SPECIAL IMMIGRATION APPEALS COMMISSION

Appeal Nos. SC/39/2005, SC/34/2005, SC/54/2005,
SC/32/2005, SC/36/2005, SC/37/2005
Hearing Dates: 5th – 13th November 2015
Date of Judgment: 18 April 2016

BEFORE:

THE HONOURABLE MR JUSTICE IRWIN
UPPER TRIBUNAL JUDGE ALLEN
MR WILLIAM FELL, CMG

BETWEEN:

BB, PP, W, U, Y AND Z

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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Miss N Lieven QC, Ms S Harrison QC, Mr A Vaughan, Ms A Weston and **Ms C Kilroy** (instructed by **Public Law Project, Birnberg Peirce & Partners** and **Fountain Solicitors**) appeared on behalf of the Appellants.

Mr R Palmer, **Miss C Stone** and **Mr M Green** (instructed by the **Government Legal Department**) appeared on behalf of the Respondent.

Mr A Underwood QC and **Mr M Goudie** (instructed by the **Special Advocates' Support Office**) appeared as Special Advocates.

Approved Judgment

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MR JUSTICE IRWIN

Introduction

1. The litigation arising from these appeals has been, by any standards, exceptionally long and fraught. It has culminated in the hearing before the Court of Appeal leading to the judgment of 23 January 2015 (*BB and Others v SSHD* [2015] EWCA Civ 9). The history is sufficiently recited in paragraphs 1 to 3 of that judgment, which we need not repeat.

2. The Court of Appeal remitted the matter to SIAC on two grounds. The first is that SIAC "failed to apply the full, nuanced and holistic approach of *Babar Ahmad* [*Babar Ahmad v United Kingdom* (2013) 58 EHHR 1] to the unusual circumstances of these cases" (paragraph 24). The second is that "SIAC erred in law by placing reliance on some sources of verification [of the effectiveness of Algerian assurances as to proper treatment of returnees] when the evidence did not permit it to do so…"

3. The Court of Appeal rejected a complaint that SIAC made a specific finding without there being OPEN evidence to substantiate it, a point which was said to be incapable of challenge by the Appellants (see paragraphs 43 to 52).

4. However, the Court did express some concern about SIAC's rejection of a body of evidence relevant to the risk of breaches of ECHR Article 3 (see paragraph 26). The Court made no finding here, given the success of the other appeal grounds and the order remitting the matter to the Commission. We have borne this in mind.

5. In preliminary hearings, the ambit of evidence on the remitted appeal was the subject of directions. We have well in mind that, in general, the existing evidence stands and is available to the Commission. As was emphasised in *DK (Serbia) v SSHD* [2006] EWCA Civ 1747, the re-making of a decision remitted to a tribunal should *prima facie* take place on the basis of fact applicable to the original decision. However, the parties are (unsurprisingly) agreed that is not sufficient here. The essential judgment for SIAC, in 2012 and in 2015, is as to future risk to the Appellants if returned to Algeria. The parties are agreed that must be assessed on the evidence available now, despite something of a tendency on both sides to have us treat as established those points of fact found by SIAC in 2012/2013 favourable to the party concerned.

6. The approach we have adopted is consistent with *DK (Serbia)* and with *Ravichandran v SSHD* [1996] Imm AR 97. We do not restate earlier conclusions of fact reached by SIAC unless there is good reason to revise such conclusions. We take the evidence as it is today, alongside such earlier conclusions, and reach our view as to the relevant future risks.

7. Finally, we bear well in mind the requirements attending a case of deportation with assurances. We have regard to the matters laid out by the European Court of Human Rights in *Othman v United Kingdom (2012) 55 EHRR 1*, in particular the question "*whether compliance could be verified or monitored*".

Evidence and Judgments

8. The Commission received evidence under three conditions: OPEN, CLOSED and PROTECTED. The last circumstance refers to evidence given, largely at the instigation of the Appellants, which was enfranchised only by the condition of complete confidentiality, meaning communicated to a named list of lawyers (including the Appellants' OPEN lawyers), the Special Advocates, lawyers and officials acting for HMG. It follows that there will be judgments under OPEN, CLOSED and PROTECTED conditions. As is the universal practice in SIAC, everything which can properly be made public will be addressed in this OPEN judgment.

The Test under Article 3

9. Following the Court of Appeal, we have applied the "full, nuanced and holistic approach" laid down in *Babar Ahmad*. The approach in these cases does not alter because removal is sought on national security grounds (*Babar Ahmad* paragraphs 166-168, 172); the distinction between torture and inhuman and degrading treatment is often hard to determine in reaching a prospective assessment of the risks of ill-treatment in a receiving State (*Babar Ahmad* paragraph 170), and it is normally unhelpful to seek to make the distinction when addressing ill-treatment which (if it occurred) would be intentionally inflicted in the receiving State (*Babar Ahmad* paragraph 171). The approach to determining whether the risk crosses the Article 3 threshold does not vary because the case in question is one where it is said to be alleviated by diplomatic or prosecutorial assurances (*Babar Ahmad* paragraph 173). The proper approach to the interpretation of Article 3 is "fully consistent" with Article 19 of the Charter on Fundamental Rights of the European Union, and the Council of Europe Guidelines on Human Rights (*Babar Ahmad,* paragraph 175).

10. We bear in mind that the law does not require these Appellants to demonstrate that there will be probable breaches of Article 3. The test is whether there are substantial grounds for believing that an Appellant faces a real risk of being subjected to treatment contrary to Article 3: see *Othman v United Kingdom* (2012) 55 EHRR 1 at paragraph 185. A fanciful risk will not suffice: see *MH (Iraq) v SSHD* [2007] EWCA Civ 852 at paragraph 22. It is no doubt for that reason that in previous judgments in these proceedings, the Commission has employed the expression that it was satisfied it was "inconceivable" that the Algerian government would breach the assurances it had given.

11. We have also considered the observations of the ECtHR in paragraphs 177 to 179. In paragraph 177, it is clear that the Court accepted the proposition formulated by Lord Brown in *Al-Skeini and Others v Secretary of State for the Home Department* [2007] UKHL 26, a case subsequently before the ECtHR with the reference 55721/07, to the effect that the Convention does not require the contracting States to impose Convention standards on other States. The distinction developed here by the ECtHR (perhaps a nuance, to adopt the language of Sir Maurice Kay in this matter) appears to be that, if what otherwise might be a breach of Article 3 proceeds from a negligent failure by the non-contracting State, such as a denial of prompt and appropriate medical treatment, then such failure:

> "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 case."

It must, we consider, be implied that deliberate infliction of ill-treatment will more readily be found to be of sufficient severity so as to breach Article 3. Indeed, that is one of the matters recited in paragraph 178 of the judgment as having been decisive in previous decisions of the ECtHR.

12. We have also noted the historic caution shown, and endorsed by the ECtHR, in finding that removal would be contrary to Article 3, particularly where removal is to a State with "a long history of respect for democracy, human rights and the rule of law": see *Babar Ahmad*, paragraph 179.

13. In a similar context, we have noted the views on intentional infliction of mistreatment in the judgment of Sir Maurice Kay, at paragraph 23 of the judgment in this case in the Court of Appeal.

14. In three of these cases the claim is in part placed on the footing that deportation will carry a risk of deterioration in the Appellant's mental health, whether at the point the individual is informed of the removal decision, or in the course of removal, or on arrival. In such cases it will still be necessary for the individual to show:

> "… strong grounds for believing that the person, if returned, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment" (per Dyson LJ in *J v Home Secretary* [2005] EWCA Civ 629 at paragraphs 18-19, 25).

We agree with the Respondent that, in order for such a case to succeed, it would be necessary to establish a foreseeable causal link between the proposed or actual removal and a real risk of suicide or serious deterioration in mental health: *J v Secretary of State for the Home Department* at paragraph 37.

15. It is helpful in this context to hold in mind the formulation of Richards LJ in *Tozlukaya v SSHD* [2006] EWCA Civ 379 at paragraph 64, where he said:

> "One way of determining whether the case reaches the Article 3 threshold is to ask whether removal would be an affront to fundamental humanitarian principles."

