Appeal No: SC/42 and 50/2005
Date of Judgment: 27 April 2007

SPECIAL IMMIGRATION APPEALS COMMISSION

Before:

The Honourable Mr Justice Ouseley (Chairman)
Senior Immigration Judge Jordan
Mr J Mitchell

DD

APPELLANT

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

and

AS

APPELLANT

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

For: DD	Mr E Fitzgerald QC, Mr R Husain, D Friedman instructed by TRP Solicitors
Special Advocates for DD	Mr A Nicol QC and Ms J Farbey instructed by the Special Advocates Support Office
For: AS	Mr E Fitzgerald QC, Mr D Friedman, Mr H Southey instructed by Birnberg Peirce Solicitors
Special Advocates for AS	Mr N Garnham QC and Ms J Farbey instructed by the Special Advocates Support Office
For: SSHD	Mr I Burnett QC, Mr T Eicke, Mr A O'Connor and Ms C Neenan instructed by the Treasury Solicitor

Hearing dates: 30th October – 10th November, 16th and 17th November 2006.

OPEN JUDGMENT

Introduction

1. The Appellants DD and AS are Libyan nationals. Their cases are entirely separate, but were heard together because of the common issues which arose in relation to the risks which they would face were they to be deported to Libya.

2. DD was born in 1975 and left Libya in November 2000, on his evidence, travelling to Tunisia, Turkey for two years, Malaysia for two months and then to China in 2003. The Libyan authorities say that he left in the early 1990s, and has not returned since. The SSHD does not accept that DD has given a full account of his travels since leaving Libya. DD arrived in the UK from China on 27 January 2004 with his pregnant wife, a Moroccan national. He used a Spanish passport, to which he was not entitled, in the name of Abselam. He claimed asylum on arrival.

3. The SSHD refused DD's asylum claim on 8 March 2004. He did not believe DD's claim to be a member of an anti-Qadhafi group and thought that he was an economic migrant who could safely be returned to Libya. An Adjudicator allowed his appeal on asylum and human rights grounds on 25 May 2005. The Adjudicator found it credible that he had engaged in anti-Qadhafi activities in Libya, had been persecuted there and was at further risk because of his activities abroad, particularly in the operation of an anti-Qadhafi website. He had not been granted ILR by the time of his arrest on 3 October 2005 with a view to deportation, and had remained throughout on temporary admission. He now has two young daughters both born in the UK.

4. DD has been in immigration detention since his arrest, as a person liable to deportation. The SSHD served DD with notice of intention to deport on the grounds that his removal would be conducive to the public good in the interests of national security. He was alleged to be a senior member of the Libyan Islamic Fighting Group, involved in providing extensive support to a wide range of Islamist extremists loosely affiliated to Al Qa'eda networks, who had been engaged in terrorist activity for a substantial period of time, well placed to assist those who were planning terrorist attacks in the UK and overseas.

5. DD appeals on the grounds that his removal would breach the UK's obligations under the Refugee Convention and Articles 2, 3, 5, 6 and 8 of the ECHR; the decision was not in accordance with law and the SSHD's discretion under the Immigration Rules ought to be exercised differently. He put the national security case in issue.

6. AS was smuggled out of Libya into Egypt in 1997, according to the statement which he supplied for his asylum claim. He says that he then went to Saudi Arabia until June 2001, when he left for Syria in order to seek asylum in Europe. In February 2002, he was in Malta; he paid $4000 to be smuggled into the UK, where he was met by his brother on 28 or 29 February 2002, and was taken by him to the Home Office to claim asylum on 8 April 2002. He said that he could not claim asylum in

those other countries because they would return him to Libya. The SSHD put forward a different version of some of his travels before he made his asylum claim in April 2002. He had spent time in Italy but left Italy for the Netherlands and then for the UK, arriving on a false Italian passport in March 2002. On 16 May 2002 he was arrested under immigration powers, since he could be removed to Italy under the Dublin Convention. His asylum claim in the UK was refused on 13 February 2003 as he had previously applied for asylum in Italy, and Italy had agreed to his return. He claimed asylum on the basis that he and his family had been persecuted and tortured by the Qadhafi regime because of their true Islamic views. His brother had been granted asylum on appeal in 2002, reflecting a view, then current but not for much longer, that absence for 6 months from Libya created a real risk of being seen as disloyal to Libya. He claimed that another brother had been tortured to death in Libya and that he too had been ill-treated there.

7. AS was prosecuted in the UK for two offences to which he pleaded guilty in July 2002: using a forged Italian identity card and handling a stolen British passport in a woman's name - which he claimed to have purchased in a mosque for his wife, who is currently in Pakistan. He received concurrent prison sentences of 1 and 2 months. After his sentence was completed, he was again placed in immigration detention.

8. In December 2002, Italy made a formal extradition request for him in respect of serious terrorist offences. Although in January 2003, Italy had notified the UK that it would accept AS back under the Dublin Convention, that did not happen as the removal was then proceeding as an extradition case. A *habeas corpus* challenge to his extradition was dismissed by the Divisional Court in December 2004, and the House of Lords refused permission to appeal in June 2005.

9. In 2oo4, the Italian Constitutional Court ruled that Italian pre-trial custody time limits applied to those in custody outside Italy whose extradition was being sought, unless they had been notified by the UK authorities of the completion of a pre-trial investigation into them in Italy. In April 2003, the Italian authorities had requested that such a notification be given to AS, urgently. Through oversight, no such notification was then given to AS by the UK authorities. It was only given in October 2005, immediately upon notification by the Italian authorities to the UK authorities of the Constitutional Court's ruling.

10. Italy then withdrew its extradition request in October 2005, and notified the UK that it would not accept AS back under the Dublin Convention - a stance the legality of which is not accepted by the UK, but which nonetheless inhibits his removal to Italy.

11. On 14 December 2005, the SSHD served AS with notice of intention to deport; AS was said to be linked to Islamist terrorist groups. The SSHD did not allege that AS was an LIFG member, although the Libyan authorities do make that allegation. He was arrested and has been in immigration detention since then. AS appeals on the same general

grounds as does DD, save that he did not expressly put the national security case in issue.

12. AS has been tried in Italy in his absence, not that he wished to be present, for conspiracy to commit acts of terrorism, forging public documents and handling stolen goods. He was convicted in January 2007 of criminal association for the purposes of producing false documents but was acquitted of the terrorist conspiracy. There is no reasoned judgment yet. He was sentenced to 4 years 6 months imprisonment but would have no time to serve because of the period spent in custody on remand in connection with the extradition request and a 3 year reduction in his sentence as a result of a new law. The SSHD believes that the State Prosecutor will appeal the decision if grounds exist.

13. In each instance the SSHD certified under s97 (1)(a) of the Nationality, Immigration and Asylum Act 2002 that his decision was taken in the interests of national security. Hence the appeal route lies to this Commission and not to the AIT.

The LIFG and Al Qa'eda

14. There was considerable debate about whether the LIFG had now become closely linked to Al Qa'eda. The SSHD contended that there were now close links between the LIFG and Al Qa'eda. If so, membership of the LIFG could the more readily be seen as demonstrating links between an individual and Al Qa'eda and a more direct threat to the UK's national security. It is the contention of the Appellants, although denying any membership of the LIFG, that there is no link between Al Qa'eda and the LIFG, and that most of the LIFG members have directed their actions at the Qadhafi regime. Some were opposed to the activities of Al Qa'eda, although some LIFG members could have joined it.

15. The LIFG is proscribed under Schedule 2 to the Terrorism Act 2000 by the Terrorism Act 2000 (Proscribed Organisations) (Amendment) Order 2005 No 2892, against which there has been no appeal. The Appellants pointed out that this proscription only took place on 14 October 2005 after the arrests of the Appellants. (The United States had placed the LIFG on its list of designated terrorist organisations in 2004).

16. The orientation of the LIFG towards Al Qa'eda was considered for the purposes of Part 4 ATCSA in the appeal of M in 2004. The SSHD accepted before that appeal began that he could not show at that time that the LIFG as a whole was affiliated or linked to Al Qa'eda. His case was that substantial parts of it were so linked. It was a consequence of the Attorney General's concession about how the Act should be applied, in the light of the nature of the emergency underlying the derogation, that the focus was on the LIFG's link to Al Qa'eda rather than on a more general global or anti-western jihadist outlook, although the two have obvious overlaps. The SSHD tried and failed to make out the case that M personally was one of those reasonably believed to be linked to Al

Qa'eda. The SSHD confirmed that in the present appeals he was not trying to say that that decision had been wrong on the material available then. There was a large amount of new material in open and closed.

17. The SSHD's evidence was that the LIFG is an Islamist extremist organisation which had started in the Afghanistan/ Pakistan border area in 1990, with strong Taleban connections and many members who, even then, had significant connections to Al Qa'eda operatives. Its aim had been to overthrow the Qadhafi regime and replace it with an Islamic state. Colonel Qadhafi, who regards himself as a devout Muslim, was not just tyrannical but non-Islamic in their eyes. The LIFG carried out a number of terrorist attacks in Libya or claimed to have done so, including at least one assassination attempt on Colonel Qadhafi. There was a tough military and security response which led to many members being killed, imprisoned or fleeing abroad in the mid 1990s. The dispersal led to a broadening of its outlook, and an embracing of the pan-Islamic, global jihadist outlook of Al Qa'eda. So although it retained its anti-Qadhafi views, they were subsumed within a deeper worldwide Islamist agenda. There is other evidence that some had returned to Afghanistan where the Taleban offered refuge until they were forced out in November 2001 whence many went to Iran, Europe and Asia.

18. Al Sadeq and Abu Mundhir, respectively the emir and spiritual leader of the LIFG, were more focused on Libya but not to the exclusion of the wider Islamist agenda. After their detention, the LIFG had become more closely aligned to Al Qa'eda. It had already been subscribing in large part to the Al Qa'eda outlook. It was possible however that some of the LIFG members were opposed to Al Qa'eda's activities, but not that the LIFG was largely involved in supporting immigrants and in mere political opposition.

19. The SSHD's generic statements themselves do not contain very much information on the Al Qa'eda/LIFG links. There is some detail about individuals, and some evidence from which it could be inferred that LIFG members had taken action in countries other than Libya. But this presupposes that the individuals are LIFG members, which in DD's case is disputed and in AS' case not alleged by the SSHD, and that some of the foreign activity can be relied on as proof of action against countries other than Libya. There are a number of Libyans who have been convicted of involvement in the Casablanca bombings but Witness D, the Security Service witness, accepted specifically in respect of one of them, in a different context, that the conviction could not be regarded as evidence in view of the way in which the arrest, interrogation and trial had been carried out. That would apply to any of the Libyans convicted and so the fact of their convictions cannot show that there was a more global outlook or an Al Qa'eda connection. The Sanabel Relief Agency, which is closely connected to the LIFG, is on the UN 1267 list as Taleban or Al Qa'eda linked, as is the LIFG itself, and its funds are credibly said to have been used to fund terrorist activities overseas. Otherwise in open there is little more than the bare assertion that Al Qa'eda and the LIFG are closely linked.

20. The SSHD's views were not essentially based on what he had been told by the Libyans, although a small amount had come from the Libyan security services. No detainee reporting from Libya was relied on now for pragmatic reasons. That which had originally been included had been excluded as a result of the Special Advocates' comments to the SSHD.

21. Witness D was asked by Mr Friedman for the Appellants, about the views of Benotman, a former member of the Shura Council which directed the LIFG, who had been or at least had seen himself as a senior LIFG figure in the UK from 1995 until he left the LIFG in 2003. These views were set out in an interview in 2005 held in the UK, published by the Jamestown Foundation in its Terrorism Monitor 2006. Witness D agreed that a Council of up to 15 men ran the LIFG and that who was leader was a matter for debate often among themselves. Benotman denied that there was any significant link between the LIFG and Bin Laden; it was not sympathetic to Al Qa'eda; no LIFG member had ever been implicated in international terrorism; the focus had always been exclusively on Libya: overthrowing Colonel Qadhafi and replacing the regime with an Islamic state. There were Libyans who were linked to Al Qa'eda but they were not LIFG members. He and several other LIFG leaders had condemned the 11 September 2001 attacks from the operational and tactical point of view; these attacks were the "Achilles heel" of the whole jihadist tendency. The LIFG had been considerably degraded by 1998, and had stopped being a credible fighting force by then.

22. Witness D did not accept that this was entirely honest: there were strong connections going back to Afghanistan between the LIFG and the Taleban, and between the Taleban and Bin Laden. There were connections between significant portions of the LIFG and Al Qa'eda in Afghanistan and elsewhere, although in 1992 the LIFG as a group would have been focused on Libya. Benotman's criticism of 9/11 was not on moral grounds and he was speaking to a public paper. Leaders' views about global jihad and involvement in terrorism outside Libya had varied; Benotman, Sadeq and Mundhir had been more focused on Libya. The SSHD's research showed no support for the view that Sadeq had ever been allowed into the UK. Although some LIFG members would be opposed to Al Qa'eda, DD was not one of them.

23. Mr Friedman also asked about Witness D's views of an article in the Terrorism Monitor of 2005 by Alison Pargeter. This article said that the LIFG had been more or less eliminated in Libya by the end of the 1990s. According to figures released in the summer of 2005 by the Qadhafi Foundation, the regime was holding 182 members of the LIFG in prison. Some 150 members had been held incommunicado for many years. This figure may include jihadists more generally. They were eventually sentenced in a mass trial in 2002. Two were sentenced to death, others to life imprisonment. The sentences were upheld in December 2004 and are being served in Abu Salim prison. Some Libyans had been engaged in the Iraq insurgency, arrested, and returned to Libya. The arrest of Sadeq and Mundhir and their removal to Libya had been a

great blow to those in exile. There were only dozens in the UK, and they had had only limited success, had abandoned the armed struggle, and were focusing their efforts on producing anti-regime propaganda and providing money and fake documents to help others settle in Europe. Some of this information about how insignificant the LIFG now was came from the wives of two of those arrested in October 2005. The names of those arrested had been among those on a list supplied by the Libyan authorities, for whom the proscribing of the LIFG and the arrests in the UK with a view to deportation, had been a major success in their fight against Islamic extremists. The Libyans had been keen to proclaim that the LIFG was connected to Al Qa'eda. When five members were arrested by the United Kingdom authorities in October 2005, according to Ms Pargeter, this looked "*more like a symbolic defeat for the remnants of a fading organization.*"

24. Witness D agreed that by the end of the 1990s, the LIFG was significantly diminished in its capabilities within Libya. The LIFG in the UK was probably helping with immigration, settlement of members in Europe and propaganda but that was not the whole truth. He had not come across an instance of false documentation or immigration papers being provided for ordinary immigration; he had seen documents provided for terrorist purposes. One might expect that the Libyans would provide a list of people whom they said were Islamist extremists. He did not accept that the Libyan authorities were particularly keen to promote the links between the two organisations and although the Libyans might take the view that the LIFG was Al Qa'eda linked, that was in fact what the position was in the SSHD's view anyway.

25. There was some debate about the purpose and relevance of an article by Moshe Terdman part of which dealt with the ideological roots of the LIFG. It was not the SSHD's purpose to deduce from it that the LIFG had a particular ideology which showed that the LIFG or DD were Al Qa'eda linked, or shared a global jihadist outlook. Rather, the SSHD used it for what it said about the structure of the LIFG. Witness D said that his case was rather based on what the LIFG did, although ideology was not ignored entirely. He had some knowledge of the ideological differences between the various strands of extremist Islam, but he did not claim to be an expert on them.

26. In reaching our conclusions on this topic, we have also taken account of the closed evidence. In general, it is our view that there are close links between Al Qa'eda and many senior LIFG members; the closest links were forged and exist outside the UK. Those who hold global jihadist views generally have the links to Al Qa'eda and still seek to oppose the Qadhafi regime by means which include violence. They co-operate with and support other groups in a broader anti-western agenda and in actions directed against what they all see as non-Islamic states notably in the Middle East and North Africa. There has been a clear shift in emphasis in recent years, caused in part by changes in leadership forced by arrests. Those with Al Qa'eda views are in the ascendancy and some of those of other views have left the LIFG or have become marginalised. The difficulties of operating within Libya, and the contacts

among the Islamists of many nationalities dispersed throughout the west and elsewhere, have encouraged a more global outlook. Those of that outlook represent a clear danger to the national security of the UK.

27. The Libyans have a clear interest in defeating the LIFG because of its opposition, and violent opposition, to the Qadhafi regime, and because of what the LIFG would replace it with if it could. But the Security Service assessment is not essentially derived from the Libyan authorities' views. The Appellants' suggestion, that a mismatch between the amount of material which might have been received from Libya and that used by the SSHD showed that material from Libya had been treated as unreliable or tainted, is of no significance.

28. The SSHD also relied on membership of the LIFG as showing a risk to national security because of its anti-Qadhafi Islamist violence. There was a reciprocal interest between Libya and the UK in combating Islamist terrorism. Taking action against the LIFG and its members advanced the UK's national security through fostering anti-terrorist co-operation with Libya, which is now a partner of importance in combating the Islamist terrorism which threatens both countries.

29. The Appellants accepted that the Government was entitled to say that the national security of the UK was now threatened by the acts of Libyan nationals which harmed Libya. This was either because that could lead to action by Libya against the UK or its nationals, or more probably because it could harm other UK interests by making counter-terror co-operation, in particular, more difficult. *SSHD v Rehman* [2003] 1 AC 253 had held that the Commission should defer to the view of the executive as to what relationships and factors constituted national security interests.

30. In our view, whether or not the LIFG generally has close Al Qa'eda connections, or has become more global in outlook, it has not abandoned its aims in Libya. That is a facet of the global jihadist aims anyway. But if the LIFG had no broader outlook in general, the focus on Libya would be yet the more important to it. It is not the force it once was in Libya; it has been significantly degraded by actions taken against it in the 1990s and by the recent arrests of its leaders, now in Libya. The impact of the arrests in the UK with a view to deportation will have weakened it. But that cannot logically be taken as a permanent state of affairs, showing that they now represent no threat to the UK's national security. There clearly are a number of LIFG members, and other individuals in the UK hostile to Colonel Qadhafi, prepared actively, for example through accommodation during planning and preparation, false documents, fund raising, training and the purchase of equipment, to support the use of violence against his regime if they have the chance. The existence of a UK base from which violent action against Colonel Qadhafi can be planned would be an encouragement to the group to grow in strength.

31. The risk of violent action against Libya and its interests, supported by UK based Libyan Islamist extremists is legitimately to be taken as a

further threat to the UK's national security, because of the desire of the UK Government to retain the newly improved relations with Libya, and the advantages which co-operation in countering Islamist terror brings to the UK's security. Advancing that co-operation and disrupting that threat to the Libyan regime assists the UK's national security interest.

32. However, submitted Mr Friedman, mere membership of the LIFG before proscription could not be sufficient to show a threat to the national security of the UK. There had also to be evidence of activities which themselves amounted to terrorism. Proscription did not of itself prove that such activities had been undertaken. The fact of membership did not advance matters because there were two groups within the LIFG: those who were active supporters of global jihad and a larger group who were providing no more than immigration assistance and political dissent from the safety of the west without violence. There had been no opportunities for individuals to modify their behaviour in the light of that proscription. It had to be shown that there were terrorist acts carried out on behalf of the LIFG and without the justification of self-defence.

33. We accept that it is not possible to conclude from the evidence that the mere fact of LIFG membership shows that an individual is necessarily a global jihadist or Al Qa'eda supporter. The real focus of the analysis of that aspect of the national security risk is not therefore simply on whether the individual is an LIFG member, but is on what an individual LIFG member has done and may do in the future, taking account of what is known of his outlook and with whom he associates. By the same token, there are Libyan jihadists who are not members of the LIFG, and so the absence of membership does not disprove an Islamist agenda. Again the focus has to be on what the individual has done and may do.

34. Witness D may not have been familiar with all that researchers have written on the LIFG, but the real point is the one which he made - the threat posed by an individual is to be judged by what his own outlook and actions show. The SSHD's case in respect of DD was not a simple assertion that LIFG membership of itself showed DD to be of a global jihadist outlook and a supporter of violence in Libya and outside. The issue of LIFG/Al Qa'eda links is capable of being something of a distraction at that more general level. What is clear however is that LIFG membership alone does show that an individual is willing actively to support violent Islamist opposition to the Qadhafi regime, which is the further basis for the threat to national security.

35. It is likely that the assessment of the risk posed by an individual will not readily be compartmentalised into categories of direct and indirect risk to national security; some activities may not readily be pinpointed on the evidence as belonging to one or other category; they may serve both a wider Islamist and an anti-Qadhafi purpose.

36. How far acts done before the date of proscription of the LIFG can show future risk is a matter for judgment on the whole of the material in relation to each individual; the date of proscription of the LIFG does not constitute a cut off point before which actions should be ignored in the

assessment of danger. The prospect that individuals might modify their behaviour in the UK in the light of the proscription is worthy of consideration.

37. There was a certain amount of cross-examination about the past conduct of the Libyan regime; we shall deal with that primarily when considering safety on return to which it might be relevant. But it appeared also to be said that not all past action against the Qadhafi regime posed or evidenced a current threat to the national security of the UK, because when those activities were being carried out, Libya was run by a leader and henchmen who were themselves supporters of illegal violence, threatening the national security of the UK.

38. There have plainly been events in the past between the UK and Libya which meant that relations were hostile. Quite how the question of any UK national security interest in preventing the overthrow by violence of the Qadhafi regime, and its replacement by an Islamist regime based on Shari'a law, would have been viewed in a deportation case at that time is irrelevant speculation. In this context, the questioning about the Shayler allegations that there might have been knowledge or involvement by the Security Service in a plot to kill Colonel Qadhafi is irrelevant; and from what we have seen, the allegations appear to be without sound foundation, and Shayler appears to be less than reliable. The SSHD position was summarised in a short statement by Mr Winton from the Treasury Solicitor's Office.

39. But a related question might arise if the national security evidence included actions at a time when relations were hostile; the improvement began no later than 1999 when diplomatic relations were restored, and gathered pace very markedly in 2004 and 2005. We have considered that in our conclusions on each Appellant.

The National Security Case against DD

40. The SSHD's case was that DD was a senior member of the LIFG and was probably responsible for the dissemination of information and propaganda for the group. He had provided extensive support to a range of Islamist extremists belonging to loosely affiliated Al Qa'eda networks, and had been involved in the procurement and possibly in the production of false documents. He represented a threat to the UK through his activities against the UK, and the West more generally.

41. The SSHD's open case that DD is a senior member of the LIFG draws on a combination of factors: that DD is an Islamist extremist and that he has or had a variety of connections, some quite close, to LIFG members. The evidence that he is an extremist is also drawn from those connections. The evidence has to be looked at in the round to see what strength as a whole it bears.

42. DD relied on three statements before the hearing began: his statement for his asylum appeal and the supporting documents, a statement for his bail application which expressly did not seek to deal with the detail of

the case against him, and what was called his second statement. He later produced a third statement dealing with the contents of a family website following expressions of disquiet by the Commission as to how the matter had been left. DD did not give evidence orally: his counsel, Mr Friedman, explained that DD had given his evidence in writing dealing with the main points in the open case; there was a significant amount of material in closed; cross-examination could create problems for DD were he to be returned because he would be detained in Libya and material from this appeal could be used against him by the Libyans; he had also been arrested here on suspicion of committing terrorist offences and had been questioned about matters which did not feature in the open evidence. One such matter had been the statement of Malek Andoulsi who might have been tortured in Morocco in connection with the Casablanca bombings investigation and trial.

43. DD's statements disputed that he was a member of the LIFG and that it had a global jihadist outlook or was linked to Al Qa'eda. He was sympathetic to the aims of the LIFG, as he was to a number of other Muslims and secular groups committed to the overthrow of the Qadhafi regime. He had *"not advocated violence save in the very specific circumstances of people defending themselves from the violence of the Colonel Qadhafi regime in Libya itself."* He was against the killing of any civilians. He had never concealed the fact that he produced websites critical of the Qadhafi regime. He had been a member of a small cell of Al Tajjamu Al Islami, the Islamic Gathering, in Libya, where he had used his artistic skill from a young age to ridicule and attack the regime through leaflets and writing on walls. He explained how he knew and what dealings he had had with certain individuals identified as Islamist extremists in the open evidence. He did not deal with all the allegations in open against him.

44. The SSHD put considerable weight on a website which was found on a DVD when DD's address was searched after his arrest on 3 October 2005. The discovery of and allegations about this website were not made known to DD until about 27 October 2006, although DD would have known that the police had his computer. The website was constructed in November 2003 and it is accepted by DD that it is his.

45. The website describes itself as the family website. DD's wife was pregnant in China where they then were, and DD said that it is intended to serve as the website for pictures of the child (or son). The translations of its content differ. China is described as their second homeland, and a place where they had wonderful days. There is a considerable amount of religious material. It asks in the Introduction that DD be granted the highest rank of *"shahadah for Your sake and to resurrect me and my family in the company of the Prophets, of the Most pious, of the Shuhadaa, and of the righteous, whose company is the best of any other company."* Later on, it says : "*O Allah, You have guided us to Islam (to Submission), without us asking You, so please Our Lord, grant us Shahadah, and this time we are asking You and beseeching you."* The introduction continues, asking for children who

will be resilient, "*make jihad for your sake and who will emigrate for your sake."*

46. We have used here the translation which was provided on behalf of DD after the Commission raised questions about the absence of any response by him to the allegations about this website and the significance which the SSHD was attaching to it. It highlights the Arabic words the translation or significance of which is important. The translation provided with the amended SSHD statement translates the Arabic words, which we have used above, as "*martyrs*" and "*martyrdom*", or, for *"jihad" "virtuous warriors".* The amended SSHD statement made it clear that he was attaching significance to the words of martyrdom in particular.

47. There were four songs on the website which the SSHD had not been able to access, one of which is entitled *"I am a terrorist"*. DD's translation did not refer to this nor did DD make any comment about the song or how it could be accessed. Another song refers in its title to rifles and other guns, and a third looks to the day *"when every nation shall come down on its knees."*

48. There was a set of pictures called *"Wonderful"* or *"Cool" "Flashes",* depending on the translation. The four pictures have background songs praising *"jihad*" and *"martyrs".* The first refers to the pain of Iraq; the second shows a black clad sword wielding figure and the writing refers to Muslim tragedies and to the second caliph, Omar, a brave fighter and leader, regaining the nation's glory; the third shows George Bush, Tony Blair, Ariel Sharon and a map of Iraq; the fourth shows Palestinian children and the writing refers to them as "*Islamic cubs of steadfastness and resistance in the face of Jewish pigs".* (DD's translator did not refer to this set other than to note them in the website menu).

49. There were then some pictures with a commentary: a baby who had been shot in Palestine, a tragedy known to all Muslims; the Al Aqsa mosque in Jerusalem, with a poem called "*The wolves of al-Quds*", to the effect that the army of Mohammed will remove the recent usurpers from the soil of Palestine, (the SSHD translation notes references to the usurpers' control by force and rape); and a picture of the Kaabah in Mecca, and prayers to Allah to bind the nation's wounds. DD made no reference to any of these pictures. There were favourite links to some Islamic websites.

50. The website background songs, according to the SSHD translation, are Jihadi songs, inciting and praising jihad and martyrdom: Muslims are strangers in their own lands; Kandahar is the resting place for the martyrs who are in paradise, so do not cry for them; *"My dear mother do not cry because I am away because we will meet. The best companions are Mujaheedins."* There is no translation of this on behalf of DD and he makes no reference to it.

51. At the end of Mr Friedman's cross-examination of Witness D, he dealt with this website briefly by asking whether this was all that the SSHD

had relating to DD as a senior LIFG member with a role in propaganda. Witness D replied that there was no more website activity in open which the SSHD was relying on. This was because, said Witness D, DD would have been aware that he was of potential interest to the UK authorities and would have been quite careful about what he kept on his computer. Witness D had been surprised to find this DVD, especially from someone who claimed to be focused on Libya. Mr Friedman suggested that that sort of material could be found on many computers without leading to deportation. No answer is recorded although Mr Friedman may have thought that there was agreement. We were concerned that Mr Friedman might not have had time to take instructions on what might be more important to us than it appeared to him. He confirmed that he had asked his questions about the website, but we gave him the opportunity to reconsider. That led to the further statement from DD and the possibly different translation.

52. DD says that it is a family website enabling his family to keep in touch, it was not for public viewing, was never finished and was never available on line. It was not created to convey political thoughts for he had other websites which he used to promote his political ideas. The quotations in the Introduction were largely from the Koran with one supplication from the Prophet Mohammed, and a supplication from DD at the end. We accept that. DD explained that "*Shahadah"* was the highest rank of religious conviction; *"jihad"* in the context of his child referred to children who would strive, be energetic and stand up for what they believed in. The translation submitted on his behalf pointed out that *"Shahadah"* meant declaring one's belief in the one God and in his Prophet; it also meant bearing witness by striving for perfection or offering one's life for Allah, and in that sense it could refer to martyrdom; *"Shuhadaa"* means *"witness"* and is a title given to a Muslim after death if he died fulfilling a religious command or during a religious war. "*Jihad*" meant striving to make Islam superior and to achieve a high moral standard for oneself and it could also mean holy fighting for Allah. We accept that those differences of meaning exist.

