Neutral Citation Number: [2004] EWCA 1123

Case No: C2/2003/2796

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C2/2004/0067

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM

THE SPECIAL IMMIGRATION APPEALS COMMISSION

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 11 August 2004

Before :

LORD JUSTICE PILL

LORD JUSTICE LAWS
and

LORD JUSTICE NEUBERGER

Between :

A, B, C, D, E, F, G, H, Mahmoud Abu Rideh	**Appellants**
Jamal Ajouaou	
- and -	
Secretary of State for the Home Department	**Respondent**

MR B EMMERSON QC & MR R HUSAIN (for all Appellants except C & D)

Mr M GILL & MISS S HARRISON (for Appellants C & D)

MR I BURNETT QC, MR R TAM, MR J SWIFT,

MISS L GIOVANNETTI, MR T EICKE, MISS C NEENAN (for the Secretary of State for the Home Department)

Hearing dates : 7-13 July 2004

- -

Approved Judgment

Lord Justice Pill:

1. These are appeals, by a number of persons detained pursuant to the certificates, against the refusal of the Special Immigration Appeals Commission ("the Commission") to cancel certificates issued by the Secretary of State for the Home Department ("the Secretary of State") under Section 21 of the Anti-Terrorism, Crime and Security Act 2001 ("the 2001 Act"). Two of the Appellants, Ajouaou and F, had ceased to be detained because they had gone to another country. Their certificates were revoked. They launched fresh appeals from abroad against the original certification. The Commission decided that it had no jurisdiction to hear those appeals, a decision which is challenged in this court.

2. On 29 October 2003, the Commission, Ouseley J presiding, delivered what has been described as a generic judgment. It included a consideration of general points arising from the legality of the certificates. It also included a detailed summary of the evidence relied on by the parties. A number of individual determinations, one for each of the Appellants, were handed down on the same day. Some bore the name of Ouseley J as Chairman of the Commission and others of Collins J as Chairman. There had been a series of hearings over a period of four months. Collins J presided at some of them and Ouseley J at others.

3. Apart from the jurisdictional issue, three general issues are raised for the consideration of this court. It is submitted that, on each of them, the Commission has misdirected itself in its approach to the evidence. Mr Emmerson QC, for the Appellants other than C & D, and Mr Gill QC for C & D, submit that if there is a finding in favour of the Appellants on any one of the three issues, remission to the Commission for re-hearing of the cases is required. It is accepted that if the generic points raised fail, there is nothing in the individual cases capable of amounting to a point of law, save as mentioned in the following paragraph.

4. For the Secretary of State, Mr Burnett QC submitted initially that there could be circumstances in which, in that event, this court could resolve individual cases finally. That submission has not been maintained and, in my view, remission would be necessary to allow

the Commission to consider the evidence afresh. A general point is also taken upon the procedure for disclosure of documents by the Respondent and a discrete point is taken, in the case of D, upon the procedure followed before the Commission in his case. A further point is taken in relation to the Refugee Convention.

The statutory background

5. The United Kingdom is of course party to the European Convention on Human Rights ("the Convention"). Article 5 provides:

> 1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law.

A series of cases is specified including, of course, "the lawful detention of a person after conviction by a competent court" (5.(1)(a)). Another case, at Article 5.1(f) is:

> "The lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition."

Article 5 (4) provides:

> "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

6. Article 6 need not be set out in full. The first sentence provides:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."
>
> It has been held in this court that proceedings before the Commission are not criminal proceedings for the purposes of Article 6. The result is that Article 6 (2) and (3) do not apply (*A & Ors v Secretary of State for the Home Department* [2004] QB 335 per Lord Woolf CJ at p364A).

7. The effect of Sections 1 and 6 (1) of the Human Rights Act 1998 ("the 1998 Act") is that it is unlawful for a court to act in a way which is incompatible with the Convention rights set out in the above Articles unless section 6(2) applies. That provides:

> "(2) Subsection (1) does not apply to an act if –

(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or

(b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions."

8. Article 15 permits derogation from obligations under the Convention in limited circumstances:

"1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligation under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law."

By virtue of Article 15 (2) no derogation is permissible from several articles, including Article 3.

9. Following terrorist attacks in the United States on 11 September 2001 the United Kingdom government formed the view that a public emergency, within the meaning of Article 15 (1) of the Convention, existed in the United Kingdom. A proposed derogation from Article 5 (1) of the Convention was notified to the Secretary General of the Council of Europe under Article 15 (3) of the Convention. The Human Rights Act 1998 (Designated Derogation) Order 2001 ("the 2001 Order") was made on 11 November 2001, having been approved by both Houses of Parliament. Section 14(6) of the 1998 Act permits the making of such a derogation order.

10. The 2001 Order provides, in Article 2:

"The proposed derogation by the United Kingdom from Article 5(1) of the Convention, set out in the Schedule to this Order, is hereby designated for the purposes of the 1998 Act in anticipation of the making by the United Kingdom of the proposed derogation".

11. The Schedule to the 2001 Order refers to the terrorist acts in the United States on 11 September 2001 and the resolutions of the United Nations Security Council recognising the attacks as a threat to international peace and security. It states that the threat from international terrorism is a continuing one and that the Security Council in its resolution 1373 (2001) "required all states to take measures to prevent the commission of terrorist attacks, including by denying safe haven for those who finance, plan, support or commit terrorist attacks". The Schedule continues:

"There exists a terrorist threat to the United Kingdom from persons suspected of involvement in international terrorism. In particular, there are foreign nationals present in the United Kingdom who are suspected of being concerned in the

commission, preparation or instigation of acts of international terrorism, of being members of organisations or groups which are so concerned or of having links with members of such organisations or groups, and who are a threat to the national security of the United Kingdom.

As a result, a public emergency, within the meaning of Article 15(1) of the Convention, exists in the United Kingdom."

12. The provisions of the then proposed 2001 Act are summarised and it is stated that the Act "is a measure which is strictly required by the exigencies of the situation". The Act is described as a "temporary provision" and reference is made to its being subject to annual renewal by Parliament.

13. Existing powers are described, by reference to authority, and the perceived gap which it was thought necessary to fill by legislation:

"In some cases, where the intention remains to remove or deport a person on national security grounds, continued detention may not be consistent with Article 5(1)(f) as interpreted by the Court in the *Chahal* [(1996) 23 EHRR 413] case. This may be the case, for example, if the person has established that removal to their own country might result in treatment contrary to Article 3 of the Convention. In such circumstances, irrespective of the gravity of the threat to national security posed by the person concerned, it is well established that Article 3 prevents removal or deportation to a place where there is a real risk that the person will suffer treatment contrary to that article. If no alternative destination is immediately available then removal or deportation may not, for the time being, be possible even though the ultimate intention remains to remove or deport the person once satisfactory arrangements can be made. In addition, it may not be possible to prosecute the person for a criminal offence given the strict rules on the admissibility of evidence in the criminal justice system of the United Kingdom and the high standard of proof required.

Derogation under Article 15 of the Convention

The Government has considered whether the exercise of the extended power to detain contained in the Anti-terrorism, Crime and Security [Act 2001] may be inconsistent with the obligations under Article 5(1) of the Convention. As indicated above, there may be cases where, notwithstanding a continuing intention to remove or deport a person who is being detained, it is not possible to say that "action is being taken with a view to deportation" within the meaning of Article 5(1)(f) as interpreted by the Court in the *Chahal* case. To the extent, therefore, that the exercise of the extended power may be inconsistent with the United Kingdom's obligations under Article 5(1), the Government has decided to avail itself of the right of derogation conferred by Article 15(1) of the Convention and will continue to do so until further notice."

The reasoning which led to the 2001 Act is discussed in the judgment of Lord Woolf CJ in *A & Ors*. The assumption underlying the derogation order is that there are persons who cannot lawfully be deported. In *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153 Lord Hoffmann stated:

> "The European jurisprudence makes it clear that whether deportation is in the interests of national security is irrelevant to rights under Article 3. If there is a danger of torture, the government must find some other way of dealing with a threat to national security."

14. The 2001 Act was duly enacted on 14 December 2001 and the relevant legislation is in Part 4 of the Act, headed "Immigration and Asylum". Section 21 provides, insofar as is material:

> 1. The Secretary of State may issue a certificate under this section in respect of a person if the Secretary of State reasonably-
>
> (a) believes that the person's presence in the United Kingdom is a risk to national security, and
>
> (b) suspects that the person is a terrorist.
>
> 2. In subsection (1)(b) "terrorist" means a person who –
>
> (a) is or has been concerned in the commission, preparation or instigation of acts of international terrorism,
>
> (b) is a member of or belongs to an international terrorist group, or
>
> (c) has links with an international terrorist group,
>
> 3. A group is an international terrorist group for the purpose of subsection (2)(b) and (c) if –
>
> (a) it is subject to the control or influence of persons outside the United Kingdom, and
>
> (b) the Secretary of State suspects that it is concerned in the commission, preparation or instigation of acts of international terrorism.
>
> (4) For the purposes of subsection (2)(c) a person has links with an international terrorist group only if he supports or assists it.
>
> (5) In this Part –

"terrorism" has the meaning given by section 1 of the Terrorism Act 2000 (c11), and

"suspected international terrorist" means a person certified under subsection (1).

(6) Where the Secretary of State issues a certificate under subsection (1) he shall as soon as is reasonably practicable –

(a) take reasonable steps to notify the person certified, and

(b) send a copy of the certificate to the Special Immigration Appeals Commission.

(7) The Secretary of State may revoke a certificate issued under subsection (1)."

15. Section 1 of the Terrorism Act 2000 ("the 2000 Act") provides:

"(1) In this Act "terrorism" means the use or threat of action where –

(a) the action falls within subsection (2),

(b) the use or threat is designed to influence the government or to intimidate the public or a section of the public, and

(c) the use or threat is made for the purpose of advancing a political, religious or ideological cause.

(2) Action falls within this subsection if it –

(a) involves serious violence against a person,

(b) involves serious damage to property,

(c) endangers a person's life, other than that of the person committing the action,

(d) creates a serious risk to the health or safety of the public or a section of the public, or

(e) is designed seriously to interfere with or seriously to disrupt an electronic system.

(3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied

(4) In this section –

(a) "action" includes action outside the United Kingdom,

(b) a reference to any person or to property is a reference to any person, or to property, wherever situated,

(c) a reference to the public includes a reference to the public of a country other than the United Kingdom, and

(d) "the government" means the government of the United Kingdom, of a Part of the United Kingdom or of a country other than the United Kingdom.

(4) In this Act a reference to action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organisation.

By virtue of section 23 of the Act, a suspected international terrorist may be detained.

16. Provision for appeal is made in Section 25 of the 2001 Act:

(1) A suspected international terrorist may appeal to the Special Immigration Appeals Commission against his certification under section 21.

(2) On an appeal the Commission must cancel the certificate if –

(a) it considers that there are not reasonable grounds for a belief or suspicion of the kind referred to in Section 21(1)(a) or (b), or

(b) it considers that for some other reason the certificate should not have been issued.

(3) If the Commission determines not to cancel a certificate it must dismiss the appeal.

(4) Where a certificate is cancelled under subsection (2) it shall be treated as never having been issued.

(5) An appeal against certification may be commenced only-

(a) within the period of three months beginning with the date on which the certificate is issued, or

(b) with the leave of the Commission, after the end of that period but before the commencement of the first review under Section 26."

17. In Section 26, provision is made for periodic review of certificates issued under Section 21. Subject to exceptions, the Commission must hold a first review of each certificate as soon as reasonably practicable after the expiry of the period of six months beginning with the date on which the certificate was issued. Thereafter a review must be made as soon as reasonably practicable after the expiry of the period of three months from the date on which the first review is finally determined. In Section 26 (4) provision is made for reviews during the above periods. Section 26(5) and (6) provides:

"(5) On a review the Commission –

(a) must cancel the certificate if it considers that there are no reasonable grounds for a belief or suspicion of the kind referred to in section 21(1)(a) or (b), and

(b) otherwise, may not make any order (save as to leave to appeal).

(6) A certificate cancelled by order of the Commission under subsection (5) ceases to have effect at the end of the day on which the order is made."

18. Section 27 provides that section 7 of the Special Immigration Appeals Commission Act 1997 ("the 1997 Act") shall apply in relation to an appeal or review under Section 25 or 26 of the 2001 Act.

19. Section 7 (1) of the 1997 Act provides:

"Where the Special Immigration Appeals Commission has made a final determination of an appeal, any party to the appeal may bring a further appeal to the appropriate appeal court on any question of law material to that determination."

Leave is required (Section 7(2)). By virtue of Section 7(3)(a), the Court of Appeal is the appropriate appeal court "in relation to a determination by the Commission in England and Wales". Section 1 of the 1997 Act, as amended by Section 35 of the 2001 Act, provides that "the Commission shall be a superior court of record".

20. Section 29 of the 2001 Act provides that Sections 21 and 23 of the Act shall expire "at the

end of the period of 15 months beginning with the day on which the Act is passed" but subject to a power in the Secretary of State to repeal the sections and also to make an order providing that the sections shall continue in force for a period not exceeding one year. Subject to a circumscribed urgency provision, such an order may not be made unless a draft has been laid before and approved by resolution of each House of Parliament. It is provided that sections 21 and 23 shall in any event cease to have effect at the end of 10 November 2006. Monitoring of the working of Part 4 of the Act has also been instituted, Lord Carlile having been given that role.

21. Protection is also provided by the Tribunal set up under the Regulation of Investigatory Powers Act 2000 to scrutinise the investigatory powers and functions of the Intelligence Services.

22. Rule 44(3) of the Special Immigration Appeals Commission (Procedure) Rules 2003 ("the 2003 Rules"), made under the 1997 Act, provides that:

> "The Commission may receive evidence that would not be admissible in a court of law."

23. The lawfulness of the 2001 Order was challenged in *A & Ors*. The Court of Appeal, reversing in certain respects the Commission to whom application had first been made, held that the derogation was lawful. Lord Woolf CJ stated, at paragraph 27:

> "... the provisions of Part 4 purport to do no more than reverse the legal position which existed subsequent to the decision in *Chahal* 23 EHRR 413. In other words they allow a suspected international terrorist who does not have a right of abode, alone, to be detained even though for the time being it is not possible to deport him. In relation to those who are not suspected international terrorists who are liable to be deported, but cannot be deported, the position remains as it was prior to the 2001 Act".

24. At paragraph 31, Lord Woolf stated that "the derogation is limited to extending the period of time during which the detention can continue: that is the *Chahal* point". Lord Woolf noted, at paragraph 42, the undertaking given by the Attorney-General that "Part 4 would be only used for the emergency which was the subject of the derogation" and added that "the powers contained in Part 4 could only be used to the extent that they were covered by the Order, otherwise they would fall foul of Article 5". At paragraph 44, Lord Woolf referred to what is required to justify a derogation:

> "The extent of the threat, required as a pre-condition to derogation, is more extensive than that required by the interests of national security. It is a public emergency threatening the life of the nation. It is the broader formulation of national security which was considered in *Rehman* [2003 1 AC 153]".

25. An appeal to the House of Lords against the decision in *A & Ors* is due to be heard on 4 October 2004.

26. When considering the statutory framework, it is important to bear in mind the fundamental nature of "the right to liberty and security of person". Indefinite detention, to be lawful, requires the clearest justification and, in these cases, there is no conviction by a competent court to justify it. It must also be borne in mind that the United Nations Security Council has resolved under Chapter VII of the United Nations Charter that there is a threat to international peace and security and in Security Council resolution 1373 has required all states to take comprehensive measures. These include:

> b) Take the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information;
>
> c) Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens;
>
> d) Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens;
>
> f) Afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings;

Further, states are called upon to:

> a) Find ways of intensifying and accelerating the exchange of operational information, especially regarding actions or movements of terrorist persons or networks; forged or falsified travel documents; traffic in arms, explosives or sensitive materials; use of communications technologies by terrorist groups; and the threat posed by the possession of weapons of mass destruction by terrorist groups;
>
> b) Exchange information in accordance with international and domestic law and cooperate on administrative and judicial matters to prevent the commission of terrorist acts;
>
> c) Cooperate, particularly through bilateral and multilateral arrangements and agreements, to prevent and suppress terrorist attacks and take action against perpetrators of such acts;

27. To take such steps is an international legal obligation of the United Kingdom government. The Government's view that a public emergency, threatening the life of the nation within the meaning of Article 15(1) of the Convention, exists in the United Kingdom, is consistent with

the Security Council view of the situation.

Insufficient scrutiny

28. The Appellants' first submission, and the oral submission made by Mr Gill QC, is that the Commission erred in affording an insufficient standard of scrutiny for the certification and detention of the Appellants. Having regard to the fundamental importance of the right to liberty and security of person and to the prospect of indefinite detention inherent in Part 4 of the 2001 Act, a very high standard is required to be applied when scrutinising the issue of a certificate under Section 21 of the Act, it is submitted.

29. The test to be applied by the Secretary of State in deciding whether to issue a certificate is that provided in Section 21(1) of the 2001 Act.

30. The subsection requires that the Secretary of State has a belief (21(1)(a)), and a suspicion (21(1)(b)). A reasonable belief can exist only on the basis of information received and the existence of a reasonable suspicion depends on an assessment of that information. A reasonable belief may be held on the basis of the receipt of information which has not been proved in the ordinary sense of that word. Suspicion may reasonably arise from unproved facts.

31. This court must make an assessment of whether the criteria in Section 21(1) were in the circumstances satisfied. While the approach adopted by the Commission can be expected to be a helpful guide, this court must form its own judgment and not merely review the manner in which the Commission made an assessment.

32. In *O'Hara v Chief Constable of the Royal Ulster Constabulary* [1997] AC 286, the House of Lords considered legislation under which a constable could arrest without warrant a person whom he had reasonable grounds of suspecting to be, amongst other things, a person who was concerned in the commission, preparation or instigation of certain acts of terrorism. That test required reasonable grounds for suspicion but not the reasonable belief also required by the present test. As to reasonable suspicion, Lord Hope of Craighead stated, at page 297G and following:

> "It is now commonplace for Parliament to enable powers which may interfere with the liberty of the person to be exercised without warrant where the person who exercises these powers has reasonable ground for suspecting that the person against whom they are to be exercised has committed or is committing an offence. The protection of the subject lies in the nature of the test which has to be applied in order to determine whether the requirement that there be reasonable grounds for the suspicion is satisfied.
>
> My Lords, the test which section 12(1) of the Act of 1984 has laid down is a simple but practical one. It relates entirely to what is in the mind of the arresting officer when the power is exercised. In part it is a subjective test, because he must have formed a genuine suspicion in his own mind that the

person has been concerned in acts of terrorism. In part also it is an objective one, because there must also be reasonable grounds for the suspicion which he has formed. But the application of the objective test does not require the court to look beyond what was in the mind of the arresting officer. It is the grounds which were in his mind at the time which must be found to be reasonable grounds for the suspicion which he has formed. All that the objective test requires is that these grounds be examined objectively and that they be judged at the time when the power was exercised.

...The information acted on by the arresting officer need not be based on his own observations, as he is entitled to form a suspicion based on what he has been told. His reasonable suspicion may be based on information which has been given to him anonymously or it may be based on information, perhaps in the course of an emergency, which turns out later to be wrong. As it is the information which is in his mind alone which is relevant however, it is not necessary to go on to prove what was known to his informant or that any facts on which he based his suspicion were in fact true. The question whether it provided reasonable grounds for the suspicion depends on the source of his information and its context, seen in the light of the whole surrounding circumstances."

33. In *Rehman,* the issue was as to when the Secretary of State could make a deportation order under Section 3(5)(b) of the Immigration Act 1971 on the ground that it would be conducive to the public good in the interests of national security. Lord Slynn of Hadley stated, at paragraph 22:

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

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

whether there should be a decision to deport and a deportation order made."

34. Lord Hoffmann stated, at paragraph 56:

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

35. Mr Gill submits that the underlying principle to be applied in approaching Section 21(1) is the principle that the Secretary of State must not act in an arbitrary way. There are different levels of suspicion and, in the present context, a high level is required, it is submitted. Substantial investigation is required before a suspicion can be a reasonable suspicion.

36. The Commission accepted, at paragraph 46, that "the extent, nature, independence and reliability of the evidence are relevant. The extent to which obvious lines of enquiry, which could have been followed, have been ignored is relevant.....It is all the circumstances which are relevant". The Commission accepted, at paragraph 48, that the evidence "does have to be scrutinised carefully and its weaknesses and gaps examined to see if it does provide such grounds [the statutory grounds] or whether suspicion exists or survives because of a failure to investigate matters in obvious ways which would have cast a clearer light, one way or the other, on the point."

37. Paragraph 49, the Commission stated:

> "What weight is attached to any particular piece of evidence is a matter for consideration in any particular case in the light of all the evidence, viewed as a whole and not as isolated pieces. ... Whilst the absence of arrest on criminal charges or interview can be an indicator as to the existence of reasonable grounds, it must be remembered both what material is admissible for these purposes and inadmissible or not usable for criminal trial purposes, and the nature of the matters in respect of which reasonable grounds for suspicion or belief has to be shown."

38. At paragraph 51, the Commission stated,

> "... By the nature of their habitual tasks they [the police or the Security Services] deal with suspicion and risk rather than proof. They acknowledge "that there may be a gap between a seemingly suspicious activity and it giving reasonable grounds for suspicion in this context which cannot be filled by inference or assessment where it could verily be filled by further investigation".

39. At paragraph 58, the Commission stated,

> "... It would equally make a nonsense of the Act, in relation to the grounds for belief that an Appellant was a risk to National Security, to require specific factual allegations to be proved on a balance of probabilities before account could be taken of them in a risk assessment or before they could afford reasonable grounds for the necessary belief."

40. Dealing with the role of the Secretary of State's views and the concept of deference, the Commission stated, at paragraph 63:

> "The judiciary had to be willing to put an appropriate degree of trust in the ability of Ministers who are publicly accountable to satisfy themselves as to the integrity and professionalism of the Security Service."

41. At paragraph 61, the Commission stated:

> "It is plain that the Commission has to be satisfied as to the existence of reasonable grounds for suspicion and belief for the section 25 appeals by taking account of all matters even if not proved on the balance of probability; the *Rehman* decision is of no assistance to the Appellants in that context."

42. At paragraph 71, the Commission stated:

> "It is our task under Section 25 to examine the evidence relied on by the Secretary of State and to test whether it affords us reasonable grounds for the relevant belief and suspicion; it is not a demanding standard for the Secretary of State to meet. ... The Commission must be careful to ensure that such deference or recognition of expertise as is appropriate does not mean that it forswears its own obligation to be satisfied that there are indeed reasonable grounds for the necessary belief and suspicion."

In *Rehman* it was accepted that the Secretary of State's assessment of whether, on a given state of facts, a person's presence is a risk to national security is entitled to considerable deference (Lord Slynn at paragraph 26, Lord Hoffmann at paragraph 54).

43. Mr Gill submits that the Commission have applied too low a test. They have relieved the Respondent of any burden of establishing facts underlying the suspicions and beliefs. They have regarded a speculative state of mind of conjecture or surmise as sufficient. A rigorous, disciplined and structured approach is required of the Commission, it is submitted. Otherwise, the Secretary of State has too great a room for manoeuvre. To place a limit on the power of the executive to deprive a person of liberty, an analysis of the reasonableness of the Secretary of State's conduct is required. While citing it, the Commission failed to apply the principle stated by the European Court of Human Rights (ECtHR) in *Murray v United Kingdom* [1994] 19 EHRR 193, paragraph 56, that "the level of deprivation of liberty at risk may also be material to the level of suspicion required". The highest level of suspicion was required and exacting standards should have been applied, it is submitted. An approach culminating in the statement that "it is not a demanding standard for the Secretary of State to meet" was in error.

44. It is the impossibility of removing people lawfully which creates the need for the derogation and the 2001 Act. What would otherwise be a breach of Article 5 is rendered lawful by Part 4 of the 2001 Act but, in each case, it must be shown that certification is a strictly necessary measure by way of response to the emergency threatening the life of the nation. That confirms the need for extremely anxious scrutiny when Section 21 powers are exercised, it is submitted.

45. The task of the Commission is to assess whether it considers that there are or are not reasonable grounds for a belief or suspicion of the kind referred to in Section 21(1)(a) or (b) (Section 25(2) of the 2001 Act). It is not necessary for present purposes to consider the effect of Section 25(2)(b), which empowers the Commission to discharge the certificate on grounds other than that reasonable grounds for a belief or suspicion are not present, save to recall the additional power to discharge conferred on the Commission.

46. In *M v Secretary of State for the Home Department* [2004] EWCA Civ 324, the Secretary of State sought to challenge a finding of the Commission that the issue of a certificate was not justified. Lord Woolf CJ analysed the task of the Commission:

> "15. SIAC's task is not to review or 'second-guess' the decision of the Secretary of State but to come to its own judgment in respect of the issue identified in s 25 of the 2001 Act. The task of this court on an appeal is limited to questions of law. However, the power of this court to determine questions of law enables the court (among other grounds) to set aside a decision of SIAC if that decision is unsupported by any evidence so that it is perverse.
>
> 16. SIAC is required to come to its decision as to whether or not reasonable grounds exist for the Secretary of State's belief or suspicion. Use of the word 'reasonable' means that SIAC has to come to an objective judgment. The objective judgment has however to be reached against all the circumstances in which the judgment is made. There has to be taken into account the danger to the public which can result from a person who should be detained not being detained. There are also to be taken into account the consequences to the person who has been detained. To be detained without being charged or tried or

even knowing the evidence against you is a grave intrusion on an individual's rights. Although, therefore, the test is an objective one, it is also one which involves a value judgment as to what is properly to be considered reasonable in those circumstances. "

47. Having considered the facts, Lord Woolf stated, at paragraph 33:

> "What is critical was the value judgment which SIAC had to make as to whether there was reasonable ground for the belief or suspicion required. As to this question SIAC was the body qualified by experience to make a judgment. SIAC came to a judgment adverse to the Secretary of State. It has not been shown that this decision was one to which SIAC was not entitled to come because of the evidence, or that it was perverse, or that there was any failure to take into account any relevant consideration. It was therefore not defective in law."

The Commission's approach was then approved. However, it is submitted that the Commission in the generic judgment failed to apply that test when stating, at paragraph 40:

> "It is a possibility that the Commission could conclude that there were reasonable grounds for the suspicion or belief without itself holding the requisite suspicion or belief. But its task under Section 25 is to consider the reasonableness of the grounds rather than to cancel a certificate if, notwithstanding the reasonableness of the grounds, it were unable subjectively to entertain the suspicion or hold the belief to which the statute refers. If such a situation were to arise, the Commission will make that clear."

The situation did not in the event arise.

48. The Commission did not have the advantage of the decision of this court in *M,* where its approach was generally approved. I do not consider the approach in paragraph 40 to be inconsistent with *M.* The Commission was correct to raise the possibility that a certificate need not be cancelled if the Commission was unable itself to entertain the relevant suspicion or hold the relevant belief while at the same time, making the appropriate value judgment, holding that there were reasonable grounds for the suspicion and belief.

49. Reading the relevant part of the judgment as a whole, I am not persuaded that the Commission applied the wrong test under Section 25(2)(a) or in its consideration of Section 21(1) powers. The members approached the evidence on the correct basis. I regard the expression "not a demanding standard" in paragraph 71 as unfortunate but in using it, the Commission were in my view, making a comparison with standards by which facts are proved in judicial proceedings and were not departing from the statutory test. They wished to emphasise that the standard is a different one from that applied in ordinary litigation which is routinely concerned with finding facts. The context is different but, as Lord Hoffmann stated in *Rehman:* "it is a question of evaluation and judgment" and "the concept of a standard of proof is not particularly helpful". All the circumstances must be considered and, while in some situations specific acts must be proved, what matters is the "assessment made of the whole

picture".

50. In their conclusions, at paragraph 253, the Commission stated:

> "Individual pieces [of intelligence or assessment] in isolation might be said to show little or nothing but should not then individually be laid aside and ignored. They should be looked at in the light of all the evidence; the individual pieces may then be seen to be part of a wider picture or to show a consistent pattern of significance. Likewise, we accept that a close and penetrating analysis of the material including the assessments and inferences is required, as the Appellants' advocates submitted".

51. The overall fairness of proceedings before the Commission was considered by Lord Woolf CJ in *A & Ors*, at paragraph 57:

> "The proceedings before the Commission involve departures from some of the requirements of Article 6. However, having regard to the issues to be inquired into, the proceedings are as fair as could reasonably be achieved. It is true that the detainees and their lawyers do not have the opportunity of examining the closed material. However, the use of separate counsel to act on their behalf in relation to the closed evidence provides a substantial degree of protection. In addition, in deciding upon whether there has been compliance with Article 6 it is necessary to look at the proceedings as a whole (including the appeal before this court). When this is done and the exception in relation to national security, referred to in Article 6, is given due weight, I am satisfied there is no contravention of that article."

52. I find no error of approach.

The effect of the derogation

53. The second submission, also made on behalf of the Appellants by Mr Gill, is that the Commission erred by misunderstanding the scope of the derogation achieved by the 2001 Order. It drew the scope of the derogation too widely so as to render persons liable to certification who were not within the scope of the derogation.

54. The scope of the derogation was considered in this court in *A and Ors*. I have cited a passage from the judgment of Lord Woolf CJ. Both Brooke LJ and Chadwick LJ expressed agreement with Lord Woolf that the Secretary of State may not lawfully issue a certificate under Section 21 unless empowered to do so under the terms of the derogation. The Appellants rely on the further statement of Brooke LJ, at paragraph 98:

> "This [derogation] refers in terms to the threat to international peace and

> security identified by the terrorist attacks on 11 September. In other words it identifies the threat posed by Al Qa'eda and its associated networks (and no-one else), and the Secretary of State has put the matter beyond doubt by the way his authorised witness explained to the Commission the factors that lead him to identify a public emergency threatening the life of the nation".

55. The point arises because, under Section 21(1) of the 2001 Act, the Secretary of State must reasonably suspect, if he is to issue a certificate, that the person is a "terrorist". Terrorist is defined in the Section 21(2), already cited. The certifications in this case were under 21(2)(b) and (c) so that the persons certified are claimed to be either a member of or belonging to a international terrorist group (as defined in Section 21(3)), or has links with such a group. It is submitted that the Commission have interpreted the word "group" in Section 21 too widely. The point is taken in a general way and there has been very little reference to the evidence about specific groups, which was analysed in great detail by the Commission.

56. The Commission referred, at paragraph 87, to the submissions before it:

> "The terms of derogation and the nature of the public emergency to which it relates are important because of contentions on behalf of the Appellants that their activities, however they might otherwise be categorised for the purposes of the section 21, fell outside the scope of the derogation and that emergency. They also were concerned at the number of links relied on in the chain to establish a connection to Al Qa'eda."

57. Mr Gill submits that it is necessary to show that there is some factor by reference to which a set of persons associate or combine, what brings them together as a group and what defines the character of the group. The combining factor must, it is submitted, at least be the assistance or support they render in respect of activities comprising part of Al Qa'eda's terrorist agenda. A significant level of activity is contemplated and a group having a common aim or policy. It is submitted that the Commission's analysis lacks precision and does not avoid the risk of guilt by association.

58. The Commission referred, at paragraph 87, to the evidence at the derogation hearings:

> "Al Qa'eda and its associates are loosely knit, lack formal organisational structures and have links with other active terrorist organisations".

The Commission noted that the Respondent's evidence before them:

> "referred regularly to the link to Al Qa'eda being created not just by national groups but by a loosely co-ordinated series of overlapping networks".

It was submitted to the Commission that the derogation covered individuals in the United Kingdom who are members of Al Qa'eda or its associated networks or are linked to members

of such organisations or groups and are by reason of that fact part of the threat to the United Kingdom which comprises the current public emergency. A number of groups were identified. "

59. The Commission concluded, at paragraph 99:

> "We accept the general schematic description of Al Qa'eda and its associated networks; it was borne out by all the evidence which we heard and was not the subject of serious debate. Terrorist groups have historically worked in small cells, often disconnected from each other with deliberate cut-outs in the chain of command, with direct communication at operational level to the leadership hierarchy discouraged. We deal later with the specific groups referred to because their relationship, if any, to Al Qa'eda was the subject of dispute. But we accept [Mr Williams' QC, then leading counsel for the Respondent] submission as to what connections and with whom had to be shown for purposes of the derogation and in very summary form his submission as to why, if such connections are shown, it shows the link to the public emergency and why the threat is increased. Of course, Mr Williams is using the word "link" in its specific statutory meaning. Mr Williams submitted that it would be an unwarranted restriction on the scope of the emergency to require the group for which an Appellant was a member or to which he was "linked" in the statutory sense to be a supporter of the core aims of Al Qa'eda as expressed in the February 1998 fatwa. That was one core aim or statement of intent and means but not the only objective. Its objectives were a combination of the global and national, the latter being part of and assisting the former and vice versa. It was not necessary to show that an individual supported that fatwa in order to show, to the requisite standard of proof, that he was both an international terrorist and connected to the public emergency. "

60. Following detailed analysis of submissions made on behalf of the Appellants, the Commission stated, at paragraph 109, that "it is necessary to understand the overlap between the various groups and individuals, and how they connect to Al Qa'eda, to realise why the derogation is expressed as it is".

61. Following further analysis, the Commission concluded, at paragraph 110:

> "But, in our judgment, if those groups also support Al Qa'eda for a part of their agenda and an individual supports them nonetheless, it is a legitimate inference that he is supporting and assisting Al Qa'eda through his support for that group, whatever his own views may be on the indiscriminate killing of civilians, in the absence of evidence showing that the group has compartmentalised operations and is not assisted in other activities by the support given for e.g. self defence purposes. Indeed the Act requires only that there be support or assistance for an international terrorist group. The derogation requires that there be a link between that group and Al Qa'eda. It is sufficient that there is that indirect connection to Al Qa'eda. It is not necessary that the assistance be in connection with the Al Qa'eda facet. A group can be strengthened through support in one

area and thus better able to carry out activities in another in a number of ways: publicity for fund raising and recruitment, the diversion of resources supplied for one purpose to another, the dual use of resources, the ability to retain resources which would otherwise have to be spent for another purpose. It is also unwise to suppose that there is a readily discernible and closely observed distinction between one activity and another within a terrorist group with many agendas. They all feed off each other. The same person who does fundraising or false documentation for one purpose is able to do it for other purposes; accommodation for one can be used for another; someone radicalised through jihadic experiences and indoctrination in Chechnya may see the violent global jihad as a next step. There is room for debate as to what has been called unwitting assistance which we deal with later."

62. The Commission recognised, in paragraph 112, the limitation to be placed upon its approach:

"We do recognise that it is possible to construct connections, which by a number of links in a chain, can reach Al Qa'eda but without having any sensible connection to any threat or any real substance. But it is unrealistic, given the lack of formal structure to Al Qa'eda, to its various associated groups or networks, or to the links between them, to define the connection in a way which suggests that no more than one remove or link is permissible in order for the link to the public emergency, derived as it is from the activities of Al Qa'eda and its associates, to be made. Any more analysis depends on the facts of the cases."

63. Following that detailed analysis, the Commission concluded:

"The overlapping groups or cells:

302. We accept the broad assessment by the Respondent that there is a network, largely of North African extremists, in this country which makes up a number of groups or cells with overlapping members or supporters. They usually have origins in groups which had or may still have a national agenda, but whether that originating group does or does not have a national agenda, whether or not is has direct Al Qa'eda links, whether or not the factions are at war in the country of origin, such as the GIA and GSPC in Algeria, those individuals now work together here. They co-operate in order to pursue at least in part an anti-West terrorist agenda. Those less formal groups are connected back to Al Qa'eda, either through the group from which they came which is part of what can be described as the Al Qa'eda network, or from other extremist individuals connected to Al Qa'eda who can be described as part of Al Qa'eda itself or associated with it. They are at least influenced from outside the United Kingdom. These informal, ad-hoc, overlapping networks, cells or groups constitute "groups" for the purpose of the 2001 Act.

303. It does not matter whether the individuals support all the means of war or

terror urged by Al Qa'eda, including the deliberate mass killing of civilians by suicide actions. They can still support or assist a group connected with Al Qa'eda and in some way increase its capability for launching terrorist operations of whatever sort which threaten the United Kingdom."

The "international terrorist group" contemplated by Section 21 is Al Qa'eda or a group associated with it, provided it is recognised that the very nature of the groups associated with Al Qa'eda encompasses informal, even ad hoc, groups which can as easily or better be described as overlapping, loosely co-ordinated groupings or networks. Their purpose may overlap in part but not in whole, and they may not agree with all the means which another would use; but that does not prevent them being part of the threat to the life of the nation as a matter of principle or law.

64. I find no error of law in the approach of the Commission to this issue. The Commission has considered in detail whether the certifications come within the scope of the derogation, following the approach indicated in *A and Ors*. They have considered and applied each of the relevant words in Section 21 including 'group' and 'links' and applied them correctly. They have acknowledged the requirements of Section 21(4) and acknowledged and kept in mind the need to avoid guilt by association. I agree with the Commission (paragraph 96) that when Brooke LJ, in *A and Ors* used the expression "and no-one else" he was only confirming that Part 4 of the Act could not be used to detain foreign nationals belonging to other terrorist organisations, such as ETA or the Real IRA.

65. The Commission correctly stated that, beyond their general statements, analysis depended on the generic evidence and the facts of the individual cases. It depended on an evaluation of evidence on the basis of the statutory definitions. It has not been suggested, upon the hearing of this appeal, that such an evaluation has not taken place or that any lack of careful analysis has affected the outcome in particular cases.

Article 3 and the admissibility of evidence

The issue

66. This issue first arose before the Commission during the appeal of *E*, the fifth case to be heard. It arose during the cross-examination of witness A called by the Secretary of State. The submission was then made that the Commission should decline to consider any evidence unless it was shown not to have come into existence as a result of a breach of Article 3 and the submission was extended to cover all the Appellants. Both Mr Emmerson QC and Mr Gill QC have made submissions on the issue in this Court, Mr Emmerson taking the lead.

67. It is necessary to consider the basis upon which this issue has been considered by the Court. There was no finding by the Commission of torture or other breach of Article 3. Because of their conclusion that the manner in which evidence was obtained went not to admissibility but only to weight, the Commission did not express conclusions as to what, if any, of the material before it emerged as a result of conduct contrary to Article 3 of the Convention. The court can proceed only on the basis that the Commission may have been influenced by such

material.

68. In written submissions delivered after the hearing, Mr Burnett QC, for the Secretary of State, has argued that, on the facts of the present appeals, the issue of principle in relation to Article 3 material does not arise. The case was not however put on that basis, Mr Emmerson putting the point, without objection, that there was material before the Commission which caused the issue of principle to arise and it is not known whether the Commission gave weight to it. Moreover, Mr Burnett concedes that, if there is any such information, it has been evaluated only as part of a broader picture based on information obtained from a variety of sources. On that basis, if some of the material is to be excluded, a re-appraisal of the remaining material is required.

69. The court of course would prefer to deal with established facts than with hypotheses but, in the circumstances, it is not unreasonable to be asked to give a ruling on the issue of admissibility. The court cannot sensibly make its own findings of fact on the bulk of material before the Commission and is not invited to do so. What Mr Emmerson in substance seeks is a declaration that the Commission are not to have regard to evidence which was or may have been obtained in breach of Article 3 of the Convention. Alternatively, to adopt the more limited submission put consistently at the hearing, he seeks a finding that there is an exclusionary rule prohibiting the admission of statements made by a person who is not a party to the proceedings as a result of torture inflicted by the agents of a foreign state.

70. Article 3 of the Convention provides:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment".

71. It is not suggested that the Appellants have been tortured. They were not even interviewed before certificates were issued. The submission is that, in performing his duty under Section 21 of the 2001 Act, the Secretary of State may have relied on material, in statements from witnesses, which had been obtained by authorities in other jurisdictions using methods which involved breaches of Article 3. In performing its task under Section 25(2), the Commission should ensure, it is submitted, that, when issuing a certificate under Section 21, the Respondent has not relied on material so obtained.

The routes to the exclusionary rule and UNCAT

72. The exclusionary rule, it is submitted, arises by one of three routes. Put at this stage in summary form they are: the common law, Article 6 of the Convention and the need to construe the 2003 Rules consistently with the Convention. In each case the law is to be informed by Article 15 of the United Nations Convention Against Torture 1984 ("UNCAT"), to which the United Kingdom is a party.

73. Article 1(1) of UNCAT defines torture:

"For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

74. Article 15 provides:

"Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made."

75. Article 16 provides:

"Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in Articles 10, 11, 12 and 13 shall apply with substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment."

Thus Article 16 introduces the forms of ill-treatment other than torture mentioned in Article 3 of the Convention but does not apply to them the exclusionary provision applied to torture in Article 15.

76. The Articles mentioned in Article 16 require states to include comprehensive measures in their judicial and administrative systems. Article 11 provides, for example, that states "shall keep under systematic review interrogation rules, instructions, methods and practices..... with a view to preventing any cases of torture".

77. Article 4 requires each state party to ensure that all acts of torture are offences under its criminal law. Effect was given to that obligation in England and Wales by Section 134 of the Criminal Justice Act 1988. A defence is provided in subsection (4). "It shall be a defence for a person charged with an offence under the section in respect of any conduct of his to prove that he had lawful authority, justification or excuse for that conduct."

78. On this aspect of the case, there is a great deal more material before this court than was before the Commission and the submissions have been fuller and more elaborate. The

Commission accepted that while UNCAT is not part of domestic law "we should not do anything which contravenes it unless compelled by domestic law to do so". The Commission stated that if there is material which shows that torture or other breaches of Article 3 may have been used to obtain the information relied on, the material must be considered, "since, at the very least, it will bear on the proper weight to be given to the information". The Commission concluded, at paragraph 84:

"We are, of course, not bound by any rules of evidence, but must act fairly in considering the appeal of each Appellant. But the means by which information is obtained goes to its reliability and weight and not to its admissibility, and that is how we have considered it".

