Hearing Date: 11th – 18th December 2012
Date of Judgment: 25th January 2013

SPECIAL IMMIGRATION APPEALS COMMISSION

BEFORE:

MR JUSTICE MITTING (Chairman)
UPPER TRIBUNAL JUDGE JORDAN
SIR STEWART ELDON, KCMG OBE

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'U', 'G', 'Y', 'W', 'Z', 'BB', and 'PP'

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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MS D ROSE QC, MS S HARRISON, MS A WESTON, MR D FRIEDMAN and MS C KILROY (instructed by Birnberg Peirce & Partners Solicitors, Luqmani Thompson & Partners and Fountain Solicitors) appeared on behalf of the Appellants.

MR R TAM QC, MR R PALMER and MS C STONE (instructed by the Treasury Solicitors) appeared on behalf of the Respondent.

MS J FARBEY QC, MR H KEITH QC and MR M GOUDIE (instructed by the Special Advocates' Support Office) appeared as Special Advocates.

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OPEN
JUDGMENT

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MR JUSTICE MITTING :

Background

1. All seven appellants are Algerian nationals. All departed Algeria many years ago and have spent a substantial period in the United Kingdom. The first to arrive was Z, in 1991. U, BB and G arrived in 1994 and 1995. W arrived in 1999 and Y in 2000. The last to arrive was PP, in September 2003. Most had been absent from Algeria for a period before their arrival in the United Kingdom. For example PP, said that he departed Algeria in 1999. Apart from U, who left the United Kingdom for Afghanistan between 1996 and 1999 and PP, who paid a short visit to Algeria in 2005, none have left the United Kingdom since their arrival. All have been detained or subjected to strict bail conditions for the majority of their time in the United Kingdom. The first to be detained was Z, in 1997 and the last PP, on his return from Algeria in November 2005. There is no evidence or suggestion that any of them has done anything which might be thought to have been harmful to the security of Algeria and its people for at least 9 years. In the case of most, that period would be an underestimate.

SIAC's approach to the remitted appeals

2. Each of the appellants has been found by SIAC to have posed a threat to the national security of the United Kingdom. This hearing is not an appropriate occasion upon which to revisit those findings. Our task has been to reconsider their appeals on the issue of safety on return in the light of the decision of the Supreme Court in *W (Algeria) v. SSHD* [2012] 2 AC 115. We proceed on the premise that SIAC's earlier determinations on the issue of national security stand.

3. We also intend to apply the approach which we have always done in Algerian cases since *Y*: to build upon the knowledge which we have acquired over the years about Algeria. We are not required to start again from scratch. We have received and considered "protected" evidence, admitted under the *W (Algeria)* procedure. For reasons which we explain elsewhere, this material is not, taken by itself, determinative of the outcome of the remitted appeals. We have taken it into account for two purposes: to revisit a particular issue referred to in earlier SIAC judgments – what happened to Q and H on their return to Algeria in January 2007; and, to assist us to determine, as of now and in the foreseeable future, what risks the appellants would face if returned to Algeria. Because it is impossible to set out a comprehensible analysis of what occurred to Q and H, taking into account the protected material, without interweaving it into the narrative, this aspect of our judgment is exclusively set out in the confidential judgment. The only reference in this open judgment will be to our conclusion.

4. We have also received a great deal of material about Algeria from witnesses and sources not previously considered, in particular from Dr. Claire Spencer and Mr. Omar Banderra. As usual, Mr. Layden has presented his own and the Foreign and Commonwealth Office's view about the current situation in Algeria. We have dealt with developments in Algeria since the beginning of

2011 and with the impact that these events may have on the issue of safety on return. If any appellate court wishes fully to understand our reasoning, it will have to read all three judgments – open, confidential and closed.

Developments in Algeria since January 2011

5. The following is, we believe, an uncontroversial headline summary of the principal events, derived in part from the US State Department's country report on human rights practices for 2011 and in part from the evidence of Dr. Spencer and Mr. Layden. Protests and disturbances occurred in January 2011, apparently triggered by increases in staple food prices, in 24 of Algeria's 48 provinces. Either two or four protesters (or "less than 10" according to Dr. Spencer) were killed and, according to government figures, more than 789 people, mostly police officers, were injured. The disturbances were contained by a large scale deployment of police officers and the use of non-lethal means of control, such as tear gas (although two protesters were reported to have died as a result of the use of tear gas). The ostensible cause of the disturbances was addressed by reversing the price rises. The protests were contained. They never developed into or gave rise to mass demands for revolutionary political change. It is common ground between Dr. Spencer and Mr. Layden that there is no appetite amongst the population of Algeria for a return to political violence at any level of Algerian society. The memory – actual or transmitted down the generations – of the appalling events of the 1990s still looms large.

6. The state of emergency, in place since 1992, was lifted in February 2011. Despite that, some of the restrictions previously existing remain or have been re-enacted, in particular the requirement for registration of "civil society" and political associations, the prohibition of demonstrations in Algiers (but not elsewhere) and the (newly enacted) right to place a person under "protective" house arrest for up to nine months. There is a vigorous press, unafraid to make strident criticisms of the government and an uncensored internet. Broadcast media are, however, under state control.

7. Apart from the hydrocarbons sector, the Algerian economy remains sclerotic. There is a large pool of unemployed or underemployed young men, many of them well educated. Hydrocarbons account for virtually all of Algeria's exports and contribute substantially to state revenues. The financial position of the Algerian state is healthy. By the end of 2011, it had built up foreign exchange reserves of $182 bn. An elite of about 2 million people, out of a total population of 39 million, benefit disproportionately from this prosperity.

8. Parliamentary elections in May 2012 returned a pro-government majority. As always, there were widespread suggestions that the reported results were manipulated. It took four months for a new cabinet to be appointed.

9. In September 2012, at the invitation of the Algerian authorities, Navi Pillay, UN High Commissioner for Human Rights, paid the first ever visit by a holder of her office to Algeria. Her visit lasted a week, during which she had extensive discussions with senior politicians, from the President downwards and members of civil society organisations. At the end of her visit, she stated her conclusions to an audience which included western embassy staff. It

contained both criticism and praise. The criticism was directed principally at the opacity of the system of government and the blanket of silence, cast by law and practice, over responsibility for the events of the 1990s. Praise included Algerian willingness to engage constructively with UN rapporteurs and increased transparency and credibility on human rights.

