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Court of Appeal References: T1/2006/2669 & T1/2007/9505
Neutral citation of judgment appealed against: [2007] EWCA Civ 808
Court of Appeal Reference: T1/2007/9502/Y
Neutral citation number of judgment appealed against: [2008] EWCA Civ 290

In the House of Lords

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ON APPEAL

IN HER MAJESTY'S COURT OF APPEAL
(CIVIL DIVISION) (ENGLAND)

BETWEEN:-

RB (ALGERIA) and U (ALGERIA)

Appellants

-v-

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SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

AND BETWEEN:-

D

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

-v-

OO (JORDAN)

Respondent

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SUBMISSIONS ON BEHALF OF JUSTICE AND HUMAN RIGHTS WATCH

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1. These submissions are made on behalf of JUSTICE and Human Rights Watch. In summary, it is submitted that:

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1.1 the diplomatic assurances at issue in these cases cannot safely be relied upon to satisfy the Government's obligations under Article 3 of the European Convention on Human Rights ("the Convention");

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1.2 that issue, and all issues of risk on return, raise matters both of principle and evaluation which appeal courts must address, and if necessary correct, in satisfying their duty to ensure that there is no breach of the Convention and in giving the issue the most anxious scrutiny;

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1.3 moreover, it is unfair, unsafe and contrary to an express assurance given to Parliament on behalf of the Government, for the issue of whether deportation would breach a Convention right to be heard in closed session and for relevant material not to be disclosed.

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2. These submissions are developed under the following eight headings: **1.**The absolute right to be free from torture and ill-treatment; **2.** The *"real risk"* test; **3.** The proper approach of an appeal court to Article 3; **4.** Diplomatic assurances; **5.** Algeria: RB and U; **6.** Jordan: OO; **7.** Disclosure and closed evidence in risk on return cases; **8.** Flagrant breach of Article 6.

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1. The absolute right to be free from torture and ill-treatment

3. The prohibition on torture and inhuman or degrading treatment or punishment contained in Article 3 of the Convention enshrines one of the, "*fundamental values of democratic societies making up the Council of Europe"* (*Chahal v United Kingdom* (1996) 23 EHRR 413, at [96], [79]; *Vilvarajah & Ors v United Kingdom* (1991) 14 EHRR 248, at [108]). For this reason it permits of no derogation or limitation and has been interpreted as prohibiting *refoulement* of a person where there is a real risk of them suffering torture or ill-treatment on return. This was established in *Soering v United Kingdom* (1989) 11 EHRR. 439 *at* [88]:

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> *"It would hardly be compatible with the underlying values of the Convention, that "common heritage of political traditions, ideals, freedom and the rule of law" to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed.*

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> *Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3 (art. 3), would plainly be contrary to the spirit and intendment of the Article, …"*

4. The Court in *Soering* drew support from Article 3 of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which provides:

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> *1. No State Party shall expel, return ("refouler") 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.*

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5. It has been repeatedly affirmed by the Strasbourg Court that the absolute nature of the prohibition on torture means that the obligations that it imposes on states—including the principle of *non-refoulement*—are unaffected by the behaviour or activities of the individual concerned (e.g. *Chahal*, at [97], [102]-[103] (Com.) [76], [79]-[82] (Ct.); *Öcalan v Turkey* (2005) 41 EHRR 45, at [179] *Saadi v Italy*, App No. 37201/06, 28 Feb. 2008 [122], [139]-[140]).[1]

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6. The absolute prohibition on torture is also a principle at the very heart of domestic law. Since 1628, the courts in England have refused to authorise the use of torture (*A (No 2)* [2006] 2 AC 221 at [64]-[65] (Lord Nicholls), cf. [11]-[13] (Lord Bingham)). The House of Lords affirmed in *A (No 2)* that torture is totally repugnant both to the fundamental principles of the law of nations and to English law.[2] Lord Bingham described it as a *"constitutional principle"* (at [12] and [51]); and Lord Hoffmann stated, *"The use of torture is dishonourable. It corrupts and degrades the state which uses it and the legal system which accepts it"* (at [82]).

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7. It is no less abhorrent for a government, whilst eschewing torture itself, to hand a person over to face torture in another country where such abuse is tolerated. Such a transfer has long been unlawful as a

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[1] This has also been confirmed by national courts and international bodies, such as the Supreme Court of New Zealand, the Committee against Torture, the UN Human Rights Committee and the Inter-American Commission on Human Rights: e.g. *A-G v Zaoui* [2005] NZSC 38 at [32]; *Arana v France* CAT 63/1997; IACHR 1999 Annual Report, OEA/Ser.L/V/II.106, Doc. 40 rev. [70], [154].

[2] At [11]–[38] (Lord Bingham), [64]-[67] (Lord Nicholls), [82]-[84] (Lord Hoffmann), [101] (Lord Hope), [129] (Lord Rodger), [146] (Lord Carswell), [160] (Lord Brown).

matter of English law. The Habeas Corpus Act 1679, which is still in force, provides a domestic law prohibition on *refoulement,* by prohibiting the removal of a subject to another country by extra-judicial process.[3] The penalties for breach are severe.[4] The principle of *non-refoulement* thus has deep roots in domestic law that pre-date modern human rights treaties. Both domestic law and international law therefore reflect the fact that if the right to be free from torture is to be truly absolute, it must not be capable of being sidestepped or watered-down by the expedient of transferring individuals outside the jurisdiction of domestic courts to countries where they may face torture.

2. The *"real risk"* test

8. The test established in the case law of the Strasbourg Court is that *refoulement* to a place where there is a *"real risk"* of torture or other inhuman or degrading treatment would render that removal unlawful. Reflecting the absolute nature of the prohibition of torture, this test must be interpreted stringently. The requirement that the risk is *"real"* imports nothing more than that the risk must not be merely fanciful or unreal. UNCAT has referred to a risk that goes, *"beyond mere theory and suspicion"* (General Comment No. 1; Germany – CAT/C/32/D/241/2002 [2004] UNCAT 7). There can be no *"acceptable level"* of risk of torture: the right to be free from torture is not a right to an 80% or a 90% chance of being free from torture and ill-treatment, it is an absolute right.

9. Indeed, it is clear from *Soering* and later Strasbourg cases that a State bears responsibility, *"for all and any foreseeable consequences of extradition suffered outside their jurisdiction"* (*Soering* at [86]

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[3] *"And for preventing illegal imprisonments in prisons beyond the seas bee it further enacted by the authoritie aforesaid that noe subject of this realme that now is or hereafter shall be an inhabitant or resiant of this kingdome of England dominion of Wales or towne of Berwicke upon Tweede shall or may be sent prisoner into Scotland Ireland Jersey Gaurnsey Tangeir or into any parts garrisons islands or places beyond the seas which are or at any time hereafter shall be within or without the dominions of his Majestie his heires or successors …"*

[4] Any person committing, aiding or abetting such an action is liable in damages with treble costs, disabled from office, held guilty of praemunire (the offence of remitting a person to a foreign court or authority), and is incapable of pardon. See P.R. Chandler, Praemunire and the Habeas Corpus Act" (1923) Columbia Law Rev. 273. noting that the Act was passed largely because it was a penchant of Charles II to send political *"undesirables"* abroad (p.276).

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(emphasis supplied); *Nnyanzi v United Kingdom* (2008) 47 EHRR 18, at [54]). And it is clear from *Chahal* that a person enjoys the protection of Article 3 even where it is, *"open to substantial doubt whether the alleged risk of ill-treatment would materialise"* (at [76]-[79]).[5]

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10. In *U (Algeria) v SSHD* SC/32/2005, 14 May 2007, SIAC relied on a line of cases in which the Strasbourg Court has spoken of a *"mere possibility"* of a person facing torture and that this is not sufficient to engage responsibility under Article 3 (e.g. *Vilvarajah v United Kingdom* (1992) 14 EHRR 248, at [111]; *Berisha v Macedonia* App. No. 18670/03, 16/06/05, at [1]]). However, the Strasbourg Court has carefully limited its comments about mere possibilities not engaging Article 3 to cases where, (1) due to the home state's internal political situation, the community to which the applicant belongs is threatened with ill-treatment, giving rise to a *"mere possibility"* of ill-treatment to individual members of that community, but (2) there is nothing about the applicant's *"personal situation"* that puts him or her at particular risk of Article 3 ill-treatment. It is a way of making clear that Article 3 will not necessarily prevent deportation of a person where they face no *particular* risk. Even so, membership of a threatened community giving rise to a possibility of ill-treatment *is* sufficient to engage responsibility under Article 3 where, *"it is foreseeable that upon his return the applicant will be exposed to treatment in breach of Article 3"* (*Salah Sheekh v Netherlands* (2007) 45 EHRR 50, at [148]).

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11. It is therefore incorrect and unsafe to take the notion of a *"mere possibility"* out of the context of cases where there are no personal circumstances giving rise to a risk of ill-treatment and to treat it as the obverse of a *"real risk"*. The appropriate test is simply whether there is a real risk of a person suffering torture or inhuman or degrading treatment.

