Appeal Number: SC/39/2005
Date of Hearing: 14-17 November 2006
Date of Judgment: 5th December 2006

SPECIAL IMMIGRATION APPEALS COMMISSION

Before

THE HONOURABLE MR JUSTICE MITTING
SENIOR IMMIGRATION JUDGE LATTER
MR J DALY

Between

'BB'

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Appellant:	Mr H Southey
Representative:	Mr R Singh, Fisher Meredith
Respondent:	Mr R Tam QC
Representative:	Ms A Forgaard, Treasury Solicitor for the Secretary of State
Special Advocate:	Mr N Blake QC and Mr M Chamberlain
Representative:	Ms C Edwards, Treasury Solicitor for the Special Advocate.

DECISION

Open Decision on National Security

1. For the reasons set out in the closed judgment on this issue, we are satisfied that BB is a danger to national security and that it would be in the public good for him to be deported. We do not address the evidence given and arguments advanced in the open part of these proceedings, for the simple reason that they do no more than touch upon or set the context for the heart of the Secretary of State's case against BB. Our reasons for reaching the conclusion broadly stated above can only be discerned from the closed decision.

2. The Secretary of State has signed a certificate under Section 33, Anti-Terrorism, Crime and Security Act 2001, which falls to be treated as if it had been made under Section 55 of the Immigration, Asylum and Nationality Act 2006. We are required to begin substantive deliberations on the asylum appeal by considering the statement in the Secretary of State's certificate. He has certified that BB is not entitled to the protection of Article 33(1) of the Refugee Convention, because Article 1F or 33(2) applies to him. We are unable either to agree or disagree with the statement that he has been guilty of acts contrary to the purposes and principle of the United Nations because of the impossibility of discerning, for any purpose material to this case, what those purposes and principles are. We are satisfied, for the reasons set out in the closed decision on national security, that there are reasonable grounds for regarding BB as a danger to the security of the United Kingdom and agree with the Secretary of State's statement that Article 33(2) applies to him. Accordingly, such part of the appeal as amounts to a claim for asylum is dismissed.

Open Decision on Safety on Return

3. The basic test is not in doubt. "Whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another state, the responsibility of the contracting state to safeguard him or her against such treatment is engaged in the event of expulsion": Chahal v United Kingdom 1996 2003 EHRR 413 80. The single English word "substantial", however, conflates two concepts which are separated in the French text: "sérieux et avérés", which can be translated as "important and acknowledged to be true". Assessment of the risk is fact-specific: the task of the Commission is to determine whether or not there are substantial grounds for believing that there is a real risk that this applicant will be subjected to treatment contrary to Article 3 if he is returned to Algeria now.

4. What part can assurances given by the receiving state play in the evaluation of that risk? This is not a question of law. Nevertheless, the Strasbourg Court has, twice, taken assurances into account in answering its basic question. In Mamatkulov v Turkey [2005] 41 EHRR 25 at paragraph 75, it took "formal cognisance" of the diplomatic notes from Uzbekistan that the applicants, whose extradition was obtained, would not be executed or subjected to torture or ill-treatment. It was part of

its reason for holding that there had been no breach of Article 3 by Turkey, when it extradited the applicant to a country in respect of which Amnesty International reported the frequent use of torture, sometimes with fatal consequences, by state authorities. In Chamaiev v Georgia and Russia, a decision of 12/10/05, at paragraphs 344 to 345 the court examined the credibility of a guarantee given by the Russian Procurator General that the applicant would not be executed, even though Russian law provided for capital punishment for the offence for which his extradition was sought. The court attached "beaucoup d'importance" to the "garanties verbales" made by the Russian Procurator General. Thus, the court has, when confronted with the issue, examined the credibility of assurances and, where they have been found to be credible, taken them into account. By contrast, in Bader v Sweden 8/2/06, the court noted, as a relevant factor, the absence of any similar assurance from the Syrian Government in deciding that the expulsion of the applicant to Syria would put Sweden in breach of Article 3.