16. As will be seen, it has not been necessary for us to reach conclusions on these issues.

Narrowing the Issues

17. Following upon the previous judgments in these cases, and after a preliminary hearing, there was an exchange of correspondence between the parties, intended to narrow the issues. The Respondent's letter of 29 May 2015 is the important document. In answering the Appellant's question whether the Respondent contended there was "no real risk that the Appellants will face treatment in breach of Article 3 … if returned to Algeria, absent the assurances", the answer was a qualified "No". The qualification was to the effect that there have been (relevant) improvements in Algeria

since the assurances were obtained, but that since "there remain reports of isolated cases of abuse still occurring" the assurances were necessary. It is, however, clear from this answer and from the way the case proceeded, that there is a difference between the two sides as to the level or degree of risk of ill-treatment in breach of Article 3.

18. The Respondent conceded that there is a real risk of the Appellants being detained on return in *garde à vue* detention for up to 12 days; in fact the case was conducted on the assumption they would all be detained for a period, although not necessarily for the full 12 days in *garde à vue*.

19. The Appellants raised the question of the current risk of detention in Antar Barracks, a facility of the Algerian Security Service, the Département du Renseignement et de la Sécurité ["DRS"]. In a rather convoluted answer, the Respondent contends that the DRS do not appear to be detaining anyone at present, but (paraphrasing) due to the uncertain cause of that fact, there was conceded to be a risk of detention in Antar Barracks. Subsequently, the evidence called by the Respondent tended to suggest that the DRS were not detaining suspects and that an imminent change in the law may affect this possibility. The fact remains however that the Respondent concedes a real risk of mistreatment so as to constitute a breach of Article 3, in the absence of effective assurances. For that reason the decisive issue is the effectiveness of the assurances given, and of verification of adherence to the assurances, in the light of the level of risk identified.

The Assurances Themselves: Content and Meaning

20. It is worth focussing on the nature and content of the assurances upon which the Respondent relies. On 11 July 2006, there was an exchange of letters between Prime Minister Blair and President Bouteflika. Each assured the other that their respective governments were "firmly committed to implementing this Exchange of Letters in accordance with its obligations under international law and … domestic law". The Exchange of Letters was said to "underscore[s] the absolute commitment of our two governments to human rights and fundamental freedoms such as … the right to be informed of the reasons for one's arrest or detention, the right to the presumption of innocence, to the assistance of legal counsel, and the right to a fair hearing and public hearing by a public and impartial court". Finally, the letters noted that the British government "in particular in cases related to questions of internal security, … may, depending on the circumstances, wish to request special assurances from the competent authorities of the Algerian government".

21. In association with this high level agreement, correspondence took place between the British ambassador in Algiers and the Algerian Directorate General of Judicial and Legal Affairs. The Director General is Maitre Mohamed Amara, a familiar figure in this litigation. The letter concerning the Appellant "Y" can stand for the rest. On 3 July 2006, the Algerians provided information concerning Y, stating that he had entered the United Kingdom on a given date and received political refugee status. The letter guaranteed that, if he was arrested in Algeria:

> "in order that his status may be assessed, he will enjoy …:"

(a) The right to appear before a court so that the court may decide on the legality of his arrest or detention and the right to be informed of the charges against him and to be assisted by a lawyer of his choice and to have immediate contact with that lawyer.

(b) He may receive free legal aid.

(c) He may only be placed in custody by the competent judicial authorities.

(d) If he is the subject of criminal proceedings, he will be presumed to be innocent until his guilt has been legally established.

(e) The right to notify a relative of his arrest or detention.

(f) The right to be examined by a doctor.

(g) The right to appear before the courts so that the court may decide on the legality of his arrest or detention.

(h) His human dignity will be respected under all circumstances."

22. The Commission has seen the document headed "*Deportations with Assurances Algeria: Returnees/Checklist of Actions for the British Embassy, Algiers*" dated 30 May 2007. The document provides for an extensive range of actions to be taken by the embassy. Some of the most relevant points are:

> **Prior to return** if the deportee wished to remain in contact, the embassy was to write to the named contact of the deportee informing that person of the date of deportation and "arrange regular time for contact to phone embassy". The Algerian authorities were to be informed of the return and reminded of the commitments made in the exchange of letters and assurances. "In some circumstances it may be appropriate to send a note verbale to this effect". If the individual had convictions or was suspected of offences in Algiers, the embassy:
>
> > "will need to establish what will happen to the individual on his return, e.g. if he will be arrested and if so where he will be detained, whether he faces retrial for a conviction in absentia, when he will have access to a lawyer. As far as possible post should try to find out about subsequent procedures …"
>
> **On the day of return**, the embassy was to attend the airport to witness the arrival of the deportee and produce a written account of events.

Follow-up

> "…if required … regular contact with returnee's family/contact point. If you are not contacted at an arranged time please endeavour to make contact with individual yourself. Unsuccessful attempts to make contact should be recorded and reported."

23. Actions for contact with the Algerians were set down. If the individual was released and the embassy had not been instructed to contact him or his family, then no further action was required. If the individual was detained:

> "… for questioning, post must establish that the detention is lawful under Article 51 of the Algerian Criminal Procedure Code… and compatibly with the assurances provided by the Algerian authorities. … [the embassy must] find out where the individual is being held and seek to establish if the DRS may be involved in questioning/detention."

24. There were then obligations upon the embassy to seek to establish whether the individual had been able to communicate with his family and receive visits and, if not, establish why not. The embassy was to establish whether the individual received a medical examination at the correct time. If the individual was released within the 12 day period then, in the absence of specific instructions to remain in contact, no further action was required, although "you should keep a watching brief for e.g. media/NGO reporting of developments in his case".

25. If the individual was charged, then the embassy's obligation was to find details of the charge, seek to establish if the individual had access to a lawyer and if possible get contact details. The embassy should "request dates of when the individuals are brought before the magistrates" and establish whether the lawyer was present. If the individual required medication, the embassy should enquire as to whether he was in receipt of it. If the individual was detained then the embassy's obligation was to "gather information on the conditions in this prison". The embassy should request information on the timeframe for the judicial process and should request to be kept informed of any changes to the individual's situation.

26. In our judgment, the role ascribed to the embassy in the checklist clearly envisaged active and reasonably close consular attention to those returned with assurances. The arrangements presupposed an adequate flow of information to the embassy staff from the Algerian authorities. It is also clear that the arrangements presuppose active preparation by the embassy in Algiers in respect of each returnee.

27. We address below some of the evidence bearing on how the embassy operated and had the capacity to update the assurances (and the checklist) in practice.

Two Key Witnesses

28. Each side called an expert witness, Dr Claire Spencer for the Appellants and Dame Anne Pringle for the Respondent. We consider their evidence in some detail later in this judgment. Dr Spencer is an academic with long experience and knowledge of the

Maghreb, including Algeria. Formerly attached to the International Institute for Strategic Studies and the International Crisis Group, she now has a post at Kings College, London at the Centre for Defence Studies and is attached to Chatham House. We note that Dr Spencer was tasked by the Deputy Coroner HHJ Hilliard QC to give evidence to the In Amenas Inquest. Dr Spencer has not visited Algeria since 2002, and this may mean that she is missing some of the "feel" for the country that might be derived from a more recent stay there. However, it is clear that she is in touch with a broad range of informants, is highly expert in the history and politics of the country, and fully conversant with the manifold sources of information available.

29. Dame Anne Pringle is a very senior former British Diplomat who rose to become the British Ambassador in Moscow. At the time of the hearing, she held the appointment as the UK Special Representative for Deportation with Assurances ["DWA"]. She was not employed by the Foreign Office, but acts, as she told us, in a manner "completely independent in thought and processes". We accept that she does so. It is accepted that Dame Anne has not had anything like as long an engagement with the affairs of the Maghreb or of Algeria. Her diplomatic career never carried her to Algeria, nor did she have direct responsibility for the relevant desk in London. However, it is clear that Dame Anne, as would be expected, has an immense capacity for diplomatic and political judgement and has had the advantage of access to sources of information, in terms of documents and people, not available to an academic such as Dr Spencer, however distinguished.

30. We wish to record our appreciation and thanks for the care and expertise shown by both these witnesses. From their different perspectives, they did their best to assist the Commission, and each did so.