10. What may perhaps be the most significant feature of the last two years is the further and significant reduction in terrorist activity: according to press reports, the number of civilians and security force members killed by terrorists in 2011 was 38 and 34 respectively. Dr. Spencer stated, uncontroversially, that terrorist activity was now focussed in the deep south of Algeria near to its border with Mali, with a residue of activity in the Kabilya mountains. AQIM enjoys virtually no support amongst the population.

Differing opinions and conclusions about the government of Algeria

11. The assessment of what has occurred and is occurring within the government of Algeria has always been bedevilled by two factors: opacity and conspiracy theories. Opacity makes it difficult for outside observers, even those who have taken a detailed interest in Algerian affairs for many years, to reach rational conclusions about the reasons for government actions and the effect of events upon them. It also provides fertile ground for conspiracy theories. They in turn cloud the judgment of outside observers, including those with direct and frequent access to Algerian residents. SIAC has had, over the years, to deal with some of these conspiracy theories. Most centre upon the presumed conflict between the civilian political establishment, with President Bouteflika at its head, and the armed forces and the Intelligence and Security Service, the Direction du Renseignement et de la Securite, the DRS. In consequence, even such a knowledgeable and respected observer as Dr. Hugh Roberts has allowed himself to express opinions which at the time were unconvincing and, in hindsight, are plainly wrong. (See paragraph 9 of SIAC's judgment in *Y, BB and U 2 November 2007*).

12. The British Embassy in Algiers, the North African desk at the Foreign and Commonwealth Office and Mr. Layden have, for many years, been of a different view: that the election of President Bouteflika and the Charter for Peace and National Reconciliation were the product of a lasting settlement, to which the armed forces and the DRS subscribed, which has determined the basic direction of travel of the Algerian state since the late1990s. Their view has been and remains that, subject to maintaining adequate health, President Bouteflika has achieved a measure of command over the state, including the armed forces and the DRS, not seen since the presidency of Houari Boumedienne; and that the armed forces and the DRS are committed to the President's policies – reconciliation at home and acceptance as a reliable partner by western states abroad. The British government's assessment has proved right so far. This is at least in part because of the frequency and closeness of its access to all relevant levels of the Algerian state in recent years. In former times, it would have been axiomatic for a court to accept an FCO assessment of the state of affairs in a foreign country. Now that its views must be submitted to critical analysis, it is, nonetheless, entitled to the respect given to those whose views have proved right in the past.

13. Of all of the "experts" who have produced reports or given evidence about Algeria to SIAC, Dr. Spencer is, by some margin, the most impressive. Mr. Layden states that there is little that he would disagree with in her report and evidence.

14. Dr. Spencer's metaphor for the Algerian government is a Rubik's cube: it contains a number of elements, always present, whose position and power relative to each other vary over time. When all of the elements agree upon a course of action, their will is put into effect. She cites, as a recent example of that, the effective containment of protests in early 2011. Thus far, no well informed observer of the Algerian scene would disagree with her analysis. It includes a significant conclusion, firmly shared by the British government and Mr. Layden: that all of the elements have agreed and continue to agree that it is in the long term interest of Algeria that it should be seen as a reliable partner of western industrialised states, in particular the United States and France, but also, at the next level down, of the United Kingdom. Thus far, her analysis supports the view of the British government that Algeria will fulfil the solemn promises which it has given about the treatment of the appellants on return.

15. In her oral evidence, Dr. Spencer expounded a significant caveat: when asked whether the Algerian state understood that it was in its interest to comply with the assurances, her answer was "not necessarily" – because the DRS would make its own calculation of what the interests of the Algerian state required. In her opinion, the DRS had the capacity to disregard promises made by the government of Algeria. Further, it was her view that Algeria had more leverage over the UK than the other way round. It was also her view that the relative power of the DRS within the Algerian state had increased since 2009 and that an internal promotion within the DRS – of General Bachir Tartag to be head of the Direction de la Securite Internale, the DRS directorate responsible for internal security – may evidence a decline in the President's relative power and, because of his history, be troubling.

16. Her analysis is founded, to a significant extent, upon a series of events known as the "Sonatrach Affair". In 2009 an investigation was conducted by the DRS into allegations of corruption and embezzlement by the senior management of the national oil company, Sonatrach. In May 2010, President Bouteflika removed the senior management by Presidential decree. At the same time, the Minister of Energy, Chekib Khelil, the Minister of Interior, Noureddine Zerhouni and the Minister of Investment Promotion, Abdelhamid Temmar were also required to resign. In her report, Dr. Spencer cited, without disapproval, two commentaries which asserted that these developments both demonstrated and represented a significant setback for the power of the President relative to that of the DRS.

17. Mr Layden's response, given in closed session, but opened with FCO approval, was that the British embassy "simply scoff at the idea that the Sonatrach Affair reflected a power struggle between the military and the President, in which the military emerge with increased influence". According to him, the embassy had very good access to the higher reaches of the energy ministry and of Sonatrach, through the BP presence in Algeria (BP is the largest foreign owned producer of hydrocarbons in Algeria). In his opinion –

which in this respect is shared by Dr. Spencer – the reason for the investigation was that corruption in Sonatrach had become florid.

18. In a supplementary report dated 8th January 2013, given in response to Mr Layden's opened response, Dr Spencer cited further commentaries on the affair, in the Economist magazine and in (wiki)leaked observations by the US Embassy in Algiers. The commentaries contain or cite speculation which supports her analysis; but they are no more than speculation and add nothing material to its strength.

19. On this issue, we prefer the evidence of Mr. Layden and the view of the British embassy to that of Dr. Spencer. She is a shrewd and knowledgeable observer who expresses her opinion in a balanced manner; but on an issue like this, the British embassy is better placed than she is to make judgments about the affair. Further, it was President Bouteflika who ordered the DRS to investigate. It is a testament to his political acumen that he did so – just over a year before the long-serving presidents of two North African countries were deposed in substantial part because of florid corruption. We accept Mr. Layden's view that, except when incapacitated by illness, President Bouteflika retains the personal primacy within the Algerian government that he has enjoyed since not long after his election as president in 1999. For the reasons explained in the opening paragraph of the closed judgment, we do not accept Dr Spencer's conclusion that his authority has been materially weakened by the Sonatrach affair.