5. In this case, the assurances given by the Algerian Government are central to the issue of safety on return. We hold that we can and should evaluate their credibility and worth. By what yardsticks should they be judged? Without attempting to lay down rules which must apply in every case, we believe that four conditions must, in general, be satisfied:

    (i) the terms of the assurances must be such that, if they are fulfilled, the person returned will not be subjected to treatment contrary to Article 3;

    (ii) the assurances must be given in good faith;

    (iii) there must be a sound objective basis for believing that the assurances will be fulfilled;

    (iv) fulfilment of the assurances must be capable of being verified.

6. (i) and (ii) are axiomatic. (iii) covers a number of possible situations. In a country where the rule of law is firmly embedded, it can safely be assumed that an assurance given to another state will be fulfilled – as, for example, assurances given by the United States of America in extradition cases that the death penalty, even if allowed by law for the extradition crime, will not be carried out. In the case of states where the rule of law is less firmly embedded, it will ordinarily be necessary to look for other grounds for believing that their assurances will be fulfilled: principally, that it is in the objective interest of the state to fulfil its assurance. We accept Mr Tam's suggestion that clear evidence of a settled political will to fulfilment can be a further relevant factor; but by itself, it is insufficient, because political personnel and imperatives can change. Only when allied to objective national interest will it provide firm support. The government of the receiving state must also be able to exercise an adequate degree of control over its agencies, including its security forces, to satisfy the reasoning and decision of the court in Chahal at paragraph 105. As to (iv), verification can be achieved by a variety of means, both formal and informal and by a variety of agencies, both governmental and non-governmental. "Monitoring" is one means of verification, but not the only one. Mr Tam submitted that the capacity to verify was not a condition, but only a factor. We do not agree. An assurance, the fulfilment of which is incapable of being verified, would be of little worth.

7. The starting point for consideration of BB's safety, if returned to Algeria, is the general situation in that country. The background material was exhaustively summarised in paragraphs 181 to 208 of SIAC's open decision in "Y" 24 August 2006. It is not necessary to repeat it in this decision. We also accept and adopt its reasoning and conclusions in paragraphs 341 to 350.

8. We are unpersuaded by the report of Professor Seddon dated 13th November 2006 that SIAC's conclusions were erroneous. Professor Seddon's evidence is based on the same material as that considered by SIAC. The bleak conclusion which he draws – that it is unsafe to return any person alleged to have been involved in Islamist extremist activities to Algeria – is belied by what has in fact occurred: the release of two thousand five hundred detainees, including persons convicted of terrorist offences committed within Algeria, under the Charter and Ordonnance; the return, on 17 September 2006 of Rabah Kebir, the head of the executive agency of FIS; and the return of "I" and "V", of which more later, on 16 and 17 June 2006; and, at the intergovernmental level, the signature, on 11 July 2006, by the UK and Algeria of four conventions, on extradition, judicial co-operation in civil and commercial matters, the circulation and readmission of persons and mutual legal assistance in criminal matters; and President Bouteflika's acknowledgement and assurance of the Algerian Government's approval of the contents, of the Prime Minister's letter of the same date. His letter contained the following statement:

> "This exchange of letters underscores the absolute commitment of our two governments to human rights and fundamental freedoms …".

By longstanding diplomatic convention, President Bouteflika's acknowledgement and approval of a letter containing those words, amounts to a commitment on the part of the Algerian government to respect those rights.

9. Nevertheless, it would be naïve to conclude that no person suspected of terrorist activity, in particular foreign terrorist activity, is at risk of torture or ill-treatment at the hands of Algerian security forces, in particular the DRS. Internal GSPC terrorism continues: there has been a bomb explosion in an urban area and troops have been killed. There are uninvestigated allegations by four men detained at a secret detention centre by the DRS, accused of foreign terrorist acts, of torture by the "chiffon" method (in which liquids are forced into the stomach of a detainee, through a cloth stuffed into the mouth, producing symptoms of suffocation, not subsequently detectable). The case advanced by Mr Southey for BB is that, notwithstanding that the assurances given by President Bouteflika were given in good faith, Central Government does not always successfully restrain the activities of lower grade state agents, especially in the DRS; and that BB will be of particular interest to the DRS on his return, because he was reported by the British authorities on 29 January 2004 as belonging to an armed terrorist group.

