A

House of Lords

A and others *v* Secretary of State for the Home Department (No 2)

[2005] UKHL 71

B

2005 Oct 17, 18, 19, 20; Dec 8

Lord Bingham of Cornhill, Lord Nicholls of Birkenhead, Lord Hoffmann, Lord Hope of Craighead, Lord Rodger of Earlsferry, Lord Carswell and Lord Brown of Eaton-under-Heywood

Human rights — Right to fair trial — Suspected international terrorists — Secretary of State issuing certificates to detain under temporary emergency statutory provisions — Detention on basis of reasonable belief and suspicion — Alleged reliance on evidence of third parties subject to torture in foreign state — Whether evidence admissible — Anti-terrorism, Crime and Security Act 2001 (c 24) ss 21, 23, 25 — Special Immigration Appeals Commission (Procedure) Rules 2003 (SI 2003/1034), r 44(3) — Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1990) (Cm 1775), art 15

C

D

Following large scale attacks in the United States on 11 September 2001 the United Kingdom Government concluded that there was a public emergency threatening the life of the nation within the meaning of the Convention for the Protection of Human Rights and Fundamental Freedoms. Legislation was passed designating the United Kingdom's proposed derogation from the right to liberty under the Convention, which was scheduled to the Human Rights Act 1998, and temporary emergency powers subject to renewal were enacted in Part 4 of the Anti-terrorism, Crime and Security Act 2001[1] providing, by section 21 and 23, for the detention of suspected international terrorists if the Secretary of State believed their presence in the United Kingdom was a risk to national security and he suspected that they were terrorists who could not be deported because of fears for their safety or other practical considerations. The applicants, the subject of certification by the Secretary of State, appealed under section 25 of the 2001 Act to the Special Immigration Appeals Commission against their detention. The commission, which by rule 44(3) of the Special Immigration Appeals Commission (Procedure) Rules 2003[2] was entitled to receive evidence that would not be admissible in a court of law, reviewed the evidence in respect of each applicant and in a number of open and closed judgments dismissed their appeals. In one case it was alleged that the Secretary of State had relied on evidence of a third party obtained through his torture in a foreign state. The commission held that, if there was such material which had been obtained without the complicity of British authorities, they might examine it and determine the proper weight to be attached to it and that there would be no prohibition on its admission within the meaning of article 15 of the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1990)[3]. They concluded, however, that there was no such material. The Court of Appeal, by a majority, upheld the commission's decision and dismissed the applicants' appeals.

E

F

G

On the applicants' appeals—

H

[1] Anti-terrorism, Crime and Security Act 2001, s 21: see post, para 3.
S 23: see post, para 4.
S 25: see post, para 5.

[2] Special Immigration Appeals Commission (Procedure) Rules 2003, r 44(3): see post, para 7.

[3] Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1990), art 15: see post, para 35.

Held, allowing the appeals and remitting each case to the commission for reconsideration, (1) that evidence of a suspect or witness which had been obtained by torture had long been regarded as inherently unreliable, unfair, offensive to ordinary standards of humanity and decency and incompatible with the principles on which courts should administer justice, and that, in consequence, such evidence might not lawfully be admitted against a party to proceedings in a United Kingdom court, irrespective of where, by whom or on whose authority the torture had been inflicted; that the Secretary of State did not act unlawfully in relying on such tainted material when certifying, arresting and detaining a person under the 2001 Act whom he suspected of international terrorism; but that the commission was established to exercise judicial supervision of his exercise of those powers and was required to assess whether at the time of the hearing before it there were reasonable grounds for his suspicion; that, although it might admit a wide range of material which was inadmissible in judicial proceedings, express statutory words would be required to override the exclusionary rule barring evidence procured by torture; that the wording of rule 44(3) could not be interpreted as authorising the displacement of that rule and that, accordingly, the commission could not admit such evidence (post, paras 47–49, 51–52, 63, 66–73, 75–76, 79, 87–88, 91, 93–97, 99, 111–114, 127, 128–129, 136–138, 147–152, 159, 161, 164–165, 175).

(2) That, since a detainee had only limited access to material advanced against him in proceedings before the commission, a conventional approach to the burden of proof was inappropriate in determining whether a statement should be excluded as procured by torture; that a detainee could not be expected to do more than raise a plausible reason that material might have been so obtained and, where he did so, it was for the commission to initiate relevant inquiries; that (Lord Bingham of Cornhill, Lord Nicholls of Birkenhead and Lord Hoffmann dissenting) the commission should adopt the test of admissibility laid down in article 15 of the Torture Convention and consider whether it was established by such inquiry as it was practicable to carry out and on a balance of probabilities that the information relied on by the Secretary of State was obtained by torture; that if satisfied that it was so established the commission should decline to admit the material, but that, if they were doubtful, they should admit it, bearing their doubt in mind in evaluating it (post, paras 55, 56, 80, 98, 116–121, 125, 138, 141–145, 156–158, 172–173).

Decision of the Court of Appeal [2004] EWCA Civ 1123; [2005] 1 WLR 414 reversed.

The following cases are referred to in the opinions of their Lordships:

A v Secretary of State for the Home Department [2002] EWCA Civ 1502; [2004] QB 335; [2003] 2 WLR 564; [2003] 1 All ER 816, CA; [2004] UKHL 56; [2005] 2 AC 68; [2005] 2 WLR 87; [2005] 3 All ER 169, HL(E)
Al-Adsani v United Kingdom (2001) 34 EHRR 273
Attorney General v O'Brien [1965] IR 142
Austria v Italy (1963) 6 YB 740
Aydin v Turkey (1997) 25 EHRR 251
Chahal v United Kingdom (1996) 23 EHRR 413
Demjanjuk, In re, Extradition of (1985) 612 F Supp 544
Director of Public Prosecutions v Ping Lin [1976] AC 574; [1975] 3 WLR 419; [1975] 3 All ER 175, CA and HL(E)
El Motassadeq, In re 2005 NJW 2326, Hamburg Higher Regional Ct
Ferrantelli v Italy (1996) 23 EHRR 288
Filartiga v Pena-Irala (1980) 630 F 2d 876
French Republic v Haramboure (unreported) 24 January 1995; Cour de Cassation, Chambre Criminelle, Case No 94-81254
GK v Switzerland (unreported) 17 May 2003; Communication No 219/2002, Committee against Torture
Garcia Alva v Germany (2001) 37 EHRR 335

A *Garland v British Rail Engineering Ltd* [1983] 2 AC 751; [1982] 2 WLR 918; [1982] 2 All ER 402, ECJ and HL(E)
Golder v United Kingdom (1975) 1 EHRR 524
HN v Poland (Application No 77710/01) (unreported) 13 September 2005, ECtHR
Harutyunyan v Armenia (Application No 36549/03) (unreported) 5 July 2005, ECtHR
Higgs v Minister of National Security [2000] 2 AC 228; [2000] 2 WLR 1368, PC
B *Hurtado v California* (1884) 110 US 516
Ibrahim v The King [1914] AC 599, PC
India v Singh (1996) 108 CCC (3d) 274
Ireland v United Kingdom (1978) 2 EHRR 25
Khan v United Kingdom (2000) 31 EHRR 1016
Korematsu v United States (1944) 323 US 214
Kuruma v The Queen [1955] AC 197; [1955] 2 WLR 223; [1955] 1 All ER 236, PC
C *Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 and 5)* [2002] UKHL 19; [2002] 2 AC 883; [2002] 2 WLR 1353; [2002] 3 All ER 209, HL(E)
LaFrance v Bohlinger (1974) 499 F 2d 29
Lam Chi-ming v The Queen [1991] 2 AC 212; [1991] 2 WLR 1082; [1991] 3 All ER 172, PC
Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion (unreported) 9 July 2004, ICJ
D *M v Secretary of State for the Home Department* [2004] EWCA Civ 324; [2004] 2 All ER 863, CA
McClean, In re [2004] NICA 14, CA(NI)
Makanjuola v Comr of Police of the Metropolis [1992] 3 All ER 617, CA
Mamatkulov and Askarov v Turkey (2005) 41 EHRR 494
Ministère Public v Irastorza Dorronsoro (unreported) 16 May 2003; Cour d'Appel de Pau, Case No 238/2003
Montgomery v HM Advocate [2003] 1 AC 641; [2001] 2 WLR 779, PC
E *PE v France* (2002) 10 IHRR 421
Pearse v Pearse (1846) 1 De G & Sm 12
Pereira, In re (unreported) 1 October 1996, Case No 103–094, Netherlands SC
Prager v Blatspiel, Stamp and Heacock Ltd [1924] 1 KB 566
Prosecutor v Furundzija (unreported) 10 December 1998, International Criminal Tribunal for the Former Yugoslavia, Case No IT-95–17/T 10
Public Committee Against Torture in Israel v Israel (1999) 7 BHRC 31
F *R v Baldry* (1952) 2 Den 430
R v Birmingham Overseers (1861) 1 B & S 763
R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 3) [2000] 1 AC 147; [1999] 2 WLR 827; [1999] 2 All ER 97, HL(E)
R v Chief Constable of West Midlands Police, Ex p Wiley [1995] 1 AC 274; [1994] 3 WLR 433; [1994] 3 All ER 420, HL(E)
R v Governor of Brixton Prison, Ex p Levin [1997] AC 741; [1997] 3 WLR 117;
G [1997] 3 All ER 289, HL(E)
R v Harz [1967] 1 AC 760; [1967] 2 WLR 297; [1967] 1 All ER 177, HL(E)
R v Horseferry Road Magistrates' Court, Ex p Bennett [1994] 1 AC 42; [1993] 3 WLR 90; [1993] 3 All ER 138, HL(E)
R v Ireland (1970) 126 CLR 321
R v Latif [1996] 1 WLR 104; [1996] 1 All ER 353, HL(E)
R v Leathem (1861) 8 Cox CC 498
H *R v Lichniak* [2002] UKHL 47; [2003] 1 AC 903; [2002] 3 WLR 1834; [2002] 4 All ER 1122, HL(E)
R v Looseley [2001] UKHL 53; [2001] 1 WLR 2060; [2001] 4 All ER 897, HL(E)
R v Lyons [2002] UKHL 44; [2003] 1 AC 976; [2002] 3 WLR 1562; [2002] 4 All ER 1028, HL(E)
R v Mullen [2000] QB 520; [1999] 3 WLR 777, CA

R v Mushtaq [2005] UKHL 25; [2005] 1 WLR 1513; [2005] 3 All ER 885, HL(E) A
R v Oickle [2000] 2 SCR 3
R v Rusby (1800) 2 Pea 189
R v Secretary of State for the Home Department, Ex p Brind [1991] 1 AC 696; [1991] 2 WLR 588; [1991] 1 All ER 720, HL(E)
R v Secretary of State for the Home Department, Ex p Simms [2000] 2 AC 115; [1999] 3 WLR 328; [1999] 3 All ER 400, HL(E)
R v Warickshall (1783) 1 Leach 263 B
R (Ramda) v Secretary of State for the Home Department [2002] EWHC 1278 (Admin), DC
R (Saifi) v Governor of Brixton Prison [2001] 1 WLR 1134; [2001] 4 All ER 168, DC
R (Smith) v Parole Board (No 2) [2003] EWCA Civ 1269; [2004] 1 WLR 421, CA; [2005] UKHL 1; [2005] 1 WLR 350; [2005] 1 All ER 755, HL(E)
R (West) v Parole Board [2002] EWCA Civ 1641; [2003] 1 WLR 705, CA; [2005] UKHL 1; [2005] 1 WLR 350; [2005] 1 All ER 755, HL(E) C
Rayner (J H) (Mincing Lane) Ltd v Department of Trade and Industry [1989] Ch 72; [1988] 3 WLR 1033; [1988] 3 All ER 257, CA; [1990] 2 AC 418; [1989] 3 WLR 969; [1989] 3 All ER 523, HL(E)
Rochin v California (1952) 342 US 165
S v Nkomo 1989 (3) ZLR 117
S v Switzerland (1991) 14 EHRR 670
Saunders v United Kingdom (1996) 23 EHRR 313
Schenk v Switzerland (1988) 13 EHRR 242 D
Selmouni v France (1999) 29 EHRR 403
Siderman de Blake v Republic of Argentina (1992) 965 F 2d 699
Soering v United Kingdom (1989) 11 EHRR 439
Teixeira de Castro v Portugal (1998) 28 EHRR 101
Teper v The Queen [1952] AC 480; [1952] 2 All ER 447, PC
United States v Hensel (1981) 509 F Supp 1364
United States v Toscanino (1974) 500 F 2d 267 E
V v United Kingdom (1999) 30 EHRR 121
Wong Kam-ming v The Queen [1980] AC 247; [1979] 2 WLR 81; [1979] 1 All ER 939, PC

The following additional cases were cited in argument:

Abdulaziz, Cabales and Balkandali v United Kingdom (1985) 7 EHRR 471
Aerts v Belgium (1998) 29 EHRR 50 F
Al-Nashif v Bulgaria (2001) 35 EHRR CD 76
Artico v Italy (1980) 3 EHRR 1
Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223; [1947] 2 All ER 680, CA
Atta, Extradition of, In re (1989) 706 F Supp 1032
Attorney General v Guardian Newspapers Ltd (No 2) [1990] 1 AC 109; [1988] 3 WLR 776; [1988] 3 All ER 545, HL(E) G
Barberà, Messegué and Jabardo v Spain (1988) 11 EHRR 360
Barcelona Traction, Light and Power Co Ltd (second phase), In re (Belgium v Spain) [1970] ICJ Rep 3
Benham v United Kingdom (1996) 22 EHRR 293
Blackburn v Alabama (1960) 361 US 199
Bosphorus Hava Yollari v Ireland (Application No 45036/98) (unreported) 30 June 2005, ECtHR H
Boudellaa v Bosnia and Herzegovina (2002) 13 BHRC 297
Brown v Illinois (1975) 422 US 590
Brown v Stott [2003] 1 AC 681; [2001] 2 WLR 817; [2001] 2 All ER 97, PC
Buckley v Fitzsimmons (1994) 20 F 3d 789
Bunning v Cross (1978) 141 CLR 54

A *Can v Austria* (1985) 8 EHRR 14
Charkaoui, In re [2004] FCJ 1236; 23 July 2004, Ct of Montreal
Clanton v Cooper (1997) 129 F 3d 1147
De Wilde, Ooms and Versyp v Belgium (1971) 1 EHRR 373
Dikme v Turkey Reports of Judgments and Decisions 2000-VIII, p 223
E v Norway (1990) 17 EHRR 30
Engel v The Netherlands (No 1) (1976) 1 EHRR 647
B *Fothergill v Monarch Airlines Ltd* [1981] AC 251, [1980] 3 WLR 209; [1980] 2 All ER 696, HL(E)
Forti v Suarez-Mason (1987) 672 F Supp 1531
Gill v Imundi (1990) 747 F Supp 1028
Groppera Radio AG v Switzerland (1990) 12 EHRR 321
Guantanamo Detainees Cases, In re (2005) 355 F Supp 2d 443
Helliwell v Piggott-Sims [1980] FSR 356, CA
C *Hussien v Chong Fook Kam* [1970] AC 942; [1970] 2 WLR 441; [1969] 3 All ER 1626, PC
Hutchinson v Newbury Magistrates' Court (2000) 122 ILR 499, DC
Jackson v Denno (1964) 378 US 368
Jecius v Lithuania (2000) 35 EHRR 400
Jersild v Denmark (1994) 19 EHRR 1
Jones v Ministry of the Interior of the Kingdom of Saudi Arabia (Secretary of State for Constitutional Affairs intervening) [2004] EWCA Civ 1394; [2005] QB 699; [2005] 2 WLR 808, CA
D
Kaya v Turkey Reports of Judgments and Decisions 2000-III, p 149
Klass v Federal Republic of Germany (1978) 2 EHRR 214
Kosiek v Germany (1986) 9 EHRR 328
Lamothe v Comr of Police of the Metropolis (unreported) 25 October 1999; Court of Appeal (Civil Division) Transcript No 1775 of 1999, CA
Lawless v Ireland (No 3) (1961) 1 EHRR 15
E *Leander v Sweden* (1987) 9 EHRR 433
Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion [1996] ICJ Rep 226
Lobban v The Queen [1995] 1 WLR 877; [1995] 2 All ER 602, PC
Loizidou v Turkey (1995) 20 EHRR 99
Lord Advocate v Lord Blantyre (1879) 4 App Cas 770, HL(Sc)
Lui Mei Lin v The Queen [1989] AC 288; [1989] 2 WLR 175; [1989] 1 All ER 359, PC
F
Lutz v Germany (1987) 10 EHRR 182
Maaouia v France (2000) 33 EHRR 1037
McKerr, In re [2004] UKHL 12; [2004] 1 WLR 807; [2004] 2 All ER 409, HL(NI)
Magee v United Kingdom (2000) 31 EHRR 822
Mainero v Gregg (1999) 164 F 3d 1199
Malinski v New York (1945) 324 US 401
G *Müller v Switzerland* (1988) 13 EHRR 212
New York v Portelli (1965) 205 NE (2d) 857
Nicaragua v United States of America [1986] ICJ Rep 14; 77 ILR 349
North Sea Continental Shelf, In re (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands) [1969] ICJ Rep 3
O'Hara v Chief Constable of the Royal Ulster Constabulary [1997] AC 286; [1997] 2 WLR 1; [1997] 1 All ER 129, HL(NI)
H *Olmstead v United States* (1928) 277 US 438
Padfield v Minister of Agriculture, Fisheries and Food [1968] AC 997; [1968] 2 WLR 924; [1968] 1 All ER 694, CA and HL(E)
Philippson v Imperial Airways Ltd [1939] AC 332; [1939] 1 All ER 761, HL(E)
Post Office v Estuary Radio Ltd [1968] 2 QB 740; [1967] 1 WLR 1396; [1967] 3 All ER 663, CA

Prebble v Television New Zealand Ltd [1995] 1 AC 321; [1994] 3 WLR 970; [1994] 3 All ER 407, PC
Pretto v Italy (1983) 6 EHRR 182
Prosecutor v Delalic (unreported) 2 September 1997 and 16 November 1998, International Criminal Tribunal for the Former Yugoslavia, Case No IT-96–21-T
Prosecutor v Kunarec (unreported) 22 February 2001, International Criminal Tribunal for the Former Yugoslavia, Case No IT-96–23/1-T
Proulx, In re [2001] 1 All ER 57, DC
R v Collins [1987] 1 SCR 265
R v Christie [1914] AC 545, HL(E)
R v Governor of Belmarsh Prison, Ex p Francis [1995] 1 WLR 1121; [1995] 3 All ER 634, DC
R v H [2004] UKHL 3; [2004] 2 AC 134; [2004] 2 WLR 335; [2004] 1 All ER 1269, HL(E)
R v Hammond [1941] 3 All ER 318; 28 Cr App R 84, CCA
R v Harrer [1995] 3 SCR 562
R v Hnedish (1958) 26 WWR 685
R v Jones (Margaret) [2004] EWCA Crim 1981; [2005] QB 259; [2004] 3 WLR 1362; [2004] 4 All ER 955, CA
R v Khan (Sultan) [1997] AC 558; [1996] 3 WLR 162; [1996] 3 All ER 289, HL(E)
R v P [2002] 1 AC 146; [2001] 2 WLR 463; [2001] 2 All ER 58, HL(E)
R v Sang [1980] AC 402; [1979] 3 WLR 263; [1979] 2 All ER 1222, HL(E)
R v Secretary of State for the Home Department, Ex p Elliot [2001] EWHC Admin 559, DC
R v Shaheed [2002] 2 NZLR 377
R v Shayler [2002] UKHL 11; [2003] 1 AC 247; [2002] 2 WLR 754; [2002] 2 All ER 477, HL(E)
R v Thompson [1893] 2 QB 12
R v Togher [2001] 3 All ER 463, CA
R v Warringham (1851) 2 Den 447
R v Yacoob (1981) 72 Cr App R 313, CA
R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2001] UKHL 23; [2003] 2 AC 295; [2001] 2 WLR 1389; [2001] 2 All ER 929, HL(E)
R (European Roma Rights Centre) v Immigration Officer at Prague Airport (United Nations High Comr for Refugees intervening) [2004] UKHL 55; [2005] 2 AC 1; [2005] 2 WLR 1; [2005] 1 All ER 527, HL(E)
R (Kariharan) v Secretary of State for the Home Department [2002] EWCA Civ 1102; [2003] QB 933; [2002] 3 WLR 1783, CA
R (McCann) v Crown Court at Manchester [2002] UKHL 39; [2003] 1 AC 787; [2002] 3WLR 1313; [2002] 4 All ER 593, HL(E)
R (Roberts) v Parole Board [2005] UKHL 45; [2005] 2 AC 738; [2005] 3 WLR 152; [2006] 1 All ER 39, HL(E)
R (S) v Chief Constable of the South Yorkshire Police [2004] UKHL 39; [2004] 1 WLR 2196; [2004] 4 All ER 193, HL(E)
R (Ullah) v Special Adjudicator [2004] UKHL 26; [2004] 2 AC 323; [2004] 3 WLR 23; [2004] 3 All ER 785, HL(E)
Raimondo v Italy (1994) 18 EHRR 237
Rotaru v Romania (2000) 8 BHRC 449
Rudd's Case (1775) 1 Leach 115
S v Zuma 1995 (2) SA 642
Scott v Scott [1913] AC 417, HL(E)
Secretary of State for the Home Department v Rehman [2001] UKHL 47; [2003] 1 AC 153; [2001] 3 WLR 877; [2002] 1 All ER 122, HL(E)
Segi v Germany [2002] EHRLR 683
Tel-Oren v Libyan Arab Republic (1984) 726 F 2d 774

A *Tinnelly & Sons Ltd v United Kingdom* (1998) 27 EHRR 249
Tonge's Case (1662) 6 How St Tr 225
Trendtex Trading Corpn v Central Bank of Nigeria [1977] QB 529; [1977] 2 WLR 356; [1977] 1 All ER 881, CA
United States v Morrow (1976) 537 F 2d 120
Welch v United Kingdom (1995) 20 EHRR 247
Wemhoff v Federal Republic of Germany (1968) 1 EHRR 55
B *Youssef v Home Office* [2004] EWHC 1884 (QB)
Zoernsch v Waldock [1964] 1 WLR 675; [1964] 2 All ER 256, CA

APPEALS from the Court of Appeal

These were appeals by ten individuals detained under Part 4 of the Anti-terrorism, Crime and Security Act 2001, by leave of the House of Lords (Lord Bingham of Cornhill, Lord Hope of Craighead and Baroness Hale of C Richmond) granted on 9 February 2005, from the Court of Appeal (Pill and Laws LJJ, Neuberger LJ dissenting) which had dismissed their appeals from the "generic judgment" dated 29 October 2003 of the Special Immigration Appeals Commission (Ouseley J, Mr C M G Ockelton and Mr J Chester) and other judgments of the commission, presided over by Collins J or Ouseley J, given on that date, refusing to cancel certificates made by the Secretary of State under section 21 of the Anti-terrorism, Crime and Security Act 2001. D The Commonwealth Lawyers Association with two others and Amnesty International with 13 others intervened in the appeals.

The facts are stated in the opinion of Lord Bingham of Cornhill.

Ben Emmerson QC, Philippe Sands QC, Raza Husain and *Danny Friedman* for the appellants. Proceedings before the Special Immigration E Appeals Commission ("SIAC") under section 25 of the Anti-terrorism, Crime and Security Act 2001 are subject to an exclusionary rule prohibiting the admission of statements made by a person who is not a party to the proceedings during the course of interrogation by agents of a foreign state where the statement is obtained (i) by torture, as defined in article 1 of the United Nations Convention Against Torture 1984 or (ii) by the infliction of inhuman and degrading treatment as understood in article 3 of the European F Convention on Human Rights.

The exclusionary rule is drawn from principles of the common law, customary international law, international conventions and a variety of other international law sources. Those materials are not "separate routes"; they are in harmony and together demonstrate the existence of a single unifying principle that admission of evidence obtained by torture or ill-G treatment is an affront to the public conscience and must be suppressed by the court.

The outright rejection of torture as a method of proof, unlike the system in continental Europe and, until union, in Scotland, has been a distinguishing feature and defining characteristic of the English common law from its earliest inception and, as such, is characterised as a constitutional principle and not simply a rule of evidence. Such use of torture as occurred H was authorised by executive warrant as an engine of the state not of the law: see *Sir John Fortescue, De Laudibus Legum Angliae* (c 1460–1470), ed S B Chrimes, (1942), ch 22, pp 47–49; *Sir Thomas Smith, De Republica Anglorum* (1584), ed L Alston (1906), bk 2, ch 24, pp 104–107); *Coke, Institutes of the Laws of England* (1644), Part III, ch 2, pp 34–36; *Hale,*

Pleas of the Crown (1736), vol 1, ch 24, pp 301–307; *Blackstone, Commentaries on the Laws of England* (1769) bk IV, ch 25, pp 320–321; *Stephen, A History of the Criminal Law of England* (1883), vol 1, p 222; D Jardine, "A Reading on the Use of Torture in the Criminal Law of England Previously to the Commonwealth", (1837), pp 11–12, 60–62; *Rushworth's Historical Collections* (1721), vol 1, pp 638–639; *C Beccaria, An Essay on Crimes and Punishments,* 1764, ch XVI; *Voltaire's Commentary of Beccaria's Crimes and Punishments,* (1766), ch XII; AL Lowell, "The Judicial Use of Torture" (1897) 11 Harvard L Rev 220–233, 290–300; *Langbein, Torture and the Law of Proof: Europe and England in the Ancient Regime* (1977); D Hope, "Torture" (2004) 53 ICLQ 807; *Holdsworth, A History of English Law,* 3rd ed (1945), vol 5, pp 194–195.