53. The question of what was meant and what it signifies has to be gathered not from translation alone but from the content of the website, what DD says about its meaning and other material which bears on it.

54. As to anti-Colonel Qadhafi material more generally, it is beyond dispute that DD has developed literature and websites attacking Qadhafi, because he himself has often said from his earliest statements that that is what he does. He says that they have been censored in Libya and that they have got his family there into difficulties with the police, leading to questioning and arrests. He has identified some websites and produced a few examples of what he has done, to none of which could any national security objection be taken.

55. The search of the hard drive of DD's computer also revealed what the SSHD said was a link to the LIFG and a role in providing support to Islamist extremists, other than in relation to propaganda. A passport photograph of a beardless M (SIAC reference letter), an admitted LIFG

member and of some seniority, was found on the hard drive. Another passport photograph was discovered on the scanner at the same address, also assessed to be of M; there was some support, said an expert, for the view that one was a digitally enhanced version of the other. This strongly supported the SSHD view that DD was involved in altering identity documents, and doing so for an LIFG member. DD did not contest any part of that evidence; he may have felt inhibited by the risk of self-incrimination. But we accept it. No doubt, by itself, it could be said to be as consistent with his sympathy for the LIFG as with his membership of it.

56. There was further evidence that DD had been engaged in the production of false documents, in addition to the fact that he had obtained and used false Spanish documents for his journey to the UK from China, and had travelled as a Moroccan to Turkey, Malaysia and China. At DD's address were also discovered two other passport photographs, a scanner, laminator, cutting knife, board and ruler, and a Sudan identity card. Neither his possession of these items nor the inference which the SSHD drew from them was challenged in any evidence or questions on behalf of DD. We accept the inference. DD had a number of aliases, which he did not dispute or explain: Mullah Shakir Ullah Ghaznawi and Imad Al Libi. Ghazni, from which "Ghaznawi" comes, is in Afghanistan. He arrived as Hossein Abselam, and he has also used the name Abdullah Bataebeid.

57. DD did take issue with one document which the SSHD relied on as showing his access to and use of false documentation. For his asylum appeal, DD produced a summons, described as a witness summons, which he said had been served on his father in Libya. He could not say whether or not it was authentic in the light of the challenge to it but he believed that it had been served on his father. The SSHD considered that DD knew that it was false. It is dated 1 September 2001 and tells DD's father that because his son has fled abroad and is continuing his anti –Revolutionary activities to the great detriment of its security and achievements, the father has to attend the Head Quarters of the Internal Security Agency with all the possessions of the son which could be useful to him abroad, has to stop communicating with him, and instead must co-operate with the Agency against traitors. It also says that DD was convicted of an offence in August 2001 contrary to a provision of the Penal Code for which DD says the minimum sentence is life imprisonment and the death penalty is a possibility. This is of course also relevant to the risks which DD would face on return. The father died in Jordan where he was receiving medical treatment on 2 March 2007.

58. The British Embassy in Tripoli confirmed that there were a number of aspects of this document including its date, and the numerals used which showed that it was not authentic. The Libyan authorities disclosed the fuller details in a Note Verbale of 1 November 2006. We accept that it is not authentic for those reasons. We see no reason to accept that DD was supplied it by well-wishers who wanted to assist his asylum claim, but did not want him to believe that the document was false and so were prepared for him to be worried for himself and his

father, but did not expect him to contact his father, who would have told him the truth. We believe that DD knew that it was false and was prepared to use it to further what, on the SSHD's current case, was a genuine asylum claim, even if not all of its detail was accurate, but which at that time the SSHD had disbelieved.

59. The SSHD pointed to DD's contacts with three individuals, apart from M, as showing significant links with Islamic extremists. The first is Al Sadeq, whom DD admits to knowing, but as Ali Mohamed. Al Sadeq was the worldwide emir or leader of the LIFG until his detention in March 2004, but DD denies that he knew at that time that Al Sadeq held that position. It is not disputed that he did hold it. DD's evidence is that Al Sadeq was an opponent of the Qadhafi regime and was wanted by it. DD must have known Al Sadeq before going to China because he says that when he arrived there Al Sadeq had already arranged accommodation for him and his wife. He does not say how they met, but it does not appear therefore to have been as Libyan exiles in China. Al Sadeq was a friend and they worked together on the website which DD used for his political activities. Their association was social and business and *"to a certain degree political"*, as DD put it, because there were many Libyan dissidents in the Far East at the time; but that political association was not within a political organisation. He discussed leaving China with Al Sadeq, who provided him with the Spanish passport in return for DD's Moroccan one. Al Sadeq is now in detention in Libya, having been arrested in Thailand and removed in March 2004. Mr Friedman says that DD has not sought to conceal his relationship with Al Sadeq. The SSHD regards the relationship as having been close and as evidencing membership of the LIFG.

60. The spiritual leader of the LIFG, Abu Mundhir, had also been in China at the same time; he too was arrested and removed to Libya from Hong Kong in March 2004.

61. For all that DD speaks of the motivation for leaving China as being his wife's botched abortion in July 2003, there were real problems for any Libyan living in China anyway. As DD says, if the Chinese authorities realised that he was Libyan and not Moroccan, he would have been removed to Libya by the Chinese. Obtaining documents for the baby would have been difficult. It is possible to entertain real doubt about his real motivation, because of the glowing way in which life in China was described in November 2003 when the website was set up, in marked contrast to the distressing medical picture painted in the statement made for the asylum appeal.

62. DD says that he met his Moroccan wife through an Arabic Muslim website and they decided to get married, which they did by proxy over the telephone a few months later in May 2003; they first met in person in Malaysia shortly afterwards and then set off for China each on Moroccan papers. The brother of Mrs DD is Mustapha Maymouni; the sister of Mrs DD was married to Serhane Fakhet. The SSHD attributed considerable weight to these familial connections, and sees them as rather more than unhappy coincidences. Maymouni was sentenced,

according to DD, to 18 years in prison in Morocco for his alleged part in the Casablanca bombings of May 2003 in which 45 people were killed. Fakhet blew himself up in a police raid following the 11 March 2004 train bombings in Madrid; Spanish authorities believe him to have been the leader of the group responsible. It was not the SSHD's case that DD himself had links to either of those atrocities. DD did not accept that that was how Fakhet died or that Fakhet had any involvement in the Madrid bombings.

63. There was a good deal of debate as to how much weight was being put by the SSHD on the fact or basis for the conviction of Maymouni in view of the evidence from Human Rights Watch that the Moroccans charged over 2000 people in connection with the bombings and ill-treated them; the trial had been unfair and the convictions of the 903 who were convicted were probably tainted by confessions and statements obtained by torture. In particular, evidence from Maleck Al Andulsi, (Malek Andoulsi), should be disregarded. According to a Moroccan newspaper website, this evidence linked the LIFG to the attacks and to the Moroccan Islamic Fighting Group, which actually carried out the attack; two UK based members of the LIFG had been convicted in their absence of involvement in the Casablanca bombings.

64. Witness D said that he was reluctant to attach great significance to the fact of the conviction of the UK based individuals, or at least to the conviction of one of them; and we have taken it that the fact of conviction in respect of the Casablanca bombings is not to be held against any individual. He did not dispute that any evidence drawn from Al Andulsi fell to be disregarded, at least on pragmatic grounds in the absence of investigation. Detainee reporting, if any, from Morocco also could not be relied on, on the same basis. The purpose of the reference to the conviction of Maymouni was to draw to DD's attention that the SSHD regarded Maymouni as a significant figure, with connections to DD and to the Casablanca bombings. He was using that conviction as a means of signalling a connection which he wished to pursue in closed; but he was not relying on the conviction as such or on material which came from Morocco.

65. DD obviously did not deny knowing his brother in law: he now sent money to his wife and her family to help support them since Maymouni's imprisonment.

66. In addition to the family connection between DD and Fakhet, the SSHD contended that Fakhet had been in telephone contact with Al Sadeq while Al Sadeq and DD were in China, according to a Spanish newspaper which appeared to be drawing on a leaked account of report sent to an Investigating Judge in connection with the 11 March 2004 bombings in Madrid. There were telephone calls in early January 2004 between a number used in China by Al Sadeq and a Jordanian in Spain with whom Al Sadeq wanted to set up a "furniture business". The report says that Al Sadeq and DD were *" together "* in China at that time, although that would not necessarily have meant that they were physically proximate when the telephone calls were made. The

Jordanian, from whose July 2004 statement to the Spanish authorities this information was drawn, also said, as we read the document, that he was next to Fakhet in Spain when the latter called London after DD had arrived from China. The Jordanian gave his Spanish fax number to his interlocutor in London. This was not the only call made by Fakhet to London after DD's arrival. Witness D agreed that he could not say definitively that DD was the recipient of the call.

67. DD says that he had never met Fakhet but had spoken to him over the telephone a few times. These contacts had no terrorist purpose at all. Their wives had also spoken to each other. Many people who knew Fakhet had not been arrested after the Madrid bombings.

68. There was an assertion that DD had access to funds and had played a role in financial facilitation, but that was all that there was in open. DD made no comment about it, beyond the general comment that he felt frustrated by the unfair lack of detail in the allegations; we take this to be one of them.

69. The SSHD also noted markings in an A-Z found in the boot of a car at DD's address in October 2005, which showed markings along footpaths under the flightpath of Birmingham International Airport. The marking might have been for reconnaissance purposes but might have a wholly innocent explanation. By themselves, Witness D accepted, they were not of any great significance. DD makes no specific comment on this one way or the other.

70. Witness D was not aware of any Libyan security service interest in DD while he had been in the UK. It was not the SSHD's case that DD had been involved with the offences for which certain named Libyans were shortly to be facing trial in the UK.

71. We are entirely satisfied that DD is a real and direct threat to the national security of the UK. He is an Islamist extremist. He is a member of the LIFG and at least within the UK is a figure of some importance and influence. He has close links with a number of senior LIFG members. He has expertise and functions as a propagandist and communicator, although it over formalises the position to suggest that he is appointed to some position to that end. His direct links to Al Sadeq and Mundhir are important in showing his own significance. His outlook was less focused on Libya than theirs, but they did not focus exclusively on Libya either.

72. DD is a global jihadist with links to the Taleban and Al Qa'eda. Such differences as exist between those two groups have no relevance to the danger he poses. He left Libya earlier than he admits, and has travelled significantly. We are quite satisfied that the more sinister interpretations of his so called "*family*" website are correct and show his support for suicide operations. The internal evidence, especially the songs and language support that view, but it has to be seen in the context of all that is known about him. Mr Friedman suggested that the martyrdom references and the racist remarks about Jewish pigs showed no

particular political orientation; Muslims of many views might make racist remarks of that sort about Jews. That may be so but what DD said is a facet of the overall picture of him. They form part of the material showing his extremist and violent outlook.

73. The evidence strongly supports the conclusions that he has probably been involved in the procurement and production of false documentation for use by LIFG members. M is a very significant LIFG figure in the UK, of a like outlook to DD's. DD's links to Maymouni and Fakhet are not mere misfortune or coincidence; we believe from experience that such family relationships with like-minded people add to contacts, cover, and security.

74. DD is also a threat to the UK's national security because his opposition to the Qadhafi regime is a major aspect of his global jihadist outlook. Opposition to the Qadhafi regime, including opposition from an Islamist perspective i.e. from the viewpoint that the regime is anti-Islamic according to their particular strand of religious belief, is not of itself a threat to the UK's national security. It is the extremist Islamist opposition, which countenances and supports the use of violence against the regime, which is a threat; and particularly so where it is part of a wider jihadist outlook. These activities cannot sensibly be regarded as legitimate self-defence.

75. In so far as the SSHD's case includes material which precedes 2000, it evidences a global jihadist outlook. We regard it as quite unlikely that DD would modify his behaviour as a result of the proscription of the LIFG, other than to adopt greater precautions against investigation by the Security Service. We believe that much of what DD has said in his statements is untrue, or selective and actively misleading. Our conclusions draw on the closed material as well.

The National Security case against AS.

76. The SSHD alleged that AS was a committed Islamist extremist who had been actively involved in providing logistic support to individuals linked to Al Qa'eda, and was linked to a terrorist cell based in Europe which was involved in raising funds, procuring forged documents and in facilitating the travel of recruits to terrorist training camps. He had links to individuals who were involved in attack planning in Europe, and himself had received terrorist training in Afghanistan. It was not alleged against him that he was a member of the LIFG, although the Libyans had accused him of being a member. Mr Friedman raised a number of issues about that aspect.

77. Almost all of the open evidence that AS represented a danger to the UK came from material supplied by the Italian authorities in connection with the extradition request in February 2003. The Italian prosecuting authorities said, and so does the Security Service, that it shows AS to have been the leader of a cell of Islamist extremists based in Milan, with contacts and links to other extremists, who were preparing for an attack, which by September 2002 was imminent, probably somewhere

in Europe. The material is based on intercept, summaries of what police surveillance or other investigation found, and inference. The Security Service points to travel and travel arrangements being made, money raising endeavours, the guarded and coded language used, the obtaining and sending of false documents and false identities, the respect shown for AS despite his youth, for he was about 21/22 years old in 2002, and the planned *"football game"*, with the radical Islamic religious overtones throughout the conversations.

78. The material evidences that, by December 2001, AS was part of a group composed, in addition to him, of some eight Tunisian men living in and around Milan, at least in 2002: Cherif, Nassim, Al Hani, Zarkaoui, Trabelsi, (not the Nizar Trabelsi currently serving a sentence in Belgium), Lotfi, Bouyahia and Salmane. Some had a variety of names; AS used a number of different names and national identities which the open evidence specified. The nature of the contacts, the different but joint activities and planning between them, show that they can properly be seen as a group or cell. These are not just coincidences or contacts in normal daily life between like-minded friends in a foreign city. The religious overtones are those of Islamist extremists, as are some of the topics of conversation such as those about jihad, martyrdom, what countries deserve to be attacked, and the tactics and the tactical wisdom of some attacks. One was a very close and supportive follower of Al Qa'eda actions in Afghanistan against western forces, with sources of knowledge not derived from the western press. There are clear signs that the language is guarded or coded at times, and they are concerned about security for themselves and what they are doing.

79. The activities included obtaining and forging false identity documents on a considerable scale, partly in order to bring people into Italy to join their *"programme"*, partly for the purposes of their own activities and partly to help them move around. There was concern about how to avoid the stricter border controls of certain countries when travelling, and the risks of militants being stopped on false papers. There is some evidence of drug dealing to raise money to live off and for their terrorist activities, though they disapproved of drug dealing if not used for that purpose; and their dealing is undertaken with other *"mujahideen"*. They had to get a van for the purpose of this trading. There is no evidence of more than sporadic employment and yet they had access to sums of money in cash for the purchase of computers and other purposes. There is evidence that they recruited Muslims to go to Yemen to join Al Qa'eda supporters there ready for action. All of this occurred while AS was still in Milan or still in touch with the group, and much can be seen from the intercept material itself.

80. More specifically, the Italian investigation into AS began in December 2001, when AS made contact with a named individual, whom the Italians were already tracking as an Islamist extremist, in order to ask the whereabouts of two other named extremists. In mid January 2002, AS and two other members of the group had tried to buy a night filter for a video-camera he had but he did not want to leave his name with the shop when told that it had to be ordered. The evidence is that the group

were then making daily use of the video-camera and were in contact with *"brothers"* in the UK in connection with it. The purpose of the filming was not ascertained but we regard it as unlikely that it was for tourist or family purposes, and surveillance is much more likely. AS told Al Hani about this time that he needed to leave Italy and AS appears to have left Italy for the Netherlands at some point between about 24 January 2002 and 14 February 2002. He appears to have evaded an attempt by the Italians, who had lost sight of him on 24 January 2002, to capture him at the border, according to a discussion between two members of the group.

81. On 17 January 2002, Nassim travelled to the Netherlands, met Al Hani and then went on to Iran. Cherif and Al Hani were in touch about Nassim's progress. AS had been in touch with Cherif and was to be told that he would be contacted when they had an answer. Nassim returned with *"five millions"*, in unknown currency which was assessed to have come from the head of the mujahideen in Iran, who could indirectly be in contact with Bin Laden. On 27 February 2002 AS told Cherif, who was one of those with whom he was closest, that his programme was changing, although he was content in the Netherlands because no one bothered him and he was clearly planning on staying there for a while. He asked if Nassim had brought the *"commission*". Nassim, who had spent ten of his days in prison in Iran, did have an envelope or message which he had intended to hand over at Amsterdam Airport to Al Hani for him to pass to AS. It is assessed that this message was instructions for the cell.

82. Shortly afterwards, on 2 March 2002, AS was demanding that Nassim procure a false passport for him, and over the next two weeks continued pressing him as a matter of urgency for one, including an Italian one: *"things aren't normal here".* He refused the suggestion that he return to Italy. The telephone contacts with the group became more cautious and guarded. AS was asked by Nassim to get in touch with the Iranians about obtaining from them a substantial sum of money. He demanded that Trabelsi in Italy obtain a portable computer for him, and one week later told Trabelsi that he was now in the UK. That was on 21 March 2002, the last noted contact within the Italian material. The Dutch and Italian police were able to establish the sending of the passport from Italy to AS living under a false name in Amsterdam.

83. There is some evidence that in March both AS and those in Italy were expecting some news imminently, and it is a reasonable inference from some of the surrounding language, of leaving for paradise, that this news was expected to have some jihadist connection.

84. From May to September 2002, there is considerable evidence that the group was engaged in planning an attack. Zarkaoui is noted talking to an Algerian about a manual, pieces, powder with mercury, which the Italians reasonably concluded was a reference to mercury switch operated detonators. (These are used to detonate IEDs). He and Cherif discussed obtaining a pistol in the context of replacing one already being owned by one of them. The obtaining of false documents for

members of the group continued. On 1 September 2002, Salmane spoke of preparing for a game of football and after Koranic quotations on the duty to inform others, said: *"the game is ready…we will win, always victorious! There is no defeat!...We too have to depart if God so wills.."* That was seen as a reference to leaving to carry out the *"programme which strengthens the faith"*. Salmane asked his interlocutor to decide soon on whether he wanted to participate. He rang to say that he would. Salmane said that he would have to see Cherif and the group about preparing a programme for him; he was also willing to depart if God willed.

85. On 3 September, the whole group was ready for what was a stifled reference to *"jihad"*. Certain identity documents were to be obtained for the journey. There were some heavy things to be collected, which is assessed to be money hidden somewhere; a substantial amount of coinage, 4500 Euro, was found under the rear seat of a car used by Cherif and there were other supporting sightings of the individuals.

86. The Italians felt that they had to make arrests on about 23 September in order to stop the *"game"* taking place. At various times between their arrest in September 2002 and 2005, four members of the group were tried for terrorist related charges in Italy. None were convicted on those charges, although Nassim, Cherif and Salmane were convicted of forged document offences. Zarkaoui was convicted of assisting illegal immigration. Bouyahia was extradited from Malta and later acquitted of all charges. Zarkaoui was sentenced to three years in prison but was released in October 2003; he is excluded from the UK on national security grounds. (He is not Al Zarkawi, deceased, of infamy in Iraq). AS was acquitted in absentia of terrorist charges but was convicted of forgery offences. Those acquittals have not altered the SSHD's view of what the group was doing or of AS' role in it.

87. Although the Commission does not have the reasoned judgment of the Italian Court in AS' case leading to his conviction in January 2007, it was supplied after the SIAC hearing with the reasoned judgment of the Court in respect of the trial of the other defendants in 2005. The Italian Court accepted that four of the defendants who were present were part of a larger group in which other named defendants and AS participated, sharing a common Islamic fundamentalist viewpoint.

88. It was not possible, in the view of the Italian Court, to identify further a particular group abroad to which they might adhere, whether Al Qa'eda or in Iran. This meant that there was no historic material from which its aims could be deduced. It was not sufficient simply to characterise them as Islamic fundamentalists, to show that some fundamentalists carried out acts of terrorist violence, and to say that that is what these defendants were therefore planning to do. They might be intending to confine themselves to opposition by words or to undertake violent activity other than terrorism, as defined in Italian law.

89. The possession of rifles and handguns, video cameras, binoculars and clothing was not sufficient to prove terrorist intent, in the view of the

Italian Court, because they might have been obtained for some other violent criminal enterprise, perhaps drug dealing. Nor did the dealing in false documents prove that they were set upon acts of terrorism. Coded language, the nature of the code and security awareness did not show that it was terrorist as opposed to other criminal activity upon which they were engaged. What the Italian Court was looking for was evidence which would prove beyond a reasonable doubt that behind it all was "*a precise and fruitful training of a military or paramilitary type specific to the needs of a terrorist cell."*

90. Having considered all the evidence, the Italian Court was of the view that it had not been absolutely established that the plan which the defendants intended to pursue was to carry out violent acts of an unequivocally terrorist nature. There was an ideological or religious motivation to participate in holy war against the infidel such as the USA, its allies or Israel, who were present on lands which they considered Muslim. They were in the transition stage to action, which was imminent when they were arrested. But where and in what form was uncertain: it could have been onward from Iran to Afghanistan, Malaysia or elsewhere; it might have had to await instructions from those in Iran to whom the Court supposed that the group would go before rather than after the attack. It could have been a suicide attack or not. They were prepared to take part in warlike activities, to sacrifice themselves for their faith, and were prepared to carry out terrorist attacks; but the acts by which they would do that had not been made sufficiently clear. There was no proof that they actually would carry out terrorist attacks or that they had actually planned such attacks properly. The training which they had had in Afghanistan would have been more relevant to guerrilla war than to terrorist attacks.

91. The Italian Court recognised the probative difficulties which were faced in proving an offence under the relevant Article of the Italian Code but that did not mean that the Court could ignore the evidential gaps. It nonetheless passed some comment on the role of individuals including AS. It said that Lotfi was the lead man in many conversations, but that AS acted as the leader in all the early affairs of the group although his position was vaguer than others and he had been detained abroad as the group moved on to action.

92. In passing sentence for the false document offences, the Italian Court found that there were no general extenuating circumstances: this activity was part of a particularly dangerous environment to elements of society which should be protected. This dangerous environment was hostile to Italian society and one from which various violent plans emerged: and although they could not be shown to be of a terrorist nature, it could certainly be stated *"that their actions would have seriously threatened the lives of others, presumably abroad, actions which were destined to develop the jihad project as a whole."* The defendants intended to commit violent acts which they justified and hoped for. The use of false documents was all part of the plan.

93. The Italian Court concluded that the proven danger to society, the lack of understanding of the rules of civility and tolerance, the choice to pursue their ideas by violent means required their expulsion after service of their sentence.

94. AS has been placed on the list of individuals associated with al Qa'eda established and maintained by the UN Security Council, the 1267 Resolution list. He was put on it in November 2003 as a result of the recommendation of the Italian Ministry of Economy and Finance along with other members of the Milan cell. It is not clear to us that that is based on any more material than that which we have seen from the Italian prosecutors. It is unlikely that that listing can add to the significance of that which we have already outlined.

95. The remaining matters upon which the SSHD relies in open support his general view of AS but are not of themselves of great importance. They reinforce the assessment that AS is an extremist, and a supporter of violence in the Islamist cause. A drawing, which depicted an assault rifle and a grenade adorned with Islamist slogans in Arabic, was seized from AS' prison cell. It is unlikely that his cellmate had been responsible. In August 2005, AS received some DVDs in the post. These included *"The Twin Towers"* and *"Al Qa'eda";* they were confiscated. This is of but modest weight.

96. Although Mr Friedman made a number of submissions about what the SSHD's evidence actually showed, AS did not give evidence and only provided a short statement in which he denied being the leader of any plan to cause terrorist explosions in Europe, and denied, blandly and without more, the SSHD's summary of the allegations against him. The very form of the denials leaves it wholly unclear what of the detail he accepts or denies or qualifies. He also denied the Libyan claim that he was a member of the LIFG or had trained at Al Qa'eda camps in Pakistan or Afghanistan. His only involvement with false documentation had been in connection with immigration purposes rather than to travel. The material relied on by the prosecution in Italy amounted to no more against him than that he had a conversation about a false passport; (that is only a comment by him on the evidence). The seemingly radical talk, from others whom the Italians had bugged, was commonplace among Muslims and meant nothing; the other events had occurred after he had left Italy, most of them while he was in prison.

97. He explained the fear which he felt because of the allegations which Libya had made against him. He feared that if he were removed to Italy he would be removed thence to Libya. (This was a fear which underlay his opposition to extradition and had been rejected by the Courts as without sound basis.) He feared to give evidence because he might be put on trial in Italy, the UK or Libya. He did not know what was in the closed evidence or what communication there had been in closed about him between Libya and the UK.

98. AS points out that he had been in UK custody for four months by the latter stage of the conspiracy in September 2002 and that there are no

records of telephone contact between him and the group after 21 March 2002 when he had come to the UK. But he says no more about whom he knew or what he was doing in Italy or the Netherlands, or what the conversations might have meant. There is a considerable amount of Italian prosecuting material which could have been answered instead of the mere bland denial of the case against him. He does not even explain why he used so many false names and identities; he does not appear to deny that he had them. There may be reasons why he is reluctant to give further evidence in this appeal which are understandable. We are not prepared to draw adverse inferences from that reluctance, although our reasons would reflect more AS' fears of specific self-incrimination or indirect incrimination, rather than all the points which led the Commission to draw no adverse inferences from silence in the Part 4 ATCSA cases. However, it does mean that there is no further explanation from AS of this material.

99. In our view, there clearly was a group of men with extremist Islamist views, supportive of violence against the West, which had been acting together for some time in the ways we have set out, including recruiting for Al Qa'eda, raising money for terrorist activities and obtaining false identity documents for that purpose. This group can properly be regarded as a serious terrorist group. It appears likely that the return of Nassim from Iran with a message for AS was an important event. This probably activated them, providing them with money and giving them a task, specific or broadly expressed. We regard the only sensible inference as being that the group thereafter was preparing for violence in the jihadist cause probably somewhere in Europe, but it could have been in Afghanistan or Iraq. We believe that the action was probably intended somewhere in Europe because of the equipment which the group had assembled which would have been an unnecessary encumbrance if the action had been intended for Afghanistan or Iraq. The existence of visas for Iran does not show that Iran was a staging post for an attack rather than part of a post attack escape strategy. There is no other way in our view of making sense of the totality of the open material. It is true that there was no evidence of the details of the planned operation such as target, country, or mode of attack. Part of that could be down to security consciousness; it may be that the action was not as imminent as the Italians thought. This *"game"* is however most unlikely to have been other than a coded metaphor for violent action somewhere against Western interests.

100. We also accept that AS knew the members of the group and had been part of it up to 21 March 2002. We conclude that he was a highly respected member of the group and that he may well have been its leader for a while, from the references to him by group members as *"sheikh"*, a term of respect, and particularly because he received the message, with money, which Nassim brought back from Iran; it was for him. He passed on instructions to the group. The probable inference is that that activated the group into the more serious planning phase for its operation. He thereafter changed his location quite rapidly and felt able to be quite demanding of his associates. We do not accept the suggestion that the only material in open against him from the Italians is

that he obtained a false passport. That is simply to ignore all the surrounding evidence about him. There is no doubt, from the evidence, of the range of extremists with whom he was in contact. He would have known fully of the activities of the group when he was in Milan and the Netherlands, and what the nature of the task was: jihadist violence probably somewhere in Europe. It could be important for the leader of the group to keep himself away from authorities who would interfere with him as appeared to have been AS' fear in Italy and again in the Netherlands. However, precisely who if anyone was the leader is not that important; he was an important, leading member at least.

101. The fact that the Italian Court did not find the terrorist conspiracy proved beyond reasonable doubt, with the specificity which its law required, does not diminish the importance of the general conclusions about which it was satisfied. These demonstrate beyond doubt the nature of the group and its active violent jihadist intentions. This is the group of which AS was a significant part on any view and in which he probably had a leading role up to his departure for the UK. He was an important part of bringing the group to the stage at which it could plan specifically for the acts of violence which by September 2002, were quite probably imminent, and for which we conclude he gave them instructions brought to him via Nassim. We find it difficult to see that the acts of violence which the group was set to perpetrate could have been other than terrorist acts. The precise nature and location of the violence could not be proved, but even if those matters were unknown with precision to AS when he left the Netherlands, (and they might have been to proceed to Iran to receive final orders), that does not diminish the threat he poses to the national security of the UK.

102. The more telling points which Mr Friedman made about this material related to the position of AS after 21 March 2002. There are no records of the group being in contact with him up to his arrest or even referring to him in their telephone conversations, with one exception. There was a telephone call shortly before the September arrests by a group member which makes it clear that they have not been in touch with AS for some time. The upshot is that Lotfi told Zarkaoui that he had been unable to make contact with AS despite trying to ring him. It cannot be inferred that that absence of contact was because the group knew that AS was in prison; the conversation does not suggest that. The lack of contact may not have been for want of trying but it is possible, as the SSHD suggests, that AS was sufficiently concerned about his security in this country that he wanted to drop contact. That would suggest that having activated the cell, he ceased to have anything much to do with it. Someone else became referred to as *"sheikh",* Cherif. It is difficult to say therefore how far the part played after March 2002 by AS went. Indeed, there is intercept evidence from June 2002 of Nassim being told of AS's arrest and of his being accused of terrorist offences, which leads to a brief discussion to the effect that that is unjust because AS has done nothing. There is nothing to suggest that the group has lost its leader.

