Neutral Citation Number: [2013] EWCA Civ 277

Case No: T2/2012/3138

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SPECIAL IMMIGRATION APPEALS COMMISSION
MR JUSTICE MITTING
SC/15/2005

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/03/2013

MASTER OF THE ROLLS
LORD JUSTICE RICHARDS
and
LORD JUSTICE ELIAS

- -

Between:

OMAR OTHMAN AKA ABU QATADA	**Respondent**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Appellant**

- -
- -

Edward Fitzgerald QC and Danny Friedman (instructed by **Birnberg Peirce & Partners**) for the **Respondent**
James Eadie QC, Robin Tam QC, Tim Eicke QC and Jessica Wells (instructed by **Treasury Solicitor**) for the **Appellant**

Hearing date: Monday 11 March 2013

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Judgment Approved by the court for handing down (subject to editorial corrections)

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Master of the Rolls: this is the judgment of the court.

1. Omar Othman is regarded by the United Kingdom government as an exceptionally high risk terrorist. For a number of years, the Secretary of State for the Home Department has been seeking to deport him from the United Kingdom to Jordan under section 5(1) of the Immigration Act 1971 ("the 1971 Act") as a person whose deportation is deemed to be conducive to the public good. He has already been tried and convicted in his absence in Jordan for offences of the utmost seriousness. If returned to Jordan, he will face a retrial. The issue that lies at the heart of the present (and earlier) proceedings is the proper assessment of the risk that the evidence against him at the retrial would include statements that have been obtained by torture and, if so, what effect this has on the lawfulness of his deportation.

2. On 18 February 2009, the House of Lords dismissed his challenges to the Secretary of State's earlier decision to give notice of deportation. On the same day, the Secretary of State signed and served a deportation order under section 5(1) of the 1971 Act. On 17 January 2012, the ECtHR handed down its judgment on his application challenging the lawfulness of his proposed deportation. We shall refer to this judgment as "the Strasbourg decision". The court held that his deportation would violate article 6 of the European Convention on Human Rights ("the Convention") on account of "the real risk of the admission at the applicant's retrial of evidence obtained by torture of third persons". Article 6(1) provides so far as material that in the determination of any criminal charge against him, everyone is entitled to a fair hearing by an independent and impartial tribunal established by law.

3. Following discussions between the British and Jordanian governments (see para 21 below), on 17 April 2012, the Secretary of State notified Mr Othman of her intention to deport him on or about 30 April 2012 and on 18 May she refused to revoke the deportation order that she had earlier made on 18 February 2009. Mr Othman appealed the refusal to revoke the deportation order to the Special Immigration Appeals Commission ("SIAC"). By a decision handed down on 12 November 2012, SIAC (Mitting J, Upper Tribunal Judge Peter Lane and Dame Denise Holt) allowed his appeal.

4. The Secretary of State appeals to this court against that decision with the permission of Richards LJ on the basis that "the high profile of this case and the nature of the issues that it raises provide a compelling reason why an appeal should be heard".

5. It is necessary to emphasise two things at the outset. First, an appeal to this court may only be brought on "any question of law material to [SIAC's] determination": see section 7(1) of the Special Immigration Appeals Commission Act 2007. Secondly, SIAC is an expert tribunal. The ordinary courts should approach appeals from any specialist tribunal with an appropriate degree of caution. As Baroness Hale said in *AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49, [2008] 1 AC 678 at para 30:

> "…it is probable that in understanding and applying the law in their specialised field, the tribunal will have got it right…..They and they alone are judges of the facts. Their decisions should be

> respected unless it is quite clear that they have misdirected themselves in law. Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently…."

6. These general observations were made in a case where the Court of Appeal had allowed an appeal against a decision of the Asylum and Immigration Tribunal. The Supreme Court endorsed and applied them in another asylum case in *MA (Somalia) v Secretary of State for the Home Department* [2010] UKSC 49 , [2011] 2 All ER 65 at para 45 adding:

> "But the court should not be astute to characterise as an error of law what, in truth, is no more than a disagreement with the AIT's assessment of the facts. Moreover, where a relevant point is not expressly mentioned by the tribunal, the court should be slow to infer that it has not been taken into account."

The facts

7. In April 1999, Mr Othman was convicted in his absence in Jordan of conspiracy to cause explosions in a trial known as the *Reform and Challenge* case. He maintained that the case against him was based mainly on the statement of his co-defendant Al-Hamasher to the public prosecutor which was obtained by torture. The State Security Court and the Court of Cassation rejected the contention that the evidence had been obtained by torture. Mr Othman was sentenced to life imprisonment with hard labour.

8. In the autumn of 2000, he was tried again in his absence in Jordan in a case known as the *Millennium Conspiracy.* This concerned an alleged conspiracy to cause explosions aimed at western and Israeli targets in Jordan to coincide with the millennium celebrations. Mr Othman maintained that the main evidence against him consisted of the statement to the public prosecutor of his co-defendant Abu Hawsher who was convicted and sentenced to death. An appeal based on the allegation that this evidence had been obtained by torture was dismissed by the Court of Cassation. Mr Othman was convicted and sentenced to 15 years' imprisonment with hard labour.