The common law rule against involuntary confessions is part of the same principle; it is based not entirely on their inherent unreliability but also on the need to preserve the integrity and fairness of the trial process. Insistence on exclusion demonstrates the common law's refusal to accept oppression or inducement as a matter going to the weight of evidence so obtained rather than to its admissibility: see *Tonge's Case* (1662) 6 How St Tr 225; *Rudd's Case* (1775) 1 Leach 115; *R v Warickshall* (1783) 1 Leach 263; *R v Sang* [1980] AC 402; *R v Baldry* (1952) 2 Den 430; *R v Thompson* [1893] 2 QB 12; *R v Warrington* (1851) 2 Den 447; *Ibrahim v The King* [1914] AC 599; *R v Harz* [1967] 1 AC 760; *R v Hnedish* (1958) 26 WWR 685; *Wong Kam-ming v The Queen* [1980] AC 247; *Lam Chi-ming v The Queen* [1991] 2 AC 212; *R v Mushtaq* [2005] 1 WLR 1513; *R v Ireland* (1970) 126 CLR 321; *R v Oickle* [2000] 2 SCR 3; *Attorney General v O'Brien* [1965] IR 142; *Rochin v California* (1952) 342 US 165 and, by contrast, *R v Hammond* [1941] 3 All ER 318.

Common law principles also recognise that courts possess an inherent power, and duty, to protect the integrity of the judicial process from abuse of power where the manner in which the accused is brought before them or in which the evidence against him has been obtained constitutes an abuse so grave as to amount to an affront to the public conscience. The abuse jurisdiction is either exercised by means of a permanent stay of proceedings or, where appropriate, by exclusion of evidence: see *R v Horseferry Road Magistrates' Court, Ex p Bennett* [1994] 1 AC 42; *R v Latif* [1996] 1 WLR 104; *R v Mullen* [2000] QB 520; *R v Looseley* [2001] 1 WLR 2060. It is not confined to cases where the state seeks to rely on the improper conduct of its own agents. The court has a discretion, although subject to issues of comity and reciprocity, to exclude evidence in extradition cases obtained by agents of a foreign state in a manner which would "outrage civilised values": see *R v Governor of Brixton Prison, Ex p Levin* [1997] AC 741; *R v Governor of Belmarsh Prison, Ex p Francis* [1995] 1 WLR 1121; *In re Proulx* [2001] 1 All ER 57; *R (Saifi) v Governor of Brixton Prison* [2001] 1 WLR 1134; *India v Singh* (1996) 108 CCC (3d) 274 and *Higgs v Minister of National Security* [2000] 2 AC 228.

The prohibition on the infliction of torture is a jus cogens norm of customary international law and, as such, forms part of the common law. One consequence is the acceptance of universal jurisdiction to try acts of torture committed by agents of a foreign state. Torture, by definition, involves the infliction of suffering for the purpose of obtaining information; if that information were to be admitted in evidence the court would give

A effect to the torturer's purpose. Accordingly the prohibition on torture requires the common law also to recognise a similar prohibition on the admission of evidence so obtained irrespective of where and by whom the torture is committed: see *Prosecutor v Furundzija* (unreported) 10 December 1998, International Criminal Tribunal for the Former Yugoslavia, Case No IT-98–17/T 10; *Filartiga v Pena-Irala* (1980) 630 F 2d 876; *Soering v United Kingdom* (1989) 11 EHRR 439; *R v Bow Street Metropolitan Stipendiary* B *Magistrates' Court, Ex p Pinochet Ugarte (No 3)* [2000] 1 AC 147; *In re Extradition of Demjanjuk* (1985) 612 F Supp 544; *S v Nkomo* 1989 (3) ZLR 117; *J H Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1989] Ch 72; *Trendtex Trading Corpn v Central Bank of Nigeria* [1977] QB 529; *Hutchinson v Newbury Magistrates' Court* (2000) 122 ILR 499 and *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia* C *(Secretary of State for Constitutional Affairs intervening)* [2005] QB 699.

Domestic law is to be interpreted in harmony with the United Kingdom's treaty obligations and, in particular for present purposes, with article 15 of the Torture Convention. To apply the exclusionary rule to evidence extracted under torture or ill-treatment by agents of a foreign state represents a principled incremental approach which does not conflict with D any statutory provision. The only provision in point, rule 44(3) of the Special Immigration Appeals Commission (Procedure) Rules 2003, is permissive: see *R v Lyons* [2003] 1 AC 976; *In re McKerr* [2004] 1 WLR 807; *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109; *J H Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418 and *R v Togher* [2001] 3 All ER 463.

Irrespective of the position at common law, SIAC has a duty under E sections 3(1) and 6(1) of the Human Rights Act 1998 to act compatibly with the appellants' rights under article 6 and/or article 5(4) of the European Convention on Human Rights unless prevented from doing so by a clear mandatory legislative provision. Those articles, read alone or in conjunction with article 15 of the Torture Convention, embody an obligation to exclude evidence obtained by torture or other treatment in violation of article 3 of F the Human Rights Convention and it is immaterial for that purpose whether the ill-treatment is inflicted by agents of the United Kingdom or of a foreign state. That obligation takes precedence over rule 44(3) of the Procedure Rules.

Domestic law must keep pace with the European Court of Human Rights' interpretation of the European Convention: see *R (Ullah) v Special* G *Adjudicator* [2004] 2 AC 323. The Convention must be construed in good faith in accordance with the ordinary meaning of its terms in their context and in the light of its object and purpose. It is therefore to be read as a unitary whole, having regard to other international treaty obligations to which states parties are committed and ensuring that the rights it guarantees are to be interpreted so as to afford practical and effective protection: see *Golder v United Kingdom* (1975) 1 EHRR 524; Vienna Convention on the H Law of Treaties (1969), articles 31 and 33; *Abdulaziz, Cabales and Balkandali v United Kingdom* (1985) 7 EHRR 471; *Al-Adsani v United Kingdom* (2001) 34 EHRR 273; *V v United Kingdom* (1999) 30 EHRR 121; *S v Switzerland* (1991) 14 EHRR 670 and *Saunders v United Kingdom* (1996) 23 EHRR 313.

Article 3, held to enshrine one of the most fundamental values of the democratic societies party to the European Convention, imposes both a negative obligation on states parties not to torture or inflict ill-treatment on individuals within their jurisdictions or to remove them to other states where they may suffer the proscribed treatment, and a positive obligation to protect individuals from such treatment. Recognition of that positive obligation logically extends to an implied obligation (subject to the familiar principles relating to implication of treaty terms), given effect through articles 6 and 5(4), to adopt an exclusionary rule with regard to evidence obtained by torture: see *Brown v Stott* [2003] 1 AC 681; *Soering v United Kingdom* 11 EHRR 439; *Chahal v United Kingdom* (1996) 23 EHRR 413; *Aydin v Turkey* (1997) 25 EHRR 251; United Nations Human Rights Committee's General Comment 20 (1992) and General Comment 13 (1984) on articles 7 and 14 of the International Covenant on Civil and Political Rights (1966).

Article 6 applies in the present context: see *Engel v The Netherlands (No 1)* (1976) 1 EHRR 647; *Benham v United Kingdom* (1996) 22 EHRR 293; *Lutz v Germany* (1987) 10 EHRR 182; *Welch v United Kingdom* (1995) 20 EHRR 247 and *Aerts v Belgium* (1998) 29 EHRR 50. But in any event the proceedings fall within article 5(4) into which the fundamental guarantees of fairness in article 6 are to be implied: see *Garcia Alva v Germany* (2001) 37 EHRR 335. Neither article 5(4) nor article 6 lays down evidential rules; that is within the margin of appreciation of the national authorities of member states and left for their regulation: see *Schenk v Switzerland* (1988) 13 EHRR 242 and *Khan v United Kingdom* (2000) 31 EHRR 1016. Admission of evidence procured unlawfully or in breach of the Convention will not necessarily render a trial unfair: see *R v P* [2002] 1 AC 146. However, it will do so where particular evidence has been obtained by compulsion, entrapment, torture or ill-treatment: see *Saunders v United Kingdom* 23 EHRR 313; *Teixeira de Castro v Portugal* (1998) 28 EHRR 101; *Austria v Italy* (1963) 6 YB 740; *Ferrantelli v Italy* (1996) 23 EHRR 288; *Mamatkulov and Askarov v Turkey* (2005) 41 EHRR 494; *Harutyunyan v Armenia* (Application No 36549/03) (unreported) 5 July 2005; *Montgomery v HM Advocate* [2003] 1 AC 641; *R (Ramda) v Secretary of State for the Home Department* [2002] EWHC 1278 (Admin); *R v Secretary of State for the Home Department, Ex p Elliott* [2001] EWHC Admin 559; *Ministère Public v Irastorza Dorronsoro* (unreported) 16 May 2003; Cour d'Appel de Pau, Case No 238/2003 and *In re Pereira* (unreported) 1 October 1996.

Articles 5(4) and 6 are to be interpreted in the light of article 15 of the Torture Convention: that torture is a crime of universal jurisdiction, its prohibition enjoying the highest normative force in international law; that the prohibition against admission of evidence obtained by torture is based not only on its unreliability but the international policy of deterrence by forbidding use of its fruits; that measures taken to counter international terrorism should not undermine that approach: see *Burgers and Danelius, The United Nations Convention Against Torture,* (1998), p 148; *PE v France* (2002) 10 IHRR 421; *GK v Switzerland* (unreported) 7 May 2003; Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by Resolution 3452 of the United Nations General Assembly, 9 December 1975; Reports of the Committee against Torture, A/53/44, (16 September

A 1998) and A/54/44, (26 June 1999); Committee against Torture, "Conclusions and Recommendations: United Kingdom of Great Britain and Northern Ireland—Dependent Territories", CAT/C/CR/33/3, 10 December 2004; Council of Europe Parliamentary Assembly Resolution 1433 (2005) on the "Lawfulness of detentions by the United States in Guantanamo Bay"; Report of the Council of Europe Commissioner for Human Rights, 8 June 2005, Comm DH (2005)6 and the 2005 Report to the Government of the B United Kingdom of the visit to the United Kingdom of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT/Inf (2005) 10. The universality of the prohibition is further expressed in similar provisions in other treaty agreements: see article 10 of the 1985 Inter-American Convention to Prevent and Punish Torture; article 68(7) of the 1998 Rome Statute of the C International Criminal Court; rule 95 of the 1996 Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia and of the 1995 Rules of the Tribunal for Rwanda and *Prosecutor v Delalic* (unreported) 2 September 1997.

Since Parliament must have intended the 2001 Act to be compatible with the authorisation in article 15 of the European Convention of the power to D derogate (see *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997), Parliament must also have intended derogating measures not to be inconsistent with the United Kingdom's other international obligations, including article 15 of the Torture Convention.

The Torture Convention distinguishes between torture, to which it applies, and ill-treatment, to which it does not. The exclusionary rule in article 15 applies, as a minimum, to the former and not the latter. But the E domestic principle is broader and prohibits the admission of any statement obtained by a public official through the infliction of inhuman and degrading treatment in breach of article 3 of the European Convention. In any event, consistently with the "evolutive" approach to interpretation, classification of treatment previously characterised as inhuman and degrading might now be classified as torture: see *Ireland v United Kingdom* (1978) 2 EHRR 25.

F To impose a burden of proof on the appellant in a section 25 appeal, or any proceedings involving closed evidence, would render the exclusionary rule meaningless. All an appellant can fairly be expected to do is to raise a suspicion requiring investigation. To impose a more onerous burden would be fundamentally unfair and therefore incompatible with rights guaranteed under the European Convention. To recognise the existence of the exclusionary rule without providing any effective means by which it can be G invoked would be a pretence at compliance with the United Kingdom's international obligations: see Committee against Torture, "Conclusions and Recommendations: United Kingdom of Great Britain and Northern Ireland—Dependent Territories", CAT/C/CR/33/3, 10 December 2004.

Special advocates could not and, in any event, would be ill-fitted to discharge the burden either fairly or effectively: see House of Commons Constitutional Affairs Committee, "The operation of the Special H Immigration Appeals Commission (SIAC) and the use of Special Advocates", Seventh Report of Session 2004–2005, vol II, HC 323-II. It is therefore for the state to prove that evidence has not been obtained by ill-treatment just as it is for the prosecution to prove that a confession to a criminal charge is voluntary, the defendant bearing no more than the burden of raising the

issue : see *Prosecutor v Delalic* 2 September 1997; Report of the UN Human Rights Committee (2003) (A/59/40), chap 4, para 63.

Article 15 of the Torture Convention imposes an obligation on states to ensure that an effective procedure exists in national law for the exclusion of torture evidence; the manner in which the obligation is discharged will depend on the nature of the domestic proceedings. Even if the burden rests generally on the complainant where the proceedings are fully adversarial it cannot do so in a "closed" evidence procedure. The burden of proof must therefore be distributed in such a way as to ensure that the proceedings as a whole, including the procedure for securing the exclusion of evidence, are fair.

The standard of proof should be that applicable to criminal proceedings by analogy with the principles applicable to the admission of a confession. Given the procedural handicaps on an appellant on a section 25 appeal, or comparable proceedings, he can do no more than rely on publicly available information about the interrogation practices of foreign states from which intelligence information is presumed to derive: see *Ireland v United Kingdom* 2 EHRR 25 and Memorandum for Commander Joint Task Force 170, Guantanamo Bay, 11 October 2002.

SIAC, in conducting its review under section 25 of the 2991 Act, is not required always to consider the same material as that on which the Secretary of State based his certificate under section 21. SIAC's function is to decide, at the time of the hearing before them, whether there were reasonable grounds for the Secretary of State's suspicion and belief as required by section 21: see *M v Secretary of State for the Home Department* [2004] 2 All ER 863. But suspicion is not to be equated with prima facie proof: see *Hussien v Chong Fook Kam* [1970] AC 942. There may well be material on which he could act but which is protected from disclosure, as by public interest immunity or authorised intercept; but if it is the only material, it may be that, if it cannot be adduced in evidence, fairness will require the discontinuance of the proceedings or, in the present context, an appellant's detention: see *Lamothe v Comr of Police of the Metropolis* (unreported) 25 October 1999; Court of Appeal (Civil Division) Transcript No 1775 of 1999; *Makanjuola v Comr of Police of the Metropolis* [1992] 3 All ER 617; *R v H* [2004] 2 AC 134; *Youssef v Home Office* [2004] EWHC 1884 (QB); *O'Hara v Chief Constable of the Royal Ulster Constabulary* [1997] AC 286 and *Prebble v Television New Zealand Ltd* [1995] 1 AC 321.

SIAC must conduct a thorough investigation where a credible allegation of torture is made against agents of a foreign state: such inquiries are not uncommon in extradition cases and are routine in asylum and deportation cases, and are not prevented by considerations of comity or national security. Nor does the duty of international co-operation in the fight against terrorism justify suspending the court's obligation to inquire into another state's interrogation practices: see United Nations Security Council Resolutions 1373 (2001) and 1456 (2003); A Barak, "A Judge on Judging: The Role of the Supreme Court in a Democracy" (2002) 116 Harvard L Rev 16 and *Public Committee Against Torture in Israel v Israel* (1999) 7 BHRC 31.

Sir Sydney Kentridge QC, Colin Nicholls QC, Timothy Otty, Sudhanshu Swaroop and *Colleen Hanley* for the first interveners. Where the implications of the torture or inhuman or degrading treatment of a non-

A party by agents of a foreign state have been considered in other jurisdictions, courts have, almost universally upheld the exclusionary rule: see *India v Singh* 108 CCC (3d) 274; *R v Harrer* [1995] 3 SCR 562; *Ministère Public v Irastorza Dorronsoro (*unreported*)* 16 May 2003; *French Republic v Haramboure* 24 January 1995; *In re Pereira,* 1 October 1996; *In re El Motassadeq* 2005 NJW 2326; *United States v Morrow* (1976) 537 F 2d 120; *Mainero v Gregg* (1999) 164 F 3d 1199; *LaFrance v Bohlinger* (1974) 499 B F 2d 29; *Clanton v Cooper* (1997) 129 F 3d 1147; *Buckley v Fitzsimmons* (1994) 20 F 3d 789; *United States v Toscanino* (1974) 500 F 2d 267; *United States v Hensel* (1981) 509 F Supp 1364; *New York v Portelli* (1965) 205 NE (2d) 857; by contrast *Gill v Imundi* (1997) 747 F Supp 1028 and *In re Extradition of Atta* (1989) 706 F Supp 1032.

The rationale behind the exclusion includes (i) the inherent unreliability C of the evidence so obtained; (ii) the outrage to civilised values caused and represented by such conduct; (iii) the public policy objective of removing any incentive to undertake ill-treatment; (iv) the need to ensure protection of the fundamental rights, in particular of due process and fairness, of the party against whose interest the evidence is tendered, and (v) the need to preserve the integrity of the judicial process. Each element of the rationale indicates D that the exclusionary rule is fundamental and is not to be characterised simply as a rule of evidence: see *Bunning v Cross* (1978) 141 CLR 54; *Olmstead v United States* (1928) 277 US 438; *R v Oickle* [2000] 2 SCR 3; *Blackburn v Alabama* (1960) 361 US 199; *Attorney General v O'Brien* [1965] IR 142; *R v Shaheed* [2002] 2 NZLR 377; *Rochin v California* 342 US 165; *Malinski v New York* (1945) 324 US 401; *Jackson v Denno* (1964) 378 US 368; *Brown v Illinois* (1975) 422 US 590; *In re Guantanamo* E *Detainees Cases* (2005) 355 F Supp 2d 443; *S v Nkomo* 1989 (3) ZLR 117 and *S v Zuma* 1995 (2) SA 642.

It is a general principle of the English law of evidence, and of other jurisdictions, that a party wishing to adduce evidence must establish its admissibility. There is no good reason for departing from that principle. The Crown bears the burden of proving that the evidence is not caught by F the rule once the individual concerned raises a serious issue that it may have been obtained by torture or by inhuman or degrading treatment. That approach reflects the practical reality as to the party who is likely to have the greatest access to information bearing on that issue: see *R v Yacoob* (1981) 72 Cr App R 313; *India v Singh* 108 CCC (3d) 274; *Ministère Public v Irastorza Dorronsoro* 16 May 2003; *In re Pereira* 1 October 1996 and *S v Zuma* 1995 (2) SA 642.

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Keir Starmer QC, Nicholas Grief, Mark Henderson, Joseph Middleton, Peter Morris and *Laura Dubinsky* for the second interveners. The prohibition of torture and other forms of ill-treatment is universally recognised and is enshrined in international and regional human rights instruments; the prohibition is absolute and non-derogable: see article 5 of the Universal Declaration of Human Rights 1948 adopted by the United H Nations General Assembly resolution 217A (III), 10 December 1948; articles 3 and 15 of the European Convention on Human Rights (1950); articles 4(2) and 7 of the International Covenant on Civil and Political Rights (1966); article 3 of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading

Treatment or Punishment, adopted by General Assembly resolution 3452, 9 December 1975; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1987); United Nations General Assembly resolution 59/182 (A/RES/59/182) (20 December 2004); principle 6 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment adopted by United Nations General Assembly resolution 43/173 (A/RES/43/173) (9 December 1988); principle 16 of the Guidelines on the Role of Prosecutors, adopted by the United Nations Congress on the Prevention of Crime and the Treatment of Offenders (UN Doc A/CONF.144/28 Rev 1) (1990); articles 5 and 27(2) of the American Convention on Human Rights (1969); article 5 of the African Charter on Human and Peoples' Rights (1981); and articles 4(c) and 13 of the Arab Charter on Human Rights (1994); General Comment 20 of the United Nations Human Rights Committee (1992) on article 7 of the International Covenant on Civil and Political Rights.

As a consequence of its fundamental importance to the international community the prohibition constitutes a norm of jus cogens and imposes obligations owed by every state erga omnes. Effective steps must be taken to prevent torture and states must refrain from recognising or endorsing acts which are in breach of the prohibition; the prohibition does not yield to the threat imposed by terrorism: see article 53 of the Vienna Convention on the Law of Treaties (1969); *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion* [1996] ICJ Rep 226; *In re Barcelona Traction, Light and Power Co Ltd (second phase), (Belgium v Spain)* [1970] ICJ Rep 3; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion* 9 July 2004; *Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883; *R (European Roma Rights Centre) v Immigration Officer at Prague Airport (United Nations High Comr for Refugees intervening)* [2005] 2 AC 1; *Prosecutor v Furundzija* 10 December 1998; *Prosecutor v Delalic* 16 November 1998; *Prosecutor v Kunarec* 22 February 2001; *Al-Adsani v United Kingdom* 34 EHRR 273; *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia (Secretary of State for Constitutional Affairs intervening)* [2005] QB 699; *Filartiga v Peña-Irala* 630 F 2d 876; *Forti v Suarez-Mason* (1987) 672 F Supp 1531; *Tel-Oren v Libyan Arab Republic* (1984) 726 F 2d 774; *Siderman de Blake v Republic of Argentina* (1992) 965 F 2d 699; *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 3)* [2000] 1 AC 147; *Ragazzi, The Notion of Obligations Erga Omnes,* (1997), pp 7–12; *Crawford, The International Law Commission's Articles on State Responsibility; Introduction, Text and Commentaries,* (2002), pp 244–246; articles 2–5 and 9–15 of the Torture Convention; United Nations Security Council resolution 1456 (2003); guideline IV of the Guidelines of the Committee of Ministers on the Council of Europe on Human Rights and the Fight against Terrorism, 11 July 2002; "Statement of the Committee against Torture in connection with the events of 11 September 2001" (22 November 2001); *Boudellaa v Bosnia and Herzegovina* (2002) 13 BHRC 297; *Klass v Federal Republic of Germany* (1978) 2 EHRR 214; *Leander v Sweden* (1987) 9 EHRR 433; *Rotaru v Romania* (2000) 8 BHRC 449; *Chahal v United Kingdom* 23 EHRR 413; *Soering v United Kingdom* 11 EHRR 439; Report of United Nations Special Rapporteur (Mr Peter Koojimans) on Torture (UN Doc E/CN.4/1986/15), para 6; Statement of United Nations

A Special Rapporteur (Sir Nigel Rodley) on Torture (8 November 2001) (UN Doc E/CN.4/2002/76, p 14; United Nations Human Rights Committee, General Comment 29 (2001), para 7; *S Joseph, J Schultz and M Castan, International Covenant on Civil and Political Rights: cases, materials and commentary* (2000), pp 150–151; Report of the Committee against Torture to United Nations General Assembly, A/59/44 (2004), para 17; United Nations General Assembly resolution 59/191 (A/RES/59/191) (2005); B Guidelines on Human Rights and the Fight Against Terrorism, adopted by Council of Europe Committee of Ministers (11 July 2002); Report of the Independent Expert on the question of the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism (Robert K Goldman) E/CN.4/2005/103; 7 February 2005, para 49; United Nations Security Council resolution 1456 (2003) UN Doc S/RES/1456/ (2003), Annex, para C 6; United Nations World Summit Declaration 2005, para 85 (UN Doc A/60/L 1) and Inter-American Commission on Human Rights' Report on Terrorism and Human Rights, 22 October 2002 (OEA/Ser.L/V/II.116, Doc 5, rev 1 corr, para 155).

The absolute quality of the prohibition of torture is linked, and extends, to the exclusionary rule. Since the rule is inherent in article 7 of the International Covenant on Civil and Political Rights it is also inherent in D article 3 of the European Convention and is required in domestic law under the Human Rights Act 1998. The erga omnes nature of the states' positive and negative obligations under the prohibition are owed to the international community as a whole; courts are therefore required to inquire into the legality of the actions and the laws of foreign states and to exclude evidence from their proceedings where it has or might have been obtained in breach of E the prohibition: see International Law Commission's Articles on State Responsibility, articles 40–42, 48.

