Appeal No: SC/36/2005
Dates of Appeal:
25-28 April 2006
2-4 and 24 May 2006
28 June 2006

Date of Judgment:
24 August 2006

SPECIAL IMMIGRATION APPEALS COMMISSION

Before:

THE HONOURABLE MR JUSTICE OUSELEY (CHAIRMAN)
MR C P MATHER (SENIOR IMMIGRATION JUDGE)
MR J DALY

'Y'

APPELLANT

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

For the Appellant: Mr B Emmerson QC, Mr R Husain, Mr D Friedman
Instructed by Birnberg Peirce and Partners

For the Respondent: Mr I Burnett QC and Mr R Tam
Instructed by the Treasury Solicitor for the Secretary of State

Special Advocate: Mr N Garnham QC and Ms J Farbey
Instructed by the Special Advocates Support Office

Introduction

1. Y is a citizen of Algeria born in October 1969. He left Algeria in 1999 for Spain and France. He arrived in the United Kingdom on 5 March 2000 using a false French passport, which he then discarded. He claimed asylum on 8 March 2000, producing his genuine Algerian passport. His application was refused on 18 January 2001, but his appeal to an Adjudicator was allowed on 1 June 2001. The SSHD did not appeal and Y was accordingly granted indefinite leave to remain in November 2001.

2. Y was arrested on 7 January 2003 on suspicion of being concerned in the instigation, preparation or commission of acts of terrorism contrary to Section 41 of the Terrorism Act 2000, and later was charged with three offences.

3. Y was tried with four others at the Central Criminal Court between September 2004 and 12 April 2005. This was known as the "ricin" or "poisons plot" trial. The indictment contained two counts: conspiracy to murder and conspiracy to cause a public nuisance. Y and three others were acquitted on all counts but one of them, Bourgass, was convicted of conspiracy to cause a public nuisance.

4. The SSHD gave notice to Y of his decision to make a deportation order against him on 15 September 2005, certifying under s97(1)(a) of the Nationality, Immigration and Asylum Act 2002 that his decision was taken in the interests of national security. Hence the appeal route lies to this Commission, and not to the AIT.

5. Y's grounds of appeal raised potential breaches of the Refugee Convention, and of Articles 2, 3, 5, 6 and 8 ECHR. Even if not a breach of Article 3, his expected treatment was cumulatively said to be sufficiently grave to cause SIAC to exercise its discretion under the Immigration Rules differently. Y said lastly that he was not a risk to national security.

6. The SSHD submitted, and we accept, that if the national security case was not made out, Y's appeal must be allowed, whatever other routes there might be to his removal.

The National Security case

7. The SSHD's national security case against Y as an Islamist extremist was based on five allegations:

   - Y had been the leader in the UK of the DHDS, which aimed to be an umbrella group of Algerian Islamist terrorist organisations

and which was linked to proscribed groups such as the GIA and GSPC;

- Y was linked to the conspiracy to carry out attacks in the UK, using toxic poisons including ricin, even though he had been acquitted of being a party to that conspiracy;

- he had had possession of false documentation including passports and banking documents;

- in other ways he was associated with various Islamist extremists in the UK;

- he had possibly been to training camps in Afghanistan.

8. We take those issues in turn. However, we make the point at the outset, to which we return, that these allegations have to be viewed in the round and cannot be judged either as factual allegations or for their significance, in isolation. Each may offer some factual support for another allegation or affect the significance of another in the overall picture of Y. The Security Service witness was Witness B.

Groups: GIA and GSPC

9. Our conclusion on the background to the GIA and GSPC is set out in the open generic SIAC judgment delivered in the Part 4 ATCSA cases at paragraphs 282 to 290. It is unnecessary to repeat it although there have been some subsequent developments in their positions. Briefly, from 1993 the GIA had conducted a terrorist campaign in and outside Algeria targeting both Algerian and foreign nationals. Over recent years its activity had declined. The GSPC split from it in early 1997 over the GIA's policy (begun in the mid 1990s) of attacking women and children, preferring to concentrate its actions against Algerian military and government personnel. The GSPC was clearly aligned and linked to Al Qa'eda. Both GIA and GSPC are proscribed organisations under the Terrorism Act 2000. Their activities are not the real point of controversy; it is the relationship of Y to them which is at issue.

10. The basis for the SSHD's assessment that Y had been linked to the GIA included Y's own admission at his asylum interview that he had worked for the GIA from 1992/3 until the end of 1994. In his interview he said that he had stopped working for them because of their policy of killing innocent civilians. Once he had left them, they became a threat to him because they did not trust him. He had however primarily been a leader of the FIS in Tlemcen, Western Algeria for some years. Y's Algerian passport showed a 2 month

visa for Germany in 1993, and his entry to Germany in August 1993. His statement to us is silent about why he went to Germany and returned to Algeria. Y's statement for his asylum appeal, at which also he did not give evidence, said that the killing of civilians by the GIA had not started in 1994. The Adjudicator found that Y had co-operated with the GIA, but made no findings as to his fear of the GIA. He said that although it might be difficult to place reliance on Y's statements since Y had unusually chosen not to give evidence, they appeared to be consistent.

11. Y's statement for this present appeal said that he had been involved in assisting the families of men who had fled after the cancelled elections of 1992, which should be seen as resistance and not terrorism, and that he himself had never taken up arms anyway. He helped people whose relatives had joined the GIA. He severed his links by the time that the GIA started killing civilians in about 1994/5.

12. Even taking Y's evidence at face value, he worked for the GIA, which was a terrorist organisation as far back as the early 90s. Helping the relatives of those who joined it, wholly unspecified in manner, obviously provides direct assistance though not necessarily violent assistance, to those engaged in terrorist activities.

13. The SSHD had also relied on "documentation related to the GIA", as it was described by police who listed material found in the search of Y's flat in January 2003 in connection with the poisons plot. Witness B for the SSHD accepted that that overstated considerably the significance of the report in the French or French/Algerian newspaper "Le Matin" of January 2002, which was the material variously described as correspondence or documents relating to the GIA. The article referred to the activities of the GIA in the west of Algeria and to intelligence from reliable sources of the involvement of a "Mustapha of Tlemcen", which Y said could have been a reference to him and so he kept the article.

14. The description "documentation related to the GIA" clearly adopted as significant the language of the police, using a brief form of words for record purposes to describe what they found. There had been no attempt by the Security Services to evaluate the material for what its contents or possession might really signify on this point. We do not regard this material, by content or by Y's possession of it, as really advancing the case that Y had been a *member* of the GIA. On any view, however, he was at least a moderately active supporter.

15. The SSHD assessed that Y had been linked to the GSPC although he was not a current member. Y's views about the killing of civilians, which led to his cutting links with the GIA, were those

which animated many to leave the GIA and to join the GSPC, the GIA offshoot which was set up in consequence of the deliberate targeting of civilians. Y does not accept or deny in his statements for this appeal that he was a GSPC member. The issue did not come up in his earlier statements or appeal. We accept that Y probably did cut his links with the GIA because of its policy towards civilians. But we also accept the SSHD assessment that that would not have lead to Y abandoning Islamic extremist activities.

16. During the search of Y’s flat in connection with the poisons plot, a GSPC produced CD Rom was found in a bag on top of a wardrobe, with other CD Roms. It contained material relating to the conflict in Algeria, and bore his fingerprints. This CD was considered at the poisons plot trial, at which Y also did not give evidence. Y’s defence at trial was that the sort of material largely to be found on it was that which an Algerian refugee with an interest in what was happening in Algeria would be interested in reading. Y said in his statement for this appeal that he had acquired the CD which was available around London because he wanted to find out more about the GSPC. He also had other CDs, books, documents and tapes which reflected his intellectual curiosity about these groups and the way in which massacres in Algeria were being analysed by NGOs and Algerian writers.

17. The CD contained fifty files in Arabic covering such matters as the role of jihad against the Algerian Government, jihad in other places such as Chechnya and Palestine, jihadist theology, military tactics and particular engagements between GSPC and Algerian Government forces. One file, MAS/50, contained instructions for making an improvised explosive device, which the Crown expert had described as incomplete, illogical and incoherent, insufficient to enable such a device to be made.

18. Y’s laptop computer was also seized and examined. A small number of files from that CD had been opened on the computer for a brief period but not MAS/50. Y admitted opening one file. There was no evidence that MAS/50 had ever been accessed on any computer to which it could be shown that Y had had access, or on any of those recovered from other addresses or from Finsbury Park Mosque. Witness B accepted that there was no evidence that it had been printed off either.

19. The SSHD did not accept the assertion that the possession of the CD was for innocent intellectual purposes. He submitted that it showed connections to and sympathy with the GSPC and Algerian terrorism. Y pointed out that he had given his address to the police when he was arrested which is how they came to know of it and he gave them the keys to his flat and to the Mosque, suggesting that he had nothing to hide.

20. We believe that if Y had accessed MAS/50, it is probable that some trace of it would have shown up in the examination of his or other computers seized. It is no more than a speculation that Y had opened it, but on some other unknown computer.

21. But we do not believe that Y would have obtained and kept the CD without being aware of the general nature of the contents: he knew the source and would have known the general nature of at least its propagandist files and probably that it contained military material of some sort, whether tactical, weapons related or worse. This was produced by an extremist organisation which would have been well known to someone who left Algeria in 1999, and who had worked with the GIA. Its possession by Y supports the conclusion that Y may have had a GSPC connection and certainly shows that he had sympathy with it, following his break with the GIA over their deliberate targeting of civilians. This was a common pattern for changes in Algerian extremist allegiances. We do not believe that that can be accounted for by the innocent intellectual interest of an Algerian refugee, at least in his case. We do not believe that Algerian refugees, who do not support terrorist groups, obtain and keep GSPC propaganda and instructional material knowing as they must do the likely nature of the contents. Nor is Y some innocent or misguided researcher into terrorist groups. Y has not taken the opportunity to answer questions as to how someone with his admitted Salafist sympathies and earlier GIA background needed such a CD to pursue an intellectual interest, or why he had not opened all the files given his interest, or kept it where he did. Nor did he explain where he got it. The explanation from Y is improbable and we believe simply untruthful.

Groups : DHDS

22. DHDS was formed with the aim of uniting the extremist Islamist groups in Algeria, apart from the GSPC, under one umbrella. It is possibly linked to Al Qa'eda on the SSHD's case. It is a purist or Salafist group. It is proscribed in the USA and is on the UN Security Council Resolution 1276 (1999) list of Al Qa'eda linked groups, but it is not proscribed in Europe or the UK. The precise relationship between DHDS and GSPC is hazy, particularly in the UK. Group allegiances which may matter in Algeria, tend to matter less and to be blurred or overlap in the UK. Y, who provided a written statement but did not give oral evidence, said that the DHDS was untainted by allegations that it had attacked civilians, but that the Algerian Government had a great (but unexplained) interest in "*challenging*" the DHDS.

23. We accept that the DHDS has engaged in terrorist activities in Algeria, even though it has not followed the GIA path of deliberately seeking out civilians to kill. It is an umbrella organisation formed to

give support to Algerian terrorist groups fighting, or at least which were fighting, the Algerian Government. It seeks support from abroad including the UK for those activities. Again it is not so much the activities of the DHDS which are at issue but Y's relationship to it, if any.

24. Y was alleged now to be the leader or a senior member of the DHDS in the UK, which he denied. He also denied being a DHDS member at all, although his statement said that he had an interest in the DHDS which we take to be a sympathetic one; the degree and nature of that interest was unspecified, and he gave no further evidence about it.

25. The SSHD relied on four pieces of evidence to support his case: comments made by one Meguerba, who was in detention in Algeria; other Algerian liaison reporting of a telephone call from the UK after Y's arrest; an audio tape cassette bearing the DHDS seal, with ink pads and two pieces of paper marked with the seal, but no seal itself, found during the search of Y's flat in connection with the poisons plot; and the "Le Matin" article which referred to sources saying that "Mustapha of Tlemcen" and another had moved to London and were seeking to unite the DHDS and the GSPC.

26. Y did not deny that he had the DHDS tape which he said he had for the same reason that he had the GSPC CD. He attributed the headed paper to precautionary assistance for his brother were he ever to leave Algeria and try to make an asylum claim in the UK; such documents were said to be widely used by Algerians to facilitate asylum claims, by implication dishonestly.

27. Meguerba was arrested in the UK in September 2002, along with others following a series of searches which produced evidence of terrorist plots involving poisons and explosives; but he was released on bail and returned via Spain and Morocco to Algeria, where, after a few days, he was arrested on 11 December 2002. He provided to the Algerian authorities, while in custody, a history of his involvement with Algerian extremist activities in Algeria and elsewhere. On his return he had joined the DHDS and planned with them to carry out attacks on foreign tourists and embassies including that of the UK. He also provided details of a plot to use poisons in the UK, including an address in Wood Green, London, which had been used to prepare the poisons. It is plain from subsequent events that some of the material which he provided was true.

28. Two issues arise over the use of material provided by Meguerba to the Algerian authorities: was any obtained by torture? Is any of it reliable anyway? This is important where he names others as

involved in particular activities and reliance is sought to be placed on what he is reported to have said to the Algerian authorities.

29. The Algerians reported to the UK Security Service on the first interrogation on 31 December 2002, dealing with the poison plot, and naming Y as DHDS representative in London. They reported to the UK Security Service on 11 January that Meguerba had said that Y was active for the DHDS in London, recruiting people including Meguerba himself for DHDS training. Meguerba had been recruited to return to Algeria covertly to teach people new techniques.

30. We indicated during the course of argument that we accepted that this evidence, in the light of what was known about Algerian detention in 2002/3, could not be admitted by SIAC unless the allegations that it had been obtained by torture had been investigated in the way envisaged by the House of Lords in *A and Others (No 2) v SSHD* [2005] UKHL 71, [2005] 3 WLR 1249.

31. We have not ruled on what the full extent of such an investigation should be, although it is clear that the investigation which they envisaged was not one in which the Commission would actually travel to another country to seek to interview its security services, police, military, persons in detention or judiciary in order to reach conclusions, and to do so with or without the representatives of the parties. It would also be wrong for the Commission to delegate any fact finding task to another body. It is not necessary at this stage to rule further on when or whether SIAC should ask another person or body to carry out a specified form of inquiry so far as possible, then to be summoned by SIAC as a witness. This is because of the approach to the consideration of Meguerba's evidence which we now describe.

32. We asked for submissions as to the reliability of Meguerba's reported statements to Algerian security forces on this and the other issues where the SSHD relied on his statements from custody. This was because we might reach the view that no weight could be given to them anyway. We also pointed out that, even if they were reliable subject to the torture question, we might reach a conclusion favourable to the SSHD without reliance on them, which would preclude the need for further investigation.

33. Although we shall deal fully with the reliability of Meguerba's statements to the Algerians when considering the "ricin" plot allegations, we accept Y's contention that he is not reliable in what he says or is reported as saying when he implicates others in wrongdoing. That does not mean that Meguerba is wrong; it is that we do not know simply from what he says, which parts are right or wrong. Other evidence supporting what Meguerba says on one occasion rather than the other may be independently reliable, but it does not appear to us to mean that we should then give weight to

one as opposed to another statement from Meguerba. This may be true of any exculpatory statements as well. We do not therefore give any weight to what Meguerba told the Algerians about Y's involvement with the DHDS.

34. The second piece of material concerning the DHDS and Y also comes from Algerian liaison, on 12 January 2003. Part of the reporting that day relates to what Meguerba told them but that appears to be intermingled with Algerian expansion and explanation. Part, paragraph 5, is not what Meguerba told them, and has a different source which is not identified. This is to the effect that an individual called Mohammed in the UK informed the DHDS network in Algeria of Y's arrest. The implication of this was that Y was of real importance to the DHDS in Algeria because it needed to be told swiftly of what had happened to him; hence he was in a senior position in London.

35. Y was of great interest to the Algerian Security Service and it was suggested on behalf of Y that the Algerian Security Service had put Meguerba up to making a telephone call to Mohammed in order that he would ring the DHDS in Algeria, creating information for them then to feed back to the UK Security Services, damaging to Y. Meguerba could not have known of the arrest of Y on 7 January 2003 because he had been in Algerian custody at the relevant time. Hence the suggestion that he was put up to making the provocative telephone call by the Algerians. Y pointed out that the Algerians had given an untruthful explanation for telephone calls made by Meguerba on 10 and 11 January 2003 when he was in custody. They had not been permitted for human rights reasons but instigated to provoke a reaction. Witness B said that he did not think that that was a deliberate attempt to mislead although that was possible; it would have been pointless, and the position was corrected within a day. There is evidence that permitted the inference, as Witness B accepted, that the telephone calls may not have been voluntary. This was not the first occasion when the Algerians had given what could be deliberately misleading information to the UK Government, and indeed on that same occasion they had given wrong information, for no obvious reasons, about Y being released from detention in Algeria for renouncing his beliefs, when he had in fact been sentenced to death in absentia.

36. There is however, no evidence that the telephone call from Mohammed was made as a result of those from Meguerba on 10 or 11 January 2003. That is an unwarranted speculation. We infer that the Mohammed call was the source of this Algerian liaison report rather than the consequence of its earlier knowledge of Y; it has not been suggested that the Algerians knew of the arrest before then; the UK had not informed them of it. We regard it as wholly improbable that some other source informed the Algerians by 10 or 11 January of the 7 January arrest and they then decided to set up

the Mohammed telephone call via Meguerba to feed information back to the UK on 12 January 2003.

37. There have been occasions when Algerian Government officials have not been wholly truthful or open to UK officials; but the true explanation for those telephone calls was given within a day, and it is not easy to see what the Algerians had to gain from the UK by reporting a fictitious call or creating a false link between the DHDS and Y. This supposed deviousness would not have helped the UK, and it is difficult to see how it could advance Algerian interests. We accept that this evidence is of some weight in support of the SSHD's assessment as to strength of the link between Y and the DHDS.

38. The audio cassette has some weight in showing support and sympathy for the DHDS, which is not in dispute, but of itself cannot show a closer link or a senior position. We do not accept that the notepaper with the mark of the DHDS seal was there as a contingency plan for a possible and apparently false asylum claim by the brother. We think that a more likely explanation is that Y needed notepaper with the seal marked for DHDS purposes; he had ink pads, though no actual seal was found at his flat. The Mohammed call indicates a senior DHDS figure and puts the story about the notepaper in a different light.

39. Witness B accepted that the "Le Matin" article of 9 June 2002 alleging that Y was a DHDS organiser would have been of some interest to Y and could explain his keeping of it. Its contents are of limited assistance, but are supportive of DHDS seniority. The Algerian "Le Matin" is independent and at times very critical of the Government; it is not a mere mouthpiece.

40. Those three items go together and show that Y had a position in the DHDS beyond being a mere sympathiser, and had some seniority in the UK. When the other pieces of admissible material about Y are taken into account, and we come to them later, we are quite satisfied that he is a DHDS figure of seniority in the UK.

The Poisons Plot

41. We now turn to the alleged involvement in the ricin or poisons plot, which was the single most serious allegation against Y.

42. A convenient starting point is the September 2002 arrests and the departure of Meguerba eventually to Algeria. There he told the authorities in detention about the poisons plot and gave details which in a number of respects turned out to be accurate. Searches of the property in Wood Green showed preparations for the use of toxic material in terrorist attacks. Y was arrested on 7 January

2003. Others including Bourgass, who murdered DC Stephen Oake, were arrested on 14 January 2003.

43. In September 2004, Bourgass, AA (SIAC appeal letter), Khalef, Feddag and Y faced trial on two counts: conspiracy to murder and conspiracy to cause a public nuisance. The conspiracy was to commit acts of terrorism through the production and use of poisons, such as ricin and cyanide, and explosive devices so as to cause death (Count 1), or disruption, fear and injury (Count 2), in the UK. They were all acquitted on all counts, save for Bourgass who was convicted on Count 2 and in respect of whom the jury was unable to agree on Count 1. The Crown decided not to proceed with the trial of a second group of Defendants, (Asli, W, Alwerfeli and Merzoug) in the light of those verdicts, nor in view of the substantial sentence which Bourgass would receive for murdering DC Oake, was it thought in the public interest to retry Bourgass on Count 1.

44. The Crown explained its interpretation of the verdicts in this way:

> *"[The jury] rejected the wide-ranging conspiracy, involving all those then in the dock, for which the Crown contended.*
>
> *The jury found a narrower conspiracy, involving at least BOURGASS and MEGUERBA, but not those acquitted.*
>
> *The jury rejected as false BOURGASS's eventual defence that the recipes and any product from them were intended for use, if necessary to kill, in self-defence in Algeria only.*
>
> *Nevertheless, a number of the jury were not sure, despite the evidence that a number of recipes were capable of producing lethal results, but given the small quantities of raw materials recovered and the absence of any conclusive evidence to show the successful making of any lethal quantity, that the objective of the conspiracy with MEGUERBA was to kill (Count 1).*
>
> *They were, however all sure that the purpose of the conspiracy with MEGUERBA was to cause the disruption, fear and injury in this country alleged in Count 2*
>
> *The Crown considered therefore that the jury confirmed the essential thrust of the Prosecution's case that there was a terrorist conspiracy aimed at the UK, but not the scope (in terms of the involvement of those acquitted) for which the prosecution had argued. The remaining Defendants were considered to have occupied secondary positions in the alleged conspiracy. The Crown considered that given the acquittals of the first tranche of Defendants there could be no doubt that that the strength of the evidence as to the whole picture which the Prosecution relied on had been reduced as it was no longer*

possible to rely on the evidence apparently incriminating those who had been acquitted. The Crown considered that there continued to be a prima facie case against each of the remaining Defendants. However, the conclusion was reached that there was no longer a realistic prospect of conviction against any of the four and the Crown therefore offered no evidence against each of the Defendants on Counts 1 and 2."

45. The evidence upon which the SSHD contended that Y should be found by SIAC to have been a party to the conspiracies is as follows. Y's fingerprints were found on one set of original handwritten poison and explosive "recipe" documents, discovered during the search of the Wood Green flat identified by Meguerba. His fingerprints were on the individual sheets. The fingerprints of Bourgass and Asli were also found on that set. Y's fingerprints were also on a photocopy recipe for the production of poisons including ricin which had been found in the search of a property in Thetford in September 2002 at around the time of the arrest of Meguerba and others. The fingerprints of Bourgass, Khalef and Meguerba were also on that set. This set had been copied on the photocopier at the Finsbury Park Mosque from the original found in the Wood Green flat with Y's fingerprints on. No prints were found on the other original recipe documents discovered in the Wood Green flat. The photocopy recipe found in Thetford had itself been photocopied by Meguerba in a newsagents in Ilford.

46. At the Finsbury Park Mosque, a plastic bag was found with Y's fingerprints on, which contained a further plastic bag in which were an imitation handgun, stun gun and a CS gas canister. There were no prints of Y on any of these items or on the inner bag. This material was not used at trial. It may not have been so directly relevant that its potentially prejudicial effect was outweighed by any probative value. The fingerprint on the bag containing the bag with the two guns and gas canister permits of several inferences, some innocent and some not. Witness B did not invite SIAC to attach significance to it. We therefore do not need to consider it further.

47. The SSHD pointed out that the trial judge had rejected a submission that Y had no case to answer and held that there was a case for the jury to decide on both counts. Obviously that means that the material deployed by the Crown, principally the fingerprint evidence, was seen as sufficient for a reasonable jury to convict Y on both counts. Y, it was said, would not have been permitted to photocopy these documents which were in Arabic unless he was trusted by the conspirators and was himself a conspirator. The jury verdict showed that they were satisfied as to the existence of a conspiracy to cause fear, disruption and injury to which Bourgass and Meguerba were parties. They were not satisfied as to Y's participation or as to the other conspiracy.

48. The SSHD also relied on what was found in the search of Y's flat: the CD Rom, the DHDS material and false documents, to which we shall return later more specifically. The associations between Y and other Islamist extremists are also relevant in considering how significant these particular pieces of evidence are. He submitted that the role of Y should be seen in the light of the whole of the evidence before SIAC.

49. Y's case, and the only topic on which he answered in an otherwise "no comment" interview with the police, was that he worked at the Finsbury Park Mosque in what was called the bookshop and worked the photocopier there. He must have photocopied the documents and that explained how his prints were on the original and the copy. It was his answer which provided the link to the Mosque and led to the subsequent search of the Mosque and the seizure of the Mosque copier.

50. What he said to the police about how his prints came to be on the documents was established as correct at the trial by the Crown's expert, as the SSHD accepted. The copy was made on the Finsbury Park Mosque copier. The position of the prints on the originals was consistent with the documents being copied individually as the automatic feed was broken, and with the bundle of copies being picked up as one to remove them from the tray. Their position was inconsistent with the documents being held in a reading position, or being handled more than once.

51. Y's statement to the Commission said that he would have been too busy to read everything which was given to him to copy. He says that Bourgass probably gave him the documents to copy, "*if there were a conspiracy*", but Bourgass at trial appeared to Y to be deeply disturbed. There was no other link shown between him and other items found in the Wood Green flat, although many items were recovered and tested for prints as were the surfaces in the flat.

52. Meguerba did not give evidence at the trial, though his participation in the conspiracy was asserted. Before the Commission, the SSHD specifically relied on what Meguerba was said to have told Algerian Security Service when in detention in December/ January of 2002/3. This was that Y knew of the use of the Wood Green flat by a group of Algerian terrorists including Bourgass, a regular at the Finsbury Park Mosque, and that the prepared poison was hidden there. This was also used to rebut what Y said about how his fingerprints came to be on the various documents. Y denies knowing Meguerba or ever knowingly having spoken to him, and had no recollection of seeing him in the Mosque, though he says that because he was in the bookshop, past which everyone entering the Mosque had to go, Meguerba could have seen him there.

53. As we have said, we have concluded that although what Meguerba said to the Algerians has been shown to be correct in a number of very important respects, it cannot be relied on where he identifies who was or was not involved in wrongdoing, including membership of extremist groups. There is substantial evidence of really significant inconsistencies in what he has said over time about whom he knew and what they did. We have not found it possible to say why what he said on one occasion can be relied on and preferred to the different version he has given on another.

54. In the first version, he gave detailed accounts of his own involvement and that of Bourgass in his early interviews in December 2002 and January 2003 with the Algerian Security Service. He had given an account of Y's knowledge of the plot and of his position in the DHDS, and how Y had sent him back to Algeria to develop new techniques.

55. A Commission Rogatoire was held over two days in October 2003, pursuant to a Letter of Request, before the Chief Examining Magistrate at which, under caution, over 150 questions were put to Meguerba and answered in some way or other. Police officers from the UK and judicial police from Algeria were present. Meguerba was still in custody at the time. He knew Bourgass and knew about his extremist activities. When asked about Y, Meguerba agreed that he had seen him in the Finsbury Park Mosque bookshop but said that he had had no contact with him, did not know him and could not say whether or not he was an extremist. They did not know each other or speak to each other. This was an answer given openly and not in the course of a Security Service interview or interrogation. It also carries with it a necessary implication that Meguerba did not know whether Y was involved in any plot or knew of it.

56. Meguerba was asked about X (SIAC appeal letter) in much the same way as he was asked about Y. He gave a similar answer. Next day, and Mr Emmerson put great weight on the opportunity which the break over night gave to the Algerian Security Service to remind Meguerba of the advisability of co-operation, Meguerba gave a long answer about how X had helped him leave the UK for Algeria and was his link to Mustapha, who was not further identified.

57. Meguerba had also told the Algerian Security Service, at least as reported, that X had taken over as the head of the Abu Doha group, which the SSHD assessed as unlikely. X is of a comparatively low intellect, and has some history of mental disturbance.

58. The reliability of what Meguerba told the Algerian Security Service was also an issue in the conspiracy trial because those Defendants whom he had not named in the unused but disclosed Algerian Security Service interviews, wished to place that absence of identification before the jury, through obtaining access to Meguerba,

and later alleged that the trial should be stayed because of a want of earlier disclosure. Part of the Crown response on both occasions was to assert the manifest unreliability of Meguerba as a witness to the participation of individuals in the conspiracy.