103. However, from the reasoned judgment of the Italian Court dealing with the other defendants in May 2005, which the Commission did not receive until after its hearing had concluded, there do appear to have been contacts after 21 March 2002, although it is difficult to attribute particular significance to them; see pp 153-163.

104. It is our conclusion that on the open evidence alone AS is a clear danger to national security. He is an Islamist extremist who has engaged actively and as a senior member with a terrorist group clearly engaged in support work for jihadist activities. He was a leading part of it before its more specific planning of terrorist violence began. That would be sufficient to make him a danger to national security. However, he also gave it instructions after Nassim returned from Iran, which were probably to plan for and to carry out violent actions directed against Western interests, which was probably intended to take place in Europe. The other obvious possibilities include action in Afghanistan and Iraq. The group did plan such violence and set out to achieve it. We are quite satisfied that AS will resume these activities when he is able to do so. The proscription of the LIFG is of no consequence to AS. In so far as any activities relied on occurred before 2000, they relate to his global jihadist outlook. Our conclusions are reinforced by the closed evidence.

105. Mr Friedman urged that we should form our own view of the evidence and not adopt, out of deference, the views of the Security Service which Mr Burnett said was very used to assessing the significance of material such as this. We recognise that the Security Service has experience in this area but this is not an area for deference. We have formed our own view of the material taking into account the views of the Security Service.

The Refugee Convention

106. DD won his asylum appeal although he has not yet been granted Indefinite Leave to Remain. AS has not had his claim determined substantively because it is said by the UK that that still remains the responsibility of Italy. We propose to consider DD's position on the basis that he has been recognised as a refugee, and AS's on the basis that he has an application outstanding which it will be for the UK to consider substantively.

107. We adopt but repeat for convenience what the Commission decided in the case of Y, an Algerian, SC/36/2005 24 August 2006. The SSHD contends first that the Convention no longer applies to protect DD from deportation because the circumstances in connection with which the Appellant was recognised as a refugee have ceased to exist, as it is now safe for him to return to Libya in the light of the Memorandum of Understanding between the UK and Libya; Article 1C(5). Secondly he contends that DD's terrorist actions cause him to be excluded from its protection under Article 1F (c), and thirdly that DD 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. Although the first issue does not arise in that specific way in AS' case, the other two do arise.

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

109. DD next contends that it is not open to the SSHD to rely upon Article 1F (c), the exclusion provision, because the acts which the SSHD relies on occurred after he had won his appeal, in which his status as a refugee was recognised.

110. 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."

111. DD 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).*"

112. 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.

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

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

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

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

89… This interpretation of the relevant clauses of the Refugee Convention is entirely coherent and sensible. It identifies what acts will lead to exclusion despite their being 'political'. A person whose acts (at any time) are contrary to the purposes and principles of the United Nations disqualifies himself from protection under the United Nations' Refugee Convention."

114. 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.

115. We prefer the reasoning in *KK* to the dicta in *Pushpanathan.* It is far from clear that, in the comments relied on by DD, the Canadian Supreme Court 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*.

116. 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.

117. 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.

118. There is no reason within the structure of the Convention or in the policy behind the exclusion provisions for treating someone who commits war crimes or acts of terror before the formal recognition by a state of the fact that he falls within Article 1, differently from someone who does the same acts afterwards. That attributes overmuch weight to formal recognition and not enough to the scope of the definition provision. Rather, the emphasis in *Pushpanathan* is on the rationale that those who are responsible for acts which create refugees, or for other acts seen as equally serious by the Convention, should not benefit from it at all. In a similar vein, a person may become a refugee sur place as a result of events which have happened since leaving the country of nationality, even if previously an asylum claimed failed.

119. Reliance was placed on the existence of Article 33(2) as the sole post-recognition removal power. Article 33(2) permits someone to be removed notwithstanding that he would be persecuted on return, in circumstances which may overlap with those in Article 1F (c). But they are not expressed in the same way and may not cover the same facts in any particular case. Nor is the possibility of removing someone who is a refugee on that basis the same as the obligatory exclusion of someone from being a refugee, formally recognised or not. True it is that almost all of the Convention is about the position of those who are refugees, but that does not mean that their position cannot change or that the exclusion provisions cannot apply to exclude someone from being a refugee before or after formal state recognition as such. The focus of those provisions remains on acts in the past rather than on future risk.

120. Article 1F (c) does not prevent reliance on acts which were done before an individual was recognised as a refugee, whether or not they come to light before or after that recognition. That was not in dispute. So this first point does not arise in AS' case. In any event, most of the material relied on DD's case precedes the appeal decision in May 2005, and indeed much precedes his arrival in the UK.

121. We accept the general submissions of the SSHD that terrorism is contrary to the purposes and principles of the UN. This is borne out by the decision of SIAC in *Mukhtiar Singh and Paramjit Singh v SSHD*

31.7.00 and of the IAT in *KK*, above, paragraphs 85, 93 and 96. It is not necessary to set them out here. That decision was approved in *AA (Palestine)(Exclusion Clause) v SSHD* [2005] UKIAT 00104. But 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.

122. We regard the findings which we have made about the activities of each of these Appellants as showing that they should be excluded from the protection of the Refugee Convention. The contrary was not seriously argued. There is sufficient evidence, in DD's case, of acts preceding his arrival in the UK and the appeal decision to require his exclusion. The same would apply to AS before his arrival in the UK.

123. The exclusion of DD, and AS for that matter, from the protection of the Refugee Convention is not to be balanced against other considerations such as the risks of persecutory treatment which they might face on return to Libya. 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."*

124. We turn to the third Refugee Convention issue: *'refoulement'*.

> Article 33: Prohibition of expulsion or return
>
> *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.*

125. 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 DD fell within the exception, and AS too were he a refugee. This issue

would arise if DD 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. The same applies to AS were the issue to arise. 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 they might face against the danger to the security of the UK which they pose and the benefit to it which their removal would bring.

126. This issue was considered by the IAT in *SB (Haiti-cessation and exclusion*) [2005] UKIAT [00036] at paragraphs 81 -83. This case referred to the decision in *T v SSHD* [1996] AC 742 which concerned the return to Algeria of a terrorist excluded under Article 1F. It had been suggested to their Lordships that there was a clearer case for a balance to be struck under Article 1F than under Article 33(2), and that support for a balancing exercise in the latter could be extracted from the reasoning of the Court of Appeal in *R v SSHD ex parte Chahal* [1995] 1 WLR 526. Their Lordships gave short shrift to the argument that there was a balance to be struck. The position is now settled by s34 ATCSA which precludes any such balance being struck.

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

The risks on return faced by the Appellants

128. In Notes Verbales of 18 July and 8 September 2006, the Libyan government confirmed that DD is a Libyan national who stands accused of membership of the LIFG. We have found that he is an LIFG member. He appears on a list of terrorist suspects issued by Interpol on 4 February 2006, which is an indicator of Libyan interest. He has not been tried in absentia, contrary to his claim based on the forged summons. He would be investigated. A charge under Article 206 of the Penal Code, which would be the relevant Article for membership of the LIFG, carries the death penalty, but that is subject to Article 29, which deals with mitigation. The Notes Verbales contains various assurances which we set out later.

129. In Notes Verbales of 17 July and 8 September 2006, the Libyan government confirmed that AS is a Libyan national and asserts that he is a member of the LIFG who trained with Al Qa'eda in Pakistan. The Libyan government confirmed that if there is sufficient evidence, he would be tried for an Article 206 offence. He is on the UN 1267 list as a result of the Italian authorities' actions.

130. Both are seen by the Libyan authorities as Islamist extremists and this judgment which takes that same view of them, and regards them as supporters of global jihad, would be available to the Libyan authorities. They would be regarded as very hostile to the regime. They could each

be charged with the more serious offence under Article 207, which also carries the death penalty. DD has already been found by an Adjudicator in 2005 to be sufficiently opposed to the Libyan regime that he would be at risk of a breach of Article 3 on return. Obviously that was without contemplation of the arrangements upon which the SSHD now relies.

131. It is accepted by the Secretary of State that upon arrival in Libya, both Appellants would be detained and questioned; they would probably be put on trial. Accordingly, the circumstances in which they will be detained, questioned and tried raise issues about their treatment, period of detention and the fairness of the process. If convicted, further issues are raised as to the risk of ill-treatment while serving any sentence. The offences for which the Appellants would probably be tried carry the death penalty; that gives rise to further issues.

132. Mr Oakden, who was the Director of Defence and Strategic Threats at the FCO, and since August 2006 UK Ambassador to the UAE, said in his second statement that serious concerns remained about the human rights situation in Libya, including restrictions on freedom of expression and assembly, political prisoners, arbitrary detention and conditions in Libyan prisons. On behalf of the British Government he welcomed the opening of a dialogue between the Libyan authorities and NGOs concerned with human rights. He continued in paragraph 9:

> "*While not expressing any opinion or endorsing the published assessments of NGOs or other governments on the human rights situation in Libya, it is not the British Government's intention to contest the general thrust of such reports in this litigation. While each case and the specific assurances given must be considered on its particular facts, it is inherent in these cases that the British Government judges that it could risk breaching its ECHR obligations if it were to deport these individuals to Libya without first obtaining assurances as to their treatment on return.*

133. The witnesses on behalf of the SSHD accepted that, but for the Memorandum of Understanding, the UK Government would have serious concerns about the real risks faced by the Appellants as extreme Islamist opponents of the Qadhafi regime and their alleged membership of the LIFG: torture or other ill-treatment, incommunicado detention without trial, an unfair trial, imprisonment and torture as political prisoners, a risk of the imposition of the death penalty and perhaps of it being carried out for an Article 207 offence. There was no agreed risk of extra-judicial killing in the absence of the MOU.

134. Mr Oakden did not give oral evidence in these appeals. That was given by Mr Anthony Layden, the UK Ambassador to Libya from October 2002 to April 2006, now a retired diplomat and appointed to the FCO as Special Representative for Deportation with Assurances. He adopted the evidence of Mr Oakden, although he produced his own further statements.

135. As Mr. Layden made clear in his evidence, it was not the Secretary of State's case that there were changes in Libyan society or politics sufficient of themselves to provide protection. He agreed that the Appellants would be seen as enemies of the state, although he added, without detail, that there were people who had returned to Libya in similar circumstances walking free in Libya.

136. Mansour El-Kikhia, the Appellants' expert, is Associate Professor and Chair of the Department of Political Science and Geography at the University of Texas at San Antonio. He was born in Libya and his academic life has focused upon research, speaking and writing on the social political and economic conditions in Libya. His book, *Colonel Qadhafi: The Politics of Contradiction* (1997) is a standard text. At the commencement of his report he recounts that his cousin, also called Mansour Kikhia, was a well known human rights activist, having previously been Libya's Foreign Minister before the revolution and Libya's ambassador to the United Nations in the late 1970s. Many believe that his disappearance in Cairo in 1993 was the result of his assassination by Libyan security services, e.g. the Amnesty International Press Release of 8 December 2003: *Time to break the 10-year silence on Mansour al-Kikhiya*. Professor El-Kikhia did not give oral evidence.

The general human rights situation in Libya

137. With those factors in mind we examine the background material on Libya. Most of it is not controversial. Indeed, the Operational Guidance Note issued to decision-makers within the Home Office in October 2006 states:

> *"The following human rights problems were reported in 2005: inability of citizens to change the government; torture; poor prison conditions; impunity; arbitrary arrest and incommunicado detention; lengthy political detention; denial of fair public trial; infringement of privacy rights; severe restriction of civil liberties-freedom of speech, press, assembly, and association; restriction of freedom of religion; corruption and lack of government transparency; societal discrimination against women, ethnic minorities, and foreign workers; trafficking in persons and restriction of labour rights."*
>
> It concludes:
>
> *"The Libyan government continues to be repressive of any dissent and opposition political activists and opposition Islamic activities are generally not allowed to operate on any substantial scale within the country. If it is accepted that the claimant has in the past been involved in opposition political activity or is a radical Islamic activist for one of the opposition political or Islamic groups mentioned above then there is a real risk they will encounter state-sponsored ill-treatment*

amounting to persecution within the terms of the 1951 Convention. The grant of asylum in such cases is therefore likely to be appropriate."

138. This can safely be assumed to reflect the United Kingdom Government's views of the state of affairs in Libya. The first passage is directly taken from the US State Department Report most recently in the report for 2005, issued on 8 March 2006. The 2006 Report was sent to us in March 2007 by the solicitors for DD. It is to much the same effect. The second extract reflects the guidance which the IAT/AIT has given in a number of cases.

139. The Human Rights Watch report of January 2006 *Words to Deeds* summarises its assessment as follows:

"Despite some improvements, the government still bans political parties and groups, non-state-run media and independent civic organisations working on human rights or political affairs. Government critics are arrested and detained in violation of Libyan and international law, and the fate of many political prisoners remains unknown. Interrogators sometimes use torture to extract a confession.

Despite the restrictions, a picture emerged of a country undergoing gradual change after years of strict repression and global isolation.

Civil and political rights in Libya are severely curtailed. Individuals are not free to express views critical of the government, the unique Jamahiriya political system, or the country's leader, Mu'ammar al-Colonel Qadhafi. Those who do express criticism or try to organise opposition political groups face arbitrary detention and long prison terms after unfair trials. Despite improvements, torture remains a serious concern. A pervasive security apparatus monitors the population to a high degree.

Some of Libya's laws are at odds with the country's international human rights commitments, specifically the International Covenant on Civil and Political Rights. Most notably, Law 71 bans any group activity based on a political ideology opposed to the principles of the 1969 revolution that brought Colonel Qadhafi to power. Violators of the law can be put to death. This and other legislation effectively prohibit the establishment of political parties and genuinely independent nongovernmental organisations."

140. The text of Law 71 (which criminalises membership of political parties and any group activity opposed to the ideology of the Revolution) is found in paragraph 3 of the Appellants' *Chronology* itself taken from Professor Vandewalle's *History of Modern Libya:*

"The punishment is death for anyone who calls for the establishment, grouping, organisation or formation prohibited by this law, or establishes, organises, administers or finances it, or provides

a place for its meetings, or joins or encourages this by whatever means, or provides any assistance to it… There shall be no difference in the severity of the punishment between the leader and the subordinate, however low the position may be within the party grouping, organisation, formation, unit, cell and the like."

A number of Islamists have been tried and sentenced to death under this provision.

141. Professor El-Kikhia refers to the January 2006 report of Human Rights Watch following its visit to Libya in May 2005: the fear amongst ordinary Libyan citizens is *"palpable and intense".* A report of October 2006 from Reporters Without Borders following a visit in September 2006 speaks of the impossibility of journalists speaking out with impunity in terms critical of the regime. It would, for example, be *"unthinkable"* for adverse comment to be made about Colonel Qadhafi's Green Guide. The same report, entitled '*We can criticise Allah but not Colonel Qadhafi"* states that, despite recent apparent relaxations, little has changed in the political and ideological domain. This is a view shared by Professor El-Kikhia. The prominent but ageing dissident Fathi Al Jahmi has been detained for years for *"slandering"* Colonel Qadhafi. Mr Layden said that he was now under house arrest, and possibly facing further prosecution. Although the USA had spoken out about him, they did so with no prior agreement or promises from the Libyans about their treatment of him.

142. There are many NGO reports over many years which deal with the wretched human rights position in Libya. It is not necessary to set them out in detail. Many of them precede 1999, the restoration of diplomatic relations and 2003, the decision to abandon Weapons of Mass Destruction. We have focused on the more recent reports, as the more significant. There is no COIS Report on Libya.

Torture

143. The US State Department Report for 2005 records that, although the law prohibits torture and other cruel, inhuman or degrading treatment or punishment, security personnel routinely tortured prisoners during interrogations or as punishment. Reports of torture were difficult to corroborate since many prisoners were held incommunicado. The reported methods of torture included chaining to a wall for hours, clubbing, electric shock, breaking fingers and allowing the joints to heal without medical care, suffocating with plastic bags, deprivation of food and water, hanging by the wrists, suspension from a pole, cigarette burns, threats of dog attacks, and beatings on the soles of the feet. Representatives of Physicians for Human Rights and the International Federation of Health and Human Rights Organizations visited Fathi Al-Jahmi and reported that his isolated confinement and sporadic and inadequate medical treatment constituted cruel, inhuman and degrading treatment.

144. In the Human Rights Watch report of January 2006: *Words to Deeds*, HRW, whilst acknowledging that torture is a crime under Libyan law and

the government has repeatedly claimed that it investigates and prosecutes cases in which torture is alleged, says that 15 out of 32 individuals whom HRW interviewed in prison said that Libyan security forces had tortured them during interrogations, usually to extract a confession. HRW interviewed all the defendants in the Benghazi trial of five Bulgarian nurses and one Palestinian doctor at the end of May 2005. Four of them gave detailed testimony of electric shocks, beatings to the body with table legs and wooden sticks, and beatings on the soles of their feet. Electric wires were attached to various parts of the body, including breasts and genitals. One detainee reported that her confession was in Arabic without translation and that she was ready to sign anything just to stop the torture.

145. On 5 September 2006, Mr Layden sent an e-mail to Dr Hall of *"Doctors for Human Rights"*, a charitable medical organisation, in which he sought unsuccessfully to persuade it to alter its refusal to assist in training those who would be involved in monitoring the return of the Appellants. He had not appreciated that this e-mail would become public but readily accepted that it reflected his views. In this e-mail, Mr Layden agreed that Libya had a sorry record on torture and stated that if this had not been the case, the United Kingdom government would not have needed to secure the assurances that have been secured about the treatment of Libyan terrorist suspects detained in the UK. In his evidence, he agreed that the sequence of reporting from respectable and reputable NGOs was so consistent that one that simply could not ignore it and, as a consequence, he accepted that but for assurances there was a real risk of torture of the political opponents of Colonel Qadhafi and the regime.

Fair trial and detention

146. The judicial system is composed of four tiers. The summary courts hear cases involving misdemeanours of lesser value. The decisions of this Court may be appealed to the courts of first instance. These were described by Mr Layden as the Court of Appeal which, in serious cases, sat as a court of first instance. These first instance courts are composed of chambers of three judges and have the authority to adjudicate in all civil, criminal and commercial cases. Cases from the courts of first instance may be appealed to the three Courts of Appeal which are composed of panels of three judges. The final Court of Appeal is the Supreme Court composed of five separate chambers. The Supreme Court sits in panels of five judges and rules by majority decision. Above this structure and exercising a function that goes beyond a simple judicial one is the Supreme Council for Judicial Authority.

147. The General People's Congress abolished the People's Court on 12 January 2005. Until it was abolished, the People's Court was a distinctively unjust feature of the criminal justice in Libya. Introduced in 1988, it was separate from the mainstream judiciary. Professor El-Kikhia refers to it as totally unaccountable; hearings were held in private,

often in the absence of defendants, with no right to a lawyer or notification of the charge. Its lack of independence was consistently acknowledged. Human Rights Watch described it as an extraordinary court which heard most political and security cases and had become notorious for politically motivated judgments and biased trials.

148. Notwithstanding the abolition of the People's Court, there is some NGO reporting, from HRW notably, that an ad hoc revolutionary court was used in the retrial of eighty five Muslim Brotherhood members recently. This may be a reference to a specialist court set up to handle the remaining cases from that Court. Mr Layden was unable to assist on what this was.

149. Alison Al-Baddawy, a research fellow at the International Policy Institute at Kings College London, in a report for Freedom House *"Countries at the Crossroads 2005",* highlighted the difficulty in separating judicial decisions from the legislative, executive and other parts of government, as all these institutions of state were tightly linked and worked together in the interests of the revolution. She said:

> *"Article 31 of the 1991 Promotion of Freedoms law states 'Judges are independent in their decisions and that there is no authority above them apart from the law.' Under the law, all parties are treated equally before the courts and tribunals. However Colonel Qadhafi has ultimate control over the outcome of important cases, especially those of a political nature."*

150. This theme is acknowledged in the US State Department Report for 2005, dated 8 March 2006, in the passage entitled *"Denial of Fair Public Trial".* Although the law provides for an independent judiciary, it was not independent in practice: Colonel Qadhafi could interfere in the administration of justice by altering court judgments or replacing judges. The judiciary itself failed to incorporate international standards for fair trials, detention and imprisonment. The government used summary judicial proceedings to suppress domestic dissent.

151. More than half of all prisoners were awaiting trial. After two days detention by the police, a prosecutor could authorise a further seven days detention. The courts could then extend detention for periods of thirty days at a time. The Penal Code also contains provision for preventative detention in Articles 122 to 123, and there may be some overlap between these two sets of provisions. This permits detention for fifteen days, an extension by the investigating judge for a maximum of a further thirty days and a three judge court of first instance can extend that for a further forty five days.

152. One feature of trial-related practice is incommunicado detention. Many political detainees, including Islamists, were so held for unlimited periods and often in unknown places, mainly in Abu Salim. Many were held for only a few months but some for rather longer, running into years. The US State Department Report for 2005 suggested that there were hundreds of such prisoners, possibly two thousand, held in

institutions controlled by Revolutionary Committees. The State Department Report gave as examples Al Kilani, who returned to Libya with, said HRW, Libyan assurances given to him as to his safety, and Fathi Al-Jahmi, the political activist, who has been held incommunicado since March 2004, allegedly for his own protection, according to the Libyan authorities. This followed two years in detention after he called for democratic reforms. HRW was able to visit him in 2005, but although he said what charges he was facing he had not been charged or tried before 2005 ended. The 2006 US State Department Report contained no fresh news.

The Benghazi trial

153. As an example of the operation of the trial system in Libya, the Commission examined what is now conveniently called the Benghazi trial. In 1998, five Bulgarian nurses and one Palestinian arrived in Libya to treat paediatric patients. They were among 23 foreign medical personnel arrested, although the other 17 were subsequently released and left the country. In early 1999, the six accused were charged with committing actions leading to the deaths of a number of children and causing an epidemic by deliberately infecting 426 children with HIV in al-Fateh Children's Hospital in Benghazi. They have been held in custody since their arrest, now 8 years ago.

154. In the course of the first trial, which commenced in February 2004 before the People's Court, reliance was placed on confession evidence. According to the US State Department report for 2005, and repeating assertions made by Amnesty International (AI) and Human Rights Watch (HRW), the foreign medical personnel reported that they had been tortured through electric shock and beatings to extract their confessions. The accused themselves stated that their confessions were obtained through torture. They were accused of working as CIA and Mossad agents, according to statements made by Colonel Qadhafi himself. The international community universally rejected the claim of a foreign plot as absurd.

155. The case came before a superior court in Benghazi in 2004 where the Libyan prosecutor withdrew the accusations of a CIA/Mossad plot. During the trial, Luc Montagnier, the co-discoverer of the HIV virus, testified that the children were probably infected as a result of poor hygiene at the hospital and that many of the children had been infected with HIV before the arrival of the foreign health workers in 1998.

156. The defendants were convicted and sentenced to death in May 2004. The court acquitted nine Libyans who worked in the hospital. The Supreme Court revoked the death sentences on 25 December 2005 and ordered a new trial, saying there were irregularities with the arrest and interrogation of the accused. On 7 June 2005, a court had acquitted the ten security officials accused of inflicting torture upon the Bulgarian and Palestinian medical staff.

157. Mr Layden was one of a number of senior foreign diplomats present at the second trial. Thus, he has had first-hand experience of the Libyan judicial system. Indeed, as the defendants were without interpreters when he was present, a member of the British Embassy staff spoke to the defendants to tell them what was happening. He identified three principal failings in the trial as being first, a judicial unwillingness to control proceedings in which the prosecutor was interfering and preventing defence lawyers from asking questions by shouting and striking the microphone; second, the judge's failure to deal with the allegations of torture and, in effect, to put it to one side; third, the failure to ensure that all the proceedings were translated into a language which the Bulgarians would understand. The Prosecutor sat at the same level as the Judge; the defence lawyers were on benches near the public. There were daily and impassioned pleas and condemnations by the parents of the dead children. The Prosecutor presented not so much evidence as inflammatory speeches. The trial seemed to him more to be intended to give a sense of closure to the families of the dead children. Mr Layden described it as a deeply distressing episode in all aspects. He hoped that the defendants' long ordeal would soon end.

158. Mr Layden's views upon this were also expressed in the e-mail sent to Dr Hall on 5 September 2006. Its content went further than he had done in his public statements. Mr Layden spoke of *"the dismal case"* and the efforts made by him personally and on behalf of the international community to secure the release of the unfortunate victims of this miscarriage of justice.

159. After the Commission hearing was concluded, it was supplied by the SSHD in a letter dated 22 December 2006 with the sequelae of the re-trial. The re-trial commenced on 11 May 2006. On 19 December 2006, a guilty verdict was returned against five Bulgarian nurses and the Palestinian doctor who were, once again, sentenced to death by firing squad. A Bulgarian doctor was acquitted. The death sentence will be reviewed by the Supreme Court. If upheld, the sentence has then to be approved by the Supreme Council of Judicial Bodies. Mr Layden, in his fourth statement of 12 February 2007, said that the trial process had taken longer than expected, but he still hoped that the defendants' long ordeal would be over soon.

160. The Appellants said that this showed Mr Layden's misplaced optimism, in relation to a case which has gone on for eight years and has attracted a great deal of international publicity and pressure on the Libyan Government. There had been high level pressure from the Bulgarian Government, from the EU and individual states inside and outside the EU. Libya's approach to international diplomacy was compromised by the needs of domestic political considerations. It illustrated how Colonel Qadhafi could, in the case of the Appellants, seek to influence the judges by indicating the desired result and specifying the appearance which he wanted them nonetheless to give to the trial.

Prison conditions

161. The Libya OGN issued 11 April 2006 represents the guidance offered to Home Office staff dealing with returns not conducted under the umbrella of assurances:

> *"Whilst prison conditions in Libya are poor with lengthy pre-trial detention and mistreatment of inmates being particular problems, conditions for ordinary, non-political prisoners are unlikely to reach the Article 3 threshold. Therefore even where claimants can demonstrate a real risk of imprisonment on return to Libya the grant of Humanitarian Protection will not generally be appropriate.*
>
> *Prison conditions in Libya for political prisoners are severe and taking into account degrading conditions and an absence of adequate medical care conditions for such individuals in prisons and detention facilities in Libya are likely to reach the Article 3 threshold…Where the real risk of imprisonment is related to the claimant's political beliefs or activism, a grant of asylum will be appropriate."*

162. The situation in Libya is also marked by the authorities' willingness to address some of these issues. The FCO and the British Embassy in Tripoli, since September 2004, have been running a prison management project with the International Centre for Prison Studies (ICPS) of King's College London and the Judicial Police Authority which runs the non-political prisons. There was a preliminary visit by two ICPS consultants in October 2003. One was able at the last minute only to make a visit to Abu Salim prison, which lasted one hour. At the time of this visit, there was a single General People's Committee for Justice and Public Security, but Abu Salim was always run separately. As a result of a recommendation made by the ICPS, the General People's Committee for Justice was separated from the Public Security function so that two separate ministries were created. At the same time, the Judicial Police Authority was given administrative independence from the rest of the police force and became an agency of the Justice Ministry. Public Security, in contrast, retains responsibility for the regular police. The ICPS consultants, including former prison governors, have returned and have had unimpeded access to all the prisons in Libya which they have asked to visit, so far twenty. There have been visits by the Libyans to the UK. There is evidence from these visits and discussions that the Libyan authorities are keen to improve the conditions in their prisons and the respect in them for human rights, and are taking active steps to do so.

The riots in Abu Salim prison

163. Abu Salim prison is located in a compound of the Military Police in a suburb of Tripoli and has an unusual status among Libyan prisons: it is run by the Internal Security Organisation and not the Ministry of Justice (the General People's Committee for Justice). In practice it operates independently and reports to Colonel Qadhafi. It is said that the prison

is used for the detention of political prisoners, but it is not the only one. There appears to be a political wing in another Tripoli prison.

164. The Appellants raised further specific risks faced by political detainees at Abu Salim prison as a result of two reported incidents of violence there.

165. The Amnesty International report for 2005 refers to an incident in Abu Salim prison in June 1996 when an undisclosed number of prisoners were killed or *"disappeared".* Estimated figures for those killed ranged from tens to hundreds. In April 2005, the Libyan authorities announced that a committee had been established to investigate this incident. It was hoped by Amnesty International that this investigation would result in the clarification of what had happened to some of those inmates who had disappeared.