20. Much has been made of the promotion of General Bachir Tartag. He the latest in a line of demonised military figures holding senior positions in the DRS. Similar criticisms of him are made as those which were made of his now deceased predecessor but one, General Smain Lamari, and of their ultimate commander, General Mediene. All are accused of being "eradicators" – i.e. those who in the 1990s sought to eradicate Islamist opponents of the Algerian state rather than to conciliate them. In General Tartag's case, even more dramatic evidence has been given – by Ahmad Chouchane, a captain of special forces in the Algerian army from 1990 until 1992. He claims to have been arrested on 3 March 1992 and accused of plotting with Islamists to carry out a coup d'etat. During his detention he was tortured personally by General Tartag (he did not state his rank then) and by men under his command. He claimed to identify, for the first time publicly, the real name of General Tartag, Bashir Sahroui. He has given evidence in the unsuccessful defamation action brought by General Nezzar (a former Defence Minister) in Paris and has made a statement for the purpose of criminal proceedings against General Nezzar in Switzerland. It was not put to him by Mr. Tam QC that his account of torture and its perpetrator was untrue and Mr. Layden said that he accepted it. Miss Rose QC submits that in those circumstances we must also do so. We do not agree. He impressed us as a self-promoting witness with an agenda of his own about which we know nothing. If his evidence had been material to the outcome of these appeals, we would have required it to be tested further before accepting it. Because it is not, for reasons which we will explain, we are content to assume that what he says is true: that he was personally tortured by General Tartag in 1992. Further, we have no reason to doubt that during the

vicious conflict in the mid-1990s, General Tartag was an "eradicator" prepared to use ruthless means against opponents. It does not, however, begin to follow that, because of his history, he is, or would be, someone who would now act contrary to the national interest of Algeria by ordering or tolerating the torture or ill-treatment of individuals in respect of whom the government of Algeria, at its highest levels, had made a solemn promise to treat them in accordance with their human dignity. As a differently constituted SIAC panel noted, at paragraph 31 of its judgment in *G* of 8 February 2007, DRS officers were present during discussions about the assurances and have subscribed to them. All this took place under General Mediene's command. He is hardly likely to have appointed a man to a senior position within his directorate who would flout a promise made during his tenure of office by his government.

21. Evidence about the relative power of the President and the DRS was also given by Omar Benderra. He was an impressive man and forthright witness. He left Algeria for France in 1992 after the military coup and has not returned since. At a fairly high level in government, he attempted to support a programme of reform between 1989 and 1991 to establish a state based on universal principles of democracy, accountability and rule of law. His last position was that of a special adviser to the Governor of the Central Bank of Algeria. He is now an independent consultant working for international banks and corporations in the field of financial analysis and project development. He is also a frequent commentator on Algerian politics. We had the impression that he had prospered in the two decades since he left Algeria. He enjoys frequent direct contact with Algerians in senior positions within the Algerian state and business world. His opinion is that Algeria is a "Potemkin village", in which real power is exercised by the DRS, behind a political façade fronted by the President. He, like many, is convinced that the generals who orchestrated the coup were also responsible for crimes against humanity committed during the "dirty war" of the 1990s and bemoans the fact that they have either retired peacefully, died in bed or remain in office. He acknowledges that President Bouteflika has exercised some power, but believes that he is now a much diminished figure.

22. In his oral evidence, he addressed the central point in the case, which he put into his own words: "Do you think that the letter of comfort/guarantee signed by President Bouteflika would prevent people expelled from the United Kingdom to be tortured in Algeria?" He broke the question down into two: Does the President have the power "to avoid torture to these people"; "Is there any guarantee these people will (not) be tortured?" In answer to the first part of the question, he said that the President had been allowed some power in his first two terms and was not "un figure de proue" (a figurehead) but still did not have the full capabilities of a head of state. He thought that the hydrocarbon wealth permitted the regime to distribute money to clients and to spend on infrastructure. In what we took to be an extended answer to the second part of his question, he accepted that it was important for Algeria to maintain good relations with the outside world, that it had a good relationship with the United Kingdom and had an interest in maintaining that relationship – political facts which even the military side and the intelligence service (the top institution in Algeria) understand. He also accepted that the government of Algeria was

rational. Despite all of that, his ultimate conclusion, which he expressed in French for emphasis and clarity, was that the will to maintain excellent relationships with foreign countries would not prevent the taking of measures in contradiction to this will for the purpose of the internal management of the country. A blunt paraphrase of his view is that the government of Algeria would break its word if it thought it in its interest to do so.

23. A feature of the evidence of Mr. Benderra and of Dr. Spencer is that neither claim to know anything about the appellants or the accusations and findings made against them. No rational assessment of the strength of the promises made by the Algerian government about them can be made without that knowledge. They are by now figures of historic interest only – even U. If the time ever arrives at which they are removed to Algeria, that will be even more true. For a rational government, which the government of Algeria is, to break its promises about their treatment or even to fail to take every practicable step to see that they are fulfilled, would be an uncharacteristic act of folly. The true position is that the government of Algeria is institutionally committed to seeing that the assurances are fulfilled. There is no reason whatever to believe that changes in personnel may or will weaken that commitment. Accordingly, despite our respect for the expertise and balance of Dr. Spencer and for the honesty and force of Mr. Benderra's views, we reject as inconceivable their proposition that the Algerian state might not fulfil its assurances in relation to these men.

24. There was included in the appellants' bundle of "expert" evidence a lengthy report by Professor Jeremy Keenan. Miss Rose QC made little or no reference to it in her opening and closing written submissions and none in her closing oral submissions. She was wise to take that course. Of all of the reports which we have had to consider over the years on Algeria, it is at the outer extreme of conspiracy theories. We have paid no regard to it. Nor have we been invited to give weight to the report of Salima Mellah, perhaps because, for the most part, it consists of a rehearsal of much-travelled ground about the events of the 1990s and the attempt to draw a veil over them. She does report two more recent allegations of torture by the DRS, of Hachemi Boukhalfa and Bachir Belharchaoui, in January and August 2011 respectively. We have no means of knowing whether or not the allegations are true. The fact that they are made, like the reporting of abuse by local human rights lawyers noted in the US State Department 2011 report, has a consequence which the British government has always recognised and continues to acknowledge: that none of the appellants could be returned to Algeria without the assurances given by its government. They tell us nothing about whether or not those assurances will be fulfilled.