59. Mr Sweeney QC for the Crown pointed out that Meguerba had changed what he had said over a range of events, that his account of how his fingerprints came to be where they were was risible, and concluded:

> *"He is not an individual whom the Crown could rely upon as a witness of truth because we do not accept what he said even as to his own position in the October 2003 interview".*

60. On the second occasion, Mr Sweeney noted the *"shifting sands"* of Meguerba's account, and referred to :

> *"..the scintillating weight to be ascribed to the proposition taking his last account as the measure, that someone who is claiming to know nothing about anything can say with authority that someone was not a party to the thing which he knows nothing about."*

61. Penry-Davey J rejected an application by Feddag to put in part of the initial Algerian liaison material under s23 Criminal Justice Act 1988. He concluded that justice did not require it to be admitted because:

> *"…first, what is sought to be put in does not include the later extensive interviews with Meguerba conducted by way of commission rogatoire in which it is clear and acknowledged that in relation to a series of matters adverted to in the intelligence reports, on the face of it he gave a fundamentally different account, which brings very much into question the reliability of any statement made by him. Perhaps most fundamental of all, in the intelligence reports, Meguerba appears to acknowledge being part of the poison conspiracy, but in the course of the commission rogatoire appears to deny any part. It is extremely difficult in my judgement, even on the face of the documents to unravel what may be reliable and what is not."*

62. We do not consider, in the absence of other material which enabled us to decide which of the versions presented by Meguerba clearly merited the greater weight, that we should take a more favourable view of what he had to say than the Court was urged by the Crown to take in its interests and did take in the interests of justice. It is notable that Meguerba named Y and that Y's fingerprints were found on the recipes. This may tend to show Meguerba was reliable when he said he knew Y. But it is also consistent with Meguerba knowing who did photocopying at the Mosque (as he

said later he did), knowing where Bourgass or Meguerba had them copied, and wishing to incriminate Y.

63. Even if an investigation were carried out into the allegations that Meguerba had been tortured in custody and had had incriminated Y in consequence, but we concluded that it had not been shown on the balance of probabilities that he had been tortured into saying what he said, we would still be left with the problem of how to treat one version as reliable and the other as not.

64. In any event, the state of the evidence on the torture allegations is unlikely ever to become so clear cut as positively to disprove it, and there is plainly some material on both sides of the argument in relation to the early statements. There would probably be at least a reasonable doubt that torture had been used. That too would remain a factor casting doubt on what Meguerba had to say, even though all of it would be admissible.

65. We do not regard it, however, as right to treat what he said in the Commission Rogatoire as reliable and what he said in his early statements as unreliable, using the forum as the basis for a distinction. Some of his evidence to the Commission Rogatoire was itself contradictory about X and possibly about Y, and gives rise to a possibility that the difference was attributable to what was said or done to him in custody overnight. If his early statements were the result of torture, he remained vulnerable to torture at the hands of the Security Service if he recanted. There is nothing in the fact that the early statements were incriminatory and the later ones exculpatory for Y to indicate which should be regarded as the more reliable. Meguerba may have realised that he could best advance the interests of what may have been his co-conspirators by lying to the Commission Rogatiore about their involvement.

66. The SSHD, of relevance to that aspect, also makes some reasonable points about why the earlier statements may not have been obtained by torture which we would have to weigh against the changes in the Commission Rogatoire answers. These include the absence of complaint of ill-treatment by Meguerba during this period of detention, the delay in complaining of ill-treatment until, it appears, his criminal trial quite recently, and the evidence, which Y has not yet had the chance to challenge, from a police officer at the Commission Rogatoire about Meguerba's seemingly normal appearance and physical condition.

67. Accordingly, we have come to the view that we cannot place reliance upon anything which Meguerba has said, incriminating or exculpatory, and we judge the case ignoring it entirely.

68. We do not, however, accept Y's further submissions that the Algerians had fabricated the Meguerba material adverse to Y.

Granted that they had a strong interest in him and were perhaps not above deception at times towards the UK, it would have been a remarkable coincidence for them to have fabricated what Meguerba said about Y's involvement with Meguerba and yet for Y to have his fingerprints on two versions of the poison and explosive "recipes" which Meguerba and Bourgass were involved with. The presence of the fingerprints is consistent with Y's participation in the plot or his being merely the photocopier, as he said. It is inconsistent with fabrication by the Algerians of what Meguerba said at his early interviews.

69. Accordingly, the principal evidence of Y's participation in the poisons plot comes from the fingerprint evidence which we have described. This evidence could warrant the conclusion that Y was a participant as the ruling on the submission of no case shows. Taken with other evidence about his extremist views and associations, and in particular his work at Finsbury Park Mosque where he was trusted to make the copy, it is a legitimate inference that he was. It is reinforced to a degree by his unwillingness to give evidence at trial. It is a curious feature of Y's statement to the Commission that it does not deal with whether or not he knew Bourgass, nor does he say whether or not he ever went to the Wood Green flat. He merely offers in many places a critique, as would a lawyer, of what the Crown or SSHD evidence shows. His evidence to us dealt with the pieces of evidence against him but did not provide a picture of the way in which he spent his time, and what he did with whom over the period of two years before his arrest, and in particular about how he came to work at the Mosque.

70. What we conclude on the totality of the evidence is that he was aware of the plot, that he was trusted by those who were engaged in it to know of it and to keep quiet about it, that he did not disapprove of it, and would not have alerted the UK authorities to it. It is clear that he has and had extremist Islamist views and has supported terrorist groups: the GIA, GSPC and DHDS. He would not have worked in the bookshop in that Mosque unless he was sympathetic to the extremist views and people which gripped it at that time. The bookshop was a central part of the Mosque, through which or by which most entrants passed, and its work was relevant to the functioning of the Mosque as a centre for Islamist extremism. We regard it as inconceivable that those who ran the Mosque, notably Abu Hamza, would have tolerated someone in a position of long term employment in the bookshop who was not sympathetic to their views, and hostile to the authorities of the UK and others who would recognise that their activities were inimical to it.

71. However, we have concluded that we cannot say that he was *more probably than not* involved in the plot on the total evidence which we have. We recognise that the concrete evidence against Y is not great: there was no further link with the Wood Green flat beyond the

finding there of the original set of notes with his prints on. His prints were not found on any other of the many items tested. The proven links with the other Defendants were limited. He handed over the keys to the bookshop, and to the front door of the Mosque and to his flat when arrested.

72. Nonetheless, we accept that there remain *serious grounds for believing* that he was a party to the plot. This is exemplified by the fact that the trial judge concluded that Y had a case to answer at the close of the prosecution case: a jury could therefore properly conclude beyond reasonable doubt on that material that Y was guilty of both conspiracies. The Crown had not relied on the disputed statements from Meguerba. There was no subsequent evidence from Y to displace that conclusion. Bourgass' evidence was disbelieved. A jury acquittal does not prove innocence. This conclusion is relevant to the application of the approach in *Rehman* and to the application of the Refugee Convention.

73. We recognise that Penry-Davey J directed the jury at trial that no adverse inference should be drawn from the fact that the Defendants had a variety of links with the Mosque. He said that the Crown accepted that the Mosque was a well respected place of worship for hundreds of law-abiding Muslims, that there was no evidence of links between the Defendants and Abu Hamza, and that the allegations against Hamza were no more than allegations. Y argued that it was an abuse of process for the SSHD to argue that presence at the Mosque was a basis for an inference adverse to Y and that there was in any event no evidence of an association between Y and Hamza. Local authorities had directed newcomer Algerian asylum seekers to the Mosque as a port of call for accommodation assistance.

74. We do not regard this contention as persuasive. The directions to the jury may well have been necessitated by the state of the evidence and the need to focus the jury on the concrete evidence against the Defendants, to avoid distraction by unproven allegations which were not central to the way the case was presented and to avoid an inference of guilt by association with a place in respect of which adverse allegations were common but then unproven. Hamza was also awaiting trial at this time. We accept the SSHD case that that Mosque played an important role in Islamist extremist activities in the UK over many years, as meeting place, accommodation, place for recruitment and as a resource for fundraising. The role of Hamza in the Mosque, dominant and malign, is now clear. He used it as a base for spreading extremist propaganda and for jihadist recruitment. Y was not just an ordinary attender at the Mosque, holding a conventional viewpoint: he worked there; he already had extremist Islamist views. Hamza would not have let him work there if Y were in any way doubtful about the type of extremist views held by Hamza. Y's known

associates, including some who also attended there, have extremist views and links.

75. The fact that Y was asked to photocopy the recipes is potent evidence that he was trusted by those in the conspiracy, whether Bourgass, Meguerba or another. We accept that he would only have been asked to do so if he were someone who at least could be relied on not to reveal what he knew because of his Islamist extremist views, or actual sympathy with their aims. The documents were in Arabic and individually copied; they were readable by Y, though the evidence is that he did not actually pick them up to read. We do not think that anyone involved would have chanced their discovery, through reading while copying, by someone not to be trusted. The fact that an ordinary newsagent was used by Meguerba in Ilford to make a further copy does not detract from that unless it were shown, which is not the case, that the person copying there could also read Arabic. The fact that other copies were not made on the Mosque copier does not show that the person copying did not need to be trusted, if he could read Arabic.

False documents

76. The third factor relied on by the SSHD relates to Y's alleged possession of false documents. There is a curious dispute over whether Y ever claimed asylum in Spain. The SSHD says that he did, and although unsuccessful, obtained a one year residence permit, "*under exceptional* circumstances" as the Spanish authorities put it, valid until November 2000. Y made a follow up work permit application for 5 years in November 2000 using his own Algerian passport number.

77. Y denies making an asylum application there, although he does not deny being in Spain at the relevant times. He says that he applied for and was granted temporary residency rather than asylum in Mellila, the Spanish enclave in Morocco, and was then able to travel to mainland Spain. He did not apply for asylum because of the close links between the Spanish and Algerian Security Services and his fear that he would be removed without any legal protection. But as the British Embassy in Paris told him that his Spanish papers did not permit him to travel to the UK, he acquired a false French passport for travel to the UK where he claimed asylum, within two or three days, using his own Algerian passport. His application for a five year residency permit in Spain was made in November 2000 as an insurance policy against an unsuccessful appeal against the refusal of his asylum claim in the UK. No decision was reached on the application. The Spanish authorities noted an outstanding Interpol request for extradition by Algeria.

78. There is nothing very sinister usually to be inferred from the mere fact of travel on a false and then discarded passport, though its use in this case is curious given his possession of his genuine Algerian passport, his use of it to enter Spain where he was more afraid than here of being sent back were he to claim asylum, and his use of it to claim asylum here, almost immediately after arrival. In fact he applied for a five year residency permit in Spain before his claim had been refused by the SSHD, contrary to his elaboration in his second statement.

79. Y admits that he had in his flat a forged IND document in the name of Youcef Mustapha. He said that he used it to make a single Western Union transfer of £300 to his family in Morocco, having forged it crudely from his own IND document. He says he used a false name for his family transfer lest they were watched in Morocco; a friend had been questioned by the Algerian authorities when he had made a transfer in his own name. This false name was never used to generate an asylum claim. Witness B admitted, contrary to the assertion in his statement, that there was no Home Office file in that name.

80. Y denies that the many other Western Union transfers in his name between December 2000 and December 2002 to a person in Morocco, were made by him, and points out that two or three were made after he had been arrested. He denies knowing the transferee. The names of transferor and transferee were extracted from Western Union records either in his name or of the two addresses which he used. He had kept using one where he had previously lived with his friend X, because he said he was unsure of the security of the post in the block of bedsits where he lived for most of this time.

81. There is evidence that Y's identity was used by others because of the post arrest transfers. However, we do not find it likely that Y's name was used for the period of two years other than by Y. It was clearly used by someone connected to one or other of the two otherwise unconnected addresses with which Y was associated. X was asked by Y to receive banking related material at his address. After Y's arrest, we infer that the user was someone known to Y using it with his agreement. We believe that all these transfers to Morocco were made by Y or on his behalf, transferring small sums regularly to Morocco, and occasionally receiving small sums. There is no explanation for this from Y. We do not accept what he said about the transfer to his family.

82. Of significance was an incoming transfer of £366.69 to Y, which Y does not deny may have come to him; he says that it probably represented a payment for some books or videos sent by the Mosque, as sometimes happened. He cannot remember it in more detail and does not know the individual who was named as Tahaoui

and assessed by the Security Services to be Tahraoui. He was one of four charged in Spain by Judge Garzon with possessing bomb-making equipment and association with a terrorist organisation, described as the GSPC, for the purposes of assisting a cell in France.

83. One WU transfer was in the name “Dimeco”, to Turkey. The SSHD accepted that that identity was used by W (one of the second group of poison plot defendants) to open, he said, four bank accounts. He relied upon it to reinforce a link between W and Y. Y denied that he had ever used that identity, although an envelope entitled “Patrick Dimeco’s file” was found on the wardrobe at Y’s address and bore his prints. It contained a National Insurance number, details of two bank accounts, medical and employment details and gave Y’s flat as his address. There was evidence at the trial from a senior immigration officer that the Dimeco identity had been in use since 1997, and had had multiple users. False identities and documentation were said to be extremely common among Algerians in the Finsbury Park area and especially among those who attended the Finsbury Park Mosque.

84. We accept the evidence about the multiple use of this identity, and the fact that the use of false identities was common especially among those who frequented the Mosque. That does not of itself show that its use can be ignored; it is difficult to see that as other than a criminal act. In Y’s case, however, the denial of its actual or intended use is not credible, in view of his possession of it. He would have had no need to use it for entry purposes because his asylum claim had succeeded; he had the associated legitimate travel documents, he could work in his own name, and he received housing benefit in his own name. He did not say that it was a leftover from the time when he was not able lawfully to work, which ended in November 2001. He has given no explanation for its being in his possession in early 2003. We believe that he has no innocent one to give, and that Y did not have it for any innocent purpose. He had it to enable him to cover his tracks in any activity he used it in. Witness B accepted that there was no evidence of terrorist use of this identity and agreed that it would be silly for terrorists to use it; it was rather evidence of association with W. We think that that underplays the significance of his possession of it in the absence of any explanation for its presence in his flat. Indeed, the very multiplicity of users could operate as a form of protection for those who used it.

85. A bank statement in the name of Charcrof was also found at Y’s flat; this was a name also used by W. We would accept that this is more relevant as a link to W than as evidence of anything else.

86. There were two French passports found in Y’s flat. One was a genuine one from which the photograph had been removed. Y said

that he had obtained that in case his brother was able to escape from Algeria where, at the time of Y's arrest, he was in custody - and come to this country. He had DHDS stamped paper for the same purpose. Y said that a few weeks before his arrest, he had been telephoned by the Algerian Security Services, who told him that they had arrested his brother and then put him on the phone, Y believed under torture, to plead for Y to return. This appears to have been before Meguerba's arrest in Algeria. The other passport was in a woman's name which Y said he had to help his then fiancée, who was due to come to London for their marriage three days before he was arrested.

87. It may be that this evidence of casual dishonest disregard for immigration law does not of itself, if accepted at face value, do more than show that Y might be deported if that could be done consistently with his human rights. It may be that such casual dishonesty is widespread among the Algerians of Finsbury Park. By itself it raises real questions about the honesty and credibility of Y.

88. But it goes further than that. Y knew that he could claim asylum in his own name and must by late 2002 have known that he could have done so upon entry on his Algerian passport. These documents were not for entry purposes: he says that his fiancée was due here in three days time, so the passport could not have been got to her for her use on entry; it could only have been for post entry use. There was no evidence to support this claim about a fiancée or imminent marriage. The passport allegedly for his brother's use was probably not for entry; it would have to be sent to him at an address notified to Y after his brother's escape. Their purpose was not to enable an asylum claim to be made after arrival; quite the reverse for French citizens are unlikely applicants, and Y would have known that a false identity was not necessary for such a claim. Rather, their purpose was to enable two Algerians to enter on one set of papers and to pass themselves off as French for other purposes. That has advantages for Algerians, but the more so the weaker their claim to be here and the more important to them that their purposes, movements and identities are not checked carefully.

89. We recognise what was said by the Commission in M, an ATCSA case, about the prevalence of false documentation among refugees. It is obviously correct and limits the inference as to terrorist connections which can be drawn from the mere possession of false documents. But that does not mean that their possession does not become more sinister in the light of other material and the explanations falsely given.

90. What struck us about Y's untested explanations was that, just as with other parts of his evidence, he had an answer of sorts for individual pieces of evidence against him, but the cumulative picture is not one of "innocent" or commonplace wrongdoing among a

fearful and uncertain refugee community; it is of a person who engages in extremist activity and his possession of two false passports for Algerians in this country supports this. We do not accept his explanation for them. The untruthfulness of some of what Y has said suggests strongly that he has something to hide.

91. Witness B had to accept that the assessment that Y had used the identity of Youcef Taleb was wrong, and that should have been appreciated earlier. It derived from an unchecked error. Y had all along truthfully maintained that he had not used it.

Links to extremists

92. We turn to the links which Y is said to have had with others who are said to be Islamist extremists. The evidence of a link to Bourgass and Meguerba, who do qualify as extremists, is provided by the role of Y in the photocopying of the poison and explosives notes or recipes which the former wrote and which the latter had in his possession. They would have known who could be trusted to do and who did the copying. One or other of them, probably Bourgass, provided Y with the documents for copying – he wrote them. There is a reasonable basis for saying that the three knew each other to some extent and of each other's views. They were all at the Mosque at various times, although there is no evidence that Y ever went to the flat at Wood Green. This is really a reflection of what we have concluded in relation to the poisons plot and does not constitute an essentially different or additional aspect of the SSHD's case. We accept that the telephone number used by Asli until November 2002 and thereafter by Bourgass does not show calls between Y and Bourgass, and it does not evidence an intensified association between Y and Bourgass. Y would also have been known to Hamza at the Mosque and accepted as a worker there because his outlook was congenial to that of Hamza.

93. X ran the bookshop at the Mosque and an association between Y and X has never been disputed. The two shared accommodation for some months over 2001/2, and it was not a secret that they did so. That address was used by Y for some of his correspondence. It is not suggested that either flat was a "safe" house. The two had a joint credit card account, substantially in credit, used for the Mosque shop according to Y and for Mosque repairs and expenses according to X. There is no explanation for the credit sum on the account which is an unusual position for a credit card holder to be in. We rather doubt that we have been told the truth and certainly the full truth about this account.

94. X is an Appellant before SIAC and the case against him is related to that against Y. He takes issue with the national security case. We can only say that there is some reasonable material to the effect

that he is an Islamist extremist but that he has not been heard in response to that assertion.

95. Y agrees that he knows W from the Mosque. He appears to dispute any closer links and certainly disputes that there is any link through the Dimeco and Chacrof identities used by W and the bank statements in the latter name found at Y's address. Landlines for Y's flat were at various times registered in both identities. We have discussed above the use by Y of the Dimeco identity. We think that this does show that Y and W were associated, in connection with false documents. W is in the same position as X, as a SIAC appellant, and we have reached the same conclusion as to the existence of a reasonable but as yet untested national security case.

96. BB was well known to Y, as Y accepts, because they both worked at the Mosque, BB in its administration. He sought a national insurance number for Y. Y says that BB was kind and helpful to Y and others in various ways. In so far as the SSHD's case that BB is an Islamist extremist depends on the extent to which he had access to an "Al Qa'eda handbook" containing instructions for explosive devices, and other equipment and propaganda material relating to the DHDS, Y's submissions show that there are some issues about that. There were however many items of interest discovered at his home when it was searched in September 2003, which Y is obviously not in a position to deal with. BB too is in the same position as X and W as set out above.

97. Y also would have known Khalef, another of the poisons plot defendants who worked as a cook at the Mosque until May 2002.

Afghanistan

98. We do not accept as reliable the suggestion, and it was in reality no more than that, that Y had "possibly" been to Afghanistan; though if made out, that would have been a serious matter. It is possible, but we do not regard it as having sufficient strength to feature in our evaluation of risk.

In absentia conclusions

99. SSHD does not rely on Y's convictions in absentia in Algeria for terrorist offences nor upon the allegations which underlie those convictions.

National security conclusions

100. The SSHD's case on national security is not as clear cut or strong on the evidence which we regard as reliable as he originally contended for. But we conclude that he has established, and the written evidence from Y does not persuade us otherwise, that Y is a danger to national security.

101. Y has been a long term supporter of various Algerian terrorist groups with a jihadist agenda, first the GIA, then the GSPC and now of the DHDS. We have concluded that Y has a senior role in the DHDS in the UK. Our view on his seniority is strengthened by the evidence of the false documentation, the money transfers, and the nature of his links with extremists.

102. This conclusion that he is not a mere passive sympathiser, but is a more influential and active member and supporter has an importance beyond the specific evidence which has been presented about what Y has done. Precise allegiances matter less in the UK than in Algeria. The supporters of these groups present in the UK do not carry on the local antagonisms from Algeria, but co-operate together. Nor do they confine their activities to Algeria, but spread a wider jihadist agenda in the UK, Europe, North Africa, the Middle East and globally. Their ability to pursue that agenda in or from the UK is a danger to the national security of the UK. The extremist Islamist religious views, the importance of which in providing the underpinning for terrorist activities cannot be overstated, the dissemination of militaristic or terrorist propaganda by word or modern technology, the production and distribution of training and instruction material, the experience and prestige in the UK of those who have supported a group engaged in terrorist activities, all act as an encouragement to others to pursue the same agenda. They can provide false documents to support the easy movement of their members and supporters, and funds to enable their activities to be pursued in the UK or abroad. These are essential support activities for the organisation and spread of these groups, and for many jihadist endeavours. They can provide useful support to those engaged in more direct activities, because they are trusted to undertake certain steps without asking about the true purpose or revealing what they know. Those steps eg the provision of money and false travel documents can be vital to successful terrorist operations. These activities spread to the looser knit groupings of extremist Islamists, and to sympathisers known to and trusted by others of a like mind.

103. Although the evidence about Y's direct activities is quite limited, we do not regard the possession of the false documents as a piece of commonplace refugee behaviour in his case, nor do we accept that he was not involved in the WU money transfers. No explanation for most of them can be given. The Tahraoui transfer is at least all of a

piece with the extremism of the Mosque; it may signify, with the other transfers, that there was a greater degree of connection with groups in or looking to Spain, and that Y has been less than frank here.

104. His role in the Mosque confirms his extremist views as does his willingness to be part of an organisation dominated by someone engaged in propagating jihadist views and actions. He would not have held that position if he had not been trusted with knowledge of what was happening there and was known by Abu Hamza to be in sympathy with it. He was trusted with the knowledge or at the very least the opportunity of knowledge of a serious terrorist plot, which again confirms that he holds extremist views.

105. His connections with other individuals alleged to be extremists is quite clear. The extremism of some is clear. The extremism of those whose appeals have yet to be heard has a reasonable basis in the evidence but we do not reach firmer conclusions yet on that because their appeals have yet to be heard. There is a pattern of contacts there. There is very little to suggest a life in which his friends and associates are or include the ordinary run of Algerian or North African refugees.

106. We emphasise two points. First, the various factors need to be looked at cumulatively and not separately. Individually, in isolation, each might be explicable as "*innocent*" i.e. non-extremist, terrorist connected, behaviour. But in reality, they cannot be treated that way. Each illuminates what can properly be inferred as the probable explanation for other acts and as to their significance for the risk which Y poses to national security. Second, Y's statements seek to rebut, as separate points, the various particular allegations made by the SSHD. Y provided explanations for what had to be explained and denials of knowledge or involvement elsewhere. Some of his evidence is argument anyway. But there is no overall picture from him at all, whether in relation to his actions, friendships, views, or past in Algeria to show an individual who is not an Islamist extremist with quite close terrorist group links. There is nothing therefore on a broader scale to refute the SSHD's allegations. His unwillingness ever to give oral evidence does not assist in persuading us that the overall conclusion we have reached is wrong.

107. We add that the individual and overall conclusions are reinforced in each instance by closed evidence, in places strongly. Y is an Islamist extremist of long-standing, who has significant terrorist group connections, notably now to the DHDS. His activities, by way of logistic support for those groups, and his presence as an active extremist supporter, show that he is a risk to the UK's national security and should be deported.

108. Y was not placed on a Control Order after acquittal and has been allowed bail, on strict terms, by SIAC. Those factors do not diminish the risk as we have now evaluated it. His periods in detention will have disrupted his activities but will not, we believe, have diminished his commitment significantly.

109. In view of the issue to which we are about to come, we make it clear that that assessment has been made disregarding the serious grounds for believing that Y was actually a party to the poisons plot conspiracy. Of course, on the approach which we later conclude is right, those grounds are in fact relevant to the evaluation of the risk posed by Y. On that basis, he is obviously a more serious and directly threatening risk to national security.

Rehman

110. It was contended by Mr Emmerson that the Commission should require the specific acts alleged against Y to be proved on the balance of probabilities. If such an act was not proved on the balance of probabilities, it fell out of account altogether and could not form any part of the evaluation of the risk posed by Y to national security. For these propositions Mr Emmerson drew upon the decision of the House of Lords in *SSHD v Rehman* [2001] UKHL 47, [2003] 1AC 153, with support for the latter also drawn from the decision in *H and Others (Minors)(Sexual Abuse: Standard of Proof)* [1996] AC 563. Mr Burnett submitted that the whole thrust of the speeches in *Rehman* was that the real question on an appeal of this type was one of the evaluation of evidence in order to judge whether someone's removal was in the interests of national security, because he was a danger to it.

111. This is not a straightforward matter. The statutory provisions are different from those at issue in the Part 4 ATCSA cases, and we do not regard the decision of SIAC or the Court of Appeal in *A and Others (No.2) v SSHD* [2005] 1WLR 414 as affording assistance. Nor do we see Laws LJ as endorsing the specific interpretation which Mr Emmerson puts on *Rehman*. Rather, he emphasises what it says about the need for an evaluative approach.

112. The question of whether or not someone is a danger to national security is a matter of evaluation. That is not at issue. The issue arises over what factual material is allowed into the evaluation exercise. It is agreed, obviously, that if a specific allegation about a past act is proved on the balance of probabilities, that allegation forms part of the basis for the evaluation. What is at issue is the part which might be played by allegations which are not and may never have been intended to be proved to that standard. In particular, the part which might be played by an allegation, which there are serious grounds for believing is true, but which has not

been proved on the balance of probabilities, will sometimes be a very live issue, for there will have been shown to be at least a sound and rational basis for it and not just a possible or speculative one. Indeed, it is not accepted by the SSHD that even such possibilities should fall outside the material for evaluation.

113. We are not entirely clear that that matter was addressed by *Rehman* in the light of the arguments before the House of Lords or the speeches, although the headnote treats it as having been decided in the way contended for by Mr Emmerson. The focus of the arguments there was largely on whether the decision that someone was a risk to national security required proof on the balance of probabilities, high or otherwise. How specific factual allegations should be approached was rather bound up with that larger issue. We do not discern any consensus on this matter from counsels' reported submissions. *H (Minors)* was referred to by Lord Hoffmann but not in this direct context.

114. SIAC had found that a number of specific factual allegations were not proved on the balance of probabilities, and held that the SSHD had not satisfied it on a high balance of probabilities that *Rehman* had endangered national security or would engage in conduct which endangered it were he to remain. We are not here concerned with the further error into which SIAC fell, of deciding that the UK's national security was not threatened by support measures for Islamic terrorist acts directed against India.

115. The judgment of the Court of Appeal was cited generally with approval in a number of the speeches, and two passages from Lord Woolf MR in particular. We cite from paragraphs 43-44:

> "…*On one approach to the issue which was before them, the standard applied by SIAC was perfectly appropriate. In so far as the Secretary of State was relying on specific allegations of serious misconduct by Mr Rehman, then SIAC was entitled to say the allegations had not been proved.*
>
> *However, in any national security case the Secretary of State is entitled to make a decision to deport not only on the basis that the individual has in fact endangered national security but that he is a danger to national security. When the case is being put in this way, it is necessary not to look only at the individual allegations and ask whether they have been proved. It is also necessary to examine the case as a whole against an individual and then ask whether on a global approach that individual is a danger to national security, taking into account the executive's policy with regard to national security. When this is done, the cumulative effect may establish that the individual is to be treated as a danger, although it cannot be proved to a high degree of probability that he has performed any individual act*

which would justify this conclusion. Here it is important to remember that the individual is still subject to immigration control. He is not in the same position as a British citizen. He has not been charged with a specific criminal offence. It is the danger which he constitutes to national security which is to be balanced against his own personal interests."

116. Lord Slynn, who was the principal support for Mr Emmerson's submissions, and with whom three others expressed explicit agreement, said at paragraph 16, in the context of national security:

"I accept that there must be a real possibility of an adverse affect on the United Kingdom for what is done by the individual under inquiry but I do not accept that it has to be direct or immediate. Whether there is such a real possibility is a matter which has to be weighed up by the Secretary of State and balanced against the possible injustice to that individual if a deportation order is made."

