that there had been many “political” arrests of demonstrators.

### **NGO Reports**

146. There is much in NGO Reports which accords with the broad picture painted by the USSD Reports and the FCO Paper. Human Rights First in 2006 contended that new legislation in 2001 represented backward steps in the move to democratisation: State Security Court case limits on appeal, an increase of 7 days in incommunicado detention, a larger range of cases for the SSCT, more and vaguer terrorism offences and a greater scope for the application of the death penalty, as well as more restrictions on freedom of expression and association. AI has made much the same points.
147. Notwithstanding some international NGO criticism of the independence of the Jordanian NCHR, the NCHR in its December 2005 Report, referred to prison and detention centre inmates being beaten. It also considered that the court system provided insufficient guarantees against torture and abuse. It had received 250 allegations of ill-treatment in detention, excluding GID detention, and reported claims in 2004/5 in terrorist cases of confessions being extracted under torture and of one death. Specific instances were given. HRW says that the NCHR is not systematic in its investigations and prefers training and capacity building. The Arab Organisation for Human Rights reported in similar vein on allegations of ill-treatment in detention, adding that the GID did not allow visiting non-Governmental human rights monitors.
148. In April 2006, the Jordanian Liberties Committee, part of an umbrella group of trades unions, publicised a report on visits it was permitted to make to six prisons in 2005: Islamist prisoners complained angrily at ill-treatment by GID during interrogation and more generally at GID hands and unfair sentences by the SSCT. Those who had been beaten

were hidden from view during ICRC visits. Sometimes relatives were beaten in front of them. The day after its publication there was a major outbreak of violence at Qafqafa prison, not for the first time, and guns were fired.

149. The Amnesty International Report of 4 May 2006, "*Jordan: Amnesty International calls for investigation into alleged torture and ill-treatment of detainees*", called on the Jordanian Government to establish immediately an impartial and independent investigation into continuing reports of torture and ill-treatment of political suspects for the GID, in response to what it described as persistent complaints of torture in incommunicado detention by the GID in its detention centre near Wadi Sir in Amman; such allegations about GID detention had been made for many years. It continued to receive reports of detainees being forced to sign "*confessions*" which were then used against them in trials before the State Security Court, which frequently failed to investigate complaints by defendants that they were tortured in pre-trial detention or failed to reject evidence allegedly obtained under torture. Although lawyers reported that some defendants had had convictions and sentences overturned by the Court of Cassation because of "*improper methods of investigation*", the court still was said to give inadequate attention to torture allegations even where the death penalty was involved.
150. Amnesty International in 2005 also expressed concern in the context of torture claims that access to lawyers was generally granted only when a detainee was formally charged and transferred to court. The Jordanian Code of Criminal Procedure states that access to lawyers should normally be allowed, but it also allows for detainees to be interrogated and detained without access to a lawyer.
151. Human Rights Watch, in its 2005 World Report on Jordan, says that the GID arrests Jordanian Islamists and detains them at its own detention facility for prolonged periods, often without charge or on baseless charges; it routinely denies detainees access to legal representation, and grants requests for family visits with considerable delay, if at all. Some security detainees allege torture and ill-treatment during interrogation, the alleged abuse almost invariably taking the form of severe beatings on the lower legs and feet.
152. HRW, in a document of February 2006 entitled "*Jordan/USS Summit should address torture problem*", referred to torture in GID detention, saying in almost all cases which it had investigated, the alleged torture took place in the initial period of detention of up to 7 days, when under the SSCT jurisdiction, suspects could be detained without charge or access to a lawyer.
153. The Ministry of Justice takes rather a different view, at least as expressed in the Jordanian Times of 17 August 2005, dismissing as "*baseless*" HRW's fears of a "*high risk*" of torture for deported security suspects. Their rights were guaranteed by the Penal Procedure Code;

local and international NGOs could talk directly to detainees. But NGOs usually accepted claims of confessions extracted under torture, which were not solidly based. Such allegations were made to enable the suspect to excuse his confession to his associates. Judges still insisted on examining the evidence on a guilty plea.

### **The Appellant's experts**

154. We turn from what the NGOs added to the background, to those parts of two of the expert reports produced on behalf of the Appellant which also go to the more general background. We shall of course have to return to them later more specifically. Neither expert was called to give oral evidence.
155. Dr Alan George is a freelance consultant, journalist, writer and academic specialising in Middle Eastern political and economic affairs. He is a Senior Associate Member of St Anthony's College Oxford, which has one of the world's leading Middle East Centres. He has travelled throughout the Middle East. He first visited Jordan in 1967, has followed Jordanian affairs for some twenty-five years and has written numerous press articles about different aspects of the country. He published a book entitled "*Jordan: Living in the Cross-fire*" in October 2005. The book covers political, economic and social affairs in Jordan and includes substantial sections on the Kingdom's democratic credentials, its human rights record and its judicial system. Research for the book involved interviews with over sixty Jordanians from all parts of its society, including King Abdullah, journalists, politicians and refugees, during six visits to Jordan in 2003 to 2004. During those trips he visited all parts of the Kingdom.
156. In preparing his report, he has drawn heavily on his book, and on governmental and NGO reports to which we have already referred. He provides an historic overview of Jordan's international relations and concludes that by expressing the view that Jordan has always been close to the UK but recently has sought to strengthen its ties with other European states. It finds the UK and Europe more comfortable to deal with in a variety of ways, particularly on the Palestinian issue, though politically it is closer to the US. Dr George outlines the development of Islamist extremism and the Jordanian government's response to it. He describes it as a serious threat to but not a determinant of Jordan's political life. The retreat from democracy has however continued, despite a rhetorical commitment to it. Dr George thinks that Western style democracy was never the aim anyway, and is not now. The adverse reaction to the peace treaty with Israel had been a cause of a retreat which had begun as a response to recession and riots. The restrictions on political parties and expression meant that Jordan is in reality a relatively benign dictatorship, ruled by the monarch. The formal trappings of democracy yield to the executive which implements the King's wishes, dissent in Parliament is rare, unelected commissions

are used, but close extra-parliamentary links are maintained by the King to various key groups, including the Islamists.

157. However, *“the margins of debate and criticism remain wide, at least by regional standards. Certainly Parliament lacks teeth and the press is constrained. A watchful eye is kept on dissidents and sometimes they are detained. But usually they are held only briefly, serious maltreatment is rare-these days at least- and the legal system offers a degree of real protection.”* The regime has a relatively benign political culture. The tribes, which are the King’s key support base, are a powerful check on overweening authority. The country is heavily dependant on revenues from abroad, and the pursuit of foreign aid is the key factor shaping Jordanian foreign policy; it occupies a strategic geographic location in the Middle East.
158. The regime is stable and secure; its legitimacy unquestioned by the great majority of Jordanians. The economy is the weak spot. The threat from terrorism will persist but the more potent danger is unrest, as has been seen in the recent past, which would have a *“distinctly Islamist flavour”*. The unrest could be based on hostility to US policies in the region, domestic political restrictions, lack of economic opportunities, and inequalities.
159. Dr George states that in fairness to the system of government in Jordan it must be said that most Jordanians, most of the time, live in freedom from the shadow of state repression that darkens much of the rest of the region. The PSD and the GID generally tread lightly. Torture and abuse of detainees does not appear to be part of the culture of the security apparatus. He put the apparent contradiction in the fact that the head of the NCHR, Mr Al-Obeidat, is a former Prime Minister and ex-head of the GID, to Mr Al-Obeidat who replied that Jordan had its own circumstances and its own characteristics. Dr George sees this as indicative of the system’s impulse to co-opt and control. He states that Parliament is required to function as an adjunct to the regime. Laws and the Constitution are declared inviolate but are designed to safeguard the established system and, when found wanting, are twisted to order. Press freedom is acclaimed, but it must be *“responsible freedom”* that does not challenge the status quo. Dr George gives plenty of examples of the operation of press restrictions against which some journalists clearly push.
160. Dr George quotes the NCHR report of 31 May 2005 stating that the court system does not provide sufficient guarantees to prevent torture and other forms of abuse at the hands of the authorities. State Security Court defendants are often held in lengthy incommunicado pre-trial detention and there have been frequent allegations of the use of torture to extract confessions. Although the Court of Cassation has ruled confessions obtained under torture to be inadmissible and has quashed State Security Court verdicts as a result, independent observers, such as AI, insist that miscarriages of justice nevertheless occur. For example, he notes a case quoted in Amnesty International’s Report of 2005

which was referred to the National Institute of Forensic Medicine which concluded the defendant had not been tortured; AI remained concerned, however, that no judicial and impartial investigations were initiated into torture allegations. He also notes the case of Jamal Darwish Fatayer who claimed that a confession he made was the result of torture by the GID; a co-defendant testified that he had never met Fatayer. Both were subsequently executed. AI also noted that the court sometimes accepted such “*confessions*” extracted by torture even though the Penal Code stipulated that a confession should be accepted as the sole evidence in a case only where it was voluntary, clear and consistent with the crime details.

161. Dr George refers to the independence of Jordan’s judiciary and courts, enshrined in the Constitution. He states that in the great majority of routine cases, the judiciary and courts are independent and citizens can expect fair trials, albeit that the process can sometimes be very lengthy, with frequent adjournments. Where cases involve “*national security*” or threaten the financial or other interests of powerful officials, the picture can be less rosy. He refers to the US State Department Report of 2003: the judiciary was not impervious to family and tribal influence, although there is little of the systematic corruption and crude official interference that typifies the legal systems in other Middle Eastern countries. In Jordan it was much more subtle, and scope for abuse was offered by the system’s structure. Dr George quotes Professor Muhammad Hammouri, a former Dean of the University of Jordan’s Law Faculty and a former Minister of Higher Education and of Culture and National Heritage, as stating that the pressures focus on more delicate cases especially in the State Security Court and the Higher Court of Justice. Though Jordanian judges do not simply wait for the authorities to tell them what to do, Professor Hammouri considers that in politically sensitive cases “*weak judges*” serve their career prospects and that on occasions judges have been transferred in order to influence the outcome in particular cases. He gives the particular example of Farouq al-Kilani who was forcibly retired from the Court of Cassation. It was suspected that this was done in part because he had been a member of the Higher Court of Justice panel which had ruled in May 1997 that amendments to the Press Law were unconstitutional.
162. Dr George contrasts the civil court system, which he considers generally to deliver justice, to the State Security Court, proceedings in which have done much to tarnish Jordan’s claim to be a country that respects the rule of law. Cases in the SSCt are brought by a special state security prosecutor and the court may have two military judges and one civilian judge, although usually it has been staffed by military judges. Cases and trials are normally open to the public although some are open only to the press. Decisions may be appealed to the Court of Cassation which can review both matters of fact and law, and such appeals are mandatory where the death sentence has been imposed. Although the Court’s procedures are based on those of the criminal courts, there are fewer safeguards for defendants. He quotes AI as

asserting that the SS Ct does not provide the same guarantees of independence and impartiality provided by the ordinary courts. Although the Court of Cassation rules confessions obtained under torture to be inadmissible and has quashed State Security Court verdicts as a result, there are examples where it is said that miscarriages of justice nevertheless occur. AI considered that the trial of Fatayer, referred to above, had fallen “*seriously short of international standards*”, noting that his claim that “*confessions*” had been extracted under torture was ignored by both the State Security Court and the Court of Cassation. Indeed, almost all of the report’s background material on human rights as they affect the Appellant’s case most directly is drawn from governmental and NGO sources which we have already quoted.

163. Mr George Joffe has been the Deputy Director of the Royal Institute of International Affairs and is now Visiting Professor in Geography at Kings College London and a lecturer at the Centre for International Studies at Cambridge University where he teaches a post-graduate course on the international relations of the Middle East and North Africa. He has considerable academic experience.
164. Much of the report, whilst of general historical and background interest, does not really advance the case. Mr Joffe says power in Jordan is personalised around the institution of the monarchy and the figure of the King. It is partial, arbitrary, unpredictable; the Jordanian state and Government has faced and continues to face extremely difficult circumstances. Although Jordan’s human rights record may be better than has generally been true of Middle Eastern states, and although it lays claim to being a democratic polity, the reality is that human rights abuses have taken place there and are doing so with an increasing frequency. This worsening in the human rights situation is directly related to the tensions within Jordanian society caused by the 1994 peace treaty with Israel and the King’s open support for that policy, and is amplified by the Kingdom’s new concerns about trans-national terrorism, particularly after three hotels were bombed simultaneously in late 2005 in Amman.
165. Mr Joffe, when considering human rights and the behaviour of the security services largely draws on the US State Department Reports, the Committee against Torture and Amnesty International reports to which we have referred above. There is no need to repeat them. Mr Edge, a further expert, also gives evidence on the structure and procedures of the State Security Court.
166. Mr Joffe explained that NGOs operate under various longstanding, restrictive laws exemplifying bureaucratic rather than repressive control, ie control through legislation, regulation and administrative procedures. The freedom of NGOs has been curtailed because their previous political role has yielded to the licensing of political parties and their other roles require registration and annual reports. They must avoid political activity and their personnel must be approved by

the security services. They cannot operate independently. The creation of the NCHR, headed by a former Prime Minister and security service chief, allowed the closure of the Jordanian Centre for Citizens' Rights which had been too active for the government's liking.

167. This general evidence taken as a whole fully justifies the SSHD's decision not to contest the general thrust of government and NGO reports on the human rights situation in Jordan. We move from that general background to the specific evidence called by the SSHD.

### **The evidence of the SSHD: the signing of the Memorandum of Understanding (MOU)**

168. This was provided in the four statements of Mr Oakden produced between 16 September 2005 and 8 May 2006. We take first the background to the negotiations with Jordan which led to the signing of the MOU.
169. In October 2001, the FCO advised that Article 3 concerns precluded the deportation of terrorist suspects to Jordan or other key countries and it advised against attempting negotiations.
170. Mr Oakden explained that the 2001 advice of the FCO was not given primarily on the basis that assurances would be not be effective, but rather that it was a judgment on a variety of factors made about a month after the attacks of September 2001. For a number of reasons this was not the right time to be pursuing this track with a number of governments. They had had doubts at that stage as to whether such governments would be prepared to give those kinds of assurance and whether they would be adhered to in that climate. This had been a collective judgement taken with regard to a number of countries although there were varying factors for each country. He had not been involved in the decisions on non-deportation at that time.
171. In December 2002 the Home Office reviewed ways to widen the Government's ability to deport people who were a threat to national security but where there were legal barriers to removal, primarily because of the ECHR. In January 2003, a written request was made at official level for the FCO to re-examine its advice of 2001, and to provide an up-to-date assessment of the human rights situation in key countries, including Jordan. In March 2003, an FCO official confirmed that its advice of 2001 remained extant, but it now said that it was considering whether key countries would be willing and able to provide the appropriate assurances to guarantee that potential deportees would be treated in a manner consistent with the United Kingdom's obligations. In May 2003 the Foreign Secretary agreed that seeking specific and credible assurance from foreign Governments in the form of MOUs might be a way of enabling deportation from the United Kingdom, and the FCO undertook to test the feasibility of obtaining

credible and enforceable assurance from a number of countries in the Middle East and North Africa, including Jordan. Later that year it agreed to approach a number of countries to negotiate MOUs governing the return of terrorist suspects.

172. The FCO asked the Embassy in Amman for its view on the prospect of negotiating an MOU with Jordan in July 2003. British officials began work to produce a generic MOU in early autumn 2003 and, in November of that year, the Embassy in Amman was instructed to broach the idea of a framework MOU with the Government of Jordan. A joint delegation of FCO and Home Office officials visited Amman in March 2004 to discuss the proposed MOU, and comments on the draft MOU were submitted by the Government of Jordan in July 2004, at the end of which month the British Government submitted its response to the Jordanian comments.
173. Following the House of Lords derogation decision in *A and others v SSHD* [2004] UKHL 56, bilateral discussions about the MOU were raised to a political level and the matter was raised by the Prime Minister with the King of Jordan in February 2005, and the Home Secretary raised it with the Jordanian Foreign Minister. At these meetings agreement was reached on the principle of an MOU between the United Kingdom and Jordan.
174. Further negotiations took place in Amman in June 2005 and in principle agreement on the substantive terms was reached on 28 June 2005. During those June 2005 negotiations Jordanian officials confirmed that no Parliamentary approval was required to bring the MOU into effect in Jordan. The course of negotiations with Jordan was relatively smooth. Negotiations at official level had progressed slowly in the early stages but once agreement to the principle of an MOU had been reached between the Prime Minister and the King the final text was agreed reasonably quickly. In bilateral contacts since the signing of the agreement on 10 August 2005, the Government of Jordan had reiterated its commitment to implementing the MOU and associated monitoring arrangements in full. The July 2005 attacks in London had added significantly to the Government's general resolve in this area.
175. A copy of the MOU is attached as Annex I to this decision, together with a side letter also of 10 August 2005 from the British Chargé d' Affaires – Amman to the Jordanian Ministry of the Interior, reiterating the UK Government's policy on the death penalty in the context of deportations.
176. The MOU is couched as a document the obligations in which apply equally to removals from Jordan to the UK, and to those from the UK to Jordan. Each is obliged to "*comply with their human rights obligations under international law regarding a person returned under this arrangement*". A monitoring body is envisaged. There are eight specific provisions which govern the proper treatment of those in custody, prompt appearance before a judge and information as to the

reason for arrest or detention, visits from the monitoring body to those in custody, access to consular posts for those not in custody, religious observance, right to a fair and public trial, if charged, before an independent tribunal but with scope for the exclusion of press and public in specified circumstances, and provision for defence facilities, lawyers and calling witnesses.

177. The side letter on the death penalty, whilst containing the UK Government's policy on return where execution is a significant risk, recognises that "*for constitutional reasons*" Jordan is not able to give a formal undertaking in the MOU itself. It records that if someone returned were sentenced to death, "*the British Government would consider asking the Jordanian Government to commute the sentence*". There was no formal response from the Jordanians; there was a debate over whether one had been expected. The terms of the UK letter had been discussed with them beforehand and agreed.

### **The evidence of the SSHD: the monitoring body**

178. The picture in relation to the monitoring body envisaged by the MOU evolved over time. Although in his first statement, Mr Oakden said that a body had been jointly identified by the two Governments, had been approached and had responded favourably at a senior level, it was not then publicly identified and its Terms of Reference had not been agreed. By 30 November 2005, a monitoring body was publicly identified: the Adaleh Centre for Human Rights; the terms of reference were being finalised. Mr Oakden and an FCO Minister, Dr Howells, had met its representatives on a visit to Jordan in October, which had led to an agreement appointing it as the monitoring body being signed on 24 October 2005.
179. However, this was not the body originally approached, and referred to in the first statement. That body was the National Centre for Human Rights. It had reconsidered its position because of "*domestic political sensitivity*". Mr Oakden explained further what had happened.
180. The Appellant's return, as well as the MOU and the monitoring, had become domestic political issues. The constitutionality of the MOU had become an issue of domestic controversy within Jordan between the Parliament and the government and the NCHR did not want to get drawn into it. The question was whether Parliament had to agree the MOU, but the firm view of the Jordanian Government was that they were at perfect liberty to sign this agreement, and had confirmed that it was fully legal from their point of view. It was not an extradition treaty. That was sufficient for the UK Government. They had checked this several times because of the controversy. Mr Oakden was not aware of any challenge to the constitutionality of the MOU in the Jordanian Parliament. The Bar Council in Jordan had raised this same constitutional question.

181. Mr Oakden said that the NCHR decision was not related to the enforcement of the MOU and it had expressed no concerns about that. Mr Joffe's view was that the NCHR decided not to act because reporting to, and receiving funds from, a foreign government could lead to indirect attacks from the government through institutions linked to the government, such as Parliament or the Jordanian Bar Association. We take the view that the Jordanian Government has accepted the MOU with its explicit monitoring and reporting provisions and it would be a considerable act of bad faith if it were not to support but instead to undermine the very agreement which it had entered. This is the implication of the view expressed by Mr Joffe. We see no reason to accept that.
182. After the NCHR had decided not to act, contact was made by the British Embassy with three other human rights organisation with a request to discuss their work on human rights issues in general, and the possibility of joint projects. These were the Arab Organisation for Human Rights, the Mirzan Law Group for Human Rights and the Arab Centre for Human Rights Studies. Meetings were held with the first two. No question had been raised as to whether those organisations would be prepared to act as the monitoring body. The Arab Centre for Human Rights Studies had declined to meet Embassy staff. Consideration had been given to making an approach to the International Committee of the Red Cross (ICRC) but this option was discounted as the ICRC provides its reports in confidence to the State whose institutions are being monitored, which would not have fitted in with the terms of the MOU. Consideration had also been given to using the Honorary Legal Adviser to the British Embassy in Amman who was willing in principle to take on a monitoring role, but this possibility was not pursued once the Adaleh Centre agreed to undertake the monitoring function.
183. Mr Oakden was aware that the Arab Organisation of Human Rights said that it had been approached and had refused to act as a monitoring body, but that was not his understanding at all. The Embassy had wanted to talk with it, and two or three other organisations, not specifically about it becoming a monitoring organisation but to get a sense initially as to whether it had the sort of experience and capacities to make that a subject worth exploring. However, they had not been able even to have that first exploratory conversation because the organisation itself had declined to meet them. The British Embassy had reported to him that they had not got as far as putting any proposal. The Arab Organisation for Human Rights might have understood them to have done so but they were very clear that they had not.
184. The Terms of Reference for its role as the monitoring body under the MOU were adopted by the Adaleh Centre and representatives of the two Governments on 13 February 2006. This agreement sets out how the Adaleh Centre for Human Rights Studies, to give it its full name, "*will monitor the execution of the undertakings given*" under the

MOU. The two Governments undertook *“to support and facilitate the Adaleh Center’s full and unrestricted implementation of these TOR”*.

185. The Terms of Reference themselves are important. They are annexed as Annex 2. In summary, *“key features”* were the independence and capacity of the Adaleh Centre for the task. It has obligations to accompany those returned to where in Jordan they may be going, to maintain weekly contact for the first year with those not in custody and to be accessible at all times to any returned person or next of kin. For those in detention, unannounced visits as frequently as permitted by the MOU should be made; private interviews should be sought with detainees. Monitoring visits should be conducted by experts to detect signs of ill-treatment, and the adequacy of conditions of detention should be ascertained. Medical examination should be arranged if necessary. They should have access to all court hearings *“subject to the requirements of national security”*. Reports should be sent regularly to the sending state, which should be contacted immediately if warranted.
186. The independence and capability of the Adaleh Centre to perform these tasks effectively was subject to some debate.
187. The Adaleh Centre had been established in 2003 as a *“civil, non-governmental, non-profit organisation”*, according to UNESCO, *“to promote the values of human rights in Jordan and the Arab world through capacity building activities for non-governmental organisations and individuals working in human rights, democracy and justice.”* It had carried out training on the International Criminal Court, monitoring trial, human rights monitoring and legal education, and training for Iraqi journalists and human rights activists, according to what its President and founder, Mr Rababa, told Mr Oakden. Its work was essentially project based, but with an objective of improving life for the people of Jordan. Mr Rababa told Mr Oakden that it was independent of the Jordanian Government, received no state funding and was willing to criticise it; but for pragmatic reasons, in order to increase its influence, it maintained and valued constructive relations with the government.
188. There had been a number of meetings with members of the Adaleh Centre. In October 2005 at the time that the agreement appointing it as the monitoring body was signed, the Chairman of its Board of Trustees, who was also the Deputy Speaker of the Jordanian Parliament, and other staff or officers met with an FCO Minister and Mr Oakden. The Chairman spoke reasonable English and another, a lawyer, spoke excellent English. They wanted to expand certain provisions of the specimen Terms of Reference, although their ideas were along much the same lines. There was another meeting shortly afterwards.
189. The Centre had very small offices provided free by lawyers on its board. It had five full-time and seven part-time employees and a number of volunteers. It was hoping to expand. There was no hierarchy among the staff, and everyone shared all the tasks, but different staff were

responsible for different projects. Its work covered a number of areas including some which had no relevance to human rights or its monitoring tasks. It had no medical staff, though it thought that it could access them. It had no core funding, living from hand to mouth and project to project, but had a good enough reputation to have had continuous project funding from its inception. It said that it had worked with Amnesty International; Mr Oakden said that it had been funded by AI, which is not borne out by the meeting notes. Either way, AI wrote to the Appellant's solicitors saying that its contact had been limited to paying the Centre for administrative functions in connection with a workshop organised solely by AI for Iraqi human rights defenders. The Centre may have talked up its role in that training and its connection with AI.

190. The Centre wanted specific help in providing training: for judges and others who would deal with cases involving those deported, for doctors and lawyers who would be involved in interviewing and detecting signs of whether a detainee had been mistreated, and for their own staff who would have to deal with all the bodies involved in these cases. They did not want help in handling the media; their general policy in that context was to maintain a low profile. Mr Oakden had noted that they could hardly have been more serious, enthusiastic or committed, and that remained his view. They wanted support from the UK but not in a way that would affect their independence.
191. They had decided to undertake the monitoring role after internal discussion and discussion with other NGOs inside and outside Jordan. They said that there was a consensus among those NGOs that such monitoring was compatible with human rights principles, as a form of protection. But they knew that AI was strongly opposed to their accepting the role. They kept other NGOs and the press informed of what they were doing. The Centre saw this work as an aspect of a wider move towards improving human rights in Jordan, through contact with the Courts, police and security apparatus.
192. When the Home Secretary had met Mr Rababa and the Chairman of the Trustees in February 2006, the latter had been quite clear about the extent of NGO opposition to the role which the Centre had agreed to undertake. He had defended the decision to a meeting of human rights groups in Beirut. They were willing to undertake it because they thought that it would be an opportunity to protect the rights of detainees in Jordan. The decision had not been based on any money it would get, and had been entirely voluntary. The role would enhance the Centre's reputation in the field and might enable them to expand their work to other countries. Mr Oakden said that the Centre had always been very open with the UK about the views of other NGOs on its role but was committed to doing the job in a very professional and responsible way.
193. The FCO human rights adviser, present at the later meeting in October 2005, advised on what capacity building measures the Centre had to

undertake. Certain functions needed to be separated from each other in a new internal structure, because the monitoring might well take up a great deal of time. Some fairly minor NGO assistance would be useful in that. The sort of training for professionals and briefings to raise awareness for those with whom the Centre would be dealing, along the lines which the Centre had itself set out, would also be useful.

194. Mr Oakden confirmed that the UK Government would provide the training and briefing facilities which were necessary for the Centre to fulfil its role, and had agreed to assist in the review of its working practices and structure. Proposals had already been submitted. He considered that the Centre was firmly committed to its role and would have the capacity and expertise to fulfil it effectively. The financial costs incurred by the Centre carrying out its monitoring functions would be met by the UK Government.
195. By the time Mr Oakden gave evidence, the FCO had provided the Centre with capacity building support to the value of £67,000.00. This had funded additional office equipment and three training events on human rights issues relevant to monitoring. These had taken place in March and April 2006 with the third due to take place in May 2006. The subjects to be covered included the role of physicians in preventing torture, standards of treatment for prisoners, the role of NGOs in preventing torture, the role of the Jordanian judiciary in preventing torture and the role of medical experience and forensic medicine in preventing torture. The UK Government would continue to provide additional capacity building as required.
196. Various criticisms of the Centre were put in cross-examination of Mr Oakden. We have referred to the actual limits of its involvement with AI as compared to the overstatements in the evidence of Mr Oakden and in the comments of its President. Mr Oakden accepted that the Centre had no record, history or experience of investigating and monitoring the treatment of individual detainees or of investigating complaints about their treatment. Its role had been educational, training and informational.
197. He agreed broadly that in Jordan considerable pressure could be exerted by the government on NGOs like the Centre. But he pointed out, as Mr Rababa had told him and it is supported by a report in the Jordan Times of 15 January 2006, Mr Rababa had criticised, with others, the lower house of Parliament for ratifying an agreement made by the government with the USA, shielding Americans from prosecution before the International Criminal Court: this was a policy of double standards.
198. A report of an Amnesty International meeting on torture and diplomatic assurances on 7 February 2006 alleged that the Centre had said that they were *“unwilling to confront security arrangements in their country”*. Mr Oakden said that they had always been fully aware of the approach which the Centre took towards the Jordanian

Government; we have set this out earlier. It seemed to him that there were various ways in which such an organisation could approach its task and he understood why it would wish to take a constructive approach rather than a confrontational one or at least to start from that basis; the National Centre for Human Rights had started off from very much the same position, although experience of abuses had led it into an increasingly confrontational position. Similar considerations might well lead the Centre in that direction, and would be the consequence if there were to be abuses of a returnee who was being monitored by the Centre. He thought it extraordinary if the alleged comment had been posted on the Centre's own website.