10. Anthony Layden, the person employed by the Foreign and Commonwealth Office as Special Representative in relation to the deportation of a number of suspected terrorists, including BB, has given evidence before us about these matters. He was a forthright and impressive witness. He had recent and extensive experience of the Middle East and North Africa. He served as Ambassador in Morocco and, most

recently to Libya. On 12 and 13 September 2006, he discussed the case of BB, in Algiers, with senior Algerian officials.

11. Mr Layden is a realist. He acknowledges that torture still exists, but is getting less. He accepts that the civil authorities do not control the DRS (they report direct to the President as Minister of Defence). He has never seen any report of any prosecution of a DRS official for torture or ill-treatment. He bluntly acknowledged that he was not saying that there would not be a risk of ill-treatment if the United Kingdom Government had not made the special arrangements which it had. However his unshakable view was that the assurances given by the Algerian authorities in the case of BB eliminated any real risk that he would be subjected to torture or ill-treatment.

12. The decisive issue on this aspect of the case is, accordingly, the worth of the Algerian Government's assurances in relation to BB.

13. The starting point is the interest which the Algerian authorities have, or may have, in him. There is no suggestion, let alone evidence, that he has ever done anything in Algeria which could be of interest to the authorities. He has not set foot in Algeria since 1992. It is, however, an offence under Article 87a 6 of the Algerian Criminal Code for an Algerian national to activate or join a terrorist or subversive association group or organisation abroad, punishable by a term of imprisonment of ten to twenty years, or life imprisonment where the acts described are intended to harm Algeria's interests. If, therefore, the Algerian authorities have or acquire evidence that BB had activated or joined a foreign terrorist or subversive group, he would be open to prosecution in Algeria. By itself, that could not prevent his deportation: the prosecution of an Algerian national for an offence contrary to the Algerian Criminal Code would not amount to treatment prohibited by Article 3 ECHR. Mr Layden's discussions on 12 and 13 September 2006 established that there were no "antécédents judicaires" in Algeria (i.e. convictions or pending prosecutions), but could not establish with one hundred per cent certainty that there was no investigation into BB. Mr Layden's clear impression, which we accept, is that there were no current investigations against him. Mr Southey submits that, because the precise terms of the report by the British authorities of 29 January 2004, already referred to, are unknown, there remains a possibility that Mr Layden's view is wrong. His supposition was that the report was made by the CPS. His supposition is plausible, though it is also possible that the Metropolitan Police, who laid the charges against him, made the report. One or other must have done, because the Algerian authorities retrieved the information, to which they referred in Annex 1 of their note dated 5 August 2006, from Interpol NCB in Algiers. If so, the information must have related to the charges which were withdrawn on 27 May 2004. On 23 March 2006, the Foreign and Commonwealth Office handed to the Algerian Embassy a note which summarised the British Government's knowledge of BB's activities in the UK,

> "Central figure in Finsbury Park Mosque, associated with Abu Hamza and with other people there including the accused in the ricin plot. Found in possession of information on bomb making, and instructions for creating chemical explosives, and propaganda material relating to … DHDS. Detained."

There is no reason to suspect that the Algerian authorities have undertaken any investigation into that statement, any more than the information supplied in January 2004. Worthwhile investigation could only take place in the United Kingdom. It was not suggested to Mr Layden or to witness E that British authorities, including the Security Service, were aware of any such enquiries. It is fanciful to think that there are. As Mr Layden accepts, the Algerian authorities will wish to interrogate BB about his activities in the United Kingdom and, to that end, will detain him for a period on his return. The only method of obtaining evidence against him of an offence under Article 87a 6 is interrogation. If, under proper methods of interrogation, BB provides evidence of such an offence, there is nothing to prevent his lawful prosecution for it. It is only if methods of interrogation involve torture or ill-treatment that the possibility of investigation or prosecution is relevant to the issue of safety on return. Thus, the issue turns upon the worth, or otherwise, of the assurances given by the Algerian authorities.