166. This incident is reflected in the Public Statement issued by Amnesty International which describes the incident in June 1996 as the mass killing of detainees with estimated figures of those killed ranging up to 1,200. The Libyan authorities initially denied that an incident had taken place. In April 2004, however, Colonel Qadhafi acknowledged that killings had, indeed, taken place. Officials from Human Rights Watch visiting Libya in May 2005 were told that an investigation had been opened. In its report of 28 June 2006, HRW confirmed that its members visited the prison in May 2005 and that an investigation had been ordered, although receiving no details of it. Prisoners interviewed by HRW in May 2005 were unwilling to speak about the incident, apparently out of fear. One former detainee, however, interviewed in the United States, claimed that Abdullah Senussi, the Head of Military Intelligence, was responsible for ordering the shooting. It is apparently from this inmate that the figure of 1,200 is derived.

167. The 1996 incident was followed by a further incident in Abu Salim on 4 October 2006. It lead to Amnesty International's Public Statement calling for a proper investigation into allegations that security forces again used excessive force when dealing with disturbances in Abu Salim prison. In this later incident, according to information supplied to AI, 190 prisoners were brought back to the prison following a court hearing in Tripoli. At this hearing, their convictions before the People's Court (by then abolished) on charges relating to membership of or links with an unauthorised organisation were upheld. The AI Report states that the unauthorised organisation was the LIFG. The original sentences of the People's Court, which included 20 death sentences and long terms of imprisonment, were also upheld. On their return to Abu Salim, violence broke out and the prison administration called for the security forces to enter the prison. AI reports that tear-gas grenades and then live ammunition were used against the prisoners; it was not clear whether this was fired by prison guards or security forces. One person was killed and another was believed to have been taken to intensive care in a critical condition. A number of others were injured mostly from bullet wounds. Later the same day, a delegation including Abdullah Senussi, visited the prison and met a group composed of

representatives of the prisoners. The official delegation is said to have expressed regret over the deaths and injuries.

The death penalty

168. As the sentences imposed upon the Bulgarian nurses illustrate, Libya continues to impose the death sentence. The Amnesty International report on Libya for 2005 suggests that it is not aware of how many death sentences were imposed or executions carried out. At least six foreigners, two Turkish and four Egyptian nationals, were said to have been executed in July 2005. There is also reference to the execution in April 2005 of two Nigerians convicted of murder; Human Rights Watch report *"Words to Deeds"*.

169. According to the same HRW report, Libya has long used the death penalty to punish a host of crimes. Article 206, for example, prescribes death for the establishment of any grouping, organisation or association proscribed by law, and this Article has been applied in conjunction with Law 71. Mr Layden said in cross-examination that his information was that no one had ever been sentenced to death under Article 206. That this might happen was described to Embassy staff by a Libyan official as *"absolutely unfounded".*

170. Article 207 prescribes death for spreading within the country theories or principles that aim to change the basic principles of the constitutional laws or the fundamental structures of the social system or to overthrow the state's political, social or economic structures, or destroy any of the fundamental structures of the social system using violence, terrorism, or any other unlawful means. Mr Layden conceded that people may well have been sentenced to death under Article 207.

171. Under Article 29 of the Penal Code, the courts have a discretion to commute the death sentence to one of life imprisonment where there are mitigating circumstances.

172. The British Embassy confirmed in writing its understanding that criminal trials resulting in serious penalties such as life imprisonment or the death penalty were heard before the Court of Appeal, sitting as a panel of three judges, and that the death penalty should be imposed only as a last resort. Where, as would be the case with the Appellants, the trial at first instance is held before the Court of Appeal, the decision that the death penalty is to be imposed must be unanimous.

173. Under Libyan law, the Supreme Court must confirm all death sentences, including those imposed by the People's Court when it was in existence; the Higher Judicial Council must then consent to the sentence. The Council is chaired by the Justice Secretary (Minister), and includes senior judges and senior officials. The HJC can take into account the political implications of the implementation of a death sentence, including the possible impact on relations with a foreign country.

174. Professor El-Kikhia noted on Article 8 of the Great Green Charter for Human Rights of 1988 which describes the death penalty as appropriate punishment for an individual whose existence constitutes a danger or is deleterious to society. He said, however, that there was an embargo on carrying out the death sentence although reports continue to refer to executions. There are no official figures for executions carried out. He accused Colonel Qadhafi of inciting extra-judicial killings, referring to the killing of Al Ghazal, and the killing of 17 Islamist demonstrators in Benghazi in 2006, to which we come later.

175. HRW states that the discussion to ban the death penalty began in 1988 with Article 8 of the Great Green Charter for Human Rights, which also says: *"the goal of the Jamahiryan society is to abolish capital punishment."* Despite repeated government statements about achieving this goal, the death penalty remains in force, and it appears likely that the new Penal Code will keep capital punishment for some crimes, including terrorist offences. On 18 April 2004, Colonel Qadhafi gave a speech to the Supreme Council for Judicial Authority and other high-ranking members of the judiciary in which he called for a number of legal reforms, including a reduction in the number of crimes for which the death penalty is applied. Despite the leader's call, the Basic People's Congresses decided against abolishing capital punishment. Colonel Qadhafi repeated his call in a November 2004 debate with judges and legal academics which was broadcast on Libya's state television. Abolishing the death penalty should stem from societal progress, he said, and it *"should not be the result of the economic, political or security pressures like the ones piled on Turkey to win a European Union membership."* It should only be abolished when Libya was ready.

176. The Appellants use HRW's assessment that this as an example of how Colonel Qadhafi uses the People's Congresses to approve or block measures he likes or dislikes. Professor El-Kikhia refers to the ability of Colonel Qadhafi to distance himself when he chooses to do so from unpalatable decisions. Consequently, he is able to claim that he wishes to abolish the death penalty but has been overruled by the General Peoples' Congress.

The Libyan system of government

177. The Libyan system of government is unusual in certain ways, and the regime would say unique. It is of direct relevance to this case. Mu'ammar Qadhafi, born in 1943, seized power in Libya in the 1969 military coup which overthrew the government of King Idris al-Sanusi. From 1969 until the mid-1970s, Libya was governed by a Revolutionary Command Council, the members of which were mainly drawn from the army with Qadhafi, swiftly promoted to Colonel, at its head. In 1977 the Socialist People's Libyan Arab Jamahiriya was set up. "*Jamahiriya"* is a Qadhafi neologism, coined in Arabic to mean '*direct rule by the people'*. A system of Basic People's Congresses in all parts of the country was

set up in which citizens were encouraged to participate. Delegates from the local Congresses form a national body, the General People's Congress, which has legislative power and the power to appoint members of the Administration, the ruling committee of which is the General People's Committee. Ministries have been replaced by People's Committees controlling the various departmental sectors. The system has no elections because elected representatives, according to Colonel Qadhafi's Green Book, act as a barrier between the people and real power.

178. The Operational Guidance Note of October 2006 issued by the Home Office says:

> *"The ideological basis of Colonel Qadhafi's regime is Colonel Qadhafi's own political philosophy, the Third Universal Theory, set out in his Green Book. Drawing heavily on Islam, socialism and Bedouin tradition, the Third Universal Theory calls for a system of direct rule by the people through a series of committees. It is intended as an alternative to capitalism and communism, and is applicable to all countries. In March 1979 Colonel Qadhafi renounced virtually all his positions in government and thereafter became known only by the title "Leader of the Revolution and Supreme Commander of the Armed Forces."*

179. Although Colonel Qadhafi is absent from the formal structure of civilian government, he remains in effective control of the country. His position is encapsulated in the US Country Profile on Libya, published in April 2005 , deposited in the Library of Congress:

> *"To this day, Colonel Qadhafi maintains absolute power as the head of a military dictatorship. In the years since 1969, Colonel Qadhafi has established himself as a somewhat flamboyant and at times unpredictable leader, but one who is always pragmatic. The Colonel Qadhafi regime made the first real attempt to unify Libya's diverse peoples and to create a distinct Libyan state and identity. It created new political structures and made a determined effort at diversified economic development financed by oil revenues. The regime also aspired to leadership in Arab and world affairs."*

180. In his e-mail of 5 September 2005 written to Dr Hall, Mr Layden said:

> *"He still has huge influence all levels of the complicated system of People's Committees which form the Libyan administration, and I believe that he can, if he chooses, ultimately have his way on any question."*

181. The structure of government carries within it the opportunity for Colonel Qadhafi to distance himself from decisions made by others when it is politically convenient to do so and is, thereby, able to disclaim responsibility for their actions. Professor El-Kikhia seeks to explain this in paragraph 17 of his report by saying that Colonel Qadhafi has unconsciously envisaged a state government that was a hybrid of a Monarchy and a Republic:

> *"In real terms that is an impossible task to achieve due to the contradictions between the systems. Libya's present system is an attempt at achieving the impossible. The official structure represents the Republic and the unofficial structure represents the Absolute Monarchy. There is an illusion that the official structure is in charge of the state of affairs, yet no rule or administered to position can be made without the blessing of the Absolute Moment. The two structures are parallel to each other and they rarely intersect."*

182. Professor El-Kikhia then says that this political methodology permits Colonel Qadhafi to maintain deniability. When the Revolutionary Committees act, they do so with his full knowledge and blessing, but if it suits him, he can subsequently changes his mind, he can do so by attributing the original decision to them and not to him. He uses the General People's Congress to approve decisions he wants which might be unpopular in some quarters; and if it proves too unpopular while he ponders reactions to some idea, he can allow them to reject it.

183. At paragraph 9 of his report, Professor El-Kikhia refers to an edict of March 1990 to the effect that any observation or directive made by the Leader of the Revolution is binding, enforceable and not subject to review by any authority in or outside the land. Libya is governed by edict and the rule of law is absent in any meaningful sense. He described the wide-ranging political offences prosecuted before the People's Court leading to harsh sentences. The law legitimised collective family or clan or tribal punishment through making it an offence not to report those who committed certain political offences.

184. The State Department Report said that although numerous charitable organisations were allowed to operate with government approval, independent human rights organisations were not allowed. They were seen as political associations which were banned. Such human rights organisations as were allowed, including one which operated under the aegis of the Qadhafi Development Foundation, followed government priorities.

185. Professor El-Kikhia regarded Colonel Qadhafi's style of rule, the *"politics of contradiction"* as designed to keep society in constant movement:

> "*Libya's political and economic system is a system of controlled chaos. The genius of Colonel Qadhafi is his ability to maintain and manipulate the chaos while simultaneously remaining inside it. He creates the chaos because the survival of his regime hinges on continued turbulence. Continuous rapid change ensures instability."*

(Extracted from Professor El-Kikhia's *"The Politics of Contradiction")*. This speech was an example of that style.

186. Professor El-Kikhia refers to the ability of Colonel Qadhafi to remove other ministers at will and, in particular, to the recent removal of Prime Minister Shukri Ghanem in March 2006 as an attempt to appease hard-liners by removing a minister with notable reformist ideas. Mr Layden placed a different gloss on this event. He did not think he was replaced because his reformist tendencies were disapproved. Ghanem had told him on many occasions that he was having trouble getting his reform agenda accepted by parts of the Libyan body politic. He was replaced by his deputy, Al-Mahmoudi. Al-Malmoudi told Mr Layden that the reforms remained top of the agenda. Mr Layden explained orally:

> *"My assumption is that because Shukri Ghanem did not have very much experience in government, he was a very well qualified economist and had taken part, including with us, in a number of studies of the necessary reform process in Libya, I think the feeling probably was that Baghdadi Al-Mahmoudi, who was very much more of a regime old hand, would be more effective at pushing the reform agenda through."*

187. Mr Layden spoke of Colonel Qadhafi's mercurial personality. A November 2005 Report from the SSHD on the succession to Colonel Qadhafi noted that he repeatedly modified his ideology to safeguard his position as Leader of the Revolution, although much of what he had done seemed irrational and counterproductive. He was an opportunist who sought to exploit every situation to his advantage. He had eliminated opposition and did not have to justify his policies; his approach to world affairs involved exploiting people to gain influence. He would do whatever he needed to in order to achieve his goals. He had realised that the normalisation of relations with the West was fundamental to his own survival and to the well being of Libya.

188. Professor El-Kikhia described the government as a modern dictatorship governed by the iron fist of Colonel Qadhafi who has, for the last 37 years, maintained power under a continuous reign of terror. It was his contention that the changes since 2003 were theoretical and that the Libyan government had not changed much politically. He saw a real tension between Libya's presentation of itself to the outside world and the reality at home. He contrasted it with Algeria and Jordan in the context of deportations with assurances.

189. Colonel Qadhafi himself is surrounded by a small inner circle of blood relatives or close allies who are committed to him personally. These include Musa Kusa, Head of the External Security Organisation, and Senussi, Head of Military Intelligence, whose involvement in terrorism we turn to later. The latter is married to Colonel Qadhafi's wife's sister. Professor El-Kikhia says that this circle includes his sons and daughter.

190. There were numerous overlapping security organisations, according to the US State Department Report: pervasive and controlling, able to impose sentences without trial and committing abuses with impunity. The security sector was governed by the Qadhafi tribe and family, and was highly privileged.

191. Mr. Fitzgerald relied upon a recent speech made by Colonel Qadhafi as establishing that, in spite of the change of direction towards the west, the Libyan authorities have, in reality, remained unchanged in domestic outlook. The key members of the regime remain in place. In particular, it remains Libyan policy to stamp out opposition to the regime. A Reuters report dated 31 August 2006, referred to a speech made by Colonel Qadhafi to mark the 37th anniversary of his assumption of power, in which there was no hint of a change in the country's domestic political direction, notwithstanding a reformist line expressed by his son, Saif al-Islam. In the speech, he expressed the view:

> *"If the enemy shows up you must finish it off because the enemy appears to exterminate you. We cannot tolerate that the enemy undermines the power of the people and the revolution."*

192. Professor El-Khikia saw this speech as an example of Colonel Qadhafi's contradictory style of government. Mr Layden was not dismayed by such a return to familiar revolutionary rhetoric. He accepted that Colonel Qadhafi was prone to such outbursts, particularly at revolutionary anniversaries. He described Colonel Qadhafi as becoming carried away on such occasions and saying things that were for the consumption of those present within his audience, whilst reverting thereafter to greater moderation:

> "*…it's as if he goes into playback mode, and we go back 10 or 20 years and he says something and then he clicks back into the present day and one carries on with a more rational policy."*

193. In contrast to the speech, it was his firm belief that the policies adopted by Libya in the 1980s of seeking out and killing political opponents were no longer pursued. In particular, he rejected the notion that such speeches would result in the resumption of the *"stray dogs"* campaign. According to the US State Department Report on Terrorism 2005, there was evidence of a plot in 2003 by Libyan officials to facilitate the assassination of Crown Prince Abdullah. In August 2005, King Abdullah pardoned five Libyans held in Saudi Arabia for their

connection with the plot. The Libya Government denies that it had anything to do with any such plot.

The United Kingdom's troubled relations with Libya

194. Any consideration of current relations with Libya must start with the specific causes for the nadir in the relations between the two countries in the period 1986 – 1999.

195. There were a series of incidents involving the Libyan government or officials working within it which caused particular outrage:

a. The death of WPC Yvonne Fletcher resulted in the United Kingdom breaking off diplomatic relations with Libya in 1984. WPC Fletcher was killed by a shot fired from within the Libyan "Embassy" in London.

b. In April 1986, an attack on La Belle discotheque in West Berlin killed 3 and left hundreds injured. A Libyan diplomat to the GDR, or a secret service member, was among those convicted. (In April 1986, the USA then bombed Tripoli and Benghazi killing 41 civilians, including an adopted daughter of Colonel Qadhafi).

c. In 1987, the vessel *Eksund* was seized containing arms and explosives destined for the IRA in Ireland.

d. In 1988 Pan Am Flight 103 was blown up over Lockerbie in Scotland killing 259 passengers and crew as well as 11 residents of the town of Lockerbie. In November 1991 an arrest warrant was issued naming two Libyan officials in connection with the bombing.

e. In 1989, the destruction of UTA Flight 772 en route from Brazzaville to Paris killed 170 people on board. The French Cour de Cassation ruled that Colonel Qadhafi could not be indicted for he enjoyed immunity as Head of State. In 1999, Senussi, Head of Military Intelligence, and five other Libyan officials were convicted in absentia in France of offences relating to this attack, and sentenced to life imprisonment. (Musa Kusa is also said in some reports to be wanted by the French in connection with this, although he does not appear to have been indicted).

196. These concerns led to, or played a significant part in, the imposition of sanctions in 1992.

The resolution of the historic difficulties

197. In 1995, the Libyan government publicly announced the cessation of links with the IRA. The United Kingdom restored diplomatic relations in 1999. Before doing so, the Libyan authorities agreed to accept "*general responsibility"* for WPC Fletcher's death and to pay compensation. A joint investigation has now been agreed first in principle and then in practicalities; Metropolitan Police officers visited Libya in connection with it and were due to examine witnesses there in November 2006. The two suspected of the Lockerbie bombing were handed over by the Libyan authorities in 1999 and were tried in the Netherlands under Scottish law. The one convicted is presently serving a life sentence in Scotland. The Libyan government has paid $8 m to each victim.

198. The rapprochement has had the effect that at least one senior Libyan official, formerly accused of terrorism, has been invited to the United Kingdom as part of the government's efforts to counter the threat posed by Islamic extremists. Thus, Musa Kusa, head of Libya's External Security Organisation visited London in October 2001 in the wake of the 11 September attacks, notwithstanding his links with Libya's grim past, and an exclusion order imposed by the British government which had been lifted. In 1980, he had been excluded from the United Kingdom, not according to Mr Layden's oral evidence, because of his alleged involvement in the assassination of a BBC journalist in London, but because he had spoken with approval to *The Times* newspaper of the Revolutionary Committee's decision to kill two more Libyan dissidents in the United Kingdom.

199. The US Library of Congress Country Profile of Libya in 2005 pointed to the impact of severe trade and economic sanctions imposed in 1992, without opposition from other Arab states, after Libya had committed terrorist attacks against the West. These had caused the decline of the economy, degrading the civilian and military infrastructure, and creating a focal point for internal opposition groups to attack the regime. The 1990s were years of political isolation and economic decline, with generally declining living standards, which created discontent exploited by Islamists, among others. They attacked the government on a number of occasions, and made a number of attempts to kill Colonel Qadhafi. There was a failed army coup in 1993. Colonel Gadhafi's shrewd and pragmatic decisions since 1999 had been aimed at reversing the problems which he faced in the 1990s.

200. According to the Human Rights Watch report of January 2006 *Words to Deeds,* one reason for the apparent turnaround was the need for foreign investment. After years of sanctions, Libya needed capital to develop its vast oil reserves. The main motivation, however, was said to be Colonel Qadhafi's concern for the Islamic resistance he faced at the time. The September 11 attacks offered him an opportunity to join the West's *"War on Terror"* and to justify security measures against these groups - and other critics - at home. The report continues that, since 2001, the government's rhetoric has hinged on the anti-terrorism concerns. Government officials had repeatedly told HRW that all individuals in prison on political charges were *"terrorists"* who threaten the security of the state. The US State Department's classification of

the LIFG as an Al- Qa'eda affiliate resulted in a Libyan response providing the United States and other countries with intelligence information, including Libyans who had trained with Al-Qa'eda. The Libyan Secretary of Public Security saw Libya as a *"local partner"* in the fight against terrorism.

201. In an article in the Middle East Policy Journal in Spring 2003, Saif al-Islam Qadhafi ("Saif"), then aged 30 and one of Colonel Qadhafi's sons spoke of this period in these terms:

> *"Even before the September 11 attacks, Libya forwarded to Western agencies a series of messages through the Internet which revealed extremist threats to both our country and theirs. Soon after September 11, Libya's director of external intelligence, Musa Kusa, met with senior US officials in London to plan a programme of mutual assistance in the war on terrorism…In recognition of a capacity for mutual assistance, the two countries have reached an accord on a secure intelligence channel."*

202. This theme was revisited in an article in the Middle East Policy Journal in Summer 2006, by Professor Zoubir of the Euromed School of Management in Marseille in a section entitled *"Libya and the Global War on Terrorism"*:

> *" Objectively, the Libyan regime had already by 1998, through Interpol, warned the international community against the threats that Al-Qa'eda posed to the world…There is no doubt that 9/11 constituted the real occasion that allowed Libya to progressively lose its pariah status. Libya's professed expertise in the war against terrorist organisations and the amount of information that its authorities held about various foreign terrorist groupings became the strongest selling point for the Libyan regime. The ultimate objective, obviously, was the normalisation of relations with the United States and improvement of relations with Europe that Colonel Qadhafi had been seeking since the mid-1990s. Thus, Musa Kusa, head of a Libya's intelligence, continued regular communication with European intelligence and counterterrorism agencies and offered to share information with them on various Islamist groups…Colonel Qadhafi's son, Saif Aleslam's "charity foundation" which played a critical role in the resolution of the Jolo hostage crisis in 2000, assisted Western governments in dealing with some Islamist groups.*
>
> *Probably the first success of Libya's policy of rapprochement with the West through participation in the global war on terrorism was its non-inclusion in 2002 of Libya in President Bush's "axis of evil" which included North Korea, Iran and Iraq. The Libyans proved their good faith by assisting the United States in the war on terrorism…In an interview given to the National Review Saif al-Islam reiterated Libya's engagement in the worldwide war on terror: "Libya has offered full cooperation in the global war against terrorism. Don't forget that Libya has been a victim of terrorist groups, some of which had their headquarters here in London along with other*

terrorist organizations from many different countries" and that in the war on terrorism "We are doing our part"… By 2003, it had provided intelligence on hundreds of Al Qaeda operatives and other jihadists."

203. On 15 August 2003, the Libyan government wrote to the UN renouncing terrorism. UN and most US bilateral sanctions and the EU arms embargo were completely lifted after Libya had fully complied with all that the UN had required of it.

204. Mr Layden and Mr Oakden describe the turning-point or transformation as being Libya's decision in December 2003 to renounce Weapons of Mass Destruction (WMD), which undoubtedly it had, and then to dismantle the Libyan stockpile in a transparent and verifiable manner. The process was completed in September 2004.

205. Diplomatic visits by the Libyan Foreign Minister and in return by the Prime Minister in 2004 initiated a process of high level contacts, including between Colonel Qadhafi and the Prime Minister. The negotiation and signing of the MOU was seen as part of the development of this process. There has been an ongoing dialogue about increasing UK and other foreign investment in Libya, and the setting up of modern financial services within a legal framework for businesses, as the country seeks investment and a more mixed economy.

206. In October 2004, Abulrahman Alamoudi was sentenced by a US Federal judge to 23 years in prison for his dealings with Libya. However, relations developed and the US restored diplomatic relations on 15 May 2006. Libya ceased to be listed as a state sponsor of terrorism. Discussions between Libya and the EU on a range of issues from fishing to migration have begun and EU leaders have visited Tripoli and Colonel Qadhafi has visited Brussels.

207. The FCO Minister, Dr Howells, visited Libya in June 2006 to sign a joint letter on Peace and Security. The Libyan Europe Minister, Mr Obeidi, (Colonel Qadhafi's senior foreign policy adviser), met Dr Howells in London in July 2006 to explore further co-operation. The two countries were now close partners in counter-terror work, in a relationship of high value to both sides. Defence co-operation on equipment, training and issues of War Graves and Remembrance had become established on a sound footing between 2004 and 2006. The joint UK/ Libya/ICPS prison improvement programme is another consequence of improving relations. There is now co-operation in education and health, language teaching, and police training.

The genesis of the Memorandum of Understanding

208. Mr. Layden set out the genesis of the MOU. The FCO advised in 2001 that Article 3 ECHR precluded the deportation of terrorist suspects to

Libya, and against any attempt to negotiate assurances. The process of reconsidering this position began in December 2002 when the Home Office reviewed how those considered to be a threat to national security might be deported conformably with the ECHR, and asked the FCO to reconsider its advice. The FCO confirmed that its advice remained extant, but that it was considering whether key countries would be able to provide appropriate guarantees. In May 2003, the Foreign Secretary agreed in principle to the negotiation of MOUs and a feasibility study was conducted in relation to a number of countries including Libya.

209. In August 2003 the FCO asked certain Embassies in the Middle East and North Africa to report on the prospects of negotiating a generic MOU. The British Embassy in Tripoli was not asked for its views at that time although, in November 2003, the instructions were copied to the Embassy in Tripoli, but for information only. Mr Oakden stated that relations between the United Kingdom and Libya "*were transformed*" in December 2003 when the Libyan Government agreed to dismantle its weapons of mass destruction (WMD) and to renounce terrorism.

210. Mr Oakden said:

> *"Political, economic and commercial links between both countries are developing fast. The UK-Libya Steering Group meets twice a year to promote place of bilateral relations, for example in the fields of health and education. The Prime Minister visited Tripoli in March 2004. The Duke of Kent, the Secretary of State for International Development, three Foreign and Commonwealth Office Ministers and a Health Minister visited Libya in 2004-5. General Searby was appointed in March 2004 as the PM's Co-ordinator on Defence to Libya."*

211. Mr Layden explained that the radical changes which we have outlined, and the growing rapprochement of the Libyans to the international community had caused the position on assurances from Libya to be viewed very differently. Since 1999, and especially since the end of 2003, the reintegration of Libya into the international community had been consistent and impressive. Difficult issues had been dealt with - from WMD, to compensation for terrorist acts and repayment of longstanding sovereign debt.

212. The London bombings in July 2005 caused the British government to re-examine more urgently the possibility of concluding an MOU. The Prime Minister spoke to Colonel Qadhafi by telephone in August 2005. Two days later, the Libyan People's Bureau in London informed the Foreign and Commonwealth Office that Libya was willing to receive a British dedication to discuss an MOU. The delegation visited Tripoli and the MOU was initialled on 24 August 2005 within a month of the Prime Minister's telephone call. In his statement, Mr Layden attributed the swiftness of the negotiations to this telephone call and to Libya's

commitment to working constructively with the UK on the deportation of terrorist suspects.

213. The Memorandum of Understanding between the General People's Committee for Foreign Liaison and International Co-operation of the Great Socialist People's Libyan Arab Jamahiriya and the UK was signed on 18 October 2005 by Mr Layden, then British Ambassador to Libya, and Mr Obeidi, the Minister or Secretary for European Affairs, for the Libyan Government. The accompanying letter which was negotiated as part of the overall understanding repeated the UK Government's commitment to its policy that no returnee should be subjected to the death penalty, by which it meant that they should not be executed. The MOU is annexed to this judgment as Annex 1.

214. In his statement made on 11 November 2005, Mr Oakden dealt with the agreement in principle about the function, role and identity of a monitoring body: the Libyan Government recognised monitoring as an integral part of the operation of the MOU, and it is referred to in the MOU. The Home Secretary visited Libya on 22-23 February 2006. When Mr Oakden came to make his second statement on the 15 March 2006, he spoke of continuing discussions about the terms of reference for monitoring and envisaged the submission of the letters of request under the MOU to the Libyan authorities seeking information about DD and AS for the purposes of determining whether to make a formal request to return them under the MOU. On receipt of that information, the UK Government would consider what specific assurances, if any, might be required.

215. On 8 May 2006 the British and Libyan Governments jointly appointed the Qadhafi Development Foundation as the Implementation Body. Under the terms of the MOU, specific assurances are offered by Libya. In relation to any individual case, further assurances might be provided if sought by the United Kingdom and agreed by Libya. The task of the monitoring body was to monitor the implementation of assurances given under the MOU and any specific assurance given in an individual case, including monitoring the return, and any detention, trial or imprisonment of a returnee. The monitoring body is required to report to both sides. It was to be "*supported by other independent organisations,"* according to Mr Layden's statement of June 2006.

216. It had been hoped that the Libyan Bar Association would participate *"for presentational reasons"*, if nothing else, according to FCO memo of the time. However, Mr Layden recognised that, because all members of the Bar, including those who acted for the defence, had to be approved, in effect by a government body, the Bar Association could not be regarded as an independent body for these purposes. Mr Layden also unsuccessfully tried, in his email to Dr Hall of 5 September 2006, to persuade Doctors for Human Rights to alter its refusal to assist the QDF with training in the recognition of the symptoms of torture. It had refused to assist because of the QDF's perceived lack of independence and the Libyan Government's record of torture. However, Mr Layden did not doubt the capacity of the QDF to perform its monitoring task.

The Memorandum of Understanding and other assurances

217. The assurances provided in the MOU are in summary: retrial for those convicted in their absence; a specific assurance that the death penalty would not be carried out "*if its laws allow*" and an obligation to use *"all the powers available to them under their system for the administration of justice to ensure"* that if the death penalty is imposed, it would not be carried out; adequate accommodation, nourishment and medical treatment for anyone detained and treatment in a humane and proper manner in accordance with internationally accepted standards. A detained person would be informed promptly why he had been arrested, of any charge and would be entitled to consult a lawyer promptly. He would be brought promptly before a civilian judge for the determination of the lawfulness of his detention. He would have unimpeded access to the monitoring body except if he were in detention, when he would be entitled to make prompt contact with a representative of that body and to meet them within a week followed by regular visits. This would include an opportunity for private interviews, and medical examination. He could at all times follow his religious observance. He would receive a fair and public hearing without undue delay before a competent independent and impartial civilian court with adequate facilities to prepare his defence and conduct his trial with legal assistance.