199. Although Mr Rababa was a lawyer, he had not made any public statement, so far as Mr Oakden knew, about the use of the State Security Court, nor expressed any private view about its compatibility with human rights law. The Centre had made no public comments about the GID or its record, even though it would be aware of the allegations about the GID's treatment of detainees, the views of other NGOs about those allegations and about the SSCT. The Centre's belief that the Appellant would go into GID detention reflected discussions which he assumed had taken place with the Embassy about what would happen to the Appellant, so that they were fully aware of what their obligations entailed. They would wish to address those concerns in the way in which they conducted themselves as monitors.
200. Mr Oakden could not say who had actually provided the training at the workshops conducted by the Centre so far, which dealt with the detection of physical and psychological signs of torture. Nor were their qualifications or professions clear. Those who attended might include people who would become monitors, as well as people who had no interest in that. The Centre was carrying out a training programme from which it was hoped that it would be able to recruit monitors, but they had not yet been identified. It was not complete.
201. The monitors themselves might not be lawyers, doctors, forensic specialist or psychologists but they needed to have access to capable specialists who had had the training necessary to be monitors. They would send a lawyer if there were concerns about a person's legal rights and if they were concerned about their medical condition they would send a doctor. It would not be cost effective for the Centre to have all possibly necessary specialists on its staff.
202. Mr Oakden did not know how far the Centre had got in identifying specific lawyers or doctors for training for monitoring. He thought that the National Council of Medicine would give expert advice and might even itself be willing to go if a concern were raised.
203. Mr Oakden did not think it was significant for the cooperation of lawyers that the Bar Council said that the MOU was unconstitutional. He did not know whether lawyers were prepared to act as monitors and

agreed that they could not be required to act; but the concerns of the Bar Council related more to the constitutionality of the MOU.

204. It is convenient here to pick up what the Appellant's two experts had to say about the Centre in their Reports. On none of Dr George's six visits to Jordan between 2003 and 2004, was the Adaleh Centre mentioned to him as an organisation he should contact in the course of his researches; he had not heard of the Centre prior to preparing the present report. The Adaleh Centre is therefore, he said, not considered by Jordanians to be a leading human rights organisation. He was told by contacts in Amman that it was not a normal NGO but a "*money making business*". He could not find out more about it, as its website was not functioning and telephone numbers he had been given for the Centre, and individuals said to be associated with it, were either non-functional or on answer phone.
205. Mr Joffe made similar comments: the Centre is not registered as an NGO but apparently enjoys a commercial registration as a law centre (this may explain Dr George's reference to a "*money making business*"). Although this protects it from the vagaries of ministerial control, it opens it to all kinds of legal and fiscal attack in terms of financial rectitude, should the Government wish to pressure it. NGOs in Amman who have dealings with the Centre, particularly those who monitor human rights, argue that it has no experience in this field. He reports allegations that it will collaborate with the Government and that there are family links between its executive director (not Mr Rababa) and the GID, for which Mr Joffe recognises there is no objective evidence. He says there are links between individuals connected with the Centre and the Government. At that level of generality, we would not be surprised.

### **The evidence of risk up to retrial**

206. We turn from the general evidence about the Adaleh Centre to the evidence about the single most significant source of risk which the Appellant faces: arrest, detention and retrial for the two offences of which he was convicted and sentenced. There is no doubt but that the Jordanians will retry the Appellant as is normal for those who have been convicted in absentia and returned to the country in question.
207. On 18 August 2005, pursuant to the MOU, the UK Government asked the Jordanian authorities for details of any outstanding charges or convictions against the Appellant. They replied giving very brief details of the two in absentia convictions: Case 400/1998, life imprisonment on 27 April 1999 for conspiracy to conduct terrorist activities contrary to Articles 147 and 148(3) of Penal Code No 16 of 1960 – this is the "*Reform and Challenge*" conspiracy; the charge of membership of an illegal organisation was dropped as a General Pardon was issued in 1999 for that offence; Case 230/2000, fifteen years imprisonment on

18 September 2000 for conspiracy to conduct terrorist activities contrary to Articles 147 and 148(1) of the same Code – this is the Millennium plot; there was no verdict on the charge of membership of an illegal organisation.

208. Further information was provided in a Note Verbale of 11 October 2005 from the Ministry of Foreign Affairs. Article 254 of the Code of Criminal Procedure 9/1961 meant that the convictions and sentence would be void upon the Appellant's return, he would be retried and resented; sentencing would be a matter for the independent judiciary. "*Thus far*", the Appellant was only wanted on the charges already notified. It was commonplace for sentences passed in absentia to be the maximum, so the new sentences were not in practice greater. This meant that if the maximum sentence had not been passed, no law prohibited a harsher sentence on retrial although a harsher sentence was not the practice. (Mr Oakden had overstated the position in his statement). Mr Oakden saw this as meaning that no death sentence would be passed on retrial. That was one reason why no request for a specific assurance under the side letter to the MOU had been sought in relation to the death penalty.
209. Further questions about the way in which the retrial would be conducted were answered in May 2006 by the Legal Adviser at the Ministry of Foreign Affairs. These are at Annex 3 to this judgment. Evidence obtained by torture was inadmissible; allegations that it had been so obtained were investigated. The evidence from the Appellant's in absentia trials would be evidence in the retrial, plus any further evidence which either side wished to introduce. Decisions at the first trials on the admissibility of evidence allegedly obtained by torture could be re-examined and new evidence introduced. He would be retried by the State Security Court. The military members of that Court were career military lawyers.
210. Although in principle the monitor could be excluded from the court hearings in the interest of national security, Mr Oakden thought that was extremely unlikely to occur in practice. The Jordanians had said that there might be a particular part of the trial in which there was sensitive intelligence and they would not want that to be open to the public, including the monitor. Dr George comments that since the term "*national security*" is defined very loosely and unilaterally by the authorities in Jordan, this means that representatives of the Adaleh Centre might not be able to attend all court hearings involving the Appellant. However no one pointed to any evidence which suggested that any part of the original trials had been held in camera.
211. The UK Government was confident, said Mr Oakden, in the integrity of the Jordanian judicial system, and that the Appellant would receive a fair trial. The UK Government did not have a policy of not deporting someone to a country where the court might accept confessions obtained by torture in cases leading to a life or death sentence. The

MOU was based on a fair and public trial before competent, independent judiciary. It was sufficient for general language derived from the ICCPR, the “*international gold standard*”, to be used rather than anything more specific to a particular case.

212. The charges faced by the Appellant carried a maximum sentence of hard labour for life, but not the death penalty. Subsequent amendments to the relevant Articles of the Penal Code had greatly enlarged the definition of terrorism, and increased the range of offences in which the death penalty “*shall be imposed*”; he would be retried under the replacement provisions which carried a hard labour or life sentence with hard labour but not those which carried the death penalty.
213. Although death sentences had been passed on some other conspirators, no such penalty had been passed on the Appellant. He had not been charged under a provision which carried that penalty; the “Reform and Challenge” conspiracy had led to explosions but not to any deaths; the Millennium plot had been disrupted before the bombs went off and again there were no deaths. Even if the provisions of Article 148.4 could have been invoked on the first conspiracy, it had not been the provision under which the Appellant had been charged. The new provisions would now make the partial destruction of a building in which people were present a capital offence, but that would not apply retrospectively to the Appellant.
214. Those who had been convicted of more serious offences were likely to go to large prisons in or around Amman: Qafqafa or Jweideh. He did not know whether there was a political prisoners wing there, although there is some evidence to that effect.
215. It is convenient at this stage to refer to the expert opinion of Ian Edge for the Appellant, produced on 17 May 2006. Mr Edge is a practising barrister and Co-Director of the Centre of Islamic and Middle East Law at the School of Oriental and African Studies in the University of London, where he has taught and researched contemporary law in the Middle East for the last twenty years, including the law of Jordan. He has provided a short opinion on three particular matters.
216. The first of these concerns the appointment of judges. The appointment of judges to the SSCt under Article 2 of the State Security Court Law Number 17 of 1959 is made by executive decision, this being the normal method by which judges would be appointed as well as removed; Article 2 enables the Prime Minister, as general leader of the Armed Forces, to establish the SSCt and to appoint its judges. The Prime Minister appoints one or more civilian judges on the recommendation of the Minister of Justice and one or more military judges on the recommendation of the Head of the Joint Chiefs of Staff. Unlike other judges in Jordanian courts there are no conditions regarding a military appointee’s legal qualifications or experience. Both the civilian and the military judges on the SSCt can be replaced by

executive decision. Article 3 of Law Number 17 of 1959 empowers the SSCt to try civilians for a number of terrorist offences, including offences contrary to Articles 147 and 148 of the Penal Code. Mr Edge could not controvert published materials reporting that in practice two of the three judges on the SSC including the presiding judge have been military judges.

217. As to prosecutors, by virtue of Article 7 of Law Number 17 of 1959 the Head of the Joint Chiefs of Staff appoints a military officer to serve as the SSCt prosecutor, who therefore holds a military rank as do GID officers, who interrogate detainees, and the military judges. All are answerable to the same military hierarchy.

218. It is provided in Article 63(2) of the Criminal Trial Procedures Code, that an accused may be questioned in the absence of his lawyer *“if rapid action is required for fear that evidence might be lost”*. By Article 64(3):

*“The public prosecutor has the right to decide to conduct an investigation in the absence of the [lawyer] if there is need for haste or whenever he deems it is necessary in order to reveal the truth. His decision in this regard is not reviewable however he must inform those concerned as to when he concludes the investigation”*.

219. As to evidence, out of court confessions of the accused are admissible in the trial before the SSCt and that position is not altered as a result of the evidence being adduced at a re-trial. On a re-trial before the SSCt, other evidence previously adduced before the SSCt is read into the record without necessarily needing to recall the witness. He agreed that the two judgments of the Court of Cassation in the appeals by other defendants in the trials leading to the Appellant’s convictions showed that its approach was to treat confessions as voluntary if made before the State Prosecutor, and he was not aware of a contrary approach.

220. Mr Edge was of the view that the jurisdiction of the Court of Cassation on an appeal from the SSCt was limited to a review function and it did not involve a re-hearing of the case. A translation of the phrase in the State Security Court Law Number 17 describing it as *“a trial court”* was misleading; a description as *“a court of substance”* would be more accurate. The Court of Cassation acts only as a court of review, considering only the legal issues and the conclusions drawn by the State Security Court from the given facts.

221. This view is supported, he thought, by the reference in Article 10(a) to the court having to found its judgments on *“the basis of the materials contained in the case file”* and Article 10(b) whereby if the Court of Cassation is asked by the prosecutor to reverse an acquittal, the normal rule is departed from so that the Court hears a repeat of the evidence.

This review function is in conformity with general practice across the Middle East.

222. Mr Oakden in cross-examination accepted that but for the MOU upon which reliance was placed there would be a real risk that the Appellant would not receive a fair trial. He accepted that with or without the MOU the trial would have a majority of military personnel. He accepted that the Court's composition would not change at all. The State Security Court was the only court before which he could be tried. He would regard that court as independent and impartial. The Appellant would be returning under the terms of the MOU with the spotlight on him and there would be a heavy onus on everybody concerned, the Jordanian Government and the judiciary to ensure that justice was done and seen to be done.
223. Mr Oakden did not consider that trial by Military Court failed to satisfy the requirements of trial by an independent and impartial court. Two military judges, provided that they were properly qualified, should not be seen as a bar to a properly conducted fair trial and he did not consider that it would breach the requirements of a trial by an independent impartial tribunal that the majority of the judges would be military officers. The UK Government had not asked for the re-trial to be before another Court. He drew an analogy with Courts Martial in the United Kingdom, although he had seen reports that the system violated the requirements of independence and impartiality. It did not mean that the British government necessarily agreed with those reports nor that this was an issue on which they would disagree with the Jordanian government. He had not received a formal legal opinion as to whether the Jordanian system was compatible with Article 14 of the ICCPR or indeed Article 6 of the ECHR, and it was not a matter upon which he could give a definitive opinion.
224. He accepted that there had been a number of reports that the State Security Court regularly admitted evidence in the form of confessions and statements and such like which had been obtained by torture or other forms of ill-treatment. Those reports of ill-treatment appeared to have foundation and could not be discounted when it came to assessing risk. He accepted that the number and frequency of reports of abuses in the past had been a matter of real concern, and that those reports continued. The incidence of allegations of abuse had declined in the last several years though there was a steady number of allegations; there had been an improvement on a relatively good general position. The NCHR said that the number of complaints had dropped from 250 to 70. He thought that with the exception of HRW saying that matters had got a little worse recently, the general run of reporting was of a reduction in torture. He did not think it was because people thought that no good came of complaining. He also agreed that there were apparently well-founded reports of incommunicado GID detention without access to lawyers for up to fifty days; and tens of complaints in 2005 of confessions being extracted by torture.

225. Mr Oakden commented that the Jordanians would say that at least a proportion of those complaining did so as a standard tactic. He did accept that some detainees had been hidden during visits by ICRC to GID facilities because they bore signs of torture. He did not dispute that there might well have been incidents of abuse, but was trying to establish the scale. There was also a danger that the focus on individual cases of past abuse could lead to a false perspective of the scale of the problem. Without minimising the gravity of what was alleged in any one case, this was not a situation of “Syrian” proportions: all his information was that this was not a country which had a culture of organised and routine abuse. Nonetheless, problems of abuses were continuing, and the MOU was necessary to show that someone could be safely returned.
226. As Mr Oakden understood the position, a confession made by one of the Appellant’s alleged accomplices would be admissible against him. They had discussed with the Jordanian Government how the process would work but it had said that the judicial system in Jordan was independent and it could not say how the process would unfold. There were no further assurances.
227. Mr Oakden did not accept that they had not explored the actual situation at a re-trial, but he had no memorandum from the prosecutor as to how the case would be presented. He saw that as part of a judicial process in which governments could not interfere. He accepted that such indications were given in extradition cases to see if the trial would be fair, but the MOU satisfied them on that here. The Jordanians had made it repeatedly clear that they did not rely on evidence which they had reason to believe was obtained by torture or ill-treatment. The normal re-trial provisions in the Code of Criminal Procedures, for those convicted in absentia, would apply. The trial would start afresh, in terms of guilt or innocence, as the Jordanians had explained, although the evidence from the first trial remained, including accomplices’ confessions. The May 2006 answers clarified this.
228. Dr George expressed the view that it was difficult to see how there could be any confidence that the trial would be fair by international standards. The SSCt had inadequate procedures and relied upon evidence which had been obtained under duress. The MOU contains a contradiction in seeking fair trial arrangements for a trial before that Court which is highly unlikely to be able to provide one.
229. The Appellant’s team sought to exemplify the risks which the Appellant would face on re-trial by an analysis of the two trials from which he was absent, and in respect of which it had obtained rather more information than had the SSHD.
230. Ms Rana Refahi provided a statement dated 5 May 2006. She is an Arabic speaker and a trainee barrister who had previously been employed by the Appellant’s solicitor as a legal researcher. In the summer of 2005 and January 2006 she had visited Amman in order to

obtain information about the two trials: to attempt to interview lawyers and defendants who had been involved in the trials and to obtain information as to the judicial process before the State Security Court and subsequent appeals. She produced a number of documents such as the written arguments, prosecution case summary and some decisions of the State Security Court and the Court of Cassation. She was able to obtain these materials with considerable difficulty and they were not complete.

231. The 1998 case, the “Reform and Challenge” conspiracy, had had an extended history, involving trial, an appeal, a retrial and a further appeal and then a further return to the State Security Court and a further appeal and retrial. There were 13 defendants in the original trial; the Appellant was number 12 on the indictment; he and two others were absent.
232. The charges against the defendants varied. All were charged with conspiracy to carry out terrorist acts. Almost all faced charges of membership of an illegal organisation. Those were the two charges faced by this Appellant. Some also faced charges of possessing or manufacturing explosives for illegal use.
233. The specific allegations against the Appellant, drawn from the prosecution case summary, relate to contacts he had from England with other defendants. He had been in, it appears, indirect contact with a defendant member of the Movement for Reform and Challenge in late 1997 and 1998 encouraging jihad, including bombing attacks on the government; he encouraged attacks on the American School in Jordan, and police targets. He congratulated the group after the attacks and urged them to continue. A hotel was car bombed. Damage was done, life was endangered but it does not appear that anyone was killed or injured. According to Ms Refahi, the contact appears to have been through an individual who did not attend the trial and could not be found; no defendants knew of him and the lawyers suspected that he did not exist. She reported that it was possible that a defendant had confessed under torture to receiving a call from the Appellant.
234. The Appellant was convicted in his absence and sentenced to life imprisonment by the State Security Court, in a judgment of 29 April 1999. Ms Refahi had not been able to obtain a copy of this judgment.
235. There were three appeals to the Court of Cassation and four hearings in total before the State Security Court, although not affecting all of the defendants. Defence lawyers appealed on behalf of six of the nine defendants originally convicted. As he had been convicted in absentia, no appeals were mounted on behalf of the Appellant. The cases were returned to the State Security Court by the Court of Cassation on the grounds that one particular charge was not appropriate for the alleged offences and after a retrial the same sentences were imposed in the second judgment.

236. Thereafter there was a second set of appeals and a number of sentences were reduced to five years by the Court of Cassation. When the cases returned to the State Security Court on 2 October 2002 six appellants were acquitted. Ms Refahi produced that decision. Subsequently these appellants were reconvicted by the Court of Cassation on the same charges (she also produced its judgment of 29 May 2003) and the matter was heard finally for a fourth time in the State Security Court where the sentences of those defendants were ultimately reduced upon reconviction.
237. It appears that during the course of the first trial before the State Security Court a witness, Mohamed al-Jeramaine or Geghamani, confessed that he and not the defendants had been involved in the attempted bombings. Ms Refahi's understanding was that it emerged that he had already made this confession to the same prosecutor who was conducting the trial of the defendants, but that the prosecutor had not revealed this to the defence. Her understanding was that the description given by him of one of the bombings on the indictment was considerably more accurate than that given by the other defendants. He gave evidence that he had not acted with the defendants, but he was disbelieved. The Court took the view that his confession was false, and demonstrably so, because of discrepancies between what he said about the nature of the explosives, for example, and other technical evidence. Mr al-Jeramaine was executed before the conclusion of all the further appeals, it appears from the various records, for homicides of which he had been convicted in another trial.
238. Ms Refahi's understanding was that the majority of defendants had complained that they were subjected to torture and as a result had made false confessions of involvement in four planned bombings with five separate bomb devices. No doctor saw the detainees during the period of interrogation and at the end of the period of interrogation during which they claimed to have been tortured, the prosecutor took a statement which each signed. No defence lawyers were present during the period of interrogation.
239. Statements from 1998 from the Military Centre of Reform and Rehabilitation show that there was no resident doctor there; a doctor only attended when necessary, but there were doctors at the GID prison. The defendants had not been referred to the doctor "*as their case was handled by the attorney general of the State Security Court*". One of the written arguments for an appellant said that a doctor saw the defendants and gave evidence of obvious marks of torture but had not seen any defendant until the eve of the trial, some five months after the period of interrogation during which they said that they had been tortured had come to an end. The written argument is very robustly critical of the SSCt, and the way in which it considered the issue and evidence about confessions allegedly obtained by torture. The SSCt concluded that the defendants could not prove torture.

240. The second case is generally known as the “Millennium plot” or conspiracy of 2000. There appear to have been 28 defendants, the Appellant being 25<sup>th</sup> on the indictment, along with 12 other absentees. He was charged with the same two offences as in the “Reform and Challenge” case. Others were charged with possession of or manufacturing explosives, weapons offences, forgery and false passport offences. The case alleges a conspiracy of some scale to cause explosions. The Appellant’s part was said to have been the provision of money for a computer and encouragement through his writings in books found at a defendant’s house. The defence case was that any conspiracy was targeted at Israel or its occupation of Palestinian territories. This was also the subject of several trials/retrials and appeals in a sequence similar to the first.
241. Most defendants were convicted on most charges, some were acquitted of some charges and some of all charges. Appeals against convictions were to some extent successful before the Court of Cassation which remitted the cases to the SSCt, where their convictions were largely repeated. Abu Hawshar and five others, including two absentees, were sentenced to death and some others were also sentenced to death as the required maximum sentence; but the Court mitigated the sentence to life with hard labour, as it was empowered to do, on all but Abu Hawshar and Samar. Other lesser maxima were also mitigated to lesser sentences on similar cases. A number of the offences fell within an amnesty, which related to all cases from 1998 to 1999 but did not include the offence of conspiracy.
242. The central aspect of the basis of the defendants’ appeals was the claim to have been tortured during 50 days of interrogation and detention during which they were denied access to lawyers. Such denial of access is permitted in circumstances already set out under Article 63 and 64 of the Criminal Court Procedure Code. Ms Refahi’s understanding was that part of the evidence against the Appellant emanated from his co-defendant Abu Hawshar as a result of a confession extracted by torture. The detainees had been interrogated for over 40 days and were then in interrogation custody for 10 more days in which marks of ill-treatment would fade; only at the end of that further period were they allowed to see defence lawyers. Defence lawyers told Ms Refahi that if there was a fingerprint at the bottom of the page, it tended to be a clear sign that it was a false confession; it was common practice whilst taking a statement under torture to make the defendant sign and fingerprint the bottom of each page. A signature would suffice but a defendant making a false confession might falsify his own signature whereas a fingerprint prevented him from retracting a statement later. Abu Hawshar’s confession was signed and marked with his fingerprint.
243. Ms Refahi interviewed defendants from the trial who were no longer in prison who also alleged that they had made confessions as a result of torture. None of them had been released as a result of the court acknowledging that the confessions were unsafe as having been taken under torture. One defendant told Ms Refahi that his “*confession*

*statement*” was prewritten and was not a true account of what he had said during the 50 days of interrogation. He had not read the final document but had signed pages on request. He said that in addition, in his case, pages of significant confessions had been inserted into his statement and he had not even signed them.

244. Other defendants told her that they had signed confessions as they were assured that if they did so they would be released. They had suffered significant injury through ill-treatment while tortured. They were not seen by their families until some 60 days after their first detention and after their release from interrogation.
245. A number of defendants had been seen by fellow prisoners at Qafqafa prison when they arrived for the interrogation. Evidence at the trial was given by members of the relevant families and by a fellow prisoner. The SSCt held that their evidence was unreliable as it was contaminated by self-interest.
246. Except for Abu Hawshar’s defence lawyer, Mr Atallah, none of the defence lawyers in the two trials were willing to make a formal statement about their involvement in either case. They had expressed fear of being identified as the source of information or material. In a letter dated 25 January 2006, from Mr Atallah to the Appellant’s solicitor, he refers to written evidence being put in, proving that the defendants were beaten and tortured during interrogation. He gives examples, including reference to a medical report and complaints made on behalf of the defendant Raed Hijazi, and personal testimonies by the families who had observed scars and bruises on the defendants, and statements by defendants.
247. Ms Refahi had been unable to achieve the compilation of a complete record of all the relevant trials and appeals. Though she had worked with lawyers, NGOs and accused people in a number of countries and circumstances where the allegations were similar and equally serious, she had never had expressed to her the kind of concerns and the level of fear exhibited by the defence lawyers during her researches into the background for these trials in Jordan. It had proved very difficult to obtain material, even material that might be considered as uncontroversial.
248. Amnesty International, in a public statement of March 2006, calling on Jordan to stop executions and to investigate all allegations of torture, said that Abu Hawsher and another who had been sentenced to death and Hijazi had all been tortured; confessions and statements against them had been obtained by torture; they had been held incommunicado and their relatives had seen the marks of torture when they were first visited. Allegations of similar treatment in other cases were made, including the murder trial for the killing of Lawrence Foley, which had led to two executions, and another in which the US had returned to Jordan a man arrested in Iraq. AI said that there had been no medical examination or investigation of any of these allegations.

249. Mr Oakden was aware that defendants in these two trials had made allegations that confessions had been obtained by torture, including ones which incriminated the Appellant. He agreed that statements and confessions of alleged co-conspirators from the first trials would be admissible at the retrial. But he said that its admission could be challenged; the SSCt acquitted defendants, convictions were overturned on appeal and sentences reduced. He had not discussed with the prosecutor how the evidence of Abu Hawshar would be handled, particularly as giving untainted evidence for the defence while under sentence of death would have its difficulties. The retrial would however be under the spotlight and in full accord with the Jordanian penal code and law; he could not intervene in that. That was how any question of the admissibility of evidence obtained by torture had to be handled.
250. Mr Oakden could not say whether or not detainees had been seen by doctors during the period of interrogation. He was not aware that it was the approach of the Court of Cassation to accept confessions as satisfactory if made by defendants in front of the prosecutor but in the absence of their own lawyers; he was aware that the death sentence could not be passed on the basis of a confession obtained by torture.
251. The Court of Cassation in the “Reform and Challenge” conspiracy held, in response to a ground of appeal that the defendants had not had their lawyers present during interrogation by the Public Prosecutor of the SSCt, that the minutes of interrogation showed that they had been told of their right to remain silent about the charges unless their lawyer was present.

### **The operation of the MOU**

252. Mr Oakden gave evidence orally about how the MOU would operate in practice. On arrival in Jordan, the returnee would have a full medical examination at the airport by one of Adaleh’s own independent doctors, and the President of the Centre would travel with the returnee to where he was being taken. Contact thereafter would be kept with someone described as a “*next of kin*” who could be any individual nominated by the returnee.
253. The Appellant would be taken to a GID detention facility before trial. He would be brought before a court in line with Jordanian domestic provisions which gave the police 48 hours in which to notify the legal authorities of an arrest, and formal charges then had to be filed within 15 days of the arrest. But prosecutors could and regularly did ask for and obtain extensions of 15 days, up to a maximum of 50 days. So, compatibly with Jordanian law, a person could pass 50 days in detention in a case of this sort without going to court. In Mr Oakden’s view however, it would be very extraordinary if, after all the preparation for the Appellant’s return, the Jordanians took 50 days to

charge him and that would not accord with either Government's understanding of what "*promptly*" meant in the MOU. The understanding that the British Government had with the Jordanian Government was that "*promptly*" would mean a matter of a few days, not 50; it meant the one to two days reflected in the 48 hours notification period. This picked up on Article 9.3 ICCPR language. That assurance was not in writing but the quality of the relationship between the two countries did not require them to write down every provision for every eventuality.

254. Mr Oakden agreed that before trial while the Appellant was being interrogated or questioned by the GID in its detention centre, he did not have a right of access to a lawyer under the MOU or under Jordanian law. The US State Department Report for 2005 did show that there were periods of up to 50 days, during which an individual might not have been able to see his lawyer. He expected the Appellant however to have a lawyer when brought "*promptly*" before a Judge, and to have been allowed prior consultation with the lawyer. The combination of MOU provisions, notably paragraphs 7 and 8, would ensure prompt access to a lawyer after arrest.

255. Mr Oakden was of the clear view that the spirit in which the MOU was approached and drawn up with a negotiating group which included the GID, required visibility and access for the Appellant's lawyers while he was in pre-trial detention. That approach could not change. The Jordanians would not say that they would be extending to the Appellant privileges not enjoyed by others. Paragraph 8 of the MOU referred to the returned person having adequate time and facilities to prepare their defence and went on to speak of legal assistance and so forth. If one were to have adequate time and facilities to prepare a defence then that implied that they would see a lawyer in good time and that did not mean only on the day before the trial. There had been discussion about including access to a lawyer in the MOU, although he did not remember it ever having been in a draft. He recalled that the British Government had said, and the Jordanians had not objected to the proposition, that there should be access to lawyers, but there was not a particular discussion on the point. There was a right to trial representation and to access for its preparation, at public expense, if necessary in serious charges. They had approached it on the basis of trust and mutual confidence under an umbrella agreement that did not try to specify each and every right in detail. Their focus in the negotiations was more on the presence of qualified monitors during the pre-trial period rather than on the presence of lawyers.

256. Mr Oakden agreed that a number of bodies expressed concern about the GID's resort to torture. But the GID had been represented on the body with which the MOU had been negotiated and agreed; it had in reality signed up to its implementation. A lot could happen in GID detention in a matter of hours when a person was being questioned, and excuses could be made for injuries if there were no independent witness. But a properly trained monitor should be able to pick up any

signs of mistreatment. Such a monitor should also be able to pick up whether a detainee was falsely saying that all was well to avoid renewed ill-treatment.

