Appeal No: SC/84/2009
Hearing Date: 17th, 18th, 19th & 20th
Date of Judgment: 14th December 2009

SPECIAL IMMIGRATION APPEALS COMMISSION

OPEN JUDGMENT

Before:

THE HONOURABLE MR JUSTICE MITTING (Chairman)
SENIOR IMMIGRATION JUDGE A JORDAN
MR M JAMES

(QJ)

APPELLANT

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

For the Respondent: Mr J Moffett & Ms C Owen
Instructed by the Treasury Solicitor for the Secretary of State

Special Advocate: Mr M Birnbaum QC & Mr A Mahmood
Instructed by the Special Advocates Support Office

For the Appellant: Mr Gill QC, Mr B Ali & Mr Z Nasim
Instructed by Aman Solicitors Advocates

The Hon. Mr Justice Mitting:

Background

1. The Appellant is a 44-year-old Algerian national who has been in the United Kingdom for at least ten years. The circumstances of his arrival are obscure. He now claims to have left Algeria in 1991 and to have arrived in the United Kingdom at the end of 1997. He says that between 1991 and 1997 he spent time successively in Italy, France, Germany and Holland. He says that he married his Algerian-born wife, then living in Algeria, by proxy in 1998. He undoubtedly claimed asylum on 4 March 1999. The UK Border Agency, in its decision letter dated 12 May 2009, states that he claimed to have entered the United Kingdom two days before, on 2 March 1999. His wife came to the United Kingdom in March 2000, via a roundabout route. There are two sons of the marriage, I and A, aged eight and seven. Neither has known any country other than the United Kingdom. I was born with a blocked or absent oesophagus and an enlarged lower lobe of the left lung. Reconstructive surgery was required to create a passage from the pharynx to the stomach. Unsurprisingly, he has suffered a variety of conditions, including difficulty in feeding, recurrent chest problems and bleeding from the gut for which he has received expert treatment at Leicester Royal Infirmary. A colon transplant may well be recommended within the next six months.

2. QJ's claim to asylum was refused on 1 March 2002. He appealed against that refusal, but his appeal was overtaken by events and automatically lapsed on the decision of the Immigration and Nationality Directorate on 19 August 2003 to withdraw its decision to refuse the claim. On 6 October 2003, his wife claimed asylum, with her two sons as dependent upon her claim. That was refused on 17 June 2008. On 22 October 2008 her appeal was allowed on limited grounds by Immigration Judge Plimmer and she was granted leave to remain for a period which has recently expired. It is her, and QJ's declared intention that, whatever should happen to him, she and their sons should, if possible, remain in the United Kingdom. It is the UKBA's intention, if QJ's appeal fails, to remove the family, as a whole, to Algeria.

3. The events which overtook QJ's asylum claim were the result of his criminal activities, undertaken in the United Kingdom, between 1 September 2000 and 26 September 2001: (1) conspiracy to defraud financial institutions by the manufacture and use of counterfeit bank, credit and charge cards and the unauthorised use of the details of card account holders; (2) entering into a funding arrangement for the purposes of terrorism. On 25 September 2001, he was detained under the Terrorism Act 2000 and later charged with offences under that Act. He was sent for trial on 17 January 2002 and was tried by Curtis J and a jury at Leicester Crown Court between 22 January and 1 April 2003. He was indicted on four counts: conspiracy to defraud, entering into a funding arrangement for the purposes of terrorism, membership of a proscribed organisation (Al Qaeda) and having a false instrument (a passport) with intent. He pleaded guilty to the last offence and, no evidence having been offered, was acquitted of the third. He was convicted of the first two and sentenced to a total of eleven years' imprisonment. He appealed, unsuccessfully, to the Court of Appeal on the single ground that adverse publicity before and during his trial had made a fair trial impossible. The case against QJ and his co-accused was that they had provided substantial sums of money, false documents and non-military equipment, to Jihadists, raised by a sophisticated and successful card-cloning fraud. Curtis J concluded that severe sentences, with a strong element of deterrence, were required and recommended that both should be deported.

4. On 16 March 2005 QJ was convicted, in absentia, by an Algerian court of an offence under Article 87(a)(6) of the Algerian Criminal Code – membership of or involvement in a terrorist group operating abroad – and sentenced to twenty years' imprisonment. The identity of the group and the nature of the evidence supporting the conviction are unknown.

5. The earliest date upon which QJ could have been released was 18 July 2007 and the latest 18 May 2009. He was not discharged from prison, and then only into immigration detention, until the latter date. In every formal assessment made of him while in prison, he maintained that he was not guilty of the

offences of which he was convicted. All OASYS assessments have produced a low-risk score.

6. From September 2006 onwards, QJ's then solicitors pressed for a decision upon his outstanding asylum claim. He was interviewed on 26 February and 24 March 2009 and a SEF completed. On 12 May 2009, UKBA gave notice of the Secretary of State's decisions:

i) To certify the asylum claim under section 72(2) and (4) of the Nationality Immigration and Asylum Act 2002 and, so, to apply the presumption that, for the purposes of Article 33(2) of the Geneva Convention, he had been convicted of a particularly serious crime and constituted a danger to the community of the United Kingdom

ii) To refuse his claim to asylum on the grounds that he did not have a well-founded fear of persecution in Algeria

iii) To refuse him humanitarian protection under paragraph 339(C) of the Immigration Rules

iv) To reject the claim that the right to respect for family and private life of QJ and his family under Article 8 ECHR would be breached if he were to be deported to Algeria

v) Accordingly, to make a deportation order against QJ under section 32(5) of the UK Borders Act 2007.

The Secretary of State certified under section 97(3) of the 2002 Act that the decision had been taken wholly or partly in reliance on information which should not be made public in the interests of the relationship between the United Kingdom and Algeria, so that any appeal by QJ lay to SIAC. QJ appealed against those decisions by a Notice of Appeal dated 21 May 2009. He also applied for bail. On 30 July 2009 SIAC granted bail, in principle, on stringent terms, including a 20-hour curfew and a geographical boundary during non-curfew hours. He has recently been released to an address in Coventry, where he resides with his family.