The exclusionary rule is inherent in the prohibition of torture and other ill-treatment. Article 15 of the Torture Convention constitutes an explicit codification of the minimum requirements of the exclusionary rule in an international treaty. The scope of the rule is broadly interpreted and prohibits, as a minimum, the admission in any proceedings of any statement F which has or may have been made as a result of torture whether instigated by or with the consent or acquiescence of the public officials of the state in question or by those of any other state, except against a person accused of such treatment as evidence that the statement was made: see 1975 adoption of Declaration, annexed to United Nations General Assembly resolutions 3452 and 3453, 9 December 1975; United Nations General Assembly G resolutions 32/62 and 32/63 (8 December 1977); *Ireland v United Kingdom* 2 EHRR 25; *Filartiga v Peña-Irala* 630 F 2d 876; *Burgers and Danelius, The United Nations Convention against Torture* (date), p 203; Inter-American Convention to Prevent and Punish Torture 1985, article 10; Report of Special Rapporteur (Mr Peter Koojimans) to United Nations Commission on Human Rights (1992), paras 588–591; Human Rights Committee, General Comment 20 (1994), para 12; Rules of Procedure and Evidence of the H International Criminal Tribunals for Yugoslavia (1996) and Rwanda (1996); Rome Statute of the International Criminal Court (1998); Report of United Nations Special Rapporteur (Sir Nigel Rodley) (1999) (UN Doc A/54/426; 1 October 1999), para 12.; *PE v France* 10 IHRR 421; Report of United Nations Special Rapporteur (Mr Gerhard Baum), 6 January 2003,

Annex 1, para 3; United Nations General Assembly resolution 59/182 (20 December 2004) on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; United Nations Commission on Human Rights resolution 2005/39; Parliamentary Assembly of the Council of Europe, resolution 1433 (26 April 2005), paras 8, 10; *GK v Switzerland* 7 May 2003; Reports of the United Nations Committee against Torture to the United Nations General Assembly (UN Doc A/52/44,1997; UN Doc A/57/44, 2002; UN Doc A/54/44,1999 and CAT/C/CR/33/3 (2004); Report of the Council of Europe's Commissioner for Human Rights (8 June 2005) (CommDH) (2005) 6; *In re Charkaoui* [2004] FCJ 1236 and *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia (Secretary of State for Constitutional Affairs intervening)* [2005] QB 699.

The exclusionary rule has therefore itself attained the status of customary international law. Customary international law is evidenced by a general practice among states which they accept as binding law. The emergence of the rule is shown by its widespread adoption by international bodies, its incorporation into international conventions and tribunal rules and the consistent observations and findings of the Human Rights Committee, Committee against Torture, and United Nations Special Rapporteurs on Torture: see *Brownlie, Principles of Public International Law*, 6th ed (2003), pp 14–15, 663; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion* [1996] ICJ Rep 226; 1975 Declaration against Torture; *Prosecutor v Furundzija*, 10 December 1998; *Cassese, International Law*, 2nd ed (2005), p 168; *Nicaragua v United States of America* [1986] ICJ Rep 14; the United Nations Torture Convention 1987; the Inter-American Convention to Prevent and Punish Torture; Rules of the International Criminal Court and of the International Criminal Tribunals for Yugoslavia and Rwanda and *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1989] Ch 72, 209–210.

The European Court of Human Rights examines and uses other human rights instruments, whether or not they are incorporated into the domestic law of member states, to assist in the proper interpretation of the European Convention both generally and in giving effect to it as a living instrument. Both the European court and domestic courts have concluded that article 6 is breached where evidence is admitted which has been obtained by torture or other improper compulsion: see *Austria v Italy* 6 YB 740; *Magee v United Kingdom* (2000) 31 EHRR 822; *Ferrantelli v Italy* 23 EHRR 288; *Dikme v Turkey* Reports of Judgments and Decisions 2000-VIII, p 223; *Montgomery v HM Advocate* [2003] 1 AC 641; *Loizidou v Turkey* (1995) 20 EHRR 99; *Al-Adsani v United Kingdom* 34 EHRR 273; *V v United Kingdom* 30 EHRR 121; *Kosiek v Germany* (1986) 9 EHRR 328; *Müller v Switzerland* (1988) 13 EHRR 212; *Groppera Radio AG v Switzerland* (1990) 12 EHRR 321; *Jersild v Denmark* (1994) 19 EHRR 1; *Pretto v Italy* (1983) 6 EHRR 182; *Can v Austria* (1985) 8 EHRR 14; *HN v Poland* (Application No 77710/01) 13 September 2005; *Aydin v Turkey* 25 EHRR 251; *Soering v United Kingdom* 11 EHRR 439; *Selmouni v France* (1999) 29 EHRR 403 and *Kaya v Turkey* Reports of Judgments and Decisions 2000-III, p 149.

The scope of obligations under the European Convention that are incorporated by the 1998 Act must be interpreted by reference to the Strasbourg court's own approach; to interpret article 6 in the light of article 15 of the Torture Convention is not therefore an improper

A incorporation by a back-door route of non-incorporated international obligations: see *A v Secretary of State for the Home Department* [2005] 2 AC 68.

The principle that the European court will leave rules of evidence to the domestic authorities is not unlimited: see *R v Looseley* [2001] 1 WLR 2060. The rationale for the inadmissibility under article 6 of evidence obtained by improper compulsion is based on inherent unreliability but also the need to B protect the integrity of the court's proceedings. Exclusion of evidence under article 6 therefore extends to third parties' statements obtained by torture instigated or committed by public officials of another state: see *R (Ramda) v Secretary of State for the Home Department* [2002] EWHC 1278 (Admin) and *R (Saifi) v Governor of Brixton Prison* [2001] 1 WLR 1134.

Since the exclusionary rule is also inherent in article 3, article 6 is also to C be interpreted to give effect to the protection against not only torture but the other forms of inhuman or degrading treatment included in article 3: see *Wemhoff v Federal Republic of Germany* (1968) 1 EHRR 55; *Artico v Italy* (1980) 3 EHRR 1 and *Soering v United Kingdom* 11 EHRR 439.

Because the exclusionary rule is a rule of customary international law it forms part of the domestic common law, is protected by the principle of legality and should be applied by the courts as such: see *Blackstone's* D *Commentaries on the Laws of England* (1769) Bk 4, chap V, p 66; *Trendtex Trading Corpn v Central Bank of Nigeria* [1977] QB 529; *R v Jones (Margaret)* [2005] QB 259; *J H Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1989] Ch 72 and *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115.

In any event, even if the exclusionary rule had not attained the status of E customary international law, article 15 of the Torture Convention imposes obligations on the United Kingdom which directly affect statutory interpretation and the common law's development.

Even if article 15 cannot be imported into domestic law by way of article 6 of the European Convention or as a rule of customary international law, legislation which is ambiguous in the sense that it is capable of a meaning which either conforms to or conflict with treaty obligations, the F familiar principles of statutory construction presume conformity: see *Garland v British Rail Engineering Ltd* [1983] 2 AC 751; *R v Secretary of State for the Home Department, Ex p Brind* [1991] 1 AC 696 and *R v Lyons* [2003] 1 AC 976.

Since, therefore, the 2001 Act does not clearly show a Parliamentary intention to establish evidential rules which are incompatible with the G Torture Convention, the exclusionary rule will apply. The common law is to be interpreted and developed compatibly with international human rights obligations; those obligations are relevant to the domestic court's consideration of the exercise of its discretion, inter alia, to exclude evidence. The admission of evidence which had or might have been obtained by torture is antithetical to and would seriously damage the integrity of the proceedings: see the *Saifi* case [2001] 1 WLR 1134; *R v Horseferry Road Magistrates'* H *Court, Ex p Bennett* [1994] 1 AC 42; *R v Latif* [1996] 1 WLR 104; *R v Governor of Brixton Prison, Ex p Levin* [1997] AC 741 and *In re Proulx* [2001] 1 All ER 57; *Burgers and Danelius, The United Nations Convention Against Torture,* (1998), p 148; the Rome Statute, article 69(7); *Rochin v California* 342 US 165; *Jackson v Denno* 378 US 368; *R v Oickle* [2000]

2 SCR 3; *R v Collins* [1987] 1 SCR 265; *Wong Kam-ming v The Queen* [1980] AC 247; *R v Hnedish* 26 WWR 685 and *R v Mushtaq* [2005] 1 WLR 1513. A

Ian Burnett QC, Philip Sales, Robin Tam and *Jonathan Swift* for the Secretary of State. As a matter of policy the Secretary of State would not place before the court, or SIAC, evidence which he knew or believed had been obtained by torture committed by officials of a foreign state. The Secretary of State is, however, free to alter his policy if he judges the circumstances to require it. Since none of the evidence to which the appeals relate had been obtained by mistreatment, the issue is whether the government is precluded from adducing evidence which it suspected had been so obtained, or whether its suspicions are sufficiently addressed by evaluation of the weight to be attached to the information. B

It is incorrect to assert that an appellant need raise only a suspicion of general wrongdoing by a foreign state in its treatment of detainees for a burden to be imposed on the Secretary of State to establish that the material in question was not obtained as a result of treatment contrary to article 3 of the European Convention. C

It is lawful for the Secretary of State to have regard to any information available to him, however obtained, in making the operational decision to certify under section 21 of the 2001 Act; if he could not rely on that information in any proceedings connected with his decision a mismatch would arise which would introduce unwarranted artificiality into the process of legal review of executive action and require the reviewing court to proceed on a false basis as to the underlying facts. There should be no mismatch between, on the one hand, the real facts relating to the action taken by the Secretary of State and its lawfulness, and, on the other hand, the manner in which and the factual material by reference to which that action is tested in the proceedings. D E

The present context involves scrutiny by a tribunal of the legality of action taken by the executive, not the bringing of criminal proceedings based on a case presented by the executive to a court with a view to the imposition of a criminal penalty. The essential role of a tribunal charged with that function should be (a) to examine the true and full picture relating to the action and (b) to apply the relevant legal standard in judging whether it was or was not lawful. Procedures have been developed to accommodate judicial scrutiny of decisions where sensitive intelligence material requires consideration: see *R v Shayler* [2003] 1 AC 247 and *R (Roberts) v Parole Board* [2005] 2 AC 738; Regulation of Investigatory Powers Act 2000, section 65; the Terrorism Act 2000, section 5 and the Data Protection Act 1998, Schedule 6, para 2. F G

The common law rules of evidence do not recognise the exclusionary rule claimed. In any event any such rule would be disapplied by the terms of rule 44(3) of the Special Immigration Appeals Commission (Procedure) Rules 2003. The Secretary of State's objective, in discharging his duty under section 21 of the 2001 Act, is to enable him to take preventative and precautionary steps to safeguard national security in the face of potentially devastating transnational terrorist action, in the context of international obligations to combat terrorism by mutual support between states. In discharging those functions he is entitled to take account of all information available to him and may receive material from many various sources; it H

A would impede his task and contravene international obligations if he were required to disregard information from foreign sources: see United Nations Security Council Resolution 1373 (2001), paras 2 and 3; Council of Europe draft Convention on the Prevention of Terrorism (16 May 2005), articles 3 and 4.

Where suspicion arises that information provided by a foreign state has been obtained by improper means the proper course for the Secretary of B State is to consider it and assess the appropriate weight to be accorded to it; but he is entitled to take it into account and treat it as potentially relevant. Given the impossibility or extreme difficulty of investigation neither the Secretary of State nor SIAC is obliged to inquire into the circumstances in which such foreign material has or may have been obtained.

The role of SIAC under section 25 is to scrutinise the Secretary of State's C decision under section 21 and to investigate whether reasonable grounds exist for his required belief or suspicion: see section 21(1)(a) and (b). In order to dismiss an appeal SIAC does not itself have to hold the Secretary of State's belief or suspicion. It does not undertake its investigative process by reference to proven facts, as in ordinary litigation, but by reference to the establishment of reasonable grounds for belief and suspicion. In the context of Part 4 of the 2001 Act there is no basis for distinguishing between the D scope of information available to the Secretary of State and that to which SIAC may have regard. SIAC's function is not to second guess the Secretary of State's decision but to reach its own determination on the basis of the material available to it at the time of the hearing, regardless of whether it existed at the time of certification: see section 25(2)(a) and (b). SIAC's review is much fuller than that on judicial review where national security E concerns are raised (see *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223); its procedures are specifically adjusted to dealing with those issues so as to provide independent scrutiny: see *Chahal v United Kingdom* 23 EHRR 413; *Tinnelly & Sons Ltd v United Kingdom* (1998) 27 EHRR 249 and *E v Norway* (1990) 17 EHRR 30.

Specific statutory provisions enable SIAC to carry out its task by permitting the reception of evidence which would have been inadmissible in F ordinary court proceedings: see rule 44(3) of the Procedure Rules and Regulation of Investigatory Powers Act 2000, section 18(1)(d). There is accordingly no place for the exclusionary rule claimed.

The central approach of the common law to admissibility is to regard all relevant evidence as admissible, even if unlawfully obtained. In general doubts as to the quality of evidence are reflected in the weight, if any, to be G attached to it and not by its admissibility: see *R v Christie* [1914] AC 545; *Ibrahim v The King* [1914] AC 599, 610; *R v Leathem* (1861) 8 Cox CC 498; *Kuruma v The Queen* [1955] AC 197, 203; *Lord Advocate v Lord Blantyre* (1879) 4 App Cas 770; *R v Sang* [1980] AC 402; *R v Khan (Sultan)* [1997] AC 558 and *Helliwell v Piggott-Sims* [1980] FSR 356.

The basis of the common law exception relating to confession evidence does not provide support for the existence of the exclusionary rule claimed. H The rationale of the confession rule derives from (1) unreliability, (2) the principle against self-incrimination and (3) the importance of proper conduct by the police towards those in their custody. However, on an appeal under section 25 unreliability may be accommodated by considerations of weight and the other two bases are not in play.

The common law rule on confessions is not an aspect of a wider, as yet unrecognised, principle. Parliament's intervention has been to confirm the confession rule in criminal proceedings only in relation to the accused; it has reaffirmed the common law position that, while involuntary confessions would be inadmissible, evidence discovered as a result of information so obtained would be admissible: see *Director of Public Prosecutions v Ping Lin* [1976] AC 574; *R v Harz* [1967] 1AC 760; *Lam Chi-ming v The Queen* [1991] 2 AC 212; *Lobban v The Queen* [1995] 1 WLR 877; *Lui Mei Lin v The Queen* [1989] AC 288.

The doctrine of abuse of process is inapposite in the present context: SIAC, as any other court, has inherent power and the duty to prevent abuse of its process and it can exercise discretion to exclude evidence; but there is no suggestion that the Secretary of State has obtained information through improper means, or has misused his powers and there is nothing arbitrary, oppressive or abusive in his deployment of the material before SIAC: see *R v Horseferry Road Magistrates' Court, Ex p Bennett* [1994] 1 AC 42; *R v Latif* [1996] 1 WLR 104; *R v Mullen* [2000] QB 520; *R v Looseley* [2001] 1 WLR 2060. *R v Governor of Brixton Prison, Ex p Levin* [1997] AC 741; *In re Proulx* [2001] 1 All ER 57 and *R (Saifi) v Governor of Brixton Prison* [2001] 1 WLR 1134.

Article 6 of the European Convention does not apply: see *Maaouia v France* (2000) 33 EHRR 1037; *Al-Nashif v Bulgaria* (2001) 35 EHRR CD 76; *Lawless v Ireland (No 3)* (1961) 1 EHRR 15; *Segi v Germany* [2002] EHRLR 683; *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153; *Engel v The Netherlands (No 1)* 1 EHRR 647; *R (McCann) v Crown Court at Manchester* [2003] 1 AC 787; *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295; *De Wilde, Ooms and Versyp v Belgium* (1971) 1 EHRR 373; *Raimondo v Italy* (1994) 18 EHRR 237; *Jecius v Lithuania* (2000) 35 EHRR 400; *A v Secretary of State for the Home Department* [2004] QB 335; *R (Smith) v Parole Board (No 2)* [2004] 1 WLR 421 and *Aerts v Belgium* 29 EHRR 50.

Since article 5(4) is apt to import most of the ingredients of fairness in article 6(1), the applicability or otherwise of the civil limb of article 6(1) is not material: see *R (West) v Parole Board* [2005] 1 WLR 350. Rule 44(3) is to be read as subject to the fair hearing requirements of article 5(4) or 6(1). Neither Strasbourg jurisprudence nor a proper construction of either article demands the exclusionary rule claimed; and it is not for the national court to find a novel principle in advance of the European court: see *R (Ullah) v Special Adjudicator* [2004] 2 AC 323 and *R (S) v Chief Constable of the South Yorkshire Police* [2004] 1 WLR 2196. The European court focuses on the overall fairness of the procedures and assesses the requirements of a fair procedure in the specific context. No exclusionary rule exists under the Convention provisions or jurisprudence, nor has the Strasbourg court stated any requirement for the exclusion of third party evidence obtained in breach of a Convention right: the significance of the evidence deployed is only one aspect of whether the proceedings taken as a whole are fair; there is nothing to suggest that any exclusionary principle exists beyond existing common law rules: see *Schenk v Switzerland* 13 EHRR 242; *Barberà, Messegué and Jabardo v Spain* (1988) 11 EHRR 360; *Ferrantelli v Italy* 23 EHRR 288; *Montgomery v HM Advocate* [2003] 1 AC 641; *Khan v United Kingdom* 31

A EHRR 1016; *Saunders v United Kingdom* 23 EHRR 313 and *Teixeiro de Castro v Portugal* 28 EHRR 101. *R (Ramda) v Secretary of State for the Home Department* [2002] EWHC 1278 (Admin) is not in point.

It is not permissible to construe the common law as though article 15 of the Torture Convention had been incorporated into domestic law and that article 5(4) was to be understood as giving direct effect to it. It has not been incorporated and the "classic" situation does not arise where ambiguous B legislation or a common law provision is to be construed so as best to achieve consistency with an unincorporated treaty obligation. National courts have no jurisdiction, absent incorporation, to apply international treaties as domestic law and should reject attempts at "backdoor incorporation": see *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418; *R v Lyons* [2003] 1 AC 976; *In re McKerr* [2004] 1 WLR 807; C *Fothergill v Monarch Airlines Ltd* [1981] AC 251; *Philippson v Imperial Airways Ltd* [1939] AC 332; *Zoernsch v Waldock* [1964] 1 WLR 675; *Post Office v Estuary Radio Ltd* [1968] 2 QB 740 and *R v Secretary of State for the Home Department, Ex p Brind* [1991] 1 AC 696.

The prohibition on torture is correctly identified as having the status of jus cogens; it meets the high and stringent evidential tests by which that status is established: see Vienna Convention on the Law of Treaties (1969), D article 53; *Hannikainen, Peremptory Norms (Jus Cogens) in International Law: Historical Developments, Criteria, Present Status* (1988), pp 2–6, 237 and the International Law Commission's "Commentary on article 26 of the Articles on State Responsibility", (2001), p 188.

To identify an ordinary rule of customary international law, it is necessary to show that there is widespread, near universal, state practice deriving from E a general sense of binding obligation: see *In re North Sea Continental Shelf (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* [1969] ICJ Rep 3; *Malanczuk, Akehurst's Modern Introduction to International Law,* 7th ed, pp 57–58 and *Brownlie, Principles of Public International Law,* 6th ed, pp 489–490.

But no similar case can be made for the exclusionary rule: the practice of the International Criminal Tribunals for Yugoslavia and Rwanda is F insufficient. The European Court of Human Rights, although making references to the Torture Convention, had not, through case law, transposed its provisions into the Human Rights Convention; the court's consistent approach to both articles 5(4) and 6 has been to avoid unvarying rules and, while recognising international obligations including the duty to combat terrorism, to focus on the specifics of fairness in the particular context: see G *Brown v Stott* [2003] 1 AC 681 and *Bosphorus Hava Yollari v Ireland* (Application No 45036/98), 30 June 2005.

States party to the Torture Convention did not expressly contemplate that article 15 would apply to any evidence other than confessions in criminal proceedings; it was intended to reflect existing constitutional guarantees, not to create a new and wider prohibition: see Report of the United Nations Committee against Torture (1999) (A/54/44), paras 44–45, 193. H The observations of the Committee are not authoritative rulings on interpretation (see articles 19–22, 30 of the Convention); article 15 was not intended to apply to the present proceedings and it does not prohibit SIAC from receiving the type of evidence in issue. Article 15 has to be interpreted in the light of articles 31 and 32 of the Vienna Convention,

taking account of its object and purpose, to prevent the state relying on such evidence in criminal proceedings and bearing in mind that at the time the Convention was entered into the present type of proceedings was not in contemplation.

There are no explicit international law obligations excluding evidence obtained by any treatment short of torture which may nevertheless be a breach of article 3 of the European Convention and article 15 of the Torture Convention cannot be so construed.

If, however, an exclusionary rule exists, article 15 provides that the prohibition only applies where it is established that the evidence has been obtained by torture: it does not operate if it is shown that it might have been so obtained. The burden of establishing the complaint rests on the complainant: see *PE v France* (2002) 10 IHRR 421; *GK v Switzerland* 7 May 2003; *Segi v Germany* [2002] EHRLR 373; Inter-American Convention to Prevent and Punish Torture (1985). It is not onerous to require him to do so, given the procedures available to SIAC for assessing closed material while safeguarding the complainant's position.

Sales following. As to the proper approach of the domestic court's extra-territorial jurisdiction with respect to the jus cogens prohibition on torture under customary international law, see *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 3)* [2000] 1 AC 147, 198–199, 212, 245, 276–277, 290.

Emmerson QC in reply. It is not appropriate that the Secretary of State chooses to adopt a policy that evidence obtained by torture will not be used in the proceedings: such a policy can be changed at any time by executive decision and therefore gives insufficient protection as a means of meeting the United Kingdom's obligations under the common law, the European Convention and the Torture Convention. In any event his existing policy applies to evidence he judges to have been obtained by torture without any independent assessment or check as to the threshold he has chosen to apply: see *Scott v Scott* [1913] AC 417; *R (Kariharan) v Secretary of State for the Home Department* [2003] QB 933 and *A v Secretary of State for the Home Department* [2004] QB 335, para 43; [2005] 2 AC 68, para 33.

The question of a supposed mismatch does not arise. The statutory test requires SIAC to determine for itself whether there were objective grounds for his belief or suspicion for certification under section 21, at the time of the appeal and on the evidence adduced by the parties. SIAC's function is not to second-guess the Secretary of State's decision and is potentially concerned with a different evidential matrix from that before the Secretary of State.

If evidence obtained by torture were to be admissible it would represent such a substantial inroad into an internationally recognised constitutional norm that only Parliament could provide for it: see *Korematsu v United States* (1944) 323 US 214.

Their Lordships took time for consideration.

8 December. **LORD BINGHAM OF CORNHILL**

1 My Lords, may the Special Immigration Appeals Commission ("SIAC"), a superior court of record established by statute, when hearing an appeal under section 25 of the Anti-terrorism, Crime and Security Act 2001 by a person certified and detained under sections 21 and 23 of that Act,

A receive evidence which has or may have been procured by torture inflicted, in order to obtain evidence, by officials of a foreign state without the complicity of the British authorities? That is the central question which the House must answer in these appeals. The appellants, relying on the common law of England, on the European Convention on Human Rights and on principles of public international law, submit that the question must be answered with an emphatic negative. The Secretary of State agrees that this B answer would be appropriate in any case where the torture had been inflicted by or with the complicity of the British authorities. He further states that it is not his intention to rely on, or present to SIAC or to the Administrative Court in relation to control orders, evidence which he knows or believes to have been obtained by a third country by torture. This intention is, however, based on policy and not on any acknowledged legal C obligation. Like any other policy it may be altered, by a successor in office or if circumstances change. The admission of such evidence by SIAC is not, he submits, precluded by law. Thus he contends for an affirmative answer to the central question stated above. The appellants' case is supported by written and oral submissions made on behalf of 17 well-known bodies dedicated to the protection of human rights, the suppression of torture and maintenance of the rule of law.

D 2 The appeals now before the House are a later stage of the proceedings in which the House gave judgment in December 2004: *A v Secretary of State for the Home Department* [2005] 2 AC 68. In their opinions given then, members of the House recited the relevant legislative provisions and recounted the relevant history of the individual appellants up to that time. To avoid wearisome repetition, I shall treat that material as incorporated by E reference into this opinion, and make only such specific reference to it as is necessary for resolving these appeals.

The Anti-terrorism, Crime and Security Act 2001

3 The 2001 Act was this country's legislative response to the grave and inexcusable crimes committed in New York, Washington DC and F Pennsylvania on 11 September 2001, and manifested the Government's determination to protect the public against the dangers of international terrorism. Part 4 of the Act accordingly established a new regime, applicable to persons who were not British citizens, whose presence in the United Kingdom the Secretary of State reasonably believed to be a risk to national security and whom the Secretary of State reasonably suspected of being terrorists as defined in the legislation. By section 21 of the Act he was G authorised to issue a certificate in respect of any such person, and to revoke such a certificate. Any action of the Secretary of State taken wholly or partly in reliance on such a certificate might be questioned in legal proceedings only in a prescribed manner.

4 Sections 22 and 23 of the Act recognised that it might not, for legal or practical reasons, be possible to deport or remove from the United Kingdom a suspected international terrorist certified under section 21, and power was H given by section 23 to detain such a person, whether temporarily or indefinitely. This provision was thought to call for derogation from the provisions of article 5(1)(f) of the European Convention, which it was sought to effect by a derogation order, the validity of which was one of the issues in the earlier stages of the proceedings.