117. Lord Slynn, after quoting from Lord Woolf as above, continued at paragraphs 22 and 23:

"Here the liberty of the person and the opportunity of his family to remain in this country is at stake, and when specific acts which have already occurred are relied on, fairness requires that they should be proved to the civil standard of proof. But that is not the whole exercise. The Secretary of State, in deciding whether it is conducive to the public good that a person should be deported, is entitled to have regard to all the information in his possession about the actual and potential activities and the connections of the person concerned. He is entitled to have regard to precautionary and preventative principles rather than to wait until directly harmful activities have taken place, the individual in the meantime remaining in this country. In doing so he is not merely finding facts but forming an executive judgment or assessment. There must be material on which proportionately and reasonably he can conclude that there is a real possibility of activities harmful to national security but he does not have to be satisfied, nor on appeal to show, that all the material before him is proved, and his conclusion is justified, to a "high civil degree of probability". Establishing a degree of probability does not seem relevant to the reaching of a conclusion on whether there should be a deportation for the public good.

Contrary to Mr Kadri's argument this approach is not confusing proof of facts with the exercise of discretion – specific acts must be proved, and an assessment made of the whole picture and

then the discretion exercised as to whether there should be a decision to deport and a deportation order made."

118. The problem with those passages, if we may respectfully say so, is that there is a potential and unresolved conflict between the proof of specific acts and reliance on all available information, relevant on a precautionary basis to the assessment of a real possibility of activities harmful to national security. There will always be specific allegations in such a case. It seems curious that that which has not been proved on a balance of probabilities should be wholly ignored in the assessment of a real possibility of future risk, as opposed to taking its place in the assessment of future risk, for what evidential value it may nonetheless have. Lord Slynn does not say that such matters as are not proved on the balance of probabilities fall entirely out of account, and it would have been inconsistent with the rest of what he said had he done so.

119. Lord Steyn at paragraph 29 emphasised the problem of applying the civil standard of proof to the actual question for decision by the SSHD and the Commission, i.e. is X a risk to national security? He said that applying that standard could lead to the SSHD concluding that X *may* be a real threat to national security but could not be deported. This too highlights that the question is as to the degree of risk. It seems to us that the way in which that risk, necessarily lying in the future, has to be assessed should affect the way in which evidence of past actions which may bear upon that risk is itself brought into the evaluation. It does not cease to be worth considering because it has not been proved on the balance of probabilities. Lord Steyn does not address the point explicitly, although he agrees with the speech of Lord Slynn.

120. Lord Hoffmann referred to the three errors of law made by SIAC which the Court of Appeal had identified. He said in paragraphs 48-49:

"*Thirdly, it was wrong to treat the Home Secretary's reasons as counts in an indictment and to ask whether each had been established to an appropriate standard of proof. The question was not simply what the appellant had done but whether the Home Secretary was entitled to consider, on the basis of the case against him as a whole that his presence in the united Kingdom was a danger to national security. When one is concerned simply with a fact-finding exercise concerning past conduct such as might be undertaken by a jury, the notion of a standard of proof is appropriate. But the Home Secretary and the Commission do not only have to form a view about what the appellant has been doing. The final decision is evaluative, looking at the evidence as a whole, and predictive, looking to future danger. As Lord Woolf MR said, ante, p 168, para 44:*

"the cumulative effect may establish that the individual is to be treated as a danger, although it cannot be proved to a high degree of probability that he has performed any individual act which would justify this conclusion."

My Lord, I will say at once that I think that on each of these points the Court of Appeal were right."

121. He continued in paragraphs 55-56, dealing with the standard of proof more specifically:

"*On this basis, cogent evidence is generally required to satisfy a civil tribunal that a person has been fraudulent or behaved in some reprehensible manner. But the question is always whether the tribunal thinks it more probable than not.*

In any case, I agree with the Court of Appeal that the whole concept of a standard of proof is not particularly helpful in a case such as the present. In a criminal or civil trial in which the issue is whether a given event happened, it is sensible to say that one is sure that it did, or that one thinks it more likely than not that it did. But the question in the present case is not whether a given event happened but the extent of future risk. This depends upon an evaluation of the evidence of the appellant's conduct against a broad range of facts with which they may interact. The question of whether the risk to national security is sufficient to justify the appellant's deportation cannot be answered by taking each allegation seriatim and deciding whether it has been established to some standard of proof. It is a question of evaluation and judgment, in which it is necessary to take into account not only the degree of probability of prejudice to national security but also the importance of the security interest at stake and the serious consequences of deportation for the deportee."

122. We see that as more directly supportive of Mr Burnett's submissions, although again it cannot be said that the issue which troubles us is confronted head on. Lord Clyde and Lord Hutton agree with Lord Hoffmann, and Lord Hutton also agreed with Lord Slynn. Lord Hutton said that the SSHD was entitled to make the decision to deport viewing the case as a whole, although it could not be proved to a high degree of probability that he had carried out any individual act which would justify the conclusion that he is a danger. It is clear that no one thought that there was any significant divergence of view on the matters which were argued before them

123. The answer to our mind, taking the speeches as a whole is that a specific allegation which is not proved on the balance of probabilities cannot thereby be wholly removed from the picture. The question which the SSHD and SIAC have to address is

ultimately one of the evaluation or assessment of risk, a risk that someone will do acts in the future which are a danger to national security. That does not mean that he must have done such acts already. In assessing that risk, all sorts of pieces of information require to be evaluated, and each piece may tell more about the existence or significance of some other factor. The degree of certainty or probability which attaches to a piece of information about past behaviour is obviously part of that evaluative process. But there is no logical incoherence in treating a past act as warranting the conclusion that X poses a real danger, and should be deported on that precautionary basis, when there are no more than serious grounds for believing it was done. Still less is there a reason for treating it as wholly irrelevant in a range of factors which tend to that end. How a mere possibility is to be approached seems to us to be a matter for evaluation rather than to point inevitably to complete exclusion. This appeal is not a form of civil litigation examining past events, and treating as proved with total certainty that which has been proved on the balance of probabilities and as being non-existent that which has not.

124. We also regard the distinction which would otherwise have to be made between specific factual allegations and evaluation as capable frequently of being spurious, and distracting. It is perfectly evident that many factual allegations could involve security service assessment as to what an individual was doing and why. The evaluation as to why behaviour was dangerous, will often be part of the allegation that it happened. Fact and significance are not here always readily divisible. The factual allegations should not lead to pleading arguments about what were facts and what were risk factors or matters of evaluation.

125. We recognise that there are passages in *Rehman* which run counter to that conclusion but there are passages which support it. The issue is not clearly confronted. We conclude that what we have set out above is the right approach. We draw attention to two other matters: first, the Refugee Convention, Article 33(2), requires only that there be serious grounds for believing that someone is a danger to national security for removal; that it does not require the factual basis for that belief to have been proved on a balance of probabilities. It would be odd to be able to remove a refugee to persecution which the Refugee Convention permits, but for the deportation grounds only to be available on a higher standard of proof. Second, the assessment of risk on return under that Convention does not require that the past events relied on by Y be proved on the balance of probabilities; this is not just because of the difficulties of proof; it is because the assessment of risk on return should be informed by the whole range of material including that which may be capable of credence but which has not been proved.

126. What Sedley LJ said *in Karanakaran v SSHD* [2000] Imm AR 271, at page 302 is as apposite to the issues we are dealing with as it was to risk under the Refugee Convention:

> "*The civil standard of proof, which treats anything which probably happened as having definitely happened, is part of a pragmatic legal fiction. It has no logical bearing on the assessment of the likelihood of future events or (by parity of reasoning) the quality of past ones. It is true that in general legal process partitions its material so as to segregate past events and apply the civil standard of proof to them: so that liability for negligence will depend on a probabilistic conclusion as to what happened. But this is by no means the whole process of reasoning. In a negligence case, for example, the question will arise whether what happened was reasonably foreseeable. There is no rational means of determining this on a balance of probabilities: the court will consider the evidence, including its findings as to past facts, and answer the question as posed. More importantly, and more relevantly, a civil judge will not make a discrete assessment of the probable veracity of each item of the evidence: he or she will reach a conclusion on the probable factuality of an alleged event by evaluating all the evidence about it for what it is worth. Some will be so unreliable as to be worthless; some will amount to no more than straws in the wind; some will be indicative but not, by itself, probative; some may be compelling but contra-indicated by other evidence. It is only at the end-point that, for want of a better yardstick, a probabilistic test is applied. Similarly a jury trying a criminal case may be told by the trial judge that in deciding whether they are sure of the defendant's guilt they do not have to discard every piece of evidence which they are not individually sure is true: they should of course discard anything they think suspect and anything which in law must be disregarded, but for the rest each element of the evidence should be given the weight and prominence they think right and the final question answered in the light of all of it. So it is fallacious to think of probability (or certainty) as a uniform criterion of fact-finding in our courts: it is no more than the final touchstone, appropriate to the nature of the issue, for testing a body of evidence of often diverse cogency.*"

127. We have considered the majority decision in *H (Minors)* carefully, and what Lord Nicholls said at pp589-591 in particular. The relevant Act drew a distinction between the making of a care order if the Court was *"satisfied"* that the child *"is suffering"* significant harm and making an order if the Court was *"satisfied"* that the child *"is likely to suffer"* such harm. The Act also required action to be taken where *"reasonable cause to believe"* was shown. Lord Nicholls applied to these civil proceedings, as he saw them to be, the normal requirement that facts be proved on the balance of probabilities.

The majority held that neither the present fact nor future likelihood of suffering could be proved by evidence which might be true but which was not shown to be true on the balance of probabilities. Part of the reasoning undoubtedly related to the wording of the specific Act, which is materially different. Part related to the principles whereby in civil proceedings factual allegations as to the past and to the future are proved. He also pointed out that unproven but credible allegations would require disproof, reversing the burden of proof.

128. The reasoning is powerful, but that of the minority is also. It is not a speech which shows, in the context of the Act and decision which we are considering, that the approach which we regard as correct lacks intellectual coherence, or is an impermissible approach to evidence. The characterisation of the proceedings as civil proceedings impels the conclusion that the balance of probabilities is what that Act intended, absent other indicators. But we do not see the proceedings before us as civil proceedings in that sense, requiring past acts to be proved on the balance of probabilities. They are public law proceedings the focus of which is risk, that is an evaluation of what harm may happen in the future. The evidence which we look at is only relevant if it tends to that end, and all evidence which is logically relevant to that should be considered. Past acts are only relevant to the extent that they tell something for the future, whether they are acts relied on by the Appellant or by the SSHD. The legislation which we consider, including the two Conventions, lacks the indicators which were partly influential in the majority decision. We do not regard it as sufficiently persuasive, as to the approach which we should adopt here, to apply it.

129. In the light of those conclusions we dismiss the ground of appeal that Y is not a danger to national security.

130. We have considered the other factors referred to in paragraph 364 of the Immigration Rules. Y raises no relevant factors apart from the mental and physical health difficulties brought on by torture in Algeria and depression and PTSD from which he suffered while on remand in Belmarsh and continues to suffer.

131. We see nothing in these factors which could justify not deporting Y in the light of the national security conclusions to which we have come, if they do not give rise to breaches of ECHR. We deal later with Article 8. No family connections were prayed in aid. None were relied on in Y's submissions. We also reject the suggestion that, if Article 3 is not breached, Y will nonetheless suffer on return in a way which should found a case under the Rules. This is theoretically possible, but Y does not make out that case. It would require a wholly exceptional case for the SSHD's national security case to be made out, for there to be no breach of Article 3 on return and yet for the discretion under paragraph 364 of the Immigration

Rules to be exercised in such a way as to preclude removal. The grounds of appeal relating to the Immigration Rules for Y's deportation are dismissed. His appeal therefore depends upon the application to his case of two international Conventions to which the UK is party: the ECHR and the Refugee Convention.

The Refugee Convention

132. Y was recognised as a refugee following his successful appeal in June 2001. The SSHD contends first that the Convention no longer applies to protect Y from deportation because the circumstances in connection with which Y was recognized as a refugee have ceased to exist, as it is now safe for Y to return to Algeria; Article 1C(5). Secondly he contends that Y's terrorist actions cause him to be excluded from its protection under Article 1F (c), and thirdly that Y 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.

133. The Adjudicator allowed Y's appeal against the SSHD's refusal of asylum, remarking upon the unusual fact that the Appellant Y had not given oral evidence. He accepted as genuine, as did the SSHD, the documentary material showing that Y had been sentenced to life imprisonment in his absence for an offence of belonging to a terrorist organisation. He regarded that as an "*inherently political offence*" in the absence of any linked and more specifically criminal behaviour. That, he said, amounted to persecution for a Convention reason, unspecified. Exclusion was not considered.

134. Although the Adjudicator had referred to a US State Department Report, which spoke of the risk that Islamists would be tortured, as supporting the appeal on ECHR grounds, he allowed the ECHR appeal because the "*sentence would amount to a breach*" of Article 3, and "*it*" would be a breach of Article 6. The risk of torture appears to have been no more than a supporting point. The reasoning is exiguous, its expression muddled and a number of pertinent issues on both sides were ignored. Nonetheless there was no appeal by the SSHD on fact or on law.

135. Y contends that it is for the SSHD to show, in view of the grant of refugee status to Y, 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.

136. Y 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 Y's appeal had been successful and 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.

137. 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."

138. Y 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)."

139. 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.

140. 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 un the United Nations' Refugee Convention."

141. 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 lead to his exclusion if known. That is not this case.

142. We prefer the reasoning in *KK* to the dicta in *Pushpanathan.* It is far from clear that, in the comments relied on by Y, 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*.

143. 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.

144. 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.

145. 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.

146. 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 remains on acts in the past rather than on future risk.

147. Y did not really seek to take issue with the SSHD’s contention that, if Y were wrong on the time point, the acts which the SSHD relied on showed that Y 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 at 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].

148. 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 not accepted the whole of the Secretary of State's case on national security. We have accepted that he was a supporter of terrorist groups in Algeria. We did not find that he probably was a party to the poisons plot. He was and probably still is a senior member of a terrorist group in the UK, and is a threat to national security.

149. Whilst we have some doubts as to whether the conclusions to which we have come on the national security issue show that he has committed *acts* of the nature or gravity required for exclusion, (see KK), that is not the question. The question is whether there are serious reasons for considering that he has done so such acts not whether he was probably a party to the poisons plot.

150. The poisons plot trial judge held that there was a case to answer against Y on both conspiracies. By itself this shows serious reasons for considering that Y has been guilty of acts contrary to the purposes and principles of the UN. He concluded that a reasonable jury could convict Y to the criminal standard on both counts. We would also give greater weight to what is known about Finsbury Park Mosque than the judge did when directing the jury. When taken in conjunction with what we have concluded about Y in the national security case, there plainly are serious reasons for considering that Y has been guilty of acts contrary to the purposes and principles of the UN. We should add that the provisions of ss54 and 55 of the Immigration Asylum and Nationality Act 2006 are not yet in force. They assert the existing jurisprudence to be the law; they do not change it.

151. The exclusion of Y 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 Algeria. 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."

152. 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.

2. *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."*

153. 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 Y fell within the exception. This issue would arise if Y 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.

154. This issue was considered by the IAT in *SB (Haiti- cessation and exclusion) [2005] UKIAT* [00036] at paragraphs 81 -83. It 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.

155. The position is therefore clear: Y is a danger to national security and the Immigration Rules and the Refugee Convention provide him with no protection against removal.

ECHR

156. Y's case 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, the country of nationality. On the face of the ECHR, it does not apply to the dangers which someone might face in such circumstances: Article 1 requires the state parties to secure the rights of those "*within their jurisdiction*". Its signing in 1950 preceded the Refugee Convention by a year. That later Convention permits the removal of refugees or those excluded from the definition of "refugee", to face persecution in the circumstances which apply here. It could never have been seen by those States which were also parties to the earlier ECHR as permitting that which they had agreed the year before to forbid under the ECHR.

157. However, the ECtHR has held, at least in relation to Article 3, and possibly in relation to certain other Articles as well, that what would be the equivalent of persecutory ill-treatment in the country to which an individual would be returned, and which would not prevent return under the Refugee Convention, would make return a breach of the ECHR. The ECtHR decision in *Chahal v United Kingdom* (1997) 23 EHRR 413 represents now a consistent jurisprudence which UK Courts should apply and not merely have regard to; *R(Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323.

158. Accordingly, we examine the evidence about safety on return. The focus of the evidence concerned Article 3, which prohibits torture or inhuman or degrading treatment, Article 5 which deals with detention, Article 6 which deals with a fair trial on criminal charges, and Article 8 in relation to Y's mental and physical condition. It also concerns the risk of Y being sentenced to death or executed pursuant to such a sentence, although the precise legal framework within which that issue has to be considered is a matter of some debate.

159. There is an issue about how the standard and burden of proof as between Article 1C (5) of the Refugee Convention, the cessation provision, and Article 3 ECHR in particular, might differ and should be reconciled. There was also some debate about the role if any of deference in considering safety on return and Article 3 in particular. We return to both those issues after considering the evidence.

Y's risk factors

160. We accept that Y was a FIS activist, a local leader, before 1992, that he supported the GIA, and split from it in the mid 90s over its policy of targeting civilians indiscriminately. We conclude that he then supported the GSPC, as did many others. We believe that his statements to SIAC and to the SSHD underplay his activities, and suggest an earlier split from the GIA than occurred. We view his position in the light of all the evidence but for these purposes that difference in timing matters little. The key point is that there is evidence that he was a FIS and then a GIA supporter, a GSPC supporter, and ultimately a DHDS member of a quite high level.

161. Y relies, more through submission than anything in his own written statement, on an allegation that he was tortured in Algeria before the 1992 coup. He gave no detail of torture allegations either in his asylum interview or appeal statement and has given no detail in his statement to the Commission. He claims that he has given no detail because that would create danger for him and his family were he ever to be returned to Algeria. The genuineness of that fear is not something which we have been able to test. He more probably in our view recognised that questions at any stage could have tested other aspects of what he said and of what was said against him, certainly before us. It is impossible to work out from his statements when he says he was detained and tortured. His asylum interview says that he was arrested as a student and suffered some ill-treatment but the main incident appears to have been a period of 48 hours detention in 1994, following which he was released but kept under surveillance. He was beaten up, slapped and kicked, he said.

162. He had to seek treatment however in the UK after 2001 for his mental and physical conditions. This aspect of his case depends upon the medical evidence which he produced in written reports over the period 2004-6. The detail of what his doctors say is taken from what Y said to them. The reports, confining attention to what they say about torture, are not consistent as to what Y said over whether there were regular periods of detention each lasting several days over a period of years, (Dr Cumming 11.6.04 para.6) or once in 1994, following which he was released into hospital (Dr Rundle 6.4.06 p2). On this occasion in 1994 he was beaten daily with iron bars and rifle butts, particularly to the head which rendered him unconscious. The former describes other methods of torture as well.

163. Dr Rundle concludes that the scars on the head, a depressed frontal region, taken with the history which includes temporal lope

epilepsy are *"entirely compatible"* with torture and adds *"it is difficult to conceive what else could have caused them."*

164. In the light of what Dr Rundle says, and it is the particular report upon which Y's submissions rely, we accept that Y was tortured in Algeria in 1994 by the authorities in the manner described. It would be consistent with the general background evidence. We do not conclude that the other supposedly regular incidents occurred, in the absence of evidence from Y himself. Although those later occasions may have occurred, it is surprising that the authorities were unable to arrest him and hold him for either of the two later trials in absentia, if he were regularly in their hands. Y, on his case to SIAC, appears to have gone into hiding in fear in 1995 after seeing two friends, who were later killed, abducted by security forces.

165. In 1996, a warrant for Y's arrest was issued by the Court in Tlemcen in respect of an offence in March 1996 of organising an armed group prejudicial to the security and integrity of the state. The later extradition request describes this offence more precisely. In June 1997, Y was convicted of this offence in his absence and was sentenced to life imprisonment.

166. Four months later, another examining Magistrate in the same Tlemcen Court issued a further warrant in respect of a further offence in May 1996 of organising an armed group prejudicial to the state. In February 1998, Y was again convicted in his absence, but this time he was sentenced to death. The group is described as "defenders of the salafist prediction"; this could be a reference to the DHDS. These two offences became the subject of an extradition request by Algeria in June 2003.

167. The Algerian Security Service or DRS maintained a close interest in Y, as the conversations with the UK Security Service in early January 2003 show. There had been contact with Special Branch about him, as El Haritha, a name by which Y was known in Algeria to the DRS, rather earlier in 2002. It was in 2002 that the article was published in "Le Matin" which Y considers shows the risk to him. Y alleges that his family in Algeria was harassed in late 2002, and his brother was taken into custody, leading to phone calls from the DRS to Y saying that he had to come back. There appears to have been contact by the authorities with the family, inquiring into the whereabouts of Y in preparation for the June 2003 extradition request.

168. Why they said incorrectly in January 2003 that Y had been released after being sentenced for terrorist offences, having renounced his former beliefs, is unclear. The June 2003 extradition request for Y is only the third Algerian extradition request made of the UK since 1997. There is no Treaty.

169. The two offences alleged in the request are contrary to Article 87a of the Criminal Code. An act is a terrorist act within that Article if it targets the security of the state, its citizens, sows terror among the population, puts lives or property into danger or hinders movement and traffic. It contains aggravated penalties for acts outside Article 87a which have the same terrorist intent.

170. The first offence related to Y's membership of a group which attacked a train between Oran and Tlemcen in March 1996, killing 15 people. The Magistrate is said in the request to have established from his investigations that Y was implicated with the group, providing logistic support, money, health and clothes. The second offence related to Y's membership of the same group which ambushed security forces in May 1996, killing 42 of them. Y was implicated in the group in the same way. The examining Magistrate also said that Y "participated" in that ambush; the "overt" acts relied on include "organising" the ambush. This was the offence which led to the death sentence and it is not hard to see that even membership of the group which carried out this attack would lead to a close security service interest in Y. Y rightly points out that the evidence of one Fethi, submitted in support of the request, and who is serving a 20 year prison sentence, does not support an allegation that Y organised or participated in the ambush but only that he dealt with logistics and money. The other witness whose evidence was in the request does not support Y's presence at the ambush either.

171. The extradition request stated, as is agreed, that the judgments in absentia were not final judgments and that if Y were extradited, he could in effect appeal against conviction and so annul the convictions. This would end all financial consequences (including the costs order). Y would thus return as an accused but not as a convicted person. He would then have a retrial before a judge and jury. Certain procedural details were given. It noted that no sentence of death has been carried out since 1993. That is still the case. In 2001, the President signed two decrees commuting death sentences passed on two groups of people "*into perpetuity*", which we take to be life imprisonment.

172. The charges, Court records, evidence, transcripts and even judgment are not available, and access to the judgment has been refused following a request made in April 2006 by the British Ambassador because, according to the Ministry of Justice, of *"the other persons cited and ..the presumption of innocence."* They do not appear to have been trials before a military court.

173. In March 2005, undisclosed advice was sent to the Algerian Embassy about the steps necessary to progress this request, focussing on the need for further evidence. There has been no response to that advice. But from the response of the Algerian

Ministry of Justice in December 2005 to the British Embassy's November 2005 request for information about charges outstanding against Y, it is clear that as at that date, the Algerian authorities contemplated a retrial of Y for the two offences for which he has been convicted in absentia, on the assumption he would contest the convictions. But this preceded the Ordonnance of February 2006.

174. Meguerba's situation is worthy of note here. He was sentenced earlier this year to ten years imprisonment for organising a terrorist group. The details are scanty. But Meguerba did make allegations at this trial that he had been tortured. Y contends that this trial could well foreshadow circumstances in which he could be charged with organising the same group, the DHDS. Meguerba did identify Y to the Algerians in his early interviews as a leader of the DHDS who had recruited Meguerba to return to Algeria to teach people in Algeria new techniques, by implication for terrorist activities.

175. Y contends that what happened to Meguerba is relevant to the risks to him in a number of other respects. First, the Algerians were deceitful to the UK authorities about the telephone calls which Meguerba made after his arrest, which is said to emphasise the desire which the Algerians have to see Y back in Algeria and to make reliance on what they say now less justified. For a day or so, they were misleading the UK authorities, but we do not accept the contention that one of the phone calls was to Y or to locate him or to provoke another to call Y or make a phone call about Y. We do not accept that the Algerians fabricated what Meguerba said. What he said was consistent with the allegations against Y which the Algerians were already in a position to make following the two convictions and there was no need for their allegations to be sourced to Meguerba. Second, Y alleges that Meguerba was detained illegally and tortured which bodes ill for Y on his return. We shall have to return to that later. The Algerians could rely on what Meguerba said or might say at a trial of Y either because of torture or to ingratiate himself with the authorities.

176. Mr Emmerson focused on three areas of risk to Y, as an Islamist extremist terror suspect with two grave convictions perhaps facing retrial or other trials, with evidence of a strong DRS interest in him: torture, flagrant deprivation of liberty and an unfair trial, and a serious risk of the death penalty. The latter two only applied if the decrees of February 2006 implementing the provisions of the Charter of National Reconciliation did not apply to Y, so as to prevent any retrial or further trial on other charges. All three risks arose from the lack of accountability or control over the security police and the Department for Information and Security (DRS) by civilian authorities, the continued use of torture which would be made more likely in the context of criminal proceedings, the absence of any effective system for investigating allegations of

torture, a climate of impunity reinforced by the provisions of the Charter, and continued army influence over the civilian government.

The background material on conditions in Algeria

177. The starting point is that at the time of the certification of suspected international terrorists and their detention under ATCSA in late 2001, early 2002 and onwards, it was a necessary part of the SSHD's case for their detention, that the individuals could not be returned to their country of origin, including Algeria, without a breach of the UK's obligations under Article 3 ECHR as interpreted in *Chahal*. Indeed, the release of those detained in March 2005 did not reflect a change in the SSHD's assessment about the risk on return.

178. Y was not one of those detained under those powers but was in custody from January 2003, awaiting trial. On release after his acquittal, he was never the subject of a Control Order**.** However, the allegations against him and the risks which he would have faced as an Islamist extremist with links to terrorist groups, meant that he could no more have been returned to Algeria than those Algerians who had been detained. It was not suggested on behalf of the SSHD that he would have faced a lesser risk than those whose detention had been predicated on a real risk of torture, inhuman or degrading treatment on return to Algeria.

179. We have been presented with a very great deal of material covering the last 4 or 5 years. Some material from NGOs argues against deportation with assurances to Algeria and other countries. Mr Oakden, Director of Defence and Strategic Threats at the Foreign and Commonwealth Office, who gave the Government's evidence on this topic, made it repeatedly clear that *"while not expressing any opinion or endorsing the published assessments of NGOs or other governments on the human rights situation in Algeria, it is not the British Government's intention to contest the general thrust of such reports".*

180. We accept the submission of Mr Emmerson QC for Y that the detail of who committed abuses, where, in what circumstances and with what frequency and consequences, is nonetheless important for the assessment of the risk which Y would face were he returned. We focus, as Mr Emmerson invited us to do, on the more recent material, produced in the last two or so years for the purpose of seeing exactly what general thrust was not at issue.

The background material

181. There is general background material across the range of topics in the Country of Origin Information Service report of October 2005 on Algeria, produced following the introduction of new procedures. It draws freely on other governmental and NGO sources. We focus on those. There is an April 2006 version but we were not specifically referred to it; we do not see it as taking matters beyond the specific materials we do consider. The US State Department Report on Algeria for 2004, published in February 2005, describes Algeria as emerging from over a decade of terrorism and civil strife in which between 100,000 and 150,000 persons were estimated to have been killed. President Bouteflika's re-election in 2004 was Algeria's first democratic contested Presidential election. The Report for 2005 said that an international observer had concluded that this election was free and fair but not flawless. There were five candidates, and the military remained neutral. It had been widely believed that the military had orchestrated the outcome of the 1999 Presidential election and it had traditionally exercised influence over areas beyond defence and foreign policy. Increased civic peace had led to trends to greater civilian control, greater professionalism and less military interference in day to day decision–making.