218. Mr Layden said that although the MOU did not use the word *"torture"* to show what was forbidden, the Libyans would have been well aware of what the purpose of the MOU was, and knew what the obligations were in the main international treaties on human rights, because it was a party to them.

219. A side-letter of 18 October 2005 re-affirmed the British government's opposition to the use of the death penalty in all circumstances. It informed the Libyans that if a person returned to Libya were sentenced to death after his return, the British Government would "*consider asking"* the Libyan Government to commute the sentence." The UK government would be likely to ask, in Mr Layden's view.

220. The agreed Terms of Reference of the monitoring body, known as the Implementation Body, take account of various international conventions on torture such as OPCAT, and require the body to be independent of the Libyan Government. It should have sufficient capacity and medical expertise for the task of monitoring those in detention who might be tortured, and access to a sufficient range of independent medical and legal expertise.

221. It was agreed that a monitor would accompany a returned person throughout the return journey and accompany him to his home or to the place of his detention. For those not in detention, contact details would be obtained and contact details for the Implementation Body would be provided to him and to another person of his choosing. The Implementation Body would report on any concerns to the UK. If he

were taken into detention a monitor would visit him promptly, and would visit without notice and as frequently as permitted by the MOU, with more frequent visits in the early stage of detention. The interviews should be in private and the visits should be conducted by experts trained to detect signs of torture. The monitor should ascertain whether adequate accommodation, nourishment and medical treatment were being provided and whether the individual was being treated in a humane manner. There should be a medical examination promptly at any time if the monitor had concerns about an individual's physical or mental welfare. The Implementation Body should obtain as much information as possible about the circumstances of detention and treatment, should inspect where an individual was being held and be informed promptly of any change in the place of detention. The monitor should be able to attend all court hearings except where the public were excluded. The Implementation Body should send regular reports to the UK and be in contact if its observations warranted it.

222. Each Appellant would be detained for the first seven days at a facility run by the Judicial Police in Tripoli, and not at a police station or prison. After seven days the investigation would be transferred to the Attorney-General's Office and they would be transferred to a prison run by the Judicial Police, according to what Libyan Ministers told Mr Layden in July 2006. Notes Verbales set out the pre-trial investigation procedure, the mechanism for extending detention which had never been sought by the Attorney General beyond ninety days. (There was some later uncertainty from the Libyans about the precise legal position but this is what the practice was said to be). They confirmed that detention would be in an institution run by the Judicial Police. Each would be entitled to a qualified lawyer at the expense of the state and of his choosing, if he were unable to afford his own. They would be entitled to contact their family and to have visits from the moment of their detention. Questioning would be in the presence of a lawyer (which we take to be a prosecution lawyer), and an agreed handwritten note would be taken and signed by the accused. They would be released if, after investigation, there was insufficient evidence to go to trial but if further evidence emerged they could still be prosecuted. The judiciary were independent, but judiciary and prosecutors belonged to the same career structure, unlike the independent Bar. Judges were appointed by the Higher Judicial Council, of which more later, which could only remove judges for serious errors or crimes. A wholly proper trial procedure was described, including the right to challenge witnesses, to call witnesses in a public hearing and to exclude evidence which had been obtained by torture. The cases against the two Appellants would be heard by the Appeal Court with rights of appeal to the Supreme Court against conviction or sentence. Acquittals could be appealed by the prosecutor. Implementation of prison sentences was subject to judicial and prosecutorial oversight.

223. In letters of 10 October 2006 recording the United Kingdom/Libyan Governments' joint understanding, Mr Obeidi, said that, in the event of a conviction, both AS and DD would serve their sentences in one of the prisons in Tripoli run by the Judicial Police Authority, one of the

administrative entities of the Ministry for Justice (the General People's Committee for Justice). These are described as *"Reform and Rehabilitation Institutions".* Mr Layden's oral evidence at one point was that Abu Salim was controlled by the Judicial Police, but he corrected himself later and explained why he had made a mistake when he had said that it was under their control. Both NGOs and the British Embassy agree that Abu Salim is not run by the Judicial Police but by one of the intelligence or security organisations answering to Colonel Qadhafi.

The Qadhafi Development Foundation as Implementation or Monitoring Body

224. The Qadhafi Development Foundation (formerly known as the Qadhafi International Foundation for Charitable Associations) has been operating since 1998. Its president is Saif al Islam al Qadhafi, Colonel Qadhafi's second son. Dr Saleh Abdussalem Saleh is its Executive Director with day-to-day control over its running. Most of the staff are volunteers, many of whom are doctors and lawyers with a personal interest in human rights. The Foundation has its base in Tripoli where twenty people are employed, branch offices in all Libyan cities and a handful abroad.

225. The Foundation is funded both from private sources, notably from the 1/9 Group which undertakes a range of commercial enterprises, from donations, and from grants from the Libyan state. Professor El-Kikhia describes the 1/9 Group as the business limb of the QDF enabling it to amass millions of dollars through private foreign companies investing in the oil industry. Saif has many business interests in Libya, he says. There was journalist material which suggested that one Deuss was behind much of the VAT carousel fraud affecting the UK and would shortly face trial in the Netherlands. Saif was said to have formed a joint venture between Deuss' company and the foreign investment arm of the Libyan national oil industry.

226. The QDF's main areas of activities are overseas humanitarian aid, support for humanitarian bodies in Libya and human rights, for which it has a number of separate parts. It has been involved in repatriation activities for Libyans stranded in Pakistan unable to return for security reasons, after fighting against the USSR in Afghanistan. It has acted as an interlocutor in negotiations where direct Libyan Government participation would have been more sensitive and as co-sponsor of a number of humanitarian conferences. It has worked closely with the UK Government in human rights, notably in enabling a joint UK/Libya programme for prison reform to be introduced.

227. The Foundation has a proven track record of protecting human rights in Libya and has developed significant international experience in doing so, according to Mr Oakden. In early 2006, Dr Saleh claimed that it had considerable experience of prison visits to deal with allegations of torture, that it had been the first organisation to carry out unannounced visits to prisons or other places of detention such as orphanages, using

special task forces to do so, often in response to tip-offs of malpractice. It usually gained entry and put its reports on its website. It intended to create a task force for any Libyans returned under the MOU. It had had experience of monitoring two individuals who had returned voluntarily from the UK and twenty five Libyans who had returned from Afghanistan. It had carried out human rights campaigns, notably on torture, and had done work which was central to some 85 Muslim Brotherhood members obtaining a retrial. It had access to a good range of expertise from its own staff and from its contacts with the Bar Association and other specialists.

228. Mr Layden described it in his first statement as the largest and most experienced NGO in Libya, enjoying a degree of independence unique among Libyan NGO. It frequently and publicly adopted positions markedly distinct from those of the Libyan authorities. He cited a number of examples in addition to those to which we have already referred:

f. Its work on the case of the Bulgarian and Palestinian medical staff accused in 1999 of deliberately spreading HIV in a children's hospital in Benghazi. The Foundation was able to secure improvements in the living conditions of those held in detention as well as providing evidence against the Libyan police personnel who had tortured the detainees in order to extract confessions. Although these police officers were subsequently acquitted, the Foundation's efforts were instrumental in their being brought to trial. The Foundation is also directly involved in international efforts to resolve the problem.

g. Similarly, the Foundation was involved in negotiating settlements on compensation for the UTA Flight 772 bombing and the attack on La Belle disco in Berlin.

h. The Foundation facilitated visits to Libya by Amnesty International in 2004 and Human Rights Watch in 2005.

229. Dr Saleh in June 2006 did not want to name in the letter of appointment those others with whom the QDF would work as the Implementation Body, because that might enable them to interfere with the work of the QDF but he recognised the need for independent experts in monitoring the condition of those returned. He sought some assistance from the UK in arranging training for some of the experts whom he had started to assemble. He would use individuals rather than organisations or professional bodies because of the extent of government influence over such bodies, as they were accountable to a General People’s Congress Committee. He recognised that the Bar Association had done some good work on human rights and in achieving the abolition of the People’s Courts. Mr Layden said that the UK Government would provide assistance in training people in the recognition of torture symptoms.

230. In July 2006, the QDF resolved to appoint a Specialist Working Group containing five specialists in forensic medicine, social welfare and the law. They were to maintain intensive daily contact with returnees, and to produce frequent and regular reports on their condition and circumstances. This Group would form a high level supervisory group for the monitors. British officials met with Dr Saleh again at a meeting on 23 August 2006. The officials also met up with some of the monitors who were said to be drawn from a range of experts. The CV's of four of them were available and were produced. Mr Saleh expressed himself almost ready to begin work but was keen to undertake more training on the medical identification of torture. He emphasised his independence, the criticisms which the QDF had made of the Ministry of Justice, and its determination to report any problems; reports would be placed on its website and the international media would be used if the QDF thought that problems were arising. At the same time two members of the International Bar Association visited the QDF in connection with the monitoring arrangements. The FCO Human Rights Group identified further capacity building work with which the Embassy could assist.

231. In his oral evidence, Mr Layden spoke of the early discussions with the Libyan leaders in which the UK Government had suggested that the QDF should lead on the monitoring group. The Libyans had been cautious, giving the impression that they would have preferred a body which they would have found easier to control. As time passed, they came to recognise the importance of an organisation that had credibility in the United Kingdom and specifically before the British courts and agreed to the QDF as being able to achieve this, as Mr Layden noted:

> *"Colonel Qadhafi having given his agreement to the principle, some of the consequences of this and at the end of today the package of agreements we have emerged with is, to my mind, fully satisfactory. In other words I think that the Colonel Qadhafi Foundation in the context of the MOU and the agreement on terms of reference for monitoring will be able effectively to do what we need it to do."*

232. A description of Saif and the QDF is found in a redacted letter from the British Embassy in Tripoli dated 6 June 2006. In a country which does not permit the presence of international NGOs, the Foundation is described as operating in a difficult environment. Libyan NGOs are *"thin on the ground,"* small and inexperienced. In paragraph 4 of the letter, the writer says:

> *"Saif al-Islam's agenda includes projecting a new, more positive image of Libya worldwide, as well as achieving progress in human rights and the various other areas of the Foundation's work. His success in this, and his status as son of the Leader of the Libyan Revolution, has enabled him and the Foundation to secure a unique degree of independence in both action and expression. The Foundation, frequently and publicly, adopts positions*

markedly distinct from those of the Libyan authorities on the issues it deals with."

233. Mr Layden described the '*somewhat enigmatic'* figure of Saif in the e-mail sent to Dr Hall on 5 September 2006. His instincts about the direction in which Libya ought to be going were mostly helpful and his position allowed him to pursue a more independent course than would be possible for anyone else in Libya. The Foundation was not an agent of, or subordinate to, the Libyan Government. Saif was seen as central in the movement to re-build Libya's relationships with the rest of the world. Mr Layden wrote that it was Saif who intervened in the Benghazi case, to improve the detainees' conditions and then to transfer them to house arrest with greater access to Embassy staff and relatives. Having commenced a campaign against torture, Mr Layden records that Saif publicly accused ten named police officers of having tortured the nurses to extract confessions. Although those defendants were acquitted, it initiated an open debate about the adequacy of the justice system.

234. Mr Layden saw Saif as wholly committed to the path which Libya was taking, and as someone who had worked hard for human rights in Libya for many years. He worked for economic and administrative reform and the improvement of Libya's overseas image. Saif was well aware, as was his father, of the serious diplomatic repercussions which would follow a breach of the MOU. An MOD view published in June 2006 that returns would be handled by the ISO or Military Intelligence was wrong.

235. An Israeli academic report saw Saif as genial, astute, English speaking, familiar with western economic and political ideas, and free from the anti-imperialist baggage which his father carries. He is ambitious and seen by many as a likely but not appointed successor to his father.

236. According to Professor El-Kikhia, Saif, notwithstanding his claim to have no position of authority in the country from a structural viewpoint, is part of the inner circle and is emerging as an increasingly important actor in Libya. He cites the US State Department report for 2006 to the effect that the Foundation is semi-official and *"followed government policy".* He cites as an example the payment of US $25 million to the Abu-Sayef group in the Philippines for the release of hostages and its payment of US $2.8 billion to the victims of the Lockerbie bombing as well as the settlement with the victims of the UTA bombing. No other institution in Libya could negotiate with foreign states, reach a settlement and pay substantial sums of money unless it did so with the backing of the Libyan authorities. Indeed, Professor El-Kikhia points out that the absence of truly independent associations in Libya is a means of identifying the Foundation with Saif's father:

"The conduct of the Foundation is essentially a means for Colonel Qadhafi to experiment with policies through the mouthpiece of his son."

237. Professor El-Kikhia view is that, given this close relationship, Saif's actions in pushing for a relaxation of his father's suffocating political pressure are an attempt to maintain his father's regime in the new political environment. Professor El-Kikhia does not dispute the fact that Saif is able to make public statements but suggests these are broadly sanctioned by his father, even when critical of the Revolutionary Committees. But the hardliners are also able to criticise the son.

238. In an interview reported in the Middle East Media Research Institute, MEMRI, of 11 November 2005, Saif was asked what he intended to do about the number of assassinations abroad of which the Libyan government was accused. He replied:

> *"There were indeed clashes between the Libyan state and [various] opposition elements… in the 1980s, due to specific circumstances, specific reasons and a different atmosphere. The circumstances, atmosphere and factors that existed for 25 years have disappeared and changed, and today we live in a different world and under a different regime. In addition, many of the assassinations and acts of violence were indeed inappropriate, and were carried out due to an individual decision by [certain] people [and then] falsely attributed to the Revolution, to the state, and to Mu'ammar Al Colonel Qadhafi. We have many instances that will be opened [to discussion] in the coming days, and the Libyans will see that these [human rights] violations and irregularities were undertaken by the individual decision of certain people…"*

This passage was identified by the Appellants' counsel as an attempt to put a favourable or unduly exculpatory gloss on past events, the vast majority of which had been organised by Tripoli.

239. A somewhat similar point was made about the QDF's statement of 10 October 2006 dealing with the events at Abu Salim in 2006. The statement refers to the fact that the QDF immediately contacted those concerned in the investigation and used its private sources to ascertain the facts. The statement refers to this *"regrettable incident"* arising as a result of protests by a group of prisoners at the court's decision to postpone the trial at the request of the defendants. The statement says:

> *"Protests have nothing to do with ill-treatment or the domestic situations inside the prison where prisoners enjoy high living conditions and well treatment [sic], they are also allowed to receive visits and contact with the outside world."*

240. The statement continues that the single incident of death was not caused by the shooting, as published by the media, and the body of the deceased was delivered to his family members who were informed of the circumstances of his death. No explanation was offered as to the circumstances in which the death occurred. The statement continues:

"The Foundation would like to point out that its efforts to ensure the rights of prisoners and to provide all the guarantees of humane treatment must not be used by irresponsible elements who seek to incite riots and chaos, and harm the interests of other prisoners for reasons that are not related with the living conditions and treatment within the present, but the real reasons are related to the decisions of the judiciary to which no one can interfere."

241. It appears from this passage that the Foundation is attributing the violence to the prisoners' reaction to judicial decisions. That said, it does not address whether excessive force was used. The content and tone of this statement are relied upon by the Appellants as indicating an apologist attitude for the regime which does not properly reflect the fact that there was credible evidence that excessive force was used.

242. It was put to Mr Layden that the QDF intervention over Abu Salim was simply propaganda but he rejected that suggestion:

"I think my reading of this would be that the Qadhafi Foundation knows that it has to operate within the framework of what's going on in Libya. It's a matter of high sensitivity in Libya when foreign groups criticise what has been going on in the country. This is an attempt by the Qadhafi Foundation to take a balanced view of the matter, not to prejudge but to continue to have a voice in the affair and be able to say more as further details, further information, emerges."

243. He also resisted forming a judgment about whether the person killed in this incident was shot by the security forces. On the basis of the information available so far, he was not able to say what caused the death and, by implication, neither was anybody else.

244. This alleged tendency of the Foundation to place a favourable gloss on events was tested in relation to a statement made by it on 20 October 2005 following the Human Rights Watch report on the human rights situation in Libya and the evidence of torture. The Foundation refuted those allegations and stressed the following:

"What has been said about the existence of torture in Libyan prisons is untrue and can never happen because of the existence of an agreement between Qadhafi International Foundation for Charity Associations and Prison Authorities in Libya. This agreement allows surprise visits by political and international human rights organisations to all prisons and rehabilitation centres in the country."

245. It is said that this forthright and comprehensive denial that torture occurs to those in detention flies in the face of the evidence but, more

importantly, shows a partisan approach by the Foundation which undermines its avowed position as an independent human rights monitor. If it is an apologist for the failings of the regime, it lessens its effectiveness as a monitor. This is taken up by Professor El-Kikhia in paragraph 25 of his report. Whilst conceding at the outset that it would be wrong to say that the Foundation has not made some difference, the Foundation's activities are *"immensely inconsistent"* when actions and statements are compared.

246. Mr Layden agreed in cross-examination that this statement by the Foundation, that torture did not happen in Libyan prisons, should not be accepted at face value and that the Foundation's response was simply not credible. In this context, he saw the operation of the Foundation as striking a delicate balance between the need to *"rally round the flag"*, close ranks and deny outside criticism but, at the same time, working privately in order to achieve results:

> *"I think what they are doing is trying to protect their own ability to work in this field at all." [Speaking of the Benghazi case by way of an example]…"And my interpretation of that was that this was Saif al-Islam , as he often does, pushing things as far as he can to see how far he can get and just occasionally being reined in and told [by his father], 'That's off-limits, son. We had better put that right.'… What you are looking at is an evolving situation with the Qadhafi Foundation doing its damndest to make things better in Libya and various forces ranged partly against it, partly on its own side and it's having to tread to carefully. I agree with you that if you compare what Human Rights Watch say and what Amnesty International say in a highly admirable and fearless way with the statements made by the Qadhafi Foundation, the comparison is not flattering to the Libyan organisation. In terms of what has been done in Libya in the past and what can be done today, it's a huge step forward."*

247. Other criticism of the Foundation appears in a statement of Salah Aboushima, whose brother Mahmoud Boushima returned to Libya in 2004, apparently having received assurances from a person purporting to be a member of the Foundation, as well as from the External Security Organisation. He then left Libya and returned again in June 2005. Two weeks after this arrival he was taken to the offices of the Internal Security Organisation and detained. His family telephoned the QDF which said it would take action but did not do so and was difficult to contact. Mahmoud remains in custody, despite the fact that the family believe he was acquitted at a court hearing. Letters to the QDF were unanswered. He was brought to Court to face trial in February 2006, but the hearing was postponed and little is known. His family were being denied access.

248. In a letter of 23 November 2006, the British Embassy in Tripoli gave Dr Saleh's response to this allegation. The QDF had been approached by both Mahmoud and Salah with a view to returning to Libya and it had intended to take their cases up with the authorities in order to see if they could return without problems. Mahmoud had returned before his case

had been taken up, and he had not contacted the QDF before he decided to return. Mahmoud had been charged with membership of a proscribed organisation. He had been acquitted on his first trial but further information on the same charge had come to light and so he was facing a second trial. Saleh thought that he was being held in good conditions and said that he would visit him.

249. There have been similar allegations about others but there is no clear evidence that they ever spoke to the QDF, although Mr Layden suggested that the ESO may also have claimed to have been from the QDF in discussions with those who returned. Nonetheless the policy for permitting or achieving these returns would have had at least the approval of the ESO.

250. The case of Al Ghazal is referred to in paragraph 86 of the Appellants' Chronology taken from Professor Vandewalle's History of Modern Libya. Al Ghazal was formerly a member of the Revolutionary Committees who, disenchanted with the regime, became a prominent journalist writing articles for dissident websites in London, and strongly opposed to corruption. He was abducted on 12 May 2005, allegedly by two members of the Internal Security Organisation. His body was found with signs of torture and a gunshot wound to the head. In August 2005, Saif spoke publicly about the impending prosecution of those accused of his murder but nothing further has occurred. Professor El Kikhia, in paragraph 17 of his report, comments that Saif has made remarks suggesting his murder was the action of anti-government forces with the aim of blackening the regime. In August 2006, according to the US State Department Report for 2006, two people were detained in connection with the shooting but it added that there were concerns that the autopsy had omitted some details necessary for the police investigation.

251. Mr. Layden would not be drawn on this incident about which he had neither personal nor official knowledge and did not wish to speculate. He accepted that the accounts provided in the Chronology and in the statement made by Saif were different. He did not have any inside information and postponed judgment. He was not, however, prepared to dismiss the account put forward by the QDF as inherently unreliable.

252. After the close of the hearing, Mr Layden produced a fourth statement on 12 February 2007 which dealt with a report produced during closing submissions that Saif was intending to leave Libya to work for an international economic institution while remaining President of the QDF. He did not think that this was a permanent departure and there was no reason to change his view that the QDF would remain able to perform its monitoring role. The background to this was said to be an attack on the reformers by the hard-line conservative Revolutionary Committees. Professor El-Kikhia saw this as representing a moment when there was public criticism from the Revolutionary Committees for the reformist views of Saif which made the QDF particularly inapposite as a monitoring body. We reject the suggestion that we should not look at this statement. We need to reach our conclusion on the up to date

material. We have had other material from the Appellants after the close of the hearing.

Fair Trial Assurances

253. In his second statement at paragraphs 25 and following, Mr Layden explained how the criminal justice system would apply to the Appellants. The information was derived from a meeting he had with the Libyan officials in the course of a visit he made to Tripoli at the end of July 2006 when he was accompanied by an FCO Legal Adviser. During the course of his visit, he had consultations in a number of meetings with the Europe Minister, Mr. Obeidi and the Minister of Justice, Mr. Hasnawi. It was Mr. Layden's considered view that the Libyan authorities remained committed at the highest level to the fullest cooperation with the British Government on the process of Deportation With Assurances.

254. As a result of these meetings, Mr Layden said that the two Appellants, like other individuals deported to Libya under the MOU, would be held in a Judicial Police facility in Tripoli. Mr Layden was provided with the detailed information on the rules governing questioning, time limits for their detention, the identity of those permitted to extend the period of detention and the procedure for commencing a prosecution, as confirmed in Notes Verbales. We have set these out already.

255. Mr Layden accepted that evidence of confessions by alleged co-conspirators would be admissible against another defendant, and that experience of Libyan courts showed that even if obtained by torture it could be admitted. He elaborated by saying that one point in the Supreme Court appeal in the Benghazi case had been that the Court had not ruled on the allegations of torture before the evidence was admitted. There was a legal requirement on the courts to investigate whether evidence had been obtained in that way but it was still admitted sometimes. He answered a question from the Commission by agreeing that the judicial investigation was *"nil or completely ineffective"*, as in the Benghazi case. He thought that it was very unlikely that such evidence would be admitted against these two Appellants as a result of the assurances given by the Libyan Government. They would be permitted to dispute its admissibility. Such confessions as had been in the evidence had been withdrawn on pragmatic grounds only, said witness D.

256. Mr Layden expressly tackled the question of why the experience of the Bulgarian medics would not apply to the trial of those returned under the MOU. He said that that trial had represented some improvement for Libya because it had been in public, the defendants had been represented and were able to call expert witnesses. The problems stemmed from the story put about early on, perhaps to deflect attention from the real cause of the outbreak of HIV at the hospital, which was probably the poor hygiene conditions, and then taken up by Colonel Qadhafi, that it had been a foreign plot. He could not thereafter readily go back on what he had claimed. This claim and the reaction was

possibly the result of the long period of isolation. The international reaction to proceedings may also have made matters worse because the Libyans saw the concern as being more for foreigners than for the plight of the infected children. The EU Action Plan for medical assistance and a support fund for the families were seen as offering hope that the ordeal would soon be ended positively for the defendants. He saw this trial as a unique event.

257. The Libyans were at one with the UK on the need for co-operation on the retrial of any deportee; the details of the procedure had been covered, the Libyan judges and officials had said that judges were free to reach what decision seems to them to be right. He believed that the trial would be very different and the deficiencies which he had identified would be rectified. He was satisfied that the indications that he received were to the effect that the Appellants would be given a fair trial, albeit in Libyan terms because, in every case where the Libyans had given an undertaking, it had been scrupulously observed. He concluded: "*… I am, in fact, convinced that these people would have a fair trial and at least that it would not be any kind of a travesty of justice. It would not be a denial of justice that they would face when they were tried by the Libyan Appeal Court.*"

258. Although there are references to a judge, singular, in some reports of the Benghazi trial, Mr Layden accepted that the trial was held before a Court of the same level in the hierarchy as that which would try the Appellants here. He did not know the rate of acquittals by such a court in political cases; records were not likely to be reliably maintained anyway.

259. Mr. Layden said to Mr Fitzgerald that there was a question mark in his mind about the degree of independence of Libyan judges. He said that, since the Revolution, it had been far more the case that all roads lead back to the leader, and there was no equivalent to judicial independence as known in the UK. It was, however, his view that Colonel Qadhafi would direct the judges that the trial had to be fair and that they would comply with his request by providing the Appellants with counsel of their choice and a proper opportunity for counsel to question witnesses. He agreed that this illustrated the lack of independence. Similarly, if Colonel Qadhafi asked for an apparently fair trial, a conviction and a twenty year sentence, that would happen.

260. He was asked by the Commission, putting aside a crude intervention in the form of a direction from Colonel Qadhafi to convict the Appellants, about the effect of a public statement by Colonel Qadhafi in which he made it clear, albeit by implication, what verdict he would like. Mr. Layden conceded that it is not beyond Colonel Qadhafi to make observations of that type and that this would be a form of indirect pressure which a properly independent judge would be required to resist. It was in relation to the power to resist such pressure that Mr. Layden principally entertained his reservations about judicial independence. He did not know whether they would resist such pressure in a highly political case, but he agreed that his doubts were greater in such a case. He agreed that Colonel Qadhafi could make his

views known privately without any outsider ever becoming aware of that. Mr. Layden resisted, however, the suggestion put to him that Colonel Qadhafi was likely to instruct the judges to convict, on his reading of the way in which the discussions over the MOU and trial had been conducted.

261. There was some evidence which Mr Layden was unable to accept or reject because the suggestion was never put to the UK, that after the first Benghazi trial, Colonel Qadhafi had suggested that the medics could go free in return for the release of the convicted Lockerbie bomber.

The Death Penalty

262. The British Embassy in Tripoli discussed the implementation of the death penalty with officials within the Libyan Attorney-General's office, recorded in a letter. It said that the death penalty may be imposed only in very limited circumstances and that, coupled with the assurances in the MOU, meant that the United Kingdom authorities should be confident that no one deported to Libya under the MOU would be executed, and that any death sentence would be commuted, according to Mr Layden.

263. The discussions with the Libyans had made it clear that the death penalty was a major issue for the UK, and a real risk of execution would prevent a deportation. This issue had been considered at the highest level in Libya. This was the basis upon which the text of the MOU was agreed, together with the side letter. But because the death penalty remained part of Libyan law, the Libyan view was that no absolute assurance could be given in the MOU that it would not be carried out, if imposed.

264. Mr Layden's understanding was that the obligation on the Libyan authorities, to utilise "*all the powers available to them under their system for the administration of justice"* to ensure that the death penalty would not be carried out, would bite when the case came before the High Judicial Council. This would only arise if the death sentence had been imposed or if the law required its imposition by the court of first instance, if Article 29 had not been used to commute it and if the death sentence had then been confirmed by the Supreme Court.

265. As Mr Layden explained it, the side-letter of 18 October 2005 which said that, if a person returned to Libya were subsequently sentenced to death, the British Government would "*consider asking"* the Libyan Government to commute the sentence, used a conventional formula in all such documents, as Ministers reserved the right to take a decision rather than being required to do so.

Other returnees

266. There are two examples of sex offenders being returned to Libya in 2004, with the benefit of assurances obtained by Mr Layden from a senior Libyan official involved in these present cases; their cases had gone before various Courts before removal. *F v UK* 36812, ECtHR 31 August 2004: the Deputy Head of Mission met F on 8 November 2006 as arranged by the Libyan Foreign Ministry. F appeared to be able to speak freely and spoke of his return to Libya as being uneventful. He had been held in Tripoli for a couple of days for routine questioning and had to go through some more enquiries described as being *"of a bureaucratic nature"* in Benghazi when renewing his papers. He had no further problems with the Libyan authorities and spoke of travelling freely between Benghazi and Tripoli to find work. He remains in contact with his family in the United Kingdom.

267. *A v SSHD* [2002] UKIAT 07355, EWCA Civ 225: A was detained by the immigration police in prison because he had no passport or other documents. He was released when his family identified him. He was well known to the police because he lacked identity documents and was a regular visitor to the police station. He managed a living. He sometimes acted as an interpreter as he spoke English well. Embassy staff were satisfied that he had not been mistreated on return.

268. The US State Department Report for 2005 refers to the case of Kamel Mas'ud Al-Kilani. According to the Libya Watch for Human Rights, Al-Kilani returned to the country on 19 July 2005 after receiving assurance of his safety but was arrested and taken to an unknown destination. No further information was available about him at the end of 2005. But the USSD Report for 2006, issued in March 2007, which was sent to us by DD's solicitors, said that he had been released in April 2006 after ten months detention, although he had still not been given his passport back.