Power in Algeria

31. It is common ground that although Algeria is in form a democracy, in fact the country is run by an elite. Shifts of power are often opaque. Elements within the powerful elite certainly include the president, senior ministers, the military and the DRS. From the commencement of his presidency, President Bouteflika was undoubtedly a dominant figure, but even before his decline in health it was customary amongst observers to express how the system worked by referring to "*le pouvoir*". Evidence from both sides in the current and previous appeals has addressed the shifts of influence within *le pouvoir* and it is clear (and unsurprising) that there is a continuing effort on the part of British diplomats and other government departments to determine the current balance of power within the elite. In our judgment, none of this has undermined the overall opacity of the system. Dr Spencer described the system as a Rubik's cube and we consider the description to be apt.

32. President Bouteflika is now approaching his 80th birthday. He sustained a brain haemorrhage in April 2013. He appears to be confined to a wheelchair and has made very limited, if any, public appearance since 2013. Despite his condition he stood for a fourth term as president and was re-elected in April 2014. Particularly influential people around him include his brother, Said Bouteflika, and the leader from time to time of the DRS. There have been public suggestions by others (for example his presidential rival M. Benflis) that there is a vacuum of power and that President Bouteflika cannot exercise effective leadership.

33. Dr Spencer's account is that President Bouteflika is still meeting foreign delegations for limited periods of time, but in private. Dr Spencer notes that in the previous judgment of SIAC of January 2013 (paragraph 19), the Commission recited the assessment of the previous Representative for Deportation with Assurances, Mr Anthony Layden, which was that President Bouteflika's "personal primacy" was contingent on his remaining in sufficiently good health. Dr Spencer doubts that this "personal primacy" can still be maintained. The Appellants seek to draw the inference that there is some instability and uncertainty within *le pouvoir*, that a waning of presidential power may mean a recruitment of power by others and that this situation makes prediction of risk for the future acutely difficult. This is said to be of great importance in such a "top-down" society.

34. The evidence of Dame Anne Pringle is to the contrary. Her evidence was given following two visits to Algeria, in the course of which she was able to consult with two successive ambassadors, senior officials in the Algerian Ministry of Justice, the Director General of the prison service, a wide range of NGOs and of course other embassy staff. Dame Anne had a very recent consultation with the ambassador in London before giving her evidence. She retailed to us the picture that President Bouteflika was in active control. He was said "by all accounts" to be intellectually very sharp, up to speed on all current issues and well briefed. He issued an anniversary message, in effect a political programme, on 1 November 2015, which included reference to social and economic issues but also to the rights of the individual and the independence of the judiciary. Dame Anne accepted that the President faced "legacy issues" but she maintained her view that President Bouteflika was in firm control, despite the limitations imposed by his health.

35. Both expert witnesses agreed, with unimportant differences of emphasis, that Algeria's progress since the dark days of the civil war in the 1990s had been marked. The terrible brutality and suffering of that decade, said Dame Anne, was a thing of the past and "there are no longer widespread or systematic cases of abuse by the authorities". Dr Spencer's view was much less sanguine, whilst accepting there had been major change since the end of the civil conflict.

36. In our view there can be no doubt that there has been a marked improvement over the last 20 years. We are prepared to accept that President Bouteflika remains of full mental capacity and remains the apex of power in Algeria. It may well be that he remains the guiding intelligence. However, his age and frailty mean that that situation could change at any time. Anticipation of Algerian governmental action on assurances must be judged by looking beyond the incumbent president.

37. In her evidence, Dame Anne emphasised the degree to which Algerian national interest is served by good relations with the West in general, and the UK in particular. This was a theme emphasised by Anthony Layden in his evidence to SIAC in previous hearings. He said "the Government of Algeria is institutionally committed to seeing that the assurances are fulfilled": see the 2013 SIAC judgment, at paragraph 23. Mr Palmer, for the Secretary of State, lays great stress on this: the assurances are general, not personal to President Bouteflika. They must be seen as part of Algeria's desire to be seen as a reliable partner of the West. The DRS must be taken to be aware of these obligations and (crucially) to understand what they entail, a point to which we return below.

38. Dr Spencer accepts that it would be in the interests of Algeria to honour the assurances. In addition to the general need for a good relationship with the West, there is a need to sell their hydrocarbons overseas in a period of falling gas and oil prices, and a need to incentivise inward investment, particularly to foster the development of hydrocarbon extraction. However, Dr Spencer argues these considerations provide no conclusive answer. She emphasises the personal aspect of the assurances, and beyond that emphasises that a range of changes have heightened security concerns and instability in Algeria, and specifically increased concern about the Islamist threat.

In Amenas and Dr Spencer's Evidence: a Subplot

39. The attack on the In Amenas gas installation in January 2013 was a major event for Algeria, representing a significant challenge to *le pouvoir*. A large number of foreign workers were taken hostage by 32 Islamist terrorists of mixed nationalities. 39 hostages and 29 hostage-takers died. The security operation was conducted in the absence of President Bouteflika, who was abroad undergoing medical treatment. The Algerians, following their established practice of never negotiating with terrorists, planned and executed their operation effectively, but there was a bloody outcome. There was little or no consultation with the governments of the nationals held hostage.

40. A range of Algerian security forces were on the ground: regular army, special forces, gendarmerie and the DRS. It is no part of our concern to re-analyse these events in detail, but it is clear that a major role in this operation was taken by Major General Bachir Tartag, then head of the Internal Security Directorate of the DRS, since appointed as overall head of the DRS.

41. In the context of the In Amenas affair, an attack is made by the Respondent on the quality of analysis and judgement displayed by Dr Spencer, in particular on her reliance upon the account of these events given by M. Habib Souaidia. His account was made available on the internet on 11 February 2013. As the Respondent sets out in her submissions, his version differs in important matters from the factual findings of the inquest, which reported following extensive evidence on 26 February 2015. The Respondent describes Souaidia's version as "dramatically incorrect". The Respondent suggests it was misguided of Dr Spencer to place any reliance upon him in a report which postdates the inquest. Souaidia is a "conspiracy theorist" who believes that the In Amenas episode was contrived by the DRS in order to augment or re-establish their power, by creating a climate of fear of Islamist terror.

42. We consider there is some force in this criticism, and it may have been incautious to place any reliance on Souaidia's account. However, it is to be noted that there were real difficulties in establishing the detailed sequence of events. As the Deputy Coroner noted (Factual Findings, paragraph 101):

> "the Algerian authorities have not provided the inquest with any information that gives the details or timing of operations decisions". "There was no evidence from the Algerian military as to their strategy or tactics, even at the most basic level" (Factual Findings, paragraph 221).

43. The engagement of security forces with the terrorists involved an attack by an army helicopter, firing shots into the site which many hostages felt put them at risk (paragraph 160) and firing by the military at vehicles containing terrorists and hostages, during an attempt by the terrorists to drive from one part of the complex to another (paragraphs 161 to 165, 173 to 174). It is therefore fair to say that, in the absence of any assistance from the Algerian authorities, it was clearly problematic to reach an authoritative view as to the command and control of this operation, which clearly did involve the active participation of different military and security arms, and did involve (perhaps perfectly properly) an aggressive response by the Algerians to the complex and rapidly developing emergency.

44. In the end, we do not view the reliance by Dr Spencer on the information posted by Souaidia as being fatal to her judgement or her evidence generally.

Reliance on the Assurances: Return to the Main Theme

45. In addition to events at In Amenas, the Appellants point to a general increase in Islamist activity in the Maghreb, the collapse of the regime in neighbouring Libya and its descent into factional fighting providing a safe haven for Islamic extremism, Islamic extremist control of significant parts of Mali, and recent and significant Islamist activity in Tunisia. Therefore, the Appellants argue that there is a worrying continuing context which is bound to increase the vigilance of the Algerian authorities, to emphasise the need for activity against Islamists by the DRS and thus to increase focus upon these individual Appellants if returned to Algeria. It is relevant, say the Appellants, that they have all been identified by the UK government and by SIAC as having a history of involvement in Islamist terrorism linked to Al Qaeda. Although their proven engagement is by now historic, Dr Spencer emphasised that in the context of more sophisticated and effective networks of Islamist terrorism, whatever the general situation may be in relation to the DRS and its activities, there will be a specific interest in the Appellants as individuals. It is submitted that:

> "…the DRS are more likely to wish to ensure the Appellants have no relevant contact and pose no risk, as well as wishing … effectively to warn them off any future involvement".