9. Like SIAC, we shall refer to the statements of Abu Hawsher and Al-Hamasher as "the impugned statements".

10. In October 2001, the Foreign and Commonwealth Office advised the United Kingdom Government that article 3 of the Convention precluded the deportation of terrorist suspects to Jordan, since there was a real risk that they would face torture or other ill-treatment in that country. The Foreign Secretary therefore decided to seek specific and credible assurances from Jordan, in the form of a memorandum of understanding ("MOU"), so as to avoid the real risk of deportees facing treatment contrary to article 3. On 10 August 2005, a MOU was signed between the United Kingdom and Jordan providing assurances of compliance with international human rights standards. The MOU had implications for article 6 as well as article 3. It was in the light of the MOU that Mr Othman was served with a deportation notice on 11 August 2005. It was his challenge to the ensuing deportation order which was eventually the subject of the Strasbourg decision.

The Strasbourg decision

11. The court set out the now familiar "flagrant denial of justice" test at paras 258 to 262 of its judgment. The principle was first stated by the court in *Soering v United Kingdom* (1989) 11 EHRR 439 at para 113:

> "It is for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if he is removed from a Contracting State, he would be exposed to a real risk of being subjected to a flagrant denial of justice. Where such evidence is adduced, it is for the Government to dispel any doubts about it."

12. It noted that in the 22 years since the *Soering* judgment the court had never found an expulsion which would be a violation of article 6. "Flagrant denial of justice" is a "stringent test of unfairness". What is required is a breach of the principles of fair trial guaranteed by article 6 which is "so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that article."

13. The court then considered whether the admission of evidence obtained by torture amounts to a flagrant denial of justice. It answered this question in the affirmative at para 263 and gave its reasons at paras 264 to 267: the admission of torture evidence is "manifestly contrary, not just to the provisions of art 6, but to the most basic international standards of a fair trial".

14. The court then considered how these general principles applied to Mr Othman's case. It noted that the central issue in the case was the admission of torture evidence. It concluded at para 270 that, if Abu Hawsher and Al-Hamasher had been ill-treated in the manner they alleged, their treatment amounted to torture. This conclusion meant that the remaining issues which the court had to consider were (i) whether a real risk of the admission of torture evidence was sufficient; and (ii) if so, whether a flagrant denial of justice would arise in this case (para 271).

15. The court then proceeded to deal with the first issue at paras 272 to 280. At para 272, the court noted that the evidence that Abu Hawsher and Al-Hamasher had been tortured was even more compelling than at the time of SIAC's determination. It then examined the evidence in detail and concluded that the systemic torture by the GID (the Jordanian Intelligence Service) could "only provide further corroboration for the specific and detailed allegations which were made by Abu Hawsher and Al-Hamasher". At para 273, the court said:

> "However, even accepting that there is still only a real risk that the evidence against the applicant was obtained by torture, for the following reasons, the Court considers it would be unfair to impose any higher burden of proof on him."

16. The reasons set out in the following paragraphs include the statement at para 276 that "thirdly and most importantly, due regard must be had to the special difficulties in proving allegations of torture." It said that not only is torture widespread in Jordan, but so too is the use of torture evidence by its courts (para 277). In support of this conclusion, the court referred to the views of a number of international bodies. One

example will suffice: in its conclusions on article 15 of the United Nations Convention Against Torture 1984 (UNCAT), the Committee Against Torture expressed its concern at reports that the use of forced confessions in courts was widespread. At para 278, the court recognised that Jordanian law provided a number of guarantees to defendants in State Security Court cases. But, in the light of the evidence summarised in the preceding paragraph, the court was unconvinced that these legal guarantees had any practical value. The court identified a number of difficulties and said that the lack of independence of the State Security Court assumed considerable importance in this respect. The court concluded this section of its judgment as follows:

> "279 Thus, while, on any retrial of the applicant, it would undoubtedly be open to him to challenge the admissibility of Abu Hawsher and Al-Hamasher's statements and to call evidence to support this, the difficulties confronting him in trying to do so many years after the event and before the same court which has already rejected such a claim (and routinely rejects all such claims) are very substantial indeed.
>
> 280 Therefore, the Court considers that, given the absence of clear evidence of a proper and effective examination of Abu Hawsher and Al-Hamasher's allegations by the State Security Court, the applicant has discharged the burden that could be fairly imposed on him of establishing the evidence against him was obtained by torture.

17. As regards the first issue, therefore, the court held that it was sufficient to prove that there was a real risk that evidence obtained by torture would be admitted at the retrial and Mr Othman had discharged the burden of proving that there was such a risk in this case.