79. The Appellants submit that the Commission was in error, at paragraphs 83 and 84, in failing to conclude that information obtained from a third party by methods which breached Article 3 is inadmissible before it. It is submitted, first, that an exclusionary rule emerges from the common law, which should reach out to embrace the point. Secondly, it emerges from an application of Article 6, either in combination with or as an extension of the common law, incorporating as it now does the concepts expressed in Article 6 and the jurisprudence under it. If, contrary to that submission, the rule does not so arise, it arises when those provisions are applied and construed in the light of Article 15 of UNCAT. The exclusionary rule in Article 15 of UNCAT is relevant to all three routes, it is submitted, and the common law and Article 6 must be interpreted consistently with UNCAT. The third route is that, having regard to the international obligation of the United Kingdom under Article 15(1) of the Convention not to take measures under the Article which are inconsistent with its other obligations under international law, domestic law must take account of Article 15 of UNCAT if the derogation relied on is to be lawful. The 2003 Rules must be construed accordingly.

80. A fourth possibility was raised. When dealing with enquiries made by members of the court, having completed his submissions, Mr Emmerson on the second morning of the hearing referred to Article 15 of UNCAT as being part of customary international law and therefore a common law obligation. This submission had not been made before the Commission, in the grounds of appeal or in the skeleton argument. Authority was requested but not then supplied. Save that Mr Burnett reserved his position, no further reference was made to the point until Mr Burnett had completed his submissions for the Respondent. In his reply, Mr Emmerson sought leave to make the submission. Mr Burnett opposed the application, submitting that the submission raised very wide issues which could not appropriately be raised at such a late stage.

81. Mr Emmerson agreed that the submission would involve considering four propositions: first, whether the rule that evidence obtained by torture was inadmissible in any judicial proceedings was in breach of customary international law, second, by what route it became part of customary international law, third, the extent to which and how customary international law finds its way into the common law and fourth, whether rule 44 of the 2003 Rules had the effect of disapplying it. Mr Emmerson frankly accepted that the issue raised entirely fresh arguments and material and that no detailed analysis had been prepared.

82. Having considered the submissions, the court refused the application. It was too late to make

the submission. In any event, in the context of the case and the points already taken, the Court was inclined to the view, and so was Mr Emmerson, that any new window it might open was a narrow one.

Routes one and two

83. The Article 6 jurisprudence is so interwoven with that of the common law that, in this context, I do not see the two routes as essentially separate and distinct, though Section 2(1) of the 1998 Act requires the Court only to "take into account" ECtHR decisions (Lord Hoffmann in *R v Lyons & Ors* [2003] 1 AC 976 at para.46). The ECtHR has also recognised that the admissibility of evidence is primarily for national law. In *Ferrantelli and Santangelo v Italy* [1996] 23 EHRR 288, the Court stated, at paragraph 48:

"It [the Court] recalls that the admissibility of evidence is primarily a matter for regulation by national law and, as a rule, it is for the national courts to assess the evidence before them. The Court's task is to ascertain whether the proceedings considered as a whole, including the way in which the evidence was taken, were fair."

Mr Emmerson accepts that the application of Article 6 does not involve a general exclusionary rule, but cites examples of situations in which an application of Article 6 has been held to require exclusions.

84. Mr Emmerson submits that there is a principle binding on the Commission requiring it to exclude altogether from its consideration of the evidence the product of interviews of third parties where the material had in fact been obtained by torture. Sufficient material as to possible torture had been brought to the attention of the Commission, it is submitted. Its production placed a burden on the Commission to consider the issue and to exclude from its consideration evidence that may have been obtained by torture. Even if there is no doubt about its reliability, it should be excluded. No judicial body can lend authority to evidence obtained by torture by admitting it. The rule applies whether the torture is by a United Kingdom public official or an official of another state and it is immaterial whether it is a party involved in the litigation or a third party who is tortured. The Commission, and any other judicial body, should demonstrate its repugnance to the means used to produce evidence by refusing to admit it.

85. Mr Burnett submits that the 2001 Act should be construed in accordance with its purpose. It was enacted because of a threat to the life of the nation and as a reaction to a new type of terrorist. The security of the United Kingdom and the life and welfare of its inhabitants was at stake. As Brooke LJ stated in *A & Ors*, at paragraph 89, the Court is concerned "not only with matters of personal liberty but with matters of life or death of possibly thousands of people". It is accepted that there is a tension between the two concerns. The Court is invited, when resolving the three legal issues before it, to consider in this context the nature of the task undertaken by the Security Services. Their skill is in evaluating and assessing information obtained from numerous different and disparate sources. The Court is also asked to bear in mind the importance of international co-operation in the fight against terrorism. The sharing of information between law enforcement agencies in different states is vital. A requirement to

ascertain how information had been obtained by another state would damage international relationships and impair the free flow of information. The Convention is a pragmatic instrument, it is submitted, and should be applied realistically.

The common law

86. Reliance is placed on the common law rule as to the exclusion of confessions in criminal trials and its rationale. It is accepted that there is no authority applying the common law rule to the interview of third parties but in principle it should apply, Mr Emmerson submits. To rely on the tainted confession of a third party is no less an affront to the Court.

87. Mr Emmerson's starting point is the longstanding common law rule classically stated in *Ibrahim v The King* [1914] AC 599 at 609. Giving the judgment of the Judicial Committee of the Privy Council, Lord Sumner stated:

"It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. The principle is as old as Lord Hale."

88. The old common law rule is now included within the scope of the statutory rule in Section 76 of the Police and Criminal Evidence Act 1984 ("the 1984 Act"). The section provides:

> "(1) In any proceedings a confession made by an accused person may be given in evidence against him in so far as it is relevant to any matter in issue in the proceedings and is not excluded by the court in pursuance of this section.
>
> (2) If, in any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained –
>
> (a) by oppression of the person who made it; or
>
> (b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof,
>
> the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid."

The section did not prevent a co-accused from introducing evidence of a confession obtained

in breach of subsection (1) but section 76A, not yet in force, severely restricts the right of a co-accused to take that action.

89. The point arose at the hearing as to whether the common law rule was based on possible lack of reliability alone (Mr Burnett) or whether also on the abhorrence of the law to confessions obtained by way of statements which were not voluntary (Mr Emmerson). In my judgment, the second has been a major factor.

90. The point was considered by Lord Hailsham of St Marylebone in *DPP v Ping Lin* [1976] AC 574 at 600. Having cited the rule and its history, Lord Hailsham stated, at page 600:

> "By the judiciary, though it ought not to be extended, it must by no means be whittled down. It bears, it is true, all the marks of its origin at a time when the savage code of the eighteenth century was in full force. At that time almost every serious crime was punishable by death or transportation. The law enforcement officers formed no disciplined police force and were not subject to effective control by the central government, watch committees or an inspectorate. There was no legal aid. There was no system of appeal. To crown it all the accused was unable to give evidence on his own behalf and was therefore largely at the mercy of any evidence, either perjured or oppressively obtained, that might be brought against him. The judiciary were therefore compelled to devise artificial rules designed to protect him against dangers now avoided by other and more rational means. Nevertheless, the rule has survived into the twentieth century, not only unmodified but developed, and only Parliament can modify it now from the form in which it was given classical expression by Lord Sumner."

91. Other cases confirm that the truth of the confession was not relevant to its admissibility. In *Chan Wei Kueng v R* [1967] 2 AC 160, it was held that on a voir dire as to the admissibility of a defendant's challenged statement, the prosecution should not ask questions in cross-examination of the defendant with the object of establishing the truth of the statement. When a statement is ruled inadmissible as contrary to the common law rule, evidence of what was said during the voir dire is inadmissible. Giving the judgment of the Judicial Committee of the Privy Council in *Wong Kam-Ming v The Queen* [1980] AC 247, Lord Edmund-Davies, at page 256H, cited with approval the judgment of Hall CJ in the Canadian case of *R v Hnedish* [1958] 26 WWR 685 at 688:

> "Having regard to all the implications involved in accepting the full impact of the *Hammond* decision [1941] 3 All ER 318 which can, I think, be summarised by saying that regardless of how much physical or mental torture or abuse has been inflicted on an accused to coerce him into telling what is true, the confession is admitted because it is in fact true regardless of how it was obtained, I cannot believe that the *Hammond* decision does reflect the final judicial reasoning of the English courts... I do not see how under the guise of 'credibility' the court can transmute what is initially an inquiry as to the 'admissibility' of the confession into an inquisition of an accused. That would be repugnant to our accepted standards and principles of justice; it would invite

and encourage brutality in the handling of persons suspected of having committed offences"

92. I can read those statements only as an affirmation of the concern of the common law to protect accused persons from oppression. The rule was based not merely on concerns about the reliability of evidence obtained by oppression; it protected accused persons from oppression and marked the repugnance of the common law, in the context of criminal trials, to evidence so obtained from a defendant. Section 76 of the 1984 Act, influenced I would expect by the jurisprudence under Article 6 of the Convention, embodied the same principle.

Abuse of process

93. Mr Emmerson also relies on the abuse of process jurisdiction exercised in criminal courts in England and Wales, which has, he submits, the same rationale as the exclusion of tainted confessions. In *R v Horseferry Road Magistrates Court* ex parte *Bennett* [1994] 1 AC 42, Lord Lowry stated, at page 76C:

> "... the court, in order to protect its own process from being degraded and misused, must have the power to stay proceedings which have come before it and have only been made possible by acts which offend the court's conscience as being contrary to the rule of law. Those acts by providing a morally unacceptable foundation for the exercise of jurisdiction over the suspect taint the proposed trial and, if tolerated, will mean that the court's process has been abused."

94. In *R v Latif* [1996] 1 WLR 104, Lord Steyn said, at page 112H:

> "The law is settled. Weighing countervailing considerations of policy and justice, it is for the judge in the exercise of his discretion to decide whether there has been an abuse of process, which amounts to an affront to the public conscience and requires the criminal proceedings to be stayed: *R v Horseferry Road Magistrates' Court, ex p. Bennett*... The speeches in *Bennett* conclusively establish that proceedings may be stayed in the exercise of the judge's discretion not only where a fair trial is impossible but also where it would be contrary to the public interest in the integrity of the criminal justice system that trial should take place. An infinite variety of cases could arise."

95. In *R v Looseley, Attorney-General's Reference (No.3 of 2000)* [2001] 1 WLR 2060, the House of Lords considered the admissibility of evidence obtained as a result of undercover police officers dealing with drug dealers. Lord Nicholls of Birkenhead stated, at paragraph 1:

> "My Lords, every court has an inherent power and duty to prevent abuse of its process. This is a fundamental principle of the rule of law. By recourse to this

principle courts ensure that executive agents of the state do not misuse the coercive, law enforcement functions of the courts and thereby oppress citizens of the state. Entrapment, with which these two appeals are concerned, is an instance where such misuse may occur. It is simply not acceptable that the state through its agents should lure its citizens into committing acts forbidden by the law and then seek to prosecute them for doing so. That would be entrapment. That would be a misuse of state power, and an abuse of the process of the courts. The unattractive consequences, frightening and sinister in extreme cases, which state conduct of this nature could have are obvious. The role of the courts is to stand between the state and its citizens and make sure this does not happen."

96. Lord Nicholls referred to *R v Sang* [1980] AC 402, ex parte *Bennett* and *Latif*. He stated, at paragraph 15:

> "These statutory and common law developments have been reinforced by the Human Rights Act 1998. It is unlawful for the court, as a public authority, to act in a way which is incompatible with a Convention right. Entrapment, and the use of evidence obtained by entrapment ("as a result of police incitement"), may deprive a defendant of the right to a fair trial embodied in Article 6: see the decision of the European Court of Human Rights in *Teixeira de Castro v Portugal* [1998] 28 EHRR 101.
>
> 16 . Thus, although entrapment is not a substantive defence, English law has now developed remedies in respect of entrapment: the court may stay the relevant criminal proceedings, and the court may exclude evidence pursuant to section 78. In these respects *R v Sang* [1980] AC 402 has been overtaken. Of these two remedies the grant of a stay, rather than the exclusion of evidence at the trial, should normally be regarded as the appropriate response in a case of entrapment. Exclusion of all the prosecution evidence would, of course, dispose of any anomaly in this regards. But a direction to this effect would really be a stay of the proceedings under another name. Quite apart from these considerations, as a matter of principle stay of the proceedings, or of the relevant charges, is the more appropriate form of remedy. A prosecution founded on entrapment would be an abuse of the court's process. The court will not permit the prosecutorial arm of the state to behave in this way."

97. At paragraph 18, Lord Nicholls stated that "courts should distinguish clearly between an application to exclude evidence on the ground that the defendant should not be tried at all and an application to exclude evidence on the ground of procedural fairness. The distinction was also made by Lord Hoffmann at paragraphs 42 to 44. At paragraph 40, Lord Hoffmann described the stay procedure as "a jurisdiction to prevent abuse of executive power".

98. *Looseley* provides an example, it is submitted, correctly in my view, where Article 6 has required the existence of an exclusionary rule in a criminal trial. It is an example of the impact of Article 6 upon the common law, to the development of which Lord Nicholls refers. While abuse of process has a more general scope, the statements cited in this part of the judgment have expressly been made with a view to dealing with problems arising in criminal

trials.

99. In *Montgomery v HM Advocate & Anr* [2003] 1AC 641; the Privy Council considered the issue to be addressed under Article 6. Lord Hoffmann stated, at page 649D:

> "Of course events before the trial may create the conditions for an unfair determination of the charge. For example, an accused who is convicted on evidence obtained from him by torture has not had a fair trial. But the breach of Article 6(1) lies not in the use of torture (which is, separately, a breach of Article 3) but in the reception of the evidence by the court for the purposes of determining the charge. If the evidence had been rejected, there would still have been a breach of Article 3 but no breach of Article 6(1)."

100. Particular reliance is placed by Mr Emmerson on the decision of the Divisional Court (Sedley LJ and Poole J) in *R (Ramda) v Secretary of State for the Home Department* [2002] EWHC 1278 Admin. The Government of France sought the extradition of Ramda wanted by them for trial in connection with a series of terrorist bombings in France. At paragraph 9, Sedley LJ stated:

> "Among the issues for the Home Secretary to determine may be whether the trial to be faced by the wanted person will be a fair trial. This may involve the voluntariness of extra-judicial confessions relied on as against him."

The court cited the passage from Lord Hoffmann's judgment in *Montgomery* already mentioned.

101. It was thought that the prosecutor in France would rely on an extra-judicial confession by Bensaid and that it would be admissible in French law against the accused person. Having considered counsel's [Mr Emmerson's] invitation to the court to infer that Bensaid had been beaten up at a time closely prior to admissions he made, the court concluded at paragraph 22:

> "Questions of admissibility within the requesting state's criminal process are ordinarily for the courts of the requesting state to decide, especially where admissibility turns upon disputed issues of fact. It is only where it can be demonstrated that the approach taken by the requesting state's courts to admissibility will itself be such as to create a real risk of a fundamentally unfair trial that the principle of mutual respect stressed in *McQuire* and other decisions may have to yield. In a case such as the present this requires the Home Secretary to be satisfied of at least two things: that Bensaid's incriminating admissions may well have been the direct result of brutality, and that the French courts will not entertain, except to reject it in limine, any argument in the claimant's defence based upon this contention. If the Home Secretary concludes that these elements are established, he will be effectively bound to refuse extradition."

102. At paragraph 24, the court stated:

> "As to the adequacy of the total inquiry, there remain at least two questions to which, on the face of the materials eventually before him, the Home Secretary has yet to give a properly reasoned response. One is whether there was any investigation at all of the original complaint of ill-treatment of Bensaid; the other is whether the French courts, given the record now available of their later decisions in relation to Bensaid, will now entertain any request by the claimant to exclude Bensaid's confessions."

In the absence of further material, the court quashed the Secretary of State's order for Ramda's return to France.

103. This case demonstrates, submits Mr Emmerson, the extent of the court's abhorrence of a conviction based on evidence obtained by torture. Moreover, the case involves a confession, not by the proposed defendant, but by a prospective prosecution witness.

Route three

104. The third possible route on which Mr Emmerson relies has been stated succinctly. Article 15 of UNCAT prohibits the admission before the Commission of testimony obtained by the torture of a third party inflicted by the agents of a foreign state. If, contrary to submissions on routes 1 and 2, Part 4 of the 2001 Act is to be construed as permitting the admission of evidence obtained by torture of a third party inflicted by the agents of a foreign state, that is incompatible with the international obligation under Article 15 of UNCAT. For that reason it is incompatible with the requirement that a derogation from Convention obligations is permissible only provided it is not inconsistent with the United Kingdom's other obligations under international law. The 2001 Act and the 2003 Rules are therefore to be interpreted in a manner consistent with the derogation, which requires compatibility with Article 15 of UNCAT, and excluding admission of evidence obtained by torture of a third party by agents of a foreign state.

105. In the alternative, and this is a return to routes 1 and 2, the limited scope of the derogation is an additional reason to construe the common law and Article 6 of the Convention in the light of Article 15 of UNCAT and thereby to achieve the level of protection sought. It was the alternative argument which was pressed orally by Mr Emmerson, conscious no doubt that the court is not concerned with the lawfulness of the derogation and that no point has been taken in the derogation proceedings upon the admissibility of statements made as a result of torture inflicted by the agents of a foreign state.

Further material

106. Reference was made to other material to demonstrate the abhorrence with which the law

regards torture. In the Institutes of the Laws of England, Part 3, 34-35, (referred to by Lord Hope of Craighead in his University of Essex lecture (2004)), Sir Edward Coke stated:

> "So as hereby it appeareth, that where the law requireth that a prisoner should be kept in *salva & arcta custodia* yet that that must be without pain or torment to the prisoner...
>
> ... Sir John Fortescue chiefe justice of England wrote his book in commendation of the lawes of England, and therein preferreth the same for the government of this countrey before the civill law; and particularly that all tortures and torments of parties accused were directly against the common lawes of England, and shewed the inconvenience thereof by fearfull example, to whom I refer you, being worthy your reading. So as there is no law to warrant tortures in this and, nor can they be justified by any prescription being so lately brought in."

107. The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991 expressed themselves strongly in *Prosecutor v Furundzija* (10 December 1998):

> "146 . The existence of this corpus of general and treaty rules proscribing torture shows that the international community, aware of the importance of outlawing this heinous phenomenon, has decided to suppress any manifestation of torture by operating both at the interstate level and at the level of individuals. No legal loopholes have been left."

At paragraph 150 they stated:

> "...By contrast, in the case of torture, the mere fact of keeping in force or passing legislation contrary to the international prohibition of torture generates international State responsibility. The value of freedom from torture is so great that it becomes imperative to preclude any national legislative act authorising or condoning torture or at any rate capable of bringing about this effect."

108. *P E v France* [2001] 10 IHRR 421 was a decision of the Committee against Torture established under Article 17 of UNCAT and empowered to consider complaints against states parties to the Convention. While holding that there had not been a violation of Article 15, it was stated:

> "6.3 The Committee considers in this regard that the generality of the provisions of article 15 derives from the absolute nature of the prohibition of torture and imply, consequently, an obligation for each State party to ascertain whether or not statements constituting part of the evidence of a procedure for which it is competent have been made as a result of torture. The Committee finds that the statements at issue constitute part of the evidence of the procedure for the extradition of the complainant, and for which the State party is competent. In this regard, in the light of the allegations that the statements at issue, which

constituted, at least in part, the basis for the additional extradition request were obtained as a result of torture, the State party had the obligation to ascertain the veracity of such allegations."

109. As to the burden of proof, the Committee also stated (paragraph 6.6)

> "The Committee, bearing in mind that it is for the author to demonstrate that her allegations are well founded, considers that, on the basis of the facts before it, it cannot conclude that it has been established that the statements at issue were obtained as a result of torture."

110. Mr Burnett draws attention to the fact that the UNCAT Committee has not challenged the focus on criminal proceedings found in the reports of the United Kingdom Government to the Committee. Documents supplied to the Court show a similar focus in the reports of other states.

111. Reference is made to the statutes and rules of international tribunals dealing with admissibility in criminal trials. Article 69(7) of the Statute of the International Criminal Court, for example, provides:

> "Evidence obtained by means of a violation of this Statute or internationally recognised human rights shall not be admissible if:
>
> (a) the violation casts substantial doubt on the reliability of the evidence; or
>
> (b) the admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings"

112. In *R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet (No.3)* [2000] 1 AC 147, it was common ground that international law prohibiting torture has the character of jus cogens or a peremptory norm, i.e. one of those rules of international law which have a particular status. Lord Browne-Wilkinson stated, at page 198:

> "the jus cogens nature of the international crime of torture justifies states in taking universal jurisdiction over torture wherever committed. International law provides that offences jus cogens may be punished by any state because the offenders are "common enemies of all mankind and all nations have an equal interest in their apprehension and prosecution:" *Demjanjuk v Petrovsky* (1985) 603 F.supp. 1468"

113. By way of general comment on Article 7 of the International Covenant on Civil and Political Rights (1976) which provides, insofar as is material, that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment", the Human Rights Committee set up under the Covenant stated on 10 March 1992 that:

> "It is important for the discouragement of violations under Article 7 that the law must prohibit the use or admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment. "

Article 12 of the UN General Assembly Declaration of 1975, which covers some of the same ground as Article 7 of the Covenant, provides:

> "Any statement which is established to have been made as a result of torture or other cruel, inhuman or degrading treatment or punishment may not be invoked as evidence against the person concerned or against any other person in any proceedings."

General Assembly Declarations, of which there are many, do not impose legal obligations but act as guidelines for the world community.

Further submissions

114. Mr Emmerson accepts that derivative evidence, with an existence independent of a tainted interrogation, is admissible regardless of its reliability or truth. The Appellants, he said, do not advance any "fruits of the poisoned tree" doctrine. He referred to Lord Diplock's statement in *Sang* (p436E) that "there is no discretion to exclude evidence discovered as the result of an illegal search".

115. He also submits, however, that there is no need, in this case, to rule on the difficult questions which may arise upon derivative evidence, such as stolen goods found as a result of a tainted confession. He seeks to establish what he describes as the core proposition that the Commission should not consider evidence consisting of statements obtained in breach of Article 3.

116. Mr Emmerson (though not Mr Gill) submits that the exclusionary principle does not bind the Secretary of State. It binds only a judicial body and it is immaterial whether the Secretary of State can take into account evidence obtained in breach of Article 3. The exclusionary rule applies not between the executive and the individual but between the court and the executive. In his reply, Mr Gill submitted that no valid distinction can or ought to be drawn between what the Secretary of State can consider in order to justify certification and what the Commission can consider in a Section 25 appeal. Mr Burnett considered extraordinary the submission that a distinction could be drawn between what the Secretary of State could have regard to under Section 21 and what the Commission could have regard to under Section 25.

117. I say now that I cannot accept that submission of Mr Emmerson. If the Commission takes the view that admission of evidence before it is abhorrent, the Commission should say so in clear terms: The evidence is not admitted because it is abhorrent. On that finding, it is abhorrent for the executive to rely on evidence obtained in breach of Article 3. It would be wrong for the Secretary of State to certify on the basis of evidence which, because it would not be admissible before the Commission, would inevitably require the discharge of the certificate by

the Commission.

118. The Appellants rely on the comprehensive prohibition in Article 15 of UNCAT, with respect to torture though not the other ill-treatment mentioned in Article 3 of the Convention. If a statement is established to be made as a result of torture, it shall not be invoked as evidence in any proceedings. The rule, it is submitted, includes statements made by persons not party to the proceedings and it covers the proceedings in the Commission.

119. It is submitted that the common law and Article 6 should be applied and construed so as to achieve the level of protection contemplated by Article 15 of UNCAT, with respect to torture. The Convention has not however been incorporated into English law. The approach to be applied is stated in *R v Lyons & Ors*. Lord Bingham stated:

> "13. ... It is true, as the Attorney General insisted, that rules of international law not incorporated into national law confer no rights on individuals directly enforceable in national courts. But although international and national law differ in their content and their fields of application they should be seen as complementary and not as alien or antagonistic systems. Even before the Human Rights Act 1998 the Convention exerted a persuasive and pervasive influence on judicial decision-making in this country, affecting the interpretation of ambiguous statutory provisions, guiding the exercise of discretions, bearing on the development of the common law. I would further accept, as Mr Emmerson strongly contended, with reference to a number of sources, that the efficacy of the Convention depends on the loyal observance by member states of the obligations they have undertaken and on the readiness of all exercising authority (whether legislative, executive or judicial) within member states to seek to act consistently with the Convention so far as they are free to do so.
>
> 14 . Mr Emmerson however accepted, as submission (7) in my summary makes clear, that a Convention duty, even if found to exist, cannot override an express and applicable provision of domestic statutory law.... "

120. Lord Hoffmann stated:

> "27. In other words, the Convention is an international treaty and the ECHR is an international court with jurisdiction under international law to interpret and apply it. But the question of whether the appellants' convictions were unsafe is a matter of English law. And it is firmly established that international treaties do not form part of English law and that English courts have no jurisdiction to interpret or apply them: *J H Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 1 AC 418 (the International Tin Council case). Parliament may pass a law which mirrors the terms of the treaty and in that sense incorporates the treaty into English law. But even then, the metaphor of incorporation may be misleading. It is not the treaty but the statute which forms part of English law. And English courts will not (unless the statute expressly so provides) be bound to give effect to interpretations of the treaty by

> an international court, even though the United Kingdom is bound by international law to do so. Of course there is a strong presumption in favour of interpreting English law (whether common law or statute) in a way which does not place the United Kingdom in breach of an international obligation. As Lord Goff of Chieveley said in *Attorney General v Guardian Newspapers Ltd (No.2)* [1990] 1 AC 109, 283: " I conceive it to be my duty, when I am free to do so, to interpret the law in accordance with the obligations of the Crown under [the Convention].
>
> 28 But for present purposes the important words are "when I am free to do so". The sovereign legislator in the United Kingdom is Parliament. If Parliament has plainly laid down the law, it is the duty of the courts to apply it, whether that would involve the Crown in breach of an international treaty or not."

Lord Hutton, at page 69, expressed a similar view. Lord Hobhouse of Woodborough agreed with Lord Hoffmann and Lord Millett with both Lord Bingham and Lord Hoffmann.

121. *Lyons* is also relied on by the Appellants as demonstrating an already existing exclusionary rule of evidence (as to statements obtained under section 434 of the Companies Act 1985). It arises, though not in that case retrospectively, from an application of Article 6 (per Lord Hobhouse at paragraph 81).

122. It is submitted that the burden of proving that the relevant evidence was not obtained in breach of Article 3 is upon the Secretary of State. It would be nonsensical, Mr Emmerson submits, to place a burden on an appellant to establish that the evidence relied on had been obtained in breach of Article 3. It is impossible for the Appellants to conduct investigations, for example, at Guantanamo Bay. The witness A before the Commission, professed ignorance of ill-treatment. Such burden as may have been on the Appellants was discharged by the production of newspaper articles showing, for example, admissions by United States Authorities which came close to admissions either of torture or of other conduct in breach of Article 3, according to the severity of ill-treatment required to fall within Article 3 indicated in *Ireland v United Kingdom* (1978) 2 EHRR 25. It had been demonstrated that there was a serious issue to be addressed. Four volumes of further material are now available.

123. It is submitted that if an exclusionary rule exists, there is no difficulty in interpreting Part 4 of the 2001 Act consistently with it. It should be construed in that way if possible.

Conclusions

124. The repugnance of the common law to the admission at a trial of statements obtained from defendants by torture is clear. That repugnance is also expressed in international instruments and by international tribunals. Article 3 of the Convention, derogation from which is not permitted, is expressed in plain terms and the provisions of Article 15 of UNCAT are comprehensive. UNCAT imposes, in international law, strict obligations upon the states party, including the United Kingdom. The abuse of process jurisdiction developed by the English courts, and also recognised in the statutes of international tribunals, enables the courts to

prevent what they regard as an abuse of state power.

125. For reasons already given, it would not in my judgment be a satisfactory outcome to hold that the Secretary of State is not constrained by an exclusionary rule whereas the Commission, as a court, is so constrained. The Commission monitors the exercise of powers by the Secretary of State and, if there is an exclusionary rule, the Commission cannot permit the Secretary of State to ignore it. The question as to what information the Secretary of State is entitled to take into account when performing his duty under Section 21(1) must be confronted on the basis that he can do only what the Commission, in its consideration, regards as lawful.

126. The issue is as to the effect of this jurisprudence upon the duties of the Secretary of State under Section 21 of the 2001 Act and on the Commission under Section 25. The issue does not turn upon the different times at which the appraisals are to be made. If free to do so, the court should interpret the law in accordance with United Kingdom obligations of the Crown under international instruments. These include the obligations under the Convention and UNCAT already considered and obligations placed on the United Kingdom by Security Council Resolution 1373. The comprehensiveness of the obligations under that Resolution, some of which are set out at paragraph 26, support the view that the Secretary of State is expected to cast his net wide in obtaining information.

127. On the assumption that the 2001 Order is lawful, an assumption this court is obliged to make on the basis of *A & Ors*, legislation such as the 2001 Act can be expected in order to discharge the obligations under the Security Council Resolution and the Secretary of State's duty to safeguard national security. The circumstances arising are very different from those in a criminal trial which is the context of most of the jurisprudence considered in this judgment, with its concern for safeguards for defendants. Under the 2001 Act certification (and consequent detention) are justified upon a suspicion and a belief. The mental process involved in forming a reasonable suspicion was examined by Lord Hope in *O'Hara,* cited at paragraph 32. Powers can be exercised while the Appellants choose to remain in the United Kingdom. They are entitled to leave. A justification for the derogation is that removal might itself result in treatment contrary to Article 3 of the Convention.

128. It is necessary to consider the process likely to be followed by the Secretary of State in performing his duty under Section 21. He and his officials are likely to have a great deal of information about the general situation covered by the derogation and about particular individuals. That was the case with the present Appellants. Some of the information before the Secretary of State will be in the form of statements from witnesses. Some of it is likely to be hearsay, first or second degree, on which the Secretary of State is entitled to rely in forming a suspicion and belief. Some of it will be derivative evidence, which has come to light as a result of statements obtained, and is accepted to be admissible. Material is also likely to be provided by other governments, including evidence based on hearsay.

129. In that context, it would be contrary to the exercise of the statutory power as intended by Parliament, and also unrealistic, to expect the Secretary of State to investigate each statement with a view to deciding whether the circumstances in which it was obtained involved a breach of Article 3. It would involve investigation into the conduct of friendly

governments with whom the Government is under an obligation to co-operate. Such a duty with respect to each individual statement is inconsistent, in this context, with the power to act on suspicion and belief. In this context, the safeguards for suspected persons must take different forms from those expected in a criminal trial and they include regular reviews by the Commission and Parliamentary monitoring of the legislation.

130. The value judgment required of the Secretary of State when deciding to issue a certificate will normally be based, as it was in these cases, on an assessment of information obtained from many and varied sources. Diligent and conscientious enquiry is required before a certificate can be issued. The statute requires the Secretary of State, in the interests of national security, to form a general and overall view with respect to the person's continued presence in the United Kingdom.

131. As to the Commission, it must review the Secretary of State's sources of information. For the Commission to be involved in deciding upon the provenance of each piece of information available to the Secretary of State would be likely to be a detailed and complex exercise. Such a duty would be inconsistent with a statutory power conferred on the Secretary of State for a legitimate purpose and would distract from the overall view which the statute requires when assessing whether reasonable suspicion and belief were present. Some acknowledgement of the Secretary of State's expertise and responsibilities is also appropriate. Provided the Secretary of State is acting in good faith, a recognition of his responsibility for national security is required when assessing his approach to the material available to him. In the context of the 2001 Act and 2003 rules, the exclusionary rule sought cannot be introduced.

132. The decision in extradition proceedings in *Ramda* does not, in my judgment, upon the above analysis, translate into the present statutory framework. Ramda was facing a criminal charge in France and the Court requested further information from France as to how proceedings there would be conducted. I leave open for further consideration the extent to which, upon a request for extradition, an English court is entitled, in this context, to investigate the legal procedures of the requesting state.

133. The obligation contained in Article 15 of UNCAT is not part of domestic law. In so far as its application would require an analysis of sources before a reasonable belief or suspicion could be formed, it would be directly contrary to the statutory intention in Part 4 in the 2001 Act, and rule 44 of the 2003 Rules. If Article 15 alone were held to be applicable, a distinction would have to be made during investigations between torture and the other forms of ill-treatment mentioned in Article 3, a concept difficult to engage with the statutory powers and duties.

134. As to the third route I accept, of course, that the court should attempt to construe domestic law so as to make it compliant with the international obligations of the United Kingdom. The obligation in Article 15 of the Convention, in relation to consistency with other obligations under international law, is not, however, part of domestic law. For the reasons given when considering the other routes, Part 4 of the 2001 Act cannot in my judgment be construed so as to introduce Article 15 of UNCAT into domestic law by a different route. Beyond that, the

submission is an attack upon the lawfulness and effect of the derogation which is not a subject now before this court.

135. On my finding, argument about the burden and standard of proof is of little significance. For the reasons given by Lord Slynn and Lord Hoffman in *Rehman*, the concept of standard of proof is not helpful. The task of the Secretary of State under Section 21 and that of the Commission under Section 25 is that of evaluation and judgment. The evaluation will have regard to the source of the material and the circumstances in which it was obtained.

136. If Article 15 of UNCAT were to be relevant, its wording suggests a burden on the person alleging torture. That was the view taken by the UNCAT Committee in *P E v France*.

137. The statute does not, however, deprive the Commission of an abuse of process jurisdiction. Indeed, the existence of such a jurisdiction is inherent in the judicial function. It is a fundamental principle of the rule of law, as stated by Lord Nicholls in *Looseley*, and it is difficult to envisage an Act of Parliament which could exclude it. There remains a residual jurisdiction even in this context. An example of abuse, accepted as such by the Secretary of State, would be where the only information relied on by the Secretary of State in forming his suspicion and belief was a statement obtained from the suspect by United Kingdom authorities by torture. I would not confine it to that situation or attempt to define it at this stage. The international co-operation necessary to combat terrorism, rightly stressed on behalf of the Secretary of State, could lead to a situation in which the United Kingdom Government was so involved with ill-treatment in obtaining information that it became an abuse of state power to attempt to rely on the information and the Commission could not tolerate its admission. The statute does not, however, permit too circumscribed a view of available material when assessing the reasonableness of the suspicion and belief formed. Moreover, provided the Secretary of State is acting in good faith, a recognition of his responsibility for national security is required when assessing his approach to the material available to him.

138. Nothing has been brought to the attention of the Court which would amount to such misuse of state power as would have required the Commission to discharge the certificates or have prevented the Secretary of State from relying on the material when discharging his duty under Section 21. While making the reservation I have, I am not prepared to hold that the Commission adopted the wrong approach to the material before them. I am not able to hold that the claimed exclusionary rule exists in the context of the 2001 Act.

139. The parties have sensibly restricted the hearing before this court to a consideration of the general legal points raised. If it is sought, in the light of the judgments in this court, to establish in a particular case, in the statutory context, misuse of state power such that the Commission should intervene, that can be done upon the forthcoming review by the Commission which the statute requires.

Jurisdiction

140. Two of the Appellants, Ajouaou and F, have left the jurisdiction. Each has lodged an appeal

against certification. In each case, the Secretary of State has exercised his power under Section 21(7) to revoke the certificate since the appeal was launched and has done so with retrospective effect.

141. The Commission concluded, at paragraph 34, that the revocation of the certificates deprived it of jurisdiction. The Commission stated:

> "The appeal is against certification, which connotes a continuing state of affairs. The powers available on appeal are only to cancel a certificate; that power only makes sense in the context of a certificate which remains in force. The statutory language is reinforced by the first ground upon which an appeal can be allowed, which goes to present merits. The appeal would at best be arguable on the rather limited paragraph (b) ground."

142. The conclusion was elaborated upon in the individual determination in the case of F. The Commission stated, at paragraph 11:

> "Section 25(4) provides that where a certificate is cancelled it shall be treated as never having been issued. Section 25(2)(a) clearly looks to the situation at the time of the appeal. It does not say, as it could have done, that *there are or were at the time it was issued* no reasonable grounds, etc. It therefore clearly in our view presupposes that the certification is still in being at the time of the hearing.
>
> ... But Parliament could have made it clear that an appeal could be made against the issue of the certificate rather than, as section 25(1) provides, against the certification."

143. The parties are at one in submitting that the finding was in error. The right of access to a tribunal or court is of fundamental importance (*R v Secretary of State ex parte Saleem* [2001] 1 WLR 443). The certified person should be permitted to challenge certification as a suspected international terrorist and the legality of past detention consequent upon certification. Certification is likely to have a seriously adverse effect upon the person's reputation. There is no requirement to give reasons for the revocation so that the person will not know whether he should never have been certified or whether the revocation was for another reason. Re-entry to the United Kingdom would be likely to be opposed by the Secretary of State and the person would, in the absence of a right to appeal to the Commission, be required to challenge the refusal of leave to enter and a decision to exclude by judicial review. There are weighty reasons, it is submitted and I agree, why the statute should be construed, if possible, so as to permit a right of appeal.

144. The impediment is in the provision in Section 25(1) that it is "a suspected international terrorist" who may appeal and a suspected international terrorist is defined in Section 21 as a person certified under the section. Upon the revocation of the certificate the person seeking a hearing before the Commission is no longer a suspected international terrorist.

145. Mr Husain, for the Appellants, has made submissions on the wording of Section 25(1). It refers not to an appeal against a certificate but an appeal against "certification". The right of appeal in Section 25(1) is against the "certification" and not against a subsisting certificate.

146. Moreover, when the Commission is deciding whether to cancel a certificate under Section 25(1), it is entitled, under Section 25(1)(b) to consider whether the certificate should have been issued at all and, if it is cancelled, the certificate shall be treated as never having been issued (Section 21(4)). A retrospective assessment of evidence and a retrospective effect following cancellation is thereby contemplated. Given the presence of that power to consider past events, it is unlikely that the right of appeal is confined as the Commission found.

147. If it had been intended to remove the right of access in such a serious matter, plainer language would have been necessary. While the Section 25(1) appeal might have been expressed to be against the "issue of the certificate" rather than "certification" to put the issue beyond doubt in favour of jurisdiction, I would have expected a word other than "certification" to have been used in Section 25(1) if it had been intended that the appeal could only be against an existing certificate as distinct from the act of certification. It is not necessary to remain within the definition of "suspected international terrorist" to have a right of appeal against certification. I read Section 25(1) as meaning that a person who has been certified as a suspected international terrorist may appeal against that certification.

148. If a right of appeal exists, the grounds in Section 25(2)(a) and (b) can be relied on. I see no reason to make a distinction and limit the right to sub-paragraph (b). If the Commission held otherwise in paragraph 34, that finding was in my view in error.

149. The Commission should have accepted jurisdiction.

Other issues

150. On the other issues mentioned in paragraph 4 of this judgment I have had the advantage of reading the judgment of Laws LJ in draft and I agree with his conclusions. There is also to be a closed judgment following submissions made in closed session. As Mr Burnett said in open court, it does not impinge on the three general issues considered in this judgment.

151. Save as to jurisdiction in the cases of Ajouaou and F, I would dismiss these appeals. That includes the appeals of Ajouaou and F which the Commission considered in case it was wrong on the question of jurisdiction.

LORD JUSTICE LAWS:

INTRODUCTORY

152. These appeals are about executive detention without limit of time. The skeleton argument prepared by Mr Emmerson QC and his junior, counsel for all the appellants save C and D, cites this observation by Lord Bingham of Cornhill:

"Freedom from executive detention is arguably the most fundamental and probably the oldest, most hardly won and the most universally recognised of human rights..."

In England this freedom has enjoyed the historic protection of the common law, notably through the writ of habeas corpus. It has also been recognised and guaranteed by Article 5 of the European Convention on Human Rights ("ECHR"). I need cite only these excerpts:

"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

...

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

...

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

153. But these appeals are also about the grave and present threat posed by international terrorists to the security of the United Kingdom and the safety of its people following the sickening massacre of many hundreds of innocent persons in New York City on 11 September 2001. In the Schedule to the Human Rights Act 1998 (Designated Derogation) Order 2001 ("the Derogation Order"), to which I must return, this is stated:

"The threat from international terrorism is a continuing one. In its resolution 1373 (2001), the Security Council, acting under Chapter VII of the United Nations Charter, required all States to take measures to prevent the commission of terrorist attacks, including by denying safe haven to those who finance, plan, support or commit terrorist attacks.

There exists a terrorist threat to the United Kingdom from persons suspected of involvement in international terrorism. In particular, there are foreign nationals present in the United Kingdom who are suspected of being concerned in the commission, preparation or instigation of acts of international terrorism, of being members of organisations or groups which are so concerned or of having links with members of such organisations or groups, and who are a

threat to the national security of the United Kingdom."

And towards the end of its open generic judgment in these cases, the Special Immigration Appeals Commission ("SIAC") made these observations:

"302... [T]here is a network, largely of North African extremists, in this country which makes up a number of groups or cells with overlapping members or supporters. They usually have origins in groups which had or may still have a national agenda, but whether that originating group does or does not have a national agenda, whether or not it has direct Al Qa'eda links, whether or not the factions are at war in the country of origin, such as the GIA and GSPC in Algeria, those individuals now work together here. They co-operate in order to pursue at least in part an anti-West terrorist agenda. Those less formal groups are connected back to Al Qa'eda, either through the group from which they came which is part of what can be described as the Al Qa'eda network, or through other extremist individuals connected to Al Qa'eda who can be described as part of Al Qa'eda itself or associated with it. They are at least influenced from outside the United Kingdom...

...

309... There are reasonable grounds, at least, for considering that there is a continuing direct terrorist threat to the United Kingdom from a group or groups or network of largely North African Islamic extremists, linked in various ways to Al Qa'eda..."

154. This grave and present threat cannot be neutralised by the processes of investigation and trial pursuant to the general criminal law. The reach of those processes is marked by what can be proved beyond reasonable doubt. But the danger of terrorist attack is by no means only presented by persons who might be convicted of criminal offences. Others, against whom little or nothing could be proved by evidence which could properly be adduced before a jury, may be the lively source of such a danger. The danger and its potential source may, however, be well established by available intelligence which does not amount to admissible evidence.

155. In these circumstances the State faces a dilemma. If it limits the means by which the citizens are protected against the threat of terrorist outrage to the ordinary measures of the criminal law, it leaves a yawning gap. It exposes its people to the possibility of indiscriminate murder committed by extremists who for want of evidence could not be brought to book in the criminal courts. But if it fills the gap by confining them without trial, it affronts "the most fundamental and probably the oldest, most hardly won and the most universally recognised of human rights": freedom from executive detention.