182. Nonetheless, it continued:

> *"Although the Constitution provides for an independent judiciary, it continued to be restricted by executive influence and internal inefficiencies. While the Government generally maintained effective control of the security forces, there were some instances in which security force elements acted independently of government authority. Some security force members committed serious human rights abuses.*
>
> *The Government's human rights record remained poor overall and worsened in the area of press freedoms; however, there were significant improvements in some areas. There continued to be problems with excessive use of force by the security forces as well as failure to account for past disappearances. New armed terrorist groups, civilian and military police arbitrarily detained and arrested persons and incommunicado detention continued. The Government routinely denied defendants fair and expeditious trials. Despite judicial reforms, prolonged pre-trial detention and lengthy trial delays were problems. Denial of defendants' rights to due process, illegal searches, and infringements on privacy right also remained problems. The Government did not always punish abuses, and official impunity remained a problem.*

Despite these problems, the Government took several notable steps to improve human rights. There was a significant reduction in reported abuses by the security forces. Government actions reduced the number of terrorism-related civilian deaths and strengthened the basic human right to life and security. The Government oversaw generally free fair elections, according to international observers, including a representative from the Organization for Security and Co-operation in Europe (OSCE). The government-appointed Ad Hoc Mechanism on the Disappeared recommended and the Government agreed to accept responsibility for unauthorized actions by security forces and pay indemnities to families of the disappeared. The government also negotiated in good faith with the Berber group "Arouch" as part of its National Reconciliation plan. In October, the Government passed new Penal Code legislation criminalizing both torture and sexual harassment for the first time.

Terrorist groups committed numerous, serious abuses. Terrorists continued their campaign of insurgency, targeting government officials, families of security force members, and civilians. The death of civilians often was the result of rivalries between terrorist groups or to facilitate the theft of goods needed to support heir operations. Terrorists used violence to extort money, food, and medical supplies. Terrorists also used vehicle-borne explosive devices to attack infrastructure targets and also used ambushes to attack military convoys. The violence occurred primarily in the countryside, as the security forces largely forced terrorist out of the cities. Successful operations by security forces helped to eliminate terrorist cells and leaders, weakened terrorist groups, and resulted in significantly lower casualty levels for the year."

183. In the more detailed parts, it said that security forces killed terrorists in armed confrontations but there were no politically motivated killings by the Government or its agents. The Government said that as a matter of policy, disciplinary action was taken against soldiers or policemen who violated human rights. There was some detail to support that comment and some which could cast doubt on its reality. Total deaths on all sides in the year were however down from 1162 to 429.

184. There were no reports of politically motivated disappearances which had been a particular concern with the Government acknowledging 7200 disappearances as a result of its actions, and 10000 as a result of terrorist kidnappings and murders. NGOs put the figure attributable to the Government a little higher. In September 2003 the government established an Ad Hoc Mechanism on the Disappeared, headed by Mr Ksentini, which could seek information on disappearances from the security service and others but which

could not compel co-operation nor investigate. Its weaknesses were criticised by local human rights NGOs. It was not seen as independent. It had an advisory and reporting role in essence. The government was not in reality investigating any of those disappearances attributable to its forces. The President had said that the state had to take responsibility for the unauthorised actions of its security personnel.

185. The FCO Human Rights paper of October 2005 produced by Mr Oakden took this a little further. The CNCPPDH, headed by Mr Ksentini, produced a report to the President in March 2005, which concluded that the Algerian state was "*accountable*" for 6146 disappearances but was "*not guilty*" of them; individual elements of the security forces had acted of their own volition. Compensation should be available to the families. There had been vigorous criticism of this report and of Ksentini himself by other human rights groups in Algeria. The FCO paper said that the President had warned *"the families of both the victims of terrorism and the disappeared that there was a price to be paid for national reconciliation and that they would have to surrender their rights in order to save and safeguard the country. Ksentini has always supported the proposed amnesty, describing it as the "best solution for turning the page" and making clear his views that it "must also benefit agents of the state guilty of committing excesses: there is no reason to exclude them". This has predictably enraged the families' groups and the LADDH."* (LADDH is a local NGO highly critical of the Algerian Government).

186. The USSD Report for 2004 pointed out that torture was forbidden by the Constitution and other legislation. But there was widespread reporting that the security forces still used torture when interrogating persons. Although new legislation had criminalised torture, no official had been prosecuted under it. Torture was on the decline but still occurred in military prisons especially on those detained on security grounds.

187. Prison conditions generally met international standards, but the government continued to refuse international observers, such as the ICRC, access to military and high security prisons, though independent human rights observers were permitted into other prisons.

188. Arbitrary arrest and detention were prohibited by the Constitution, but, although less frequently than before, they continued to occur at the hands of the security forces. Detention pre-trial, (more aptly pre-charge or garde a vue detention) of up to 12 days was permitted in terrorism cases; the shorter periods were generally adhered to in other cases. This could be followed by investigative detention which could permissibly last, with extensions, for 16 months. This was said to have been abused by prosecutors. The rights of detainees

to receive visitors and medical examination on release were often not adhered to and detention beyond the legal limit occurred in some cases.

189. The 2004 Report then dealt with the judiciary. The judiciary was not independent in practice but the government had technical programmes under way with international assistance to rectify many of the problems. Military Courts heard cases involving civilians charged with security or terrorist offences, although it also said that the regular criminal courts heard security cases:

> *"According to the Constitution, defendants are presumed innocent until proven guilty. Trials are public, and defendants have the right to be present and to consult with an attorney, which is provided at public expense. Defendants can confront or question witnesses against them or present witnesses and evidence on their behalf. Defendants also have the right to appeal and the testimonies of minorities and women have equal individual weight."*

190. There was government interference and harassment of local human rights NGOs. International groups were often not allowed entry and the UN Special Rapporteur on Torture continued to be denied entry. There was a prospect that the government would act more closely with such bodies in the future but their co-operation rather than interference in Algeria's internal affairs was required.

191. Both sides sought assistance and support from the USSD Report for 2005 published in 2006. Government had further strengthened civilian control over the military; it continued to say that "*however, in some instances security forces acted independently of government authority."*

192. Reported human rights problems included allegations of abuse and torture of detainees, impunity and arbitrary arrest and prolonged pre-trial detention, a lack of judicial independence and a denial of fair and speedy trials. But it continued :

> *"Despite these problems following over a decade of civil strife and terrorism, the government took several important steps to strengthen human rights. There was a significant further reduction in reported abuses and use of torture by the security forces. A new code of police conduct reduced the number of arbitrary arrests. Government actions contributed to a reduction in the number of terrorism-related civilian deaths."*

193. Security forces weakened terrorist groups and casualty levels lowered during the year.

194. There were again no politically motivated killings by the government. The number of deaths on all sides was higher at 488 than in 2004, approximately half by the government, all down as terrorists. There were again no reports of politically motivated disappearances. But the report now said that most of the disappearances in the mid 90s were attributed to the security forces, and the issue continued to be debated in Algeria. The government would not investigate any of the 5200 disappearances now said to be accepted by the government as properly attributable to its forces.

195. The comment in this report that human rights groups and lawyers had said that the incidence and severity of torture was on the decline is repeated, but it is unclear whether that represented a continuing decline from 2004. The same is true of the comment in relation to the decline in arbitrary arrest and detention.

196. Prison conditions were improved in certain low security prisons but the ICRC was still unable to visit military or high security prisons and detention centres.

197. There was a significant change in relation to the judiciary, where historic strides had been made towards reform but the chief instances affected judicial corruption at the lower level. There were four military courts which tried security related cases involving civilians:

> *"Each tribunal consists of three civilian judges and two military judges. Although the president of each court is a civilian, the chief judge is a military officer. Defense lawyers must be accredited by the military tribunal to appear. Attendance of the public at the trial is at the discretion of the tribunal. Appeals are made directly to the Supreme Court. The military tribunals tried cases during the year, but no specific information was available."*

198. The harassment of and interference with local NGOs continued; they were required to be licensed by the government, although over 100 unlicensed ones operated openly.

199. Mr Oakden produced two FCO research papers. The Human Rights paper of August 2005, sets out the insurgency as the backdrop to the human rights situation in Algeria. The annulling of the elections which the FIS looked set to win, was followed by the outbreak of campaigns of terror by the GIA which led to indiscriminate killings of civilians and ultimately to anyone who did not accept extremist Islam becoming their target. Villages were massacred. Violence was widespread. 100,000 to 150,000 were killed in a decade of violence. It repeats much of what is in the USSD reports.

200. It noted the continuing state of emergency, and the shortfall of some Algerian legislation in relation to international obligations to which it was party; it has breached reporting requirements under two treaties. The death penalty remained on the statute book although it had not been carried out since 1993. The moratorium does not prevent the death sentence being imposed, and indeed it has been imposed in 2003 and 2005. The government intends to legislate for its abolition, but not for terrorist offences.

201. It sets out usefully the background to the Charter for Peace and Reconciliation and the differing views about it:

> *"26. As Algeria slowly emerges from the shadow of the insurgency, the government's strategy has been to promote national reconciliation. On 1 November 2004 President Bouteflika publicly announced the forthcoming creation of a Charter for Peace and National Reconciliation, which was formally presented on 14 August 2005. The Charter follows earlier measures taken with the stated intention of bringing about reconciliation, notably the 1999 Law on Civil Harmony, which granted clemency to members of armed groups who renounced violence, exemption from prosecution for persons responsible for certain less serious terrorist-related offences, and reduced sentences for those who had committed such crimes; and a presidential decree in January 2000 which granted amnesty to hundreds of members of certain armed groups which had declared cease-fires in 1997, regardless of whether or not they had committed human rights abuses. The Algerian media have universally described the Charter as a "general amnesty". But, although it goes further than in earlier measures, it is not all-embracing, continuing to exclude those who have killed, raped or placed bombs in public places.*
>
> *27. NGOs and victims groups allege that the government is promoting reconciliation at the expense of justice. Amnesty International, Human Rights Watch and others have expressed concern that the measures may permanently deprive victims or their families of their right to truth, justice and reparation."*

202. The second paper was an analysis of political, economic and social trends in November 2005. It suggested that there had been a positive modernising trend over the last 5 or 6 years. The human rights debate in Algeria was said essentially to concern how to address the legacy of the 1990s rather than current difficulties. Increased professionalism among the armed forces, conflict fatigue, and amnesty initiatives had confined the remaining insurgents to a few mountainous areas. They no longer threatened the existence of the state. Attacks were now aimed at the security forces rather than the population as a whole.

203. It described how a principal theme of President Bouteflika's first term had been to lay the ground for reconciliation and reabsorption into society of former terrorists with grants of clemency in 1997 to those who renounced violence and an amnesty in 2000 for those who had declared a cease fire in 1997. The Charter had been popularly acclaimed in September 2005 but was attacked by human rights groups as promoting reconciliation at the expense of justice.

204. It noted improved prison conditions and access to civil prison for the ICRC and NGOs but confirmed that that still did not apply to places of detention run by the *Securite Militaire* "*which would house persons detained in relation to terrorism–related charges, and in which serious human rights abuses are alleged most frequently to occur.*"

205. It is useful to note here Amnesty International's "Memorandum to the Algerian President" of April 2006. It points out that the President is the Minister of Defence and is in charge of the DRS whose actions have led to most of the reports of torture over the years. Although acknowledging that the level of violence has decreased in recent years, with fewer arrests and fewer allegations of torture, it says:

> *"Despite these improvements, torture and other ill-treatment remain both systematic and widespread in cases of arrests linked to alleged terrorist activity. Many of these arrests are carried out by the DRS and, while fewer than during the height of the violence of former years, the DRS remains formidably powerful. People detained by the DRS are systematically held in secret detention and denied any contact with the outside world, often for prolonged periods – in conditions which facilitate torture and other ill-treatment. As military personnel, offices of the DRS operate under the authority of senior army command and Algeria's president in his role as Minister of Defence."*

206. It repeated concerns which it had expressed earlier that the Charter for Peace and Reconciliation adopted by national referendum in September 2005 had not addressed the problem of torture because of the comprehensive immunity for members of the security forces for human rights violations, and was concerned at the message that this immunity sent. It referred to statements from the government that since the laws for "national reconciliation" in February 2006, some 2000 people had been released from prison, including terrorist suspects who had been held in secret detention and who were reportedly tortured. It reiterated its hostility to deportations with assurances.

207. The Memorandum took 12 cases, most of whom were released in March 2006, to illustrate various more general points about human rights abuses. These included arrests by DRS officers who did not

identify themselves as required by law, absence of information to detainees as to their rights to communicate with their families, absence of notification that they had been taken into detention, arrests by the DRS when AI had been told by the Ministry of Justice that the police handled the vast majority of terrorist cases, in eight of the twelve cases the garde a vue detention period of 12 days was exceeded, and exceeded by several months in 5 cases and by over 2 years in one case. Some arrest dates were falsified. Detainees were held incommunicado, or held in places which were not recognised places of detention, notably in DRS barracks, which AI said that prosecutors had not inspected, contrary to the Code and contrary to what AI had been told. Most terrorist suspects did not have the benefit of legal assistance on their first appearance before the examining magistrate. Conditions of detention were poor and in virtually all cases detainees were reportedly tortured or ill-treated and forced to sign confessions. Confessions obtained by torture were admitted at their trials often as the sole evidence. Allegations of torture were made by detainees to the examining magistrate but were routinely dismissed without investigation. There was no provision for medical examination in DRS detention contrary to what the law required.

208. There was a lack of civilian oversight of the DRS. Prosecutors failed to oversee the activities of the DRS officers who acted as judicial police. They were not kept informed of arrests and did not visit DRS barracks where detainees might be held. They did not insist on the requisite medical examinations or verify records of arrest, detention or interrogation. This put at risk those who might be detained by the DRS on return to Algeria. There had been no prosecutions of any DRS officer for torture and immunity was in practice conferred.

209. Mr Oakden agreed that DRS custody is where historically NGOs have pointed to torture taking place, but it was now he said under the full control of the Government, and the President was head of both the Ministry of Defence and of the DRS.

210. The COIS, USSD and FCO reports were either produced as reliable by the SSHD or as material the general thrust of which was not contested by him. Mr Oakden agreed that the breaches of human rights as evidenced by the USSD Report for 2004, NGO reporting and the FCO report on human rights of August 2005 cast a high burden of proof on the SSHD that Y could be returned safely. But he linked the breaches of human rights closely to the civil emergency in Algeria over the 1990s and improvement in the position to the advances in the security situation and in the social and political arenas.

211. Mr Oakden however entered qualifications about aspects of the AI report. The UK Government did not endorse individual NGO reports. Mr Oakden regarded the part of the AI April 2006

Memorandum cited above as an overstatement which was not borne out by the individual case studies, which were themselves not shown to be representative of a wider group of cases. Some but not all were 2-3 years ago. But we regard it as needing some careful consideration because of the more recent cases and the more recent history of older cases, and so we deal with them in a little detail later.

Mr Joffe's Report of 1st April 2006

212. Y produced a report from Mr Joffe, Director of the Centre for North African Studies, within the Centre of International Studies at Cambridge University, who has considerable academic experience. Algeria is a particular area of interest for him. Much of the report has no application to this case, even at a general level. Some of his views are drawn from sources which we have already quoted, but most of the more controversial or even idiosyncratic views are without specific sourcing.

213. We do not accept his view of the extent to which the GIA behaved as it did because of infiltration by Government agents, for the reasons set out in the generic Part 4 judgment. He is sceptical about the degree of popular support which the President won at the 2004 election, saying that adjusted results were normal in Algeria, but he does not say who are the unofficial sources upon whom he relies nor does he mention the views of international observers. He is sceptical about the extent of popular approval of the Charter, quoting an allegation that the approval levels were inflated by the security service to embarrass the President; yet the newspapers quoted by an AI report which is his ultimate source for the allegation that the turnout was inflated, make no allegation that it was done by the security service to embarrass the President. The COIS Bulletin, which is his listed source, quotes another report as saying that the referendum result, because of the amnesty for the military, puts them in debt to the President, and yet another, which points out that the result will strengthen the President's hands in establishing civilian control over the military. It is an illustration of the difficulty of taking what Mr Joffe says at face value and of his tendency to be very selective in citation to validate what can seem a preset view, so bleak is the picture which he paints at all times. A comparison of a COIS Report, which has gone through the new critical review process, with Dr Joffe's report reveals many such instances. He regards little as having changed in the last 18 months and thus is essentially wholly dismissive of the Charter process and the implementing legislation. Of course, the legislation and process can be criticised and its impact overstated; care is needed for an individual case. But Dr Joffe's view is too bleak.

214. One factor for which Mr Emmerson did explicitly draw upon Mr Joffe was the extent to which there was now civilian control over the military and security forces and the extent to which they might still dominate the President. He attributed delay in the legislation to their objections. In paragraphs 12-17, he dealt with the influence which the military had exercised over Algerian political life; indeed it is clear that after a military coup that would be so. This followed its long dominance of the political process ever since the war of independence. This is simply said to continue and Mr Joffe refers to the fact that while a number of important generals have left office, the head of the DRS remains. No other view is cited.

215. We prefer what the Economist Intelligence Unit said in July 2005, reported in the COIS Report of October 2005, reinforced in the Bulletin cited by Mr Joffe as the source for his comment on the turnout for the Charter referendum. This is to the effect that the President has used his victory in the 2004 election to force some of the senior military to retire , and their leaving office for other work, important though that may be, reduces the strength of *"le pouvoir"*. Their power is not broken yet and their influence is extensive over patronage in the public sector firms, banks and civil service, where they had contributed to the opacity and corruption of political economy. Nevertheless, for the first time in decades, an Algerian civilian President was master of his own domain broadly speaking, and not a mere puppet of the military. We note that the President also has strong trade union support which provides an additional source of strength. It fits better with other reports and changes which have undeniably occurred.

216. This view also tallies with the Charter and Ordonnance. There is likely to be some force in what Mr Joffe says about delays being in part caused by the political negotiating process which must have occurred behind the scene between the military, the President, victims of terror and Government, and the insurgents' families in order to arrive at a deal which would broadly give some incentive to everyone to make it work. It could not have happened without the military being in agreement. This picture is far more likely than the unchanged one of military dominance which Mr Joffe paints. But on Mr Joffe's view, the cementing into Algerian life of the process is even more significant an illustration of how far the military have moved.

217. Mr Burnett made a number of criticisms of Mr Joffe's report, which all have force, although the report makes some interesting and thought provoking points. However, it does exhibit the problems which led to the IAT echoing the Court of Appeal's distinct reservations about his reports, summarised in *AB v Home Secretary* [2004] UKIAT 00009.

218. Y produced a great deal of other material, which we have considered. But we do not gain any real assistance from it. Most precedes 2004 and is of marginal relevance now, and earlier background can be obtained more comprehensively from the USSD and COIS reports. Some is very general and draws on earlier material to make campaigning points, legitimate in themselves but not of additional value.

The evolution of the evidence

219. We set out the development of the evidence rather than proceeding directly to the final position because its evolution was relied on to show how the SSHD had fallen short of what he had considered necessary for lawful deportation of Y.

220. The first relevant statement of Mr Oakden, (his second) was dated 20 November 2005. For some time the British Government had expressed the belief that individuals, who were not British nationals, and who posed a threat to the national security of the United Kingdom, should not have the right to remain here indefinitely. It was hoped that assurances would satisfy the United Kingdom's international obligations, in particular Article 3 ECHR, and permit the deportation of terrorist suspects to their countries of origin. The Foreign and Commonwealth Office had advised the Home Office, following the events of 11 September 2001, against such an attempt. It was apparent from Mr Oakden's "fourth" statement that in December 2002, the Home Office had decided to ask the FCO to review its advice of October 2001 that assurances should not be sought to enable the deportation of foreign terrorists. The concerns of the FCO remained but in May 2003 the Foreign Secretary agreed that seeking *"specific and credible assurances"* might be one way of deporting such individuals, and later agreed to approach a number of countries.

221. The Algerian Government was approached in 2004. Its response was to link any such memorandum to wider judicial co-operation, which resulted in little progress being made.

222. The British Government's endeavours were given a fresh impetus in December 2004 when the House of Lords ruled that detention of foreign national terrorist suspects under Part 4 of the Anti-Terrorism, Crime and Security Act 2001 was incompatible with the United Kingdom's ECHR obligations. As a result, a further approach, including an offer of wider judicial co-operation, was made to the Algerian authorities in January 2005. The Government became yet more determined to conclude suitable arrangements with Algeria, and other states in the Middle East and North Africa, following the attacks of 7 and 21 July 2005, and so the issue was raised again by a Minister of State on a visit to Algeria in July 2005.

Political agreement was obtained during that visit to an agreement on deportation as part of a larger package of judicial co-operation including an extradition treaty. By August, it was hoped that an agreement could be concluded in September 2005, although the FCO believed an overall package of co-operation would lengthen the discussions. The Prime Minister spoke to President Bouteflika in August 2005 and re-iterated the importance to the United Kingdom of an early agreement to a Memorandum of Understanding. There was also a discussion between the British Ambassador and President Bouteflika on 6 August 2005 when the question of counter-terrorism was discussed in the context of wider co-operation.

223. Mr Oakden co-chaired a British delegation at negotiations with the Algerians on Deportation with Assurances and wider judicial co-operation at the end of August 2005. Those discussions continued and at the time of that statement the most recent set of negotiations had taken place in London on 21 and 22 November 2005.

224. Mr Oakden also accompanied Baroness Symons who visited Algeria as the Prime Minister's representative, when she met President Bouteflika on 31 October 2005 and 14 November 2005. On the second of those two visits Baroness Symons delivered a letter from the Prime Minister to President Bouteflika. On both visits, Mr Oakden said that he observed clear signs of political will on the Algerian side generally and of the President's personal determination in particular, to conclude a package of arrangements. There were other personal contacts around this time, between the Lord Chancellor and the Minister of Justice, and the Home Secretary and the Minister of Justice.

225. Mr Oakden set out in his statement details of the proposed co-operation package. This comprised four draft conventions: on the circulation of persons between Algeria and the United Kingdom, on judicial co-operation in civil and commercial matters, on mutual legal assistance in criminal matters, and on extradition. The United Kingdom had also agreed to provide support for Algeria's ongoing process of reform of the judiciary.

226. Importantly, in the context of this appeal, on 22 November 2005 British and Algerian officials reached what the Algerians saw as an agreement on a working-level draft Exchange of Letters on assurances in relation to terrorist suspects. The UK side later sought variations without success, which we deal with later. Mr Oakden's statement said that the British Government intended to complete discussions and reach formal agreement on the Exchange of Letters as soon as possible. He summarised the position in this way: at the highest possible level during discussions, the Algerian Government had undertaken to safeguard the well-being of those deported to Algeria; the Algerian

Government was prepared to re-state that commitment in personal letters between the Prime Minister and President Bouteflika. This should provide assurance on the treatment of those returned to Algeria. The British Government regarded the commitment as one that it should, and could trust, because the commitment was given by the head of a sovereign state which enjoyed friendly and rapidly developing relations with the United Kingdom.

227. The question of monitoring these assurances had been discussed with the Algerian Government on a number of occasions, both in negotiating sessions and at a political level. Whilst the British Government had sought to negotiate independent, credible monitoring of assurances, agreement had not been reached and discussions were still continuing in the context of the Exchange of Letters.

228. At the date of the statement it was intended that there would be further discussion of the content of the proposed Exchange of Letters (the exchange having been suggested by President Bouteflika) at a meeting between the President and the Prime Minister in Barcelona on 27 and 28 November. Unfortunately President Bouteflika was unexpectedly admitted to hospital the night before and it was not then known whether he would be able to undertake a subsequent planned visit to London in December.

229. Mr Oakden said that it was a matter of policy that the British Government would not return someone to Algeria if he faced a significant risk of the death penalty being carried out on return. Similarly, should a returned person face trial at the time of his removal from the UK on a charge for which the maximum sentence was death, the British Government would not remove that person from the UK without an assurance that, should he be convicted, any capital sentence would be commuted. Similarly, in the event of a capital charge being brought against any individual after return to Algeria the British Government "*would consider asking*" the Algerian Government to commute any death sentence. Mr Oakden noted the position on the moratorium and added that in July 2004, the Algerian Minister of Justice announced his Government's intention eventually to abolish the death penalty for all offences save for those linked to terrorism, attacks on state security, treason, infanticide and patricide.

230. During oral evidence, Mr Oakden placed some weight on what President Bouteflika had told the Prime Minister in the summer of 2005 about the death penalty and had reiterated to Baroness Symons in Autumn 2005 at a meeting at which Mr Oakden had been present. It was an oral assurance that no person returned from the UK would be executed. It had originally been in the closed material because the Commission and the Special Advocates had regarded that as a comment on the way to a formal assurance

which had not yet been reached and there were sound objections to what may have been private and informal negotiating positions being made public. Likewise they could not be relied on for more than that. They were made open when Mr Oakden attributed to them this greater weight. The draft letter noted that the Algerian position was that the death penalty was rarely imposed and had not been carried out since 1993; the crimes for which it was available was being reduced. The UK noted that it opposed its use in all circumstances and would not return someone to Algeria who faced a significant risk of being subjected to the death penalty.

231. Thereafter, in his statement, Mr Oakden considered the general situation in Algeria in ways which have largely been covered. The Charter for Peace and Reconciliation had been approved in a referendum in October 2005 and provided for an amnesty for individuals involved in earlier terrorist acts, excluding those involved in massacres, rapes and placing bombs in public places. At the time of the statement, primary legislation to give effect to the Charter was being drafted by the Algerian Government and the British Government had an outstanding inquiry as to whether the provisions of the amnesty would apply to Y.

232. The preamble to the Charter for Peace and National Reconciliation of August 2005 explains its political background: ending the destructive tragedy which had engulfed Algeria, marking the defeat of terrorism and its abuse of Islam, furnishing the means for ensuring permanent peace and security through National Reconciliation, supported by the whole Algerian people. Eight measures were aimed at consolidating peace:

> *"A – Extracts from the Charter for Peace and National Reconciliation*
>
> *MEASURES AIMED AT CONSOLIDATING PEACE*
>
> *Firstly: Extinguishment of judicial proceedings against individuals who have given themselves up to the authorities since the 13th of January, 2000, the statutory time-limit for effects of the Law on Civil Concord;*
>
> *Secondly: Extinguishment of proceedings against individuals putting an end to their armed activity and surrendering arms in their possession. This extinguishment of proceedings does not apply to individuals involved in collective massacres, rapes and bombings in public places;*
>
> *Thirdly: Extinguishment of judicial proceedings against wanted individuals, in Algeria and abroad, who have decided to give themselves up voluntarily to the relevant Algerian authorities. This extinguishment of proceedings does not apply to individuals*

involved in cases of collective massacres, rapes and bombing in public places;

Fourthly: Extinguishment of judicial proceedings against all individuals involved in support networks for terrorism, who have decided to declare their activities to the relevant Algerian authorities;

Fifthly: Extinguishment of judicial proceedings against individuals sentenced in absentia, other than those involved in collective massacres, rapes and bombings in public places;

Sixthly: The pardoning of individuals already sentenced and imprisoned for supporting terrorism;

Seventhly: The pardoning of individuals already sentenced and imprisoned for acts of violence, other than collective massacres, rapes and bombings in public places;

Eighthly: Commutation of and remission of sentence for all other individuals on whom final sentence has been served or wanted individuals for whom the extinguishment of judicial proceedings or pardons described above do not apply."

233. The Charter contains a series of general measures aimed at consolidating national reconciliation, tackling the dossier of the disappeared, and strengthening national cohesion. The provision in relation to the disappeared attributes the disappearances to the acts of terrorists and rejects all state responsibility. Reprehensible acts by state agents could not be used to discredit the whole of the forces of law and order who did their duty. General measures for helping the dependants of the disappeared were envisaged.

234. Algeria's EU Association Agreement came into effect on 1 September 2005 and would give a more formal structure to the human rights dialogue between the EU and Algeria. In addition, the UK agreed to fund the visit of a prison specialist to Algiers which was expected to happen in December. The British Government proposed to work, bilaterally and with partners, to improve the human rights situation in Algeria. Mr Oakden's assessment of the overall situation in Algeria was that there had been real progress in social, economic and institutional modernisation in Algeria in the last five or six years; terrorism had fallen away sharply and democracy had been firmly established in Algerian politics. As to the state of UK/Algeria relations, he assessed this as being in sound shape and fast developing. He recognised that the UK, historically, had not been a natural partner but, notwithstanding, both Governments were, developing closer ties. Projects with which the UK Government was co-operating included counter-terrorism, empowering women and reform of the penal system.

Algeria had become an important commercial and economic partner to the United Kingdom and as a result the British Embassy in Algiers was expanding its staff and the scope of its activities.

235. Mr Oakden's statement said that the British Government accepted that it could be at risk of breaching its obligations under the European Convention if it were to return Y without first obtaining assurances as to his treatment on return. Algeria's human rights record had been criticised by NGOs and the international community. The concerns covered torture, arbitrary detention, extrajudicial executions and the right to a fair trial. On the other hand the British Government's view, from diplomatic reporting, and other Governments' published assessments was that the situation was improving. The improvement in human rights was directly linked to the recent political and security history of Algeria, as described in the two FCO papers.

