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RECENT HUMAN RIGHTS DEVELOPMENTS IN EXTRADITION LAW & RELATED IMMIGRATION LAW[1]

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This article provides a critical overview of some key human rights developments since January 2012 in the field of extradition and deportation law. It is arranged by reference to the key Articles of the European Convention on Human Rights likely to be engaged, namely, Articles 3, 8 and 6.

1. ARTICLE 3

Assurances and the Abu Qatada case

The case of *Othman (Abu Qatada) v UK*[2] represents something of a setback in the European Court of Human Rights for the cause of Article 3 protection. Here the Court accepted the assurance of the Jordanian regime that Abu Qatada would not be tortured or ill-treated on his return despite acknowledging of the systemic practice of torture in Jordan. The Court refused to accept or adopt any *general* principle that assurances could not reduce the risk to an acceptable level even in a country which routinely practises torture.[3] Instead, it laid down a list of relevant factors for the courts to apply when deciding on the reliability of 'non-torture' assurances from the requesting or receiving state:

> "More usually, the Court will assess first, the quality of assurances given and, second, whether, in light of the receiving state's practices they can be relied upon. In doing so, the Court will have regard, *inter alia*, to the following factors:

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[1] This article is based on the keynote speech by Edward Fitzgerald QC at the Justice International Crime Conference, Tuesday 19 March 2013. Originally entitled 'Evolving Human Rights Standards in Cross-Border Criminal Cases.'

[2] [2013] 55 EHRR 1.

[3] At paras 193-6.

(i) whether the terms of the assurances have been disclosed to the Court;
(ii) whether the assurances are specific or are general and vague;
(iii) who has given the assurances and whether that person can bind the receiving state;
(iv) if the assurances have been issued by the central government of the receiving state, whether local authorities can be expected to abide by them;
(v) whether the assurances concerns treatment which is legal or illegal in the receiving state;
(vi) whether they have been given by a Contracting State;
(vii) the length and strength of bilateral relations between the sending and receiving states, including the receiving state's record in abiding by similar assurances;
(viii) whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms, including providing unfettered access to the applicant's lawyers;
(ix) whether there is an effective system of protection against torture in the receiving state, including whether it is willing to co-operate with international monitoring mechanisms (including international human-rights NGOs), and whether it is willing to investigate allegations of torture and to punish those responsible;
(x) whether the applicant has previously been ill-treated in the receiving state; and
(xi) whether the reliability of the assurances has been examined by the domestic courts of the sending/contracting State."[4]

Applying these guidelines in the *Othman* case, the Court relied on the strong bilateral relationship between the UK and Jordan, the specificity and detail of the memorandum of understanding between the two states, and the high profile of Mr Othman as removing any 'real risk' of torture despite the evidence of systemic torture there. It confirmed that the efficacy of assurances to reduce Article 3 risks to an acceptable level (i.e. to remove the 'real risk' of ill-treatment or torture) must be judged on a case by case basis. This put an end to an emerging jurisprudence, exemplified in *Ismoilov*[5] that non-torture assurances would simply not be accepted from states where torture is systemic or endemic.

[4] At para 189. Cases referred to by the European Court have been omitted.
[5] (2009) 49 EHRR 42 [127].

The test in extradition cases

Harkins & Edwards v UK[6] is important for clarifying that the Article 3 test is the same for both extradition and deportation cases, namely the existence of *substantial grounds* for believing that there is a *real risk* of torture or ill-treatment:

> "The Court therefore concludes that the *Chahal*[7] ruling (as reaffirmed in *Saadi*[8]) should be regarded as applying equally to extradition and other types of removal from the territory of a contracting state and should apply without distinction between the various forms of ill-treatment which are prevented by Article 3."[9]