156. The issues in these appeals concern the ways and means by which in practice the State has sought to confront and resolve this dilemma. At this stage I give merely the broadest outline. By Part IV of the Anti-Terrorism, Crime and Security Act 2001 ("ATCSA") Parliament has conferred on the Secretary of State a power of executive detention in defined circumstances. The power is subject to substantial checks and controls, not least the right of appeal against the Secretary of State's decision (effected by a certificate issued by him) to SIAC, which is a

specialist tribunal constituted as a superior court of record and presided over by a High Court judge. There is a right of further appeal to this court on any material point of law. I will give the detail in due course. In essence Part IV of ATCSA is concerned with the minimisation of risk: the risk of threats by terrorists to the national security of the United Kingdom. The ten appellants are all persons in respect of whom the Secretary of State issued a certificate, and whose appeals to SIAC have been dismissed. Their grounds of appeal to this court, advanced with permission granted by SIAC on 5 December 2003, reflect the dilemma I have described. By one route or another it is urged, in effect, that the law's abhorrence of executive detention should be given greater weight, and the State's duty to protect its citizens against violent outrage should be given less.

157. Given this overall perception of the appellants' arguments, I consider it worth making some general remarks at this stage about the law's approach to the avoidance, or minimisation, of risk. The paradigm of the common law's function is, I suppose, the case where A undertakes to prove a claim against B. Whether A is a public prosecutor or a private claimant, his case is won if it is proved and lost if it is not. Our long history of adversarial process conduces to a sense that this is the just way of doing things. The defendant is only subject to criminal sanction or civil redress if the case is properly proved against him, the standard of proof being appropriate to the subject-matter of the case.

158. But the law knows many instances in which a defendant is fixed with onerous legal consequences in the absence of any proof beyond a reasonable doubt or on the balance of probability; where, rather, all that can be shown is that there is a *risk* or a *chance* that this or that will eventuate. Such instances generally arise where the court is particularly called on to assess what may happen in the future. In the field of environmental law "risk theory", as it is sometimes named, plays an increasingly important role. Claimants for damages for personal injuries may recover for the loss of a future chance (say of advancement at work) or the burden of a future danger (say of contracting epilepsy). In the law of crime, a man may be sentenced to a term of imprisonment, and it may be life imprisonment, longer than would be justified by considerations of retribution or deterrence; its justification consists in the unpredictable future risk which he presents of danger to the public. Our asylum law is about the avoidance of risk of persecution. Legislation concerning the disclosure (in some circumstances) of unproved allegations of sexual misconduct has been enacted to minimise the risk of abuse of children and vulnerable adults.

159. Other instances may readily be called to mind. I refer to such cases only to show that our law is no stranger to the prevention of risk. Its processes are not limited to the allocation of legal consequences on proof of facts. This is unsurprising. The prevention of risk may be a very powerful imperative; powerful enough, in reason, to justify the imposition of legal sanctions or burdens where there is no conventional proof that this or that has happened or will happen. It is true that in the instances I have mentioned relating to personal injury and crime, a case will at least have first been proved against the defendant before he has to pay for unproved risks. He will have been shown to have been negligent, or to have committed the crime in question, according to the appropriate standard of proof. The sanction imposed upon him for the prevention of risk – additional damages, longer imprisonment – is not the whole substance of the case against him. It is for consideration whether the like is to any extent true of a person certified by the Secretary of State under ATCSA. Is the risk case

effectively the whole case against him? Or, upon his appeal to SIAC, must the Secretary of State show that at least some facts, such as concrete links with a terrorist organisation, are proved against him if the certificate is to be held lawful? For reasons I shall give I am clear that the answer to that question is No; but this is merely a foretaste of the issues in the appeal.

160. Here the law's prevention of risk arises in a constitutional setting, forged by the dilemma I have described. It consists in the tension between these two constitutional fundamentals, the abhorrence of executive detention and the State's duty to safeguard its citizens and its own integrity. The first of these is in large measure the business of the courts, the second the business of government. We must see how far the fact of these different domains itself informs the resolution of the issues in the appeals.

161. However the appeals also involve a further, no less important, constitutional fundamental. Its essence consists in another abhorrence: the abhorrence, in any civilised community, of the use of torture. Concretely, the question is whether SIAC is obliged to exclude from its consideration any evidence adverse to an appellant before it which may have been procured by torture or other treatment in violation of ECHR Article 3. As I shall show this question needs careful refinement. So does the reach of the constitutional principle in question. But whatever the refinements, this is by far the most important point in the case.

162. The appeals disclose a number of themes, some of which interlock. Ordinarily the starting point would be to introduce the legislation. But in this case the legislation – Part IV of ATCSA – proposing as it did to allow indefinite executive detention without trial of a criminal offence, could not be passed consistently with the United Kingdom's obligations arising under ECHR Article 5(1). Accordingly the government effected a derogation from Article 5(1) pursuant to ECHR Article 15. The terms and in particular the scope of this derogation have played no little part in the arguments deployed before us, and these are matters to which I shall have to return. The derogation's legality has been tested, and in this court upheld, in *A, X, Y & others v Home Secretary*. An appeal against that decision is due to be heard in their Lordships' House in October 2004.

163. In what follows I propose first to describe the derogation, by reference to the Derogation Order (made under s.14 of the Human Rights Act 1998 ("HRA")) by which the derogation was heralded in our domestic law. Then I will set out the material legislative provisions. I will next introduce the outline facts of the ten cases (and in that context I will give some account of the SIAC decisions under challenge). In dealing with the facts, it will be convenient at that stage to dispose of two particular arguments raised respectively in *C* and *D* by Mr Manjit Gill QC, leading counsel for those appellants. The argument in *C* requires consideration of ATCSA s.33, together with provisions made by Articles 1F and 33 of the 1951 United Nations Refugee Convention. I will explain it when I come to it. The argument in *D* is to the effect that the Secretary of State unfairly sought to change his case at a late stage and was wrongly permitted to do so by SIAC. Next after the facts I will articulate the remaining issues in the appeals and explain how to my mind those issues are to be resolved.

THE DEROGATION

164. Article 15 ECHR provides:

"1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary-General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed."

165. The Derogation Order was made on 11 November 2001, and came into force on 13 November 2001. Article 2 stated:

"The proposed derogation by the United Kingdom from article 5(1) of the Convention, set out in the Schedule to this Order, is hereby designated for the purposes of the 1998 Act [sc. the HRA] in anticipation of the making by the United Kingdom of the proposed derogation."

The Schedule refers to the events of 11 September 2001, and describes the terrorist threat to the United Kingdom in paragraphs which I have already set out. It provides a summary of the material provisions of ATCSA, beginning thus:

"As a result of the public emergency, provision is made in [ATCSA], *inter alia*, for an extended power to arrest and detain a foreign national which will apply where it is intended to remove or deport the person from the United Kingdom but where removal or deportation is not for the time being possible, with the consequence that the detention would be unlawful under existing domestic law powers."

Later, this is stated:

"It is well established that Article 5(1)(f) permits the detention of a person with a view to deportation only in circumstances where 'action is being taken with a view to deportation' (*Chahal v United Kingdom* (1996) 23 EHRR 413 at paragraph 112)."

Finally this, under the heading *Derogation under Article 15 of the Convention*:

"The Government has considered whether the exercise of the extended power to detain contained in [ATCSA] may be inconsistent with the obligations under Article 5(1) of the Convention. As indicated above, there may be cases where, notwithstanding a continuing

intention to remove or deport a person who is being detained, it is not possible to say that 'action is being taken with a view to deportation' within the meaning of Article 5(1)(f) as interpreted by the Court in the *Chahal* case. To the extent, therefore, that the exercise of the extended power may be inconsistent with the United Kingdom's obligations under Article 5(1), the Government has decided to avail itself of the right of derogation conferred by Article 15(1) of the Convention and will continue to do so until further notice."

The derogation was effected on the international plane, as I understand it by the communication of a *note verbale* to the Council of Europe through the appropriate diplomatic channels.

THE LEGISLATION

166. S.21 of ATCSA provides:

"(1) The Secretary of State may issue a certificate under this section in respect of a person if the Secretary of State reasonably-

(a) believes that the person's presence in the United Kingdom is a risk to national security, and

(b) suspects that the person is a terrorist.

(2) In subsection (1)(b) 'terrorist' means a person who-

(a) is or has been concerned in the commission, preparation or instigation of acts of international terrorism,

(b) is a member of or belongs to an international terrorist group, or

(c) has links with an international terrorist group.

(3) A group is an international terrorist group for the purposes of subsection (2)(b) and (c) if-

(a) it is subject to the control or influence of persons outside the United Kingdom, and

(b) the Secretary of State suspects that it is concerned in the commission, preparation or instigation of acts of international terrorism.

(4) For the purposes of subsection (2)(c) a person has links with an international terrorist group only if he supports or assists it.

(5) In this Part-

‘terrorism’ has the meaning given by section 1 of the Terrorism Act 2000, and

‘suspected international terrorist’ means a person certified under subsection (1).

(6) Where the Secretary of State issues a certificate under subsection (1) he shall as soon as is reasonably practicable-

(a) take reasonable steps to notify the person certified, and

(b) send a copy of the certificate to the Special Immigration Appeals Commission.

(7) The Secretary of State may revoke a certificate issued under subsection (1).

(8) A decision of the Secretary of State in connection with certification under this section may be questioned in legal proceedings only under section 25 or 26.

(9) An action of the Secretary of State taken wholly or partly in reliance on a certificate under this section may be questioned in legal proceedings only by or in the course of proceedings under -

(a) section 25 or 26, or

(b) section 2 of the Special Immigration Appeals Commission Act 1997."

S.23:

"(1) A suspected international terrorist may be detained under a provision specified in subsection (2) despite the fact that his removal or departure from the United Kingdom is prevented (whether temporarily or indefinitely) by-

(a) a point of law which wholly or partly relates to an international agreement, or

(b) a practical consideration.

(2) The provisions mentioned in subsection (1) are-

(a) paragraph 16 of Schedule 2 to the Immigration Act 1971 (detention of persons liable to examination or removal), and

(b) paragraph 2 of Schedule 3 to that Act (detention pending deportation)."

S.24 confers on SIAC a jurisdiction to grant bail. Its construction has given rise to controversy in circumstances which, however, demand no enquiry for the purpose of these appeals. But s.25 is a key provision:

"(1) A suspected international terrorist may appeal to the Special Immigration Appeals Commission against his
certification under section 21.

(2) On an appeal the Commission must cancel the certificate if-

(a) it considers that there are no reasonable grounds for a belief or suspicion of the kind referred to in section 21(1)(a) or (b), or

(b) it considers that for some other reason the certificate should not have been issued.

(3) If the Commission determines not to cancel a certificate it must dismiss the appeal.

(4) Where a certificate is cancelled under subsection (2) it shall be treated as never having been issued.

(5) An appeal against certification may be commenced only-

(a) within the period of three months beginning with the date on which the certificate is issued, or

(b) with the leave of the Commission, after the end of that period but before the commencement of the first review under section 26."

I should also set out ss.26 – 29. The provisions there contained possess some importance for our consideration of the way in which Parliament has sought to strike the balance between

the abhorrence of executive detention and the imperative of the State's protection. Moreover some of these measures are of direct relevance to various points in the case, as I shall in due course explain.

"26(1) The Special Immigration Appeals Commission must hold a first review of each certificate issued under section 21 as soon as is reasonably practicable after the expiry of the period of six months beginning with the date on which the certificate is issued.

(2) But-

(a) in a case where before the first review would fall to be held in accordance with subsection (1) an appeal under section 25 is commenced (whether or not it is finally determined before that time) or leave to appeal is given under section 25(5)(b), the first review shall be held as soon as is reasonably practicable after the expiry of the period of six months beginning with the date on which the appeal is finally determined, and

(b) in a case where an application for leave under section 25(5)(b) has been commenced but not determined at the time when the first review would fall to be held in accordance with subsection (1), if leave is granted the first review shall be held as soon as is reasonably practicable after the expiry of the period of six months beginning with the date on which the appeal is finally determined.

(3) The Commission must review each certificate issued under section 21 as soon as is reasonably practicable after the expiry of the period of three months beginning with the date on which the first review or a review under this subsection is finally determined.

(4) The Commission may review a certificate during a period mentioned in subsection (1), (2) or (3) if-

(a) the person certified applies for a review, and

(b) the Commission considers that a review should be held because of a change in circumstance.

(5) On a review the Commission-

(a) must cancel the certificate if it considers that there are no reasonable grounds for a belief or suspicion of the kind referred to in section 21(1)(a) or (b), and

(b) otherwise, may not make any order (save as to leave to appeal).

(6) A certificate cancelled by order of the Commission under subsection (5) ceases to have effect at the end of the day on which the order is made.

(7) Where the Commission reviews a certificate under subsection (4), the period for determining the next review of the certificate under subsection (3) shall begin with the date of the final determination of the review under subsection (4).

27(1) The following provisions of the Special Immigration Appeals Commission Act 1997 shall apply in relation to an appeal or review under section 25 or 26 as they apply in relation to an appeal under section 2 of that Act-

(a) section 6 (person to represent appellant's interests),

(b) section 7 (further appeal on point of law), and

(c) section 7A (pending appeal).

(2) The reference in subsection (1) to an appeal or review does not include a reference to a decision made or action taken on or in connection with-

(a) an application under section 25(5)(b) or 26(4)(a) of this Act, or

(b) subsection (8) below.

(3) Subsection (4) applies where-

(a) a further appeal is brought by virtue of subsection (1)(b) in connection with an appeal or review, and

(b) the Secretary of State notifies the Commission that in his opinion the further appeal is confined to calling into question one or more derogation matters within the meaning of section 30 of this Act.

(4) For the purpose of the application of section 26(2) and (3) of this Act the determination by the Commission of the appeal or review in connection with which the further appeal is brought shall be treated as a final determination.

...

(9) Cancellation by the Commission of a certificate issued under section 21 shall not prevent the Secretary of State from issuing another certificate, whether on the grounds of a change of circumstance or otherwise.

...

28(1) The Secretary of State shall appoint a person to review the operation of sections 21 to 23.

(2) The person appointed under subsection (1) shall review the operation of those sections not later than-

(a) the expiry of the period of 14 months beginning with the day on which this Act is passed;

(b) one month before the expiry of a period specified in accordance with section 29(2)(b) or (c).

(3) Where that person conducts a review under subsection (2) he shall send a report to the Secretary of State as soon as is reasonably practicable.

(4) Where the Secretary of State receives a report under subsection (3) he shall lay a copy of it before Parliament as soon as is reasonably practicable.

...

29(1) Sections 21 to 23 shall, subject to the following provisions of this section, expire at the end of the period of 15 months beginning with the day on which this Act is passed.

(2) The Secretary of State may by order-

(a) repeal sections 21 to 23;

(b) revive those sections for a period not exceeding one year;

(c) provide that those sections shall not expire in accordance with subsection (1) or an order under paragraph (b) or this paragraph, but shall continue in force for a period not exceeding one year.

(3) An order under subsection (2)-

(a) must be made by statutory instrument, and

(b) may not be made unless a draft has been laid before and approved by resolution of each House of Parliament.

(4) An order may be made without compliance with subsection (3)(b) if it contains a declaration by the Secretary of State that by reason of urgency it is necessary to make the order without laying a draft before Parliament; in which case the order-

(a) must be laid before Parliament, and

(b) shall cease to have effect at the end of the period specified in subsection (5) unless the order is approved during that period by resolution of each House of Parliament.

(5) The period referred to in subsection (4)(b) is the period of 40 days-

(a) beginning with the day on which the order is made, and

(b) ignoring any period during which Parliament is dissolved or prorogued or during which both Houses are adjourned for more than four days.

(6) The fact that an order ceases to have effect by virtue of subsection (4)-

(a) shall not affect the lawfulness of anything done before the order ceases to have effect, and

(b) shall not prevent the making of a new order.

(7) Sections 21 to 23 shall by virtue of this subsection cease to have effect at the end of 10th November 2006."

ATCSA s.33 is relevant to a particular argument advanced by Mr Gill in *C*, with which I will deal (as I have indicated) in addressing the facts of C's case:

"(1) This section applies to an asylum appeal before [SIAC] where the Secretary of State issues a certificate that-

(a) the appellant is not entitled to the protection of Article 33(1) of the Refugee Convention, because Article 1F or 33(2) applies to him (whether or not he would be entitled to protection if that Article did not apply), and

(b) the removal of the appellant from the United Kingdom would be conducive to the public good.

...

(3) Where this section applies the Commission must begin its substantive deliberations on the asylum appeal by considering the statements made in the Secretary of State's certificate.

(4) If the Commission agrees with those statements it must dismiss such part of the asylum appeal as amounts to a claim for asylum before considering any other aspect of the case.

(5) If the Commission does not agree with those statements it must quash the decision or action against which the asylum appeal is brought.

...

(7) The Secretary of State may revoke a certificate issued under subsection (1).

(8) No court may entertain proceedings for questioning-

(a) a decision or action of the Secretary of State in connection with certification under subsection (1),

...

(9) Subsection (8) shall not prevent an appeal under section 7 of the Special Immigration Appeals Commission Act 1997 (appeal on point of law).

..."

167. I should fill out three cross-references. First ATCSA s.1(5) mentions the definition of "terrorism" given in s.1 of the Terrorism Act 2000. It is in these terms:

"1(1) In this Act 'terrorism' means the use or threat of action where—(a) the action falls within subsection (2), (b) the use or threat is designed to influence the government or to intimidate the public or a section of the public, and (c) the use or threat is made for the purpose of advancing a political, religious or ideological cause.

(2) Action falls within this subsection if it—(a) involves serious violence against a person, (b) involves serious damage to property, (c) endangers a person's life, other than that of the person committing the action, (d) creates a serious risk to the health or safety of the public or a section of the public, or (e) is designed seriously to interfere with or seriously to disrupt an electronic system.

(3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.

(4) In this section—(a) 'action' includes action outside the United Kingdom, (b) a reference to any person or to property is a reference to any person, or to property, wherever situated, (c) a reference to the public includes a reference to the public of a country other than the United Kingdom, and (d) 'the government' means the government of the United Kingdom, of a part of the United Kingdom or of a country other than the United Kingdom."

The second cross-reference, in ATCSA ss.27(1) and 33(9), is to the Special Immigration Appeals Commission Act 1997 ("SIACA"). S.7 creates the relevant jurisdiction of this court, as follows:

"Where [SIAC] has made a final determination of an appeal, any party to an appeal may bring a further appeal to the appropriate appeal court on any question of law material to that determination."

An appeal under s.7 is the only means by which a decision of SIAC may be questioned in legal proceedings: SIACA s.1 as amended by ATCSA s.35. Having regard to a point arising in the appeals of F and Ajouaou, I should also set out SIACA s.7A(4):

"A pending appeal to the Commission is to be treated as abandoned if the appellant leaves the United Kingdom."

168. The third cross-reference is to be found in ATCSA s.33(1)(a), and is to Articles 1F and 33 of the 1951 United Nations Refugee Convention. These provisions are material to Mr Gill's specific argument in *C* which I will address when I come to C's facts. I will set out the provisions below, where I collect other international materials which are relevant in the appeals.

169. Specific procedure rules have been made for the conduct of SIAC appeals: the Special Immigration Appeals (Procedure) Rules 2003. Amongst other things they make provision for the appointment of a special advocate to represent the interests of an appellant at hearings at which "closed material" is being canvassed, and from which for reasons of security the

appellant himself and his conventional representative are excluded: see Rules 34 ff. Such hearings took place before SIAC in these cases, and two of the special advocates, Mr Blake QC and Miss Whipple, have been present in court at the appeals before us. There is another rule, however, that is directly relevant to the issue before us concerning evidence obtained in violation of ECHR Article 3. Rule 44(3) provides:

"The Commission may receive evidence that would not be admissible in a court of law."

170. Now I will deal with the remaining material international provisions. First, Articles 1F and 33 of the Refugee Convention, mentioned in ATCSA s.33(1)(a). 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 principle of the United Nations."

Article 33:

"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 opinions.

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 judgment of a particularly serious crime, constitutes a danger to the community of that country...."

171. There is next a further provision of ECHR, namely the first sentence of Article 6(1):

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

Finally, there is the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), which was adopted and opened for signature and ratification in 1984 and entered into force in 1987. Mr Emmerson told us that CAT has

been ratified by 136 States, including Afghanistan, the United Kingdom and the United States of America. The following provisions are contained in Part I. Article 1(1):

"For the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

Article 2:

"1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

3. An order from a superior officer or a public authority may not be invoked as a justification of torture."

Article 4:

"1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.

2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature."

Article 12:

"Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction."

Article 15 has been the particular focus of argument in these appeals. It provides:

"Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a

person accused of torture as evidence that the statement was made."

172. Part II of CAT (Articles 17 – 24) established the Committee against Torture, and made provision for its membership and functions. By Article 19 the States Parties are to submit regular reports to the Committee concerning measures taken by them to give effect to their undertakings under CAT. In the course of argument reference was made to the first such report submitted by the United Kingdom in 1992. Then Article 22(1) provides:

"A State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention..."

The Committee's consideration of such communications is then provided for, and Article 22(7) states:

"The Committee shall forward its views to the State Party concerned and to the individual."

In the course of argument we were referred to certain opinions of the Committee arrived at under Article 22.

THE OUTLINE FACTS

173. As I have said, the ten appellants are all persons in respect of whom the Secretary of State issued a certificate under ATCSA s.21, and whose appeals to SIAC under s.25 have been dismissed. On 29 October 2003 SIAC delivered an open generic judgment (to which I have already referred) which sets out general conclusions. It delivered also specific open judgments in each of the appeals, as well as closed judgments to which it will be unnecessary to make any reference. As recorded at paragraph 121 of the open generic judgment, it was the Secretary of State's case "that all of the Appellants were linked to groups or networks linked to Osama bin Laden and Al Qa'eda". Mr Emmerson made it admirably clear at the outset that he did not pursue any points on SIAC's individual decisions relating to his eight clients; his case stands or falls by reference to general arguments which go, in essence, to the integrity of the open generic judgment. In particular Mr Emmerson pressed the argument relating to the admission of evidence obtained by torture, which as I have said is by far the most important point in the case. Mr Gill had one specific submission relating to his client D, which was to the effect that the Secretary of State had changed his case at a late stage causing such unfairness to D as to justify striking down SIAC's decision against him, and I will come to that. We are not, then, on the whole concerned with factual *minutiae*. But I must give some account of the individual cases, both in order to set the scene and because in some instances they are the necessary introduction of more general arguments.

A

174. A is an Algerian who arrived in the United Kingdom on 31 July 1989. There is some

immigration history. On 29 July 1992 the Secretary of State decided to deport him as an overstayer. His appeal was dismissed and a deportation order was signed. He went to Sweden but was returned here by the Swedish authorities. He sought asylum on the basis of his claimed involvement with an Algerian newspaper. That was refused and his appeal was dismissed. In the spring of 2001 he applied for indefinite leave to remain in the United Kingdom on the basis that children of his had been living in this country for more than seven years. That was rejected in December 2001, and on 17 December 2001 the Secretary of State issued a certificate under ACTSA s.21(1) in A's case. The certificate was notified to A the following day.

175. The essence of the Secretary of State's case relating to A was that he had been active in supporting a terrorist group called the GSPC within the United Kingdom, and more broadly had supported the objectives of Osama bin Laden and Al Qa'eda. The GSPC (which is a proscribed organisation under the Terrorism Act 2000) is described in SIAC's open generic judgment as follows:

"289. ... [I]t is clear that the GSPC is an international terrorist group. We consider the evidence, open and closed, supports the conclusion that it is active in pursuit of both a national agenda, including fighting the Algerian regime and the Zouabri-led GIA, and a wider anti-Western agenda. We reject the suggestion that its attention is confined to Algeria or that it can be regarded as not part of the Al Qa'eda-linked threat because it does not target civilians. The latter proposition resulted from a series of questions designed to highlight the difference between the GIA and the GSPC. But there is no evidence at all to support the curious implicit proposition that GSPC terrorism excluded any civilian targets, or that attacks on non-civilian targets in the West are excluded from the scope of the emergency. The distinction itself is over simple: how do police, civil servants in the Ministry of Defence or Security Services' buildings fare? There was evidence, particularly in closed, about GSPC-linked civilian attacks outside Algeria, in France and Niger.

290. The GSPC was also linked to Al Qa'eda through training, and funding and in other ways, from all the material which we had. Here the UN list is supportive of the evidence given to us and can add to the weight of evidence as to those links. It is controlled or influenced by people outside the United Kingdom, as for that matter is the GIA."

As for the GIA, SIAC held at paragraph 282 of the open generic judgment that it was a functioning terrorist organisation but with no current links "at an organisational level" with Al Qa'eda. In the same paragraph they also stated:

"It poses no threat to western interests outside Algeria. Those threats, disturbing though they are, are not the basis of, nor truly part of, the Al Qa'eda linked emergency. As an organisation it is difficult to see that it is currently part of the threat to the United Kingdom underlying the public emergency. It focuses on Algeria currently... The GIA is significant in these appeals either as the precursor to the GSPC, or as the original terrorist group supported by those who are said now to be significantly connected to other looser networks, and in that different way linked to Al Qa'eda."

176. More specifically the case against A was that he had supported the GSPC by means of his involvement in credit card fraud, which was the GSPC's main source of income in the United Kingdom. He had also been heavily involved in the procurement of telecommunications equipment, giving assistance to a terrorist called Abu Doha, who at length was arrested at Heathrow Airport as he tried to flee the United Kingdom. Abu Doha headed or inspired a group, referred to as "the Abu Doha Group", of which SIAC in its generic judgment said this:

At Para 294:

"There is ample evidence to support the conclusion that this group falls within the Act, has links to Al Qa'eda and is a very important part of the emergency. It is not a group with an exclusive membership; its members or supporters or some of them may form part of other networks or groups, as well. It is the paradigm group, loosely co-ordinated but overlapping with other groups or cells of North African, principally, Algerian, extremists. It may overlap with groups centred around Abu Qatada or around Beghal. It too is controlled or influenced by people outside the United Kingdom."

177. SIAC held that the Secretary of State had reasonable grounds to suspect that A was an international terrorist within the meaning of ACTSA s.21 and dismissed his s.25 appeal. They dismissed also his outstanding appeals against the Secretary of State's decisions not to revoke the deportation order and to refuse him indefinite leave to remain in the United Kingdom.

G

178. G is also from Algeria. He arrived in the United Kingdom in August 1995 and claimed asylum. His claim was rejected in September 1997 and his appeal dismissed by the Adjudicator in December 1999. However he obtained a residence permit for six months from 5 June 2001, by reason of his marriage to a French national. In his case the Secretary of State issued a certificate under ATCSA s.21 on 18 December 2001 on the footing that G was an active supporter of the GSPC. SIAC concluded in its specific open judgment, paragraph 15:

"... [T]he closed material confirms our view that there is indeed reasonable suspicion that the Appellant is an international terrorist within the meaning of section 21 and reasonable belief that his presence in the United Kingdom is a risk to national security. We have no doubt that he has been involved in the production of false documentation, has facilitated young Muslims to travel to Afghanistan to train for jihad and has actively assisted terrorists who have links with Al Qa'eda. We are satisfied too that he has actively assisted the GSPC. We have no hesitation in dismissing his appeal."

Abu Rideh

179. Abu Rideh was born in Jordan to stateless Palestinian parents and arrived in the United Kingdom with a Jordanian passport in January 1995. On 10 November 1998 he was granted indefinite leave to remain in the United Kingdom as a refugee within the meaning of the 1951 Refugee Convention. On 17 December 2001 the Secretary of State issued a certificate under

s.21. The covering letter of the same date stated the reasons:

"You are an active supporter of various international terrorist groups, including those with links to Usama Bin Laden's terrorist network. Your activities on their behalf include fund raising."

180. This appellant's mental health has been poor, and SIAC noted in their open specific judgment that since July 2002 he had been held in Broadmoor Hospital, having been transferred there from HM Prison Belmarsh. Notwithstanding that, SIAC concluded that he had told a series of deliberate lies about important matters, and had been a very successful fundraiser able to get money out to Afghanistan. They acknowledged (paragraph 21) that "the open evidence taken in isolation cannot provide the reasons why we are dismissing the appeal...", and stated (paragraph 24) that "[t]he closed material confirms our view that the certification in this case was correct."

E

181. E is from Tunisia. He came to the United Kingdom and sought asylum. According to SIAC's open specific judgment in his case it took the Home Office six and a half years to determine the claim. At length it was rejected in January 2001, though E was granted exceptional leave to remain until 2005. I find it very difficult to see how any plea of scarce resources, or indeed anything else, could justify so gross and deplorable a delay. However that was not a matter gone into at the hearing before us. There may be some explanation, and I say no more about it.

182. The basis of the Secretary of State's certificate, issued under s.21 on 18 December 2001, was explained in his letter of the same date:

"You are an active supporter of the Tunisian Fighting Group, a terrorist organisation with close links to Al Qaida. You have provided direct assistance to a number of active terrorists."

At paragraph 133 of the open generic determination SIAC stated that the Secretary of State had identified the Tunisian Fighting Group ("TFG") as a "generally relevant" terrorist group. It seems that there was an issue in E's case as to its very existence. As to that SIAC entertained no doubt (paragraph 6 of the open specific judgment). The Secretary of State sought to demonstrate that the TFG had its origins in the Tunisian Islamic Front ("FIT"); its ultimate aim was the establishment of an Islamic State in Tunisia; both it and the FIT had links with Al Qa'eda. SIAC were satisfied that E was a member of the TFG and so had links with an international terrorist group, the TFG itself being an international terrorist organisation within the meaning of ATCSA. They acknowledged that their reasons rested largely on closed material, but stated (paragraph 10 of the open specific judgment):

"We have... been careful only to rely on material which cannot in our judgment have an innocent explanation."

183. It was in E's case that the issue relating to evidence having been obtained by torture or other treatment in violation of ECHR Article 3 first arose. At a late stage in the hearing before us there were the beginnings of a disagreement between Mr Emmerson and Mr Burnett QC, leading counsel for the Secretary of State, as to precisely how this came about. I do not think it matters very much. I shall, of course, have to say something about the factual assumptions upon which the legal debate has proceeded, but I shall do that when I come to deal with the issue substantively. SIAC itself stated, at paragraph 3 of its open specific judgment in E's case:

"Mr Emmerson did, however, raise a new point of substance in this appeal. He had in earlier cases submitted that if information obtained had been or may have been obtained by means of torture, the Commission should afford it no or very little weight. Before us he went further and submitted that information obtained by torture or by breaches of Article 3 of the European Convention on Human Rights was inadmissible."

SIAC rejected this submission for reasons given in the open generic judgment, and I will come to that.

B

184. B is an Algerian. It is not clear when he arrived in the United Kingdom. He had some dealings with the immigration authorities, and at length he made an asylum claim which was refused by the Secretary of State. His appeal was dismissed by the Adjudicator on 17 January 1996. He was detained pending removal. He made a further asylum claim. He was granted temporary release, was re-arrested and then released again. He served two short sentences of imprisonment for driving while disqualified and associated offences.

185. On 5 February 2002 the Secretary of State decided to make a deportation order against B, and also to certify him pursuant to ATCSA s.25. On the same day he also issued a certificate under ATCSA s.33 to the effect that B was not entitled to the protection of Article 33(1) of the Refugee Convention because Article 1F or 33(2) applied to him. The Secretary of State's open case against him was that he had belonged to the GSPC since 1997 or 1998 having contacts with leading members of the GSPC in the United Kingdom, and in 2000 had played an important role in procuring telecommunications equipment and providing logistical support. The Secretary of State's assessment was that the equipment was for use by Chechen Mujahaddin extremists and the GSPC in Algeria.

186. B appealed to SIAC both against the s.25 certificate and the decision to deport him. However he chose not to attend the appeal hearing and the short statement he put in was cast in the most general terms. In those circumstances there was really nothing to displace the Secretary of State's evidence. SIAC found as a fact that B worked with Abu Doha and used a false name in purchasing telecommunications equipment. The closed material rendered the Secretary of State's conclusions "even more reasonable". The appeals were dismissed.

JAMAL AJOUAOU

187. Ajouaou is from Morocco. He arrived in the United Kingdom on 24 December 1985. On 21 June 1988 he was granted indefinite leave to remain on the basis of his marriage to a British citizen. However the marriage broke up shortly afterwards. He made two applications for naturalisation as a British citizen, in 1990 and 1997. The latter application has not been formally determined. In 2000 he re-married, again to a British citizen, and there is a child of the marriage.

188. On 17 December 2001 the Secretary of State decided to make a deportation order against Ajouaou, and also to certify him pursuant to ATCSA s.25. On 19 December Ajouaou lodged appeals to SIAC against both decisions. But on 22 December 2001 he left the United Kingdom and has remained in Morocco since that date. His departure from this country meant that his outstanding appeals fell to be treated as abandoned: ATCSA s.27(1) and SIACA s.7A(4). But a ruling was sought and obtained from SIAC to the effect that this did not prevent the issue of a fresh notice of appeal, and that was done. (By the fresh notice Ajouaou sought to appeal, as he had earlier done, both against the deportation decision and the s.25 certificate. In fact the purported deportation appeal was ineffective because he was outside the United Kingdom.) However after this new appeal was lodged the Secretary of State revoked the s.25 certificate pursuant to ATCSA s.21(7). He did so on 16 January 2003, with effect (or purportedly with effect) from 22 December 2001, the date of Ajouaou's departure from the United Kingdom. As SIAC was to explain in paragraph 6 of their open specific judgment in Ajouaou's case the Secretary of State acted in this way because he took the view "that he could not properly believe that a person's *'presence in the United Kingdom'* was a risk to national security if the person was not present in the United Kingdom".

189. As I will shortly demonstrate a like state of affairs arose in F's case. F lodged a fresh appeal after leaving for France, and the Secretary of State thereafter revoked his certificate. Now, it might be thought that once an appellant had left the United Kingdom, and the s.25 certificate issued in his case had in fact been revoked, he would have no surviving sensible interest in seeking to continue an appeal which he had earlier lodged against the certificate. However it is said for Ajouaou and F that they should not be deprived, by the Secretary of State's executive act of revocation, of the opportunity to establish in proceedings before SIAC that the certificate should never have been issued in the first place. Their chances of re-admission to the United Kingdom in the future might well be enhanced by a successful *ex post facto* appeal against the certificate. It is said also that the very issue of the certificate is a stigma, and the certificate's recipient is entitled, even after revocation, to seek to have his reputation cleared of it. Given the desire of Ajouaou and F to pursue their s.25 appeals from abroad for these reasons, SIAC had to decide a question going to their jurisdiction: did the Secretary of State's revocation of the certificates undercut the whole s.25 apparatus, so that there was nothing left against which to appeal and accordingly no jurisdiction to continue the appeal process? In fact (somewhat to the surprise of SIAC: see paragraph 9 of their open specific judgment in F's case) the Secretary of State was at one with the appellants in urging that the jurisdiction, and he has taken the same position in this court. However SIAC ruled that the revocation of the certificates deprived it of jurisdiction to continue to entertain the appeals. It gave reasons at paragraphs 8 – 14 in the open specific judgment in F's case and briefly at paragraphs 33 – 35 of the open generic judgment. We have to decide whether SIAC's conclusion is correct.

190. In both *Ajouaou* and *F* SIAC proceeded to consider the merits of the appeals, in case they were wrong on the jurisdiction issue. The Secretary of State's case against Ajouaou was that he had links with both the GIA and GSPC and was a close associate of extremists who themselves were linked with Al Qa'eda or Bin Laden; he had been involved in preparing or instigating acts of international terrorism by procuring high-tech equipment for the GSPC and/or Islamic extremists in Chechnya; and he had supported one or more extremist factions in Chechnya by his involvement in fraud which facilitated the provision of funds, and the storing and handling of propaganda videos promoting the jihad. And he was a close associate of Abu Doha.

191. Although it acknowledged (open specific judgment paragraph 11) that the fraud case depended effectively entirely on closed material, SIAC gave a good deal of chapter and verse for its conclusion that (paragraph 23):

"We are entirely satisfied that the Secretary of State is reasonable in his suspicion that Ajouaou supports or assists the GIA, the GSPC, and the looser group based around Abu Doha, and in his belief that at any time Ajouaou is in the United Kingdom his presence here is a risk to national security."

F

192. F is an Algerian who (on his own account) first arrived in the United Kingdom in 1994 on a false Spanish passport. In 1997 he was charged alongside others with offences contrary to the Prevention of Terrorism Act. He claimed asylum in December 1997. On 3 March 2000 the case against him and his co-defendants was abandoned. On 15 March 2000 he was granted a right of residence until March 2005 on account of his French wife's status as an EEA resident. On 17 December 2001 the Secretary of State issued a certificate under s.21 on grounds that:

"You have provided active support to the [GIA], which is designated a proscribed organisation under Part 2 of the Terrorism Act 2000. Your activities on behalf of international terrorists include the procurement of terrorism-related materials and equipment and the provision of false documentation."

193. F was detained pursuant to the certificate under ATCSA s.23 but (as SIAC put it in paragraph 6 of their open specific judgment), "[o]n 12 March 2002, [he] decided that he could face detention no longer. He went to France the next day." He remains in France. It is to be noted that he had become a French national in May 2001, though he does not seem to have informed the Secretary of State of the fact. His first notice of appeal against the certificate, lodged on 21 December 2001, stated that his nationality was Algerian.

194. In describing the facts of Ajouaou's case I have already explained the nature of the sequence of events culminating, in that case and this, in the bringing of a second appeal against the certificate after the appellant's departure from the United Kingdom, the revocation thereafter of the certificate by the Secretary of State, and the issue then arising as to SIAC's jurisdiction to continue to entertain the second appeal. F lodged his second appeal one day out of time (with SIAC's leave given under ATCSA s.25(5)(b)). Thereafter, as in *Ajouaou* and for the

same reasons, the Secretary of State revoked the certificate pursuant to s.21(7). As I have said SIAC considered that in those circumstances there was no jurisdiction to entertain the s.25 appeal further, but they confronted its merits in case they were wrong.

195. SIAC first addressed the contention that, since F was a French national, he could have been removed to France, and in those circumstances there had been no basis for his detention under ATCSA s.23 and therefore no justification for a s.21 certificate. But the Secretary of State had no knowledge of F's French nationality when he issued the certificate. Accordingly (open specific judgment paragraph 19) that nationality could not avail to impugn the certificate although "[the certificate] ought... to have been revoked once the ability to remove was appreciated".

196. SIAC proceeded next to consider whether there had been a reasonable belief and suspicion within the meaning of ATCSA s.21 at the time of certification ("since nothing material occurred so far as [F] was concerned while he was detained": open specific judgment paragraph 20). They acknowledged (paragraph 22) that there would have been no basis for a certificate in May 1997 (had ATCSA then been in force) when F had been charged with terrorist offences, since, for want of links with Al Qa'eda, the GIA and its activities would not have fallen within the scope of the Article 15 derogation. Accordingly SIAC stated (paragraph 22):

"The question therefore must be whether his activities since March 2000, when the prosecution collapsed, seen in the light of what was known against him could establish the necessary suspicion and belief to justify certification."

In the result SIAC was satisfied that F had continued to associate with GSPC affiliates, and had provided false documentation for its members and for the Mujahaddin in Chechnya. Accordingly they indicated that they would not have allowed the appeal on the facts.

H

197. H is an Algerian. He supported the FIS, which won the elections in Algeria in 1991, leading to the military coup. Later it was banned. He went to Afghanistan in 1992. He arrived in the United Kingdom in August 1993 and claimed asylum on the ground that as a supporter of FIS he would be persecuted if returned to Algeria. At length on 12 August 2000 he was granted indefinite leave to remain in the United Kingdom as a refugee. The Secretary of State issued a s.25 certificate on 22 April 2002, and gave these reasons:

"You are an active supporter of [the GSPC], which is designated a proscribed organisation under Part 2 of the Terrorism Act 2000 and has links to Osama Bin Laden's terrorist network. Your activities on behalf of the group include fundraising and distribution of propaganda."

198. Unlike the majority of the appellants H gave evidence before SIAC. He contested the Secretary of State's case with some vigour. SIAC found some of his evidence unsatisfactory, not least that relating to certain documents. In the result (relying in part on closed material) they were satisfied that the Secretary of State "was correct in his view and... the Appellant is

an international terrorist within the meaning of section 21 and that it is proportionate that he be detained".

C

199. C is an Egyptian. He claimed asylum in the United Kingdom on 27 March 2000, stating that he had arrived here the day before. He gave false accounts of his earlier movements in his asylum interview and in an interview with the Security Service. However he was recognised as a refugee in the United Kingdom on 30 March 2001 and granted indefinite leave to remain accordingly. On 17 December 2001 the Secretary of State issued a certificate in his case under ATCSA s.33, and on 18 December a s.21 certificate. The grounds were:

"You are an active supporter of [EIJ] which is designated a proscribed organisation under Part 2 of the Terrorism Act 2000. Earlier this year, EIJ merged with Al Qa'eda. You were sentenced in abscentia *[sic]* to fifteen years imprisonment by an Egyptian military court for your role in trying to recruit serving Egyptian Army officers for the EIJ and in planning operations on behalf of the EIJ, both in Egypt and abroad."

200. In the open generic judgment SIAC said this of the EIJ:

"228. C's appeal involved consideration of the Egyptian Islamic Jihad (EIJ)... The EIJ was described by [the Secretary of State] as a terrorist group, aiming to overthrow the Government of Egypt and proscribed under the Terrorism Act 2000. It had mounted a number of high profile attacks up to the mid-1990s and had merged in some form or other with Al Qa'eda in 2001. Indeed, from the late 1990s its leadership had been closely associated with Osama Bin Laden. For example, in February 1998 Al Zawahiri, its then leader, was the second signatory to the Bin Laden fatwa published in the name of "*The World Islamic Front for the Jihad against the Jews and the Crusaders*". He was one of Bin Laden's closest associates. There were now organisational links, well established between the EIJ and Al Qa'eda. The majority of the group was fully merged with it. EIJ members were on Al Qa'eda's ruling council and assisted with terrorist attacks. The EIJ was a good example of a terrorist group which had had originally a national agenda, but which had become a close supporter of the global agenda, which is capable of being pursued alongside or as an inseparable part of a national agenda."