Q and H and others who have returned

25. For the reasons set out in the confidential judgment, we see no reason to depart from the conclusion expressed in paragraph 35 of the open judgment in *U* of 14 May 2007 and in the addendum to that judgment about the treatment of Q and H: that it is possible that they were exposed to the sounds of actual or pretended ill-treatment, but that is all. There is no evidence that anything untoward has happened to any of the seven other men who have returned from

the United Kingdom, six of them with the benefit of assurances, including the latest man to return, Brahim Benmerzouga on 26 January 2010. In each of their cases, the assurances given have been fulfilled, as has been explained in previous SIAC judgments. There is nothing in Miss Rose's submission that the British embassy should have attempted to contact them in 2011 or 2012. This possibility was contemplated and raised with Maitre Amara in January 2011. The embassy agreed with Maitre Amara that they would have been unlikely to have welcomed an enquiry by state officials about their current circumstances. Five Guantanamo Bay detainees were returned by the United States, with the benefit of assurances that they would not be ill-treated. Those assurances were fulfilled. All but one are now at liberty.

The British citizen who visited Algiers on 3 May 2012

26. The name of the British citizen referred to by us as AB, is stated in the confidential judgment. Although he has made an open statement in his own name, he has requested anonymity, which we readily grant.

27. AB and his wife arrived at Algiers airport on Thursday 3 May 2012 to attend the wedding of a friend. After several hours, he was detained by the DRS and taken to the Antar barracks. There he was required to change into prison uniform and put into an unlit cell of which the door was locked. The cell was damp and dusty. There was no bed. He suffered an asthma attack, but despite his requests, medical assistance did not arrive until the following morning. He was then seen by a doctor and later given an inhaler and other medication. He was also transferred to another cell with an open door. He was allowed to go to the lavatory, under escort, but not permitted to shower. He was allowed to pray, but mocked when doing so. He was well fed.

28. AB was questioned by a number of men who simply referred to themselves by rank: "the boss" or "major". He was questioned about Pakistan and Afghanistan and terrorist attacks in Mumbai. Questions were in French and Arabic and by gesture. On Sunday evening – after three nights in detention – his wife was summoned. AB was allowed to wear his own clothes and she was told to come back on Monday morning, when he would be released. She did so. On her return, she translated questions by sign language for AB, who is deaf, on the same topics as those about which he had been questioned before. He was then required to sign a document in Arabic, which he could not read. It was then explained that there had been a misunderstanding and an apology was made to him. He was taken to a hotel and the bill paid.

29. An odd feature of his account, first given to the British embassy official who saw him soon after his release, was that his hearing aids, which permitted him to hear sounds, but not to discern words, were removed from him. The embassy official did not record how, in those circumstances, the questions had been asked and answered. AB cleared up that mystery in his witness statement: the questions were in writing.

30. We accept the evidence of AB and his wife as true, without reservation.

31. Their account is instructive. It shows that at least one, and by inference many, of the holding cells in the Antar barracks are primitive in the extreme. Most people would find the experience of being confined in such conditions disorienting and alarming. They are hardly the conditions in which a detained man can prepare himself to deal adequately with interrogation. The response to AB's request for medical assistance to deal with his asthma attack was dilatory. Nevertheless, AB was not threatened or struck. No pressure was put upon him to make a false confession. Questions were put, in the only way in which they could be put to a deaf man without a sign language interpreter, in writing. There was no attempt to deprive him of sleep by leaving a bright light on or playing loud music in his cell. When medical help finally arrived, he was prescribed appropriate medication and given an inhaler and transferred to a cell with an open door. When his interrogators realised that a mistake had been made, they arranged for his wife to visit him and told him he would be released the next day. These do not seem to us to be the actions of interrogators seeking to break down the moral resistance of a suspect by unacceptable means. Physical violence has, at least in the past, been the means by which DRS interrogators have attempted to achieve that end. The deplorable conditions in which AB was detained indicate rather a lack of care for the welfare of persons detained for questioning.

32. The DRS did not notify the British Consulate of AB's detention without delay, as required by Article 36(2) of the 1963 Vienna Convention on Consular Relations. Nothing significant can be read into this omission. As Mr. Layden said, consular cases of this kind routinely occur in many countries without calling into question the good faith and efficacy of solemn bilateral undertakings given at a high level by the government concerned.

33. The circumstances in which AB was detained and questioned give rise to two questions, the answer to which is of importance in determining these appeals:

    i) Would the DRS officers who would detain and question the appellants regard conditions of detention comparable to that experienced by AB as consistent with their human dignity?

    ii) If so – on the basis that there would then be a real risk that an appellant would be detained in such conditions – would that put the United Kingdom in breach of its obligations to that appellant under Article 3 ECHR?

34. Mr. Layden's answer to the first question, given in closed session, but subsequently opened, was that he honestly did not know. We therefore address the second question on the premise that there is a real risk that they would, so that the answer to the first must be assumed to be affirmative.

35. The approach of the Strasbourg Court to the second question is set out in § 67 and 68 of *Peers v. Greece*:

> "67 The court recalls that, according to its case law, ill-treatment must attain a minimum of level of severity if it is to fall within the scope of Article 3. The assessment of this

> minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim…
>
> 68 Furthermore, in considering whether a treatment is "degrading" within the meaning of Article 3, the court will have regard to whether its object is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Article 3…"

Peers concerned conditions in the prison of a contracting state. In a "foreign" case, the test is not identical. In § 177 of *Babar Ahmad v. UK*, final judgment 24/09/2012, the court set out the approach to be adopted. Having first declared in § 176 that the *Chahal* ruling applied without distinction between the various forms of ill-treatment which are prescribed by Article 3 in removal cases, it stated,

> "However, in reaching this conclusion, the court would underline that it agrees with Lord Brown's observation in *Wellington* that the absolute nature of Article 3 does not mean that any form of ill-treatment will act as a bar to removal from a contracting state. As Lord Brown observed, this court has repeatedly stated that the Convention does not purport to be a means of requiring the contracting states to impose Convention standards on other states…This being so, treatment which might violate Article 3 because of an act or omission of a contracting state might not attain the minimum level of severity which is required for their to be a violation of Article 3 in an expulsion or extradition case. For example, a contracting state's negligence in providing appropriate medical care within its jurisdiction has, on occasion, led the court to find a violation of Article 3 but such violations have not been so readily established in the extra-territorial context (compare the denial of prompt and appropriate medical treatment of HIV/Aids in *Aleksanyn v. Russia*…with *N v. The United Kingdom*…"

In *Batayav v. SSHD* [2003] EWCA Civ 1489, a decision which binds us, a real risk of ill-treatment infringing Article 3 by reason of the conditions of detention in a receiving state can only be established by "a consistent pattern of gross and systematic violation of rights under Article 3": § 7.