46. We bear in mind that there were very active Islamist threats and attacks in Algeria in earlier times, as Mr Palmer has emphasised. He points to the fact that there were ten bombings in 2007, including attacks on the Prime Minister's office and the Interior Ministry. These did not divert President Bouteflika from his decision to pursue the path of national reconciliation. We note that point well, as we note Mr Palmer's point that recent Islamist threats have been principally external. However, we consider that the instability consequent on the "Arab Spring" and arising from uncertainty about President Bouteflika, mean that there is now a different context. It is also unclear how high the system of Deportation with Assurances will feature on the Algerian "event horizon".

47. Before turning to the specific position of the DRS, we record our conclusion that, on balance, events since 2013 do not significantly reduce the need for verification of the assurances given. We recognise the real incentives to the Algerian authorities for good relations with the United Kingdom and adherence to the assurances. However, the continuing opacity of Algerian leadership, the particular position of President

Bouteflika, and the concerns that there will be instability arising from his health and the succession to the presidency, and the accentuated external Islamist threat within the region combine to mean that in our judgment there is a definite need for effective verification of the operation of assurances even before we consider the specific position of the DRS. To that extent we reject the argument advanced by the Respondent that the risks of breach of assurances are almost entirely eliminated, and that consequentially the requirement for effective verification is lessened.

Anthony Layden

48. As we have mentioned, the previous DWA representative was Anthony Layden, formerly HM Ambassador (*inter alia*) to Morocco. Mr Layden gave evidence in previous iterations of these appeals. He has since resigned from this role, and a disagreement has become public between Mr Layden and the British government, as to the ambit and application of the policy of DWA. The dispute appears to have come to a head in connection with a proposed deportation with assurances to Ethiopia. The Appellants place reliance on the change of attitude by Mr Layden, given how central a witness he was in these cases.

49. In the end, we do not find the breakdown of the relationship with Mr Layden to be of assistance either way. We have not heard evidence from him. The material disclosed does tend to demonstrate that Mr Layden thought that the policy of DWA was being applied beyond the area, the "exceptional" area, of national security, and that in some sense this undermined the integrity of the system and the good faith of government. However, we are not in a position to reach a proper judgment about any of this. In any event, Mr Layden has said nothing bearing on these cases, which do concern national security, and he has said nothing about the effectiveness of assurances given by Algeria. We therefore set to one side the question of Mr Layden's withdrawal from the system of DWA. It does not assist us.

The DRS

50. It is clear that there has been some shift in recent times in the powers and position of the DRS. As the matter was described to Dame Anne Pringle by Maitre Miloud Brahimi, Honorary President of the Algerian League for Human Rights, the DRS had recently had its powers "much reduced". As he expressed it, the DRS could now only:

> "…investigate a narrower set of issues around national security. For example, corruption cases begun by the DRS will be transferred to the MoJ. The change followed a crisis, demonstrated by open criticism of the DRS by the leader of the FLN Party."

51. A natural reading of this information is that the DRS have been driven back to the "core business" of national security. There is, however, in our judgment no evidence that within that area the ambit or primacy of the DRS has been reduced.

52. It appears that as of January 2015, the British Ambassador was uncertain as to the role of the DRS.

53. As previous judgments of SIAC make clear, the critical period when concern about breaches of Article 3 may most readily arise is in the initial period of *garde à vue* detention ["GaV"]. The question arises as to whether this detention will likely be by the DRS or by other authorities, and where those detained may be held. Dame Anne's evidence was as follows. In her first report, she suggested that the DRS were not detaining any suspects. In her second report, that information was qualified, and she said the DRS were apparently not "routinely" detaining suspects. We note that Dame Anne was not given the opportunity to meet the leaders of the DRS. When this issue was raised with Mr Lakhdari, representative of the Algerian Ministry of Justice, his evidence was that since the Appellants were alleged terrorists, it would be the DRS who would exercise detention under GaV and would do so in DRS facilities. Quite how this evidence fits with the presidential decree of September 2013, which it is said removed DRS powers to detain individuals, or with the "partial reinstatement" of DRS detention powers in June 2014, is difficult to say. It is accepted that DRS officers have the status of "judicial police officers" and as such have the formal power to detain. When she was asked directly about this, Dame Anne's answer was as follows:

> "My understanding is that the power to detain was reinstated in the June 2014 decree, but since that time the DRS have not detained terrorist suspects. It is not clear why. There is an on-going Ministry of Justice review of detention facilities that the DRS have. We are not clear whether it is linked to that review and when that review might be published, but my understanding is that the DRS are not detaining terrorist suspects at present."

54. However, when she was cross-examined, Dame Anne agreed that this was not the import of the advice she had been given by Maitre Lakhdari.

55. Dame Anne also agreed that there are multiple DRS detention facilities in Algeria, separate from the ordinary prison system. They have not been visited or inspected by Dame Anne or any other representative of the UK government. One of the most well-known DRS facilities is at Antar Barracks, where it is beyond doubt that serious mistreatment of prisoners on a significant scale has happened in the past. Conditions in Antar Barracks have, of course, been considered previously in this group of cases. Dame Anne asked specifically to visit Antar Barracks and this request was directly refused by the government of Algeria. Dame Anne made no bones about this:

> "I was told that there would be no contact with DRS officials or a visit."

56. In their 2015 report on Algeria, the US State Department identify detention by the DRS as a particular problem:

> "Overuse of pre-trial detention remained a problem. Authorities held individuals detained as terrorism suspects at facilities administered by the DRS."

The extant evidence from Amnesty International supports that position.

57. In addition, the Commission heard evidence of the detention of a man named Ali Attar. Attar was detained in late 2014. This case was highlighted by Dr Spencer in her supplementary report. Ali Attar is a human rights activist associated with the Algerian League for the Defence of Human Rights. It appears that he was detained by DRS officials in February 2015 and held incommunicado for a period. His family called a press conference a little time later. They did not know where he was. The press conference appears to have generated little interest at the time. According to a press release from a foreign-based human rights and legal support organisation, the Alkarama Foundation, Mr Attar was detained and was the victim of physical and psychological torture by agents of the DRS before being transferred to "the Central Operational Command Centre in Algiers". Dr Spencer indicates that, for at least some of the period, police rather than DRS would have been involved. However, she makes several points. Firstly there was no indication of any effective civilian supervision during the period of 12 days secret detention, no mention of judicial oversight and no indication of any specific charges having been brought against the detainee. Moreover, Dr Spencer's evidence was the Algerian press had not reported this detention at all until the Alkarama report surfaced in October. The Secretary of State responds that the weight of the evidence suggests that Mr Attar was arrested by police rather than by the DRS. Moreover the Secretary of State submits that evidence of ill treatment by the DRS of a detainee who is not the subject of assurances "is not predictive of the treatment by the DRS of a detainee who is the subject of assurances".

58. Part of the Secretary of State's case, as advanced by Dame Anne Pringle in her evidence, is that there has been training of DRS officers in the meaning of Article 3 and as to the standards which should be adhered to in relation to detainees. This training has been delivered to DRS officers by the ICRC, alongside training for the Algerian police and gendarmerie. This included training in human rights standards, detention and investigation methods and medical checks. Dame Anne's evidence is that the DRS gives every appearance of a highly structured and "professional" organisation, which through its leadership must be taken to be alive to the genuine interests of the Algerian state, including good relations with the United Kingdom, and by that route to understand the incentives supporting adherence to the assurances given.

59. We understand that evidence so far as it goes. However, it is necessarily general in its import. As the evidence developed, it became clear that there could be no confidence about the number of DRS officers who have been trained: it may be as few as 10. Nor was there any clear evidence as to how that training was to be passed on through the organisation: there is absolutely no detail on the point. It is clear that the organisation is sizeable. Whilst there is no exact evidence of numbers overall, Dame Anne was clear that the organisation was numbered in four figures rather than three. If the training was given to ten officers, that represents at the very most one per cent of the organisation. It appears to us, therefore, that the influence of this training is at best speculative.

60. The Respondent advances a number of matters to suggest that there has been an effective modernisation of the DRS in recent times. The British ambassador expressed the view to Dame Anne in February 2015 that:

> "the DRS was heading in a positive direction, moving towards a role more akin to a traditional intelligence agency. The DRS

> presence in Government line ministries had been removed. Their power to detain had been temporarily removed, but had been recently returned (although it was not thought that they had detained anyone since their power had been returned). It was clear that the DRS were working with the ICRC to improve their detention practices. Leading international NGOs such as Amnesty International were not accusing the Algerian Government of torture, and there was no evidence of systematic mistreatment."