201. C did not give evidence but put in two statements which, for reasons they gave, SIAC regarded as entirely unreliable. They were (open specific judgment paragraph 19) "entirely satisfied that the Secretary of State has reasonable grounds for suspecting that C has a senior leadership role in the EIJ in the United Kingdom". They dismissed the s.25 appeal.

202. C had also appealed, on asylum and human rights grounds, against a decision of the Secretary of State to deport him. In that context SIAC considered and rejected a submission advanced by Mr Gill that there existed a free-standing statutory right of appeal to SIAC against the issue of a certificate under ATCSA s.33. This was the first part of the argument in C's case with which I indicated I would deal at this stage. The argument is plainly hopeless. Such a right of appeal could only be given by statute. So much I understood Mr Gill to

accept. But there is no provision in ATCSA, SIACA, or elsewhere in the immigration legislation that is capable of being construed as conferring any such appeal right. There was of course a right of appeal against the decision to deport C: but none, distinctly, against the s.33 certificate. It was (and is) also submitted – and this is the second part of the argument with which I will deal at this stage – that Article 1F cannot be deployed to revoke C's refugee status, since once recognised as a refugee he can only lose the protection of the 1951 Convention through Article 32 (which I will not set out), and so the s.33 certificate is simply irrelevant on the facts of the case. But as SIAC held (open specific judgment, paragraphs 27 – 28) Article 33 applies to putative and recognised refugees alike, and Article 1F disqualifies a person from refugee status whether or not he has earlier been recognised as a refugee. Any other interpretation produces bizarre results which cannot have been intended by the drafters or the States Parties to the Convention.

D

203. D is an Algerian. He applied for asylum in the United Kingdom on 5 March 1999 claiming that he had arrived here illegally on 27 February 1999. That application was refused on 13 February 2001. D's appeal to the Adjudicator had not been determined when on 17 December 2001 the Secretary of State issued a certificate in his case under ATCSA s.33. The following day he also issued a certificate under s.21 and a decision to deport D.

204. The Secretary of State's case before SIAC was that D was an active supporter of the GIA, used false documents, and was involved with other extremists whom the Secretary of State named. One of these was Djamel Beghal, to whom I shall have to refer further in light of a submission advanced by Mr Gill to the effect that at a late stage the Secretary of State unfairly changed his case. D gave evidence and was cross-examined. SIAC stated (open specific judgment, paragraph 10):

"We regard D as a practised and accomplished liar. We do not believe his excuses, his claims to ignorance, his attempts to distance himself from other terrorist suspects, or his assertions that he has nothing to do with the GIA or other terrorist organisations, networks or activities."

However SIAC at once recognised (paragraph 11) – obviously rightly – that merely to condemn D as not worthy of belief did not of itself make the Secretary of State's case. But they proceeded to reason as follows (paragraph 11):

"[S]ome of the relationships, in particular that with Beghal, had a social content. But that was not all. Taken as a whole, the evidence we have seen is sufficient to support the Secretary of State's case that D's extensive contacts with those who were involved at various levels in terrorist planning and activity did not arise primarily or solely for social reasons: he had contact with these individuals because he was himself supporting international terrorism in various ways. As we note in the generic part of this determination, his association with the GIA would be formally sufficient to justify the certificate, but would not be '*within the derogation*'. His support of the looser network of North African terrorists is, however, sufficient for both purposes. His appeal against the certificate is dismissed."

205. I indicated that I would deal now with Mr Gill's argument for D that at a late stage the Secretary of State unfairly changed his case. What is said is that the Secretary of State alleged for the first time in his final submissions in the closed hearing that D was a member of an international terrorist group described as the "Beghal group", which had not previously been identified as such in the evidence, and that no material was provided in the open case to explain how association with Beghal could be translated into support or assistance for a group. In fact, shortly after the conclusion of the appeal hearing which included D's case, the President of SIAC telephoned leading counsel for the Secretary of State to indicate that he felt that disclosure should be made to D and his advisers about aspects of the closed submissions on behalf of Secretary of State. That was done. On 5 August 2003 the Treasury Solicitor wrote to D's solicitors stating in terms that it was part of the Secretary of State's case that "... Beghal was a leading member of a terrorist network linked to Al Qa'eda", and that "[D] was a member of and/or had links to this network...". Extensive written representations were put in on D's behalf. It was submitted by Mr Gill (supported as I understand it to some extent by Mr Blake) that the admission by SIAC of this new case, if it was such, was irretrievably unfair to D, who would be deprived of a proper opportunity to test it. Before us Mr Gill repeated this argument. He went so far as to submit that the Secretary of State had perpetrated an abuse of the process which had "irretrievably compromised" the proceedings.

206. I have to say I think this point is a conspicuously bad one. It was comprehensively dealt with in SIAC's open generic judgment. I can do no better than cite these passages:

"298... In these cases it has been clear from even the earliest material that the group or groups referred to in the letter [sc. explaining the decision to certify] do not constitute the complete expression of the Respondent's case... We do not think that Mr Blake and Mr Gill have a sound point of appeal to us as a matter of principle, even if the Respondent does change the basis or the emphasis of the case upon which he maintains that the certificate should be upheld. After all, it is universally agreed in relation to those detained that the Commission has to judge matters on the evidence before it as at the date of its decision. Indeed it is only realistic for them to deal with the case as it is in fact mounted by the Respondent at the hearing because, as Mr Blake recognised, the Secretary of State could re-certify on the changed basis...

299. The real issues are whether there has been a change which Appellant D has not had a proper chance to address in open or closed sessions and whether the changed basis or emphasis is sound on its merits. It is plain that there has been a change to some extent revealed in the Respondent's closed closing submissions. He continues to place reliance on the GIA, but, perhaps in recognition of the open evidential problems as to the current activities of the GIA itself and the absence of current organisational links to Al Qa'eda, has sought to show the links to an international terrorist group which is related to the public emergency, by elevating the associates of Beghal into a group which qualifies under the Act and the emergency. There is no doubt that D's association with Beghal formed a significant part of the case against him in open evidence. Mr Blake does not complain that he has been unable to deal with any closed material relevant to this point; his complaint is about the fact that there has been an additional emphasis on what hitherto had not really identified as a

group as such. Likewise, Mr Gill and Appellant D himself have been able to deal with the association asserted between him and Beghal, and any other members of what the Respondent characterises as the group, both as to the nature and the significance of any associations with D or between Beghal and those others. He has been able to deal with the notion of a loosely co-ordinated network of mainly North African radical Islamists with anti-western terrorist agenda. Mr Gill refers to cross-examination and evidence which he was unable to provide; no particular aspect was identified. We do not regard this as a realistic point."

207. I have heard nothing which begins to refute this reasoning. If anything, SIAC took a position too favourable to Mr Gill's argument. Mr Burnett's skeleton argument (paragraph 10.4 ff) deploys material, from the Secretary of State's amended First Open Statement onwards, which demonstrates the Secretary of State's reliance on links between D and Beghal who had, to put it at its lowest, international terrorist connections. I will not lengthen this judgment by setting out the references. Mr Gill's only point is a barren one: that the "Beghal group" had not been so categorised at an earlier stage. I do not think it is shown that that circumstance occasioned the least unfairness to his client.

THE PRINCIPAL ISSUES

208. Three principal arguments were advanced by the appellants. I have already foreshadowed one, namely that relating to evidence obtained by means of torture or other ill-treatment in violation of ECHR Article 3. I will call this the torture issue. The second was that SIAC applied an insufficiently rigorous standard of scrutiny, of the facts and of the Secretary of State's case, in the exercise of its appellate function under ATCSA s.25. I will call this the scrutiny issue. The third was that SIAC misdirected itself in law as to the scope of the derogation under ECHR Article 15. I will call this the derogation issue. Mr Emmerson had the principal carriage of the torture issue; Mr Gill the other two. I must of course explain the nature and the basis of all of them.

209. In addition to the specific arguments in *C* and *D* with which I have dealt, there remain three further matters. One is the jurisdiction issue to which I have referred in setting out the facts in *Ajouaou*, and which arises also in *F*: did the Secretary of State's revocation of the certificates of those appellants, after they had left the United Kingdom, undercut the whole s.25 apparatus, so that there was nothing left against which to appeal and accordingly no jurisdiction to continue the appeal process? The second is a submission by Mr Gill that SIAC should have required of the Secretary of State higher standards than it did in two areas: the investigation of what were referred to as "obvious lines of enquiry", and the disclosure to appellants or to the special advocates (as appropriate) of potentially relevant unused material. The third is a submission, also advanced by Mr Gill, to the effect that the Secretary of State was required to undertake positive investigations, in the case of any prospective detainee, as to whether any other country was prepared to receive him before his detention could be justified on the footing that he could not be removed from the United Kingdom.

210. I find it most convenient to deal first with the derogation issue, the scrutiny issue and the torture issue in that order, and the three further points thereafter.

THE DEROGATION ISSUE

211. The proposition advanced by Mr Gill at paragraph 54 of his skeleton argument is that SIAC misunderstood the scope of the derogation made under ECHR Article 15, drew it too widely, and in consequence held that "it caught persons who cannot fairly be said to [be] within the scope of the derogation". More concretely the submission is (I summarise) that SIAC wrongly accepted that a person's suspected connection with a loose unorganised group not directly linked to Al Qa'eda would in principle suffice to bring him within the reach of certification under ATCSA s.21(2)(b) or (c) read with s.21(3). In short, SIAC adopted too broad an approach to the sense to be given to the term "international terrorist group". In its open generic judgment SIAC articulated the argument as it had been advanced by one of the special advocates, Mr Macdonald QC:

"105.... In order for the necessary link to the public emergency to be made, it was... necessary for the Respondent to show that there was a common aim, the aims of Al Qa'eda, which the Appellants pursued. The fact that there might be some evidence of some association with Al Qa'eda of which an Appellant might have been aware, was insufficient to show the connection to the public emergency; that required the pursuit of the common purpose. That could only be shown by evidence of material assistance and support for the core Al Qa'eda aims. Association with someone who was associated with someone who was connected with Al Qa'eda was not enough. There had to be support in terms of the threat to the United Kingdom; so if there was support for Al Qa'eda in conflicts in Chechnya or for other national purposes e.g. the change of regime in Algeria to an Islamic one, that could not provide the necessary link to the threat to the United Kingdom or the suspicion of one. The core aims of Al Qa'eda could be seen in the 1998 fatwa, which went beyond the encouragement to terrorism which was seen in Bin Laden's 1996 Declaration of Jihad against the US. It was in the 1998 fatwa 'Jihad Against Jews and Crusaders', addressed to all Muslims, that he ordered the killing of Americans and their allies, civilians and military, in any country in which that could be done. It was support for this global jihad, with indiscriminate killings as its aim, which had to be shown through membership of or support for a group which subscribed to the aims and to the means of that fatwa."

212. The argument has been put in various ways, in this court and below. I do not consider it necessary to take time with any other formulations, save to note that it was as I understood him an emphatic theme of Mr Gill's submissions that a person could not lawfully be certified save on suspicion of a *direct* link with Al Qa'eda or associated groups actively pursuing Al Qa'eda's aims.

213. On this part of the case I think it important first to get clear what is the true issue. We are not in these proceedings concerned with the distinct question whether the provisions made by Part IV of ATCSA lie within the terms of the derogation under ECHR Article 15. Domestic law indeed allows such a question to be tested, by means of a challenge to the Derogation Order. Such a challenge was brought, first to SIAC and thence on appeal to this court, in *A, X, Y & ors* to which I have referred earlier in passing. The procedure for the challenge deployed in that case consisted in an application for an order to quash the Derogation Order and a declaration under HRA s.4 that ATCSA s.23 was incompatible with ECHR Articles 5 and

14. The specific point being made was that s.23 permitted the detention of suspected international terrorists "in a way that discriminates against them on the ground of nationality": the provision as enacted could only be deployed against persons who were not British nationals. SIAC acceded to the challenge. Its decision was reversed in this court.

214. In these appeals the argument is not the same. It is to the effect that, given the terms of the derogation, SIAC has interpreted ATCSA s.21 so as to accord a breadth to the expression "international terrorist group" which is wider than the derogation contemplated. Properly understood this argument can in my judgment only go to the correct construction of the statute.

215. In substance the argument depends in considerable measure on the court's acceptance in *A, X, Y* of what was said by the Attorney General as to the government's position on the derogation's scope. Now, it is plain that the powers of ATCSA Part IV are not on their face limited so as only to justify action taken in response to threats to the United Kingdom emanating from Al Qa'eda. The statute makes no reference, express or implied, to any such threats. That was recognised by the court in *A, X, Y*. Lord Woolf CJ accepted at paragraph 42 that Part IV on its face is "over-inclusive". He went on to state in the same paragraph:

"Lord Goldsmith [the AG] gave the Commission on behalf of the government an undertaking that Part 4 would only be used for the emergency which was the subject of the derogation."

Brooke LJ stated at paragraph 98:

"I agree with Lord Woolf CJ that the Secretary of State may not lawfully issue a certificate under section 21 unless he is empowered to do so under the terms of the derogation. This refers in terms to the threat to international peace and security identified by the terrorist attacks on 11 September. In other words it identifies the threat posed by Al Qa'eda and its associated networks (and no one else)..."

Lastly, Chadwick LJ stated at paragraph 149:

"I agree that, on the language of section 21(1) of the 2001 Act, the power to certify does go beyond what can be regarded as strictly required by the exigencies of the situation. But, as Lord Woolf CJ has pointed out..., that is a point of no substance. It is plain that the power to certify can only be exercised in relation to the emergency which gave rise to the Derogation Order. That the Secretary of State recognises that limitation was confirmed by the Attorney General in the course of the hearing."

216. Though it is not strictly germane to Mr Gill's argument, I am driven to say that I would view with considerable unease a state of affairs in which the scope and application of legislation depended upon what a minister of the Crown, here the Attorney General, said was its scope or application. Not because the Attorney's word is questionable; I hope it goes without saying that it is entirely unquestionable. The reason is quite different, and in our developed law must be elementary. It is that the objective state of the law, and the claims or concessions of executive government, are never to be confused. But with great respect I do not consider

that this court in *A, X, Y* based its reasoning on any such claims or concessions pure and simple. The Derogation Order and the Attorney's statement to the court in *A, X, Y* provide the matrix in which, or the vice against which, ATCSA Part IV was enacted. On ordinary principles the Act is to be interpreted against that background. Accordingly the familiar principle established by their Lordships' House in *Padfield* is invoked: the discretionary powers conferred by the Act (to certify and detain) may only be exercised in furtherance of the Act's policy and objects. The Act's policy or object, against the background to which I have referred, is and is only to combat the threat posed to the United Kingdom by Al Qa'eda and its associated networks. Once it is recognised that this is nothing more nor less than an application of the *Padfield* principle, the territory is rock, not sand: law, not concession. I apprehend that this approach is consistent with what was said by Lord Woolf CJ in *M v Secretary of State*, although *Padfield* is not there referred to (paragraph 11):

"Although the definition of a terrorist in s.21 of the 2001 Act is in general terms it is common ground that the Secretary of State's powers under the 2001 Act are limited by the terms of [the Derogation Order]... Accordingly, those powers cannot be exercised (except in accordance with the derogation) in respect of someone whom he does not reasonably suspect or believe to be a risk to national security because of his connection to the public emergency threatening the life of the nation – namely the threat posed by Al-Qaida and its associated networks. Thus it is not enough that the person detained may have had connections with a terrorist organisation. It must be a terrorist organisation which has links with Al-Qaida."

217. The question, then, is whether SIAC ought to have held that any of these appellants had been certified and detained otherwise than in pursuance of the Act's policy and objects, namely to combat the threat posed to the United Kingdom by Al Qa'eda and its associated networks. And it is to be assumed that the legislature chose the words of Part IV of ATCSA as being apt to give effect to this object. In particular, the term "international terrorist group" in s.21 has to be read so as to reflect the reality of the way in which Al Qa'eda operates.

218. SIAC's open generic judgment contains a good deal of material which demonstrates the reality of the way in which Al Qa'eda operates, certainly in relation to the threat it poses to the United Kingdom:

"96. The true emphasis, for the limit to the exercise of Part 4 powers, is on the emergency underlying the derogation... There is a risk that that phrase ["Al Qa'eda and its associated networks (and no-one else)" – Brooke LJ in *A, X, Y*], taken in isolation from the rest of the judgments and indeed that of the Commission, might be thought to suggest clear cut distinctions and a clear point at which the nature or number of the links to an associated group fell outside the scope of the derogation. The reality of the nature of the terrorist groups and individuals, whose activities give rise to the emergency and the derogation, does not permit such clear cut distinctions. As was pointed out in the evidence for the derogation hearings, Al Qa'eda and its associates are loosely knit, lack formal organisational structures and have links with other active terrorist organisations...

97. In the appeals, the Respondent's evidence referred regularly to the link to Al Qa'eda being created not just by national groups but by a loosely co-ordinated series of overlapping

networks. They shared a broadly similar ideology, had shared training and jihad experiences and shared logistic and financial support. Mr Williams submitted that the derogation covered:

'... individuals in the United Kingdom who are members of Al Qa'eda or its associated networks or are linked to members of such organisations or groups [and] are by reason of that fact part of the threat to the United Kingdom which comprises the current public emergency. That threat is compounded where they provide support for Al Qa'eda or any of the networks associated with it because they are thereby enhancing the capability of those networks.'

98. He identified groups such as the GIA and the GSPC, the EIJ, the Arab Mujahaddin in Chechnya, the Abu Doha group or network, a group or network centred around Beghal, and a wider North African network comprised of "*individuals who are also previous or present members of other networks linked to Al Qa'eda (including the GSPC and the Abu Doha Group) and is itself part of the Al Qa'eda network or a network linked to Al Qa'eda*". A UN Monitoring Report of August 2002... described Al Qa'eda as *'a series of loosely connected operational and support cells.'* A diagram annexed to it illustrated what was meant: at the centre of an oval was Al Qa'eda, linked by arrows to the cardinal points where were marked four distinct but interlinked entities: the strategic decision-making structure, the base force for guerrilla warfare in Afghanistan, the loose coalition of transnational terrorist and guerrilla groups, and the global terrorist network. Links around the circumference of the oval connected to those groups.

99. We accept that general schematic description of Al Qa'eda and its associated networks; it was borne out by all the evidence which we heard and was not the subject of serious debate. Terrorist groups have historically worked in small cells, often disconnected from each other with deliberate cut-outs in the chain of command, with direct communication at operational level to the leadership hierarchy discouraged... [W]e accept Mr Williams' submission as to what connections and with whom had to be shown for the purposes of the derogation and in very summary form his submission as to why, if such connections are shown, it shows the link to the public emergency and why the threat is increased. Of course, Mr Williams is using the word "link" in its specific statutory meaning. Mr Williams submitted that it would be an unwarranted restriction on the scope of the emergency to require the group of which an Appellant was a member or to which he was "linked" in the statutory sense to be a supporter of the core aims of Al Qa'eda as expressed in the February 1998 fatwa. That was one core aim or statement of intent and means but not the only objective. Its objectives were a combination of the global and national, the latter being part of and assisting the former and vice versa. It was not necessary to show that an individual supported that fatwa in order to show, to the requisite standard of proof that he was both an international terrorist and connected to the public emergency."

219. Mr Gill offers no substantial challenge – indeed, no challenge at all – to these findings. Nor could he sensibly do so. They are based on a very large body of evidence considered by SIAC over many weeks. In those circumstances it is in my judgment all the more difficult to quarrel with SIAC's rejection of the submissions made by Mr Macdonald and Mr Gill:

"108... [W]e are of the view that the formulation by Mr MacDonald of the link to Al Qa'eda

and those associated with it, as requiring support for a core aim of global jihad, expressed in the indiscriminate killing of civilians, is too narrow an approach. It is not necessary for adherence to that core aim of Al Qa'eda, expressed in the 1998 fatwa, to be the point of overlap between the GSPC, GIA, Al Qa'eda or the Appellants. Similarly, Mr Gill's submission that there has to be support for the core aims of global jihad against the West by terrorist means is too narrow. The threat to the life of the nation is not so confined although that is an obvious part of it. The threat is not confined to activities which may take place within the United Kingdom for the nation's life includes its national activities abroad whether diplomatic, cultural or in civil aviation and tourism. Nor would it necessarily be right to suppose, in the light of *Rehman*, that the nation's life cannot be threatened by attacks upon other countries who are allies, friends or vital sources of material for the economy such as oil. This threat could come directly from the disruption created by such attacks, or indirectly from the strength which the terrorist may gain from such an attack in a world in which the interdependence of countries facing a global terrorist threat is obvious. The threat to the nation, which underlies the derogation, is posed by any of the various activities of Al Qa'eda and those who are associated with it, whether or not they agree with all aspects of his global agenda or with the indiscriminate killing of civilians as a means or end.

109. It is necessary to understand the overlap between the various groups and individuals, and how they connect to Al Qa'eda, to realise why the derogation is expressed as it is. Take the Arab Mujahaddin fighting in Chechnya: those who go there or support those who fight there with that group, connected as it is to Al Qa'eda, are assisting fighters with a radical Islamic agenda to train, and to gain experience and prestige which is capable of being deployed later for global jihad purposes or in the recruitment of others, radicalised by their experiences, to be part of a United Kingdom based terrorist support network able to carry out attacks in or against the United Kingdom. The derogation is properly seen as related to Al Qa'eda and its associates. The "international terrorist group" contemplated by section 21 is Al Qa'eda or a group associated with it, provided it is recognised that the very nature of the groups associated with Al Qa'eda encompasses informal, even ad hoc, groups which can as easily or better be described as overlapping, loosely co-ordinated groupings or networks. Their purposes may overlap in part but not in whole, and they may not agree with all the means which another would use; but that does not prevent them being part of the threat to the life of the nation as a matter of principle or law. It is that connection to Al Qa'eda which provides the threat rather than a desire for a particular type of atrocity, because it is Al Qa'eda and its associates which provide the threat to the nation by whatever means they consider further their anti-western agenda and through whomsoever they operate directly or indirectly."

220. Given these findings, it can be seen that Mr Gill's argument on the derogation issue, if it were accepted, would confine the application of ATCSA Part IV to a scope or compass much narrower than is required for the fulfilment of the Act's policy and objects. That is sufficient to condemn the submission. There might, of course, be a case where, through bad or inapt drafting, the court felt driven to conclude that a statute's policy and objects could not be met because the words used simply did not allow it. But that is not so here. The term "group" is perfectly apt to encompass the kind of loose-knit associations which SIAC describes.

221. I should add that it seems to me that Mr Gill's argument is also flawed by another mistake,

which I think is of some importance. He submits that because "[t]he powers in s.21 have a grossly detrimental effect on fundamental human rights" they must be narrowly construed. Now, I certainly accept that the court will be very astute indeed to see that a claimed power of executive detention on grounds only of suspicion and belief enjoys a solid justification on the words of the statute. But that engages the *scrutiny* issue. In the context of the *derogation* issue such a claimed power in my judgment offers no basis upon which to shrink the reach of the Act's policy and objects. If anything, the reverse: the legislature's choice of belief and suspicion as the test for certification and thus detention tends to support the view that the target of the Act's policy includes those who belong to loose, amorphous, unorganised groups. At the least it is consistent with such a view. The derogation issue is the wrong territory in which to sound the drum of individual rights. In this territory, the loudest noise is the Al Qa'eda threat, in all its manifestations.

222. For all these reasons I consider that Mr Gill's submissions on the derogation issue have no force whatever, and I would reject them.

THE SCRUTINY ISSUE

223. Earlier I characterised Mr Gill's submission on this issue as being to the effect "that SIAC applied an insufficiently rigorous standard of scrutiny, of the facts and of the Secretary of State's case, in the exercise of its appellate function under ATCSA s.25". That was I hope a convenient summary. However on the face of it the argument, certainly as articulated in Mr Gill's skeleton, contains a number of different strands; but they are extremely repetitive. Thus it is said that the grounds for belief and suspicion under ss.21 and 25 must point "unequivocally and strongly to the conclusion" that the person in question is an international terrorist and a risk to national security. Then exception is taken to SIAC's comment in paragraph 71 of the open generic judgment that [the test for reasonable grounds for the relevant belief and suspicion] "is not a demanding standard for the Secretary of State to meet". Mr Gill submits by contrast that the Secretary of State must in fact meet a very demanding or exacting standard. Then it is said that where the case is not urgent, the test for reasonable belief and suspicion must be the more stringent, there being more scope for the Secretary of State to investigate the circumstances. Mr Gill reminded us that C had been under investigation for many months and D since February 1999. Next it is submitted that the powers granted are so intrusive as to require "an extremely strong basis for suspicion". Next, that suspicion must be based on the establishment of objective and verifiable facts, so that there is more than a *prima facie* case of the kind required in the law of crime to justify the detention of a suspect before charge.

224. I was not assisted by these repetitive arguments. It is axiomatic that a power of executive detention on grounds of no more than belief and suspicion – albeit reasonable belief and suspicion – is on its face grossly antithetical to established constitutional rights. Our task is to construe ATCSA Part IV so as to ascertain the nature of the power conferred by s.21, and by the same token the scope of SIAC's function under s.25(2). That requires some consideration of the policy and objects of the Act, to which I have already referred, and also as it seems to me the checks and balances for which, given the draconian powers of s.21, ATCSA itself provides: not only the right of appeal to SIAC but also the provisions for review in individual cases under s.26, the requirement for review of the operation of ss.21 – 23 under s.28, and

the "sunset" clause provided in s.29. But we were not assisted by any developed submissions on these matters.

225. Mr Gill advanced two concrete submissions. The first was that where past facts are relied on by the Secretary of State to establish a reasonable suspicion that an individual is a terrorist within s.21, then on an appeal to SIAC the Secretary of State must prove the facts alleged "to a high degree of probability or at least on balance of probabilities". For this proposition Mr Gill relied on the decision of their Lordships' House in *Rehman*. The second concrete submission was that in assessing risk to national security under ATCSA s.25, SIAC should have paid less deference to the views of the Secretary of State (in essence, the views of the Security Service) than in fact it did. For this proposition Mr Gill sought to distinguish *Rehman*.

226. The passage in which SIAC address the question what deference is due to the Secretary of State's views on matters of national security is to be found at paragraphs 62 – 71 of the open generic judgment. I need cite only paragraph 67 (in which the references to Lord Steyn and Lord Hoffmann are to their Lordships' opinions in *Rehman*):

"67. The question of whether a risk to national security exists is one on which the Commission should show deference to the Secretary of State. Due weight, not unquestioning adherence, must be given to the views and assessment of the Secretary of State who bears the direct responsibility for the safety of the country and is answerable to Parliament for his actions. As Lord Steyn said, at paragraph 28, *'the executive is the best judge of the need for international co-operation to combat terrorism…'*. Lord Hoffmann made the point at paragraph 50 that the question of whether something is in the interests of national security is a matter of judgment and policy, entrusted to the executive and not to the courts. It is artificial to separate such issues from foreign policy, which is an issue for Ministers answerable to Parliament and not for the courts. At paragraph 54, he pointed to the need for the Commission to evaluate the material relied on by the Secretary of State, but considered that its scope to differ from the Secretary of State's views was limited by the advantage which he had over the Commission through the advice which he received from people with specialist day-to-day involvement in security matters, given the very considerable margin allowed to his appraisal of national security matters especially as they involved the assessment of risk. The cost of failure, as he put it, can be high; this required the judiciary to respect the conclusions of the Secretary of State that, in that case, support for foreign terrorists acting in a foreign country constituted a threat to national security. Such decisions required a legitimacy which could only be conferred by entrusting them to those who were answerable for them to Parliament."

227. *Rehman* was a case in which the Secretary of State had decided to make a deportation order against a Pakistani national under s.3(5)(b) of the Immigration Act 1971 on the ground that his deportation would be conducive to the public good in the interests of national security. Because of the national security element the appellant's appeal against the decision was to SIAC and not to the regular immigration appellate authorities; I need not give the legislative detail, which is contained in SIACA. SIAC allowed the appeal. The Secretary of State's appeal from SIAC was allowed by this court. The House of Lords dismissed the appellant's further appeal.

228. The reasoning in *Rehman* relied on by Mr Gill to support both arguments, namely that the Secretary of State must prove past facts relied on and that SIAC paid excessive deference to the Secretary of State's view of national security, is principally to be gathered from two passages, respectively to be found in the speeches of Lord Slynn of Hadley and Lord Hoffmann. I will first cite Lord Slynn at paragraphs 21 – 23:

"21. Mr Kadri's second main point is that the Court of Appeal were in error when rejecting the Commission's ruling that the Secretary of State had to satisfy them, 'to a high civil balance of probabilities', that the deportation of this appellant, a lawful resident of the United Kingdom, was made out on public good grounds because he had engaged in conduct that endangered the national security of the United Kingdom and, unless deported, was likely to continue to do so...

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

23. Contrary to Mr Kadri's argument this approach is not confusing proof of facts with the exercise of discretion—specific acts must be proved, and an assessment made of the whole picture and then the discretion exercised as to whether there should be a decision to deport and a deportation order made."

Then Lord Hoffmann:

"54. ... It is important neither to blur nor to exaggerate the area of responsibility entrusted to the executive. The precise boundaries were analysed by Lord Scarman, by reference to *Chandler v Director of Public Prosecutions* [1964] AC 763 in his speech in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 406. His analysis shows that the Commission [viz. SIAC] serves at least three important functions which were shown to be necessary by the decision in *Chahal*. First, the factual basis for the executive's opinion that deportation would be in the interests of national security must be established by evidence. It is therefore open to the Commission to say that there was no factual basis for the Home Secretary's opinion that Mr Rehman was actively supporting terrorism in Kashmir. In this respect the Commission's ability to differ from the Home Secretary's evaluation may be

limited, as I shall explain, by considerations inherent in an appellate process but not by the principle of the separation of powers. The effect of the latter principle is only, subject to the next point, to prevent the Commission from saying that although the Home Secretary's opinion that Mr Rehman was actively supporting terrorism in Kashmir had a proper factual basis, it does not accept that this was contrary to the interests of national security. Secondly, the Commission may reject the Home Secretary's opinion on the ground that it was 'one which no reasonable minister advising the Crown could in the circumstances reasonably have held'...

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

229. I will first address Mr Gill's submission that where past facts are relied on by the Secretary of State to establish a reasonable suspicion that an individual is a terrorist within s.21, then on an appeal to SIAC the Secretary of State must prove the facts alleged "to a high degree of probability or at least on balance of probabilities". The starting-point must be the language of the statute. It seems to me that the structure of s.21(1) repays close attention. Two states of mind are required of the Secretary of State if he is to issue a lawful certificate: a reasonable *belief* in a *risk* and a reasonable *suspicion* of a *fact*. Belief and suspicion are not the same, though both are less than knowledge. Belief is a state of mind by which the person in question thinks that X *is* the case. Suspicion is a state of mind by which the person in question thinks that X *may be* the case. Now, the risk to national security referred to in s.21(1)(a) is a matter of evaluation; the Secretary of State must reasonably believe that the risk is correctly evaluated. But when in s.21(1)(b) the statute confronts fact rather than evaluation, a lesser state of mind is required; the Secretary of State must reasonably suspect that A is a terrorist, that is, he must reasonably think that A may be a terrorist. This alignment of belief with evaluation and `suspicion with fact, which is plainly carried through to the appeal provision contained in s.25, must have been arrived at advisedly. No doubt it was driven by the nature of the subject-matter. The assessment of the question whether a person is a terrorist within the meaning of s.21(2) will most likely depend on intelligence – the pieces of an often incomplete jigsaw puzzle – rather than hard evidence. Accordingly it will be difficult or impossible to get any further than suspicion.

230. These considerations possess, in my judgment, two consequences for Mr Gill's argument. First, while it would have been hard enough to find a requirement of proof of facts had the statute said in s.21(1)(b) "*believes* that the person is a terrorist", it is certainly impossible to do so faced with a requirement of suspicion only. Mr Gill's submission is hopelessly foundered

on the language of the Act. As for his reliance on *Rehman*, it is important to have in mind with respect that *Rehman* did not at all engage Part IV of ATCSA, which was not on the statute book at the time of the Secretary of State's decision or SIAC's judgment on appeal in that case. Their Lordships were dealing with the deportation provisions contained in the Immigration Act 1971 which have no analogue to ATCSA s.21. Moreover, while I of course acknowledge Lord Slynn's reference (paragraph 22) to the need to prove specific past acts relied on, the central place of evaluation in a security context received much emphasis from their Lordships.

231. The second impact upon Mr Gill's argument arising from these considerations of the choice of language in the Act is this. The nature of the subject-matter is such that it will as I have indicated very often, usually, be impossible to prove the past facts which make the case that A is a terrorist. Accordingly a requirement of proof will frustrate the policy and objects of the Act. Now, it will at once be obvious that the derogation issue and the scrutiny issue run together here. In dealing with the former I have already said that the legislature's choice of belief and suspicion as the test for certification and thus detention tends to support the view that the target of the Act's policy includes those who belong to loose, amorphous, unorganised groups. So it does; the choice is apt to strike the target. Proof would not be. Just as Mr Gill's submission misdescribes the Act's policy and objects, so it misdescribes the mechanisms provided for their achievement.

232. However in addressing the derogation issue I also said that the imperative of a solid justification, on the words of the statute, for any claimed power of executive detention on grounds only of suspicion and belief engages the scrutiny issue; and I have summarised Mr Gill's various formulations of the need for stringent tests before the material belief or suspicion should be held to be established. Should our abhorrence of executive detention drive the court to accept that in truth something more than belief and suspicion is required, despite the statute's language and its aptness to achieve the statute's objects?

233. The construction of statutes is hardly ever a value-free exercise. Where a statute on its ordinary construction infringes a constitutional right, the courts will look to see whether it may after all be construed so as to avoid or at least diminish such an infringement. This is not merely a function of HRA s.3(1). It is a function also of the common law, which gives special protection to constitutional fundamentals, albeit that s.3(1) is an interpretative tool of particular force in the context of ECHR rights. In any event there is here – leaving aside Mr Emmerson's arguments on the torture issue, to which I must come separately – no question of any actual or putative violation of the ECHR. It is true that Mr Gill, as I understood him, submitted that the derogation, articulated in the Derogation Order, only justified indefinite detention without trial and not the adoption of arbitrary procedures (such as a need only to show belief or suspicion) which were inherently repugnant to Article 5. But this submission in truth does no more than seek to re-introduce the discipline of the very provisions of Article 5(1) which are the subject of the United Kingdom's lawful derogation under ECHR Article 15, and as such is doomed to failure.

234. The question, then, is what the common law should say. Since it is elementary that the common law cannot step into the legislature's shoes, it has to be accepted that to conclude that suspicion, or for that matter belief, means or means in part something quite different –

proof – is to climb a very tall hill indeed. In the end I am clear that we should not even step onto the lower slopes. First, we are dealing, as I said at the outset, with the tension between two constitutional fundamentals: the abhorrence of executive detention and the State's duty to safeguard its citizens and its own integrity. The first of these is in large measure the business of the courts, and the second the business of government. Where, as here, they clash, and the ground on which they do so is a statute which allows the first so as to secure the second, the courts' duty is surely as follows. First, they must respect the legislature's sovereignty; they cannot re-legislate; so much goes without saying. Secondly, so far as there is scope to construe the statute more or less narrowly so as to lean against executive detention without trial or to require stringent proof of its justification, the courts will look to see how far the legislature has built protections into the legislation out of respect for the first constitutional fundamental, the abhorrence of executive detention. To the extent that that is done, the court will incline to a broader construction of the power relied on by the State. To the extent that the legislation does not on its face respect this first constitutional fundamental, the court will look, so far as it may, to confine the conferred power of executive detention by a narrower construction of the statute. The principle is in essence that of proportionality, which the common law has made its own. It is that the courts will expect the legislature to interfere with fundamental constitutional rights to the minimum extent necessary to fulfil the State's duty to safeguard its citizens and its own integrity. If it is perceived that that is not done, the courts will tend to confine and restrict the legislation's interference with constitutional rights, so far as they may do so consistently with Parliament's ultimate legislative supremacy. It must be obvious that there should be a partnership, not an opposition, between the branches of government in these matters.

235. In the present case, the requirement that the belief and suspicion must be reasonable is in my judgment very important, especially at the s.25 appeal stage. It means that the appeal is no mere *Wednesbury* exercise. SIAC has a substantial task on the merits, to assess the presence or absence of reasonable grounds for the relevant suspicion and belief. It is plain that SIAC recognised this, and its detailed and meticulous treatment of the evidence, open and closed, testifies as much. The fact of a substantial, meaningful right of appeal to a senior independent court marks the legislature's respect for the first constitutional fundamental, the abhorrence of executive detention. So do the carefully structured procedures for the deployment of special advocates. Further, I attach no little importance to the other protections which I have summarised: the provisions for review in individual cases under s.26, the requirement for review of the operation of ss.21 – 23 under s.28, and the "sunset" clause provided in s.29. In this connection I have had in mind the observations of Lord Woolf CJ, set out at paragraphs 60 – 62 of his judgment in *A, X, Y*, concerning the reasoned opinion given by the Commissioner for Human Rights on aspects of the United Kingdom's derogation from Article 5. I need not, with respect, set out these materials.

236. In my judgment ATCSA provides for a reasonable balance between the constitutional fundamentals I have discussed. In those circumstances there is no cause to adopt a strained and artificial construction of the critical provisions in ATCSA, even if (which I greatly doubt) there were any legitimate scope to do so. This conclusion is, I think, supported by these observations of Lord Woolf CJ in *M v Secretary of State*:

"17. SIAC is required to come to its decision as to whether or not reasonable grounds exist

for the Secretary of State's belief or suspicion. Use of the word 'reasonable' means that SIAC has to come to an objective judgment. The objective judgment has, however to be reached against all the circumstances in which the judgment is made. There has to be taken into account the danger to the public which can result from a person who should be detained not being detained. There are also to be taken into account the consequences to the person who has been detained. To be detained without being charged or tried or even knowing the evidence against you is a grave intrusion on an individual's rights. Although the test is an objective one, it is also one which involves a value judgment as to what is properly to be considered reasonable in those circumstances ..."

237. There remains, on this part of the case, Mr Gill's submission about deference. In my judgment it is entirely without substance. I have heard nothing to undermine SIAC's reasoning at paragraph 67 of the open generic judgment, which I have set out. Mr Gill submitted that there was a material difference between the kind of danger to national security being considered in *Rehman* and an emergency threatening the life of the nation such as has given rise to the enactment of ATCSA. I have not been able to understand the submission that less deference should be paid to the Secretary of State (or to the State's security experts who advise him) in the latter case than in the former. Given the loose and amorphous nature of at least some aspects of Al Qa'eda and its associates, and therefore of the threat they pose, I should have thought, if anything, that the opposite should be the case.

238. I would reject all of Mr Gill's arguments on the scrutiny issue.

THE TORTURE ISSUE

239. It is first necessary to establish the factual basis on which, in its determination of this part of the case, the court ought to proceed. I have already said that the torture issue first arose in E's appeal. At paragraph 3 of their open specific determination in *E* SIAC refer to certain allegations to which Mr Emmerson had drawn attention, for example that Beghal had stated that confessions made by him had been forced out of him and were untrue. In the same paragraph SIAC conclude:

"... [T]here is no sufficient material which persuades us that we can conclude either that torture or other treatment contrary to Article 3 of the ECHR was used or even that it may have been used if (which we doubt) that is the test to be adopted."

In the open generic judgment SIAC had a little more to say about what Mr Emmerson was suggesting:

"72. ... He [Mr Emmerson] referred to many observations made about treatment by the Americans at, for example, Guantanamo Bay and allegations about ill-treatment of particular individuals such as Moazzim Begg. Thus Abu Zubaida, said to be an important terrorist with close links to Osama Bin Laden, had suffered a bullet wound when captured and it was alleged that he was interrogated without any treatment being given for the wound. It might apply to the partially retracted confession of Djamel Beghal in the United Arab Emirates."

It is plain to my satisfaction that there was no evidence in any of the appeals which should have persuaded SIAC that any material relied on by the Secretary of State had in fact been obtained by torture or other treatment in violation of ECHR Article 3. Nor did SIAC think there was. In those circumstances, while I myself have said that the torture issue is by far the most important point in the case, I have thought it right to consider whether it is a point that should properly be pursued at all. For good reason we do not generally adjudicate upon hypothetical questions.

240. SIAC also said this in the open generic judgment:

"80. We do, however, accept that if there is material which shows that torture or other breaches of Article 3 may have been used to obtain the information relied on, those advising the Respondent and we must consider that material since, at the very least, it will bear on the proper weight to be given to the information. If torture is alleged, that must be looked into, but the material will not fall within the embargo set out in Article 15 [sc. of CAT] unless torture is established. And the assertion by an individual that he or anybody else was tortured may not of itself suffice to prove that he was: he may be seeking to exclude evidence against him which would be damning."

241. I have concluded that we ought to pass judgment on Mr Emmerson's arguments which were advanced as a matter of principle on the torture issue. It is important that the legal position be as clear as possible – for appellants, the Secretary of State, and SIAC itself – when there is a suggestion (which may by no means be liable to be dismissed out of hand) that material relied on *may* have been obtained by methods involving violations of Article 3. And that leads to the concrete formulation by which I would, for the purposes of these appeals, articulate Mr Emmerson's contention. I would put it thus: where it is credibly asserted that evidence relied on by the Secretary of State has been or may have been directly obtained by means of torture or other violation of Article 3, SIAC should not receive such evidence on an appeal under s.25 (unless, no doubt, the matter were investigated and the assertion reliably contradicted): and this is so whatever view SIAC may provisionally form as to the truth of the evidence. I should explain what I mean by "directly". There is plainly a distinction between (1) evidence directly attributable to torture, such as a statement got from a detainee by means of torture, and (2) material indirectly so obtained: that is to say the existence of facts to which the questioner is alerted by the statement obtained under torture, which can then be followed up. The detainee may for example reveal to his questioner the hidden location of terrorist equipment. The Secretary of State, apprised of the stated location, may go and dig up the equipment. Our attention was drawn to s.76(4)(a) of the Police and Criminal Evidence Act 1984 ("PACE") which provides in the context of a criminal trial that where a confession is excluded under s.76(2) because it was or may have been obtained by oppression, the admissibility in evidence "of any facts discovered as a result of the confession" is not thereby affected. It seems to me to be obvious that a fact which became known initially through a tainted statement can be relied on before SIAC, at least if the statement itself does not have to be deployed. The real debate on the torture issue is about the direct use of statements which may have been obtained by torture.