The Principal Issues

7. QJ's circumstances are capable of giving rise to manifold legal and factual issues. Nevertheless, Mr Gill QC helpfully accepts that the outcome of the appeal will be determined by the answers to the following questions (though he has not posed them in this order):

If QJ were to be deported to Algeria,

i) would the United Kingdom be in breach of its obligation to respect the right to family and private life of QJ and his family under Article 8?

ii) are there substantial grounds for believing that there is a real risk that he would be subjected to such ill treatment as to put the United Kingdom in breach of its obligation to him under Article 3?

iii) are there substantial grounds for believing that there is a real risk that he would be subjected to a trial so flagrantly unfair as to put the United Kingdom in breach of its obligation to him under Article 6?

Mr Gill accepted that the answers to these questions would make it unnecessary to determine separately the issues which would otherwise arise on his asylum claim, under paragraph 339C of the Immigration Rules and under Article 5. He was right to do so, for the answers to those questions are determinative of the appeal. He also submitted that, even if QJ could not establish a breach of any of the individual obligations under Articles 3, 6 and 8, nevertheless, QJ could not lawfully be deported because of the cumulative impact upon QJ and/or his family of acts which engaged, even though they did not breach, the United Kingdom's obligations under those Articles. We can deal with this argument shortly: it has no basis in principle or in precedent. The approach of the Strasbourg court has invariably been to ask itself whether an individual obligation under the Convention has been breached by a signatory state. If not, the application in respect of that obligation is dismissed. We are unaware of any Strasbourg case in which it has been submitted, let alone held, that Convention rights can in some way be breached

if taken collectively, when no individual breach has been found. We do not accept Mr Gill's proposition.

Article 8

8. QJ, his wife and sons undoubtedly enjoy a family and private life in the United Kingdom. This is so, despite the fact that, for almost all of the last eight years, he has been in prison. Apart from the time when he was in HMP Frankland, which was inaccessible to them, his wife and sons have visited him regularly. There is no reason to doubt that they are a strong family unit. The adults have close ties to Algeria – of blood, upbringing and citizenship. Miss Plimmer has already decided, for wholly convincing reasons, that QJ's wife would, personally, be at no risk on return to Algeria and has no viable claim to asylum in the United Kingdom. If the only members of the family were QJ and his wife, and the deportation of QJ could lawfully be effected, there would be no bar to the removal of them both; and such removal would not interfere with the exercise of the rights of either of them to respect for their private and family life. The answer to the first of Lord Bingham's questions in *R v SSHD ex p. Razgar* [2004] UKHL 27 paragraph 17 would be negative. But the family does not consist only of the two adults. The two sons have ties of blood to Algeria and of relationship to the one surviving grandparent (QJ's mother) and numerous uncles and cousins, but none of upbringing, which has occurred solely in the United Kingdom. There can be no doubt that removal to Algeria would be, for them, a major and disruptive event in their life. Further, I has a pressing need to remain, in the short term, in the United Kingdom if, as Mr Hoskyns, his treating consultant paediatrician anticipates, a colon transplant is recommended within the next six months. Even if such a procedure were available in Algeria, it seems inconceivable that QJ and/or his wider family in Algeria, could afford to pay for it, as he would certainly have to do if the procedure were to be performed in Algeria. Removal of the family to Algeria would, in our view, interfere with the exercise of the family's right to respect for its private and family rights in respect of the two sons, and in particular of I. The answer to Lord Bingham's second and third questions is that, in the case of the two sons, removal would have consequences of such

gravity as potentially to engage the operation of Article 8, but that it would be in accordance with the law: no member of this family has an indefinite right to remain in the United Kingdom. Subject to the questions considered below, QJ's removal is both lawful and required by section 32 of the UK Borders Act 2007 and, now that their leave to remain has expired, his wife and children have no right to remain and are liable to administrative removal.

9. The circumstances of this case require that questions four and five be answered together. There are, in principle, three possible factual outcomes:

i) (as UKBA intend, and Mr Moffett contends) the whole family will be removed together;

ii) QJ will be deported on his own, but his wife and two sons will follow, either voluntarily, or under compulsion, when and if I has his operation and is medically stable;

iii) QJ is removed and his wife and sons remain permanently in the United Kingdom.

(i) is possible, but not certain. It is far from inconceivable that UKBA will make the compassionate decision to allow QJ's wife and two sons to remain in the United Kingdom until I's operation has been successfully performed; or, if it did not, that the removal of the wife and children would be subject to challenge before the Tribunal or the Administrative Court. (ii) is, therefore, a realistic possibility, unless QJ's litigation (whether domestic or in Strasbourg if this appeal fails) is not finally determined until after I's operation has been performed. Of the three possibilities, (iii) is the least likely, because of the precarious nature of the long-term claims of this family to remain in the United Kingdom; but, because it cannot be entirely excluded, it must at least be considered.

10. Three of the interests identified in Article 8(2) are relied on to justify interference in the exercise of the Article 8 rights of this family: national security, public safety and the prevention of crime. They are, individually and cumulatively interests of the highest importance. The deportation of QJ is

both intended and effective to further them and is no more than is reasonably required to do so. While claiming the protection of the United Kingdom from a claimed fear of persecution for a Geneva Convention reason in Algeria, QJ undertook large scale and successful efforts to facilitate Jihadist terrorism. With or without the statutory presumption in section 32(2) of the 2007 Act, that fact alone justifies the decision to deport him. Such activities pose a threat, direct or indirect, dependent on their target, to the national security of the United Kingdom and the safety of its inhabitants. Further, deportation is a legitimate deterrent to those who are not British citizens to the commission of such crimes. The recommendation for deportation made by Curtis J was part of the sentence imposed by him. By undertaking the activities of which he was convicted, QJ knowingly put at risk the opportunity, at the time short-lived and tenuous, of enjoying family life with his wife and (then only) son I in the United Kingdom. He can have no legitimate complaint at the disruption, long-or short-term of his family life with them, by his deportation. The position of his wife and children, in particular of his children, commands more sympathy; but their predicament is, in principle, very similar to that of the family of a man separated from them, by the imposition of a long or indefinite term of imprisonment. The near-total disruption of family life produced by such a sentence is justified, under Article 8(2), in the interests of the prevention of crime. Accordingly, even in the unlikely event that the deportation of QJ results in his physical separation from his wife and two children for the long term, or even permanently, it is lawful and justified.