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[5] The Court made this comment in the context of rejecting the UK Government's submission that in such cases the right can be overcome by national security considerations. The Court held that it could not.

3. Approach of appellate courts to Article 3

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12. By making it unlawful for any public authority to act incompatibly with a Convention right, the Human Rights Act 1998 ("HRA") creates a new head of *"illegality"* in domestic law (See *GCHQ* [1985] AC 374, at 410 (Lord Diplock); P.P. Craig, *Administrative Law* 5th ed., 2003, p.579). As Lord Phillips has said, *"since the coming into effect of the Human Rights Act 1998, errors of law have included failures by the Secretary of State to act compatibly with the Convention"* : *R (Q) v SSHD* [2004] QB 36, at [112]. It follows that the issue of compatibility with Convention rights is a point of law that can be appealed when an appeal lies on a point of law.

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13. The position is *a fortiori* given that SIAC would itself act in breach of Convention rights if it authorised the deportation of a person contrary to Article 3: *A (No 2)* at [24] (Lord Bingham). It falls to an appeal court to evaluate whether there was a *"real risk"* on return, and to correct SIAC if it finds that SIAC was wrong to conclude that there was no such risk. If the appeal court did not do so it would not be complying with its own obligations under the HRA to act compatibly with the Convention. As the House of Lords said in *Huang* [2007] UKHL 11; [2007] 2 AC 167 at [8]:

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> *In the Human Rights Act 1998 Parliament not only enabled but required the Convention rights set out in Schedule 1 to the Act (including article 8) to be given effect as a matter of domestic law in this country. .... Thus immigration officers, the appellate immigration authority and the courts, as public authorities (section 6(3)), act unlawfully if they do not (save in specified circumstances) act compatibly with a person's Convention right under article 8. The object is to ensure that public authorities [i.e. including appeal courts] should act to avert or rectify any violation of a Convention right, with the result that such rights would be effectively protected at home, thus (it was hoped) obviating or reducing the need for recourse to Strasbourg.* (emphasis supplied)

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14. The approach of an appellate court on an appeal on a point of law from SIAC was explained by Lord Bingham in his speech in *A (No 1*) [2005] 2 AC 68, at [44] in the context of whether indefinite detention

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powers contained in Part 4 of the Anti-Terrorism Crime and Security Act 2001 were *"strictly required"* and proportionate. Lord Bingham stated (at [44]):

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> *The European Court does not approach questions of proportionality as questions of pure fact: see, for example, Smith and Grady v United Kingdom 29 EHRR 493. Nor should domestic courts do so. The greater intensity of review now required in determining questions of proportionality, and the duty of the courts to protect Convention rights would in my view be emasculated if a judgment at first instance on such a question were conclusively to preclude any further review. So would excessive deference, in a field involving indefinite detention without charge or trial, to ministerial decision. In my opinion, SIAC erred in law and the Court of Appeal erred in failing to correct its error.*

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15. Lord Bingham's judgment in *A (No 1)* also exemplifies this approach in practice. For instance, SIAC had found that it was necessary for the UK to remove persons suspected of involvement in terrorism, to prevent them operating actively in the UK and because it disrupts terrorist activities. Lord Bingham rejected these conclusions, stating that it, *"does not explain why the measures are directed only to foreign nationals"* (at [44]). Thus Lord Bingham was not satisfied, even after affording due respect to SIAC's particular expertise in national security matters, that the need for the detention powers had been sufficiently established by the Government.[6]

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16. This is not to suggest that appellate courts have to re-make the decisions of lower courts and reconsider all of the primary facts. Where they do not have all of the evidence—for instance, where the first instance court or tribunal has heard oral evidence—they will give appropriate weight to the findings of primary fact reached below, and they will take account of any expertise that the tribunal has in relation to particular findings. This is how Baroness Hale's comments in *AH (Sudan)* [2008] 1 AC 678, at [30] should be understood. Appellate

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[6] In accordance with this approach, Lord Nicholls considered that the House of Lords was entitled to re-assess whether Parliament had given sufficient weight to the interference with individual rights (at [81]). Lord Hope held that SIAC had made an error of law in not examining the detention powers with sufficient scrutiny (at [131], i.e. misdirection), but, in common with Lord Bingham and Lord Nicholls, was prepared to go on and himself hold that it had not been shown that the powers of detention were necessary (at [132]). Only Lord Rodger appeared to base his judgment on the ground that SIAC's conclusion was irrational (see [185] and [188]).

courts ought nonetheless to probe the reasoning of the court or tribunal based on its expressed primary findings of fact, in order to detect any errors of approach which may, if left uncorrected, risk violating the absolute prohibition against torture under Article 3. It is insufficient, to ensure compliance with Article 3, for appellate courts to confine themselves to asking only whether SIAC asked itself the right questions or was irrational.

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17. Importantly, this approach does not mark a significant departure from the approach which courts have long taken in cases concerning fundamental rights requiring *"anxious scrutiny"*. An illustration of that approach, in the context of domestic law, is contained in the speech of Lord Bridge in *Bugdaycay v SSHD* [1987] 1 AC 514, at 532-4 in which his Lordship gave close and detailed consideration to the evidence and affidavits submitted in the proceedings (also see *R v SSHD, ex parte. Turgut* [2000] HRLR 337, at 350-355 (Simon Brown LJ)).

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18. The Court of Appeal in *RB and U (Algeria) v SSHD* sought to distinguish the approach taken by the House of Lords in *A (No 1)* on the basis that it concerned an issue of proportionality, whereas the question of the treatment which a person risks receiving upon return to their home country is, it stated, *"pure fact"* ([2008] QB 533, at [106]). However, there is no logical or principled basis for treating assessments of proportionality and assessments of risk under Article 3 differently in terms of whether they are questions of "*law"* or *"fact"*.

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19. Plainly, an assessment of proportionality is not a pure question of fact. It is an evaluative exercise. But so too is an assessment of whether circumstances are such as to render conduct a violation of Article 3. Indeed, evaluation of the proportionality of a particular measure often *requires* the court to undertake a risk assessment, or evaluate the likely impact of a measure on affected individuals (eg the risk of breach of a Control Order).[7] If the appellate court considers that the

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[7] The illusory nature of the distinction between evaluating *"risk on return"* and *"proportionality questions"* is illustrated by the UK Government's own submissions in *Saadi v Italy*. In that case, the government unsuccessfully argued for an implied qualification of Article 3, on the basis that a

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lower court or tribunal has erred in its evaluation of the significance of the facts before it or afforded too little or too much weight to a particular element it must correct that error in order to comply with its own obligations under section 6, HRA to protect Convention rights wherever possible. This is precisely what Lord Bingham did in *A (No 1)*. There is no reason for a different approach under Article 3.

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20. Indeed, the absolute nature of Article 3 calls for *greater* scrutiny than the court applies in relation to qualified Convention rights, not less. This was, for instance, recognised by Simon Brown LJ (as he then was) in *R v SSHD ex parte Turgut* [2000] HRLR 337, at 350: more anxious scrutiny will be afforded under Article 3, and no *"special deference"* will be afforded to the Secretary of State, because Article 3 is, *"absolute and fundamental; it is not a qualified right requiring a balance to be struck with some competing social need."*

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21. Lastly, it is of significance that the approach taken by the Court of Appeal does not reflect the approach taken by the Strasbourg Court when considering whether there has been a violation of Article 3. The approach of the Strasbourg Court is encapsulated in the following passage:

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> *"[the Court] must be satisfied that the assessment made by the domestic authorities is adequate and sufficiently supported by domestic materials as well as by materials originating from other, reliable and objective sources, such as, for instance, other contracting or non-contracting states, agencies of the United Nations and reputable non-governmental organisations….This further implies that, in assessing an alleged risk of treatment contrary to Art.3 in respect of aliens facing expulsion or extradition, a full and ex nunc assessment is called for as the situation in a country of destination may change in the course of*

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person's right not be subject to a risk of treatment contrary to Article 3 by return to their home state needed to be balanced against the risks that the individual poses to other members of the community. Had the Strasbourg Court accepted that submission, the question of whether *refoulement* would violate Article 3 in a particular case would be a question of proportionality: it would have required the degree of risk to be balanced against the risks that not returning the individual would pose to national security. But, on the approach adopted by the Court of Appeal in *RB and U (Algeria) v SSHD*, this would have transformed the criterion governing *refoulement* into a question of judgment and law; it would not be a question of *"pure fact"* because it would be a proportionality question. Yet the factual issues which the court would have had to consider in evaluating the degree of risk on return would have been the same. There is no sense in treating one exercise as an appealable exercise in judicial evaluation, the other as an (unappealable) exercise of fact-finding. The true distinction is between the elements of each assessment which are tied to findings of primary fact, which the appellate court cannot effectively re-consider, and those aspects of the assessment which are evaluative or judgmental, which the appellate court is just as well able to consider.