242. I will start with the law of evidence. We were shown much authority to support the

proposition that in a criminal trial a confession exacted by threats (*a fortiori* by actual violence) or promises is without qualification inadmissible. This was, however, an exception to the general rule of the common law, which was that (in civil and criminal cases alike) evidence is admissible if it is relevant, and the court is not generally concerned with its provenance. The general rule, and the exception, are crisply stated by Lord Goddard giving the judgment of the Judicial Committee of the Privy Council in *Kuruma v R.* I need not with respect set out the relevant passages. The principle is that if a suspect confesses, his confession if it is later to be relied on must be shown to have been freely and voluntarily made: see also *R v Thompson.* It is a principle which goes back at least as far as Coke. Mr Emmerson sought to persuade us that this exclusionary rule (now encapsulated in s.76 of PACE) enjoys or should enjoy a wider sphere of application, so as to exclude any evidence, not only a defendant's confession, if it was obtained by torture or other ill-treatment, and should be so applied in any kind of proceedings. I have seen nothing in the common law cases which supports that submission.

243. There was some discussion in the course of argument as to whether the basis of the rule about confessions rested upon the perceived unreliability of admissions which had been induced by ill-treatment, or some broader ethical principle by which the courts had set their face against letting in such material because they disapproved on moral grounds of the way in which it had been obtained, whether or not it might be reliable. So far as this debate was instigated by myself I should apologise for it, for I have come to think it barren. The reason is that Mr Emmerson cannot rely on any rule of evidence to support his case on the torture issue, whatever its motivation, because SIAC are by subordinate legislation not bound by any rules of evidence. I repeat for convenience Rule 44(3) of the SIAC Procedure Rules:

"The Commission may receive evidence that would not be admissible in a court of law."

The result is that no appeal to the law of evidence can prosper Mr Emmerson's argument, because any exclusionary rule vouchsafed by the law of evidence (whatever the rule's motivation) is disapplied from proceedings before SIAC by force of Rule 44(3). Mr Emmerson has therefore to show that there exists some over-arching or constitutional principle, not capable of being abrogated by the Rule, which vouchsafes the result for which he contends. In particular, the principle must be one which, by force of its constitutional or fundamental nature, subordinate legislation such as Rule 44(3) cannot lawfully override in the absence of express or at least specific authority: see for example such cases as *Simms.*

244. In what might such a principle consist? Mr Emmerson has two candidates. First he submits that the admission by SIAC of evidence which may have been obtained by torture would by the common law amount to an abuse of process. He says that this principle of abuse of process is independent of the common law rule relating to the exclusion of improperly obtained confessions. Whether that latter rule depended on the need to exclude unreliable admissions or more generally on the law's repugnance to torture, the condemnation of abuse of process is distinctly based on the common law's refusal to tolerate arbitrary or oppressive conduct by State authority. It amounts to a constitutional fundamental, and it would be violated by SIAC's receiving evidence which may have been obtained by means of torture or other violation of Article 3.

245. Mr Emmerson's second argument on this part of the case was that the reception of evidence of the kind objected to would constitute a violation of ECHR Article 6(1); and the court should read Part IV of ATCSA so as to avoid such a result, and so hold that such evidence should be excluded. I should say at this stage that in developing his case both on the common law and Article 6 Mr Emmerson was at pains to muster the support of CAT Article 15 which, in both contexts, was he said "an important source of guidance".

246. Mr Emmerson also advanced a subsidiary argument. It took a little teasing out, and that was done with the assistance of further written submissions supplied after the close of the hearing. It was, as in the end I understood it, as follows. (1) Admission of evidence of the kind objected to would violate the United Kingdom's obligations under CAT Article 15. But (2) compliance with our international obligations (other than those arising under ECHR) is a condition of a lawful derogation under ECHR Article 15. (3) We should therefore construe ATCSA as not permitting the admission of such evidence; it is to be presumed that the derogation was lawful, and the statute should be interpreted (so far as possible) to promote that result.

The Common Law – Abuse of Process

247. Mr Emmerson placed substantial reliance on recent leading cases dealing with abuse of the process in the criminal jurisdiction: *Ex p. Bennett*, *R v Mullen* (in which the judgment of the Court of Appeal Criminal Division delivered by the Vice President contains substantial citations from their Lordships' opinions in *Bennett*), and in particular *R v Looseley* in their Lordships' House. With respect I need consider only the reasoning in *Looseley*. There were two cases before their Lordships. Both involved entrapment or alleged entrapment; in each the accused had supplied heroin to undercover police officers. I need say nothing more about the facts. Lord Nicholls said this:

"1. My Lords, every court has an inherent power and duty to prevent abuse of its process. This is a fundamental principle of the rule of law. By recourse to this principle courts ensure that executive agents of the state do not misuse the coercive, law enforcement functions of the courts and thereby oppress citizens of the state. Entrapment, with which these two appeals are concerned, is an instance where such misuse may occur. It is simply not acceptable that the state through its agents should lure its citizens into committing acts forbidden by the law and then seek to prosecute them for doing so. That would be entrapment. That would be a misuse of state power, and an abuse of the process of the courts. The unattractive consequences, frightening and sinister in extreme cases, which state conduct of this nature could have are obvious. The role of the courts is to stand between the state and its citizens and make sure this does not happen."

Lord Nicholls proceeded to discuss earlier learning, not least their Lordships' decision in *R v Sang* in which the House affirmed that, aside from admissions and confessions, the court was not concerned with how evidence was obtained. Then at paragraphs 11 and 12 he considered s.78 of the Police and Criminal Evidence Act 1984, and continued:

"12. ... Most recently in *R v Shannon* [2001] 1 WLR 51, 68, para 39 Potter LJ, as I read his

judgment, accepted that evidence may properly be excluded when the behaviour of the police or prosecuting authority has been such as to justify a stay on grounds of abuse of process.

13. Next, the common law also has developed since the decision in *R v Sang*... In ... *Ex p Bennett*... your Lordships' House held that the court has jurisdiction to stay proceedings and order the release of the accused when the court becomes aware there has been a serious abuse of power by the executive. The court can refuse to allow the police or prosecuting authorities to take advantage of such an abuse of power by regarding it as an abuse of the court's process. Lord Griffiths, at p 62, echoed the words of Lord Devlin that the courts 'cannot contemplate for a moment the transference to the executive of the responsibility for seeing that the process of law is not abused': see *Connelly v Director of Public Prosecutions* [1964] AC 1254, 1354. The judiciary should accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that 'threatens either basic human rights or the rule of law': [1994] 1 AC 42, 62.

...

19. As already noted, the judicial response to entrapment is based on the need to uphold the rule of law. A defendant is excused, not because he is less culpable, although he may be, but because the police have behaved improperly. Police conduct which brings about, to use the catchphrase, state-created crime is unacceptable and improper. To prosecute in such circumstances would be an affront to the public conscience, to borrow the language of Lord Steyn in *R v Latif* [1996] 1 WLR 104, 112. In a very broad sense of the word, such a prosecution would not be fair."

The next citation (also from Lord Nicholls' opinion) is important for Mr Emmerson's argument based on ECHR Article 6(1). It is convenient to collect the passage at this stage.

"30. The question raised by *Attorney General's Reference (No 3 of 2000)* is whether, in a case involving the commission of an offence by an accused at the instigation of undercover police officers, the judicial discretion conferred by section 78 of the Police and Criminal Evidence Act 1984 or the court's power to stay proceedings as an abuse of the court has been modified by article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the jurisprudence of the European Court of Human Rights. I would answer that question in the negative. I do not discern any appreciable difference between the requirements of article 6, or the Strasbourg jurisprudence on article 6, and English law as it has developed in recent years and as I have sought to describe it.

31. *Teixeira de Castro v Portugal* 28 EHRR 101 concerned a conviction for trafficking in heroin, based mainly on statements of two police officers. The European Court of Human Rights held, at p 116, para 38, that the necessary inference from the circumstances was that these officers had 'exercised an influence such as to incite the commission of the offence'. The court concluded there had been a violation of the applicant's right to a fair trial under article 6(1). The court's statement of principle, at p 115, para 36, is not divergent from the

approach of English law."

Lastly I will set out just this paragraph from Lord Hoffmann's opinion:

"40. ... [In *Ex p Bennett*] the House of Lords decided that a criminal court had power to inquire into allegations that the accused had been kidnapped abroad by authorities acting in collusion with the UK police and, if it found them proved, had a discretionary jurisdiction to stay the proceedings. Lord Griffiths said that the jurisdiction was necessary to enable the courts to refuse to countenance behaviour which threatened basic human rights or the rule of law. The stay is sometimes said to be on the ground that the proceedings are an abuse of process, but Lord Griffiths described the jurisdiction more broadly and, I respectfully think, more accurately, as a jurisdiction to prevent abuse of executive power."

The Common Law – Constitutional Principle

248. In my judgment the reasoning in *Looseley* rests on a general constitutional principle, which their Lordships then considered in the particular context of criminal prosecutions. It is the most elementary principle in our books. It is that the law forbids the exercise of State power in an arbitrary, oppressive or abusive manner. This is, simply, a cardinal principle of the rule of law. The rule of law requires, not only that State power be exercised within the express limits of any relevant statutory jurisdiction, but also fairly and reasonably and in good faith. Consequently the courts will not entertain proceedings, or receive evidence in ongoing proceedings, if to do so would lend aid or reward to the perpetration of any such wrongdoing by an agency of the State. Thus if a criminal prosecution is the fruit of such State misconduct, the court will not hear the case; or, depending on the facts, it may be enough to exclude the testimony of a particular witness or witnesses.

249. Because the principle is entirely general, its deployment in the context of legal proceedings to see that State misconduct does not prosper is obviously not limited to criminal prosecutions. If the State sought in any form of judicial process to obtain a favourable result, or some other kind of advantage, by relying on unconstitutional conduct by its servants acting on its behalf, the court dealing with the case would not allow it and would take whatever steps were required to prevent it: whether by stopping the case, debarring a defence, or excluding evidence. Accordingly, while the plain differences between the conventional criminal process and the regime of appeals under ATCSA s.25 are important and have to be recognised, they are simply irrelevant to the application of the principle I have described. The Secretary of State is no more entitled to rely on State abuse of power in a SIAC appeal than in any other kind of *lis*.

250. It follows, in my judgment, that were the Secretary of State to rely before SIAC on a statement which his agents had procured by torture, or which had been procured with his agents' connivance at torture, SIAC should decline to admit the evidence; and this is so however grave the emergency. I apprehend it is fanciful to suppose that such a state of affairs might eventuate. In fairness Mr Burnett accepted without qualification that SIAC would rightly exclude such evidence. Still, the principle should be stated and stated clearly. Here, the *ratio* of the Israeli Supreme Court's decision in *Public Committee Against Torture in Israel*

& ors v Israel & ors marches with the common law. The Israeli General Security Service ("GSS") had employed methods amounting to torture (certainly if judged at Strasbourg they would be held to constitute violations of ECHR Article 3) in the interrogation of persons suspected of terrorist crimes. Application was made to the Supreme Court (I summarise) to test the legality of what was done. The court held that the general power to interrogate did not authorise the GSS to employ "physical means" unless they were "inherently accessory to the very essence of an interrogation and were both fair and reasonable". Under the heading "A Final Word" President Barak, giving the judgment of the court, said this:

"39. This decision opens with a description of the difficult reality in which Israel finds herself security wise. We shall conclude this judgment by re-addressing that harsh reality. We are aware that this decision does not ease dealing with that reality. This is the destiny of democracy, as not all means are acceptable to it, and not all practices employed by its enemies are open before it. Although a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand. Preserving the rule of law and recognition of an individual's liberty constitutes an important component in its understanding of security. At the end of the day, they strengthen its spirit and its strength and allow it to overcome its difficulties. This having been said, there are those who argue that Israel's security problems are too numerous, thereby requiring the authorisation to use physical means. If it will nonetheless be decided that it is appropriate for Israel, in light of its security difficulties to sanction physical means in interrogations (and the scope of these means which deviate from the ordinary investigation rules), this is an issue that must be decided by the legislative branch which represents the people. We do not take any stand on this matter at this time. It is there that various considerations must be weighed. The pointed debate must occur there. It is there that the required legislation may be passed, provided, of course, that a law infringing upon a suspect's liberty 'befitting the values of the state of Israel', is enacted for a proper purpose, and to an extent no greater than is required (see art 8 of the Basic Law: Human Dignity and Liberty)."

I make no comment as to what the legal position would be if the United Kingdom Parliament passed legislation to sanction the use of torture in the course of interrogation.

251. This decision of the Supreme Court of Israel illustrates, if I may respectfully say so, a basic truth which applies in any jurisdiction where public power is subject to the rigour of democracy and the rule of law. It is that State power is not only constrained by objective law – that is, the imperative that it be exercised fairly, reasonably and in good faith and within the limits of any relevant statute. More than this: the imperative is one which cannot be set aside on utilitarian grounds, as a means to a further end. It is not in any way to be compromised. This, I think, is the theme of Lord Steyn's observations in *R v Latif*, when (holding that in any given case it is for the judge to decide whether there has been an abuse of process, amounting to an affront to the public conscience) he said at 113B:

"But it is possible to say that in a case such as the present, the judge must weigh in the balance the public interest in ensuring that those who are charged with grave crimes should be tried and the competing public interest in not conveying the impression that the court will adopt the approach that the end justifies any means."

252. Thus the constitutional principle which forbids abuse of State power rules out reliance by the Secretary of State, before SIAC or any other tribunal in this jurisdiction, upon any statement obtained by torture which the State has procured or connived at.

253. But I am quite unable to see that any such principle prohibits the Secretary of State from relying, for the purposes of ATCSA ss.21 and 25, on evidence coming into his hands which has or may have been obtained through torture by agencies of other States over which he has no power of direction. If he has neither procured the torture nor connived at it, he has not offended the constitutional principle which I have sought to outline. In that case the focus shifts, as it seems to me, back to the law of evidence. Given that the specific rule against involuntary confessions is not engaged (we are not dealing with tortured defendants), the general rule – evidence is admissible if it is relevant, and the court is not generally concerned with its provenance – applies. At the very least, there is nothing to displace Rule 44(3).

254. Any other approach seems to me to be replete with difficulty. First, I cannot believe that the law should sensibly impose on the Secretary of State a duty of solemn enquiry as to the interrogation methods used by agencies of other sovereign States. Apart from the practical unreality, I can find no sound juridical base for the imposition of such a requirement. Next, it seems to me quite impossible to create a distinction between the categories of material which the Secretary of State may take into account under s.21 and the categories to be considered by SIAC under s.25. But if the Secretary of State is bound to dismiss from his mind material which may have been obtained by violations of Article 3, his duty under s.21 becomes extremely problematic. He may be presented with information of great potential importance, where there is, let us say, a suspicion as to the means by which, in another jurisdiction, it has been obtained? What is he to do? The common law obliges him to abide by the constitutional principle I have described. It does not, in this context, do more.

255. I shall of course have to consider Mr Emmerson's submissions on CAT as "an important source of guidance" (for the common law and Article 3) to see whether they alter the position. I find it convenient to address that after dealing with Mr Emmerson's second argument on this part of the case, relating to ECHR Article 6(1).

ECHR Article 6(1)

256. It is common ground that Article 6 applies to s.25 proceedings, on the basis that the appellant's civil rights – indeed his very right to liberty – are engaged. This court in *A, X, Y* so held. The question is therefore whether the admission of evidence which may have or has been obtained by torture renders the determination (by means of s.25) of his rights unfair.

257. Mr Emmerson cited a good deal of Strasbourg authority in order to persuade us that this question should be answered affirmatively. They included *Austria v Italy* (a decision of the Committee of Ministers adopting the Commission's Report), *Barbera & ors v Spain* and *Ferrantelli & anor v Italy*. But all of these were cases of actual, alleged or suspected torture or ill-treatment of the applicants themselves who had been defendants to criminal charges in the relevant domestic proceedings. Their territory is that of the common law rule which excludes involuntary confessions. The same is true of this passage from the opinion of Lord

Hoffmann in the Privy Council in *Montgomery v HM Advocate*:

"I accept that the Lord Advocate is 'master of the instance' (dominus litis) and that his powers may be greater than those of any prosecutor in English law. But what he clearly does not have is power to determine the charge against the accused. He may, for example, tender inadmissible evidence. But the decision as to whether to admit that evidence as part of the material for determining the charge against the accused is a decision of the court. If the reception of the evidence makes the trial unfair, it is the court which is responsible. Of course events before the trial may create the conditions for an unfair determination of the charge. For example, an accused who is convicted on evidence obtained *from him* by torture has not had a fair trial. But the breach of article 6.1 lies not in the use of torture (which is, separately, a breach of article 3) but in the reception of the evidence by the court for the purposes of determining the charge. If the evidence had been rejected, there would still have been a breach of article 3 but no breach of article 6.1." (my emphasis)

258. These cases cannot assist Mr Emmerson. If anything, the contrary. In *Barbera* at paragraph 68 the European Court of Human Rights said this:

"As a general rule, it is for the national courts, and in particular the court of first instance, to assess the evidence before them as well as the relevance of the evidence which the accused seeks to adduce. The Court must, however, determine... whether the proceedings considered as a whole, including the way in which prosecution and defence evidence was taken, were fair as required by Article 6(1)."

This is a consistent theme of the Strasbourg cases. It is repeated (in virtually the same language) in *Ferrantelli* at paragraph 48. Now, it is obvious that neither the Strasbourg court nor (since the coming into force of the HRA) our courts can abdicate their duty to safeguard the Convention rights. However this theme of the case-law shows, I think, that there is a primary responsibility on the court of trial to adjudicate upon issues of admissibility and weight; indeed I doubt whether authority is needed for such a proposition. To my mind it has a more pointed importance than is suggested by the bland statement in which it consists. It is that questions of fairness under Article 6 are just as sensitive to *the kind of proceedings in hand* as are questions of admissibility, or for that matter abuse of process, arising under the common law. At this point, in my judgment, the torture issue is face to face with the scrutiny issue. The s.25 process is concerned, not with proof, but with the establishment of reasonable belief and suspicion. The nature and quality of the evidence to be admitted has to be looked at against that essential background. The fairness of the hearing for the purpose of Article 6 has to be judged in the same context. Where proof is required, the reliability of the evidence is particularly acute. In such a case an objection, taken on grounds of unfairness, to the admission of tainted evidence may possess greater force than where issue is joined on the s.25 questions.

259. In short, any read-across from the position arising in criminal prosecutions to the very different kind of *lis* constituted by a s.25 appeal is liable to be unhelpful and misleading in the context of ECHR Article 6(1). In my judgment this marries with these observations of Lord Bingham of Cornhill, summarising other Strasbourg cases, in *Brown v Stott*:

"The jurisprudence of the European Court very clearly establishes that while the overall fairness of a criminal trial cannot be compromised, the constituent rights comprised, whether expressly or implicitly, within article 6 are not themselves absolute. Limited qualification of these rights is acceptable if reasonably directed by national authorities towards a clear and proper public objective and if representing no greater qualification than the situation calls for. The general language of the Convention could have led to the formulation of hard-edged and inflexible statements of principle from which no departure could be sanctioned whatever the background or the circumstances. But this approach has been consistently eschewed by the court throughout its history. The case law shows that the court has paid very close attention to the facts of particular cases coming before it, giving effect to factual differences and recognising differences of degree. Ex facto oritur jus. The court has also recognised the need for a fair balance between the general interest of the community and the personal rights of the individual, the search for which balance has been described as inherent in the whole of the Convention: see *Sporrong and Lonnroth v Sweden* (1982) 5 EHRR 35, 52, para 69; *Sheffield and Horsham v United Kingdom* (1998) 27 EHRR 163, 191, para 52."

Other passages in *Brown v Stott*, if I may respectfully say so, repay close attention, not least what was said by Lord Steyn at 708E-709E and by Lord Hope of Craighead at 718H-720F. I will not set them out. Overall the Strasbourg cases show, as Mr Burnett submits, that the States Parties enjoy a margin of appreciation in the application in practice of the Article 6 right. He cites *Stubbings and Others v UK, Chahal v UK,* and *Tinnelly & Sons & ors v UK,* and again I will not lengthen this judgment by citing the texts.

260. At this stage it is I think important that I should dispel any possible misunderstanding. I am by no means suggesting that the Article 6 right should in some way be marginalised in the name of national security. I insist only that the right's application, and its scope in practice, is highly dependent upon the practical context in which it is asserted; and that this proposition is commonplace in the judgments of the Strasbourg court. Once that is recognised, and one recalls the nature of the s.25 exercise – belief and suspicion, not proof – then in my judgment the admission of evidence of third parties which was or may have been obtained, without any connivance of the British State, in violation of ECHR Article 3 is no more offensive to Article 6 than it is to the common law. At least I would hold, given that under HRA s.2 our duty is no more nor less than to "take into account" the Strasbourg jurisprudence, that that is the position as a matter of English human rights law.

261. It is convenient at this stage, in light of what I have so far said, to consider an authority of the Divisional Court on which Mr Emmerson places particular reliance. This is the case of *Ramda*. The court gave relief by way of judicial review against an order by force of which the claimant was to be extradited to France. The case against the claimant involved alleged terrorist acts and the evidence against him included a confession of one Bensaid which was said to have been made under torture. Giving the judgment of the court Sedley LJ said at paragraph 22:

"It is only where it can be demonstrated that the approach taken by the requesting state's courts to admissibility will itself be such as to create a real risk of a fundamentally unfair trial that the principle of mutual respect... may have to yield. In a case such as the present this

requires the Home Secretary to be satisfied of at least two things: that Bensaid's incriminating admissions may well have been the direct result of brutality, and that the French courts will not entertain, except to reject it in limine, any argument in the claimant's defence based upon this contention. If the Home Secretary concludes that these elements are established, he will effectively be bound to refuse extradition."

It is to be noted (paragraph 16 of the judgment) that counsel for the Secretary of State in that case accepted that if Bensaid's evidence was tainted by his having been beaten up, and it was not going to be excluded at the claimant's trial, then the extradition would be "impermissible".

262. The significance of *Ramda* for the purpose of Mr Emmerson's argument is, of course, that it concerned tainted evidence coming not from the accused himself but from a third party prosecution witness. I venture to entertain, diffidently and with great respect, some reservations about the decision in the case, both as regards the lengths required of the Secretary of State to investigate the procedures of a foreign friendly State seeking a fugitive's extradition under established treaty provisions, and as regards the impact on the fairness of a prospective trial of the fact that the trial court may be asked to consider evidence against the accused (not consisting of a statement made by himself) which was or may have been obtained by oppressive conduct. If we are looking, as Article 6 in terms enjoins us, at *fairness*, why is fairness not satisfied by the availability of robust argument going to the *weight* of the tainted evidence?

263. More particularly, and this I think is at the heart of the matter, we must address this question: why should we attribute to Article 6 a requirement, absent from the common law, to adopt an absolute rule against admissibility in case of evidence said to be tainted by violations of Article 3? In my judgment, a State Party to the ECHR does not violate Article 6 by adopting a rule to the effect that issues about the means by which evidence was obtained should go to weight, not admissibility. I have seen nothing in the Strasbourg jurisprudence to suggest the contrary. At the least I would hold that this is so in the context of s.25 appeals, and that is what we are required to confront. And in that context, *Ramda* provides no pull in the opposite direction.

264. Mr Emmerson referred also to the well-known case of *Saunders*. But that was a case about self-incrimination in the context of the company law legislation. I do not think it is of any assistance at all on the questions before us. He also referred to *Texeira de Castro*, to which, as I have shown, their Lordships' House drew specific attention at paragraph 31 of *Looseley*. *Texeira*, however, sits with our abuse of process cases. The case concerned (paragraph 36) "the use of evidence obtained as a result of police incitement". It seems to me that *Texeira* shows in the context of abuse, just as *Austria v Italy*, *Barbera* and *Ferrantelli* show in the context of confessions, how near the Strasbourg jurisprudence is to the common law.

265. In my judgment the Strasbourg cases sit easily with the common law: a man will not be confronted with a confession wrung out of him, and proceedings based on State misconduct will not be entertained. But that is the reach of it; anything else is a matter of the weight to be given to the evidence adduced. I would accordingly reject Mr Emmerson's argument on Article 6 as I would reject, for reasons I have given, his submissions as to the common law.

But these conclusions are subject to a further dimension in the case. Does the impact of CAT make all the difference, whether to the common law or to the ECHR?

The Impact of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT")

266. Three propositions may be stated at the outset. (1) An unincorporated treaty confers no rights directly enforceable in our courts. But (2) there is a strong presumption that our law, judge-made or statutory, should be interpreted so as not to place the United Kingdom in breach of an international obligation. These two propositions are elementary. If authority were needed for them, it is amply to be found in *R v Lyons*. (3) Obligations arising under international law, including the terms of treaties other than ECHR itself, may inform and colour the interpretation of the ECHR provisions including Article 6. This proposition is vouchsafed not least by the Strasbourg court's decision in *Al-Adsani v UK*. The case concerned the law of State immunity: far distant from these appeals. At paragraph 55 the court said:

"... The Convention, including Article 6, cannot be interpreted in a vacuum. The Court must be mindful of the Convention's special character as a human rights treaty, and it must also take the relevant rules of international law into account. The Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the grant of State immunity."

The judgment in *Al-Adsani* contains much else, not least a ringing endorsement of the view expressed by the International Criminal Tribunal for the Former Yugoslavia in *Furundzija* that the prohibition of torture has achieved the status of a peremptory norm, or *jus cogens*, in international law. So much was recognised, as the court notes, by the House of Lords in *Pinochet (No 3)*.

267. The Secretary of State would not I think contest propositions (2) and (3), nor the further proposition that the prohibition of torture has achieved the status of a peremptory norm, or *jus cogens*, in international law. In any event they are plainly incontestable. Nor, on the face of it, would Mr Emmerson contest proposition (1), though his argument does so in practice. In my judgment the mistake in Mr Emmerson's position, in relation to the common law, is in truth (though he would disavow it) to deploy proposition (2) so as to contradict proposition (1). He seeks in effect to subject the common law to a particular rule requiring compliance with CAT Article 15 on the back of the general rule (proposition (2)) that our law should be read consistently with our international obligations. The argument proves too much. It would justify the incorporation into domestic law, without a validating statute, of any rule of international law in relation to any subject-matter clearly common to both.

268. Mr Emmerson's argument to the effect that CAT informs the Article 6 obligation is, in my judgment, open to like objections. Our adherence to the ECHR, and now our incorporation of its core provisions into our domestic law by the HRA, does not carry on its back an acceptance that other international obligations should drive our administration of Article 6. These observations of Lord Bingham in *Brown v Stott* are with respect very much in point:

"In interpreting the Convention, as any other treaty, it is generally to be assumed that the parties have included the terms which they wished to include and on which they were able to agree, omitting other terms which they did not wish to include or on which they were not able to agree. Thus particular regard must be had and reliance placed on the express terms of the Convention, which define the rights and freedoms which the contracting parties have undertaken to secure. This does not mean that nothing can be implied into the Convention. The language of the Convention is for the most part so general that some implication of terms is necessary, and the case law of the European Court shows that the court has been willing to imply terms into the Convention when it was judged necessary or plainly right to do so. But the process of implication is one to be carried out with caution, if the risk is to be averted that the contracting parties may, by judicial interpretation, become bound by obligations which they did not expressly accept and might not have been willing to accept. As an important constitutional instrument the Convention is to be seen as a 'living tree capable of growth and expansion within its natural limits' (*Edwards v Attorney General for Canada* [1930] AC 124, 136 per Lord Sankey LC), but those limits will often call for very careful consideration."

269. To my mind this reasoning is in line with what was said by Dawson J in *A v Minister for Immigration and Ethnic Affairs* in the High Court of Australia:

"[T]he purpose of an instrument may... be pursued in a limited way, *reflecting the accommodation of the differing viewpoints*..." (my emphasis).

Accordingly we should be very wary of expanding treaty obligations into territory where it is by no means clear that the founders meant to tread.

270. In my judgment, then, just as Mr Emmerson's reliance on CAT article 15 in the common law context proves too much, so also in the context of ECHR Article 6(1). A general requirement to interpret Article 6 in harmony with other rules of international law does not make compliance with these other rules a condition of compliance with Article 6. That proves too much; it makes for too exuberant a reading of the Convention, a reading which cannot sit with the strictures of Lord Bingham and Dawson J which I have cited. It is not, in my judgment, a systematic condition of compliance with Article 6 that CAT Article 15 should also be complied with.

271. Nothing in the jurisprudence of the Committee against Torture militates against this conclusion. I accept, as Mr Emmerson submitted, that *PE v France* shows that the Committee considered that CAT Article 15 applied, or was capable of applying, in proceedings in State A in which evidence obtained by torture in State B was sought to be adduced. The case also suggests (paragraph 6.6) that it is for the author of any complaint brought under Article 15 to demonstrate that it is well-founded; and that requires (as appears from the words of the Article) that it be *established* that the statement in question was obtained by torture. The case is by no means an engine that begins to drive CAT Article 15 into the substance of ECHR Article 6.

272. There remains, on this part of the case, what I have called Mr Emmerson's subsidiary argument, which runs as follows. (1) Admission of evidence of the kind objected to would violate the United Kingdom's obligations under CAT Article 15. But (2) compliance with our international obligations (other than those arising under ECHR) is a condition of a lawful derogation under ECHR Article 15. (3) We should therefore construe ATCSA as not permitting the admission of such evidence; it is to be presumed that the derogation was lawful, and the statute should be interpreted (so far as possible) to promote that result.

273. I mean no discourtesy to Mr Emmerson, nor to his careful written submissions delivered after the close of the hearing, in dismissing this argument out of hand. If it were viable at all, it would require the demonstration of actual violations of Article 15 by the United Kingdom. None are demonstrated. That aside, given the outcome in this court of *A, X, Y,* we must I think proceed on the footing that the Derogation Order was lawful. On that basis I cannot think it right that within the four corners of these appeals we should contemplate, and pass judgment on, a contingent set of circumstances on one view of which the Derogation Order might, after all, turn out not to be lawful. This argument is, I fear, nothing but an attempt to municipalise our obligation under CAT Article 15 and that is something that only the legislature can do.

Postscript

274. Before leaving the torture issue, I should notice the fact that Mr Emmerson was at a late stage inclined to advance a submission to the effect that CAT Article 15 expressed a principle of international customary law, and as such was part of the fabric of the common law. That would have required a very substantial enquiry, legal and historical. The ground had not been prepared for it, and we did not permit Mr Emmerson to embark upon it.

JURISDICTION

275. As I have shown, this point only arises in the cases of *Ajouaou* and *F*. I will not set out the statutory materials again. In my judgment SIAC were right to hold that the revocation of the certificates by the Secretary of State deprived them of jurisdiction to continue to hear the appeals. My reasons are as follows. First, s.25(2)(a) is cast in the present tense. SIAC are thus obliged to look at the case as at the date it comes before them. But if there is then no longer an extant certificate, the exercise simply cannot be performed. Either s.25(2)(a) has to be understood as referring to some other date, or it must be concluded that SIAC is only to consider s.25(2)(b). Such recourses are in my judgment entirely illegitimate because they involve re-writing the statute. (I will come to HRA s.3 shortly.) Secondly, the only person competent to launch an appeal under s.25 is a "suspected international terrorist" as defined in s.21(5): "a person certified under subsection (1)". But of course a person whose certificate is revoked is no longer within the definition. Thirdly, s.26(5)(a), dealing with the review of a certificate, is expressed in just the same language as s.25(2)(a). If s.25(2)(a) bites on a revoked certificate, I should have thought that s.26(5)(a) would do the same. But no one, I think, contends for so eccentric a result.

276. In short the structure of s.25 appeals demonstrates that only an appeal against a live

certificate is contemplated. As for HRA s.3, I have to say that in my view the language of s.25 and associated provisions cannot bear the amount of re-writing that would be necessary to permit an appeal against a revoked certificate, without the court legislating for itself. As regards the ECHR rights which might require an appeal against a revoked certificate, I make only two observations. First, a previously certified person who seeks to return to this country would be entitled to have a proper decision made on the merits of his claim to enter. I do not see why the fact of previous certification would entitle or require the Secretary of State to close his ears to anything the applicant might say. Secondly, I am not clearly persuaded that the terms of s.21(9) would necessarily suffice to prevent a later challenge, in the case of a person whose certificate had been revoked, to the legal merits of his past detention under s.23. But we have not heard full argument on the question and I express no concluded view.

INVESTIGATION AND DISCLOSURE

277. These are Mr Gill's remaining points. First, I would with respect reject out of hand the suggestion that the Secretary of State is required to undertake positive investigations, in the case of any prospective detainee, as to whether any other country was prepared to receive him before his detention could be justified on that footing that he could not be removed from the United Kingdom. I cannot see any potential legal source of such an obligation. I cannot think that such a prospective obligation could live with the Secretary of State's duty under s.21 which in some cases might require him to act urgently. The submission is not in the real world.

278. As for Mr Gill's broader submissions on investigation and disclosure, SIAC dealt at some length with such concerns as were expressed before it. I must set out what they said in the open generic determination:

"51. It may be useful at this juncture to deal with two features of the Respondent's evidence which arose on a number of occasions: investigations and disclosure. Suspicions were aroused by activities for which sometimes an explanation was offered by the Appellants; sometimes they may have not been aware of them because the evidence was only dealt with in closed session. On a number of occasions, an obvious line of inquiry was not pursued either by the police or the Security Services; we exclude those where there would have been risks of one sort or another in pursuing them. Sometimes the enquiries were not pursued for the simple reason that at the time of the investigation, there was no desire or need on the part of the services to do more than see whether a particular individual was of interest to them so that resources should be allocated to him; they were not as such collecting evidence and still less were they trying to prove a case or investigate a possible innocent explanation. It is not a question of them simply ignoring material which might assist the Appellants because their minds would not be deflected from the track upon which they were set. It is that by the nature of their habitual task, they deal with suspicion and risk rather than proof. So it does not always appear to them necessary to pursue lines which might confirm or eliminate alternative explanations. But it does mean that less weight can be attached than otherwise might have been the case to certain aspects which aroused their suspicions. There may be a gap, between a seemingly suspicious activity and it giving reasonable grounds for suspicion in this context, which cannot be filled by inference or assessment where it could readily have been filled by further investigation.

52. The general point relating to disclosure did not so much concern the disclosure of material to the advocates, although it had an indirect effect there; it concerned the disclosure of material to the special advocates. Once disclosed to them, however, it could and sometimes did become the subject of further disclosure to the advocate and the Appellant. The SIAC Act and the Procedure Rules do not contain any provision for disclosure of unused material to the special advocates; there is no equivalent to the disclosure process applicable to criminal proceedings and there would be obvious difficulties in any such system. We were told in closed session on 28th May 2003, transcript p10 and following, that there was a guide within the Security Service SIAC team about disclosure which included a requirement that any "exculpatory material" should be disclosed. This requirement covered "material that may assist the Appellant's case or undermine his own". The obligation lasted throughout the case. Examples were given of what was meant. Legal advice should be sought about the disclosure. It would not necessarily be disclosed to the Appellant or his open advocate. A team was responsible for disclosure rather than the witness in the case, who was not in a position to read all the documents which might relate to a particular Appellant.

53. Mr Williams accepted that it was Counsel's responsibility ultimately to make sure that if a point arose during the hearing that required a review of what had been disclosed to the Special Advocate, that such a review took place. There had been a process of secondary review already following the service of the Appellants' statements. It was accepted by Mr Williams that there needed to be a more formalised system of document checking for these purposes. (In fact the particular passage of cross- examination which led to that discussion revealed that there was both strong supportive material for the point being made by the witness which had not been disclosed, and a document which could be construed as helpful to the Appellant, but was not as helpful as Mr Scannell was inclined to suggest.)

54. It is correct that this disclosure system leaves control over disclosure in the hands of one party and its fair operation depends on the integrity of the Respondent's team and its understanding of what might actually assist an Appellant. We had no reason to doubt the integrity of those who operate it and no-one sought to cast doubt upon it. But the understanding of the Appellant's case is important as well. The Commission records and welcomes the Respondent's acknowledgement of the role of responsible counsel in a more formalised system of checking, drawing to the Respondent's team areas which should be looked for when the documents are reviewed after the Appellant's statement and as the case proceeds. There is no reason why the Special Advocate should not raise specific issues to be borne in mind during such a review. The Commission would be very slow to draw conclusions adverse to the Appellant if it felt that the Respondent's own guidance had not been faithfully and effectively followed. The reasonableness of the grounds would be reviewed in that light."

279. It is, I think, clear that in the course of these cases SIAC and the parties found themselves on something of a learning curve as regards the evolution of proper interlocutory procedures especially in relation to the need for an orderly system for the disclosure of relevant documents. I do not say that the way matters proceeded left no room for improvement. Equally, Mr Gill's criticisms before us are entirely overblown. There is no substance in the suggestion that either of his clients suffered any real injustice, such as might require this court to remit their cases to SIAC for further consideration, arising out of the procedures for

disclosure that were adopted.

280. As for the rigour with which relevant investigations were or were not pursued, I see nothing in paragraph 51 of SIAC's open generic determination with which to disagree. And in the security context it must be especially difficult for this court to form a responsible and objective view as to what should or should not have been done in the pursuit of any given or prospective lines of enquiry.

CONCLUSION

281. For the reasons I have given I would dismiss these appeals.

282. I end where I began. This case has concerned the means by which, in the acute setting created by the threat to the life of the nation which currently faces the United Kingdom, the State has sought to reconcile competing constitutional fundamentals. I do not say it has been done perfectly, or could not have been done better. But I do not think the executive or the legislature has at all lost sight of those constitutional principles which it is the court's special duty to protect: the rule of law, and the avoidance of arbitrary power.

Lord Justice Neuberger:

Introduction

283. The Anti-Terrorism, Crime and Security Act 2001 ("the 2001 Act") gives the Secretary of State for the Home Department the power to detain a person in custody in circumstances where there is insufficient evidence to mount a prosecution against him for any imprisonable offence. This is a draconian power which, save in the most exceptional circumstances, is fundamentally inconsistent with the role of government in a democratic society. However, the legislature gave such a power to the Secretary of State, because of another fundamental role of government in a democratic society, namely the duty to ensure the safety and well-being of its citizens.

284. The 2001 Act has as its genesis the attacks which took place in the United States on 11th September 2001. Those attacks, no doubt together with other available evidence, led the legislature to conclude that the interests of national security required the Secretary of State to be given the power to detain any person `without a right of abode in this country, whom he believes to threaten national security and suspects of being a terrorist. While the Secretary of State is given such powers, the legislature has, very properly, ensured that persons detained under the 2001 Act, should be entitled to have recourse to a tribunal to challenge their detention.

285. Although it will be necessary to look at the provisions of Part 4 of the 2001 Act in more detail, the general scheme is as follows. Under s21, the Secretary of State can issue a certificate in respect of a non-national whom he suspects of being a terrorist and believes to be a risk to national security. Such a certificate results in that person being detained, unless

and until he can find another country to which to travel. Such a person is given a right of appeal under s25 of the Act to the Special Immigration Appeals Commission ("SIAC"), from which there is a right of appeal on a point of law to the Court of Appeal. Part 4 of the 2001 Act requires periodic reviews of any such detention, and it also provides for its own ultimate determination, in November 2006 at the latest.

286. Since Part 4 of the 2001 Act came into force in November 2001, the Secretary of State has apparently ordered the detention of a total of 16 individuals pursuant to its provisions. The present appeals are brought by ten of those individuals, in respect of whom there were linked hearings before SIAC. Those hearings were complex for a number of reasons. First, there were ten separate appeals, which raised a number of similar points, but each of which, inevitably, depended on its own particular facts. Secondly, a number of points of principle and practice had to be determined by SIAC during the course of the hearings. Thirdly, some of the evidence upon which the Secretary of State relied had to be given in closed session, and was so sensitive that it could not be vouchsafed to the appellants. Accordingly, Special Advocates were appointed to represent them in connection with this evidence, pursuant to s6(1) of the Special Immigration Appeals Commission Act 1997 ("the 1997 Act"), as explained by Lord Woolf CJ in paragraph 12 of his judgment in *M -v- Secretary of State for the Home Department* [2004] 2 All ER 863. As he went on to say in paragraph 13:

"In this situation individuals who appeal to SIAC are undoubtedly under a grave disadvantage. So far as it is possible this disadvantage should be avoided, or, if it cannot be avoided, minimised. However, the unfairness involved can be necessary because of the interests of national security."

287. Where it is necessary to have a closed hearing, SIAC will normally need to produce two judgments, one of which covers all the open material, and the other of which is limited to the closed material.

288. Each of the ten appellants in these appeals was detained in late 2001 or early 2002 pursuant to a certificate under s21 of the 2001 Act issued by the Secretary of State. Two of the appellants, Jamal Ajouaou and F thereafter left the UK (for Morocco and France respectively) as they were entitled to do. The other eight appellants, A, G, Mahmoud Abu Rideh, E, B, H, C and D remain in custody. Each of the ten appellants exercised his right of appeal to SIAC against his certification. Eight of the ten appellants were granted anonymity by SIAC. All ten appeals were dismissed; in the cases of Ajouaou and F, SIAC held that, because they had left the UK, their s21 certification lapsed and SIAC had no jurisdiction to determine their appeals.

289. There is one so-called generic judgment which applies to five of the appellants. It runs to 309 paragraphs and is dated 29th October 2003. In that judgment, SIAC (Ouseley J, Mr C Ockleton and Mr J Chester) considered the issues of law, principle and inference which have been debated before us, and anxiously analysed the factual and opinion evidence put before it, and the arguments arising from them. SIAC also prepared a number of open and closed judgments in relation to the individual appeals, and we have in particular been referred to the judgment of SIAC (Collins J, Mr Ockleton and Mr J Daly) relating to F, which runs to 25 paragraphs.