5 Section 25 of the Act enables a person certified under section 21 to appeal to SIAC against his certification. On such an appeal SIAC must cancel the certificate if

> "(a) it considers that there are no reasonable grounds for a belief or suspicion of the kind referred to in section 21(1)(a) or (b), or (b) it considers that for some other reason the certificate should not have been issued."

If the certificate is cancelled it is to be treated as never having been issued, but if SIAC determines not to cancel a certificate it must dismiss the appeal. Section 26 provides that certifications shall be the subject of periodic review by SIAC.

SIAC

6 SIAC was established by the Special Immigration Appeals Commission Act 1997, which sought to reconcile the competing demands of procedural fairness and national security in the case of foreign nationals whom it was proposed to deport on the grounds of their danger to the public. Thus by section 1 (as amended by section 35 of the 2001 Act) SIAC was to be a superior court of record, now (since amendment in 2002) including among its members persons holding or having held high judicial office, persons who are or have been appointed as chief adjudicators under the Nationality, Immigration and Asylum Act 2002, persons who are or have been qualified to be members of the Immigration Appeal Tribunal and experienced lay members. All are appointed by the Lord Chancellor, who is authorised by section 5 of the Act to make rules governing SIAC's procedure. Such rules, which must be laid before and approved by resolution of each House of Parliament, have been duly made. Such rules may, by the express terms of sections 5 and 6, provide for the proceedings to be heard without the appellant being given full particulars of the reason for the decision under appeal, for proceedings to be held in the absence of the appellant and his legal representative, for the appellant to be given a summary of the evidence taken in his absence and for appointment by the relevant law officer of a legally qualified special advocate to represent the interests of an appellant in proceedings before SIAC from which the appellant and his legal representative are excluded, such person having no responsibility towards the person whose interests he is appointed to represent.

7 The rules applicable to these appeals are the Special Immigration Appeals Commission (Procedure) Rules 2003. Part 3 of the Rules governs appeals under section 25 of the 2001 Act. In response to a notice of appeal, the Secretary of State, if he intends to oppose the appeal, must file a statement of the evidence on which he relies, but he may object to this being disclosed to the appellant or his lawyer (rule 16): if he objects, a special advocate is appointed, to whom this "closed material" is disclosed (rule 37). SIAC may overrule the Secretary of State's objection and order him to serve this material on the appellant, but in this event the Secretary of State may choose not to rely on the material in the proceedings (rule 38). A special advocate may make submissions to SIAC and cross-examine witnesses when an appellant is excluded and make written submissions (rule 35), but may not without the directions of SIAC communicate with an appellant or his lawyer or anyone else once the closed material has been disclosed to him

A (rule 36). Rule 44(3) provides that SIAC "may receive evidence that would not be admissible in a court of law". The general rule excluding evidence of intercepted communications, now found in section 17(1) of the Regulation of Investigatory Powers Act 2000, is expressly disapplied by section 18(1)(e) in proceedings before SIAC. SIAC must give written reasons for its decision, but in so far as it cannot do so without disclosing information which it would be contrary to the public interest to disclose, it must issue a separate B decision which will be served only on the Secretary of State and the special advocate (rule 47).

The appellants and the proceedings

8 Of the ten appellants now before the House, all save two were certified and detained in December 2001. The two exceptions are B and H, C certified and detained in February and April 2002 respectively. Each of them appealed against his certification under section 25. Ajouaou and F voluntarily left the United Kingdom, for Morocco and France respectively, in December 2001 and March 2002, and their certificates were revoked following their departure. C's certificate was revoked on 31 January 2005 and D's on 20 September 2004. Abu Rideh was transferred to Broadmoor D Hospital under sections 48 and 49 of the Mental Health Act 1983 in July 2002. Conditions for his release on bail were set by SIAC on 11 March 2005, and on the following day his certificate was revoked and a control order (currently the subject of an application for judicial review) was made under the Prevention of Terrorism Act 2005, enacted to replace Part 4 of the 2001 Act. Events followed a similar pattern in the cases of E, A and H, save that none was transferred to Broadmoor and notice of intention to deport E (currently the subject of challenge) was given to A and H in August 2005, since which date they have been detained. The control orders made in their cases were discharged. B's case followed a similar course to A's, save that he was transferred to Broadmoor under sections 48 and 49 of the 1983 Act in September 2005. In the case of G, bail conditions were set by SIAC in April 2004 and revised on 10 March 2005. His certificate was revoked and a control order made under the 2005 Act on 12 March 2005. He was given F notice of intention to deport (which he is challenging) on 11 August 2005, and he has since been detained. His control order was discharged.

9 The appellants' appeals to SIAC under section 25 of the 2001 Act were heard in groups between May and July 2003. During these hearings argument and evidence were directed both to general issues relevant to all or most of the appeals and to specific issues relevant to individual cases. SIAC G heard open evidence when the appellants and their legal representatives were present and closed evidence when they were excluded but special advocates were present. On 29 October 2003 judgments were given dismissing all the appeals. There were open judgments on the general and the specific issues, and there were also closed judgments. On the question central to these appeals to the House, raised in its present form when the proceedings before it were well advanced, SIAC gave an affirmative answer: the fact that H evidence had, or might have been, procured by torture inflicted by foreign officials without the complicity of the British authorities was relevant to the weight of the evidence but did not render it legally inadmissible. In lengthy judgments given on 11 August 2004, a majority of the Court of Appeal (Pill and Laws LJJ, Neuberger LJ in part dissenting) upheld this decision: [2005]

1 WLR 414. Despite the repeal of Part 4 of the 2001 Act by the 2005 Act, the appellants' right of appeal to the House against the Court of Appeal's decision under section 7 of the 1997 Act is preserved by section 16(4) of the Prevention of Terrorism Act 2005, and no question now arises as to the competency of any of these appeals.

The common law

10 The appellants submit that the common law forbids the admission of evidence obtained by the infliction of torture, and does so whether the product is a confession by a suspect or a defendant and irrespective of where, by whom or on whose authority the torture was inflicted.

11 It is, I think, clear that from its very earliest days the common law of England set its face firmly against the use of torture. Its rejection of this practice was indeed hailed as a distinguishing feature of the common law, the subject of proud claims by English jurists such as Sir John Fortescue (*De Laudibus Legum Angliae*, c 1460–1470, ed S B Chrimes (1942), ch 22, pp 47–53), Sir Thomas Smith (*De Republica Anglorum*, ed L Alston (1906), book 2, ch 24, pp 104–107), Sir Edward Coke (*Institutes of the Laws of England* (1644), Part III, ch 2, pp 34–36), Sir William Blackstone (*Commentaries on the Laws of England* (1769) vol IV, ch 25, pp 320–321), and Sir James Stephen (*A History of the Criminal Law of England* (1883), vol 1, p 222). That reliance was placed on sources of doubtful validity, such as chapter 39 of Magna Carta 1215 and *Felton's Case* as reported by Rushworth (*Rushworth's Collections,* vol 1, p 638) (see D Jardine, "A Reading on the Use of Torture in the Criminal Law of England Previously to the Commonwealth", (1837), pp 10–12, 60–62) did not weaken the strength of received opinion. The English rejection of torture was also the subject of admiring comment by foreign authorities such as Beccaria (*An Essay on Crimes and Punishments*, (1764), chap XVI) and Voltaire (*Commentary on Beccaria's Crimes and Punishments*, (1766), ch XII). This rejection was contrasted with the practice prevalent in the states of continental Europe who, seeking to discharge the strict standards of proof required by the Roman-canon models they had adopted, came routinely to rely on confessions procured by the infliction of torture: see A L Lowell, "The Judicial Use of Torture" (1897) 11 Harvard L Rev 220–233, 290–300; *John H Langbein, Torture and the Law of Proof: Europe and England in the Ancien Regime* (1977); D Hope, "Torture" (2004) 53 ICLQ 807, 810–811. In rejecting the use of torture, whether applied to potential defendants or potential witnesses, the common law was moved by the cruelty of the practice as applied to those not convicted of crime, by the inherent unreliability of confessions or evidence so procured and by the belief that it degraded all those who lent themselves to the practice.

12 Despite this common law prohibition, it is clear from the historical record that torture was practised in England in the 16th and early 17th centuries. But this took place pursuant to warrants issued by the Council or the Crown, largely (but not exclusively) in relation to alleged offences against the state, in exercise of the Royal prerogative: see Jardine; and Lowell, pp 290–300. Thus the exercise of this royal prerogative power came to be an important issue in the struggle between the Crown and the parliamentary common lawyers which preceded and culminated in the English civil war. By the common lawyers torture was regarded as (in

A Jardine's words: pp 6 and 12) "totally repugnant to the fundamental principles of English law" and "repugnant to reason, justice, and humanity". One of the first acts of the Long Parliament in 1640 was, accordingly, to abolish the Court of Star Chamber, where torture evidence had been received, and in that year the last torture warrant in our history was issued. Half a century later, Scotland followed the English example, and in 1708, in one of the earliest enactments of the Westminster Parliament after the Act of B Union in 1707 (Scot c 7), torture in Scotland was formally prohibited. The history is well summarised by Sir William Holdsworth (*A History of English Law*, 3rd ed (1945), vol 5, p 194, footnotes omitted):

> "We have seen that the use of torture, though illegal by the common law, was justified by virtue of the extraordinary power of the Crown C which could, in times of emergency, override the common law. We shall see that Coke in the earlier part of his career admitted the existence of this extraordinary power. He therefore saw no objection to the use of torture thus authorised. But we shall see that his views as to the existence of this extraordinary power changed, when the constitutional controversies of the seventeenth century had made it clear that the existence of any extraordinary power in the crown was incompatible with the liberty of D the subject. It is not surprising therefore, that, in his later works, he states broadly that all torture is illegal. It always had been illegal by the common law, and the authority under which it had been supposed to be legalised he now denied. When we consider the revolting brutality of the continental criminal procedure, when we remember that this brutality was sometimes practised in England by the authority of the extraordinary E power of the Crown, we cannot but agree that this single result of the rejection of any authority other than that of the common law is almost the most valuable of the many consequences of that rejection. Torture was not indeed practised so systematically in England as on the continent; but the fact that it was possible to have recourse to it, the fact that the most powerful court in the land sanctioned it, was bound sooner or later to have a demoralising effect upon all those who had prisoners in their F power. Once torture has become acclimatised in a legal system it spreads like an infectious disease. It saves the labour of investigation. It hardens and brutalizes those who have become accustomed to use it."

As Jardine put in, at p 13:

> "As far as authority goes, therefore, the crimes of murder and robbery G are not more distinctly forbidden by our criminal code than the application of the torture to witnesses or accused persons is condemned by the oracles of the common law."

This condemnation is more aptly categorised as a constitutional principle than as a rule of evidence.

13 Since there has been no lawfully sanctioned torture in England since H 1640, and the rule that unsworn statements made out of court are inadmissible in court was well-established by at latest the beginning of the 19th century (*Cross & Tapper on Evidence*, 10th ed (2004), p 582), there is an unsurprising paucity of English judicial authority on this subject. In *Pearse v Pearse* (1846) 1 De G & Sm 12, 28–29 Knight Bruce V-C observed:

> "The discovery and vindication and establishment of truth are main purposes certainly of the existence of courts of justice; still, for the obtaining of these objects, which, however valuable and important, cannot be usefully pursued without moderation, cannot be either usefully or creditably pursued unfairly or gained by unfair means, not every channel is or ought to be open to them. The practical inefficacy of torture is not, I suppose, the most weighty objection to that mode of examination . . . Truth, like all other good things, may be loved unwisely—may be pursued too keenly—may cost too much."

That was not a case involving any allegation of torture. Such an allegation was however made in *R (Saifi) v Governor of Brixton Prison* [2001] 1 WLR 1134 where the applicant for habeas corpus resisted extradition to India on the ground, among others, that the prosecution relied on a statement obtained by torture and since retracted. The Queen's Bench Divisional Court (Rose LJ and Newman J) accepted the magistrate's judgment that fairness did not call for exclusion of the statement, but was clear (para 60 of the judgment) that the common law and domestic statute law (section 78 of the Police and Criminal Evidence Act 1984) gave effect to the intent of article 15 of the International Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (1990) (Cm 1775), "the Torture Convention", to which more detailed reference is made below.

Involuntary confessions

14 The appellants relied, by way of partial analogy, on the familiar principle that evidence may not be given by a prosecutor in English criminal proceedings of a confession made by a defendant, if it is challenged, unless the prosecution proves beyond reasonable doubt that the confession had not been obtained by oppression of the person who made it or in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof. This rule is now found in section 76 of the Police and Criminal Evidence Act 1984, but enacts a rule established at common law and expressed in such decisions as *Ibrahim v The King* [1914] AC 599, 609–610, *R v Harz* [1967] 1 AC 760, 817, and *Lam Chi-ming v The Queen* [1991] 2 AC 212, 220.

15 Plainly this rule provides an inexact analogy with evidence obtained by torture. It applies only to confessions by defendants, and it provides for exclusion on grounds very much wider than torture, or even inhuman or degrading treatment. But it is in my opinion of significance that the common law (despite suggestions to that effect by Parke B and Lord Campbell CJ in *R v Baldry* (1852) 2 Den 430, 445, 446–447, and by the Privy Council, in judgments delivered by Lord Sumner, in *Ibrahim v The King* [1914] AC 599, 610 and Lord Hailsham of St Marylebone in *Director of Public Prosecutions v Ping Lin* [1976] AC 574, 599–600) has refused to accept that oppression or inducement should go to the weight rather than the admissibility of the confession. The common law has insisted on an exclusionary rule. See, for a clear affirmation of the rule, *Wong Kam-ming v The Queen* [1980] AC 247.

16 In *R v Warickshall* (1783) 1 Leach 263 this rule was justified on the ground that involuntary statements are inherently unreliable. That justification is, however, inconsistent with the principle which the case

A established, that while an involuntary statement is inadmissible real evidence which comes to light as a result of such a statement is not. Two points are noteworthy. First, there can ordinarily be no surer proof of the reliability of an involuntary statement than the finding of real evidence as a direct result of it, as was so in *Warickshall's* case itself, but that has never been treated as undermining the rule. Secondly, there is an obvious anomaly in treating an involuntary statement as inadmissible while treating as B admissible evidence which would never have come to light but for the involuntary statement. But this is an anomaly which the English common law has accepted, no doubt regarding it as a pragmatic compromise between the rejection of the involuntary statement and the practical desirability of relying on probative evidence which can be adduced without the need to rely on the involuntary statement.

C 17 Later decisions make clear that while the inherent unreliability of involuntary statements is one of the reasons for holding them to be inadmissible there are other compelling reasons also. In *Lam Chi-ming v The Queen* [1991] 2 AC 212, 220, in a judgment delivered by Lord Griffiths, the Privy Council summarised the rationale of the exclusionary rule:

> "Their Lordships are of the view that the more recent English cases D established that the rejection of an improperly obtained confession is not dependent only upon possible unreliability but also upon the principle that a man cannot be compelled to incriminate himself and upon the importance that attaches in a civilised society to proper behaviour by the police towards those in their custody."

Lord Griffiths described the inadmissibility of a confession not proved to be E voluntary as perhaps the most fundamental rule of the English criminal law. The rationale explained by Lord Griffiths was recently endorsed by the House in *R v Mushtaq* [2005] 1 WLR 1513, paras 1, 7, 27, 45–46, 71. It is of course true, as counsel for the Secretary of State points out, that in cases such as these the attention of the court was directed to the behaviour of the police in the jurisdiction where the defendant was questioned and the trial was held. This was almost inevitably so. But it is noteworthy that in F jurisdictions where the law is in general harmony with the English common law reliability has not been treated as the sole test of admissibility in this context. In *Rochin v California* (1952) 342 US 165 Frankfurter J, giving the opinion of the United States Supreme Court, held that a conviction had been obtained by "conduct that shocks the conscience" (p 172) and referred to a "general principle" that "states in their prosecutions respect certain G decencies of civilized conduct" (p 173). He had earlier (p 169) referred to authority on the due process clause of the United States constitution which called for judgment whether proceedings "offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses". In *Attorney General v O'Brien* [1965] IR 142, 150, the Supreme Court of Ireland held, per Kingsmill Moore J, that "to countenance the use of evidence extracted or H discovered by gross personal violence would, in my opinion, involve the state in moral defilement". The High Court of Australia, speaking of a discretion to exclude evidence, observed (per Barwick CJ in *R v Ireland* (1970) 126 CLR 321, 335), that "convictions obtained by the aid of unlawful or unfair acts may be obtained at too high a price". In *R v Oickle*

[2000] 2 SCR 3, a large majority of the Supreme Court of Canada cited with approval (para 66) an observation of Lamer J that "What should be repressed vigorously is conduct on [the authorities'] part that shocks the community" and considered (para 69) that while the doctrines of oppression and inducements were primarily concerned with reliability, the confessions rule also extended to protect a broader concept of voluntariness that focused on the protection of the accused's rights and fairness in the criminal process.

Abuse of process

18 The appellants submit, in reliance on common law principles, that the obtaining of evidence by the infliction of torture is so grave a breach of international law, human rights and the rule of law that any court degrades itself and the administration of justice by admitting it. If, therefore, it appears that a confession or evidence may have been procured by torture, the court must exercise its discretion to reject such evidence as an abuse of its process.

19 In support of this contention the appellants rely on four recent English authorities. The first of these is *R v Horseferry Road Magistrates' Court, Ex p Bennett* [1994] 1 AC 42. This case was decided on the factual premise that the applicant had been abducted from South Africa and brought to this country in gross breach of his rights and the law of South Africa, at the behest of the British authorities, to stand trial here, and on the legal premise that a fair trial could be held. The issue, accordingly, was whether the unlawful abduction of the applicant was an abuse of the court's process to which it should respond by staying the prosecution. The House held, by a majority, that it was. The principle laid down most clearly appears in the opinion of Lord Griffiths, at pp 61–62:

> "In the present case there is no suggestion that the appellant cannot have a fair trial, nor could it be suggested that it would have been unfair to try him if he had been returned to this country through extradition procedures. If the court is to have the power to interfere with the prosecution in the present circumstances it must be because the judiciary accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law. My Lords, I have no doubt that the judiciary should accept this responsibility in the field of criminal law."

Counsel for the Secretary of State points out that the members of the majority attached particular significance to the involvement of the British authorities in the unlawful conduct complained of, and this is certainly so: see the opinion of Lord Griffiths, at p 62F, Lord Bridge of Harwich, at pp 64G and 67G and Lord Lowry, at pp 73G, 76F and 77D. But the appellants point to the germ of a wider principle. Thus Lord Lowry, at p 74G, understood the court's discretion to stay proceedings as an abuse of process to be exercisable where either a fair trial is impossible or "it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of a particular case." He opined, at p 76:

> "that the court, in order to protect its own process from being degraded and misused, must have the power to stay proceedings which

A have come before it and have only been made possible by acts which offend the court's conscience as being contrary to the rule of law. Those acts by providing a morally unacceptable foundation for the exercise of jurisdiction over the suspect taint the proposed trial and, if tolerated, will mean that the court's process has been abused."

Lord Lowry's opinion did not earn the concurrence of any other member of B the House, but the appellants contend that this wider principle is applicable in the extreme case of evidence procured by torture. In *United States v Toscanino* (1974) 500 F 2d 267 the US Court of Appeals reached a decision very similar to *Bennett*.

20 In *R v Latif* [1996] 1 WLR 104 the executive misconduct complained of was much less gross than in *Bennett*, and the outcome was C different. Speaking for the House, Lord Steyn, at pp 112–113, acknowledged a judicial discretion to stay proceedings as an abuse if they would "amount to an affront to the public conscience" and where "it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place". In that case the conduct complained of was not so unworthy or shameful that it was an affront to the public conscience to allow the prosecution to proceed.

D **21** The premises of the Court of Appeal's decision in *R v Mullen* [2000] QB 520 were similar to those in *Bennett*, save that a fair trial had already taken place and *Mullen* had already been convicted of very serious terrorist offences, and sentenced to 30 years' imprisonment, before he was alerted to the misconduct surrounding his abduction from Zimbabwe. Despite the fairness of the trial, his conviction was quashed. Giving the reserved E judgment of the court, Rose LJ said, at pp 535–536:

> "This court recognises the immense degree of public revulsion which has, quite properly, attached to the activities of those who have assisted and furthered the violent operations of the IRA and other terrorist organisations. In the discretionary exercise, great weight must therefore be attached to the nature of the offence involved in this case. Against that, F however, the conduct of the security services and police in procuring the unlawful deportation of the defendant in the manner which has been described represents, in the view of this court, a blatant and extremely serious failure to adhere to the rule of law with regard to the production of a defendant for prosecution in the English courts. The need to discourage such conduct on the part of those who are responsible for G criminal prosecutions is a matter of public policy to which, as appears from *R v Horseferry Road Magistrates' Court, Ex p Bennett* [1994] 1 AC 42 and *R v Latif* [1996] 1 WLR 104, very considerable weight must be attached."

22 The fourth authority relied on for its statements of principle was *R v Looseley* [2001] 1 WLR 2060, which concerned cases of alleged H entrapment. At the outset of his opinion (para 1) my noble and learned friend, Lord Nicholls of Birkenhead, declared that:

> "every court has an inherent power and duty to prevent abuse of its process. This is a fundamental principle of the rule of law. By recourse to this principle courts ensure that executive agents of the state do not

misuse the coercive, law enforcement functions of the courts and thereby oppress citizens of the state."

A stay is granted in a case of entrapment not to discipline the police (para 17) but because it is improper for there to be a prosecution at all for the relevant offence, having regard to the state's involvement in the circumstances in which it was committed. To prosecute in a case where the state has procured the commission of the crime is (para 19) "unacceptable and improper" and "an affront to the public conscience." Such a prosecution would not be fair in the broad sense of the word. My noble and learned friend, Lord Hoffmann, having referred to Canadian authority and to *Bennett*, accepted Lord Griffiths's description of the power to stay in the case of behaviour which threatened basic human rights or the rule of law as (para 40) "a jurisdiction to prevent abuse of executive power".

The European Convention on Human Rights

23 If, contrary to their submission (and to the opinion of the Divisional Court in *R (Saifi) v Governor of Brixton Prison:* see para 13 above) the common law and section 78 of the 1984 Act are not, without more, enough to require rejection of evidence which has or may have been procured by torture, whether or not with the complicity of the British authorities, the appellants submit that the European Convention compels that conclusion.

24 It is plain that SIAC (and, for that matter, the Secretary of State) is a public authority within the meaning of section 6 of the Human Rights Act 1998 and so forbidden to act incompatibly with a Convention right. One such right, guaranteed by article 3, is not to be subjected to torture or to inhuman or degrading treatment. This absolute, non-derogable prohibition has been said (*Soering v United Kingdom* (1989) 11 EHRR 439, para 88) to enshrine "one of the fundamental values of the democratic societies making up the Council of Europe". The European court has used such language on many occasions (*Aydin v Turkey* (1997) 25 EHRR 251, para 81).

25 Article 6 of the Convention guarantees the right to a fair trial. Different views have in the past been expressed on whether, for purposes of article 6, the proceedings before SIAC are to be regarded as civil or criminal. Rather than pursue this debate the parties are agreed that the appellants' challenge to their detention pursuant to the Secretary of State's certification in any event falls within article 5(4). That provision entitles anyone deprived of his liberty by arrest or detention to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful. It is well established that such proceedings must satisfy the basic requirements of a fair trial: *Garcia Alva v Germany* (2001) 37 EHRR 335; *R (West) v Parole Board; R (Smith) v Parole Board (No 2)* [2005] 1 WLR 350. Sensibly, therefore, the parties are agreed that the applicability of article 6 should be left open and the issue resolved on the premise that article 5(4) applies.

26 The Secretary of State submits that under the Convention the admissibility of evidence is a matter left to be decided under national law; that under the relevant national law, namely, the 2001 Act and the Rules, the evidence which the Secretary of State seeks to adduce is admissible before SIAC; and that accordingly the admission of this evidence cannot be said to undermine the fairness of the proceedings. I shall consider the effect of the

A statutory scheme in more detail below. The first of these propositions is, however, only half true. It is correct that the European Court of Human Rights has consistently declined to articulate evidential rules to be applied in all member states and has preferred to leave such rules to be governed by national law: see, for example, *Schenk v Switzerland* (1988) 13 EHRR 242, para 46; *Ferrantelli v Italy* (1996) 23 EHRR 288, para 48; *Khan v United Kingdom* (2000) 31 EHRR 1016, para 34. It has done so even where, as in B *Khan*, evidence was acknowledged to have been obtained unlawfully and in breach of another article of the Convention. But in these cases and others the court has also insisted on its responsibility to ensure that the proceedings, viewed overall on the particular facts, have been fair, and it has recognised that the way in which evidence has been obtained or used may be such as to render the proceedings unfair. Such was its conclusion in *Saunders v United* C *Kingdom* (1996) 23 EHRR 313, a case of compulsory questioning, and in *Teixeira de Castro v Portugal* (1998) 28 EHRR 101, para 39, a case of entrapment. A similar view would have been taken by the Commission in the much earlier case of *Austria v Italy* (1963) 6 YB 740, 784, had it concluded that the victims whom Austria represented had been subjected to maltreatment with the aim of extracting confessions. But the Commission D observed that article 6(2) could only be regarded as being violated if the court subsequently accepted as evidence any admissions extorted in this manner. This was a point made by my noble and learned friend Lord Hoffmann in the much more recent devolution case of *Montgomery v H M Advocate* [2003] 1 AC 641, 649, when he observed:

> "Of course events before the trial may create the conditions for an E unfair determination of the charge. For example, an accused who is convicted on evidence obtained from him by torture has not had a fair trial. But the breach of article 6(1) lies not in the use of torture (which is, separately, a breach of article 3) but in the reception of the evidence by the court for the purposes of determining the charge. If the evidence had been rejected, there would still have been a breach of article 3 but no breach of article 6(1)."