61. The President of the Algerian League for Human Rights stated to Dame Anne that the DRS "had had its powers much reduced" and the specific matter mentioned was that corruption cases had been transferred to the Ministry of Justice. There was however, once more, no intimation that the DRS had lost primacy over terrorism.

62. The Algerian Ministry of Justice stated that they had been working with the DRS on GaV facilities and the organisation was cooperative and showing a willingness to improve, and to take criticism.

63. The Appellants have relied at least to some degree on the leadership of the DRS now being in the hands of General Tartag. He has figured individually in considerations and evidence before the Commission in previous iterations of these appeals. The broad submission on the part of the Appellants is that he is said to have been responsible for very widespread brutality during the terrible period of civil war in the 1990s, and its aftermath. There has also been the suggestion that he was personally involved in the uncompromising militaristic response to the crisis at In Amenas. We have already expressed our doubts as to whether any clear conclusion can be reached on that issue, for the reasons set out. In the end we do not find that the leadership of General Tartag materially alters the case. Even if it is accepted as a premise that he operated ruthlessly during the period of terrible crisis in Algeria, it does not follow in our judgment that General Tartag is necessarily likely to sanction torture or mistreatment now, or to encourage or instigate breach of the assurances. In our view it is simply not clear whether his leadership will make any significant difference to the behaviour of the DRS. At its highest, the fact of his leadership may simply be a pointer against any encroachment on the security preserve of the DRS and against the likelihood of a widespread liberalisation of its *modus operandi*.

64. A further point advanced by the Appellants is that DRS officers appear to operate with effective impunity. The matter can be put simply. As Dame Anne accepted in the course of cross-examination, while there have been some instances of police officers being disciplined and/or made the subject of legal action for mistreatment of prisoners or detainees, there is no known example of a DRS officer being made the subject of disciplinary or legal action. Mr Palmer argues that consideration here should not be confined to legal or disciplinary action. It may be that, short of such specific sanctions, DRS officers who breached assurances would suffer in their careers. That is a possibility, but there is no evidence of that either.

65. The historic record of detention by DRS officers at Antar Barracks has undoubtedly been poor. Previous accounts have been accepted as accurate.

66. In the course of giving his evidence in previous appeal hearings, Mr Layden agreed that at least some DRS officers considered that the abuse and pressurisation of detainees was a legitimate and justifiable way to gain information and to extract confessions, to break the moral resistance of detainees and neutralise opponents, to produce pressure on detainees to become informants, or to intimidate them into silence. This line of cross-examination culminated in the following example:

> "Q. So we know from the history of torture, killings and corruption in Algeria that the government authorities in Algeria have acted and continue to act in ways that are detrimental to Algeria's international image and that they do so because other interests predominate when they act in that way?
>
> A. Yes, I accept that.
>
> Q. Another reason why governmental authorities might act in a way that does not enhance Algeria's international image or its bilateral relationship is if they think they will not get found out, is not it?
>
> A. Yes.
>
> Q. So if for example the DRS thought that they could plausibly deny having mistreated somebody in their custody they would be more likely to do so?
>
> A. Yes.
>
> Q. And if the DRS is in a position where the prospect of finding out whether they have mistreated somebody is poor the deterrent against them doing so is reduced, is not it?
>
> A. Yes.
>
> Q. That is one of the reasons, is not it, why robust means of verification of compliance with the assurance is crucial in this case?
>
> A. It is the obvious underlying reason why we seek robust means of verification in all partner countries in DWAS.
>
> Q. There is a particular history, is not there, with the DRS of them having impunity against allegations of torture?
>
> A. Yes.
>
> Q. I do not believe there is a recorded instance of a person from the DRS being convicted of torturing anybody, is there?

A. I agree."

67. The Secretary of State offers a number of arguments to counter this high level of concern with the DRS. As we have noted, the British ambassador has given his view to Dame Anne Pringle that the DRS is heading in a positive direction towards adopting the role of the traditional intelligence agency. In addition, the FLN leader (regarded as being very close to the presidency) has openly criticised the previous head of the DRS, General Mediene: an unprecedented step, which carries the implication that the organisation may be less powerful. The Algerian Ministry of Justice representatives stated that they had been working with the DRS on GaV facilities and on the approach to such detention for a number of years. They assured Dame Anne that the DRS had been cooperative throughout, showing a will to improve and a willingness to take criticism. The Ministry officials assured Dame Anne that the DRS facilities are subject to high standards. Dame Anne submitted that there was clear evidence of improving relations with the UK and in particular that the British ambassador met the head of the external intelligence of the DRS for the first time in January 2015. These are all said to be positive signs that the DRS, as an organisation, is moving in the right direction and that the Algerian authorities as a whole, including the leadership of the DRS, have genuinely realised the importance of the assurances.

68. We bear all these considerations well in mind. We should not be misunderstood as concluding that mistreatment by the DRS is probable. It may well be probable that the DRS will comply with the assurances given. However, we cannot regard the evidence as bringing us to the point (as was submitted by the Respondent) that the level of concern is so reduced that there is a diminished need for effective verification of adherence to the assurances.

Verification

69. This topic can be approached from two or three rather stark starting points. There will be no monitoring of anyone detained by the DRS. There has never been access to any DRS facility. As we have noted above, subject to a meeting between HM Ambassador and the head of the external DRS, there has been no contact between the British Embassy and the DRS. Dame Anne Pringle's explicit request for such a meeting was refused.

70. There is no inspectorate or other official system reviewing DRS detention.

71. We of course understand that there is no legal requirement for formal monitoring. As SIAC has stated previously in *BB*:

> "Verification can be achieved by a variety of means, both formal and informal and by a variety of agencies, both governmental and non governmental. Monitoring is one means of verification but not the only one."

That conclusion was expressly upheld by the House of Lords in *RB (Algeria)*, paragraph 193. Again as previously addressed before SIAC and on appeal from SIAC, the refusal of the Algerian authorities to accept independent monitoring may proceed from their extremely strong sense of national pride and sovereignty and, in itself, is not necessarily a sinister indication.

72. We also accept that no system of verification, including even independent monitoring, can ever ensure that there is no risk of ill-treatment. No guarantee is achievable. As the Respondent submits and as was accepted by the Commission in *Sihali (No 2)* (B22/14 at paragraph 71), there are methods of torture which leave no sign. However, in our judgment the Respondent comes close to undermining the importance of verification. No human system is foolproof. An adequate system of verification must mean that there is a good prospect of mistreatment being brought to light or else it is ineffective. Moreover, an adequate system of verification must represent a real disincentive to mistreatment. As Mr Palmer agreed, the purpose of verification must be to prevent abuse, not merely detect it afterwards.

73. Essentially, the Respondent's case in relation to verification is not to advance a system as such, but to submit that a pattern of discrete factors, taken together, represents a satisfactory means of verifying that the assurances are effectively observed. Mr Palmer does not submit that any one of these checks would suffice: the Commission must look to the sum of the parts. We agree that, in principle, that is a proper approach.

74. The Appellants' reply is in essence that each of the separate matters relied on by the Secretary of State is so flawed and ineffective that, even taken together, they cannot reasonably be said to represent effective verification.

75. The elements relied on by the Secretary of State are the actions and protests of the families of detainees, the access of lawyers to detainees during the period of GaV, the scrutiny of Ministry of Justice officials of the system, the press in Algeria, international attention and opinion, scrutiny by non-governmental organisations and oversight by the British embassy. We consider each in turn and then consider them together.

76. It is worth mentioning one safeguard or potential means of verification upon which Mr Palmer places no emphasis, or indeed no reliance: the role of the judiciary. This really reflects the information provided to Dame Anne Pringle. When she spoke to Maitre Miloud Brahimi, President of the Algerian League for Human Rights, she asked specifically about whether judges "are able to tackle mistreatment". Maitre Brahimi replied:

> "… that they had the powers under the law but they are not always practised, and that judges may close their eyes to mistreatment… Asked why this was the case, MB posited that the system meant that the police and security services are more powerful.
>
> However he confirmed there are "absolutely" some brave judges willing to speak out."

When asked what judges tended to do when "hearing allegations of torture" the answer was: "Nothing. Mostly judges will close their eyes to it. On paper judges [are] indep[endent] but not in practice."

77. The Court of Appeal made it clear (paragraph 34 of the judgment) that their view was the previous reliance of SIAC on medical examinations conducted during GaV

detention was irrational. The Secretary of State accepts that the Commission is bound by this finding.