290. The issues raised on these appeals concern the proper approach to be adopted by SIAC in relation to the determination of appeals it entertains. The resolution of those issues depends in part on the proper construction of the 2001 Act, but in some cases on the rules governing the procedure of SIAC, the Human Rights Act 1998 ("the 1998 Act"), the European Convention on Human Rights ("ECHR") and the Convention Against Torture And Other Cruel, Inhuman Or Degrading Treatment or Punishment ("CAT"). The issues also have to be resolved in light of two earlier decisions of this court, namely *A -v- Secretary of State for the Home Department* [2004] QB 335 and *M -v- Secretary of State*.

291. The points of principle raised on these appeals in relation to the 2001 Act appear to me to be as follows:

i. Issues of construction of the 2001 Act, namely:

a. the ambit of s25(2)(a) and (b);

b. whether it is open to a person against whom a s21 certificate was issued to appeal to SIAC if his certificate has been revoked;

c. the test to be applied by SIAC for assessing whether there are "reasonable grounds" within the meaning of s25(2);

d. the burden of proof as to any specific allegations of fact relied on by the Secretary of State on an appeal to SIAC;

e. the meanings of "international terrorist group", "member", "supports" and "assists" in s21;

f. the duty to investigate the prospect of removal to another country under s23.

ii. whether evidence obtained from a third party under torture in another country can be relied on by SIAC and, if not, the extent of the exclusion of such evidence and the determination of the party on whom the burden of establishing the use or non-use of torture rests.

292. Once these issues of principle have been determined, it will be appropriate to deal with the specific complaints raised on these appeals, including complaints about SIAC's approach to the evidence. Before dealing with the various issues of principle, however, I must refer to the relevant provisions of the 2001 Act, and the other legislative or convention material of relevance to which we were referred.

The legislative and convention material

The 2001 Act

293. Part 4 of the 2001 Act came into force on 11th December 2001, and it is headed *Immigration and Asylum*. The first section in this part of the Act is s21, which provides, so far as relevant:

"1) The Secretary of State may issue a certificate under this section in respect of a person if the Secretary of State reasonably—

(a) believes that the person's presence in the United Kingdom is a risk to national security, and

(b) suspects that the person is a terrorist.

(2) In subsection (1)(b) terrorist" means a person who-

(a) is or has been concerned in the commission, preparation of instigation of acts of international terrorism;

(b) is a member of or belongs to an international terrorist group; or

(c) has links with an international terrorist group.

(3) A group is an international terrorist group for the purposes of subsection (2)(b) and (c) if-

(a) it is subject to the control or influence of persons outside the United Kingdom, and

(b) the Secretary of State suspects that it is concerned in the commission, preparation or instigation of international terrorism.

(4) For the purposes of subsection 2(c) a person has links with an international terrorist organisation group only if he supports or assists it."

294. Sections 21(8) and (9) make it clear that the issue of a certificate (and any subsequent action based on it) can only be challenged under ss25 and 26 of the 2001 Act.

295. Section 23(1) provides that:

"A suspected international terrorist may be detained under a provision specified in subsection (2) despite that fact that his removal or departure from the United Kingdom is prevented (whether temporarily or indefinitely)."

Those circumstances are defined by reference to paragraph 16 of Schedule 2, and paragraph 2 of Schedule 3, to the Immigration Act 1971.

296. Section 25(1) and (2) are in these terms so far as relevant:

"(1) A suspected international terrorist may appeal to the Special Immigration Appeals Commission against his certification under section 21.

(2) On an appeal the Commission must cancel the certificate if—

(a) it considers that there are no reasonable grounds for a belief or suspicion of the kind referred to in section 21(1)(a) or (b), or

(b) it considers that for some other reason the certificate should not have been issued."

These are exclusive grounds of appeal - see s25(3). Section 25(4) provides that cancellation of a s21 certificate under s25(2) means that the certificate "shall be treated as never having been issued".

297. Section 26 requires SIAC to "hold a first review of each s21 certificate as soon as is reasonably practicable after the expiry of the period of six months" after its date of issue and, so far as possible, every three months thereafter. Section 26(5)(a) requires SIAC to cancel a certificate it "considers that there are no reasonable grounds for a belief or suspicion of the kind referred to in s21(1)(a) or (b)".

298. Section 27(1)(b), through the medium of s7 of the 1997 Act, entitles a party to proceedings before SIAC under s25, to appeal any determination in such proceedings to the Court of Appeal "on any question of law material to the determination".

299. Section 29 provides for ss21-23 to "expire" fifteen months after they came into force, subject to the power of the Secretary of State to repeal them earlier, or to extend them, subject to a final expiry date of 10th November 2006. Section 30 makes reference to a "derogation by the United Kingdom from Article 5(1)" of ECHR.

300. Finally, it is right to refer to s35 which, by adding a subsection (3) to s1 of the 1997 Act, provides that SIAC is "a superior court of record".

301. The Special Immigration Appeals Commission (Procedure) Rules 2003 (SI 2003 No 1034) ("the 2003 Rules") came into force on 1st April 2003, and govern the procedure of SIAC. Rule 44 is in these terms:

"(1) Subject to these Rules, the evidence of witnesses may be given either-

(a) orally, before the Commission;

(b) in writing ...

(2) The Commission may also receive evidence in documentary or any other form.

(3) The Commission may receive evidence that would not be admissible in a court of law".

ECHR

302. ECHR Article 3 is in these terms:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

303. ECHR Article 5 provides, so far as relevant:

"(1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of the court ...;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence ...;

(d) the detention of a minor ...;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases ...;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

(2) ...

(3) Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. ...."

304. ECHR Article 6(1) states:

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent

and impartial tribunal established by law. ..."

305. The final provision of ECHR to which I must refer is Article 15, which provides as follows:

"1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2. No derogation ... from Article ... 3 ... shall be made under this provision.

3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed of the measures it has taken and the reasons therefor."

The 1998 Act

306. I turn then to the 1998 Act. Section 3(1) provides:

"So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

307. Those rights are defined in s1(1) and (2) as the rights in ECHR Articles 2 -12 and 14, "subject to any designated derogation or reservation". A "designated derogation" is in turn defined in s14(1) of the 1998 Act as meaning "any derogation by the United Kingdom from an article of the Convention ... which is designated for the purposes of this Act in an order made by the Secretary of State".

308. Section 6 of the 1998 Act provides, so far as relevant:

"(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

(2) Subsection (1) does not apply to an act if

(a) as a result of one or more provisions of primary legislation, the authority could not have acted differently; or

(b) in the case of one or more provisions of, or made under, primary legislation, which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.

(3) In this section 'public authority' includes ... a court or tribunal ....".

The Derogation Order

309. On 11th November 2001, the Human Rights Act 1998 (Designated Derogation) Order 2001 (SI 2001 No 3644) was made, being laid before Parliament the following day, and coming into force the day after that. Its preamble begins by stating that "the United Kingdom is proposing to derogate from Article 5(1)" of the Convention, and that the Order was made by the Secretary of State pursuant to s14 of the 1998 Act.

310. Article 2 of the Derogation Order states that:

"The proposed derogation by the United Kingdom from Article 5.1 of the Convention, set out in the Schedule to this Order, is hereby designated for the purposes of the 1998 Act in anticipation of the making by the United Kingdom of the proposed derogation."

The terms of the Schedule are important, because they explain why the UK government concluded that the national interest required the enactment of Part IV of the 2001 Act.

311. The Schedule begins by referring to the "public emergency in the UK" arising from "the terrorist attacks in New York, Washington DC and Pennsylvania on 11th September 2001" and the fact that the "threat from international terrorism is a continuing one". It goes on:

"There exists a terrorist threat to the United Kingdom from persons suspected of involvement in international terrorism. In particular, there are foreign nationals present in the United Kingdom who are suspected of being concerned with the commission, preparation or instigation of acts of international terrorism, of being members of organisations or groups which are so concerned or of having links with members of such organisations or groups, and who are a threat to the national security of the United Kingdom."

It then states that, as a result, "a public emergency, within the meaning of Article 15.1 of the Convention, exists in the United Kingdom".

312. The Schedule to the Derogation Order then goes on to explain the purpose of the 2001 Act. It is to make provision:

"for an extended power to arrest and detain a foreign national which will apply where it is intended to remove or deport the person from the United Kingdom but where removal or deportation is not for the time being possible, with the consequence that the detention would be unlawful under existing domestic powers".

It then summarises the procedure laid down by ss21-25, and the duration provisions of s29 of the 2001 Act.

313. The Schedule to the Derogation Order then explains that, in *R -v- Governor of Durham Prison ex p Singh* [1984] 3 All ER 983, it had been decided that the power of detention contained in

Schedules 2 and 3 to the Immigration Act 1971 "can only be exercised during the period necessary, in all the circumstances of the particular case, to effect removal and ... if it becomes clear that removal is not going to be possible within a reasonable time, detention will be unlawful". The Schedule then states that:

"It is well established that Article 5(1)(f) permits the detention of a person with a view to deportation only in circumstances where 'action is being taken with a view to deportation' [and] that detention will cease to be permissible under Article 5(1)(f) if deportation proceedings are not prosecuted with due diligence."

314. The Schedule goes on to say that it might be impossible to "remove or deport a person on national security grounds" where "removal to their own country might result in treatment contrary to Article 3 of the Convention". In those circumstances, the Schedule explains:

"If no alternative destination is immediately available, then removal or deportation may not, for the time being, be possible even though the ultimate intention remains to remove or deport the person once satisfactory arrangements can be made. In addition, it may not be possible to prosecute the person for a criminal offence given the strict rules on the admissibility of evidence in the criminal justice system of the United Kingdom and the high standard of proof required."

315. The Schedule to the Derogation Order ends by saying that:

"[T]here may be cases where, notwithstanding a continuing intention to remove or deport a person who is being detained, it is not possible to say that 'action is being taken with a view to deportation' within the meaning of Article 5(1)(f) as interpreted by the [European Court of Human Rights]. To the extent, therefore, that the exercise of the intended power may be inconsistent with the United Kingdom's obligations under Article 5(1), the government has decided to avail itself of a right of derogation conferred by Article 15(1) of the Convention ...."

316. Formal notification of this derogation was apparently given to the Secretary-General of the Council of Europe in accordance with ECHR Article 15(3), in effectively identical words to those contained in the Schedule to the Derogation Order.

The UN and CAT

317. Before turning to CAT, it is worth referring to UN Security Council Resolution 1373 which requires all states to take comprehensive measures, such as "exchange of information", denial of safe harbour, cooperating and providing assistance in connection with criminal investigations with regard to those connected with, financing or supporting terrorist acts. The UK government is therefore bound to take such steps under international law.

318. The UK is similarly bound by CAT, which came into force on 26th June 1987. We were told that there are now well over 130 states parties to the Convention, which was produced under the ægis of the UN.

319. Article 1 of CAT defines "torture" as:

> "Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."

320. Article 2 provides:

> "(1) Each state party shall take effective legislative, administrative, judicial or other measure to prevent acts of torture in any territory under its jurisdiction.
>
> (2) No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."

321. Article 3(1) is in these terms:

> "No state party shall expel, return or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture."

322. Article 4 requires each state party to "ensure that all acts of torture are offences under its criminal law".

323. Article 12 of CAT requires each state party to institute "a prompt and impartial investigation" whenever "there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction".

324. Article 14(1) provides:

> "Each state party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation ...."

325. Article 15 is to this effect:

> "Each state party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made."

326. Article 16 requires each state party "to prevent in any territory under its jurisdiction other

acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture" when committed, or consented to or acquiesced in, by public officials.

327. Article 17 of CAT sets up a Committee Against Torture ("the Torture Committee"), which, by virtue of Article 19, each state party is required to inform about the measures they have taken in order to comply with their obligations under CAT.

328. Under Article 20, the Torture Committee is required, in effect, to investigate if it "receives reliable information which appears to it to contain well-founded indications that torture is being systematically practised in the territory of a state party".

329. Article 22 entitles any state party to declare "that it recognises the competence of the Torture Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a state party of the provisions of the Convention". The UK has not made a declaration pursuant to Article 22.

Issues of construction of the 2001 Act

Introductory

330. A number of issues have been raised which turn in whole or in part on the proper construction of Part 4 of the 2001 Act, and they are set out at paragraph 291.(i) above. Because that statute must, of course, be construed as a whole, these issues, at least to some extent, inter-relate.

331. Before turning to these issues, there are two points of general relevance. First, to quote from the appellants' written submissions, certification under s21, Part 4 of the 2001 Act involves "the most grave deprivation of the liberty of individuals who are entitled to the full protection of ECHR Article 3 including its procedural requirements, the guarantees in Article 5 including Article 5(4) (save for Article 5(1)(f), which is the subject of derogation) and Article 6 fair trial rights in respect of their civil right to liberty". I accept that this must at all times be in the forefront of the mind of any judge considering any argument of fact or law relating to, or arising out of, the 2001 Act.

332. However, I think it is equally important to bear in mind that the legislature, one of whose primary functions is to ensure the safety of the realm, has concluded that there is a sufficiently grave and imminent threat to national security from terrorist activity connected with Al-Qa'eda, to justify taking the drastic step of passing Part 4 of the 2001 Act and derogating from ECHR to the extent (and indeed for the reasons) identified in the Derogation Order.

333. The inevitable tension, indeed conflict, between two fundamental rights, the right of every individual not to be detained by the UK government without due process, and the right of every individual to expect the government to protect the security of the realm, must inform the consideration of all arguments concerning the construction and application of the 2001

Act.

334. Secondly, as I have already mentioned, this is not the first time that the Court of Appeal has had to consider Part 4 the 2001 Act. In *A -v- Secretary of State* the Court of Appeal held that the derogation effected by the Derogation Order did not infringe ECHR Article 14 (reversing SIAC on that issue). The Court of Appeal also held that, at least on the arguments raised in that case, proceedings before SIAC and detention adopted by the 2001 Act did not contravene ECHR. That decision is under appeal to the House of Lords.

335. In paragraph 44 of his judgment, Lord Woolf referred to "the deference which should be extended to the executive on matters of national security", - as to which see also the fuller comments of Lord Hoffmann in *Secretary of State for the Home Department -v- Rehman* [2003] 1 AC 153 at paragraphs 50-54. Lord Woolf also mentioned the threat identified by the United Nations Security Council "to international peace and security" requiring all states to take measures "to prevent the commission of terrorists attacks, including by denying safe haven to those who finance, plan, support or commit terrorist attacks".

336. As Lord Woolf made clear in paragraph 42 of his judgment, Part 4 of the 2001 Act could only be invoked by reference to what Brooke LJ referred to as:

"The terms of the derogation. This refers in terms to the threat to international peace and security identified by the terrorist attacks on 11 September. In other words it identifies a threat posed by Al-Qa'eda and its associated networks (and no-one else)" (at paragraph 98).

337. I should also refer to paragraph 57 of Lord Woolf's judgment, where he considered the impact of ECHR Article 6. He rejected the contention that proceedings before SIAC were criminal, saying that "they are civil proceedings within Article 6". He went on to say:

"The proceedings before SIAC involve departures from some of the requirements of Article 6. However, having regard to the issue to be inquired into, the proceedings are as fair as could reasonably be achieved."

338. In *M -v- Secretary of State*, after an *inter partes* hearing, the Court of Appeal refused permission to the Secretary of State to appeal a decision of SIAC made under s25. Lord Woolf, having said in paragraph 2 that "SIAC is a superior court of record", then stated, in paragraph 11, consistently with his and Brooke LJ's observations in *A -v- Secretary of State*, that:

"It is not enough that the person detained may have connections with a terrorist organisation. It must be a terrorist organisation which has links with Al-Qa'eda."

339. In paragraphs 9 and 16 of his judgment, Lord Woolf said this:

"9. It will be observed that s25 refers to what SIAC considers the position to be. If SIAC considers 'there are no reasonable grounds for a belief or suspicion' then SIAC must cancel

the certificate. Similarly, it must do so if it considers that the certificate should not have been issued.

...

16. SIAC is required to come to its decision as to whether or not reasonable grounds exist for the Secretary of State's belief or suspicion. Use of the word 'reasonable' means that SIAC has to come to an objective judgment, the objective judgment has however to reached against all the circumstances in which the judgment is made. There has to be taken into account the danger to the public which can result from a person who should be detained not being detained. There are also to be taken into account the consequences to the person who has been detained. To be detained without being charged or tried or even knowing the evidence against you is a grave intrusion on the individual's rights. Although, therefore, the test is an objective one, it is also one which involves a value judgment as to what is properly to be considered reasonable in those circumstances."

340. At paragraph 34(iv), Lord Woolf concluded:

"This is not a case in which SIAC over-ruled the decision of the Secretary of State. SIAC had to come to its own decision on the material which ... was tested in a way which it could not be tested before the Secretary of State."

341. With those introductory observations, I turn to the issues of construction identified in paragraph 291.i)above.

The ambit of s25(2)(a) and (b) of the 2001 Act

342. At least on the face of it, the meaning of s25(2)(a) of the 2001 Act presents no real difficulty. It is expressed unambiguously in the present tense, which, in the absence of very cogent reasons to the contrary, strongly suggests that SIAC must consider for itself whether there are "reasonable grounds", and that it must judge that question by reference to all the material put before it at the date of the hearing. In other words, it is not to carry out the exercise by considering only the material available to the Secretary of State when he issued the certificate. SIAC is entitled, indeed bound, to take into account all the material available at the date of the hearing, which may include fresh material which assists the case of the appellant or that of the Secretary of State, which was not available to the Secretary of State, and may not even have been in existence, at the time he issued the certificate.

343. My view that that is what s25(2)(a) means is reinforced by the identical wording of s26(5)(a) of the same Act, which must be intended to refer to the material before SIAC at the relevant time. It was not suggested on behalf of any of the parties that s25(2)(a) could be read in any other way. Indeed, in light of what Lord Woolf said in paragraphs 9, 15 and 34(iv) of his judgment in *M -v- Secretary of State*, I do not think it would be open to this court to reach a different conclusion.

344. There is greater difficulty about the meaning of s25(2)(b). It appears to have been accepted by all parties, and indeed by SIAC, that, if SIAC concluded that the Secretary of State did not have the necessary belief and suspicion to satisfy s21(1), when he issued a certificate, SIAC would be entitled, indeed, in light of the mandatory opening wording of s25(2), obliged, to cancel the certificate, and that this would be SIAC's obligation even if it was satisfied that, by the date of the hearing, there was material giving rise to "reasonable grounds". That is because s25(2) requires cancellation of a certificate if either of its paragraphs is satisfied.

345. I must confess to having doubts about that proposition. It can be said to overlook the word "other" in s25(2)(b), and it leads to somewhat impractical results. The word "other" in s25(2)(b) indicates that s25(2)(a) is to be treated as representing a "reason the certificate should not have been issued". I accept that s25(2)(a) does not strictly satisfy that requirement, because it requires consideration of the grounds by reference to material available at the date of the hearing. However, what the word "other", at least arguably, shows is that the legislature intended the question of "reasonable grounds" for the issue of the certificate to be considered by reference to material available to SIAC at the date of the hearing, and that s25(2)(b) is concerned with reasons other than the existence of such reasonable grounds. On this basis, s25(2)(b) may have pretty limited application, but it was presumably included in the 2001 Act, in the light of the draconian effect of a s21 certificate, to ensure that any abuse of power by the Secretary of State in issuing such a certificate (other than being unable to satisfy SIAC that there are reasonable grounds) could be raised to challenge the certificate.

346. SIAC pointed out that, if a certificate was revoked because there was insufficient material to found "reasonable grounds" at the time the certificate was issued, there would be nothing to prevent the Secretary of State from issuing a further certificate on the basis that the more extensive material before SIAC now justified its issue. While I accept that that is possible and logical, it seems to me to be cumbersome in its effect. If SIAC concludes that there are "reasonable grounds", (a) it would be much simpler if the certificate stands, and (b) it would seem rather a waste of time and money if SIAC had to go on to consider whether or not there were "reasonable grounds" at the date of the issue of the certificate. If SIAC concludes that there are not reasonable grounds, consideration of whether there were such grounds is pointless: the certificate would have to be revoked anyway.

347. It is said that the person against whom a certificate has been issued may wish to obtain damages because the certificate should never have been issued. However, in many cases whether the Secretary of State may not have had reasonable grounds, SIAC will decide that no reasonable grounds exist at the date of the hearing; the certificate will then be revoked under s25(2)(a), rendering it unnecessary to consider whether the Secretary of State had reasonable grounds when he issued the certificate.

348. The most powerful argument in favour of SIAC's (and the parties') construction of s25(2)(b), in my view, is that it would be wrong to interpret it in such a way as to prevent a person against whom a certificate has been issued from contending that, even though the certificate may be justified by virtue of subsequent material, the Secretary of State ought never to have issued the certificate in the first place. This is a particularly powerful point bearing in mind the draconian effect of a s21 certificate.

349. In the event, not least because this aspect of the construction of s25(2)(b) was not the subject of argument, I will proceed on the basis that the view taken by SIAC as to the ambit of s25(2)(b) is correct, which it may well be.

The rights under s25 of a person whose s21 certificate has been revoked or has lapsed

350. In its generic judgment, SIAC concluded that it was not open to a person in respect of whom a certificate had been issued to mount or pursue an appeal under s25 of the 2001 Act if the certificate had lapsed (eg by the person concerned leaving the UK) or if the Secretary of State revoked the certificate. Accordingly, SIAC concluded that it did not have jurisdiction to entertain the appeals of Mr Ajouaou or F. On this appeal, Mr Ajouaou and F, as well as the Secretary of State, contend that SIAC was wrong on this point.

351. In the absence of s3 of the 1998 Act requiring the 2001 Act to be construed in such a way as to comply with ECHR, I would have been inclined to agree with the conclusion reached by SIAC. The right of appeal granted by s25(1) is to "[a] suspected international terrorist", a term defined in s21(5) as "a person certified under subsection (1)". As a matter of ordinary language it appears to me that this means that the only persons who are given a right to appeal are those in respect of whom a certificate exists. Once the certificate in respect of a person has lapsed or is revoked, he is no longer "a suspected international terrorist" and therefore, it would seem, he would have no right to appeal under s25(1). Furthermore, if it concludes that paragraphs (a) or (b) thereof is satisfied, the primary duty of SIAC is, under subsection 25(2), to "cancel the certificate"; that is a pretty meaningless concept, at least as a matter of ordinary language, if the certificate no longer exists.

352. Nonetheless, it cannot be pretended that (even ignoring s3 of the 1998 Act) there are no arguments to the contrary. It does not involve a great straining of language to read s25(1) as applying to a person who is or was a suspected international terrorist. Furthermore, the tense used in s25(2)(b) - "should not have been issued" - and in s25(4) - "shall be treated as never having been issued" - can be said to give some support to the notion that the legislature intended a person, in respect of whom a certificate had been issued, should be able to contend that, as a matter of law, no certificate had ever been issued in respect of him. That provides a reasonable basis for supposing that the legislature could well have intended a person in respect of whom a certificate had been issued, albeit that it had lapsed or been revoked, should nonetheless be able to mount an appeal under s25.

353. There is another point which somewhat militates against SIAC's conclusion. Given that the Secretary of State can revoke a certificate at any time, it seems to me that there would be nothing to prevent him making a revocation order during the currency of the hearing of a s25 appeal, or even after the appeal had been heard and before SIAC gave its determination. In such a case, SIAC's construction would raise the question as to whether its jurisdiction could effectively be removed by the Secretary of State's unilateral act of revoking the certificate. If such revocation would result in SIAC's jurisdiction coming to an end (as SIAC held), that is unattractive. It would mean that, once an appeal was launched, its prosecution would

effectively be at the mercy of the Secretary of State. While one would not expect him to exercise his revocation powers capriciously, it does not seem desirable that the jurisdiction of a court of record, on so fundamental an issue as the validity of a s21 certificate, could be removed at any time at the behest of the Secretary of State. On the other hand, if SIAC's jurisdiction depended solely on the certificate being effective at the time the s25 appeal was launched, that would seem to be capable of leading to capricious results. If an appellant lodged his appeal the day before his certificate was revoked, then he could maintain it, whereas if he only launched his appeal the day after the certificate was revoked, he would be wholly disabled from bringing an appeal.

354. In these circumstances, even in the absence of s3 of the 1998 Act, I consider that there would be a powerful case for contending that a s25 appeal could be launched and/or maintained by a person in respect of whom a certificate has lapsed or been revoked by the Secretary of State. The factor which convinces me, in agreement with all the parties to the appeal, and in disagreement with SIAC, that this is in fact the correct analysis, is the effect of s3 of the 1998 Act.

355. A person may have grounds for establishing that the certificate should never have been issued, relying on s25(2)(b), and/or he may seek to cancel the certificate under s25(2)(a). In the former case he may have a powerful argument, in the latter case - in light of s25(4) - a real argument, for saying that his imprisonment was unlawful. Further, the fact that a s21 certificate was issued in respect of a person could plainly affect his reputation, and even his treatment, here and overseas. The revocation, or the lapsing, of the certificate may not remove any stigma thereby attaching to him. This would be particularly true where the certificate lapsed as a result of the person going abroad. Even where the certificate was revoked by the Secretary of State, the person concerned may feel that his reputation remains detrimentally affected, not least because the Secretary of State may give no reasons for the revocation. If an appeal can be mounted under s25, and, for instance, satisfy SIAC that there are no reasonable grounds for believing that he is associated with an international terrorist group, that would, to put it at its lowest, assist him in rehabilitating his reputation.

356. In principle, it therefore appears to me that a person who has been certified should be able to challenge the certificate (and at least call into question his consequent imprisonment) in court - see ECHR Article 6(1).) He cannot do so save by an appeal under s25 - see s21(8) and (9) of the 2001 Act. In *Fayed -v- The United Kingdom* (1994) 18 EHRR 393 at paragraph 58, the European Court of Human Rights ("ECtHR") after mentioning ECHR Article 6(1), referred, with obvious approval, to the fact that the UK "did not dispute the existence and 'civil' character of the right under English law to a good reputation" in light of earlier decisions of the ECtHR. (In that case, the point did not in fact assist the applicants, because, as the ECtHR went on to explain in the succeeding paragraphs of its judgment, the applicants' complaint related to the activities of its inspectors, who carried out an investigative, and not a determinative role.) Accordingly, it appears to me that ECHR Article 6(1) strongly, indeed conclusively, supports the argument mounted by the parties against SIAC's decision on this issue.

357. Having reached the conclusion that a person is not prevented from mounting an appeal under s25 by virtue of the fact that his certificate lapses or is revoked, that is not quite the end of

this discussion. SIAC appears to have taken the view that, if this argument was correct, it could not consider the issue raised by s25(2)(a) on an appeal by such a person, and that it was limited to considering his appeal under s25(2)(b). That view is shared by the appellants in these proceedings.

358. I do not consider that that is necessarily right. If, as appears to me to be correct for the reasons I have given, s25(1) applies not merely to a person who is, but also to a person who has been, certified under s21, then no immediately obvious reason why, as a matter of principle or in the light of its language, s25(2)(a) cannot apply to both types of person. On the face of it, SIAC can consider "that there are no reasonable grounds for a belief or suspicion of the kind referred to in s21(1)(a) or (b)" in respect of a person against whom a s21 certificate was issued, but subsequently revoked or allowed to lapse. As with a person against whom a certificate still exists, the question for SIAC is not whether, at the time the certificate was issued, there were such reason grounds; it is whether such reasonable grounds exist when the matter is before SIAC. It may well be that the Secretary of State will stop collecting information in respect of a person, once a certificate lapses or is revoked, but I think it questionable whether it is a strong enough a factor to justify concluding that s25(2)(a) should not be given its natural meaning in relation to an appeal brought by such a person.

359. Indeed, given the conclusion that a person who was certified, but whose certificate has been revoked, should be treated as having the same right to appeal against his certificate as a person whose certificate is still in existence, it is not immediately easy to see why the latter person should enjoy the benefit of more potential grounds of appeal than the former person. Perhaps particularly if one brings ECHR into play on this issue, one might expect both categories of person to be entitled to raise the same grounds of appeal, unless that would give rise to real difficulties.

The test to be adopted to establish whether there are "reasonable grounds"

360. The appellants criticise the approach adopted by SIAC to the evidence relied on by the Secretary of State in relation to each of the appellants on a number of grounds. Each of these grounds can, I think, be dealt with comparatively shortly, in light of the way in which s25 of the 2001 Act is worded.

361. The first criticism is directed towards the observation of SIAC that the test for certification under s21 of the 2001 Act is "not a demanding standard for the Secretary of State to meet", and its reference to "the low threshold of proof" that has to be established by the Secretary of State under s25(2)(a).

362. I can understand why those observations, if taken out of context, might be said to suggest an insufficient degree of care, or even a wrong approach, on the part of SIAC, when considering an appeal under s25. However, read in context, I am of the view that those expressions of opinion are not merely unexceptionable; they are right.

363. In the great majority of cases where the court has to arrive at its own view on an issue of

fact or opinion, it normally must do so on one of two bases. In the criminal context, the court normally (but by no means always) has to be satisfied by the prosecution of the correctness of a particular fact or opinion beyond reasonable doubt; in a civil context, the party seeking to establish the fact or opinion almost always has to do so on the balance of probabilities. In the context of s25 of the 2001 Act, however, while SIAC has to make its own assessment of the evidence and arguments relating to the questions of whether an appellant is a risk to national security and a terrorist, the ultimate decision it is required to make is whether there are "reasonable grounds" for both "believ[ing]" that the appellant poses a threat to national security and "suspect[ing]" that he is a terrorist.

364. Those words are clear in their meaning, if not always easy to apply. The court is not infrequently called upon to determine whether a certain opinion is reasonable. It seems clear that, in such a case it is not the function of the court to form its own opinion, but to consider whether the opinion is one which a reasonable person could, in the relevant circumstances, hold. The wording of s25(2)(a) requires SIAC to carry out that type of exercise. It must simply inquire whether "reasonable grounds" exist for a particular belief and a particular suspicion. In order to be persuaded that "reasonable grounds" exist, SIAC does not have to be satisfied on the balance of probabilities either that the appellant is a threat to national security, or that he is a terrorist.

365. The appellants contend that such a literal reading of ss21(1) and 25(2) of the 2001 Act cannot be justified in light of the drastic consequences of upholding a s21 certificate, namely that the appellant can be detained in prison for an indefinite period (or at least until November 2006) even though he has not been charged, let alone convicted, of any crime. That argument is powerful if one concentrates solely on one of the unusual and important features of Part 4 of the 2001 Act, namely that it results in the deprivation of the liberty of an individual against his will in circumstances where that could not normally begin to be justified.

366. However, apart from the difficulty caused to the appellants' argument by the language of ss21(1) and 25(2) of the 2001 Act, it appears to me that their argument is also weakened by the other two unusual and important features of the 2001 Act. First, there is the threat to the realm perceived by the government and identified in the Schedule to the Derogation Order. Secondly, there is a factor, which perhaps only has substantial weight in this connection when linked to the threat to the realm: the difficulty faced by the executive in establishing that a person is a member of a terrorist network, particularly one such as Al-Qa'eda, and that he is a threat to national security, which involves contemplating future possibilities, rather than what is more familiar to the law, namely past acts.

367. When considering whether there are reasonable grounds under s25(2)(a), SIAC must approach the evidence with great care, bearing in mind, in an appellant's favour, the draconian consequences of upholding a s21 certificate, but also bearing in mind the difficulty which would normally be involved in establishing that an appellant is a terrorist or a threat. It appears to me, from reading the very full consideration given by SIAC to the evidence adduced by and against each of the appellants, and the care with which the evidence was assessed and the explanation for the conclusions arrived at, that it cannot be suggested that SIAC did not adopt an appropriate approach to each of the appeals. Indeed, as mentioned

already, I believe that SIAC performed its difficult and worrying task in an exemplary fashion.

The burden of proof

368. It is also suggested by the appellants that, when assessing the factual material put forward by the Secretary of State, SIAC should decide, in relation to each allegation of fact, whether, on the balance of probabilities, the Secretary of State has established its correctness, and, only if so satisfied, should SIAC take that fact into account. If SIAC, when carrying out its role under s25(2), decides to take a particular fact into account as a fact, then I think that point is well made. Indeed, it would be difficult to hold otherwise in light of the observations in *Rehman*, where, in relation to a not dissimilar, but somewhat differently worded, provision, s3(5)(b) of the Immigration Act 1971, Lord Slynn said at paragraph 22: "when specific acts which have already occurred are relied on, fairness requires that they should be proved to the civil standard of proof".

369. However, as Lord Hoffmann said in the same case at paragraph 56:

"[T]he whole concept of a standard of proof is not particularly helpful in a case such as the present. In a criminal or civil trial in which the issue is whether a given event happened, it is sensible to say that one is sure that it did, or that one thinks it more likely than not that it did. But the question in the present case is not whether a given event happened but the extent of future risk. This depends on an evaluation of the evidence of the appellant's conduct against a broad range of facts with which they may interact. The question of whether the risk to national security is sufficient to justify the appellant's deportation cannot be answered by taking each allegation *seriatim* and deciding whether it has been established to some standard of proof. It is a question of evaluation and judgment."

370. In these circumstances, I think that there are two problems with the appellants' criticism that SIAC failed to apply a proper standard of proof. The first is that, in deciding whether there are, as a matter of fact, reasonable grounds for suspicion or belief, SIAC is not necessarily concerned with primary facts, and, to that extent, there is no need to establish a primary fact on the balance of probabilities. For instance, subject to consideration of its reliability (which may raise all sorts of factors) a newspaper report relating to the activities of an appellant may be taken into account by the Secretary of State under s21 or by SIAC under s25. In such a case it is not necessary for SIAC to be satisfied on the balance of probabilities that the reported facts are true; it would merely need to be satisfied, on the balance of probabilities, as to the existence of the newspaper report. (I should emphasise that SIAC may, even if so satisfied, give no or little weight to the contents of the newspaper report, if it thought it right to do so.) Secondly, when considering whether there are reasonable grounds for the relevant belief or suspicion, SIAC need not, as I have sought to explain, be concerned about satisfying itself that, on the balance of probabilities, the belief for suspicion is justified, or that it shares the belief or suspicion. It is merely concerned with deciding whether there are reasonable grounds for such belief or suspicion.

371. The question of whether someone is an international terrorist can be said to be a matter of fact, whereas the question of whether he is a threat to national security is itself a matter of

assessment. However, the question of whether there are reasonable grounds for suspecting a person is a terrorist and believing he is a threat to national security is a question of assessment.

The meanings of certain expressions in s21 of the 2001 Act

372. The appellants' complaints about SIAC's interpretation of a number of expressions in s21 of the 2001 Act, involve a general criticism of the approach of SIAC generally, which to a substantial extent I have already considered. The criticism is that SIAC did not give enough weight, when construing Part 4 of the 2001 Act, to the fact that it permitted a very substantial interference with the fundamental rights of individuals in respect of whom a certificate was issued under s21. As already indicated, I accept, without hesitation, that, when considering any argument in relation to Part 4 of the 2001 Act, this is a very important factor. Furthermore, as was emphasised by Lord Woolf in paragraph 42 of his judgment in *A -v- Secretary of State*, the limits of the derogation effected by the Derogation Order must be carefully defined, because, otherwise, the relevant law becomes too imprecise and lacks clarity and accessibility.

373. However, it is, as also mentioned, equally important to bear in mind, when considering any argument in relation to Part 4 of the 2001 Act, that it is designed to deal with a threat to national security which, in the view of the executive and the legislature, justifies this exceptional legislation. Furthermore, one must also bear in mind the inevitable difficulties which exist (and are impliedly recognised by the way in which ss21 and 25 of the 2001 Act are expressed) in finding evidence in relation to an individual's link with Al-Qa'eda and the possible risk he poses in the future to national security. Indeed, the very fact that, as the Schedule to the Derogation Order says, the powers under Part 4 of the 2001 are only to be invoked when there is insufficient evidence to justify the bringing of criminal proceedings, serves to emphasise the difficulties.

374. Particularly once it is accepted, as the appellants accept (inevitably, in light of the decision of this court in *A -v- Secretary of State*) that Part 4 of the 2001 Act is compatible with ECHR, criticisms of the clarity of the terminology of Part 4 of the 2001 Act, or the interpretation given to that terminology by SIAC, cannot be judged in abstract terms, or solely by reference to the factors upon which the appellants rely. It has also to be judged by reference to the perceived threat to national security and what is practical and feasible in the context of the clear purpose of the legislation.

375. So far as the word "group" in the expression "international terrorist group" is concerned, it appears to me to have a wide and imprecise meaning. As I have already mentioned, the effect of the derogation, as discussed in *A -v- Home Secretary*, must mean that the word "group" is limited to "Al-Qa'eda and its associated networks (and no one else)".

376. SIAC said in paragraph 113 of its generic judgment:

"A group for these purposes may be informal, ad hoc, formed for temporary expediency; the effect of the [2001] Act draconian though it is, should not be approach as if it were only

intended to apply to those terrorist groups whose affairs are conducted with some formality and constitutionalism. We do not consider that a group can only exist if it is shown to have a formal structure capable of membership. A group in this context is no more than an association of some sort between individuals to pursue one or more aims; the lone terrorist is excluded, 'group' is a word of very wide meaning. It covers the concept of networks."

377. While it can be dangerous to seek to define a word or expression in a statute, I consider that those observations cannot be faulted. They can be said to be vague. However, the word "group", particularly in the context of Part 4 of the 2001 Act, does appear to be a word of wide meaning, and when one considers the nature of terrorist groups, and of Al-Qa'eda in particular, it seems positively unreal to think that the legislature can have had a relatively narrow meaning in mind. It would be inappropriate to consider the many other references in SIAC's judgment to the meaning of the word "group". Because of the different facts and arguments on each appeal, SIAC inevitably expressed itself in slightly different ways in different places in the generic judgment, but in my view, there is no basis for criticising its approach or conclusions. Thus, in paragraph 125, SIAC made reference to:

"The ideology which Osama bin Laden has developed and which has united the individuals and groups in a way which does not undermine the individuals, but works with them to further their common objectives against a common enemy is set out in the *Declaration of Jihad by Osama bin Laden against the US* of 23rd August 1996."

I see nothing wrong with that.

378. Similar complaints about the relatively broad meaning given by SIAC to the words "member", "supports" and "assists" appear to me to be ill-founded. At paragraph 113 of the generic judgment, SIAC said:

"It may not always be clear in any given case whether someone is a member of a group, or whether he supports or assists it. ... [I]t would be unwise to lay down any hard and fast distinctions for the purposes of the [2001] Act between membership and support and assistance."

Again, this seems to me to be correct.

The duty to investigate the prospect of removal under s23 of the 2001 Act

379. The appellants contend that the effect of s23(1) of the 2001 Act is that the Secretary of State is required to investigate whether another country could or would take the appellants before he could detain them. This point arises in relation to one of the appellants, D, whose solicitors wrote to the Treasury Solicitor stating that D was willing to go to France and invited the Secretary of State to make "preliminary inquiries" as to whether France would take him. The Treasury Solicitor replied some five weeks later suggesting there was no reason why D should not make those inquiries.

380. I do not understand how, as a matter of language, it can be contended that s23(1) of the 2001 Act imposes an obligation on the Secretary of State to investigate countries which might accept someone in respect of whom he has issued, or intends to issue, a s21 certificate. As SIAC said in paragraph 116 of its generic decision:

"It is not for the [Secretary of State] ... to contact speculative possibilities for the appellant. ... If there are obvious third countries to be investigated, we would expect the [Secretary of State] to make some inquiries. But they may be limited where an appellant has already left that third country, fearing that it would return him to his country of nationality or imprison him. In reality an appellant would be expected to identify the country to which he thought he might be able to go, if he does not wish to return to his country of nationality directly or indirectly via a third country and has indicated a fear of such a result."

Again, I agree.

Admissibility of statements obtained under torture

Introductory

381. Some of the evidence relied on by the Secretary of State, in order to establish that there were reasonable grounds to satisfy s25(2)(a) in relation to some of the appellants, consisted of statements said by them to have been obtained from individuals held by the United States at Bagram Airbase in Afghanistan or Guantanamo Bay in Cuba, or transferred by the United States to various countries, including Egypt, Jordan and Morocco.

382. In civil or criminal proceedings before an English court, such a statement would hardly ever be admissible in common law because it is hearsay, quite apart from any other reason. Particularly in civil proceedings, there are, of course, statutory exceptions to the rule against hearsay evidence. However, in relation to s25 appeals, it is common ground that a hearsay objection cannot be take to such evidence. That is because of rule 44(3) of the 2003 Rules ("rule 44(3)"), which disapplies the normal rules relating to admissibility of evidence, so far as hearings before SIAC are concerned.

383. The appellants nevertheless contend that, contrary to the conclusion reached by SIAC, these statements should not have been admitted. This is because the appellants say that there is and was reason to believe that the individuals concerned made the statements under torture by agents of the relevant national (ie US, Egyptian, Jordanian or Moroccan) authorities. Accordingly, the appellants argue, these statements could not be relied on by the Secretary of State before SIAC as evidence of "reasonable grounds", and could not be relied on by SIAC in order to decide whether there were such reasonable grounds.

384. This topic gives rise to three issues. The first issue is whether, as a matter of principle it is in fact open to the Secretary of State in evidence before SIAC, and SIAC in its decision, to rely upon a statement which was made by a third party when under torture by officials of a third country. In contending that the answer is in the negative, the appellants put their case on three bases. The first is the English common law. The second is a right to a fair trial under

ECHR Article 6. The third argument turns on the Derogation Order and ECHR Article 15.

385. The second and third issues only arise if the appellants succeed on one or more of those three arguments. The second issue is, if a statement obtained by torture is excluded from evidence, how far that exclusion goes. The third issue is whether it is for the Secretary of State to prove that the statement was not obtained by torture, or for the appellant to prove that it was obtained by torture and, in either case, whether the standard of proof is the civil, balance of probabilities standard, or the criminal, beyond reasonable doubt, standard.

386. I shall consider these issues and arguments in turn. Before doing so, however, it is right to emphasise that the Secretary of State does not accept that any evidence adduced before SIAC in these cases consisted of statement made when under torture. Indeed, he contends that SIAC concluded that no evidence before it did consist of such statements. That is a matter we may have to determine, or at least consider, once the issues of principle are resolved.

Does the common law preclude reliance on statements obtained by torture?

387. The appellants' contention that English common law requires a statement obtained by torture to be excluded from the court's consideration is based essentially on two arguments. The first is that this is, or should be, the position in light of the state of the relevant authorities. Alternatively, it is submitted that it is the position as a result of the common law developing in the light of international law (other than ECHR).