257. When monitors went to the place of detention, the lawyer concerned would be well equipped to observe and interact with the individual; there was also provision for private discussions with him. In practice therefore there would be an informed view of how he was being treated. They would also have access to legal advice. Paragraph 4(g) of the TOR provided for the monitoring body to obtain as much information as possible about a detainee's circumstances of detention and treatment, including inspection of detention facilities, and to arrange to be informed promptly if the detainee was moved. Paragraph 4(b) provided for qualified monitors to visit all detainees frequently without notice.
258. Mr Oakden expected that the Appellant before return would have expressed a wish to see the monitors, and if a monitor was told that the Appellant, in prison or GID detention, had said that he did not want to see him, the monitor would then report this to the Centre, which would report to the UK Government. The Government would take the matter up very firmly and urgently with the Jordanian authorities. The Centre would also tell the next of kin or nominated contact. He had trust and confidence that the Jordanian authorities would do what they said they would do.
259. The monitors and the UK Government would be extremely sensitive and alive to any suggestion that a brush off was occurring. If they were told that for reasons of security the Appellant had been moved to another location, they would want to know to where and would want to see him there, as no doubt also would the ICRC. It would not take long for communications to take place and for such matters to be checked. Telephones worked perfectly well in Amman and the British Government had extremely good contacts with all levels of the Jordanian Government and with its Security Forces.
260. Mr Oakden thought it would be extraordinary if, in the circumstances under which the Appellant would be returned, the first person under this MOU, under intense international press and NGO scrutiny, the Jordanian Government were not to be scrupulous in the way in which it ensured that the Centre could see clearly how the Appellant was treated. The TOR gave access to all places of detention. It was not realistic to suppose that the GID, with the complicity of the Jordanian Government, would in effect conspire to evade the MOU. The Jordanians had throughout made clear their commitment to making the MOU work.
261. There was nothing in the MOU giving a right to a detainee to have a medical examination or treatment by a doctor of his choice. The provision for a medical monitor would give an independent medical view of his condition, but the monitor could not say that he wanted the

detainee examined medically by a doctor of the Adaleh Centre's choice. The TOR only required that monitors arrange for medical examination to take place promptly if they had any concerns, but it did not say that a doctor of choice would carry out the examination. The Centre could not insist on treatment other than through the prison medical facilities. However, if a properly trained monitor considered a detainee was not being properly treated medically, he would raise that concern with the Adaleh Centre and the UK Government which, through the Centre, would want reassurance given on the person's medical condition. If, despite a GID medical examination, the monitor continued to have concerns and the Jordanians continued to obstruct the resolution of those concerns, then the Adaleh Centre would want to find another way of reassuring itself about the returnee's treatment.

262. Visits were not expected to be more than fortnightly, but in the early stages the Centre's plan was to visit more frequently; it contemplated three visits a week. If the person was being treated well and there were no concerns, there might be no need for them to visit more frequently than every fourteen days but if there were a need, more frequent visits would occur.

263. Dr George takes the view that he would not expect the Appellant *"to be treated other than correctly in the period before his trial at the State Security court and in the months immediately following his near-certain conviction. Conscious of the intense public interest there would likely to be in his case, the Jordanian authorities would not wish to suffer the domestic political consequences of being accused of colluding in Mr Othman's maltreatment or torture-especially as in the eyes of the Jordanian and wider Middle Eastern public Mr Othman's forcible return to Jordan will very likely be viewed as a further example of the Jordanian regime's subservience to the United States and United Kingdom whose record in the region is very widely disparaged. In my opinion, any maltreatment of Mr Othman would be more likely after the immediate public interest in his case has subsided."* He does not take that view because of any belief that the MOU would have any effect. It is the period after re-conviction for which Dr George concludes that, based on the numerous allegations of maltreatment, the Appellant would face a serious risk of maltreatment, in either a GID prison or in one of the large prisons, Jweideh or Swaqa, where those convicted of terrorist offences go. The maltreatment would either be by prison guards or by the GID.

### **Later evidence**

264. On 6 July 2006, the Commission was sent a press statement issued by the UN Special Rapporteur on Torture on his 5 day visit to Jordan in June 2006. Mr Nowak met a wide range of officials, including members of the GID and PSD, Ministers including the Minister of the Interior, and NGOs and diplomats. There were two *"notable and regrettable*

*exceptions*” to the full co-operation which he had had in visiting prisons, carrying out unrestricted inspections and talking privately to whom he wished. And he acknowledged the significance of the invitation from the government to him to come and inspect the position in Jordan. First, he had been abruptly denied the right to speak to detainees of the GID in private, contrary to the agreed Terms of Reference approved by the government for his visit. Second, the Criminal Investigation Department tried to obstruct his visit and to hide evidence.

265. He concluded: “*On the basis of all the evidence gathered, including serious allegations substantiated by forensic expertise, and taking into account the efforts of both authorities to obstruct the fact-finding of the Special Rapporteur, he cannot but conclude that torture is systematically practiced by both the GID and the CID.*” This was especially so because those were the two facilities most often cited as the most notorious centres of torture.
266. Mr Nowak’s statement also said that allegations of beatings had been received from Jweideh and Swaqa prisons; one rehabilitation centre was more a punishment centre. There was a general impunity for torture and ill-treatment in Jordan. Primacy is placed on obtaining confessions. There was no sense of responsibility among public officials that allegations of torture had to be investigated. There was no functioning mechanism for reporting and seeking redress for torture. There was a chorus of denials that torture took place; but despite providing clear and credible allegations of torture, no steps could be demonstrated to have been taken to investigate or even to document injuries sustained by detainees. The police and security forces operated outside the common legal framework, and were left to investigate and prosecute themselves before their own special courts. There had been virtually no prosecutions and the actions taken, loss of salary or dismissal, were only tokens.
267. The SSHD responded to the Special Rapporteur’s statement on his June 2006 visit by strongly welcoming his mandate and the invitation to visit Jordan, but it did not alter the UK Government’s view that the Appellant could safely be returned to Jordan in the light of the arrangements made. He pointed out that the conclusion that torture was systematically practised in Jordan was at odds with the views of both Dr George and of Mr Oakden, in evidence which we have already referred to. Dr George did not think there was a culture of torture in the GID. Mr Nowak was wrong to say that there was no crime of torture: a law had recently been passed following a Cabinet decision of 30 May 2006. It took issue with the comment that virtually no criminal prosecutions had been brought against police: a number had been charged with inflicting intentional harm to obtain a confession or information which carried a prison sentence of up to three years. The NCHR reported that in 2005, 11 police officers had been sentenced to prison or dismissed.

268. The Jordanian Government had said in response to the visit that it would investigate every allegation of torture. The UK considered that the visit and the Jordanian response showed the Jordanians determination to respect human rights. The press statement could not be regarded as the definitive account of the human rights situation in Jordan. The Special Rapporteur had also visited 4 MPs, not referred to in the press statement, who were being held in prison. They were being well-treated according to the Special Rapporteur. This, he said, was because of the media attention which the government knew would attach to what they said. The SSHD relies upon this media effect as applying to the Appellant on return as well.

### **Other offences and the death penalty**

269. No assurance had been sought or given that the Appellant would be tried only for those matters for which he had already been convicted in absentia. The extradition law concept of speciality did not apply to prosecutions after deportation. There was nothing to stop the Jordanian authorities from prosecuting the Appellant for other matters. If there was evidence about other acts which the Appellant had committed before removal, the UK Government would not want to stand in the way of questioning or a trial.

270. Mr Oakden was unable to help with the possible impact which a draft National Security law, not yet before Parliament, might have on the Appellant were it passed. It was alleged to provide for indefinite detention without charge of terrorist suspects. The real position was less draconian, providing for renewable but short term residence orders.

271. Mr Oakden accepted that if other matters for which the Appellant was then prosecuted carried the death penalty, he could, consistently with the MOU, be sentenced to death. However, if he were convicted of a capital offence in respect of acts done before his deportation, British Ministers would have to be consulted. Mr Oakden's view was that in those circumstances the UK Government would ask the Jordanian Government to commute that death sentence. The Jordanians were in absolutely no doubt about the United Kingdom's position on the death penalty. The Government would still make this position clear at the political level even if the Appellant were convicted of offences committed after his removal. Mr Oakden accepted that the Appellant could in theory be executed for a capital offence, although in practice he thought it extremely unlikely.

272. The "*constitutional reasons*", referred to in the side letter of 10 August 2005, as to why no formal undertaking could be given that the death penalty would not be imposed, related to the separation of powers between the judiciary and the executive, and fettering the powers of the courts. It was a matter for the courts whether the death penalty could

or would be imposed. They could not say that the Appellant would not be charged with a capital offence.

273. If the death penalty were imposed, they would be asking the executive to commute the sentence, not the courts. They could not interfere with a decision, for example by the prosecution, to charge him with an offence that carried the death penalty, nor with the decision of a court imposing the death penalty. They would at that stage consider asking the Jordanian Government to commute the sentence. There were four stages through which the matter would go; to the Court, to the Ministry of Justice, to the Council of Ministers and then to the King. The King had the right to grant a special pardon or remit any sentence, but any general pardon was to be determined by a special law. Under Article 39, a death sentence could be carried out only after confirmation by the King. Only the King could commute the death penalty; it could not thereafter be reinstated. In practice, the execution of the death penalty required confirmation by the King. Requests could be made at a number of stages. Mr Oakden found it very difficult to envisage circumstances in which they would not want to make the request.
274. The Jordanian Government itself had not committed itself to commuting any death penalty imposed on the Appellant. As a matter of principle the Jordanian government had explained that it would not want to ask the King to fetter himself in advance, in an individual case. The King's right under the constitution to make the decision in an individual case could not be fettered. Although there was no reason in principle why he could not say in advance what he would do, he had not been asked. Mr Oakden said that the Jordanians were sending a very clear signal and it was very hard to see that they could go further given their constitutional position. He agreed that for the side letter to make sense it had to be supposed the specific assurance was in fact from the King, because the Council of Ministers could make only recommendations. He said that the assurance would come from the Jordanian government with all the authority that it would need to have to give such an assurance. The Government spoke with the authority of the King. He said more in closed.
275. No assurance had been sought with respect to the death penalty because the UK Government was confident in the light of all that it had been told by the Jordanian government, that the Appellant would not face a significant risk of the death penalty on return. They said they only wanted to try him on those two charges. In the unlikely circumstances of the Appellant being convicted and sentenced to death on new grounds relating to pre-return matters, they had the capability and intention of asking the Jordanian government to commute the sentence. They had not asked for a hypothetical assurance in a hypothetical situation, because they regarded it as most unlikely. In the end it did come down to a question of trust, and the UK Government had trust and confidence, against the background of its very strong relationship with the Jordanians, that they would fulfil the

MOU. No letter of assurance about the death penalty was therefore sought.

### **Compliance with the MOU**

276. The question of whether the Jordanian Government would be willing in the future and able in reasonably or realistically foreseeable circumstances to comply and enforce compliance with the MOU by its officials was contentious. The political climate and diplomatic relationship between the United Kingdom and Jordan would be relevant to that question, and also to the existence of any sanction for its breach, so as to secure compliance.
277. Mr Oakden emphasised the very good longstanding relations between the United Kingdom and the Hashemite Kingdom of Jordan. Jordan is a valued partner in the Middle East; the relations between the two countries are wide-ranging and include political dialogue, defence and security cooperation, commercial links as well as education and social interchanges. Dr George makes the same points, although he notes that the USA has largely supplanted the UK's historic role as the guarantor of the regime: Jordan is in practice part of the West, although officially non-aligned.
278. In reaching this arrangement with the Government of Jordan, the UK Government had taken into consideration the long tradition of friendly relations between the two countries. It believed that placing the agreement in the context of the countries' bilateral relations reinforced the commitment of both parties to respect it. At the most senior level and at all levels, politically and technically, the Jordanian authorities had stated their full commitment to implementation of the MOU and monitoring arrangements. The clear expectation, which had been expressed at the highest level in Jordan, was that both the United Kingdom and Jordan would comply with their MOU commitments. The signature of the Jordanian Interior Minister had been on behalf of the whole government.
279. The agreement could not be enforced legally by the Appellant or by the UK Government but Mr Oakden said that he would be very surprised if the Jordanian Government decided not to respect it. Conversely, the parties were not approaching the MOU as if it were to be the basis for legal argument about narrowly defined obligations, which one or other could seek to get round. Commitment had been firm on both principle and practice. It was that firmness of commitment at all levels which had persuaded Mr Oakden that the MOU would work as intended.
280. In oral evidence Mr Oakden accepted that in general and in Jordan the situation was quite capable of dramatic change if there was political instability, conflict or further terrorist outrages. He did not however accept that if that happened the MOU would be swept aside. What would not change was the underlying strength of the UK/Jordanian

relationship which was founded in this case on a bilateral agreement between them and was politically binding. It would not be discarded because of a change of circumstances. Like Dr George, he thought that King Abdullah's position was stable and secure. It was a commitment from the whole Jordanian Government made in good faith. The Jordanians had made clear their commitment both to putting the arrangements in place and also crucially, to ensuring that they worked in a way that both sides intended. The reasons why he had such confidence that the Appellant on return would not be ill-treated were firstly because of the specific arrangements that they had put in place and for which preparations were being made, which provided a very firm basis upon which the Appellant could return; and secondly because of the commitment of the Jordanian Government and all of the organisations which depended upon it and reported to it, which had been very firm both on the principle and on making it work in practice.

281. There were incentives other than fighting terrorism for Jordan to adhere to the agreement, but Mr Oakden said that that was the main reason. There were many facets to counter-terrorism but he thought that that was the central driving force within the Kingdom of Jordan. The willingness of other countries to co-operate and support Jordan, would be influenced by its position on a number of areas including human rights. The fewer human rights concerns that there were, the easier it was for there to be a fully constructive relationship, and so clearly the UK, the USA and others would all like to be working in that direction.
282. If a breach of the MOU were alleged, the UK Government, said Mr Oakden, would expect to receive an immediate report of the circumstances from the Adaleh Centre. It would have the right to conduct interviews with the Appellant in private, to arrange a medical interview at any time and would ascertain whether he was being provided with adequate accommodation, nourishment and medical treatment, as well as being treated in a proper and humane manner. The likely mechanism was that if there were serious concern the Adaleh Centre would telephone the political staff of the British Embassy but it would be elevated to the level of the Ambassador extremely quickly, within minutes, because of the gravity and importance of the issue. The Adaleh Centre would then make its own representations to the Jordanian Government, initially to the Ministry of Interior with whom they had co-signed the agreement in the TOR; representations could be made equally to the Ministry of Foreign Affairs and no doubt to other concerned organisations as well. The UK Government worked very hard on such an issue. Whether it was raised publicly rather than privately was a political matter for Ministers; he expected the initial approach to be private. Mr Oakden accepted that the MOU did not say that if there was a complaint, there must be an investigation and explanation given to the UK Government. It was clearly consonant with the MOU however that an apparent abuse would need to be looked into and rectified.

283. As Dr George points out in his report, there is no provision for sanctions against Jordan; he concludes that there was therefore no reason for the UK to take any steps on being informed by the Adaleh Centre of a violation of the MOU. Mr Oakden however said that failure to comply with formal political commitments in an MOU could do serious damage to diplomatic relations between the signatory states, and would harm a state's reputation as a reliable international partner. The Appellant was a well known figure in the United Kingdom and in Jordan, and his case had been well publicised. Allegations of a breach of the conditions in the MOU in his case would inevitably attract considerable publicity and damage the international reputations of both governments.
284. Mr Oakden said that if there were a major problem of delay in responding to a serious concern, the UK Government had levers which it could use, with the proviso that the steps would be for ministers to agree at the time, from its bilateral relationship with Jordan across a very wide range of military, economic, cultural, tourist and similar forms of cooperation. In other words, the basis of the relationship and the obligations went very much wider than the MOU and was founded on many years of working very closely together. The depth of the intelligence relationship was also very real. The Jordanian government at all levels had made it clear that they were committed not just to putting the arrangements in place but to making sure they worked. The Jordanians had a very strong interest with the British in showing that the agreement worked and that when their government signed up to something, they carried it out.
285. As to how far the United Kingdom would be willing to damage those wide ranging bilateral relations in the Appellant's interest, Mr Oakden replied that the UK Government attached a very high importance to human rights. They were a good deal more active and did a good deal more than sometimes they were given credit for, in trying to advance that commitment in practice with other countries. Very often that was best done in a cooperative way and in private because on the whole governments were better at doing what they did not necessarily want to do, if they were encouraged to do them rather than being pressurised to do them. In the Jordanian context, there would be a heavy onus on the UK Government to show that the MOUs were not just pieces of paper and to show that they were effective, not least for any future deportations. There was a lot behind the phrase "*good relations*" to which he was confident the Jordanian government would attach real weight, and quite a lot that they would lose if the relationship were to deteriorate. They were men of honour and he did not believe that they would lightly not implement the commitment they had given or turn a blind eye whilst others did not implement it.
286. The particular incentive to comply with the MOU so as to achieve the return of hostile nationals and put them on trial and imprison them did not appear to exist in this case; there was not a string of extradition

requests, nor a series of requests which had been refused because of Article 3 ECHR concerns.

287. This was not a case either in which Jordan was particularly keen to have the Appellant back in view of what Mr Oakden described as his “rather chequered record”. They had not been willing partners in the MOU in order to get their hands on him. Their willingness had been because they recognised their responsibility as his country of nationality and wished to work with the UK and others in countering terrorism, which was a threat to them all. This work would be strengthened by international co-operation.
288. The fact that the Appellant was a Palestinian and an Islamist extremist had a relevance to how he would be treated. A small minority of Palestinians and Islamists in Jordan had welcomed the September 2001 attacks on the USA; the Appellant was known for his record of support for and belief in the legitimacy of a particular and violent brand of Islamist extremism. He was also seen as an important kind of spiritual leader. There was a range of opinion in Jordan about him, from the small minority which agreed with him, to a larger number who had a sneaking regard for him because of his opposition to the USA, the UK and to the Jordanian Government. The Jordanian Government would always have to balance its support for the West, its own fight against Islamist terror in a Muslim country, while desirous of maintaining solidarity with other Arab countries and with a large Palestinian population not always reconciled to its situation. The Appellant’s political/religious views were hostile to the state of Jordan, and he had the support of a number who were also wholly opposed to the state and constituted a threat to it. But they did not pose a real threat to it or to the regime. Nonetheless, that latter aspect made the MOU important so that there was “visibility” of a detained Islamist extremist.
289. Mr Oakden acknowledged a concern amongst states whose origins lay in an imperial or mandated past about interference or seeming interference from a former colonial power. Mr Oakden did not think that that cause for sensitivity, resentment or a stand against interference would affect adherence to the MOU or its enforcement, because of the Jordanian Government support for human rights, and a fully functioning judiciary. This could be seen in the national agenda which King Abdullah was taking forward, which had a section on judicial reform, and his wish to modernise and make more effective the whole judicial sector and Jordan’s upholding of human rights standards. Though there was a countervailing pressure in the sense that a significant body of the population might ask why the Appellant was perhaps getting favoured treatment when people like him had been setting off bombs, it was necessary to consider that there were very strong pressures on the other side, including Jordan’s wish to be a country which came up to international standards in all respects.

290. Dr George considered that it was established that, especially in the areas of security and “*terrorism*”, the Jordanian authorities did not respect international, legal and other standards, and paid scant heed to the protests of respected international human rights organisations such as Amnesty International, and Human Rights Watch. He saw no reason to suppose with any great confidence that the Jordanian authorities would take effective remedial action in respect of any violations of the MOU reported to them, or even why the UK government need take any steps.
291. Breaches of the MOU would not require the UK to take steps and there are no sanctions. Dr George did not believe that the Jordanians would take any notice of breaches reported by the Adaleh Centre, because of their established record of ignoring their international human rights obligations and the protests of NGOs. It was at root a dictatorship albeit a relatively benign one. There were no meaningful guarantees in the MOU and monitoring arrangements that the Appellant’s human rights would be respected. There was “*every likelihood*” that he would be subjected to an unfair trial and “*a real risk*” that he would suffer maltreatment including torture. Dr George does not suggest that there is a risk of the death penalty.

### **Other evidence about the use of assurances in deportations**

292. The Appellant relies upon a number of bodies and reports which express general opposition to deportation with assurances.
293. Mr Nowak, the UN Special Rapporteur on Torture, issued a report dated 23 December 2005, section 3 paragraph 31 of which sets out his views on recent developments relating to deportations with assurances. His main points are:
- (a) international law prohibits torture absolutely;
  - (b) assurances are sought from states with a proven track record of torture, which is what makes the assurance necessary in the first place; in most cases those in respect of whom assurances are sought are in high risk groups such as Islamic fundamentalists;
  - (c) the relevant parties are both usually bound already by international obligations not to torture people, and seeking specific assurances of exceptional treatment for a few, rather than seeking to hold the states accountable for their violations of those international obligations leads to double standards in relation to other detainees;
  - (d) assurances were not legally binding and why states which already breached their obligations should comply with bilateral assurances was “*unclear*.” An important issue was whether the body which provided the assurances had power to enforce them vis a vis its own security forces;
  - (e) even the best internationally provided or agreed monitoring provisions provided no guarantees against torture;

- (f) the individual had no recourse if the assurances were violated;
- (g) there were no sanctions and the perpetrators of torture were not brought to justice;
- (h) both states had an interest in denying that returnees had been tortured; which might lead to political pressure on the monitoring organisation particularly if it received state funding from one or other party.

294. The Special Rapporteur regarded assurances as merely attempts to circumvent the absolute prohibition on torture and urged the Council of Europe to urge its member states to refrain from seeking them from states with a proven record of torture.

295. These concerns were echoed by Ms Arbour, the UN High Commissioner for Human Rights, in a speech at Chatham House on 15 February 2006. She considered it unlikely that a post-return monitoring mechanism set up explicitly to prevent torture and ill-treatment in a specific case would have the desired effect: these practices often occur in secret, with the perpetrators skilled at keeping such abuses from detection. The victims, fearing reprisal, were often reluctant to speak about their suffering, or were not believed if they did.

296. Mr Oakden considered that Mr Nowak's concern that it was "*unclear*" why states which breach international obligations should comply with assurances, involved a misunderstanding of how an MOU worked in practice. States look not only to the legal status of international documents when deciding their behaviour but to the whole political context. The UK Government was party to many non-legally binding bilateral MOUs with other governments on a diverse range of subjects. This MOU, while imposing less than a legal obligation, was made with respect to one state only, with an exceptionally strong political commitment on the part of both governments; it also included the monitoring arrangements. United Nations human rights treaties might constitute legal obligations between each state party and every other state party in the world, but their enforcement mechanisms are relatively weak. He stated that the protection provided by the MOU was more specific than multilateral human rights treaties, related to identified individuals and referred expressly to their treatment.

297. Mr R K Goldman, the Independent Expert on the Protection of Human rights and Fundamental Freedoms whilst Countering Terrorism, reported to the UN Commission on Human Rights in February 2005. He expresses reservations along much the same lines as the Special Rapporteur, adopting similar earlier expressions of the Special Rapporteur's views. Assurances should not be used to circumvent the absolute obligation not to expose someone to a risk of torture. Were assurances to be used, instead of the rudimentary ones which had sometimes been seen, minimum requirements would be: prompt access to a lawyer, recorded interviews with those present being identified, independent and timely medical examinations, prohibition on incommunicado detention or detention in undisclosed places,

independent and appropriately qualified monitors conducting prompt, regular visits which included private interviews.

298. Human Rights Watch and Liberty have expressed their opposition to deportations with assurances. In a letter to the Prime Minister in June 2005, they alleged that such deportations to a country where the deportee would be at risk of torture would be incompatible with international obligations. They say that diplomatic assurances and post return monitoring have been shown to be ineffective, either as a disincentive to torture or as a mechanism of accountability. They are unlike assurances that the death penalty will not be used, because torture is clandestine and deniable. There is no reason to suppose that a government which breaks its legally binding obligations will keep to a non-binding agreement. They point to others who agree with them. And in January 2006, a broad consensus was reached at a meeting of NGOs in Beirut that deportations to countries where torture took place should not be undertaken on the basis of assurances; the Adaleh Centre's willingness to act as monitors for the MOU was criticised at this meeting.
299. As to specific examples of the ineffectiveness of assurances, they first point to cases in which such assurances have not been accepted by the courts or governments: *Chahal* in which the assurances would not deal with the recalcitrant and enduring problem of torture in India, at the hands of rogue elements in the police; the blocked extradition of Zakayev to Russia because the UK Court did not think that the Russian assurances in respect of a Chechen leader eliminated a real risk of ill-treatment. They instance examples of torture in Jordan, but not ones involving assurances.
300. HRW has also made the point, in its April 2005 paper "*Still at Risk: Diplomatic Assurances No Safeguard against Torture*", that diplomacy is by its nature concerned with compromise in the management of international relations and that is inherently inimical to the protection of someone from the absolute prohibition on torture. Although human rights may be one interest which one state may promote in a relationship, it will not be the only one, and so diplomacy is not a very powerful lever for the protection of human rights. Good relations may mean that the paramount interest lies in not raising possible breaches of diplomatic assurances. Human rights agreements lack the incentives which other forms of international agreements enjoy, and neither government has an incentive to monitor or investigate breaches of the assurance: each has an incentive to show that there has been no violation. Those who violate treaty obligations often deny that there is any abuse at all in their country. They create no rights and offer no mechanism for enforcement. They ignore the abuses endemic in the country which affect other detainees. Assurances, said AI, in October 2005, paper over the UK Government's attempts to breach its obligations to prevent torture; there is no real means of enforcing them and international treaties carry greater weight.

301. There is said to be a profound lack of transparency about the process of securing assurances which makes them difficult to challenge where, as in the US, there is no judicial assessment of the assurances which have been obtained, merely an executive or intelligence assessment.
302. This report also elaborates on the ineffectiveness of monitoring as a deterrent to abuse. Torture, it says, can be carried out in a way which makes it virtually undetectable to the untrained eye; fear of retribution on the individual or on his family may prevent allegations of torture being made. Safeguarding measures are rarely provided: recording interrogations, the presence of a lawyer, private meetings with the detainee, expert monitors, routine examination by a doctor not associated with the detention facility, unhindered access without advance notice for monitors and confidentiality for the allegations of torture which may be made. The advantage of universal monitoring of detainees is that allegations can be made which are not attributable to any particular detainee. It also says that confidentiality in reports to the receiving state, such as in those made by the ICRC, creates the problem that the report can be ignored. Nor were assurances effective in holding the receiving state to account, because both parties had an interest in denying that there had been torture and in an ineffective investigation. Requests for investigations could be evaded or stalled.
303. HRW is critical of a number of governments, including the USA and Canada, in seeking assurances and of a number of court decisions which have accepted them in those countries; some decisions by governments and courts have not accepted assurances. It calls for the practice to stop.
304. But almost all of the decisions in which assurances have been accepted are still, at the time of the report, making their way through the legal system. There are few cases in which returns have taken place on the basis of assurances in which the subsequent treatment of the person returned can be measured. We shall return to those later.
305. This HRW report was written and researched by Julia Hall who is described as counsel and senior researcher in the Europe and Central Asia division of HRW. She also provided a statement for the Appellant dated 30 April 2006 concerned with the MOU with Jordan. She is researching the global use of diplomatic assurances. She quotes the views and deep concerns of others, to some of whom we have already referred. She argues against their use on bases which we have summarised. She regards political commitments in the MOU as less effective than the legally binding international treaty obligations which Jordan has regularly breached and which have not caused the UK to review its long standing and good relationships with it. Monitoring organisations themselves do not claim that their activities alone are sufficient to prevent abuse; she instanced the suspension by the ICRC of visits to GID detention facilities after it experienced difficulties of access to certain detainees. They can provide no guarantee against torture. Such difficulties tend to be experienced in terrorist or security

cases. She is critical of the evidence in Mr Oakden's witness statements.

306. She refers to a few cases of actual returns based on assurances to which we now turn, using material from a number of the documents before us. Before turning to the two chiefly relied on by her and others, we should refer briefly to what she says about two others. In October 2004, a radical Muslim cleric, Kaplan, was deported from Germany to Turkey on the basis of diplomatic assurances about a fair trial. Amnesty International and others made several allegations about the unfairness of the trial, including allegations that evidence obtained by torture was admitted. However, there was a successful appeal which overturned the verdict on the grounds of procedural deficiencies and inadequate investigation.
307. Mamatkulov and Askarov who were extradited from Turkey to Uzbekistan in 1999 following assurances of a fair trial and humane treatment, and whose case went to the ECtHR after removal, suffered an unfair trial and there are allegations of torture, according to HRW.
308. The first case referred to in some detail is that of Agiza, who was removed from Sweden to Egypt on the basis of diplomatic assurances. The facts are taken from the decision of the Committee against Torture in *Agiza v Sweden* Communication 233/2003, UN Doc Cat/C/34/D/233/2003 (2005). Agiza is an Egyptian national who was allegedly tortured by the Egyptian authorities in 1983 because he was a cousin of one of President Sadat's assassins. He was released in 1983 and married Ms Attia. He then left Egypt because of continuing difficulties, and eventually went to Iran. He was convicted in absentia in Egypt in 1998 of belonging to a jihadist terrorist organisation and was sentenced to 25 years imprisonment. They left Iran fearing that he might be returned to Egypt and claimed asylum in Sweden, in September 2000. There the asylum claim was balanced against the evidence that he was a leading member of a terrorist organisation, and his asylum claim was rejected. The decision was referred by the Courts for those reasons to the highest executive level, from which no appeal was possible. Their deportation was ordered but Ms Attia went into hiding.
309. Before he was expelled, the Swedish government obtained written assurances from Egypt that Agiza would not be subject to the death penalty, tortured or ill-treated and would receive a fair trial; a monitoring mechanism involving diplomatic visits was agreed. The CAT held that Sweden knew of the persistent resort by Egypt to torture and of the particular risk that detainees alleged to have been involved in terrorist activities would be under. It knew of the interest of the US in interrogating Agiza and of its role in flying Agiza to Egypt; Agiza had been interrogated in Sweden by foreign intelligence agents. The assurances, which moreover provided no mechanism for their enforcement, were not sufficient to protect against the manifest risk of torture which Sweden should have recognised Agiza faced. The CAT

reached that conclusion, excluding from its mind what it heard about Agiza's subsequent treatment in Egypt.