18. As for the second issue, the court noted at para 281 that SIAC (in its decision of 26 February 2007) had found that there was a high probability that the evidence incriminating Mr Othman would be admitted at the retrial and that the evidence would be of considerable, perhaps decisive, importance against him. The court agreed with this conclusion and said at para 282:

> "The Court has found that a flagrant denial of justice will arise when evidence obtained by torture is admitted in criminal proceedings. The applicant has demonstrated that there is a real risk that Abu Hawsher and Al-Hamasher were tortured into providing evidence against him and the Court has found that no higher burden of proof can fairly imposed upon him. Having regard to these conclusions, the Court, in agreement with the Court of Appeal, finds that there is a real risk that the applicant's retrial would amount to a flagrant denial of justice."

19. Again at para 285, the court said:

> "Moreover, in the course of the proceedings before this Court, the applicant has presented further concrete and compelling evidence that his co-defendants were tortured into providing the case against him. He has also shown that the Jordanian State Security Court has proved itself to be incapable of properly investigating allegations of torture and excluding torture evidence, as art 15 of UNCAT requires it to do. "

20. It concluded at para 285:

> "In those circumstances, and contrary to the applicants in *Mamatkulov*, the present applicant has met the burden of proof required to demonstrate a real risk of a flagrant denial of justice if he were deported to Jordan.

Subsequent events

21. What happened thereafter is described in detail by SIAC at paras 44 to 48 of its judgment. Extensive discussions took place between ministers and officials of the British and Jordanian governments. With the qualification that the Jordanian government could not interfere with the judicial decision-making, they made it clear that they would do everything in their power to ensure that a retrial was fair. If Mr Othman were deported, the court for the retrial would comprise three civilian judges. They would not be chosen by the Prime Minister, but would be appointed by the Council of Judges. It was clear that the GID would have nothing to do with his arrest, questioning or detention and would not seek to influence a retrial in any way. Finally, there was evidence that the reputation of the court was improving and that the Jordanian judiciary were determined to ensure that Mr Othman would receive, and would be seen to receive, a fair retrial. In short, the court at the retrial would be impartial, independent and could approach the case fairly and conscientiously.

22. It was these developments which formed the basis of the submission on behalf of the Secretary of State before SIAC that there was no longer a real risk of a flagrant denial of justice if Mr Othman were to face a retrial in Jordan.

The decision of SIAC under appeal

23. At para 18, SIAC said that the relevant test involved the assessment of three "risks": (i) the risk that Mr Othman would be retried for two offences of conspiracy to cause explosions; (ii) the "risk" that the impugned statements were obtained by torture; and (iii) the risk that the statements would be admitted against him at his retrial. We agree with SIAC that the use of the word "risk" in relation to (ii) (a past event) is not entirely apt, but like SIAC we shall use it for the sake of convenience.

24. It was common ground that the first risk had been established. At para 20, SIAC said that it was also common ground that it was impossible to prove that there was not a real risk that the impugned statements were obtained by torture for the reasons given at paras 272 and 278 of the Strasbourg decision. For these reasons, the appeal to the SIAC proceeded on the footing that the first two risks existed and the focus of the case was on the third (para 21).

25. The Strasbourg court had found that there was a high probability that the impugned statements would be admitted at the retrial**.** It had therefore been unnecessary for that court to identify the factors which would give rise to such a risk. But now SIAC had heard and read a good deal of fresh evidence which had not been available in the earlier proceedings and which required that judgment to be revisited.

26. At para 23, SIAC rejected the submission of Mr Fitzgerald QC on behalf of Mr Othman that there would be a real risk of a flagrantly unfair trial unless the law of the receiving state required its courts to satisfy themselves before or at the outset of any trial that there was no real risk that a statement inculpatory of an accused was obtained by torture. It said:

> "….The Strasbourg Court has always been careful not to seek to impose Convention standards on foreign states, for the obvious reason that the Convention only binds contracting states: *Drozd & Janousek v. France and Spain* [1992] 14 EHRR 745 at §110. To require of a foreign state that its laws replicate, in detail and with precision, those imposed on contracting states would be contrary to that approach. It would also go beyond the express requirement of Article 15 of the 1984 United Nations Convention against Torture and other Cruel Inhuman or Degrading Treatment or Punishment which requires 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, except against a person accused of torture as evidence that the statement was made."
>
> It would also contradict the Strasbourg Court's own observation in §276 that in a truly independent criminal justice system where cases are prosecuted impartially and allegations of torture conscientiously investigated, "one might conceivably require a defendant to prove to a high standard that the evidence against him had been obtained by torture". In our judgment, the provisions of the law of the receiving state as to the burden of proof and the stage at which a determination must be made whether evidence has been obtained by torture and so can or cannot be admitted or relied upon, are important factors in determining whether there is a real risk that such evidence would be admitted but are not by themselves determinative of the question. We do, however, accept that, in the words of Buxton LJ, cited by the Strasbourg Court in §51, a "high degree of assurance" is required before a person may lawfully be deported to face a trial that may involve evidence obtained by torture: [2008] EWCA Civ 290 §49."