388. So far as the English common law is concerned, reliance was placed by the appellants on the powers, indeed the duty, of a criminal court: (a) to exclude evidence of an accused's confession, save where satisfied that it was freely made; and (b) to exclude evidence (or even to stay the prosecution) where the production of the evidence (or the proceedings themselves) would involve an abuse of process.

389. The exclusion from evidence in a criminal trial of an accused's confession, save where it was clearly made voluntarily, is a very well-established rule (and now enshrined in statute), although not one without criticism: see for instance *DPP -v- Ping Lin* [1976] AC 574 at 599-600 per Lord Hailsham of St Marylebone. Before us, there was some discussion as to whether the basis for the exclusion of a confession, save where it was wholly voluntary, was based on the need to avoid abuse by the executive, or concern about the unreliability of any but a voluntary confession. Whatever the basis in earlier cases, (where the justification for the rule is not entirely clear) I consider that the modern answer is that both factors are in point.

390. In this connection, I would refer to the speech of Lord Mustill in *R -v- Director of Serious Fraud Office ex p Smith* [1993] AC 1 at 30E-32D. He first identified six types of immunity, including:

"a general immunity, possessed by all persons and bodies, from being compelled on pain of punishment to answer questions posed by other persons or bodies" (at 30F).

He then went on to identify various motives, which, he pointed out, would not necessarily all apply to each type of immunity which he had identified. Those motives were:

"The first is a simple reflection of the common view that one person should so far as possible be entitled to tell another person to mind his own business.

...

Secondly, there is a long history of reaction against abuses of judicial interrogation.

...

Next there is the instinct that it is contrary to fair play to put the accused in a position where he is exposed to punishment whatever he does. If he answers, he may condemn himself out of his own mouth; if he refuses he may be punished for his refusal.

...

Finally there is the desire to minimise the risk that an accused will be convicted on the strength of an untrue extra-judicial confession, to which the law gives effect by refusing to admit confessions in evidence except upon proof that they are 'voluntary.'" (see at 31D and E and 32A and B)

391. In that case, the applicant, who had been cautioned for an offence under the Companies Act 1985, objected to being required to answer questions put to him in connection with the matter by the Director of the Serious Fraud Office pursuant to s2 of the Criminal Justice Act 1987. Accordingly Lord Mustill's second reason was a reference to "abuses of judicial interrogation", rather than what, on the appellants' case here, is said to be what Lord Hoffmann called, in paragraph 47 in *R -v- Looseley* [2001] 1 WLR 2060, "an abuse of executive power".

392. None of the cases to which we were referred on the topic of confessions in criminal proceedings concerned the prosecution's right to use in evidence, a statement which had been obtained by force, threat or inducement from a person other than the defendant, or where the force, threat or inducement was perpetrated by someone independent of any authority in this country. That is, of course, not surprising, not least because (as mentioned above) a statement made by a third party outside court would hardly ever be admissible under common law in criminal proceedings, or indeed in civil proceedings. The third party would be expected to attend court to give evidence himself. There is, therefore, an air of unreality about an inquiry whether the common law would admit evidence of what a third party said outside court, whether under torture or not.

393. Having said that, it is fair to say that it is arguable that three of the four reasons identified by Lord Mustill do not, at least necessarily, justify the exclusion of a statement obtained through

torture by a foreign government from someone other than a defendant. The first and third reasons can be said to apply, at least primarily, to confessions by the defendant himself, and not by any means necessarily to statements extracted from someone who is not a party to the proceedings. The second reason can be argued to apply to the authorities in this country, but not to foreign authorities. Even the fourth reason can be said to go to weight - see for example per Lord Hailsham in *Ping Lin* at 600.

394. Indeed, the Secretary of State can get some assistance from *R -v- Sang* [1980] AC 402 where the House of Lords concluded that, save (a) in relation to evidence whose prejudicial effect outweighed its evidential value, and (b) in relation to improperly obtained evidence from the accused himself, a judge in criminal proceedings had "no discretion to refuse to admit relevant admissible evidence on the ground that it was obtained by improper means" (see for example per Lord Salmon at 444D-445C).

395. So far as abuse of process is concerned, we were taken to *R -v- Looseley*, where Lord Nicholls of Birkenhead said in paragraph 1:

"My Lords, every court has an inherent power and duty to prevent abuse of its process. This is a fundamental principle of the rule of law. By recourse to this principle courts ensure that executive agents of the state do not misuse the coercive, law enforcement functions of the courts and thereby oppress citizens of the state. Entrapment, with which these two appeals are concerned, is an instance where such misuse may occur. It is simply not acceptable that the state through its agents should lure its citizens into acts forbidden by the law and then seek to prosecute them for doing so. That would be entrapment. That would be a misuse of state power, and an abuse of the process of the courts. The unattractive consequences, frightening and sinister in extreme cases, which state conduct of this nature could have are obvious. The role of the courts is to stand between the state and its citizens to make sure this does not happen."

396. He went on to point out in paragraph 11 that "in this field English criminal law has undergone substantial development over the comparatively short period of 20 years ...". Accordingly, observations in cases such as *Ping Lin* and *Sang* must be read and applied bearing in mind these modern developments.

397. At paragraph 13, Lord Nicholls went on to say that:

"The judiciary should accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that ‘threatens either basic human rights or the rule of law’ ....".

398. As Lord Nicholls went on to explain in paragraphs 15 and 16, where executive abuse has occurred, the appropriate reaction of the court may depend on the circumstances. Thus, where the crime was committed purely as a result of entrapment, the only course for the court may be to stay the proceedings. In other cases, for instance where certain statements have been obtained unfairly by the authorities, the proper course may be to permit the prosecution to proceed, while excluding the unfairly obtained statements (see also per Lord

Hoffmann at paragraphs 40, 42-44.)

399. It is also relevant to observations from members of the House of Lords in two other cases, which Lord Nicholls no doubt had in mind. First, in *R -v- Horseferry Road Magistrates' Court ex p Bennett* [1994] 1 AC 42, at 76C-D, Lord Lowry said:

"[T]he court, in order to protect its own process from being degraded and misused, must have the power to stay proceedings which have come before it, and have only been made possible by acts which affect the court's conscience as being contrary to the rule of law. Those acts by providing a morally unacceptable foundation for the exercise of jurisdiction over the suspect taint the proposed trial and, if tolerated, will mean that the court's process has been abused. ... It affects the proper administration of justice according to the rule of law and with respect to international law."

400. In that case, as Lord Bridge made clear at 67G, the executive had only been able to prosecute the defendant "by participating in violations of international law and of laws of another state in order to secure the presence of the accused within the territorial jurisdiction of the court".

401. In *R -v- Latif* [1996] 1 WLR 104 at 112H - 113B, Lord Steyn said:

"Weighing countervailing considerations of policy and justice, it is for the judge in the exercise of his discretion to decide whether there has been an abuse of process, which amounts to an affront to the public conscience and requires the criminal proceedings to be stayed .... [P]roceedings may be stayed in the exercise of the judge's discretion not only where a fair trial is impossible, but also where it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place. ... General guidance as to how the discretion should be exercised in particular circumstances will not be useful. But it is possible to say that in a case such as the present, the judge must weigh in the balance the public interest in ensuring that those who are charged with grave crimes should be tried and the competing public interest in not conveying the impression that the court will adopt the approach that the end justifies any means."

402. In my view, it does not follow from cases such as *Looseley* and *Bennett* that the common law, or the inherent powers of the court, can be invoked to exclude, as of right, as to a statement improperly obtained by someone unconnected with the UK authorities. Those cases were concerned with wrongful acts carried out by, or participated in by, agents of the UK executive. It does not follow that the principles enunciated are to be applied to cases where nothing wrong was done by or on behalf of the executive.

403. I believe that that is supported by the decision of the Court of Appeal (Criminal Division) in *R -v- Shannon* [2001] 1 Cr App R 168 where the defendant had been enticed to commit a crime involving supply of controlled drugs by a journalist acting as an *agent provocateur*. The court held that it was open to the judge hearing the prosecution to exclude the evidence on the grounds that it was unfair, but there was no principle which required its exclusion. Further, even in his strongly expressed observations, Lord Steyn in *Latif* indicated that the common

law regards the decision whether to permit a trial to proceed on the basis of tainted events or evidence, was a balancing exercise, rather than subject to an absolute rule. However, I accept that that does not mean that, in cases where the taint is so great or of a particular nature, the discretion cannot be required to be exercised only one way.

404. In any event, the appellants' argument based on these cases faces an additional difficulty. The present proceedings are, as Lord Woolf held in paragraph 57 of his judgment in *A -v- Secretary of State*, albeit in the context of ECHR Article 6, civil proceedings. They are not criminal proceedings, unlike all the cases so far considered. To me, at least, the point has limited attraction. While appeals to SIAC under s25 are, technically, civil proceedings, they are, from the point of view of an appellant, in many ways as penal as criminal proceedings, and, in light of the nature of the evidence which is sufficient to justify an appellant's indefinite imprisonment, in some ways more penal than criminal proceedings.

405. So far as civil proceedings are concerned, the law, at least as it has been traditionally understood, is summarised thus in *Phipson on Evidence* 15th Edition at paragraph 33-34:

"The courts have on occasions disclaimed any general discretion in civil cases to exclude evidence on grounds of unfairness. There is no discretion to exclude evidence on the ground that it was unlawfully obtained. Nor is there any authority for the exclusion of evidence that its prejudicial effect outweighs its probative value."

However, as the editors go on to explain, there are certain exceptional grounds for excluding facts, statements of documents from evidence, such as public interest immunity, privilege, and similar fact evidence.

406. In *Blackledge -v- Arrow Nominees Inc* (unreported, 22nd June 2000), the Court of Appeal held that, in a civil case, it was open to a judge to dismiss proceedings (in that case a petition under s459 of the Companies Act 1985) in circumstances where the applicant, with the "object of frustrating a fair trial" had falsified and destroyed documents, with the result that it was not "fair to the respondents - [or] in the interests of the administration of justice generally - to allow the trial to continue", per Chadwick LJ at paragraph 56. In the same paragraph he went on to explain that:

"A decision to stop the trial in those circumstances is not based on the court's desire (or any perceived need) to punish the party concerned; rather it is a proper and necessary response where a party has shown that his object is not to have a fair trial which it is the court's function to conduct, but to have a trial the fairness of which he has attempted (and continues to attempt) to compromise."

407. It appears to me that both logic and the reasoning of Lord Nicholls in paragraph 16 and 17 in *Looseley* suggest that it should be open to a court in civil proceedings to exclude evidence, rather than to take the more drastic steps of striking out the proceedings, if the trial would not be fair were the evidence admitted, but by not admitting the evidence, a fair trial could be achieved. (However, in some cases, a party's behaviour in the conduct of litigation, although very blameworthy, may not result in the claim or defence being struck out, or even

in evidence being excluded: see for instance *Jones -v- University of Warwick* [2003] 1 WLR 954 at paragraph 28).

408. I do not consider that the reasoning in *Blackledge* is of assistance to the appellants here. There is no suggestion that the UK government was directly or indirectly responsible for, or indeed involved with, the procuring by torture of a statement, which the Secretary of State sought to rely on before SIAC. Nor is there any suggestion that the purpose of an alleged torturer was to interfere with the proceedings before SIAC; indeed it is unlikely in the extreme that any alleged torturer would have had in mind, or even known about, any projected SIAC proceedings.

409. From this analysis of the cases, it appears to me to follow that the appellants have not demonstrated that there is any authority to support the proposition that there is, or necessarily should be, a rule of common law whereby any statement obtained from a person under torture should be inadmissible, at least where neither the tortured nor the torturer is party to the proceedings. However, that is not the end of the matter, because it is not as if the Secretary of State has been able to establish that there is any case which does establish that such a statement is admissible. The point may therefore be said to be an open one, although it is fair to say that, in the absence of any authority suggesting that the common law requires a certain type of evidence to be excluded, the presumption would be that it does not require the exclusion of such evidence.

410. The common law is far from being static or petrified. Indeed, the change in the House of Lords' attitude in the 20 years between the decisions in *Sang* and *Looseley* is a good illustration of that (see *Looseley* at paragraph 11). Given that there is no case, and no reference in any authoritative text, to which we have been referred where it has been held that a statement obtained by torture is or is not admissible, it appears to me that this is a point which we are free to decide. However, it is not a point which should be resolved on the basis of moral feeling or personal preference; it should be determined, so far as possible, in a way which is consistent with the present state and character of the common law.

411. In considering this sort of question, it may often be unsafe to embark on the inquiry without bearing in mind the impact of ECHR, not least because, if the common law is, as was observed by Lord Bingham and Lord Hoffmann in *R -v- Lyons* [2003] 1 AC 76, informed by norms of international law, it must all the more be informed by international treaties which are incorporated into national law. However, as the appeal on this issue was argued on a rather compartmentalised basis, I am content to consider the point without reference to ECHR. After all, if the effect of ECHR is to exclude evidence obtained under torture, the appellants do not need to succeed on the common law, and if a statement obtained by torture is not to be excluded pursuant to ECHR, on the basis that it is a matter for the English court, it would be unlikely to influence the common law on the topic.

412. In my view, there are four powerful reasons for concluding that, at least where it is the executive which is seeking to rely on evidence obtained by torture, the common law would exclude it. The first reason is the revulsion from torture. In his recent Essex Clifford Chance lecture on *Torture* (29 January 2004), Lord Hope of Craighead considered the history of the use of torture in connection with judicial proceedings. Torture, as a means of extracting the

truth from suspects, "was not permitted in any of the common law courts in England as part of the ordinary course of the administration of justice" (p6). As Lord Hope explained at p9, torture was last used in England in connection with judicial proceedings in 1640. In other European countries it continued until well into the 18th, and even into the 19th, century (see p7). The outright rejection of torture was voiced in Sir Thomas Smith's *De Republica Anglorum*, and in the 1906 edition edited by Mr Leonard Alston, one finds this in chapter 24, on p106:

"The nature of our nation is free, stout, haulte, prodigall of life and bloode: but contumely, beatings, servitude and servile torment and punishment it will not abide."

Outright rejection of torture can be said to carry with it rejection of evidence obtained under torture, whoever the torturer or the tortured may be.

413. Secondly there is the fact that at least in the present appeals, it is the UK government, through the Secretary of State, which is seeking to rely upon evidence which, at least according to the appellants, was extracted under torture. While this is not a case where there is any question of the executive having been in any way connected with the torture, it remains the case that it is the executive which is seeking to rely in legal proceedings upon evidence which is alleged to have been obtained through torture. In a sense, therefore, it can be said that the executive has "adopted" the means by which the evidence was extracted, and therefore that the duty of the court to intervene has arguably been triggered.

414. Thirdly, one of the principal reasons why a confession made by an accused is excluded from evidence unless it was voluntary, is that such a confession is self evidently unreliable. That reason would apply with equal force to a statement obtained from a third party under torture.

415. Fourthly, in a case such as the present, where the statement is from a third party, there could be said to be greater unfairness to the appellant than if the statement was his. The person from whom the statement has been obtained would almost certainly not be available for cross-examination by the appellant, whereas the appellant can at least give evidence about his own confession. There are also particular difficulties faced by an appellant before SIAC, both because he may not be able to see much of the relevant evidence, and because the nature of the evidence which SIAC is entitled to take into account will, at least in many cases, be second-hand, conjectural and/or sketchy.

416. While these are very powerful arguments, I have come to the conclusion that, subject to what may well be a very important qualification in practice, they do not justify concluding that the common law would require evidence obtained by torture to be excluded, even in relation to a s25 appeal before SIAC. First, as has been authoritatively stated in the context of criminal proceedings, for instance in *Sang*, the well-established approach of the English courts was that evidence was admissible, irrespective of how it was obtained. Save where the state is implicated in the wrongful obtaining of evidence, the common law may be expected to take its normal pragmatic approach. Improper action by the executive may often lead to high principle prevailing over pragmatism (as in *Bennett* and *Looseley*); so too, possibly,

where the accused is unfairly caused to incriminate himself. Otherwise, it should be weight rather than admissibility which comes into play.

417. Secondly, there are observations at the highest level which suggest that the rule that involuntary confessions are to be excluded in criminal cases, can be regarded, at least in the absence of any statutory provision to that effect, to be somewhat anomalous, on the basis that the circumstances in which a confession is extracted logically go to the weight to be given to the confession, rather than its admissibility - see for example the observations of Lord Hailsham in *DPP -v- Ping Lin* at 600. If there are grounds for characterising the exclusionary rule relating to involuntary confessions in criminal cases as anomalous so far as the common law is concerned, that makes it difficult to justify extending the rule to exclude from evidence in non-criminal cases a statement extracted from a third party, and where the executive is not involved in the unlawful obtaining of the evidence.

418. Thirdly, although it can be said that the executive, by using evidence obtained under torture, has somehow adopted the means of obtaining that evidence, it appears to me that that argument is weakened by the decision in *Shannon*, where it could have been said that, by prosecuting, the Crown had effectively adopted the actions - or at least the results of the actions - of the *agent provocateur*.

419. Fourthly, in relation to an appeal under the 2001 Act, the Secretary of State may, at least in some cases, have had very little option but to rely on upon evidence obtained by torture, if it is supplied to him through his officials, who will have obtained it, either directly or indirectly, officially or unofficially, from officials from other governments. In the absence of a good reason, one would expect the same type of evidence to be available to SIAC as is available to the Secretary of State.

420. Fifthly, while it is not a particularly attractive point, s25 appeals are civil proceedings, and not criminal proceedings. It is clear from the passage in *Phipson* (*op cit*) that, whatever changes or advances there may have been since the decisions in *Sang* and *Ping Lin* so far as the attitude of the courts in criminal cases is concerned, relevant and otherwise admissible evidence in civil proceedings is only excluded in very rare circumstances, and recent cases, such as *Blackledge* do not provide any assistance to the appellants' case in this regard.

421. Sixthly, there are the provisions of rule 44(3) itself. The purpose, at least as expressed in general terms, of that rule was, in my view, to ensure that any rule relating to admissibility which would normally have precluded the receipt of evidence in an English court should not apply to a s25 appeal before SIAC. However, that does not mean that rule 44(3) will over-ride every objection to admissibility. That would involve giving the rule far too wide an effect. After all, the rule is only expressed in general permissive terms.

422. Thus, I consider that any statutory exclusionary rule which would otherwise apply, would not be disapplied by Rule 44. Further, any fundamental rule, which might be described as more than a "mere" common law rule, but one of constitutional importance, would not be disapplied. To raise what is a very unlikely possibility, evidence obtained from an appellant, or indeed, anyone else, through the means of torture to which the UK government was in

some way party, should be excluded despite rule 44(3): that would be a classic case of SIAC carrying out the protective duty described by Lord Nicholls in paragraphs 1 and 13 of *Looseley*.

423. Accordingly, albeit with real hesitation, I am of the view that, unless the effect of any principle of non-domestic law can be relied on, the appellants' contention, that a statement obtained by a third party under torture from someone unconnected with the UK government should be inadmissible in s25 proceedings as a matter of English common law, must, on the basis of the arguments before us, be rejected. However, this conclusion is subject to two important qualifications.

424. First, I am firmly of the view that, in the unlikely event of the torture having been carried out by or on behalf of, or even with the connivance of, the UK government, the court would have no hesitation in excluding any statement given under such torture, if it was sought to be relied on by the Secretary of State. To permit the executive to rely in court on evidence which its agents had extracted, or assisted in extracting, under torture would involve the court failing in the duty identified by Lord Mustill in his second factor in *Smith*, and so ringingly described by Lord Nicholls in paragraphs 1 and 13 of *Looseley*.

425. Secondly, there is what I have referred to as what is possibly a very important qualification in practice. As already mentioned, it appears to me that the common law, being based more on pragmatism than principle, at least where there is no question of executive wrong-doing, will approach statements obtained by torture by reference to weight rather than admissibility. While the point was not greatly discussed before us, it appears to me, as at present advised, that, in the absence of any internal corroboration, it would be inappropriate to give a statement made under torture any weight. By "internal corroboration" I have in mind something said by the person under torture which somehow serves to confirm that he is telling the truth in that part of the statement which implicates the appellant. Thus, if the person under torture identifies eight people (including an appellant) as terrorists, the fact that the other seven were known to be terrorists might, I suppose, provide some sort of internal corroboration. (Even in such a case, it may be said that it would be wrong to rely upon the statement, unless one knew that the seven names had not been given to the person under torture by his torturers).

426. External corroboration would not take matters any further, because it would consist of evidence, outside any statement obtained by torture, tending to suggest that the appellant was a terrorist, which would be evidence which would stand on its own anyway. However, a simple statement, which does no more than implicate the appellant, even with some details, if given by a third party under torture, appears to me to be, at least in the absence of special circumstances, very unlikely to be regarded by any right minded person as being of any probative value.

427. My view on this question of weight is not affected by rule 44(3). In *R -v- Deputy Industrial Injuries Commissioner ex p Moore* [1965] 1 QB 456, it was clear that "Parliament did not intend that the proceedings should be governed by the strict rules of evidence" (per Willmer at 474F). However, Diplock LJ explained, at 488C-E:

"The requirements that a person exercising quasi-judicial functions must base his decision on evidence means no more than that it must be based upon material which tends logically to show the existence or non-existence of facts relevant to the issue to be determined, or to show the likelihood or unlikelihood of the occurrence of some future event the occurrence of which would be relevant. It means that he must not spin a coin or consult an astrologer, but may take into account any material which, as a matter of reason, has some probative value in the sense mentioned above. If it is capable of having any probative value, the weight to be attached to it is a matter for the person to whom Parliament has entrusted the responsibility of deciding the issue. The supervisory jurisdiction of the High Court does not entitle it to usurp this responsibility and substitute its own view for his."

428. Accordingly, if an uncorroborated statement given under torture is not (at least normally) of any weight, rule 44(3) could not be invoked to change that on a s25 appeal.

429. I have wondered whether such an uncorroborated statement made under torture could be required to be excluded on the basis that its prejudicial effect must outweigh it probative value - an exception to the general rule allowed in *Sang*. In the absence of having heard argument on the point, I would not like to rest any decision on it. After all, it is arguably only relevant in criminal cases, and it is of particular application to jury trials.

430. I turn, then, to the contention that the English common law requires the court to exclude evidence obtained by torture as a result of developments in international law.

431. In *Lyons*, at paragraph 13, Lord Bingham observed:

"Even before the Human Rights Act 1998 the Convention exerted a persuasive and pervasive influence on judicial decision-making in this country, affecting the interpretation of ambiguous statutory provisions, guiding the exercise of discretions, bearing on the development of the common law."

432. At paragraph 27, Lord Hoffmann said this:

"Of course, there is a strong presumption in favour of interpreting English law (whether common law or statute) in a way which does not place the United Kingdom in breach of an international obligation."

433. In this connection, the appellants do not rely upon the ECHR, because, of course, unlike in *Lyons*, it is open to them effectively to rely directly on ECHR because the hearing before SIAC took place after the 1998 Act had come into force. What the appellants do rely on is CAT, and in particular Article 15 thereof. They contend that, by admitting evidence obtained under torture by an official of a foreign government, particularly, it is said (though I am not sure why), a government which is a signatory to CAT (eg the United States), SIAC would be putting the UK government in breach of its obligations under Article 15 of CAT.

434. I do not consider that that contention, even if it is right insofar as the effect of Article 15 of

CAT is concerned, is correct. The mere fact that the UK is party to an international convention under which the states parties agree that an action should not be taken, whether in the courts or elsewhere within their jurisdiction cannot, without more, result in the common law preventing the taking of that action. It is well established that international treaties are not themselves part of domestic law, and that the English courts have no jurisdiction to apply them directly as domestic law, at least until they are incorporated, which would normally be by statute, into national law. That was made clear by Lord Hoffmann in paragraph 27 of his speech in *Lyons* where he said:

"[I]t is firmly established that international treaties do not form part of English law and that English courts have no jurisdiction to interpret or apply them."

If the common law simply incorporated every commitment entered into by the UK government in an international treaty, it would make a nonsense of the principle identified by Lord Hoffmann. At paragraph 39 in *Lyons*, he said that a similar argument "comes to nothing more than an attempt to give direct domestic effect to an international treaty".

435. Indeed, the opening words of Article 15 of CAT themselves contain a difficulty for the appellants' argument based on common law, over and above any problem of principle. That Article envisages that each contracting state will ensure that evidence obtained by torture cannot be relied on in its national courts. Article 15 therefore carries with it the notion that, if the current national law does not have such an exclusionary rule, something more will have to be done by the national government to ensure that it does. No such further action has been identified on behalf of the appellants in the present case.

436. In my judgment, there would be a formidable argument for contending that the common law should, irrespective of the impact of the ECHR, be extended to exclude from evidence statements obtained by torture, if it could be shown that there is, in the international hierarchy, an "ordinary" customary rule that statements obtained by torture should not be admissible in a court. In that connection, it is clear that the prohibition of torture itself is not merely such a customary rule, but now "has the character of *jus cogens*, or a peremptory norm" which involves a higher rank even that ordinary customary rules: see per Lord Browne-Wilkinson in *R -v- Bow Street Metropolitan Stipendiary Magistrate ex p Pinochet Ugarte (No 3)* [2002] 1 AC 147 at 198B-C, and per the ECtHR in *Al-Adsani -v- United Kingdom* (2002) 34 EHRR 11 at paragraph 30, quoting extensively from paragraphs 144-154 of the judgment of the International Criminal Tribunal for the former Yugoslavia in *Prosecutor -v- Furundzija* (1999) 38 ILM 317.

437. However, I do not think that it follows from this that there is such a customary rule or peremptory norm relating to the acceptance by national courts of statements obtained by torture. Such a contention would have to be made out by reference to authorities, text-books and articles in appropriate journals. We have not been referred to any such material, although it is right to record that the appellants applied for permission to develop an argument to that effect. Because that application was made very late in the hearing of these appeals, it would have been unfair to the Secretary of State to have acceded to it, and consequently it is not a line of argument which is open to the appellants.

438. In all these circumstances, I consider that the appellants have failed to make out their case, whether based on purely domestic law considerations or on international treaty obligations (other than ECHR), that the common law would preclude the Secretary of State from relying in proceedings on statements obtained from third parties by torture to which the UK was in no way party.

Does ECHR Article 6(1) preclude reliance on statements obtained by torture?

439. The second basis upon which the appellants put their case for contending that evidence obtained by torture cannot be relied on before or by SIAC is essentially through the medium of ECHR Article 6(1), which confers the right to a "fair trial". In this connection, in light of the status of SIAC, the nature of proceedings under s25 of the 2001 Act and the decision of this court in *A -v- Secretary of State* at paragraph 57, it is rightly common ground that such an appeal is within the scope of the Article. The question is whether the dismissal by SIAC of an appeal brought under s25 would infringe an appellant's right to a fair trial, if the dismissal turned on evidence consisting of an statement obtained by torture, albeit that the statement was made by a third party on whom the torture was committed by someone wholly independent of the UK government.

440. It appears clear from a number of decisions of the ECtHR that the question whether a trial was "fair" under ECHR Article 6(1) does not normally involve consideration of whether certain evidence should or should not have been admitted, which is a matter for the domestic courts. The question for the ECtHR is ultimately whether, viewed in the round, the trial could accurately be described as unfair. Thus in *Barbera -v- Spain* (1988) 11 EHRR 360, the ECtHR said this:

"As a general rule, it is for the national courts, and in particular, the court of first instance, to assess the evidence before them as well as the relevance of the evidence which the accused seeks to adduce. The Court must, however, determine ... whether the proceedings, considered as a whole, including the way in which prosecution and defence evidence was taken, were fair as required by Article 6(1)."

441. To the same effect are observations in *Schenk -v- Switzerland* (1988) 13 EHRR 242, *Ferrantelli -v- Italy* (1996) 23 EHRR 288 at paragraph 48, and *Khan -v- United Kingdom* (2000) 31 EHRR 45 at paragraphs 34-35. Indeed, both in *Schenk* and *Khan*, the ECtHR held that evidence which had been adduced by the prosecution had been obtained in breach of ECHR Article 8, but nonetheless concluded that there had been no breach of the accused's rights under ECHR Article 6(1).

442. In this connection, Lord Bingham of Cornhill said in *Brown -v- Scott* [2003] 1 AC 681 at 704D-F:

"The jurisdiction of the European Court very clearly establishes that while the overall fairness of a criminal trial cannot be compromised, the constituent rights comprised, whether expressly or implicitly within article 6 are not themselves absolute. Limited qualification of

these rights is acceptable if reasonably directed by national authorities. ... The Court has also recognised the need for a fair balance between the general interest of the community and the personal rights of the individual ...."

443. Nonetheless, it does appear that the ECtHR is prepared to lay down some rules of fairly general application, and give a degree of general guidance as to the circumstances which could normally be expected to give rise to the conclusion that a trial was not fair. In *Saunders -v- United Kingdom* (1966) 23 EHRR 313, the court said this at paragraph 74:

"[T]he general requirements of fairness contained in Article 6, including the right not to incriminate oneself, apply to criminal proceedings in respect of all types of criminal offences, without distinction, from the most simple to the most complex. The public interest cannot be invoked to justify the use of answers compulsorily obtained in a non-judicial investigation to incriminate the accused during the trial proceedings."

444. In *Teixeira de Castro -v- Portugal* (1998) 28 EHRR 101, the ECtHR, after emphasising that the question of admissibility of evidence was generally for the national courts (paragraph 34), went on to say this in paragraph 36:

"The general requirements of fairness embodied in Article 6 apply to proceedings concerning all types of criminal offence, from the most straightforward to the most complex. The public interest cannot justify the use of evidence obtained as a result of police incitement."

The ECtHR concluded that:

"The two police officers' actions went beyond those of undercover agents because they instigated the offence and there is nothing to suggest that without their intervention it would have been committed. That intervention and its use in the impugned criminal proceedings meant that, right from the outset, the applicant was definitively deprived of a fair trial."

445. Most in point here, it appears that the use of evidence against an accused person in criminal proceedings which has been obtained from him through torture would inevitably result in his trial not being fair within the meaning of ECHR Article 6(1). This seems to have been accepted by the Council of Ministers, when they adopted the decision of the Commission in *Austria -v- Italy* [1963] YB 740 - see at 784. It also appears to have been assumed by Lord Hoffmann in *Montgomery -v- HM Advocate* [2003] 1 AC 641 at 649D-E in clear if *obiter* terms:

"Of course events before the trial may create the conditions for an unfair determination of the charge. For example, an accused who is convicted on evidence obtained from him by torture has not had a fair trial. But a breach of Article 6(1) lies not in the use of torture (which is, separately, a breach of Article 3) but in the reception of the evidence by the court for the purpose of determining the charge."

446. The issue which therefore falls to be considered, as I see it, is whether it can be said that,

particularly in light of Article 15 of CAT, the use of a statement, obtained from a third party by torture, against an appellant to SIAC under s25 of the 2001 Act would deprive him of a fair trial. I shall first consider the meaning of Article 15 of CAT and its inter-relationship with ECHR Article 6(1) - ie fairness in the wider perspective. I shall then turn to the effect of admitting in evidence a statement obtained from a third party by torture, against an appellant in a s25 appeal - ie fairness to the particular appellant.

447. On the wider perspective, the first question which has to be considered is whether admission of evidence obtained under torture in another country would involve an infringement of Article 15 of CAT. Technically, it might be said that such an argument must fail *in limine*, because, as I have mentioned, the Article merely imposes an international treaty obligation on the UK to put into effect exclusionary rules of court procedure in relation to statements obtained by torture. That argument, not, so far as I could see, advanced on behalf of the Secretary of State, is very unattractive, and is, in my view, to be rejected. The UK became party to CAT more than 15 years ago, and has had ample time to implement its obligation under Article 15. Furthermore, I do not think that, if one is otherwise entitled to treat Article 15 of CAT as informing the effect of ECHR Article 6, such a nice drafting point should carry any weight.

448. Another point which did not appear to be pressed on behalf of the Secretary of State, although it was briefly raised in argument, is whether Article 15 of CAT should be read as limited to evidence obtained by torture at the suit of, or within the jurisdiction of, the state in whose courts the evidence is sought to be admitted. I do not think that this would involve a legitimate reading of Article 15. The court should be reluctant to imply words into a provision of an international treaty (see per Lord Bingham in *Brown* at 703E-F), which is what such a construction involves. The point is underlined by the wide definition of torture in Article 1 of CAT. Furthermore, it seems to me that, where CAT intends the reference to torture to be limited to torture carried out within a particular state's jurisdiction, it says so: see for instance Articles 2(1), 12 and 13.

449. There was also a suggestion that Article 15 of CAT should not apply to the receipt of evidence in civil trials. I can see no basis for such a reading either as a matter of language or as a matter of policy.

450. More specifically, the Torture Committee, established under Article 17 of CAT, had no hesitation in holding in *PE -v- France* (2002) 10 IHRR 421, that Article 15 of CAT precluded evidence obtained by torture in one country being used in the court of another country, although, on the evidence, the Torture Committee was not persuaded that torture had in fact been used (see paragraphs 6.3 and 6.6). Accordingly, I am of the view that, if a statement, obtained by officials from another state from a third party under torture, is admitted in evidence by SIAC, it would be inconsistent with Article 15 of CAT.

451. Article 15 of CAT does not stand alone in international law by any means. For instance, Article 12 of the UN General Assembly Declaration 1975 provides that:

"Any statement which is established to have been made as a result of torture ... may not be

invoked as evidence against the person concerned or against any person in any proceedings."

The Human Rights Committee set up under the International Covenant on Civil and Political Rights (1966) said the same thing in March 1992.

452. When considering whether or not a person is entitled to (or has had) a fair trial under Article 6(1), regard can be had to the provisions of international treaties, and in particular to CAT. In paragraph 5 of its judgment in *Al-Adsani,* the ECtHR said this:

"The Convention, including Article 6, cannot be interpreted in a vacuum. The court must be mindful of the Convention's special character as a human rights treaty, and it must also take the relevant rules of international law into account .... The Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the grant of state immunity."

453. In paragraph 146 of the judgment in *Furundzija,* quoted in full with approval by the ECtHR in paragraph 30 of its judgment in *Al-Adsani,* the International Criminal Tribunal for the former Yugoslavia referred to:

"The existence of [a] *corpus* of general and treaty rules proscribing torture [which] shows that the international community, aware of the importance of outlawing this heinous phenomenon, has decided to suppress any manifestation of torture by operating both at the inter-state level and at the level of individuals. No legal loopholes have been left."

454. Two earlier decisions of the ECtHR are also in point in relation to torture. In *Aydin -v- Turkey* (1998) 25 EHRR 251, the ECtHR said this at paragraph 103:

"It is true that no express provision exists in the [ECHR] such as can be found in Article 12 of the [CAT Convention] which imposes a duty to proceed to a 'prompt and impartial' investigation whenever there is a reasonable ground to believe that such an act of torture has been committed .... However, such a requirement is implicit in the notion of 'an effective remedy' under Article 13 ...."

455. *Soering -v- United Kingdom* (1989) 11 EHRR 439 is to similar effect. In paragraph 87 the court said that:

"any interpretation of the rights and freedoms guaranteed [by ECHR] has to be consistent with 'the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society [quoting from an earlier judgment]."

456. After referring to ECHR Article 3, in the next paragraph the ECtHR stated that it's

"absolute prohibition of torture" was "also to be found ... in other international covenants on civil and political rights and the 1969 American Convention on Human Rights."

457. In the same paragraph, after referring to Article 3 of CAT, the court said this:

"The fact that a specialised treaty should spell out in detail a specific obligation attaching to the prohibition of torture does not mean that an essentially similar obligation is not already inherent in the general terms of [ECHR] Article 3."

458. *V -v- United Kingdom* (1999) 30 EHRR 121 is another example of international conventions affecting the construction of Articles of ECHR. In that case, a minor alleged that there was a breach of ECHR Article 3 because he was subjected to what the ECtHR called "criminal proceedings [which] took place over three weeks in public in an adult Crown Court with attendant formality, and that, after his conviction, his name was permitted to be published" (paragraph 75). The ECtHR then went on to refer to the guarantees provided by Article 40(2)(b) of the UN Convention on the Rights of the Child (1989), Rule 8 of the Beijing Rules, and the 1987 Recommendation of the Committee of Ministers of the Council of Europe. It then stated that these three documents:

"demonstrate ... an international tendency in favour the protection of the privacy of juvenile defendants, and ... in particular ... the UN Convention is binding in international terms on the United Kingdom in common with all other member states of the Council of Europe."

459. It is right to mention that, in the same paragraph, the ECtHR went on to say that:

"Whilst the existence of such a trend is one factor to be taken into account when assessing whether the treatment of the applicant can be regarded as acceptable, under other articles of the Convention, it cannot be determinative of the question whether the trial in public amounted to ill-treatment attaining the minimum level of severity necessary to bring it within the scope of Article 3."

460. It is, I think, worth emphasising the general aim of CAT as identified in *Furundzija* and quoted with approval by the ECtHR in *Al-Adsani*, when considering the wider context. If courts of states that are parties to ECHR decide that evidence obtained under torture is admissible, then, while not expressly condoning torture, they would effectively be indicating that the use of torture to obtain evidence is not merely impliedly condoned, but is worthwhile, because such evidence may well be taken into account in those courts.

461. The fact that the torture may have occurred in a country not a signatory to ECHR appears to me to be of no real significance. In *Soering*, the ECtHR held that it was wrong for the UK to extradite a person to Virginia, USA when this would be likely to result in treatment which, if it was in a state which was a party to ECHR would infringe ECHR Article 3. Indeed, the priorities engaged by ECHR as between torture abroad and domestic national security were described thus by Lord Hoffmann in *Rehman*, in paragraph 54:

"The European jurisprudence makes it clear that whether deportation is in the interests of national security is irrelevant to rights under [ECHR] Article 3. If there is a danger of torture, the government must find some other way of dealing with a threat to national security."

462. I turn to the second aspect, namely the effect on an appellant under s25 of the 2001 Act of allowing the Secretary of State to adduce, and SIAC to take into account, evidence in the form of a statement by a third party made under torture to officials of other countries, in support of the case for saying that there are "reasonable grounds" under s25.

463. I accept, of course that there is a difference in principle, and in the degree of offensiveness, between relying on an accused's own confession obtained under torture by UK authorities, and relying on a third party's statement against an accused, obtained under torture by another state. Indeed, if there were no such difference, then I would, as a matter of logic, have reached a different conclusion on the appellants' case insofar as it is based on the common law. Nonetheless, the prejudice to an appellant, if one allows in a statement extracted from a third party under torture is obvious. Reliability is just as much a point as in relation to a confession obtained from the appellant himself.

464. Indeed, as already mentioned, it appears to me that, in some respects, it would be even more unfair on an appellant to rely upon a statement extracted from a third party under torture, than to rely upon a confession extracted from the appellant himself under torture. The appellant at least will know of all the circumstances in which the confession was extracted, and will be able to give evidence in court to explain those circumstances, and possibly to give other evidence to rebut the reliability of the confession. However, it will be a very rare case where the appellant would know very much about the circumstances in which the statement was extracted from a third party, or where the appellant would be able to arrange for evidence to be given about those circumstances. Almost by definition, he will not be able to call or cross-examine the third party with a view to the third party explaining or rebutting the statement. Indeed, if the third party were available, the statement extracted under torture would normally not be admitted, as he would be able to give evidence directly to the court.

465. Accordingly, particularly as the s25 appeal can result in an appellant being detained in prison for an extended period, it appears to me that, if the Secretary of State can rely on a statement obtained by torture from a third party, especially if that third party cannot be cross-examined, I would not find it easy to characterise the appeal process as "fair", from the appellant's point of view. In this connection, it seems to me that, if a statement obtained by torture can be relied on, there is the rather sobering thought that one must proceed on the basis that the statement would be crucial. If the appeal would have failed without the admission of the statement, the statement would not have been needed. It is only if it is crucial that its admissibility would matter.

466. In relation to s25 appeals, I accept that there are arguments the other way, bearing in mind the existence of the terrorist threat identified in the Derogation Order, and the possible difficulty in obtaining evidence to satisfy even the relatively low threshold requirements of s25(2) of the 2001 Act.

467. Nonetheless, I have come to the conclusion that, bearing in mind that ECHR Article 6(1) must be treated as informed by other international treaties, the general international determination to eliminate torture in all circumstances, and the terms of Article 15 of CAT,

coupled with the specific unfairness to an appellant against whom a statement obtained under torture is to be used, as the person who gave the statement will not be available for cross-examination, and as the statement will be relied on to justify detaining the appellant potentially indefinitely, I do not think that any party mounting a s25 appeal before SIAC can be said to have had fair trial within ECHR Article 6(1), if evidence obtained by torture is used against him.

468. There is one English authority which provides significant, if indirect, support for this conclusion. It is a decision of the Divisional Court, in *R (Ramda) -v- Secretary of State for the Home Department* (unreported, 27th June 2002), granting judicial review of an order extraditing the claimant to France. The French authorities wished to prosecute the claimant in connection with a series of terrorist bombings, and intended to rely on the evidence and confession of one Bensaid, which was given under torture. In paragraph 9, the Divisional Court said this:

"Among the issues for the Home Secretary to determine may be whether the trial to be faced by the wanted person will be a fair trial. This may involve the voluntariness of extra-judicial confessions relied on as evidence against him."

469. In paragraph 16 of his judgment, Sedley LJ went on to consider the evidence said to support the contention that Bensaid's confession and evidence had been obtained with the assistance of violence. He said this:

"[Counsel for the claimant] contends that the central point remains unanswered: how did Bensaid come to have injuries ...? If there is no intelligent explanation, [counsel] submits that the Home Secretary would be justified in inferring - in fact might be driven to infer - that Bensaid had been beaten up, and at a time so closely prior to the admissions which form a crucial part of the case against both himself and the claimant as to taint them irredeemably with oppression. If so, and if the evidence is not going to be excluded at the claimant's trial, extradition - as [counsel for the Home Secretary] accepts - would be impermissible."