269. The Appellants' Chronology cited the case of Mustapha Krer, a Canadian citizen who returned to Libya after 15 years, was arrested on arrival and had been detained ever since. According to Amnesty International, he initially travelled to Malta, where he was reportedly assured by members of the Libyan security forces and officials from the Libyan Embassy in Malta that he would not be arrested on his return. His ticket and his travel documentation were said to have been provided by the Libyan Embassy. He was apparently detained by members of the Internal Security Organisation and was held in detention for two years before seeing a lawyer in March 2004, when he appeared for the first time before the People's Court. He was charged, together with others, in connection with an alleged offence of affiliation to the LIFG. No assurances were given, it appears, to Canada.

270. After the conclusion of the hearing, the SSHD sent to the parties and the Commission a letter which had recently come to its notice, from Clive Stafford Smith of Justice in Exile to the then Foreign Secretary. In it, he refers to Omar Deghayes, a Libyan national who had been recognised by the UK as a refugee twenty years ago, and who was being held in

Guantanamo Bay by the US authorities. Mr Deghayes gave an account of being visited by four Libyan officials. In the course of the meeting he was shown photographs which the officials told him were of Sadeq and Mundhir. Both men had been badly abused, judging by the photographs. Mr Deghayes said he was threatened that the same would happen to him were he to return to Libya, which they were trying to bring about.

271. An AI report of 16 February 2007, sent to us by DD's solicitors, referred to Idriss Boufayed who returned to Libya in September 2006 after sixteen years as a refugee in Switzerland on the basis of unspecified assurances given to him by the Libyan Embassy that he would not be at risk from the authorities. It is not said that he had been told that he could carry on his activities without attracting adverse attention from the authorities. He was the leader of a reform group, seeking a democratic Libya. He was arrested six or so weeks after his return but released unconditionally after nearly two months detention incommunicado. Various national and international organisations pressed for his release. He was re-arrested in February 2007 because, with others, he was planning a demonstration about the way in which the police had attacked a demonstration in Benghazi in 2006 when a number of people had been killed. Others were arrested as well. There were no reports of torture in respect of the detention at the end of 2006, but it was said that the family home had been attacked by men colluding with the authorities and the family assaulted.

272. Mr Layden accepted that there was evidence that people to whom some sort of an assurance had been given had subsequently been imprisoned or disappeared. He accepted that the QDF writ *"does not run"* where it conflicts with the security services. Mr Layden had no reason to doubt the reliability of the account of what happened to Mr. Boushima, whom the US State Department Report for 2006 said was still in custody at the year end, but spoke of it in these terms:

> *"I don't know what's happened to Mr Boushima up to now but I think that this is the sort of case, and to some extent I am speculating here, where, as I have said, the Qadhafi Foundation's writ does not run. They have done what they can to help and they have come to a point where they cannot make good on the assurance they gave."*

273. We note what was said in the Embassy letter of 23 November 2006, after Mr Layden's evidence, which said that the QDF denied that it had given any assurance or that Mahmoud had contacted it before he returned.

274. Mr Layden said that he would not advise people to return to Libya having had an assurance from the QDF but not under the protection of the MOU. There was a great difference between an assurance given to an individual and one given to a state with which Colonel Qadhafi wanted to maintain friendly relations.

Reliance upon the assurances

275. In paragraph 24 of Mr Layden's second statement, given his assessment of the developments in United Kingdom/Libyan relations, he states:

> *"In my opinion this series of developments makes it well-nigh unthinkable that Libya would put the continuation of this positive, constructive relationship at risk by failing to honour the assurances it has given in respect of the Appellants in the two cases under consideration."* [Emphasis added.]

276. He drew upon the fact that Libya's determination to co-operate with the UK over these deportations under the MOU had been expressed at the highest level, as demonstrated in this instance by the speed with which the negotiations were concluded. Libya now had a clear track record of honouring its commitments. The Libyan Government would be aware of the high level of public scrutiny which these deportations would have. Any allegation of a breach would attract publicity which would damage relations with the UK, the UK's reputation on a matter of high importance to it and to Libya's improving reputation.

277. Mr Layden was firm in his judgment that, given the MOU, the Appellants would be properly protected. As he expressed it in the e-mail to Dr Hall:

> *"I know that most of the Human Rights NGOs - people whose principals and dedication I admire to the highest degree - have set their faces firmly against the Government's policy on deportation with assurances. I believe that on this issue, at this time, they are wrong…You will have gathered that I believe very strongly in what we are trying to do."*

278. Mr Layden summarised his view :

> *"It is intrinsic in the whole idea of assurances that you have to take a judgment on how reliable those assurances are and my judgment is that we can rely on these ones."*

279. Professor El-Kikhia, in paragraph 6 of his report, takes the view that any firm reliance upon any undertaking given by the Libyan regime is seriously dangerous. In paragraph 15 of his report, Professor El-Kikhia refers to the fact that the document was signed on behalf of the Libyan Government by Mr Obeidi rather than Colonel Qadhafi himself. He states:

> *"…there is no guarantee that Colonel Qadhafi has taken real ownership of the undertakings…The normal assumption that a representative of the government is able to speak in good faith on behalf of regime, simply cannot apply here."*

280. Mr Layden rejected that suggestion and stated that the assurances were given with the authority and approval of Colonel Qadhafi. His involvement explained the speed with which negotiations were concluded after the telephone call from the Prime Minister to him. Mr Obeidi was one of Colonel Qadhafi's closest advisers, and could speak for the regime with complete authority; he had been one of the leading interlocutors for the regime on issues such as Lockerbie and WMD. There was no separation between the government and the will of Colonel Qadhafi.

281. The problem for Colonel Qadhafi, explained Professor El-Kikhia, was that he was dependent on the Revolutionary Committees and on his tribe; he needed them to preserve his own position and could not easily reform them without jeopardising his own position. That meant that the reliability of the assurances was dependent on Colonel Qadhafi and this group because the formal structure of government had no power to give effect to any thing which it might have signed up to. He would see the MOU as but a part of the picture whereby he maintained himself in power.

282. Professor El-Kikhia also expressed the view that there was a history of extreme and sudden volte face: opening and closing borders, inviting and then expelling foreign workers, encouraging and then removing small import/export businesses, and shifting from pan-Arabism to pan-Africanism and back again. Colonel Qadhafi was quite capable of going back on his word: negotiating an end to WMD while still dealing with the rogue Pakistani nuclear expert, inciting unlawful activity by suggesting that the USA should bomb the UK because it harboured terrorists, and he noted the reported link to an assassination plot against the Saudi Arabian Crown Prince which we have referred to earlier.

283. Many of these matters were more fully answered by Mr Layden in the closed evidence, but he accepted that that there had been sudden policy changes in the past, a history of lying to foreign governments, pursuing assassinations and terrorism abroad. But he concluded that Colonel Qadhafi would adopt a pragmatic approach and had demonstrated that he did so in relation to his rapprochement with the West. Colonel Qadhafi had agreed to assist in the continuing investigation into the killing of WPC Fletcher, and to compensate her family, accepting responsibility for the shooting. He settled the sovereign debt to the UK, and paid it before the agreed time. The Lockerbie and WMD undertakings were fully honoured, *"whole heartedly and scrupulously"* in the case of WMD, in a matter which went to the heart of Libya's view of its national security. There had been benefits to both sides. There were mutual benefits with the MOU. There had been full compliance with the undertakings over compensation for the UTA and Berlin disco bombings. He accepted that the compliance with the undertakings had been something which could be seen and could not be a matter of dispute. It was only after several years of building up trust that Mr Layden felt willing to put the MOU forward. Although Islamists

remained particular enemies and ones whom Colonel Qadhafi would have had in mind during his August 2006 speech, he would not see the *"neutralisation"* of the two Appellants as his main priority and certainly not as taking precedence over good relations with the UK.

284. In the course of his evidence, Mr Layden was asked to assess the relative importance of the assurances and the monitoring function: 90 percent of his confidence that the assurances would be adhered to came from his assessment of how Colonel Qadhafi thought and acted, and 10 percent upon the monitoring function performed by the QDF. In other words, whilst this was not insignificant in the overall package, it was not something on which the United Kingdom Government placed over-reliance. In Mr Layden's words, it had *"a small but measurable effect."* It could not stop Colonel Qadhafi if he wanted to breach the MOU. But it made it less likely that he would take that decision. It could deter a more junior individual who was minded to act contrary to what Colonel Qadhafi had instructed, because it would make detection more likely. In a conflict between Colonel Qadhafi and what Saif thought was necessary for the MOU to be observed, the father's word would be decisive.

285. Mr Layden explained what would happen if a breach of the MOU were alleged. The UK Government would expect an immediate report from the QDF, which would have been accessible to the returned persons or his chosen *"next of kin",* the alternative contact point. If the individual were in detention, he would be visited and examined with the appropriate expertise. The UK would then consider what to do, but it could include asking the Libyan Government to provide further information or to take remedial action.

286. Professor El-Kikhia said that the assurances should be seen in the context of an ongoing clampdown on Islamists; he attributed the killing of a prisoner in Abu Salim, the deaths of Islamist demonstrators in Benghazi and the conviction of Islamists by an ad hoc revolutionary court to the Anniversary speech urging the killing of dissidents.

287. He also thought that there were certain factors which made a UK response to an alleged breach of the MOU difficult: recent heavy investment by UK companies, the completed removal of WMD, the absence of the need for international aid, unlike many other Middle East countries, and the re-establishment of diplomatic relations with the USA meant that Libya needed the UK less.

288. Mr Layden answered questions on this point from the Commission by saying that a breach of the MOU would affect areas which mattered to Libya including intelligence, counter-terror and defence; and although there could be damage to the UK through reprisals for any action which it took, the balance of advantage in the developing relationship lay with Libya and was far more crucial to it. There had not been heavy investment by UK businesses; and he was of the view that Professor El-Kikhia had misunderstood the significance of the oil bids by the Oasis

Group which had been dominated by USA companies. That was but a part of a much wider EPSA programme which involved many countries around the world. The US companies, said Mr Layden, were very sensitive to the political atmosphere, more so than the UK companies perhaps, and if Colonel Qadhafi went back on these undertakings it would be very damaging to Libya's economic prospects.

289. He contrasted a set back in those circumstances to UK interests in the region with a loss of that which was of personal and high importance to Colonel Qadhafi, in terms of the survival of his regime. He emphasised the pragmatism of Colonel Qadhafi. It was the rapprochement with the West which provided the changed political context in which the reliability of the assurances had to be judged rather than in any domestic political changes. He accepted however that there was no instance in which the UK had broken off diplomatic relations because of the treatment by a foreign country of one of that country's nationals.

290. Mr Layden said that Colonel Qadhafi may be a mercurial personality but he had always been pragmatic about his own survival as head of the regime, even when that meant taking actions which were illegal such as the *"stray dogs"* policy. He saw that as a forceful means of removing opposition. Mr Layden was not sure whether Colonel Qadhafi had actually ordered the Lockerbie attack, although he was sure that the person convicted had done what he was accused of doing. Colonel Qadhafi had certainly seen violent and totally illegal acts against the UK and others as necessary for regime survival: he had become hyper-sensitive to threats from overseas, after a series of attempts to kill him. Although he thought that Colonel Qadhafi had not been involved in any plot against the Saudi Crown Prince, the pragmatic explanation would have been that he saw Wahhabism, funded by Saudi Arabia, as the ideology behind Islamist terrorism. Although Colonel Qadhafi was unpredictable, that affected what he said more than what he did and Mr Layden could not think of any action by Colonel Qadhafi in recent years which was unpredictable and had any lasting effect. Pragmatically he realised that his old ways had got him nowhere, and his survival depended more on improving the welfare of the Libyan people.

291. The possibility of an attempted assassination of Colonel Qadhafi by the LIFG would not cause him to change his chosen path or to breach the MOU because he would recognise, even if the group were based outside Libya that he had more to gain by seeking help from the intelligence and counter-terror relationship which he had built up with the UK.

292. This pragmatism would enable any problems which might arise over a change in UK Prime Minister to be overcome provided that was handled with care. The personal chemistry, which had enabled the relationship between the two leaders and countries to get off the ground, had now been superseded largely by the interests which it had brought into play, which both parties wanted to keep going.

293. Although over time the relationship between the USA and Libya would become closer than it currently was, Mr Layden saw the UK as enjoying a unique advantage through the educational relationship, health and other areas of advantage to Libya whereas Libyans still had to go to Tunis to get a visa for the USA. The UK would remain its main interlocutor for many years. The bombing of Tripoli and Benghazi by the USA in the mid 80s still rankled with Colonel Qadhafi who maintained a shrine where his house in Tripoli was hit, shown to special visitors.

Conclusions: Introduction

294. The SSHD has made it clear that the return of the two Appellants to Libya without breach of the UK's international obligations is dependent on the MOU, the Implementation or Monitoring Body arrangements reflected in the MOU and in its Terms of Reference, and in the Notes Verbales which cover where they would be detained. The pre-trial and trial provisions are fleshed out in other Notes Verbales to deal with the potential breach of Article 6. The death penalty is further covered by the side letter to the MOU.

295. The Appellants assert greater risks of the death penalty and of execution than the SSHD accepted and also a risk of extra-judicial execution which the SSHD rejected. We shall have to consider those in due course.

296. Suffice it for the present to reiterate that it is not the SSHD's case that domestic changes have made it safe to return the Appellants or have altered the context or degree of risk which they were thought to be facing. The changes which he relies on, and which we have described, relate to the way in which the foreign policy of Libya, its rapprochement with the West and the UK in particular, has enabled the diplomatic, economic, counter-intelligence relationship to develop to such an extent that Libya can be seen to have a real interest in maintaining that relationship. This leads directly to whether it can be trusted therefore to adhere to the bilateral assurances which it has agreed with the UK.

297. If the MOU, the monitoring or implementation body work as intended by the SSHD, and if the various other assurances in the Notes Verbales are adhered to according to their terms, there would be no basis for concluding that the UK's human rights obligations in the ECHR would be breached by the removal of these two Appellants to Libya. The only area of doubt, and it is one to which we shall return would be the timescale within which any death penalty would be commuted or carried out, if that were to occur. There would still be a question mark over the institutional independence of the judiciary but not one which could create a real risk of a complete denial of a fair trial.

298. It is clear that the MOU would have to be effective in a situation in which it is certain that the Appellants would be detained on arrival, questioned, very probably put on trial and kept in detention till then. The trial would be on charges under Article 206 at least, of belonging to the LIFG, and

we believe that there is a real risk that they could be tried on more serious charges under Article 207. Each of those carries the death penalty, and although Mr Layden's evidence is that it is not imposed for the Article 206 offence, which we accept, there is at least some risk that it could be imposed for an Article 207 offence. There is plainly a real risk that each would be convicted at least of the Article 206 offence. Even if the death penalty were not imposed, the probability is that long prison sentences would be imposed. The question of where the Appellants would be kept and under what conditions would arise both before and after conviction.

299. At root, the question for the Commission is whether what is set out on paper would be adhered to or whether there is a real risk that it would be breached in ways which would involve a breach of the UK's ECHR obligations. We therefore turn to consider the relevant components for that judgment, starting with the human rights picture generally, the nature of the Libyan regime and how it arrived at its current relationship with the UK.

Conclusions: the general human rights picture

300. The SSHD's general stance in relation to the human rights position in Libya, as articulated by Mr Oakden and adopted by Mr Layden, leaves no real room for debate as between him and the Appellants, who rely on US State Department and NGO Reports, often the one drawing on the other, and Professor El-Kikhia, as to the extent of current human rights abuses, except over extra-judicial killings. We have set it out because, as we have emphasised, the general acceptance of the position of the SSHD must not obscure the extent and significance of the abuses. There are no disputes of fact or evaluation in relation to those matters for us to resolve.

301. Torture is extensively used against political opponents among whom Islamist extremists and LIFG members are the most hated by the Libyan Government, the Security Organisations and above all by Colonel Qadhafi. It is practised for the purposes of obtaining confessions for use in trials against the confessor or other defendants; it is used in intelligence gathering although there may be some realisation growing that that is not as generally useful as humane treatment. There is evidence that it is used for punishment. The holding of political prisoners, who could include Islamist extremists, in conditions which breach Article 3 ECHR, incommunicado and in several instances without trial for many years, is a disfiguring feature of Libyan justice and punishment. The position of ordinary prisoners has shown some improvement in the last few years. The death penalty continues to be available and imposed; it is rather less often carried out. The period of time between the imposition of the death penalty and either commutation or execution is unclear, although there are instances where it appears that the time has been counted in several years.

302. The judicial system is clearly marked by a lack of judicial independence stemming both from the practice and acceptance of political interference

with the outcomes of trials especially those of a political nature, and from an ingrained lack of institutional independence of thought or judgment among the judiciary in such cases. They would share the characteristics, of what might be called the Libyan establishment, of hostile thought and attitude towards the regime's political opponents. Libyan judges may say otherwise, but Mr Layden's question mark over it appears to be more probably an example of under statement.

303. The range of other human rights which are curtailed include freedom of expression in the media, and of association, both in the form of demonstrations and in the existence of political, human rights or other organisations. It is very difficult for such organisations to exist lawfully and professional bodies are not independent either. We highlight those features because they are relevant to the existence of means of deterring and checking, or publicising and working against the abuse of prisoners, their arbitrary detention, and at their trials.

304. These are essentially the reasons why the SSHD has accepted that an MOU would be necessary for the safe return of the Appellants, but their degree is relevant to the assessment which we have to undertake of the effectiveness of the arrangements which the SSHD has put in place.

Conclusions: the system of Government

305. It is not that human rights are respected to some extent but that there are failures and shortcomings; it is rather that the system of government is designed to procure the survival of the regime, and it does so by repressing the expression and organisation of dissent in a variety of ways, whether that dissent is that of a secular non-violent opponent or that of the violent Islamist.

306. There is very little difference in substance between the descriptions provided by Mr Layden, Professor El-Kikhia and other commentators of the way in which Libya is governed. We accept what they both say, which we have set out above. We identify as relevant to our decision in these appeals the following features, in addition to the systematic suppression of active dissent in what can properly be described as a unique form of dictatorship, and not a benevolent one either.

307. Colonel Qadhafi is able ultimately to have his own way in any decision or action in which he wants to intervene, even though he has no official governmental position. That he can exercise such power as Leader of the Revolution enables him to deny any role in or responsibility for events or to take responsibility as he chooses. We emphasise that it is *"ultimately"* that Colonel Qadhafi can have his own way, because he has to make his interventions, aware that he needs to maintain the support of the security organisations, of Revolutionary Committee hard liners, and to have an ear to what the populace may be saying. He is astute enough now to realise that although he may issue edicts, that does not guarantee survival for his regime.

308. There is no elected Parliament which in some form or other, however attenuated, can act as a focus for debate, opposition, or as a check on the actions of the executive. The General People's Congress does not perform any such function. We have already discussed the judiciary.

309. The bureaucracy is slow and dysfunctional, cut through only when Colonel Qadhafi becomes personally involved. The security organisations are by contrast efficient and effective, and answer to Colonel Qadhafi. They have been part of the power structure for a long time. The heads of those organisations are among the circle of advisers close to Colonel Qadhafi which includes his sons and daughter. Corruption is endemic, and certainly at a high level.

310. Colonel Qadhafi is described by Mr Layden as mercurial. Other descriptions of his personality and outlook are not at issue: he is a devout Muslim, highly sensitive to slights personal or national, with an intense anti-colonial attitude, enlivened by an admixture of socialism and revolutionary fervour. We accept that he is a pragmatist in certain ways but that is a facet to which we shall return in more detail.

311. There is no doubt but that he and some of his senior advisers in the security organisations were involved in acts of terrorism against the West and have been involved in serious human rights abuses domestically. The former have been set out where we describe the nadir in relations between Libya and the UK, and the West more generally, and the background to the exclusion of Musa Kusa from the UK. The latter appear from some of the human rights abuses which are described in the open material. It should not be supposed however that Colonel Qadhafi and his senior advisers are without other relevant qualities of greater advantage to the SSHD's case. Mr Layden was right to emphasise that although there is much which is gravely adverse to them in their past, they have other relevant qualities which assist the SSHD's case, and which should not be ignored because of the many comments justifiably hostile to them.

Conclusions: the rapprochement with the West

312. We accept the reasons which have been outlined earlier as to how the breakdown in relations with the West occurred and the course which it took in terms of terrorist attacks by Libya and sanctions. We also accept that the motivation for the rapprochement drew on two strands, and in this respect as well there appears to be little between Mr Layden and Professor El-Kikhia, and other commentators make much the same points that we now come to.

313. First, the long term effect of UN and bilateral sanctions, diplomatic isolation from almost all countries, and the wildly changeable foreign policy towards other Arab or African countries, had led to the long term decline of Libya's economy, growing discontent and unemployment. This was in stark contrast to the growth in prosperity evident in other oil rich countries. The growing discontent among the population was a

threat to the regime's survival and it had to accept doing what was necessary in order to remove sanctions, and obtain investment especially in the oil industry.

314. Second, although the LIFG was very much weaker by the end of the 1990s, it and other Muslim radical groups had long been regarded as a threat to the Libyan regime. Their existence, with some later growth in their strength, was seen as a threat to the regime and because of their past assassination attempts, as a threat to Colonel Qadhafi personally. There may well have been an element of opportunism in the way in which Colonel Qadhafi reacted after 9/11 towards the USA, but diplomatic relations had already been restored by then with the UK.

315. The account given by Mr Layden of the course of negotiation of the MOU and the related documents is accepted, as his account of the meeting which led to the acceptance of the QDF as Implementation Body and of the views of Dr Saleh about the involvement of other bodies. Likewise we accept what he told us about the attempts to involve other groups in that Body.

Conclusions: assessing the effectiveness of the package of assurances

316. Against that background we turn to the assessment of the effectiveness and reliability of the package of assurances upon which the SSHD relies. We consider the general approach to assurances, the way in which the Commission should approach the evidence of Mr Layden, the so-called *"deference"* issue, the impact of the QDF as the monitoring body and the political and diplomatic context in which the assurances have been given and could be tested and enforced. We then give separate consideration to the issue of the fairness of any trial.

Conclusions: the approach to assurances

317. The Commission discussed, in its decisions in *Y* SC/36/2005 24 August 2006 paragraphs 389-396 and in *Othman* SC/15/2005 28 February 2007 paragraphs 491-496, how it views diplomatic assurances in relation to deportations given so as to prevent the UK breaching its ECHR obligations. It has recognised and commented on the concerns which various bodies from the UNHRC to NGOs have expressed and the experiences which other countries have had. It has taken the view that diplomatic assurances are legally relevant and capable of reducing the risk which would otherwise be faced to a level at which return would no longer breach the UK's obligations. There is no need here to repeat what is set out in those decisions.

318. Such assurances as the Commission has accepted do not fall foul of the decision of the House of Lords in *Armah v Government of Ghana* 1968 AC193 that assurances which require the receiving country to suspend or disapply its normal laws should not be relied on. Those which the SSHD puts forward here do not require the application of different laws

from those which, on the face of what the Libyans say about their laws, would apply to any Libyan facing such charges as the Appellants would or after conviction. They only require the Libyan authorities to apply the laws according to their terms. Many abuses in Libya stem from the disapplication by its authorities of much of the law from those suspected of terrorist or Islamist extremist opposition. But that has to be tested, of course, against the reality or what we know of practices in Libya.

319. The Commission has also been clear that the assessment of the value and effectiveness of assurances is less a matter of their text, though that can be relevant in showing what issues have been considered and what room may exist for a government to take a strictly legalistic view of what it has undertaken, and more a matter of the domestic political forces which animate a government and of the diplomatic and other pressures which may impel its performance of its obligations, or lead to quick discovery and redress for any breach.

Conclusions: the FCO evidence and deference

320. The SSHD has relied on the evidence of Mr Layden as to the reliability of the assurances which have been negotiated, and has also submitted that we should accord his views deference. Mr Layden was an impressive witness – forthright, completely honest, realistic, with a commitment to truth and fairness, and to the upholding of the UK's international human rights obligations. He had the advantages of long experience of diplomacy in the Middle East and of being an Arabic speaker. Above all, he had been the British Ambassador in Libya when the MOU was contemplated and negotiated; he was a participant in the negotiations. True it is that he is not an independent expert witness in the conventional forensic sense, and his roles in the process could suggest that he could be an enthusiast for the work which he had done. But he is retired and only fills his particular post because he has been asked to, and because he believes that the agreements which he has negotiated would assist the security of the UK without breaching the ECHR. He has been frank about why he would not have adopted that stance earlier in relation to Libya. His expertise is particularly relevant to the assessment of the significance of the course of negotiations, to the domestic political situation, to the relationship between the various personalities who feature in this case, and to the assessment of why the interests of a diplomatic relationship between Libya and the UK would suffice to prevent a breach of the MOU. Of course, when he says that a breach would be *"well nigh unthinkable",* that view commands considerable respect, although it is very strong indeed.

321. Nonetheless, for the reasons which we have given in *Othman*, in paragraphs 339-340, adopting *Y* in paragraphs 324-326, we do not treat his views with deference on those matters. They are entitled to weight according to the expertise, experience and cogency with which they were expressed and with which the difficulties were considered and dealt with. We have set out the areas in which he has particular expertise and experience.

322. This is not to downplay the value of the views of Professor El-Kikhia, and we do not do so. Although the disappearance of his cousin, probably at the hands of the Libyan authorities, might be capable of impairing his objectivity, we saw little evidence of that. Much of what he says accords with the evidence of Mr Layden. But as we have already said, there is a significant difference between them on the question of whether the Libyans can be trusted as the result of a number of incidents which arose during the initial stages of the rapprochement, including over the abandonment of WMD. On these, we conclude that Mr Layden has by a long way the greater immediate and direct knowledge; part of it was dealt with only in the closed material. We accept Mr Layden's evidence that the Libyans have proved in the end completely trustworthy in the way in which they have dealt with some very difficult issues, and have kept to what they said they would do, even if there have been some uncertainties and surprises along the way. It is in the very nature of their roles that Mr Layden's knowledge would be greater.

323. Mr Layden is also able to speak with a greater understanding than Professor El-Kikhia could have of the diplomatic relationship between the UK and Libya, its origin and its important components, the incentives on Libya to adhere to the obligations, and the sanctions open to the UK in the event of a reported breach of the MOU. There can be an advantage in the distance which Professor El-Kikhia has from Libya, but there is a much greater advantage in the personal immediacy and recentness of knowledge of people and events as they affect this relationship.

324. We also take Mr Layden as representing the considered and collegiate views and wisdom of the FCO, and as not pursuing some personal cause which the FCO has been pleased to see him promote if he felt able to do so.

Conclusions: the QDF as monitoring body

325. There is an importance to independent and effective monitoring of assurances which we should identify. The tasks of the body are to visit those returned and especially those detained, to observe them, and interview them, to enquire about them, to insist on seeing them and knowing of their whereabouts, and to report candidly if privately to both states. The fulfilment of those tasks, together with the diplomatic response which any report of concern would generate, should act as some deterrent to abuse, before it acts as a means of obtaining redress. The significance of any concerns becoming public may depend on the way in which a government would react to adverse publicity and an adverse domestic or international public reaction. The willingness of a government to accept monitoring by whatever name can be an indication of its willingness to prevent abuses.

326. The body undertaking such tasks needs to be independent of the power structure which it is monitoring or at least sufficiently so for that task to be effectively carried out. If that task is not effectively carried out, the returning state is dependent solely on the willingness and ability of the other state by itself to take such steps as would prevent a real risk of abuses arising. One area of importance is that it should be capable of creating confidence on the part of the person being monitored that what he says will be treated confidentially where that is necessary.

327. Saif clearly has some achievements to his credit in relation to human rights, is well-educated and familiar with the ideas and many attitudes of the West. He is well-meaning and economically progressive. He has been able to speak out to say that which few others would have been able to say. He has been able to use his relationship with his father and his political position to advance the QDF, and to fund it in large measure from commercial activities which his position has enabled him to undertake. We are not in a position to take any further, and see no advantage to our consideration of these appeals in doing so, the relationship between the 1/9 Group and Deuss. The QDF also has some record to its credit and we accept is not the body which the Libyans first wanted to do the task. Those matters have been set out in the evidence rehearsed earlier.

328. The evidence shows that there are real limitations to what the QDF is likely to be able and in part willing to do. Saif is clearly part of the power structure of the Libyan government and part of the inner circle advising his father. He has had a role as interlocutor and negotiator for the government on sensitive issues. He has had a public relations role and to adapt a phrase which may not be quite apt, he can be seen as the acceptable face of the regime. He may yet be a successor to his father and he has an interest in the stability and survival of the regime. He also shares, we infer, his father's hostility to Islamist extremists and to the LIFG.