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time." Salah Sheekh v The Netherlands (2007) 45 EHRR 50, §136 (emphasis supplied)

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22. If appellate courts could not take the same approach, they would not provide as effective a remedy as an application to Strasbourg. If SIAC's determinations on risk on return are unappealable save on the ground of irrationality, individuals would be forced to apply to Strasbourg to protect their rights. This would undermine the central purpose of the HRA that individuals should be able to obtain a judgment and relief in domestic courts (e.g. *Huang*, at [8], quoted paragraph 13 above; *R (SB) v Denbigh High School Governors* [2007] 1 AC 100, at [29] (Lord Bingham)).

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23. Accordingly, Human Rights Watch and JUSTICE submit that, in cases of this kind, the appellate courts should give their own anxious scrutiny to the elements which have led SIAC to find that there is no *"real risk"* of torture or inhuman or degrading treatment on return. This includes SIAC's assessment of the effectiveness of diplomatic assurances.

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4. Diplomatic Assurances

The need for an assurance to eliminate any real risk

24. The underlying principle which courts must protect in cases of this kind is *non-refoulement* to a place where there is a real risk of torture or ill-treatment. Governments acknowledge that diplomatic assurances are only employed in cases where there is such a real risk (if there were no such underlying risk, there would be no need to seek the assurance). The question for any court examining the relevance of such assurances is whether they are sufficient to remove *any* real risk of torture or inhuman or degrading treatment. Given that it is accepted that there is an underlying risk, this is an exercise which must be conducted with the very greatest degree of scrutiny.

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25. The Strasbourg jurisprudence makes clear that if diplomatic assurances are to be considered a *"sufficient"* / *"adequate"* / *"effective"* guarantee, they must *eliminate* the real risk of torture and

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ill-treatment that would otherwise be present if a person was returned to their home state (see *Saadi* at [148], *Chahal* at [69] and [113] (Com.) and [92], [105] (Ct.)). In *Soering* the Court was not satisfied that the diplomatic assurance in issue could be relied upon to render extradition compliant with Article 3 because, *"objectively, it cannot be said that it eliminates the risk of the death penalty being imposed"* (at [98] (emphasis supplied)).[8] This approach was supported by the then Council of Europe Commissioner for Human Rights, in his report re. Sweden, 8/7/04, CommDH(2004)13, at [9]: *"Due to the absolute nature of the prohibition of torture or inhuman or degrading treatment, formal assurances cannot suffice where a risk nonetheless remains."* (Gil-Roberts).

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26. Thus, whilst the weight to be given to diplomatic assurances depends on the circumstances (*Saadi* at [148]), unless, in the circumstances, a diplomatic assurance eliminates the otherwise-existing real risk of torture or ill-treatment, the assurance cannot be relied upon as allowing *refoulement*. The focus of the court should rightly be directed to whether a residual risk of torture or ill-treatment remains given the assurance, and not at the *degree* of effectiveness of the assurance: as there can be no *"acceptable level"* of risk of torture or inhuman or degrading treatment.

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Inherent weaknesses in diplomatic assurances as a means for protecting people from human rights abuses

27. There are a number of inherent weaknesses in diplomatic assurances as a means of protecting a person from human rights abuses, particularly in the context of ill-treatment and torture. Human Rights Watch and JUSTICE submit that these weaknesses should be judicially recognised and they provide a further reason why such assurances must be subjected to the most anxious scrutiny. These inherent weaknesses are documented and accepted in a growing body

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[8] See also, *Salah Sheekh v The Netherlands* (2007) 45 EHRR 50 (an *"internal flight"* case), at [147]: *"the Court is far from persuaded that ....the risk .... has been removed or that he would be able to obtain protection from local authorities"* (emphasis supplied).

of research and literature.[9] The main deficiencies include the following.

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28. First, diplomatic assurances are particularly unreliable when they relate to torture and ill-treatment because it is inherently difficult to establish whether a breach of an assurance not to subject a person to torture or ill-treatment has occurred.

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28.1 Torture and ill-treatment are carried out behind closed doors without prior warning. It is thus different by its very nature from other matters to which diplomatic assurances can relate. The death penalty, for instance, is imposed in (usually open) judicial proceedings following a hearing; and there is usually a period of time between the sentence and the penalty being carried out.

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28.2 Moreover, a person can be subjected to torture and ill-treatment without it leaving any physical marks. It is increasingly recognised that interrogation methods involving sensory deprivation or bombardment, solitary confinement, stress positions, threats, and other 'non-physical' techniques can inflict severe mental suffering and can constitute torture. A recent study concluded:

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> *"In conclusion, aggressive interrogation techniques or detention procedures involving deprivation of basic needs, exposure to aversive environmental conditions, forced stress positions, hooding or blindfolding, isolation, restriction of movement, forced nudity, threats,*

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[9] E.g. **UNHCR,** "Note on Diplomatic Assurances and International Refugee Protection", August 2006; **Louise Arbour**, UN High Commissioner on Human Rights, *"In Our Name and On Our Behalf"* speech at Chatham House, 15 Feb. 2006 pp.17-18; **Manfred Nowak**, UN Special Rapporteur on Torture, "'Diplomatic Assurances'" Not an Adequate Safeguard for Deportees, UN Special Rapporteur Against Torture Warns", press release, 23 Aug. 2005; **Joint Committee on Human Rights**, 19th Report of 2006-7, UN Convention Against Torture, HL 185 I/HC 701-I, at [129], [131]; **European Commissioner on Human Rights,** Thomas Hammarberg, "Viewpoint: The Protection against Torture Must be Strengthened," 18 February 2008, at http://www.coe.int/t/commissioner/Viewpoints/080218_en.asp; **European Committee for the Prevention of Torture**, 15th General Report on the CPT's Activities, CPT/Inf (2005) 17, at [38]-[39]; **Human Rights Watch** "Cases Involving Diplomatic Assurances against Torture: Developments since May 2002", Jan. 2007, No.1; Human Rights Watch, *Still at Risk: Diplomatic Assurances No Safeguard Against Torture*, April 2005, Vol. 17 No4(D) **(*"Still at Risk"*)**; **M. Nowak and E. McArthur**, *The UN Convention Against Torture, A Commentary*, OUP 2008, A3.4**; M. Jones**, "Lies, Damned Lies and Diplomatic Assurances: The Misuse of Diplomatic Assurances in Removal Proceedings" (2006) 8 European Journal of Migration Law 9; **G. Noll**, "Diplomatic Assurances and the Silence of Human Rights Law" (2006) 7 Melb. J. Int. Law 104; **K. R. Hawkins**, "Note: The Promises of Torturers: Diplomatic Assurances and the Legality of "Rendition"" (2006) 20 Geo. Immigr. L.J. 213.

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humiliating treatment, and other psychological manipulations conducive to anxiety, fear, and helplessness in the detainee do not seem to be substantially different from physical torture in terms of the extent of mental suffering they cause, the underlying mechanisms of traumatic stress, and their long-term traumatic effects."[10]

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28.3 Similarly, a recent report by Physicians for Human Rights on eleven former detainees at Guantanamo Bay concluded that they had suffered severe psychological injury after being subjected to a wide spectrum of ill-treatment including: deprivation of basic needs, isolation, sensory bombardment/deprivation, exposure to extremes of temperature, threats to harm family and witnessing torture or cruel treatment (*Broken Laws, Broken Lives: Medical Evidence of Torture by US Personnel and Its Impact*, June 2008).

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28.4 Crucially, this means that even if complaints of torture or ill-treatment are made, it will often be extremely difficult for such complaints (and thus whether a diplomatic assurance has been breached) to be verified. This in turn means that torture is deniable. Where a state's public officials are responsible for ill-treatment or torture, its Government will often feel confident in denying that it has taken place, knowing that the allegations will not be capable of being substantiated (see e.g. *Still at Risk* (fn. 9 above), pp.62-3).

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28.5 A further reason why torture and ill-treatment is so difficult to verify is that individuals who have been subjected to it have a strong incentive not to complain about it for fear or reprisals against themselves or their families or friends, or otherwise out of a fear for the worsening of their situation.

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29. A second weakness in diplomatic assurances as a means for protecting human rights is that, even if monitoring is in place, a returned

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[10] Metin Basoglu, Maria Livanou, Cvetana Crnobari, "Torture vs Other Cruel, Inhuman, and Degrading Treatment - Is the Distinction Real or Apparent?" Archives of General Psychiatry, Mar. 2007, 64, No. 3.

individual is entirely dependent on the political appetite of the returning state to ensure compliance with the assurance. Governments are generally unwilling to expend significant political capital in policing human rights obligations owed by other states and especially in the case of those sent abroad by the government because they were deemed to be a threat to the state's own nationals. As one commentator has explained:

> *[T]he major engines of compliance that exist in other areas of international law are for the most part absent in the area of human rights. Unlike the public international law of money, there are no "competitive market forces" that press for compliance. And, unlike in the case of trade agreements, the costs of retaliatory noncompliance are low to nonexistent, because a nation's actions against its own citizens do not directly threaten or harm other states. Human rights law thus stands out as an area of international law in which countries have little incentive to police noncompliance with treaties or norms.*[11]

30. It is, regrettably, unrealistic to anticipate that governments will choose to incur any significant damage to their diplomatic relations with a foreign state—which may threaten trade or information exchange—for the sake of an individual who has been deported. This is all the more so when the individual concerned is regarded as a danger to national security (see e.g. *Still at Risk*, pp.26-7). The fact that diplomatic assurances are bi-lateral, rather than multi-national, agreements does not alter this basic fact.

