
CASES

Deportation of Suspected Terrorists with ‘Real Risk’ of Torture: The House of Lords Decision in *Abu Qatada*¹

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This note discusses the House of Lords’ decision in *RB (Algeria) (FC) and another v Secretary of State for the Home Department; OO (Jordan) v Secretary of State for the Home Department* that the real risk of third-party foreign torture evidence does not meet the required standard of unfairness so as to prevent the deportation of suspected terrorists under Article 6 ECHR. It considers three key issues that were raised by this case: Parliament has deliberately restricted the right of appeal from SIAC to the Court of Appeal on questions of fact; the procedure of using closed material by SIAC in the assessment of safety on return is unequivocally permitted by statute; and the conclusions by SIAC that diplomatic assurances contained in Memoranda of Understanding do not give rise to points of law and, therefore, are beyond review by the appellate courts.

INTRODUCTION

Suspected of terrorism, Abu Qatada resisted deportation at the Court of Appeal on the single ground that the Special Immigration Appeals Commission (SIAC) erred in law by concluding that the ‘very real risk’ of being convicted at retrial in Jordan on the basis of torture evidence procured by Jordanian officials (third-party foreign torture evidence) did not constitute ‘a flagrant denial of the right to fair trial’ required by Article 6 ECHR.² In *RB (Algeria) (FC) and another v Secretary of State for the Home Department; OO (Jordan) v Secretary of State for the Home Department*, the House of Lords, for the first time, had to consider whether the required standard of unfairness had indeed been met in order to prevent Qatada’s deportation.³ Accordingly, Lord Phillips observed that ‘by invoking Articles 5 and 6, Qatada invites the House to break further new ground’.⁴ Ultimately the House refused to do so but it was the complex broader issues that make this case significant. This note concerns three common issues that are relevant to all three of the appeals in the present case: Parliament has deliberately restricted the right of appeal from

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1 *RB (Algeria) (FC) and another v Secretary of State for the Home Department; OO (Jordan) v Secretary of State for the Home Department* [2009] UKHL 10.

2 *Othman (Jordan) v Secretary of State for the Home Department* [2008] EWCA Civ 290. Third-party foreign torture evidence refers to torture inflicted by Jordanian authorities without the complicity of British authorities against third-parties in order to procure confessions and incriminating statements.

3 n 1 above. The proceedings concerned three conjoined appeals that shared common issues and for convenience the House delivered a single judgment. Abu Qatada is identified by the name ‘OO’. The other two appellants also suspected of terrorism are identified as ‘RB’ and ‘U’ and are both of Algerian nationality.

4 *ibid* at [8].

SIAC to the Court of Appeal on questions of fact; the procedure of using closed material by SIAC in the assessment of safety on return is unequivocally permitted by statute; and the conclusions by SIAC on assurances contained in Memoranda of Understanding (MOU) do not give rise to points of law and, therefore, are beyond review by the appellate courts.

DEPORTATION OF TERRORISM SUSPECTS

The facts of the present case are complex and may be described as 'typical' of cases that have emerged since 2001 concerning the 'problem' of foreign nationals suspected of international terrorism who are liable to deportation but who cannot be removed from the UK because of Article 3 ECHR.⁵ Qatada claimed asylum upon arrival in the UK in 1993 and was granted refugee status in 1994 on the ground that he had been subjected to torture by Jordanian authorities.⁶ In 1999 and 2000 he was convicted *in absentia* by the Jordanian State Security Court, a military court, for participation in terrorist conspiracies to cause explosions in Jordan and was sentenced to life imprisonment and fifteen years imprisonment respectively. At both trials incriminating statements were admitted against Qatada to the State Prosecutor by co-defendants. The co-defendants unsuccessfully sought to have these statements excluded on the basis that they had been obtained by torture. Following the terrorist attacks on 11 September 2001, Qatada was excluded from the Refugee Convention⁷ and the Home Secretary certified his presence in the UK as not 'conducive to the public good' on the ground of national security and issued a notice of intention to deport.⁸ Deportation back to Jordan, however, was not possible because of the 'real risk' of ill-treatment contrary to Article 3 ECHR.⁹ In 2002 Qatada, along with 16 other foreign nationals suspected of terrorism, was certified and detained indefinitely by the Secretary of State pursuant to Part 4 of the Anti-Terrorism, Crime and Security Act 2001. After an unsuccessful appeal by Qatada before SIAC challenging Part 4, in December 2004 the House of Lords in *A(FC) and others; X(FC) and others v Secretary of State for the Home Department (Belmarsh)* granted a declaration that the inde-

5 Article 3 ECHR was incorporated into UK law by virtue of the 1998 Human Rights Act and provides that: '[n]o one shall be subject to torture or to inhuman or degrading treatment or punishment.'

6 United Nations Convention on the Status of Refugees 1951, art 33(1), provides that: 'No contracting state shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a social group or political opinion.'

7 Article 33(2) provides that: 'the benefit of the present provision may not . . . be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.'

8 Immigration Act 1971, s 5.

9 The Grand Chamber of the ECtHR has held Article 3 ECHR to be non-derogable and broader than the Refugee Convention in that individuals cannot be returned to their country of origin even if they represent a danger to national security, *Chahal v United Kingdom* App No 22414/93, judgment of 15 November 1996; *Saadi v Italy* App No 37201/06, judgment of 28 February 2008. For commentary on *Chahal* and *Saadi* and Article 3 ECHR, see J. C. Barker and M. Garrod, 'Security or Responsibility: The UK Borders Act 2007 and the Automatic Deportation of Foreign Prisoners' (2007/08) 9 Contemporary Issues in Law 93, 99.

finite detention of foreign nationals was incompatible with the ECHR, resulting in its repeal and the enactment of the Prevention of Terrorism Act 2005 and the introduction of a system of Control Orders.¹⁰ On 11 March 2005 Qatada was released from detention on immigration bail and made subject to a Non-Derogating Control Order the following day. On 10 August 2005 a MOU was signed between the UK and the Jordanian Governments that, if returned to Jordan, Qatada would not be subjected to torture or inhuman treatment.¹¹ One day after signing the MOU, the Home Secretary issued a new notification of an intention to deport and Qatada was detained, once again, pending deportation.