310. It appears to have been conceded or concluded that Agiza was tortured or ill-treated within a short time of his arrival in Egypt, and that the fair trial assurances were breached. There was considerable dispute about a number of allegations of torture during his subsequent detention because of what the diplomats from Sweden saw and were told by Agiza. The CAT conclusions on that are unclear; it appears that Sweden accepted that there were serious allegations and its diplomatic endeavours to obtain an independent and thorough investigation from Egypt met with denials that there had been torture, and investigations were stalled.
311. The Committee had rejected an earlier application from Ms Attia that her removal would breach CAT. At that stage it had accepted the assurances given in respect of her husband and the reports of the visits to Agiza in detention by the Swedish Ambassador, or his staff, reporting that all was well or at least adequate. In its decision on Agiza, the Committee reflected that it had not then known of the allegation made by Agiza on the Ambassador's first visit to him, about five weeks after arrival, that he had been tortured or ill-treated, nor the evidence of ill-treatment in Sweden by foreign intelligence agents in which the Swedish authorities had acquiesced, the involvement of the CIA in his removal, the greater information about how states exposed individuals to torture, the breach of the fair trial assurances, and the unwillingness of the Egyptians to carry out an independent investigation. The breach of the fair trial assurances went to the weight which could be attached to the assurances as a whole.
312. HRW instance the lapse of five weeks before the Ambassador's first visit to Agiza as showing the frailty of assurances, because he had said that to visit earlier would have shown distrust of the assurances given. The allegations had been deleted from the publicly available versions of the monitoring reports.
313. The UN Commissioner for Human Rights commented on the case: where there was an elevated risk of torture, proceedings leading to expulsion should be surrounded by legal safeguards consisting of a judicial hearing and an appeal. The case illustrated the risks of relying on diplomatic assurances which involved an acknowledgment that there was a real risk of torture in their absence. Assurances should only be sought where the receiving state did not practice or condone torture and controlled the acts of non-state agents.
314. The second case, which related also to rendition, concerns a dual Syrian-Canadian national called Arar. According to the HRW report of April 2005, he was arrested in the USA in September 2002 in transit from Tunisia to Canada, where he resided. He was detained for two weeks and then flown to Jordan by US immigration authorities where he was driven over the border and handed to Syrian officials. His

requests to be returned to Canada and fears that he would be tortured in Syria were ignored. The US Government claimed that it had obtained assurances from the Syrians that he would not be tortured but those have not been made public. After ten months, he was released from Syrian custody, and claimed that he had been beaten by Jordanian security officers in Jordan and tortured in Syria. He returned to Canada.

315. A Commission of Inquiry was set up in Canada. The Commissioner concluded that the very short time which Arar spent in Jordan and his very limited interaction with Jordanian officials meant that what happened to him there could not be material; he had however been tortured in Syria. The US did not co-operate. In January 2004, Arar commenced proceedings in the US Federal Courts against the US government. It argued that the release of any information about the transfer of Arar to Syria could damage national security and no official information could be released. The action was dismissed in February 2006; the rendition claim failed on national security grounds. An internal review within the Department of Homeland Security was set up.
316. Mr Oakden was asked about what the Canadian Commission of Inquiry, which found Arar to be credible, recorded him as saying about his treatment in Jordan in transit to Syria. He had been hit repeatedly on the head and blindfolded while being transported; he had been questioned and had been unable to sleep for fear. That, said Mr Oakden, was one reason why the MOU had been sought. He would be concerned about how Arar had been treated; the US and UK had different views about rendition. He did not know of any informal arrangements which Jordan might have with neighbouring countries. He knew about its extradition arrangements. His strong expectation would be that US officials could put questions directly or indirectly in particular cases to those in Jordanian custody. He thought that it would be extraordinarily unlikely that Jordan would be involved in a clandestine operation in the case of this Appellant.
317. Hijazi, was a co-defendant of the Appellant, but his trial appears to have taken place at a different time from the main trial. He is a dual Jordan/US national. He was extradited from Syria to Jordan in 2000. He was held incommunicado in GID detention for 21 days and, it was alleged, beaten and his life was threatened. The US had requested an investigation into the allegations of ill-treatment but Mr Oakden did not know and had not found out whether there had ever been one or an answer to the request. There were limits to what a state could do for a dual national in relation to treatment by the other state of nationality. He did not see that as relevant to this case because of the MOU and the very strong political commitment to it by both governments. Both would be very tough in wanting to find out what had happened if there were any allegations of abuse, even though the MOU did not require any investigation if there were a complaint made by the government.

318. The FCO August 2005 Human Rights Paper also referred to Dahduli, a Jordanian national who had been resident in the US for 20 years but was deported to Jordan. He was held in solitary confinement by the GID for 13 days, incommunicado for 10 days but was then released having been “*otherwise well-treated*”. Charges were dropped.
319. Mr Oakden said that the UK Government was satisfied with the assurances which it had received about the Appellant’s well-being, but the allegations had led to the request to the Jordanians for clarification about its law on extradition and deportation from Jordan. If what was said about Arar, Bashmilah and Salim’ Ali was true, it evidenced most unpleasant abuses which should not have happened. He could not say whether they were correct or not. But mistreatment of this sort would have been several years ago and the Jordanian Government’s position now was that it took action against abuses. He was not saying that there must have been higher approval, nor in view of the general level of control exercised over the PSD and GID that they were the acts of rogue elements. Command and control had been good for the last ten years.

### **Evidence relating to extradition, rendition, and third country interrogation**

320. After checking, Mr Oakden was satisfied that there had only been one request for the Appellant’s extradition, and that was in respect of the first conspiracy, in 1998. The UK Government had not indicated any position on the request. The Jordanians had not pursued it because of the political situation in relation to Jordan, Israel and the West Bank. He knew of no extradition requests from other countries for the Appellant. Extradition of Jordanian nationals was permitted to those countries with which bilateral treaties had been concluded i.e. to various Middle East states; the extradition treaty with the US was not applicable because it had not been ratified by Parliament. Extradition could be of those charged as well as of those convicted by the requesting country.
321. The risk of interrogation by US officials or rendition at the behest of the US to another country or to the USA was examined. We start with the general evidence put forward for the Appellant.
322. The term “*rendition*” describes the transfer of individuals from one country to another, by means that bypass all judicial and administrative due process. Amnesty International comment on this in a 2006 paper entitled “*United States of America Below the Radar: Secret Flights to Torture and Disappearances*”. It states that in the context of the “*war on terror*” the practice is mainly although not exclusively initiated by the USA and is carried out with the collaboration, complicity or acquiescence of other Governments. The most widely known manifestation of rendition is the secret transfer of terror suspects into the custody of other states, including Egypt, Jordan and Syria, where physical and psychological brutality feature prominently in

interrogations. It is said that the rendition network's aim is to use whatever means are necessary to gather intelligence and to keep detainees away from any judicial oversight. It also serves to transfer people into US custody whether in Guantanamo Bay, detention centres in Iraq or Afghanistan or in secret facilities known as "*black sites*" run by the CIA. Because of the secrecy surrounding the practice of rendition and because many of the victims have "*disappeared*", it is difficult to estimate the scope of the programme. In the FCO Human Rights Paper there is reference to a report from Human Rights First, a US based group. It alleges that the Al-Jafr prison in Jordan is a possible interrogation and detention facility for terrorist suspects transported to Jordan from elsewhere. This has been denied by the Jordanian government; the US neither confirmed nor denied it.

323. In many countries, families are said to be reluctant to report their relatives as missing, for fear that intelligence officials will turn their attention on them. Amnesty International has spoken to several people who have given credible accounts of rendition but are unwilling to make their names or the circumstances of their arrests and transfers known. The number of cases worldwide is said currently to be in the hundreds. The United States Government has claimed that renditions do not lead to a risk of torture, and that where appropriate it seeks assurance that transferred persons will not be tortured.
324. Since 11 September 2001 the aim of rendition practices is now to ensure that suspects are not brought to stand trial, but are handed over to foreign Governments for interrogation, a process known in the USA as "*extraordinary rendition*" or are kept in US custody on foreign sites. Amnesty International concludes that for all practical purposes the USA has created a law-free zone, in which the human rights of certain individuals have simply been erased. A number of examples are provided.
325. One of these concerns Bashmilah and Salim' Ali, both Yemenis, who were arrested in Jordan before being transferred to US custody in October 2003. AI reports that they were tortured for four days in GID detention facilities, and then transferred over time to at least four different facilities probably in three different countries. They were questioned by Americans in a secret location which may have been in Europe. They were returned to Yemen in 2005, and released in 2006 after account had been taken, in calculating how much time they should serve on forgery charges, of the eighteen months in US custody. There were two other Yemenis who had been either detained by the Americans abroad or transferred incommunicado to another country, Jordan, for four months for questioning.
326. Louise Arbour, the UN High Commissioner for Human Rights, in her speech at Chatham House on 15 February 2006 quoted the Committee on Legal Affairs and Human Rights of the Council of Europe as concluding that it had not found any formal, irrefutable evidence of the existence of secret detention centres in Europe, but saying there were

many indications from various reliable sources that justified the continuation of its investigations. It concluded that there was a great deal of coherent, convergent evidence pointing to the existence of a system of “relocation” or “out-sourcing” of torture, and cases of “abduction” of persons subsequently transferred to detention centres abroad. Ms Arbour made the point that it is difficult to examine this issue when the factual basis for public debate is largely withheld. She said that, whereas transfers of individuals outside the legal process had been used for years by states, it would appear that the main purpose had been to obtain a suspect’s presence so that he might stand trial. The aim had shifted in the context of the “war on terror” as both suspects as well as sources were apparently transferred to secret detention facilities or to places where it was known or should be known that the person might be tortured. This was done for the purpose of interrogation or warehousing, or both.

327. Ms Arbour goes on to make the point that the use of abductions and extra legal “transfers” for interrogation, particularly in secret detention centres, leads to a vicious circle of illegality. Subsequent recourse to legal process is precluded as courts will continue to apply sound rules designed, in part, to protect their own integrity. She concludes that the entire system of abductions, extra-legal transfers and secret detentions is thus a complete repudiation of the law and of the justice system and no state resting its very identity on the rule of law should have recourse or even be a passive accomplice to such practices.
328. Mr Oakden accepted that the US would be interested in interviewing the Appellant and at least in having access to information that he had, given his known links with al-Qa’eda. He was sure that they would ask for any information that there might be. He did not know what the Jordanian rules were about giving access to third countries to attend and question at the same time as the Jordanians own questioning, but thought the answer was probably that they could. Dr George said that US involvement in questioning the Appellant was a real risk; the influence of the financial and military aid from the US to Jordan should not be underestimated.
329. Mr Oakden agreed that the US and British governments had a different view on the appropriateness of rendition; the United States took the view that it was a necessary instrument in the fight against terrorism. However, he did not think that the US authorities would seek to get the Appellant into their detention and to question him; that was “most unlikely”. The course for the British authorities to take would be to indicate that if the Americans were minded to do something which it was alleged that they had done in other cases, they would be grateful if the Americans did not attempt that in this case. There was a very close and excellent relationship as he understood it between the American and Jordanian governments but he did not think that anyone would suggest that even if the Americans were to put heavy pressure on the Jordanian government they would simply agree. But the Americans

had lobbied successfully to exempt US personnel from the International Criminal Court jurisdiction.

330. The Jordanian government would have its own domestic, legal and wider concerns including its relationship with the United Kingdom which would bear heavily on any decision that it made on the subject. In that respect he agreed with Mr George that for Jordan to surrender the Appellant to the US would cause an outcry in Jordan, in the Middle East and internationally, which would be potentially destabilising for the regime and which it would wish to avoid. This was because of the strength and influence of the large Palestinian component in the population of Jordan, their very strong views on issues such as the two Gulf wars, and the support which some of them gave to the attacks on the World Trade Centre. They would be very strongly opposed to any move to render or surrender the Appellant to the USA. This would be a restraining factor; the views of this section of the population always had to be taken into account.
331. Clive Stafford Smith, the Legal Director of Reprieve, a charitable organisation working on behalf of people facing the death penalty and other human rights abuses, provided a statement in May 2006. He represents Jamil el Banna, a Palestinian from Jordan who had been granted leave to remain in the United Kingdom. He visited Gambia on business. He says that before he went, he was visited by two UK intelligence officers who told him that he could go to Gambia and had nothing to worry about. Once there he claims to have been detained by the Gambian authorities in terrible conditions where he was interrogated by the CIA, and seemingly promised his freedom. But after 5 days, the US authorities took him to Kabul, seriously ill-treated and detained him (and another man). He claims to have been interrogated by the Americans almost exclusively about Abu Qatada, claiming that they wanted him to say that Abu Qatada was linked to al Qa'eda and that he had been involved in some bombing in Jordan. He refused to do so. He was told he could be a "*secret witness*", and he was offered enormous bribes and a US passport; he and his family were also threatened. He did not cooperate. Two weeks later they were taken to Guantanamo Bay, where prolonged interrogation and ill-treatment occurred. Mr Oakden agreed that this statement had to be taken seriously, but it did not reflect what would happen to this Appellant.
332. Mr Oakden was referred to a letter dated 10 May 2006 from Amnesty International to the Appellant's solicitor, concerning Mr Amawi, a dual Jordanian/US national who according to Amnesty International's information had been removed involuntarily from Jordan on 19 February 2006, having been living there for some seven months, and taken to the United States of America. Prior to his removal he had been detained apparently without charge by the GID since early on 19 February 2006. He was now detained in Cleveland, Ohio and had been charged with conspiring to commit acts of terrorism. It appeared that he was removed involuntarily from Jordan to the USA without due

legal process or in accordance with formal extradition procedures. Concern was expressed that his involuntarily removal might amount to a “*rendition*” and that prior to his involuntary removal he had been detained by the GID without access to a lawyer or family members in Jordan. Clarification was sought as to whether the aeroplane used to transport him to the USA was chartered by the CIA, and the Jordanian Prime Minister was urged to ensure an investigation into the circumstances.

333. Mr Oakden thought that it would be rash to comment on whether this undermined the view that there was no deportation of Jordanian citizens to the USA or anywhere else as he had only just seen the document and he did not have detailed knowledge. It would be necessary to know what the Jordanians and the American said about it, and the extent to which the fact that Mr Amawi was a dual national was relevant. The letter only represented one side. He did not accept that if it were true, it would cast a doubt on the safety of any of the assurances given to the British Government or to SIAC. All he could sensibly comment on was what would happen in the Appellant’s case, as someone who had been in the United Kingdom until returned to Jordan and in relation to him therefore they had more locus and involvement to deal with the situation.

### **Conclusions: introduction**

334. At the time of the Appellant’s arrest for the purposes of Part 4 ATCSA, at the time of his subsequent appeal and indeed throughout his detention until March 2005, it was the SSHD’s contention that the Appellant could not be returned to Jordan because of a real risk that his rights under Article 3 would be breached. Nor has the SSHD said that that view at the time was wrong. The Appellant’s release in March 2005 was not occasioned by a change in the assessment that he could not be returned safely to Jordan. We do not accept the SSHD’s submission that there has been a general improvement over time in the human rights situation in Jordan; the evidence did not support that. There may have been fluctuations. There certainly has been no major political change.
335. It was also Mr Oakden’s general stance that the UK Government could not return the Appellant to Jordan, conformably with its international obligations, in the absence of the particular measures contained in the Memorandum of Understanding.
336. However, the totality of the evidence including that on behalf of the Appellant shows that that general stance is not necessarily applicable to every risk or every stage of events. We consider it important to consider the risks by reference to the likely sequence of events were the Appellant returned. The MOU may not be necessary for each, but rather reinforce the protection available. That general stance does not

require an assumption of risk of a particular nature or degree which does not in reality exist on the evidence as a whole.

### **Conclusions: Mr Oakden's evidence**

337. Mr Oakden is not an independent expert; his outlook may be affected by the post which he has held as Director for Defence and Strategic Threats in the FCO. Undoubtedly, in that position and as a negotiator, he has an interest in success in this case, which would be true of the FCO and the Government more generally. We are well aware that there were a number of issues on which he did not have direct knowledge, and was prepared to offer what to him was a reasonable inference, or information as to normal practice. But he was honest, balanced and careful.
338. It does him an injustice to treat him as lacking in expertise in Middle East affairs; this has been his prime area of activity for most of his career. He also has the ability to offer an informed, experienced judgment on the nature of Jordan – UK – US relationships, the significance of various components in the Jordan political structure, their true attitude, the strength of their commitment, their intent and ability to abide by them, the various sanctions available to the UK and their effect in the event of a breach. Those are crucial areas, and no NGO or UN body can match his knowledge. His views also represent something of the corporate experience of the FCO and not simply the personal views of one man.

### **Conclusions: deference**

339. The SSHD's case was not that Mr Oakden's evidence required deference from SIAC but that his experience and expertise could and should be relied on. The SSHD's submissions that we should tread lightly and recognise that we were "*poorly equipped to review the assessments and decisions*" in the field of diplomatic relations was wholly unpersuasive to us. We take the view that it is for SIAC to decide how much weight to give to what he says, forming its own view of his evidence.
340. We considered this issue in *Y*, paragraphs 324-326. The FCO does have considerable expertise in some of the areas about which Mr Oakden gave evidence: e.g. in assessing how weighty assurances are, the diplomatic circumstances in which they operate, their background, and the way in which the two Governments would react to breaches. But he is not a lawyer.
341. To us, in the ways described and qualified, he brings insight, experience and expertise which we are well placed to scrutinise and carefully assess. We have taken note of that expertise but not accorded it deference. We have reached our own appraisal of the evidence. In

practice, given the previous stance of the SSHD about the risk of return to Jordan, we have to be persuaded that now it is safe to return the Appellant, and that there is no real risk of a breach of the UK's international obligations, after testing and evaluating all the evidence carefully.

342. We regard the characterisation by the SSHD of the principal issue as being the trust and confidence of the UK Government that Jordan will keep to the spirit and letter of the MOU as capable of being a mischaracterisation of the principal issue. As the Special Advocates point out, there is no reason to doubt the UK Government's trust and confidence; the question is rather as to the soundness of its trust and confidence when judging the nature and degree of risk on return which the Appellant would face.
343. In reality, the SSHD did not rely on simple statements as to its trust and confidence. Mr Oakden did explain why the relationship between the two countries, their respective interests and the course of negotiations justified it.

#### **Conclusions: risk during detention up to the conclusion of the retrial**

344. We accordingly turn to the risks which the Appellant would face at the first stage of return. We accept that on return he would be taken into the custody of the GID, and retried on the two charges on which he was convicted in absentia. That much was not in dispute. The first stage which we examine is his detention up to the conclusion of his trial, including all the stages of appeal which might be open to him, a process which, judging by the original trials, could take a number of years. The risk to be considered in that period of detention is the risk of torture or other serious ill-treatment for the purpose of obtaining a confession from him, or for intelligence gathering purposes in the light of his extensive contacts or for obtaining statements which could be used in trials of other individuals. The desire to interrogate him for those latter purposes would not necessarily end with the end of the trial; we consider that later. We also deal later with the trial procedures themselves.
345. We see no reason at all not to accept that the Appellant would be accompanied on his return by a representative of the Adaleh Centre to his place of detention. He would probably have a medical examination on arrival by a doctor arranged by the Centre, if he had not had an examination before he left the UK, so as to establish a baseline for his condition. He would have a nominated point of contact, the "next of kin".
346. We accept that the GID would interrogate him with a view to obtaining a confession in relation to these two charges, because of the important role which confessions appear to play in trials in Jordan and elsewhere

in the Middle East. The GID would also interrogate him about his extremist contacts and activities at least for intelligence purposes. That might lead to evidence of criminal acts by others for whose trials they might seek statements from the Appellant. We have no evidence that there are any persons in connection with whom the GID would wish to interview the Appellant for that latter purpose, but it seems to us to be on the cards that a purpose of the GID interrogating the Appellant would be obtaining such a statement.

347. It is but a speculation that the GID would wish to interrogate the Appellant about other offences not presently alleged against him with a view to bringing further charges against him. There is no evidence that there are any other charges outstanding against the Appellant or even that he is considered a suspect or potential defendant in relation to some other unknown offence. We see no reason to suppose that the Jordanians would not have revealed to the UK any such other matter of interest which they had in the Appellant. There is nothing for them to gain in keeping quiet about it now, only to reveal it once the Appellant is returned. The Jordanians are not overly keen or pressing to have the Appellant returned to them, to achieve which they are willing to indulge in subterfuge. The reference in the Note Verbale of 11 October 2005, to there being no other offences "*thus far*" for which the Appellant is wanted, shows that the Jordanians are not prepared to exclude the possibility and the UK Government has not sought to exclude or prevent it either. But it is, on the evidence, no more than a theoretical possibility with no evidence to suggest that it has any real foundation. Rather the Jordanians are simply preserving their position should it turn out to be the case, so that no one is misled. The Jordanians do not need to search for offences with which to charge him. The question of whether they would look for another offence to charge him with, were he to be acquitted on the two charges which he does face, will be considered later. Of course, it cannot be ruled out that an interrogation for intelligence purposes or with a view to obtaining evidence to be used against others might furnish the eventual basis for further charges against the Appellant.

348. We also accept that the USA would seek to question the Appellant at some stage while he is in detention and to do so directly in the presence of GID officials or failing that indirectly through GID officials. This would be in order to obtain intelligence for counter terrorist purposes. We see no reason to suppose that the GID would allow the USA to conduct such interrogations alone, even if only for the benefit which they would otherwise forego in not having his answers available to them directly. There is a high probability of indirect questioning by the US at least and a realistic prospect of direct questioning with the GID present. It is probable that this questioning by the GID and USA would take place soon after the Appellant's arrival, because what intelligence he might have would then be at its freshest, although the periods of his detention in the UK would have made some of it less than new, were he to share it.

349. There is in our view no real risk that the Appellant's Article 3 rights would be breached in the period up to the conclusion of the retrial. As a preliminary observation, we note that the general conditions in which he would be held in GID custody do not breach Article 3; they are considered generally to be better than elsewhere in the prison system and it is to GID detention that the Appellant would go. Nor was it said that the other parts of the Jordanian prison system generally breached Article 3, although as the general evidence makes clear there are inadequacies in a number of respects. We consider this further later.
350. There is a real risk of torture or ill-treatment for what might be called the ordinary Islamist extremist in GID detention before charge. This risk arises while the investigation of an offence is under way, and while a confession or incriminating statements are being sought. This real risk clearly led the UK Government not to seek to remove the Appellant before 2005.
351. Although the scale and frequency may be hard to estimate, we accept at its face value the assessment by Mr Nowak in the Press Notice of his June 2006 visit. We accept that it is reasonable to draw the inferences that the problem is quite widespread in the GID and of longstanding, that there is a climate of impunity, and that the GID has concealed people during monitoring visits, and adopted other evasive tactics in order to cover up torture or other ill-treatment. This ill-treatment is a particular risk in the first few days of interrogation in detention after arrest, as HRW says. The GID detention facilities are not the prisons in which a convicted person serves his sentence.
352. We would also accept that that assessment means that the abuse is sanctioned or overlooked, possibly varying from case to case, at a senior level within the GID. This would not be the work of a few rogue officers, disobeying clear GID instructions, of which the GID hierarchy were unaware.
353. Mr Oakden may well have been unduly positive in his evidence that these problems were reducing, that effective action was taken against GID officers, and in his comments about the uncertain scale of ill-treatment. It may also be that Dr George was unduly optimistic in saying that torture was not part of the GID culture in the light of the Special Rapporteur's assessment, although Dr George has not said so.
354. However, whilst that is the starting point for anyone being returned to Jordan, it is not the end of the debate for two reasons, one of which may be peculiar to this Appellant: he is a well known figure in the Arab world and he would be going back as someone in respect of whom the agreement with Jordan, embodied in the MOU and the monitoring arrangements would apply.
355. Turning to the first point, he is a well known figure in the Arab world, he is known to some as a religious figure and to others as a leading Islamist extremist. He is seen as publicly defiant of the USA and the

UK, and of the West more generally, which is attractive to some in Jordan and elsewhere who might not support all that he stands for in terms of violence. He is a Palestinian which gives him a degree of support among a group whose views and reactions have always been taken into account by the Jordanian Government, as Dr George says. Regardless of the MOU, his return and subsequent treatment would be a matter of intense local and international media interest and scrutiny. Deputies in Parliament, for all the limits on their power, would be in a position to raise the issue of his treatment and to criticise breaches of human rights, emboldened by media and domestic popular interest. The very sensitivity of the Jordanian Government to his position, because of his profile and the interest and support which he arouses, and the destabilising effect which his supporters could have, is exemplified by the way in which the extradition request was shelved at a time of Jordanian political sensitivity, (while the second Palestinian intifada was in full flow), and by the absence of Jordanian Government enthusiasm for his return now. The evidence of Dr George and of Mr Oakden was along very much the same lines in this respect.

356. If he were to be tortured or ill-treated, there probably would be a considerable outcry in Jordan, regardless of any MOU. The likely inflaming of Palestinian and extremist or anti-Western feelings would be destabilising for the government. The Jordanian Government would be well aware of that potential risk and, in its own interests, would take steps to ensure that that did not happen. The GID would be sufficiently aware of that de-stabilising risk too. The instructions that the Appellant should be treated properly, which can realistically be anticipated to be given by the Government and at the highest level, would suffice to avoid that risk in his case; and ill-treatment by any less disciplined GID officers in those circumstances is unlikely, in their own selfish interests. The Jordanian Government would not need the MOU and the obligations within it to achieve that end. Both Mr Oakden and Dr George agreed that it was to be expected that the Appellant would be treated correctly during this period. Indeed, as a serious, publicised allegation, true or not, could be as de-stabilising as proof that the allegation was correct, the aim of the Jordanian Government and GID in its own interest would be for the Appellant's treatment to be sufficiently and demonstrably correct to avoid a real risk of a grave allegation. Mr Nowak's comments about the effect of publicity on the treatment of the four MPs also bears this point out.
357. We also add that the GID already has investigated the offences for which the Appellant would be retried, and has obtained incriminating evidence sufficient to lead to convictions in the past. No other defendants are being retried. This is likely to reduce the need it might otherwise feel to ill-treat someone in detention in order to mount a case against them.
358. Dr George's view about the absence of risk at this stage is not dependant on the MOU at all, because he regards the MOU as ineffective to prevent a breach of Article 3 ECHR at the later stages

where he considers that a real risk of ill-treatment would arise. Mr Oakden agreed with Dr George's view about this first stage, when it was put to him, although his own statements did not divide the risks which the Appellant might face into stages in that way. The past acts of torture experienced by the Appellant are not any real indication as to his position now, with his current notoriety.

359. Turning to the second aspect and treating the MOU as merely giving the UK Government a legitimate and strong interest in following how the Appellant was treated, and in challenging the Jordanian Government over any allegations of breaches of the clear bilateral obligation not to torture or ill-treat him, that still plainly reinforces the effect which the Appellant's profile and local support or sympathy would have on the way in which the Jordanian Government treated him, at the very least up to the conclusion of the trial process.
360. The fact of the monitoring agreement adds further reinforcement. It would be publicly known in Jordan that these visits were supposed to be allowed to this individual. The Adaleh Centre would be a local body keen to show its mettle at this early stage, with UK Government support; and we cannot help but feel that some other NGOs would also keep a vigilant eye on the way in which the Adaleh Centre dealt with issues of access and allegations of ill-treatment, even if only to try to assert that assurances did not work. The Jordanians would be keen to avoid the risk of serious de-stabilising allegations, by transparent and conscientious adherence to the MOU and monitoring arrangements at least early on in the Appellant's return. The existence of the MOU and monitoring arrangements significantly reinforce the conclusion that there would be no real risk of ill-treatment in detention up to the conclusion of the trial even if many of the more serious criticisms of the MOU and monitoring arrangements were correct. We discuss those criticisms later.
361. The visits by the monitoring body, which we conclude would be allowed as agreed and would take place, even if only for much the same self-interested reasons as we have adumbrated above, would prevent incommunicado detention. The Appellant would have been accompanied to the place of detention. We accept that frequent visits early on are envisaged and see no reason why they should not occur, either from the point of view of the Centre or from the attitude of the Jordanian Government. The return of the Appellant, and the need to make arrangements for what to do with him, would not take the Jordanians or the Centre by surprise. It would be the fact of the monitoring visits, as much as anything, as a point of contact and communication between the Appellant and the outside world, which would be a further deterrent to any ill-treatment, and as an incentive for the Government to be seen to comply with the obligations it has undertaken. The risk that breaches of the monitoring arrangements would lead to de-stabilising allegations of ill-treatment, as well as UK Government intervention, would prevent any real risk of the use by the GID of tactics such as last-minute refusals of access, claims that the

Appellant did not wish to see them or had recently moved elsewhere without notification. The precise expertise, or none, of the monitors at this early stage may be less important than later.