78. The Respondent does submit that despite express or implied criticism by the Court of Appeal of reliance on the reaction of family members and on the role of Maitre Amara, these considerations remain for the Commission as the fact finding tribunal. The weight to be placed on such "elements of the collective verification system" say the Respondents, is a matter for the Commission. We agree, although we hold well in mind the remarks of the Court of Appeal.

79. There is no dispute but that Article 51 of the Algerian Penal Code provides for contact with family members during the period of GaV. As the Algerian Ministry of Justice stated, this usually takes the form of a single phone call, although more may be permitted for "humanitarian reasons". In addition, family members are able to visit relatives regularly once the period of GaV is finished and the individual has been transferred to the mainstream prison system. We accept that there are examples of the contact by phone call during GaV established in evidence.

80. The first point to consider in this context is the question whether a detainee who is being mistreated will raise a complaint with his family during telephone contact. There is no evidence upon which we could conclude that the telephone conversation will be confidential. Common sense suggests that many detainees might choose not to raise a complaint in such circumstances for fear of stimulating reprisal. Equally, if a complaint were raised, many families might take a similar view. There is the further consideration that, if a detainee and his family felt it was too risky to complain of mistreatment at the time, then subsequent complaint may be dismissed because the complaint was not made at the time.

81. At several points in her evidence, Dame Anne expressed a very firm view that families who were informed by a detainee of mistreatment would always complain, such would be their concern for their relative. We consider her view here to be definitely too sanguine.

82. The Respondent points to the example of the family of Ali Attar. We have touched on the facts already. The family of Mr Attar held a press conference following his detention. In our judgment this does not carry the matter forward. Firstly, it is a single example, and many families might react differently. Secondly, the point in question with Mr Attar was that he had been detained and his family were in ignorance of his whereabouts. It is also relevant that he had already chosen to be a public spokesman for human rights, necessarily entailing a stance publicly critical of the Algerian authorities. The balance of advantage and disadvantage in seeking publicity in circumstances such as that may be very different from the situation facing a family who receive a complaint of mistreatment from a relative known to be in detention, who has been found to be connected to Islamist terrorism.

83. We accept that in due course, through continuing contact once the detainee has moved to the conventional prison system, families are likely to learn from the prisoner if he suggests he was mistreated. Whether that can represent effective verification of the government's assurances depends on whether the prisoner and his family choose to pursue the matter. By definition he will now be out of DRS custody, although as an Islamist presumably not beyond their contemplation or interest. In the course of the

evidence before us there was considerable discussion about whether families would be "brave" in reporting this conduct. We agree that is more likely once the detainee is in the ordinary prison system. But in our judgment this addresses only part of the question facing detainees and families in such circumstances: the question may be "is it wise to complain of mistreatment"?

84. In this context, Dame Anne gave her view that fears of reprisal or difficulty on the part of families were "overblown". Dr Spencer conceded that the climate of fear for Algerian citizens generally was diminished, given the improvements in society over the last five to ten years. Dr Spencer maintained her view that families would be fearful. We understand that Dr Spencer was unable to cite specific examples of reprisal. However, we note the historic evidence of Mr Layden on this issue in relation to 2012. In our view this is of some significance. For the reasons we have given, we do not accept that there has been a complete sea change in atmosphere over the last three years.

85. In addition, Dame Anne accepted that she had been told by the honorary legal adviser to the British embassy that "people don't like to talk about GaV". She accepted that this must mean either that individuals have had experience of GaV and they "do not like to talk about it" or "they do not like to talk about it because they are afraid".

86. The Appellants rely, for example, on the evidence given in 2012 by a documentary film maker, to the effect that lawyers, researchers and activists are reluctant to be identified when discussing the activities of the DRS. The Appellants also rely on a discussion in 2011 between the embassy and Maitre Amara concerning the question of attempting to make contact with seven deportees with whom the embassy had lost contact. This situation is of course not identical to the issue of complaint of mistreatment, but in our view it is germane to the atmosphere in Algeria concerning the DRS. When asked about contacting these individuals, Maitre Amara said:

> "This could have a negative impact on the individuals, with the security apparatus prying into their lives and thus raising the individuals' profiles for no beneficial reason. Amara said he would be willing to put inquiries in train, but we should be aware of the potential pitfalls doing this."

The embassy's response to this was to decline any request to the Algerian authorities to find the individuals:

> "… as this could bring us into conflict with our international obligations, e.g. under the ECHR or ICCPR, if this resulted in causing them harm."

87. In considering publicity or public complaint by families as a means of verification, the question must not be confined to asking whether family members are justified in being afraid: the question must be, at least in part, whether they will actually be afraid. Taking a "holistic" view of this issue, we cannot conclude with any confidence that families would report misconduct unless they are confident they will get a positive response from the authorities or the press, the legal system, or the British embassy. Moreover, complaint by families can only be effective if it can evoke a protective, or helpful, response from others in a position of power or

influence. In practical terms, the calculation for a detainee and his family as to whether to raise a complaint must relate to the response by the press, the Algerian authorities, NGOs and/or potentially the British embassy.

The Press

88. The Secretary of State relies heavily on the role of the Algerian press and media. In 2013, the Commission agreed that Algeria had a vigorous press and some parts of the media were unafraid to criticise the government. There was also an uncensored internet. Dame Anne Pringle described the Algerian press as "fiery, vibrant, independent". Certainly there appears to be a plethora of media outlets with more than 100 newspaper titles.

89. Dr Spencer accepts the breadth and the active nature of the Algerian press. However, she voiced concern as to the capacity of the press to address breaches of the assurances. She considered it was unlikely that there would be real time reporting of incidents. She was concerned that the press would be much less likely to address individual cases than to generalise about DRS abuse, and she was also concerned that parts of the media at least are under the influence of the different groupings or "clans", jockeying for power within *le pouvoir*. In their submissions, the Appellants add that parts of the media in Algeria at any rate may be very unresponsive to allegations made by suspected Islamists, given that the media themselves have been amongst the principal victims of such terrorist groups in the past.

90. A particular point made, both by Dr Spencer in her evidence and by the Appellants in their submissions, is that the credibility of the Algerian press is very low. The Appellants point to the remarks made by the serving British ambassador when giving evidence at the In Amenas inquest. The ambassador was being questioned about press reports of arms and weapons being hidden in the desert. He was asked what the embassy did in response to such newspaper reports. He said:

> "The first point to make about press reports in Algeria is that we have to be very sceptical about any press reports in Algeria, and this was based on our own contacts in the Algerian government, and outside the Algerian government, telling us to be extremely careful of any reports in the Algerian press.
>
> We would check them. If there were reports which we were extremely concerned about we would check them with our own contacts, with other contacts that we have made but the starting point was to be extremely sceptical because often newspaper reports were inaccurate and the Algerian government told us many times not to believe a specific article. We were aware that there were elements within the Algerian administration that were using the press for their own benefit, their own ends, and the timing of articles appearing in the press was also at times highly questionable.
>
> So we were very wary of any articles and it certainly wouldn't be advisable to be basing policy on anything which appeared in the Algerian press."

91. We accept the point made by Dame Anne that the embassy would be interested and would react to a press report outlining a breach of the assurances, and to that extent the former ambassador's scepticism might well be counter-balanced by the embassy's specific interest in the topic. However, her answer was not unqualified, perhaps for understandable reasons. We touch on this below when considering the role of the embassy.

92. The Secretary of State is able to cite at least some examples of press references to specific concerns of abuse or torture, giving by way of example the speech made by Mr Bouchachi, head of the Algerian League for the Defence of Human Rights, in June 2014. He, of course, was in a public position and able to claim attention. As the Respondent summarises it:

> "It appears that not only did Mr Bouchachi quote recorded cases of torture and those which had escaped the Attorney General's attention (specific names are not mentioned), but [the newspaper] did not feel inhibited from reporting he had done so."

The Ali Attar case was reported in *Algerie Focus*. There is also material in internationally-based media organisations relating, for example, to a Guantanamo Bay returnee. The largest selling Arabic language daily paper, *El Khabar*, reported concerns from Amnesty International and Algeria Watch concerning the return of previous deportees.

