Appeal no: SC/31/2005
Hearing Dates: 26th – 29th Jan & 25th Feb 2010
Date of Judgment: 22nd March 2010

SPECIAL IMMIGRATION APPEALS COMMISSION

OPEN JUDGMENT

Before:

THE HONOURABLE MR JUSTICE MITTING (Chairman)
SENIOR IMMIGRATION JUDGE LATTER
MR C GLYN-JONES, CBE

(T)

APPELLANT

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

For the Appellants: Ms S Harrison & Mr E Grieves
Tyndallwoods Solicitors

For the Respondent: Mr R Palmer & Ms C Owen
Instructed by the Treasury Solicitor for the Secretary of State

Special Advocate: Mr M Shaw, QC & Ms H Mountfield
Instructed by the Special Advocates Support Office

The Hon. Mr Justice Mitting :

Background

1. T was born on 14 May 1970 in Rahouia Tiaret, Algeria, of Algerian parents. They are still alive and live in Algeria. He has three sisters and five brothers, all but two of whom live in Algeria. He married an Algerian woman, by proxy, in late 2000. He and she arrived in the United Kingdom on 29 January 2001. He first came to the notice of UK Immigration officials when he claimed asylum on 9 February 2001. He completed and signed a SEF on 21 February 2001, in which he claimed to have sustained injuries to his right eye and leg in an explosion in a market in Algeria on an unstated date. He also claimed that in September or October 1999, he had been seized by the Gendarmerie, struck with the butt of a rifle and detained for a week during which he was tortured and asked about terrorist activities. He reiterated this account (though changing the date of his arrest to 1997/98 and stating that he had been arrested on more than one occasion) when interviewed on 2 July 2001. His claim was rejected by a letter dated 6 July 2001. He appealed to an adjudicator, advancing the same story. His appeal and further appeal were dismissed by March 2002.

2. Having made a claim for asylum, he and his wife were afforded NASS accommodation in London until May 2001, when he was moved to Birmingham. He has lived there ever since. He now has four children, aged eight, six, three and one.

3. On 9 August 2005 T was served with a notice of intention to deport on the grounds that his deportation was conducive to the public good for reasons of

national security. He was detained pending deportation on 11 August 2005 and released on SIAC bail on 25 October 2005. He appealed to SIAC against the notice of intention to deport. The Secretary of State's case against him asserted that he had attended the Khalden training camp in Afghanistan, had come to the United Kingdom before 29 January 2001 and had lived with Mustafa Melki and associated with Abu Doha and his group. In an undated and unsigned witness statement bearing the creation or printing date 6 July 2006, T categorically denied that he had ever been to Afghanistan or Pakistan or knew or had stayed with Melki or knew or had met Abu Doha.

4. On 16 January 2007 T gave notice of his wish to withdraw his appeal against the notice of intention to deport. On 22 January 2007 the Secretary of State signed a deportation order. On 3 July 2008, T requested "the reinstatement of his appeal". In a long letter dated 1 September 2008, his solicitors gave his reasons which were, that on a variety of grounds, he no longer considered it safe for him to return to Algeria. The letter made no mention of his family circumstances or the impact which deportation would have on his wife and children. A statement by T dated 28 August 2008 accompanied the letter. In it, he said that he wanted his children to have a normal life in Algeria, but did not now believe that that was possible because, on the basis of information given to him by an Algerian official and other Algerians who had returned, he believed that he would be imprisoned if he were to return. By a letter dated 14 May 2009, the Secretary of State treated T's request as an application to revoke the deportation order already made and refused to revoke it. She stated that the further submissions on which he relied were available to him before he withdrew his appeal and did not, in her opinion, offer a reasonable prospect

of success before an Immigration Judge. Nevertheless, she did not issue a certificate under Section 96 of the Nationality, Immigration and Asylum Act 2002, but accepted that T had a right of appeal to SIAC against her decision to refuse to revoke the deportation order. He appeals against that decision.

5. In support of his appeal, he has prepared a belated and unsigned, but detailed 59 page statement bearing the creation or printing date of 11 December 2009. By it, he accepts that all previous accounts of his adult life since 1992, except about purely personal matters, were false. He now claims to have given a true and comprehensive account of his activities since 1992. The Security Service accepts that much of what he now says is true, but maintains that his account is incomplete and that it misstates his past motivation for his actions in a way that casts significant doubt upon his present intentions.

National Security

6. The starting point for our consideration of this issue is the deportation order itself. It was lawfully made and factually well founded. The Secretary of State believed, correctly as T now admits, that T had attended the Khalden training camp and subsequently lived with Melki in London and associated with Abu Doha and members of his group. Further, when confronted with these allegations in response to his SIAC appeal, he denied them categorically and falsely in July 2006. Six months later, when she signed the deportation order, the Secretary of State was clearly entitled to conclude that T was a threat to national security and that it would be conducive to the public good to deport him. If, instead of withdrawing his appeal, he had maintained it, we have no doubt that SIAC would have upheld the Secretary of State's decision. T had

not only taken part in terrorism-related activities, he had deliberately and recently suppressed the truth about them. The reasonable inference would have been drawn that, in consequence, the threat remained.