236. It is clear from this "second" statement of Mr Oakden's that as at November 2005, the SSHD was not seeking to return Y without assurances about his treatment in a variety of ways, assurances which he was seeking to make the subject of independent and credible monitoring.

237. Mr Oakden's "third" statement, (the second which directly concerned Y), was dated 24 February 2006. At one level it revealed an absence of finality in negotiations with Algeria, partly as a result of the President's illness. At another, it showed progress with a sequence of high level official, Ministerial and Prime Ministerial/Presidential contacts. But the UK Government was still seeking assurances in relation to torture and ill-treatment, which the Algerians indicated that they would provide by way of exchanges of letters in each individual case. It was also still seeking a monitoring body to oversee implementation of the assurances which were to be given. The Government remained optimistic that a package would be concluded.

238. The content of the proposed draft Exchange of Letters between the President and the Prime Minister had been settled; there had been a query over who would initial it but we were told on the last day of closing submissions that they had now been initialled and were to be exchanged on the Presidential visit in August. They remain largely in the closed evidence. It provides general assurances to be applied to individuals, to be supplemented by individual assurances.

239. According to Mr Oakden's statements two additional assurances had been sought in January 2006. He said, wrongly as he accepted in closed, there had been no debate over the torture assurances, and the Algerians had fully subscribed to their commitments. He also said that more was said in closed; but the terms of the exchange of letters were unchanged.

240. As part of the process of attempting to return Y to Algeria, information was sought (on 27 and 30 November 2005) about any charges which might be outstanding against him, together with full details of the sentences passed in absentia.

241. On 5 December 2005, the Algerians had explained in response to a November request from the UK Government what would happen to Y upon return in the light of his convictions in absentia. Y could have the convictions automatically set aside and he would be retried in public before a competent court. On arrival, because of this, he would be arrested by the judicial police and detained in a Ministry of Justice prison. According to the Ministry of Justice, Y would have the following rights**:**

> *"i. To appear before a court for the purpose of obtaining a decision as to the legality of his arrest or detention, be informed of the charges laid against him, and to be informed of his right to be assisted by counsel of his choice and to make immediate contact with such counsel.*
>
> *ii.* Legal aid.
>
> *iii. That he may not be detained otherwise than by competent judicial authority.*
>
> *iv. He has the benefit of the presumption of innocence until his guilt has been established lawfully.*
>
> *v. To inform one of his family or friends of his arrest or detention.*
>
> *vi. To be visited by a doctor.*
>
> *vii. To respect in any circumstances for his human dignity.*
>
> *viii. That if he is retried and found guilty and the death penalty is imposed, the 1993 moratorium on executions would apply.*
>
> *ix. That if he has not been previously involved in collective massacre, rape or explosive attacks in public places he will be eligible to benefit from the provisions of the Charter for Peace and National Reconciliation and the subsequent legislation implementing it."*

242. The Note Verbale continued :

"Taking into account the acts of which he is accused, as set out above, and in the event that he is not involved in collective massacre, rape and explosive attacks in public places, Y would be eligible to benefit from the provisions of the Charter for peace and national reconciliation and from the subsequent legislation implementing that Charter."

243. By the time of the "fourth" statement of 8 April 2006, the legislation implementing the Charter had been enacted and an Ordonnance of 27 February 2006 had been approved by the Algerian Cabinet and an associated Presidential Decree implementing the Charter had been published officially on 28 February 2006. On 6 April the Algerian Ministry of Justice had supplied information as to how the Charter and Ordonnance would work; this would continue even up to the final closing speeches on 28 June 2006.

244. The UK Government "*had no reason to believe"* that someone who would benefit from the amnesty in the Charter and Ordonnance would be detained beyond a very few days if needed to regularise matters, or that he would be at a real risk of a breach of Article 3 rights upon return. Nonetheless it was continuing to seek monitoring arrangements for anyone who was placed in detention. No generic monitoring agreement for those detained on return had proved possible at least as yet to agree. The Algerians had agreed that the British Embassy could keep in contact with anyone who was not in detention and with their next of kin.

245. Mr Oakden explained orally how the arrangements for contact with the British Embassy would operate on return, if Y were not detained other than while his position was regularised. They would include a contact point with next of kin or others, a point of contact with the Embassy, a regular pattern of telephone calls, information given to nominated individuals of the return arrangements, contact at the airport and explanation of the role of the CNCPPDH in the return of Algerians. A breakdown in the pattern of established calls would lead to British requests for confirmation of Y's whereabouts and wellbeing in the light of the assurances given, assurances which the UK Government regarded as trustworthy.

246. The delegation had met Mr Ksentini, President of the CNCPPDH, who had been closely involved in drafting the Charter and amnesty to demobilise and demotivate the rump of terrorists in Algeria: it was intended to draw a line under the past and change Algerian society, reintegrate people and address the issues which had led to terrorism in the first place. The CNCPPDH had already been contacted by Belhadj, deputy chairman of the FIS, and relatives of those who returned to Algeria brought their cases to its attention so that it was forewarned and able to intervene in the event of ill-treatment. This was a role which the UK was keen to bring to the

attention of those who might be returned. Mr Ksentini knew through these contacts of dozens who had returned and there had been no complaints of ill-treatment in relation to them. The UK Government was not aware of any complaints either. Four Algerians with appeals before SIAC had withdrawn them to return to Algeria; (though one has refused to go at the last minute and has been served with fresh documentation generating a fresh right of appeal).

247. Mr Oakden accepted that the Charter had been and could be criticised for a lack of balance as between the security services who enjoyed complete immunity for their wrongdoings and the insurgents for whom there was a more circumscribed amnesty. But this balance had been endorsed by a substantial majority in the referendum. It was intended to draw the line under the past for both sides. This was a change for the better, and all were now subject to the rule of law. It was necessary for outsiders to be careful about how they criticised amnesties for events which they had not lived through. The UK and South Africa had each found their own ways in different circumstances. Algeria had experienced an exceptionally savage war of independence, with atrocities on both sides, followed by one party rule for twenty years and then a large scale civil war for ten years. The Algerians did not want to reignite the embers. That immunity was the price paid for the amnesty and a stipend or compensation to the families of the disappeared. The amount was less important than the fact that the Government was reaching out to them.

248. Mr Oakden continued to regard the position with optimism: certain agreements in principle had been reached, there was a rapidly developing bilateral relationship, and there had been real progress in Algeria in the last few years on many fronts, with some progress in respect of human rights. The recent steps to implement the Charter had substantially altered the level of risk which Y would face on return.

249. This was not the first step ever taken in national reconciliation, because there had been a Civil Accord in 1999, but the Charter and the 2006 Ordonnance were major steps in that they drew a line under the conflict. The President had been elected and then re-elected to bring national reconciliation and the Charter was a further step

250. Although Mr Oakden did not take issue with what the COIS, USSD and FCO reports said, he was pressed closely by Mr Emmerson as to whether or not they still represented the position as at November 2005, or even later. Many answers were given but the upshot was, in our view, that Mr Oakden accepted them as still accurate as at the time when they were written, in relation to the period which they were written about, but considered that the position had changed considerably by November 2005. There had been political changes

in 2005 of considerable magnitude reflected in the Charter, and later in the Ordonnance.

251. Nonetheless, the position derived from those reports was what had led the UK Government to seek *“credible and enforceable*” assurances in order to avoid a breach of its international obligations in return. Monitoring of those assurances independently of the Algerian Government had been required; that could take many forms. The purpose of the monitoring was to help detect breaches of the assurances, as a means of seeking to enforce them. There was at present no independent monitoring of those held in DRS custody and no assurance had been obtained that it would be provided for Y or others generally. It did exist and was improving for those in civil prisons, as were conditions in them. Although prosecutors were now allowed access to DRS places of detention, Mr Oakden could not point to evidence that in practice they did make such visits, again unlike the position with other prisons. There was no bilateral independent monitoring agreement for any persons detained, although in a non DRS prison or garde a vue facility where someone suspected of a terrorist offence might be detained lawfully for up to 12 days, there was independent monitoring including by the ICRC and provision for visits by NGOs. There was no provision for monitoring by the British Government. Mr Oakden hoped that access for independent monitors to DRS facilities might change because of the direction of change in Algerian politics and security.

252. The UK Government had not taken a specific position on the 12 days garde a vue detention, but the excess periods of detention were clearly relevant. The Algerian refusal to investigate allegations of torture was an area in which their practices would clearly need to improve. The Charter and drawing the line under the past was relevant to past refusals to investigate, whereas subsequent abuses were to be investigated under it.

253. The Securite Militaire did act sometimes outside civilian control but there had been a radical decrease in the number of incidents in the last two years. Its officials had been responsible for 7000 disappearances in the 1990s. There had been a significant decrease in incidents of torture since the 2003 report of the Commission of Human Rights referred to in the 2005 FCO Human Rights paper. One needed to be careful in looking back. Nonetheless, Mr Oakden could not exclude the possibility of their continuing at some level, although the Algerians were doing all that they could to remove them. Mr Oakden could not say that it was now fully under effective control but there had been substantial progress towards that end and that reduced the risk of rogue or independent actions by DRS officers. It was a question of political will and many NGOs recognised the direction in which events were moving. The armed forces remained an important part of the

Algerian political structure, and the Charter and Ordonnance struck balances between different actors.

254. There had been a culture of impunity in the past for the DRS, but there were now only instances of abuse instead. The blanket immunity for past abuses would be coupled with a growing sense of a risk of prosecution for future abuses. The signal which would be sent by that immunity to the DRS was that a line had been drawn. He did not agree with the concerns about that expressed by AI in its April 2006 Memorandum to the President. The lack of enforcement of Constitutional guarantees in the 1990s did not now apply to the same degree and what had been all too frequent was declining and would cease.

255. Mr Oakden expressed the view that Algeria had changed over recent times and that its Government was determined to implement the Charter for the advancement of Algeria and would see it as being in its own interests to ensure that Y was not harmed on return. A British Embassy email of 31 March 2006 to the FCO, exhibited by Mr Oakden to his fifth statement emphasised the importance attached to the Charter and its implementation by the President, although it was not supported by a number of organisations, including human rights organisations.

256. The Algerian stance on ill-treatment had always been that they objected to repeating, in generic form, commitments which they had entered into in the Convention against Torture and in the International Convention on Civil and Political Rights. But they had no difficulty in committing themselves to treating those returned fully in accord with those obligations. A general reiteration was seen as casting doubt on whether they would abide by commitments which they had already entered into, whereas an individual assurance was seen as applying to an individual the general obligation already undertaken. Their history, that is their colonial past, made them very sensitive about that. No open assurance was more explicit than that given in the December 2005 answers, which said that Y had the right to "*respect… for his human dignity*" in all circumstances. Representatives of the DRS and other relevant Ministries had been present at all the talks and had accepted the commitments.

257. Any ill-treatment would undermine its own endeavours to advance after the war years. There had been an unprecedented level of high contact between the UK and Algeria over the recent past reflecting the "*wide range of common challenges*" of which counter-terrorism was but one. The President had received an invitation to undertake a formal visit to the UK. An Exchange of Letters was still expected.

258. Letters signed by the Head of Government (UK) and State (Algeria) were important, explained Mr Oakden: *"…failure to comply with*

formal political commitments in an MOU or similar international instrument can do serious damage to diplomatic relations between the signatory States and will harm a State's reputation as a reliable international partner." Such consequences would apply in the case of a breach following the Exchange of Letters. Allegations of a breach of assurances would attract considerable publicity and damage the international reputation of both Governments. Both Governments understood that such a factor acts as a safeguard against breach of assurance. Mr Oakden recognised that in the event of Y being returned, there would be substantial scrutiny by the international human rights community, most if not all of whom were opposed to reliance on diplomatic assurances to safeguard human rights.

259. Mr Oakden explained that it was the British Government's view that Algeria would comply with the commitments expressed in the draft Letters for Exchange, having received an expression of that commitment at the highest level in Algeria. It was the British Government's view that, if Y were to allege a breach of the assurances, the British Government would seek an immediate report of the circumstances from the Algerian authorities, would request access to the detainee and consider what further action to take with the Government of Algeria. Mr Oakden suggested that the action taken would be proportionate to the nature of the alleged breach but could include an immediate request for an independent enquiry and/or a request for the Algerian authorities to take immediate remedial action.

The Ordonnance

260. The Ordonnance now came to play a very significant part in the SSHD's case. The most immediately relevant part of the Ordonnance is Appendix 1 to this judgment, and it is necessary here to consider it in some detail.

261. We summarise its main features. The provisions apply to certain specifically listed offences, which include those of which Y was convicted, and offences connected to them. The provisions have generally but misleadingly been described as an amnesty. That convenient shorthand should not cause the distinctions between its various provisions to be ignored.

262. There are time limited provisions for the extinguishment of the right to bring a public prosecution in respect of such offences in Articles 4-8, of which Article 8 is the most germane because it applies to those convicted in absentia. Article 9 applies the extinguishment provisions to those who have not been finally sentenced for such an offence which would be the case for Y, were he to appeal against the convictions. Article 10 excludes from the benefit of the

extinguishment of prosecution provisions those who have committed offences of collective massacre, rape or public bombings. Articles 12 -15 contain important procedural provisions, including a requirement for a declaration as to past acts for those seeking to benefit under Articles 5-8, and providing for which body should apply the provisions of the Ordonnance to an individual, depending on the stage that a prosecution has reached.

263. Section 4, Articles 16-17, deal with what the Ordonnance describes as amnesty. It applies to those who have received a final sentence, subject to the same exception for the three very grave offences as are excluded from Articles 5-9. Section 5, Articles 18-20, provide for commutation and remission of sentence for those not covered by the other provisions of the Ordonnance but who have received a final sentence; principally this would be those who have been convicted of the three grave offences.

264. We also note Article 13 at this stage which sets out that declarations are required. A Presidential decree of 28 February 2006 elaborated this. Those covered by Article 13 had to inform one of a number of specified law and order institutions "in *unambiguous terms that they have ceased any terrorist or subversive activities",* and present themselves to certain security forces and hand over their weapons, munitions, documents etc and then attest that all that material had been handed over. The decree also required the individuals to present themselves to an authority such as an Algerian Embassy, or state prosecutor and make the individual declaration concerning the acts which they had committed or participated in, and complete the declaration required by Article 13. The information to be declared is specified and includes the places of refuge in which the declarant operated and the details of the acts committed, participated in or instigated.

265. Chapter 6 of the Ordonnance contains other provisions in Articles 45 and 46 which Mr Emmerson submitted showed the risks which Y might face: no prosecution could be brought against any member of the security forces for action carried out to protect people, property, the nation and its institutions; a blanket amnesty. It was made an imprisonable offence to make any statements which used the "*national tragedy*" to attack the institutions of the state or those who served it in accordance with their duty. This, he said, would inhibit or prevent allegations of torture being made against the security forces in respect of a witness whose statement they relied on in any trial which Y would face.

266. The Algerian Criminal Code of 1995 contains a number of relevant provisions: Article 87a first and second tirets, under which Y's two convictions were obtained read:

"Art.87a – (Ordinance No.95-11 of 25 February 1995) The following shall be considered as terrorist or subversive acts: any act prejudicial to the security of the State, the integrity of national territory and the stability and normal operation of institutions, through any action, the purpose of which is:

> *To spread fear amongst the population and to create a climate of insecurity, by causing psychological or physical injury to persons or endangering their life, liberty or safety, or by causing damage to their property*
>
> *To disrupt traffic or the freedom of movement on the public highway and to occupy public places with mass gatherings"*

267. Article 87a6 paragraphs 1 and 2 are as follows:

"Art.87a 6 – (Ordinance No.95-11 of 25 February 1995). Any Algerian national who activates or joins a terrorist or subversive association, group or organisation abroad, whatever its former name may be, even if its activities are not directed against Algeria, shall be liable to imprisonment for a set term of 10 (ten) to twenty (20) years and a fine of 500,000 DA to 1,000,000 DA.

Where the acts described above are intended to harm Algeria's interests, the penalty shall be life imprisonment."

268. It is only paragraph 2 which is subject to the Charter. Meguerba was recently sentenced to 10 years in prison for involvement in a terrorist group abroad contrary to Article 87a6, but it is not clear under which paragraph.

269. Article 582 of the Criminal Code enables a crime which is a "*major offence*" committed abroad by an Algerian to be tried in Algeria, but only when the offender has returned to Algeria and cannot prove that he has been "*definitively*" tried abroad, and if convicted, that he has served his sentence. This would be applicable if any attempt were made in Algeria to try Y for the "ricin" plot.

270. A common exemption, and in this case it is said a relevant one, from certain provisions of the Charter and Ordonnance, are offences of collective massacre, rape and bombing in a public place. There are specific offences in the Criminal Code for these, respectively, Articles 84,334-6 and 401.

271. On 6 April 2006, the Algerian Ministry of Justice provided, through the seconded High Court Judge, details of how the Algerian Penal Code applied to detention and how abuses were remedied. It confirmed the maximum permitted duration of detentions under the garde a vue procedure or "pre-trial "detention referred to in the USSD and other reports. There was a maximum of 12 days for

terrorist suspects, and penalties for arbitrary detention. Various other rights existed for those in custody eg to family visits. The note also described how the Ordonnance worked but in terms which drew upon a reading of the law rather than upon any insight into how the mechanics were handled.

It described the effect of the Article 13 declarations: *"Extinction of public proceedings and all criminal prosecution in hand in any Algerian court or the annulment of any ruling in default or in absentia against them for the actions declared unless those actions count as some other offence, described otherwise and qualifying for commutation or remission of sentence."*

If public proceedings were ended, the declarants had to be told of the abandonment of all searches for them for the acts *"committed and declared".*

272. This was relevant to an issue as to whether the exemption for massacres and public bombings applied only to an offence which had been charged as such or whether it covered offences which were charged differently but where the underlying conduct could have been charged as an exempt offence.

273. Various specific questions had been asked of the Algerians and answered after a fashion in the 6 April Note. Y would be held in a civil or military prison according to the jurisdiction of the Court trying him. There had been regular and satisfactory visits by the ICRC to penal establishments, but no mention was made of the DRS prisons. The answer to whether Y would benefit from the amnesty was said by Mr Emmerson to be ambiguous: *"Yes, except for the commission of collective massacres, rapes or bombings in public places."* This left it uncertain as to whether Y was regarded as having committed such offences, even though not charged under the specific provisions for such offences. There has never been any suggestion of a rape offence though. The decision on the application of the amnesty could take place while Y was outside Algeria if he completed the formalities. "*Subject to regularising his position",* Y would not be detained on return. If the Charter applied to him there would be no new trial or sentence after he had appealed against his conviction which would nullify the verdict, and any civil compensation. There were no other charges pending against him. The details of the verdicts could not be transmitted because of the presumption of innocence and the involvement of others. More elaborate questions as to where he would be detained, whether he would be questioned and if so by whom and as to what would happen if he were sentenced to death and the moratorium were lifted and how the Charter might affect that position, were not explicitly answered.

274. These answers of 6 April 2006 superseded an earlier set of answers given on 27 March 2006 (but drafted somewhat earlier), to a similar set of questions about the operation of the Charter. We note that these said that Y would most certainly benefit from the Charter, extinguishing proceedings or shortening or reducing his sentence in accordance with the Ordonnance, which was still under consideration when the answers were drafted. Any possible lifting of the death penalty was seen as "*a highly political decision*" which would be taken at the highest political level, but were it to be lifted, *"it will be applied to everyone concerned without exception".*

275. Mr Oakden said in his "fourth" statement that the Government was seeking further clarification as to whether the amnesty applied to Y.

276. His final statement dated 24 April 2006 was served shortly before the appeal began. An official delegation from the FCO and the HO had visited Algiers on 21-22 April. As had been foreshadowed in his previous statement, 2025 people had been released under the Charter and Ordonnance provisions, ("*benefited from*" said the email of 31 March 2006 from the British Embassy to the FCO exhibited by Mr Oakden); and 85 had surrendered and "*dozens*" had returned to Algeria in March/April according to the Ministry of Justice. Those released included Layada the former leader of the GIA, who had been sentenced to death and had been in custody since 1993, and Belhadj the deputy-chairman of the FIS. Only the GSPC remained actively fighting, according to the BBC, and some 800 terrorists were active. There were other initiatives and the measures to help the dependants of the disappeared had begun to take effect.

277. Mr Oakden detailed the further clarification which the delegation, of which he had not been a member, had received about the Charter's operation. It was for the prosecutor to decide whether or not a conviction was covered by Article 2 of the Ordonnance. If it was covered, extinguishment of the right to prosecute was an entitlement and there was no discretion to proceed with charges. Nor could he decline to extinguish the proceedings on the ground that the same facts could have led to a different charge which was not amnestied. This was an important point in view of the way in which the offences leading to the in absentia convictions could be seen as collective massacre or public bombings. The exclusion could only arise if the convictions were actually for one of those specific offences under the specific Articles which created them.

278. Accordingly, the Ministry of Justice had said that in relation to Y's convictions, which were both under Article 87a, and sentenced under 87a 1, that as these were listed in Article 2 of the Ordonnance, and Article 8 applied to convictions in absentia, the exclusions in the Charter for offences under articles 84,336 or 401 of the Penal Code did not apply to Y. So, on Y's making the

necessary declaration, *"all public prosecutions in relation to the facts underlying his convictions would be extinguished".*

279. Mr Oakden produced an email dated 26 April 2006 from the British Ambassador after a conversation the seconded High Court Judge about what was necessary for the declaration. We accept that Y could not be expected to admit to the serious offences of which he had been convicted, yet which he denied committing. The seconded High Court Judge was reported as saying that Y did not have to admit to the offences; he could make a valid declaration by writing in the section which required admissions of the acts done "*not applicable*", and that would still lead to a "*valid*" declaration. Quite what a "*valid"* declaration signified then became a matter of debate and in particular whether it would be effective to extinguish prosecutions for offences which were thus not admitted.

280. If there were to be a retrial, which could happen if Y did not make the required declaration, he would normally be retried on the charges on which he had been convicted but he could be tried, with the court's consent on different charges.

281. Mr. Oakden said that it was only in the last few days before giving evidence that the British Embassy had been told by the seconded High Court Judge that the Ordonnance declaration of acts committed could be signed "*not applicable*" in that respect. This was not then in writing. This meant that Y would not have to admit to offences which he denied in order to take advantage of the Charter; nor did the fact that he would not be admitting to offences of which he had been convicted, mean that he could not benefit from the Charter provisions to avoid retrial. This was despite the fact that at least some of the acts of which Y had been convicted could be said to involve participation in a massacre or bombing and could fall outside the Charter's extinguishment provisions. That had led to the oral clarification sought that Y would not be vulnerable to a charge which fell outside those parts of the Ordonnance. The logic of the argument that an amnesty could not benefit those who did not admit their wrongdoing had led them to check whether Y had to admit the offences of which he had been convicted and they had been told that he did not have to do so; the purpose of the Charter was to draw a line under the past. Such a declaration would be valid in the sense of enabling the application and the process to be completed, which was consistent with the objectives of the Charter. The Charter would be applied to the two convictions and Y could return knowing that there were no other charges. Some years had elapsed since the earlier ones. If no charges were pending for past acts, the expiry of the period of grace in August 2006 would not lead to further charges based on past acts. If the UK did go back for further clarification, there would be no more advanced answer from Algeria, until after Y made an application under the Ordonnance.

282. Mr Oakden was clear that the UK officials had been told that charges under Article 87 automatically benefited from the amnesty but accepted that offences such as those, which fell within Article 2 of the Ordonnance, might not benefit from the extinguishment provision in all cases because of the provisions of Articles 18 and 19 which dealt with commutation and remission of sentence. The answers of 27 March 2006, drafted between December 2005 and 26 February 2006, said that Y would benefit from either the extinguishment or other provisions of the Ordonnance. They had not asked about what would happen in the event that no declaration at all was made because not receiving the benefit of the amnesty went beyond what the Government had contemplated. It became apparent that the Algerians did not understand why issues as to a trial were being raised because, said Mr Oakden, they were only considering matters on the basis that the Charter applied to Y. We asked the SSHD, during cross-examination, to write a letter to the Algerian authorities seeking clarification of how this was supposed to work.

283. The seconded High Court Judge told the UK team that the texts of the Charter and the legislation implementing it would be applied to Y if he presented himself to the Algerian Embassy. Article 15(3) of the Ordonnance would be applied to him. This deals with who orders the application of the extinguishment provisions in relation to a case proceeding before the courts. The decision–making power lay with the competent judicial authority. These were answers to questions directed at establishing whether or not the Charter would apply to Y even if the facts of the allegations against him might have given rise to a charge under one of the three exempt Articles of the Penal Code, and as to who would make the decision under Article 15. The answers do not truly engage with the question.

284. The declaration under Article 13 was required but it was in reality a *"purely procedural rule which, in reality, has no negative bearing"* on Y. This was in answer to the question whether a declaration would prevent any subsequent prosecution for the offences of which had had been convicted, and what would happen if he made no declaration. Again it does not really answer the underlying point which is what would happen to a prosecution for the two offences if he made a "*not applicable*" declaration as to past acts.

285. During cross-examination, Mr Oakden described what he had recently learnt about the mechanisms for the application of the Charter to individual cases. It had been too recent to find its way into a statement. It arose in the context of who actually made the decisions as to whether the Charter applied. The UK had been seeking more detail as to precisely how it worked rather than as to outcomes. There was a first or top level which was an inter-departmental body including the Ministry of Foreign Affairs and chaired by the High Court Judge seconded to the Ministry of

Justice. They decide whether someone qualifies under the Charter. The prosecutor decides under which Article a person had been charged, and whether convictions were covered by the Charter; there was no discretion. The role of the magistrate in this was unclear.

286. He could see no circumstances in which Y would not qualify for the extinguishment provisions; he would be eligible for release and automatically released once the procedures had been completed. Mr Oakden did not know the extent of the inter-departmental committee's powers to refuse the benefits of the Charter to someone who qualified. He demurred from the notion that the presence of a High Court Judge, even on secondment, indicated that a judgment could be called for on a discretionary area, suggesting instead that the sensitivity of the subject and the bureaucratic style of the Algerians meant that its Committees could be top heavy for certain wholly procedural and automatic functions. The nub of what he was saying was correct even if not all the detail was there: someone had to make the decision as to whether a conviction or charge fell within the Ordonnance and someone had to make the decision ordering release.

287. A Note from the British Ambassador of a Prime Ministerial announcement about the first meeting in February 2006 of the committee set up to implement the Charter said that judicial procedures were for the judiciary without executive interference. The President had also made a speech in March in which he said that the judicial system was still seriously dysfunctional, required a revolution which could not happen overnight and required impartiality, a lack of corruption, and a refusal to be swayed by pressure from politicians and, it was said for the first time, by pressure from the military. One of the consequences of the wider package of agreements between the UK and Algeria is the provision of support for the reform of the judiciary.

288. Mr Oakden agreed that the cases in the AI Memorandum, to which we come later, did suggest, especially Saifi's, that there was a degree of discretion because as Mr Oakden accepted, each case appeared to be considered on its merits, adding that that was the position with Y. It was clear from the questions and answers from the Algerians that he would benefit; they fully expected the Charter to apply and everything would be clear once the application was made by Y. Clarification had been sought because it was clear that some questions would be raised. The Algerians had been so clear about it, and the UK Government had wanted to be absolutely sure how it would happen in practical detail. Clarification had not been sought because there was doubt about whether the offences of which Y had been convicted fell outside the extinguishment provisions of the Ordonnance. The Algerians would have had to be lying to the UK's officials about what would happen, for Y to fall

outside those provisions and to be facing charges which were excluded from those benefits; they were not lying.

289. It was the High Court Judge seconded to the Ministry of Justice who had told his UK interlocutor officials orally but authoritatively, said Mr Oakden, that it was the Article under which a conviction had been obtained which determined whether or not an offence was excluded from the extinguishment provisions of the Charter. There would have to be a charge in the charge sheet specifically relating to the three excluded offences. The Charter automatically applied to Article 87.

290. The Government had worked on the basis that, apart from the two convictions, there were no outstanding or pending charges and that the ricin acquittal removed that from consideration. For the Algerians to charge Y with other offences, would be wholly contrary to what they had been saying, to the way negotiations had been conducted, and to the direction in which relations were moving. It would be very strange given that no other charge had been mentioned to the UK at all.