362. We have accepted that there is a probably quite a high level of seniority within the GID which has sanctioned or turned a blind eye to torture, and that the abuses cannot be attributed to a few rogue junior officers (although some references in the evidence to a good level of command and control over the security forces appear more connected to crowd control than questioning). But on the basis that there is quite a high level of seniority within the GID which has ignored or encouraged torture and ill-treatment in interrogation, there are two features of importance in addition to those which we have identified already as preventing a real risk of treatment breaching Article 3 for this Appellant. First, the MOU and arrangements are supported at the highest levels and the King's political power and prestige are behind it. It can reasonably be taken that instructions specific to how this Appellant should be treated would be given to the GID, which would be known to the GID to have high level and specific interest. The GID would know that the UK Government had a specific interest in how this individual was treated. There would be an awareness that those instructions would be more likely to be followed through, that breaches would be punished and that a climate of impunity which might prevail otherwise would not apply here. This would be a real deterrent to abuses by GID officers. It would not be some general sop to public or world opinion. The Jordanian Government would have a specific interest in not being seen by the UK Government or the public in Jordan in this case as having breached its word, given to a country with which it has long enjoyed very good relations. This reinforces the self-interest which the GID and Jordanian Government would have anyway in the avoidance of allegations of ill-treatment against the Appellant.
363. Second, the GID has been involved at a high level in the negotiations and has accepted the MOU and monitoring provisions. It is aware of the provisions. It knows that what has been acceptable at some levels in the past would have to cease as far as this Appellant was concerned. They would know that any diplomatic or security approaches by the UK would quickly lead down the hierarchy of the GID with which there are good connections, with some threat to the self-interest of those breaching the MOU. This would have a deterrent effect.
364. We take the view that in general the command structure within the GID is quite good, that the senior officers are aware of what happens and would take steps in this particular case to keep themselves out of trouble by ensuring that orders were obeyed, and that would follow down the military hierarchy. If however, the position is that the abuses are the work of rogue officers disobeying orders, the specific and unusual position of the Appellant and the effect of the MOU would lead to senior officers ensuring, even if only in their own interests, that orders were more effectively obeyed by the rogues whom they are likely to be aware of.

365. Although we accept that some of the allegations and certainly some of the diplomatic, security or Ministerial responses would be made in private and could be counter-productive if made in public, that does not detract from the overall effectiveness of the MOU. It would enable responses to be made which would otherwise not be made. There is an unusual combination of diplomatic and security interest here which would operate more in private, and an interest among sectors of the population which could be activated by a public allegation that the monitoring arrangement or terms of the MOU were being breached.
366. Even if Mr Oakden and Dr George were unduly optimistic in their appraisal of how extensive torture was in the GID, the political factors which they identified as preventing the Appellant being at real risk of a breach of Article 3 during detention to the end of his trial, even without the MOU, continue to apply. If their effect had been overstated, and that is not a probable corollary of an unduly optimistic appraisal of the extent of torture, the risk to the Appellant would be more than adequately reduced by the additional effect of the MOU and the commitment of the Jordanian Government, even if it only engaged other aspects of the GID's and its officers' self-interest.
367. Although we recognise that the USA would want to question the Appellant, it seems to us reasonable to conclude that for the political reasons which we have referred to, there would be considerable sensitivity on the part of the Jordanians at this stage about allowing direct questioning by the US. Such questioning is, however, not forbidden by the MOU. The UK would also however have warned the US about its interests and obligations in ensuring that this deportation and the obligations in the MOU worked, and the US would have some interest at least in not bringing about a breach of such an arrangement, which it would recognise as having a counter-terrorist function. However, it seems to us probable that the CIA would be allowed to question the Appellant directly at this stage with the GID present. But the Jordanians and the US would each be careful to ensure that the US did not overstep the mark in the way it carried out its interrogation. We do not think that there is any real risk at this stage of ill-treatment arising from interrogation by or at the instigation of the US. This conclusion assumes that the Appellant would remain in GID detention, and would not be surrendered to US custody, anywhere. For the same reasons which we have given in relation to ill-treatment by the GID, and the added sensitivity to US actions against him, even without the UK's interest, it is also highly unlikely that his detention would be in any unknown or GID or CIA secret facility in Jordan.
368. Mr Joffe's view is different from Mr Oakden's and Dr George's. He recognises that there is tension between Palestinians and the Government of Jordan, but regards the King as being particularly intolerant of and vigilant about criticism from that quarter. He is more hostile than his father was to Hamas, and is notably hostile to extremist Islam and Shia activism. There are some similarities here with points

made by Dr George and Mr Oakden, although Mr Joffe's views are more broad brush and considerably over-simplified. He considers the political reaction between the King and those views to be one simply of hostility and repression, and does not reflect the spectrum of views which Palestinian and other Jordanians hold about the Appellant. We note that the Appellant is neither a member of Hamas nor a Shia Muslim. He does hold extremist views to which the whole Government and much of the population would be hostile, but he would have a range of support from some who would be in full agreement with him, through to those who were sympathisers, and if not with his religious views, then at least with his apparent anti-USA, UK and Western outlook. This means that the Government's hostility to the Appellant's extremist views would have to take account of that range of support and sympathy. The King and the rest of the political forces in Jordan operate a more balanced approach to this range of views and would try to avoid antagonising them unnecessarily, rather than merely ignoring those with whom tensions existed. That is the point which, for this stage, Dr George and Mr Oakden are making and it is one which we accept.

369. Mr Joffe appears to take it for granted that the Appellant would be at a real risk of torture or ill-treatment if interrogated. He simply takes the view that the constraints on NGOs in Jordan and the lack of capacity or ability on the part of the Adaleh Centre mean that it is doubtful that they could prevent ill-treatment in the process of interrogation. He does not consider the issues in stages and what he has to say would apply throughout any period of detention. He makes no reference in his assessment of risk during interrogation to the impact of the spectrum of views, or to the intense local and international media interest which the Appellant's return would excite. We do not find Mr Joffe's views persuasive on this point.

### **Conclusions: pre-trial procedures and the re-trial**

370. The next stage comprises the pre-trial procedures and the trial itself. The issue here is principally its fairness under Article 6 ECHR, although Article 5 also arises. It is of course right that the length of period in detention, the absence of lawyers during questioning, the absence of access to lawyer, doctor, or other visitors during detention can create conditions in which ill-treatment can occur and remain undetected or unproven. Those considerations are part of the rationale for Article 5(3) ECHR. But in so far as they bear upon the issue of treatment here, and not the length of detention of itself, we do not regard the Appellant as facing a real risk of forbidden treatment. They would also be affected by the MOU.
371. The Appellant would be taken into GID detention, where he would be questioned. The first issue concerns the period of this detention: its duration without being seen by a lawyer or being presented to a Court, and the presence of lawyers during questioning. A related issue

concerns access to medical treatment during detention up to the conclusion of the trial process, of greatest importance in relation to ill-treatment to obtain confessions.

372. The Appellant would be tried before the SSCt, a special court within the Jordanian Constitution. The second issue thus concerns the composition of the SSCt and its independence, to which is related the position of the prosecutor. The third issue concerns the evidence which would be admitted before the Court: to what extent in reality the previous trial dossier would be before the Court and open to effective challenge; how the SSCt would treat evidence of confessions either by the Appellant or others allegedly obtained by torture; the extent to which the Appellant would be able to deal with the evidence of certain witnesses; and the nature of the appeal process.
373. We now deal with the length of detention, and access to lawyers and others. Although Jordanian law requires that the police notify the legal authorities of an arrest within 48 hours, and that formal charges be brought within 15 days of arrest, those time limits are regularly and lawfully extended by courts at the request of the prosecutor, in stages of up to 15 days, up to a maximum of 50 days. It would not be incompatible therefore with Jordanian law for the Appellant to be held in detention for 50 days without being physically brought before a Court before being charged. It appears however that the extensions are approved by judicial authority, though not necessarily in the physical presence of the suspect.
374. During this period there is no requirement in Jordanian law that the individual be allowed access to a lawyer, nor is it forbidden. Lawyers are not present during GID interrogation. Article 63(2) of the Criminal Trial Procedures Code referred to in Mr Edge's evidence requires the presence of a lawyer during questioning by a prosecutor except where "*rapid action is required for fear that evidence will be lost*".
375. Article 64(3) provides for the prosecutor to conduct an investigation in the absence of a lawyer if necessary for speed or "*whenever he deems it necessary in order to reveal the truth.*" The prosecutor's decision in that respect is declared to be not reviewable. The material from the two in absentia trials shows that a confession before the prosecutor is not admissible unless the prosecutor has warned the individual that he need not answer questions without his lawyer being present.
376. It appears that access in practice to lawyers was often only permitted in a brief period before trial, notwithstanding that the period before trial was often lengthy. Dr George also says that the lengthy pre-trial period can often involve detention incommunicado, which we accept can happen. He means for this purpose detention without access to lawyers or other visitors. There are separate allegations of a "ghost" detention facility run by the CIA in Jordan which, if it exists, would not be where the Appellant was held or questioned, as we have discussed.

377. The MOU does not explicitly require that there be no extensions of time beyond the initial 15 days. It requires that the individual be brought “*promptly*” before a judge or other person authorised by law to determine the lawfulness of his detention. He must be informed “*promptly*” of the reasons for arrest, and of any charge. He is to have “*prompt and regular*” visits from the monitoring body, at least once a fortnight. He is to have adequate time and facilities to prepare his defence. As Mr Oakden accepted, there is no requirement that there be a lawyer present during questioning whether by the GID or by the prosecutor, or for access to a lawyer at other times; but that is subject to the scope of the trial preparation provisions. There are no other provisions for visits by family or friends or British Embassy access. The monitoring body has expressed a desire to attend sessions in which the Appellant might be questioned, but that is not part of the MOU or TOR, and it would not be in a position to act as the Appellant’s legal representative.
378. The MOU and TOR do not provide for independent medical examinations and we assume that, for a while from now, the Centre might not have access to specialist expertise on whether certain forms of ill-treatment might have occurred, while it is still in its early stages of gearing up to deal with any returns which might occur. The only obligation is in effect that the Appellant be treated by a doctor, and as it is likely that the doctor normally used would be based at or routinely used by the detention facility, that would probably not be of help in that assessment. But the interest of the Centre and of the UK in the performance of the MOU in relation to medical treatment would be of some assistance, because the fact of its being necessary and provided would itself raise questions. A refusal of a request for an independent medical examination, if the Appellant or Centre were able to provide it, could give rise to real concern by the UK. As specialist monitors or advisers become available, as we believe would happen over time and probably before the Appellant would actually be returned, these deterrents to ill-treatment would increase.
379. Mr Fitzgerald alleges a tension in Mr Oakden’s understanding of how the parties to the MOU understood “*promptly*”, between his view that the Appellant would receive only treatment which was in accord with Jordanian law and no treatment which other Jordanians did not enjoy, and his view that the MOU would mean that the Appellant was brought before a judicial authority “*promptly*”. Mr Oakden was plainly of the view that the Jordanians would bring the Appellant before such authority within the sort of timescale which the ECHR envisaged i.e. “*promptly*” as envisaged by the MOU. There is nothing in Jordanian law to prevent that, even though that there might still be extensions of time for questioning in detention before charge. This is not a question of the MOU requiring the Jordanians to disapply domestic law. It would mean that the Appellant received more favourable treatment than appears to us to be common at least in the SSCT, if he were physically present before judicial authority within 48 hours. But it would be what Jordanian law requires.

380. That part of the MOU would be carried though in our view. The Appellant would be at an early stage in his return and the provision for “*prompt*” appearance before judicial authority would be one of the earliest if not the earliest points at which the MOU was engaged. The requirement is not a hard one to comply with. There would also be every incentive on the Jordanian Government domestically, through the tensions, publicity and interest which would surround the Appellant’s return, to show that it was providing what it had agreed, and that the Appellant was not being ill-treated. It would not require investigation to see that the Appellant had not been brought before judicial authority. (The judicial authority empowered to determine the lawfulness of detention could be the prosecutor, who has a judicial status as is common in civil law systems.)
381. The concept of promptness under the MOU could have some elasticity; at worst it might in application stretch the due limits of the ECHR concept for Article 5(3). That the period before appearance would run until a second 15 day extension were sought is a possibility but by far the greater likelihood is that the Appellant would be brought promptly before judicial authority. By “*promptly*”, we do not mean at the expiry of 50 days detention but within 48 hours. If before the Appellant’s first production, a 15 day extension were granted judicially that would stretch the concept of “*promptly*” beyond its intended limits in the MOU, so far as appearance before judicial authority was concerned. Mr Fitzgerald QC for the Appellant is right to submit that even 4 days has been held to be too long a period, before being brought before a judicial authority, for compliance with Article 5(3); e.g. *Ocalan v Turkey* (2005) 41 EHRR 45. It would not breach the MOU, however, if he were to be detained for a maximum of 50 days, by means of judicially approved 15 day extension, or if he were absent from those later decisions. It may be regarded as debatable as to whether such a maximum with judicially approved extensions breaches Article 5.
382. However, we accept that in reality the total period of 50 days is unlikely to be sought, even without an MOU, because the Appellant faces a re-trial and the case dossiers have already been through the trial and appeal process a number of times. The amount of investigation to be undertaken will be the more limited. Some material for one trial may well have been prepared in connection with the extradition request. We accept that the Minister of the Interior, talking of the preparation of the dossier by the State Prosecutor for extradition now being under way, in fact had the return of the Appellant under the MOU in mind.
383. While the Jordanian Government would resist being asked to grant privileges to the Appellant, and these provisions would involve the Appellant being better treated than appears common to SSCT defendants, the real question is whether that is how the Jordanians would see it. There are no difficulties identifying legal provisions which can apply to give effect to this part of the MOU; whether they are applied in any other particular cases depends on their circumstances.

This on any view would be a case with a number of unusual features, not least of which is that this is a retrial and not the start of an investigation afresh following after a series of arrests, as a plot is newly discovered. Such provisions as the MOU requires do not depart from Jordanian legal provisions, but may lead to uncommon treatment, in uncommon circumstances, which could readily be seen or presented as not according special privileges to the Appellant.

384. Mr Fitzgerald, in closing submissions, contended that the Commission should infer that there was a practice for the state prosecutor to treat an investigation as commencing when he obtained a confession from a defendant, who might have been detained for some time before that by the GID; the suggestion appears to have been that that was the starting point for the application of the detention provisions of the Criminal Code. It was said that this practice was indicated by the Opening Note of the Prosecutor in the Millennium plot trial in which the defendants who were present were all said to have been “arrested” on the same date, 2 January 2000. This, points out Mr Fitzgerald, was the date on which the defendant Abu Hawshar made his incriminatory statement to the Prosecutor. The Opening Note makes no reference to there being any such practice as was said to have been indicated by it. The inference was said to arise from a comparison of the alleged date of the arrests with actual dates of detention, gleaned from various defendants’ voluntary statements in which they assert with some vigour that they were tortured while in GID detention.
385. The statement principally relied on in the submission was that of Hijazi, dated 5 July 2001. In it he says that he had been detained and tortured between October 2000, when he appears to have returned to Jordan, and October 2001. However, neither at the start nor finish do the dates in the Hijazi and other statements support the inference. It is clear that he was not arrested in January 2000 and that the date of his statement or period of detention by the GID before seeing the prosecutor is wrong. The statement of the defendant Tantawi refers to detention by the GID for two months between December 1999 and February 2000 before referral to a prosecutor. Abu Hawshar says that he was in detention in December 1999, in a statement dated June 1999.
386. The material adduced simply does not support the point, even taking the defendants’ statements at face value. Clearly, the dates in the statements contain some internal inconsistencies which are of such a nature as to preclude the specific inference being drawn from the dates. It may be that the word “arrest” is inaccurately translated in the Opening Note. But even if it does mean something closer to “investigations starting” or a basis for arrest being found, there is nothing to warrant the inference as to the practice which Mr Fitzgerald appeared to seek to draw. There are complaints that individuals were not brought before the prosecutor within the time frame for being brought before a judicial authority, which suggests that the prosecutor, as a judicial officer, is the relevant body for these purposes.

387. What the material appears to support is that the maximum 50 days detention may be exceeded without authority and unlawfully by the GID, and that torture may occur during GID detention before an individual is brought before the prosecutor. Those issues we have already considered in the particular circumstances of this Appellant against a background which shows that torture by the GID does occur and that there may be detention for longer than allowed by Jordanian law, before someone is brought before the relevant authority. We do not think that those risks would apply to this Appellant for the reasons which we have given. He would be treated differently from the way in which other defendants have said that they were treated. He would not be detained without necessary judicial authority, nor for longer than the law, with its scope for extensions, permitted. We take the view that all the relevant Jordanian authorities would be scrupulous to observe the law, under the spotlight.
388. Turning to the presence of lawyers, it would be unlikely that the Appellant would have a lawyer present during questioning by the GID or the USA, in the absence of any provision in the MOU or practice for it. But it is very likely that he would have access to a lawyer for any appearance in front of a judge. There is no requirement in the MOU that he have a lawyer present for any questioning by the State prosecutor, but it is difficult now to see why any of the domestic provisions enabling a lawyer's presence to be dispensed with before the prosecutor could apply to charges relating to events some 6-8 years ago. We would be very surprised if he lacked for legal advice and representation acceptable to him and would expect the prosecutor, for the same general reasons which we have given, to be scrupulously careful about questioning the Appellant in the absence of the lawyer. He would take steps to avoid allegations against him in this case that he had failed to observe the procedural requirements of the law or had fabricated or inserted pages of false statements into a confession, allegations which some defendants made against State prosecutors in the two trials in absentia. His purpose would be at least the self-interested one of avoiding criticism of him in a very high profile case, whether from sympathisers of the Appellant, NGOs, or superiors who would have been looking to avoid public criticism. So, if for no other reason, the prosecutor would abide by Jordanian law and the consonant general provisions of paragraph 7 of the MOU in this respect. Any allegations made by the Appellant to the prosecutor of prior ill-treatment would in this instance be taken seriously.
389. Time for pre-trial preparation by lawyers seems from the background material to have been short often to the point at which it must have been quite inadequate for the gravity of the charges, sometimes but one to two days before the SSCt trial. However, our reading of the material in relation to the two in absentia trials does not show that that was a complaint, among the many made by the lawyers and defendants about their treatment before and the conduct of the trial. No such complaint was shown to us. That may be because such brief opportunities are seen as normal and there was no point complaining.

390. There is obviously scope for a difference of view as to how long a lawyer needs to have with his client in order fairly to prepare for a particular trial. The MOU makes no provision for any particular time. However, for the same reasons which have persuaded us on other aspects of how the Appellant would be treated on return at the early, pre-trial and trial stages, we conclude that the Jordanians would be very likely to enable access to a lawyer earlier and more frequently; trial preparation access would not be as starkly brief as appears often to happen. We would nonetheless be surprised if the period and facilities were as extensive as would be regarded as necessary in the UK, because that would be so markedly different from that which is commonplace in Jordan.
391. We now turn to the trial itself, and first to the nature of the court. We consider first what would or might happen, then whether that would breach Article 6. We then draw the threads together in examining whether there would be a real risk of a total denial of a fair trial. The SSCt would consist of three judges, two at least of whom, including the presiding judge, would be military officers with the rank of Brigadier or Lt Colonel. One would probably be a civilian. The military officers would have law degrees, and would be lawyers in the armed forces rather than officers with other functions drafted in or seconded to the Court. Their legal work is in Courts but includes work as prosecutors, who are seen as judges within the civil law system of Jordan and the Middle East. The judges would be appointed by the Prime Minister on the recommendations of the Head of the Joint Chiefs of Staff or the Minister of Justice, for military and civilian judges respectively. Appointment by the Prime Minister is not said to be a real problem as such. They have no security of tenure in the Court and can be replaced by executive decision.
392. The state prosecutors in the SSCt are also military officers of the rank of Lt Colonel or Major. They are part of the same military hierarchy as the military judges. They work from the same buildings as are used for detention and questioning by the GID. Ultimately, they are all answerable to the same executive power.
393. The Court of Cassation is a civilian court. It sits in panels of various sizes, and for some of the appeals, these have been as large as nine. It is not a Court which normally rehears all the evidence when an appeal is made to it. But its remit extends beyond errors of law or procedure and it can review the factual conclusions which the SSCt has reached. Neither Court would hear argument that a trial before the SSCt was unfair or violated the Constitution because the composition of the SSCt made it unfair, whether for want of independence, or because it was unfair for a civilian on these charges to be tried before a Court dominated by military judges. It is the Court provided for by the Constitution and they would also regard themselves as independent as declared by the same Constitution.

394. The fact that the executive is responsible for the budget of the judiciary and its training is of lesser concern. The general reputation of the Jordanian judiciary for providing fair trials is of no real weight in relation to judging the fairness of trial before a Court such as the SSCt. Similarly the suggestion that judges may be open to family influence is of no real weight here either. The concern is rather of the power and influence of the executive. The evidence supports the conclusion that the executive has the power and has exercised it at times to promote or move civilian judges who reached decisions of which they approved or disapproved. This could encourage “weak” judges. That factor must be the more present for a military court with its ranked hierarchy. There is no clear evidence that the executive has tried to pick judges for specific cases, although we assume that it could do so were it so minded.
395. Mr Burnett puts weight on the fact that the SSCt has not always convicted those appearing before it, is not simply a tool of the executive and exercises in practice an independent factual judgment. He points out rightly that in the “Reform and Challenge” conspiracy trial, it acquitted five defendants of belonging to an illegal group, (there was a general pardon in operation for that offence), six defendants were acquitted on the more serious charges, again it acquitted all those who had appealed after one Court of Cassation ruling, (albeit that the convictions were later reinstated by that Court), and reduced the sentences on those who had appealed. There were in total four hearings before the SSCt and three before the Court of Cassation over a four year period. The torture allegations relate to the period before the first SSCt hearing, so far as we can tell. The appeals to the Court of Cassation involved first and principally the claim that the SSCt had not approached properly the admissibility of confessions alleged to have been obtained by torture and claims that its reasoning had been inadequate.
396. There were a number of acquittals by the SSCt in the Millennium plot. There were repeated appeals over a period of four or more years and the process does not appear yet to have been concluded. The appeals debated whether or not the facts found by the SSCt required an amnesty to be applied to certain of the offences depending on when they were completed; the reasoning of the SSCt does not appear to have been comprehensive enough for the issue to be resolved. The centre piece of the main appeal again related to the approach adopted to the admission of confessions before the prosecutor or GID which were alleged to have been obtained by torture or to have been falsified. An appeal was allowed in respect of four defendants, though seemingly remitted, on the basis that their counsel were not licensed, having been suspended from practice. The Court took certain grounds of appeal of its own motion.
397. The MOU is of no direct relevance to this particular aspect because although it requires the trial to be fair, the trial can only be before the SSCt constituted as it is required to be. The MOU, it must be accepted

therefore, treats in principle as “fair” within its terminology a trial before such a Court.

398. The next issue is whether the re-trial is a complete hearing afresh or whether the dossier or file from the earlier trials would be before the Court not just for reading but as evidence. This would include statements which the Appellant would wish to challenge and statements which he would wish to say had been obtained by torture. Mr Fitzgerald submits that the position is unclear. Mr Burnett submits that it is clear that it would be a hearing afresh. Again the MOU has no bearing directly on this point. The trial will follow what ever is normal procedure for retrials in a civil law system as applied by this Court.
399. Clearly, the Court will have before it the files from the previous trials. The evidence which they contain from the previous files would constitute evidence in the retrial. There is no necessary requirement that all witnesses who were called at the first trial be recalled or even, as we understand it, that all the evidence given then or at the retrial be given by witnesses in person. Hearsay evidence including out of court statements by others which incriminate the Appellant are admissible, as we understand the system. The previous dossiers therefore stand as the basis of the cases. This is clear from the answers given by the Legal Adviser to the Jordanian Ministry of Foreign Affairs to the FCO on 15 May 2006. We also accept that the Appellant, in principle, could call those witnesses who had incriminated him, and any other witnesses whom he wished to.
400. The next and major issue in relation to evidence concerns how allegations that evidence was obtained by torture would be dealt with. This applies to the confessions of others which incriminate the Appellant and which he or the maker of the statement allege were obtained by torture. We consider it most unlikely that the Appellant himself would be ill-treated into making a confession.
401. The trial dossiers would include evidence which had been alleged to have been obtained by torture and which the SSCt or Court of Cassation had ruled admissible, rejecting that allegation. It would be possible for the Appellant to challenge that ruling but how the Court would react would depend on what had been determined previously and what new evidence if any the Appellant was able to introduce. He could call the witnesses whose evidence incriminated him and who had said that their confessions had been obtained by torture and other witnesses, if any, relevant to that issue. There would be actual and potential difficulties over certain witnesses.
402. The Court of Cassation, in the “Reform and Challenge” conspiracy appeal, held that confessions made to the Public Prosecutor constituted sufficient evidence for conviction if the Court accepted them, and if the Public Prosecutor was satisfied with the confessions. It rejected the claim that the Prosecutor had to prove that the defendants had confessed to him of their own accord, because these were confessions

made before the prosecutor who was a judge. His task was to investigate, interrogate and take confessions and statements. The Prosecutor's obligation to prove that a confession was obtained willingly only arose where the confession had not been obtained before him. The confessions in question were made to the Public Prosecutor, were authentic and there was no evidence that those confessions had been made under financial or moral coercion.

403. The Court then considered the impact of the allegations that the confessions to the Prosecutor resulted from coercion against them and their families while they were in GID detention. Such conduct during an investigation was against the law and rendered the perpetrators liable to punishment. However, that would not nullify the confessions made to the Public Prosecutor unless it were proved that the confessions were the consequence of illegal coercion to force them to confess to things which they had not done. The defendants had not shown that that was the case.
404. The Court of Cassation in the Millennium plot appeal does not deal quite so explicitly with the problem of a confession made in front of a Public Prosecutor, who has not exercised any coercion himself at all, but which may have been preceded by acts or threats of ill-treatment or torture from GID officers.
405. As we read these judgments, if a confession is made other than to the Public Prosecutor, it is for the prosecution which relies on it to show that it was not obtained improperly. If the confession is made to the Public Prosecutor and the various legal requirements are satisfied as to e.g. authenticity or notification that he can remain silent if his lawyer is not present, it is for the defendant to show that it was the product of earlier coercion. That is because the Prosecutor is regarded as a judicial figure and an admission in Court would be treated in that same way.
406. At the first trial, the case against the Appellant included the confession statement of Al Hamasher or Al Khamaysa, made in front of the Prosecutor in which, in addition to confessing his own part, he incriminated the Appellant. It was alleged by Al Hamasher at the trial that the confession had been obtained as a result of prior treatment by the GID which included but went wider than torture. The SSCt and Court of Cassation held that this defendant had not shown that the statement which he made to the Prosecutor had been obtained through prior ill-treatment by the GID or was in some other way improperly obtained.
407. It is said for the Appellant, drawing on what the defendant said in his statement for the appeal, that the GID destroyed the videos of the interrogation, that there were no medical examinations during detention and that independent medical examinations were delayed until several months after the allegations of torture had been made. There was credible evidence to support the allegations from eye witnesses including their lawyers. The Court is criticised for its

examination of the allegations; no GID officers were called, nor were their details provided.

408. There is no evidence either way about the availability of the defendant Al Hamasher for the retrial. He may still be in custody. But in principle he could be called both to say that the incriminating statement was procured by prior duress and that it was false. The direct evidence of the missing contact between Al Hamasher and the Appellant would be no more likely to be available at a retrial than it was at the original trial.
409. Al Jeramaine would not be available because he has been executed for other offences. The complaint at the trial and on appeal in respect of his evidence was that the prosecutor had taken a statement from him in which he had confessed to the conspiracy, exonerating the defendants, but the Prosecutor had withheld it from them. He had taken the view that the statement was false. Al Jeramaine gave evidence and his exonerating evidence was disbelieved. His statement would still be part of the dossier before the court on the retrial.
410. The allegation in the Millennium plot trial follows much the same pattern. The defendant Abu Hawshar confessed to his part in the conspiracy and incriminated the Appellant. The statement was admitted because it was made in front of the Prosecutor in due form and the defendant did not prove that it had been obtained by prior ill-treatment or threats by the GID. It would be part of the retrial dossier. It would be open to the Appellant to call this defendant as a witness. However, he has been sentenced to death. If he has not been executed by the time of the retrial, Mr Fitzgerald points out rightly that he would face a considerable temptation to incriminate the Appellant if he thought that he could thereby save his own life. But Abu Hawshar's voluntary defence statement states his admiration and respect for the Appellant.
411. We do not think that any of the allegations of prior ill-treatment were made to the Prosecutors when the confessions were made to them. Indeed, it is unlikely that a confession would be preceded by an allegation that it was only being made as a result of prior torture. We cannot decide whether there actually had been any torture or any which could have been obvious to the prosecutor, although the allegations include treatment which did leave marks and scars. On the evidence, the allegations may very well be true. There is some indication that questions before the prosecutor are videoed, because some tapes were introduced at least in the first trial in circumstances which led to complaints that they could not be seen clearly by the defence, and might have been tampered with.
412. In our judgment, at the retrial, the SSCt would not dismiss out of hand the allegations that incriminating evidence had been obtained by torture, even though they have been the subject of a previous ruling. But, it is extremely unlikely that the Appellant would succeed in showing, and it would be for him to do so, that that earlier ruling

should be changed in the absence of further very strong evidence, which now would itself be unlikely to be available.