7. The test which we must apply in an appeal against a refusal to revoke a properly made deportation order is not the same as that which we have applied to appeals against a notice of intention to deport. In the latter case, if we conclude that an appellant no longer poses a threat to national security, our practice has been to allow his appeal. Miss Harrison, for T, submits that we should adopt the same approach here. We do not agree. The starting point is paragraph 390 of the Immigration Rules, which provides:

> "An application for revocation of a deportation order will be considered in the light of all the circumstances including the following:
>
> 1) The grounds on which the order was made;
>
> 2) Any representations made in support of revocation;
>
> 3) The interests of the community, including the maintenance of an effective immigration control;
>
> 4) The interests of the Applicant, including any compassionate circumstances."

Paragraph 392 makes it clear that, in the case of a person subject to a deportation order, who has left the United Kingdom, revocation does not entitle him to re-enter the United Kingdom: all that it does is to make him eligible to apply for leave to enter. In the case of an individual who has not left, the Secretary of State is entitled to give directions under paragraph 10(2) of Schedule 2 to the Immigration Act 1971 for his removal. The decision to do so, subject to certification under Sections 94 or 96 of the 2002 Act is appealable: Section 82(2)(h). The effect of allowing an appeal against a refusal

to revoke a deportation order is, in either case effectively the same: to entitle the Secretary of State to refuse leave to enter or to decide upon removal and to give to the individual concerned, subject to certification, a right of appeal against an adverse decision. In neither case will the factors which may be taken into account be limited to those which would be relevant to an appeal against a notice of intention to deport on conducive grounds founded on national security. The Secretary of State and SIAC is required by Rule 390 to have regard to "all the circumstances". These will include whether or not the appellant is still a threat to national security and can safely be returned to his home country, but it is not limited to those matters. Factors such as his own immigration history and family circumstances can also be taken into account and may be determinative.

8. T's case is now as follows. He left Algeria in 1992, for economic reasons, to go to France. Lack of success in France led him to go to Germany in 1993 and stay there until 1997. In each country, he made untrue and unsuccessful asylum claims. Over time, and under the impact of reports of events in Bosnia and Chechnya, he contemplated going to fight in both countries to support oppressed Muslims. He learnt about training camps in Afghanistan from a man called Khaled and bought a false passport to use to travel there. Action by the German authorities, apparently consequent upon his asylum claims in Germany, caused him to leave before he put his plan into effect. At Khaled's suggestion, he decided to go to the United Kingdom and bought a French passport to permit him to do so. During his stay in Germany, he first met Melki. He flew to Manchester, moved to London after a week and, whilst staying in a house there, met Toufiq (assessed by the Security Service to be a

senior figure in the Abu Doha group). After about three months, he was able to buy a plane ticket to Karachi, intending to travel onwards to Afghanistan. A few days before he left, he discovered that Toufiq was also travelling to Pakistan, with the same purpose in mind and, as it happened, on the same flight as him. Neither discussed why they wanted to go to Afghanistan for training. They stayed at a guest house, run by Abu Zubeida in Peshawar. Toufiq left after a few days. T stayed for about two to three weeks. He was then taken to Jalalabad, Kabul and Khost and then to the Khalden camp. Toufiq was already there. He received training in the use of Kalashnikovs and hawns (mortars). After about a month, he transferred to the adjoining Mahd, where he received religious instruction and weapons training. He first met Abu Doha and Farid Belaribi there. After about four weeks, he returned to the "normal" camp, where he again met Melki. The man in charge was a Libyan, Ibn Sheikh. His purpose in attending the camp was to receive training to fight in Chechnya. An accident occurred which caused Melki to lose both hands and T to sustain fractures to his right leg and an injury to his right eye. It occurred when the trainer asked the trainees to get the explosive charge out of a hawn. The accident occurred in October or November 1997. Thereafter, he received medical treatment in Peshawar. Finally, he was moved to a guest house in Jalalabad, at which he met, for the second time a man called Ressam (whom he had met previously on arrival at a guest house, which we take to be the guest house in Peshawar). Arrangements were made for his return to the United Kingdom by a man called Ja'affar, who suggested that he went to Finsbury Park Mosque, where he might meet Melki. He did so in September or October 1999 and did meet Melki, who invited him to stay at his flat in

Limehouse, East London. When Melki moved to a house in Leyton, he accompanied him. He also stayed with other acquaintances elsewhere in London. He met Belaribi again sometime in 2000 and visited his flat, which was near to Archway tube station. The flat was not in Wessex House. He met Abu Doha and Toufiq again. All three were occasional visitors to Melki's home, where they talked a great deal about Chechnya. They did not, however, discuss things together as a group and he learnt nothing of what they were planning to do. He was aware that Algerians, mainly centred around the Finsbury Park Mosque, were engaged in fraud and the supply of false documents, but thought it was for purely financial reasons. In a further statement dated 28 January 2010, T impliedly admits some participation in fraud – for purely personal reasons. His injuries put paid to any thought of going to Chechnya and his intentions focused on finding a wife and settling down. In paragraphs 9 and 10 of his latest statement, he hints that there are details and matters concerning his time in Afghanistan and in London about which he must remain reticent, to avoid difficulties for himself and his family. His wish to marry was fulfilled in late 2000 when he married his wife by proxy. The marriage was arranged by his parents, after an introduction by a man called Lakhtar. He met her for the first time in Spain in December 2000. He obtained, from Melki, a new French passport for her to facilitate her entry into the United Kingdom. He made a second trip to Spain in January 2001 and travelled back to the United Kingdom with her on 29 January 2001. They did not then go to live with Melki, but stayed at an acquaintance's house near Brixton, until he claimed asylum on 9 February 2001. They were then given NASS accommodation near Brixton and, in May 2001, moved to Birmingham.