27. Having referred to the developments to which we have referred at para 21 above, SIAC concluded at para 49:

> "If the only question which we had to answer was whether or not, in a general sense, the appellant would be subjected to a flagrantly unfair retrial in Jordan, our unhesitating answer would be that he would not. That answer is not, however, sufficient to dispose of the principal ground of appeal under Article 6. Although criticisms of the State Security Court formed a significant part of the reasoning of the Strasbourg Court, the determinative question for it and for us is whether or not there is, under Jordanian law, a real risk that the impugned statements of Abu Hawsher and Al-Hamasher would be admitted as probative of the appellant's guilt at his retrial. To answer that question it is necessary to analyse Jordanian law and to attempt to forecast how it would be applied by the three civilian judges in the State Security Court."

28. SIAC then proceeded to consider two questions of Jordanian law which it described as "critical questions" which would determine whether there was a real risk that the impugned statements would be admitted in evidence. The first was whether, irrespective of the means by which they were obtained, the impugned statements were admissible at all under article 148.2 of the Code of Criminal Practice. The second was whether a recent amendment to article 8 of the Jordanian Constitution altered the rules relating to the admissibility of confessions obtained by torture so as to satisfy the requirements of article 6 of the Convention.

29. Article 148.2 of the Code provides:

> "The statement of a defendant against another defendant shall be admissible if there is other evidence to support it and the other defendant or his lawyer shall have the right to cross-examine the defendant concerned."

SIAC considered the first question carefully and comprehensively at paras 55 to 66. All criminal proceedings against Al-Hamasher in respect of the two plots were concluded years ago. Abu Hawsher was pardoned and released in November 2011, so that all criminal proceedings against him had been concluded too. The principal contention advanced by the Secretary of State was that, in these circumstances, neither man was a "defendant" so that their statements were not admissible under article 148.2. Since nobody had suggested that the impugned statements would be admissible under any other provision of Jordanian law, there could be no question of their being admitted as evidence against Mr Othman at a retrial. SIAC heard and read expert evidence on this issue to which it is unnecessary to refer in detail. It is sufficient to say that the experts did not agree. At para 66, SIAC concluded that, until and unless the Court of Cassation gives an authoritative ruling on the question, it must remain open. Both views were tenable. The Secretary of State had failed to establish that there was not a real risk that the impugned statements would be admitted as evidence against Mr Othman. Mr Eadie QC does not seek to challenge this finding.

30. SIAC then proceeded to consider the second question of Jordanian law. Article 159 of the Code of Criminal Procedure provides:

> "The testimony of the indicted or the accused or the defendant in the absence of the public prosecutor's presence, where he confesses the crimes committed shall only be accepted if the prosecution submit evidence on the conditions in which the testimony was obtained, and the court is satisfied that the indicted, accused or defendant had given such testimony out of free will and choice."

31. Having set out the terms of article 159, SIAC continued at para 68:

> "Case law of the Court of Cassation establishes that which is implicit in Article 159 : a statement made by a person to the public prosecutor is "legal evidence" and, by necessary implication, treated as made freely and not under duress unless the contrary is established by "legal evidence". If it is, the court must rule it inadmissible, as the Court of Cassation did in a high profile case 74/1994, *Alouhuah & Others*, in which the defendants were convicted of a conspiracy against the life of the King. As far as we can tell from the cases cited to us, to satisfy the test of adducing "legal evidence", a defendant must, in practice, produce independent medical evidence of injuries or the signs of ill-treatment and/or detention for a period not permitted by Jordanian law. Both were present in that case. Complaints by a defendant, whether or not supported by the evidence of his relatives and friends do not appear to suffice, as the trials and appeals in the two cases in which the appellant was convicted demonstrate. In common law language, the burden of proving that a statement made to a public prosecutor was obtained by duress or worse is on the maker of the statement and has, historically, been difficult to discharge."

32. In 2011, a significant amendment was made to article 8 of the Jordanian Constitution. Article 8.2 in its amended form provides:

> "Every person who is arrested, imprisoned or whose freedom is restricted must be treated in a way that preserves his/her human dignity. It is forbidden for him/her to be tortured (in any form) or harmed physically or mentally, as it is forbidden to detain him/her in places other than those designated by the laws regulating prisons. Any statement extracted from a person under duress of anything of the above or the threat thereof shall neither be taken into consideration or relied on."

33. At para 70, SIAC said that this amendment "may have the effect of making it easier to challenge confessions allegedly procured by torture." But there was a difference of opinion among the experts about that too. SIAC's conclusion on this question was set out at para 72 in these terms:

> "Any view expressed by us about this issue must necessarily be tentative. We can do no better that the three eminent lawyers who expressed their opinion on 29th February 2012:

> it is not known what effect the amendment will have in practice. There must remain at least a real risk that the three civilian judges of the State Security Court will accept the "conservative" proposition for which Major General Al-Faouri contends. It is likely to require a definitive ruling by the Court of Cassation or the newly established Constitutional Court to overturn that approach and place the burden of proof that the statements were not obtained by torture on the state prosecutor."