F

Lord Hoffmann, in *R v Governor of Brixton Prison, Ex p Levin* [1997] AC 741, 748, did not exclude the possibility (he did not have to decide) that evidence might be rejected in extradition proceedings if, though technically admissible, it had been obtained in a way which outraged civilised values. Such was said to be the case in *R (Ramda) v Secretary of State for the Home Department* [2002] EWHC 1278 (Admin) where the applicant resisted G extradition to France on the ground that the evidence which would be relied on against him at trial had been obtained by torture and that he would be unable to resist its admission. The Queen's Bench Divisional Court concluded (para 22) that if these points were made out, his trial would not be fair and the Secretary of State would be effectively bound to refuse to extradite him. In the very recent case of *Mamatkulov and Askarov v Turkey* H (2005) 41 EHRR 494 Judges Bratza, Bonello and Hedigan delivered a joint partly dissenting opinion, in the course of which they held, in paras 15–17:

> "15. As in the case of the risk of treatment proscribed by article 3 of the Convention, the risk of a flagrant denial of justice in the receiving state for the purposes of article 6 must be assessed primarily by reference to the

facts which were known or should have been known by the respondent state at the time of the extradition. A

"16. The majority of the court acknowledge that, in the light of the information available, there 'may have been reasons for doubting at the time' that the applicants would receive a fair trial in Uzbekistan (judgment, para 91). However, they conclude that there is insufficient evidence to show that any possible irregularities in the trial were liable to constitute a flagrant denial of justice within the meaning of the court's *Soering* judgment. B

"17. We consider, on the contrary, that on the material available at the relevant time there were substantial grounds not only for doubting that the applicants would receive a fair trial but for concluding that they ran a real risk of suffering a flagrant denial of justice. The Amnesty International briefing document afforded, in our view, credible grounds for believing that self-incriminating evidence extracted by torture was routinely used to secure guilty verdicts and that suspects were very frequently denied access to a lawyer of their choice, lawyers often being given access to their client by law enforcement officials after the suspect had been held in custody for several days, when the risk of torture was at its greatest. In addition, it was found that in many cases law enforcement officials would only grant access to a lawyer after the suspect had signed a confession and that meetings between lawyers and clients, once granted, were generally infrequent, defence lawyers rarely being allowed to be present at all stages of the investigation." C D

The approach of these judges is consistent with the even more recent decision of the court in *Harutyunyan v Armenia* (Application No 36549/03) (unreported) 5 July 2005 where in paras 2(b) and (f) the court ruled: E

"(b) As to the complaint about the coercion and the subsequent use in court of the applicant's confession statement, the court considers that it cannot, on the basis of the file, determine the admissibility of this part of the application and that it is therefore necessary, in accordance with rule 54(2) (b) of the Rules of the Court, to give notice of this complaint to the respondent Government. F

"(f) As to the complaint about the use in court of witness statements obtained under torture, the court considers that it cannot, on the basis of the file, determine the admissibility of this part of the application and that it is therefore necessary, in accordance with rule 54(2) (b) of the Rules of the Court, to give notice of this complaint to the respondent Government." G

Had the court found that the complaints of coercion and torture appeared to be substantiated, a finding that article 6(1) had been violated would, in my opinion, have been inevitable. As it was, the court did not rule that these complaints were inadmissible. Nor did it dismiss them. It adjourned examination of the applicant's complaints concerning the alleged violation of his right to silence and the admission in court of evidence obtained under torture. H

Public international law

27 The appellants' submission has a further, more international, dimension. They accept, as they must, that a treaty, even if ratified by the

A United Kingdom, has no binding force in the domestic law of this country unless it is given effect by statute or expresses principles of customary international law: *J H Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418; *R v Secretary of State for the Home Department, Ex p Brind* [1991] 1 AC 696; *R v Lyons* [2003] 1 AC 976. But they rely on the well-established principle that the words of a United B Kingdom statute, passed after the date of a treaty and dealing with the same subject matter, are to be construed, if they are reasonably capable of bearing such a meaning, as intended to carry out the treaty obligation and not to be inconsistent with it: *Garland v British Rail Engineering Ltd* [1983] 2 AC 751, 771. The courts are obliged under section 2 of the 1998 Act to take Strasbourg jurisprudence into account in connection with a Convention right, their obligation under section 3 is to interpret and give effect to C primary and subordinate legislation in a way which is compatible with Convention rights so far as possible to do so and it is their duty under section 6 not to act incompatibly with a Convention right. If, and to the extent that, development of the common law is called for, such development should ordinarily be in harmony with the United Kingdom's international obligations and not antithetical to them. I do not understand these D principles to be contentious.

28 The appellants' argument may, I think, be fairly summarised as involving the following steps. (1) The European Convention is not to be interpreted in a vacuum, but taking account of other international obligations to which member states are subject, as the European court has in practice done. (2) The prohibition of torture enjoys the highest normative E force recognised by international law. (3) The international prohibition of torture requires states not merely to refrain from authorising or conniving at torture but also to suppress and discourage the practice of torture and not to condone it. (4) Article 15 of the Torture Convention requires the exclusion of statements made as a result of torture as evidence in any proceedings. (5) Court decisions in many countries have given effect directly or indirectly to article 15 of the Torture Convention. (6) The rationale of the F exclusionary rule in article 15 is found not only in the general unreliability of evidence procured by torture but also in its offensiveness to civilised values and its degrading effect on the administration of justice. (7) Measures directed to counter the grave dangers of international terrorism may not be permitted to undermine the international prohibition of torture. It is necessary to examine these propositions in a little detail.

G

(1) Interpretation of the Convention in a wider international context

29 Article 31 of the Vienna Convention on the Law of Treaties (1969), (1980) (Cmnd 7964), reflecting principles of customary international law, provides in article 31(3)(c) that in interpreting a treaty there shall be taken into account, together with the context, any relevant rules of international H law applicable in the relations between the parties. The European court has recognised this principle (*Golder v United Kingdom* (1975) 1 EHRR 524, para 29, *HN v Poland* (Application No 77710/01) (unreported), 13 September 2005, para 75), and in *Al-Adsani v United Kingdom* (2001) 34 EHRR 273, para 55, it said (footnotes omitted):

"55. The court must next assess whether the restriction was proportionate to the aim pursued. It recalls that the Convention has to be interpreted in the light of the rules set out in the Vienna Convention of 23 May 1969 on the Law of Treaties, and that article 31(3)(c) of that treaty indicates that account is to be taken of 'any relevant rules of international law applicable in the relations between the parties'. The Convention, in including article 6, cannot be interpreted in a vacuum. The court must be mindful of the Convention's special character as a human rights treaty, and it must also take the relevant rules of international law into account. The Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the grant of state immunity."

The court has in its decisions invoked a wide range of international instruments, including the United Nations Convention on the Rights of the Child 1989 and the Beijing Rules (*V v United Kingdom* (1999) 30 EHRR 121, paras 76–77), the Council of Europe Standard Minimum Rules for the Treatment of Prisoners (*S v Switzerland* (1991) 14 EHRR 670, para 48) and the 1975 Declaration referred to in para 31 below (*Ireland v United Kingdom* (1978) 2 EHRR 25, para 167). More pertinently to these appeals, the court has repeatedly invoked the provisions of the Torture Convention: see, for example, *Aydin v Turkey* 25 EHRR 251, para 103; *Selmouni v France* (1999) 29 EHRR 403, para 97. In *Soering v United Kingdom* 11 EHRR 439, para 88, the court said (footnotes omitted):

"Article 3 makes no provision for exceptions and no derogation from it is permissible under article 15 in time of war or other national emergency. This absolute prohibition on torture and on inhuman or degrading treatment or punishment under the terms of the Convention shows that article 3 enshrines one of the fundamental values of the democratic societies making up the Council of Europe. It is also to be found in similar terms in other international instruments such as the 1966 International Covenant on Civil and Political Rights and the 1969 American Convention on Human Rights and is generally recognised as an internationally accepted standard.

"The question remains whether the extradition of a fugitive to another state where he would be subjected or be likely to be subjected to torture or to inhuman or degrading treatment or punishment would itself engage the responsibility of a contracting state under article 3. That the abhorrence of torture has such implications is recognised in article 3 of the United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, which provides that 'no state party shall . . . extradite a person where there are substantial grounds for believing that he would be in danger of being subjected to torture.' The fact that a specialised treaty should spell out in detail a specific obligation attaching to the prohibition of torture does not mean that an essentially similar obligation is not already inherent in the general terms of article 3 of the European Convention. It would hardly be compatible with the underlying values of the Convention, that 'common heritage of political traditions, ideals, freedom and the rule of law' to which the Preamble refers, were a contracting state knowingly to surrender a fugitive to another state where there were substantial grounds for believing that he

A would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of article 3, would plainly be contrary to the spirit and intendment of the article, and in the court's view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving state by a real risk of exposure to inhuman or degrading treatment or punishment proscribed B by that article."

(2) The international prohibition of torture

30 The preamble to the United Nations Charter (1945) recorded the determination of member states to reaffirm their faith in fundamental human rights and the dignity and worth of the human person and to C establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained. The Charter was succeeded by the Universal Declaration of Human Rights 1948, the European Convention 1950 and the International Covenant on Civil and Political Rights 1966, all of which (in articles 5, 3 and 7 respectively, in very similar language) provided that no one should be D subjected to torture or inhuman or degrading treatment.

31 On 9 December 1975 the General Assembly of the United Nations, without a vote, adopted Resolution 3452 (XXX), a Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. This included, in article 1, a definition of torture:

E "*Article 1*

"1. For the purpose of this Declaration, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of F having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.

"2. Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment."

G Articles 2 to 4 provided:

"*Article 2*

"Any act of torture or other cruel, inhuman or degrading treatment or punishment is an offence to human dignity and shall be condemned as a denial of the purposes of the Charter of the United Nations and as a violation of the human rights and fundamental freedoms proclaimed in H the Universal Declaration of Human Rights.

"*Article 3*

"No state may permit or tolerate torture or other cruel, inhuman or degrading treatment or punishment. Exceptional circumstances such as a state of war or a threat of war, internal political instability or any other

public emergency may not be invoked as a justification of torture or other cruel, inhuman or degrading treatment or punishment.

"*Article 4*

"Each state shall, in accordance with the provisions of this Declaration, take effective measures to prevent torture and other cruel, inhuman or degrading treatment or punishment from being practised within its jurisdiction."

Action was then taken to prepare a convention. This action culminated in the Torture Convention, which came into force on 26 June 1987. All member states of the Council of Europe are members with the exception of Moldova, Andorra and San Marino, the last two of which have been signed but not yet ratified.

32 The Torture Convention contained, in article 1, a definition of torture:

"*Article 1*

"1. For the purposes of this Convention, 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

"2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application."

It is noteworthy that the torture must be inflicted by or with the complicity of an official, must be intentional, and covers treatment inflicted for the purpose of obtaining information or a confession. Articles 2, 3 and 4 provide:

"*Article 2*

"1. Each state party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

"2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

"3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

"*Article 3*

"1. No state party shall expel, return ('refouler') or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture.

"2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations

A including, where applicable, the existence in the state concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

"*Article 4*

"1. Each state party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.

B "2. Each state party shall make these offences punishable by appropriate penalties which take into account their grave nature."

33 It is common ground in these proceedings that the international prohibition of the use of torture enjoys the enhanced status of a jus cogens or peremptory norm of general international law. For purposes of the Vienna Convention, a peremptory norm of general international law is defined in C article 53 to mean

"a norm accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

D In *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 3)* [2000] 1 AC 147, 197–199, the jus cogens nature of the international crime of torture, the subject of universal jurisdiction, was recognised. The implications of this finding were fully and authoritatively explained by the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v Furundzija* (unreported) 10 December 1998, Case No IT-95–17/T 10, in a passage which, despite its length, calls for citation (footnotes E omitted):

"3. *Main Features of the Prohibition Against Torture in International Law.*

"147. There exists today universal revulsion against torture: as a USA court put it in *Filartiga v Pena-Irala,* 'the torturer has become, like the pirate and the slave trader before him, hostis humani generis, an F enemy of all mankind'. This revulsion, as well as the importance states attach to the eradication of torture, has led to the cluster of treaty and customary rules on torture acquiring a particularly high status in the international normative system, a status similar to that of principles such as those prohibiting genocide, slavery, racial discrimination, aggression, the acquisition of territory by force and the forcible suppression of the G right of peoples to self-determination. The prohibition against torture exhibits three important features, which are probably held in common with the other general principles protecting fundamental human rights.

"(a) *The Prohibition Even Covers Potential Breaches.*

"148. Firstly, given the importance that the international community attaches to the protection of individuals from torture, the prohibition against torture is particularly stringent and sweeping. States are obliged H not only to prohibit and punish torture, but also to forestall its occurrence: it is insufficient merely to intervene after the infliction of torture, when the physical or moral integrity of human beings has already been irremediably harmed. Consequently, states are bound to put in place all those measures that may pre-empt the perpetration of torture. As was

authoritatively held by the European Court of Human Rights in *Soering*, international law intends to bar not only actual breaches but also potential breaches of the prohibition against torture (as well as any inhuman and degrading treatment). It follows that international rules prohibit not only torture but also (i) the failure to adopt the national measures necessary for implementing the prohibition and (ii) the maintenance in force or passage of laws which are contrary to the prohibition.

"149. Let us consider these two aspects separately. Normally states, when they undertake international obligations through treaties or customary rules, adopt all the legislative and administrative measures necessary for implementing such obligations. However, subject to obvious exceptions, failure to pass the required implementing legislation has only a potential effect: the wrongful fact occurs only when administrative or judicial measures are taken which, being contrary to international rules due to the lack of implementing legislation, generate state responsibility. By contrast, in the case of torture, the requirement that states expeditiously institute national implementing measures is an integral part of the international obligation to prohibit this practice. Consequently, states must immediately set in motion all those procedures and measures that may make it possible, within their municipal legal system, to forestall any act of torture or expeditiously put an end to any torture that is occurring.

"150. Another facet of the same legal effect must be emphasised. Normally, the maintenance or passage of national legislation inconsistent with international rules generates state responsibility and consequently gives rise to a corresponding claim for cessation and reparation (lato sensu) only when such legislation is concretely applied. By contrast, in the case of torture, the mere fact of keeping in force or passing legislation contrary to the international prohibition of torture generates international state responsibility. The value of freedom from torture is so great that it becomes imperative to preclude any national legislative act authorising or condoning torture or at any rate capable of bringing about this effect.

"(b) *The Prohibition Imposes Obligations Erga Omnes.*

"151. Furthermore, the prohibition of torture imposes upon states obligations erga omnes, that is, obligations owed towards all the other members of the international community, each of which then has a correlative right. In addition, the violation of such an obligation simultaneously constitutes a breach of the correlative right of all members of the international community and gives rise to a claim for compliance accruing to each and every member, which then has the right to insist on fulfilment of the obligation or in any case to call for the breach to be discontinued.

"152. Where there exist international bodies charged with impartially monitoring compliance with treaty provisions on torture, these bodies enjoy priority over individual states in establishing whether a certain state has taken all the necessary measures to prevent and punish torture and, if they have not, in calling upon that state to fulfil its international obligations. The existence of such international mechanisms makes it

A possible for compliance with international law to be ensured in a neutral and impartial manner.

"(c) *The Prohibition Has Acquired the Status of Jus Cogens.*

"153. While the erga omnes nature just mentioned appertains to the area of international enforcement (lato sensu), the other major feature of the principle proscribing torture relates to the hierarchy of rules in the international normative order. Because of the importance of the values it B protects, this principle has evolved into a peremptory norm or jus cogens, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules. The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by states through international treaties or local or special customs or even general customary rules not endowed with the C same normative force.

"154. Clearly, the jus cogens nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community. Furthermore, this prohibition is designed to produce a deterrent effect, in that it signals to all members of the international community and the individuals over whom they wield authority that the prohibition of D torture is an absolute value from which nobody must deviate.

"155. The fact that torture is prohibited by a peremptory norm of international law has other effects at the inter-state and individual levels. At the inter-state level, it serves to internationally de-legitimise any legislative, administrative or judicial act authorising torture. It would be senseless to argue, on the one hand, that on account of the jus cogens E value of the prohibition against torture, treaties or customary rules providing for torture would be null and void ab initio, and then be unmindful of a state say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law. If such a situation were to arise, the national measures, violating the general principle and any relevant treaty provision, would produce the legal effects discussed above and in addition would not be accorded F international legal recognition. Proceedings could be initiated by potential victims if they had locus standi before a competent international or national judicial body with a view to asking it to hold the national measure to be internationally unlawful; or the victim could bring a civil suit for damage in a foreign court, which would therefore be asked inter alia to disregard the legal value of the national authorising act. What is G even more important is that perpetrators of torture acting upon or benefiting from those national measures may nevertheless be held criminally responsible for torture, whether in a foreign state, or in their own state under a subsequent regime. In short, in spite of possible national authorisation by legislative or judicial bodies to violate the principle banning torture, individuals remain bound to comply with that principle. As the International Military Tribunal at Nuremberg put it: H 'individuals have international duties which transcend the national obligations of obedience imposed by the individual state'.

"156. Furthermore, at the individual level, that is, that of criminal liability, it would seem that one of the consequences of the jus cogens character bestowed by the international community upon the prohibition

of torture is that every state is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction. Indeed, it would be inconsistent on the one hand to prohibit torture to such an extent as to restrict the normally unfettered treaty-making power of sovereign states, and on the other hand bar states from prosecuting and punishing those torturers who have engaged in this odious practice abroad. This legal basis for states' universal jurisdiction over torture bears out and strengthens the legal foundation for such jurisdiction found by other courts in the inherently universal character of the crime. It has been held that international crimes being universally condemned wherever they occur, every state has the right to prosecute and punish the authors of such crimes. As stated in general terms by the Supreme Court of Israel in *Eichmann*, and echoed by a USA court in *Demjanjuk*, 'it is the universal character of the crimes in question i e international crimes which vests in every state the authority to try and punish those who participated in their commission'.

"157. It would seem that other consequences include the fact that torture may not be covered by a statute of limitations, and must not be excluded from extradition under any political offence exemption."

There can be few issues on which international legal opinion is more clear than on the condemnation of torture. Offenders have been recognised as the "common enemies of mankind" (*Demjanjuk v Petrovsky* (1985) 612 F Supp 544, 566, Lord Cooke of Thorndon has described the right not to be subjected to inhuman treatment as a "right inherent in the concept of civilisation" (*Higgs v Minister of National Security* [2000] 2 AC 228, 260), the Ninth Circuit Court of Appeals has described the right to be free from torture as "fundamental and universal" (*Siderman de Blake v Argentina* (1992) 965 F 2d 699, 717) and the UN Special Rapporteur on Torture (Mr Peter Koojimans) has said that "If ever a phenomenon was outlawed unreservedly and unequivocally it is torture" (Report of the Special Rapporteur on Torture, E/CN 4/1986/15, para 3).

(3) The duty of states in relation to torture

34 As appears from the passage just cited, the jus cogens erga omnes nature of the prohibition of torture requires member states to do more than eschew the practice of torture. In *Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883, paras 29, 117, the House refused recognition to conduct which represented a serious breach of international law. This was, as I respectfully think, a proper response to the requirements of international law. In General Comment 20 (1992) on article 7 of the ICCPR, the UN Human Rights Committee said, in para 8:

"The committee notes that it is not sufficient for the implementation of article 7 to prohibit such treatment or punishment or to make it a crime. States parties should inform the committee of the legislative, administrative, judicial and other measures they take to prevent and punish acts of torture and cruel, inhuman and degrading treatment in any territory under their jurisdiction."

Article 41 of the International Law Commission's draft articles on Responsibility of States for internationally wrongful acts (November 2001)

A requires states to cooperate to bring to an end through lawful means any serious breach of an obligation under a peremptory norm of general international law. An advisory opinion of the International Court of Justice on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (unreported) 9 July 2004 (General List No 131), para 159 explained the consequences of the breach found in that case:

B "159. Given the character and the importance of the rights and obligations involved, the court is of the view that all states are under an obligation not to recognise the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all states, while respecting the United Nations C Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end. In addition, all the states parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 are under an obligation, while respecting the United Nations Charter and international D law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention."

There is reason to regard it as a duty of states, save perhaps in limited and exceptional circumstances, as where immediately necessary to protect a person from unlawful violence or property from destruction, to reject the fruits of torture inflicted in breach of international law. As McNally JA put E it in *S v Nkomo* 1989 (3) ZLR 117, 131: "It does not seem to me that one can condemn torture while making use of the mute confession resulting from torture, because the effect is to encourage torture."

(4) Article 15 of the Torture Convention

35 Article 12 of the 1975 Declaration provided:

F "Any statement which is established to have been made as a result of torture or other cruel, inhuman or degrading treatment or punishment may not be invoked as evidence against the person concerned or against any other person in any proceedings."

Article 15 of the Torture Convention repeats the substance of this provision, subject to a qualification:

G "Each state party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made."

The additional qualification makes plain the blanket nature of this exclusionary rule. It cannot possibly be read, as counsel for the Secretary of H State submits, as intended to apply only in criminal proceedings. Nor can it be understood to differentiate between confessions and accusatory statements, or to apply only where the state in whose jurisdiction the proceedings are held has inflicted or been complicit in the torture. It would indeed be remarkable if national courts, exercising universal jurisdiction,

could try a foreign torturer for acts of torture committed abroad, but could none the less receive evidence obtained by such torture. The matter was succinctly put by Mr Alvaro Gil-Robles, the Council of Europe Commissioner for Human Rights, in his Report on his visit to the United Kingdom in November 2004 (8 June 2005, Comm DH (2005)6), para 27: "torture is torture whoever does it, judicial proceedings are judicial proceedings, whatever their purpose—the former can never be admissible in the latter."

(5) State practice

36 A Committee against Torture was established under article 17 of the Torture Convention to monitor compliance by member states. The committee has recognised a duty of states, if allegations of torture are made, to investigate them: *PE v France* (2002) 10 IHRR 421, paras 5(3), 6(3); *GK v Switzerland,* (unreported) 12 May 2003, Communication No 219/2002, para 6(10). The clear implication is that the evidence should have been excluded had the complaint been verified.

37 In Canada, article 15 of the Torture Convention has been embodied in the criminal code: see *India v Singh* (1996) 108 CCC (3d) 274, para 20. In France, article 15 has legal effect (*French Republic v Haramboure* (unreported) 24 January 1995, Case No 94–81254, Cour de Cassation, Chambre Criminelle, and extradition to Spain was refused where allegations that a witness statement had been procured by torture in Spain was judged not to have been adequately answered (*Ministère Public v Irastorza Dorronsoro*, (unreported) 16 May 2003, Case No 238/2003, Cour d'Appel de Pau. In the Netherlands, it was held by the Supreme Court to follow from article 3 of the European Convention and article 7 of the ICCPR that if witness statements had been obtained by torture they could not be used as evidence: *In re Pereira* (unreported) 1 October 1996, No 103-094, para 6(2). In Germany, as in France, article 15 has legal effect: *In re El Motassadeq*, decision of the Higher Regional Court of Hamburg, 14 June 2005, NJM 2326, para 2.

38 In the United States, torture was recognised to be prohibited by the law of nations even before the Torture Convention was made: *Filartiga v Pena-Irala* (1980) 630 F 2d 876. Earlier still, it had been said to be:

> "unthinkable that a statement obtained by torture or by other conduct belonging only in a police state should be admitted at the government's behest in order to bolster its case" : *LaFrance v Bohlinger* (1974) 499 F 2d 29, para 6.

(6) The rationale of the exclusionary rule.