Between those dates he saw Melki and Belaribi, but only infrequently. Since his marriage, he has devoted himself entirely to the happiness and welfare of his wife and, now, four children. In 2001, he spoke to or visited Melki infrequently, when he travelled to London and, with his wife, visited Belaribi in Leicester. His wife and Belaribi's wife became friends. They stopped visiting Leicester after Belaribi was detained in 2002 (in fact, for conspiracy to defraud, for which he was sentenced to three and a half years imprisonment on 10 July 2003). He undertook market trading and occasionally visited Leicester and London, until his detention on 11 August 2005. He lied in his appeal statement, because he accepted advice from fellow detainees that he had nothing to gain from his appeal. He maintains that he has made a complete break from his past and wishes to devote his life to looking after his family. He reiterated the account given in his recent statements in his oral evidence.

9. The Security Service accepts that much of what T has said in his recent statements is true; but it assesses that he has not told the whole truth about a number of significant topics: his motivation for travelling to Afghanistan; the circumstances in which he did so; what happened to him there; and his relationships with the Abu Doha group and Melki in London from his return in September or October 1999 to February 2001. It also assesses that his passivity since his release on SIAC bail in October 2005 is attributable to the stringency of the bail conditions and not to any change of heart on his part.

10. We share much of the reservations of the Security Service about T's account of past events. The first loose end is T's conviction in 1995 in Algeria of an offence of failing to display prices, for which a fine was imposed which was

paid. T's explanation is that he had assigned the licence which he had to trade to a friend who was the person who was convicted and fined. That explanation is not accepted by the Security Service, but little, if anything turns upon it. Of greater significance is the implausibility of his stated reason for undertaking military training in the Khalden camp: to fight in Chechnya. By the time that he says he left the United Kingdom – July 1997 – the first Chechen war was over. In August 1996 Alexander Lebed signed an armistice with the Chechen commander Aslan Maskhadov. In November 1996, the two sides signed an agreement which provided for the withdrawal of Russian forces and the holding of elections in January 1997. A peace agreement was signed by President Yeltsin and Aslan Maskhadov, by then Chechen president, on 12 May 1997. Although the issue of Chechen independence was still unresolved, the fighting had substantially stopped. There was no need for outside fighters to defend the Muslim population of Chechnya. T's explanation – that he knew nothing of these events – is simply not credible. They were widely reported throughout Europe. T's information about the wrongs originally done to the Muslim population of Bosnia and Chechnya must have come directly or indirectly through media reporting of events there. If he learnt about the need for fighters by such means, he must have learnt, by similar means, that there was no longer any such need. We are also sceptical about his account of the accident. We do not understand how Melki could have survived with his life if he was close enough to encased explosives for his hands to have been so badly injured that they had to be amputated: he would surely have been killed by shrapnel. We lack the expertise to draw positive conclusions from our scepticism, save to observe that the accident is consistent with the handling of

uncased explosives – i.e. during explosives, not small arms, training. The totality of the open and closed evidence satisfies us, on balance of probabilities, that this is what happened. Further, the people that he admits encountering in Afghanistan – Abu Doha, Toufiq, Melki, Ressam and Ja'affar - had a wider jihadist agenda than supporting Muslims in Chechnya, as did others who were trained at the Khalden camp, for example Richard Reid and Saajid Badat. These factors support the assessment of the Security Service that his purpose in undertaking military training in Afghanistan was to support a wider jihadist agenda than he has admitted. Our assessment of the open and closed material relating to his activities after his return to the United Kingdom in 1999 is that he did not then and thereafter do anything to further such an agenda. We do not know, and cannot reliably assess, whether that was because he never shared it or because events in Afghanistan, and in particular his accident, diminished enthusiasm for it.

11. The company which he chose on return to the United Kingdom and the distance which, retrospectively, he attempts to put between it and him, again support the Security Service's assessment about his outlook. He says that all thought of fighting in Chechnya was removed by his accident and that all he wished to do was to settle down. If so, it is remarkable that he chose to lodge with a man (Melki) who was an active member of a very active terror group (the Abu Doha group). Although he accepts that he was in the company of members of the group and present when, as individuals, they visited Melki's house, he had no idea that they were a group. He also believed that Melki was engaged in fraud and the supply of false documents only for personal financial reasons. We share the scepticism of the Security Service about these

