

EXTRADITION, DEPORTATION AND HUMAN RIGHTS

Edward Fitzgerald QC

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INTRODUCTION

- 1.1 My purpose in giving this lecture is two fold.
- 1.2 Firstly to interest you in extradition law, and defend it against the charge of being boring.
- 1.3 Secondly, to defend the Human Rights Act, the European Convention and the judges who apply both, and especially to defend them from the politicians who denounce them for protecting the human rights of unpopular people. Because it is decisions in the field of extradition and deportation that have prompted the most vociferous outcry against our judiciary and the Human Rights Act. And that is particularly so when it comes to protecting terror suspects from deportation to torture regimes.
- 1.4 Let me just give you some examples. Over the past decade, President Putin of Russia has denounced the English judiciary for shielding alleged terrorists from extradition to Russia on a number of occasions. That is because the courts have barred extradition of

certain political enemies of President Putin on the grounds that there is a real risk that they will be tortured or killed there and a virtual certainty that they will not receive a fair trial. But President Putin is not alone. In 2005, in the wake of the July bombings, our own then Prime Minister Tony Blair issued his twelve points statement. He said the rules of the game are now changed. It was time to ensure that terror suspects would be deported to countries which practise torture like Libya, Syria, Egypt and Jordan. If necessary, it was time to amend the Human Rights Act. And, of course, our current Home Secretary Theresa May has recently gone even further. She has threatened to pull out of the European Convention because of her indignation at judicial decisions to block Abu Qatada's deportation to Jordan on Article 6 grounds. What she actually said on 8th March was this: "When Strasbourg constantly moves the goalposts and prevents the deportation of dangerous men like Abu Qatada, we have to ask ourselves to what end are we signatories of the Convention?".

2. THE ACCUSATION OF "BORINGNESS"

- 2.1 Last summer Lord Kerr gave a brilliant lecture on the Assange case here in the Inner Temple. But his starting point was the provocative reflection that

extradition law generally has the infinite capacity to bore. He was referring to the fact that, historically, extradition law has often tended to get bogged down in a quagmire of technicalities. Technicalities such as:

- The validity of extradition warrants;
- Whether the correct seal is affixed to the Request;
- The definition of extradition crime;
- The scope of specialty protection;
- The receivability of foreign evidence.

2.2 But much of the technicalities have now gone with the 2003 Extradition Act and recent decisions of the Supreme Court. And, once extradition law starts to touch on human rights, it raises issues that are both legally and morally profound. And as we know from recent experience, the courts' decisions in cases involving extradition and deportation are sometimes far-reaching in their political implications.

2.3 Let me just give you some examples.

Pinochet

2.4 Think of the Pinochet case for a start. That raised the question of universal jurisdiction over the crime of torture, and whether Spain had jurisdiction to try General Pinochet for crimes of torture in Chile many years ago. It attracted massive interest worldwide - and rightly so.

Assange

2.5 Then there has recently been the Assange case. The legal issue decided by the Supreme Court was interesting enough: whether a prosecuting authority in Sweden was a judicial authority for the purposes of the Extradition Act and the European Framework. But behind it lurked other more controversial and profound issues:

- Whether there was an ulterior motive to the Swedish extradition request;
- Whether there was a risk of onward extradition to the United States and an unfair trial there;
- And of course, it all culminated in high drama with Julian Assange taking refuge in the Ecuador Embassy, alleging threats by William Hague to storm the embassy and a stand-off in which the UK and

Ecuador have asserted rival theories as to the existence or scope of diplomatic asylum.

All this was far from boring.

McKinnon

2.6 Then there was the McKinnon case. The Home Secretary's decision to refuse extradition was on grounds of the high risk of suicide. That, in itself, raises difficult legal and moral issues on the scope of Article 3 protection in threatened suicide cases. I have sought to analyse them in the "Background Note on Recent Developments" which you have.