39 In their work on *The United Nations Convention against Torture* (1988), p 148, S H Burgers and H Danelius suggest that article 15 of the Torture Convention is based on two principles:

> "The rule laid down in article 15 would seem to be based on two different considerations. First of all, it is clear that a statement made under torture is often an unreliable statement, and it could therefore be contrary to the principle of 'fair trial' to invoke such a statement as evidence before a court. Even in countries whose court procedures are

A based on a free evaluation of all evidence, it is hardly acceptable that a statement made under torture should be allowed to play any part in court proceedings. In the second place, it should be recalled that torture is often aimed at ensuring evidence in judicial proceedings. Consequently, if a statement made under torture cannot be invoked as evidence, an important reason for using torture is removed, and the prohibition against the use of such statements as evidence before a court can therefore B have the indirect effect of preventing torture."

It seems indeed very likely that the unreliability of a statement or confession procured by torture and a desire to discourage torture by devaluing its product are two strong reasons why the rule was adopted. But it also seems likely that the article reflects the wider principle expressed in article 69(7) of the Rome Statute of the International Criminal Court, which has its C counterpart in the Rules of Procedure and Evidence of the International Criminal Tribunals for the Former Yugoslavia and Rwanda:

> "Evidence obtained by means of a violation of this Statute or internationally recognised human rights shall not be admissible if: (a) the violation casts substantial doubt on the reliability of the evidence; or (b) the admission of the evidence would be antithetical to and would D seriously damage the integrity of the proceedings."

The appellants contend that admission as evidence against a party to legal proceedings of a confession or an accusatory statement obtained by inflicting treatment of the severity necessary to fall within article 1 of the Torture Convention will "shock the community", infringe that party's rights and the fairness of the proceedings (*R v Oickle:* see para 17 above), shock E the judicial conscience (*United States v Hensel* (1981) 509 F Supp 1364, 1372), abuse or degrade the proceedings (*United States v Toscanino* 500 F 2d 267, 276), and involve the state in moral defilement (*Attorney General v O'Brien:* see para 17 above).

(7) The impact of terrorism

F 40 The European court has emphasised that article 3 of the European Convention is an absolute prohibition, not derogable in any circumstances. In *Chahal v United Kingdom* (1996) 23 EHRR 413, para 79, it ruled:

> "Article 3 enshrines one of the most fundamental values of democratic society. The court is well aware of the immense difficulties faced by states in modern times in protecting their communities from terrorist violence. G However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct. Unlike most of the substantive clauses of the Convention and of Protocols Nos 1 and 4, article 3 makes no provision for exceptions and no derogation from it is permissible under article 15 even in the event of a public emergency H threatening the life of the nation."

That the Torture Convention, including article 15, enjoys the same absolute quality is plain from the text of article 2, quoted in para 32 above.

41 It is true, as the Secretary of State submits, that states members of the United Nations and the Council of Europe have been strongly urged since

11 September 2001 to cooperate and share information in order to counter the cruel and destructive evil of terrorism. But these calls have been coupled with reminders that human rights, and international and humanitarian law, must not be infringed or compromised. Thus, while the Council of Europe's Parliamentary Assembly recommendation 1534 of 26 September 2001 refers to co-operation "on the basis of the Council of Europe's values and legal instruments", it also refers to Parliamentary Assembly resolution 1258, para 7 of which states:

> "These attacks have shown clearly the real face of terrorism and the need for a new kind of response. This terrorism does not recognise borders. It is an international problem to which international solutions must be found based on a global political approach. The world community must show that it will not capitulate to terrorism, but that it will stand more strongly than before for democratic values, the rule of law and the defence of human rights and fundamental freedoms."

The Council of Europe Convention on the Prevention of Terrorism of 16 May 2005, recalling in its preamble

> "the need to strengthen the fight against terrorism and reaffirming that all measures taken to prevent or suppress terrorist offences have to respect the rule of law and democratic values, human rights and fundamental freedoms as well as other provisions of international law, including, where applicable, international humanitarian law . . ."

went on to provide:

> "Article 3—National prevention policies
> "1. Each party shall take appropriate measures, particularly in the field of training of law enforcement authorities and other bodies, and in the fields of education, culture, information, media and public awareness raising, with a view to preventing terrorist offences and their negative effects while respecting human rights obligations as set forth in, where applicable to that party, the Convention for the Protection of Human Rights and Fundamental Freedoms, the International Covenant on Civil and Political Rights, and other obligations under international law."

Other similar examples could be given.

42 The United Nations pronouncements are to the same effect. Thus Security Council resolution 1373 of 28 September 2001 called for co-operation and exchange of information to prevent terrorist acts, but also reaffirmed resolution 1269 of 19 October 1999 which called for observance of the principles of the UN Charter and the norms of international law, including international humanitarian law. By Security Council resolution 1566 of 8 October 2004 states were reminded:

> "that they must ensure that any measures taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, and in particular international human rights, refugee and humanitarian law."

Again, other similar examples could be given. The General Assembly has repeatedly made the same point: see, for example, resolution 49/60 of 9 December 1994; resolution 51/210 of 17 December 1996; and resolution

A 59/290 of 13 April 2005. The Secretary General of the UN echoed the same theme in statements of 4 October 2002, 6 March 2003 and 10 March 2005.

43 The events of 11 September prompted the Committee against Torture to issue a statement on 22 November 2001 (CAT/C/XXVII/Misc 7) in which it said:

> "The Committee against Torture condemns utterly the terrorist attacks
> B of September 11 and expresses its profound condolences to the victims, who were nationals of some 80 countries, including many state parties to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. The committee is mindful of the terrible threat to international peace and security posed by these acts of international terrorism, as affirmed in Security Council resolution 1368. The
> C committee also notes that the Security Council in resolution 1373 identified the need to combat by all means, in accordance with the Charter of the United Nations, the threats caused by terrorist acts.
>
> "The Committee against Torture reminds state parties to the Convention of the non-derogable nature of most of the obligations undertaken by them in ratifying the Convention.
>
> "The obligations contained in articles 2 (whereby 'no exceptional
> D circumstances whatsoever may be invoked as a justification of torture'), 15 (prohibiting confessions extorted by torture being admitted in evidence, except against the torturer), and 16 (prohibiting cruel, inhuman or degrading treatment or punishment) are three such provisions and must be observed in all circumstances.
>
> "The Committee against Torture is confident that whatever responses to the threat of international terrorism are adopted by state parties, such
> E responses will be in conformity with the obligations undertaken by them in ratifying the Convention against Torture."

A statement to similar effect was made by the Committee against Torture, the Special Rapporteur on Torture, the Chairperson of the 22nd session of the Board of Trustees of the United Nations Voluntary Fund for Victims of Torture and the Acting United Nations Commissioner for Human Rights on
F 26 June 2004 (CAT Report to the General Assembly, A/59/44 (2004), para 17). In its Conclusions and Recommendations on the United Kingdom dated 10 December 2004 (CAT/C/CR/33/3), having received the United Kingdom's fourth periodic report, the committee welcomed the Secretary of State's indication that he did not intend to rely upon or present evidence where there is a knowledge or belief that torture has taken place but
G recommended that this be appropriately reflected in formal fashion, such as legislative incorporation or undertaking to Parliament, and that means be provided whereby an individual could challenge the legality of any evidence plausibly suspected of having been obtained by torture in any proceeding.

44 This recommendation followed the judgment of the Court of Appeal in these appeals. Concern at the effect of that judgment was also expressed by the International Commission of Jurists on 28 August 2004, which
H declared that "Evidence obtained by torture, or other means which constitute a serious violation of human rights against a defendant or third party, is never admissible and cannot be relied on in any proceedings", and by the Council of Europe Commissioner for Human Rights, Mr Gil-Robles in his Report cited in para 35 above. In a report of 9 June 2005 on a visit

made to the United Kingdom in March 2004, the Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT/Inf (2005) 10), para 31, observed:

> "During the 2004 visit, several persons whom the delegation met were very concerned that the SIAC could apparently take into consideration evidence that might have been obtained elsewhere by coercion, or even by torture. Such an approach would contravene universal principles governing the protection of human rights and the prohibition of torture and other forms of ill-treatment, to which the United Kingdom has adhered."

In resolution 1433, adopted on 26 April 2005, on the Lawfulness of Detentions by the United States in Guantanamo Bay, the Parliamentary Assembly of the Council of Europe called on the United States to cease the practice of rendition and called on member states to respect their obligation under article 15 of the Torture Convention.

45 The House has not been referred to any decision, resolution, agreement or advisory opinion suggesting that a confession or statement obtained by torture is admissible in legal proceedings if the torture was inflicted without the participation of the state in whose jurisdiction the proceedings are held, or that such evidence is admissible in proceedings related to terrorism.

The Secretary of State's case

46 While counsel for the Secretary of State questions the effect and applicability of some of the material on which the appellants rely, he founds his case above all on the statutory scheme established by Part 4 of the 2001 Act. He builds on the appellants' acceptance that the Secretary of State may, when forming the reasonable belief and suspicion required for certification under section 21, and when acting on that belief to arrest, search and detain a suspect, act on information which has or may have been obtained by torture inflicted in a foreign country without British complicity. That acceptance, he submits, supports the important and practical need for the security services and the Secretary of State to obtain intelligence and evidence from foreign official sources, some of which (in the less progressive countries) might dry up if their means of obtaining intelligence and evidence were the subject of intrusive inquiry. But it would create a mismatch which Parliament could not have intended if the Secretary of State were able to rely on material at the certification stage which SIAC could not later receive. It would, moreover, emasculate the statutory scheme, which is specifically designed to enable SIAC, constituted as it is, to see all relevant material, even such ordinarily inadmissible material as may be obtained on warranted intercepts. This is reflected in rule 44(3) of the applicable Rules, which dispenses with all rules of evidence, including any that might otherwise preclude admission of evidence obtained by torture in the circumstances postulated. This is not a negligible argument, and a majority of the Court of Appeal broadly accepted it. There are, however, in my opinion, a number of reasons why it must be rejected.

47 I am prepared to accept (although I understand the interveners represented by Mr Starmer not to do so) that the Secretary of State does not act unlawfully if he certifies, arrests, searches and detains on the strength of

A what I shall for convenience call foreign torture evidence. But by the same token it is, in my view, questionable whether he would act unlawfully if he based similar action on intelligence obtained by officially-authorised British torture. If under such torture a man revealed the whereabouts of a bomb in the Houses of Parliament, the authorities could remove the bomb and, if possible, arrest the terrorist who planted it. There would be a flagrant breach of article 3 for which the United Kingdom would be answerable, but B no breach of article 5(4) or 6. Yet the Secretary of State accepts that such evidence would be inadmissible before SIAC. This suggests that there is no correspondence between the material on which the Secretary of State may act and that which is admissible in legal proceedings.

48 This is not an unusual position. It arises whenever the Secretary of State (or any other public official) relies on information which the rules of C public interest immunity prevent him adducing in evidence: *Makanjuola v Comr of Police of the Metropolis* [1992] 3 All ER 617, 623 e to j; *R v Chief Constable of West Midlands Police, Ex p Wiley* [1995] 1 AC 274, 295F–297C. It is a situation which arises where action is based on a warranted interception and there is no dispensation which permits evidence to be given. This may be seen as an anomaly, but (like the anomaly to which the rule in *R* D *v Warickshall* gives rise) it springs from the tension between practical common sense and the need to protect the individual against unfair incrimination. The common law is not intolerant of anomaly.

49 There would be a much greater anomaly if the duty of SIAC, hearing an appeal under section 25, were to decide whether the Secretary of State had entertained a reasonable belief and suspicion at the time of certification. But, as noted above in para 5, SIAC's duty is to cancel the certificate if it E considers that there "are" no reasonable grounds for a belief or suspicion of the kind referred to. This plainly refers to the date of the hearing. The material may by then be different from that on which the Secretary of State relied. He may have gathered new and better information; or some of the material on which he had relied may have been discredited; or he may have withdrawn material which he was ordered but was unwilling to disclose. SIAC must act on the information lawfully before it to decide whether there F are reasonable grounds at the time of its decision.

50 I am not impressed by the argument based on the practical undesirability of upsetting foreign regimes which may resort to torture. On the approach of the Court of Appeal majority, third party torture evidence, although legally admissible, must be assessed by SIAC in order to decide what, if any, weight should be given to it. This is an exercise which could G scarcely be carried out without investigating whether the evidence had been obtained by torture, and, if so, when, by whom, in what circumstances and for what purpose. Such an investigation would almost inevitably call for an approach to the regime which is said to have carried out the torture.

51 The Secretary of State is right to submit that SIAC is a body designed to enable it to receive and assess a wide range of material, including material which would not be disclosed to a body lacking its special characteristics. H And it would of course be within the power of a sovereign Parliament (in breach of international law) to confer power on SIAC to receive third party torture evidence. But the English common law has regarded torture and its fruits with abhorrence for over 500 years, and that abhorrence is now shared by over 140 countries which have acceded to the Torture Convention. I am

startled, even a little dismayed, at the suggestion (and the acceptance by the Court of Appeal majority) that this deeply-rooted tradition and an international obligation solemnly and explicitly undertaken can be overridden by a statute and a procedural rule which make no mention of torture at all. Counsel for the Secretary of State acknowledges that during the discussions on Part 4 the subject of torture was never the subject of any thought or any allusion. The matter is governed by the principle of legality very clearly explained by my noble and learned friend, Lord Hoffmann, in *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, 131:

> "Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document."

It trivialises the issue before the House to treat it as an argument about the law of evidence. The issue is one of constitutional principle, whether evidence obtained by torturing another human being may lawfully be admitted against a party to proceedings in a British court, irrespective of where, or by whom, or on whose authority the torture was inflicted. To that question I would give a very clear negative answer.

52 I accept the broad thrust of the appellants' argument on the common law. The principles of the common law, standing alone, in my opinion compel the exclusion of third party torture evidence as unreliable, unfair, offensive to ordinary standards of humanity and decency and incompatible with the principles which should animate a tribunal seeking to administer justice. But the principles of the common law do not stand alone. Effect must be given to the European Convention, which itself takes account of the all but universal consensus embodied in the Torture Convention. The answer to the central question posed at the outset of this opinion is to be found not in a governmental policy, which may change, but in law.

Inhuman or degrading treatment

53 The appellants broaden their argument to contend that all the principles on which they rely apply to inhuman and degrading treatment, if inflicted by an official with the requisite intention and effect, as to torture within the Torture Convention definition. It is, of course, true that article 3 of the European Convention (and the comparable articles of other human rights instruments) lump torture and inhuman or degrading treatment

A together, drawing no distinction between them. The European court did, however, draw a distinction between them in *Ireland v United Kingdom* (1978) 2 EHRR 25, holding that the conduct complained of was inhuman or degrading but fell short of torture, and article 16 of the Torture Convention draws this distinction very expressly:

> "1. Each state party shall undertake to prevent in any territory under
> B its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture or references
> C to other forms of cruel, inhuman or degrading treatment or punishment.
> "2. The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibit cruel, inhuman or degrading treatment or punishment or which relate to extradition or expulsion."

Ill-treatment falling short of torture may invite exclusion of evidence as
D adversely affecting the fairness of a proceeding under section 78 of the 1984 Act, where that section applies. But I do not think the authorities on the Torture Convention justify the assimilation of these two kinds of abusive conduct. Special rules have always been thought to apply to torture, and for the present at least must continue to do so. It would, on the other hand, be wrong to regard as immutable the standard of what amounts to torture. This is a point made by the European court in *Selmouni v France* 29 EHRR
E 403, paras 99–101 (footnotes omitted):

> "99. The acts complained of were such as to arouse in the applicant feelings of fear, anguish and inferiority capable of humiliating and debasing him and possibly breaking his physical and moral resistance. The court therefore finds elements which are sufficiently serious to render such treatment inhuman and degrading. In any event, the court reiterates
> F that, in respect of a person deprived of his liberty, recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in article 3.
> "100. In other words, it remains to establish in the instant case whether the 'pain or suffering' inflicted on Mr Selmouni can be defined as 'severe'
> G within the meaning of article 1 of the United Nations Convention. The court considers that this 'severity' is, like the 'minimum severity' required for the application of article 3, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc.
> "101. The court has previously examined cases in which it concluded
> H that there had been treatment which could only be described as torture. However, having regard to the fact that the Convention is a 'living instrument which must be interpreted in the light of present-day conditions,' the court considers that certain acts which were classified in the past as 'inhuman and degrading treatment' as opposed to 'torture'

> could be classified differently in future. It takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies."

It may well be that the conduct complained of in *Ireland v United Kingdom*, or some of the category II or III techniques detailed in a J2 memorandum dated 11 October 2002 addressed to the Commander, Joint Task Force 170 at Guantanamo Bay, Cuba, (see *The Torture Papers: The Road to Abu Ghraib,* ed Karen Greenberg and Joshua Dratel, (2005), pp 227–228), would now be held to fall within the definition in article 1 of the Torture Convention.

The burden of proof

54 The appellants contend that it is for a party seeking to adduce evidence to establish its admissibility if this is challenged. The Secretary of State submits that it is for a party seeking to challenge the admissibility of evidence to make good the factual grounds on which he bases his challenge. He supports this approach in the present context by pointing to the reference in article 15 of the Torture Convention to a statement "which is established to have been made as a result of torture". There is accordingly said to be a burden on the appellant in the SIAC proceedings to prove the truth of his assertion.

55 I do not for my part think that a conventional approach to the burden of proof is appropriate in a proceeding where the appellant may not know the name or identity of the author of an adverse statement relied on against him, may not see the statement or know what the statement says, may not be able to discuss the adverse evidence with the special advocate appointed (without responsibility) to represent his interests, and may have no means of knowing what witness he should call to rebut assertions of which he is unaware. It would, on the other hand, render section 25 appeals all but unmanageable if a generalised and unsubstantiated allegation of torture were in all cases to impose a duty on the Secretary of State to prove the absence of torture. It is necessary, in this very unusual forensic setting, to devise a procedure which affords some protection to an appellant without imposing on either party a burden which he cannot ordinarily discharge.

56 The appellant must ordinarily, by himself or his special advocate, advance some plausible reason why evidence may have been procured by torture. This will often be done by showing that evidence has, or is likely to have, come from one of those countries widely known or believed to practise torture (although they may well be parties to the Torture Convention and will, no doubt, disavow the practice publicly). Where such a plausible reason is given, or where SIAC with its knowledge and expertise in this field knows or suspects that evidence may have come from such a country, it is for SIAC to initiate or direct such inquiry as is necessary to enable it to form a fair judgment whether the evidence has, or whether there is a real risk that it may have been, obtained by torture or not. All will depend on the facts and circumstances of a particular case. If SIAC is unable to conclude that there is not a real risk that the evidence has been obtained by torture, it should refuse to admit the evidence. Otherwise it should admit it. It should throughout be

A guided by recognition of the important obligations laid down in articles 3 and 5(4) of the European Convention and, through them, article 15 of the Torture Convention, and also by recognition of the procedural handicaps to which an appellant is necessarily subject in proceedings from which he and his legal representatives are excluded.

57 Since a majority of my noble and learned friends do not agree with the view I have expressed on this point, and since it is of practical B importance, I should explain why I do not share their opinion.

58 I agree, of course, that the reference in article 15 to "any statement which is established to have been made as a result of torture" would ordinarily be taken to mean that the truth of such an allegation should be proved. That is what "established" ordinarily means. I would also accept that in any ordinary context the truth of the allegation should be proved by C the party who makes it. But the procedural regime with which the House is concerned in this case, described in paras 6–7 and 55 above, is very far from ordinary. A detainee may face the prospect of indefinite years of detention without charge or trial, and without knowing what is said against him or by whom. Lord Woolf CJ was not guilty of overstatement in describing an appellant to SIAC, if denied access to the evidence, as "undoubtedly under a D grave disadvantage" (*M v Secretary of State for the Home Department* [2004] 2 All ER 863, para 13). The special advocates themselves have publicly explained the difficulties under which they labour in seeking to serve the interests of those they are appointed to represent (Constitutional Affairs Committee of the House of Commons, "The operation of the Special Immigration Appeals Commission (SIAC) and the use of Special Advocates", Seventh Report of Session 2004–05, vol II, HC 323-II, Ev 1–12, 53–61).

E 59 My noble and learned friend, Lord Hope, proposes, in para 121 of his opinion, the following test: is it established, by means of such diligent inquiries into the sources that it is practicable to carry out and on a balance of probabilities, that the information relied on by the Secretary of State was obtained under torture? This is a test which, in the real world, can never be satisfied. The foreign torturer does not boast of his trade. The security services, as the Secretary of State has made clear, do not wish to imperil their F relations with regimes where torture is practised. The special advocates have no means or resources to investigate. The detainee is in the dark. It is inconsistent with the most rudimentary notions of fairness to blindfold a man and then impose a standard which only the sighted could hope to meet. The result will be that, despite the universal abhorrence expressed for torture and its fruits, evidence procured by torture will be laid before SIAC because G its source will not have been "established".

60 The authorities relied on by my noble and learned friends, Lord Hope of Craighead and Lord Rodger of Earlsferry, to support their conclusion are of questionable value at most. In *El Motassadeq*, a decision of the Higher Regional Court of Hamburg of 14 June 2005, the United States Department of Justice supplied the German court, for purposes of a terrorist trial proceeding in Germany with reference to the events of 11 September H 2001, with summaries of statements made by three Arab men. There was material suggesting that the statements had been obtained by torture, and the German court sought information on the whereabouts of the witnesses and the circumstances of their examination. The whereabouts of two of the witnesses had been kept secret for several years, but it was believed the

American authorities had access to them. The American authorities supplied no information, and said they were not in a position to give any indications as to the circumstances of the examination of these persons. Two American witnesses who attended to give evidence took the same position. One might have supposed that the summaries would, without more, have been excluded. But the German court, although noting that it was the United States, whose agents were accused of torture, which was denying information to the court, proceeded to examine the summaries and found it possible to infer from internal evidence that torture had not been used. This is not a precedent which I would wish to follow. But at least the defendant knew what the evidence was.

61 In *Mamatkulov and Askarov v Turkey* 4 February 2005 the applicants had resisted an application by the Republic of Uzbekistan to extradite them from Turkey to stand trial on very serious charges in Uzbekistan. They resisted extradition on the ground, among others, that if returned to Uzbekistan they would be tortured. There was material to show that that was not a fanciful fear. On application made by them to the European Court of Human Rights, it indicated to Turkey under rule 39 of its procedural rules that the extradition should not take place until it had had an opportunity to examine the validity of the applicants' fears. But in breach of this measure, and in violation of article 34 of the Convention, Turkey surrendered the applicants. The Chamber found, in effect, that no findings of fact could be made since the applicants had been denied an opportunity to have inquiries made to obtain evidence in support of their allegations: para 57 of the judgment. The approach of the Grand Chamber appears from paras 68 and 69 of its judgment:

> "68. It would hardly be compatible with the 'common heritage of political traditions, ideals, freedom and the rule of law' to which the Preamble refers, were a contracting state knowingly to surrender a person to another state where there were substantial grounds for believing that he would be in danger of being subjected to torture or inhuman or degrading treatment or punishment (*Soering*, cited above, p 35, para 88).
>
> "69. In determining whether substantial grounds have been shown for believing that a real risk of treatment contrary to article 3 exists, the court will assess the issue in the light of all the material placed before it or, if necessary, material obtained proprio motu . . ."

Despite a compelling dissent, from which I have quoted in para 26 above, the Grand Chamber concluded that Turkey had not violated article 3 of the Convention in surrendering the applicants. It did so in reliance on assurances received by Turkey from the Uzbek Government and the Uzbek Public Prosecutor before and after the surrender, and medical reports by doctors at the Uzbek prison where the applicants were being held. These matters were not sufficient to allay the concerns of the minority, and understandably, since Turkey's unlawful conduct prevented the European court examining the case as it would have wished. But the applicants were able to participate fully in the proceedings in Turkey and were not denied knowledge of the case against them.

62 I regret that the House should lend its authority to a test which will undermine the practical efficacy of the Torture Convention and deny detainees the standard of fairness to which they are entitled under

A article 5(4) or 6(1) of the European Convention. The matter could not be more clearly put than by my noble and learned friend, Lord Nicholls of Birkenhead, in the closing paragraph of his opinion.

Disposal

63 The Court of Appeal were unable to conclude that there was no B plausible suspicion of torture in these cases. I would accordingly allow the appeals, set aside the orders made by SIAC and the Court of Appeal, and remit all the cases to SIAC for reconsideration in the light of the opinions of the House.

LORD NICHOLLS OF BIRKENHEAD

64 My Lords, torture is not acceptable. This is a bedrock moral C principle in this country. For centuries the common law has set its face against torture. In early times this did not prevent the use of torture under warrants issued by the King or his Council. But by the middle of the 17th century this practice had ceased. In 1628 John Felton assassinated the Duke of Buckingham. He was pressed to reveal the names of his accomplices. The King's Council debated whether "by the law of the land they could justify the D putting him to the rack". The King, Charles I, said that before this was done "let the advice of the judges be had therein, whether it be legal or no". The King said that if it might not be done by law "he would not use his prerogative in this point". So the judges were consulted. They assembled at Serjeants' Inn in Fleet Street and agreed unanimously that Felton "ought not by the law to be tortured by the rack, for no such punishment is known or allowed by our law": *Rushworth, Historical Collections* (1721) vol 1, E pp 638–639.