14. By a note signed by Mohammed Amara, an Algerian High Court Judge seconded as personal advisor to the Minister of Justice, and under the seal of that Ministry, the Algerian authorities gave the following assurance:

> "Should the above named person (BB) be arrested in order that his status may be assessed, he will enjoy the following rights, assurances and guarantees as provided by the Constitution and the national laws currently in force concerning human rights:
>
> a. the right to appear before a court so that the court may decide on the legality of his arrest or detention and the right to be informed of the charges against him and to be assisted by a lawyer of his choice and to have immediate contact with that lawyer;
>
> b. he may receive free legal aid;
>
> c. he may only be placed in custody by the competent judicial authorities;
>
> d. if he is the subject of criminal proceedings, he will be presumed to be innocent until his guilt has been legally established;
>
> e. the right to notify a relative of his arrest or detention;
>
> f. the right to be examined by a doctor;
>
> g. the right to appear before a court so that the court may decide on the legality of his arrest or detention;
>
> h. his human dignity will be respected under all circumstances."

The assurances were repeated in a similarly signed and sealed document on 16 September 2006, with minor modifications:

> (g) was deleted, but the following was added:

> "he may benefit from the suspension of the death penalty which has applied since 1993, in the same way as other Algerian citizens who have received the same sentence."

It was not suggested that there was any significance in the deletion of paragraph (g).

15. Mr Southey objects that there is no express assurance not to torture or ill-treat BB. The short and sufficient answer is that the assurance that "his human dignity will be respected under all circumstances" is precisely that, couched in universally understood diplomatic language. The first of the conditions identified by us in paragraph 3 is, accordingly, satisfied.

16. Mr Southey does not suggest that the undertaking was given in anything other than good faith. Mr Layden was satisfied that it was. So are we. The second condition identified by us is, accordingly, satisfied.

17. The third condition has given rise to the most extensive debate. Mr Tam submits that, consistent with the findings of SIAC in Y and supported by the evidence of Mr Layden in both open and closed sessions, there has been demonstrated a clear and settled political will on the part of the Algerian Government to comply with, and secure compliance with, its assurances. We agree, but, as indicated, believe that it is necessary to examine whether or not it is in the long term interests of the Algerian state to do so. These interests have been examined in both open and closed sessions. Evidence given in closed session powerfully supports the proposition that it is in the Algerian state's interest to do so. From the point of view of public understanding of our reasoning, it is unfortunate that that material cannot be put into the public domain.

18. We are satisfied that it is in the long term interest of the Algerian state to comply with the assurances given in respect of BB, for the following reasons.

    (i) For the reasons set out in Y, Algeria wishes to become, and to be accepted by the international community as, a normally-functioning civil society. To give and to break a solemn assurance given to another state would be incompatible with that ambition. So, too, would be a failure on the part of Central Government to ensure that its security services, at lower levels, did not frustrate them.

    (ii) There are significant and strengthening mutual ties between Algeria and the United Kingdom: UK investment in Algeria, said to be the largest of any foreign state; the supply and purchase of gas; the exchange of security and counter-terrorism information; the assistance which the United Kingdom can give Algeria in its turn towards free enterprise and the use of the English language. Very considerable efforts have been made at the highest political levels on both sides to strengthen these ties. It is barely conceivable, let alone likely, that the Algerian Government would put them at risk by reneging on solemn assurances. Nor is there any reason to suppose that the British Government would turn a blind eye if they did. The safe and lawful return of persons found to be a threat to national security to their countries of origin is a high political priority of the British Government. If there were real grounds for believing that the assurances of the Algerian Government had been breached, the

subsequent deportation of a person on national security grounds would be problematic or impossible. Further, the actions of the British Government would be undertaken in the knowledge that they would be scrutinised, in any subsequent case, by SIAC.

(iii) BB is, as Mr Tam puts it in his written closing submissions, a "small fish", by comparison with others who have been released by the Algerian authorities or allowed to return. He will return under the watchful gaze of the British Government, the British media and of non-government organisations such as Amnesty International. It would make no sense for the Algerian Government to renege on its assurances or even to fail to take steps to ensure that government agents at a lower level complied with them in the case of a man such as BB.