explanations. We believe that he knows more about the activities of others in London than he has disclosed. The Abu Doha group was an active terrorist cell: its leader, at least, supported Ressam's attempt to bomb Los Angeles airport on 14 December 1999; it supported the aborted plan to attack the Christmas market in Strasbourg in December 2000. T was present in London and in the company of significant members of the group at both times and in between them; yet there is no material which demonstrates, or even suggests, that he did anything to support either. We accept that when the attack on the Strasbourg market was being plotted, his mind was on other things: marrying and securing the passage of his wife to the United Kingdom. The reasons for this conclusion are more fully stated in the closed judgment. Thereafter, it may be that T was fortunate in the timing of the arrests of Abu Doha (14 January 2001) and of Melki (15 February 2001) and of Belaribi's move to Leicester (February 2001). It is very likely that these events contributed to T's decision to curtail his contacts with his former associates. We believe that he had mixed motives: his claimed desire to settle down with his wife and his wish not to put that at risk by continued close association with individuals who were, to his knowledge, of adverse interest to the authorities. The two motives are not inconsistent. In the end, it does not matter which was the stronger provided that, by now, both have combined with the raising of a young family to produce a situation in which T no longer poses a real threat to national security.

12. T's conduct and circumstances since February 2001 strongly suggest that he has put any thought of fighting, or of assisting those who might wish to fight, for an Islamist cause anywhere in the world behind him. He has lived quietly

with his wife and growing family in Birmingham. His links with former associates were largely severed when he and his wife left for Birmingham. His trips to Leicester in 2001 and 2002 to see Belaribi are mainly explained by his wife's friendship with Belaribi's wife and by T's wish to trade in Leicester. We accept T's wife's written account of her developing friendship in her unsigned and undated witness statement bearing the creation or printing date 25 January 2010. (Although she did not give evidence orally, she had every reason not to do so: she has four young children to look after). She states that he has explained to her that he went to Afghanistan before they married, but no longer holds views outsides the mainstream of moderate Muslim opinion. It is of course possible that he has presented a false face to her or that she has lied to us; but if so, there would surely be some material which convincingly demonstrated continued support for extremist activity during the last nine years. There is none. All that can be said of him is that he has not made a clean breast of the past; but even so, he has gone a good way towards telling the truth about it. We are not persuaded that the only or main reason why he has not resumed support for extremist activity since October 2005 has been the imposition of stringent bail terms upon him. We are satisfied that there are now no convincing grounds to believe that he now poses a risk to national security.

Safety on return

13. By a Note Verbale dated 24 September 2006 (which replaced a Note Verbale dated 5 August 2006 which, as a result of a clerical error, incorrectly identified

T's parents as those of another appellant) the Algerian Ministry of Justice gave the following assurances in respect of T:

> "Should the above-named person be arrested on entry to Algeria in order that his status may be assessed, he will enjoy the following rights, assurances and guarantees as provided by the Constitution and the national laws currently enforced concerning human rights:
>
> a) The right to appear before a court so that the court may decide on the legality of his arrest or detention and the right to be informed of the charges against him and to be assisted by a lawyer of his choice and to have immediate contact with that lawyer.
>
> b) He may receive free legal aid.
>
> c) He may only be placed in custody by the competent judicial authorities.
>
> d) If he is the subject of criminal proceedings, he will be presumed to be innocent until his guilt is finally established by due legal process.
>
> e) The right to notify a relative of his arrest of detention.
>
> f) The right to be examined by a doctor.
>
> m) His human dignity will be respected under all circumstances.
>
> n) He may benefit from the suspension of the death sentence which has applied since 1993, in the same way as other Algerian citizens who have received the same sentence.
>
> o) If the above-named person may have committed an offence covered by the terms of the Charter for Peace and National Reconciliation, he may then appeal under the Order applied by the Charter."

The Note Verbale also stated that T had been convicted in 1995 "for failure to display prices". A further Note Verbale dated 22 July 2009 confirmed that he had been convicted of that minor offence on 6 February 1995 and fined 1,500 Dinars.

14. On 25 August 2006 T, together with other appellants, completed a declaration under the Charter. On 12 January 2007 the Algerian Deputy Ambassador told a Foreign and Commonwealth official that the embassy had been authorised to issue a travel document for T's return to Algeria. Mr Layden's understanding was that this signified that the Algerian authorities had decided that the Charter should apply in T's case. All looked set for his imminent return. However, there was a delay in issuing travel documents for him. During a visit to Algeria in September 2007, Mr Layden asked why there had been a delay in documenting him. He was told that T had made an application under the Charter which had yet to be considered. No decision had been made by the time that T's solicitors wrote on 3 July 2008 indicating that he wished to reinstate his appeal. In his supporting witness statement dated 28 August 2008, he says that he contacted an official in the military intelligence service (which we understand to be the name given by T for the DRS) who put him in telephone contact with his superior. He told T that he could not give him his word that he would not be arrested and would not give him his word unless he was 95% sure that he would be safe to go back to Algeria. When asked about this by Mr Palmer, he accepted that it was the fact that the Algerians could not give him an assurance that he would not be arrested which concerned him. By a Note Verbale dated 27 August 2009, the Algerian Ministry of Justice confirmed that T had requested that he benefit from the Charter, but stated that because he had never been prosecuted or convicted in Algeria for acts in relation to terrorist or subversive activities, he could not be covered by the Charter.