Irony of the case

2.7 The McKinnon case is striking for the irony that the Home Secretary had to rely on the much maligned Human Rights Act and Article 3 of the European Convention to justify her decision. Moreover, she was applauded for doing so by the Daily Mail and Daily Telegraph despite their campaigns to stop what they call the "human rights farce". But, behind the decision there lurks even more profound background issues such as:

- Whether the United States claims an exorbitant jurisdiction over foreign nationals;
- Whether we should protect our own citizens by introducing a forum conveniens bar to extradition, as the government has now undertaken to do.

Other issues traced

2.8 I have traced some of the other important recent developments in the attached notes. They include:

- The recent cases of Harkins, Ahmed and Aswat. They raise the question of the extent to which sentences in foreign jurisdictions with disproportionate sentences or inhuman prison conditions can justify the refusal of extradition;
- The recent Supreme Court decision in the case of the Polish mother, F.K. That involved the scope of refusal of extradition on the grounds that the extradition of a mother would irreparably damage the best interests of her dependent children, and therefore violate Article 8;
- And I have already mentioned the cases involving the threat of suicide, and the principle to be applied when a risk of suicide is invoked to justify the refusal of extradition on Article 3 or

Article 8 grounds. You have a more detailed analysis in the "Background Notes".

Each of these issues are ethically profound and legally interesting. Each would justify a lecture in themselves. So I want to use the remaining time to focus on just one case and the background to that case. That is the Abu Qatada case.

2.9 As you know, the Abu Qatada case has two aspects.

- (i) Firstly, it's fair to say that Mr Qatada is not wanted here. That is because he is alleged to be a serious threat to national security, although he has not been convicted of any crime. As a result of the finding that he is a threat to national security, he has been detained for most of the last nine years awaiting deportation, but without trial.
- (ii) Secondly, Abu Qatada is wanted in Jordan. That is to face a retrial for two offences of terrorist conspiracy for which he has been convicted in absentia. But on return there is every likelihood that he would be retried on the basis of evidence obtained by torture from his co-defendants there.

The European Court's Findings

2.10 The European Court has made two findings. The first was that, though Jordan is a regime that practises torture, and Abu Qatada is perceived as a threat to the regime, there is no real risk of torture on his return there. That is because of the specific and detailed memorandum of understanding between the UK and Jordan guaranteeing he will not be tortured. The second finding was that his extradition would violate Article 6. That was because he would face a trial there that would constitute a flagrant denial of justice. And that in turn was because he would be tried on evidence that was probably, or may well have been, obtained by the torture of his co-accused. There was concrete and compelling evidence that they were tortured into making statements against him; and a high probability that the evidence would be admitted at a retrial.

SIAC's decision

2.11 SIAC controversially upheld his right not to be deported on the basis that there was still a real risk that he would be exposed to a flagrant denial of justice. But I would suggest that on analysis their reasoning was impeccable.

Setting the decision in context

2.12 I wish to set the case in some context, and try to outline the background history. I do so to indicate just how moderate, reasonable, and defensible the decision of the European Court, and of our own courts, has been in this field.

3. HISTORY OF ASSURANCES AND DEPORTATION

The deportation question

3.1 Abu Qatada's case is part of a wider saga. That involves the government's continuing efforts to seek the deportation of terror suspects to torture regimes on the basis of governmental assurances. And it is this issue most of all that has led to suggestions that the Human Rights Act be amended or repealed; that we pull out of the European Convention; or that we introduce a British Bill of Rights that permits a balance of national security on the one hand and the rights of terror suspects not to be tortured on the other. There are those who say: - "Why can't we send these ideologues of hatred packing?". There are those who say: - "These people represent a threat to us and who cares if they go back to torture in Syria, or Libya, or Jordan?" Well, I would suggest that the short answer is "because torture is absolutely wrong,

and we cannot acquiesce in it, or promote it, or legitimise it". It is a universal principle of human rights law that we should not extradite or deport where there is a real risk of torture. And we have committed ourselves to it by signing Article 3 of the Torture Convention.