291. Likewise it would be wholly contrary to the assurances and to what had been said about the Charter process for the DRS to detain Y on return. These might be points to be clarified precisely further but different answers would be wholly contrary to the thrust of the assurances and negotiations. There was no reason to think that Y was of any specific interest to the DRS, notwithstanding the way he had been described by Algerian liaison in January 2003, the extradition request later that year and the fact that the victims of the second attack were members of the security forces. Mr Oakden accepted that the description of Y as someone who had been released under the 1999 Civil Accord was wrong, and that there had been untruthful information given about the Meguerba telephone calls. He could not explain why Algeria in its request for the extradition of Ait Haddad in 2001 had relied on a witness whom they knew to be dead because it had executed him. Mr Wood of the HO said in a statement that the request, bristling with problems anyway, failed for want of a prima facie case. It would be surprising, in our view, if the manner in which the request was made had not struck the HO with surprise and real concern.

292. Mr Oakden said that the Algerians were puzzled as to why so many questions were being asked about modalities when they had been clear that Y would benefit from the amnesty. There was evidence in a March broadcast by the Minister of the Interior, that after release individuals would be monitored. He had also suggested some concern that the UK was seeking co-operation and assurances, whilst he thought, wrongly as it happens, that the UK was refusing to extradite one particular non-Islamist individual, whom the Algerians were very keen to have returned to Algeria.

293. The reason why the answers of 5 December 2005, referred to Y being excluded from the Charter *"in the event that he is not involved in collective massacre, rape and explosive attacks in public places"* was not because the convictions included such acts but because it was repeating the terms of the Charter, including in effect a repetition of the standard exemption, before the terms of the Ordonnance was known, and the formal Charter process could not be pre-empted. The position had become clearer since that date. A similar point was made about the April 2006 answers. The wording, said Mr Oakden, should be read as repeating the standard exemption without containing a suggestion that Y might be charged with an exempt offence. The Algerians were seeking to draw a line and it would be a "*pretty extraordinary outcome*" in the light of the discussions with the Algerians that Y would benefit for him to be charged with an exempt offence. Their attitude had been to ask what the UK was driving at in suggesting that he might be so charged in the light of what they had said.

294. Mr Oakden agreed that if Y benefited from the amnesty, which was his case, Y would only go into custody for a "short period" on return while matters were regularised and would then be released. The sense of a "short period" given by the Algerians was of hours or a day or two, but that was speculation and would need to be resolved before return. The expectation behind that was that someone returning from abroad would already have dealt with much of the process of applying and making the declaration before returning. This was based on an oral report from a meeting at which Mr Oakden had not been present. There would be no formal monitoring but Y and his next of kin would be free to maintain contact with the British Embassy. The reason why Y would not be at risk went further than that, however.

295. If Y were in custody, whether or not he benefited from the amnesty, he could rely on the assurance of 5 December 2005, would be held in Ministry of Justice detention and could seek a retrial with the benefit of the Constitutional guarantees. Those guarantees had been in place for many years and there was evidence that many had been regularly disregarded. But Mr Oakden said that that was not the position now. If Y were held in DRS detention, the UK Government would continue to press for monitoring. It was not necessarily the case now that the previous standard practice whereby terrorist suspects went into DRS or Securite Militaire custody continued today, although DRS police could act as Judicial Police. Indeed, Mr Oakden thought that there was only a low risk that that is where Y would go, although an offence under Article 87a would be regarded as a terrorist offence. The political and public attention which Y's return would attract meant that some other branch of the Judicial Police would complete the Charter work in Y's

case. That question had not been put in those terms to the Algerian authorities.

296. Mr Oakden produced a letter dated 7 May 2006 from Mr Ksentini of the CNCPPDH to the British Ambassador saying that Algerians abroad would benefit from the Charter if they followed its provisions and made the applications in the UK. They would face no risk on return because of the extinguishment of proceedings. His task was to ensure that the Charter and the Ordonnance were correctly applied as they had been so far.

297. Mr Oakden also produced a further letter from the seconded High Court Judge in response to a letter from the Ambassador of 7 May 2006 seeking clarification of various points that had arisen in cross-examination by Mr Emmerson. It does not in reality add much. The death penalty would be vacated along with the conviction if Y lodged *"an opposition"* to the conviction, and then there would be a new trial in accordance with the Criminal Procedure Code. The moratorium in respect of the death penalty was *"a highly political decision"* freely taken by Algeria over ten years ago with a view to the gradual abolition of the death penalty. It did not answer the question of whether the death penalty is commuted to life in those circumstances or had been in the case of Y's earlier death sentence.

298. The Government's commitment to ending the death penalty as announced in 2004 had not included terrorist offences. They would be the last offences for which it would be abolished. Nonetheless AI regarded it as an abolitionist state. There had been repeated assurances from the Algerian Government that Y would not be subject to the death penalty, in the sense that it would not be carried out if imposed. The fact that the moratorium could be lifted by Presidential decree did not alter Mr Oakden's certainty that Y would not be exposed to the death penalty. He accepted that there was no note saying that Y would not be charged with a capital offence, or that any death sentence would automatically be commuted to one of life imprisonment. The assurances were at an official and political level and given in Mr Oakden's presence; he had recorded them in writing and later they were made open. No Government anywhere could commit its successors but the assurances were seen as applying whoever was the President.

299. What would happen if the moratorium were to be lifted would be a highly political decision according to the answers sent in March; the question had only been raised because the UK was trying to cover all contingencies. The question involved a number of hypotheses. Lifting the moratorium would be wholly contrary to the thrust of Algerian policy and assurances given at a very high level that no returnee from the UK would be executed. The April answers overtook those given in March, but were in effect non-answers on

that matter. The non-answer deliberately cross-referred to the Algerians answer in April that Y would not be detained upon or after return, subject to regularising his position. For Y the issue simply did not arise. The possible position after President Bouteflika left office was not spelt out, but the clear position was that Algeria was moving towards abolition and there was no limited time frame for the moratorium. The officials had said that they could not pre-empt the judicial process in terms of the imposition of the death penalty nor pre-empt any Presidential decision on the continuation or lifting of the moratorium. This exchange between the UK and Algeria was not the right place for a general and major decision of that sort to be taken, even though the President wished to move to a permanent end to the death penalty. The draft letters to be exchanged contained no general assurances on the death penalty for those reasons. The UK had set out to obtain a simple clear assurance in writing, but it was clear that the death penalty was not an issue and that as the Charter applied, even if the moratorium were lifted, there would be no risk

300. Mr Oakden also said that if the Commission came down in favour of the SSHD, the UK would want specific assurances that the interpretations advanced by Mr Emmerson were wrong. If Y doubted all this, and the Algerians were punctilious on this sort of matter, he could go through the application process and see. This understanding had not been confirmed in writing.

301. Shortly before Mr Burnett's closing submissions on 28 June 2006, a further document seeking to explain the operation of the Ordonnance was received. It followed a visit to Algeria on 6-7 June 2006. It related to the generality of the Algerian cases coming up in SIAC, and it also therefore had some relevance to Y. We rejected Mr Emmerson's argument that we should ignore it: it would not have been right to reach a conclusion in this case on a basis which could shortly thereafter be confounded and be inconsistent with other decisions; we needed to see how the case was continuing to evolve in the interests of both parties for it was not clear who might have the most to gain from the document. We did not regard further cross-examination of Mr Oakden as likely to advance our understanding of legal issues in the light of the evidence which we had heard. He made no claims to be a lawyer, and Mr Emmerson seemed adept at pointing out what might advance his own case or undermine the SSHD's.

302. The document recorded the outcome of what were said to be detailed discussions between an FCO/HO team and the Algerian Ministry of Justice, the Ministry of Defence and others. There was no witness statement to accompany it but that would have been a formality and Mr Oakden had not been present. As with other documents recording the UK Government officials' understanding of what had been said, there had been no note sent to the Algerians

asking them to confirm that what was recorded was correct. This seemed to be a step which was thought unlikely to receive a sympathetic response, as we understood what we were told when we pressed Mr Burnett.

303. The note seemed to change the way in which the case was put in a number of respects. It said that the Article 2 offences were the principal terrorist offences, as is clear. But Article 2 also included "*offences connected to*" such offences. This language was broad enough to cover those offences which furthered the individual's terrorist activities and was broader than offences committed on the same occasion. It was not broad enough to cover all offences committed by a terrorist even if the particular offence had nothing to do with terrorism. Those words also brought within the scope of Article 2 the otherwise exempt offences of collective massacre, rape and public bombings if they were connected to a principal terrorist offence. This could at first sight then enable them to benefit from Articles 5-9 of the Ordonnance, the extinguishment of prosecution provisions. However, Article 10 had the effect of removing the individual who has committed those offences entirely from the extinguishment provisions. He can be prosecuted for any offence and gains no benefit from Articles 5-9 even for an offence specified in Article 2. He has to rely on other provisions of the Ordonnance.

304. Where someone was convicted in absentia, Article 10 would only disapply the extinguishment provisions where the conviction was for one of the three specific exempt offences, even where the underlying facts suggested an involvement in an exempt offence.

305. It is for the prosecutor, under the supervision of the Criminal Division of the Court of Appeal and the Supreme Court to decide whether a person convicted in absentia qualifies for the extinguishment provisions. If a person were convicted of an offence, other than the exempt three, he might benefit from the true amnesty provisions in Article 16 if the President so decided. Where conviction was for one of those three offences, it is for the President to decide upon the commutation or remission of sentence under Articles 18 and 19.

306. A declaration was necessary in order for someone to benefit from Articles 5-8. It was not necessary to complete the admission section, admitting to acts which had been committed. Further details were promised of how this had worked in practice.

307. The apparent oddity that Article 87a 6(1) offences were excluded from the Ordonnance whereas the same offences were included when they were aimed at Algeria from abroad, was explained as being a contribution to the fight against terrorism and as a reflection that it was not for Algeria to forgive offences abroad aimed at

another country. So such an offence could be prosecuted in Algeria. In that particular instance, the exemption from the Ordonnance did not have the effect that the individual lost all opportunity to take advantage of the Ordonnance, including the extinguishment provision for Article 2 offences. He did still benefit. Article 582 meant that someone who had been acquitted of the “ricin” plot allegations in the UK could not be prosecuted for them under Article 87a 6 (1).

308. In the context of the Ordonnance, we refer to the 12 cases referred to in the AI Memorandum of April 2006. Meziche arrived in Algeria from Germany in January 2006, and was arrested on arrival without any prior warrant or conviction. This does not appear to have been a case in which any assurances had been sought in advance by anyone. He was held in DRS custody for 33 days in excess of the maximum 12 permitted for garde a vue detention, in a secret place unknown to the outside world for 43 days. During interrogation he was slapped on the face and insulted. A legal complaint appeared not to have been followed up. He was charged with belonging to a terrorist group operating abroad, but he was released on 4 March 2006 and told that all proceedings against him were ended under the Charter.

309. Benyamina was arrested in September 2005 on his way out of Algeria after a short visit from France, where he had been living. He was detained at a location, undisclosed to family or friends who asked about him, in unpleasant rather than merely spartan conditions, and probably by the DRS. He was frequently interrogated about being a member of a terrorist group and plotting attacks; he was not prepared to detail the ill-treatment which he alleged he had received for fear of reprisals while still in Algeria. He was forced to sign a report of interrogation which he was not allowed to read. He was charged with belonging to a terrorist group operating abroad and joining one operating in Algeria. He was detained for 138 days beyond the permitted limit of garde a vue detention. He did not receive from the examining judge his full legal rights. He was released on 4 March 2006 and told that all proceedings against him were ended under the Charter. But he was re-arrested a month later by the DRS, and held incommunicado for two days, and remains in custody. The Minister of Justice said that his release had been an error by the judge and that he fell outside the Charter because he had been involved in planning attacks with explosives. Another Ministry statement said that the offences were not covered by the Charter because they were committed against another country. (Those statements are consistent). Mr Oakden thought that the French might have asked for his detention because of their continuing investigation into the planned attack on the DST Head Quarters; this put that case into a different position from that of Y if he faced charges relating to planning attacks with explosives.

310. The Saker brothers were arrested in February 2005 for belonging to the GSPC. They were held in DRS custody and were tortured during interrogation. One was held for 2 days beyond the legal limit for garde a vue detention and the records were falsified to appear to correct that. They were forced to make admissions incriminating themselves and others. They were charged with belonging to and supporting a terrorist group abroad, and providing logistical support. They were in detention awaiting trial when on 4 March 2006, they were released in the context of the Charter, and told that judicial proceedings against them were ended.

311. Touati was arrested in June 2004 by the DRS, held for a day beyond the permitted limits, the dates again being falsified, in poor conditions in which he was tortured during interrogation. His complaints of duress and torture were ignored by the judge. He was charged with encouraging terrorist activities and released 13 days after arrest in 2004. In March 2006, proceedings were dropped under the Charter. His brother was arrested in 2003 while home on a visit from Ireland where he lived. He was released, but re-arrested in June 2004 in connection with organising a terrorist group abroad, on information obtained under duress from his brother. He was detained for 4½ months, tortured and made to sign an admission. The judge declined to investigate this allegation. In March 2006, he was told that all charges were dropped, but he ha not been able to leave.

312. Saifi or El Para was an Algerian paratrooper who became a senior member of the GSPC, who had actively participated in attacks upon soldiers, killing dozens, and who was involved in the abduction of tourists. He was handed over to Algeria by Libya in 2004; there is no suggestion that any assurances as to his treatment were sought. He was brought before a judge some 3-4 months after arrest. In June 2005, he was sentenced to life imprisonment for creating an armed group to spread terror among the population, an Article 87a offence, reportedly on the basis of other Defendants' statements made during interrogation and under duress. He appears to have been absent from a number of court hearings including his trial and his whereabouts remain unknown. Exculpatory material produced by the SSHD showed that while the Ministry of Justice thought that he could benefit from the Charter, the Minister of the Interior had said publicly that he would not and that it was a very sensitive case, as was another case involving the assassination of a former president. The significance of that remains to be seen but Mr Oakden pointed out that Saifi's case may be seen as very sensitive because Saifi was a former soldier, who had attacked soldiers. Mr Joffe reports this case as one in which there is growing evidence that Saifi has been released surreptitiously because he was in fact an agent provocateur; Mr Emmerson treats him as reporting speculation – we think he is doing rather more than that, but

understandably and in our view correctly, Mr Joffe's reluctance to treat that as speculation is ignored.

313. Ikhlef was deported from Canada to Algeria in February 2003 as a risk to national security. The Algerians gave assurances to Canada that he would not be subjected to ill-treatment if returned. He had been sentenced to life imprisonment in absentia in 1993 for membership of a terrorist group operating in Algeria and abroad. He was arrested by the DRS and during transfer was *"reportedly forced to lie on his stomach to prevent him from seeing where he was being taken";* he was held for 10 days during which he was *"pressurized and insulted."* He denied his identity when asked about it after a DRS officer "*had stepped on his foot".* He was denied the right to a lawyer at the first hearing, which the records said he had renounced, and that hearing was not annulled at the second hearing at which he was represented. In July 2003, he was acquitted of the 1993 charges and in November 2005 was convicted of a charge of belonging to a terrorist group operating abroad against Algeria and sentenced to 7 years in prison. He alleged that the statements which were used against him had been extracted under *"duress".* He was released in March 2006 and told that all judicial proceedings against him had ended in the context of the Charter but he was re-arrested a week later, according to Ministers because his release had been an error by the judge: he had been involved in planning attacks with explosives. The same further statement was made as in Benyamina's case, that the offences were committed against another country, which explains the judicial error in treating the offences as covered by the Charter's extinguishment provisions. Neither in this case nor in Benyamina's had there been any judicial involvement in the re-arrest or any adjudication upon it. Mr Emmerson pointed out that Ikhlef was allegedly involved in the planned attack on Los Angeles airport.

314. Sadek had been arrested and convicted in 1995 for terrorist offences but was released in 1999 under the civil Accord Law. He was arrested again in September 2002 on various terrorist related offences, tortured severely in 2002 in the course of which he made admissions. He did not receive his full legal rights at the first hearing and made no allegations of torture until the second. No investigation was ordered. In 2004, he was sentenced to life imprisonment for creating an armed group and possessing weapons and explosives. An appeal to the Supreme Court is pending but it appears that he remains in prison.

315. Bennia and Harizi (cousins): H was arrested in December 2002 and for just over two years his family did not know where he was being detained or why. B was deported from the Netherlands and was arrested in June 2003. Both had been in Afghanistan amongst other places. Both were held in DRS detention, B for just over two years and H for 19 months, and were tortured. They did not mention

torture at their first hearing. In March 2006, both were released from detention in the context of the Charter and told that judicial proceedings would be ended.

316. Sebbar returned to Algeria from Saudi Arabia in 2002, having received assurances from Bosnia, where he had fought until the Bosnians expelled foreign fighters in 1999, that he would not be prosecuted in Algeria. The date of the assurances is unknown and whether the Algerians gave any. He was arrested 6 months after his return, seemingly by the DRS, and was severely tortured during interrogation. He made confessions. The prosecutor and judge were dismissive of his torture allegations. He was charged with belonging to an armed group but was over a year later acquitted in November 2004 and released.

317. Mr Joffe referred in his report to five instances in which individuals were ill-treated after return to Algeria in 2000, he says to take advantage of the 1999 Civil Accord. They did not return with any assurances nor were they deported. Three went into prison, without charge and the other two have disappeared. There is no update beyond November 2000. There is no comparison of the terms of the Civil Accord against what there might have been against the three. The fact that nothing is known of the whereabouts of two does not necessarily signify anything.

318. He also refers to Chalabi, who was deported by France to Algeria in November 2001. What happened to him led to France refusing to remove his brother to Algeria. The Algerians gave France an assurance that he would not be re-tried, yet on arrival he was immediately arrested by the DRS and was later tried for the offence for which he had been convicted in absentia and sentenced to death. He was alleged to have attempted to assassinate two senior politicians. There is criticism of the trial procedure but it does not appear that he was tried by a military court. He was acquitted in May 2002. He was not released because he faced new terrorism charges. There is no update after January 2003. He did not suffer ill-treatment, at least up to the date of his trial, because, says Mr Joffe, his case had a high profile to the French after the broken assurances about trial.

Conclusions

Mr Oakden's evidence

319. Criticisms were made of Mr Oakden's evidence in a number of respects by both Mr Emmerson and Mr Garnham. Mr Garnham's description of him as an advocate does him an injustice though we have to bear in mind that these cases, of which Y is one, have political impetus behind them, and political importance. Mr Oakden

will inevitably have had his outlook coloured by his work as Director of Defence and Strategic Threats at the FCO, where he had responsibility within the FCO for the supervision of the UK Government's counter-terrorism strategy, and his involvement in parts of the negotiations. He was certainly not an independent expert, but such a person would have lacked the knowledge, at times first hand, of what he gave evidence about. We did not see in his position, reason for preferring the evidence of Mr Joffe. We have already dealt with his report and other material provided by Y.

320. We considered Mr Oakden to be a careful, generally accurate witness, one who was willing to recognise mistakes; he was honest, fair-minded though of course subject to the limitations of his position, and his diplomatic and at times indirect, language could convey a more generally positive position than blunter and more direct answers might have done. But that is a matter we have taken into account. He certainly had no direct personal interest for his promotion is secure regardless of outcome.

321. He made a number of errors and there were some omissions in his evidence; he was also answering questions on a number of documents for which he was not responsible, containing the views of others. It would be fair to say that at times he gave quite speculative answers, as it was clear he was dong, at times when a "*don't know*" followed by an "*informed or sensible inference*" would have more directly conveyed the soundness of his answer. His "*diplomatic*" style of answering, cautious, desirous of avoiding offence, not always direct, which was as true in closed as it was in open, could obfuscate issues; but subject to being aware of those tendencies and taking them into account in judging the impact of his answers, we did not consider those stylistic points to be significant criticisms.

322. It is perfectly correct that he is not merely not a lawyer, but he is not an expert in foreign law. Evidence from such an expert is how the state of foreign law would be proved in civil or criminal proceedings as Mr Garnham pointed out. Mr Oakden's evidence about the interpretation of the Ordonnance or its application to Y did not come from an expert in Algerian law, or even always directly from an official in the Ministry of Justice. What there was was often relayed at second or remoter hand, often without written confirmatory follow-up, and was in places variable and uncertain. This matters because the SSHD's case in essence came to rest on the application of the Charter and Ordonnance to Y.

323. However, we have analysed the Charter, which is the core political document, and its legal implementation in the Ordonnance, as the totality of the evidence has evolved. We are satisfied that the essential features of relevance to Y are clear. They are also consistent with what the Algerians have gradually been making

clear. Many of the earlier answers lacked a certain precision because the Ordonnance had not been passed and because they did not see the detailed issues of concern as arising in the light of their position on the application of the Ordonnance. It would not have been wise to pre-empt the Ordonnance in giving answers before 28 February 2006 as to its application; the Ordonnance probably resulted from high-level internal Algerian considerations and negotiations. The Ordonnance later became the focus of inquiry and answer as to what would happen to Y.

Deference

324. There was no dispute about the role of constitutional deference in relation to safety on return; it had no place. Mr Burnett did assert the relevance of FCO expertise, and Mr Oakden's ability, drawing on the collective experience of those involved, to convey that expertise and experience fairly to the Commission.

325. To us, it is perfectly clear that the FCO has an expertise in assessing why a foreign government adopts a particular stance in negotiations, how significant that is for the reality of the attitudes it presents, how weighty, reliable or trustworthy its assurances are, and what incentives it has to abide by or breach its assurances. It has expertise in assessing the political situation and the trends in the broadest sense in a given country. We include in that the political strength of parties, factions and individuals, civil – military relations, policy trends over areas such as human rights, prisons and judicial roles, as well as economic and social conditions. It has particular expertise in assessing the basis and strength of diplomatic and other relationships between the UK and other countries, and prospective developments in them.

326. We have made some comments about Mr Oakden's evidence. We regard him as having the understanding himself and the ability fairly to convey the expertise of the FCO to us on those issues. We have kept in mind the reservations which we have accepted about that evidence. Nor is this to deny the value of the background reports with their NGO contributions or of NGO reports. There are certain areas, particularly in relation to complaints of ill-treatment and individual cases where their sources are likely to be beyond the reach of the FCO. Mr Oaken's expertise rather outweighs Mr Joffe's, however, when dealing with general political assessments.

The evolution of the SSHD's case

327. Of course, the SSHD's case has evolved, and as finally presented is markedly different from that presented in the November 2005 Statement.

328. In 2001 and on through to March 2005, the detention of Algerian Islamic extremists, suspected of being international terrorists linked to Al Qa'eda, was justified under Part 4 of the ATCSA 2001 because they could not be returned to Algeria conformably with the UK's obligations under ECHR and Article 3 in particular, at least without assurances which had scarcely been sought and certainly not given. During that period, Y's risk profile on return, even were he seen simply as an Islamic extremist, suspected of international terrorism, would have precluded his return for the same reasons. But he had also been convicted twice in absentia of serious terrorist offences and had been sentenced to life imprisonment and to death. The Algerian liaison material of January 2003 affirmed their real interest in him and his extradition had been sought, in a request rarely made, in 2003. There had been earlier contacts about him in 2002. The nature of the offences for which he was convicted, and the activities of the group which he was alleged to have organised make such interest unsurprising, even merited.

329. It is plain from the background material that the extradition request could not then have been acceded to, because of Article 3 if no others, at least in the absence of credible and independently monitored assurances as to Y's treatment - although it may have been the charges in relation to the "ricin" plot which lessened any UK interest in answering the request quickly. That state of affairs continued through 2004 and into early 2005, as can be seen from the USSD reports, the FCO Human Rights paper of August 2005, and other NGO material.

330. The FCO saw no basis for pursuing any such assurances until May 2003, when it agreed to a cautious departure from its 2001 advice that such assurances be not pursued. This was the result of pressure from the Home Office that it reconsider its position. There was no real impetus behind this new position, perhaps because of the complexity of the task, for no approach was made to Algeria until 2004. The Algerians were in no hurry to assist the UK in its new policy, and it is clear from the progress of subsequent negotiations that they were very sensitive to anything which hinted at interference in or disrespect for Algeria's sovereignty from a Western state, may be still more so from one which had been seen perhaps as unhelpful to it as its fight against Islamist terrorism.

331. It is clear that the negotiations were given fresh impetus as a result of the declared incompatibility of Part 4 of the ATCSA with the ECHR in December 2004, and real urgency was added by the terrorist attacks of 7 and 21 July 2005 in London. The political situation was developing within Algeria in 2004 and 2005, with the re-election of President Bouteflika in what were generally seen as free and fair contested elections, a reduction in terrorist violence and a more peaceful civil society, with Government acceptance for what it publicly regarded as the unauthorised actions of the security

forces leading to several thousand disappearances, and the announcement in 2004 of the Charter for Peace and National Reconciliation, formally presented in August 2005. However, those changes, welcome as they no doubt were, had not led to the Government altering its view by mid August 2005, when the first deportation related arrests of Algerians were made, that credible and independently monitored assurances were necessary for the return of such as Y to be consistent with ECHR obligations. Indeed, that remained the position in Mr Oakden's November and February 2006 statements.

332. The Government's case underwent a considerable change by the time of the April statements. Its primary case now rested on the application to Y of the Charter and the Ordonnance of 27 February 2006 implementing it. Any detention would only be for a short period if at all and there would be no prosecutions. Y and his next of kin could maintain contact with the British Embassy in Algiers. If perchance there were to be prosecutions and more prolonged detention, the assurances contained in the Note Verbale of 5 December 2005 would suffice when seen in the context of the negotiations as a whole, the UK's developing relationship with Algeria, and the "direction of travel" in Algerian politics, to use Mr Oakden's phrase. This meant that although the UK Government would continue to press for independent monitoring of those returned who went into detention, there was no need for that to be in place before Y's return. It is obvious that the Government has not obtained the monitoring of assurances which it set out to obtain in 2004 and 2005 and continued to seek. It had not obtained a simple written assurance on the non-application of the death penalty to Y in any circumstances. There is no assurance in relation to ill-treatment in specific and explicit language.

333. This might suggest that the Ordonnance and how it could be applied to Y was fortuitous, enabling the SSHD to attempt to rescue a case which would otherwise fail for want of the monitored assurances which it itself had regarded as necessary to avoid a breach of ECHR obligations. But that would be an unduly simplistic analysis, although it is undoubtedly the case that those events have assisted and altered the thrust of the SSHD's case. The impact of the Charter, and the Ordonnance on the need for assurances, and as to what, and on the need for them to be monitored in the case of Y, has to be seen in the light of the associated changes which are taking place in Algeria. That legislation cannot be ignored because its timing and effect may seem fortuitous. Indeed, it has to be addressed. It reflects and reinforces changes underway earlier, but which are now more sharply defined and having practical effects. It is not window-dressing.

334. The real question for SIAC is as to the nature and degree of risk which Y would now face. As is clear, the passing and

implementation of the Ordonnance together with what has been said about its application to Y, puts a very different complexion on the nature and degree of risk which Y was thought to be facing. It was against a real risk of prolonged detention and trial that monitoring, which would have been of those in detention, was sought. The need for that monitoring in Y's case is very much reduced. The absence of monitoring is rather less significant in respect of risks which, so far as Y is concerned we do not think really arise except for a short or comparatively short period.

335. The reasons monitoring has been refused by Algeria demonstrated to us that it is not a fear of what would be revealed or prevented by monitoring that has motivated the Algerians to adopt the stance they have; nor a desire to inflict or protect those who might inflict such ill-treatment. The assessment of a sensitive, rather prickly state, seeing NGO monitoring, UK monitoring, bilateral monitoring agreements as a public slur on its record (however true in substance), and thus a public humiliation at the hands of a Western former colonial power which has not been notably friendly or helpful to it in the past, is perfectly understandable and we think correct. It would be seen as public acknowledgement that it could not be trusted to keep its word, needed special treatment, and its sovereignty would be impugned. The Algerian Government is simply not used to the sort of give and take on assurances seen e.g. between the UK and USA, although those are usually coupled to the death penalty rather than interference with custodial or trial arrangements

336. So the absence of monitoring does not cause us to conclude that what has been said about detention, trial and ill-treatment is unreliable, or said in bad faith. And in Y's case the need for monitoring is very significantly reduced.

337. The Charter and Ordonnance have also created some difficulty for the UK Government in its negotiation of assurances, because the Algerian response, we accept, has been to question why such assurances with monitoring were necessary in the light of what they have said about how that legislation would be applied to Y, and their apparent lack of interest in charging and trying Y now: such monitored assurances could only be necessary if the UK Government had reservations about the good faith or effectiveness of the Algerians' assurances on the application of the Ordonnance to Y.