413. There is therefore a high probability that the past statements made to the Prosecutor which incriminated the Appellant will be admitted at the retrial, as they were at the original trials. The Court would listen to evidence and argument that they had been obtained by torture or ill-treatment or threats beforehand by the GID. We do not regard it as likely that the Appellant would succeed in excluding them from the trial, either because of an earlier judicial ruling which could not in practice be controverted by new evidence, or because of the evidential difficulties of proving to the SSCt that the confessions had been obtained as a result of such treatment.
414. If there were an incriminating statement made before the Prosecutor which had not been the subject of earlier judicial ruling, which was alleged to be the result of threats or past acts done by the GID, the SSCt would consider the evidence about how it was obtained, and its finding could be reviewed by the Court of Cassation. It would again be for the Appellant or defendant to prove this point, and we accept that he would find that difficult. It would appear that the bar in practice is set high, and any records which would support such an allegation are unlikely to exist or to be kept. The SSCt may be very unwilling to accept that the procedure before the Prosecutor could realistically and demonstrably be tainted by prior ill-treatment or threats of future ill-treatment.
415. Although there are allegations by defendants in the two trials that the Prosecutors in the SSCt have falsified statements, we have no way of assessing whether there is any sound ground for that. We do not think that the SSCt or Court of Cassation would accept that that had been done by a prosecutor-judge except on the clearest and most indisputable evidence. The possibility of falsification cannot be ruled out in view of close working conditions with the GID, but we do not think that any real weight can be given to it.
416. If a statement was alleged to have been obtained by torture or ill-treatment by the GID but not repeated or made to the prosecutor, it would be for the prosecutor to prove that it was admissible and there is a greater prospect that the Court would exclude it, having heard evidence about it. It is a less likely source of evidence anyway because the prosecution relies, it appears, on statements made to the Prosecutor rather than GID interrogation statements. If it were to be admitted, it would be the result of judicial consideration of the evidence about its nature. That would be hampered by the probable lack of material available to support the challenge. That is made the more difficult by the absence of allegation to the prosecutor, as we see it, that there had been prior ill-treatment or threats. It is rather more difficult to judge the outlook of the SSCt on this aspect because of the much greater reliance upon statements made to the Prosecutor. But the SSCt does not enjoy a good reputation for concern about evidence which may have been obtained by torture.

417. The MOU adds little to this issue, beyond what is relevant to ill-treatment. The trial would be conducted according to Jordanian procedures. The legal principles governing the admission of statements made to the Prosecutor are unaffected by the MOU. The quality of the Court's appraisal of admissibility would not change.
418. The Jordanian legal system, by its terms, does not therefore permit the use of involuntary confession or incriminatory statements. There is a judicial examination of allegations of that nature before the evidence is admitted. Those allegations can themselves be tested by evidence. How far those allegations can be practicably tested is affected by certain features of the system. The burden of proof for excluding confessions made to the Prosecutor lies on the defendant. There is obvious difficulty in proving prior acts or threats by the GID in the absence of systems for recording questioning, for ensuring the presence of lawyers during questioning, and independent prompt medical examinations. There is likely to be considerable reluctance on the part of the Court to accept that confessions to the Prosecutor, a common source of evidence, are tainted by ill-treatment. The Court or Prosecutor does not appear prepared to compel the appearance of GID officials to testify about these allegations. There may be a sense that these allegations are made routinely, as a matter of defence strategy.
419. There may well be a greater willingness to test the nature of confessions made only in the course of GID questioning. There is some evidence that at least at Court of Cassation level, confessions alleged to have been obtained by torture have been excluded, (though it is not clear whether those were made to the GID or to the Prosecutor).
420. However, the general background evidence and that specific to the two trials in question shows that there is at least a very real risk that the incriminating statements against the Appellant were obtained as a result of treatment by the GID which breached Article 3 ECHR; it may or may not have amounted to torture. It is very improbable that those statements would be excluded on the retrial, because the SSCt is unlikely to be persuaded that they were so obtained, particularly having already rejected that assertion at the first trials, although the makers could give evidence that they were so obtained and were in fact untrue.
421. Once treated as voluntary and not excluded, it would be a considerable hurdle for the Appellant to persuade the Court then to reject their truthfulness, particularly as it had accepted their truthfulness in the past, through convicting the co-defendants.
422. There is therefore a high probability that evidence, in respect of which there is a very real risk that it has been obtained in breach of Article 3, would be admitted against the Appellant and would be of considerable, perhaps decisive, importance against him. However, with whatever deficiencies the legal system may have in terms of the burden of proof, the availability of evidence or in terms of judicial attitude towards such

allegations, whether correct, sceptical, naive or even indifferent, the admission of that evidence would be the consequence of a judicial decision, within a system at least on its face intended to exclude evidence which was not given voluntarily. We cannot say that that decision, on that burden of proof, would probably be wrong; still less that it would be manifestly unreasonable or arbitrary. Nor can we say that the original decisions on the admissibility of the evidence were wrong or manifestly unreasonable or arbitrary.

423. We have referred already to the difficulties which the Appellant would face in calling certain relevant witnesses. These, with the use of the dossiers, undoubtedly impose practical limits on the extent to which the retrial could be a completely fresh hearing, starting with a clean slate.
424. Turning now to other aspects of the retrial, it would be in public; the reservation that the public could be excluded if there were evidence of a national security nature is one which applies to all SSCt trials. It does not appear to have been invoked in the two trials from which the Appellant was absent. The Adaleh Centre would be able to attend it so as to monitor it and it would attract very wide public interest. That could operate as some spur to empanel the more experienced judges, who might strive to provide as fair a trial as the system in which they operated would normally permit.
425. Mr Fitzgerald submits that there is no prima facie case and that nonetheless the Appellant would face the virtual certainty of conviction. We do not feel able to say that there is no prima facie case, although without the statement of Al Hamasher the case on the “Reform and Challenge” conspiracy would be very severely attenuated. The evidence of Mr Stafford Smith suggests that the GID would be willing to pressure people to incriminate the Appellant; some might be willing to volunteer such material to advance their own situation. It is impossible to know whether there would be any additional prosecution evidence - it is certainly not excluded from a retrial, but fresh forensic evidence appears irrelevant to the Appellant’s case. We do not accept that conviction would be a near certainty. Not all previous defendants were convicted; the evidence is open to challenge and to the drawing of other inferences. We recognise that several years would have elapsed since the offences and there would be difficulties in relation to certain evidence which the Appellant might wish to call. He has yet to give evidence. However we would certainly accept that there is a very real prospect of his conviction on both counts.
426. The Appellant would face a lengthy period of imprisonment if convicted. There is a real risk of a life sentence on the first conspiracy, although there is a greater prospect that it would be considerably less because of the way in which sentences on the other defendants appear to have been reduced over the appeal process, to 4 or 5 years. There is no real risk that the sentence on reconviction on the Millennium plot would be life, although that is the legal maximum and there is no rule

that would prevent a sentence higher than 15 years on reconviction. The clear practice is against it and no good reason has been advanced as to why that practice would not be followed, and why a more unfavourable view would be taken of the Appellant when present than when absent.

427. There is no risk that the Appellant would be subjected to the passing let alone the carrying out of the death penalty on the charges of which he has been convicted and on which he would face retrial. They simply do not carry the death penalty. The new legislation does not have retrospective effect in that respect. There is no risk of the “death-row” phenomenon as a consequence of the retrial. The side letter and discussions about the death penalty are not relevant to these charges.
428. We regard the suggestion that the Jordanians might charge the Appellant with a different offence which did carry the death penalty, arising out of one or both of the two conspiracies, as fanciful. It is difficult to see what purpose that would have other than to impose the death penalty and to carry it out. No sensible reason has been advanced as to why the Jordanians would do that. They charged the Appellant with non capital offences when he was absent. Conviction on them is a real prospect. It is fanciful to imagine that an acquittal would be followed by more serious charges arising out of the same conspiracies. The offences carry maximum life sentences and it would not be contrary to sentencing practice for 15 years to be imposed on the Millennium plot charge. There is no obvious reason why the Jordanians would create for themselves the domestic political problems and diplomatic response which a fresh and capital charge would excite, and excite early on upon the Appellant’s return. The caution implicit in the use by the Jordanians of the phrase “*thus far*” to describe their absence of interest in the Appellant on other charges does not warrant the view that they might charge him with a significantly more serious offence in relation to the two plots on which he already faces charges. There has been no suggestion that that is what they have in mind. It would be contrary to the whole way in which the diplomatic negotiations have been conducted and to the UK-Jordan relationship. Neither Dr George nor Mr Joffe expressed the view that there was any risk of the Appellant facing the death penalty.
429. Any prison sentences would be served in Jweideh or a like prison. They would not be served in GID detention. The sentence of “hard labour” does not connote any additional punishment and was not said on the Appellant’s behalf to do so. The conditions in those prisons can be unpleasant. But it was not suggested that they would breach Article 3 of themselves.
430. Before we examine further other risks which it was asserted the Appellant might face after conviction, we draw together our conclusions on the fair trial and detention issues. We start from the premise which we shall briefly examine later that the question in a removal case, extradition or deportation, in which it is contended that

Article 6 ECHR falls for consideration, is whether the deportee would run a real risk of a flagrant denial of the right to a fair trial under Article 6. It is the real risk which has to be shown and not any more demanding test of showing it on a balance of probabilities. The notion of a “flagrant denial” or “gross violation” of a fair trial is better understood as the concept of a “complete denial or nullification” of the right to a fair trial; see *Ullah* paragraph 24, *supra*. The same concept applies to Article 5.

431. On the evidence available here, we conclude that there probably would be breaches of Article 6, but that those breaches would fall short of a complete denial of a fair trial. First, the trial would not be before an independent body and the existence of an independent appellate body, if such it is, could not cure that defect. But we have not heard the arguments which Jordan could mount were it a party to the ECHR.
432. Although a military court can be an independent judicial body, even when trying a civilian, such a trial process calls for a “particularly careful scrutiny”; *Ergin v Turkey (NO 6)* ECtHR 4 May 2006 Case 47533/99. But the more common emphasis is on the lack of independence of a military court by the nature of its composition; see e.g. *Incal v Turkey* (2000) EHRR 32. The objectionable features normally inherent in a military court are the holding of a military rank which puts the judge under the control of the executive, subject to military discipline and assessment, appointed and removable by the executive. Those features are present here: the judges hold military rank; they are appointed by the executive on the recommendation of the Head of the Joint Chiefs of Staff; they are removable by the executive. We have no information on their security of tenure. Although we accept that they are career military lawyers, legally trained, and that they are not ordinary officers seconded to a judicial post, their appointment, its duration, and promotion prospects are subject to the decision of the executive in which the Head of the Joint Chiefs of Staff has a powerful say. We do not know how panels are selected. The minority civilian judge is also subject to executive appointment in circumstances which say nothing about his security of tenure or the duration of any posting to the SS Ct. The Higher Judicial Council which deals with assignments is under Ministry of Justice control.
433. The Prosecutor is not independent for the same reasons. The fact that the Prosecutor and the majority of the judges are part of the same military hierarchy does not add to the appearance of justice or independence.
434. This lack of independence cannot be cured by the independence of the Court of Cassation. We do not have specific evidence about the appointments to that Court but it has not been the subject of complaint about its independence in the same way. However, it cannot hear submissions about the independence of the SS Ct. It can correct errors of law, approach and procedure and it can review findings of fact but it does not hear the cases afresh apart from prosecution appeals. The

precise boundaries of its factual review are not wholly clear. Mr Fitzgerald is right that the lack of independence of the SSCt, as the trial court, cannot be cured by the availability of a right of appeal; *De Cubber v Belgium* 7 EHRR 236; *Findlay v UK* 24 EHRR 221. Other defects might be cured by appeal however.

435. Second, it would be a breach of Article 6 and the trial would be unfair if evidence were to be admitted which had been obtained by torture or other acts which breached Article 3, or if confessions or incriminating statements which were not made voluntarily were admitted.
436. As we have explained, there is no real risk that any confession from the Appellant himself would be obtained by treatment which breached Article 3 or gave rise to any concerns about unfairness. The concern relates to the statements which have already been obtained from the other defendants and possibly which might yet be obtained from other witnesses. We have expressed the view that there is a high probability that evidence which may very well have been obtained by treatment which would breach Article 3 ECHR would be admitted, because the SSCt would probably not be satisfied that there had been such treatment or that it made the maker of the statement to the Prosecutor say what he did. But that is not the finish of the argument over whether the admission of the statements in question would breach Article 6, again on the same hypothesis. Whilst it is unfair for statements obtained by ill-treatment to be admitted, the first question is whether there is legal provision for its exclusion, and second, whether that provision is adequately effective. There is always scope for disagreement about the correctness of a judicial decision on a factual issue related to admissibility in this area.
437. Jordanian law does not permit evidence found to have been obtained involuntarily to be admitted, but it does require the defendant to prove that the statements which are most likely to be at issue here, those given before the Prosecutor, have been obtained in that way. A statement which may possibly have been given to a prosecutor as a result of prior GID duress is thus not excluded if the burden of proof is not discharged. We do not regard a legal prohibition on the admissibility of tainted material framed in that way as itself a factor which would make a trial unfair. The fact that under Jordanian law, statements to a Prosecutor which might have been obtained by prior duress are not excluded, because they have not been shown to have been so obtained, does not make the trial unfair. So to hold would mean that a fair trial required the Prosecutor/judge, in a civil law system, always to disprove an allegation that a confession made to him was obtained by prior ill-treatment; or it would involve the Courts of the deporting country holding that the Courts of the receiving country would not endeavour to apply its own laws. However, as to the first, the ECtHR treats the regulation of the admissibility of evidence as essentially a matter for the domestic legal system. The burden of proof in Jordan is reversed anyway where the statement at issue was made to the GID. The majority decision in *A and Others (No 2)* supra, did not

regard it as unfair, albeit with caveats, for evidence said to have been obtained by torture to be excluded only if that had been proved on a balance of probabilities by an appellant. We cannot conclude, particularly in the light of the incomplete information we inevitably have, that the evidence was probably obtained by treatment breaching Article 3. We can only conclude that that was a very real risk. The Jordanian Courts might agree.

438. We do not conclude either that for all the deficiencies of independence the SSCt, and Court of Cassation, did not or would not endeavour to apply its law reasonably conscientiously. We cannot conclude that the Jordanian Courts did or would probably err in their application of Jordanian law to the facts, or had or would reach decisions which were manifestly unreasonable or arbitrary. And after all, whatever the burden or standard of proof, Courts can always disagree on the application of law to fact without the outcome being legally unfair. It might be said of any Court, including a UK Court, especially on incomplete information, that there is a real risk that it might appraise the evidence wrongly. If the UK were applying its law to the exclusion of such evidence, on the material which we have although that is necessarily incomplete, the evidence would be excluded. But that cannot be the test for a fair trial.

439. To us, the question comes back to whether or not it is unfair for the burden of proof in Jordan to lie where it does on this issue; we do not think that to be unfair in itself. However, this burden of proof appears to be unaccompanied by some of the basic protections against prior ill-treatment or means of assisting its proof eg video or other recording of questioning by the GID, limited periods of detention for questioning, invariable presence of lawyers, routine medical examination, assistance from the Court in calling relevant officials or doctors. The decisions are also made by a court which lacks independence and does not appear to examine closely or vigorously allegations of this nature. It is taking these points in combination which leads us to conclude that the trial would be likely to be unfair within Article 6 because of the way the allegations about involuntary statements would be considered. But again, we do not know how Jordan would put the case and with what factual material were it a party to the ECHR, nor what impact any derogation might have.

440. We do not regard there as being a real risk that the retrial would be unfair because of the use of the dossier. How much evidence had to be repeated would depend on how much of the dossier was challenged and what evidence the Appellant might seek to call. He would be allowed to challenge the statements which incriminate him and the circumstances in which they were obtained, including by calling the makers. This is not comparable with the situation in which a defendant cannot challenge a conviction in absentia. We do not think that any unfairness arises of itself from the fact that out of court statements incriminating a defendant are admitted. It is hearsay evidence and that is quite

commonly admitted in civil law jurisdictions and indeed now, with fewer restrictions than before, in the UK.

441. The execution of Al Jeramaine, who might have given evidence that the Appellant had nothing to do with the conspiracy, does not remove his statement from the dossier; his evidence had in any event been disbelieved. The position of Abu Hamasher is unknown; Abu Hawsher would be in a difficult position. But we do not accept that those problems would make the trial unfair.
442. However, although there are ways in which the retrial would probably not comply with Article 6 ECHR, the question is whether the retrial would be a complete denial of those rights. It is our view that the retrial would not involve a complete denial of the right to a fair trial before an independent and impartial body.
443. The retrial would take place within a legally constructed framework covering the court system, the procedural rules and the offences. The civil law system contains aspects anyway which may seem strange to eyes adjusted to the common law, but which do not make a trial unfair. The charges relate to offences which are normal criminal offences rather than, as can happen, offences of a nature peculiar to authoritarian, theocratic, or repressive regimes. There is some evidence, if admitted, which would support the charges.
444. The Appellant would be present at the retrial. The trial would be in public and would be reported. Even with local media restrictions, its progress would be reported on satellite channels. He would be represented by a lawyer and at the public expense, if necessary. He would know of the charges and the evidence; indeed he already knows some of it. There would probably be a shortfall in time and facilities for the preparation of the defence on the general background evidence but the particular position of the Appellant would probably obtain for him better facilities and time than most Jordanian defendants.
445. The civil law system dossier or file does not mean that evidence cannot be challenged. It can be. The Appellant could give evidence and call witnesses, including those whose statements were in the dossier and who claim that they were involuntary. The fact that one possible witness has been executed for other offences, (not to prevent his giving evidence for he gave evidence at the first trial), does not show the trial system or the retrial to be unfair. His evidence could impact only tangentially, it would appear, on the Appellant's involvement. The difficulties which other witnesses may face, notably Abu Hawsher, would not make the retrial unfair.
446. We accept the lack of institutional independence in the SSCt. The lack of independence for SSCt Judges is in the structure and system. There is no evidence as to why particular judges might be chosen for particular cases, or that they are "*leaned on*". But the SSCt is not a mere tool of the executive: there is sound evidence that it appraises the

evidence and tests it against the law, and acquits a number of defendants. It has reduced sentences over time.

447. Its judges have legal training and are career military lawyers. There is a very limited basis beyond that for saying that they would be partial, and that has not been the gravamen of the complaint. Their background may well make them sceptical about allegations of abuse by the GID affecting statements made to the Prosecutor. They may instinctively share the view that allegations of ill-treatment are a routine part of a defence case to excuse the incrimination of others. The legal framework is poorly geared to detecting and acting upon allegations of abuse. The way in which it approaches the admission of evidence, on the material we have, shows no careful scrutiny of potentially tainted evidence. There would be considerable publicity given to the retrial and public trials can encourage greater care and impartiality in the examination of the evidence. This would not be a mere show trial, nor were the first trials; nor would the result be a foregone conclusion, regardless of the evidence.
448. Reasons are given for the decisions, and an appeal to the Court of Cassation is available. The fact that such an appeal cannot cure the want of structural independence in the SSCt is not a reason for discounting its existence in the overall assessment of whether there would be a complete denial of Article 6 rights. This Court is a civilian court and the evidence of undue executive influence through appointment or removal is quite sparse. There is no evidence again as to how its panels are chosen, nor that they are "*leaned on*" by the executive. It plainly operates as a corrective to the rulings of the SSCt on law and procedure, and is of some relevance to factual matters, even though it does not hear the evidence all over again or have a full factual jurisdiction except on Prosecutors' appeals. The probable sentences are not wholly disproportionate to the offences.
449. We have discussed at length the approach of the SSCt to the admission of statements to a prosecutor allegedly given as a result of prior ill-treatment. Although we take the view that a contribution of factors would probably make the retrial unfair in that respect, they do not constitute a complete denial of a fair trial. The existence of a legal prohibition on the admissibility of such evidence cannot be ignored, nor the fact that the SSCt would hear evidence relating to the allegations. The role of the Court of Cassation in reviewing and at times overturning the conclusions of the SSCt on this issue is material. The want of evidential or procedural safeguards to balance the burden of proof, and the probable cast of mind towards statements made to a prosecutor/judge in a civil law system, all within a security court dominated by military lawyers, does not suffice for a complete denial of justice.
450. There is a danger, given the inevitable focus on what is said to be potentially unfair about the retrial, in focussing exclusively on deficiencies when deciding whether there would be a total denial of the

right to a fair trial, rather than looking at the picture of the trial as a whole. That is what has to be done however and it is that picture as a whole which has led us to our conclusion on this issue.

451. The various factors which would be likely to cause the retrial to breach Article 6 are to a considerable degree interlinked. Taking them in the round does not persuade us that there is a real risk of a total denial of the right to a fair trial.
452. Of course, the nature or gravity of the deficiencies required to show a total denial of a fair trial is not capable of precise definition. But the concept conveys a sense of a trial which overall is largely or essentially indefensible, affronting any true sense of justice or fairness, even though that affront does not have to be so grave as a mere show trial or facade for a pre-determined conclusion. To us, the retrial would be some distance overall from that concept, and does not satisfy the stringent test which, if Article 6 were engaged, the ECtHR would apply. The difficulties of satisfying this test are exemplified by *Einhorn v France* ECtHR Reports 2001-xi and *Bader v Sweden* (app.no. 13284(04) in which respectively the absence of the accused, his lawyer and evidence showed a flagrant denial of justice, whereas, and closer to here, in *Mamatkulov and Ashkarov v Turkey* (2005) 41 EHRR 25, the irregularities did not constitute a flagrant denial of justice.
453. We do not consider that any breaches of Article 5 which we have considered earlier would amount to a total denial of that right.
454. We have adopted thus far an approach to the concept of a “complete denial” which involves an analysis of the degree and gravity of the shortfall. The concept cannot be regarded as “quantitative”, because “complete denial of a fair trial” is not capable of being quantitatively assessed and the point at which the test is satisfied is necessarily qualitative. “Flagrant” and “gross” were also endeavours to express extremity rather than obviousness. The Court of Appeal in *EM (Lebanon) v SSHD* [2006] EWCA Civ 1531 adopted that same approach, and treated the test in *Devaseelan v SSHD* [2001] Imm AR1 para III, approved in *Ullah* as being a test of general application. Although approval was given to that test in a part of his speech where Lord Bingham was dealing with qualified rights, *Devaseelan* itself was dealing with Articles 5 and 6. We see no reason for a different test for derogable Articles.
455. The Court of Appeal also rejected the notion that what it considered would be wholly indefensible in an Article 8 case by a party to the ECHR, (para 32), did not prevent removal for that risk to be faced in a custody hearing in Lebanon.
456. It appears to us possible, however, that the approval given by Lord Bingham in *Ullah* to the approach of the IAT in *Devaseelan v SSHD* [2001] Imm AR 1 para 111, may have involved more than the adoption of a clearer form of words than the “flagrant denial” test. His approval

may have extended to the analysis behind the adoption of that phrase by the IAT.

457. The analysis behind *Devaseelan* is that a breach would occur on the part of the removing country where, on the assumption that the receiving country were a party to the ECHR, there is nothing which it could say to show that the acts exposure to which was risked by removal, were permitted by the facts, or interpretation of the Convention, or by any qualifications or by any derogations which could have been made. Derogation as a defence was explicitly raised as a possibility in *Devaseelan*, a Sri Lankan case. If that is the assumption, then a further analysis is required.
458. The ECHR contains no explicit provision which makes the removal of an individual, and thereby his exposure to the risk of acts which would be a breach of the ECHR were the receiving state a party, a breach of any obligation on the part of the removing state. But the ECtHR has developed an obligation in certain circumstances not to remove an individual, although the removing state does not itself directly cause or bear responsibility for the acts of the receiving state: it indirectly causes and bears responsibility for those acts because its own act of removal exposes the individual to those risks. The ECtHR's jurisprudence on this area is developing.
459. But indirect responsibility for such exposure cannot arise unless, at the very least, the acts of the receiving state would be a breach of the ECHR by that receiving state, were it a party. For that indirect responsibility to arise, it has to be shown that there could be no defence by the receiving state to the allegation that the acts, to which removal risks exposure, would be a breach of its ECHR obligations were it a party, no matter how those obligations might be interpreted or whatever might be said by or on its behalf. It is not a breach of the ECHR by the UK to remove someone merely because it would be a breach if the UK itself, in its present circumstances and on the material before the Court, were to do the acts at issue. The acts have to be incapable of defence, recognising that the issue is also being judged prospectively rather than with the normal benefit of hindsight and knowledge as to what actually happened, and with the directly relevant party actually appearing before the Court. Consideration also has to be given to the scope for successful reliance by the receiving state on the qualifications to the qualified Articles, even though it is not a party. The application of the qualifications might have to recognise, on this approach, that it was not for the Court to impose international protection requirements based on cultural or religious disagreements alone. *EM (Lebanon)* could be an example of that.
460. We consider that this alternative "complete denial" approach requires there to be no defence based upon a possible derogation either which the receiving state could mount. That was the context of the *Devaseelan* test. After all there is no breach of the ECHR where a derogation has been made, and the question is not whether the UK

would breach Article 6 if the acts took place here and now but whether there would be a breach in the receiving country, which has not faced the need to make a derogation from a Convention to which it is not a party.

461. The application of this *Devaseelan* analysis to Articles 5 and 6 means, in our judgment, that the removal of the Appellant to Jordan would not constitute a breach of the UK's obligations. We do not know what factual material Jordan could produce were it a signatory to the ECHR, facing proceedings in the ECtHR. Its possible defences also involve the prospect that Jordan could derogate proportionately from the Articles in question, for they are derogable. It could well be that, were it a signatory, Jordan would have declared that a public emergency existed - as the UK has done in the recent past, perhaps with less justification but in not wholly dissimilar circumstances. In our judgment it would be difficult to say that in such circumstances, the provisions for detention for questioning, for trial by the SSCt and the provisions whereby statements made to the prosecutor were accepted as voluntary unless the contrary were shown by the defendant, even in the absence of the safeguards referred to, were outside the legitimate scope of such a proportionate derogation. We cannot conclude, on that approach, that there is a real risk that the removal of the Appellant by the UK to Jordan would breach the UK's obligations. These considerations underline how difficult it is in reality for an appellant to succeed in a removal case on Articles other than 3 or 2. This is especially so where the fairness of a trial outside the context of removals is judged overall and with the benefit of hindsight.
462. There is a further aspect which requires consideration. Article 6 does not exist in isolation; an unfair trial will be the more likely to lead to a conviction and sentence. In some egregious cases, unfairness is the deliberate precursor to severe punishment. It would be too narrow to exclude the nature of the potential penalty from consideration of what form of trial constituted a total denial of justice. A trial which might lead to the death penalty might have to be less unfair than one which led simply to a large fine. Considerations of this nature may also reflect the scope for differential application of Article 6 and the test of what amounts to a total denial of justice in the different contexts of extradition and deportation, as foreshadowed by Lord Bingham in *Ullah*. However, in this case, looking at the Article 6 issue with the potential consequences in mind, that is a real prospect of a long term of imprisonment, the overall nature of the prospective retrial for the charges in question does not persuade us that there would be a total denial of the Appellant's rights in such a way that his deportation would breach the UK's obligations.
463. The fact that Article 6 does not operate in isolation also means that a total denial of justice may lead to breaches of other rights. Where a total denial of justice would lead to the carrying out of a death penalty, Article 2 would probably be breached, and in line with *Chahal*, no removal could take place. Where it led to imprisonment, it is probable

that an equally serious breach of Article 5 would occur. Where, however, the conditions and terms of detention, albeit unpleasant, do not themselves give rise to a real risk of a breach of Article 3, we do not consider that the fact that such imprisonment might follow a wholly unfair trial could create a breach of Article 3. The nature of the obligations in that Article does not permit its application through such a combination of circumstances. If those conditions would not breach Article 3 after a fair or reasonably fair trial, they still would not do so after a wholly unfair trial. They could not for example retrospectively become degrading if a conviction were overturned upon the discovery of perjured prosecution evidence.