Mr Eadie does not challenge this assessment.

34. SIAC's overall conclusion on the question whether there was a real risk that the impugned statements would be admitted even though there was a real risk that they had been obtained by torture was expressed at para 73:

> "If the burden of proving that the impugned statements were obtained by torture is imposed on the appellant, it will be difficult to discharge. They were made over fourteen years and nearly twelve years ago respectively. The only medical evidence available is that given by Dr. Al-Hadidi in the Reform and Challenge trial. Evidence from relatives in the Millennium trial will be on file and they may be able to give oral evidence. The same is true of co-defendants in both trials. All of that evidence may, however, be discounted or disbelieved, as it was before. Even if, as we believe would be the case, the three judges who try him will be independent and impartial and will evaluate the evidence conscientiously, it may simply be too late and too difficult for the appellant to discharge the burden of proof, especially if the judges do not accept the general truthfulness of Abu Hawsher and Al-Hamasher as they may well not, for good reason. The Strasbourg Court's observation in § 276, which envisages the possibility that the burden of proof might legitimately be cast upon a defendant will not apply, even if the prosecutor at the retrial is impartial and the court independent and impartial because, in the view of the Strasbourg Court, the damage was done when the statements were taken by a prosecutor who was not impartial. The only means of eliminating a real risk that statements which may well have been obtained by torture will be admitted probatively at the appellant's retrial would be for the burden of proving, to a high standard, that they were not, to be placed upon the prosecutor. Anything less gives rise to a real risk that they will be."

35. In his closing remarks to SIAC, Mr Tam QC submitted that because of the number of possible outcomes of a retrial, the risk that the impugned statements would be admitted probatively was "vanishingly small". He identified seven such possible outcomes. They have assumed more significance before us than they did before SIAC. We set them out at para 52 below.

36. At para 77, SIAC said:

> "While we acknowledge that there are a number of possible outcomes which would not involve the admission of the impugned statements probatively, that fact does not determine the narrow questions which we have to answer."

37. Finally, SIAC expressed its overall conclusion on the article 6 issue at para 78 as follows:

> "The Secretary of State has not satisfied us that, on a retrial, there is no real risk that the impugned statements of Abu Hawsher and Al-Hamasher would be admitted probatively against the appellant. Until and unless a change is made to the Code of Criminal Procedure and/or authoritative rulings are made by the Court of Cassation or Constitutional Court which establish that statements made to a public prosecutor by accomplices who are no longer subject to criminal proceedings cannot be admitted probatively against a returning fugitive and/or that it is for the prosecutor to prove to a high standard that the statement were not procured by torture, that real risk will remain."

The two grounds of appeal

38. The first ground of appeal is that SIAC erred at para 73 of its judgment in finding that there would be a real risk of a flagrant denial of justice on transfer to Jordan unless it could be established that, under Jordanian law, the prosecutor would bear "the burden of proving to a high standard" that the impugned statements would not be admitted in evidence at the retrial.

39. The second ground of appeal is that SIAC failed to consider the question whether there was a real risk of a flagrant denial of justice in the round. There are three elements to this. First, SIAC was wrong to give separate consideration to (i) the risk that the statements had been obtained by torture and (ii) the risk that the statements would be admitted at the retrial. Secondly, when assessing the risk that the statements would be admitted in evidence, SIAC was wrong to give separate consideration to the two "critical" questions of Jordanian law to which we have referred at paras 28 to 33 above. These questions should have been considered cumulatively: the existence of *two* potential obstacles to the admission of the statements reduced the risk that they would be admitted. Thirdly, in assessing the risk that the statements would be admitted, SIAC focused exclusively on the two critical questions and failed to consider other possibilities that might have affected the assessment of that risk.

The first ground of appeal

40. Mr Eadie puts his argument in alternative ways. The first can be summarised as follows. SIAC erred in elevating the requirement that the burden of proof be placed on the prosecutor from being one of a number of factors relevant to determining whether there would be a real risk of a flagrant denial of justice into a factor that was determinative of that issue. This was wrong in principle. There is nothing in the

Strasbourg jurisprudence to support the proposition that the burden of proving that evidence was *not* obtained by torture and will *not* be admitted in evidence should as a matter of law be placed on the prosecution if a real risk of a flagrant denial of justice is to be avoided. Whether this risk exists is a question of fact to be determined in the light of all the circumstances of the case. SIAC stated the position accurately at para 23: the provisions of the law of the receiving state as to the burden of proof are important factors as to whether there is a real risk of flagrant denial of justice, but they are not determinative.

41. Mr Eadie submits that even in the context of a "domestic" case (ie one not involving expulsion of a person by one state to face trial in another state), the ECtHR jurisprudence does not support the proposition that, as a matter of principle, article 6 requires the burden of proof to be on the prosecutor in cases concerning evidence which is alleged to have been obtained by torture. In *El Haski v Belgium* (Application No 649/08) 25 September 2012, the court went no further than to require independent, impartial and conscientious examination of the claim that the evidence was obtained by torture. It said at para 89:

> "The domestic court therefore cannot admit the evidence in question without first having examined the arguments of the accused relating to that evidence and satisfying itself that, notwithstanding those arguments, there is no [risk that the statement was obtained by torture]."