338. The evolution of Algerian politics and the Government's attitude towards human rights and their violation as it emerges from the civil war, and as terrorist activities markedly decline, means that there is unlikely to be one single event or piece of legislation which marks or creates the circumstances in which Islamic extremists or those seen by the Algerians as former terrorists can return safely with or

without monitored assurances. The pace of change is not constant. The evolution is taking place in a variety of ways, whether in elections, civil-military relations, legislation on human rights, eg criminalising torture, and on the death penalty, a very great reduction in terrorist activity, the cessation of disappearances, a large reduction in allegations of torture, and particularly in the Charter and its implementing legislation.

339. There is force in the point made by the SSHD that the reality of risk on return involves an assessment of differing factors which intermesh: they may evolve and change over time. Here, the need for monitored assurances was seen as a function of the level of human rights abuses. The decline in the level of abuse meshes with the decline in violence, with political change which reflects and encourages a continuing decline in violence and in abuses; they mesh with the specific provisions of the Ordonnance, what has been said about its application to Y and the substance of its implementation. The precision or firmness of assurances needed to protect an individual against a real risk of a breach of Article 3, will depend on the combination of circumstances, including the diplomatic relationship, within which they are to be adhered to. There is no black and white point at which that particular combination shows that no real risk exists, or in which a variation would inevitably reveal one.

340. To our minds, the Algerian position in relation to torture and ill-treatment, and detention arbitrary or contrary to its own laws, has to be considered not so much in the light of the terms of the now initialled Exchange of Letters, which we discuss further in closed. They add little if anything to what is open – their significance lies in the weight given to the political attitudes behind them. The Algerian position on torture and ill-treatment has to be seen in the light of the dramatic decline in terrorist violence, which was so much the progenitor of human rights abuses by the Government, and declining reports of torture and reports of its declining severity. The Charter and Ordonnance are not changes made for the purpose of Y or Algerian deportees. The Charter process itself is important for the political changes it reflects and which it heralds. The potential for prosecution of future, though not past, abuses, may have some effect.

The political situation

341. The first important feature of the background material is the very large decline in the level of violence over the last few years: the number of deaths is much reduced, and we infer that the same is also true of the number of acts of violence resulting in injuries short of death; terrorist activity is no longer experienced in urban areas but is confined to the rural or mountainous areas of a very large

country; there have been no disappearances for two years, and we regard these politically motivated disappearances, on whichever side, as a signal of the level of terrorist activity and of the ferocity of the response, and their cessation as a sign of the return of peace and stability. The incidence of torture and its severity is markedly declining, as is arbitrary arrest and detention. The response of the security forces is obviously affected by the level of the terrorist threat which it is dealing with. Thus, as Algeria emerges from a decade of civil war and insurgency, the reducing level of violence reduces the abuses committed by the security forces. The perceived justification for them on both sides diminishes. This is not a short term reduction. It is a settled direction for the evolution of Algerian politics which reflects war-weariness, changes in the outlook of government, and a degree of military success against groups which have lost popular support through the atrocities which they committed.

342. The second feature is that as a consequence of the reduction in violence and as a contributor to its further reduction and to the introduction of the rule of law in a reasonably free society, the Algerian Government has embarked on the programme of peace and national reconciliation embodied in the Charter. It is very significant that there is a degree of political stability following the re-election of President Bouteflika and that his re-election was seen as a generally free and fair, in the light of the coup against the victory of the FIS in 1992. Peace and reconciliation was part of his appeal. The implementation of this Charter through the Ordonnance is of high importance to Y's case.

343. Third, the implementation of the Charter and Ordonnance has already begun in practical terms. Over 2000 individuals have benefited largely through release, as we understand it, and also through the ending of prosecutions or through the reduction or commutation of sentence since March 2006. That is a very persuasive demonstration that the reconciliation process is not window dressing nor mere words, let alone a deceitful disguise for some more regressive steps. It is not a process which has been created solely for a handful of returnees, calling for a different approach to them by the Algerian authorities from that which they would apply to others facing similar charges. Those released include senior figures in the GIA and FIS. Although the AI Memorandum contains disquieting features, what comes across strongly from the 12 cases is the fact that 7 were released under the Ordonnance or had proceedings dropped, even though they were facing serious terrorist charges and had been tortured during interrogation. Another was acquitted. The allegations of torture or other ill-treatment after September 2005 are slender: Meziche should not have been slapped or insulted but taken at face value that is not a breach of Article 3 and is a far cry from other allegations made in the past about Algeria; Benyamina experienced

unpleasant conditions of custody but made no allegations of violence or other torture; the Saker and Touati torture allegations were made in respect of a period no later than early 2005; the torture allegations in respect of the others relate to yet earlier periods of detention and interrogation. There is nothing to be learned either way from Drif. Ikhlef was deported, pre-Charter, with a general assurance about ill-treatment; he was detained by the DRS, tried and convicted. There is no evidence of ill-treatment which would breach Article 3 covering that 3 year period. Chalabi instances a breach of an assurance in a serious criminal case, but there was an effective reaction to prevent ill-treatment by the DRS, or a lack of interest by the DRS in ill-treatment, and the pre-trial detention period was six months or so. There was an acquittal. The subsequent events are obscure. That said we do not overlook the allegations about the re-arrest of two others who were released nor the extensive breaches, it appears, of the legal limits of garde a vue detention. But the re-arrests do appear to be limited to offences aimed at foreign countries, not benefiting from the Ordonnance. (The email of 31 March 2006 refers to another 2 re-arrests but nothing further is known).

344. Fourth, we recognize that some NGOs, Algerian and foreign, regard aspects of the Charter and Ordonnance as retrograde: the immunity for past acts of the security services, the criminalising of allegations of past ill-treatment by the security services, which we regard as the way in which Chapter 6 is intended to operate, and the absence of any investigation into the acts of the security services which caused disappearances. This shows the Charter to be unbalanced, in favour of the security forces; no such blanket protection against prosecution is extended to those on the other side. Those are all perfectly understandable and accurate descriptions of the Charter's weaknesses.

345. But they miss the larger picture: the Charter and Ordonnance reflect a compromise which had to be reached, at both a high level and at a popular level, for there to be a broad acceptance of arrangements for ending the insurgency on all sides. A perfect solution to these troubles, with the wrongdoers on all sides investigated and punished, seems unlikely. It is readily understandable that a compromise, which drew a line under the past and was a large step towards the restoration of a normal society, was welcomed over the potential continuation of the wearying and murderous conflict. The various insurgent groups wanted an end to detentions and prosecutions but there was a line beyond which the Government was not able or willing to go; the release of those whom the security forces and the military at large saw as their enemies could not take place in such a way as would enable them to pursue the security forces through the courts. It would be unreal to ignore that for all the lack of balance seen by human rights groups, there is an Algerian counterpoint view which is concerned with avoiding a victory for

terrorism and Islamic radicalisation. There was recognition that the security forces had been responsible for disappearances and some recompense for the families was provided.

346. There are thus two important points: this process is responding to changes in the situation in Algeria and itself encourages the return to a normal, peaceful society; it has been accepted by the military and the security forces because they are on any view a major part of the political structure of Algeria still and it could not have proceeded without their acceptance of it. They benefit from it also. There is reason therefore to suppose that they will abide by its terms.

347. There are pictures of the relationship between the civil government and the military/security forces which differ over the degree to which by now there is civilian control: between substantial but not yet complete control, to government with military support and influence. But two important points are clear. The loosening of military power is established, marked and continuing. Mr Joffe's rather bleaker picture of military dominance and independence, is unsourced, and more extreme than most other material. In any event, the military and security forces accepted the Charter and the implementing legislation; indeed it is their acceptance of it which had led to the criticism of its unfair balance. This is in line with an inevitable recognition by the civilian government that it still needed to keep the military supportive but does not suggest military dominance. But, paradoxically, were it consistent with greater military power, it would further underline the commitment of the military and security forces to the process of reliance, reconciliation and re-integration. We have no doubt that they accepted the compromises in the Charter and Ordonnance.

348. There is no certainty about the continued pace of change, though we accept that its direction is clear, and, on the evidence we have, we conclude that the direction is sufficiently set for any likely successor to President Bouteflika to continue it should anything untoward happen. Time will be needed for Algeria to be a fully functioning civil state, and progress may not always be smooth. How far implementation has gone and will go in relation to the surrender of those still "*in the hills*" is uncertain.

349. The question is not whether all abuses have ended so that Y can return without any risk at all of a breach of his human rights; the question is whether the stage has been reached in Algeria, with the Charter and Ordonnance in the circumstances which engendered and permitted that legislation and which are now propelled forward by it, where Y can be returned without a real risk of a breach of the UK's ECHR obligations. The strength of any assurances and monitoring needed, depends on the degree of risk and of what which the person returned may face.

350. The Charter and Ordonnance could not by or of themselves turn Algeria from a country to which Islamic extremists could not be returned into one in which they can. They need to be seen instead as reflecting and continuing the process and extent of political change. Their importance is not to be understated, and those steps are of much greater significance than anything which has been experienced thus far. They mark the stage which had been reached in the attitudes of the military and other security services, their erstwhile enemies in the larger Islamic insurgent groups, and the populace at large, for such a Charter to have been proposed, accepted in a referendum by a substantial majority and implemented by legislation. The underlying conditions are very significantly different from what they were during the decade when civil strife and violence on all sides dominated Algerian life, and in 1999-2000. But they also affect the way in which Algerian political life in the broadest sense, including the relationship between the security services and the civil authorities and the rule of law, will develop from now on. Their clear aim is to draw a line under the ending conflict, and to enable future abuses to be controlled and punished.

<u>The application of the Ordonnance</u>

351. It is not in dispute but that Y could appeal against his convictions on return and that they would be annulled, so that in the absence of the Ordonnance, he would face a fresh trial, and if convicted would be sentenced again not necessarily receiving the same sentences. He would not be someone on return who had received a final sentence. It is possible, but unusual, for different offences to be charged by a prosecutor.

352. Y was convicted in absentia of offences under Article 87 of the Criminal Code which fall within Article 2 of the Ordonnance. By Article 8, the right for the authorities to prosecute him would be extinguished if, by 26 August 2006, he presents himself to the Algerian authorities which include the Embassy in the UK, and makes the declaration required by Article 13, declaring an end to his activities. But it is not as simple as it might appear.

353. First, the date will have passed before any appeal in respect of an adverse decision in this appeal will have been heard and we consider that there is no real prospect of Y making the declaration in the set time. We note however that Y has not taken simple steps open to him to sign the declaration and to test the waters in the way that others have done. There is an obvious need for a deadline to the extinguishment provisions in order to prove an incentive for the declarants and to set a date for the continuance of prosecutions. It is but a speculation which we ignore that there might be an

extension of that deadline. This by itself would put Y into the provisions of Article 9.

354. But second, even if Y were to apply in time, the declaration required by Articles 8 and 13 would give rise to difficulties which are not yet fully resolved. It would be wholly unreasonable to expect Y to admit to offences of the gravity alleged which he denies, whether or not that would lead to extinguishment of the right to prosecution in respect of them, and even more so if there were real doubt over whether the acts committed could be charged in a way which fell outside the extinguishment provisions. We accept that the consistent material from the Ministry of Justice shows that the declarant can enter *"not applicable"* in that section of the declaration which requires the acts committed to be declared. It is the effect of that which is at issue. A declaration in those terms may only enable the declaration to be treated as valid, ie effective as a declaration for the purposes of Article 13. Its effectiveness as a means of achieving extinguishment of the offences is less clear.

355. We recognise that declarations are not required of those who presented themselves to the authorities between 2000 and 27 February 2006, nor in respect of those who seek extinguishment of prosecution while in custody, or amnesty, commutation or remission. That does not show that the *"not applicable "*declaration suffices for extinguishment under Articles 4-8 of the right to prosecute for acts which have not been admitted. Voluntary presentation to the authorities before the extinguishment provisions were introduced may have provided an opportunity for the authorities to investigate and take a decision on prosecution; likewise those finally sentenced will have had a form of judicial determination of their acts and those in custody will have been arrested for an identifiable offence. The SSHD's submissions as to the effect of a "*not applicable*" declaration may be right; but there is no clear written statement from the Ministry of Justice to that effect. It is all very well it being said that it is a *"purely procedural rule which, in reality, has no negative bearing on [Y's] interests...",* as did the Algerian Note of 7 May 2006. But the effect of it on the procedures for extinguishment remains unclear. The latest answers from the Ministry do not clarify this. Examples might have shed light but none were then provided.

356. The operation of the declaration is a matter upon which the Government is better placed than Y to obtain the necessary and conclusive information. This is one of a number of areas concerning the operation of the Ordonnance in which the SSHD's evidence was unsatisfactory. The evidence was not given by an expert in the foreign law or procedure. In the light of the newness of the provisions, that may be understandable but it serves to emphasise the scope for uncertainty about how a new process will operate in practice, as underlined by the two re-arrests of two

individuals apparently released in error under the Ordonnance. The evidence was given often at second or third hand and the understandings were not all confirmed in writing; even when written confirmation was sought, the responses fell short of a clear confirmation or answer to the question. We accept that part of the SSHD's difficulties arises from the fact that the Algerian side in the negotiations does not see why the UK Government seeks this information when it has said that it will apply the procedure to Y and he will benefit from the extinguishment provisions. We recognize the consistency of the assurances that the Ordonnance would apply to Y, and that the declaration of offences signed "*not applicable*" would suffice. But it has not been conclusively demonstrated. There would still be a risk that Article 8 would not be the route to the beneficial application of the Ordonnance to Y, even if the declaration were made in time.

357. On the basis that Article 8 will not apply to Y for time reasons and might not be effective for another, Y would have to rely on Article 9 which does not require any declaration for extinguishment but does suppose that the individual is in custody. That is a matter to which we shall have to return. The next issues are common to extinguishment under Articles 8 and 9: does that apply to those whose offences include facts which could be, but were not, charged as one of the three excepted offences? Could they yet be charged with such offences?

358. Articles 8 and 9 provide for extinguishment in respect of *"the offences described in the provision referred to in Article 2 above."* Article 2 lists provisions of the Criminal Code which do not include the three dealing with collective massacre, rape and bombings in a public place. But it adds to the provisions listed "*and also offences connected with them."* Article 10 excludes from the measures in Articles 5-9 persons who have committed, have been accomplices in or have instigated any of those three excluded offences. Mr Emmerson submitted that, as none of the offences listed in Article 2 were the excluded offences, Article 10 was only or at least was most readily explicable on the basis that, if the facts underlying the commission of an offence listed in Article 2 involved the substance of an excluded offence, that offence was excluded from the extinguishment provisions even though charged as a listed offence. Article 10 would otherwise be mere surplusage. Mr Burnett initially submitted that it was the person who was included or excluded from the extinguishment provisions, and that if the charge was one of the listed ones, the fact that it might have been charged as an excluded offence did not prevent the provisions applying to the individual. But the latest material from the Algerian Ministry of Justice led to the contention that an excluded offence was within Article 2 as an offence *"connected with"* a listed offence. Hence Article 10 was necessary to exclude that connected offence from the benefit of the extinguishment and amnesty measures.

359. We conclude that this is the position, and the more we considered it the clearer it became. The extinguishable offences are not just the listed offences but all connected offences, which might include the three excluded offences. The breadth of the expression "*connected offences"*, intended to enable the slate to be wiped clean, might extinguish prosecutions for offences which throughout the Charter and Ordonnance it is intended still to try. Hence Article 10 is necessary to provide for that possibility. If a connected offence is one of the three excluded offences, the benefit of the measures in Articles 5-9 cannot be enjoyed at all by the individual in question, even in respect of a listed offence. That makes sense of the total provisions of the Ordonnance and of the language of Article 10. The individual cannot benefit from the amnesty provisions either because of the second paragraph to Article 16, but may benefit from the commutation and reduction provisions in Articles 18 and 19. That represents a coherent structure.

360. It is not a realistic interpretation of the Ordonnance that a charge for a listed offence might not receive the benefit of the measures in Articles 5-9 because it might on some analysis of the facts involve accusations of elements of the excluded offences. There is no need for listed offences to be considered in that way if it is the intention of the prosecutor to deprive an individual of the benefit of Articles 5-9 and 16; the offence can be charged as one of the three excluded ones and the prosecution can proceed. There is nothing in the structure or purposes of the Ordonnance to suggest that a charge for a listed offence might be excluded from benefit. The consistent evidence of Mr Oakden about the Algerian attitude that Y would benefit from the extinguishment provisions of the Ordonnance and that they could not see what the problems were at the UK end supports that view, based at least on the charges of which Y was convicted.

361. There is also force in the SSHD's submissions that the basis for Y's concern that the offences of which he was convicted are capable of being seen as excluded offences is overstated. Assuming that *"participated in the ambush"* connotes in the original language presence at the ambush, (which it may not), all the detail of the offence, including that of the witnesses, related to a logistics role for the group and absence from the ambush. Mr Emmerson also points to the lack of evidence of participation as against Y, in the evidence accompanying the request.

362. Mr Emmerson put weight on reference in the 5 December 2005 Note Verbale to Y's eligibility to benefit from the measures "*in the event that he is not involved in collective massacre, rape and explosives attacks in public places*" as showing that there was an as yet unresolved potential for Y to be charged with such offences and the extradition request showed just how such a charge might

be contemplated. The answer to question 8 drafted before the Ordonnance but dated 27 March 2006 shows that this potential remained because the benefit from the measures included the shortening or reduction of sentence which only applied to those whose offences did not attract extinguishment or amnesty. The obvious offences were the three referred to.

363. There is some force in these points. But the passages relied on pre-date the terms of the Ordonnance. It would have been sensible for the Algerians in describing the range of measures and the potential benefit to Y to include that important and oft expressed caveat, regardless of whether or not it would actually apply, and perhaps in a state of unknowing on the part of the author. But once the Ordonnance was published and its terms seen, the Algerians have been clear that Y would benefit from Articles 5-9. The fact that it is a reference to the general exclusion rather than a specific and considered reference to an exclusion in Y's case is shown by the reference to rape – which has never been suggested as an offence committed by Y.

364. We conclude that while Y might not benefit from the provisions of Article 8 because he could apply too late to do so, or because the "not applicable" declaration might not cover the charges which he would face upon appealing against convictions, it is clear that he would benefit from Article 9 in relation to those charges. The route to benefit would be either of the provisions mentioned under Article 15. If the charges are confined to Article 87, there would be no power in the prosecutor or Court to exclude Y e.g. on the basis that he ought to be charged with graver offences, or that he could have been.

365. There are two ways in which it is said that Y might face prosecution for an excluded offence upon return.

366. First, in addition to the three very grave excluded offences, which by Article 10 exclude all the individual's offences from extinguishment or amnesty, the offence created by Article 87a (6) paragraph 1 is also excluded. This operates only so as to exclude that offence and not all the offender's offences, because while that offence falls outside the extinguishment provisions, it does not fall into the overall exclusion from benefit provisions of Article 10. We accept that most recent analysis from the Algerians.

367. We accept that it is possible that the Algerians could charge Y with an offence under Article 87a(6) paragraph 1. This may be the offence of which Meguerba was convicted. This appears to be the charge on which the two who were re-arrested were being held and which led to the Ministerial claim, correctly on that basis, that they were released in error because their charges could not be extinguished. Those two cases had however the additional feature

that there was foreign government interest in their prosecutions abroad. There is material upon which the Algerians could conclude that Y had joined a terrorist organisation abroad. After all that is the very contention of the SSHD. But the Algerians have known about the allegations that Y was a leading member of the DHDS for some years; they passed them on to the UK government, together with Meguerba's allegations which are relevant for these purposes, that Y had sent him to Algeria to develop new techniques. Yet, there has not been a word to the UK authorities from the Algerians in the course of these negotiations that they have any interest in Y now for his leadership or membership of the DHDS, or any activities in the UK. Article 582 of the Criminal Code makes it clear that Y could not be prosecuted in Algeria for the "ricin" plot in the light of his acquittal in the UK.

368. The prosecutor, second, might charge Y with an excluded offence. The prosecutor does have some discretion as to the charges which are raised on a retrial, as we understand. Likewise, the Algerians have been well aware for many years of the nature of the allegations which led to the convictions and to the extradition request. Although the extradition request has not formally been withdrawn, and the answers dated 27 March 2006 relate to the extradition request, what would happen would now be governed by the Charter and Ordonnance. Again there has been no suggestion in the negotiations that the Algerians have any interest in prosecuting Y for any of the three major excluded offences. Quite the reverse. They did not charge Y with an excluded offence in 1996 either, when they could readily have done so.

369. There remains some confusion about how the mechanics of the extinguishment work, who makes the decision and whether or not they have any discretion. The Ordonnance provisions are in Article 15; the Note from the Ministry of Justice of 7 May 2006 referred to 15 (3), and the Minute of the 6-7 June 2006 visit referred to 15 (1). The latter provides that the State Prosecutor decides that a person is exempt from prosecution where proceedings are at a preliminary investigative stage; the former deals with cases, broadly, before the Courts already, which are submitted to the Criminal Division of the Appeal Court at the instigation of the Prosecutor. The former note says that the decision-making power lies with the competent judicial authority, and in a context where there are examining magistrates, precise demarcation along English lines may be absent. We believe that the two grounds were referred to because where there is an appeal, or more accurately an opposition, lodged against conviction in absentia, there may be room for some doubt as to what stage a case may reach before it is dealt with under Article 9.

370. What is absent from any provision of the Ordonnance is any reference to the high powered but essentially bureaucratic decision making body described by Mr Oakden, or any clear provision

whereby there is scope for errors of the sort said to have occurred in the case of the two who were released and then re-arrested. The language of Article 15 permits to English eyes of one decision-maker who has no discretion to refuse the benefits if the case falls within Article 2 or to grant them if it does not. That is how it is meant to work in our view. A decision has to be made about whether an offence falls within one of a number of excluded categories, but that would appear to be quite straightforward, provided attention is given by the decision-maker to the relevant provisions. There is nothing in the Ordonnance to conflict with the Ministry evidence that it is for the prosecutor to decide how to charge an offence. There is however clearly scope for some discretion under Articles 18 and 19 because there is a decision to be made as between commutation and remission, and possibly about the length of any remissions. If a case falls outside the scope of the benefits but receives them nonetheless, it is a judicial error for release to take place, an error made in those instances by the investigating court or examining magistrates. What is far from clear is how re-arrest can take place without judicial intervention or declaration of error.

371. On these matters, we accept Mr Oakden's appraisal of the Algerian interlocutors that if they had such an interest or intention, it would have surfaced during the negotiations. The Algerians have been misleading in the past on occasion about events for no very clear reason, (although that involving Meguerba's telephone calls in January 2003 lasted only for a day or two). But for Y to be prosecuted for an offence which was excluded from Articles 5-9 would require a level of enduring and planned deceit, which went far beyond anything experienced a few years ago and would be wholly at odds with the growing co-operation, trust and familiarity within the negotiations. It would be wholly at odds with the way in which the Charter and Ordonnance are plainly intended to work for someone who has been convicted of a non-excluded offence. The Article 87 offences are not seen as excluded offences even if committed in the way in which Mr Emmerson contends they could be seen. The Algerians have made it clear e.g. in the 6 April Note that there are no other pending charges against Y. We see no reason not to accept the evidence that the Article 87 offences would not attract exclusion even committed in the way described in the extradition request, and that no other charges are to be laid.

372. Although there may be doubts about how the Ordonnance would work in certain areas, for Y to be tried at all, even for the offences of which he has been convicted, would be wholly contrary to what the Algerians have constantly said about the application to him of the new legislation. The Algerians have set a new course and it would be astonishing if they turned their back on it, or have been misleading about their intentions as to the application of the new legislation to Y.

373. The thrust of the written notes of 6 April 2006, the records of 26 April 2006 and 6-7 June 2006, and the oral record of conversations of 22 April 2006 are all that way.

374. Of course, none of those assurances or statements are legally enforceable by the UK or by Y. Their value depends first on a judgment that the Algerians are acting in good faith and have the political will and ability to give effect to them. Second, their value depends on the accuracy of what has been said about the application of the Ordonnance to 'Y'. We have concluded that they are acting in good faith; the political changes demonstrate their will and the level and consistency of the assurances support that. The Charter and its implementation, the growing entrenchment of civilian authority and of the President over the military show their ability to give effect to them. What has been said about the application of the Ordonnance to 'Y' fits with its purpose and language There is an area of uncertainty over the role of the high-powered Committee; but if it has a role in 'Y's case, which seems to us rather unlikely, it is a role in which the political or official statements can properly carry weight in judging the application of the Ordonnance. Likewise, both the legal and the political assurances show that there are no other charges, excluded from the Ordonnance or otherwise, which would be levied against 'Y' for any past conduct of his.

375. There are also diplomatic pressures which work against possible breaches of assurances; on this we accept Mr Oakden's view of what they are. They are likely to be of some effect in keeping the Algerians to their work, controlling rogue elements and in rectifying any faults.

376. We note that Y would have been able to test these points himself to some extent at the Algerian Embassy, and has chosen not to do so. We do not infer from this that he is refusing to take a simple measure for his own safety and thus that his return would not be a breach of the UK's obligations, which could involve a number of controversial propositions. But we do point out that there is nothing from him to challenge the SSHD's contentions, when there are steps which he could take which had some potential for revealing that what was being said was wrong.

377. Accordingly, we conclude that Y can return to Algeria, can enter opposition to his in absentia convictions and will then be able to benefit from the provisions of Article 9 of the Ordonnance, even though he will be unable to benefit from Article 8. The nature of the declarations is thus only relevant if there were to be an extension of the deadline, which is mere speculation. We think there is no real likelihood that he would not benefit in that way.

Detention

378. If the deportation order were to be made following dismissal of this appeal, we would expect him to attend the Embassy and sort out what would happen procedurally on return, which would minimise any period in custody. It had been anticipated by the SSHD that Y would only be in custody for a short period, but that was on the basis that he was returning to claim the benefit of Article 8.

379. We do not know what the period of custody would be for someone returning to claim the benefit of Article 9. However, there is no real reason why that period should be any longer than the short period which was envisaged in relation to a declarant and Article 8. But it is possible that it could be longer, without breaching the substance of the assurance, because it would not be quite the same procedure. If so, we consider that a period of a few weeks would be the outside which Y would be in custody for after arrival because many of the formalities would have been completed before arrival, the prosecutor and courts would be aware of the case and the charges would be extinguished. The procedure is not itself a very complex one. The courts have no incentive to delay this case; nor does the Prosecutor. This conclusion does not depend on some assurances specific to Y which would accord to him a treatment which is not available to others.

380. We do not regard that period of detention, nor even necessarily a somewhat longer one, as of itself giving rise to any breach of UK human rights obligations. The assumption does not require a breach of the legal limits for garde a vue detention. Y would be returning as a potential beneficiary of extinguishment provisions for alleged offences of some gravity, of which he had been convicted and for which he would face re-trial absent extinguishment under the Ordonnance.

381. Is there a real risk that the treatment that Y would face during that period in custody would breach Article 3 ECHR? We think not. First, the problems of ill-treatment are only said to arise were Y in DRS custody, and not in civilian prisons. Although Y might very well have been held in DRS custody had he returned before the Charter and perhaps the Ordonnance, the evidence does not suggest that that is now as likely as it was. We do not consider there to be more than a mere possibility that Y would be detained on return by the DRS. Other prisons and judicial police forces can and do handle terrorist cases. This case would not be one marked for trial following exclusion from the Ordonnance; were it to be so marked DRS detention would be more likely. There is no specific assurance as to who would detain Y for the short period envisaged in those circumstances, and the question has not been asked in that way. Mr Oakden's evidence, which we accept however, was that detention in DRS custody was simply not envisaged for Y were he

returning as an Article 8 case with a valid declaration, and would be inconsistent with the way in which the Algerians had clearly intended to treat Y.

382. There is no reason, in any of the evidence which deals with how Y would be dealt with as a beneficiary of the Ordonnance, to draw a distinction between the way he would be treated as between Articles 8 and 9. If Y is to benefit from Article 9, as we conclude he would, there is no reason to suppose that the attitude of the Algerians would be any different towards where he was detained. The DRS no longer have any interest in Y, although it was strong in the past. The DRS have been present at all the negotiations and have acquiesced or accepted what has been said about returnees generally and Y in particular according to Mr Oakden. It would require an act of gross bad faith for Y to be returned and for the past interest to be revived to a hostile end, in DRS detention. The general impact of the changes in Algeria following the Charter and Ordonnance are consonant with an absence of continuing interest. The line under the past has been drawn; erstwhile DRS enemies and terrorists are being released. It is far from clear why Y should still be of hostile interest when those others are not. The gravity of his offences are no more than those alleged against others who have been released. Even those who had committed Article 10 offences and who fell within Article 4 by surrendering before 28 February 2006 benefited from extinguishment, as Article 10 itself and the April 2006 answers show. Those who did not, still benefit from the other measures in the Ordonnance.