464. In *R v Offen* 2001 1 Cr. App. R 372, the CACD considered that Article 3 would be breached were a mentally ill person, confined to prison, denied medical treatment. That does not help. Mr Fitzgerald also cited to us *R v Drew* 2003 3 Cr. App R 24, p371. This dealt with the compatibility of unjust but mandatory minimum sentences with Articles 5 and 3. The relevant provision was interpreted so as to achieve compatibility with Article 5. Article 3 was raised very briefly and left by the Court as a possibility without any consideration of it. That possibility we recognized, but having considered the argument we reject it.
465. Finally, there is a question as to whether or not, were we to have concluded that Articles 5 and 6 would be breached through removal because of the real risk that there would be an unfair trial, any balancing factors were to be brought to bear. Could the degree and nature of the risk to national security which the Appellant poses be balanced against the degree and gravity of risks in relation to Articles 5 and 6 which he might face if returned? Is it sufficient or is it merely a pre-requisite of holding that removal would breach the UK's obligations under the ECHR to hold that there was a real risk of a total denial of those rights in the country of return on the *Devaseelan* test. This is not a question of the balancing of interests inherent in the application of parts of Article 6.
466. This gives rise to some very difficult issues, which do not fall for decision on the conclusions to which we have come. We do not think that the *Devaseelan* test as approved in *Ullah* answers the issue, because it did not arise for decision. We make these observations.
467. The ECtHR has not enunciated any general theory of indirect responsibility for those acts of the receiving state which amount to a complete denial of a right, such as to prevent removal, although it is clearly the foundation for the engagement of state responsibility without necessarily being the final and exclusive test or answer. Had the ECtHR enunciated any such general and unqualified test, it would have been apparent by now. *Ullah* did not hold that it had done so. That judgment reflected the tentative nature of the jurisprudence, even though a theory of indirect responsibility underlies the obligation on a state to prevent removal. The tentative nature of the ECHR

jurisprudence suggests rather that such a theory may not be of general application or at least may not be a complete answer to when removal may be prevented under the ECHR.

468. On the face of the *Devaseelan* test as approved in *Ullah*, at least on the alternative view of what the “complete denial” test means, it is only where the right would be completely denied in the country of return that the UK would be in breach of its obligations under ECHR. It would bear indirect responsibility in those circumstances for the acts of the country of return. But that position is reached by considering whether the country of return would be in breach of the ECHR, were it a party, after making allowance for what evidence it could bring and what *it* could say in relation to the Article 8 (2) qualifications. If the argument stops there, and that is not an impossible analysis of the general application of the indirect responsibility theory allied to a complete denial of rights in the country of return, a return would be forbidden by virtue of a breach of Article 8 without the qualifications ever being considered from the point of view of the *UK's* interests. It may be that the effect of *Ullah* is that the total denial would prevent the ordinary interest of immigration control justifying removal, but it was not considered in the context of the graver matters which can arise.
469. This point can be illustrated by the decision in *EM (Lebanon)*. The Court of Appeal held in para 32 that if Lebanon had been a party to the ECHR there would have been a total denial of the mother's rights, even allowing for any Article 8(2) qualifications which Lebanon could put forward. And it was close to finding a total denial of her rights on a more general basis. Had the mother been a threat to national security, which she was not, she would have been allowed to stay without regard being had to that factor at all, simply because the law in Lebanon denied her rights as a mother without objective justification. The Article 8(2) qualifications from the UK's point of view, save perhaps the ordinary interests of immigration control, would never have become relevant. The UK's breach would have arisen solely because of its responsibility for the total denial of rights by Lebanon. *EM* would not be treated differently from someone who was a threat to national security. That would be a strange result which it is difficult to see as justified by the terms of Article 8.
470. The further question ought to be whether the UK could justify return in those circumstances. Therefore it may be that in relation to a qualified Article, a second stage is required in which the qualifications in Article 8(2) are applied to the returning country's interests and found to be inadequate, before removal becomes a breach of the removing country's obligations. The total denial in the country of return merely shows that without more there would be a breach by the UK; but it could still rely on the qualifications in the usual way to defend what would otherwise be a breach. That however would mean that indirect responsibility for a total denial of rights did not provide the complete answer to when removal would breach the returning country's obligations; it would be but the starting point. The reality may be on

the other hand that the test for a complete denial of the right is so stringent, that no matter what risk the individual posed, he should not be removed. But that is not the way in which the test has been explicitly formulated, and such a test would permit the removal of someone who posed no risk but who faced nonetheless real difficulties on return.

471. If however, the complete denial of a right is the starting point, it cannot be excluded that a balance may be required for the derogable Articles; that balance could take account of the more serious matters in the qualified Articles. The ECtHR develops the ECHR as a living document cautiously and in cohesion with other instruments to which the parties are also signatories. There are some powerful arguments that the primary guiding obligation as to how the indirect responsibility for a state on removal should be judged is still, even post *Chahal*, to be found in the near contemporaneous Refugee Convention. There would be a very striking and stark contrast between the removal, permitted under the Refugee Convention, of a refugee who was a threat to national security, without consideration of the harm to which that person would be subject on return, and the removal, forbidden under the ECHR, of that same person facing that same risk, but without consideration of the threat to national security.
472. It is hard to see that these contrasting outcomes could be justified by anything in the language or intent of the signatories to the ECHR. The concept of the living document is not a means for the judicial arrogation of decisions which belong elsewhere. If the principles of indirect responsibility are to develop from a Convention which did not appear to contain any such principles at all, a difference of approach as between the absolute, the derogable and the qualified Articles is compatible with the concept of balance inherent in the ECHR. It is difficult to see as incompatible with that balance an approach which takes account of the graver matters in the state's interests and obligations in relation to the derogable Articles, when dealing with the removal of those who have otherwise no right to remain. Those interests and obligations may involve protecting the rights of other UK residents.
473. The adoption of a different approach for Article 3 can be seen as justified by the nature of the right which it protects, and by the other international Conventions to which ECHR signatories had become party, which forbid removal to face a real risk of torture. There is of course an element of speculation about why no balance fell to be struck because no reasons are specifically given for the apparent change from *Soering*, which is surprising in view of the substantial minority dissent on that point. But the probable reasoning is peculiar to Article 3 and the developing international prohibitions on torture to which the signatories to the ECHR were also parties, and is not of general application - at least beyond the other absolute rights which have much in common with Article 3 or, in the case of Article 2, are stronger still.

474. However, although we express no conclusion on this issue as it is not necessary, we are satisfied that any balance would favour removal.

### **Conclusions: post-trial questioning**

475. If the Appellant were acquitted, or were to receive only a fairly short sentence, and there were other possible offences which could lead to a charge arising out of his conduct before his return, we would expect the GID to question him about them if it had not done so already. There could be no sound objection to that in principle. If other offences did come to light, there could be no proper objection to their being prosecuted. However, as we have said, the existence of such other offences is essentially somewhat speculative. It is simply that the Jordanians cannot rule out that others might come to light; and the GID might seek them out in the event of an acquittal or a short term of imprisonment.

476. If this were to happen, it would happen quite shortly after acquittal or early on during detention after conviction. We consider that the factors which would operate during detention pending retrial would largely continue to apply; the acquittal or sentence would still leave the Appellant as a notable figure, an acquittal the more so. Dr George is of the view that there would be no real risk of a breach of Article 3 during the early months of post-trial detention. Those factors would be supplemented by the MOU and monitoring arrangements.

477. Still less can we see any reason to suppose that the Jordanians have in mind or would bring any capital charge; the reasons which we have given in relation to fresh charges arising out of the two conspiracies and leading to the death penalty would continue to apply in large measure. The Appellant would still be a notable, divisive and public figure and to charge him with such an offence would simply stir a hornet's nest in a way which the astute Jordanian authorities would not do. We regard there as being no real risk that there would be such a charge and even less that if convicted the Appellant would actually be sentenced to death. We have already seen in the two trials that an apparently mandatory death sentence can be mitigated by judges. We see no reason to doubt that the side letter is agreed to by the Jordanians, and agreed at the highest levels. The unexpected absence of a response does not alter our view. That letter, although containing no explicit assurance for any case, gives the UK Government standing to raise at Ministerial and higher levels the question of the sentence upon a non-UK national. Although the King could have been asked to give an assurance, the acceptance of the side letter sends a clear signal as to his position. We would regard it as astonishing if there were not to be a successful intervention in the unlikely sequence of events of a capital charge being brought, and a death sentence being passed and sustained on appeal.

478. There might be further questioning by the Jordanians whatever the outcome of the retrial, for the purposes of gathering intelligence or obtaining evidence which could be used against others. However, it is unlikely that this would happen to any significant extent and we do not consider that there is a real risk that it would be accompanied by treatment which breached Article 3. First, such questioning would have taken place at an early opportunity after the Appellant's return, and before the re-trial. His knowledge of events before his return would be at its freshest, and after a period in detention its immediacy and usefulness would be diminishing. It is unlikely that more would remain to be asked in the absence of some very specific event. The general evidence suggests that it is in the early period of detention that the greater risk of ill-treatment during questioning occurs. Second, we would regard it as unlikely indeed that the GID would think that a delay would reduce the effectiveness of any publicity or public concern about the Appellant's well-being so that "tougher" questioning could usefully be reserved until after a period of quiet; and any such thinking would be misplaced. The Appellant's notoriety or profile among those of his cast of mind or simply among those in Jordan with anti-Western sympathies, is unlikely to diminish much for some years, if it ever does. Third, we do see the MOU as involving a specific bilateral obligation, which the Jordanian Government would adhere to, not to engage in but rather to prevent, as it could, the sort of ill-treatment for which the GID has developed a deserved reputation. Fourth, as we come to in more detail later, the MOU would give the UK Government a continuing standing and interest in the way in which the Appellant was treated in custody and in his whereabouts, and the Terms of Reference would enable some check to be maintained on his treatment. The MOU would be of some significance.

479. The concern that the USA would continue to be interested in questioning the Appellant at this stage is equally unlikely. The relevant questions would probably have been put at an early stage to obtain the freshest information and the same considerations which apply to further questioning by the GID also apply to any further questioning by the USA in the presence of the GID in Jordan. But mere questioning is not of itself objectionable; it is the treatment which might accompany it. There is no greater risk with the USA present than with the GID alone. It may be that the past objectionable conduct of interrogations by the USA prevented it acting as a brake on the excesses of others. The fact of and attitudes which lie behind its Detainee Treatment Act of 2005, the revision of attitudes towards certain forms of ill-treatment which in 2002/3 may have been regarded by some US authorities as legitimate or to which a blind eye was turned, may not show that it yet acts as a brake on others. But they make serious ill-treatment, sanctioned or carried out with impunity, rather less likely than it might have been in the past.

## **Conclusions: rendition**

480. The chief concern raised about the USA lies in its practice of rendition. We simply do not see this as a real risk at all, regardless of the possible arguments about its rights and wrongs. The evidence shows that Jordanian law does not permit its nationals to be deported. There is no evidence of any rendition from Jordan of a purely Jordanian national; Amawi was removed in circumstances of which there is limited evidence but which suggest that he was rendered to the US, but he is a dual US/Jordanian national. The Jordanian Government would face a powerful incentive, the force of which the USA would recognise, not to permit that to happen to this Appellant; such an act carried out to him with the apparent connivance or ineffective prevention of the Jordanian Government would create real domestic political difficulties for the Jordanian Government, including among those who support the monarchy but are unsympathetic to an overly pro-American stance, for all the fact that Jordan is reliant on US foreign aid. The USA would be well aware that its own best interests did not lie in risking the destabilisation of the very state or regime which its foreign aid seeks to maintain in stable power. Although such chances may be taken over certain major issues, the advantages of rendering this Appellant to a US facility are not realistically among them in our view. Evidence that other nationalities may have been removed from Jordan e.g. Bashmilah, Salim Ali and Arar, or that the USA has undertaken acts of rendition of Jordanians from outside Jordan, notably el Banna, does not advance the case that this Appellant faces such a risk from within Jordan as a Jordanian.
481. The UK is not to be ignored in this assessment of how the Jordanian-US relationship could affect the possibility of rendition, even though economically the USA is by far the more important to Jordan. The UK is a long term partner in many areas, with historic ties which have been maintained through the changes to which hereditary and elected leaders are variably subject over the years. The UK has a close relationship with both Jordan and the USA. We accept the evidence of Mr Oakden that the UK would warn off the USA from any thoughts of trying to render the Appellant to its detention, that the Jordanians would in this interest have a like interest to that of the UK and would refuse to co-operate and would not let it happen. Indeed we do not see the USA as even trying to render the Appellant in those circumstances.
482. Nor do we see that the possibility that there may be a secret CIA facility in Jordan at Al Jafr alters that risk. That would involve the Jordanians again conniving in the Appellant's removal to a US facility. The interest of the UK and the operation of the MOU would make such action by the US and the Jordanians very unlikely; and as it could not be kept secret with even a modest operation of the monitoring provisions, it would excite the sort of outcry which the Jordanians and the US would wish to avoid.

483. Some of these considerations apply also to any question of extradition from Jordan to the USA were a request to be made. There might be domestic political difficulties for Jordan were such a request to be made or granted but it would not represent the legal black hole which rendition does. There has been no request from the USA to the UK for the Appellant's extradition, as there could have been, and we see no reason why there should be one were the Appellant to be returned to Jordan. The US regularly seek extraditions from the UK, including that of terrorist suspects. If any extradition request were made, which we regard as unlikely, the Jordanians might well seek special assurances about detention in Guantanamo Bay or trial before a civil court, with or without UK encouragement. We do not see that there is any real risk of any breach by the UK of its obligations in the Appellant's removal to Jordan in such circumstances. It is not possible to say that there is a real risk that removal to Jordan would lead to extradition to the US, a capital charge, conviction and a death sentence.
484. There is evidence from the Appellant that Jordan has received Jordanians rendered or forcibly removed to it by the US or others from Libya, Egypt and Pakistan. That is not what this Appellant would be facing.

### **Conclusions: conditions of detention**

485. We turn now to conditions of detention. If the Appellant were convicted, he would serve his sentence in an ordinary prison such as Jweideh and not a GID facility. An ordinary inmate would experience uncomfortable and unpleasant conditions at times, sometimes with inadequate food, water and sanitation. No doubt he could at times experience some harshness, even beatings, from the guards. However, these general conditions would not reach the high level required for a breach Article 3, and were not said to do so.
486. The concern of Dr George was not in the months following conviction, but in the longer term: the Appellant, as an Islamist, would be at risk of targeted ill-treatment as by the prison guards or by the GID, against which the MOU provided no enforceable guarantees.
487. We do not accept that analysis. The risks of ill-treatment by the GID would arise only in the circumstances which we have dealt with above, rather than in the normal prison. The prisons are visited by the ICRC and other NGOs have had access at various times. The Special Rapporteur was not prevented from visiting the ordinary prisons, and did not suggest that there was systemic or systematic ill-treatment of Islamist inmates serving sentences in those prisons, unlike those being questioned in GID facilities. There is no evidence that such inmates as the Appellant would be targeted by guards for beatings, although beatings sometimes occur. If his profile and the nature of the support which he attracts in Jordan, which acts to a considerable extent as a restraint on the way in which he might otherwise be treated,

diminished over time, so too could such incentive to ill-treatment in prison as his position as an Islamist extremist might provide.

488. Although there would not be special privileges for the Appellant, the monitoring provisions would be of relevance to his active ill-treatment. Supplementary rations or financial assistance from friendly outsiders which could be used to that end would not be privileged treatment. The visits of the monitors could enable that to happen.

489. The proposed new national security legislation does not provide for indefinite detention. There is provision for a three month residence order which is renewable by a judge, albeit with no upper limit on its total duration, and a 14 day detention power. These can be movement and communication restrictions. This does not involve a flagrant breach of Article 5, nor engage a risk of treatment breaching Article 3.

### **Conclusions: the effectiveness of the MOU**

490. It is in this context that we examine the effect of the MOU and the monitoring provisions. First, the conclusions which we have reached about the treatment which the Appellant would experience on return, and the lack of a real risk of a breach of Article 3 at that stage are reinforced by their existence. We expect the MOU to have some influence on the way in which the legal procedures pre-trial are carried out. The MOU and monitoring reinforce our conclusions about other risks, although we have not relied on them as the crucial components which make what would otherwise be a real risk of a breach of Article 3 into something less.

491. Second, we make the following general observations about reliance on MOUs in cases of this sort. They echo what we said in *Y*, SC/36/2005, 24 August 2006, between paragraphs 389-396. Opposition in principle to MOUs because they may undermine longer term attempts to achieve more general adherence to international human rights obligations may or may not be justified; they could advance the cause of human rights through the protection of individuals becoming an example of what should be done. But it is not for us to take a view upon that. It is not a relevant concern for us.

492. To some extent, however, the Appellant's own submissions on the way in which individual assurances undermine the goal of improving human rights for all demonstrate that there is some reality to the effectiveness of such assurances. The concern could not be voiced, were they without some effect in creating a two tier system.

493. We see no justification for the comments from NGOs that the UK Government's attempt to negotiate and rely on MOUs is an attempt to evade the UK's international obligation; MOUs may or may not succeed in achieving a safe return, but they are rather an attempt to fulfill

international obligations when dealing with those who ought to be deported.

494. ECtHR authority, such as *Chahal* and *Mamatkulov*, shows that reliance can lawfully be placed on such assurances; the weight to be given to them depends upon the circumstances of each case. The question to which they are addressed is whether there is a real risk of treatment which would breach Article 3, and possibly Articles 5 and 6, taking them into account. It is a fallacy to treat the ECHR obligation on the removing state as one which requires a guarantee, let alone a legally enforceable one, that there would be no risk at all of a breach of Article 3 in the receiving state.
495. The political realities in a country matter rather more than the precise terminology of the assurances, and with the bilateral diplomatic relationship, are the key to whether or not the assurances would be effective in that respect. The fact that the receiving state does not adhere fully or in large measure to its multilateral international human rights obligations is relevant to whether political realities and diplomatic relationships will lead to compliance, but cannot rule out assurances as a means of ensuring that the removing state's obligations are adhered to. There is however a powerful case for not relying on an assurance which requires the state to act in a way which would not accord with its normal law; but that only goes to its weight e.g. had we interpreted the fair trial obligations as requiring there to be a retrial other than before the SSCT. We have not interpreted the MOU in that way. We see a real difference between that and an obligation to adhere to what the law requires but which may not be fully or regularly observed in practice. The Appellant might be treated better than others, and indeed there could be criticism from some about that, but it is difficult to see that a contention that he ought to be mistreated because some others have been, would carry much impact were it to be made.
496. Third, there is comparatively little material available on the experience of assurances in practice in cases of this sort. Criticisms of assurances by courts which have precluded removal in reliance on them in particular cases show no more than that they may not always be effective, as in *Chahal* itself. The case of *Agiza* stands as a clear warning of the dangers of simple reliance on a form of words and diplomatic monitoring. There were already warning signs which ought to have alerted the Swedish authorities to the risks, including the role they had permitted to a foreign intelligence organisation. But we note what to us are the crucial differences: the strength, duration and depth of the bilateral relationship between the two countries by comparison with any that has been pointed to between Sweden and Egypt; the way in which the negotiations over the MOU have proceeded and the diplomatic assessment of their significance; the particular circumstances of this Appellant and Jordan; the degree of risk at the various stages, in the absence of the MOU, particularly at the early stages of detention which is when the risk from torture by the GID would normally be at its greatest and when the confirmed torture of

Agiza in Egypt appears to have occurred; and the speed with which the monitors would be seeking and we believe obtaining access to the Appellant in those early days. The Swedes felt that to seek to see Agiza would betray a want of confidence in the Egyptians, whereas there is no such feeling in either the UK, the Centre or the Jordanian Government. Quite the reverse applies. One aspect of that case which also troubled the CAT was that Agiza had been removed without final judicial determination of his case. That would not be the position here.

497. We did not find any real assistance either way in what happened to Arar, in which the US relied on unspecified assurances from Syria about his treatment. We are not considering Syria and know not what was said. The bilateral relationship between the US and Syria has not been close in recent years.

498. Turning to the effectiveness of the MOU and monitoring arrangements here, it is necessary to consider the political situation to which this Appellant would return. We have already spelt this out at length and how it would work to reduce the risks which he would face, especially when coupled with his high profile and the wide and public interest which his return, treatment and trial would generate. There is thus already an incentive to do what the MOU envisages. Although Jordan is not a functioning democracy, it does have some features of public institutional life which assist to reduce the risk to this Appellant. It has a degree of press freedom, foreign satellite broadcasts, and some freedom of assembly for those critical of the Government. Parliament is not wholly toothless and can raise issues which are of concern. So there are other bodies which can react to what may happen or be alleged in respect of the Appellant. That is not unimportant in judging the way in which the Appellant would be treated, why the Jordanians might wish to avoid allegations of breaches of the monitoring arrangements and how they might be dealt with if made. Indeed, NGOs have some ability to operate within Jordan and their scepticism about the Centre would not necessarily lead them to ignore what was said to be happening.

499. Mr Oakden expressed the view that even if there were a terrorist outrage, the MOU would be adhered to and we accept that. The regime is also stable and even if there were to be a change of monarch the close relationship would continue as it did after the death of the previous King.

500. The concern about the constitutionality of the MOU in the absence of Parliamentary approval appears to be misplaced as this is not an extradition treaty. It is not a treaty or agreement involving financial commitments by the Jordanian Government, nor does it affect public or private rights; it does not therefore fall within Article 33 (ii) of the Jordanian Constitution requiring Parliamentary approval for its validity. It is an inter-governmental agreement which, as Mr Fitzgerald points out, does not give public or private rights, nor impose financial obligations on Jordan. The Jordan Government is not concerned about this as a hindrance to the effectiveness of the MOU and as it is not

intended to be enforceable in international law or to give rise to any domestic legal obligations, it is hard to see why concern should persist, if indeed it still does. There is no sound basis for holding that the Jordan Government is or might be wrong.

501. The significance of the MOU against that political background, is first in the fact of its negotiation. It plainly did require some political thought at all levels, political, security and diplomatic. This is an agreement which we accept has been supported and agreed to not just at the highest level but also by the GID which has to operate within it. It is not a mere piece of paper which some ordinary official could sign and then leave others to ignore, hoping that that was enough to satisfy an old friend.
502. Second, the level of scrutiny which Jordan has accepted, through giving another individual state with which it has close relations a real interest in the way in which one of its own nationals is treated, cannot but show that it is willing to abide by the terms and spirit of the MOU. The MOU was not the result of a desire by Jordan to obtain the return of the Appellant. It gives standing to the UK and to another body to intervene, ultimately through diplomatic measures, in what it has done or might do. It knows that a failure on its part to observe the MOU and the monitoring arrangements would lead to a diplomatic response at all levels and quickly. We accept the evidence of Mr Oakden as to how the responses would function in terms of diplomatic or Ministerial contact.
503. Third, we do not suppose that Jordan has agreed to these matters in the expectation that a brush off to any inquiry will suffice. There is some force in the general argument that diplomatic measures for human rights breaches would come low down on the list of diplomatic priorities in a bilateral relationship between countries. But here there is a specific agreement, which has a specific purpose engaging the self-interest of the UK and, in differing ways, of Jordan. We accept that there must be a limit, albeit undefined, as to how far the UK Government would go in taking measures against Jordan in the event of a breach or a failure to investigate a well-founded allegation of a breach, or in the event of obstruction of the monitors. There is an obvious problem about the UK taking steps which would harm itself in the apparent interest of this Appellant. But there is scope and an incentive for measures to be taken by the UK and an incentive to take steps to obviate such a response on the part of the Jordanians. The fact that its foreign aid comes largely from the US does not mean that the current relationship with the UK is not of real value to Jordan and a counterpoint to its relationship with the west through the USA. The depth and range of interests which form the long standing and friendly bilateral relationship mean that the two Governments each have an interest in preventing a breach, to avoid reducing those interests or making co-operation more difficult. Jordan has a real interest in maintaining co-operation on counter-terror matters as does the UK. Importantly however, the UK also has a very real concern that it should be able to remove foreign nationals without breaching their rights

under Article 3, and a failure with Jordan in this first Jordanian and highly publicised case would be a major setback to that process, whether a return was sought to Jordan or elsewhere. Jordan would have a real incentive to avoid being seen as a country which in bilateral arrangements could be seen to have broken its word. Many diplomatic relationships do not or cannot depend on the legal enforceability of the arguments; the trustworthiness of the other party to a diplomatic relationship is of great importance.

504. There is a counter argument that both the UK and Jordan would have an incentive not to explore the existence of any breaches, were allegations to be made. They would each be able to point to its success and to the absence of need for any steps to be taken, if they did not pursue any allegations and did not support the Centre were it to seek to do so. The premise for this is that the UK Government has no real interest as such in human rights as an end in themselves. We accept what Mr Oakden told us about its attitude, which was that it saw them both as an end in their own right, and as a means of strengthening the scope for fruitful relations between states which did not fully respect such rights, and the UK and other western countries. But in many ways the problems for both countries arise when an allegation is made publicly of a breach of the MOU. The UK Government would be very likely to seek an answer; those responsible in Jordan would expect to provide one. The incentives which are present for both parties to the MOU would bite when an allegation was made and not just when the breach was proved. Take the desire of the UK to return Islamist extremists to Middle East and North African countries: that process would be inhibited by any failure to provide proper answers to well-founded allegations of a breach and if there were allegations that the Centre had been prevented from fulfilling its functions, that would be a very serious matter.
505. It is right that the MOU does not specify the steps which are to be taken in order to investigate an allegation of a breach; indeed there is no provision for an investigation as such at all. Mr Oakden could only say that an investigation would be consonant with the MOU. However, in reality, if an allegation of a breach were made or if the Centre were to be hindered in the way in which it went about its work, for example if the Appellant were not produced and the monitors were told that he did not want to see them or had been removed to another place of detention, the most obvious starting point for any diplomatic response would be to try to find out or to require that the Jordanians find out what had happened and to do so quickly. A failure in that respect would lead to the sort of rapidly escalating diplomatic and Ministerial contacts and reactions which Mr Oakden described.
506. The failure as it appears of the USA to obtain an effective investigation into allegations of ill-treatment by the GID of Hijazi, a co-defendant of the Appellant's, does not tell anything of the position in which the UK might find itself. Far from this being a stronger example than that of the Appellant, it is a weaker one. The sole position which the USA had

was that of being one of the states of nationality, expressing concern about the treatment by the other state of nationality on its territory. That would not normally give the USA any position at all. Nor were there any assurances which it was seeking to enforce. Here, by contrast, the MOU gives the UK a specific standing in relation to the way in which the Appellant would be treated, and provides an agreement as to what should happen to him.

507. So whilst it is true that there are no specific sanctions for breaches, and the MOU is certainly not legally enforceable, there are sound reasons why Jordan would comply and seek to avoid breaches. The MOU would be an important factor in the way in which Jordan conducted itself. It would be one basis upon which the Government instructed the GID to ensure that it behaved properly and upon which it would avoid interference with the judiciary.

508. For our part, we have some difficulty in seeing why Mr Nowak regards it as being unclear why a bilateral agreement in the form of an MOU would be adhered to, where a multilateral human rights agreement with reporting arrangements has been breached. The answer here as set out above is precisely that it is bilateral, and is the result of a longstanding and friendly relationship in which there are incentives on both sides to comply once the agreement was signed. The failure of those who regard these arrangements as unenforceable, in some asserted but not altogether realistic comparison with international human rights agreements, is a failure to see them in their specific political and diplomatic context, a context which will vary from country to country.

509. The question of whether an individual, such as this Appellant, would be prepared to make allegations of ill-treatment to a monitor and risk reprisals is an important one, because it underlies the potential for a breach to be alleged, investigated and dealt with. At a general level, the point may well inhibit the making of allegations. Certainly, allegations made to the monitors could not be confidential, although those to the ICRC would be and they would visit the prisons. We do not ascribe real significance to that point here, although we are aware that the point has been made in the Jordanian context and that all but one of the lawyers for the defendants in the two trials refused to talk to Ms Refahi, apparently out of fear. First, the defendants in those cases all or nearly all made allegations of torture; the Minister of Justice said that such allegations were routinely made. There have been many such allegations before the SSCt and the Court of Cassation. Many if not all, of those allegations must have been made at a time when the individual was still in GID custody or within its reach. So the degree of inhibition does not appear to be a large consideration here. Second, the effect of the MOU and the visits of the monitors would reduce the fear and threat of reprisals further, because there would be a known disapproval of such acts higher up, a known external interest from the UK, and a real prospect that such acts to the Appellant would become known and

punished rather than overlooked as might more commonly happen in other instances.