This was a significant rejection of the 'relativist' approach to Article 3 protection advocated for extradition cases by Lord Hoffman in *Wellington*.[10] Here, Lord Hoffman had reasoned that protection from ill-treatment was a *relative* concept and that the public interest in upholding extradition arrangements and avoiding impunity somehow justified a 'higher threshold' in order to find a violation of Article 3 in extradition cases. The European Court rejected this and reaffirmed the principle that the protection from ill-treatment under Article 3 was 'absolute'.[11] However the European Court did recognise that because 'the Convention does not purport to be a means of requiring the Convention states to impose Convention standards on other states...treatment which might violate Article 3 because of an act or omission of a contracting state might not attain the minimum level of severity which is required for there to be a violation of Article 3 in an expulsion or extradition'.[12]

Mandatory life sentences without parole

The *Harkins* case itself involved the applicant's exposure in the State of Florida to a mandatory sentence of life without parole on conviction for murder on the basis of the outdated 'felony murder' rule. The Court distinguished between the two types of sentence of life imprisonment without parole:

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[6] (2012) 55 EHRR 19.
[7] (1997) 23 EHRR 413.
[8] (2009) 49 EHRR 30.
[9] At para 128.
[10] [2009] 1 AC 335.
[11] At paras 124-5.
[12] At para 129.

i) A discretionary sentence of life imprisonment without the possibility of parole;
ii) A mandatory sentence of life imprisonment without the possibility of parole.[13]

The Court held that the Article 3 issues did not arise at the time the sentence was imposed but only at the point – many years down the line – when 'continued incarceration no longer serves any legitimate penological purpose.' It continued that no Article 3 issue arose unless the life sentence was '*irreducible de facto* and *de iure*'.[14] The Court reasoned that, in Mr Harkins' case, the time at which his incarceration no longer served any legitimate penological purpose might not ever arise, because his crime certainly deserved lengthy detention. And if that point was ever reached, there was still the power of executive clemency vested in the governor of Florida.[15]

The net effect is that extradition will be refused on Article 3 grounds only when the mandatory life sentence, that will foreseeably be imposed in the requesting state, will be grossly disproportionate on the facts at the time when it is imposed. The Court rejected any argument based on such gross disproportionality in Mr Harkins' case – though he was only twenty at the time and would be sentenced to life without parole on the basis of the discredited felony-murder rule.[16] This is a disappointing result. It shows just how difficult it will be to rely on disproportionality of sentence as a ground for refusing extradition. But, the European Court has at least now clearly accepted that, in principle, extradition can be refused when the foreseeable sentence in the receiving state will be grossly disproportionate to the facts of the case.

Prison conditions in 'Supermax'

In *Ahmad & Others*[17] the European Court rejected the Article 3 challenge to extradition on grounds of prison conditions in Supermax Prisons in the United States and, in particular, the ADX Florence prison in Colorado. The Court did not distinguish between the applicable test for the inhumanity of 'solitary' conferred in a domestic European case and in a 'foreign' extradition

[13] Ibid n 6 para 134.
[14] Ibid n 6 para137.
[15] At Ibid n 6 para 140. The later decision in *Ahmad & Others v UK* (2013) 56 EHRR 1 [176] was to like effect.
[16] Ibid n 6 para 139.
[17] (2013) 56 EHRR 1.

case.[18] It held that indefinite detention in solitary confinement might well 'reach the minimum level of severity required for a violation of Article 3':

> "If an applicant were at real risk of being detained indefinitely at ADX, then it would be possible for conditions to reach the minimum level of severity required for a violation of Article 3."[19]

However, the European Court accepted (highly contentious) evidence of a real possibility of progress out of the isolation regime and, on that basis, held that extradition to face detention in ADX Colorado would not violate Article 3 (para 223). There was a further unsuccessful attempt by the applicants to stop extradition by the Home Secretary on the basis that the European Court had misunderstood the evidence, and there clearly was a risk of indefinite, long-term detention in solitary.[20] Overall, the future prospects of ever stopping extradition to the United States on grounds of prison conditions do not appear good.

Prison conditions in other extradition contexts

Even so, there have been Article 3 rulings in the English courts blocking extradition to other jurisdictions on grounds of prison conditions and these have clearly been influenced by the recent development in case law.