42. We cannot accept the first of Mr Eadie's alternative arguments. Para 73 must be read in the context of the judgment as a whole, including para 23. It is rightly accepted by the Secretary of State that what SIAC said about the burden of proof in para 23 was unimpeachable: the provisions as to the burden of proof are "important factors in determining whether there is a real risk that such evidence would be admitted, but are not by themselves determinative of the question". If Mr Eadie is right, at para 73 SIAC overlooked what it had said at para 23. This would have been a surprising mistake to make, particularly in such a central part of its reasoning. Further, on any view, this is a detailed and careful judgment by an experienced tribunal. It would be wrong to conclude that SIAC made such a mistake unless that is the only reasonable interpretation of para 73.

43. Far from being satisfied that there is no other reasonable interpretation, we consider that the natural and proper meaning of para 73 is consistent with para 23. Having decided at para 23 that the burden of proof was an "important" factor, SIAC considered this important factor in the context of evidence that the Jordanian case law shows that (i) a defendant must, in practice, produce independent medical evidence of injuries or the signs of ill-treatment; and (ii) complaints by a defendant, whether or not supported by the evidence of relatives or friends do not appear to suffice: see para 68 (quoted at para 31 above). If SIAC had intended to say that, as a matter of principle, the burden of proof to a high standard must be on the prosecutor in all cases, it would surely have said so. Instead, SIAC explained why *on the facts of this case* the only way of eliminating a real risk that the impugned statements would be admitted as evidence at the retrial would be to place the burden of proof on the prosecutor to a high standard to show that the statements would not be admitted.

44. The second of Mr Eadie's alternative arguments is that, if at para 73 SIAC did not propound a principle that the burden of proof should be placed on the prosecution, then it was plainly wrong to hold that there should be a burden on the prosecution on the facts of this case. In particular, he makes the following points. First, since the date of the Strasbourg decision, there have been the important developments to which we have referred at para 21 above. Secondly, the existence of the flaws in the Jordanian system which these developments have remedied was prominent among the reasons that led the ECtHR to reach the decision that it did in 2012. Thirdly, there was a series of compelling reasons for concluding that both the executive and judicial authorities in Jordan would do everything in their power to ensure that a retrial was fair. Fourthly, in so far as the burden of proving that the impugned statements were obtained by torture would be difficult for Mr Othman to discharge for the reasons given by SIAC, this is something which the Jordanian courts would take into account.

45. The real difficulty that Mr Eadie faces is that in substance his criticism is of SIAC's assessment of the facts. But the Secretary of State can only appeal on a point of law. Her fundamental complaint is that SIAC did not take into account or (if it did) it did not place sufficient weight on the fact that the Jordanian court is independent, impartial and, in its quest for a fair trial, would conscientiously take account of the difficulties that Mr Othman would face in seeking to prove that the impugned statements were obtained by torture. But SIAC did expressly take into account the fact that the three judges who tried Mr Othman would be independent and impartial and would evaluate the evidence conscientiously. Its judgment was that it may simply be "too late and too difficult" for Mr Othman to discharge the burden of proof if it were placed on him. That was an assessment of the facts that it was entitled to make. It is impossible to hold that it was irrational (and Mr Eadie did not contend that it was). There was ample material on which it could properly reach this conclusion: see para 68 of the judgment. It is also worth noting that SIAC's point that "it may be simply too late" precisely reflects para 279 of the Strasbourg decision. SIAC was entitled to hold that none of the developments that had taken place since the Strasbourg decision would overcome the difficulties to which it referred at para 73.

46. For all these reasons, we reject the first ground of appeal.

The second ground of appeal

47. In the grounds of appeal, the focus of the Secretary of State's criticism was on the failure of SIAC to weigh up (i) the level of risk that the impugned statements had been obtained by torture and (ii) the level of risk that they would be admitted in evidence, having regard cumulatively to the two principal routes by which the evidence might be excluded (the two "critical" questions of law) and to consider whether the *combination* of these two risks was sufficient to constitute a real risk of a flagrant denial of justice. In Mr Eadie's supplemental skeleton argument, the focus of the argument is somewhat different. Here the point that is emphasised is that, in relation to the key question of whether there was a real risk that the impugned statements would be admitted in evidence, SIAC failed to consider *all* the matters that were relevant to the weighing of the risk. In particular, Mr Eadie submits that its approach to the seven possible "outcomes" suggested by Mr Tam in his closing address was impermissibly narrow. Mr Eadie prays in aid para 77 of the judgment as showing that SIAC excluded these possibilities from its evaluation of the risk that the evidence would be admitted because they did not "determine the narrow questions

which we have to answer" (para 77). That was a flawed approach. He submits that in any exercise of risk assessment, a small risk multiplied by a small risk results in an even smaller risk: see, for example, *A-G v MGN Ltd* [1997] 1 All ER 456 at p 460 per Schiemann LJ.