36. In assessing whether or not the conditions experienced by AB demonstrate that there is a real risk that the appellants would, if returned to Algeria, experience conditions of detention which would cause the United Kingdom to be in breach of its obligations to them under Article 3, there is no bright line test. It is a matter of judgment for us to make. Our judgment is that if there is a real risk that an appellant would be subjected to conditions of detention similar to that experienced by AB, even for a period as long as 12 days, the United Kingdom would not be put in breach of its obligations to him under

Article 3. In reaching that judgment, we have had principally in mind the factors referred to in paragraph 31.

Verification

37. Save for the reservation expressed by a SIAC panel in § 28 in *G* 8 February 2007, SIAC has always required as a condition of acceptability that fulfilment of assurances must be capable of being verified. We do not intend to depart from that approach in this judgment.

38. This issue is also addressed in the confidential judgment, which underpins some of the conclusions stated below.

39. In our view, the principal purpose of verification is to ensure that promises have been fulfilled. We accept that it also serves a further purpose: to encourage compliance. The relative importance of verification may vary in proportion to the strength and reliability of the assurances. In the case of state agencies with a history of malpractice in breach of clear assurances given to another state, contemporaneous private access to detainees will almost certainly be required – as in the circumstances described in *Maya Evans v. Secretary of State for Defence* [2010] EWHC 1455 (Admin). The assurances given by the government of Algeria do not provide for such access. Although it may be given, we cannot act on the assumption that it will be. If there had been a history of breaches of assurances given in respect of other deportees, the lack of access by British embassy personnel to those detained in garde a vue detention for up to 12 days would, in our view, be fatal to reliance on the assurances. However, given the strength and reliability of the assurances and the past history of good compliance noted in previous SIAC judgments, we are satisfied that this provision is not required. (*BB* § 19, *U* § 14 – 26, *QJ* §18 – 19,*T* § 16 – 17, *Moloud Sihali* 26 March 2010 § 52 -64).

40. We are satisfied that the means of verification, although largely informal, are adequate to ensure that its principal purpose is fulfilled. The first and most basic fact which requires verification is that an individual has been released or brought before a judge within the time limit prescribed by Algerian law. This has not proved problematic in the case of any of the 14 men deported by the UK and the US. The medical examination required by Algerian law at the end of garde a vue detention provides some, but very far from complete, reassurance that a detainee has not been physically ill-treated. British embassy contact with Maitre Amara affords a formal and contemporaneous means of enquiry, both during and after detention, which, as past experience has shown, is of value, even if mistakes are sometimes made. British embassy contact with the detainee and family members, before, during and after release, if facilitated by them, is effective, as the case of Benmerzouga demonstrated (*T* § 17). We do not accept Miss Rose's submission that family members will be deterred from contact with the British embassy or may not tell the truth out of fear of the Algerian authorities. Two striking open examples demonstrate why that proposition is erroneous. Q, from within Serkadji Prison, wrote an open letter in his own name to Ouseley J protesting about the treatment which he said he had received in garde a vue detention and then in prison. Benmerzouga confirmed the date of his release and that he was well and at

home by telephone to a female British embassy official. Miss Rose did not suggest that he had not told the truth. She did, however, advance a further proposition that no Algerian will dare speak on the telephone about malpractice by the DRS, for fear of the consequences, because telephone calls are intercepted. We regard this proposition as far-fetched. Not even the DRS has unlimited manpower and resources. It would be unproductive to devote both to monitoring the telephone calls of detainees who have been released, because there was no ground upon which to detain or prosecute them. The proposition that it will is untenable.

41. In addition to direct and personal means of verification, there are indirect means of some value. The first is the francophone press and the Algeria Watch website, in both of which reports of torture are freely made, as Dr. Spencer acknowledged in her oral evidence. She qualified that by saying that no-one paid any attention to it, so that the DRS may work on the calculation that allegations give rise to no consequence. In the case of these appellants that proposition is unlikely to be right, because the British embassy has the capacity and will to monitor press reporting and to attempt to get to the truth and act upon it – by raising the allegations with the Algerian authorities – if the allegations are capable of belief. Miss Rose criticises that as wrong in principle too – what is required is confidential contact with the deportee. This is necessary in the case of a state which has flouted its assurances; but in the case of a state such as Algeria, which has not done so, it is not. Further, if put into effect, this suggestion would remove an important means of verifying that assurances had been fulfilled and of demonstrating to the authorities that the British government remained concerned to ensure fulfilment.

42. The final indirect means is NGO reporting. In a letter dated 22 November 2012 to Birnberg Peirce & Partners, Amnesty International has made it clear that its sources of information in Algeria are, in the main, indirect: in the case of detainees, from their lawyers and from family members. In three cases *V*, *I* and *X*, they did speak to the individuals concerned directly. They emphasise, as they have done directly to SIAC before, that they and other NGOs cannot be relied upon to "monitor" compliance with assurances given to the British government by the Algerian government. No such reliance is intended. It is, however, a fact that Amnesty International does take a keen interest in those deported to Algeria with the benefit of assurances. They are opposed in principle to reliance on assurances in such cases. If they have evidence that they have been flouted in any individual case, they can be relied upon to say so and have done so, albeit with detailed inaccuracies, in the past, as was noted in § 18 of SIAC's open judgment in *QJ*.