In *Lutsyuk v Government of Ukraine*[21] the Divisional Court took as its starting point on prison conditions the decision of the Asylum and Immigration Tribunal in the case of *PS (Prison Conditions, Military Service) Ukraine v Secretary of State for the Home Department CG*:[22]

> "Imprisonment in the Ukraine is likely to expose the detainee to the real risk of inhuman or degrading ill-treatment that would cross the Article 3 threshold."

This finding of a specialist tribunal on the very issue before the court was stated to be 'an authoritative starting point'[23] and of a kind that should 'usually be determinative of the specific issue it addresses',[24] where the same

[18] At paras 205ff.
[19] At para 223.
[20] See *R v Secretary of State ex parte Ahmad & Others* [2007] EWHC 3217 (Admin).
[21] *Lutsyuk v Government of Ukraine*, Court of Appeal - Administrative Court, January 18, 2013, [2013] EWHC 189 (Admin) - CO/889/2012
[22] [2006] UKAIT 00016 [100].
[23] Para 15 of Laws LJ's judgment.
[24] Per Higginbottom J at para 24.

issue arises in the extradition context. The requested person did not have to prove which particular prison he would be sent to, merely that there was a 'real risk' that he would be detained in a jail where he would be subjected to ill-treatment.[25] This is an important judgment for which the finding in *Harkins* as to the equivalence of the test on immigration and extradition clearly paved the way – though the Court held there was no real inconsistency between Lord Hoffman's approach in *Wellington* and that of the European Court in *Harkins*.

In *Russian Federation v Trefilov*[26] District Judge Evans held the prison conditions in Russia were such that extradition would be inconsistent with the 'absolute' prohibition on extradition to face Article 3 treatment in a requesting state (whether in the form of 'inhuman or degrading treatment or torture.'[27]) He adopted the submissions of counsel which in turn relied heavily on the judgment of the European Court in *Ananyev v Russia*.[28] That pilot judgment of the European Court held that 'there had been a *repeated and ongoing failure* by the Russian Federation to address the concerns underpinning a series of judgments ... in which violations of Article 3 had been found'. The consistent pattern of inhuman conditions due to overcrowding in pre-trial detention meant that there was a systematic violation of Article 3. *Trefilov* marks a new departure in Russian extradition cases. Effectively it means that, unless some new development ensues or some new form of assurance is given, *any* extradition to Russia will be barred when there is a real risk of pre-trial detention on the basis that this exposes the individual to a real risk of inhuman conditions contrary to Article 3.

In the case of *Lithuania v Liam Campbell*,[29] the Northern Ireland Court of Appeal rejected the Lithuanian government's appeal against the Recorder of Belfast's decision to refuse extradition on Article 3 grounds – because of the prison conditions on remand in Lithuania. Key aspects of the Court's reasoning can be summarised as follows:

> i) It relied on the evidence of Professor Rod Morgan of the Committee for the Prevention of Torture on the deplorable state of Lithuanian prisons, the overcrowding and the consequent violence – both inter-prisoner and by prison guards.
> ii) The Court relied on the absolute nature of the prohibition on extradition to face inhuman conditions established by the European Court in *Harkins* (see para 21).

[25] Per Laws LJ at para 22.
[26] Unreported, 16th November 2012.
[27] Ibid para 51(a).
[28] (2012) 55 EHRR 18.
[29] [2013] NIQB 19.

iii) It declined (at para 32) to follow a line of English decisions that had previously held that extradition to Lithuania did not involve a violation of Article 3 on grounds of prison conditions there, the most recent of which being *Janovic v Prosecutor General's Office Lithuania*.[30]
iv) It rejected the argument that there was an irrebuttable presumption that European Convention countries would comply with Article 3 (a fallacy first promulgated by Mitting J in *Rot*,[31] involving Poland, but subsequently rejected by the English Divisional Court in *Agius v Court of Magistrates Malta*.[32]

This is a significant judgment, and again owes something both in its spirit and its ratio to the clarification in *Harkins* of the absolute nature of the Article 3 protection in extradition cases.