31. A third weakness in using diplomatic assurances to prevent human rights abuses is that there is a clear incentive for the Government of a state that has returned a person to their home state, to accept denials made by the Government of the home state in response to any claims that a diplomatic assurance has been breached. This is because a returning state will not want to jeopardise its ability to rely on diplomatic assurances in future cases. The disincentive for the UK Government to take steps to ensure compliance with diplomatic

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[11] Oona Hathaway, "Do Human Rights Treaties Make a Difference?" (2002) 111 Yale LJ 1935, at 1938.

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assurances is particularly marked because such assurances are a major component in its anti-terrorism strategy: the Government will not want to discover or accept that a foreign state has breached a diplomatic assurance made to it because it will not then be able to rely on assurances to return individuals suspected in involvement in terrorist activities to that state in the future (for a graphic illustration of such political considerations see *Youssef v HO* [2004] EWHC 1884 (QB) at [9], [23]-[24],and [51]-[52]).

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32. Additionally, the home state also has obvious reasons why it would not want to investigate alleged breaches of a diplomatic assurance or to acknowledge any breach. Acknowledging a breach would involve the Government of the home state admitting either bad faith on its part or negligence in ensuring compliance.

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33. In short, the effect of allowing diplomatic assurances to satisfy Article 3 would be to make an individual's protection from torture dependent on a political agreement that, (1) he cannot enforce, (2) can be breached without warning, (3) can be breached without detection (or at least, without a breach being necessarily capable of conclusive verification), and which, (4) both parties have powerful political incentives to deny has been breached.

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States where torture and human rights abuses are widespread and systemic

34. There are particularly pressing concerns about the use of diplomatic assurances in relation to states where torture and human rights abuses are widespread and systemic. As a matter of principle and common sense it undermines the global regime of international human rights law for Governments to accept assurances from states whose officials routinely practice or acquiesce in torture in violation of their legally-binding human rights obligations.

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35. In addition to this there are overwhelming practical impediments to the effectiveness of assurances given by such regimes:

35.1 Compliance with a diplomatic assurance by the officials of a state where torture and human rights abuses are widespread and systemic will be entirely a matter of political expediency and self-interest and will not be borne out of any genuine recognition of the rights of the individual to be protected. Compliance will thus be more fragile and subject to change as the assessment changes as to what are the interests of the Government, its various agencies and officials. Where a person, like OO, is likely to be detained for many years, if not for the rest of his life, it is difficult to see how a court could be satisfied that there would be no real risk of torture or mistreatment *ever occurring* in a state where torture of persons suspected of militant activities is routine and committed with impunity, as it is in Jordan.

35.2 One particular aspect of this concern is that there will be no recognition by public officials that mistreatment is contrary to the law and subject to legal sanction. On the contrary, they will view it as acceptable and normal. As Lord Hope has recognised, where torture is tolerated within a legal system there is *always* a risk that it will be resorted to:

> *"The lesson of history is that, when the law is not there to keep watch over it, the practice is always at risk of being resorted to in one form or another by the executive branch of government. …where the rule of law is absent, or is reduced to a mere form of words to which those in authority pay no more than lip service, the temptation to use torture is unrestrained."* (*A (No 2)* at [101]).

35.3 Furthermore, in a state where torture and human rights abuses are regularly committed by public officials, it is much more likely that incidents of torture and mistreatment will go *unreported* because the detainee fears, or has been threatened with, reprisals against him or his family members and friends. This was, for example, the experience of Maher Arar, a Canadian national who was handed over by United States

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authorities to Syria in 2002. In a post-release statement Arar recalled,[12]

> *"The interrogation and beating ended three days before I had my first consular visit, on October 23… I was told not to tell anything about the beating, then I was taken into a room for a 10-minute meeting with the consul. ... I cried a lot at that meeting. I could not say anything about the torture. I thought if I did, I would not get any more visits, or I might be beaten again ….The consular visits were my lifeline, but I also found them very frustrating. ... I would bang my head and my fist on the wall in frustration. I needed the visits, but I could not say anything there."*

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35.4 It is also far more likely that, in such a state, torture and mistreatment will go undetected or uncorroborated because of the likelihood that state agencies will be either complicit or sympathetic to the torturers. Cover-ups, denials and techniques to evade detection of abuse by monitors are commonplace in regimes where torture and mistreatment are routinely practiced. In relation to Jordan, for instance, the UN Special Rapporteur stated in January 2007:[13]

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> *"A torture victim in Jordan who seeks redress, especially one who is a criminal suspect still in detention, faces an impenetrable wall of conflicting interest. In simple terms, the person whom a suspect is accusing of committing torture is the same person who is guarding him or her, and the same person who is appointed to investigate and prosecute the allegations of torture being made against him."*

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36. Therefore in relation to states where torture and human rights abuses are widespread and systemic Human Rights Watch and JUSTICE submit that the courts should adopt a *principled approach* which holds that diplomatic assurances not to torture or mistreat deportees from

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[12] Maher Arar's Statement, CanWest News Service, 4 Nov. 2003, www.informationclearinghouse.info/article5156.htm reproduced in the Declaration of Julia Hall, Counsel and Senior Researcher in Europe and Central Asia Division of Human Rights Watch, Sameh Sami S. Khouzam (A 75 795 693) Civil. No. 3:CV-07-0992, US District Court Middle District of Pennsylvania.

[13] Report on Mission to Jordan, 5 Jan. 2007, A/HRC/4/33/Add.3, at 53. Another example of this is the frustration of ICRC monitoring at Abu Graib, documented by US investigation reports: See Human Rights Watch, *Still At Risk: Diplomatic Assurances No Safeguard Against Torture*, April 2005 Vol. 17 No 4(D), at 24-5.

governments of such states are *inherently unreliable* and should not be afforded any weight.

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37. The judgment of the Strasbourg Court in *Chahal* supports such an approach. The UK Government had received an assurance from the Indian Government that Mr *Chahal* would not suffer mistreatment at the hands of Indian authorities of any kind (at [32], [105]). It is significant that in the part of its judgment in which it examines the risk of mistreatment that Mr Chahal might suffer on return, the Court does not give any attention to the assurance, including to its terms, status and incentives for compliance. The Court simply reasoned that, *"problems still persist in connection with the observance of human rights by the security forces in Punjab"* (at [102]), that *"no concrete evidence has been produced of any reform or reorganisation"* of the Punjab police ([103]), that torture by police in other parts of India was *"endemic"* and mistreatment *"widespread"* ([104]). This *in itself* was sufficient to find a real risk on return, as the Court concluded:

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> *"the violation of human rights by certain members of the security forces in Punjab and elsewhere in India is a recalcitrant and enduring problem. Against this background, the Court is not persuaded that the above assurances would provide Mr Chahal with an adequate guarantee of safety."* ([105])

In other words, because of the endemic and widespread human rights abuses, the assurance could not be relied upon.

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38. The UN Convention Against Torture also draws a distinction between states where human rights abuses are widespread and routine and other states. The second paragraph of Article 3 states:

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> *2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.*

39. The approach of the court in *Chahal* has been distilled into a principled formulation by the Federal Court of Canada in *Sing v*

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Canada [2007] FC 361 which Human Rights Watch and JUSTICE respectfully invite the House to endorse:

> *"[In] circumstances where there is a consistent pattern of gross, flagrant or mass violations of human rights, or of a systematic practice of torture the principle of non-refoulement must be strictly observed and diplomatic assurances should not be resorted to."* (at [37] per Montigny J).

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Post-return monitoring

40. Attempts have been made by Governments to cure these inherent weaknesses in diplomatic assurances as a mechanism for protecting human rights by developing schemes of post-return monitoring. However, successive UN special rapporteurs on torture have rejected the proposition that occasional visits to a single detainee—in the absence of independent monitoring of all places of detention in a country and continuing, unhindered access to all detainees, including by independent medical professionals, in private and without notice—can be an effective safeguard against torture and ill-treatment. (E.g. Report to the Gen. Ass. 30 Aug. 2005, UN Doc. A/60/316 at [46] "*the evidence of documented cases is that monitoring does little to mitigate the risk*").

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5. Algerian Cases: U and RB

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41. The inherent weaknesses in diplomatic assurances, some of which have been set out above, are illustrated by the facts of these appeals. The judgments of SIAC failed adequately to grapple with these issues or show that they are overcome in the circumstances of these cases.