Conclusion on generic issues

43. Like previous SIAC panels, we remain convinced that the four conditions identified in § 5 of *BB* are and will be satisfied in the case of these appellants. That test was cited, without disapproval, by the Strasbourg Court in *Othman*. We in turn must now address the factors to which the Strasbourg Court will have regard when considering the reliability of assurances. The obligation on us is to examine whether the assurances provide, in their practical application, a sufficient guarantee that an appellant will be protected against the risk of ill-

treatment. We must consider the circumstances and the general human rights situation in the receiving state – in the case of Algeria, disastrous in the 1990s, still imperfect but on an improving trend. In deciding whether or not against that background the assurances can be relied upon, we, like the Strasbourg Court will have regard to the 11 factors set out in § 189 of its judgment. This is not a box-ticking exercise, in which each box must be ticked affirmatively. In the end, it is a question of judgment. The factors are as follows:

> "(1) Whether the terms of the assurances have been disclosed to the court.
>
> (2) Whether the assurances are specific or are general and vague.
>
> (3) Who has given the assurances and whether that person can bind the receiving state.
>
> (4) If the assurances have been issued by the central government of the receiving state whether the local authorities could be expected to abide by them.
>
> (5) Whether the assurances concerns treatment which is legal or illegal in the receiving state.
>
> (6) Whether they have been given by a contracting state.
>
> (7) The length and strength of bilateral relations between the sending and receiving states, including the receiving state's record in abiding by similar assurances.
>
> (8) Whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms, including providing unfettered access to the applicant's lawyers.
>
> (9) Whether there is an effective system of protection against torture in the receiving state, including whether it is willing to co-operate with international monitoring mechanisms (including international human rights NGOs), and whether it is willing to investigate allegations of torture and to punish those responsible.
>
> (10) Whether the applicant has previously been ill-treated in the receiving state and
>
> (11) Whether the reliability of the assurances has been examined by the domestic courts of the sending/contracting state."

44. These questions have been answered above at some length, but a summary of our answers is given here.

(1) Yes.

(2) The assurances are specific, although the key assurance uses indirect language to state that which is universally understood in diplomatic exchanges between states: that an individual will not be tortured.

(3) The assurances have been given by the President and by the Ministry of Justice. Both bind Algeria.

(4) The "local authority" in this case is the DRS which participated in the discussions giving rise to the assurances. They can be expected to abide by them.

(5) The assurances concern treatment which is illegal in the receiving state.

(6) No.

(7) Close relations between the governments of Algeria and the United Kingdom have existed since the Algerian government's opening to the West after 2001. They are now strong. The record of Algeria in relation to the small number of men deported with the benefit of assurances is good.

(8) There are no monitoring mechanisms and access to a deportee's lawyer is prohibited during garde a vue detention, but unfettered thereafter. As far as we know, no foreign lawyer has been permitted to visit a detained former client in Algeria. Despite these limitations, we are satisfied that effective verification is achievable.

(9) Not as a general proposition in the case of the DRS. There is no monitoring or inspection of their facilities. As far as we are aware, no DRS officer has been punished for torture.

(10) Except for Y, no.

(11) They have been.

We would respectfully add to the Strasbourg Court's list of factors two of those to which we always give great weight: whether or not the assurances are given in good faith; and whether or not it is in the objective national interest of the receiving state to fulfil its assurances. Taking those factors into account, in addition to those identified by the Strasbourg Court, we are satisfied that the Algerian state's assurances can be relied upon in the case of these appellants.

Considerations particular to individual appellants

U, PP and BB

45. Although the findings about them and their backgrounds are very different, it is accepted on their behalf that they are men of normal fortitude. Whether or not the assurances can be accepted in their cases depends upon the answer to generic questions, not on their particular circumstances. One generic proposition not dealt with in the first part of this judgment is the proposition that they will be ill-treated because they will be seen to have been traitors to

Algeria, by claiming asylum in the United Kingdom and refusing voluntarily to return to Algeria. This proposition is far-fetched. If true, it would indicate a lack of good faith on the part of the Algerian government or a lack of control over the actions of DRS officers or both. We are satisfied that the assurances were given in good faith and that the chain of command is strong, so that orders given by the President and those immediately responsible to him will be obeyed by those charged with carrying them out.

W

46. In W's case, there is persuasive evidence which was not available to SIAC when it made its determination in his case on 14 May 2007 about his intellectual and social functioning. According to Dr. Alim, a psychologist who has on three occasions administered standard tests of intelligence and social functioning to W, he falls into the category of those with a moderate learning disability. Mrs. Newton, a psychologist who has not examined W, but has reviewed Dr. Alim's tests and the extensive medical reports upon him, considers that his intelligence is probably in the subnormal range, that immediately above the level identified by Dr. Alim. Mrs. Howells, who has known W since 2005, befriended and looked after him and, for a time, allowed him to live in her home, compares his deficiencies with those of children with special educational needs, whom she encountered as a teacher with pastoral responsibility for the care of children. She has given an extensive and detailed account of his shortcomings. We unhesitatingly accept her account. It is unnecessary, for present purposes, to resolve the difference of opinion between Dr. Alim and Mrs. Newton about precisely where to place W on standard scales of intelligence and social functioning. On any view, he has a substantial intellectual deficit, by comparison with a person of average or below average intelligence.

47. This finding calls into question SIAC's earlier decision in his case on the issue of national security. The (now former) President was a party to that decision. It was based upon evidence which connected W with the "ricin" plot and one of its principal perpetrators, Bourgass and the lies which he told to distance himself from it and from him. SIAC's open findings are set out in paragraphs 6 – 10 inclusive of the open judgment of 14 May 2007. In the former President's view, if he had then known what he now knows about W's intellectual deficits, he would not necessarily have reached the same conclusions. The likelihood that W did not have a full or even significant understanding of what was going on and was used or duped by those who did would have to be carefully considered. For SIAC to arrive at a just result in his case, it would be necessary to reconsider the national security case in the light of what we now know about him.

48. For that to occur one of a number of possible steps would have to be taken. The Secretary of State could retake her decision to deport him on conducive grounds, giving rise to a fresh right of appeal to SIAC. In the light of the decision which we make on these remitted appeals, his solicitors could make further representations to the Secretary of State under paragraph 353 of the Immigration Rules, inviting her to reconsider her decision and, if adverse, to afford him a further right of appeal. If neither course was adopted, and a

deportation order was signed, his solicitors could apply to the Secretary of State to revoke that order and, if she did not do so and did not certify the claim under section 94(2) Nationality Immigration and Asylum Act 2002 as clearly unfounded, that decision, too, would give rise to a fresh in-country right of appeal. These are, however, matters for the future. For present purposes, we act on the finding that it is conducive to the public good to deport W on national security grounds and that, in consequence, Article 8 has no practical part to play in our decision.