383. Second, if perchance Y were to be in DRS custody while his position under the Ordonnance was being regularised, we do not see him as facing a real risk of treatment which would breach Article 3. He would have a considerable profile to the UK Government: and we have no doubt but that it would keep in close touch with the Algerian authorities were that to happen, because it would clearly be a surprise turn of events. The UK Government has a clear incentive to do so because of its interest in returning numbers of Algerian Islamist extremists. The Algerian Government has its own interest in ensuring that those returned from the UK are seen to not to be ill-treated, because it wants the return of one particular non-Islamist individual from wherever he is. While accepting that it is generally more supportive of the Government than other local NGOs, the CNCPPDH has a voice and influence with the Government. Other local NGOs would also have an interest in how this return was being managed. These varied voices, and in particular that of the UK Government, in the light of the currently developing relations which in a variety of ways and on a variety of levels both sides are keen to encourage, would affect the way in which the DRS reacted and the way in which the Algerian Government dealt with it. There would be high level political interest and a threat to the good faith of Algeria in international relations

which cannot be overlooked although it is difficult to assess in concrete terms. We accept what Mr Oakden had to say on that aspect. The level of allegations of torture has declined significantly recently and that is not to be seen as a temporary or happenstance state of affairs; that decline reflects the changing and stabilising political situation in Algeria. Torture now is less likely to be overlooked as the judiciary improve, and the DRS itself is aware that the past climate of impunity is intended not to apply for future acts. The allegations against the DRS in relation to the post Charter period made by those who were recently released, do not amount to a breach of Article 3.

384. The purpose of DRS torture in the past appears to have been to obtain confessions, evidence which can be used against others and information, rather than to inflict pain as an end in itself. The Charter and Ordonnance remove the incentive to carry out interrogations to obtain admissions from Y which can be used at his trial, because there will be no trial. It is known that there were others convicted at the same time as Y, but nothing is known of whether they were present or not at the trial. But if Y benefits from the Ordonnance in respect of the offences alleged against him, there is no reason to suppose that the same would not apply to those others and that they too would not be tried. Y might be thought to have knowledge of the DHDS, and perhaps of GSPC fighters who remain active; it is conceivable but no more than that that the DRS would wish to ask him about those matters and would take the opportunity of his return and detention to do so. There would be no monitoring of his detention or interrogation by the DRS. Nonetheless, even if such an interrogation were to take place, and that seems to us to be more speculative than real, the factors which persuade us that there is no real risk of ill-treatment in Y's case are set out above.

385. We give some weight to the assurances received in December 2005 about how he would be treated were he returned to face re-trial, pre the Ordonnance, and to the verbal assurances which have been received. They result, as Mr Burnett correctly submitted, from a considerable number of contacts at diplomatic, official and high political level, in the course of developing diplomatic relations and a progressively changing domestic political situation. It is not conceivable that these are given deceitfully or that the Algerian attitude will change when Y is returned. The situation has moved on since Chalabi's return and the issues have been gone into with some care with Algeria. But the principal factors which persuade us that that is not a real risk are the changes in circumstance allied to the profile which Y would have, the interest of both Governments in avoiding a disruption to the return of Algerians, and the extinguishment of prosecutions for Y. The diplomatic pressures on both sides would be of some value in reducing the risks.

386. Of course, the evidence does not show that torture has now ceased to be a real risk for everyone in all circumstances and it would be wrong to conclude that that state of affairs now exists, but it is possible to make a more individualised assessment of that risk for someone in DRS detention for a relatively short period.

387. Again, the risk posed by the unauthorised acts of DRS agents, perhaps seeking revenge for what they may see as an attack upon their comrades cannot be completely ruled out, although it requires an increasing sequence of unlikely events. But those same factors as discussed above reduce it in this case to somewhat below the level of significance for Y's return to be a breach of ECHR obligations. These will lead to greater civilian oversight of DRS operations down through the chain of command. The judiciary will be less willing to ignore credible complaints of torture. The past effective immunity does not continue as part of the Charter's compromise. The past incentive for torture is largely missing in the absence of a trial. There is already growing civilian control over the DRS operations and activities. We reject the fullness of what Mr Joffe and A1 had to say about the degree of continued dominance of the military and unaccountability of the DRS. The military and security forces remain an important part of Algerian politics but the President is now in a better position than in the past to exert civilian authority over the DRS and their acceptance of the Charter and Y's return illustrates that they do not seek to operate as a semi-autonomous unit. The diplomatic pressures to adhere to proper standards and treatment if Y were to be in DRS custody would be as effective as they were in the case of Chalabi. There would be no monitoring in DRS custody, but the arrangements for return would both discourage DRS detention and ill-treatment there. These are set out in Mr Oakden's fifth witness statement and include accompanied return, notification of relatives, Embassy contact details and contact with the CNCPPDH.

388. These measures will provide a significant measure of protection for Y, when he is not in detention, against a resurgent and malign interest in him for past acts.

389. We received a number of submissions and had evidence about the views of various bodies on the ineffectiveness and undesirability of deportation with assurances to countries which practise torture. Most human rights groups oppose it as does the UN Commissioner for Human Rights. We recognise that there is an argument that such bilateral arrangements may undermine longer term attempts to achieve adherence more generally to international human rights norms, although we do not see that there is any necessary conflict. But that issue is not open for us to resolve nor is it relevant to our decision.

390. We also accept the submission of Mr Burnett that there is no ECtHR authority which suggests that assurances are in principle to be ignored in deportation or extradition cases; it is difficult to see how such a conclusion could be reached. Its decisions in *Chahal* and in *Mamatkulov v Turkey* (2005) 41 EHRR 25 for example, acknowledge that assurances can reduce the risk of a breach of Article 3 to below the threshold level. What matters to us is whether such assurances in any individual case signify that there is no real risk that the individual would be subject to treatment breaching Article 3, or whatever other Article is engaged. So a judgment as to their effectiveness in the light of all the circumstances of the case and country is called for.

391. Two matters are obviously of importance in that judgment. Assurances are not usually sought unless there is a prospect that the treatment to be guarded against will occur. Where that treatment is already forbidden by a state's domestic law and international obligations, but nonetheless there is a real risk that it would occur in the absence of contrary assurances, there has to be something about the assurances, sufficient to show that the promise to do that which it has already agreed to do or is bound to do, will be honoured rather than breached in this instance. That may come from the person giving the assurances, the terms of it, the circumstances of the country, monitoring, the political and diplomatic incentives to adhere to it or the potential penalties for a breach, or from a combination of some or all of them. What we do not accept is that there is a principle which requires assurances in such circumstances to be ignored as opposed to being assessed carefully. The political realities in the country will matter far more than the precise text, because it is the probable attitudes of those in power or having dealings with the individual case that are at stake, rather than the legal enforcement of that which is inherently not legally enforceable.

392. We have examined the position in relation to the actuality of the operation of the Ordonnance and the individual cases to which AI and Mr Joffe have referred us. We do not see that in principle a bilateral assurance that an individual will not be treated in a particular way is incapable of reducing the risk which a deportee faces to an acceptable level depending on the circumstances. To discount it, a priori, as an agreement to do that which is already ignored, is to ignore the circumstances of the case.

393. The second point is that where a country offers an assurance that it will act in a way which falls outside the scope of its domestic law and which would give special case treatment to the individual in that way, there is a powerful case for not relying on an assurance by a government that it will act in a way which its law does not allow. It may also be necessary in that context to see to what extent the assurance given is about the way in which another body would act,

especially if that is outside the way it would normally be required to act. That is what we see as the basis for the comments in *Armah v Government of Ghana* 1968 AC 193 of Lords Reid and Upjohn. There was no unanimity on that point. However, such assurances as we take into account here are not of that nature. The Algerians are not promising to treat Y in a way in which he would not be entitled to be treated under its law. The assurances are as to the law and its application to him. *Armah* does not contain observations of relevance to this case.

394. In *Greece v Governor of Brixton Prison* [1971] AC 250, the Government of Greece sought to extradite Kotronis pursuant to an Extradition Treaty which forbad trial or detention for any offence other than that for which extradition had been granted. Kotronis suggested that that was exactly what the Greek Government would do because of its past treatment of him. Lord Reid observed that that would be a clear breach of faith on the part of the Greek Government as it would be a breach of its Treaty obligations. The Court could not assume that a country with which the UK Government had diplomatic relations might act in that manner. We do not think that such observations can guide us here. There can be no conclusive assumption that Algeria would not breach its assurances, whether in a lesser form of Treaty or in none at all. The prospects of a breach is a matter for an evidenced based judgment taking account of what we are told about their strength, the intent behind them and the incentives to adhere and penalties for breach in the political circumstance prevailing.

395. In *R v Home Secretary ex parte Launder* [1997] 1WLR 839 HL, the House of Lords considered the effect of treaty arrangements with China which guaranteed certain fair trial rights but which it was said were in fact ignored. Lord Hope held that such an argument could not be justiciable in the courts; p855B. They were however matters for the Home Secretary to consider carefully. Mr Burnett used that to support his argument as to the respect due to the expertise of the FCO, but did not argue that SIAC should regard itself as unable to consider the reality of compliance with obligations. We have no difficulty as a matter of principle in considering and deciding on the reality of a foreign state doing what it has said it will do.

396. We acknowledge that there is little evidence that assurances are sought and then relied on for deportations. The SSHD referred us to the compilation of replies given by 17 EU States to the Group of Specialists on Human Rights and the Fight against Terrorism in 2006. They were not much sought largely because of concern that they were no more than promises to do that which was already promised but not done.

397. The reality however is that this is not, at least now, essentially a case of bilateral assurances that laws which are otherwise commonly broken will be adhered to for Y. The assurances are of a rather different nature. They are principally assurances and information about the application of an existing but new law to Y. There are associated assurances about there being no other pending charges, about the period of detention, understandings created as to where any detention might be, and general assurances about treatment in any detention, written and verbal. But they are all understood and evaluated by us in the context of the application of the Ordonnance to Y. We are not dealing with this as a case in which the Algerians will try Y for serious offences which could readily be the subject of DRS interest and long term detention after a trial in what may or may not be a civilian Court. This puts the case into a category which is rather different at least as a matter of degree from those to which much hostility and concern has been directed by human rights groups and others.

Other risks

398. It might be arguable that even if Y were to be retried and to enjoy no benefit from the extinguishment provisions of the Ordonnance, and were instead forced to rely on the commutation and remission provisions instead, there would be no risk of a breach of Article 3. After all, the offences are serious and could properly be retried without that trial, or a life sentence and detention, in principle being persecutory or involving of themselves a breach of Article 3 ECHR.

399. We do not consider such a possibility in the light of what we have been told by Mr Oakden and what we have accepted are the true implications of the Charter and more particularly of the Ordonnance for Algerian politics and the response to Y's return. Mr Oakden has made much of the fact, and properly so, that the Algerians have been puzzled, genuinely as he sees it, as to why the UK seeks assurances to cover contingently events which they reassure the UK will not arise, because Y will benefit from the Ordonnance provisions on extinguishment of prosecution. Were Y to be retried on those charges, it would mean that what the UK Government had been told by Algeria at all levels was worthless or had been completely misunderstood. The Ordonnance would not assist except for commutation and remission. The prospect that Y would be detained by the DRS would become a real one on this hypothesis; there would be greater incentives to torture him, the period of detention would be far longer than has been envisaged by us or the UK in its evidence and submissions, and the ability of interested parties to maintain his profile would diminish. The context in which those issues would be considered is wholly different from that which has been painted and which we have essentially

accepted. It is impossible to take pieces of the picture and to try to apply them in that situation.

400. We do not therefore need to reach any conclusions on whether any retrial would involve a flagrant breach of Articles 5 or 6, a total denial of the right to a fair trial, or on whether that sufficed to show that return would engage or alternatively breach the UK's obligations under the ECHR or on whether a balance remained to be struck in between the impact of return on Y and the interests of the UK in protecting its national security.

401. We do not need either to reach a view on whether there would be a real risk of a death sentence being imposed following a retrial; we do not think that there is any real risk of a retrial following entry of appeal by Y. However, if there had been a retrial, a death sentence would be a real risk. But even in those circumstances and treating all assurances as valueless, there is such a longstanding practice in Algeria of not executing individuals that there is not in our view any real risk that it would be carried out. If it was not carried out during the period from 1993 onwards, it is difficult to imagine what worse circumstance could arise in which the trend towards abolition could be first halted and then thrown completely into reverse. It is not necessary to examine here the jurisdictional or public law basis for consideration of that issue by the Commission.

Impact on the Refugee Convention

402. It follows from those conclusions that the circumstances which led to the grant of refugee status have now changed so that Y is no longer in need of protection. The change is a sufficiently enduring and stable one for Y. The decline in violence in the insurgency is very marked; there have been moves over some years now to achieve civil accord and national reconciliation. The Charter and its implementing legislation are an important part of the process of drawing a line under the circumstances which led to the abuses of the 1990s. The changes in our view are sufficiently well-established and the beneficial directions of future change clear. They provide the basis for continued growth in civilian control of military and security forces, and for judicial improvement in quality and independence, with a greater willingness to examine allegations of ill-treatment, and an end to the climate of impunity for future abuses by the security forces. This does not mean that there will be no abuses in the future, or that no person could face a real risk of significant human rights abuses. But so far as Y is concerned, the Ordonnance removes the particular risk he faced of prosecution for serious offences with the associated risks of torture and long detention by the DRS.

403. It is not necessary to resolve what could, in theory at least, be a conflict between the burden of proof which lies upon an Appellant to make out his case under Article 3 ECHR, and the burden which lies upon the SSHD to make out his case under Article 1C (5), the cessation provision. The same facts would be relied on in relation to each provision and it would be highly undesirable for different conclusions to be reached on each. We refer to the comments of Lord Justice Simon Brown in *Arif v SSHD* [1999] Imm AR 271 at 276, not repented of but nonetheless not repeated without some qualification by Lord Brown in *R (Hoxha) v SSHD* [2005]UKHL 19, [2005] 1WLR 1063 at paragraph 66. The essential point in both instances was that the past pointed to a basis for current fears unless the evidence established that the risks were no longer well-founded.

404. The evidence about a past and unsafe state of affairs in a country, as with Algeria, plainly has a major part to play in the consideration of the current risk. We do not start at the date of decision with a blank sheet for the past. The current level of risk has to be considered in the light of an acceptance that there was, at least a real risk of torture in the past, whether looking at the cessation provisions or at an initial decision at a later date. There may be differences but the decision–maker in both cases inevitably focuses on whether the evidence shows that the past risks no longer give rise to a real risk, or a well-founded fear. Where the main evidence for that consists of materials which it is only open to the SSHD to produce and which he seeks to produce, the question of where the burden of proof lies becomes an unhelpful and even irrelevant question. The decision-maker is asking the single question: are we satisfied on all the evidence, including that as to the past risk, that Y would face no real risk of Article 3 ill-treatment? We are so satisfied. The decisions on the cessation provisions and on Article 3 align themselves on the same evidence. The necessary approach to past risk, and the nature of the material relied on by the SSHD, iron out the differences which could exist.

Article 8 ECHR

405. Article 8 ECHR arises for consideration in the light of those conclusions as to what might or might not happen to Y on return. The Article 8 claim concerns personal integrity and not family life and is particularly focused on Y's physical and mental health. He was, we accept, tortured during one detention in 1994. There is little material from Y himself except references to past torture, to *"mental and physical health difficulties"* and to suffering from bad depression and PTSD since his asylum appeal. He said in his statement that he was reluctant to talk in detail about his experiences of torture because he was uncertain as to whether his appeal would succeed and disclosures in papers which might be

sent to Algeria could be dangerous for his family and himself. He said that that was commonplace among Algerian asylum seekers.

406. The material is therefore really contained in medical reports. We did not hear from the doctors. The most recent report is from Dr Rundle, FRFPSG (physician), FRCP (Ed.), MRCP, MRCS, who has a very wide range of medical experience including neurology and psychiatry. He has worked at the Medical Foundation for several years, specialising in patients who have alleged violent trauma to the head. We have already accepted Dr Rundle's conclusion that Y was tortured in 1994.

407. Dr Rundle concluded that Y suffers from temporal lope epilepsy as a result of the blows to his head suffered during torture in Algerian detention. The neurological deficit is permanent. He does not now experience spontaneous losses of consciousness, but he does have panic attacks, palpitations, losses of balance, misses parts of conversations, experiences deja vue, and unpleasant tastes in his mouth. Dr Rundle says that Y needs anticonvulsant medication indefinitely and also that he needs specialist hospital treatment but the nature, duration and frequency of that is not specified. Dr Rundle also concludes that Y suffers from PTSD to a marked degree which makes his *"psychological status"* fragile. He has a well established suicidal ideation. The loss of the appeal would materially worsen his PTSD and psychological fragility. Y has told Dr Rundle that he fears that he would be tortured on return and that, although he did not mind being executed, he could not face being tortured again. Dr Rundle concludes that Y's *"suicidal ideation will supervene and he will use the most efficient means to end his life",* in view of his compromised psychological state and his view of his situation. The report does not say at what point he would kill himself, whether in this country or in Algeria, if returned. Y's own statement does not go that far. The Commission has not been able to probe how Y would react to the various possibilities which arise out of the differing views about how he would be treated. Indeed the submissions rather skated over this issue, referring to a volume of material but with little more.

408. Dr MacKeith, a consultant psychiatrist, saw Y for 40 minutes while he was detained in Long Lartin in November 2005. The Inmate Medical Records covering the period of detention pending trial for the poisons plot show anti-depressants being prescribed, and an improvement over time, coupled with a concern by Y that he was being provoked into harming himself, an intention which he denied. He was depressed after his arrest in September 2005, gave accounts of torture, the IMRs record increased depressive symptoms, and a longer term risk of suicide. His mood fluctuated daily. He believed that he was threatened with a dreadful fate.

409. A report for the Medical Foundation by a psychologist and a caseworker who saw Y in September 2005, before his re-arrest, but completed in November 2005, referred to Y's fear of re-arrest and his feeling that he was being surveilled after his acquittal. There had been an increase in his suicidal thoughts; if he were to face removal, there was concern that he would try to kill himself.

410. Dr Meux, a consultant psychiatrist, produced a report in June 2004, for the purposes of bail and fitness to stand trial. He had a moderate depressive illness with biological symptoms. The short term risk of self harm was low but could rise significantly in the future.

411. The need for medical treatment itself does not show that return to Algeria would be a breach of Article 8(1), and there is no evidence that there is not a reasonable level of treatment in Algeria for epilepsy and depression. Certainly there is nothing to show that the return of someone who is a risk to national security could be disproportionate for that reason under Article 8(2). The significant issue relates to the risk of suicide because of a fear of torture in circumstances where we have concluded that there is no real risk that Y would in fact receive treatment which breached Article 3 in Algeria.

412. Dr Rundle does not help as to where the risk arises and as to the risks on various factual permutations of return. Dismissal of the appeal would, we accept, increase the risk of suicide in this country. It is difficult to be precise as to the degree of risk because Y's evidence on this point is negligible and Dr Rundle has not been questioned; but the increase in risk would be marked. However, two points need to be made: first, it would be quite wrong for a threat of suicide, however real and genuine, to force a Court to reach a decision other than that to which it would otherwise come. The measures available to protect individuals in the UK against the risk of suicide will be available to Y, when he is told of an adverse decision, and thereafter if he is minded to commit suicide. There would be protection during any pre-removal detention. We would expect Y, if the appeal is dismissed, to attend the Algerian Embassy in the UK to prepare the procedures for the operation of the Ordonnance, and we would expect them to have been alerted before Y's arrival in Algeria as to his suicide risk. We would expect him to be able to take some hope from the way in which those procedures were conducted. No breach of any ECHR obligation should be anticipated to arise in the UK.

413. There would be an escort available for his return to Algeria, on the SSHD's normal practice, to help protect him against the risk of suicide. On arrival in Algeria, assuming he were taken into detention and even more seriously, possibly taken into DRS detention for the periods which we have contemplated, we do not

consider that he would face a real risk of torture, even though he might still fear it. As reality dawns that there will be no torture, the risk of suicide would diminish. He might well take a different view of his position by that stage; the reports do not assist either way. But we do not consider that even a significantly increased risk of suicide based on a misapprehension of the risk of torture by the Algerians would itself cause Y's removal to breach Article 3 or suffice to make his removal disproportionate and a breach of Article 8 (2).

414. We consider our conclusions to reflect the approach of the Court of Appeal to this issue in *J v SSHD* [2005] EWCA Civ 629, [2005] Imm AR 409. It will only be a very exceptional case in which a decision, which conforms to the Immigration Rules, to deport someone who is a risk to national security, and who is not at risk of Article 3 ill-treatment at the hands of the receiving state, would be disproportionate under Article 8.

<u>Overall conclusion</u>

415. None of the grounds of appeal are made out.

416. This appeal is dismissed.

MR JUSTICE OUSELEY
CHAIRMAN

APPENDIX I

PRELIMINARY PROVISIONS

Article 1 – The purpose of the present Ordinance is:

- to implement the provisions of the Charter for Peace and National Reconciliation, which is the expression of the sovereign will of the Algerian people

- to give concrete expression to the determination of the Algerian people to put the final touches to the policy of peace and national reconciliation, which is essential for the Nation's stability and development.

CHAPTER II

IMPLEMENTATION OF MEASURES TO CONSOLIDATE PEACE

Section 1

General provisions

Art. 2 - The provisions set out in the present Chapter shall apply to persons who have committed or who have acted as accomplices in the commission of one or more of the offences described by and punishable under Articles *87a, 87a 1, 87a 2, 87a 3, 87a 4, 97a 5, 87a 6 (paragraph 2), 87a 7, 87a 8, 87a 9 and 87a 10 of the* Penal Code and also offences connected with them.

Art.3 - The Criminal Division of the Appeal Court shall be competent to give rulings on ancillary matters which may arise during the course of the application of the provisions of the present Chapter.

Section 2

Extinguishment of the right to bring a public prosecution

Art. 4 - The right to bring a public prosecution shall be extinguished in respect of any person who has committed one or more of the offences described in the provisions referred to in Article 2 above, or who has acted as an accomplice in the commission of such offences, and who has surrendered himself to the competent authorities during the course of the period between 13 January 2000 and the date of publication of the present Ordinance in the *Journal Officiel* [Official Gazette].

Art. 5 - The right to bring a public prosecution shall be extinguished in respect of any person who, within a maximum of six (6) months from the date of

publication of the present Ordinance in the *Journal Officiel*, voluntarily presents himself to the competent authorities, ceases to commit the offences described in the provisions of Articles *87a, 87a 1, 87a 2, 8 a 3, 87a 6 (paragraph 2), 87a 7,87a 8, 87a 0 and 87a 10 of the* Penal Code and surrenders the arms, munitions, explosives and any other materials in his possession.

The right to bring a public prosecution shall be extinguished in respect of any person which is being sought within or outside national territory for having committed or having acted as an accomplice in the commission of one or more of the offences described in the provisions referred to in Article 2 above who, within a maximum of six (6) months from the date of publication of the present Ordinance in the *Journal Officiel*, voluntarily presents himself to the competent authorities and declares that he is putting an end to his activities.

Art. 7 - The right to bring a public prosecution shall be extinguished in respect of any person who has committed or has acted as an accomplice in the commission of one or more of the offences described in Articles *87a 4 and 87a 5*of the penal Code who, within a maximum of six (6) months from the date of publication of the present Ordinance in the *Journal Officiel*, puts an end to his activities and makes a declaration to that effect to the competent authorities to whom he has presented himself.

Art. 8 - The right to bring a public prosecution shall be extinguished in respect of any person who has been sentenced by default or *in absentia* for committing one or more of the offences described in the provisions referred to in Article 2 above who, within a maximum of six (6) months from the date of publication of the present Ordinance in the *Journal Officiel*, voluntarily presents himself to the competent authorities and declares that he is putting an end to his activities.

Art. 9 - The right to bring a public prosecution shall be extinguished in respect of any person who is held in custody and has not been finally sentenced for having committed or having acted as an accomplice in the commission of one or more of the offences described in the provisions referred to in Article 2 above.

Art. 10 - The measures provided for in Articles 5, 6, 8 and 9 above shall not apply to persons who have committed or who have acted as accomplices in the commission of or have instigated the offences of collective massacre, rape or the use of explosives in public places.

Art. 11 - The beneficiaries of the extinguishment of the right to bring a public prosecution, covered by Articles 5, 6, 7, 8 and 9 above, shall return to their homes as soon as the formalities provided for in the present Ordinance have been completed.

Section 3

Rules of procedure for the extinguishment of the right to bring a public prosecution

Art. 12 - For the purposes of the present Chapter, competent authorities shall mean, in particular, the following authorities:

- Algerian embassies, consulates-general and consulates
- Public prosecutors in appeal courts [*procureurs généraux]*
- *State prosecutors [procureurs de la République*
- the national security services
- the National Gendarmerie
- officers of the judicial police, as defined in Article 15(7) of the Code of Criminal Procedure

Art. 13 - Any person who has presented himself to the competent authorities for the purposes of the application of the provisions of Articles 5, 6, 7 and 8 above shall be required to make a declaration, which must *inter alia* cover the following:

- the offences which he has committed or in the commission of which he has acted as an accomplice or which he has instigated
- the arms, munitions or explosives or any other materials which he has in his possession which are connected with those offences

In the latter case, he must hand them over to the said authorities or inform them where they can be found.

The standard form for the declaration and the information it must contain shall be laid down by regulation.

Art. 14 - As soon as the person appears before them, the competent authorities must inform the appeal court prosecutor of this and the latter shall, where appropriate, take the necessary legal measures.

If the person appears before an Algerian embassy or consulate, the latter must inform the Ministry of Foreign Affairs of the declarations made and that Ministry shall forward them to the Ministry of Justice, which shall take any legal measures it deems appropriate.

Art. 15 - The circumstances in which the right to bring a public prosecution is extinguished, provided for in Articles 4, 5, 6, 7, 8 and 9 above, shall be subject to the following rules:

1. if the proceedings are at the preliminary investigation stage, the State Prosecutor shall decide that the person concerned is exempt from prosecution

2. if the offences are the subject of a judicial enquiry, the investigating court must issue an order or judgement ruling that the right to bring a public prosecution is extinguished

3. if the case has been referred, entered on the cause list or is in progress before the courts which are to give judgement, the file shall, at the instigation of the State Prosecutor's Office, be submitted to the Criminal Division of the Appeal Court, which shall give a ruling that the right to bring a public prosecution is extinguished

4. the rules provided for in paragraph 3 above shall apply to appeals lodged with the Supreme Court.

Where several prosecutions or decisions are involved, the competent prosecutor's office shall be that within whose jurisdiction the place where the person presented himself is located.

Section 4

Amnesties

Art. 16 - Persons who have received a final sentence for having committed or having acted as an accomplice in the commission of one or more of the offences described in the provisions referred to in Article 2 above, shall be granted an amnesty in accordance with the provisions of the Constitution.

Persons who have received a final sentence for having committed or having acted as an accomplice in the commission of or for instigating offences of collective massacre, rape or use of explosives in a public place, shall not be eligible for an amnesty.

Art. 17 - Persons who have received a final sentence for having committed or having acted as an accomplice in the commission of one or more of the offences described in Articles *87a 4 and 87a 5* of the Penal Code, shall be granted an amnesty in accordance with the provisions of the Constitution.

Section 5

Commutation and remission of sentences

Art. 18 - Any person who has received a final sentence for having committed or having acted as an accomplice in the commission of one or more of the offences described in the provisions referred to in Article 2 above, who is not covered by the measures extinguishing the right to bring a public prosecution

or granting an amnesty set out in the present Ordinance, shall have his sentence commuted or remitted.

Art. 19 - Any person who is being sought for having committed or having acted as an accomplice in the commission of one or more of the offences described in the provisions referred to in Article 2 above who is not covered by the measures extinguishing the right to bring a public prosecution or granting an amnesty set out in the present Ordinance shall, after receiving a final sentence, have his sentence commuted or remitted.

Art. 20 Any person who, having benefited from one of the measures set out in the present Chapter, in future commits one or more of the offences described in the provisions referred to in Article 2 above, shall be liable to the provisions of the Penal Code concerned with re-offending.