470. Finally, in paragraph 22, Sedley LJ concluded:

"Questions of admissibility within the requesting state's criminal process are ordinarily for the courts of the requesting state to decide, especially where admissibility turns upon disputed issues of fact. <u>It is only where it can be demonstrated that the approach taken by the requesting state's courts to admissibility will itself be such as to create a real risk of a fundamentally unfair trial</u> that the principle of mutual respect ... may have to yield. In a case such as the present, this requires the Home Secretary to be satisfied of at least two things: that Bensaid's incriminating admissions may well have been the direct result of brutality, and that the French courts will not entertain, except to reject it *in limine* any argument in the claimant's defence based on this contention." (emphasis added).

471. It was not suggested on behalf of the Secretary of State that the decision in *Ramda*, which is not of course binding on us, was wrong, or that the concession recorded as having been made on his behalf in that case was misinterpreted or wrongly made. As mentioned, it

appears to me that the decision and reasoning in *Ramda* provide significant support for the conclusion I have reached.

472. First, it seems to support the proposition that an accused will not receive a fair criminal trial under ECHR Article 6(1), if the evidence against him includes a statement obtained from a third party under torture. While I accept that a s25 appeal before SIAC is not a criminal trial of an appellant, I do not regard that distinction as very powerful, particularly given the nature of the proceedings, and the consequences of the s25 appeal failing, namely involuntary detention of the appellant, potentially for an indeterminate period. Secondly, although I accept that the decision in *Ramda* turned in a sense on the construction of ss12 and 13 of the Extradition Act 1989, it would seem very odd if the law of England was such that, on the one hand, its courts were permitted to receive in evidence statements obtained under torture while, on the other hand, its courts were bound to quash extradition orders because the person to be extradited would be prosecuted in a foreign court with the assistance of evidence consisting of a statement obtained under torture.

473. Accordingly, I consider that the appellants have made good their case as to the inadmissibility of statements given under torture. For reasons already discussed, rule 44(3) does not call this conclusion into question. The exclusion is required by what is ultimately a statutory provision, namely a Convention right under the 1998 Act. Further, rule 44(3) must be construed so as to be compatible with ECHR Article 6(1): see ss3 and 6 of the 1998 Act.

474. If my conclusions on the issue so far are correct, they may be said to be somewhat ironic: the common law of England, which has a particularly good record as to the vice of torture since 1640, does not exclude evidence obtained by torture, whereas the law of Europe, where the abolition of torture is rather more recent, would exclude such evidence. This does not cause me to doubt my conclusions. First, as I have explained, the effect of ECHR on the common law has, perhaps somewhat artificially, been excluded from consideration. Secondly, as also mentioned, common law lays somewhat more emphasis on pragmatism, whereas the approach under ECHR is perhaps rather more influenced by moral principle. Thirdly, the very fact that countries in mainland Europe have had a more chequered history over the past 300 years may render their courts more sensitive on issues such as torture. Fourthly, ECHR is an international convention and rather more prone to interpretation by reference to other such conventions than the common law.

Evidence obtained by torture: the case based on derogation

475. The appellants developed a further argument, albeit that it was somewhat unclear whether it was intended to be a free-standing argument, or an argument bolstering their case based on the common law and/or ECHR Article 6(1). The argument is to this effect. The derogation effected by the Derogation Order must, in order to be valid, not be "inconsistent with [the UK's] other obligations under international law": see the closing words of ECHR Article 15(1). Therefore, if SIAC can rely on evidence obtained by torture, that means that the UK is in breach of its obligations under Article 15 of CAT, and consequently in breach of one of its obligations "under international law". Accordingly, unless SIAC is somehow precluded from relying on evidence obtained by torture, the derogation effected by the Derogation Order must be ineffective, and consequently the provisions of the 2001 Act is incompatible with

ECHR Article 5(1)(f).

476. This argument was initially advanced on the basis that it was a reason for concluding that evidence obtained by torture could not be presented to, or relied on by, SIAC, by virtue of ECHR Article 6(1), or even under the common law. However, it seems to me that that cannot be the right analysis. Neither the contents of the common law nor the meaning of ECHR Article 6(1) can depend on the terms or effect of a purported derogation by the UK government under ECHR Article 15, nor by the provisions or effect of a UK statute. To my mind, if the appellants' argument is correct in principle, then, in light of s3 of the 1998 Act, this court should first attempt to construe the 2001 Act and/or the SIAC rules in such a way as precludes SIAC from entertaining evidence obtained by torture, or (by necessary inference) it must conclude that the 2001 Act is, to this extent, incompatible with ECHR, which would present an obvious difficulty, because, even now, the appellants do not seek a declaration of incompatibility.

477. If the appellants' point is a good one, it seems to me that it can be solved in this way. SIAC, as an organ of the UK government for this purpose, is obliged to comply with ECHR if it is possible for it to do so. If it admits and relies on evidence obtained by torture in order to uphold a certificate against a particular appellant, then that would put the UK, in breach of ECHR Article 5(1)(f), because, if the argument of the appellants is correct, the derogation would be ineffective.

478. If the argument is right, then one must look to see whether there is anything in a statute or statutory instrument which can be said to require SIAC to admit evidence obtained by torture. In my view, there is no such requirement in the 2001 Act, or in the 2003 Rules. The only possible relevant provision to which our attention was drawn was Rule 44 of the 2003 Rules, and I do not see how it can be said that that can be construed as requiring SIAC to admit evidence obtained by torture. It merely disapplies the normal rules of evidence. However, if, by admitting evidence obtained by torture, SIAC would inevitably put the UK government in breach of the appellants' rights under ECHR, it seems to me to follow that it is not merely a rule of evidence, but a fundamental point of principle, that SIAC should not admit evidence obtained by torture.

479. The central question, therefore, appears to me to be whether the derogation would be ineffective if SIAC were to admit and rely on evidence obtained by torture. The first point made on behalf of the Secretary of State is that it is not open to this court to question the validity of the derogation. This point is based on the contention that, as ECHR Article 15 is not a Convention right under Schedule 1 to the 1998 Act, ie it has not been incorporated into English law, this court cannot inquire as to whether its provisions have been complied with.

480. In resolving that argument, an English court's starting point must, I think, be the 1998 Act. The effect of s1(1) and (2) of that Act is that ECHR Articles 2-12 and 14 "have effect ... subject to any designated derogation ...". The question, as I see it, is therefore whether a derogation contained in a statutory instrument, which is susceptible of being held to be unlawful under the terms of ECHR Article 15(1), which is not an Article referred to the 1998 Act, is, nonetheless, a "designated derogation". If it is, then an English court must give effect

to it. In this connection, s14(1) defines such a designated derogation as:

"any derogation by the United Kingdom from an Article ... which is designated for the purposes of this Act in an order made by the Secretary of State."

481. On the face of it, there is an Order which has been laid before, and effectively approved by, the legislature, under which the UK government has derogated from an Article of the ECHR. The appellants' contention is effectively that if evidence obtained by torture is admissible before SIAC, the derogation is invalid in light of ECHR Article 15(1). The notion that a provision in, or the whole of, a statutory instrument can be declared unlawful and ineffective by the court is, of course, well-established. However, the court can only reach such a conclusion on the basis of English law, that is common law or statutory law. Insofar as an English court relies on international treaties, it can only do so insofar as the treaties are incorporated into English law, as pointed out by Lord Hoffmann in paragraph 27 in *Lyons*.

482. The appellants' contention that the derogation effected by the Derogation Order would be unlawful rests on the closing words of Article 15(1). However, that Article is not incorporated into English law, because it is not identified as a Convention right under the 1998 Act. In those circumstances, it appears to me that it may well not be open to an English court to conclude that a derogation effected by the UK government purportedly pursuant to ECHR Article 15, and embodied in something which is plainly a "designated order", was ineffective because it does not comply with, or satisfy the requirements of, ECHR Article 15. Indeed, if that is right, then, even if the court was satisfied that the derogation did not satisfy ECHR Article 15, I doubt it would be open to the court to make a declaration of incompatibility under s4 of the 1998 Act. That is because, under s4(2) the court has to be satisfied that "the provision is incompatible with a Convention right" which brings one straight back to the definition of Convention rights in s1.

483. A troubling aspect of this argument, is that it does not seem to have been raised in *A -v- Secretary of State*. In part (6) of his judgment in that case, Lord Woolf, at paragraphs 32-36, expressly considered "whether there has been compliance with the threshold requirements for derogation. There does not appear to have been any suggestion in that case, either in argument or from the court, that that was not something which it was open to an English court to consider. (In this connection see also paragraphs 72-85 and 99 of the judgment of Brooke LJ, and paragraphs 140-151 of the judgment of Chadwick LJ). It may be that it was assumed (possibly correctly) that the reference to derogation in s14(1) of the 1998 Act should be interpreted as referring only to a lawful or effective derogation.

484. Even if the English courts cannot rule on the effectiveness of a derogation, I do not think that it would follow that it would not be open to an English court, when determining an issue, to take into account the fact that, if it is determined one way, it would involve the UK infringing the ECHR. It is clear from the observations of Lord Bingham and Lord Hoffmann in *Lyons* that the English courts, even before the 1998 Act came into force, were influenced, in many cases strongly, by the provisions of the ECHR, even though they were not at that time incorporated into English law. By the same token, it appears to me that this court can properly be influenced by the fact that, if a certain point is determined one way, it would appear to result in a purported derogation by the UK government pursuant to ECHR Article 15(1) being

ineffective.

485. I turn to the Secretary of State's second point in this connection, which is that, in any event, the closing words of ECHR Article 15(1) are not of assistance to the appellants' contention in this case. The derogation effected by the UK government, as expressed in the Derogation Order, was limited to ECHR Article 5(1)(f). In *A -v- Secretary of State*, Lord Woolf had no difficulty in rejecting an argument on behalf of the Secretary of State that the derogation effected by the Derogation Order, although only expressed in relation to ECHR Article 5(1)(f), also involved an implied derogation in relation to ECHR Article 14 (see paragraphs 30 and 31).

486. However, I do not accept that it follows that, in order to determine whether the requirements of ECHR Article 15(1) are satisfied, one must confine oneself to considering that issue in relation to ECHR Article 5(1)(f). First, it does not accord with the view taken by SIAC, not appealed by either party, in *A -v- Secretary of State*. Secondly, that does not seem to me to be what ECHR Article 15(1) naturally means. Thirdly, it would involve a triumph of form over substance, and provide an easy and attractive escape route for a government which wished to derogate. It would mean that a derogating government could, whether in good faith or artfully, identify a single Article or sub-Article from which it was purporting to derogate, which would then shut out the possibility of any argument that it had in fact derogated from other Articles or sub-Articles of ECHR, for the purpose of considering the lawfulness of the derogation under ECHR Article 15. That cannot be right.

487. It is necessary, as I see it, to inquire into the nature of the powers which the derogating government is seeking to exercise in order to decide whether the requirements of ECHR Article 15(1) are satisfied. I accept that one must look at the provisions of Part 4 of the 2001 Act as a whole in order to decide what it is that the UK government is enacting in connection with, or even as a result of, its purported derogation. However, I do not consider that a challenge to the validity of a derogation under ECHR Article 15(1) can properly involve an inquiry as to whether every possible step permitted or required to be taken as a result of, in connection with, or even as part of, the overall statutory scheme of the act involving a derogation can be the legitimate subject of an inquiry to see whether one of those steps happens, in a certain respect, to involve a breach of one of the UK's many international treaty obligations.

488. The result of such a construction would, to my mind, be little short of absurd. Virtually every measure involving a derogation under ECHR Article 15 will involve depriving some individuals of one or more of what would normally be their ECHR rights. Unless the right actually removed is a right to a hearing in some shape or form, any such country could normally be expected to give the individual from whom the right is removed an opportunity to challenge the relevant executive decision against him in a court. That would normally be expressed, although it could be implied, in the relevant measure enacted by the legislature of the relevant state. If the appellants' argument is right, it would mean that, in almost every case of a purported derogation, the ECtHR would be entitled to consider virtually the whole of the civil or criminal procedure rules and practice of the courts of the state concerned, with a view to seeing whether there was anything in those rules that breached any international treaty to which the state concerned was a party. That is merely one result, albeit a relevant and rather

stark result, of the construction of Article 15(1) advanced by the appellants. For my part, I cannot accept it.

489. Having said that, I would accept that it is difficult, probably impossible, to define quite how far one can go when considering the extent of a particular measure which involves derogation under ECHR Article 15, in order to see whether it complies with the relevant state's international treaty obligations. However, in the present instance, I would accept that it would probably be open to a court considering the validity of the derogation to consider any specifically prescribed variations from the normal procedures of courts and tribunals adopted under the 2003 Rules as this court did, albeit in the context of ECHR Article 6(1) in *A -v- Secretary of State*.

490. I do not consider that the relaxation of the ordinary rules of evidence by virtue of Rule 44(3) assists the appellants' case. If the normal principles of English law do not exclude from evidence statements obtained by torture, then the appellants' case based on derogation would ultimately rely on contending that the normal principles of English law infringed Article 15 of CAT, not that the special procedure adopted under, or in connection with, Part 4 of the 2001 Act had a special provision which infringed Article 15 of CAT and was an exception to the normal rules of admissibility in English courts.

491. In these circumstances, I do not accept the appellants' contention that the fact that the provisions of the 2001 Act required the UK government to effect a derogation pursuant to ECHR Article 15(1) would be of assistance in determining whether or not SIAC is entitled to rely on evidence obtained by torture.

Admissibility of statements obtained under torture in principle: conclusion

492. In these circumstances, I am of the view that, while the arguments based on the common law and the Derogation Order are not of assistance to the appellants on the issue of admissibility, they are nonetheless correct in their contention that a statement made under torture cannot be put before SIAC on a s25 appeal, or taken into account by SIAC when determining a s25 appeal, because it would otherwise represent an infringement of ECHR Article 6(1). It appears to me that an appellant in a s25 appeal, against whom a statement obtained by torture is used in evidence, and relied on in rejecting his appeal has not had a fair trial, within the meaning of ECHR Article 6(1).

493. I should mention two arguments which were raised on behalf of the Secretary of State to call this conclusion into question. The first argument is that the exceptional risk posed by Al-Qa'eda, and the difficulty of obtaining evidence against people connected with it, may justify putting before SIAC statements obtained by torture as evidence against suspected terrorists. The second argument is the incongruency of SIAC not being permitted to rely on a statement obtained by torture when considering whether or not to revoke a s21 certificate, in circumstances where there appear to be no reasons why, when such granting the certificate, the Secretary of State should not be able to take into account, indeed might regard himself as obliged to take into account, such a statement.

494. I accept that the legislature has formed the view that Al Qa'eda poses a serious and potentially imminent threat to the security of the realm, and I am also prepared to accept that there are obviously difficulties in finding evidence that person is a member of, or connected with, Al Qa'eda. As a result, I have little doubt but that there may be some, possibly many, members of the public who would regard it as relatively unexceptionable that the Secretary of State should be able to rely as evidence against an appellant, on a statement obtained under torture (at least if it was not torture to which the UK authorities were in any way party). However, in the first place, I have based my conclusion on the provisions of the ECHR and CAT Convention, to both of which the UK government is, and has been for many years, a party. Both those conventions make it clear that torture cannot be justified, however grave and extenuating the circumstances. The ECHR does this through the exclusion of Article 3 from the right to derogate under Article 15. CAT does this by making it clear in terms that torture will never be acceptable - see Article 2(2) thereof. In those circumstances, it is not particularly surprising that there should be a rule that evidence obtained by torture should not be admissible in a court.

495. Secondly, in rejecting the argument based on necessity or exceptional circumstances, I derive support from the decision of the Supreme Court of Israel in *Public Committee against Torture in Israel -v- Israel* (1999) 7 BHRC 31. In that case, the Israeli Supreme Court had to consider the lawfulness of the use of torture carried out by Israeli security troops on suspected terrorists. Their conclusion in paragraph 38 was this:

"According to the existing state of the law, neither the government nor the heads of security services possess the authority to establish directives and bestow authorisation regarding the use of liberty infringing physical means during the interrogation of suspects suspected of hostile terrorist activities, beyond the general directives which can be inferred from the very concept of an interrogation .... An investigator who insists on employing these methods, or does so routinely, is exceeding his authority. ..."

496. In paragraph 39 the Israeli Supreme Court referred to:

"the difficult reality in which Israel finds herself security-wise. We shall conclude this judgment by re-addressing that harsh reality. We are aware that this decision does not ease dealing with that reality. This is the destiny of democracy, as not all means are acceptable to it, and not all practices employed by its enemies are open before it. Although a democracy must often fight with one had tied behind its back, it nonetheless has the upper hand. Preserving the rule of law and recognition of an individual's liberty constitutes an important component in its understanding of security. At the end of the day, they strengthen its spirit and its strength and allow it to overcome its difficulties. This having been said, there are those who argue that Israel's security problems are too numerous, thereby requiring the authorisation to use physical means. If it will nonetheless be decided that it is appropriate for Israel, in light of its security difficulties to sanction physical means in interrogation ... this is an issue that must be decided by the legislative branch which represents the people. We do not take any stand on this matter at this time. It is there that various considerations must be weighed."

497. I accept, of course, that that case was concerned with actual acts of torture carried out by

agents of the Israeli government. However, in my view, those observations emphasise two points. First, democratic societies, faced with terrorist threats, should not readily accept that the threat justifies the use of torture, or that the end justifies the means (as Lord Steyn said in *Latif*). Indeed, it can be said that, by using torture, or even by adopting the fruits of torture, a democratic state is weakening its case against terrorists, by adopting their methods, thereby losing the moral high ground an open democratic society enjoys. Secondly, if it is thought to be appropriate for a democratic state, or any of its organs, to torture, or to enjoy the fruits of torture, then it is for the democratically elected legislature, after a full and informed public debate, to spell out that intention unequivocally in appropriate legislation.

498. Thirdly, if I am wrong in my conclusion that evidence obtained by torture is inadmissible, at least in a case such as this, then there are two possibilities. Either evidence obtained by torture is always admissible, or its admissibility is a matter for the court. I find the first of those two alternatives very unattractive: the notion that a court would be obliged to admit a statement obtained under torture, however disgusting the torture may have been, and however unacceptable its use may have been, even to those who might accept that torture might be justified in certain exceptional circumstances, seems to me wrong. I would therefore reject such a contention.

499. That leaves one with the proposition that it would be a matter for the court, in each case, to decide whether to admit evidence obtained by torture, on the basis that the fact that it was obtained by torture would be a reason, but not a requirement, for refusing to admit it. If that was the law, it would place a court in a very difficult position. The personal attitude of the judge would almost inevitably play a substantial part in the decision of whether to admit such evidence. That is a recipe for inconsistency, which in turn impinges negatively on the reputation of the justice system. Further, it would be difficult to know how to balance the fact that a statement has been given under torture against the sort of reasons which might be advanced for allowing the statement in. One would be balancing competing factors which have nothing to do with each other: that is also a recipe for inconsistent decisions.

500. The fact that the Secretary of State may (and, in my view, would) be entitled to take into account a statement obtained by torture has some force, as I have mentioned when considering the common law position. However, it does not, at least in my judgment, cause any difficulty of principle. It is by no means inconceivable for the executive to make decisions based on certain evidence and for certain reasons, but when the court comes to consider the lawfulness of the decision, some of those facts and reasons cannot be put before the court. An obvious example is where a decision is based partly or wholly on facts contained in documents which are subject to public interest immunity. As Bingham LJ said in *Makanjuola -v- Commissioner of Police for the Metropolis* [1992] 2 All ER 617 at 623 (in a passage approved by the House of Lords in *R -v- Chief Constable of West Midlands Police ex p Wiley* [1995] 1 AC 274 at 296C and 308B):

"Where a litigant asserts the documents are immune from production or disclosure on public interest grounds he is not (f the claim is well founded) claiming a right, but observing a duty. Public interest immunity is not a trump card vouchsafed to certain privileged players to play when and as they wish. It is an exclusionary rule, imposed on parties in certain circumstances, even where it is to their disadvantage in the litigation."

Accordingly, the fact that my conclusion would result in there being occasions where the Secretary of State would not be able to put all the evidence, which he took into account when deciding to issue a s21 certificate, before SIAC when it considers a s25 appeal against the issue of a certificate, does not represent a new or unusual state of affairs.

501. Furthermore, as was pointed out by Lord Woolf in paragraphs 9, 15 and 34(vi) of his judgment in *M -v- Secretary of State*, when entertaining an appeal under s25 SIAC is not reviewing the exercise of the Secretary of State's power to issue a certificate under s21. It is carrying out its own assessment, namely whether there are, at the date of the hearing of the s25 appeal, "reasonable grounds", based on the evidence before it. The Secretary of State may himself accept that evidence, which appeared to him to have weight - possibly substantial weight - when he issued a certificate can be shown to be wholly valueless by the time a s25 appeal is heard. Accordingly, it should not cause much surprise that there could be circumstances where the Secretary of State may not be able to put before SIAC on a s25 appeal, evidence which he took into account under s21.

Evidence obtained by torture: two further issues

502. Having decided that a statement obtained by torture cannot be relied on in a s25 appeal, two questions remain. The first is the extent of that principle. The second is to identify who has the burden of proof, and what is the standard of proof.

The extent of the exclusion of evidence obtained by torture

503. At least in the case of a statement extorted by torture, it appears to me that there are three levels of evidence. The first is a simple confession or accusation. The second is a confession or accusation which contains confirmation, or what ultimately transpires to be objective confirmation, of its accuracy. The third is a confession or accusation which leads to evidence which confirms the confession in such a way that the confession is no longer needed. The difference between the three categories can be demonstrated by an example involving a person suspected of having brought a dangerous chemical into the country. The first level is where the suspect admits, under torture, having brought the chemical into the country. The second is where, under torture, he admits having brought the chemical into the country, and says where he has concealed it, as a result of which the authorities find the chemical. The third level is similar to the second, save that the authorities also find the suspect's fingerprints on the packaging of the chemical.

504. In light of my conclusion, and the reasons for it, there are obviously very strong arguments for contending that all three categories of evidence should be excluded, even where the statement is made by a person other than the accused. The first is a simple confession or accusation under torture, and should plainly be excluded; indeed, as I have already mentioned, the exclusion can be justified on the simple grounds of unreliability. The second, is more difficult, because, in order for there to be good evidence against the suspect, it would be necessary not merely to disclose the finding of the chemical, but also the fact that he had told the authorities where to find the chemical, and that would involve putting before the

tribunal what he had said under torture. In my view, this second category of evidence (which is, as I have already suggested, unlikely to arise where one is considering a third party statement, rather than a statement given by the suspect himself) must also be excluded, albeit only insofar as it relates to the statement. The essential point is that it does not merely involve putting evidence before the tribunal which was attributable to the fact that the suspect was tortured, but actually giving direct evidence of what he said under torture.

505. Real difficulty is presented by the third category, because there is no need to rely upon the evidence actually given under torture: all the prosecuting authorities need rely on is the finding of the chemical together with the suspect's fingerprints on its packaging. There is obviously a powerful argument for saying that none of that evidence should be permitted to be adduced, on the basis that it was only obtained as a result of torture. If the fundamental reason for excluding evidence obtained by torture is due to the revulsion on the part of the international community and the signatories to the ECHR against torture, and that revulsion extends to evidence obtained by torture, as enshrined in Article 15 of CAT, there is obviously powerful logic in the contention that the exclusion of evidence obtained by torture should apply to all evidence obtained by torture and not merely to evidence given under torture.

506. Despite this argument, I have come to the conclusion that what I have called the third category of evidence, namely evidence obtained as result of torture, but not involving putting before the court evidence of what was actually said under torture, is admissible. First, there is the wording of Article 15 of CAT itself. As a matter of ordinary language, it appears to me to exclude statements given under torture, not evidence obtained as a result of torture. Secondly, while it may appear formalistic, even hypocritical, it appears to me that one is here concerned with evidence given to the court, and what the court can legitimately object to should be statements given under torture. In other words, what the court should set its face against is evidence in respect of which the person against whom it is given is able to say that it was given under torture, whether it was given by him or some other person. That would not apply to the third category of evidence. Thirdly, for what it is worth, this conclusion is consistent with what I understand to be the common law position in this country, and, indeed, the current statutory position, as embodied in ss76 and 78 of the Police and Criminal Evidence Act 1984 ("the 1984 Act").

Evidence obtained by torture: burden and standard of proof

507. If a statement obtained by torture is not properly admissible before SIAC, the next issue is whether it is for an appellant to prove that statement was obtained by torture, or for the Secretary of State to prove that it was not obtained by torture. Having decided on whom the burden lies, the question is whether the burden has to be discharged by establishing that torture was (or was not) used, on the balance of probabilities, or beyond reasonable doubt. The Secretary of State's contention is that it is for the appellant to prove that a statement was obtained by torture and he further contends that the normal, civil, standard of proof, would apply, namely the balance of probabilities. The contention on behalf of the appellants is that it is for the Secretary of State to show that any statement he relies on was not obtained by torture, and that he has to establish this beyond all reasonable doubt.

508. It is clear from s76(2) of the 1984 Act that, in the case of confessions by an accused in

criminal proceedings, it is for the prosecuting authorities to establish beyond reasonable doubt that the confession was given voluntarily. On the other hand, in civil proceedings, one would, at any rate at first sight, expect the normal principles to apply, namely that the person who makes the allegation must prove it on the usual balance of probabilities, and consequently that the burden of proof would be on the appellant to establish that a statement was obtained by torture. However, bearing in mind the unusual nature of these proceedings, and the fact that evidence obtained by torture is to be excluded as a result of the fair trial requirement of ECHR Article 6(1), I do not consider that these domestic law principles are of much assistance.

509. I turn to relevant decisions of international courts. In *PE -v- France*, it seems clear that the Torture Committee concluded that it was for the person alleging that evidence had been obtained under torture to prove his case. In paragraph 6.6 of its decision, the Torture Committee stated that "it is for the author to demonstrate that he allegations are well-founded" and that, in light of this case the Torture Committee "cannot conclude that it has been established that the statements at issue were obtained as a result of torture".

510. However, in *The Prosecutor -v- Delalic* (unreported) the International Criminal Tribunal of the former Yugoslavia had to consider the application of rule 95 of its Rules which provides:

"No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to or would serious damage the integrity of the proceedings."

In paragraph 41 of its decision, the Tribunal said it had "no doubt" that statements obtained involuntarily from a suspect, could not be admitted. In paragraph 42 the Tribunal said this:

"The burden of proof of voluntariness or absence of oppressive conduct in obtaining a statement is on the Prosecution. Since these are essential elements of proof fundamental to the admissibility of a statement, the Trial Chamber is of the opinion that the nature of the issue demands for admissibility the most exacting standard consistent with the allegation. Thus, the Prosecution claiming voluntariness on the part of the Accused/Suspect ... is required to prove it convincingly and beyond reasonable doubt."

511. Given these inconsistent views expressed in international tribunals, and that, in any case, they were concerned with criminal cases, whereas the present proceedings are not strictly criminal, I consider that one must go back to first principles.

512. The Secretary of State contends the normal rule that he who asserts must prove, and the way in which Article 15 of CAT is worded, both point in favour of the appellant having to establish that the evidence in question was obtained by torture. For the appellants, it is contended that it is unrealistic and unfair, because the source of the evidence will often be unclear, and, in many cases, it may well be that the evidence cannot even be shown to an appellant, but only to his Special Advocate (and even they will have little idea as to the circumstances in which the evidence was obtained).

513. On the basis that this problem is to be solved purely by reference to domestic law, while I accept that the Secretary of State's case to the contrary is powerful, I am of the view that the burden should be on him. First, it is the Secretary of State who will be adducing, and seeking to rely on, the statement said to have been obtained by torture. He is more likely to know of the circumstances in which the statement was obtained than is the appellant. Secondly, domestic criminal law places the burden of establishing that a confession was voluntary firmly on the prosecution - see s76 of the 1984 Act. Thirdly, an appellant on an appeal under s25 of the 2001 is, as Lord Woolf acknowledged in *M -v- Secretary of State* at paragraph 13, at a particular disadvantage which, if it cannot be avoided, should be "minimised". In particular, it appears quite unfair that the burden should be on an appellant when he will not know the nature of the evidence invoked against him before SIAC.

514. It also appears to me that the standard of proof should be the civil, and not the criminal standard. First, as a s25 appeal is civil, the civil standard appears more appropriate. Secondly, even allowing for the difficulties of the appellant, it would be unduly onerous to require the Secretary of State to provide beyond reasonable doubt that a statement which he did not obtain, and was not party to obtaining, was or was not obtained by torture.

515. The exclusion of a statement obtained by torture is justified by ECHR Article 6(1), which itself requires a fair trial. The fairness of the trial is not merely to be judged by reference to what evidence is to be excluded, but also upon the principles which govern the means of establishing whether the evidence is of a nature which should be excluded. In the present case, I think it is important to bear in mind that the sort of evidence with which the present point is concerned would, presumably, be a statement allegedly made to a member of the police force, armed services, or secret services, of another country, which is then passed on, officially or unofficially, to a representative or agent of the UK government. The degree to which the Secretary of State will be able to identify the provenance, let alone many details of the provenance, of the information, will often be slight. The ability of the Secretary of State to make investigations will also be slight in many cases. Having said that, the position of an appellant, with no official position, and (save in the most exceptional circumstances) far fewer (if any) sources of information, and far less (if any) money available to him, will be even worse.

516. In these circumstances, subject to what I say below, it seems to me that the requirement of a fair trial would place on the Secretary of State the burden of proof of establishing that the evidence on which he seeks to rely was not obtained by torture, but that the burden of proof is the civil one, namely the balance of probabilities. It can be said with some force that it is unfair to place the burden of proof on the Secretary of State, but the answer to that, in my view, is that it would be even more unfair to place the burden of proof on an appellant. Given my conclusion that a statement obtained under torture cannot be used in evidence, and given the almost insurmountable difficulty an appellant would have in establishing anything about the circumstances in which much of the Secretary of State's evidence was acquired, placing the burden of proof on an appellant would be tantamount to taking away with one hand what has been given with the other. As to the contention that the standard of proof should be the criminal standard, it seems to me that the way in which the evidence will have reached the Secretary of State is such that it would be normally be unrealistic to place any such standard of proof in relation to the circumstances in which the evidence was obtained.

517. This conclusion must, however, be a qualified or provisional one. Once one bears in mind the exceptional nature of the proceedings before SIAC, and the inevitable uncertainties regarding the circumstances in which the evidence was obtained, I think it would be very dangerous to proceed on too analytical or absolute a basis on the question of who must establish whether a statement was obtained under torture or not. Earlier in this judgment I discussed the basis upon which SIAC should reach a conclusion as to whether or not there are reasonable grounds within s25(2)(a). The exercise is not one which, to a substantial extent requires, or even permits, the assessment of evidence in a manner which any criminal court, or indeed any civil court, would normally set about its task. Nonetheless it is appropriate that it is a court which carries out this function, because courts are used to assessing evidence, risks and the reasonableness of grounds or beliefs. In other words, when it comes to assessing, on the basis of the evidence, whether there are "reasonable grounds", SIAC will be carrying out a familiar task, but will be doing so on evidence which would not normally be admissible in any court, and which will not be assessed by reference to normal burdens or standards of proof.

518. To a significant extent, I consider that similar principles should apply when SIAC has to consider a dispute as to whether a statement upon which the Secretary of State wishes to rely was obtained by torture. In considering that issue, SIAC will, no doubt, frequently be called on to rely upon evidence which would not be admissible in a criminal court, or even normally in a civil court, consisting of, for instance, newspaper reports, Secret Service reports and the like. When considering whether a statement was obtained by torture or not, SIAC will, ultimately, have to come to the sort of decision with which criminal, and indeed civil, courts are familiar, namely, whether, on the balance of probabilities, certain primary evidence (albeit that it is not being provided in its primary form) was or was not obtained in a certain way. In reaching its conclusion on this point, however, SIAC will find itself taking into account evidence, and possibly, argument, which would not normally be admissible or advanced to a court.

519. So far as the burden of proof is concerned, I consider that SIAC should bear in mind the difficulties which both parties face in relation to establishing the circumstances in which the primary statement was obtained. This will inevitably mean that, although the initial burden ultimately rests on the Secretary of State, the sort of evidence which might be sufficient to discharge that burden would be such as might not be very convincing in the context of civil, let alone criminal proceedings. Having said that, it is only fair to the appellants to add that precisely the same considerations would apply to the admissibility and value of the evidence and arguments which they may wish to advance to support the contention that the Secretary of State will not have discharged the burden of proof resting on him.

520. I have considered whether it could be said that it is, in fact, unnecessary, indeed inappropriate, for SIAC to reach a conclusion that a statement was, or, as the case may be, was not, given under torture, and that it could merely take into account, when considering all the evidence and arguments in the round, that the statement in question may (or could conceivably, or is very likely to) have been obtained under torture as part of the overall exercise of deciding whether or not there are "reasonable grounds" within s25(2)(a) of the 2001 Act. At first sight, such a course, which was not pressed by any party on this appeal,

has its attractions, not least because it could be said to be consistent with the general approach to the assessment which SIAC has to carry out, and, indeed, consistent with some of the comments in *Rehman*, particularly what was said by Lord Hoffmann at paragraph 56.

521. However, it appears to me that this is not a sensible, or indeed a permissible, course. Although SIAC's general approach to the evidence and arguments must involve considering whether, taken in the round, there can be said to be "reasonable grounds" for suspicion or belief sufficient to satisfy s25(2) of the 2001 Act, it is still necessary to decide what factors can properly be taken into account when considering that question. If a statement made under torture is not properly admissible, then it has to be excluded from those factors. Accordingly, once it is rationally contended that a statement, which might otherwise properly be relied on, was obtained under torture, I consider that SIAC must determine whether it was, in fact, so obtained.

Complaints about the hearing before SIAC

522. On the basis of my view of the arguments, the appellants have succeeded on one issue of principle which has been argued before us, namely whether or not SIAC is entitled to receive and take into account as evidence statements made by third parties under torture, and, albeit to a qualified extent, the appellants have also succeeded on the question of the burden of proof in connection therewith.

523. If I am right in this connection, it will probably be necessary for this court to go on to consider, in relation to each of the appellants, each item of evidence which was before SIAC and consisted of a statement made by a third party who is said by the appellants to have made the statement under torture. In particular, it will be necessary to consider whether SIAC made a finding as to whether or not the statement was obtained by torture, and, whether, in reaching its conclusion, SIAC applied the right burden and standard of proof. If is appears that SIAC went wrong in connection with any such item of evidence in relation to a particular appellant, it will be necessary to remit his appeal to SIAC. Indeed, as at present advised, it seems to me that if there is any real possibility of SIAC having gone wrong in connection with a particular piece of evidence, justice would require the appeal to be remitted to SIAC.

524. In light of the discussions which took place at the beginning of the hearing of this appeal, it may well be that, at least in the case of some of the appeals, the Secretary of State would agree to the appeal being remitted to SIAC without a further hearing. That could only be done with the formal agreement of the Secretary of State.

525. However, in light of the fact that Pill and Laws LJJ do not take the same view as I do as to the inadmissibility of statements obtained under torture, none of these matters need to be considered.

526. That does not dispose of all the complaints raised by the appellants. Three further complaints are raised about the conduct of the hearing of the instant appeals before SIAC. The first concerns disclosure. The second concerns the weakness of the Secretary of State's evidence

in some of the appeals. The third concerns a late amendment which the Secretary of State was permitted to make.

527. Before considering these complaints in turn, it is fair to say, at least on the face of it, that they would not appear to be very strong. First, each of them concerns the sort of matter which is ultimately a case management decision, with which an appellate court is normally very reluctant to interfere. Secondly, as I have already mentioned, it is clear from its judgments in each of the ten appeals that SIAC has very carefully considered each of the arguments and points raised by the parties. Thirdly, the right of appeal to this court from SIAC can only be exercised in relation to a point of law. While the combined effect of these three factors obviously gives rise to problems for an appeal based on the sort of complaints which I am now considering, it would be wrong to dismiss such complaints out of hand. If SIAC went wrong in relation to any of the matters complained of, it might be possible to characterise the mistake as one of law. Furthermore, given the grave potential consequences (prison without a criminal trial) for an appellant if SIAC made an error which rebounded to their disadvantage, it seems to me that this court should not be over-eager to dismiss an appeal on the grounds that it does not raise a point of law, if it has concluded that SIAC may well have gone wrong in a certain respect.

528. Before turning to the three specific complaints, there is one other more general point I should make. It is idle to pretend that there is nothing whatever in any of the three complaints to which I have referred. The procedure before SIAC was less than perfect. However, even bearing in mind the potentially very grave consequences for an appellant if his s25 appeal to SIAC is dismissed, it cannot possibly justify this court ordering a rehearing because the hearing before SIAC could have been better in certain respects. First, almost by definition, no hearing before any tribunal is perfect, in the sense that, with wisdom of hindsight, one can think of steps that might have been taken, or which might have been taken better, more fairly, or earlier, than they actually were. Perfection is unattainable at a hearing, and if its absence justified this court ordering a rehearing, there would never be an end to it.

529. In order to justify this court remitting an appeal to SIAC for rehearing, we would have to be satisfied that there was not merely an imperfection, but an imperfection which amounted to an error of law, or which involved some degree of potential unfairness on the appellant. Many complaints about the conduct of a trial involve criticising the tribunal for a decision which was ultimately one for its discretion. In such a case, it is normally fatal to an appeal if the discretion was exercised in a lawful way, which is not necessarily the same as the way in which the appellate court would have exercised the discretion if it had been the court trying the matter.

530. Furthermore, it is worth remembering that, as the generic judgment in this case shows, SIAC was doing its conscientious best an early stage of its existence, in carrying out an exercise in sensitive circumstances, bearing in mind the competing interests to which I have to more than once referred. There is no doubt that the Secretary of State and his advisors, the barristers and solicitors involved in these proceedings, and the members of SIAC themselves, will have learnt lessons in relation to procedure and disclosure as a result of these very proceedings. However, if a mistake was made in relation to the proceedings, or to disclosure,

and that mistake caused material potential unfairness to an appellant, I do not intend thereby to suggest that his appeal should not be remitted to SIAC simply because everyone was at a relatively earlier stage of the learning process. However, I think it is fair to bear that factor in mind when evaluating any criticism of the procedure adopted, or the disclosure process, in these appeals.

531. The appellants' complaint about disclosure is that the Secretary of State has not demonstrated that he has given full disclosure of documents in relation to each of the appeals. In this connection, we were told by leading counsel on behalf of the Secretary of State that the disclosure exercise was initially carried out by lawyers working in, or effectively at the direction of, the Treasury Solicitor's department, but that leading and junior counsel instructed on behalf of the Secretary of State were also involved in the process, albeit relatively late on.

532. I am unpersuaded that there is anything in this complaint. In any proceedings, the disclosure exercise must involve the parties either trusting each other to carry out the initial sifting process, often with the benefit of advice from their respective lawyers, or being able to establish, by various possible different means, that full disclosure has not taken place.

533. Quite apart from the assurances that we have been given by experienced and respected counsel, instructed by and in the presence of representatives of the Treasury Solicitor, there is nothing in the voluminous documentation, or as a result of cross-examination or any other source, which leading and junior counsel (including Special Advocate) and the two firms of solicitors instructed by the various appellants, have been able to put forward to suggest that the Secretary of State's disclosure has been partial or incomplete.

534. In saying this, I do not underestimate the difficulties in which an appellant finds himself in a case such as this, and the inevitable suspicion which many such appellants may have. However, even in litigation as sensitive as a s25 appeal, with all its unusually harsh features so far as an appellant is concerned, it seems to me that, while an appellant is entitled to expect the court to consider any complaint about disclosure particularly carefully, there is no alternative to the normal approach to disclosure.

535. Secondly, there is a complaint that, in one case, SIAC permitted the Secretary of State to change his case, in the sense of identifying the nature of the group and connection alleged against a particular appellant, rather late in the appeal. In my view, while proper regard must of course be had to the harsh consequences of an appeal failing, and the difficulties which an appellant has to face in light of the inquiry SIAC has to carry out on a s25 appeal, the question of whether or not to permit the Secretary of State to amend his case is classically a matter for SIAC's discretion. In the present instance, I have not heard any argument or seen any evidence to support the proposition that any relevant prejudice was suffered by the appellant as a result of the Secretary of State being permitted to amend his case. In my view, that factor alone is enough to dispose of the appeal on this point.

536. Finally, there is a complaint that, at least in the case of some of the appeals, the Secretary of State ceased gathering evidence well before the hearing. I accept that, particularly in the

case of a person whose s21 certificate has not lapsed or been revoked, one would normally expect the Secretary of State to be seeking to compile evidence which bears on the question of whether or not there are "reasonable grounds" under s25 in relation to that person. First, by virtue of ss25 and 26, the question of reasonable grounds in relation to that person from time to time will have to be considered quite frequently by SIAC. Secondly, there must be almost a moral duty (and probably a legal duty as well) on the Secretary of State to take some steps to keep himself satisfied that there are grounds for continuing detention of that person pursuant to s21 of the 2001 Act.

537. Nonetheless, the fact that, in a particular case, the Secretary of State may not have any recent relevant evidence in relation to a particular person cannot mean, as a matter of law, that SIAC cannot be satisfied of the existence of present reasonable grounds sufficient to satisfy s25 of the 2001 Act. In each case, as I have already said, the question of whether that test is satisfied depends on SIAC's assessment of all the relevant facts available to it. I do not see how it can be said, save in the most extreme cases, that the fact that there was no relevant recent evidence can of itself mean that it is not open to SIAC to find that there are reasonable grounds sufficient to satisfy s25.

538. Accordingly, I would reject the three specific complaints upon which it is said that some or all of the appellants did not have a fair hearing in relation to their respective s25 appeals.

Conclusion

539. In these circumstances, at least for my part, I would reject all the points raised by the appellants, save that:

i. I would hold that, in an appeal under s25 of the 2001 Act, it is not open to SIAC to receive in evidence, or to take into account, a statement sought to be adduced by the Secretary of State, if that statement was made under torture, and this applies whether the statement was made by the appellant or a third party, and irrespective of the identity of the torturers;

ii. however, this exclusion of evidence does not extend to evidence found as a result of a statement made under torture;

iii. while due regard must be had to the difficulties faced by both parties in relation to the question, it is for the Secretary of State to establish, albeit only on the balance of probabilities, that a statement made by a third party was not extracted by torture, rather than being on an appellant to establish that it was.

540. I am also of the view that SIAC had jurisdiction to entertain the appeals of Mr Ajouaou and F, although they had left the country.