PROCEEDINGS BEFORE SIAC AND THE COURT OF APPEAL

Qatada challenged his deportation order before SIAC on three main grounds.¹² For present purposes Article 6 ECHR is of prime importance. Qatada submitted that some of the evidence that would be admitted against him at his retrial in Jordan was third-party foreign torture evidence. The Secretary of State accepted that if returned to Jordan, Qatada would be put on trial for the crimes for which he was convicted in his absence. On 26 February 2007 Ouseley J delivered the judgment of SIAC, which found 'at least a very real risk' that evidence was obtained by treatment that breached Article 3 ECHR and that 'may or may not have amounted to torture'.¹³ Moreover, Ouseley J pointed out the 'high probability' that this evidence would be admitted at Qatada's retrial in Jordan and 'would be of considerable, perhaps decisive, importance against him'.¹⁴ SIAC concluded that whilst the real risk of torture evidence is unfair, it would not amount to a 'flagrant denial of the right to a fair trial', which means a 'complete denial of a fair trial' under the 'stringent' test of Article 6 ECHR.¹⁵

Qatada appealed the decision of SIAC to the Court of Appeal. On 9 April 2008 Buxton LJ delivered the judgment of the Court and upheld the appeal on the single ground that SIAC had 'understated or misunderstood the fundamental nature in Convention law of the prohibition against the use of evidence obtained by torture' and had 'erred by applying an insufficiently demanding test'.¹⁶ Referring

10 [2004] UKHL 56. The power of indefinite detention was held to be a disproportionate measure for the derogation of Article 5 ECHR and, as this was solely an immigration power, it did not extend to British nationals suspected of terrorism and was held to be discriminatory under Article 14 ECHR. For commentary on that case, see S. Shah, 'The UK's Anti-Terror Legislation and the House of Lords: The First Skirmish' (2005) 5 *HRLR* 403.

11 MOU were introduced by the UK Government in order to circumvent the non-deportation rule in *Chahal* n 9 above; see, for example, HC Deb vol 430 col 307 26 January 2005.

12 *Omar Othman v Secretary of State for the Home Department* 26 February 2007 (SC/15/2005) at [114]–[118]. Qatada raised additional complaints under Articles 3, 5 and 6 ECHR. Articles 2 and 8 ECHR were raised but not made out. Qatada unsuccessfully raised protection under the Refugee Convention on the basis that he is 'a danger to national security and the Refugee Convention provides him with no protection against removal' *ibid* at [110] (*per* Ouseley J).

13 *ibid* at [420].

14 *ibid* at [422].

15 *ibid* at [442]–[552].

16 n 2 above at [46]. As with SIAC, the Court of Appeal rejected Qatada's claim under Article 3 ECHR and dismissed his complaints under Articles 5 and 6 ECHR and the Refugee Convention.

to Lord Bingham in *A and Others (No 2) v the Secretary of State for the Home Department*,¹⁷ the critical issue for Buxton LJ was that SIAC neglected that evidence obtained by torture or ill-treatment is prohibited not 'because of its likely unreliability, but rather because the state must stand firm against the conduct that has produced the evidence'.¹⁸ Thus, the main issue for Buxton LJ was the 'connexion' of torture evidence with Article 3 ECHR, a right which is 'fundamental, unconditional and non-derogable'.¹⁹ Accordingly, he concluded that:

SIAC was wrong not to recognise this crucial difference between breaches of art 6 based on this ground and breaches of art 6 based simply on defects in the trial process or in the composition of the court . . . [i]t treated the possible use of evidence obtained by torture *pari passu* with complaints about the court . . . That caused it not to recognise the *high degree of assurance* that is required in relation to proceedings in a foreign state before a person may lawfully be deported to face a trial that may involve evidence obtained by torture.²⁰

DECISION OF THE HOUSE OF LORDS

The Secretary of State appealed the decision of the Court of Appeal to the House of Lords. The House delivered its judgment on 18 February 2009 and unanimously overturned the decision of the Court of Appeal and reinstated the decision by SIAC. Senior Law Lord, Lord Phillips delivered the lead judgment and determined that the Court of Appeal was wrong to hold that the 'real risk' of third-party torture evidence was, by itself, sufficient to meet the relevant test of a flagrant denial of justice under Article 6 ECHR.²¹ Their Lordships were of the opinion that a flagrant denial of justice requires the 'complete denial' or 'nullification' of this right in order to prevent deportation. Accordingly, a high degree of assurance from Jordan that torture evidence would not be admitted at Qatada's retrial before his deportation would be lawful is not necessary. It is notable that their Lordships were in agreement that the real risk of foreign torture evidence would be sufficient to breach Article 6 ECHR in a Member State of the Council of Europe but does not prevent the deportation of a foreign national to stand trial in a non-Member State.²² This conclusion was reached on several different grounds (discussed below). In addition, their Lordships unanimously dismissed two further issues raised by Qatada's cross-appeal under Articles 5 and 6 ECHR. Thus, in respect of Article 5 ECHR, Lord Phillips, with Lords Hoffmann and Hope in full agreement, held that Qatada's potential detention in Jordan prior to his retrial for a period of 50 days 'falls far short of satisfying the "flagrant breach"

17 [2005] UKHL 71 at [17].

18 n 2 above at [48].

19 *ibid.*

20 *ibid* at [49] (*italics added*). Importantly, this decision by the Court of Appeal called into question other MOU concluded with Libya, Lebanon, Egypt, Nigeria and Syria.

21 Notably, Lord Brown found it 'striking' that both of the authorities principally relied on by the Court of Appeal were domestic cases that did not address what would amount to a 'flagrant denial' of justice in a non-Member State (n 1 above at [260]).

22 *ibid* at [146] (*per* Lord Phillips); at [197] (*per* Lord Hoffmann); and at [258] (*per* Lord Brown).

test' required by Article 5 ECHR in foreign cases.²³ In respect of Article 6, Lord Phillips cited the jurisprudence of the ECtHR on military tribunals and the case of *Ergin v Turkey (No 6)*²⁴ and held that the Jordanian military court does not comply with Article 6 ECHR in a Member State but does not, by itself, constitute a flagrant denial of justice under Article 6 ECHR so as to prevent deportation to a non-Member State.²⁵ Thus, their Lordships made it clear that there is a lower set of human rights standards for foreign nationals being deported to non-Member States of the Council of Europe.