11. Lord Bingham's observations in paragraph 20 of *Huang v SSHD* [2007] UKHL 11, on which Mr Gill relies, are not in point.

> "In an Article 8 case where this question (proportionality) is reached, the ultimate question for the appellate immigration authority is whether the refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the applicant in a manner sufficiently serious to

> amount to a breach of the fundamental right protected by Article 8. If the answer to this question is affirmative, refusal is unlawful and the authority must so decide."

Those observations apply only to the question to which they were directed: "the refusal of leave to enter or remain". They do not address, let alone determine, cases in which the deportation of an individual with no right to remain in the United Kingdom, is under consideration for the protection of one or more of the interests identified in Article 8(2), any more than they would the imposition of a lengthy sentence on an individual convicted of a serious crime.

Assurances

12. By a note verbale dated 6 March 2008 the British Embassy notified the Algerian government of its intention to deport QJ to Algeria "for reasons of national security" at the conclusion of his sentence for conspiracy to commit fraud and involvement in the funding of terrorism. Specific assurances were sought that he would be treated in accordance with accepted international human rights standards, in particular, that he would be treated with strict regard for his human dignity under international law and Algerian domestic law. The note also sought information about outstanding criminal convictions in Algeria, whether he would be detained on arrival in Algeria and, if so, how long, by whom, where and under what provisions of the criminal code. A prompt reply was received from Maitre Amara at the Ministry of Justice dated 21 April 2008. It stated that QJ was convicted in absentia on 16 March 2005 by the Criminal Court of Algiers and sentenced to 20 years' imprisonment for the offence of membership of a terrorist group operating abroad. His conviction would be quashed upon QJ's arrest or surrender in accordance with the provisions of Article 326 of the Criminal Code, which provides for the quashing of such a conviction by operation of law. He would be examined "by the judicial police" in accordance with customary provisions applicable to deported persons. The note verbale also gave an assurance about reconviction:

> "In accordance with the principles of Algerian criminal law, QJ does not risk being convicted in respect of offences on account which he has already been convicted and served the associated sentence in the United Kingdom."

13. By a second note verbale dated 16 April 2009, the British Embassy notified the Algerian Ministry of Foreign Affairs that QJ would complete his sentence next month and that it was intended to deport him as soon as possible thereafter. Assurances were sought that "on extraditing QJ, he will be treated in accordance with international human rights standards, in particular that he will be treated with full respect for his human dignity, in accordance with international law and Algerian national law". The reference to extradition was an obvious mistake. There had been no request by the Algerian government for the extradition of QJ under Article 6 of the Extradition Convention signed on 11 July 2006. We accept Mr Layden's evidence that it has never been the intention of the British government to extradite QJ. The Ministry of Foreign Affairs replied on 23 May 2009, in respect both of QJ and another individual, in the following terms:

> "In the event that they are arrested in order that their status may be assessed, they will enjoy the rights, assurances and guarantees as provided by the constitution and the domestic legislation in force relating to human rights. In any event, respect for their human dignity, in accordance with the international standards in force, is guaranteed by Algerian national laws."

14. By a third note verbale dated 22 June 2008, addressed to the Ministry of Foreign Affairs, the British Embassy noted that the wording of the assurances given appeared to be different from those received during the exchanges of letters between President Bouteflika and the British Prime Minister (and, the note could have added, from those given in respect of all other Algerian appellants whose cases have been determined by SIAC) and sought confirmation that he would be treated in accordance with accepted international human rights standards, in particular with strict respect for his

human dignity in accordance with international and Algerian law and the specific assurances given in other cases. This prompted a detailed note verbale from the Ministry of Justice dated 7 July 2009 which gave the assurances sought. In particular, it stated that he would undergo a status examination "by the judicial police" during which his identity would be verified and preparations made for him to be brought before the competent representative of the public prosecutor's office, that the judgment delivered in absentia would be quashed as a matter of law, that if he was detained, he could make immediate contact with his family and that he, his family or lawyer were entitled to request a medical examination which would, at the end of the period in custody, be "compulsorily carried out on the person detained". In response to the request for confirmation that his human dignity would be respected in all circumstances, the note reiterated the relevant provisions of Algerian law which guaranteed that right.

15. In paragraph 7 of his witness statement dated 29 July 2009, directed to QJ's circumstances specifically, Mr Layden said that on 10 June 2009 a British Embassy official asked the Director General of Judicial and Legal Affairs at the Ministry of Justice (Maitre Amara) to enquire as to the reason for the change in the wording of the assurances, as given in the note verbale of 23 May 2009. Maitre Amara indicated that the change was simply administrative and confirmed that the usual, full assurances, had been given by the government of Algeria for QJ. Hence the detailed confirmation in the note verbale of 22 June 2009.

16. Professor Joffé, the expert witness who has prepared a report and given evidence on behalf of QJ accepts that the effect of the assurances is the same as those considered in previous SIAC appeals. We are satisfied that, as in the case of those assurances, the assurances given in respect of QJ are such that, if they are fulfilled, he will not be subjected to treatment contrary to Article 3. Mr Gill did not suggest otherwise.