15. Mr Layden states that SIAC's open judgment in the case of T will be disclosed to the Algerian Ministry of Justice. The references in it to his admission that he received military training in Afghanistan will mean that he is open to prosecution for an offence under Article 87(a)(6) of the Algerian Criminal Code. As deleted paragraphs in the re-amended first open statement dated October 2006 make clear, the Algerian authorities have information, based on what they have been told by Mohammed Meguerba in January 2003 about T's activities in Afghanistan. Mr Layden's view is that there is a real possibility that he will be prosecuted for an offence under Article 87(a)(6). His assessment was that it was more likely than not that he would be. We would not go that far. As paragraph 10 of the first re-amended open statement makes clear, Meguerba stated that T had been trained in explosives by Farid – i.e. Belaribi. He was one of the first SIAC appellants to return. He was interviewed by the DRS, but released without charge. It is not unlikely that the same would happen to T. The difference in assessment does not matter: on any view, there is a real possibility that T would be detained and prosecuted, so that questions undoubtedly arise under Articles 3 and 6 ECHR.

16. The ability of the United Kingdom to deport T is, accordingly, dependent upon the credibility and worth of the assurances given in his case by the Algerian authorities. The terms of the assurances are identical in effect to those considered by SIAC in the cases of other SIAC appellants. The background against which assurances have been given and the reliance which can properly be placed upon them have been exhaustively considered by SIAC (whose conclusions have been upheld by the House of Lords) in BB (5 December 2006), U (14 May 2007), the remitted appeals of Y, BB and U (2 November

2007) and recently in QJ (14 December 2009). We adopt those conclusions. It is unnecessary for us to repeat the reasons for them in this judgment. We will, however, in accordance with our practice, bring matters up to date. The only relevant events have been modestly encouraging. In September 2009 a prison officer was convicted and sentenced to 18 months imprisonment for torturing a detainee in Blida Prison. On 21 November 2009 the Algiers Criminal Court acquitted two men who had returned from Guantanamo Bay on 25 August 2008 of charges of belonging to a terrorist organisation, despite the prosecutor's request for sentences of 20 years imprisonment. When Mr Layden took up SIAC's suggestion, made in its open judgment in QJ, of raising the reporting of serious prison violence in El Harrach Prison in February 2008, on 6 January 2010, Maitre Amara responded constructively by arranging for him and colleagues to visit the prison on the following day, which they did. They met the director and the resident judge for the prison. They were taken on a comprehensive tour of the whole of the prison apart from the womens' quarters. His detailed impressions are set out in paragraphs 9 to 21 of his 10th generic witness statement dated 22 January 2010. Apart from overcrowding – a long standing problem of the Algerian prison estate – his impressions of prison conditions and of the conduct towards and of the prisoners were favourable. Maitre Amara's response to Mr Layden's request is itself significant. It is the clearest demonstration yet of the by now well established relationship of trust and openness between him and his officials and Mr Layden and British Embassy officials. It demonstrates that conditions in Algeria are far removed from those rightly castigated by the Strasbourg Court in Ryabikin v Russia (2009) 48 EHRR 55 in Turkmenistan.

17. On 26 January 2010 Brahim Benmerzouga was deported to Algeria. Together with a SIAC appellant, QJ, he had been convicted in April 2003 of conspiracy to defraud and entering into a funding arrangement for the purposes of terrorism and sentenced to eight years imprisonment. At the conclusion of his criminal sentence, he was released into immigration detention. Assurances were given by the Algerian Government in respect of him in terms identical to those given in respect of QJ. He asked that the British Embassy in Algiers should make contact with his father to alert him to his return home. The Deputy Head of Mission did so on 24 January 2010 and provided him with the flight details. On 26 January 2010, she went to the airport to meet the UKBA and Metropolitan Police escorts who had accompanied Benmerzouga on the flight, but did not see him. On 28 January 2010, Benmerzouga's solicitors emailed the Embassy to state that he had not been released by the Algerian authorities and that his family were not aware of his whereabouts. The Embassy responded on 3 February 2010 to state that they planned to make further contact with Benmerzouga's father on 8 February, when the maximum period of garde a vue detention of twelve days had elapsed. The Deputy Head of Mission telephoned the family on 8 February 2010, but there was no answer. She telephoned again on 9 February and spoke to Benmerzouga himself. He confirmed that he was well and had returned to his family's home on 4 February. Although Benmerzouga was not the subject of a notice of intention to deport on conducive grounds founded on national security considerations, he does, in practice, fall into the same category as the eight other SIAC appellants who have returned to Algeria. His treatments provides

further ground for confidence in the reliability of the Algerian Government's assurances.