Trace the history

- 3.2 But let me just trace the key steps in the history of this problem. And I do this to show that there is nothing perverse or crazy about the European Convention principles, or their application by our courts. There is nothing to justify public or political outrage, or to legitimise calls to amend or repeal the Human Rights Act.

The Chahal decision

- 3.3 As you know, the debate started with the European Court decision in the Chahal (1997) 23 EHRR 413 case that Article 3 of the European Convention prevented extradition to a state where there was a real risk of torture. What some politicians have objected to is the court's affirmation that this protection was absolute even when the person in question was found to present a risk to national security. But, of course, that principle is not just some exotic

creation of the Strasbourg judges. It is a principle enshrined in Article 3 of the United Nations Convention Against Torture - signed by this country in 1984 and signed by at least 140 other countries. It is a binding principle of international law, borne out of the special abhorrence of torture. Because, in the words of Lord Brown in the A case, "Torture is an unqualified evil. It can never be justified."

The Belmarsh detentions

3.4 After 9/11, this government looked again at those whom it claimed it could not prosecute, and could not deport because of the decision in the Chahal case. It decided to introduce the power to detain them indefinitely. But the House of Lords rejected such indefinite detention.

3.5 They held that resort to indefinite detention without trial was anathema. They held that the case for derogation from the Article 5 rights not be arbitrarily detained had not been met, and that the proposed steps were not proportionate. I suggest they were right. Detention without trial is the first step to tyranny. But this led to further consideration of the possibility of deportation to terror regimes and further diplomatic initiative to

see if memorandums of understanding could be negotiated to facilitate such deportation.

The twelve points in August 2005

3.6 Then came the July bombings in 2005. And it was then that Mr Blair revisited the issue of the deportation of foreign terror suspects with his twelve points speech in August 2005. The rules of the game had been changed, he said. If we can't detain them in Belmarsh, we'll deport them and challenge the principles in Chahal. He told us we could learn from France and Spain on how to deal with terror suspects. The solution was to deport such terror suspects first and let them appeal later: the non-suspensive appeal. More importantly, he said it was fine to deport to regimes such as Egypt, Libya and Algeria - provided these regimes promised not to torture those sent back. And if our courts objected, said Mr Blair, the government would amend the Human Rights Act to silence the objections. "Should legal obstacles arise", he said, "we will legislate further including if necessary amending the Human Rights Act." So, in the mind of Mr Blair, the most fundamental of legal principles - that we should not render up anybody to foreign torturers - became a mere "legal obstacle".

The attempted deportations to Libya, Jordan and Algeria

3.7 And so the process began. For example Libyan suspects released from Belmarsh were detained for deportation to Libya. As Islamicists and vocal opponents of Gaddafi, they faced torture or death at the hands of Gaddafi's police. But it was said that they could go back safely because Colonel Gaddafi had promised Mr Blair to treat them properly on return, and try them fairly. In the case of AS and DD [2008] EWCA Civ 289, SIAC applying the principles in Chahal and the case of Saadi (application no. 37201/06), judgment of 28 February 2008, rejected this argument. They held that the Libyan assurances could not be relied on and that the appellants would be exposed to a real risk of torture in a trial that amounted to a flagrant denial of justice.

Other cases

3.8 In other cases, SIAC and the Court of Appeal have taken a different approach. Thus, in the Algerian case, SIAC held that there was no risk of torture because the human rights situation had improved there. In the Jordanian case of Othman, SIAC and the Court of Appeal held that there was a risk of torture generally, but not in the particular case of Abu

Qatada and relied in part on the assurances given and the monitoring system set up. So the courts have adopted a case by case, pragmatic and factual approach. And it's difficult to see how that approach can be criticised by the government. If anything, it is the human rights organisations that are entitled to criticise the approach as to cautious.