48. We are not persuaded by these arguments. We start with the submission that SIAC failed to consider whether the combination of the two risks was sufficient to constitute a real risk of a flagrant denial of justice. As we have seen, it was common ground that it was impossible to prove that there was no real risk that the impugned statements were not obtained by torture: see para 20 of SIAC's judgment. The focus of the case was therefore on whether there was a real risk that the statements would be adduced in evidence. That is how the case was argued before SIAC. It was to that issue that the evidence was directed. This is hardly surprising in view of the findings made in the Strasbourg decision. The evidence that the impugned statements had been obtained by torture was said by the ECtHR to be "even more compelling than at the time of SIAC's [original] determination" (para 272). In that same paragraph, the court said:

> "If anything, it was worse when the applicant's co-defendants were detained and interrogated. The systemic nature of torture by the GID (both then and now) can only provide further corroboration for the specific and detailed allegations which were made by Abu Hawsher and Al-Hamasher"

As we have seen, at para 285 the court said that the applicant had presented "further concrete and compelling evidence that his co-defendants were tortured into providing the case against him."

49. In other words, this was not a case of a slight possibility that the statements had been obtained by torture. We accept that, if SIAC had considered that the risk that the statements had been obtained by torture was remote, then it would have been necessary to take that fact into account, together with its assessment of the seriousness of the risk of the evidence being admitted, when it made its overall judgment as to whether there was a real risk of a flagrant denial of justice. But the ECtHR made strong findings as to the compelling nature of the evidence that the statements had in fact been obtained by torture. That is why the focus of the enquiry before SIAC was on whether there was a real risk that these statements would be admitted as evidence against Mr Othman at his retrial. That is no doubt why it was common ground before SIAC that, if it were shown that there was a real risk that the statements would be admitted as evidence, it would follow that there was a real risk that there would be a flagrant denial of justice. In adopting this approach, SIAC made no error of law on the facts of this case.

50. We turn to the other aspect of the second ground of appeal. The focus here is on the approach adopted by SIAC to deciding whether there was a real risk that the impugned statements would be admitted in evidence. In examining this question, SIAC concentrated on the two "critical" questions of Jordanian law. However, it is relevant to note that at para 22 SIAC identified a number of other factors which they also had to take into account in evaluating the risk that the statements would be admitted in evidence. These included "the nature and composition of the court which will retry him and, insofar as it can be ascertained, the attitude of the judges".

51. We do not accept that SIAC failed to have regard to the combined effect of the two possible ways in which the evidence might properly be excluded under Jordanian law. It is true that it did not in terms state that it was considering the combined effect of these two potential hurdles, but it is trite law that it would need to do this and as the Supreme Court noted in the *MA (Somalia)* case (see para.6 above), we should be slow to assume that the court made such an error simply because it did not state in terms that it was considering the evidence in the round. Moreover, in our judgment, since SIAC decided that the relevant law in relation to *both* matters was so uncertain, the only conclusion it could properly reach was that there was a real risk that evidence obtained by torture would be admitted.

52. In the light of the way that the issue was presented by the parties to SIAC, it is not surprising that it concentrated on the narrow question of whether, having regard to the two critical questions, there was a real risk that the impugned statements would be admitted in evidence. Those were the live issues in the case as it was presented by the parties. It is worth pointing out that all parties were represented by leading counsel. That is how they saw the case at the time. In these circumstances, this court should be slow to find that this approach was wrong in law.

53. But we are not satisfied that SIAC did in fact approach the question of whether there was a real risk that the impugned statements would be admitted in such a narrow way. We have already referred to para 22. We need to address the seven possible "outcomes" suggested by Mr Tam for the first time in this way in his closing submissions and which Mr Eadie submits SIAC failed to take into consideration. They were:

(1) The Jordanian courts might decide (in accordance with the view of the Jordanian legal expert instructed on behalf of the Secretary of State, Mr Thaer Najdawi) that, under Article 148.2 of the Jordanian Code of Criminal Procedure, Abu Hawsher and Al-Hamasher would no longer be regarded as co-defendants, but would be required to give their evidence as ordinary witnesses on oath and that the court could only act on their fresh evidence and not on their previous statements;

(2) they might not appear to give evidence at the retrial and consequently, under Article 148.2, because there would not have been an opportunity to cross-examine them, their previous statements could not be taken into account;

(3) they might attend and give fresh evidence in which they confirmed what they said in their previous statements. In that situation, the court would be acting on the basis of their fresh evidence which had not been obtained by torture;

(4) they might attend and give fresh evidence in which they properly and convincingly explained that their previous statements were not obtained by torture, in which case the court could properly take that into account in determining whether or not the previous statements had been obtained by torture;

(5) they might attend and give fresh evidence in which they contradicted their previous statements and the court might prefer the fresh evidence given before it and attach no probative weight to their previous statements;

(6) there might be no corroboration of their evidence against Mr Othman, in which case their evidence (whether in the form of their previous statements or their fresh evidence to the court) would not be admissible under Article 148.2;

(7) they might attend and give fresh evidence, but the court might prefer their original statements to the fresh evidence given before the court. It is only at this stage that the court would be required to consider whether those statements should be admitted in evidence, given that an issue had been raised that the statements had been obtained by torture.