18. There have also been legal developments. In Daoudi v France (3 December 2009) the 5th section of the Strasbourg Court held that a decision by France to remove the Applicant to Algeria was in breach of Article 3 ECHR. Daoudi was convicted of terrorism-related offences by the Paris Criminal Tribunal on 15 March 2005, sentenced to 9 years imprisonment (reduced to 6 on appeal) and permanent exclusion from French territory. In 2008, he applied to have the exclusion decision set aside and, in separate proceedings, for asylum. The first application was stayed when, on 23 April 2008, the Strasbourg Court gave an indication under Rule 39, requesting the French state not to remove him to Algeria until the Court's decision was made. On 31 July 2009 the French National Asylum Court (CNDA) held that it was reasonable to think that, in the circumstances of the case, he might, on his return to Algeria, be subjected to means and processes which could be regarded as inhuman or degrading treatment, but that he was excluded from the protection of the Refugee Convention by reason of the gravity of the acts of which he had been convicted by the Paris court. The French government told the Strasbourg Court that it did not have recourse to the practice of diplomatic assurances: paragraph 62. The court reviewed publicly available material about conditions in Algeria. On the basis of them, it concluded that it had not been demonstrated that the frequency of ill-treatment of terrorist suspects had ceased or even diminished: paragraph 68. It concluded that terrorist suspects were arrested in an unpredictable manner, and without a clearly established legal basis, by the DRS and found particularly significant several reports from

reliable sources of secret detention lasting several months: paragraphs 70. The Court's findings are not inconsistent with the approach which SIAC has consistently taken to the deportation of individuals found to pose a risk to national security (or to have been believed to have done so): without the assurances given by the Algerian Government, they could not be lawfully deported. The Court has not yet considered the credibility and worth of those assurances. If, as we believe it will, it does so, it will have to consider the open (but not closed) material which SIAC has analysed in reaching its conclusion that the assurances can safely be relied upon. It is not for us to speculate what the Court will decide.

19. The Court has considered diplomatic assurances given by Tunisia to Italy in respect of persons convicted of terrorist offences in Italy, notably Saadi v Italy (28 February 2008) and Abdelhedi v Italy (24 March 2009). It concluded that assurances given hurriedly, in the case of Saadi and by the Advocate General in Abdelhedi did not suffice to make a decision to expel either of them to Tunisia otherwise than in breach of Italy's obligation under Article 3. In Abdelhedi, the Court noted that it was not established that the Advocate General was competent to give the assurances in the name of the Tunisian state: paragraph 48. It also noted, as a relevant factor, the fact that Abdelhedi's Italian lawyer and/or the Italian Consulate could not visit him in prison: paragraph 49. The fact that assurances given in those circumstances on behalf of the Tunisian state were not held sufficient by the Court does not mean that the assurances of the Algerian government, patiently negotiated and given at the highest level, can not be accepted and/or will not be effective to ensure that those deported will not suffer inhuman or degrading treatment at the

hands of Algerian state officials. Again, we can not speculate what the court will decide. All that we can note is that nothing in the Strasbourg jurisprudence so far requires us to overturn the conclusions we have reached about the credibility and worth of the Algerian government's assurances.

20. Miss Harrison intends, in the case of Sihali, to advance the proposition that the Secretary of State can not or should not rely on assurances in the case of an individual who has not been found by SIAC to pose a risk to national security. She has not fully developed that argument in T's case. We do not wish to preclude her from doing so in Sihali's case. For the reasons explained below, the issue is likely to be academic in T's case. In those circumstances it is unnecessary for us to give detailed reasons for the view which we presently hold: that there is no reason why the Secretary of State can not rely on assurances in such a case. If, after detailed argument, the Commission is persuaded in Sihali's case that that view is wrong, by one means or another, our corrected view can be applied in T's case, if necessary.

21. We have dealt with Article 6 in the previous cases referred to above. We have no reason to believe that if T were to be prosecuted in Algeria for an offence under Article 87(a)(6) he would receive a flagrantly unfair trial.

22. For the reasons given, we are satisfied that if T were to be deported to Algeria the United Kingdom would not be in breach of its obligations to him under Articles 3 and 6.

Other circumstances

23. The letter of 14 May 2009 by which the Secretary of State gave notice that she would not revoke the deportation order made no mention of T's children. This was unsurprising, given that the long letter dated 1 September 2008 made no mention of their circumstances and that the statement, by T, dated 28 August 2008, which accompanied it, simply stated that he wanted his children to have a normal life in Algeria, but did not now believe that it was possible – not for reasons connected with family life in the United Kingdom, but because he believed he would be imprisoned on return. Miss Harrison submits that, because the decision letter did not address the interests of the children, it was legally deficient. In consequence, it should be held to be not in accordance with the law under section 84(1)(e) Nationality, Immigration and Asylum Act 2002. The appeal should be allowed and the Secretary of State should make the decision again, having express regard to their interests. The foundation for the argument is section 21(2)(a) UK Borders Act 2007, which required the "Border and Immigration Agency" (which, by extended definition, included the Secretary of State in respect of functions relating to immigration: section 21(5)(a)(ii)) to "have regard to" the code of practice issued by the Secretary of State under section 21. The code of practice was issued in December 2008 under the title "UK Border Agency Code of Practice for Keeping Children Safe from Harm". Publication of the code followed closely upon the withdrawal by the United Kingdom of a reservation made at the time of ratification of the Convention on the Rights of the Child (CRC) by which the United Kingdom reserved the right to apply legislation related to "the entry into, stay in and departure from the United Kingdom of those who do not have

the right under the law of the United Kingdom to enter and remain in the United Kingdom". Under the heading "Children First and Foremost" paragraph 1.6 of the Code provided:

> "The UK Border Agency must also act according to the following **principles**:
>
> - Every child does matter, as much if they are subject to immigration control as if they are British citizens;
>
> - The best interests of the child will be a primary consideration (although not necessarily the only consideration) when making decisions about his or her future."