Conclusion on Article 3 developments regarding assurances and prison conditions

It does appear that the clarification in *Harkins & Edwards* that the Article 3 test in extradition cases is an absolute one has had some real impact on the courts' readiness to refuse extradition on Article 3 grounds – particularly in cases involving prison conditions. But the evidence as to the inhumanity of prison conditions still has to be recent, specific, and founded on expert evidence or judicial findings of Article 3 violations. On a practical level, evidence of systemic brutality or ill-treatment by prison officers or fellow prisoners may be more compelling than general evidence of poor conditions and overcrowding. But both are significant.

Despite the European Court's acceptance of the very specific and detailed assurances in *Othman* – together with the 'tailor-made' monitoring mechanism, assurances will not always work. In particular, this will be unlikely to thwart an Article 3 argument in the following situations:

i) Where the assurances are vague or generalised rather than specific and effective;
ii) Where there is doubt as to the requesting state's power to enforce them (as in *Zakaev v Russia* [33] (and *Chahal*[34]), or to monitor compliance;
iii) Where torture is systemic and impunity for its practice is general in the requesting state (*Ismailov*[35]);

[30] [2011] EWHC 710 (Admin).
[31] [2010] EWHC 1829 (Admin).
[32] [2011] EWHC 759 [32] - [33].
[33] 13th November 2003.
[34] Ibid n 7.

iv) Where there is no sound diplomatic basis for reliance on the requesting state's promises or doubts as to its consistency (as in the case of *AS and DD v Libya*,[36] where the assurances came from Colonel Gaddafi, and the Special Immigration Appeals Commission (SIAC) found he was too unpredictable and quixotic to be relied on despite the glowing write-up of Gaddafi as a 'man of honour' provided by the Foreign Office!

2. THE SUICIDE CASES

The 2013 decision of the Secretary of State to refuse the extradition of Garry McKinnon on Article 3 grounds has focused attention once more on suicide risk as a reason to refuse extradition. It was on grounds of the high risk of suicide that the Secretary of State based her decision.

The most helpful and simple test in this area is that distilled by Mr Justice Bean from earlier authorities in the case of *Marius Wrobel v Poland*.[37] The earlier cases from which he derived the test were *Rot* (below), *Prosser*[38]and *Jansons v Latvia*.[39] The relevant test was whether there was 'independent and convincing evidence' of a psychiatric nature of 'a very high risk of suicide if the fugitive is returned'. The test was developed in the Section 25 context (which has to do with physical or mental health making it oppressive to extradite) but was held to be consistent with the correct approach in Article 3 and Article 8 cases. This was the test that the Secretary of State was invited to apply in the McKinnon case and which she appears to have applied.

It is obviously necessary that the suicide risk should arise from mental disorder, or be heavily influenced by it. Hence the need for psychiatric evidence. A rational decision to commit suicide if extradited is not a good ground for refusal to refute extradition: see *Turner v Government of USA*.[40] Otherwise defendants could blackmail the courts into refusing extradition.

It is also necessary to consider what measures are in place in the requesting state (and in transit) to remove or reduce the risk of suicide to an acceptable level: see *Turner v Government of USA* (above). In the 2013 case of *Poland v Wolkowicz*[41] the President (Lord Justice Thomas) approved the propositions laid down by Aikens LJ in *Turner v Government of USA* at paragraph 28. These were:

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[35] http://www.memo.ru/eng/news/2012/06/25/2506122.html last accessed on August 13th 2013.
[36] [2008] EWCA Civ 289.
[37] [2011] EWHC 374.
[38] [2010] EWHC 84.
[39] [2004] EWHC 1845.
[40] [2012] EWHC 2426.
[41] [2013] EWHC 102 (Admin).