The Saadi case

3.9 The government was not happy with the Chahal principle. They intervened in the Italian case of Saadi trying to persuade the European Court to get tough. Firstly, they wanted the court to change the test for the refusal to expel, and require a higher standard of proof of the likelihood of torture. Secondly, they wanted the courts to be able to balance the risk to national security of not deporting against the risk of torture if they were deported. The European Court in Saadi said "no". It rejected the argument for balancing the risk to the community against the risk of torture of the suspect abroad. It did not underestimate or ignore the threats of terrorism. But it rightly insisted that the current threat "must not call into question the absolute nature of Article 3". And it rejected the argument that we should accept more readily the risk

of torture in cases where the appellant presents a risk to national security (para 140).]

Reliance on assurances

3.10 Of course it is right that the government justify the proposed deportations on the basis that they have sought and obtained assurances from the regimes to which they are to be returned. But there is a fundamental flaw in the whole enterprise of accepting non-torture assurance from torture regimes.

3.11 Firstly, if we do not trust these regimes not to torture their other prisoners, how can we trust them not to torture those that we send back to them? If they have systematically breached the UN Convention banning the practice of torture, how can we be sure that they will respect bilateral agreement not to torture particular individuals.

Monitoring

3.12 Then there is the problem of monitoring compliance. It is said that we can monitor compliance with the diplomatic assurances. But, where torture is pervasive, it is almost always hidden, and denied. It is not the sort of practice you can monitor and prevent.

Power of enforcement

3.13 Even if we obtain assurances, what power do we have to enforce them once they have been deported? Sweden relied on the Egyptian government's assurances in a case called Agiza CAT/C/34/D/233/2003 (20 May 2005); and, as you might expect, it was not honoured. He was tortured with electric shocks. So much for relying on assurances.

European Court's Approach

3.14 In the past the European Court has recognised the danger of such reliance in cases such as Chahal and more recently in Ismailov (application no. 2947/06), judgment of 24 April 2008. Ismailov was a case of extradition to Uzbekistan. And the European Court held that when there is reliable evidence of systematic torture, as in Uzbekistan, assurances from the authorities do not offer a reliable guarantee against the risk of ill-treatment (para 127).

The European Court caselaw

3.15 So until the Othman case, the European Court appeared to be moving towards a rejection of reliance on assurances.

- (i) In Chahal the European Court declined to rely on assurances in a case where there was a "recalcitrant and enduring problem of violation of human rights by the Security services" (para 105). They further rejected an argument based on the notion that Mr Chahal's high profile would protect him (para 106).
- (ii) In Saadi the Court's Grand Chamber re-affirmed that the Chahal test of a real risk in the context of deportation from Italy to Tunisia. The Court made clear that diplomatic assurances would not automatically remove the risk (at para 147).
- (iii) In Ismailov, the Court commented more generally on assurances - particularly where torture is endemic or persistent. It referred back to the Chahal and Saadi cases and then stated at para 127:-

"Given that the practice of torture in Uzbekistan is described by reputable international experts as systemic, the Court is not persuaded that the assurance from the Uzbek authorities offered a reliable guarantee against the risk of ill treatment."

The Court for the first time recorded extracts from the relevant UK and Council of Europe documents concerning the use of diplomatic

assurances (paras 96-100) and summarised the Human Rights Watch intervention (at paras 111-114).

4. ARTICLE 3

Othman v UK

4.1 Against that background, I turn to the case of Abu Qatada, or Othman. In Othman v UK [2013] 55 EHRR 1, the Court accepted the assurance of the Jordanian regime that Abu Qatada would not be tortured or ill-treated on 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 (paragraphs 193-6). 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 (paragraph 189) (Appendix One). Applying these guidelines, in Mr Othman's case, the Court relied on the strong bilateral relationship between the UK and Jordan, the specificity and detail of the memorandum of understanding, 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 Ismailov, at para 127, that non-torture assurances would not be accepted from state where torture is systemic.)

4.2 So that was hardly an unbalanced or crazy decision. If anything, it did not go far enough in the protection of human rights. How can that justify Theresa May's claim that it's necessary to pull out of the European Convention?