54. As to (1), SIAC explained in detail at paras 55 to 67 why it could not accept Mr Najdawi's thesis. As to (2), it said at para 53 that it was satisfied that Abu Hawsher and Al-Hamasher would be available for cross examination: article 226 of the Code of Criminal Procedure gives the court the power to call any person as a witness and to issue a summons or warrant to secure his attendance if necessary. As to (3) and (4), the only evidence available to SIAC was that Abu Hawsher and Al-Hamasher had repeatedly said that their statements had been obtained by torture. That was the basis on which they had appealed against their own convictions: see paras 28 and 31. There was no evidence to support the possibility that they might change their accounts and say that they had made their statements voluntarily. Such a possibility would be mere speculation. As to (5), there was no evidence to suggest that this was a realistic rather than a speculative possibility either. As to (6), SIAC made specific findings that there was available evidence to corroborate the impugned statements. This was set out in some detail at para 27. At para 74, SIAC referred to the fact that Jordanian law requires corroboration and said: "There is, in each case, some supporting evidence, as we have set out above". As to (7), this does not seem to add anything to the other possible "outcomes" already considered.

55. For these reasons, we accept the submission of Mr Fitzgerald that SIAC dealt with all these possibilities, save those which were speculative and without evidential foundation. So what was SIAC saying at para 77? It was not saying that it was unnecessary to address any of the possible outcomes suggested by Mr Tam. That is clear from its explicit acknowledgement of the fact that there *were* a number of possible outcomes which would not involve the admission of the impugned statements in evidence. Furthermore, SIAC did not go on to say that the possible outcomes were *irrelevant* to the narrow questions that it had to decide. It said that they did not "determine" those questions. That was clearly correct. SIAC might have been better advised to expand para 77 to explain what it was saying in a little more detail. But we are not persuaded that there is any merit in this aspect of ground 2. SIAC dealt fully with all the matters which realistically bore on the question whether the impugned statements would be adduced in evidence. At the forefront of these were the two critical questions of Jordanian law and there is no challenge to the way in which SIAC dealt with them. As we have explained, SIAC also dealt with Mr Tam's possible "outcomes" in so far as there was an evidential basis for doing so. It cannot be criticised for failing to deal explicitly with mere speculative possibilities.

Overall conclusion

56. Mr Othman is considered to be a dangerous and controversial person. That is why this case has attracted so much media attention. It is entirely understandable that there is a general feeling that his deportation to Jordan to face trial is long overdue.

But the principles that we have to apply do not distinguish between extremely dangerous persons and others who may not constitute any danger in the United Kingdom and whom the Secretary of State wishes to deport to face trial in another country. The fact that Mr Othman is considered to be a dangerous terrorist is not relevant to the issues that are raised on this appeal. It would be equally irrelevant if we were deciding the question whether there was a real risk that he would be tortured if he were returned to Jordan.

57. Strasbourg recognises that it is only in a very rare case that a state should be prevented by the ECHR from deporting persons to face trial in the courts of another country. The fact that there is a risk that the deported person will not have a fair trial is not enough. There must be a real risk that he or she will suffer a flagrant denial of justice. Strasbourg has rightly set the bar very high. The unfairness must be of a very high order. What is required is a real risk of a breach of the principles of a fair trial guaranteed by article 6 which is "so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that article".

58. Torture is universally abhorred as an evil. A state cannot expel a person to another state where there is a real risk that he will be tried on the basis of evidence which there is a real possibility may have been obtained by torture. That principle is accepted by the Secretary of State and is not in doubt. That is the principle which SIAC had to apply in the present case in the light of all the evidence that it heard and read. This included evidence as to what had happened and what there was a real risk would happen if Mr Othman faced a retrial on the very serious charges that he faces. SIAC found that there was a real risk that evidence obtained by torture would be admitted at the retrial and that, as a consequence, there was a real risk that he would be subject to a flagrant denial of justice.

59. In order to succeed in this appeal, the Secretary of State has to show that SIAC erred in law. It is not sufficient to persuade us that we would have reached a different conclusion on the facts and Mr Eadie rightly recognised the difficulty of such an exercise. The Secretary of State accepts that SIAC directed itself properly as to the general legal test to apply. Her case that SIAC nevertheless erred in law is based on a detailed examination of a careful and comprehensive judgment. As we have stated at paras 5 and 6 above, criticisms of this kind of a decision by a specialist tribunal are particularly difficult to sustain. For the reasons that we have given, we are satisfied that SIAC did not commit any legal errors.

60. This appeal must therefore be dismissed.