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42. In *RB* and *U*'s cases, it was accepted that, absent the diplomatic assurances given by the Algerian Government, RB and U would face a real risk of torture or inhuman or degrading treatment on their return (Statement of Facts and Issues, at [8]). The question for SIAC in both cases was therefore whether, given that there are substantial grounds for believing that the appellants would face a real risk of mistreatment on return, the diplomatic assurances eliminate that risk. However, SIAC did not approach the appeals in this way. Instead, in *RB*, it

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judged the assurances against four criteria of its own invention (*RB*, SC/39/2005, 5 Dec. 2006, at [5]). It concluded that, judged against those criteria, the assurances *"can safely be accepted"* (at [22]). This conclusion was relied upon in *U* (SC/32/2005, 14 May 2007, at [13]).

43. In part, the basis for SIAC's conclusion is contained in a closed judgment, which Human Rights Watch and JUSTICE are unable to scrutinise. Of its open reasons, of particular concern is SIAC's treatment of its fourth criteria: *"verification"*. Whilst in principle, Human Rights Watch and JUSTICE would respectfully endorse the comments of SIAC that, "*An assurance, the fulfilment of which is incapable of being verified would be of little worth"* (at [6]), they submit that SIAC erred by equating verification with the opportunity of an individual to make a complaint. Thus, SIAC held that the assurances were verifiable because the British Embassy *"may maintain contact"* with RB and that NGOs such as Amnesty International *"can be relied upon to find out if they are breached and publicise that fact."* (at [21]). This however is very far from enabling the UK Government to verify whether the assurances have been breached.

44. Thus, SIAC's judgment does not adequately address two of the inherent weaknesses of diplomatic assurances, as set out above. In the first place, it gravely underestimates the possibility that the returned individual, facing the prospect of spending the rest of his life living with his family in his home state, will not risk reprisals or harassment to himself, or to his friends and family, by making a complaint about mistreatment. In the circumstances of RB as well as U, the possibility for complaints being stifled by fear is particularly clear given that:

    44.1 as the Government accepted, RB will be detained and interrogated on return (at [13]);

    44.2 RB would, but for the assurance, be at risk of torture or mistreatment during this period;

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44.3 such period of detention would not be monitored or supervised; RB would not be subject to independent medical examinations; and, moreover

44.4 Amnesty International has reported that two individuals who had been returned to Algeria—I and V—had not made complaints about their treatment during post-return detention, *"for fear of reprisals."* (at [19])

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45. SIAC dismissed the evidence of Amnesty International because it was *"unclear"* whether this was what the individuals had said or Amnesty's *"gloss"* (at [19]). However, even if the men had made such comments to Amnesty, Amnesty could not have reported this for obvious reasons. Since there is a generally accepted practice both in domestic courts and in Strasbourg of accepting such reports as reliable Amnesty's report should not have been rejected on this point.

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46. Furthermore, it was plainly irrational for SIAC to have, on the one hand, relied upon reporting by NGOs – and mentioning Amnesty's reporting in relation to I and V's cases specifically – to support its conclusion that any breach of the assurances would come to light and be thus verifiable, whilst on the other hand refusing to treat as cogent or reliable Amnesty's report that the men did not make complaints of mistreatment because of fear of reprisals. Had Amnesty's report related to RB or U, how could it be said, in the light of its treatment by the court, that it provided *"verification"* of compliance with the assurance?

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47. Further evidence was obtained after the judgment in RB that other returned individuals had been subjected to treatment contrary to Article 3. SIAC considered this evidence in *U*. In its judgment, SIAC put decisive weight on reports that the men had been found to be *"well"* (esp. at [34]), which, it is submitted, further reflects a failure to appreciate the unlikelihood that individuals will make complaints about their treatment where there is a risk of reprisals. Its conclusion that mistreatment was only a *"mere possibility"* discloses a clear misdirection, since, as set out in paragraphs 10 and 11 above, this was

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a case in which the *personal situation* of the appellant gave rise to a risk on return.

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48. Secondly, SIAC also failed to deal adequately with the fact that torture need not leave physical marks and is therefore deniable. SIAC touched on the point in making the following remarks:

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> *"It is, of course, true that a detainee could be tortured by the chiffon method, and refuse to say anything about it afterwards; but such an event could occur even under a monitoring regime. ..."* (at [21])

49. But this reasoning is illogical and unsatisfactory. And it is very far from the anxious scrutiny that SIAC should have given to the possible risks on return:

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49.1 First, SIAC overlooked the possibility that even if a returned individual made an allegation of torture, this could be denied by the Algerian Government and that, absent overt physical injuries, it would not be possible to verify it without there having been careful and thorough monitoring including psychological examinations.

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49.2 Second, SIAC underestimated the possibility for other methods of ill-treatment to be employed (other than the chiffon method).

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49.3 Third, it was irrational for SIAC to dismiss the risk of complaints not being made about such mistreatment on the basis that, *"such an event could occur under a monitoring regime"*. This may well be the case, but that speaks to the fact that monitoring regimes may not eliminate a risk of ill-treatment, it cannot render an even more inadequate regime acceptable.

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50. The third criticism of SIAC on this point reflects SIAC's general approach of identifying criteria and testing the assurance against those criteria. SIAC concluded that the criteria were satisfied or almost satisfied. But the approach is flawed because *"verification"* as SIAC understood it, clearly would not eliminate a risk of torture. Therefore it was not sufficient for SIAC to find that that criteria were satisfied.

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Had SIAC asked the correct question—whether the assurance eliminated the risk of torture—it must have held that it did not.

51. A further concern with the judgment of SIAC in *RB* and SIAC's reliance on it in *U*, relates to its finding that a promise that RB's "*human dignity will be respected under all circumstances…"* in accordance with the Constitution and national law of Algeria, represents an adequate safeguard. The Court of Appeal regarded the submission that the assurance was not sufficiently explicit and that Algerian authorities "*might in some way wish to hide behind provisions of Algerian law that permit torture"* to be *"unreal"* and *"fanciful"* (at [129]). Again, however, neither SIAC nor the Court of Appeal anxiously scrutinised this issue. Far from being fanciful or unreal, it is quite conceivable that states will adopt literalistic interpretations of diplomatic assurances. By its own terms, the guarantee of human dignity only applies insofar as it is protected by national law. Algerian officials may consider that Algerian law adequately protects human dignity and therefore will treat RB in the same way as they treat any other detainee. It may also be doubted whether all public officials in states such as Algeria would regard solitary confinement, threats, stress positions, sleep deprivation etc. as inconsistent with *"human dignity"*.

52. For evidence of the importance of the precise terms of assurances—and the literalistic approach of states to their undertakings under such assurances—one need look no further than the United States. In its 2007 Human Rights Report, the House of Commons Foreign Affairs Committee (HC 533) accepted that because of a divergence between how the US administration and the UK Government (and international community) understand the meaning of *"torture*", the UK cannot rely on diplomatic assurances from the US even where they explicitly refer to torture:

> *52. There appears to be a striking inconsistency in the Government's approach to this matter. As noted above, it has relied on assurances by the US Government that it does not use torture. However, it is evident that, in the case of water-boarding and perhaps other techniques, what the UK considers*

to be torture is viewed as a legal interrogation technique by the US Administration. With the divergence in definitions, it is difficult to see how the UK can rely on US assurances that it does not torture. ...

53. We conclude that, given the clear differences in definition, the UK can no longer rely on US assurances that it does not use torture, and we recommend that the Government does not rely on such assurances in the future. (footnotes omitted; emphasis supplied)

53. Moreover, the approach of the Strasbourg Court emphasises the importance of giving close attention to the precise terms of the guarantee that has been given (e.g. *Soering,* at [98]). Therefore, given the government's acknowledgement that RB and U would be at risk of torture and ill-treatment upon return; Algeria's rejection of unhindered independent monitoring of all places of detention; the broad, general, language used in the Algerian assurances, particularly since Algerian law does not mirror its international obligations with respect to torture, it is submitted that the assurances do not eliminate the real risk of torture and ill-treatment on return.

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6. Jordan: OO

The MoU

54. SIAC did not apply a sufficiently stringent test when assessing the adequacy of the MoU. It described it as a *"fallacy"* to treat the obligation under Article 3 as "*one which requires a guarantee, let alone a legally enforceable one, that there would be no risk at all of a breach of Article 3 in the receiving state"* (at [494]). However, as has been seen (paragraph 24 and 25 above) an effective *guarantee* that there is no *"real risk"* is precisely what *is* required to ensure compliance with Article 3. This error is carried through to SIAC's conclusion that the MoU would *"reduce the risk sufficiently"* (at [516]), which fails to reflect the fact that no real risk is acceptable.

OO App Pt. Ia p. 192

OO App Pt. Ia p. 199

55. SIAC also failed to adopt the principled approach required in cases involving states where torture and human rights violations are widespread and systemic. Had SIAC recognised the inherent

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A unreliability of diplomatic assurances given by such regimes it could not have reached the conclusion that weight could be put on the MoU entered into with Jordan.