As indicated, their Lordships reached the conclusion that the real risk of foreign torture evidence does not prevent deportation under Article 6 ECHR on several grounds. For Lord Phillips, the crucial issue was the reasoning of the Court of Appeal. Thus, turning to the key passages of Buxton LJ, Lord Phillips observed that the prohibition of evidence obtained by torture was held to be necessary not because such evidence is unreliable or unfair but because 'the State must stand firm against the conduct that has produced the evidence'.²⁶ In rejecting the reasoning of Buxton LJ that a 'high degree of assurance' would be required before it would be lawful to deport Qatada to face proceedings in Jordan, Lord Phillips asserted that:

That principle applies to the state in which an attempt is made to adduce such evidence. It does not require this state, the United Kingdom, to retain in this country to the detriment of national security a terrorist suspect unless it has a high degree of assurance that evidence obtained by torture will not be adduced against him in Jordan.²⁷

It is notable that his Lordship included Qatada's suspected threat to national security as part of the justification for his reasoning.²⁸ The crucial issue is that Buxton LJ approached the appeal of foreign torture evidence as a broader substantive issue under Article 3 ECHR which is 'universally recognised both within and outside Convention law'.²⁹ Lord Phillips, on the other hand, was careful to approach the appeal as one of procedure under Article 6 ECHR. Thus, Lord Phillips cited Lord Hoffmann in *Montgomery v HM Advocate*³⁰ and concluded that a breach of Article

23 *ibid* at [132]. Their Lordships referred to *R (Ullah) v Special Adjudicator* [2004] UKHL 26 at [43] (*per* Lord Steyn) and the example of a flagrant breach of Article 5 requiring 'arbitrary detention for many years'.

24 App No 47533/99, judgment of 4 May 2006.

25 n 1 above at [146] (*per* Lord Phillips). Lord Phillips also pointed out (n 1 above at [133]) that Article 6 ECHR has never successfully been invoked and that there is a lack of authoritative guidance of what will amount to 'flagrant breach' with the use of military courts. This was echoed by Lord Hope, who stated that 'there is no absolute rule' (n 1 above at [249]).

26 *ibid* at [152] (citing Buxton LJ, n 2 above at [46]).

27 *ibid*.

28 This may be contrasted with that the way that Qatada was portrayed by Buxton LJ at the Court of Appeal, n 2 above. The Grand Chamber at the ECtHR in the cases of *Chahal* and *Saadi*, n 9 above, emphasised that appellants' threat to national security must not be taken into consideration in relation to deportation and Article 3 ECHR. Of course, the importance of this observation is dependent upon whether foreign torture evidence is dealt with as an issue under Article 3 or Article 6 ECHR, which is the distinguishing feature between the Court of Appeal and the House of Lords in the present case.

29 n 2 above at [48].

30 [2003] 1 AC 641, 649.

6 ECHR is due not to evidence obtained by torture – that is a breach of Article 3 ECHR – ‘but is the reception of such evidence by the court for the purposes of determining the charge.’³¹ Accordingly, Lord Phillips made it clear that it is the responsibility of the Jordanian and not the UK courts to stand firm against the use of torture evidence. The reasoning of Buxton LJ does highlight the universal, and perhaps optimistic, approach towards the prohibition of torture as opposed to the strict territorial, and perhaps more realistic, approach taken by Lord Phillips. Although it was not acknowledged by Lord Phillips, the ECtHR has stated in its admissibility decision in the case of *Harutyunyan v Armenia* that a complaint regarding torture evidence would be ‘more appropriately’ dealt with under Article 6 rather than Article 3 ECHR.³² Thus, Lord Phillips’s dealing with third-party torture evidence under Article 6 ECHR does not appear to be problematic. It would be premature to suggest, however, that the ECtHR will reach the same conclusion when the present case reaches Strasbourg.³³ It is certainly the case that part of Qatada’s predicament is the lack of authoritative guidance on the relationship between Articles 3 and 6 ECHR and the use of torture evidence, although it is one that is presently being worked out by the ECtHR.³⁴

Unlike Lord Phillips, Lord Hoffmann in the present case focused on the standard of flagrant denial of justice in respect of admissibility of evidence. In an attempt to demonstrate that there is no authority that the ‘real risk’ of evidence procured by torture constitutes a flagrant denial of justice under Article 6 ECHR, his Lordship turned to the authority of the ECtHR and the case of *Mamatkulov and Askarov v Turkey*³⁵ and asserted that ‘a deporting state will be in breach of Article 6 only if there is a real risk that the alien will suffer a “flagrant denial of justice” in the receiving state.’³⁶ However, Lord Hoffmann conceded that ‘the meaning of flagrant denial of justice is not a precise expression’ and, relying on the partly dissenting opinion of Judges Bratza, Bonello and Hedigan in *Mamatkulov*, suggested that flagrant is intended to convey the notion of a ‘complete destruction’ of that right.³⁷ This lack of definition and understanding of ‘flagrant’ fails to provide clarity

31 n 1 above at [153]. Lord Phillips pointed out that the relationship between Article 6 ECHR and the use of third-party torture evidence caused SIAC the most concern (n 1 above at [54]).

32 App No 36549/03 (unreported), judgment of 28 June 2007. In that case the Court decided to consider the merits of self-incriminating and witness statements procured by torture and used during criminal proceedings.

33 For example, it seems that the reason why the ECtHR in *Harutyunyan ibid*, found it more appropriate to deal with the use of torture evidence under Article 6 ECHR is because the applicant’s complaint of Article 3 ECHR was, in accordance with Article 35 § 1 of the Rules of the Court, lodged out of time and was rejected; as regards the applicant’s complaints regarding self-incriminating confession statements and witness statements procured by torture, the Court found that it could not determine the admissibility of these parts of the complaint and, in accordance with Rule 54 § 2(b) of the Rules of the Court, referred these issues back to the respondent government.

34 *El-Haski v Belgium* App No 649/08.

35 (2005) 41 EHRR 494.

36 n 1 above at [197]. Lord Brown observed the ‘shocking circumstances’ which arose in that case and determined that as ‘... the majority of the Grand Chamber held in *Mamatkulov*, extradition was not unlawful even in the circumstances arising there, in my judgment expulsion most certainly is not unlawful here’ (n 1 above at [260]).