65 Doubt has been cast on the historical accuracy of this account: Jardine, "Use of Torture in the Criminal Law of England", (1837), pp 61–62. The precise detail does not matter. What matters is that never again did the Privy Council issue a torture warrant. Nor, after 1640, did the king issue a warrant under his own signet: see Professor Langbein, *Torture and the Law of Proof*, pp 134–135. In Scotland prohibition of torture came later, after F the union of the two kingdoms, under section 5 of the Treason Act 1708 (7 Anne c 21).

66 It is against the background of this long established principle and practice that your Lordships' House must now decide whether an English court can admit as evidence in court proceedings information extracted by torture administered overseas. If an official or agent of the United Kingdom G were to use torture, or connive at its use, in order to obtain information this information would not be admissible in court proceedings in this country. That is not in doubt. It would be an abuse of the process of the United Kingdom court for the United Kingdom Government to seek to adduce in evidence information so obtained. The court would not for one moment countenance such conduct by the state. But what if agents of other countries extract information by use of torture? Is this information admissible in H court proceedings in this country?

67 Torture attracts universal condemnation, as amply demonstrated by my noble and learned friend, Lord Bingham of Cornhill. No civilised society condones its use. Unhappily, condemnatory words are not always matched by conduct. Information derived from sources where torture is still practised

gives rise to the present problem. The context is cross-border terrorism. Countering international terrorism calls for a flow of information between the security services of many countries. Fragments of information, acquired from various sources, can be pieced together to form a valuable picture, enabling governments of threatened countries to take preventative steps. What should the security services and the police and other executive agencies of this country do if they know or suspect information received by them from overseas is the product of torture? Should they discard this information as "tainted", and decline to use it lest its use by them be regarded as condoning the horrific means by which the information was obtained?

68 The intuitive response to these questions is that if use of such information might save lives it would be absurd to reject it. If the police were to learn of the whereabouts of a ticking bomb it would be ludicrous for them to disregard this information if it had been procured by torture. No one suggests the police should act in this way. Similarly, if tainted information points a finger of suspicion at a particular individual: depending on the circumstances, this information is a matter the police may properly take into account when considering, for example, whether to make an arrest.

69 In both these instances the executive arm of the state is open to the charge that it is condoning the use of torture. So, in a sense, it is. The government is using information obtained by torture. But in cases such as these the government cannot be expected to close its eyes to this information at the price of endangering the lives of its own citizens. Moral repugnance to torture does not require this.

70 The next step is to consider whether the position is the same regarding the use of this information in legal proceedings and, if not, why not. In my view the position is not the same. The executive and the judiciary have different functions and different responsibilities. It is one thing for tainted information to be used by the executive when making operational decisions or by the police when exercising their investigatory powers, including powers of arrest. These steps do not impinge upon the liberty of individuals or, when they do, they are of an essentially short-term interim character. Often there is an urgent need for action. It is an altogether different matter for the judicial arm of the state to admit such information as evidence when adjudicating definitively upon the guilt or innocence of a person charged with a criminal offence. In the latter case repugnance to torture demands that proof of facts should be found in more acceptable sources than information extracted by torture.

71 Difficulties arise at the interface between the different approaches permitted to the executive on the one hand and demanded of the courts on the other hand. Problems occur where the lawfulness of executive decisions is challenged in court and there is an apparent "mismatch", as the Secretary of State described it, between the material lawfully available to the executive and the evidence a court will admit in its proceedings. Suppose a case where the police take into account information obtained by torture abroad when arresting a person, and that person subsequently challenges the lawfulness of his arrest. Can the police give evidence of this information in court when seeking to justify the arrest?

A 72 In my view they can. It would be remarkable if the police could not. That would create a bizarre situation. It would mean the police may rely on this evidence when making an arrest, but not if the lawfulness of the arrest is challenged. That would be a curious application of a moral principle. That would be to treat a moral principle as giving with one hand and taking away with the other. That makes no sense. Either the police may rely on such information when carrying out their duties, or they may not. If they can B properly have regard to such information despite its tainted source, and in the particular case do so, they should not be precluded from referring to this information in court when giving evidence seeking to justify their decisions and actions. Repugnance to the use in court of information procured by torture does not require the police to give an incomplete account of the matters they took into account when making their decisions. (Different C considerations apply where, in the interests of national security, there are statutory or other restrictions on the use of certain matters in legal proceedings, such as the contents of intercepted communications or information attracting public interest immunity. In these cases the "mismatch" arises from a perceived need to preserve confidentiality, not from the application of a broad moral principle.)

D 73 So far I have noted the distinction between executive decisions of an essentially operational or short-term character and judicial decisions on criminal charges. Tainted information may be taken into account in the former case but not the latter. I have also noted that when reviewing the lawfulness of such executive decisions a court may have regard to all the matters the decision-maker properly took into account.

74 But this categorisation by no means covers the whole ground. Many E cases do not conform to this simple division of functions. Executive decisions, such as deportation, may have serious long-term consequences for an individual. And judicial supervision of an executive decision may take different forms. The Anti-terrorism, Crime and Security Act 2001 is a recent instance. Certification of a person as a "suspected international terrorist" is the responsibility of the Secretary of State. The issue of this certificate authorises the minister to exercise extensive powers, including power under F section 23 to detain the certified person indefinitely in certain circumstances. This power of detention, in its adverse impact on an individual, goes far beyond the adverse impact of executive acts such as search and arrest. Detention by order of the executive under the 2001 Act is not a preliminary step leading to a criminal charge.

75 Despite this difference, in the case of this Act the rationale G underlying the distinction between the executive's ability to take into account information procured by torture and the court's refusal to admit such evidence holds good. It holds good because the Special Immigration Appeals Commission, or SIAC in short, is required to review every certificate, by way of appeal or otherwise, and form its own view on whether reasonable grounds currently exist for believing a person's presence is a risk to national security and for suspecting he is a terrorist: sections 25 and 26. If H SIAC considers these grounds do not exist the certificate must be cancelled. Thus the certificate issued by the Secretary of State will lead nowhere if SIAC considers reasonable grounds do not exist. The certificate, although a prerequisite to exercise of the Secretary of State's powers under the Act, will be comparatively short-lived in its effect if SIAC considers the necessary

reasonable grounds do not exist. In other words, the certificate is in the nature of an essential preliminary step.

76 For its part, in forming its own view on whether reasonable grounds exist SIAC is discharging a judicial function which calls for proof of facts by evidence. The ethical ground on which information obtained by torture is not admissible in court proceedings as proof of facts is applicable in these cases as much as in other judicial proceedings. That is the present case.

77 Similar problems are bound to arise with other counter-terrorism legislation. One instance concerns decisions by the Secretary of State to deport on the ground that deportation is conducive to the public good as being in the interests of national security. An appeal lies to SIAC, which must allow an appeal if the decision involved the exercise of discretion by the minister and SIAC considers the discretion should have been exercised differently: section 2 of the Special Immigration Appeals Commission Act 1997, as substituted by the Nationality, Immigration and Asylum Act 2002. Another instance concerns non-derogating control orders made by the Secretary of State under section 2 of the Prevention of Terrorism Act 2005. Here the role of the court is expressed to be of a different and more limited character than under the 2001 Act. Under the 2005 Act the supervisory role of the court regarding non-derogating control orders is essentially limited to considering whether the relevant decision of the Secretary of State is "flawed". In deciding this issue the court must apply the "principles applicable on an application for judicial review": section 3(11).

78 Whether the Secretary of State may take tainted information into account when making decisions under statutory provisions such as these, and whether SIAC's function requires or permits evidence to be given of all the matters taken into account by the Secretary of State, are questions for another day. They do not call for decision on these appeals, and they were not the subject of submissions. It would not be right therefore to express any view on these issues.

79 For these reasons, and those stated by my noble and learned friends, I would allow these appeals.

80 In doing so I associate myself with the observations of Lord Bingham of Cornhill on the burden of proof where the admissibility of evidence is challenged before SIAC on the ground it may have been procured by torture. The contrary approach would place on the detainee a burden of proof which, for reasons beyond his control, he can seldom discharge. In practice that would largely nullify the principle, vigorously supported on all sides, that courts will not admit evidence procured by torture. That would be to pay lip-service to the principle. That is not good enough.

LORD HOFFMANN

81 My Lords, on 23 August 1628 George Villiers, Duke of Buckingham and Lord High Admiral of England, was stabbed to death by John Felton, a naval officer, in a house in Portsmouth. The 35-year-old Duke had been the favourite of King James I and was the intimate friend of the new King Charles I, who asked the judges whether Felton could be put to the rack to discover his accomplices. All the judges met in Serjeants' Inn. Many years later Blackstone recorded their historic decision: "The judges, being consulted, declared unanimously, to their own honour and the honour of the English law, that no such proceeding was allowable by the laws of England."

A 82 That word honour, the deep note which Blackstone strikes twice in one sentence, is what underlies the legal technicalities of this appeal. The use of torture is dishonourable. It corrupts and degrades the state which uses it and the legal system which accepts it. When judicial torture was routine all over Europe, its rejection by the common law was a source of national pride and the admiration of enlightened foreign writers such as Voltaire and Beccaria. In our own century, many people in the United States, heirs to that B common law tradition, have felt their country dishonoured by its use of torture outside the jurisdiction and its practice of extra-legal "rendition" of suspects to countries where they would be tortured: see Jeremy Waldron, "Torture and Positive Law: Jurisprudence for the White House" (2005) 105 Columbia Law Review 1681–1750.

83 Just as the writ of habeas corpus is not only a special (and nowadays C infrequent) remedy for challenging unlawful detention but also carries a symbolic significance as a touchstone of English liberty which influences the rest of our law, so the rejection of torture by the common law has a special iconic importance as the touchstone of a humane and civilised legal system. Not only that: the abolition of torture, which was used by the state in Elizabethan and Jacobean times to obtain evidence admitted in trials before the court of Star Chamber, was achieved as part of the great constitutional D struggle and civil war which made the government subject to the law. Its rejection has a constitutional resonance for the English people which cannot be overestimated.

84 During the last century the idea of torture as a state instrument of special horror came to be accepted all over the world, as is witnessed by the international law materials collected by my noble and learned friend, Lord E Bingham of Cornhill. Among the many unlawful practices of state officials, torture and genocide are regarded with particular revulsion: crimes against international law which every state is obliged to punish wherever they may have been committed.

85 It is against that background that one must examine the Secretary of State's submission that statements obtained abroad by torture are admissible in appeals to the Special Immigration Appeals Commission ("SIAC") under F section 25 of the Anti-terrorism, Crime and Security Act 2001. First, he says that there is no authority to the contrary. He accepts that the common law has long held that confessions obtained by torture are inadmissible against an accused person. Indeed, the common law went a good deal further and by the end of the eighteenth century was refusing to admit confessions which had been obtained by threats or promises of any kind. But nothing was said G about statements obtained from third parties. The general rule is that any relevant evidence is admissible. As Lord Goddard said in *Kuruma v The Queen* [1955] AC 197, 203, "the court is not concerned with how the evidence was obtained". He referred to a remark of Crompton J in *R v Leathem* (1861) 8 Cox CC 498, 501, overruling an objection to production of a letter which had been discovered in consequence of an inadmissible statement made by the accused: "It matters not how you get it; if you steal it H even, it would be admissible."

86 It is true that there are no cases in which statements from third parties have been held inadmissible on the ground that they had been obtained by torture. But the reason is not because such statements have been admitted in an ordinary English court. That has never happened. It is

because ever since the late 17th century, any statements made by persons not testifying before the court have been excluded, whatever the circumstances in which they were made. There was no need to consider whether they had been obtained by torture. They were simply rejected as hearsay. One must therefore try to imagine what the judges would have said if there had been no hearsay rule. Is it credible that, while rejecting a confession obtained by torture from the accused, they would have admitted a confession incriminating the accused which had been obtained by torturing an accomplice? Such a proceeding was precisely what had been held to be unlawful in the case of Felton. It is absurd to suppose that the judges would have said that the torture was illegal but that a statement so obtained would nevertheless be admissible.

87 As is shown by cases like *Kuruma*, not all evidence unlawfully obtained is inadmissible. Still less is evidence inadmissible only because it was discovered in consequence of statements which would not themselves be admissible, as in *Leathem* and the leading case of *R v Warickshall* (1783) 1 Leach 263, in which evidence that stolen goods were found under the bed of the accused was admitted notwithstanding that the discovery was made in consequence of her inadmissible confession. But the illegalities with which the courts were concerned in *Kuruma* and *Leathem* were fairly technical. Lord Goddard was not considering torture. In any case, since *Kuruma* the law has moved on. English law has developed a principle, illustrated by cases like *R v Horseferry Road Magistrates' Court, Ex p Bennett* [1994] 1 AC 42, that the courts will not shut their eyes to the way the accused was brought before the court or the evidence of his guilt was obtained. Those methods may be such that it would compromise the integrity of the judicial process, dishonour the administration of justice, if the proceedings were to be entertained or the evidence admitted. In such a case the proceedings may be stayed or the evidence rejected on the ground that there would otherwise be an abuse of the processes of the court.

88 As for the rule that we do not necessarily exclude the "fruit of the poisoned tree", but admit relevant evidence discovered in consequence of inadmissible confessions, this is the way we strike a necessary balance between preserving the integrity of the judicial process and the public interest in convicting the guilty. And even when the evidence has been obtained by torture—the accomplice's statement has led to the bomb being found under the bed of the accused—that evidence may be so compelling and so independent that it does not carry enough of the smell of the torture chamber to require its exclusion. But that is not the question in this case. We are concerned with the admissibility of the raw product of interrogation under torture.

89 The curious feature of this case is that although the Secretary of State advances these arguments based on the limited scope of the confession rule and the general principle that all relevant evidence is admissible, he does not contend for what would be the logical consequence if he was right, namely, that evidence obtained from third parties by torture in the United Kingdom would also be admissible. He accepts that it would not. But he submits that the exclusionary rule is confined to cases in which the torture has been used by or with the connivance of agents of the United Kingdom. So the issue is a narrow one: not whether an exclusionary rule exists, but whether it should

A extend to torture inflicted by foreigners without the assistance or connivance of anyone for whom the United Kingdom is responsible.

90 Furthermore, the Secretary of State has attempted to fend off concern by the International Committee Against Torture over whether his position was in accordance with our obligations under article 15 of the UN Convention Against Torture ("Each state party shall ensure that any statement which is established to have been made as a result of torture shall B not be invoked as evidence in any proceedings") by saying that he does not intend to "rely upon or present evidence where there is a knowledge or belief that torture has taken place". No doubt he thought that in addition to being an international obligation, that was the least that decency required. But the Secretary of State insists that this is a matter of policy which he is free to change or depart from. So the question remains over whether such evidence C is admissible as a matter of English law.

91 The answer to that question depends upon the purpose of the rule excluding evidence obtained by torture, which, as we have seen, the Secretary of State largely admits to exist. Is it to discipline the executive agents of the state by demonstrating that no advantage will come from torturing witnesses, or is it to preserve the integrity of the judicial process and the honour of English law? If it is the former, then of course we cannot D aspire to discipline the agents of foreign governments. Their torturers would probably accept with indifference the possibility that the work of their hands might be rejected by an English court. If it is the latter, then the rule must exclude statements obtained by torture anywhere, since the stain attaching to such evidence will defile an English court whatever the nationality of the torturer. I have no doubt that the purpose of the rule is not to discipline the E executive, although this may be an incidental consequence. It is to uphold the integrity of the administration of justice.

92 The Secretary of State's second argument is that while there may be a general rule which excludes all evidence obtained by torture in an ordinary criminal trial, proceedings before SIAC are different. The function of SIAC under section 25 of the 2001 Act is not to convict anyone of an offence but to decide whether there are reasonable grounds for belief or suspicion F that a person's presence in the United Kingdom is a risk to national security or that he is a terrorist: subsection (2)(a). There is no restriction upon the information which the Secretary of State may consider in forming such a belief or suspicion. In the exercise of his functions, he may rely upon statements from any source and in some cases it may be foolish of him not to do so. If the security services receive apparently credible information from a G foreign government that bombs are being made at an address in south London, it would be irresponsible of the Secretary of State not to instigate a search of the premises because he has a strong suspicion that the statement has been obtained by torture. So, it is said, the exclusionary rule would produce a "mismatch" between the evidence upon which the Secretary of State could rely and the evidence upon which SIAC could rely in the exercise of its supervisory jurisdiction over the Secretary of State under the Act. H Furthermore, rule 44(3) of the Special Immigration Appeals Commission (Procedure) Rules 2003 specifically provides that the commission "may receive evidence that would not be admissible in a court of law". The purpose of that rule, it is argued, is to allow SIAC to consider any evidence which could have been considered by the Secretary of State.

93 In my opinion the "mismatch" to which counsel for the Secretary of State refers is almost inevitable in any case of judicial supervision of executive action. It is not the function of the courts to place limits upon the information available to the Secretary of State, particularly when he is concerned with national security. Provided that he acts lawfully, he may read whatever he likes. In his dealings with foreign governments, the type of information that he is willing to receive and the questions that he asks or refrains from asking are his own affair. As I have said, there may be cases in which he is required to act urgently and cannot afford to be too nice in judging the methods by which the information has been obtained, although I suspect that such cases are less common in practice than in seminars on moral philosophy.

94 But the 2001 Act makes the exercise by the Secretary of State of his extraordinary powers subject to judicial supervision. The function of SIAC under section 25 is not to decide whether the Secretary of State at some particular time, perhaps at a moment of emergency, acted reasonably in forming some suspicion or belief. It is to form its own opinion, after calm judicial process, as to whether it considers that there are reasonable grounds for such suspicion or belief. It is exercising a judicial, not an executive function. Indeed, the fact that the exercise of the draconian powers conferred by the Act was subject to review by the judiciary was obviously an important reason why Parliament was willing to confer such powers on the Secretary of State.

95 In my opinion Parliament, in setting up a court to review the question of whether reasonable grounds exist for suspicion or belief, was expecting the court to behave like a court. In the absence of clear express provision to the contrary, that would include the application of the standards of justice which have traditionally characterised the proceedings of English courts. It excludes the use of evidence obtained by torture, whatever might be its source.

96 Rule 44(3) is in my opinion far too general in its terms to justify a departure from such a fundamental principle. It plainly disapplies technical rules of evidence like the hearsay rule. But I cannot for a moment imagine that anyone in Parliament who considered the statutory power to make rules of procedure for SIAC could have thought that it was authorising a rule which allowed the use of evidence obtained by torture or that the Secretary of State who made the regulations thought he was doing so. Such a provision, touching upon the honour of our courts and our country, would have to be expressly provided in primary legislation so that it could be debated in Parliament.

97 In my opinion therefore, there is a general rule that evidence obtained by torture is inadmissible in judicial proceedings. That leaves the question of what counts as evidence obtained by torture. What is torture and who has the burden of proving that it has been used? In *Ireland v United Kingdom* (1978) 2 EHRR 25 the European court delicately refrained from characterising various interrogation techniques used by the British authorities in Northern Ireland as torture but nevertheless held them to be "inhuman treatment". The distinction did not matter because in either case there was a breach of article 3 of the Convention. For my part, I would be content for the common law to accept the definition of torture which Parliament adopted in section 134 of the Criminal Justice Act 1988, namely,

A the infliction of severe pain or suffering on someone by a public official in the performance or purported performance of his official duties. That would in my opinion include the kind of treatment characterised as inhuman by the European Court of Human Rights in *Ireland v United Kingdom* but would not include all treatment which that court has held to contravene article 3.

98 That leaves the question of the burden of proof, on which I am in agreement with my noble and learned friend, Lord Bingham of Cornhill. In B proceedings in which the appellant to SIAC may have no knowledge of the evidence against him, it would be absurd to require him to prove that it had been obtained by torture. Article 15 of the Torture Convention, which speaks of the use of torture being "established", could never have contemplated a procedure in which the person against whom the statement was being used had no idea of what it was or who had made it. It must be for C SIAC, if there are reasonable grounds for suspecting that to have been the case (for example, because of evidence of the general practices of the authorities in the country concerned) to make its own inquiries and not to admit the evidence unless it is satisfied that such suspicions have been rebutted. One of the difficulties about the Secretary of State's carefully worded statement that it would not be his policy to rely upon evidence "where there is a knowledge or belief that torture has taken place" is that it D leaves open the question of how much inquiry the Secretary of State is willing to make. It appears to be the practice of the security services, in their dealings with those countries in which torture is most likely to have been used, to refrain, as a matter of diplomatic tact or a preference for not learning the truth, from inquiring into whether this was the case. It may be that in such a case the Secretary of State can say that he has no knowledge or E belief that torture has taken place. But a court of law would not regard this as sufficient to rebut real suspicion and in my opinion SIAC should not do so.

99 In view of the great importance of this case for the reputation of English law, I have thought it right to express my opinion in my own words. But I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Bingham of Cornhill, and there is nothing in it with which I would wish to disagree.

F

LORD HOPE OF CRAIGHEAD

100 My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Bingham of Cornhill. His account of the background to this case is so complete that I hesitate to say anything that might detract from it. But it is one thing to condemn torture, as we all do. It G is another to find a solution to the question that this case raises which occupies the moral high ground but at the same time serves the public interest and is practicable. Condemnation is easy. Finding a solution to the question is much more difficult. It requires much more thought. So it is on that aspect of the case in particular, after looking at the history, that I should like to concentrate.

H *Background*

101 Torture, one of most evil practices known to man, is resorted to for a variety of purposes and it may help to identify them to put this case into its historical context. The lesson of history is that, when the law is not there to keep watch over it, the practice is always at risk of being resorted to in one

form or another by the executive branch of government. The temptation to use it in times of emergency will be controlled by the law wherever the rule of law is allowed to operate. But where the rule of law is absent, or is reduced to a mere form of words to which those in authority pay no more than lip service, the temptation to use torture is unrestrained. The probability of its use will rise or fall according the scale of the perceived emergency.

102 In the first place, torture may be used on a large scale as an instrument of blatant repression by totalitarian governments. That is what was alleged in *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 3)* [2000] 1 AC 147, where the picture presented by the draft charges against Senator Pinochet which had been prepared by the Spanish judicial authorities was of a conspiracy. It was a conspiracy of the most evil kind—to commit widespread and systematic torture and murder to obtain control of the government and, having done so, to maintain control of government by those means for so long as might be necessary. Or it may be used in totalitarian states as a means of extracting confessions from individuals whom the authorities wish to put on trial so that they can be used against them in evidence.

103 The examples I have just mentioned are of torture as an instrument of power. But the use of torture to obtain confessions was also sanctioned by the judiciary in many civil law jurisdictions, and it remained part of their criminal procedure until the latter part of the 17th century. This was never part of English criminal procedure and, as there was no need for it, its use for this purpose was prohibited by the common law. But warrants for the use of torture were issued from time to time by the Privy Council against prisoners in the Tower under the Royal Prerogative. Four hundred years ago, on 4 November 1605, Guy Fawkes was arrested when he was preparing to blow up the Parliament which was to be opened the next day, together with the King and all the others assembled there. Two days later James I sent orders to the Tower authorising torture to be used to persuade Fawkes to confess and reveal the names of his co-conspirators. His letter stated that "the gentler tortours" were first to be used on him, and that his torturers were then to proceed to the worst until the information was extracted out of him. On 9 November 1605 he signed his confession with a signature that was barely legible and gave the names of his fellow conspirators. On 27 January 1606 he and seven others were tried before a special commission in Westminster Hall. Signed statements in which they had each confessed to treason were shown to them at the trial, acknowledged by them to be their own and then read to the jury: *Carswell, Trial of Guy Fawkes* (1934), pp 90–92.

104 This practice came to an end in 1641 when the Act of 16 Charles I, c 10, abolished the Star Chamber. The jurisdiction of the Privy Council in all matters affecting the liberty of the subject was transferred to the ordinary courts, which until then in matters of state the executive could by-pass. Torture continued to be used in Scotland on the authority of the Privy Council until the end of the 17th century, but the practice was brought to an end there after the Union by section 5 of the Treason Act 1708. That section, which remains in force subject only to one minor amendment (see Statute Law (Repeals) Act 1977, Sch I, Part IV) and applies to England as well as Scotland, declares that no person accused of any crime can be put to torture.

A 105 We are not concerned in this case with the use of torture for either of the purposes that I have mentioned so far. But they do not exhaust the uses for which torture may be sanctioned by governments. The use with which this case is concerned is the extraction of information from those who are thought to have something that may be of use to them by the security services. Information—the gathering of intelligence—is a crucial weapon in the battle by democracies against international terrorism. Experience has B shown from the beginning of time that those who are hostile to the state are reluctant to part with information that might disrupt or inhibit their activities. They usually have to be persuaded to release it. Handled responsibly, the methods that are used fall well short of what could reasonably be described as torture. But in unscrupulous hands the means of persuasion are likely to be violent and intended to inflict severe physical or C mental pain or suffering. In the hands of the most unscrupulous the only check on the level of violence is likely to be the need to keep the person alive so that, if he has any information that may be useful, he can communicate it to his interrogators.