The wording of paragraph 1.6 reflected Article 3.1 CRC:

> "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration".

Although the casual reader of the code might have thought that, in relation to immigration decisions affecting them, children would be "first and foremost", paragraph 1.12 would soon have put him right:

> "This code does not create any new or overriding duty which will interfere with the UK Border Agency's primary function; namely to uphold the integrity of the immigration control system, and in doing so, to apply the immigration legislation, the Immigration Rules and the relevant policies of the Secretary of State for the Home Department."

Although the word "primary" appears in both paragraphs 1.6 and 1.12, its effect is determined by the article which precedes it: indefinite in 1.6 and definite in 1.12. Paragraph 1.6 makes the best interests of a child a principal consideration – at its lowest, an important consideration which should not be omitted when an immigration decision is made or, at its highest, one of the most important considerations when such a decision is made. But whichever it

is, it is not to interfere with the principal function of the UK Border Agency: to uphold the integrity of the immigration control system.

24. Miss Harrison's submission must be founded on the premise that, in refusing to revoke the deportation order, the Secretary of State was discharging a function relating to immigration. If she was not, section 21 did not apply to her decision, because she only fell within the extended definition of "the Border and Immigration Agency" in respect of such a decision. If it was, she would only have been required to treat the best interests of the children as a primary consideration to the extent that it did not interfere with her primary function: upholding the integrity of the immigration control system. Accordingly, if section 21 applied to her decision, she fulfilled its requirements, by basing her decision on her proper national security concerns. Nothing in the correspondence addressed to her before she made that decision should have alerted her to the possibility that it might not have been in the best interests of the children for them to return with their parents to Algeria, as T had stated had been his intention. Her decision was in accordance with the law, and this ground of challenge to it must fail.

25. Section 21 has now been replaced by section 55 Borders, Citizenship and Immigration Act 2009, the relevant parts of which provide:

> "1. The Secretary of State must make arrangements for ensuring that –
>
> (a) The functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom…
>
> (2) The functions referred to in subsection (1) are –

> (a) Any function of the Secretary of State in relation to immigration, asylum or nationality…
>
> (3) A person exercising any of those functions must, in exercising the function, have regard to any guidance given to the person by the Secretary of State for the purpose of subsection (1)."

Guidance was issued under section 55 in November 2009, entitled "Every Child Matters: Change for Children". Paragraph 2.7 provides:

> "The UK Border Agency must also act according to the following principles:
>
> - Every child matters even if they are someone subject to immigration control.
>
> - In accordance with the UN Convention on the Rights of the Child the best interests of the child will be a primary consideration (although not necessarily the only consideration) when making decisions affecting children."

There is no precise equivalent of paragraph 1.12 in the December 2008 code. Neither section 55 nor the new code expressly states that it applies to decisions taken by the Secretary of State personally or by SIAC. Mr Palmer's submissions to us were made on the assumption that they did; and we are content to assume that they do. It follows that, when deciding whether or not to uphold the Secretary of State's decision not to revoke the deportation order, we must treat the best interests of T's children as a principal consideration (although not necessarily the only one). But for the consequences of continuing litigation, which we analyse below, we would be satisfied that the appropriate method of discharging that obligation would be for us to make the decision. It would be neither necessary, nor sensible, to remit the matter to the Secretary of State for further decision.

26. If we were required to have regard only to the circumstances of T and his wife, we would, without hesitation, dismiss his appeal. The immigration history of both of them is very poor. T twice used false documents to gain entry to the United Kingdom – in 1997 and 1999. He arranged for the entry of his wife on false documents in 2001. He then made a false asylum claim. When allegations were made against him by the Secretary of State about activities of his which posed a threat to national security, he adamantly, and falsely, denied them. Neither he nor his wife have ever had any legal right or permission to remain in the United Kingdom, beyond that afforded to him by section 78 Nationality, Immigration and Asylum Act 2002. Both are Algerian citizens. Their parents and most of their siblings and wider family live in Algeria. Although they have established a family life in the United Kingdom, they have done so in circumstances in which they were well aware that the immigration status of both of them was, at best, precarious. There is no obligation on the United Kingdom to respect their choice of residence. We doubt that removal to Algeria would, in the circumstances described, amount to an interference in their right to family life of sufficient gravity as to give rise to an issue under Article 8 ECHR at all. If it did, removal would be unquestionably justified by the need to maintain immigration control.