17. Professor Joffé has reservations about the good faith of the Algerian government in giving the assurances. He relies on what happened to four named individuals: Meziche, Ikhlef, Abderrazak le Para and Mohamed

Chalabi; and upon Maitre Amara's part in drafting the legislation which put into effect the Charter for National Reconciliation and Peace. The cases of three of the individuals do not support his reservations: no assurances were given in the cases of Meziche or Abderrazak le Para. An assurance was given to the Canadian government in respect of the treatment of Ikhlef. It was not as stated in paragraph 313 of SIAC's open judgment in *Y* 24 August 2006. For the reasons set out in the closed judgment in *U* 14 May 2007, it was not breached. The only confirmed case of an assurance given to a western government which was not fulfilled is that reported to have been given to France before the return to Algeria of Mohamed Chalabi in November 2001: that he would not be retried. He was, and was acquitted in May 2002: see paragraph 318 of *Y*. As Professor Joffé notes, he was subsequently tried on other charges and eventually released from detention in 2007. We do not understand the basis for Professor Joffé's reservations about the good faith of Maitre Amara. We have no reason to doubt his contention that Maitre Amara drafted the legislation which gave effect to the charter. It undoubtedly contains provisions which are objectionable in principle to many external observers: the granting of blanket immunity to combatants on both sides of the civil conflict and provision for the imposition of sanctions on those who criticise the conduct of the security forces during it. It is true that the underlying political bargain, like many made to bring internal conflict to an end, may contain theoretically objectionable features; but it is unreasonable to draw the conclusion that the draftsman who translated it into law cannot be trusted because he did so. Professor Joffé's reservation is without a proper basis. We much prefer the evidence which we, as a Commission, have observed at one remove over the years during which Mr Layden and the British Embassy have been dealing with Maitre Amara: that the relationship between them has become one of well-founded trust on both sides.

18. Mr Gill relies on the statements made about three individuals who returned to Algeria from the United Kingdom in two Amnesty International reports: their report on Algeria for 2008 and their briefing note about the return of Algerian nationals from Guantanamo Bay of 18 September 2009. The individuals concerned are K, Q and H. SIAC has already considered, in some detail, the

information available to it about each individual, together with five others similarly returned from the United Kingdom: see the open judgments in ***BB*** 5 December 2006, ***U*** 14 May 2007, the addendum to ***Sihali*** 14 May 2007 and ***Y, BB and U*** 2 November 2007. Amnesty's 2008 report states:

> "A man known as 'K' … and (Q) were detained by the DRS when they were deported to Algiers on 20 and 24 January respectively by the UK authorities, who considered them a threat to national security. 'K' was released uncharged on 4 February after being held longer than the legal limit of twelve days without charge or access to legal counsel; (Q) was held by the DRS until 5 February and then transferred to prison to await trial … . Both were held secretly, probably in military barracks in Algiers, and without access to their relatives."

As will be apparent from the text, the statements are unequivocal and unqualified. They are in significant respects wrong or, at least, likely to be wrong. K was deported to Algiers on 24, not 20 January. He was not detained for longer than the legal limit of twelve days: he was detained from 24 January to 4 February, exactly twelve days. According to Maitre Amara he was allowed to contact his relatives, in accordance with Algerian law. It is possible that Mr Amara's statement, undoubtedly made in good faith, was mistaken; but the unqualified assertion that he was not allowed access to his relatives is at least misleading. Maitre Amara also assured a member of staff at the British Embassy on 31 January 2008 that Q had spoken directly to his family (as well as being visited by a doctor). On the premise that Maitre Amara spoke in good faith, it is unlikely that he was mistaken. We are unpersuaded that our assessment of what occurred to K and Q (qualified, in the case of Q, by acceptance of the possibility that he may have been exposed to the sound of ill treatment of others during his detention) is wrong. In the case of H, whose case is referred to in the briefing note of 18 September 2009, the reporting is accurate, but incomplete. It is immediately followed by a paragraph dealing with the return of Guantanamo detainees, which contains the statement "even in high-profile cases involving the authorities of another

state, the DRS has felt able to flout safeguards for detainees contained in Algerian law, which stipulate that the detainees have the right to receive access to relatives." The reporting might have been more balanced if reference had been made to H's experience: as Amnesty knew, because they reported the fact on 8 February 2008, H had been allowed to make a telephone call to a member of his family. Amnesty's principled objection to deportation to Algeria on the basis of governmental assurances merits serious consideration; but it is not aided by reporting which is, in small, but significant, respects inaccurate or partial.

19. The United Kingdom is not the only country to have returned individuals suspected of terrorism-related activity to Algeria. In its briefing note of 18 September 2009, Amnesty reported on the return, between July 2008 and January 2009, of eight Algerian nationals transferred from US custody in Guantanamo Bay. We have no reason to doubt that each was held by the DRS for periods of up to twelve days (though we doubt the claim that one or more was held for thirteen days – our doubt is based upon the inaccuracy of the report about K already noted) and that some or all of them have been charged under Article 87(a)(6) of the Algerian criminal code. We note the fact that none of them has complained of ill treatment since their release from detention. Apart from the suggestion that one or more of them may have been detained for more than twelve days, the only assertion that Algerian law was breached in any of their cases is that they were not allowed access to relatives. Because that assertion in the cases of K and Q is probably wrong, we have reservations about the accuracy of Amnesty's reporting in the case of these men. There is no reporting of any public assurance made by the Algerian government to the American government about individuals removed from Guantanamo Bay and we do not know if any private assurances have been given. The only conclusion which can be drawn from the limited material available to us is that the reported experiences of these men does not appear to be relevant to, or to undermine faith in, the reliability of assurances given in respect of specific individuals to the British government.

20. Nor do we place any reliance on the contentious article headed "Out of Control Orders" published in the New Statesman on 17 April 2008 about H and Q:

> "The two men believed that they would not be detained for more than a few hours on arrival and that, as the British diplomat who organised their deportations had promised, there was no risk that they would be held by Algeria's infamous DRS secret police".

We do not doubt that that was their belief, but the British diplomat concerned, Mr Layden, did not make any "promise". He expressed the view, in the case of H only, that there was no reason to believe that he would be arrested or detained for a prolonged period. That view was, as we noted in *U* 14 May 2007, shown to be mistaken. No such view or promise was made in the case of Q.