37 *ibid* at [197]. This reliance by Lord Hoffmann on the partly dissenting opinion of Judges Bratza, Bonello and Hedigan in *Mamatkulov* may not necessarily stand up to scrutiny when the present case reaches Strasbourg.

or certainty. Thus, Lord Mance in the present case pointed out the 'realistic difficulty' of distinguishing between the concepts of 'flagrant breach' required by the ECHR and 'denial of justice' required by public international law.³⁸ Lord Hoffmann ultimately made recourse to the majority in *A (No 2)*³⁹ and concluded that to exclude from the Jordanian court evidence that would have been admissible before SIAC would be 'too much of a paradox to form part of a rational system of jurisprudence.'⁴⁰ This reasoning is rather surprising given that in *A (No 2)* Lord Hoffmann was in firm agreement with the trenchant dissenting opinion of the then Senior Law Lord, Lord Bingham that the real risk of foreign torture evidence should be excluded from SIAC and that the exclusion of such evidence on a balance of probabilities is a burden 'which in the real world, can never be satisfied'.⁴¹ Whilst Lord Hoffmann may have simply recognised the majority position in *A (No 2)* as the true state of the law in the present case, it could be objected that the crucial issue in *A (No 2)* was whether real risk of evidence obtained by torture abroad was admissible before SIAC in determining whether the appellants posed a threat to UK security. That is quite different from the present circumstances where Qatada will be deported to the country whose authorities have allegedly procured the torture evidence and will face proceedings before a military court on the basis of such evidence.

Following his leading opinion in *A (No 2)*, in the present case Lord Hope concentrated on an immensely important technical point. That is the standard of proof to be applied by SIAC in determining whether evidence has been obtained by torture. His Lordship observed *Gäfgen v Germany*⁴² where the ECtHR stated that 'real' evidence recovered as a direct result of ill-treatment should never be relied upon. Thus, Lord Hope held that the evidence before SIAC in the present case 'did not come up to that standard' and that '[t]here were allegations but no proof'.⁴³ His Lordship rejected the 'real risk' test as the necessary standard of proof that evidence has to achieve in order to show that expulsion would violate Article 6 ECHR and, citing *A (No 2)*, asserted that the necessary burden is a 'balance of probabilities'.⁴⁴ Accordingly, in dismissing Qatada's appeal his Lordship stated that '[t]he assertion that there is a real risk that [evidence] was obtained in this way is not enough'.⁴⁵ It is notable that *A (No 2)* is domestic authority and, in an attempt to strengthen the reasoning of this

38 *ibid* at [265]. It is notable that SIAC also observed that the 'total denial' of a fair trial is incapable of precise definition (n 12 above at [552]).

39 n 17 above. In *A (No 2)*, the majority of the House, led by Lord Hope, held that the real risk that an inculpatory statement has been procured by torture by officials of a third state without the complicity of the British authorities' is not enough to make it inadmissible in proceedings before SIAC and that the burden of proof is on the appellant to satisfy SIAC on a balance of probabilities to the contrary. For commentary on that case, see S. Shah, 'The UK's Anti-Terror Legislation and the House of Lords: The Battle Continues' (2006) 6 *HRLR* 416; A. T. H. Smith, 'Disavowing Torture in the House of Lords' (2006) 62 *CLJ* 251.

40 n 1 above at [202].

41 n 17 above at [59] (*per* Lord Bingham).

42 App No 22978/05 (unreported), decision of 30 June 2008 at [99].

43 n 1 above at [248].

44 The test propounded by Lord Hope in *A (No 2)* n 17 above at [118] to be applied by SIAC in determining whether or not to exclude evidence was that 'if SIAC is left in doubt as to whether evidence was obtained [by torture], it should admit it . . .'

45 n 1 above at [248]. In the present case, none of their Lordships explicitly disagreed with Lord Hope on this issue.

demanding burden in the present case, Lord Hope turned to international law. In particular, he relied on the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment 1984 (UNCAT), Article 15, and held that it must be 'established' that evidence was obtained by torture.⁴⁶ Apart from being content to apply directly Article 15 of UNCAT 1984 – an unincorporated treaty provision,⁴⁷ further difficulty derives from the way that Lord Hope interpreted the scope of Article 15 to justify his reasoning that the real risk test does not satisfy the burden of proof. Indeed, Lord Hope did not consider that Article 15, a principle for excluding evidence, is an obligation imposed on State Parties and not, as in the present case, the responsibility for appellants to dispel. This inappropriate reliance on Article 15 is not reflective of the true state of domestic law⁴⁸ and neglects the uniquely disadvantaged position of foreign nationals, many of whom have a connection with their home country that is, at best, tenuous.⁴⁹ Although the ECtHR has not prescribed a European standard of proof, it remains to be seen whether it will accept such a heavy burden.⁵⁰ It is certainly the case that actually 'establishing' that evidence has been obtained by torture could prove an impossible standard to meet. In the present case, it is surprising that Lord Hope failed to consider, particularly as he pointed out in *A (No 2)*, that Article 15 applies only to torture but not to inhuman and degrading treatment, the latter being of particular relevance to the present case.⁵¹ The remainder of this note considers three issues that were common to all three of the appeals in the present case.

JURISDICTION OF THE APPELLATE COURTS

The first issue raised by the present case, with the support of interveners,⁵² challenged that the Court of Appeal is bound to adopt the same approach taken by the ECtHR,

46 UNCAT, Article 15, provides that: 'Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings . . .'

47 For commentary on the problem with the House giving direct effect to UNCAT 1984, Article 15, see N. Rasiah, 'A v Secretary of State for the Home Department (No 2): Occupying the Moral High Ground?' (2006) 69 *MLR* 986, 1000.

48 In *A and Others v Secretary of State for the Home Department (No 2)* [2004] EWCA Civ 1123, Pill LJ at [133] rightly concluded that '[t]he obligation contained in Article 15 of UNCAT 1984 is not part of domestic law.'

49 It is notable that, in response to *A (No 2)* n 17 above, the United Nations Committee Against Torture recommended the UK Government formally incorporate into UK law its intention 'not to rely on or present in any proceeding evidence where there is knowledge or belief that it has been obtained by torture' and to 'provide a means for individuals to challenge, in any proceedings, the legality of any evidence plausibly suspected of having been obtained by torture.' The UK Government rejected these recommendations and suggested that appellants could rely on SIAC; see the Joint Committee on Human Rights – Nineteenth Report, session 2005–06 at 44.

50 In *A (No 2)* n 17 above, Lord Bingham at [26] rightly observed that the ECtHR has not prescribed a European standard of proof but has held that 'the way in which evidence has been obtained or used may be such to render the proceedings unfair.'

51 Indeed, during Qatada's appeal before SIAC, Ouseley J clearly pointed out that there was 'at least a very real risk' that evidence was obtained by treatment that breached Article 3 ECHR which 'may or may not have amounted to torture' (n 12 above at [420]).