(Current position on assurances)

4.3 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, assurance will be unlikely to thwart a successful Article 3 argument in the following situations:

- (i) Firstly, where the assurances are vague or generalised rather than specific and effective;
- (ii) Secondly, where there is doubt as to the requesting state's power to enforce them (as in Zakaev v Russia (13th November 2003) and Chahal);

or when they are unwilling or unable to monitor compliance;

(iii) Thirdly, where torture is systemic and impunity for its practice is general in the requesting state (Ismailov);

(iv) Fourthly, 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 & DD v Libya [2008] EWCA Civ 289, where the assurances came from Colonel Gaddafi, and 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".)

5. THE ARTICLE 6 RULING IN ABU QATADA

5.1 But, of course, in the Abu Qatada case the European Court did rule that extradition was barred on Article 6 grounds. And this caused great controversy. The Court ruled that extradition would violate Article 6 because it would expose him to the "real risk" of a "flagrant denial of justice". That was on the basis that there was a real risk that the main evidence against him at his retrial on return 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). I want just to highlight certain points about the judgment.

The flagrant denial of justice test

5.2 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 means more than an unfair trial for the purpose of Article 6 when dealing with a trial taking place in the European Convention state itself (paras 258-62). The Court had previously given some examples in cases such as Einhorn, Bader and Al Modyad. 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. The court stressed it was an exacting test that would seldom be met:

"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 destruction of the very essence, of the right guaranteed by that Article."

Trial on torture evidence amounts to flagrant denial of justice

5.3 Applying that test to Mr Othman's case, the Court's reasoning was that trial on the basis of torture evidence would constitute a flagrant denial of justice (para 263). That is because the prohibition of the use of torture evidence is a universal norm (para 264):

"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."

Real risk of trial on torture evidence amounts to real risk of flagrant denial of justice

5.4 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.

5.5 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."

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

5.6 The second question was 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's position

5.7 The Home Secretary 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 one consisting of two military and one civilian member. Reliance was placed also 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

5.8 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.

Principal controversy that remains

5.9 The principal controversy throughout has been whether the "real risk" test is sufficiently exacting, and whether, providing there is a hearing at which the torture issues are considered by an "independent" court, it is 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. But there is a reasonable prospect that they will uphold SIAC's interpretation of the European Court's judgment and decline to interfere with its application of the test.

Conclusion on Article 6

5.10 I would suggest that the test the European Court has developed of a "flagrant denial of justice" is reasonable and moderate. The test recognises that we cannot expect complete uniformity in the standards of justice throughout the world. On the other hand the test recognises that it is wrong to send someone back to a show trial. That is the bottom line.

Application of bottom line by the English courts

5.11 That bottom line test has been sparingly but justifiably applied by the English courts. For example, the English courts have found that a

"flagrant denial of justice" would be involved in trial by a military court in Guantanamo; trial 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 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.

The problem of impunity

5.12 There remains the problem of impunity. On the face of it the protection from extradition has an "all or nothing" quality to it. Either, the requested person goes back to face the risk of torture or a flagrantly unfair trial or they remain here and are not tried at all. But there are solutions. The first is the development of the principle of universal jurisdiction over crimes involving terrorism, drug trafficking and torture so that people who cannot be extradited can be tried here if appropriate. The second is the development of principles of forum conveniens so that British citizens who escape extradition could still be put on trial here on the basis of their well established links with this

country. These solutions are not panaceas but they do remove the stark choices that otherwise fill people with a sense of indignation at the "all or nothing" results of human rights principles in this area.

6. PROTECTION OF PUBLIC

6.1 I have briefly traced with you the history of recent decisions - in our courts and the European Court. They have upheld certain fundamental principles in the face of political pressure to modify them in the light of the war against terror. But they have not left society unprotected. There remain the considerable powers to prosecute in this country for any number of new offences of terrorism and related crimes. And potential for extending the scope of universal jurisdiction. Moreover, both the House of Lords and the European Court in the Mafia cases such as Guzzardi have upheld control orders as compatible with Article 5 of the European Convention, provided that the curfews imposed do not exceed sixteen hours. It is significant that it is the politicians who have abolished control orders and not the judiciary or the European Court. So much for the claim that it is the judiciary and the European Convention that leaves society unprotected. On examination, the case law of the European Court and of our own courts under the

Human Rights Act is balanced, reasonable, and entirely defensible.