> "(1) the court has to form an overall judgment on the facts of the particular case: *United States v Tollman* [2008] 3 All ER 150 per Moses LJ [50]. (2) A high threshold has to be reached in order to satisfy the court that a requested person's physical or mental condition is such that it would be unjust or oppressive to extradite him: *Howes v HM's Advocate* [2009] SCL 341 and the cases there cited by Lord Reed in a judgment of the Inner House. (3) The court must assess the mental condition of the person threatened with extradition and determine if it is linked to a risk of a suicide attempt if the extradition order were to be made. There has to be a 'substantial risk that [the appellant] will commit suicide'. The question is whether, on the evidence the risk of the appellant succeeding in committing suicide, whatever steps are taken is sufficiently great to result in a finding of oppression: see *Jansons v Latvia* [2009] EWHC 1845 at [24] and [29]. (4) The mental condition of the person must be such that it removes his capacity to resist the impulse to commit suicide, otherwise it will not be his mental condition but his own voluntary act which puts him at risk of dying and if that is the case there is no oppression in ordering extradition: *Rot v District Court of Lubin, Poland* [2010] EWHC 1820 at [13] per Mitting J. (5) On the evidence, is the risk that the person will succeed in committing suicide, whatever steps are taken, sufficiently great to result in a finding of oppression: *ibid.* (6) Are there appropriate arrangements in place in the prison system of the country to which extradition is sought so that those authorities can cope properly with the person's mental condition and the risk of suicide: *ibid* at [26]. (7) There is a public interest in giving effect to treaty obligations and this is an important factor to have in mind: *Norris v Government of the USA (No 2)* [2010] 2 AC 487."

The fourth proposition in *Turner* suggests that 'the mental condition of the person must be such that it removes the capacity to remove the impulse to commit suicide'. This is a psychologically crude and legally questionable test. The psychiatric condition must be *a* cause, or possibly the *main reason*, for the suicidal intention. But to talk of irresistible impulse is not really appropriate. For instance, a person suffering from severe depression sees the world differently and may therefore form a suicidal intention because of their depressive world view and then find it difficult to restrain themselves. That is not to say that they surrender to an irresistible impulse if they take their life. And, for the purposes of Article 3, the existence of an irresistible impulse should not be necessary, provided a diagnosed mental disorder causes or influences the high risk of suicide.

In *Wolkowicz* (above), Sir John Thomas suggested that where extradition is to a Council of Europe jurisdiction, there should be a presumption that

effective preventative measures will be in place. But it is important that any such presumption must be rebuttable in the light of specific evidence either that preventative measures will not prove effective or that they are not actually available in the requesting state.

Alternatives to Article 3

Article 3 has the advantage of providing an absolute prohibition on extradition when its high threshold is met in suicide cases. But it is a high threshold. By contrast, Article 8 involves an overall balancing of the harm to private life (which includes the effect of a person's extradition on their susceptibility to suicide) against the public interest in upholding extradition arrangements. It may be easier to rely on Article 8 when the crime is of no great gravity – as in *Jansons v Latvia* (above) and the successful 'children' case of *F-K*.[42] In such cases, the argument would be the fact that the crime is of no great gravity means that the public interest in extradition is not so great as to outweigh the very high risk of suicide if the requested person is extradited. As to Section 25, it would appear that the Section 25 test has been broadly assimilated to the test under Article 3 and Article 8 (see *Wrobel* above). But reliance on it does serve to emphasise that the basis of the objection to extradition is the mental health of the requested person.

3. ARTICLE 8: THE RIGHT TO FAMILY LIFE AND THE BEST INTERESTS OF CHILDREN

The central issue in the Supreme Court judgment in *HH, PH & F-K* (above) was whether the rights of young children who were dependent on a requested person could outweigh the public interest in extradition and justify the refusal of extradition on Article 8 grounds. In the case of *F-K*, the Supreme Court held that it would be a violation of Article 8 to extradite to Poland a mother of five with two very young children charged with offences of fraud of 'no great gravity' dating back some sixteen years. The Court held that the public interest in honouring extradition arrangements was outweighed by the 'inevitable severe harm to the interest of the two youngest children in doing so' (per Baroness Hale at para 48; Lord Hope at para 91; Lord Brown at para 96; Lord Manse at para 102; Lord Judge at para 133; and Lord Kerr at para 147). By contrast in the case of *HH,* which involved the extradition of two parents to Italy for very serious crimes of drugs importation, the Court held that the public interest in extradition outweighed the best interests of the children even though extradition would lead to the separation of the children

[42] [2012] 3 WLR 90: see the discussion below.

from the primary care-giver and the likelihood of the children being separated and taken into care.