56. A further worrying aspect of SIAC's judgment in this respect relates to its treatment of the monitoring arrangements. Critical weaknesses in

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56.1 The absence of any provision for an independent investigation of allegations of torture;

56.2 No guarantee that the Adaleh Centre, which would be

C responsible for the monitoring, would be given access, with sanctions for breach;

56.3 The limited expertise and experience of the Adaleh Centre and the general subordinate position of civil society organisations in Jordan in relation to the state;

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56.4 No right to independent medical examinations;

56.5 No provision for OO to make allegations confidentially;

56.6 These concerns are heightened against the background of the

E UN Special Rapporteur's Report to the UN General Assembly on his Mission to Jordan (5 Jan. 2007) during which he had been denied access to GID facilities and had met with *"deliberate attempts by the officials to obstruct his work"* (A/HRC/4/33/Add.3, p.2).

F 57. SIAC recognised these weaknesses in the MoU (at [505]-[515]) but reached the conclusion that weight could nonetheless be placed on it (at [516]). It is submitted that, on the contrary, these critical weaknesses mean that a real risk of torture or ill-treatment in breach of Art. 3 is clearly present, *in spite of the MoU*.

OO App Pt. Ia pp. 195-199

G 58. Most obviously, the Jordanian authorities, aware of these limitations, would know that, (1) torture and ill-treatment leaving no outward marks might well go undetected; (2) it would know if allegations of

torture were made by OO to the monitors (thus allowing threats of reprisals to be made); and (3) any such allegations could be denied as they would not have to be investigated or verified by independent monitoring mechanisms or medical experts.

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59. SIAC gave no answer as to how the MoU could be effective in these circumstances. The evidence of the Government witness was simply that,

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OO App Pt. Ia
p. 133

> *"If, despite a GID [General Investigation Department] medical examination, the monitor continued to have concerns, then the Adaleh Centre would want to find another way of reassuring itself about the returnee's treatment."* (at [261])

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Indeed, SIAC also recognised that it was *"uncertain how the UK would react"* if an independent medical examination were to be refused (at [510]).

OO App Pt. Ia
p. 197

60. These weaknesses in the MoU underscore the importance of adopting a principled approach in relation to states such as Jordan.

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OO's high profile

61. SIAC held that because of the notoriety of OO and the "*interest and support that he arouses"* in certain sections of the community in Jordan, the aim of the Jordanian Government and the GID would be for the treatment of OO to be sufficiently and demonstrably correct both before and after his retrial (at [355]-[356], [476], [478]). ("*the high-profile point*").

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OO App Pt. Ia
pp. 156-157;
pp. 187-188

62. The high profile point was central to SIAC's overall conclusion that it is safe to return OO. There are suggestions in its judgment that this finding was sufficient in itself irrespective of the adequacy of the MoU. However, as explained below its finding on the high profile point is logically dependent on the effectiveness of the MoU, at least in relation to the monitoring arrangements that it provides for. Furthermore, SIAC made clear that it drew support from the MoU in excluding any real risk that OO would be mistreated (at [359], [476], [478], [516]). In these circumstances, it is submitted that it would not

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OO App Pt. Ia
p. 158;
pp. 187-188
p. 199

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be safe to uphold SIAC's judgment, and the deportation of OO, on the high profile point if, as is submitted below, the MoU cannot be relied upon.

63. SIAC reasoned that treating OO properly would *"avoid a real risk"* of an allegation of torture being made. But it would obviously not avoid the possibility of a *false* allegation being made. The significance of this point lies in SIAC's own finding, in the same paragraph, that false allegations which are not substantiated would be as damaging to the Jordanian Government as a genuine allegation. As SIAC stated, "*a serious publicised allegation, true or not, could be as de-stabilising as proof that the allegation was correct....".* Given this finding, it was illogical for SIAC to conclude that a real risk of de-stabilisation would be avoided by treating OO properly and that this would provide a sufficient incentive for the Jordanian Government and the GID to do so. On the contrary, the risk could *not* be avoided since—if SIAC is correct— it would be open to OO at any time to de-stabilise the regime by making a false allegation of torture. It follows that there would be little point in the Jordanian Government or the GID making concerted efforts to avoid mistreatment of OO.

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64. Moreover, the evidence accepted by SIAC in other parts of its judgment makes clear that the risk of false allegations would be well-understood by the Jordanian authorities and is far from a fanciful prospect. Thus the US State Department Report for 2005, accepted by SIAC, stated that,

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> *"Government officials denied many allegations of detainee abuse, pointing out that many defendants claimed abuse in order to shift the focus away from their crimes. During the year, defendants in nearly every case before the State Security Court alleged that they were tortured while in custody...."* (at [128])

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OO App Pt. Ia p. 101

65. Indeed, the most worrying aspect of SIAC's reasoning is that it failed to recognise or address the fact that the obvious way that Jordanian authorities *could* avoid a risk of *any* allegations of torture being made by OO—whether true or untrue—would be to hold him incommunicado or to threaten him or his family with reprisals. The only way to meet this point would be to rely on the monitoring

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arrangements contained in the MoU. Logically, therefore, SIAC's conclusion as to the relevance of OO's high profile could only be supported if the MoU is effective. As submitted above, the MoU cannot safely be relied upon.

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7. Disclosure and closed evidence in risk on return cases

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66. Human Rights Watch and JUSTICE submit that where a person makes a credible claim that they face a real risk of torture or ill-treatment if returned to their home state, to dismiss that claim and return that person on the basis of evidence that they have not seen or been given an opportunity to challenge, is grossly unfair. There is no basis for the derogation from the principles of open justice and equality of arms in these circumstances.

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67. It is also grossly unfair for a person not to be provided with evidence or information which may support his fear that he would suffer a risk of torture or ill-treatment on return. The unfairness is exacerbated by the fact that, (1) denial of such information could prevent an individual from satisfying the evidential burden under Article 3 and thus requiring the Secretary of State to disprove that there would be any risk on return, and (2) it is the Government, rather than the individual, that is most likely to have information and evidence that corroborates the individual's fear of mistreatment.

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68. In *MB v SSHD* [2008] AC 440 (at [91]) Lord Brown made clear that the right to a fair hearing is absolute:

> *I cannot accept that a suspect's entitlement to an essentially fair hearing is merely a qualified right capable of being outweighed by the public interest in protecting the state against terrorism ... On the contrary, it seems to me not merely an absolute right but one of altogether too great importance to be sacrificed on the altar of terrorism control. By the same token that evidence derived from the use of torture must always be rejected so as to safeguard the integrity of the judicial process and avoid bringing British justice into disrepute, so too in my judgment reliance on closed material must be rejected if reliance on it would necessarily result in a fundamentally unfair hearing....* (emphasis supplied)

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The contrary proposition is a slippery slope. If the principle of open justice could be diluted to protect society from threats to national security, it could surely also be diluted in the face of other potential social evils, such as murder, or child abuse. But in such circumstances – criminal proceedings, or cases concerning children – courts have been astute to emphasise the importance of a person suspected of wrongdoing having access to all the evidence upon which such an assertion is made, as an essential element of giving procedural protection under Arts 6 and/or 8.[14] No lesser protection should exist in relation to the procedural elements of Art 3, which is absolute and permits no derogation even when threats to national security might obtain.

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69. The requirements of fairness were described by Upjohn J in *Re K (Infants)* [1963] Ch 381, at 405-6:

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> *It seems to be fundamental to any judicial inquiry that a person or other properly interested party must have the right to see all the information put before the judge, to comment on it, to challenge it and if needs be to combat it, and to try to establish by contrary evidence that it is wrong. It cannot be withheld from him in whole or in part. If it is so withheld and yet the judge takes such information into account in reaching his conclusion without disclosure to those parties who are properly and naturally vitally concerned, the proceedings cannot be described as judicial.*

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> *Take this very case for example. We know not what confidential facts or advice have been given by the Official Solicitor to the judge; we know not what written or oral opinions have been expressed by the medical adviser. How can it be right to prevent a parent, whose legitimate interest in the welfare of her infant is at stake, from knowing and giving her the opportunity to challenge those facts, advice or opinions?*

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> *That harm may result to an infant if such disclosure is made is one of the many distressing results that may occur when a home is broken, but it cannot, in my judgment, be an excuse for a failure to observe what is a most fundamental concept of British justice.*

70. In *Ex p. Doody*, Lord Mustill made clear that when fairness demands that there is a right to make representations, that right, in order to be

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[14] In accordance with this approach, see *R v Davis* [2008] UKHL 36, where Lord Brown recognised *"the core common law principle that the accused has a fundamental right to know the identity of his accusers."* ([65])

effective, must be accompanied by the material on which a decision could be based:

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> *It has frequently been stated that the right to make representation, is of little value unless the maker has knowledge in advance of the considerations which, unless effectively challenged, will or may lead to an adverse decision. The opinion of the Privy Council in Kanda v. Government of Malaya [1962] A.C. 322, 337 is often quoted to this effect. This proposition of common sense will in many instances require an explicit disclosure of the substance of the matters on which the decision-maker intends to proceed.* (p.563)

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71. Lord Mustill recognised that the extent and scope of this right is dependent upon the circumstances, but his Lordship was in no doubt that it applied to representations relating to the penal element in a life prisoner's sentence. It must therefore apply to an immigration decision that might expose a person to torture. Any doubt about this is dispelled by Baroness Hale's speech in *MB v SSHD* [2008] 1 AC 440 in which her Ladyship stated that requirements of fairness apply no less rigorously in immigration proceedings where Article 5 is engaged (at [60]-[61]). By extension, this must also be the case where Article 3 rights are engaged.