Edward Fitzgerald QC

18th March 2013

BACKGROUND NOTES FOR INNER TEMPLE LECTURE BY EDWARD

FITZGERALD QC ON DEPORTATION, EXTRADITION AND HUMAN

RIGHTS

RECENT HUMAN RIGHTS DEVELOPMENTS IN EXTRADITION LAW &

RELATED IMMIGRATION LAW

OVERVIEW

1.5 This is an 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 Convention likely to be engaged.

ARTICLE 3

Othman v UK

2.1 The year 2012 opened in January with somewhat of a setback in the European Court for the cause of Article 3 protection. In Othman v UK [2013] 55 EHRR 1, the Court accepted the assurance of the Jordanian regime that Abu Qatada would not be tortured or ill-treated on 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 (paragraphs 193-6). 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 (paragraph 189) (Appendix One). Applying these guidelines, in Mr Othman’s case, the Court relied on the strong bilateral relationship between the UK and Jordan, the specificity and detail of the memorandum of understanding, 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 (2009) 49 EHRR 42, at para 127, that non-torture assurances would simply not be accepted from states where torture is systemic or endemic.

Harkins & Edwards v UK: The test in extradition cases

2.2 Harkins & Edwards v UK [2012] 55 EHRR 19 was 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 test laid down in the deportation cases of Chahal [1997] 23 EHRR 413 and Saadi [2009] 49 EHRR 30) (para 128):

“The Court therefore concludes that the Chahal ruling (as reaffirmed in Saadi) 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.”

This was a significant rejection of the “relativist” approach to Article 3 protection advocated for extradition cases by Lord Hoffman in Wellington [2009] 1 AC 335. 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” (paras 124-5). But 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.”

Ruling on mandatory life sentences without parole

2.3 The Harkins case itself involved the applicant’s exposure 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 (at para 134):

- (i) A discretionary sentence of life imprisonment without the possibility of parole;
- (ii) A mandatory sentence of life imprisonment without the possibility of parole.

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” (para 137). It further held that no Article 3 issue arises unless the life sentence is “irreducible de facto and de jure” (para 137). 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 (para 140). (The later decision in Ahmad & Others v UK [2013] 56 EHRR 1 was to like effect, see paragraph 176.)

Gross disproportionality on facts

2.4 The net effect of this is that it is only when the mandatory life sentence that will foreseeable by imposed in the requesting state will be grossly disproportionate on the facts at the time when it is imposed, that extradition will be refused on Article 3 grounds. And 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 (para 139). 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 (see Harkins & Edwards v UK at paras 133-4; and Ahmad v UK at paras 237-8).

Prison conditions in Supermax

2.5 In Ahmad & Others [2013] 56 EHRR 1, the European Court rejected the Article 3 challenge to extradition on grounds of prison conditions in Supermax Prisons in the US and, in particular, 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 case (at paras 205ff). It held that indefinite detention in solitary confinement might well "reach the minimum level of severity required for a violation of Article 3" (para 223):

"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."

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 later 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. But this proved unsuccessful (in R v Secretary of State ex parte Ahmad & Others [2007] EWHC 3217 (Admin)). So 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

2.6 However, there have been Article 3 rulings in the English courts blocking extradition to other jurisdictions in Eastern Europe and Africa on grounds of prison conditions. And these have clearly been influenced by the recent development in caselaw.