21. There continue to be reports of the detention, incommunicado, of a small number of individuals suspected of terrorist-related activity in Algeria: see, for example, those named in section 1(d) of the US Department of State report of 25 February 2009. This is consistent with the reporting which SIAC has previously considered. There remain widely-held concerns about the use of torture or ill treatment by the DRS on terrorist suspects. These concerns appear neither to have increased nor decreased in the years since SIAC has considered the issue of safety on return to Algeria (2006 to date). Mr Layden has acknowledged, from the start that, without the assurances which have been given, it would not be safe for the United Kingdom to return Algerians suspected of terrorism-related activity to Algeria. He remains of that view. The AIT considered the position of a terrorist suspect who was liable to removal without the benefit of such assurances in *HS v SSHD* [2008] UKAIT 00048. We agree with its conclusions. The issue of safety on return turns critically on the reliability of the assurances.

22. Nothing in the general situation in Algeria causes us to place less weight on the assurances than SIAC has in previous cases. Terrorism, perpetrated by the

re-named GSPC ("Al Qaeda of the Islamic Maghreb") (AQM) continues. The death toll has diminished, from over 600 in 2007, to over 300 in 2008, to less than 70 in 2009 to date; but it is too soon to conclude that the decline is secular. Terrorist activity depends upon the intentions and capacity of a group of men of uncertain size whose intentions and capacity are necessarily unknown. The situation in Algeria should be assessed on the premise that terrorist violence is likely to continue on a significant scale for the indefinite future. We are puzzled by Professor Joffé's contention that violent acts have been on a rising trend. Even though the decline in fatalities may not be the whole picture, it is inconsistent with the proposition, if advanced, that serious violence is on a rising trend. If all that Professor Joffé means is that economic and social discontent in Algeria remains alive and may be increasing, we would accept that view as reasonable; but it would be a poor guide to the likely incidence of serious terrorist acts.

23. Until 2008, reporting on prison conditions in Algeria focussed on overcrowding and poor conditions. These problems remain. Nothing that we have seen recently leads us to believe that they have improved or deteriorated since SIAC last considered them in *U* and *Y, BB and U*. SIAC has not previously been invited to consider the use of unlawful violence by prison guards. An incident in February 2008 in El Harrach prison, in which terrorist suspects, among others, are held, requires this issue to be addressed. Both the United States Department of State and Amnesty International have reported on the incident, in their reports of 25 February 2009 and 18 September 2009 respectively. The reports are consistent and are about the same incident: a protest by inmates about the closure of a prayer room led to a prolonged assault by prison guards on at least thirty – more likely, eighty – prisoners. Amnesty noted reports that the prisoners had been stripped naked, kicked, punched, beaten with metal bars and threatened with sexual abuse. Two suffered significant injuries: a broken leg and a fractured jaw. Several made formal complaints and were questioned by judicial officials. An ICRC delegation visited the prison in February 2008, after the reports had been made. The incident was publicised in the Algerian press. We do not doubt that it occurred and that the prison guards behaved towards the prisoners in a

way which would undoubtedly have infringed Article 3 if the incident had occurred in a Convention State. The incident appears, however, to have been exceptional. If it was not, reports of similar incidents would be frequent. The fact that the incident was immediately investigated by the ICRC and, it seems, by judicial officials, suggests that the Algerian state does not turn a blind eye to serious ill treatment of prisoners within its prisons. The issue is one which needs to be raised by British diplomats with Maitre Amara; but the occurrence of a single incident which has been investigated, does not give rise to substantial grounds for believing that there is a real risk that it will recur in the case of QJ or any other deportee who is prosecuted and/or convicted and imprisoned after return.

24. In one respect, QJ will be better placed than most other Algerian deportees. Because, like Y, he has been convicted of an offence under Algerian law, he is liable to be arrested immediately on entering Algeria, by the Judicial Police, as the note verbale of 21 April 2008 states. In that event, there is no reason to doubt that the same provision will apply in his case as in that of Y: he will be detained in a prison establishment falling within the jurisdiction of the Ministry of Justice. He will be interrogated by members of the DRS, some of whom are sworn in as members of the judicial police, but not in a DRS facility, such as the Antar barracks.

25. Adopting the approach which SIAC has hitherto taken to assurances by the Algerian government, which has withstood scrutiny in the Court of Appeal and the House of Lords, we do not find that, if QJ were to be deported to Algeria, there are substantial grounds for believing that he would be subjected to ill treatment of a kind which would breach Article 3.

26. Mr Gill submits that SIAC's approach must be modified in the light of the decision and observations of the Strasbourg court in *Ryabikin v Russia* [2009] 48 EHRR 55. The facts of that case are somewhat removed from those of the Algerian cases which SIAC has considered. Turkmenistan sought the extradition of the applicant, a citizen of Turkmenistan of Russian ethnic origin, for an offence of embezzlement. He claimed asylum in Russia and resisted the application to extradite him. He put before the Strasbourg court

numerous reports from organisations such as the OSCE, the US State Department and Amnesty International which spoke of serious and continuing human rights violations in Turkmenistan, including persecution of ethnic minorities, including Russians, the wide-spread use of torture and the lack of access to detainees by independent bodies, lawyers and relatives. Turkmenistan was described as "one of the world's most repressive and closed countries", which systematically refused access to the country of international observers and of any monitoring of places of detention by international or non-governmental observers. The Russian Prosecutor General said that he had obtained a guarantee from his counterpart in Turkmenistan to the effect that the applicant would not be subjected to torture, inhuman or degrading treatment, but did not produce the document to the court. In those circumstances, the court said that it was "bound to question the value of the assurances that the applicant would not be subjected to torture, given that there appeared to be no objective means of monitoring their fulfilment". On the facts which it considered, its conclusion is hardly surprising. The situation in Algeria is different. It does allow the ICRC, the UN Development Programme and the Red Crescent Society to visit regular, non-military prisons: see the US Department of State 2008 report of 25 February 2009. The assurances given in relation to QJ, like other Algerian deportees, have been patiently negotiated at the highest levels of government and tested in the case of those who have returned with the benefit of such assurances. The issue is, in any event, resolved as far as SIAC is concerned by the observations of Lord Phillips in paragraphs 113 and 114 of *RB (Algeria) v SSHD* [2009] UKHL 10: "If, however, after consideration of all the relevant circumstances of which the assurances form part, there are no substantial grounds for believing that a deportee will be at risk of inhuman treatment, there will be no basis for holding that deportation will violate Article 3".