329. There clearly is a tendency to close ranks and to rally round the flag, and limits on how far Saif can go in his public statements, or in his own views of the past acts of the Libyan regime, exampled by the unduly favourable perspective which he put on its history of assassinations. Saif can be brought in to line by his father, if he is seen as straying too far for his father's liking, and Saif is not immune from criticism, from the Revolutionary Committees for his progressive views, of which his father will take note. The risk that he might wish to spend time abroad, whether in response to such criticism or not, would diminish his effectiveness in providing an influential role for the QDF. Mr Layden accepted that if there were a clear conflict between the security organisations and Saif, the views of the former would prevail with Colonel Qadhafi and so too obviously would his own views prevail over those of Saif.

330. It is clear that the ability of the QDF to perform the monitoring role in any form derives from the position and influence which Saif enjoys. It would be subject to no lesser constraints of thought, outlook and action. It is no more independent of the regime than is Saif himself, and he is not

independent. Its limitations at the very least can be seen in its limited interventions in the cases of those returned who alleged, even if incorrectly, that they had done so with the benefit of assurances from the QDF, and in its very cautious statements about incidents which gave rise to real concerns. Its statement about the absence of torture in detention is bizarre, for we do not believe that that is what it truly thought. If it did, it would not have sought the prosecution, albeit unsuccessful, of ten guards in connection with the Benghazi trial. We accept Mr Layden's appraisal of those comments: the QDF had to strike a balance between closing ranks with the regime and working privately to bring about improvements where it could.

331. We do not wish to diminish the efforts which the QDF has made and may continue to do in a difficult environment. We accept that it was the best that could be found as a monitoring body. We note that there is no other body which is part of the Implementation Body, and understand why this would have been sought for presentational reasons, and accept that it could not usefully be found so as to create greater independence. Only ten percent of Mr Layden's high confidence that the assurances would be observed derived from the monitoring body's role. That low percentage is a wholly justified assessment. It means to us that the body would only be effective if either a rogue guard or interrogator were minded to disobey the instructions of Colonel Qadhafi or his security officials as to how someone was to be treated, or as a check against some overhasty reaction by Colonel Qadhafi, when his close advisers could use the existence of the monitoring body to dissuade him or deter action by others. We do not see the rogue guard as being of any real importance in Libya.

332. It would not work for any other abuses because, as Colonel Qadhafi and the Security Organisations are in total control, abuses would only occur with their permission or acquiescence. In such circumstances, the QDF would be unable to carry out its monitoring function of visiting, interviewing and reporting; if those activities continued despite officially sanctioned abuses, it would be unable to render true reports to the UK Government. In such circumstances, it would lack the power and perhaps the interest or will to risk contradicting or reporting adversely on the Libyan regime. Indeed, in the circumstances to which we come, the temptation to close ranks would be strong. It could not obtain in such circumstances any confidences from the person being monitored. In reality the aspirations of the QDF to operate in public would not be achieved in relation to abuses which the regime had accepted. We accept that it would not be the function of the QDF to carry out investigations or to confront the regime, anyway. It would not be able to make any public accusations against Colonel Qadhafi or the heads of the security organisations. It would be very reluctant to report accusations privately to the UK or to the Libyan authorities. It could only be as independent as the regime would permit it to be.

Conclusions: the risk that Colonel Qadhafi would not adhere to the assurances

333. In the light of our conclusion that the monitoring body would not be effective to deter, monitor or report were Colonel Qadhafi, or the heads of the security organisations, or other high officials close to the regime, to decide to breach the assurances, the question of whether the assurances would be effective to avoid a real risk of breaches of the UK's international obligations, does come down simply to whether there is a real risk that those individuals would act in such a way. This involves very much an assessment of the individuals and the way in which they would view breaching the assurances against the diplomatic reaction which they would calculate that the UK would mount. In the absence of effective monitoring, this cannot depend to any real extent on the prospect of detection deterring abuses, but more on whether they might decide to breach the MOU, believing that they could avoid detection, or more readily deny a breach and avoid sanction in that way.

334. We note that it was never said by the SSHD that the real risk could be eliminated simply by reliance on trusting the current Libyan regime, and Mr Layden placed little reliance on mere trust compared with his assessment of the way in which the regime would behave. They were not put forward as men whose word would always be honoured, as a matter of personal principle. There may indeed be other circumstances in which an MOU or monitoring under it are unnecessary, or risks against which they might have been devised are obviated by other factors, but none of those apply here. It comes down to a question of how far the regime's self–interest in keeping to what it has said is predictably constant, reducing the risks to acceptable levels.

335. We examine in particular the position of Colonel Qadhafi and of the heads of the security organisations because the former has the ultimate say on any matter in which he chooses to intervene, and the latter are part of the inner circle of power, holding the positions of significance in relation to the Appellants were they in detention anywhere or facing questioning. There are no institutions within the political structure of Libya which would act as a constraint on any breach, as we have already explained. The Revolutionary Committees certainly would not do so and there is no evidence that the People's Congress could do so. Nor are there any non governmental institutions, whether trade unions, political parties, independent professional bodies, newspapers and media or NGOs with specific remits, which could take up any allegations. The Bar Association has expressed concerns about torture but its comments could not be regarded as a source of anxiety to the regime, likely to affect its course, even if the Bar Association were to find out about a breach and be willing to speak out. Nor would the Islamist extremist in Libya be able to appeal to any popular group of which the regime had to take notice, rather than repress.

336. All that said however, we start from the premise that the regime has not signed up to the MOU and given the assurances which it has, as some form of deceitful endeavour to obtain the return of the Appellants, or the other Libyans, intending to harm them upon return. It has not entered into these arrangements in bad faith. We accept the way in which Mr

Layden has described the negotiations and the relationship now existing between Libya and the UK at a number of levels. There are clear advantages to Libya in pursuing its closer relationship with the UK in counter-terror intelligence, diplomatic, economic and other ways. It has entered into the agreements with a view to long term adherence to them. We accept his appraisal thus far of how the parties view the arrangements.

337. As Mr Layden said, Colonel Qadhafi did not see any great advantage in having the Appellants and others like them returned to Libya, and saw the MOU rather as a favour done to the UK, for which no doubt something in return could be sought. The security organisations would see the advantage in having such individuals returned as rather greater however, because of the more direct control which could be exercised over them. The Libyan adherence to the MOU would also be of great importance to the UK Government because of the role which the programme of Deportations With Assurances plays in its counter-terror strategy.

338. We have considered all the evidence, including what Professor El-Kikhia has said, about the untrustworthiness of the Libyans during the course of other negotiations but we accept the contrary evidence of Mr Layden as considerably more sound. That is not to say that there has not been room for misunderstandings or misplaced optimism, although events have usually turned out satisfactorily. There has been no breach of clear and formal assurances given to the UK.

339. We do not regard the fact that the regime, with the same people involved, has in the past committed violent and illegal acts, in some instances serious acts of terrorism, warrants a different starting point. The evolution in its outlook towards the West is genuine and a change set for the long term, even if only because the inner circle has seen that as the route to the survival of the regime. It has renounced those former ways; that renunciation has been generally accepted in the community of nations and there is concrete evidence that it has adhered conscientiously to that new direction for some years now. This is not a new course in relation to human rights however, and any abuses would not be a return to behaviour now abandoned or largely in the past, but an application of the normal for political opponents.

340. The suggestion from Professor El-Kikhia that the absence of Colonel Qadhafi's signature from the MOU meant that he could disown it, and so deny responsibility for a breach, was not persuasive. We prefer the evidence of Mr Layden that the speed of negotiation and the range of discussions which had involved Colonel Qadhafi personally, and his security organisation heads, showed that the MOU had his full backing and assent. We accept that Mr Obeidi is one of the inner circle of Qadhafi advisers and that his signature here represents the imprimatur of Colonel Qadhafi.

341. We also accept that this would mean that Colonel Qadhafi and the heads of those organisations which would be dealing with the Appellants

would give genuine instructions that they were to be treated in accordance with the MOU and the other assurances given. Although the bureaucracy is slow and dysfunctional, the security organisations, though overlapping and possibly competitive amongst themselves, are efficient. There is evidence that comparable instructions have been given and adhered to in the past.

342. No very useful parallel can be drawn with the assurances alleged to have been given by the ESO, with the involvement in some instances of the QDF, to some individuals who returned in reliance on them. They were not given to a foreign country, there is no record of what was said, some may have returned before the assurances had been finalised, and there may well have been conditions imposed as to co-operation and non-involvement in political activity which the regime thought were not met. Even if deceit were involved in those cases, we do not see that that means that deceit may have been involved here: the negotiations were with UK diplomats, the assurances were committed to writing, and there is very little scope for misunderstanding. Mr Layden's evidence that these assurances were given with the intent that they be kept was clear and powerful. He also said that he would not have advised anyone to return on the strength of the assurances said to have been given in the case for example of Aboushima. The assurances to Al-Kilani were not given to a foreign state. It is not clear that any assurance was given to anyone other than Al-Kilani, nor is it clear by whom, or what precise assurance was given. We are not under any illusion that Libya could readily ill-treat someone who was returned without the protection of the MOU, and that it could exercise deceit at times to achieve the return of an individual. It could threaten them as was said to have happened in the case of Mr Deghayes. But we do not think that those circumstances apply here.

343. Mr Layden did not regard the circumstances in which the two sex offenders returned to Libya as crucial to the Secretary of State's case. The circumstances are, of course, entirely different and are unlikely to shed much light upon the risk faced by political opponents of the regime. However, the undertakings were honoured and were given by one of those closely involved with the undertakings here.

344. So the reliability of the assurances becomes a question of whether there is any real risk that that position could change and do so in a manner which had the consequences that the Appellants would be ill-treated in a way which breached Article 3.

345. The essence of the answers given by Mr Layden as to why Colonel Qadhafi would adhere to the MOU and not change his position was not that the regime was composed of men who could be trusted to keep their word as men of integrity and honour, but that they would keep their word because it was in their own interests to do so. There were strong pragmatic reasons for their having embarked upon their current course and for that course to continue, namely that the rapprochement with the West with the economic and counter-terror intelligence and other, lesser advantages were seen by them as essential to the survival of their

regime. Mr Layden's view that the regime is pragmatic, concerned for its survival, with a long term course of improving relations with the UK and the West set for the foreseeable future, is wholly correct in our view. However, does that mean that it there is no significant risk that it would act in a way which the UK would perceive as contrary to that course, and do so in a way which breached the MOU, if it took a different view at any particular time?

346. We accept that Colonel Qadhafi is a mercurial personality, in the sense which we describe, that the unpredictable changes of course and of action have diminished in recent years and are to be seen now more in the way in which he sometimes speaks. But that is a change of degree, rather than a complete change. In our view, there is still an important element of unpredictability about what Colonel Qadhafi may say or do. Others in the inner circle are much more predictable, but their public utterances, if any, would lack the impact which those of Colonel Qadhafi could have. This leads to the following problems.

347. First, this combination of pragmatism with a mercurial personality, which we take to mean for these purposes changeability of view and unpredictability of reaction, highlights a contrast and even a conflict between a short term reaction and a longer term course to which the regime would revert after the short term reaction had worn off. This may mean that for a short period, but of uncertain duration, some course divergent from the longer term course could be followed. The regime may see that longer term course as continuing so far as it is concerned, possibly at some short term cost. It might see no incompatibility between its longer and shorter term courses.

348. Second, the way in which Colonel Qadhafi sees his pragmatic interest in his survival may itself be unpredictable and need not to western eyes, be rational or in his self-interest. That has been so in the past, and indeed there is plenty of evidence over many years of Colonel Qadhafi adopting an approach which must have reflected his assumed pragmatism for his regime's survival, but which Mr Layden saw as counter-productive, contrary to Colonel Qadhafi's own best interests. This had happened in the short term as well. Colonel Qadhafi may well see a course of conduct as necessary for his survival which Mr Layden would regard as unlikely to be conducive to that end.

349. Third, if Colonel Qadhafi has adopted a pragmatic approach in the past, based on his perception of what would preserve and enhance the regime's long term prospects of survival, that pragmatism is also compatible with torture, incommunicado detention, and unfair trials. Indeed, much of the purpose of those abuses would have been to enable the regime to remain in power. It would be possible to give a *"pragmatic"* interpretation to any of those, especially if reprisals are allowed as a rational form of policy. Such an interpretation could be attempted for the Lockerbie bombing.

350. Mr Layden did not think that that particular attack had the blessing of Colonel Qadhafi, although the person convicted had done what he was

accused of. But that would suggest that others could act in quite drastic ways without seeking or obtaining his approval, or could perhaps somewhat misinterpret what he had said. The informal and highly personalised style of rule and decision–making could lead to just such misunderstandings of what was meant and had been decided, with inadequate records kept and insufficient involvement of a bureaucracy or of important Ministers. The personality and the style of government cannot really be separated.

351. The willingness of the regime to endure international opprobrium and diplomatic pressure, whether in pragmatic mode or in short term changeable mode, in a way which cannot be explained other than by the vital importance of maintaining a particular domestic posture, can be seen in the way in which the Bulgarian medics have been dealt with. It is a dismal story of injustice, despite the high level, persistent diplomatic pressure and adverse publicity which the trial and detention have attracted. If it is the position, as we accept, that Colonel Qadhafi could determine the outcome of the trial, he plainly has not done so in response to that very considerable external pressure. There must be overriding considerations of domestic politics which outweigh in his mind all other considerations.

352. These may illustrate the difficulty which Colonel Qadhafi has in seeing a trial lead to acquittals when he has pronounced on the defendants' guilt, the difficulty he has in accepting that the medical system run by the state might have been to blame for the outbreak of HIV/AIDS, the effect of local pressure from the families for a guilty verdict and the counter-productive effect of public external pressure and publicity. We would accept that the outcome also suggests that Mr Layden has been over-optimistic in his assessment of when the ordeal would be over.

353. If this is pragmatism in the regime's view, or more probably in the eyes of Colonel Qadhafi, it illustrates the limitations of judging reliability by the pursuit of self-interest as assessed from the outside. If it is not pragmatism, it reflects the ability of the regime to adopt a stance which causes breaches of human rights for non-pragmatic reasons. The true answer, in our view, is that what is pragmatic to Colonel Qadhafi may not be so to the western states, which do not see the world through his eyes and may be unaware of how he really sees the various pressures which he faces.

354. We conclude that the pragmatism of the regime in its own self-interest is not sufficient itself to exclude a real risk that it would act discordantly with that long term course, temporarily or on occasions, whilst still taking the view that they were acting pragmatically to ensure its survival. The question is whether such temporary or occasional acts would lead the regime leaders or others to breach the MOU, particularly with regard to the way in which the Appellants would be treated in detention or during questioning. Certainly, the past and current practices of the regime and its security organisations show that violence and human rights abuses are regarded as legitimate, even necessary, weapons to be deployed to

protect the regime or to punish opponents. There is no institutional or personal rejection of such acts when used to those ends.

355. It is inherent in the above considerations that the particular events which might cause Colonel Qadhafi or the heads of the security organisations to take action which is contrary to what Mr Layden regards as the pragmatic course, and to do so in a manner which risked a breach of Article 3 in relation to the Appellants, are unpredictable. However, there are a number of events which could create a risk of that sort in our view.

356. One particular area of concern would be a recrudescence of the LIFG in Libya, or an attack or real fear of attack by the LIFG on Colonel Qadhafi, his family, inner circle members in Libya or abroad, or on growing Western interests in Libya, whether British or not. Indeed, the attack need not be by the LIFG as such, but could be by other violent groups of Islamist extremists such as the one associated with AS. Whilst there might be a countervailing desire to show that the relationship with the UK was holding true in such circumstances, and the greater advantage might lie in doing nothing to disrupt the availability of intelligence from the UK, the temptation to interrogate LIFG members or other Islamist extremists in Libya, whether in custody already or not, using methods which breached Article 3 could readily be too great to be resisted. (It may seem paradoxical that the risk of terrorist violence directed against the UK's interests can be exploited by the supporters of that very violence so as to obtain the UK's protection, but such is the law post *Chahal*.)

357. Colonel Qadhafi could readily make very hostile remarks about Islamist extremists and terrorists. Some revolutionary speech could be interpreted or applied by some officials to the disadvantage of the Appellants, before any wiser advice could be obtained and action countermanded or inhibited. Public comments could be made which he could not recant without loss of prestige, or without creating difficulties for the balance between the hardliners in the Revolutionary Committees and the progressives which include Saif and, for certain purposes, the heads of the security organisations. The agitating comments need not be in public at all. It may very well be that pragmatism would return and remain the longer term course. But it does not take very long for severe personal ill-treatment to befall those who are in detention and it is not as though the institutions which can inflict such ill-treatment do not already exist or would be departing from their common practice.

358. It is a clear characteristic of Colonel Qadhafi and, to a lesser extent some of the other regime leaders, as well that they are very sensitive to personal slights and to slights upon Libya. This may be partly due to strong anti-colonial attitudes, but in Libya's case it may also reflect rebuffs experienced at the hands of its neighbours and of other Arab and African states, and its years of isolation. There could be a strong albeit temporary reaction to some slight, actual or perceived, on the part of the UK or even of some other Western country: for example, if the UK were to make known publicly its displeasure at the way in which an

allegation of a breach of the MOU had been dealt with, or at some other incident between the countries.

359. Colonel Qadhafi may well regard the MOU as a favour done to the UK and could conclude at some point that Libya has done a great deal for the West in its rapprochement and that the West owed it favours in return. If Libya did not feel that it was receiving enough for what it had done, it could take the view that the benefit was not worth full adherence to the MOU. There remains room for misunderstandings, although the diplomatic ties and other relationships are growing closer, more trusting and open.

360. We cannot say how far into the period of return any such incident could occur, for it could occur at any time, although we would expect the initial stages of return, detention and questioning to proceed as required and to be without any real risk of a breach of the MOU or of Article 3.

361. Indeed, we would accept that there is an element of speculation about how any change of approach might occur in what we have set out. That is inevitable in this case for what we are satisfied about is that there is a considerable element of unpredictability which we do have to consider. That is where the risk first arises and it could result from a number of actions. We have to do what we can to assess its degree, causes and impacts. We are satisfied that there are real risks of such events occurring, which could lead to acts which diverge from the pragmatic course as Mr Layden would see it, even though the divergence would be occasional, responding to events, or temporary. These are not in our judgment unrealistic scenarios.

362. Of course, it does not follow that were some event to occur or were some speech to be misinterpreted, that the reaction or consequence would be a breach of the MOU. However, the risks appear to us to be these, seen in the context of the very widespread and grave human rights abuses of political opponents in detention, whether or not being questioned for trial purposes. First, while those returned under the MOU might well be spared any simple if widespread reprisal in the event of a violent attack against the regime, they could well be subjected to treatment which breached Article 3 during the course of interrogation as part of the investigation into such an attack. Second, any one of the three intelligence services could conclude that it wanted more information from the Appellants which it believed they had, whether for a trial of some other defendant or for intelligence purposes. These would be newcomers to them and could have information which they felt had not been divulged. An absence of co-operation could be resented if there were a growing body of LIFG members in Libya returning and rebuilding its infrastructure there, and especially so if the Libyans believed that the UK was unable or unwilling to obtain or provide the information which they felt they needed. The Libyan intelligence or security organisations may not always operate in harmony rather than in competition. Third, if some grievance or slight were felt against the UK, the reaction could be to place an Appellant in a political prison, and in the case of a prison run by the Judicial Police but which had a political

wing, a transfer would not be difficult to arrange, nor a return. But life in the political wings or prisons would involve a probable breach of Article 3. Either of those last two reactions could occur at any stage during detention, before or after trial and conviction. Fourth, although it would not necessarily lead to a breach of Article 3, Colonel Qadhafi could give instructions, or be interpreted as having done so, for the conviction of the Appellants and for the sentence, whether as a long term of imprisonment or as the death penalty. Appeals and any commutation of the death penalty could then be long delayed or used as a bargaining counter with the UK. The judicial and the political part of the commutation process in the HJC could be delayed for any number of reasons. Fifth, any desire to obtain a conviction could be reinforced by interrogation in breach of Article 3, to obtain a confession.

363. We have to consider next whether, were such triggering events to occur, there are any factors which would deter such breaches of the MOU, if that were the reaction which they would otherwise generate.

364. The problem with the QDF in such circumstances is that it would be least effective when it was most needed and that when the risks are most likely to arise, the interests of the regime and of the QDF, and Saif, would be most closely aligned. Indeed, even if it wished to pursue the issue, it could readily be warned off taking steps to pursue the matter or from alerting the UK to what had happened. It could not give useful publicity to what might have happened. The fact that it may be the best NGO in Libya for the task, does not make it necessarily sufficient.

365. So the calculation which the regime would be making in such a situation, if it gave the point thought in the heat of the moment, would not be whether it could dissuade the UK from taking any measures against it for the breach of the MOU, or whether it could stand the price which might be paid in diplomatic or counter-intelligence terms; first it would calculate whether it could prevent any breach coming to light. The ability of an MOU to work where a regime could use well known ploys to prevent access to a prisoner does depend on the monitoring body having access or the willingness to report obstructions to the sending country. The very real prospect here that a breach could go undetected, or undetected for a long time, means that the potential adverse reaction from the UK would also be delayed or prevented. The downside of any breach could be markedly diminished.

366. We recognise the ways in which Mr Layden described how the UK might react to a breach of the MOU, and the disadvantages which could accrue to Libya. There is a range of measures which could be taken. We accept that the UK would be prepared to take steps to mark the breach even though such steps might be harmful to itself, because the maintenance of the programme of deportations of Islamist extremists is an important part of its counter-terror endeavours, and it would wish it to be preserved. We also accept that human rights considerations would play a part of themselves. If the Libyan regime knew that these consequences were to be visited upon it, they might well pause sufficiently for thought for its words or reaction to events to be more

measured, and that could avoid any real risk to the Appellants. However, there are limitations here too which call for consideration.

367. A problematic aspect is that, although Colonel Qadhafi has personally endorsed the MOU, the system of government does permit him to maintain a distance from responsibility for any of its acts should he wish to do so. Now, although that may mean that he can blame underlings for what he has brought about and he may therefore be less unwilling to provide redress, it may also enable him to excuse what has happened or is alleged to have happened, by blaming others. He could then seek on those grounds to avoid any adverse reaction by the UK, which by its nature would have to be directed more generally against the interests of the Libyan regime.

368. As the trial of the Bulgarian medics shows, the regime can be impervious to major international pressure, and may even take strongly against it. This somewhat limits the availability of publicity or a fear of publicity as a means of bringing about compliance or redress. There are no domestic political bodies or considerations in Libya which would assist. There is no constituency in Libya to which the violent Islamist extremist could appeal which this regime has to avoid inflaming. The Qadhafi regime may lack popular support, but it should not be supposed that Islamist extremists are popular because they oppose it. Nothing that we have seen suggests any popular groundswell of support in Libya for extremist Islamists, such as DD and AS are, certain if in power to be wholly intolerant and likely to be very violent towards any dissent from its citizenry.

369. There are plainly circumstances in which the regime does not respond or respond promptly to private pressure either. We have no difficulty in envisaging sometimes an initially hostile reaction especially to anything that smacked of a rebuke or threat, overcoming which would require a range of diplomatic skills. Equally, we have no difficulty in envisaging that it may well respond in time to such pressure. But the question of how long it may take for the regime to respond and return to the expected pragmatic path is much more important in this sort of case than in other forms of negotiation or dealing. And it is not as though a personal aversion to abuses would affect the reaction of regime leaders either, so that cannot be factored into the calculations at all.

370. There is not yet the range of contacts or years of experience of dealing with each other at many different and friendly levels, or the depth of other links between Libya and the UK which would make the diplomatic path predictable, and the operation of the bilateral relationship clearly understood. The scope for misunderstandings, counter-measures, and bargaining are greater than they would be with a longer friendly diplomatic relationship. We accept that Libya places great store by its relationship with the UK, and that the UK has advantages over the USA in certain respects, though possibly diminishing, and over other EU states, notably Italy, the closest major EU state. How Libya would use those relations in a dispute with the UK is unclear, but the length of the friendly relationship is comparatively short for clarity about how Libya

would see its own self interest. It might regard itself as having achieved what it needed on the economic strand or as not putting that or further progress at risk by any particular step. This would leave the counter-terror intelligence strand as yielding the greater risk of loss to Libya in the event of a breach of the MOU, but yet that is one in which the UK itself has real interest. The development of further significant bilateral ties at a variety of levels is at an early stage.

371. We have accordingly come to the conclusion that although it is probable that Mr Layden's judgment as to how the Libyans would observe the MOU in relation to the physical treatment of the Appellants is sound, and that they would not be ill-treated in a way which breached Article 3, we cannot adopt his conclusion that that would be well-nigh unthinkable. Instead we think that there is a real risk that that would happen. The need in this case to make a large allowance for the unpredictable reaction, which in the short term or occasionally diverges from the pragmatic path upon which the Libyans are set means that we cannot eliminate the real risk which we have identified. The fact that the direction of Libyan foreign relations would largely remain the same does not remove the risk. There are no domestic changes, institutions or considerations which would assist. Above all the risk is not reduced sufficiently by the monitoring system because it is at these times that its limitations would be most evident and felt. We have to bear in mind that the monitoring system is intended to deter and check on potential breaches which can occur quite quickly, and to alert the UK's diplomats to the problem rapidly. The diplomatic pressure which the UK could bring to bear and the responses adverse to Libya's interests which it could deploy, would not be engaged if the monitoring were ineffective to report on possible abuse. We do not therefore have the confidence which we need to have, for the return of the Appellants not to breach the UK's international obligations. In short there is too much scope for something to go wrong, and too little in place to deter ill-treatment or to bring breaches of the MOU to the UK's attention.

372. The opportunities for matters to go wrong would exist, not because these individuals were being returned to Libya simply as opponents of the regime, in the light of the MOU. That would be a matter for further consideration. It is because these Appellants would return to face detention, serious charges, trial, conviction and prolonged punishment. During all of that time they would be readily accessible to the security organisations, and would need monitoring until the passage of time had perhaps eliminated any effective interest which the Libyans might have in them.

373. This conclusion draws on two points which warrant elaboration. First, we accept that the effect of the discussions over where the Appellants would be held is that they would not be held in Abu Salim. It is quite clear to us that that is not a prison run by the Judicial Police. It would not require a very advanced monitoring system to check that the Appellants had not been removed there from one of the prisons run by the Judicial Police, but it would require some mechanism.

374. However, at least one prison in Tripoli has a political wing, although the rest of it is certainly run by the Judicial Police. There does not appear to be a clear exclusion of detention in the political wing of such a prison among the assurances, although that is what we believe was intended. It appears to be the case that prison conditions in the Judicial Police system generally avoid breaches of Article 3. Those in the political prisons or wings breach Article 3, or risk breaching it. But the risks of ill-treatment and incommunicado detention, where such treatment is more common, would be reduced by greater certainty as to where an individual would be detained, if that were a location at which his presence could always readily be verified.

375. Second, there are two periods of detention which could give rise to breaches of Article 3, albeit indirectly. The first is the period of detention pre-trial. This matters because it is the period when interrogation is likeliest, whether to obtain a confession, intelligence or incriminating evidence for use against someone else. The intelligence would be at its freshest and the knowledge of others who could be of interest would be at its greatest. Prolonged pre-trial detention incommunicado in political cases is quite common, and in some there may have been no trials for years. Putting Article 5 to one side, that prolonged period adds considerably to the risk of ill-treatment.

376. The assurance of a trial without undue delay is one which, in the unpredictable scenarios which we have referred to, is quite readily breached in the UK eyes but without it being readily shown that Libya has done anything other than apply its trial system in its usual way. We do not have any clear evidence as to the speed with which the ordinary court system deals with cases of this sort. As the Revolutionary Courts have been abolished, and these case would probably not be in the ad hoc courts, there is no track record of the pre-trial delays in the new system. We accept that we cannot take at face value what Mr Layden was told about how the system of criminal justice operates in Libya.

377. The other aspect of detention concerns the period which would be spent awaiting commutation of the death penalty were it passed. We accept that if the charges were confined to Article 206, there is no real risk that the death sentence would be imposed because in reality it is not imposed for that offence. But no assurance has been sought or obtained that there would be no charge under Article 207. It cannot be said that there is no basis for such a charge. There is obviously a real risk that such a charge would lead to a conviction, and there is a then a real risk that the death sentence would be imposed.

378. We do not believe there to be a real risk that the death penalty would actually be carried out, and in that respect accept what Mr Layden told us about the course of negotiations, the clear understanding reached and the way in which the HJC is constituted and functions. Even if there were some occurrence of the sort which we have postulated, we do not regard execution as a real risk.

379. However, the timetable for the operation of the commutation process by the HJC, on the likely basis that the Supreme Court upheld the death sentence, is unclear. There is no assurance which bears upon this point. Yet we consider, and not just because of the trial and appeal delays which can be seen from the Benghazi trial, that it can take many years, after conclusion of the appeal process, before a decision is reached in political and other cases, as to whether a death sentence should be carried out or commuted. The promise that there will be an eventual commutation may be of little comfort during very long delays. This adds in our view to the risk of a breach of Article 3 during post trial detention. If the regime were minded to do so in response to some slight or some fear, a delay in putting the matter to the HJC could readily be engineered. Although it would be apparent that it was taking a very long time, in the absence of some provision in the MOU or other assurance, the UK would not have more than a diplomatic hand to play, without the MOU in it, in order to speed up the process, mindful as it would have to be, that it wished for a favourable outcome.