Lutsyuk v Government of Ukraine

2.7 In Lutsyuk v Government of Ukraine (18th January 2013), the Divisional Court took as its starting point (at para 20) 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 [2006] UKAir 00016:

"Imprisonment in the UK 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" (para 15 of Laws LJ's judgment) and of a kind that should "usually be determinative of the specific issue it addresses" (Higginbottom J at para 24), where the same 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 is a "real risk" that he would be detained in a jail where he will be subjected to ill-treatment (per Laws LJ at para 22). 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 (paras 13-14).

Russian Federation v Trefilov

2.8 In the case of Trefilov (16th November 2012), 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", (para 51(a)). He adopted the submissions of counsel which in turn relied heavily on the judgment of the European Court in Ananyev v Russia [2012] 55 EHRR 18. 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 (post Kalashnikov) 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 to a real risk of inhuman conditions contrary to Article 3.

Lithuania v Liam Campbell

2.9 In the case of Lithuania v Liam Campbell [2013] NIQB 19 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)
- (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 (most recently Janovic v Prosecutor General's Office Lithuania [2011] EWHC 710 (Admin)).
- (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 the

Rot case, involving Poland, but subsequently rejected by the English Divisional Court in Agius v Court of Magistrates Malta (2011) EWHC 759 at paragraphs 32 & 33).

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.

Cases on Prison conditions in Africa (see Gambia v Alpha Bah 3rd February 2012)

2.10 In a recent case, extradition has been refused to Gambia inter alia on grounds of the inhuman prison conditions there and the risk to life in such prisons. Moreover, in the case of Kenya v Devani, District Judge Zani is reconsidering the question of whether extradition to Kenya would violate Article 3 because of the prison conditions there, and the risk not just of poor conditions but of ill-treatment and brutality by the prison guards there. In the earlier decision of Deya [2008] EWHC 2914 (Admin), the Divisional Court had relied on assurances as to the defendant's placement in a single cell in the supposedly "best" prison in Kenya, namely Kamiti prison. (A video of prison guards mercilessly beating

naked prisoners at this supposedly model Kamiti prison has subsequently falsified the Divisional Courts blithe assumptions about the excellence of conditions at Kamiti prison.)

Conclusion on Article 3 developments

2.11 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.

Current position on assurances

2.12 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 (13th November 2003) and Chahal), or to monitor compliance;
- (iii) Where torture is systemic and impunity for its practice is general in the requesting state (Ismailov);
- (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 [2008] EWCA Civ 289, where the assurances came from Colonel Gaddafi, and 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!

3. THE SUICIDE CASES

3.1 The recent 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 test in Wrobel

3.2 The most helpful and simple test is that distilled by Mr Justice Bean from earlier authorities in the case of Marius Wrobel v Poland (2011) EWHC 374. The earlier cases from which he derived the test were Rot (2010) EWHC 1829 (Admin), Prosser (2010) EWHC 84 and Jansons v Latvia (2004) EWHC 1845. 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 Theresa May was invited to apply in McKinnon, and which she appears to have applied.

Mental disorder needed

3.3 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 refuse extradition (see Turner v Government of USA (2012) EWHC 2426). Otherwise defendants could blackmail the courts into refusing extradition.

Preventative Measures

3.4 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).

The case of Wolkowicz & Others

3.5 In the recent case of Poland v Wolkowicz [2013] EWHC 102 (Admin), the President (Lord Justice Thomas) approved the propositions laid down by Atkin J in the case of Turner at paragraph 28. These were:

"(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*** at 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

3.6 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 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.

The "presumption" as to preventative measures

3.7 In Wolkowicz, Sir John Thomas, the President, 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.

Article 3, or Article 8, or Section 25?

3.8 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, and the successful "children" case of F.K.[2012] 3 WLR 90. In such cases, the argument would be that 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). But reliance on it does serve to emphasise that the basis of the objection to extradition is the mental health of the requested person.

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

Article 8: The right to family life and the best interests of children

4.1 On June 20th 2012, the Supreme Court gave judgment in the case of H.H. & F.K. (2012) 3 WLR 90. The central issue 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 charge 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 H.H., 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 from the primary care-giver and the likelihood of the children being separated and taken into care.