510. There are certain weaknesses though which we recognise in the MOU and monitoring provisions. Some of the features which Mr Goldman and others see as the minimum features are not explicitly present: these include provision for prompt access to a lawyer, recorded interviews, independent medical examinations, prohibition on undisclosed places of detention. In reality, most of those aspects are covered. The requirement for prompt access to a judge is likely to bring with it the presence of a lawyer at hearings, even though not provided for as such. There may be recorded GID interviews but the availability of those records to defendants appears uncertain and unlikely to be kept if something has gone wrong at the interview. There is no requirement for independent medical examinations and the monitors could not insist on one, although they could be accompanied by an independent physician for the purposes of assessing how the Appellant had been treated. It is uncertain how the UK would react if the GID or a prison refused independent medical treatment, if that were thought by the Centre to be necessary. We would expect that to give rise to real concern. The provisions for monitoring visits and for the Centre to be informed of any removals of the Appellant from one place of detention to another, would be important in reducing such risk of incommunicado detention or detention in an undisclosed place as there might be, although we do not regard it as a real risk in the Appellant's case.
511. We accept that there is no guarantee that access as required by the TOR would always be granted and there are no specific sanctions for a refusal or specific investigatory steps which the parties are to take. But that does not mean that the MOU and TOR can be discounted when assessing the degree of risk that the Appellant would face. They are relevant to the weight given to them.
512. Of course, the experience of Mr Nowak in being refused access to a GID facility, despite a prior arrangement that he would be permitted free access, is disturbing. We do not know more than that. It would suggest that the GID could refuse access to the Centre monitors just when a visit was most needed, because there had been ill-treatment by the GID. We note however that there was no intervention to prevent visits to the normal prisons, and on the evidence which we have accepted there is no real risk of ill-treatment by the GID of this Appellant. The period when Dr George fears it most would be when the Appellant was by and large unlikely to be in GID hands. We also note that it is in the early period that the Centre would propose to visit most often, and we see no reason to doubt its intention and ability to do so three times a week at least. This would mean that any refusal of visits would be brought to light quite quickly, unlike in the case of Agiza, and in the early days we would expect the GID and Jordan Government to react swiftly to any approach by the UK, were a visit to have been refused. If a refusal were to happen, it would represent a complete reversal of

position by the Jordanian Government and the more so were it not rapidly to be rectified. We do not expect that reversal of position to happen at all. Visits by other monitors e.g. ICRC to the ordinary prisons are commonplace. We would also expect that if, at any stage of detention, the monitors were told that the Appellant could not see them because he had been moved or did not want to see them, that would trigger their alarm and a quick response by the UK Government. But we do not see that as a real risk, and would expect the Appellant and monitors to be brought together.

513. A further weakness of the monitoring arrangements lies in the relative inexperience and scale of the Centre. It would be undertaking a task which would be new to it; it does not have the expertise among its staff, as it recognises. It is a fairly new body with limited resources and staff. The office and staff resources can be overcome and the UK Government would bear the cost of that. It already has done so to some extent. We do not see the Centre's non-confrontational stance as a drawback but rather as a matter of legitimate judgment about how the Jordan Government should be approached in this context. It is certainly not a campaigning body on such issues. But that is not what is required and would not obviously be an advantage. What is required are qualities of independence and determination, persistence, a degree of scepticism, a willingness to speak out and not to be intimidated whether by government or others. To some extent its very willingness to take the position and to defend it publicly to hostile NGOs, to whom it would look for support and acceptance in the normal course of events, indicates a degree of independence, even courage. We accept the good faith, willingness to learn, enthusiasm and commitment of the Centre. We believe that it, and its monitors would have sufficient qualities with the backing of the UK Government, for the effective performance of its tasks. There is evidence that NGOs in Jordan can come under some Government pressure. But this is an unusual situation. We accept the evidence that Jordan has not signed up to these arrangements, intending to subvert them by an indirect pressure which would readily become known to the UK. Jordan is acting here in good faith.
514. The training programmes will have given its staff some insight into what to look for in testing whether someone has been tortured in a way which leaves no marks, or is refusing to speak for fear of reprisals. But they do not have the full personal expertise which is necessary for that. They would have to obtain specialist monitors or specialists to accompany them. They do not have them yet. We expect that they would be able over time to obtain, at least on an ad hoc basis, sufficient expertise to function adequately, not least because we would expect that aspect to receive the support of the UK Government. But we do not know what they would have, were the Appellant to be returned imminently.
515. We have accorded therefore very limited and probably unduly limited weight to any specialist expertise which the monitors might be able to bring to bear in the early stages of return and detention. It is, however,

the very fact of monitoring visits which is as important to the process whereby the GID treat the Appellant properly, and the absence of specialist expertise is not fatal to their value. As time goes on, expertise could become the more important and especially if there were serious allegations of ill-treatment. But we would expect that deficiency to be remedied over time, as the possible removal became actuality. This should counter the problem, were it to arise in this instance which we very much doubt, of methods of ill-treatment which left no outward signs. After conviction the Appellant would be in prison in an ordinary facility, and the degree of expertise needed to ascertain whether there has been the sort of harsh treatment such as a beating which a prison guard might have meted out, is more limited than that required to ascertain whether a more sophisticated form of torture including sensory deprivation has been used.

516. Accordingly, we take the view that in detention before and after trial, or in questioning after an acquittal, the MOU and monitoring would reduce the risks which the Appellant would face. If, without the MOU, there were real risks of treatment which breached Article 3, the MOU would reduce the risk sufficiently for removal of the Appellant not to breach the UK's obligations. That does not require a guarantee against treatment breaching Article 3.
517. There is a provision for withdrawal of both parties from the MOU, inserted by the UK as it was seen as a normal provision of diplomatic agreements. Early withdrawal or withdrawal while someone was being monitored in detention would be regarded with real concern, even though the monitoring obligation would continue. But such acts would go wholly against the way in which negotiations had been conducted. There is nothing to indicate that as a real possibility; it cannot be ruled out.
518. There was a debate largely in closed about the scope for differences as to what constituted "*internationally accepted standards*". There is no scope for textual debate: Article 3 ECHR is mirrored in Article 7 of the International Covenant on Civil and Political Rights, prohibiting torture as well as cruel, inhuman and degrading treatment or punishment. Article 16 of UNCAT extends the prohibition on torture in Articles 1 and 2 to cruel, inhuman or degrading treatment or punishment.
519. Other standards relevant to the treatment of prisoners were attached to the specimen TOR and provide obligations which go beyond the Article 3 ECHR minimum. These include the Standard Minimum Rules for the Treatment of Prisoners 1955 as updated, and the 1988 UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.
520. Debate about whether certain acts are "*torture*" or "*cruel, inhuman or degrading*" is not relevant. Nor would it be wise or necessary to provide catalogues of precisely what could or could not be done. The

nature of the inter-governmental discussions could leave no real doubt that Jordan understood what its obligations meant and would adhere to the spirit and not just the letter, to some nicety.

521. Mr Fitzgerald suggested that if the Commission were to accept what Dr George had to say about the position pre-trial and for the months following the Appellant's conviction, it would be bound to accept what he said about the later risks. We profoundly disagree. Dr George's assessment as to the first draws clearly upon his expertise in Jordanian politics. As to the latter, it does so rather less clearly, and appears more to be the adoption of a generalised view about Jordanian treatment of inmates. There is no clear explanation as to why, if the Appellant has a high profile, the previous factors would not continue, nor the impact of time and previous questioning on the desire of GID or CIA to question further. Dr George also wholly rejected the value of the MOU for reasons which we concluded were more than adequately rebutted by Mr Oakden's evidence.

### **Conclusions: disguised extradition**

522. Mr Fitzgerald submitted that deportation with the certain prospect that the Appellant would face a re-trial was a form of disguised extradition. It lacked the safeguards which would apply, including the specialty rule, the need for a prima-facie case to be shown for a country such as Jordan with whom there was no extradition treaty, death penalty assurances, fair trial and non-discrimination provisions. It was an abuse of process for the SSHD to seek to remove the Appellant and deprive him of those protections.
523. We reject this approach. It is not uncommon for the major risk which an individual faces in an ordinary non-extradition removal case to be a trial in the country of nationality. There is no general principle that his removal is prohibited if the extradition safeguards did not apply.
524. The suggestion of an abuse of process is ill-founded. In so far as the contention is that the SSHD is endeavouring to evade extradition safeguards rather than simply to remove the Appellant in the UK's interest and conformably with its international obligations, this is wholly without foundation.
525. Shorn of that, the allegations of abuse rely on a non-existent general principle; the interaction between extradition and deportation was considered in *R v Governor of Brixton Prison ex p Soblen* 1963 2 QB 243 at pp.299-301, and applied again in eg. *R v Caddoux* 2004 EWHC 642 Admin.
526. In so far as the argument is simply one of how risk in relation to a re-trial was judged, we have considered most of the issues already. There was no evidence that this Appellant would be disadvantaged as a Palestinian.

## **Conclusions : the death penalty**

527. In the light of the conclusions which we have expressed above that there is no real risk of the death penalty being imposed, let alone being carried out, it is not necessary to consider whether such a risk would breach any UK ECHR or Protocol obligations or the legal basis upon which the Commission could hold that the SSHD's decision was not in accordance with the law simply because he had reached a different but rational appraisal of the degree of that risk.

## **Conclusions: production of material**

528. We deal here with a submission made by the Special Advocates in relation to the production of material to them by the SSHD. The issue does not concern the disclosure of closed material to the open advocates. There had been complaints by them as to the timing and adequacy of the performance by the SSHD of the duty which he has undertaken to produce, in open or closed as the material may require, material which is in the possession of the Government, expressed broadly so as to cover the FCO and SIS, which may advance the Appellant's case or undermine his own. This obligation reflects the CPR test. It is not yet incorporated in the SIAC Rules although it has been a developing practice since the first Part 4 ATCSA cases. It has acquired the sobriquet of "exculpatory disclosure."

529. The practice has developed to the extent that the SSHD now provides both open and closed statements of the extent of the searches which he has carried out.

530. Some of the submissions or complaints of the Special Advocates as to what had not been provided to them appeared to the Commission to be pursuing rather a pre CPR approach.

531. At the close of their cross-examination, as the issue in part was still being raised, they were invited to put down clearly what documents or class or source of documents they said had not been provided which should have been. Their open Note of 17 May 2006 was the result.

532. The upshot of this was that they submitted that the Commission simply did not have material on relevant issues sufficient to enable it to decide the appeal, or rather to decide it in favour of the SSHD. The Commission could not be satisfied that "*the material available to it enables it properly to determine proceedings.*" This was required by Rule 4(3) of its Procedure Rules.

533. That submission is unrealistic. We have a very great deal of material on all the relevant issues, and we do not regard ourselves as unable to come to our conclusion for want of any material. Second, the search

carried out by the SSHD appears to be comprehensive and careful. In our view it plainly covered the relevant sources; the search was for the relevant types of information; the direct and at times rather indirect relevance of the material produced showed the breadth of the test of relevance which had been applied; there was clearly a great deal of effort put into it. It was also a continuing exercise, with further material being produced on a number of occasions after the conclusion of the hearing and indeed close to delivery of this judgment. The nature of the exculpatory material produced was such that the exercise could not have been done by those withholding material because it might damage the SSHD case; no accusation of bad faith could be made. We are quite satisfied that we have what we need, that there is nothing of real significance which we do not have and that the SSHD has conscientiously and effectively carried out his obligations. We cannot say that there is nothing of possible relevance that may have been overlooked.

534. We accept that these Special Advocates, and they are not alone in that respect, received considerable material late in the day. That does not give rise to any procedural fairness issue and no adjournment was sought, though we can understand the difficulties which that created. That is not however quite as simple as saying that the SSHD ought to have produced the material earlier, in view of the nature of the searches. Still less is it a basis for saying that material has been withheld or rather that the search has not been adequate. It has happened and it was suggested in an exchange of correspondence in November 2006 that it had happened here, that material which could be relevant to one case has come to light in the course of another SIAC case. Sometimes the file has not been examined, perhaps because of the way in which the files are structured. It may be that the possible relevance had not been appreciated, and it may be that on examination it still had no relevance. That is we believe a possibility in any large scale document search in litigation and is no basis for holding that the Commission could not deal with the case or that there had been any real unfairness.
535. We are not concerned here with the fact that some material which the Appellant obtained could arguably have been material which the SSHD should have obtained, in particular the material relating to the two trials in Jordan. It is a matter which, although surprising to us, has featured in a number of cases, that foreign trials e.g. in France, the decisions or transcripts of evidence seem to be available only with real difficulty. That is not material in the Government's control.
536. The actual material which, in the light of our direction on 16 May 2006, the Special Advocates say should have been produced is quite limited: it concerns comments on and exchanges of comments on the draft MOU between the UK and Jordan Governments. If they existed in writing and still exist they could be relevant, and there is no reason why they should not have been produced. There was an opportunity to ask Mr Oakden about them and where they were. The Special Advocates did

not take it. We do not regard their absence if they still exist in written form as a production failure on the SSHD's part of real significance. There was evidence about the evolution and negotiation of the MOU. It does not warrant a conclusion as to a more general or systematic production failure in the light of what we do have, any more than the late production of the asylum file. Complaint was made that the Appellant's H.O. asylum file had not been produced till later on. It had not been asked for by the Appellant. He himself already would have had his own statements and correspondence. It should have been produced earlier nonetheless for its background relevance. Although the Special Advocates refer to other documents which they say are relevant, they were asked to provide specifics by the Commission and, except for some short points answered in correspondence, have not gone further than this, which is not what we asked for and is insufficient to support their point.

537. The note of 9 May 2006 preceded cross-examination, and we specifically asked for a note after cross-examination in order to focus on what was still said to be outstanding in the light of the questions asked, and issues not pursued. We also had made a number of observations during cross-examination about how far a trail of references could usefully be pursued, and the value of varying levels of comment on drafts.

### **Conclusions: Article 8**

538. The Appellant scarcely raised Article 8 but as he has a family here and some of his children were born here, we take the view that we should deal with it. We do not know if any of his family would return to Jordan with him. Their position on that is unknown. We do not know whether they would face any risk of ill-treatment or arbitrary arrest simply as his relatives were they to return. We rather doubt it for much the same reasons as apply to the Appellant, but we reach no firm conclusion on the limited evidence on them which we have. We have considered Article 8 on the basis that they would not return and that it is the act of removal rather than their choice to stay which would disrupt family life in the UK. The gravity of the risk which the Appellant poses would in our view make his deportation proportionate notwithstanding the disruption which that would bring to his family.

### **Conclusions: the Refugee Convention**

539. We have concluded that there is no real risk of persecution of the Appellant were he now to be returned with the safeguards and in the circumstances which now apply to him. Whatever may be the scope for differences as a result of different burdens of proof, as we discussed in *Y* at paragraphs 403-404, they do not arise here.

### **Conclusions: the Immigration Rules**

540. There is nothing additional in the Rules which falls for consideration. The exercise by the SSHD of his discretion is fully justified and we agree with it.

### **Decision**

541. This appeal is accordingly dismissed. There is a rather shorter closed judgment. We have reflected the closed evidence and our conclusions on it in this open judgment. Obviously that has informed our approach and conclusions.

MR JUSTICE OUSELEY

## Annex 1A

### **MEMORANDUM OF UNDERSTANDING BETWEEN THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND THE GOVERNMENT OF THE HASHEMITE KINGDOM OF JORDAN REGULATING THE PROVISION OF UNDERTAKINGS IN RESPECT OF SPECIFIED PERSONS PRIOR TO DEPORTATION**

#### **Application and Scope**

This arrangement will apply to any person accepted by the receiving state for admission to its territory following a written request by the sending state under the terms of this arrangement.

Such a request may be made in respect of any citizen of the receiving state who is to be returned to that country by the sending state on the grounds that he is not entitled, or is no longer entitled, to remain in the sending state according to the Immigration laws of that state.

Requests under this arrangement will be submitted in writing either by the British Embassy in Amman to the Ministry of the Interior or by the Jordanian Embassy in London to the Home Office. Where a request is made under the terms of this arrangement, the department to which it is made will acknowledge receipt of the request within 5 working days.

A response to a request under the terms of this arrangement may be given verbally, but must be confirmed in writing within 14 days by the Home Secretary, in the case of a request made to the United Kingdom, or by the Minister of Interior in the case of a request made to the Hashemite Kingdom of Jordan before any return can take place.

To enable a decision to be made on whether or not to return a person under this arrangement, the receiving state will inform the sending state of any penalties outstanding against the subject of a request, and of any outstanding convictions or criminal charges pending against him and the penalties which could be imposed.

Requests under this arrangement may include requests for further specific assurances by the receiving state if appropriate in an individual case.

#### **Understandings**

It is understood that the authorities of the United Kingdom and of Jordan will comply with their human rights obligations under International law regarding a person returned under this arrangement. Where someone has been accepted under the terms of this arrangement, the conditions set out in the

following paragraphs (numbered 1-8) will apply, together with any further specific assurances provided by the receiving state.

1. If arrested, detained or imprisoned following his return, a returned person will be afforded adequate accommodation, nourishment, and medical treatment and will be treated in a humane and proper manner, in accordance with internationally accepted standards.

2. A returned person who is arrested or detained will be brought promptly before a judge or other officer authorised by law to exercise judicial power in order that the lawfulness of his detention may be decided.

3. A returned person who is arrested or detained will be informed promptly by the authorities of the receiving state of the reasons for his arrest or detention, and of any charge against him.

4. If the returned person is arrested, detained or imprisoned within 3 years of the date of his return, he will be entitled to contact, and then have prompt and regular visits from the representative of an independent body nominated jointly by the UK and Jordanian authorities. Such visits will be permitted at least once a fortnight, and whether or not the returned person has been convicted, and will include the opportunity for private interviews with the returned person. The nominated body will give a report of its visits to the authorities of the sending state.

5. Except where the returned person is arrested, detained or imprisoned, the receiving state will not impede, limit, restrict or otherwise prevent access by a returned person to the consular posts of the sending state during normal working hours. However, the receiving state is not obliged to facilitate such access by providing transport free of charge or at discounted rates.

6. A returned person will be allowed to follow his religious observance following his return, including while under arrest, or while detained or imprisoned.

7. A returned person who is charged with an offence following his return will receive a fair and public hearing without undue delay by a competent, independent and impartial tribunal established by law. Judgment will be pronounced publicly, but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

8. A returned person who is charged with an offence following his return will be allowed adequate time and facilities to prepare his defence, and will be permitted to examine or have examined the witnesses against him and to call and have examined witnesses on his behalf. He will be allowed to defend himself in person or through legal assistance of his own choosing, or, if he has

not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.

### **Withdrawal**

Either government may withdraw from this arrangement by giving 6 months notice in writing to the Embassy of the other government.

Where one or other government withdraws from the arrangement, the terms of this arrangement will continue to apply to anyone who has been returned in accordance with its provisions.

### **Signature**

This Memorandum of Understanding represents the understandings reached between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Hashemite Kingdom of Jordan upon the matters referred to therein.

Signed in duplicate at Amman on 10 August 2005 in the English and Arabic languages, both texts having equal validity.

Pat Phillips (signature)

(signature)

For the Government of the  
United Kingdom of Great Britain  
and Northern Ireland

For the government of the  
Hashemite Kingdom of Jordan

20 August 2005

## Annex 2 Terms of Reference

### Terms of Reference For Monitoring Body – the Adaleh Center for Human Rights Studies

#### 1. Key features of Monitoring Body

- (a) The Monitoring Body must be **independent** of the government of the receiving State, ie:
- the State must have no influence over the mandate of the Body nor over its existence/composition, even on a change of government
  - the Body's personnel must be independent of the State
  - the Body must be financially independent<sup>1</sup>
  - the Body must be able to produce frank and honest reports.
- (b) The Monitoring Body must have **capacity** for the task, ie have experts ("Monitors") trained in detecting physical and psychological signs of torture and ill-treatment. The Body must have, or have access to, sufficient independent lawyers, doctors, forensic specialists, psychologists, and specialists on human rights, humanitarian law, prison systems and the police.

#### 2. Journey to receiving State

A Monitor should accompany every person returned under the MOU ("returned person") throughout their journey from the sending State to the receiving State, and should go with them to their home or, if taken to another place, to that place.

#### 3. Accessibility to persons

- (a) Before leaving a returned person at their home or other destination, the Monitor should obtain his or her contact details, and should obtain the contact details of one other person of the returned person's choosing ("next of kin") who generally has knowledge of the returned person's movements. The Monitor should provide both the returned person and the next of kin with the Monitoring Body's contact details.
- (b) For the first year after the person returns, a Monitor should contact him or her, either by telephone or in person, on a weekly basis. If the returned person is unavailable on any occasion, the Monitor should instead contact the next of kin.

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<sup>1</sup>This does not exclude state funding as long as there are no conditions attached to that funding.

- (c) At all times, the Monitoring Body should be accessible to any returned person or next of kin who wishes to contact it, and should report to the sending State on any concerns raised about the person's treatment or if the person disappears.

#### 4. Visits to detainees

- (a) When the Monitoring Body becomes aware that a returned person has been taken into detention, a Monitor or Monitors should visit that person promptly.
- (b) Thereafter, Monitors should visit all detainees frequently and without notice (at least as frequently as the MOU permits; Monitors should consider requesting more frequent visits where appropriate, particularly in the early stages of detention.
- (c) Monitors should conduct interviews with detainees in private, with an interpreter if necessary.
- (d) Monitoring visits should be conducted by experts trained to detect physical and psychological signs of torture and ill-treatment. The visiting Monitor or Monitors should ascertain whether the detainee is being provided with adequate accommodation, nourishment, and medical treatment, and is being treated in a humane and proper manner, in accordance with internationally accepted standards.
- (e) When interviewing a detainee, a Monitor should both encourage frank discussion and observe the detainee's condition.
- (f) Monitors should arrange for medical examinations to take place promptly at any time if they have any concerns over a detainee's physical or mental welfare.
- (g) The Monitoring Body should obtain as much information as possible about the detainee's circumstances of detention and treatment, including by inspection of detention facilities, and should arrange to be informed promptly if the detainee is moved from one place of detention to another.

#### 5. Fair Trial

In order to monitor compliance with the right to fair trial, Monitors should have access to all court hearings, subject to the requirements of national security.

#### 6. Specific assurances

Monitors should ensure that they are mindful of any specific assurances made by the receiving State in respect of any individual being returned, and should monitor compliance with these assurances.

7. Reporting

- (a) The Monitoring Body should provide regular frank reports to the sending State.
- (b) The Monitoring Body should contact the sending State immediately if its observations warrant.

## ANNEX 3

### **JORDANIAN GOVERNMENT RESPONSES TO QUESTIONS ARISING IN THE APPEAL OF MR OTHMAN AGAINST DEPORTATION**

The British Embassy in Amman put a number of questions to the Government of Jordan during the period 7-14 May. This document records the Government of Jordan's responses (provided by the Legal Adviser at the Jordanian Ministry of Foreign Affairs, Bisher Khasawneh).

#### Admissible Evidence

General context: the question of what is and is not admissible evidence is covered in the Law of Criminal Procedure and the Law of Evidence. There are specific references to confessions.

1. Is a confession by the defendant admissible? Is evidence of a confession by an alleged accomplice admissible in evidence against the defendant?

*A confession is a piece of evidence to be weighed up with the rest of the evidence. Less weight is given to the confession of an alleged accomplice than to a confession by the person charged.*

2. Is confession evidence admissible even if the State Security Court (SSC) have reason to believe that it was obtained by torture?

*No.*

*(The Embassy in Amman is asking for clarification of the legal test applied by the SSC as well as copies of the relevant provisions of the Law to Evidence. To follow.)*

3. When it receives allegations that evidence has been obtained by torture, does the SSC investigate those allegations or dismiss them without investigation?

*It investigates. A doctor is asked to produce a certificate as to the person's medical condition.*

*(The Embassy in Amman is asking for further information on the steps taken by the SSC to investigate allegations.)*

4. The Court of Cassation has ruled that the SSC may not hand down the death sentence for a conviction involving evidence obtained by torture.

Is the SSC prevented from handing down other sentences when relying on such evidence?

*Yes – because evidence obtained by torture is inadmissible.*

### Re-trial

5. Will evidence from Mr Othman's trial in absentia be among the evidence before the Court on Mr Othman's retrial (for example as part of the 'case file')?

*Yes – all of it plus any new evidence either side wished to introduce.*

6. Would this evidence include confessions from accomplices that were allegedly obtained by torture, where those allegations of torture have been dismissed in the earlier proceedings?

*If the Court previously ruled that the evidence was inadmissible then no. If the Court previously ruled that the evidence was admissible, then yes (ie because the Court in the previous trial would already have examined the allegations of torture and come to a view).*

7. Will Mr Othman have an opportunity to challenge that evidence?

*Yes. He can challenge any witness, statement, or any other piece of evidence whatsoever.*

8. For example, can he make fresh allegations that it was obtained by torture?

*Yes.*

9. How would the Court determine at this stage whether witnesses were or were not tortured years ago?

*It would depend in part on what the Court determined at the time of the previous trial but it would also be open to Mr Othman to introduce new evidence to back up claims of torture.*

10. If such confessions are in evidence at his re-trial, can Mr Othman or his legal representative call the individuals who made the confessions to give oral evidence?

*Yes. He can call any witness whatsoever.*

11. What is the status of the military members of the State Security Court?

*All of the military members of the State Security Court have law degrees. They are assigned to legal work throughout their career. This can be in the State Security Court or other military courts. They*

*are not 'fighting soldiers' assigned to the SSC for a temporary tour of duty.*

### Penalty on Re-trial

12. The Government of Jordan has confirmed that Mr Othman is not being charged under Article 148/4, which provides for the death penalty. He faces charges under Articles 147, 148/1 and 148/3 of the Penal Code No.16. Under the current version of those provisions, the maximum sentence that could be imposed on Mr Othman's re-trial is hard labour for life.
13. Penal Code No 16 was amended on 16 September 2001 (i.e. subsequent to Mr Othman's trials in absentia). The amendments included cancelling the old Articles 147, 148.3 and 148.4, and replacing them with new ones. Mr Othman was tried in absentia under the old Articles 147, 148.1 and 148.3 (translation attached). He will be retried under the current Articles 147, 148/1 and 148/3 (pages 22-23 of EO16).
14. The penalty which Mr Othman would face were he to be convicted on retrial could not exceed the penalty from the old Articles, on the grounds that a harsher punishment cannot be imposed than that applicable when the offence was committed (Article 15 (1) ICCPR).
15. What provisions of Jordanian law give effect to Article 15(1) ICCPR?

*Jordan has signed and ratified the ICCPR and published it in the "Official Gazette" of Jordan. This gives it direct effect in law.*

### Deportation and Extradition

16. Is the deportation of Jordanian nationals permitted under Jordanian law?  
  
*No.*
17. Is the extradition of Jordanian nationals permitted under Jordanian law?  
  
*Yes.*
18. What Jordanian laws/constitutional provisions govern deportation and extradition from Jordan?  
  
*Articles 9.1 and 21 of the Constitution.*
19. Is there a definition in Jordanian law of "deportation" as used in Article 9(i)?  
  
*No.*

20. If the extradition of Jordanian nationals is permitted under Jordanian law, with which countries does Jordan have bilateral extradition treaties?

*Lebanon, Syria, Tunisia, Egypt, UAE, Collective Treaty with all members of the Gulf Co-operation Council and a frozen treaty with USA.*

On 14 May the MFA Legal Adviser clarified what he had meant by a 'frozen' extradition treaty with the USA. The Jordanian Court of Cassation has ruled that the treaty is not applicable in Jordanian law. This is because the treaty has not gone through the correct ratification procedure, in particular it has not been approved by the Jordanian Parliament.

21. Is it possible to extradite from Jordan without a bilateral treaty? E.g. by reference to a multilateral treaty (such as the UN Convention on Transnational Organised Crime)?

*No.*

22. What are the grounds on which people can be extradited from Jordan?

*If they have been convicted of a criminal offence in the extraditing country, and only in accordance with the relevant Treaty.*

Following cross-examination in SIAC, the Embassy in Amman was asked to check this answer with the Government of Jordan. It was confirmed that an individual can be extradited from Jordan if convicted in absentia in the requesting state. He/she can also be extradited if officially accused of an offence in the requesting state or if formally charged with an offence in the requesting state.

#### Re-trials of individuals convicted in absentia

23. If an individual is convicted in absentia by the State Security Court and is subsequently re-tried in his presence for the same offence under Article 254 of the Code of Criminal Procedure no 9 of 1961, will the re-trial be conducted by the State Security Court?

*Yes.*

24. We understand that the Courts rule for the maximum penalty in trials in absentia and so the new penalty in a trial where the accused is present will be no greater than the maximum and may in fact be less. Please provide a copy of any law which governs this.

*This is not stated in law. The judge sets the sentence at the end of the retrial. In practice, it is lower and anyway cannot be higher than the maximum penalty.*

Commutation of the Death Penalty

25. The only mechanism for commuting the death penalty is the King. To be precise, a death sentence can only be executed after confirmation by the King. See Articles 38-39 of the Constitution. Once a sentence is commuted it remains so in perpetuity.

**COUNTER TERRORISM DEPARTMENT  
Foreign and Commonwealth Office  
15 May 2006**