27. Accordingly, we conclude that there are no reasons of fact or law for us to reach a different conclusion in the case of QJ about the issue of safety on return from those in the cases of other Algerian appellants already considered by SIAC.

Article 6 – double jeopardy

28. Mr Gill, supported by the special advocates, mounted a sustained argument that if QJ were to be deported to Algeria he would be exposed to a real risk of double jeopardy and so of the flagrant denial of a fair trial in Algeria. Accordingly, he submits, the deportation of QJ would put the United Kingdom in breach of Article 6.

29. The starting point is to assess the likelihood of QJ being tried in Algeria. We have no doubt that his conviction in absentia of 16 March 2005 would, by reason of the operation of Article 326 of the Algerian criminal code, be set aside on his surrender to or detention by Algerian authorities on his return. Mr Layden accepts, as do we, that it is likely that he would be retried for an offence under Article 87(a)(6) of the Algerian criminal code which provides,

> "Any Algerian national who activates or joins a terrorist or subversive association, group or organisation abroad, whatever its former name may be, even if its activities are not directed against Algeria, shall be liable to imprisonment for a set term of ten to twenty years and a fine …
>
> Where the acts described above are intended to harm Algeria's interests, the penalty shall be life imprisonment."

Although Article 87(a)(6) appears to provide for a mandatory minimum term, the experience of Q and H, who were each convicted of an offence under this article, but were sentenced to eight and three years' imprisonment respectively, suggests that this is not so. Whether or not it is, the principle is unaffected: it is likely that QJ will face re-trial under Article 87(a)(6) and, if convicted, will be ordered to serve a significant term of imprisonment.

30. As in the case of the Algerian government's assurances about the treatment of QJ, and for the same reasons, we are satisfied that full reliance can be placed upon the assurance about re-conviction referred to at the end of paragraph 12 above: QJ does not risk being convicted "in respect of offences on account of which he has already been convicted and served the associated sentence in the

United Kingdom". The only relevant conviction is that under section 17 of the Terrorism Act 2000, of which the particulars were that, between 20 February 2001 and 26 September 2001, QJ "entered into or became concerned in an arrangement as a result of which money or other property was made available, or was to be made available, to another knowing or having reasonable cause to suspect that it would or might be used for the purposes of terrorism". That offence did not require proof that QJ had activated or joined a terrorist or subversive association, group or organisation – merely that he had entered into an arrangement to provide "another" with money or other property for terrorist purposes. It would not be difficult for an Algerian court to conclude that conviction of that offence did not preclude conviction for an offence under Article 87(a)(6). Nor would QJ's acquittal of the count charging him with membership of a proscribed organisation – Al Qaeda – between 30 March 2001 and 26 September 2001, for one or more of three reasons: according to the Algerian lawyer who provides advice to the British Embassy in Algiers, acquittal in a foreign country does not preclude retrial for the same or substantially the same offence in Algeria; acquittal of the offence of belonging to Al Qaeda would not prevent an Algerian court from convicting QJ of belonging to any other terrorist organisation, in particular the GSPC, which was the Algerian organisation most active in and outside Algeria in the period during which QJ was in the United Kingdom; and the temporal limits of the charge would not inhibit conviction for activities occurring before 30 March 2001. For those reasons, we accept that there is at least a real risk that QJ would be prosecuted for and convicted of an offence under Article 87(a)(6) which was, at least in part, founded on allegations and facts which had been the subject of his conviction and acquittal at his trial in Leicester. It is, therefore, necessary to consider whether that risk amounts to a real risk of a flagrantly unfair trial, such as would put the United Kingdom in breach of Article 6 if QJ were to be deported to Algeria.

31. Mr Gill's legal analysis begins with two uncontroversial propositions of English law: except when a retrial is ordered by the Court of Appeal under section 77 of the Criminal Justice Act 2003, a person may not be retried for an offence of which he has been acquitted, even when his acquittal results from

an order under section 17 of the Criminal Justice Act 1967; in the absence of special circumstances, it is an abuse of process for a person to be prosecuted for a second time for an offence founded on facts which have already resulted in the prior conviction or acquittal of that person for another offence: *Beedie* [1998] QB 356 and *Z* [2000] 2 AC 483 per Lord Hutton paragraph 497C-D. The concept of double-jeopardy embraces both propositions. The first is an absolute bar, narrowly confined. The second is wider, but permits a second prosecution in exceptional circumstances. The narrow principle is stated in Article 14.7 of the UN International Covenant on Civil and Political Rights: "No-one shall be liable to be tried or punished again for an offence for which he has already by finally convicted or acquitted in accordance with the law and penal procedure of each country".

32. We accept that QJ could not be retried in England and Wales for membership of Al Qaeda before 26 September 2001 on the narrow principle. We also accept that, in the absence of special circumstances, it would be an abuse of process to prosecute him for membership of another terrorist organisation, such as the GSPC, if the prosecution were founded on the same facts as those which gave rise to his conviction for conspiracy to defraud and for entering into a funding arrangement for the purposes of terrorism. It is difficult to conceive of any special circumstances which might permit a British prosecutor to prosecute QJ for an offence of membership of a proscribed organisation other than Al Qaeda before 26 September 2001. We accordingly accept that the double-jeopardy rule would effectively prevent any further prosecution of QJ in England and Wales for an offence arising out of his activities here between 1 September 2000 and 26 September 2001.