49. We have little doubt that, under proper questioning by the DRS, W will confess, in short order, to whatever is put to him. We have no reason to doubt that the DRS does have material which would incriminate him of an offence under Article 87a(6) of the Algerian Penal Code, so that his prosecution would be possible. Because his confession would not have been procured by ill-treatment, the United Kingdom would not be in breach of its obligations to him under Article 3 ECHR. In the light of SIAC's earlier findings about the Algerian judiciary and criminal justice system, there could be no question of a flagrantly unfair trial: it would be for his lawyers to demonstrate that he was of low intellect, so that no reliance could be placed upon his confession and for the tribunal hearing his case to judge whether or not that contention was made out.

50. Accordingly, on the basis upon which we must consider his remitted appeal, there is no ground for concluding that the United Kingdom would be in breach of its obligations to him under Articles 3 and 6 ECHR if he were to be deported.

G

51. G is now 43. He has suffered from long-term physical and mental illness. Because he contracted polio as a child, he is confined to a wheelchair. Ever since he was first examined by British doctors at the end of 2003, he has been diagnosed as suffering from persecutory and auditory hallucinations and a serious depressive disorder. He is dependent for much of day to day life and social functioning on his wife.

52. Three of the consultants who have examined him since 2003, have diagnosed a major depressive disorder with psychotic symptoms: Professor Ian Robbins, a consultant clinical psychologist first made this diagnosis in December 2003. Dr. Sumi Ratnam, a consultant forensic psychiatrist made the same diagnosis in the same month. G was then interned at HMP Belmarsh under the Anti-Terrorism Crime and Security Act 2001. Release produced an abatement of the psychotic symptoms in April 2004, according to Professor Robbins. Dr. Ian Cumming, a consultant psychiatrist whose responsibilities include consultancy at HMP Belmarsh concluded in August 2004 that the symptoms of his depressive illness were sensitive to external events and stressors, so that a return to prison was likely to cause a quick deterioration. After G's return to detention on 11 August 2005, his condition deteriorated quickly. Professor Robbins again diagnosed a major depressive disorder with psychotic symptoms, severely aggravated by his detention. G made a serious suicide attempt on 15 September 2005. He was found suspended by the neck in his

53. Two consultant psychiatrists examined G for the purpose of his remitted appeal: Dr. Quentin Deeley, who produced a report dated 14 November 2012 and Dr. Latcham, who examined G in Field House and produced a report dated 16 December 2012. Both gave oral evidence. Dr. Deeley's diagnosis was that G was suffering from a recurrent depressive disorder, currently severe, with psychotic symptoms and post-traumatic stress disorder. Dr. Latcham disagreed with this diagnosis, because his psychotic symptoms receded quickly when he was released, for the first time, from detention and because he did not experience early morning waking or guilt, typical symptoms of psychotic depression. His diagnosis was one of a reactive depression. Dr. Deeley disagreed, but accepted that there was a reactive component to his depression. They disagreed about how he would be able to cope with detention and interrogation in Algeria and the separation from his family which that would involve. For present purposes, it is unnecessary to resolve that difference. Of greater immediate concern is the risk that he would commit suicide if deported to Algeria.

54. Both Dr. Deeley and Dr. Latcham agree that there is a risk of suicide. Dr. Deeley assessed that risk in his report as high. Dr. Latcham agreed that the risk would be extremely high if he suffered from true psychotic depression, but lower if only from reactive depression. Both agreed that if he suffers from psychotic depression his condition should respond to anti-psychotic medication. We share Dr. Latcham's scepticism that he suffers from true psychotic depression, a dangerous condition which would require his admission to hospital; but we are unpersuaded that all that he suffers from is reactive depression. Psychotic symptoms – delusions and auditory hallucinations - have been present, to some degree, for at least nine years. They are present now even though he was released from detention seven years ago. Dr. Latcham did not suggest that they were invented. Their persistence must, therefore, have an underlying cause.

55. At the conclusion of his oral evidence, we asked Dr. Latcham what steps could be taken to mitigate the suicide risk. He gave an instructive answer: medication had no part to play, but continuous observation did. Intermittent observation would be of little use. When asked to confirm that the Algerian authorities would have to take the same step – continuous observation – to obviate the risk, his answer was

> "Yes. If he was a patient in a psychiatric hospital, I would say if he was returned to Algeria, if he was waiting to be returned to Algeria this court having decided that he should go back to

> Algeria, if he was in hospital at that point I would consider it negligent were he not to be continuously observed."

In a written submission made subsequent to the hearing, the Treasury Solicitor has invited us to treat that answer as referring only to circumstances in which he was hospitalised as a patient suffering from psychotic depression. We did not understand his answer in that sense. It was given in response to an open question about the steps which could be taken in the United Kingdom and in Algeria to obviate the suicide risk. In the light of his earlier observation that true psychotic depression would respond to medication, he would not have said that medication would have no part to play. Dr. Latcham had earlier accepted that the suicide attempt in September 2005 was a serious one. We take his answer to be of general application, not tied to the specific diagnosis of psychotic depression.

56. An issue such as this should not depend critically upon a single set of answers given at the end of oral evidence by one witness, however, frank and helpful he may have been, as Dr. Latcham was. We must look at the totality of the psychiatric evidence in the round. We are persuaded by it that the risk that G would commit suicide, especially after arrival in Algiers, is very high. It may be containable in the UK; but no special arrangements have been negotiated with Algeria to cope with it. Unless and until they are, we are satisfied that the United Kingdom would be in breach of its obligations to G under Article 3 ECHR if he were to be deported in his present condition. The approach which we have adopted to this issue in reaching that conclusion is that summarised by the Divisional Court in *Savage v. USA* [2012] EWHC 3317 (Admin), when addressing the practically identical issue of oppression in paragraph 14 of its judgment:

> "(3). The court must assess the mental condition of the person threatened with extradition and determine if it is linked to a risk of a suicide attempt if the extradition order were to be made. There has to be a "substantial risk that (the appellant) will commit suicide". The question is whether, on the evidence the risk of the appellant succeeding in committing suicide, whatever steps are taken is sufficiently great to result in a finding of oppression: see *Jansons v. Latvia* [2009] EWHC 1845 at (24) and (29)….
>
> (5) On the evidence, is the risk that the person will succeed in committing suicide, whatever steps are taken, sufficiently great to result in a finding of oppression…
>
> (6) Are there appropriate arrangements in place in the prison system of the country to which extradition is sought so that those authorities can cope properly with the person's mental condition and the risk of suicide…"

We are not satisfied that arrangements are in place during the period of garde a vue detention in Algeria so that the risk of suicide can properly be managed during that time. For that reason, G's appeal is allowed.