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as demonstrated by the Grand Chamber in *Saadi*, and undertake a full review of SIAC's conclusions in order to ensure that a proposed deportation does not violate the right to safety on return under Article 3 ECHR.⁵³ Their Lordships unanimously rejected this argument and pointed out that neither the ECHR nor the Human Rights Act 1998 requires the Court of Appeal to adopt the same approach as the ECtHR in order to carry out a full review of SIAC's conclusions.⁵⁴ Their Lordships were in agreement that the issue of safety on return is always a question of fact.⁵⁵ For Lord Phillips, this was underlined by the passage of Lord Bridge in *Bugdaycay*.⁵⁶ Lords Hoffmann and Brown, on the other hand, turned to the jurisprudence of the ECtHR and, observing *Chahal* and *Saadi*, stated that there is nothing to convert the factual question of the potential breach of a Convention right into a question of law.⁵⁷ Thus, their Lordships agreed that the conclusions of SIAC are open to challenge before the Court of Appeal only if irrational on points of law.⁵⁸ Central to their Lordships' reasoning was that the ECHR does not impose an obligation to accord deportees even a limited right of appeal against a deportation order. Thus, Lord Phillips observed that SIAC was created in response to *Chahal* in order to provide an 'effective remedy' before a national authority under Article 13 ECHR and asserted that:

... the scrutiny that is required by the national authority does not have to be done by a court. Even less does it have to be subject to an appeal to a court. The United Kingdom has gone further to protect those facing deportation than the Convention requires.⁵⁹

A key issue raised by present the case is that Parliament has deliberately restricted the jurisdiction of the Court of Appeal from conducting a full review of final determinations by SIAC in respect of safety on return. Thus, Lord Phillips observed that:

... Parliament has deliberately circumscribed the review of SIAC's decisions that the Court of Appeal is permitted to undertake, so that it falls well short of the review that will be carried out if the case reaches the ECtHR, as described in *Saadi*.⁶⁰

The broader issue raised is the standard of review undertaken by the ECtHR and the unavoidable tension with the standard employed by domestic courts under the less exacting requirement of Article 13 ECHR. Indeed, their Lordships were only too aware that the ECtHR could overturn the conclusions of SIAC on closer examination of the relevant facts, or if it conducted its own independent investi-

53 Special Immigration Appeals Commission Act 1997, s 7, restricts appeal from SIAC to points of law that are material to its determination.

54 n 1 above at [67] (*per* Lord Phillips); at [190] (*per* Lord Hoffmann); at [214] (*per* Lord Hope); at [253] (*per* Lord Brown); at [263] (*per* Lord Mance). Accordingly, the appeals by *RB* and *U* were also rejected on this issue.

55 Indeed, their Lordships emphasised *obiter* that the Court of Appeal (n 2 above) had no general power to rehear SIAC's conclusions that there was no real risk of treatment contrary to Article 3 ECHR, *ibid* at [73] (*per* Lord Phillips); at [214] (*per* Lord Hope); and at [253] (*per* Lord Brown).

56 *R v Secretary of State for the Home Department, Ex p Bugdaycay* [1987] AC 514, 532 (cited by Lord Phillips *ibid* at [72]).

57 *ibid* at [185] (*per* Lord Hoffmann); at [254] (*per* Lord Brown).

58 *ibid* at [73] (*per* Lord Phillips); at [191] (*per* Lord Hoffmann); and at [216] (*per* Lord Hope).

59 *ibid* at [65] (*per* Lord Phillips); at [190] (*per* Lord Hoffmann).

60 *ibid* at [66].

gation, including evidence *proprio motu*, and additional relevant facts come to the Court's attention.⁶¹ For Lord Phillips, this possibility is simply one that Parliament has chosen to accept, while Lord Hope believed it to be an issue that Parliament must answer in Strasbourg, if necessary.⁶² Lord Brown, with Lord Hoffmann in concurrence, on the other hand, considered the jurisdiction of the ECtHR to be irrelevant and stated that:

The fact that Strasbourg itself might choose to carry out a close factual re-examination of these cases to reach its own decision upon whether expulsion would involve a Convention breach is simply nothing to the point.⁶³

Lord Hoffmann was careful to point out, however, that '[i]f the ECtHR takes a different view of a case from that of a domestic court, it is just as likely to be because it takes a different view of the facts.'⁶⁴ Of course, this view is based on the assumption that the standard of review undertaken by SIAC is adequate.

PROCEDURE OF CLOSED MATERIAL BY SIAC

The second issue raised by the present case challenged the procedure of closed material by SIAC in the exercise of its functions under Rule 4 of the 2003 Rules of Procedure.⁶⁵ In particular, closed material related to assurances contained in MOU and relied upon by the Secretary of State in respect of safety on return.⁶⁶ Qatada argued that closed material is permissible in respect of issues of national security but is *ultra vires* in respect of treatment contrary to Article 3 ECHR. In addition, following the decision of the majority of the House in *MB*,⁶⁷ Rule 4 should be given restrictive interpretation so that it does not apply if it is incompat-

61 In the vast majority of cases the ECtHR is able to reach a judgment on the basis of the decisions made and documents created in the course of prior domestic proceedings. However, if domestic authorities are either unable or unwilling to carry out an adequate fact-finding process then this function falls to the ECtHR. See P. Leach, and C. Paraskeva, and G. Uzelac, 'International Human Rights & Fact Finding' (2009) Human Rights and Social Justice Research Institute 1, 5.

62 n 1 above at [66] (*per* Lord Phillips); at [217] (*per* Lord Hope).

63 *ibid* at [253] (*per* Lord Brown); at [190] (*per* Lord Hoffmann).

64 *ibid* at [189] (*per* Lord Hoffmann).

65 The Special Immigration Appeals Commission (Procedure) Rules 2003, SI 2003/1034. Rule 4(1) provides that: '[w]hen exercising its functions, the [SIAC] shall secure that information is not disclosed contrary to the interests of national security, the international relations of the United Kingdom, the detection of crime, or in any other circumstances where disclosure is likely to harm the public interest.'

66 The procedure of closed material is a term used 'for the procedure by which SIAC hears evidence and submissions in closed session in which the interests of the deportee are represented by a special advocate' (n 1 above *per* Lord Phillips at [74]). This procedure enables the government to conceal evidence of a sensitive nature from the deportee and, if necessary, his special advocate, in protection of the 'public interest'. For commentary on the procedure of closed material and the special advocate regime, see J. Ip, 'The Rise and Spread of the Special Advocate' (2008) Public Law 717; G. V. Harten, 'Weaknesses of Adjudication in the Face of Secret Evidence' (2009) 13 *International Journal of Evidence and Proof* 1.