The most significant aspect of the case was the recognition that Article 3.1 of the United Nations Convention on the Rights of the Child applied to extradition hearings involving the parents of a child. It required the court to treat the 'best interests of the child' as a 'primary consideration' (per Baroness Hale at paras 10-11 and 33-34). This did not mean that the best interests of dependent children would generally or normally prevail over the public interest in extradition. Their best interests were a primary consideration, not the primary consideration and could be outweighed by the public interest in extradition. Indeed, generally this would be the case. But in every case the two interests had to be balanced against each other in order to determine whether extradition was compatible with Article 8. Thus as the case of *F-K* showed, in an especially compelling case the best interests of the child could prevail over the public interest in extradition: here the factor of delay and the relative lack of gravity of the offences told in favour of extradition being disproportionate.

The Supreme Court recognised that the criminal justice context meant that the public interest factor was greater in extradition cases than in deportation cases. But a balancing exercise was nonetheless required in every case. Lord Judge suggested that one relevant factor was as follows:

> "When resistance to extradition is advanced, as in effect it is in each of these appeals, on the basis of the article 8 entitlements of dependent children and the interests of society in their welfare, it should only be in very rare cases that extradition may properly be avoided if, given the same broadly similar facts, and after making proportionate allowance as we do for the interests of dependent children, the sentencing courts here would nevertheless be likely to impose an immediate custodial sentence: any other approach would be inconsistent with the principles of international comity."[43]

The ruling in *F-K* was a breakthrough in the sense that it was the first time that the courts had refused extradition in the interests of an innocent juvenile and their dependence on the requested person. Subsequently the courts have not always been true to the spirit of the decision and the importance it attached to the best interests of the child. Thus in *Czech Republic v JP*[44] the extradition of a mother was upheld by the Divisional Court as proportionate and consistent with Article 8 – even though her crimes were of even lesser gravity than those of *F-K,* and she had three young children dependent on her

[43] At para 132.
[44] [2013] EWHC 2603 (Admin).

as their primary carer. The court declined to grant a certificate to resolve the glaring inconsistency between its decision and that of the Supreme Court in *F-K*. However in *MS*, the Divisional Court did adopt a broadly similar approach to that in *F-K* and refused extradition on Article 8 grounds where the crimes were of no great gravity and there was a risk to her two very young children and also to the mental health of her vulnerable fourteen year old daughter, if she was extradited.

4. ARTICLE 6 CASES

A mention of Article 6 as a ground for refusing extradition is also necessary. This is because of the great controversy created by the European Court's decision that the extradition of Abu Qatada[45] would involve a violation of the Article as it would expose him to the 'real risk' of a 'flagrant denial of justice'. This was on the basis that on his return there was a real risk that the main evidence against him at his retrial would consist of confession evidence obtained from two alleged co-conspirators who had been tortured (or may well have been tortured) into making their confessions (which incriminated both themselves and him).

Firstly, the Court emphasised that for a country to be found in breach of Article 6 by reason of extradition or expulsion to another state where there was a risk of an unfair trial, the test was a high and exacting one. The prospective trial in a foreign state would have to constitute a 'flagrant denial of justice' – which meant more than an unfair trial for the purpose of Article 6 when dealing with a trial taking place in the European Convention state itself.[46] The Court had previously given some examples in cases such as *Einhorn,*[47] *Bader*[48] and *Al-Moayad*[49] but it had never before 'found that an expulsion would be in violation of Article 6' in any case since the test was formulated in *Soering.*[50] It emphasised that:

> "What is required is a breach of the principles of a fair trial guaranteed by Article 6 which is so fundamental as to amount to a nullification, or

[45] Ibid n 2 *Othman (Abu Qatada) v the United Kingdom* - 8139/09 Judgment 17.1.2012 [Section IV].
[46] At paras 258-62.
[47] *Einhorn v France* (Application No 71555/01, 16 October 2001.
[48] *Bader and Kanbor v Sweden*(Application no. 13284/04) 8 November 2005.
[49] *Al-Moayad v Germany* (Application no 35865/03) European Court of Human Rights 20 February.
[50] *Soering v United Kingdom* 161 Eur Ct HR (ser. A) (1989).