19. Mr Layden draws considerable comfort from the treatment on return of I and V on 16 and 17 June 2006. He is right to do so. Both were deported after their appeals to SIAC were withdrawn. The British Government told the Algerian Government that it believed I to be a senior figure in the Abu Doha Group and that the proceeds of a fraud which he had committed had been used to fund terrorist activities. It explained that V had been one of the accused in the ricin trial, against whom proceedings have been discontinued when the first group of defendants was acquitted. They were detained for six and five days respectively, being returned to their families on 22 June. Amnesty International spoke to both men on their release and published what they said about their detention on 23 June 2006. Neither made any complaint of torture or ill-treatment, though Amnesty noted that they did not wish to give further details about their treatment in detention "for fear of reprisals". It is unclear whether that was what they said to Amnesty or whether it was Amnesty's gloss upon their refusal to speak about it. According to Mr Layden, the British Government has heard no reports of ill-treatment of them. Both they and their families were offered the opportunity to contact the British Embassy in Algiers. Neither did so. The British Government was given broadly similar assurances in the case of I to those offered in the case of BB. None were given, or sought, in the case of V. In Mr Layden's opinion, which we share, the case of BB is similar to that of I. There is no reason to believe that he will be any differently treated. We regard the experience of I and V as far more cogent evidence of what will happen to BB than the claimed experiences of Mourad Ikhlef, in March 2003 (which, taken at their highest, fall well short of torture) or of the four men referred to in the Amnesty Alert issued on 17 October 2006, in respect of whom no assurance had been sought by, or given to, a foreign state.

20. Accordingly, for the reasons given, we are satisfied that our third condition will be fulfilled.

21. Hitherto, the Algerian Government has refused to accept the monitoring by external bodies of persons in detention. It is said to have agreed in principle to sign and ratify OPCAT, which requires monitoring, but has not done so. We do not regard either of the omissions as sinister. Like Mr Layden, we accept the reasoning of SIAC in Y in paragraphs 335 and 336. The absence of monitoring does not, however, mean that it will not be possible to verify the Algerian Government's fulfilment of its assurances in the case of BB. It has agreed with Mr Oakden (Mr Layden's predecessor in negotiations with the Algerian Government) that British Embassy officials may maintain contact with anyone returned who is not in detention, and with their next of

kin. (Fourth witness statement of Oakden, paragraph 31). It would soon become apparent if BB were to be detained for any period significantly longer than I or V – a clear warning sign that the assurances (which include assurances about the authorisation of his detention) were at risk of being breached. It is true that this aspect of verification depends to an extent upon the willingness of BB to allow contact between the British Embassy and him and his family; but he could not justly complain that the British Embassy had failed to do its part, if he did not permit it to do so. Verification, however, need not only be achieved by official means. Amnesty International and other non-governmental agencies, who object to reliance on assurances as a matter of principle, can be relied upon to find out if they are breached and publicise that fact. The fact that Amnesty was able to and did speak to both I and V on their release demonstrates the effectiveness of non-official verification. It is, of course, true that a detainee could be tortured by the chiffon method, and refuse to say anything about it afterwards; but such an event could occur even under a monitoring regime. However, in neither case is it realistic to suppose that breaches by the Algerian authorities, or the turning of a blind eye by Central Government to wholesale breaches at lower levels, could occur without the fact of breaches becoming known. Accordingly, we are satisfied that, even in the absence of monitoring, practical verification is feasible and will occur.

22. For the reasons given, we are satisfied that the assurance of the Algerian Government can safely be accepted for the purpose of determining whether or not there are substantial grounds for believing that BB would face a real risk of being subjected to treatment contrary to Article 3 if deported to Algeria. Relying on the assurances, given against the background fully described in Y, we are satisfied that there are no such grounds.

23. Mr Southey further submitted that, if BB were returned to Algeria and if he were to be prosecuted for an offence under Article 87a 6 of the Algerian Criminal Code, he would not receive a fair trial in a civil or military court. We can deal with this submission shortly. Like Mr Layden, we are satisfied that the possibility that BB would be prosecuted for anything on his return is remote. Even if he were to be, there are no grounds for believing that the right to a fair trial would be "completely denied or nullified in the destination country" (per Lord Bingham, paragraph 24 of Ullah v Home Secretary [2004] 2AC 323). Mr Southey's proposition (which, in fairness to him, was not at the forefront of his argument) amounts to this: that a person in respect of whom there is only a remote possibility that he will be prosecuted will, if he is, not receive a trial compliant in all respects (notably judicial independence) with Article 6. This argument, if correct, would prohibit the deportation or administrative removal of anyone who could plausibly claim that he might be prosecuted for an offence in his country of origin when its legal standards fell below those of signatories to the ECHR. The proposition answers itself.

MR JUSTICE MITTING
DECEMBER 2006