33. Mr Gill's next proposition is that QJ could not be extradited to Algeria to stand trial for an offence under Article 87(a)(6) which arose out of the same facts. Algeria and the United Kingdom signed an extradition convention on 11 July 2006. Article 4 provides:

> "(1) Extradition shall be refused if final judgment has been passed in the requested State or in any other State in respect of the act for which the person's extradition is sought.

(2) Extradition may be refused on the following grounds:

…

(d) If the relevant offence was committed outside the territory of the requesting State and the law of the requested State does not allow for prosecution of that offence in those circumstances;

(e) Where the extradition would breach the international principles of human rights and in particular those provided for in the International Covenant on Civil and Political Rights, done at New York on 16 December 1966…"

34. The mandatory prohibition in Article 4(1) and the discretionary ground for refusal in Article 4(2)(e) reflect the narrower double-jeopardy principle. The discretionary ground for refusal under Article 4(2)(d) reflects, or at least includes, the wider ground. For the reasons given above, we accept that an extradition request by Algeria for an offence under Article 87(a)(6) would be refused for one or both of two reasons: if the allegation was of membership of Al Qaeda, it would be prohibited under Article 4(1); if it was founded on the same or substantially the same facts as those which gave rise to his conviction at Leicester Crown Court, it would be refused under Article 4(2)(d).

35. Mr Gill submits that, because QJ could not be retried in the United Kingdom or extradited to Algeria, it would be unlawful under domestic law for QJ to be deported unless, at least, reliable assurance had first been obtained from the Algerian political and judicial authorities that QJ would not be prosecuted for an offence under Article 87(a)(6) which arose out of the same or substantially the same facts as those which gave rise to his conviction and acquittal at Leicester Crown Court. Save to the extent already stated (no conviction for offences for which he has already been convicted and served a sentence in the United Kingdom) no such assurance has been sought or given. We do not accept Mr Gill's submission. QJ is liable to be deported because he is a "foreign criminal" as defined by section 32(1) of the UK Borders Act 2007 and because, subject to the exceptions set out in section 33, the Secretary of

State must make a deportation order in respect of him under section 32(5). None of those exceptions applies. Section 33 contains no provision which relieves the Secretary of State from the obligation to make a deportation order or permits him to revoke one once made because extradition would be prohibited or might be refused, whether under an extradition treaty or under the Extradition Act 2003. The position is, in principle, the same as when, before the enactment of the 2007 Act, the Secretary of State made a discretionary decision to deport on the ground that it was conducive to the public good to do so under section 3(5)(a) of the Immigration Act 1971 or, before that, in the exercise of prerogative power: re *Caddoux* [2004] EWHC 642 (Admin) paragraph 11 per Kennedy LJ ("If the purpose of the deportation was to surrender the applicant to France without the benefit of extradition safeguards because the French government had asked for him then that would be illegal, but if the purpose of the deportation was simply to send the applicant back to his own country because the Secretary of State considers his presence here not to be conducive to the public good then a decision of the Secretary of State to deport him would be lawful (see *R v Governor of Brixton Prison ex parte Soblen* [1963] 2 QB 243 at 302)". It is only when deportation would amount to an abuse of power, because it was ordered to avoid extradition proceedings that it would be open to challenge on the ground that extradition would be refused.

36. Mr Gill is, accordingly, driven to rely on the ECHR. Exposure to the risk of double-jeopardy is not, in terms, prohibited by Article 6 or by any other article of the Convention as originally signed. Article 4 of the seventh protocol done at Strasbourg on 22 November 1984 provides:

> "1. No-one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.
>
> 2. The provisions of the preceding paragraph shall not prevent the re-opening of the case in accordance with the law and penal

> procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case."

Article 4 is inapplicable to the facts of this appeal, for two reasons: the United Kingdom has not ratified it; and, it only applies to acquittals and convictions "under the jurisdiction of the same State". It has no application to proceedings in different signatory States, let alone to proceedings in one signatory State and in another State which is not a signatory. On the only occasions on which double-jeopardy (the principle "ne bis in idem") has been considered by the Strasbourg Court/Commission, it has summarily rejected applications which have invoked the principle as inadmissible: see paragraph 1 of the Commission decision in *S v Germany* 8945/80 13 December 1983 and paragraph 1 of *Blokker v The Netherlands* 45282/99 7 November 2000. Mr Gill submits that these decisions must now be reviewed in the light of a decision of a section of the court in *Nikitin v Russia* [2005] 41 EHRR 10. The facts are far removed from those in this appeal. It concerned proceedings within one country, Russia. The issue was whether or not a supervisory review of criminal proceedings at first instance in which the applicant had been acquitted constituted a violation of Article 4 of Protocol 7 and/or Article 6(1) of the Convention. It concluded that the supervisory review was lawful under Article 4(2) of Protocol 7. It also observed that compliance with Article 4 Protocol 7 was not sufficient to establish compliance with Article 6. In paragraph 57, it stated,

> "A mere possibility to re-open a criminal case is therefore prima facie compatible with the convention, including the guarantees of Article 6. However, certain special circumstances of the case may reveal that the actual manner in which it was used impaired the very essence of a fair trial. In particular, the court has to assess whether, in a given case, the power to launch and conduct supervisory review was exercised by the authorities so as to strike, to the maximum extent

> possible, a fair balance between the interests of the individual and the need to ensure the effectiveness of the system of criminal justice."

It concluded that, although the authorities conducting supervisory review did not strike that fair balance, because the outcome of the proceedings was that his acquittal was upheld, there was no breach of Article 6. Neither the reasoning nor the decision has any bearing upon the question which we have to decide, which is settled law in Strasbourg and in the appellate courts of the United Kingdom: are there reasonable/substantial grounds for believing that if QJ were deported to Algeria the criminal trial which he might face there "would have defects of such significance as fundamentally to destroy the fairness of his trial or … to amount to a total denial of the right to a fair trial", per Lord Phillips in *RB (Algeria) v SSHD* [2009] 2 WLR 512 at paragraph 154?