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72. The counter-argument, that there may be issues on which it would make no difference for the appellant to be entitled to know of the evidence and to be entitled to make submissions, was answered by Megarry J (as he then was) in *John v Rees* [1970] 1 Ch 345, at 402.

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> *It may be that there are some who would decry the importance which the courts attach to the observance of the rules of natural justice. "When something is obvious," they may say, "why force everybody to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard? The result is obvious from the start." Those who take this view do not, I think, do themselves justice. As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.*

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73. His Lordship went on to emphasise a second reason for observing rules of natural justice. As he put it, any person with knowledge of human nature who pauses to think cannot, *"underestimate the feelings*

of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events." Informing a person of the basis for a decision affecting their interests reflects a basic respect for human dignity and autonomy (also see *Ex p. Doody*, at 551E-F). It is hard to imagine a much greater perception of injustice than where a person who claims, credibly, to face a risk of torture if returned to their home state is nonetheless returned following a determination made in secret on the basis of secret evidence. Such an approach is contrary to principles of justice and is corrosive of respect for the rule of law.

74. Furthermore, determining risk on return in secret and without providing all the relevant evidence to the appellant fails to satisfy the requirement that there is a, "*rigorous examination, to ensure that it is in no way flawed"* applying the *"most anxious scrutiny"*: *Bugdaycay v SSHD* [1987] 1 AC 514, at 531 (Lord Bridge). In *Ex p. Doody*, Lord Mustill stated that without disclosure of the relevant material, "*there is a risk that some supposed fact which [the prisoner] could controvert, some opinion which he could challenge, some policy which he could argue against, might wrongly go unanswered."* (p.563) (emphasis supplied). It is submitted that in the context of torture there is no scope for any risk of a wrong determination. This is the reason why the courts will give the matter the most anxious scrutiny.

75. Indeed, the whole premise of the Strasbourg case law on risk on return, from *Soering* onwards, reflects the fact that the state must satisfy the Court that there is no real risk of treatment contrary to Article 3 on return by reference to open evidence. As far as Human Rights Watch and JUSTICE are aware, it has never been suggested that a Government can rely before the Strasbourg Court on material or evidence that is not disclosed to the parties. The approach taken by the Strasbourg Court was summarised in *Saadi v Italy*:

> *128. In determining whether substantial grounds have been shown for believing that there is a real risk of treatment incompatible with Article 3, the Court will take as its basis all the material placed before it or, if necessary, material obtained proprio motu .... In cases such as*

> *the present the Court's examination of the existence of a real risk must necessarily be a rigorous one (see Chahal, cited above, § 96).*
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> *129. It is in principle for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he would be exposed to a real risk of being subjected to treatment contrary to Article 3 (see N. v. Finland, no. 38885/02, § 167, 26 July 2005). Where such evidence is adduced, <u>it is for the Government to dispel any doubts about it.</u>[ie. in the material it places before the Court]*

76. It is important to emphasise that whilst the Strasbourg Court has recognised that *"confidential material may be unavoidable where national security is at stake"* (*Chahal*, at [131]) it has also made clear that national security considerations are not relevant when assessing risk on return (*Chahal*, at [80]-[81]). Thus whilst the court is prepared to countenance the withholding of some material when domestic courts conduct national security assessments, it has not done so when the question is whether there would be a risk on return.

77. The approach of the Strasbourg Court has two implications:

    77.1 First, there can be no prejudice to the Government in requiring disclosure by it of all information on which it relies in risk on return in domestic immigration proceedings, since it would have to be disclosed to justify its decision before the Strasbourg Court in any event;

    77.2 Second, if domestic courts are to be faithful to the central purpose of the HRA—which is to provide a remedy in domestic courts that could be obtained in Strasbourg—they should not permit the Government to present its case in secret when the individual would be entitled to require the Government to present its case in open before the Strasbourg Court.

78. It is a principle repeatedly affirmed by the Strasbourg Court that Article 3 rights are *"equally absolute in expulsion cases"* and cannot be watered-down to any degree by national security concerns (eg *Chahal*, at [80]-[81]). In *Saadi v Italy*, the Court refused to impose any more substantial evidential requirements on appellants simply because the reason for their deportation was national security (at

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[140]). Precisely the same principle applies to closed evidence. A person who claims that their return will subject them to a real risk of torture should not be disadvantaged because the basis of the deportation is national security. But that would be the effect of keeping secret evidence relevant to the issue of risk on return.

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79. Notably, very sensitive diplomatic and high-level political exchanges concerning the (failed) negotiation of diplomatic assurances with Egypt were disclosed, apparently unproblematically, in the case of *Youssef* [2004] EWHC 1884 (QB): see especially diplomatic exchanges at [13]-[14], [20]-[21], [30]-[31]. The Secretary of State has failed to explain why such disclosure, in open, would be any more problematic in the present cases.

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Special Advocates

80. The task of the Special Advocate in SIAC hearings was recently described by Sedley LJ (giving the unanimous judgment of the Court of Appeal) in the following terms:

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> *"….to the extent that non-disclosure is maintained, the special advocate is to do what he or she can to protect the interests of the appellant, a task which has to be carried out without taking instructions on any aspect of the closed material. In the words of the (undated) memorandum agreed between the Lord Chief Justice and the Attorney-General, the special advocate represents no one. A special advocate system is thus not a substitute for the common law principle that everyone facing an accusation made by the state is entitled to a fair chance to know the evidence in support of it and to test and answer it in a public hearing." (Murungaru v SSHD [2008] WCA Civ 1015, at [17]* (emphasis supplied).

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81. Sedley LJ also stated that, *"The availability of a special advocate can never be a reason for reducing the procedural protections which the law otherwise gurantees…."* (at [20]).

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82. Human Rights Watch and JUSTICE submit that the Court of Appeal was right to recognise that the use of Special Advocates cannot be a substitute for procedural protections that the law otherwise provides.[15]

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[15] However it is respectfully submitted that Sedley LJ erred in saying that Special Advocates "*represent no one*". The undated memorandum referred to relates only to advocates to the court (amicus curiae), as opposed to special advocates who serve a distinct role. Whereas the former properly represent no one, the latter are explicitly appointed to represent individuals (or, at the very

The pertinent question is therefore: but for the Special Advocates, could SIAC determine that a person's return to their home state does not breach their Convention rights on the basis of closed evidence? – the answer to that question is plainly, *"no"*.

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83. The most significant reasons why Special Advocates do not provide a substitute for disclosure to the parties are as follows:

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83.1 The Special Advocate cannot take instructions on the evidence disclosed to him or her and therefore obtain any input on closed material from the appellant. Whilst in theory permission can be obtained from SIAC to speak to an appellant (SIAC (Procedure) Rules 2003 ("Procedural Rules"), r. 36(2) and (4)), (1) no closed evidence can be disclosed, (2) all pertinent communications would be likely to suggest the content of closed material and therefore be inappropriate, (3) the Secretary of State must be informed of the questions that are put, thus breaching client confidentiality and enabling the Government to obtain tactical insights into the appellant's case. In practice, communications are rarely if ever made save on non-substantive matters.

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83.2 The Special Advocates cannot call any evidence to rebut the evidence of the Secretary of State or to assist with cross-examination of Government witnesses. Calling witnesses exceeds the powers of a Special Advocate as set out in rule 35 and would in any event require the divulging of closed material.

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83.3 This is particularly problematical in diplomatic assurances cases where the Secretary of State will rely heavily on expert opinion about the relations between the UK and the home state, or on the internal political situation in the state itself. It is impossible for Special Advocates effectively to challenge this evidence without the input of experts who take a contrary view; and there is no possibility of rebutting the evidence of the Government without calling witnesses.

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least, their interests) in closed proceedings (c.f. section 6 of the Special Immigration Appeals Commission Act 1997).

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Reading down rule 4

84. SIAC rule 4 provides that, *"the Commission shall secure that information is not disclosed contrary to the interests of national security, the international relations of the United Kingdom, the detection and prevention of crime, or in any other circumstances where disclosure is likely to harm the public interest."*

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85. That rule was made under section 5(3) of the SIAC Act 1997. Section 5(3) confers a discretion on the Lord Chancellor to make rules that can include a provision for enabling SIAC to hold proceedings in camera (s.5(3)(b)). In exercising that discretion the Lord Chancellor must *"have regard"* to *"the need to secure that information is not disclosed contrary to the public interest."* (s.5(6)(b)). There is nothing in these provisions that requires rules to be made that override fundamental principles of fairness or rights under Articles 5 and 3.