67 *Secretary of State for the Home Department v MB; Secretary of State for the Home Department v AF* [2007] UKHL 46. The majority in that case held that in certain cases it was necessary to 'read down' Rule 4 in order to make it compatible with the right of a controlled person to a fair trial under the civil limb of Article 6(1) ECHR. For commentary on that case, see D. Feldman, 'Deprivation of Lib-

tible with the right to a fair trial under the civil limb of Article 6 ECHR. These arguments were unanimously rejected by their Lordships, pointing out that closed material in relation to safety on return under Rule 4 is unequivocally permitted by section 5 of the Special Immigration Appeals Commission Act 1997 in protection of the broad public interest.⁶⁸

Lords Phillips and Brown, in an attempt to demonstrate that *MB* has no direct application on the jurisdiction of SIAC, distinguished non-derogating control orders from the 'very different context' of deportation orders.⁶⁹ As Lord Phillips put it, the most important question in *MB* was whether the disclosure of evidence was necessary to enable the controlee subject to the order to meet the case against him:

The same is not true of the position of the deportee. It is true that, if that deportee will be at real risk of a violation of his human rights on return to his own country, this is likely to be because they are personal to him. The difference is that he will normally be aware of those facts and indeed will be relying on them to establish the risk that he faces on return.⁷⁰

Not surprisingly, as the only dissenter on the disclosure of material in *MB*,⁷¹ Lord Hoffmann in the present case considered this to be a 'radical submission because SIAC was set up as a court which could rely upon closed material' in response to *Chahal*.⁷² Lord Hope went the furthest in placing confidence in SIAC itself and, citing the passage of Baroness Hale in *MB*, stated that 'SIAC was in the best position to judge whether the proceedings accorded a substantial and sufficient measure of procedural protection.'⁷³ It is notable, however, that the decision of *MB* has since been seriously undermined in a recent decision by the House in *Secretary of State for the Home Department v AF (No 3)*.⁷⁴ In the present case their Lordships ul-

erty in Anti-Terrorism Law' (2008) 67 *CLJ* 4; A. Sandell, 'Liberty, Fairness and UK Control Order Cases: Two Steps Forward, Two Steps Back' (2008) 1 *EHRLR* 120.

68 s 5(6)(b) provides that the Lord Chancellor, in making rules under this section, shall have regard to 'the need to secure that information is not disclosed contrary to the public interest.' Accordingly, the appeals by *RB* and *U* were also rejected on this issue.

69 n 1 above at [102] (*per* Lord Phillips). This was echoed by Lord Brown who pointed out that control orders are made under the jurisdiction of the High Court (*ibid* at [252], [256]).

70 *ibid* at [95].

71 In *MB* n 67 above, Lord Hoffmann at [54] recognised that the special advocate procedure is imperfect but did not think that 'we should put the Secretary of State in such an impossible position [of having to disclose material that a judge considers it would be contrary to the public interest to disclose] and I therefore [*sic*] agree with the Court of Appeal that in principle the special advocate procedure provides sufficient safeguards to satisfy article 6.'

72 n 1 above at [160]. This was echoed at [233] (*per* Lord Hope) and at [255] (*per* Lord Brown). In *Chahal*, n 9 above, the Grand Chamber at [144] observed the Canadian Security Intelligence Review Committee as an example of accommodating legitimate security concerns whilst providing appellants with a substantial measure of procedural justice where deportation involved national security.

73 n 67 above at [67] (*per* Baroness Hale) (quoted by Lord Hope n 1 above at [232]).

74 [2009] UKHL 28. In that case, the House applied the unanimous decision of the Grand Chamber of the ECtHR in *Av United Kingdom* App No 3455/05. Accordingly, Lord Phillips at [59] held that in the context of control order proceedings and where 'the open material consists purely of general assertions and the case against the controlee is based solely or to a decisive degree on closed materials the requirements of a fair trial will not be satisfied, however cogent the case based on the closed materials may be'. Lord Hope at [81]; Lord Scott at [96]; Lord Rodger at [98]; Lord Walker at

mately made recourse to the authority of the ECtHR and, referring *Maaouia v France*,⁷⁵ held that deportation involves no determination of civil rights and is therefore beyond the reach of Article 6 ECHR.⁷⁶

Underlying the reasoning of their Lordships was that disregarding the rights of a few to protect the public was a proportionate balance – a classical utilitarian argument. As Lord Hope put it: '[t]hese procedures are intended to provide a fair balance between the need to protect the public interest and the need to provide the applicant with a fair hearing.'⁷⁷ It is notable that their Lordships appear to understate the 'acute tension' that exists in this balancing exercise and the difficulty of ensuring fairness with the procedure of closed material and safety of return.⁷⁸ On the contrary, their Lordships considered that closed material enhanced the level of procedural justice in comparison to ordinary civil and criminal proceedings on the basis that SIAC is obliged to search for exculpatory material.⁷⁹ Thus, the most crucial issue for Lord Phillips, with Lord Hope concurring, was that closed material is put into the public domain.⁸⁰ For justification of this assertion, Lord Phillips cited an interlocutory judgment of SIAC, delivered by Ouseley J on 12 July 2006, which stated that:

SIAC could not put weight on assurances which the giver was not prepared to make public; they would otherwise be deniable, or open to later misunderstanding; the fact of a breach would not be known to the public and the pressure which that might yield would be reduced. They must be available to be tested and recorded.⁸¹

It is apparent that their Lordships adopted a deferential approach to the procedure of closed material by SIAC in the assessment of safety on return and expressed reluctance to hear closed evidence.⁸² Although *AF (No 3)* does not apply to the context of deportation, it does highlight the problem of ensuring procedural fairness

[99]; Baroness Hale at [103]; Lord Carswell at [108]; and Lord Brown at [119] were in unanimous agreement. It is notable that since *AF (No 3)*, the High Court has quashed the control orders of AF and AE from the date that they were made because the orders made against them were based solely on closed evidence that they were not able to effectively challenge, *Secretary of State for the Home Department and AF; Secretary of State for the Home Department and AE* [2010] EWHC 42 (Admin).

75 Judgment of the Grand Chamber (2000) 33 EHRR 1037.

76 n 1 above at [172] (*per* Lord Hoffmann); at [255] (*per* Lord Brown); and at [264] (*per* Lord Mance).

77 *ibid* at [230] (*per* Lord Hope); at [103] (*per* Lord Phillips).