380. We have considered whether the risks of which we speak are increased by the fact that Colonel Qadhafi had friendly personal relations with the Prime Minister, who will shortly leave office. This personal relationship has been of importance to the process of rapprochement and to the development of the relationship between the UK and Libya. But the relationship is moving on to a different basis, with greater engagement at all levels and an appreciation of the importance of relations with Colonel Qadhafi to the overall relations with Libya. We do not think that any significantly greater risks arise through the departure from office of the present Prime Minister. Colonel Qadhafi would remain in power till death.

381. We have also considered the possibly that Colonel Qadhafi may die in the near future, in view of his age. We regard this as unlikely. Were he to die in the near future, there could be a period of instability. But those likeliest to obtain power would be of the same outlook as Colonel Qadhafi in the way in which they saw the need to maintain the rapprochement with the West, and for very much the same reasons. Whether domestic policy would liberalise in a material way is more difficult to gauge.

382. In reaching our conclusion on these issues, we have taken full account of the closed evidence and acknowledge the contribution made by the Special Advocates.

Conclusions : Fair Trial

383. In the light of the conclusion which we have reached in relation to Article 3, we do not propose to go into great detail. We comment briefly first on the legal framework for consideration of Article 6, in a removal case. There is no authority from the ECtHR which decides that Article 6 can be invoked to prevent a deportation. It has only provided dicta to the effect that such a possibility cannot be excluded. We see that as

jurisprudential uncertainty rather than uncertainty about the application of established principle to the particular facts of a case. There is no binding domestic authority that Article 6 can be invoked to prevent deportation either. The decision of the House of Lords in *R (Ullah) v SSHD* [2004] UKHL 26, [2004] 2 AC 323, does not hold that Article 6 can be invoked in such a case; rather it recognises the tentative nature of the ECtHR jurisprudence. It held only that it was wrong for the Court of Appeal to exclude the application of Article 6 and other ECHR Articles where no such decision had been taken by the ECtHR, which instead had left the position open or uncertain. In those circumstances, it is not easy for those who have to decide on the application of the ECHR at first instance to avoid being either ahead or behind what the eventual jurisprudence of the ECtHR may turn out to be. However, in this instance, the SSHD did not put that forward as a major plank of his case, while not conceding the position either. We shall proceed for the moment on the basis that Article 6 is capable of application to a deportation case.

384. ECtHR jurisprudence as to the test which it would apply appears to centre, without much elaboration or reasoning, on whether there would be a flagrant or complete denial of the right to a fair trial in the country to which the individual would be returned. It has given very little guidance as to the content of that test, leaving it rather on the basis that when such circumstances arise, they will be recognisable. Two examples are referred to in paragraph 452 of the SIAC decision in *Othman.* The absence of the accused or his lawyer and of evidence illustrated the point. A breach of Article 6 alone, if that could be established in respect of the possible future acts of a non-party, would not suffice to bring Article 6 or 5 for that matter into play in deportation case.

385. The test at face value is a simple descriptor, conveying the sense of a trial which overall is largely or essentially indefensible, affronting any true sense of justice or fairness. On what we know of the trial of the Bulgarian medics, it was a flagrant or complete denial of justice in the sense which the ECtHR seeks to convey. Even without the torture of the defendants into making confessions, the trial was a show trial. The conclusions of the trial court were pre-determined. There was gross interference with the outcome as a result of the speeches of Colonel Qadhafi; the judge or judges were manifestly not independent and were biased towards the prosecutor, failing to control his endeavours to prevent the defence lawyers from speaking; no equality of facilities was given to the defence lawyers; the prosecutor seems to have produced no evidence other than the confessions; the expert evidence was ignored; the families of the victims were allowed to make inflammatory speeches each day; the proceedings were not translated for the defendant and they were on trial for their lives; there was no endeavour at all to consider the allegations that the confessions had been obtained by torture. The whole process is lasting many years, even though the death penalty has been hanging over them for some time. The lack of judicial independence is shown by the expectation that the regime would do what had to be done to secure the acquittals; and that that did not happen was because such a result had not been willed by the regime.

The totality of the Benghazi trial experience also involves a breach of Article 3 in our view.

386. The fair trial assurances cannot readily be taken at face value, for the system which they describe is so far removed from the system which has been seen in operation in Benghazi. We accept that, for the reasons given by Mr Layden, it is unlikely that the Appellants would be tried in a manner which was as bad as that which befell the Bulgarian nurses, even on the basis of the scenarios which we have considered earlier. Their trial would at least be in public, and comparison with the trial procedure promised would be possible.

387. However, that does not mean that the system would or could in consequence transform itself into the one described in the assurances. It is noteworthy that Mr Layden saw the Benghazi trial as something of *"an improvement"* from the norm because it was held in public, and the defendants were present, represented, and able to call expert evidence. This sort of case used to go before the Revolutionary Courts as we understand matters, but they are no more, and these Appellants would not be tried by the ad hoc courts, which are dealing with the outstanding cases. Trial before the Revolutionary Courts probably amounted to a complete denial of a fair trial as well. We have no clear picture of how such a trial process as the Appellants would face would actually be conducted. We include in that the pre-trial processes. No evidence measures the performance of the civilian courts against the assurances. We cannot assume that the system described in the assurances represents a system that actually exists in Libya for the trial of charges such as these Appellants would face. The Bulgarian medics were tried before a court of the same level as that which would try the Appellants.

388. Two elements stand out. The first is that the judiciary completely lacks independence in this sort of case. It would be influenced, decisively so, by what Colonel Qadhafi says in public or in private. Indeed, the SSHD's case relies on this lack of independence, for it assumes that Colonel Qadhafi would instruct them that they are to reach a decision fairly based on the evidence, and that they need such an injunction. There is a real risk in the scenarios which we have considered that he would go further in private. In any event, there is at least a real risk that the judges would assume that Colonel Qadhafi wanted a conviction in view of the offences, so that the Appellants could be imprisoned for a long time. They would then do what they thought, no doubt correctly, he wanted them to do. We do not have any contrary picture based on reported experience of a trial of this sort of case before the civilian courts. This means that evidence called on behalf of the Appellants would simply be ignored.

389. The second is that evidence which has been procured by torture would be admitted. Although we think it unlikely, we cannot exclude the real risk that the Appellants would sign confessions as a result of treatment which breached Article 3. Mr Layden's evidence was that the judiciary, and we understood him to be talking more broadly than just of the Benghazi trial judges, made no endeavours to exclude or were

obviously completely ineffective in excluding such evidence. There is nothing to show that the picture of the Benghazi trial is not largely applicable to this sort of case when tried before civilian courts. The reality of the assurances is doubtful here too. The same applies to the evidence of others which may have been obtained by torture as well.

390. We think that if there were evidence against the Appellants from Sadeq or Mundhir, it would not have been obtained by torture; but that cannot be applied more generally. We do not accept that on the evidence Mr Layden can justifiably say that it is very unlikely that evidence obtained by torture would be used.

391. Some of the defects of the Benghazi trial would not be relevant, notably the absence of an interpreter. Quite what role a hostile public could play is unclear. How the defence lawyers would be treated by the judges and prosecution is unclear. The Benghazi experience may not be repeated in all its awfulness but how far its defects would be remedied remains unknown.

392. We cannot say therefore on the evidence which we have that there is not a real risk of a complete denial of a fair trial. The assurances do not persuade us otherwise in the absence of concrete supporting evidence of practical experience. This is not to put the burden of proof upon the SSHD when it belongs on the Appellants. It is rather a reflection of the fact that the only trials of which we have any evidence, specific or general, for serious, politically high profile offences, involve a complete denial of justice, and there is no evidence as to how that might now be different for the Appellants.

393. That may not be the end of the fair trial issue however. Before there could be a breach of the ECHR on the part of the removing country, on the basis of indirect responsibility for the acts of the country to which someone was deported, it would have to be shown that the acts of that country which were at issue would amount to a breach of the ECHR were it a party, and could not be defended by evidence, or by reference to the qualifications in the qualified Articles, or by reference to derogations which would be available to it in respect of the derogable Articles. Otherwise there could be no possible breach of the ECHR for which the removing country could be responsible. This is the analysis which underlines the test in *Devaseelan v SSHD* [2001] Imm AR 1 para 111.

394. It may be that the test approved from *Devaseelan* in *Ullah* was simply that a *"complete*" as opposed to a *"flagrant"* denial of a right had to be shown, and it appears to have been understood in that sense by the Court of Appeal in *EM (Lebanon) v SSHD* [2006] EWCA Civ 1531. However, the language of Lord Bingham suggests, by his reference to a breach having to be shown, no matter how the obligations might be interpreted and no matter what might be said on behalf of the country to which someone was returned, that the *Devaseelan* analysis was adopted, rather than it being the source for a mere preference for one adjective over another.

395. All that a complete denial of a right would mean on the *Devaseelan* analysis is that there would be an undeniable breach of the ECHR were the country to which the individual was returned a party. It would say very little of itself about the gravity of the breach, other than that it was indefensible. The ECtHR clearly envisages that an assessment of degree is required, and envisages if Article 6 proves capable of invocation in a deportation case, that a *complete* denial of the right as a matter of degree has to be shown as well a breach which could not be defended before the ECtHR.

396. We can see that the ordinary interests of immigration control might not override a complete denial of a right in those circumstances. And it may be that that is all that *Ullah* was deciding, on the assumption that the ECtHR would eventually further extend the ECHR to cover the non-absolute Articles. What is not easy to see is that the *Devaseelan* or *Ullah* test by its nature precludes account being taken of other factors, such as the more important issues of a state's interests which cases such as these involve. The Commission also discussed in *Othman*, in paragraphs 466 to 474, whether any other factors came into a balance. *Devaseelan* establishes no more than an essential starting point: an Appellant must show that there is a real risk that the state to which he is to be removed would itself be unable to show that its expected acts were conformable to the ECHR, even given its domestic circumstances as allowed for in the qualifications and derogations to the ECHR.

397. The ECtHR has not enunciated any general principle that a state bears an indirect responsibility for breaches of the ECHR by states which are not parties but to whose territories someone is deported. That reflects in our view the fact that its jurisprudence is tentative, and that it has shrunk, for very good reason, from making so large a judicial extension to the ECHR. It could easily have put forward such a general approach but it has declined to do so and has instead enunciated a partial and ad hoc approach to Article 3, which does not lend itself readily to general application beyond the absolute Articles.

398. Quite how real cultural or religious differences are to be allowed for remains unclear, and the decision of the Court of Appeal in EM *(Lebanon)* highlights the difficulties; perhaps they are not relevant, yet the ECtHR has been chary of being seen to impose ECHR values on non-parties. It would also be surprising if the *Devaseelan* test could be seen as the complete answer to the application of Articles other than the unqualified and non-derogable rather than as the essential starting point, given that that would mean that the interests of the removing state, even under the qualified Articles, would never fall for consideration.

399. The ECtHR has eschewed for so long some such universal and general jurisprudence of indirect responsibility that it cannot credibly exist. There was no finding in *Ullah* that such a jurisprudential theory existed; had it been found, the House of Lords would not have been so tentative about where the ECtHR jurisprudence had reached. It was acknowledging

what would be the basis of any application of Article other than Article 3 to removal cases, were it to apply.

400. In the absence of such jurisprudence in relation to the non-absolute Articles, it is difficult to see why any further extensions to the ECHR, tentative and fact sensitive, as the ECtHR might feel able to make, should not include allowance for a balance to be struck between the individual rights which compete in a case such as this, at least in relation to the derogable and qualified Articles. After all, the absence of room for any such balance should mean that the test to be satisfied would be pitched very high. It would have to be applicable no matter what the individual had done, or what risk he posed to the state on which he had imposed himself, perhaps for the very purpose of harming its citizens there or abroad, or those of other countries who could properly expect that the well being of their citizenry would be of concern to the UK. It could not permit a more generous attitude to be taken to those who represented no threat to the removing country, the only interests of which they breached was immigration control.

401. Any balance would favour removal in these two cases. We do not need to add to what we said in *Othman* about disguised extradition in a deportation case. These are not disguised extraditions.

Conclusions: the death penalty

402. We have already set out our conclusions in relation to the prospect that the Appellants would be sentenced to death, and executed. The former is a real risk, but the latter is not. It is not therefore necessary to consider the jurisdictional basis upon which the Commission might or might not act had it concluded that there was a real risk that the death penalty might be carried out. This is touched on in paragraph 527 of *Othman*. We have also considered whether the lapse of time before the sentence was commuted, as we are satisfied it eventually would be, could itself give rise to a risk of a breach of Article 3, and that added to our view that there was a real risk of a breach of Article 3 during post-trial detention.

403. We have considered the alleged risk of extra-judicial killing. We do not regard that as a real risk here. It would have been at one time a real risk for political opponents but that practice has stopped for some years. We are not satisfied that, even if Al –Ghazal was killed by some form of security organisation, that that shows that men such as the two Appellants would face such a risk. That was a rare occurrence now, and a journalist would make for a more awkward defendant in any trial. The Appellants, without an MOU, would face no greater risk than other Islamist extremists, and they are dealt with by detention, with or without a trial. Extra-judicial killing is not a real risk even on the scenarios which we have considered give rise to a real risk of treatment which would breach Article 3.

404. The major riot in Abu Salim in 1996 was ten years ago, and the recent death does not point clearly to an extra-judicial killing at all. It is a factor which justifies the understanding, as we accept it to be, that the Appellants would not be held in that prison. Even if there were to be a temporary transfer in breach of that understanding, for one of the reasons which we have set out earlier, there is no real risk that that particular form of harm would befall. Prison riots are also rather different from the calculated killing of opponents as are deaths caused by repressive violence used on demonstrators.

Conclusions: Article 8

405. Only DD raised Article 8. He then abandoned it before reinstating it in his closing submissions. He contends that his Moroccan wife, and his two children born in the UK, could not return to Libya with him; or rather that the SSHD has not shown that she could go there. He contends that deportation would therefore interfere with his and their Article 8 rights.

406. The Appellant submits that the Article 8 jurisprudence puts great weight on the preservation of what he calls the nuclear family, and instances cases in which even very serious offenders, drug traffickers for example, have been able to avoid deportation because of the separation which that would create from the immediate family. DD recognises that he would have to show particularly strong grounds.

407. We approach this issue on the basis that the rights of the whole family are relevant. This is not the position as we understand from the decision of the Court of Appeal in for example *Betts v SSHD* [2005] EWCA Civ 828. This would confine attention to the effect of removal on the Appellant's Article 8 rights. The Appellant says that an appeal in that case on that point is pending in the House of Lords. So we consider the overall picture as a matter of caution.

408. It is unsatisfactory for an Article 8 point to be taken in this way. The submissions on the position of the family as a whole, and the assertion that there is no evidence that they could remain together if DD went to Libya would legitimately require greater notice than a reinstatement of a point barely trailed in any evidence from the Appellant. It is particularly unsatisfactory for the Appellant then simply to say that the burden of proof is on the SSHD to prove that his wife could go to Libya and that he has not discharged that burden, as though there were no part which DD himself or his wife had to play. We note that it is not contended that the wife would be at any risk in Libya, or that she would face any harshness there such as would prevent her going there with her children. It is not even said that Libya would prevent her entry.

409. No one has considered whether the Appellant could live with his wife in Morocco; she has no right herself to remain in the UK. There is no suggestion that she would be at risk there herself. If the Appellant were able safely to live in Morocco, these proceedings could not require him to go to Libya instead. They are not extradition proceedings.

410. Neither DD nor his wife are UK nationals. She has no right to remain in the country; he only has the right not to be removed because of Article 3. It is trite that a couple does not have the right to impose its choice of country of residence upon a state of which neither is a national. It is for DD to prove that removal would interfere with his family life, and therefore it is for him to prove that his wife would be unable to accompany him to Libya. Until that is shown, it is difficult to see how his removal to his country of nationality would interfere with their Article 8 rights at all.

411. The SSHD's written submissions say that publicly available travel information suggests that Moroccan nationals do not require a visa or passport to enter Libya. We accept what the SSHD has said. Mrs DD can enter Libya. We do not know about residence, but it is a commonplace, though not invariable, for countries to permit wives and children to join the husband who is a national, even if there is some form of immigration process.

412. In the absence of contrary evidence, we approach this on the basis that the common practice whereby wives can join husbands applies in Libya at least so far as Moroccan citizens are concerned. There would probably be no interference with family life.

413. Were there to be such interference, the grounds for deporting DD are sufficiently powerful to mean that separation from his wife and children is necessary and proportionate in the national interest. However, the conclusions which we have reached in relation to Article 3 make discussion of Article 8 academic. But we do not exclude the possibility that the SSHD may find ways over time of strengthening certain aspects of his case for deportations to Libya.

414. There was no error of law by the SSHD in the exercise of his discretion under the Immigration Rules.

Disclosure

415. Issues were raised in open and in closed submission on behalf of the Appellants as to the extent of disclosure by the SSHD. Although in the light of the decision to which we have come, the issue is also academic, we think that we ought to say something about it, for it may have wider ramifications. This is not as such an issue of whether closed material should be made open; it concerns what material the SSHD searches for and produces, in open or in closed, as appropriate.

416. There is no specific provision in the SIAC Rules, applicable to these appeals, which covers this issue. The practice of the SSHD, which has now become embodied in new Rules, is to search for and produce material which may undermine his own case or assist an Appellant. He

produces an open and a closed statement about the extent of the searches which he has carried out for such material. That material has acquired the sobriquet of *"exculpatory disclosure".* Rule 4(3) requires SIAC to be satisfied that the material available to it enables it properly to determine proceedings.

417. The Appellants contended that the SSHD had adopted too narrow an approach, and should produce material which had a real as opposed to a fanciful prospect of generating a line of inquiry in relation to an issue already in the case, or which related to any issue which disclosure might possibly raise. This contention was supported by elaborate submissions on what fairness entailed; a high standard of fairness was required in view of the human rights at stake, and the availability of material in closed.

418. We do not accept that that test is appropriate. First, the Commission is plainly well placed to judge whether it has sufficient material to determine the case, or whether there are important areas not covered. It can decide whether to call for material.

419. Second, the obligation on the SSHD to produce a statement of the files and areas searched does enable the Commission to see how extensive that has been, and to judge whether the SSHD, who does have a real responsibility in this respect, has examined the relevant sources of information. It is also clear to the Commission from what is disclosed, and this is as true in this case as in others, that there is no holding back of material which may harm his case or advance an Appellant's. The exercise is undertaken conscientiously. There have been occasions when material has been redacted for relevance, where the Commission has ordered deredaction, but that further material has not been of more than marginal relevance.

420. Third, the test which the SSHD applies reflects the CPR approach and we see no need for a broader test. It has often been the case that advocates, open or closed, have argued that further documents relating to particular topics or fields of enquiry should be searched for and produced. The Commission gives such directions where necessary. The test applied by the SSHD is perfectly adequate to require him to produce what is relevant and of assistance to the Appellants and to the Commission. That is what we meant by describing the system as *"full production-limited disclosure"* in *Y and Othman*, 12 July 2006 para 50, the disclosure decision.

421. Taking the Appellants' suggested test at its broadest, the examination of documents could be endless, with so many documents having drafts, comments, cross references, and with so many different aspects of the state's functions engaged. These are not criminal proceedings, whence comes the test suggested by the Appellants. There is no real cut-off to the search by reference to issues, because appellants do not usually raise issues in any specific way. That is inherent not in the open/closed distinction but in the nature of the issue of safety of return.

422. The test applied by the Commission and the SSHD sits well with the test put forward by Laws LJ in *Secretary of State for Foreign and Commonwealth Affairs v Quark Fishing Ltd* [2002] EWCA Civ 1409. The SSHD must assist the Court with full and accurate explanations of all the facts relevant to the issues which the Commission has to decide, and give a true and comprehensive account of how the relevant decisions were arrived at. Indeed, the test which the Commission and the SSHD apply goes rather wider than that, for it covers material which he may or may not have been aware of, but which helps the Appellants and does not help him. The SSHD applies the *"cards face up",* approach which Sir John Donaldson required in *R v Lancashire County Council ex p Huddleston* [1986] 2 All ER 941; nor does the test of disclosure which he applies mean that cards of value are not in the table at all, but kept up his sleeve.

423. Indeed, the fact that material is protected from open disclosure has enabled the Commission to see a far wider range of material than could ever conceivably be made available to a Court otherwise, sometimes to the assistance of Appellants.

424. The Appellants also contended that the SSHD was wrong to limit his searches relating to safety on return to material which post dated the resumption of diplomatic relations in 1999. The concern was that we would receive less than a full picture of Libya's behaviour in the period which led to the rupture of diplomatic relations and subsequently. The fuller picture would enable us better to assess risk, or would show the actions of certain individuals opposed to Colonel Qadhafi to have been qualitatively similar to many acts undertaken by others at the same time, and so not legitimately now to be held against Libyans opposed to Colonel Qadhafi.

425. As to the fullness of the picture during the rupture in relations, there was considerable material available in open and in closed about the activities of Libya during this period which we have noted in each judgment. There could have been no value in further searches. No one was under any illusions about what the regime had done. (In fact the cut-off was 1st January 1999, so the search for exculpatory material covered a period of six months before the resumption of diplomatic relations). We did not find any real assistance in much of the cross-examination about that period.

426. As to the latter aspect, we have expressed our view about what the Appellants may have been doing in 1999 and before, and whether it had an exclusively Libyan regime focus. We do not necessarily accept the premise for this argument but it did not arise in fact on any material relevant to the Appellants before 2000.

427. We regard the SSHD's answers to the specific request for information as sufficient.

Decision

428. All the conclusions which we have reached reflect and are supported, at times strongly so, by the closed evidence. Although we accept that the MOU and other assurances have been given in good faith by Libya, and that there is no probable risk of a breach of Article 3 ECHR were the Appellants to be returned, there remains a real risk that that could happen. That is because there is too much scope for changes to happen, for things to go wrong, and too little scope for a breach of Article 3 to be deterred or for acts which might lead to a breach of Article 3 to be remedied in time, essentially through effective monitoring. There is also a real risk that the trial of the Appellants would amount to a complete denial of a fair trial. We do not exclude the possibility that the SSHD's case for their deportation could be strengthened over time.

429. We reject the claim that removal would breach the Refugee Convention. We find that DD is excluded from the Refugee Convention. But for DD's exclusion from the Refugee Convention, the SSHD would be obliged to give effect to the Adjudicator's decision that he was a refugee, since he cannot be safely returned to Libya, and Article 33(2) of the Refugee Convention, which would permit his removal, cannot be applied because of the ECHR.

430. We have given this decision anxious consideration in view of the risks which the Appellants could face were they returned, and those which the UK, and individuals who can legitimately look to it for the protection of their human rights, would face if they were not. We must judge that matter, at least in relation to Article 3 ECHR, by considering only the risks which the Appellants could face on return, no matter how grave and violent the risks which, having chosen to come here, they pose to the UK, its interests abroad, and its wider interests. Those interests at risk include fundamental human rights.

431. The decision of the ECtHR in *Chahal* in 1996 provides the framework for that decision. It clearly requires us to consider matters in that way, however slight its reasoning or negligible its response to the substantial minority dissent on the problems posed by a direct threat comparable to that arising here to the interests of the country seeking removal, and on the protection to the human rights of others which the deportation of the Appellants would afford. That decision is part of its established jurisprudence, and in reality we are bound by it.

432. This outcome is not a consequence of the enactment of the Human Rights Act in 1998. The UK was party to the ECHR, the judicial interpretation or extension of which was revealed in *Chahal*, long before that decision, and the UK would have been obliged in any event to give effect to that decision as part of the established jurisprudence of the Strasbourg Court.

433. For the reasons which we have given relating to Article 3 ECHR, these appeals are allowed.

MR JUSTICE OUSELEY

APPENDIX I

MEMORANDUM OF UNDERSTANDING BETWEEN THE GENERAL PEOPLE'S COMMITTEE FOR FOREIGN LIAISON AND INTERNATIONAL CO-OPERATION OF THE GREAT SOCIALIST PEOPLE'S LIBYAN ARAB JAMAHIRIYA AND THE FOREIGN AND COMMONWEALTH OFFICE OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND CONCERNING THE PROVISION OF ASSURANCES IN RESPECT OF PERSONS SUBJECT TO DEPORTATION

Application and Scope

A request for assurances under this Memorandum may be made by the sending state in respect of any citizen of the receiving state, any stateless person who was habitually resident in the receiving state, or any third-country national whom the receiving state is prepared to admit.

Such requests will be submitted in writing either by the British Embassy in Tripoli to the General People's Committee for Foreign Liaison and International Co-operation or by the Bureau of the Great Socialist People's Libyan Arab Jamahiriya in London to the Foreign and Commonwealth Office. The state to which the request is made will acknowledge receipt of the request within 5 working days.

A final response to such a request will be given promptly in writing by the Foreign Secretary in the case of a request made to the United Kingdom, or by the Secretary of The General People's Committee for Foreign Liaison and International Co-operation in the case of a request made to Libya.

To assist a decision on whether to request assurances under this Memorandum, the receiving state will inform the sending state of any penalties outstanding against a person to be deported, and of any outstanding convictions or criminal charges pending against him and the penalties which could be imposed.

Requests under this Memorandum may include requests to the receiving state for further specific assurances. It will be for the receiving state to decide whether to give such further assurances.

The United Kingdom and the Great Socialist People's Libyan Arab Jamahiriya will comply with their human rights obligations under international law regarding a person in respect of whom assurances are given under this Memorandum. The assurances set out in the following paragraphs (numbered 1-9) will apply to such a person, together with any further specific assurances provided by the receiving state.

An independent body ("the monitoring body") will be nominated by both sides to monitor the implementation of the assurances given under this Memorandum, including any specific assurances, by the receiving state. The responsibilities of the monitoring body will include monitoring the return of, and any detention, trial or imprisonment of, the person. The monitoring body will report to both sides.

Assurances

1. Where, before his deportation, a person has been tried and convicted of an offence in the receiving state in absentia, he will be entitled to a retrial for that offence on his return.

2. In cases where the person may face the death penalty in the receiving state, the receiving state will, *if its laws allow,* provide a specific assurance that the death penalty will not be carried out. In any case, where there are outstanding charges, or where charges are subsequently brought, against a person in respect of an offence allegedly committed before his deportation, the authorities will utilise *all the powers available to them under their system for the administration of justice to ensure* that, if the death penalty is imposed, the sentence will not be carried out.

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

4. If the deported person is arrested or detained, he will be informed promptly by the authorities of the receiving state of the reasons for his arrest or detention, and of any charge against him. The person will be entitled to consult a lawyer promptly.

5. If the deported person is arrested or detained, he will be brought promptly before a civilian judge or other civilian official authorized by law to exercise judicial power in order to the lawfulness of his detention may be decided.

6. The deported person will have unimpeded access to the monitoring body unless he is arrested, detained or imprisoned. If the person is arrested, detained or imprisoned, he will be entitled to contact promptly a representative of the monitoring body and to meet a representative of the monitoring body within one week of his arrest, detention or imprisonment. Thereafter he will be entitled to regular visits from a representative of the monitoring body in coordination with the competent legal authorities. Such visits would include the opportunity for private interviews with the person and, during any period before trial, will be permitted at least once every three weeks. If the representative of the monitoring body considers a medical examination of the person is necessary, he will be entitled to arrange for one or to ask the authorities of the receiving state to do so.

7. The deported person will be allowed to follow his religious observance following his return, including while under arrest or while detained or imprisoned.

8. If the deported person is charged with an offence he will receive a fair and public hearing without undue delay by a competent, independent and impartial civilian court established by the law. The person will be allowed adequate time and facilities to prepare his defence, and will be permitted to examine or have examined the witnesses against him and to call and have examined witnesses on his behalf. He will be allowed to defend himself in person or through legal assistance of his own choosing, or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.

9. Any judgment against the deported person will be pronounced publicly, but the press and public may be excluded from all or parts of the trial in the interests of morals, public order or national security in a democratic society, where the interests of justice or the protection of the private life of the parties and require, or to the extent strictly necessary in the opinion of the court in special

circumstances where publicity would prejudice the interests of justice.

Withdrawal

Either participant may withdraw from this Memorandum by giving 6 months notice in writing to the diplomatic mission of the other.

Where one or other participant withdraws from the Memorandum any assurances given under it in respect of a person will continue to apply in accordance with its provisions.

Signature

This Memorandum of Understanding represents the understandings reached upon the matters referred to therein between the Great Socialist People's Libyan Arab Jamahiriya and the United Kingdom of Great Britain and Northern Ireland.

Signed in duplicate at Tripoli on 18 October 2005 in the English and Arabic languages, both texts having equal validity.

Anthony Layden
HM Ambassador
British Embassy, Tripoli
For the United Kingdom of Great Britain and Northern Ireland

Abdulati Ibrahim al-Obidi
Acting Secretary for European Affairs
Secretariat for Foreign Liaison and International Cooperation
For the Great Socialist People's Libyan Arab Jamahiriya