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86. In *MB v SSHD* [2008] 1 AC 440 the House of Lords read down sections of the Prevention of Terrorism Act 2005 and the CPR that establish broadly equivalent provisions for withholding material in control order cases. If anything, subparagraph 4(3)(d) of the Schedule to the 2005 Act is more difficult to read compatibly given the mandatory requirement not to prevent disclosure in the public interest. Thus, following *MB v SSHD* the provisions now read:

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> *Sch paras 4(3)(d):*
>
> *"Rules of court made in exercise of the relevant powers must secure— …*
>
> *that the relevant court is required to give permission for material not to be disclosed where it considers that the disclosure of the material would be contrary to the public interest <u>[except where to do so would be incompatible with the right of the controlled person to a fair trial]</u>"*

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> *76.29(8):*
>
> *"The court must give permission to the Secretary of State to withhold closed material where it considers that the disclosure of that material would be contrary to the public interest <u>[except where to do so would be incompatible with the right of the controlled person to a fair trial]</u>"*

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87. The effect is to put the Secretary of State to her election as to whether to continue with the proceedings and disclose the material, or to discontinue the proceedings.

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88. In the present analogous context, it is submitted that rule 4 should be qualified by the following words: "*save where to do so would be incompatible with an appellant's Convention rights or unfair*". Alternatively, section 5(3) should be qualified by such words and rule 4 should be declared to be ultra vires as over-broad. This qualification can and should be achieved by reference to the common law principle of legality and section 3 of the HRA.

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89. The Court of Appeal in *MT (Algeria)* rejected the argument that rule 4 and section 5(3) of the SIAC Act 1997 could be read down by reference to the common law principle of legality or section 3 of the HRA. Sir Anthony Clarke MR reasoned that Parliament had *"squarely confront[ed]"* the issue (at [17]).

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90. However, the Court of Appeal's reasoning cannot withstand the House of Lords' decision in *MB v SSHD* as set out above. In the context of a decision that may breach the constitutional prohibition on torture, the position is a *fortiori*. The rights of the affected individual must be protected to their fullest extent and nothing less than the clearest express words of Parliament could exclude them. This was recognised by the House of Lords in *A (No 2)*.[16]

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91. Furthermore, the Court of Appeal was wrong in its assumption that Parliament had understood that closed proceedings would not only be limited to national security issues and that it had been intended that they should extend to assessments as to whether deportation would breach Convention rights. This was the subject of an express assurance to the contrary given to the House of Commons by Mike

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[16] *"I am startled, even a little dismayed, at the suggestion (and acceptance by the Court of Appeal majority) that this deeply-rooted tradition and an international obligation solemnly and explicitly undertaken can be overridden by a statute and a procedural rule which make no mention of torture at all. Counsel for the Secretary of State acknowledges that during the discussions on Pt 4 [of the Anti-Terrorism, Crime and Security Act 2001] the subject of torture was never the subject of any thought or any allusion."*: *A (No 2),* at [51] (Lord Bingham), also [95]-[96] (Lord Hoffmann) [114] (Lord Hope) cf. [137] (Lord Rodger).

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O'Brien MP, junior Home Office minister during the Bill's Third Reading in the House of Commons:

> *Mr Malins: … A connected point is that it seems to me that the House should ask the Minister for an assurance that if an asylum application not connected with national security is conducted before the commission, such a matter should be heard not in camera but openly. [col. 1036]*

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> *Mr O'Brien: The hon. Member for Woking raised clause 5(3)(a) and (b). Clause 5(3)(a) provides for proceedings to take place*
>
> > *"without the appellant being given full particulars of the reasons for the decision".*

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> *That is true in the sense that national security matters that we are seeking to have excluded from the appellant's knowledge will not be disclosed to him at any stage. That is for obvious national security reasons. There is a legitimate view that that is regrettable, but it is probably necessary. It is part of the difficult balance between the rights of the individual and the needs of the state to protect its national security. I do not think that we are ever going to get this entirely right--where we have absolute rights for the individual and still preserve national security. In the Bill, we try to make the most sensible, reasonable and balanced judgment that we can. [col.1039]….*

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> *The hon. Gentleman asked for an assurance that matters not involving national security would not be heard in camera. I am sorry about the double negative there, but I give him that assurance. It is envisaged that matters would be heard in camera only when there is a need for secrecy for reasons of national security. Other matters would not be heard in camera.*
> *Article 3 is absolute; there is no evasion of it. The hon. Gentleman raised the question of Libya. The convention appears to be absolute and the European Court of Human Rights has indicated that it is absolute. …. [col.1040].* (emphasis supplied)

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92. In submitting that matters not relating to national security but relating to risk on return can be heard in camera, it appears that the Secretary of State has overlooked the assurance given on her predecessor's behalf to Parliament.[17]

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[17] It is submitted that reference can be had to this assurance under the principles established in *Pepper v Hart* [1993] AC 593, or that the Secretary of State is estopped from contending that there is a clear Parliamentary intention that section 5 of the SIAC Act 1997 authorises the withholding of evidence relevant to the question of whether deportation would be incompatible with a Convention right: Lord Steyn, "Pepper v Hart: A re-examination" (2001) OJLS 21(1) 59.

8. Flagrant breach of Article 6 A

93. In these submissions Human Rights Watch and JUSTICE have focused on Article 3 of the Convention. That focus should not detract from the importance of other matters in issue in these appeals. JUSTICE has previously intervened on the issue of *"flagrant denial of justice"* in the hearings before the House of Lords in *R (Ullah) v Special Adjudicator* [2004] 2 AC 232 and *EM (Lebanon) v Secretary of State for the Home Department* (currently awaiting judgment). Human Rights Watch and JUSTICE fully endorse the submissions of RB, U and OO on the application of that concept in these appeals (as well as the other issues before your Lordships). B C

94. In particular Human Rights Watch and JUSTICE submit that the Court of Appeal in *OO* seriously and materially misunderstood the importance attached by both domestic law and the Strasbourg Court to an independent tribunal, particularly in criminal proceedings (such as OO faces before a Jordanian Military Tribunal). D

   94.1 Independence and impartiality underpin and render meaningful all other aspects of the right to a fair trial: the right to be heard, the right to know the case against one, the right to be presumed innocent (etc.) are valueless if a court lacks either independence or impartiality. The presence of these other facets of a fair trial cannot therefore compensate for a lack of the central protections of independence and impartiality (cf. SIAC Judgment at [444]). E

   94.2 Domestic courts have held that independence is a matter of *"fundamental constitutional importance"* and is regarded as an *"indispensible condition for the preservation of the rule of law"*. Thus, lack of independence will lead to a conviction being rendered unsafe even if it is *"unimpeachable"* from *"every other angle"* (*Millar v Procurator Fiscal, Elgin* [2001] UKPC D4 at [80], [85] (Lord Clyde) also at [63]-[69] (Lord Hope) [18]-[19] (Lord Bingham)); *R v Dundon* [2004] EWCA Crim 621 at [16]. F G

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94.3 Likewise, the Strasbourg Court has recognised that lack of independence will lead to a finding of a breach of Article 6 unless a complete re-hearing is possible in a criminal case, even where an applicant has pleaded guilty: e.g. *Incal v Turkey* (2000) 29 EHRR 449, at [25] and [72]; *Findlay v United Kingdom* (1997) 24 EHRR 221.

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95. Human Rights Watch and JUSTICE also submit that the Court of Appeal was right to conclude that there would be a flagrant breach of Article 6 in circumstances where there is a real risk that a person will be tried on the basis of evidence obtained by torture or inhuman or degrading treatment. Individuals have a right not to be deported to face a real risk of treatment contrary to Article 3 and this includes a right not to be tried on the basis of evidence obtained by torture or ill-treatment. A risk of being tried on the basis of such evidence would therefore breach Article 3.

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96. Since the Article 3 right is equally absolute in relation to *both* torture *and* other inhuman or degrading treatment, the distinction between the two which the Secretary of State invites your Lordships' House to draw has no basis in logic or principle. Furthermore, it is not a practical distinction given the increasing recognition that 'non-physical' practices and conditions can reach the level of severity required to constitute torture (see paragraph 28.2 above).[18]

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DAVID PANNICK QC
Blackstone Chambers

HELEN MOUNTFIELD
Matrix Chambers

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TOM HICKMAN
Blackstone Chambers
(acting pro bono)

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[18] The study referred to in that paragraph also concluded that the distinction between torture and inhuman or degrading treatment, *"reinforces the misconception that cruel, inhuman, and degrading treatment causes less harm and might therefore be permissible in exceptional circumstances…."* . Furthermore, the study also found that some individuals are more resistant than others; thus whether conduct amounts to torture or inhuman/degrading treatment will to some extent depend on the particular individual against whom it is inflicted.

JULIA HALL
Human Rights Watch

ERIC METCALFE
JUSTICE

1st October 2008.

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IN THE HOUSE OF LORDS

ON APPEAL

IN HER MAJESTY'S COURT OF APPEAL (CIVIL DIVISION) (ENGLAND)

BETWEEN:-

RB (ALGERIA)
and U (ALGERIA)

Appellants

-v-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

AND BETWEEN:-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

-v-

OO (JORDAN)

Respondent

SUBMISSIONS ON BEHALF OF JUSTICE AND HUMAN RIGHTS WATCH

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