> destruction of the very essence, of the right guaranteed by that Article."[51]

It is significant that the English courts have recognised the trial in a military court at Guantanamo would satisfy the test of a flagrant denial of justice (*Ahmed*), and that trial by a court that was not independent and impartial would also do so: see *Rwanda v Brown*.[52]

Essentially the Court's reasoning was that trial on the basis of torture evidence would constitute a flagrant denial of justice because the prohibition of the use of torture evidence is a universal norm:

> "More fundamentally, no legal system based upon the rule of law can countenance the admission of evidence – however reliable – which has been obtained by such a barbaric practice as torture. The trial process is a cornerstone of the rule of law. Torture evidence damages irreparably that process. It substitutes force for the rule of law and taints the reputation of any court that admits it. Torture evidence is excluded to protect integrity of the trial process and, ultimately, the rule of law itself."[53]

The Court further found that all that could be expected of the applicant was that he showed that there was a real risk of the admission of evidence obtained by torture at his forthcoming 'retrial' on return to Jordan. (He had also been convicted in absentia on the basis of his co-accused's confession but was entitled to a retrial on return.) The Court's reasoning appears to justify a twofold test: -

The first test is whether there is a real risk that the confession evidence of his co-accused was obtained by torture.

> "The Court has found that a flagrant denial of justice will arise where 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 be imposed upon him. Having regard to this conclusion, the Court, in keeping with the Court of Appeal, found that there is a real risk that the applicant's retrial would amount to a flagrant denial of justice."[54]

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[51] Ibid n 2 at para 260.
[52] [2009] EWHC 770 (Admin).
[53] Ibid n 2 para 264.
[54] Ibid n 2 para 282.

The Court also found that there was concrete and compelling evidence that Abu Hawsher and Al Hamasher had been tortured into confessing (para 285).

The second test is whether there was a real risk that such evidence would be admitted at the trial. Here the court relied on the finding of SIAC in England that there was a high probability that the State Security Court would admit the confession evidence. It further referred to the questionable reputation of the State Security Court in investigating allegations of torture.

The Secretary of State did not appeal from the European Court's decisions to the Grand Chamber. Instead she negotiated further assurances from Jordan, and obtained further information as to the likely course of the trial. The principal assurance obtained was that Mr Othman would be tried by a State Security Court panel composed of three civilians rather than a panel consisting of two military and one civilian members. Reliance was also placed on the amendment of the constitution to prohibit the admission of evidence obtained by torture and the (disputed) evidence of an expert that the confession evidence would not be admissible at Mr Othman's retrial.

SIAC's finding was that neither the change in the composition of the court, nor the amendment to the constitution could remove the 'real risk' that the confession evidence would be admitted at trial. SIAC further indicated that it did not propose to go behind the European Court's finding that the confession evidence may well have been obtained by torture and that there was 'concrete and compelling' evidence to support this fact.

Some final thoughts on Article 6

The principal controversy throughout was whether the 'real risk' test was sufficiently exacting, and whether, providing there was a hearing at which the torture issues were considered by an 'independent' court, it was still possible to claim that the prospective trial would constitute a 'flagrant denial of justice'. This is the issue now to be determined by the Court of Appeal.

In fact, the 'flagrant denial' finding is far more common than is generally realised. It is certainly true that the European Court itself has only found the real risk of a flagrant denial of justice in one case – that of Abu Qatada. But the English courts have recognised that the trial process in a foreign country would fail the 'flagrant denial' test in a number of other cases. For example, where the 'flagrant denial of justice' would be involved in trial by a military court in Guantanamo (in the case of *Ahmad*); by trials in Russia for opponents of Putin or alleged Chechen 'terrorists' such as Akmed Zakaev; and the trial in Rwanda of alleged Hutu mass murderers. All these prospective trials have been held to involve a real risk of a flagrant denial of justice. So the concept

has continuing vigour and application and is an important safeguard in the field of both deportation and extradition.