Best interest of child a primary consideration

4.2 The most significant aspect of the case was the recognition that Article 3.1 of the UN Convention on the Rights of the Child applied to extradition hearings involved 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. And, 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. In the F.K. case, the factor of delay and the relative lack of gravity of the offences told in favour of extradition being disproportionate.

4.3 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.

4.4 Lord Judge (at para 132) suggested that one relevant factor was what would the sentencing courts have done in this country:

“Where resistance to extradition is advanced, as in effect it is in each of these appeals, on the basis of the interests of dependent children and the interests of society in their welfare, it should only be in very rare cases that extradition must properly be avoided if, given the same broadly similar facts, and after making proportional allowances as we do for the interests of children, the sentencing courts here would nonetheless be likely to impose an immediate custodial sentence: any other approach would be inconsistent with the principles of international comity”.

Subsequent cases

4.5 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 F.K. decision and the importance it attached to the best interests of the child. Thus:

- (i) In the case of Czech Republic v JP [2013] EWHC 2603 (Admin), the extradition of a mother was upheld by the Divisional Court as proportionate and consistent with Article 8 - even though J.P.'s crimes were of even lesser gravity than

those of F.K., and she had three young children dependent on her 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..

(ii) However in the case of Poland v S, 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.

5. ARTICLE 6 CASES

5.1 It is right to make some mention of Article 6 as a ground for refusing extradition. That is because of the great controversy created by the European Court's decision that the extradition of Abu Qatada would involve a violation of Article 6 because it would expose him to the "real risk" of a "flagrant denial of justice". That was on the basis that there was a real risk that the main evidence against him at his retrial on return 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).

The flagrant denial of justice test

5.2 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 means more than an unfair trial for the purpose of Article 6 when dealing with a trial taking place in the European Convention state itself (paras 258-62). The Court had previously given some examples in cases such as Einhorn, Bader and Al Modyad. 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:

"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 destruction of the very essence, of the right guaranteed by that Article."

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 (Rwanda v Brown [2009] EWHC 770 (Admin)).

Trial on torture evidence amounts to flagrant denial of justice

5.3 Essentially the Court's reasoning was that trial on the basis of torture evidence would constitute a flagrant denial of justice (para 263). That is because the prohibition of the use of torture evidence is a universal norm (para 264):

"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."

Real risk of trial on torture evidence amounts to real risk of flagrant denial of justice

5.4 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:

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- 5.5 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."

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

- 5.6 The second test is whether there is 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's position

5.7 The Home Secretary 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

5.8 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.

Principal controversy

5.9 The principal controversy throughout has been whether the "real risk" test is sufficiently exacting, and whether, providing there is a hearing at which the torture issues are considered by an "independent" court, it is 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.

"Flagrant denial" finding far more common than is generally realised

5.10 It is 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 cases. For example, the English courts have found that a "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.

EDWARD FITZGERALD Q.C.

18th March 2013

APPENDIX 1
RELEVANT FACTORS WHEN RELIANCE IS PLACED ON
REQUESTING STATE'S ASSURANCES

Othman v United Kingdom [2012] 55 EHRR 1 (para 189)

"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:

- (1) whether the terms of the assurances have been disclosed to the Court;
- (2) whether the assurances are specific or are general and vague;
- (3) who has given the assurances and whether that person can bind the receiving state;
- (4) if the assurances have been issued by the central government of the receiving state, whether local authorities can be expected to abide by them;
- (5) whether the assurances concerns treatment which is legal or illegal in the receiving state;
- (6) whether they have been given by a Contracting State⁸⁶;
- (7) the length and strength of bilateral relations between the sending and receiving states, including the receiving state's record in abiding by similar assurances;
- (8) whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms, including providing unfettered access to the applicant's lawyers;
- (9) 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;
- (10) whether the applicant has previously been ill-treated in the receiving state;

and

- (11) whether the reliability of the assurances has been examined by the domestic courts of the sending/Contracting State.