57. We do not, however, accept G's case that he was tortured in Algeria. He was disbelieved by an adjudicator when he first made this claim. He has not since given evidence about it in a manner which permitted it to be tested by cross-examination.

Y

58. Y is 43. SIAC has previously accepted that in 1994 he was tortured by being beaten repeatedly over the head with iron bars and rifle butts, injuries which left scars and caused epilepsy. He was convicted in his absence of two serious terrorist crimes. In his case, the assurances given include an assurance that he will be detained by the judicial police in an institution under the jurisdiction of the Ministry of Justice. That would not include the Antar barracks or any DRS facility of which we are aware. We are satisfied that the Algerian government will honour its assurance in that respect. He has always claimed to be in fear of return to Algeria. He has reiterated that fear and the claimed reasons for it in a statement prepared for the purpose of his remitted appeal. He has been befriended by Bruce Kent, amongst others, who has provided a statement speaking highly of him, which confirms that he is fearful of being returned to Algeria.

59. Professor Kopelman, a consultant neuro-psychiatrist, has assessed him on three occasions since 3 June 2011 and produced a report dated 26 November 2012 for the purpose of this hearing. It was supplemented by his oral evidence. In his opinion, Y suffers from three relevant disorders: temporal lobe epilepsy, which is well controlled by anti-convulsive medicine, a depressive disorder of severe or moderate severity and post-traumatic stress disorder. In Professor Kopelman's opinion, fear of torture has resulted in the persistence of the latter two conditions. He has no doubt that there would be a further deterioration in his psychological health if deportation became imminent. The letter of instruction to Professor Kopelman somewhat misrepresented the circumstances which would be faced by Y on return. It suggested that he would be taken to a military barracks and there submitted to physical torture, threats and humiliation. The first proposition is wrong, for reasons already stated. It was corrected before Professor Kopelman gave evidence. The second begs the question of how Y will be treated in garde a vue detention. Professor Kopelman said that he did not take those factors principally into account in forming the opinion that his psychological health would deteriorate and that he would be vulnerable to making a false confession. The latter proposition also begs a significant question. Given SIAC's open and closed findings in its judgment of 24 August 2006, it cannot sensibly be asserted in advance that any confession would be false.

60. In Professor Kopelman's view, there is a suicide risk. However, Y has consistently said that his religion prevented him from acting upon suicidal ideas. Bruce Kent states that he is a devout Muslim. We have no reason to doubt that. Accordingly, given the strong prohibition of suicide in Islam, we assess the risk that Y will make a serious suicide attempt as slight.

61. We accept that the assessment of an Article 3 risk is "relative" – i.e., that it can take into account the physical and mental condition of a person. In an

extreme case, such as *Price v. UK*, a judgment of the third section of the Strasbourg Court made final on 10 October 2001, very severe disability can make treatment that would be acceptable for an able bodied person, contrary to Article 3 in a contracting state. We also accept that, subject to the qualification noted in *Baber Ahmed* the same principle applies in a "foreign" case. We are not, however, satisfied that Y's mental condition is such that to deport him to Algeria under the protection of the assurances would put the United Kingdom in breach of its obligations to him under Article 3. Y would undoubtedly fear torture on return. If the assurances are fulfilled, as we are confident that they will be, his fear would be dispelled by the fact that he was not tortured. As the Strasbourg Court made clear in *Bensaid v. UK* [2001] 33 EHRR 10, the threshold in an Article 3 case in which the premise is that a person suffering from a severe psychiatric illness will be treated less well in Algeria than in the UK, is high. In our judgment, provided that the assurances are fulfilled, Y's circumstances do not cross it.

Z

62. Z is 45. Until late September or early October 2012, he was in good mental health, despite long periods of detention and the imposition of stringent bail conditions since 1997. His last period of detention occurred because he breached his SIAC bail conditions by deliberately attempting to remove his tag. He was, in consequence, detained for 16 months until readmitted to bail in November 2012. During the last weeks of his detention, he developed depressive symptoms, characteristic of a major depressive episode, falling on the cusp between moderate and severe. The triggers noted by Professor Katona included anxiety and stress caused by the departure of detainees from Long Lartin (extradited to the United States). Oddly, Professor Katona did not note, as a trigger, a long anticipated but disastrous visit by his wife and children to Long Lartin during the same period. In his oral evidence, Professor Katona stated that the main cause of depression was separation from his wife and children, an opinion which we readily accept. Since his release, his state of mind has improved.

63. In Professor Katona's opinion, Z's mental state would deteriorate very significantly if he were deported and detained for up to 12 days in DRS military barracks. A major cause of concern would be the possibility of the imposition of a long prison sentence. If that were to happen, it would mean that he would be separated from his family, which would make him vulnerable to worsening anxiety.

64. We accept Professor Katona's opinion, but are satisfied that Z's circumstances do not and would not approach, let alone cross, the high threshold set in a "foreign" Article 3 case, any more than it would prevent prosecution and imprisonment for a criminal offence in a contracting state. We are satisfied that his deportation to Algeria would not put the United Kingdom in breach of its obligations to him under Article 3 ECHR.

Conclusion

65. The remitted appeal of G is allowed. The remitted appeals of the remaining appellants are dismissed.

Post-script

66. Except in the case of PP, this litigation has now lasted over seven years. There is, as yet, no end in sight. The objectives of the appellants and of the Secretary of State – respectively, to be able to live free of restrictions and permanently in the United Kingdom and to deport the appellants to Algeria – are nowhere near attainment. Nevertheless, both sides have gained something from the continued litigation: the appellants are still here and the threat which they pose to national security has been contained. In hindsight, if not in foresight, the outcome of this litigation, so far, has been to produce a regime which can, with the unattractive use of acronyms and advertising language, be described as "ACTSA-lite".