78 For example, in *AF (No 3)* n 74 above, Lord Hope at [76] observed the: '... acute tension that exists between the urgent need to protect the public from attack by terrorists and the fundamental rights of the individual'. Baroness Hale (n 74 above at [101]) referred to her previous opinion in *MB* and conceded that: '... I was also far too sanguine about the possibilities of conducting a fair hearing under the special advocate procedure.'

79 n 1 above at [103] (*per* Lord Phillips); at [231] and [233] (*per* Lord Hope).

80 *ibid* at [102] (*per* Lord Phillips); at [231] (*per* Lord Hope). Lord Hoffmann, Lord Brown and Lord Mance did not comment.

81 *ibid* (*per* Lord Phillips). In a recent judgment by SIAC concerning the deportation of foreign nationals suspected of terrorism to Pakistan, Mitting J observed Lord Phillips in the present case and, upholding the appellants' appeal, held that SIAC 'would not be willing to accept confidential assurances as a sufficient safeguard against prohibited ill-treatment in a state in which otherwise there was a real risk that it would occur.'

82 It is well established that British courts are reluctant to enter so-called 'forbidden areas' where the subject-matter includes, amongst other things, national security and foreign relations, *R (on the application of Abbasi and another) v Secretary of State for Foreign and Commonwealth Affairs and another* [2002] EWCA Civ 1598 at [106].

with the use of closed material by SIAC. Their Lordships in the present case did not consider that it may be difficult for a deportee to establish evidence of ill-treatment if he has no connection with the receiving country, particularly when combined with the demanding burden of a balance of probabilities as the necessary standard of proof that foreign torture evidence must achieve before it is admissible before SIAC.⁸³ Nor did their Lordships consider that the UK Government has an interest in not investigating and providing evidence of ill-treatment for SIAC to review. In any case, practices of ill-treatment tend to be systemic and beyond the purview of the international community and could certainly be beyond the review undertaken by SIAC. Accordingly, the reliance by their Lordships on what appear to be general political statements contained in MOU and placed in the 'public domain' may not reflect the realities on the ground in a foreign country. Further difficulties arise from the fact that their Lordships avoided the complex issues of MOU (discussed below). Thus, it seems that their Lordships were overly sanguine about the possibility of ensuring a fair hearing under SIAC's procedure of closed material and safety on return.

DEPORTATION AND DIPLOMATIC ASSURANCES

The third issue raised by the present case concerned an immensely important set of issues surrounding diplomatic assurances contained in MOU and safety on return. The Secretary of State accepted that in the absence of MOU there would be a real risk of treatment contrary to Article 3 ECHR.⁸⁴ Qatada, with the support of interveners,⁸⁵ argued that the UK Government could not rely on MOU in principle from countries with a history of human rights violations and that SIAC's reliance on MOU was irrational in law.⁸⁶ Their Lordships unanimously rejected these arguments, pointing out that MOU do not give rise to points of law and that SIAC exercised the necessary degree of scrutiny required by Article 13 ECHR.⁸⁷ Thus, Lord Phillips briefly observed the criticism of diplomatic assurances and, citing *Sing v Canada*⁸⁸ and *Suresh v Canada*,⁸⁹ held that the issue of safety on return, including diplomatic assurances, is a fact-driven assessment and does not give rise to points of law.⁹⁰ Lords Hoffmann, Hope and Brown turned to the authority of the ECtHR and asserted that the Grand Chamber in *Saadi* made it clear that the reliability of MOU is always a question of fact to be decided in all of the material circumstances.⁹¹ Thus, their Lordships appear to adopt a deferential approach towards SIAC and, by

83 For example, the Joint Committee on Human Rights, n 49 above, at [49], pointed out the '... obvious risk that lack of information about the provenance of evidence will lead to evidence which has in fact been obtained by torture being admitted before SIAC. For the SIAC duty of inquiry to be meaningful, SIAC must be able to access adequate information on the provenance of the evidence concerned.'

84 n 1 above at [107] (*per* Lord Phillips).

85 Justice, Human Rights Watch and Liberty.

86 For defence of the reliability of assurances contained in MOU, see K. Jones, 'Deportations with Assurances: Addressing Key Criticisms' (2007) 57 *ICLQ* 183.

87 n 1 above at [126] (*per* Lord Phillips); at [240] (*per* Lord Hope); and at [254] (*per* Lord Brown). Accordingly, the appeals by *RB* and *U* were also rejected on this issue.

88 *Sing v Canada (Minister of Citizenship and Immigration)* [2007] FC 361.

89 *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3.

90 n 1 above at [116]–[117].

91 *ibid* at [187] (*per* Lord Hoffmann); at [236]; at [239] (*per* Lord Hope); and at [254] (*per* Lord Brown).

holding that MOU do not give rise to points of law, deliberately restricted the right of appeal from SIAC to the Court of Appeal.⁹² A broader issue raised by the present case, however, is what MOU actually are if they do not give rise to points of law.

For present purposes, the key issue is that their Lordships appear to affirm the validity of MOU but deliberately avoid examining the effectiveness and reliability of MOU.⁹³ Thus, Lord Phillips simply stated that whilst SIAC found the influence of MOU significant:

The MOU was not critical to this conclusion. SIAC commented that the political realities in Jordan and the bilateral diplomatic relationship mattered more than the terminology of the assurances. The former matters, and the fact that Mr Othman would have a high public profile, were the most significant factors in SIAC's assessment of article 3 risk.⁹⁴

Strikingly, analysis of MOU stopped there. Lord Phillips, observing *Chahal* and *Saadi*, further rejected the argument advanced by the interveners that '... these decisions establish a principle that assurances must eliminate *all* risk of inhuman treatment before they can be relied upon.'⁹⁵ Once again, his Lordship did not comment directly on MOU and instead placed emphasis on the wider circumstances pertaining to MOU. Accordingly, Lord Phillips opined that although a State will have to show that there is good reason for placing reliance on assurances:

... after consideration of all the relevant circumstances of which assurances form part, there are no substantial grounds for believing that a deportee will be at real risk of inhuman treatment, there will be no basis for holding that deportation will violate Article 3.⁹⁶

In concurrence with Lord Phillips, Lord Hope relied on a utilitarian calculus and stated that:

There can be no absolute guarantees that assurances, even at the highest level, will be adhered to. But the Strasbourg jurisprudence does not require them to achieve that standard. The words "substantial" and "real risk" show that the court's approach to assurances is essentially a practical one that strikes a balance between the interests of the community and the protection of the individual.⁹⁷

This reliance placed on the 'real risk' test by Lord Hope appears to conflate the burden of proof that appellants have to satisfy in order to demonstrate that deportation should not take place under Article 3 ECHR with the reliability and effectiveness of diplo-

92 Kavanagh has observed that the UK courts are highly deferential when issues of national security are at stake. A. Kavanagh, 'Judging the judges under the Human Rights Act: deference, disillusionment and the "war on terror"' (2009) PL 302.