93. We therefore accept the Respondent's submission that if families or detainees did report matters to the Algerian press, there is a good chance that the allegations would be published in some form or another. However, the likelihood is that this would be after the event rather than in real time. We accept that relevant NGOs would be interested in such reports, provided they reached them. We accept that given the level of focus on these assurances, the British embassy would wish to follow the matter up. None of that displaces the broader scepticism to the quality of Algerian press reports, nor does it tell us what would be the Algerian government's reaction to such reports, or the capacity of the embassy to achieve any particular outcome from further enquiries. We consider those questions below.

NGOs

94. We accept from the Respondent that there are a range of NGOs, national and international, focussed on human rights in Algeria. These certainly include Alkarama, Amnesty International, Human Rights Watch, and others. If allegations of breach of the assurances and of misbehaviour are made to these NGOs, they will take the matter up and they will publicise such allegations. However, they will usually not be able to do so "in real time", that is to say in time to prevent further mistreatment to the individual involved. Moreover, it is an obvious point to observe that these organisations have been focussed on human rights in Algeria for many years, without any measurable, or even any noticeable, effect on the treatment of detainees. Moreover for such organisations as these, mistreatment by the Algerian authorities is significant, whether or not it represents a breach of assurances to the UK government. We have not seen evidence that activity by any of these NGOs has prevented further abuse of any detainee, or would operate to prevent breach of the assurances.

Undoubtedly, publicity by a NGO would serve to alert the British embassy and the Algerian authorities to any alleged torture or mistreatment, but we do not see that publicity by the NGOs would on its own operate as an effective brake on abuse. Such reporting has never achieved that in the past.

95. It is to be noted that as recently as 2015 the US State Department has criticised in public the overuse of pre-trial detention of terrorism suspects at DRS facilities. There is no suggestion this has had any particular impact.

Maitre Amara and Ministry of Justice Officials

96. As we have noted, Maitre Amara is a familiar figure in this saga. Strong scepticism was expressed about his role in the course of the judgment in the Court of Appeal. Putting the matter shortly, in our view the "error" attributed to Maitre Amara may well have been less culpable than was presented to the Court. It appears that the reassurance he gave that a detainee was at home, was based on recent and accurate information, and that the detention happened very shortly before Maitre Amara's unintentionally misleading reassurance. Given the timing, it is probably unrealistic to think he should have known of the detention. We accept from the previous findings of SIAC, unaltered by any evidence before us, that Maitre Amara is a senior official who genuinely wishes to see the system of deportation with assurances work properly. There is in our view no basis upon which to question his good faith, and he is likely to have a continuing effect in favour of adherence to proper standards of treatment. We accept that in the past, Maitre Amara has been helpful in addressing concerns in the cases of Q, H, K and P. He did make contact with families and "relevant lawyers", as Mr Palmer put it. He has clearly been a helpful and useful resource.

97. All that said, given the authoritarian nature of the Algerian state, its opacity and the position of Maitre Amara and his colleagues as officials within the Algerian government, we do not see that Maitre Amara can play more than a minor part in any system of verification. We believe he operates in good faith, and he is well-connected. However, he cannot be regarded as independent of the Algerian government and in our view his contribution to verification must be circumscribed by his role.

Lawyers and Courts

98. The Respondent relies on amendments to the Code of Criminal Procedure, agreed in July 2015, said to apply immediately, but coming into force in January 2016. These changes were announced to the British ambassador at the end of July. The new law, it is said, will provide the right for detainees held in GaV to (1) a telephone call to a lawyer of the suspect's choice and (2) a 30 minute meeting under the supervision of a judicial police officer, if the initial 48 hour period of detention is extended. The ambassador was informed that in terrorism cases, the visit from the lawyer would be at the end of half the maximum period of GaV detention, that is to say six days. In addition, the ambassador was informed that there was:

> "tightened civilian control over all pre-charge detention facilities, including any such run by the military police and the security services (DRS). The Public Prosecutor will have the right to visit all facilities unannounced at any time."

99. In the course of the meeting with the minister, the ambassador noted that the discussion with the lawyer would be a "private audience". The translated text of the relevant provision reads:

> "… the person being held on remand can be visited by his legal representative once half of the maximum period set out in this law has been reached. The visit shall take place in a secure space which guarantees that the interview will take place in confidence, under the supervision of the criminal investigation police officer. The duration of this visit cannot exceed 30 minutes."

The Respondent relies heavily on this as an innovation and a considerable safeguard. Mr Palmer argues that there are within the evidence at least some examples of lawyers raising concerns on their client's behalf, whether through the embassy, UK authorities, or lawyers based in the UK.

100. One difficulty with this procedural change is that the decree is ambiguous as to the privacy of the interview with the lawyer. The phrase "in confidence" tends to suggest privacy, but the phrase "under the supervision of the criminal investigation police officer" tends to suggest the opposite. As we have noted elsewhere, officers of the DRS are judicial police officers. Dame Anne acknowledged that she was unclear as to whether the supervision could be conducted by a DRS official in the same room as the lawyer and the detainee.

101. Another suggested innovation was the power of public prosecutors to inspect DRS detention facilities. The effect of this was rather blunted when it was put to Dame Anne that public prosecutors had always had the power to visit GaV facilities run by the DRS, but had not used the power: a suggestion unchallenged by the Respondent.

102. In the course of her investigations in Algiers, Dame Anne Pringle spoke to the honorary legal adviser to the British embassy. We have been able to see the notes of the discussion. The legal adviser gave a reasonably mixed picture of the legal and judicial systems. When asked was there interference by government in trials, the answer was "theoretically no, in reality who knows?" When asked as to the professionalism of the legal profession, the answer was that it depends: there were some excellent and competent judges and lawyers, the more so at senior levels. Dame Anne asked if there were many allegations of mistreatment and the answer was "not really" but the legal adviser said that he didn't "know about GaV – people don't like to talk about it". In relation to the legal reforms recently announced and to the restructuring of the DRS so that they no longer detained people, the answer was the legal adviser did not know about the application of these (by which we take him to mean the extent to which they were actually applied).

103. When the legal adviser was asked about medical examinations and assessments following the end of GaV and whether the doctors were independent, the answer was "in theory, yes". There were further remarks, the implication of which was the judges may not look for evidence of mistreatment in a serious terrorism-type case.

104. In our view the effectiveness of lawyers and judges as verification of the assurances are closely connected. If the judiciary cannot be relied on, or cannot always be relied

on, then why should the lawyers be "brave"? In what way should they be brave and how effective? Where the judiciary will not investigate and expose mistreatment, lawyers are left with complaint to the executive, to the embassy, to NGOs or to the press. Many lawyers may well feel that any such initiative is beyond their professional role.

The British Embassy

105. We have addressed above the difficulties facing families who wish to report abuse of detainees, including to the British embassy. We accept that arrangements can be made to encourage and facilitate such reports from families. The arrangements could include pre-arranged phone calls or pre-arranged contact with the embassy. Such arrangements can be set up before deportation happens. There is always the possibility of anonymous reporting to the embassy, although that would necessarily lessen the impact of the reporting. While we agree that families might have concerns as to whether any of these communications could be intercepted or breached, we accept the submissions from the Respondent that in fact the arrangements could be such as to minimise that risk, whether or not those arrangements would in the end allay the fear.

106. However, in addition to arrangements allowing the embassy to receive complaints, verification must depend on what the embassy is able to do in practice, once in receipt of a complaint.

107. We have already noted the strong assertion by Dame Anne Pringle that the embassy would react vigorously to a credible report of a breach of the assurances. The qualification "credible" is relied on heavily by the Appellants, the point really being derived from one passage in Dame Anne's evidence. In the course of cross-examination she was tested as to her view of the embassy response were an allegation raised. It is clear that the first step normally to be taken by the embassy would be a referral to the Algerian Ministry of Justice, raising the question of mistreatment. As will be clear from our earlier remarks, that in itself could not be regarded as an independent check on the facts, even accepting as we do the good faith of Maitre Amara.

108. Dame Anne was pressed on the embassy's response if they received reassurance or denial by the Ministry of Justice officials. Her response was as follows:

> "If the Embassy had real reasons to believe that people had been mistreated, so for instance the lawyers, the family members had all said we have been told categorically in real time passing on these messages to the embassy that somebody has been mistreated, if the Ministry of Justice came back blandly saying that it's not our understanding, it would be pursued further if the embassy were really concerned and had really real time evidence that something had happened … it would of much higher, much further and become quite serious politically quite quickly if we had really credible backed up allegations from multiple sources."