37. Applying that test, we are satisfied that, if QJ were to be tried for and convicted of an offence under Article 87(a)(6) based wholly or partly on the facts which resulted in the verdicts at Leicester Crown Court, it would not, by reason of that fact alone, fundamentally destroy the fairness of the trial or amount to a total denial of the right to a fair trial. That would be so even if the group or organisation which was the subject of the charge was Al Qaeda. The effect of an acquittal of a criminal charge brought in England and Wales in Algerian law is a matter for Algerian law. If Algerian law permits a person acquitted abroad to be prosecuted for and convicted of a similar offence in Algeria, his trial there would not be flagrantly unfair. The person concerned might not wish to set foot in Algeria so as to avoid that consequence and could not be extradited there, but if, as a result of his conduct in another State, he has made himself liable to deportation from that State, he cannot resist deportation on the ground that it may have that consequence. Mr Gill, supported by Mr Birnbaum, further submits that it would be unfair to expose QJ to the risk of prosecution and punishment for conduct for which he has already been tried and punished in the UK. Mr Gill submits that he would, if convicted, be sentenced to twenty years' imprisonment, a term which he describes as "gross

by any standards". We do not accept that submission, either in principle or in practice. In principle, an Algerian judge would be entitled to determine that an Algerian citizen, belonging to a terrorist group operating abroad deserves punishment for that crime even though he has already been punished for facilitating the activities of the group, providing that his determination did not infringe the provision of Algerian law which prohibits conviction of offences on account of which he has already been convicted and sentenced in a foreign court. The criminal law of a State will reflect the political and social circumstances of that State. Algeria may, or may not, take a more serious view of membership of a terrorist group operating abroad than does the United Kingdom. If it does, international comity requires that its views of the conduct of its own citizens must be respected. Our, limited, experience of other cases suggests that an Algerian court would be unlikely to impose a sentence as long as twenty years on QJ. Although Q and H provide a very small sample, they are a more reliable guide to what is likely to happen to QJ if convicted than the sentence imposed upon him in his absence.

38. Professor Joffé disclaims any expertise in Algerian law. We, therefore, discount the views which he personally has expressed about the Algerian legal system, which add nothing to the conclusions which we set out at length in *U*. He draws attention to two expressions of opinion by better qualified commentators:

i) The International Commission of Jurists' observations of 15 August 2008, set out in paragraph 52 of his report. Its conclusions accord with those which SIAC has reached in the past: the Algerian judicial system is imperfect and subject to pressure from the Executive; but effective steps are being taken to improve it and to enhance the independence of the judiciary.

ii) Newspaper reports published on 9 July 2007 and 3 January 2009 of the comments of the distinguished Algerian jurist Professor Mohand Issad, which confirmed the continuance of shortcomings in the Algerian judicial system including its openness to political interference.

For the reasons explained in *U*, we do not regard it as remotely likely that there would be political interference in any retrial of QJ. Nothing in the views of the International Commission of Jurists or of Professor Issad requires us to revise the conclusions expressed in *U*. Mr Layden accepts, as a fact, that Algerian judges rarely investigate accusations of torture made on behalf of those prosecuted for terrorist offences. His belief (expressed in the closed session, but capable of being referred to in this judgment) is that judges generally regard such allegations as fabricated. We have no means of knowing whether his view is well founded or, if it is, whether the opinion of Algerian judges is generally well founded. Algerian law requires that detainees are medically examined at the conclusion of the garde à vue and the juge d'instruction will see a detained person, at the latest, at that time. If that reveals no obvious sign of ill treatment or torture, it may be unsurprising that judges treat the allegations with short shrift. Any conclusion about this matter would be speculative. The only secure ground is what has happened to the six Algerians (out of eight) who were deported with the benefit of assurances given to the British government. As SIAC has already found, there is no good reason to believe that any of them were tortured or, save for the "mere possibility" that H may have been exposed to the sound of ill treatment of others with the intention or effect of breaking his moral resistance, subjected to other ill treatment in breach of Article 3. If, as we find, there do not exist substantial grounds for believing that there is a real risk that QJ will be tortured or subjected to ill treatment in breach of Article 3, the possibility that a judge might not investigate a claim by him that he was subjected to such treatment cannot, in principle, make his trial so flagrantly unfair that the United Kingdom would be in breach of its obligations under Article 6 if he were to be deported.

Miscellaneous

39. For the avoidance of doubt and, lest we have misunderstood the concessions made by Mr Gill, we set out, briefly, our conclusions on the remaining issues:

i) Article 5: garde à vue detention for up to twelve days would not be unlawful. Further detention, pending a lawful trial and/or resulting from a lawful conviction would not be unlawful.

ii) No argument has been advanced to the effect that the United Kingdom would be in breach of its obligations under Articles 9, 10 and 11 if QJ were to be deported.

iii) The presumption under section 72(2) of the 2002 Act applies, but not that under section 72(4), because the secondary legislation which designates the offence is ultra vires. In any event, we are satisfied that QJ does not have reasonable grounds to fear persecution for a Refugee Convention reason, if returned to Algeria. What he risks is prosecution for a criminal offence. The prohibition on refoulement under Article 33.1 of the Refugee Convention does not, therefore, apply. Even if it did, he has been convicted by a final judgment of a particularly serious crime – the offence under section 17 of the 2000 Act – which, despite his favourable OASYS assessments demonstrates that he constitutes a danger to the community of the United Kingdom.

iv) For similar reasons, he does not qualify for humanitarian protection under Rule 339C of the Immigration Rules.

v) There has been no unreasonable delay on the part of the Secretary of State, who was entitled to withdraw the original notice of refusal of asylum because QJ was a serving prisoner with several years of his sentence to run: no good purpose would have been served by an appeal at that time.

Conclusion

40. For the reasons given, we reject this appeal against the decision of the Secretary of State under section 32(5) of the 2007 Act to deport QJ to Algeria.