27. It is not the status and circumstances of the adults which gives rise to the issue under Article 8 and/or section 55 and the November 2009 code, but the interests of the children, As, now eight and a half, Ab, just six, H, three and Ad, one year and eleven months. The report of Diane Jackson dated 25 February 2010 and the letter from Mrs Carter, head teacher of the school attended by As and Ab make it clear that, despite the considerable restrictions

placed upon them by T's bail conditions, T and his wife have made a happy and supportive home for their children. In her visit to the family home, Diane Jackson found "a very relaxed, caring, joyful, atmosphere with the parents working together and both sharing their attention with all the children". Mrs Carter describes both parents as "very supportive of our school". They want what is best for their children and have built a strong partnership with the school. It shows in the performance of the children at school. As is described as "a polite, happy and articulate girl who tries very hard and shows a responsible attitude to school life". Ab is described as "a happy, polite, friendly, keen and enthusiastic boy who participates well in all lessons". Both are well behaved and have well developed social skills. In Mrs Carter's view, removal of the family to Algeria would have a detrimental impact upon their education and well-being. We agree with Diana Jackson's comment that the presentation of the two oldest children at school "is a testament to the good care within their family". Her observations are borne out by As's responses to informal questions by Ms Garcia, a partner in T's solicitors. She describes her home and school life in terms which any teacher or parent would be delighted to read and declares her ambition to be a doctor. She is bilingual in English and Arabic, but cannot read or write Arabic. She speaks to her grandparents in Algeria on the phone, but does not understand much of what they say. She says that she does not know what it is like in Algeria. The impression which we have is that, despite her parents' background, she regards her home as being in England. As she grows up, for so long as she remains in England, it is likely that she will see her future here too. Paragraphs 1.3 and 1.4 of the November 2009 guidance requires UKBA (and so, the Secretary of State and

SIAC) “to carry out its existing functions in a way that takes into account the need to safeguard and promote the welfare of children”

and

“undertaking that role so as to enable those children to have optimum life chances and to enter adulthood successfully”.

These words mirror the guidance given under section 11 of the Children Act 2004 in a document also headed “Every Child Matters” as the British Government’s designated five desired outcomes for all children, set out at the conclusion of Diane Jackson’s report. Unless the words are to be treated as empty rhetoric, some effect must be given to them. In a case such as this, where there are now no convincing grounds to believe that T now poses a risk to national security, the best interests of children who have spent their whole life in the United Kingdom, in particular of the oldest two, must weigh heavily in the balancing exercise which the Secretary of State and we must conduct under Article 8 ECHR. Their best interests would not be served by removal to Algeria. If the balance must be struck now, between the need to give effect to a lawful and well founded deportation order in the wider interests of the United Kingdom and its inhabitants, and the interests of the children, it is a fine one. Mr Palmer submits that it falls in favour of upholding the decision to refuse to revoke the order and that, in consequence, we should so decide now and dismiss the appeal. We do not accept his submission, for the reasons explained below.

28. Litigation concerning the Secretary of State’s decision to deport T to Algeria is certain to continue for at least two years. No Algerian appellant to SIAC can

be deported until the appeals of Z, G, BB, U, Y, VV, PP and W have been determined by the Court of Appeal at a hearing fixed for June 2010. If we were to dismiss T's appeal, we have no doubt that he would apply for permission to appeal, at least on the grounds in respect of which permission has been given in those cases. His application, if refused by SIAC, would either be granted by the Court of Appeal, to permit his case to be added to those cases or stayed, pending determination of their appeal. In either event, he could not be removed: section 77 of the 2002 Act. If the appeals of the Algerian appellants fail, the Secretary of State will no doubt make deportation orders in their cases. They, and T, will then undoubtedly apply to the Strasbourg Court. Given its judgment in *Daoudi* and the fact that it has not previously considered the reliability and effectiveness of assurances given by Algeria, it is a practical certainty that it will give an indication under rule 39 to the British Government requesting it not to deport the applicants to Algeria until the Court has decided their cases. The British Government will comply with that indication. Experience in similar cases (e.g. *Saadi v Italy* and *Daoudi*) suggests that it is unlikely to take less than 18 months for the Court to reach its decision. By the time it has done so, As will be ten and Ab nearly eight. They will each have become even more settled in England than they already are. It is not unlikely that the balance, now fine, will, by then, have tilted significantly in favour of revocation of the deportation order. If, arguably, it did, the Secretary of State might find it difficult, lawfully, to refuse to treat the fresh representations that would inevitably be made as giving rise to a fresh claim, and so further right of appeal, under paragraph 353 of the Immigration Rules. Whatever decision we make on this appeal, the

Secretary of State will have to make a further decision which, if unfavourable to T, is virtually certain to result in a further appeal. If we were to uphold the deportation order, it would be by way of a further appeal against the decision to refuse to revoke it. If we were to allow the appeal, it would be pursuant to a decision of the Secretary of State to give directions for the removal of T and, probably, his family, under paragraph 10(2) of Schedule 2 to the Immigration Act 1971. In either event, the questions would be effectively the same: would the best interests of the children and the right to respect for family life under Article 8 ECHR outweigh the other considerations deployed by the Secretary of State analysed above? In the case of a man, such as T, who no longer poses a threat to national security, it is better that that question is determined at the appropriate time in proceedings which focus upon what will then be the real issues in the case. The circumstances which will result from inevitable further litigation are included in those which we can take into account under paragraph 390 of the Immigration Rules, even though not expressly mentioned in the four subparagraphs. In the circumstances of this singular case, and for the reasons set out above, we allow this appeal. We have not been invited to, and do not, give any direction under section 87 of the 2002 Act to the Secretary of State.