109. Both sides have asked us to read this evidence with great care, and we do so. We do not accept that Dame Anne meant to imply that the embassy would take at face value and without any further thought reassurance from the Algerian Ministry of Justice. We do accept that the embassy would take the question of the assurances seriously. However, as her own evidence makes clear, what the embassy could do is circumscribed. Allegations by a detainee or his family, which are by definition likely to be uncorroborated, met by denial on the part of government, clearly present the embassy with a difficult problem. In the absence of corroborative evidence, medical evidence, or an adequate route to judicial judgment on the point, it is hard to see effective action emerging.

110. It was in large measure because of our consideration of this problem that we set out early in this judgment the detailed provisions for action by the embassy. The agreement and checklist we have spelled out clearly means that it was anticipated there should be a close consular attention to those returned with assurances. But the arrangements presuppose a proper flow of information to the embassy and the assistance of the Algerian authorities. In the absence of confidential access in the course of consular follow-up, it is hard to see how the arrangements would solve the problem of verification, where allegations are met with denial by the Algerians.

111. The Appellants support their position here by pointing to the responses in the cases of H and Q. The outcome of the only investigation, it is said, by the British embassy in Algeria was the *Note Verbale* sent to Maitre Amara in April 2007, to which the response from Maitre Amara also came in the form of a *Note Verbale* dated 10 April 2007. In the course of SIAC's judgment in *U v SSHD* dated 14 May 2007, it is made clear that Maitre Amara obtained the court file in relation to H and Q, but did not speak to any DRS officers responsible for detention and interrogation. Written statements signed by the detained individuals included an acknowledgement "that they had been treated with respect and that they had not received any inhumane or degrading treatment". The *Note Verbale* went on to record that those statements were corroborated by medical certificates and to recite that neither had made any mention of the allegations to the public prosecutor or the examining magistrate. In relation to this passage of events, evidence from Mr Layden also indicated that complaints would only be further investigated by the embassy if they were "credible".

112. It is important to recognise the role and the capacity of the embassy. As Dame Anne confirmed the embassy will not take positive steps of its own to verify or report on breaches of assurances. As we have said, the embassy will depend on family members or somebody else coming to them with complaints or reports. This approach is confirmed by emails involving the ambassador, Mr Andrew Noble, of 13 November 2014. The partly-redacted exchange reads as follows:

> "**From**: [redacted]
> **Sent:** 13 November 2014 14:30
> **To:** [redacted]
> **Cc:** [redacted]
> **Subject:** RE: Monitoring of Assurances in Extradition Cases, MLA and OSJAs
> [redacted]

That's ok, but it makes it sound as if we are fully resourced to do so, when the reality is that our monitoring role is very limited. So "BE Algiers performs a limited monitoring role in a constrained environment" would be better.

From: Andrew Noble (Sensitive)
Sent: 13 November 2014 14:45
To: [redacted]
Cc: [redacted]
Subject: RE: Monitoring of Assurances in Extradition Cases, MLA and OSJAs
And I had thought that we were actively preparing to hand on the role to an NGO since there is no objective reason for this Embassy to be the only one that performs the role. **As I understand it, in any case, it has been entirely passive in the past** [*emphasis added*] – ie the deportees (who did not object to being returned) had our number to call if they wanted. And none of them ever did.

Andrew J Noble | Ambassador | British Embassy Algiers [redacted]

From: [redacted]
Sent: 13 November 2014 14:53
To: [redacted]
Subject: FW: Monitoring of Assurances in Extradition Cases, MLA and OSJAs
[redacted]

To be aware of how things look on the ground. I do think it's right not to describe the current situation as "robust" monitoring.

[redacted]"

113. In an email exchange between the outgoing and incoming ambassadors at the same point in November 2014, the linked questions of resources and the effectiveness of the embassy in verifying the assurances were addressed as follows:

"**From:** Andrew Noble [redacted]
Sent: Thursday, November 13, 2014 02:45PM
To: [redacted]
Cc: [rerdacted]
Subject: FW: Monitoring of Assurances in Extradition Cases, MLA and OSJAs
[redacted]

Do you believe it to be true that this Embassy has been given extra resources to monitor our DWA Assurances?

From: Martyn Roper [redacted]

> **Sent:** 13 November 2014 16:35
> **To:** Andrew Noble [redacted]
> **Cc:** [redacted]
> **Subject:** RE: Monitoring of Assurances in Extradition Cases, MLA and OSJAs
> [redacted]
>
> Andrew
>
> Not as far as I am aware. We used to have a Migration Delivery Officer (whose function could have included monitoring but I don't recall that specifically). However, the HO cut the slot as part of a prioritisation exercise.
>
> [redacted] role is largely about confirming the identity of illegal immigrants in UK through enquiries in Algeria, [redacted]
>
> In an Algeria context, there was never a realistic prospect of being able to monitor the whereabouts and well-being of the DWA deportees. That runs into sensitivities about sovereignty. We rely exclusively on the assurances received at the highest levels of the Algerian state from the President and wider Algerian system (key point). I had no doubt in my time that these assurances, taken very seriously by Algeria, would be honoured.
>
> [redacted]"

114. We should be careful to express what we conclude on this issue and in particular on the role of the embassy. We do not mean to state or imply that the British embassy would be lofty or lazy about reports of breaches of the assurances. We do not accept that Dame Anne intended to set "pre-conditions for further investigation of allegations". We consider the correct conclusion from the evidence was that the embassy will be keen to look at any suggested breach, but unless there is material with which they can work, supported in some credible way, then in the face of denials from the Algerian authorities, it is hard to see what the embassy could do without persuasive and specific material to deploy. As Dame Anne explained, "ideally" the embassy would wish to cross-check with other sources and in some instances they might find other sources which are credible, whether support from lawyers or perhaps medical evidence. In the absence of such cooperation, and given the constraints, it is hard to see how the embassy could be effective in verifying, one way or the other, the truth of such allegations.

Conclusions

115. In reaching our conclusions we have of course considered the CLOSED and PROTECTED evidence, in addition to the evidence which we have been able to analyse above. However our conclusions are principally based on the OPEN evidence addressed in this judgment. We emphasise that the CLOSED and PROTECTED evidence lead us to the same conclusions as the OPEN evidence.

116. Our conclusions can be simply stated. Viewing the evidence as a whole we are not convinced that the improvements in conditions in Algeria are so marked or so entrenched as to obviate the need for effective verification that the authorities will adhere to the assurances given. It is not inconceivable that these Appellants, if returned to Algeria, would be subjected to ill-treatment infringing Article 3. There is a real risk of such a breach. The different means of verification of adherence advanced by the Respondent do not, taken together, amount to a robust system of verification.

117. For these reasons, in addition to the matters addressed in the CLOSED and PROTECTED judgments, the appeals succeed.

Individual Cases

118. At the conclusion of the hearing, the Commission canvassed with the parties whether, in the event that the Appellants were to succeed on the common issues, the Commission should proceed to make findings on the individual medically-based grounds for opposing removal to Algeria. The parties agreed that the Commission should not do so. Hence we make no findings on these individual issues.

ADDENDUM

119. On 26 February 2016, as the judgments in this case were in the final stages of preparation, the Commission received a message from the Respondent stating that, by Presidential decree of 20 January 2016, the DRS had been "disbanded". On 8 March the Commission was passed a redacted copy of a Diplomatic Telegram from HM Ambassador in Algiers, dated 18 February 2016, giving some detail of the change. Following that Irwin J gave a short period for both parties and the Special Advocates to make submissions. The Special Advocates and the Commission have seen the unredacted DipTel. All have made further submissions.

120. We have consulted together having read these submissions, and in the case of the Appellants, the letter prepared by Dr Spencer of 9 March.

121. We are of the clear view that this development should not alter the outcome of the case, or cause us to amend the judgments already drafted. We reject the submission of the Secretary of State that this decree is sufficient to remove any real risk of a breach of Article 3, and thus remove the need for effective verification of the assurances. On the very slim amount of material available, the changes bear the appearance of a bureaucratic change at the top. There is no change in the overall leader of the Algerian Security and Intelligence Service (General Tartag). The material before us provides a wholly inadequate basis for concluding there is any material change in the personnel or the culture of the security and intelligence service, however named and wherever placed within government structures. In our view, there remains a requirement in law for effective verification of the assurances, and it remains the case there is no sufficient means of that effective verification.