93 It could be that their Lordships deliberately did not address MOU in anticipation of the decision of the ECtHR in *Ramzy v the Netherlands* App No 25424/06 (forthcoming). In that case the governments of Lithuania, Portugal, Slovakia and Poland, led by the UK, are intervening as a joint third-party in support of the Netherlands in deporting an Algerian national suspected of terrorism back to Algeria with real risk of ill-treatment on the basis of diplomatic assurances.

94 n 1 above at [126].

95 *ibid* at [114] (italics added). Lord Hoffmann, Lord Brown and Lord Mance did not comment.

96 *ibid* (italics added).

97 *ibid* at [242].

matic assurances in reducing the treatment contrary to Article 3 ECHR to an acceptable level. The problem is that the former applies to appellants while the latter applies to Member States. The reasoning of Lord Hope does appear to be inconsistent in that he rejected the real risk test as the required burden of proof for foreign torture evidence under Article 6 ECHR but relied on the same test to demonstrate that MOU do not have to reduce all risk of ill-treatment before the UK Government may place reliance upon them.⁹⁸ Contrary to his Lordship, the ECtHR has not stated the standard that MOU must achieve.⁹⁹ Whilst it is illogical to suggest that MOU are inherently unreliable, the position adopted by Lord Hope could have the effect of absolving the UK Government from the responsibility of taking adequate measures to ensure that MOU are effective. Indeed, this would appear to be the effect of removing the jurisdiction of appellate courts in matters involving safety on return. In any case, even if the UK Government wanted to ensure that MOU are effective, their Lordships did not consider how it would be able to do so in practice.¹⁰⁰

CONCLUSION

Central to this case is the extent to which Member States of the Council of Europe ought to be responsible for deported terrorism suspects to non-Member States. It is clear that their Lordships were prepared to treat foreign nationals suspected of terrorism being deported to non-Member States with lower standards of human rights, which appears to be reflective of the broader approach by the UK Government.¹⁰¹ Their Lordships were unanimous in agreement that the real risk of foreign torture evidence is the responsibility of foreign courts and created a demanding burden of a 'flagrant denial of justice' (whatever that means) in order to prevent deportation under Article 6 ECHR. Whilst their Lordships were content to deal with foreign torture evidence under Article 6 and not Article 3 ECHR, it is not inevitable that the ECtHR will reach the same conclusion when the present case reaches Strasbourg.¹⁰²

A crucial issue raised by this case is that Parliament has deliberately restricted the jurisdiction of the appellate courts to points of law. Accordingly, a decision by SIAC on MOU can only be overturned by the appellate courts if it was irrational.

98 It is apparent that Lord Hope, as well as their Lordships more generally, did not consider the problem of 'future speculation' involved with the 'real risk' test in consideration of both treatment contrary to Article 3 ECHR and the effectiveness and reliability of MOU; see the Joint Concurring Opinion of Judge Zupančič in *Saadi*, n 9 above at [1].

99 In *Saadi*, n 9 above, the Grand Chamber of the ECtHR at [148] did not rule out the possibility of deportation where assurances were given but did observe that '[e]ven if . . . the Tunisian authorities had given the diplomatic assurances requested by Italy, that would not have absolved the Court from the obligation to examine whether such assurances provided, in their practical application, a sufficient guarantee that the applicant would be protected against the risk of treatment prohibited by the Convention.'

100 Jones, n 86 above at 188 has suggested that MOU are not legally binding and that compliance depends upon the 'incentives' provided and less on the legal status of a commitment. There is a general lack of international mechanisms to enforce compliance with MOU and the UK Government would not be able, nor would it be obliged, to exercise diplomatic protection over deported foreign nationals. For critical analysis of MOU, see Barker and Garrod, n 9 above at 102.

101 See, for example, the creation of a new Special Immigration Status and its inclusion in the Criminal Justice and Immigration Act 2008, ss 130–137.

102 On 11 February 2009, Qatada lodged an application with the ECtHR. App No 8139/09.

This could have the effect of absolving the UK Government from ensuring that MOU are reliable and effective. The appropriateness of SIAC as a reviewing body in respect of safety on return has been brought sharply into focus by the present case. Their Lordships seemingly accepted the lack of rigour in the standard of review undertaken by SIAC and that the review of SIAC's conclusions by appellate courts, in the words of Lord Phillips, 'falls well short' of that carried out by the ECtHR. At the same time, their Lordships appeared to be overly sanguine that the reliance placed by SIAC on MOU in the 'public domain' does ensure procedural fairness and adequate safety on return. Further tension derives from the fact that their Lordships affirmed the validity of MOU but did not consider what MOU are and deliberately avoided taking the opportunity to examine the effectiveness and reliability of MOU. Thus, it is not clear the standard and practical effect that MOU must achieve before they may be said to be reliable. It is notable that their Lordships did not consider that the UK Government has an interest in limiting the disclosure of the evidence of ill-treatment in receiving countries for SIAC to review, which could undermine SIAC's review process.

It is not the suggestion in this note that foreign nationals suspected of terrorism are not deported, but rather that if their Lordships are content for the UK Government to deport to countries with a real risk of ill-treatment then they should openly confront the practical realities of safety on return and, for example, the potential use of independent monitoring bodies in order to ensure that MOU are effective and, if necessary, the UK Government is held responsible. It seems that for the foreseeable future, suspected terrorists deported with a real risk of torture will have to rely on the ECtHR for an effective remedy.

Uncertainty Over Causal Uncertainty: *Karen Sienkiewicz (Administratrix of the Estate of Enid Costello Deceased) v Greif (UK) Ltd*

Sandy Steel*

In *Sienkiewicz v Greif*,¹ the Court of Appeal considered the application of and relationship between section 3 of the Compensation Act 2006 and the common law relating to proof of causation in asbestos-related mesothelioma cases.

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1 *Sienkiewicz v Greif* (UK) Ltd [2009] EWCA Civ 1159 (*Sienkiewicz*).