106 It was not unknown during the 17th century, while torture was still being practised here, for statements extracted by this means to be used as evidence in criminal proceedings to obtain the conviction of third parties. D *John H Langbein, Torture and the Law of Proof: Europe and England in the Ancien Regime* (1977), p 94 has shown that a warrant was issued by the Privy Council in 1551 for the torture of persons committed to the Tower on suspicion of being involved in the alleged treason of the Duke of Somerset. The confession obtained from William Crane was read, in Crane's absence, at the Duke's trial: *Heath, Torture and English Law: An Administrative and* E *Legal History from the Plantagenets to the Stuarts* (1982), p 75.

107 When the jurisdiction of the Star Chamber was abolished in England prisoners were transferred to Scotland so that they could be forced by the Scots Privy Council which still used torture to provide information to the authorities. This is illustrated by the case of Robert Baillie of Jerviswood whose trial took place in Edinburgh in December 1684. A detailed description of the events of that trial can be found in *Fountainhall's* F *Decisions of the Lords of Council and Session*, vol 1, pp 324–326: for a summary, see "Torture" 53 ICLQ 807, 818–820. Robert Baillie had been named by William Spence, who was suspected of being involved in plotting a rebellion against the government of Charles II, as one of his co-conspirators. Spence gave this information having been arrested in London and taken to Edinburgh, where he was tortured. Baillie in his turn was arrested in G England and taken to Scotland, where he was put on trial before a jury in the High Court of Justiciary in Edinburgh. All objections having been repelled by the trial judge, the statement which Spence had given under torture was read to the jury. Baillie was convicted the next day, and the sentence of death that was passed on him was executed that afternoon. There is a warning here for us. "Extraordinary rendition", as it is known today, is not new. It was being practised in England in the 17th century.

H 108 *Baron Hume, Commentaries on the Law of Scotland respecting Crimes* 4th ed (1844), vol 2, p 324, described the use of torture for the purpose of discovering transgressors as a barbarous engine. So it was. It had increasingly come to be recognised that there was a level beyond which, however great the threat and however imminent its realisation, resort to this

means of extracting information was unacceptable. The need of the authorities to resort to extreme measures for their own protection had, of course, disappeared with the arrival of the period of stability that came with the ending of the Stuart dynasty. But one can detect in Hume's language a revulsion against its use which would have certainly been voiced by the judges of his time, had it been necessary for them to do so.

109 The threat of rebellion and revolution having disappeared, the developing common law did not find it necessary to grapple with the question whether statements obtained by the use of torture should continue to be admissible against third parties in any proceedings as evidence. There is no doubt that they would be caught today by the rule that evidence of the facts referred to in a statement made by a third party, however that statement was obtained, is hearsay: *Teper v The Queen* [1952] AC 480, 486, per Lord Normand. *Alison, Principles (1832) and Practice of the Criminal Law of Scotland* (1833), vol 2, pp 510–511 states that hearsay is in general inadmissible evidence. He bases this proposition on the best evidence rule, and declares that the rule is "firmly established both in the Scotch and English law". But we cannot be absolutely confident that judges in the latter part of the 19th century would have been prepared to rely on the hearsay rule to exclude such evidence. In *R v Birmingham Overseers* (1861) 1 B & S 763, 767, Cockburn CJ said: "People were formerly frightened out of their wits about admitting evidence, lest juries should go wrong. In modern times we admit the evidence, and discuss its weight." If, as this passage indicates, the hearsay objection went only to the weight of the evidence, the judges would have had to face up to the more fundamental question whether at common law it was an abuse of the judicial process to rely on it.

110 I think that it is plain that the barbarity of the practice, as Hume describes it, would have led inevitably to the conclusion that the use against third parties of statements obtained in this way as evidence in any proceedings was unacceptable. This would have been a modest but logical extension of the rule already enshrined in statute by section 5 of the Treason Act 1708, that no person accused of a crime could be put to torture. The effect of that section was to render confession evidence obtained by this means inadmissible. It would have been a small but certain step to apply the same rule to statements obtained in the same way from third parties.

111 This is the background to the ratification by the United Kingdom of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment which was adopted by the United Nations General Assembly on 10 December 1984 and entered into force on 26 June 1987. The Convention was designed to provide an international system which denied a safe haven to the official torturer. But long before it was entered into state torture was an international crime in the highest sense, as Lord Browne-Wilkinson pointed out in *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 3)* [2000] 1 AC 147, 198G. The rule set out in article 15 of the Convention about the use of statements obtained by the use of torture must be seen in this light. Article 15 provides:

> "Each state party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked in any proceedings, except against a person accused of torture as evidence that the statement was made."

A **112** This provision has not been incorporated into our domestic law, unlike the declaration that the use of torture is a crime wherever it was committed which was made part of our law by section 134 of the Criminal Justice Act 1988. But I would hold that the formal incorporation of the evidential rule into domestic law was unnecessary, as the same result is reached by an application of common law principles. The rule laid down by article 15 was accepted by the United Kingdom because it was entirely B compatible with our own law. The use of such evidence is excluded not on grounds of its unreliability—if that was the only objection to it, it would go to its weight, not to its admissibility—but on grounds of its barbarism, its illegality and its inhumanity. The law will not lend its support to the use of torture for any purpose whatever. It has no place in the defence of freedom and democracy, whose very existence depends on the denial of the use of C such methods to the executive.

113 Once torture has become acclimatised in a legal system it spreads like an infectious disease, hardening and brutalising those who have become accustomed to its use: *Holdsworth, A History of English Law*, vol v, p 194. As Jackson J in his dissenting opinion in *Korematsu v United States* (1944) 323 US 214, 246 declared, once judicial approval is given to such conduct, it lies about like a loaded weapon ready for the hand of any authority that can D bring forward a plausible claim of an urgent need. A single instance, if approved to meet the threat of international terrorism, would establish a principle with the power to grow and expand so that everything that falls within it would be regarded as acceptable. Without hesitation I would hold that, subject to the single exception referred to in article 15, the admission of any statements obtained by this means against third parties is absolutely E precluded in any proceedings as evidence. I would apply this rule irrespective of where, or by whom, the torture was administered.

The issue for SIAC

114 Rule 44(3) of the Special Immigration Appeals Commission (Procedure) Rules 2003 provides that the commission may receive evidence that would not be admissible in a court of law. But I consider, in agreement F with all your Lordships, that this rule is incompatible with the fundamental nature of the objection to the admission of statements obtained by the use of torture, wherever it was administered, and that it does not extend to them. That being the nature of the objection, the question whether it can be overridden and, if so, in what circumstances must be left to the legislature. This is not a matter that can be left to implication. Nothing short of an G express provision will do, to which Parliament has unequivocally committed itself.

115 There are ample grounds for suspecting that the use of torture on detainees suspected of involvement in international terrorism is widespread in countries with whom the security services of the United Kingdom are in contact. The Secretary of State's position is that he does not rely on information that he *knows* has been obtained by torture, as a matter of H principle. But he is willing to accept and act upon information whose origin is obscure and undetectable, in the knowledge that it may have come from countries that use torture. He says that it is for the party who objects to its use on the ground that torture was used to make good his objection. What then is the approach that SIAC should take to this issue?

(a) The burden of proof

116 I agree that a conventional approach to the burden of proof is inappropriate in this context. It would be wholly unrealistic to expect the detainee to prove anything, as he is denied access to so much of the information that is to be used against him. He cannot be expected to identify from where the evidence comes, let alone the persons who have provided it. All he can reasonably be expected to do is to raise the issue by asking that the point be considered by SIAC. There is, of course, so much material in the public domain alleging the use of torture around the world that it will be easy for the detainee to satisfy that simple test. All he needs to do is point to the fact that the information which is to be used against him may have come from one of the many countries around the world that are alleged to practise torture, bearing in mind that even those who say that they do not use torture apply different standards from those that we find acceptable. Once the issue has been raised in this general way the onus will pass to SIAC. It has access to the information and is in a position to look at the facts in detail. It must decide whether there are reasonable grounds to suspect that torture has been used in the individual case that is under scrutiny. If it has such a suspicion, there is then something that it must investigate as it addresses its mind to the information that is put before it which has been obtained from the security services.

(b) The standard of proof

117 Guidance needs to be given on this point too. Do the facts need to be established beyond a reasonable doubt or do they need to be established only on a balance of probabilities? To answer this question we must know what it is that has to be established. It is at the point of defining what SIAC must inquire into that, with the greatest of respect, I begin to differ from Lord Bingham. He says that it is for SIAC to initiate or direct such inquiry as is necessary to enable it to form a fair judgment whether the evidence has, or whether there is a real risk that it may have been, obtained by torture or not. But it is one thing if what SIAC is to be required to do is to form a fair judgment as to whether the evidence has, or may have been, obtained by torture. It is another if what it is to be required to do is to form a fair judgment as to whether it has not, or may not, have been obtained by torture.

118 Lord Bingham then says that SIAC should refuse to admit the evidence if it is unable to conclude that there is not a real risk that the evidence has been obtained by torture. My own position, for reasons that I shall explain more fully in the following paragraphs, is that SIAC should refuse to admit the evidence if it concludes that the evidence was obtained by torture. I am also firmly of the view that, if it approaches the issue in this way, it should apply the lower standard of proof. The liberty of the subject dictates this. So SIAC should not admit the evidence if it concludes on a balance of probabilities that it was obtained by torture. In other words, if SIAC is left in doubt as to whether the evidence was obtained in this way, it should admit it. But it must bear its doubt in mind when it is evaluating the evidence. Lord Bingham's position, as I understand it, is that if it is left in doubt SIAC should exclude the evidence. That, in short, is the only difference between us.

A *(c) The test*

119 I must now explain why I believe that the question which SIAC must address should be put positively rather than negatively. The effect of rule 44(3) of the Procedure Rules is that sources of all kinds may be relied upon, far removed from what a court of law would regard as the best evidence. SIAC may be required to look at information coming to the attention of the security services at third or fourth hand and from various sources, the significance of which cannot be determined except by looking at the whole picture which it presents. The circumstances in which the information was first obtained may be incapable of being detected at all or at least of being determined without a long and difficult inquiry which would not be practicable. So it would be unrealistic to expect SIAC to demand that each piece of information be traced back to its ultimate source and the circumstances in which it was obtained investigated so that it could be proved piece by piece, that it was not obtained under torture. The threshold cannot be put that high. Too often we have seen how the lives of innocent victims and their families are torn apart by terrorist outrages. Our revulsion against torture, and the wish which we all share to be seen to abhor it, must not be allowed to create an insuperable barrier for those who are doing their honest best to protect us. A balance must be struck between what we would like to achieve and what can actually be achieved in the real world in which we all live. Articles 5(4) and 6(1) of the European Convention, to which Lord Bingham refers in para 62, must be balanced against the right to life that is enshrined in article 2 of the Convention.

120 I would take as the best guide to what is practicable the approach that article 15 of the Torture Convention takes to this issue. The United Nations has adopted it, and it has the support of all the signatories to the Convention. So it deserves to be respected as the best guide that international law has to offer on this issue. First, the exclusionary rule that it lays down applies to statements obtained under torture, not to information that may have been discovered as a result of them. Logic might suggest that the fruits of the poisoned tree should be discarded too. But the law permits evidence to be led however it was obtained, if the evidence is in itself admissible: *Kuruma v The Queen* [1955] AC 197. Secondly, the exclusionary rule applies to "any proceedings". Mr Burnett for the Secretary of State suggested that this phrase should be read as extending to criminal proceedings only, but I would not so read it. The word "any" is all-embracing and it is perfectly capable of applying to the proceedings conducted by SIAC.

121 Thirdly, and crucially, the exclusionary rule extends to any statement that "is established" to have been made under torture. The rule does not require it to be shown that the statement was not made under torture. It does not say that the statement must be excluded if there is a suspicion of torture and the suspicion has not been rebutted. Nor does it say that it must be excluded if there is a real risk that it was obtained by torture. An evaluation of risk is appropriate if the question at issue relates to the future: see *Mamatkulov and Askarov v Turkey* 4 February 2005, para 71. The question in that case was whether there was a real risk for the purposes of article 3 of the European Convention at the time of their extradition that the applicants would be tortured. The rule that article 15 lays down looks at what has happened in the past. It applies to a statement that is established to

have been made under torture. In my opinion the test that it lays down is the test that should be applied by SIAC. It too must direct its inquiry to what has happened in the past. Is it established, by means of such diligent inquiries into the sources that it is practicable to carry out and on a balance of probabilities, that the information relied on by the Secretary of State was obtained under torture? If that is the position, article 15 requires that the information must be left out of account in the overall assessment of the question whether there were no reasonable grounds for a belief or suspicion of the kind referred to in section 21(1) (a) or (b) of the Anti-terrorism, Crime and Security Act 2001. The same rule must be followed in any other judicial process where information of this kind would otherwise be admissible.

122 Support for this approach is to be found in a decision in the case of *In re El Motassadeq* of the Hanseatisches Oberlandesgericht (the Hanseatic Court of Appeals, Criminal Division), Hamburg of 14 June 2005, NJW 2326. El Motassadeq had been charged with conspiracy to cause the attacks of 11 September 2001 on the United States of America and with membership of an illegal organisation. The court had been provided by the US Department of Justice with summaries of statements of three witnesses which, subject to certain safeguards, were admissible under its Code of Criminal Procedure as equivalent to written records of statements by these witnesses. The court was, of course, aware from press articles and other reports that there were indications that suspected Al Qaeda members had been subjected to torture within the meaning of article 1 of the Convention, and it was contended that these statements should be excluded under article 15. Repeated requests to the competent US authorities for information about the circumstances of the examination of these witnesses met with no response, and attempts to obtain this information through the German authorities were blocked on the ground that the information had been given to them for intelligence purposes only and that a breach of the limitations of use would jeopardise the security interests of the Federal Republic of Germany. In this situation the court had no option but to base its assessment of the question whether torture had been used on available, publicly accessible sources. On the one hand the White House denied that it used or condoned torture. On the other hand it had admitted that it did not view Al Qaeda prisoners as coming under the protection of international human rights agreements on the treatment of prisoners of war. This was enough to raise the suspicion that torture had been used. There was a question to answer on this point.

123 The court's conclusions are to be found in the following paragraphs of the certified translation:

> "On the whole, the Division does not consider the use of torture within the meaning of article 1 of the UN Anti-Torture Convention at the examinations of Binalshibh, Sheikh Mohammend and Ould Slahi as proved according to article 15 of this Convention. The fact is not ignored here that it is state agents of the United States, a country accused in the press of using torture, who deny the Division access to sources from which might be expected comparatively more reliable and, in particular, verifiable information than that in the available press articles and reports of humanitarian organisations. However, a significant circumstance added to the inadequate evidence situation in this case is the fact that the

A forwarded summaries of the examinations of Binalshibh, Sheikh Mohammed and Ould Slahi do not exhibit the one-sidedness of a universal incrimination of persons not in custody, which might be expected if torture had been used to extract information incriminating only certain suspected persons . . . To the certainly weak evidence for assuming the use of torture is added the fact that the contents of the summaries of statements by Binalshibh, Sheikh Mohammed and Ould B Slahi tend to indicate torture not having been used. It is only because of this that the Division has decided here not to consider it proved that article 15 of the UN Anti-Torture Convention was violated in a way that would have justified a prohibition of evidence utilisation and would also have precluded the hearing of evidence by the reading of evidence material."

C

In a concluding paragraph the court said that it was mindful of the problems posed by the possible use of torture and would take this into consideration when assessing the information in the summaries, adding: "This does not imply legitimisation of the use of torture, even in view of the enormous scale of the attacks of 11 September 2001."

D **124** The significant points that I would draw from that case are these. The court was careful to distinguish between the generalised allegations of torture which were to be found in the press articles and other material—sufficient, it might well be said, to raise a suspicion of torture—and the position of these three witnesses in particular. What it was looking for was evidence which established that the statements of these three witnesses in particular had been obtained under torture. The test which it was asked to E apply was that laid down by the article. The evidence for assuming that torture had been used was said to be weak, and the contents of the statements tended to show that torture had not been used. The court did not go so far as to say that it was unable to conclude that there was not a real risk that the evidence had been obtained by torture. It was left in a state of doubt on this point. If it had applied the test which Lord Bingham suggests, the F result would have been different because it had been denied access to information about the precise circumstances.

125 Article 15 of the Convention does not compel us to adopt the test which Lord Bingham suggests, and there are good reasons—as the case of *El Motassadeq* so clearly demonstrates—for thinking that the terms on which information is passed to the intelligence services would make it impossible for it to be met in practice. Your Lordships were provided with a statement G by the Director General of the Security Service which indicates that the problems of obtaining access to the sources of information from foreign intelligence services are just as acute in this country as they appear to have been in Germany. In my opinion the public interest requires us to refrain from setting up a barrier to the use of such information which other nations do not impose on themselves and which is likely in practice to be H insuperable. I do not believe that the test which I suggest is one that in the real world can never be satisfied. Nor do I believe that applying the test which the Convention itself lays down in the way I suggest would undermine the practical efficiency of the Convention. I think that we should adhere to what the Convention requires us to do, while making it clear that the issue as

to whether torture has been used in the individual case is of the highest importance and that it must, of course, receive the most anxious scrutiny.

126 There is a fourth element in article 15 which ought to be noticed, although the issue has not been focussed by the facts of this case. The exclusionary rule that article 15 of the Torture Convention lays down extends to statements obtained by the use of torture, not to those obtained by the use of cruel, inhuman or degrading treatment or punishment. That is made clear by article 16(1) of the Convention. The borderline between torture and treatment or punishment of that character is not capable of precise definition. As John Cooper, *Cruelty—an analysis of Article 3* (2003), para 1-02 points out, the European Committee for the Prevention of Torture are unwilling to produce a clear and comprehensive interpretation of these terms, their approach being that these are different types of ill-treatment, more or less closely linked. Views as to where the line is to be drawn may differ sharply from state to state. This can be seen from the list of practices authorised for use in Guantanamo Bay by the US authorities, some of which would shock the conscience if they were ever to be authorised for use in our own country. SIAC must exercise its own judgment in addressing this issue, which is ultimately one of fact. It should not be deterred from treating conduct as torture by the fact that other states do not attach the same label to it. The standard that it should apply is that which we would wish to apply in our own time to our own citizens.

127 For these reasons, although I take a different view from my noble and learned friend, Lord Bingham, as to the advice that should be given to SIAC, I too would allow the appeals and make the order that he proposes.

LORD RODGER OF EARLSFERRY

128 My Lords, I have ultimately come to agree with your Lordships that the appeals should be allowed, but, I confess, I have found the issue far from easy. In resolving it, I have derived considerable assistance from the closely reasoned judgments in the Court of Appeal. Unfortunately, outside the courts, the decision of the majority, Pill and Laws LJJ, has been subjected to sweeping criticisms which to a large extent ignore their reasoning and the very factors which led them to their conclusion.

129 It should not be necessary to emphasise that the difficulties which troubled the majority in the Court of Appeal and which have troubled me do not arise from any doubt about the unacceptable nature of torture. That has long been unquestioned in this country. The history of the matter shows that torture has been rejected by English common law for many centuries. In Scotland, torture was used until the end of the seventeenth century. For the most part, when used at all, torture seems to have been employed to extract confessions from political conspirators who might be expected to be more highly motivated to resist ordinary methods of interrogation. Such confessions would often contain damning information about other members of the conspiracy. Eventually, section 5 of the Treason Act 1708 declared that no person accused of any crime can be put to torture. The provision is directed at those accused of crime, but this does not mean that Parliament would have been happy for mere witnesses to crime to be tortured. On the contrary, it is an example of the phenomenon, well known in the history of the law from ancient Rome onwards, of a legislature not bothering with what is obvious and dealing only with the immediate practical problem. By

A 1708, it went without saying that you did not torture witnesses: now Parliament was making it clear that you were not to torture suspects either. So the prohibition on the torture of both witnesses and suspects is deeply ingrained in our system. The corollary of the prohibition is that any statements obtained by officials torturing witnesses or suspects are inadmissible. Most of the considerations of public policy which lead courts to reject such statements are equally applicable to torture carried out abroad B by foreign officials. The question for the House is whether that general approach applies to proceedings in SIAC under the Anti-terrorism, Crime and Security Act 2001.

130 Information obtained by torture may be unreliable. But all too often it will be reliable and of value to the torturer and his masters. That is why torturers ply their trade. Sadly, the Gestapo rolled up resistance C networks and wiped out their members on the basis of information extracted under torture. Hence operatives sent to occupied countries were given suicide pills to prevent them from succumbing to torture and revealing valuable information about their mission and their contacts. In short, the torturer is abhorred as a hostis humani generis not because the information he produces may be unreliable but because of the barbaric means he uses to D extract it.

131 The premise of this appeal is that, despite the United Nations Convention against Torture and any other obligations under international law, some states still practise torture. More than that, those states may supply information based on statements obtained under torture to the British security services who may find it useful in unearthing terrorist plots. Moreover, when issuing a certificate under section 21 of the 2001 Act, the E Secretary of State may have to rely on material that includes such statements.

132 Mr Starmer, who appeared for Amnesty and a number of other interveners, indicated that, in their view, it would be wrong for the Home Secretary to rely on such statements since it would be tantamount to condoning the torture by which the statements were obtained. That stance has the great virtue of coherence; but the coherence is bought at too dear a F price. It would mean that the Home Secretary might have to fail in one of the first duties of government, to protect people in this country from potential attack. Not surprisingly therefore, Mr Emmerson for the appellants was at pains to accept that, when deciding whether to issue a certificate, the Home Secretary was not obliged to check the origins of any statement and could take it into account even if he knew, or had reason to G suspect, that it had been obtained by torture. But, he submitted, when SIAC came to discharge its functions under section 25 or 26 of the 2001 Act, in any case where the issue was raised, it could not take account of a statement unless the members were satisfied, beyond reasonable doubt, that it had not been obtained by torture.

133 On this approach there is a stark disjunction between what the Home Secretary can properly do and what SIAC can properly do. It is, of H course, true that, because of public interest immunity or section 17(1) of the Regulation of Investigatory Powers Act 2000, a party to a litigation may not be able to lead evidence of a matter which it was nevertheless legitimate for him to take into account. Such analogies cast little light, however, on a situation where the disjunction arises between sections in the same Act.

134 Parliament gave jurisdiction in proceedings under sections 25 and 26 of the 2001 Act to SIAC, which had been established by the Special Immigration Appeals Act 1997 in order to meet the criticisms of the European Court of Human Rights in *Chahal v United Kingdom* (1996) 23 EHRR 413. SIAC is tailor-made to deal with sensitive cases where intelligence material has to be considered. One member of the court will have had experience in handling such material. Section 18(1)(e) of the 2000 Act disapplies section 17(1) and so allows the commission to consider the content of intercepts. Rule 44(2) of the Special Immigration Appeals Commission (Procedure) Rules 2003 allows the commission to receive evidence in documentary or any other form, while rule 44(3) allows it to receive evidence that would not be admissible in a court of law. By giving jurisdiction to SIAC, Parliament must have intended that the appeal or review should be considered by a body that was not bound by the ordinary rules of evidence and that was, in general, free to consider all the material that the Home Secretary had taken into account when issuing his certificate. Not surprisingly, therefore, in section 29(1) Parliament provided that any action of the Secretary of State taken wholly or partly in reliance on a section 21 certificate could be questioned only in legal proceedings under section 25 or 26 or under section 2 of the 1997 Act—proceedings in other courts would not be satisfactory since they would not be able to consider the same range of material. Of course, after the certificate was issued, material might often come to hand which strengthened, or even superseded, the material on which the Home Secretary had relied. Conversely, new evidence, or criticism of the existing evidence during the hearing, might undermine the basis for the Home Secretary's decision. SIAC can take account of all that. What is not immediately clear, to me at least, is that Parliament would have contemplated that the specialist tribunal would have to shut its eyes to statements which the Home Secretary was entitled, or perhaps even bound, to take into account. Why should the Secretary of State be entitled to use such a statement to issue a certificate under section 21 if, in default of any additional information, SIAC is then bound to cancel that certificate under section 25 because the members cannot look at the critical statement?

135 My noble and learned friend, Lord Nicholls of Birkenhead, seeks to resolve the dilemma on the basis that the Secretary of State's certificate is in the nature of an essential preliminary step, which will be short-lived in its effect if SIAC considers that the necessary reasonable grounds do not exist. So the definitive decision is taken by SIAC, which is subject to the ethical rule that information obtained by torture is not admissible in court proceedings as proof of facts. Potentially attractive though such an analysis is, it is rather difficult to square with the fact that, if there is no appeal, SIAC is not required to review the Home Secretary's certificate for six months after it has been issued: section 26(1). A certificate which Parliament regards as sufficient warrant for a suspect's detention for six months is not, in essence, short-lived or a mere preliminary step. And, the appellants concede, such a certificate can properly be based on a statement obtained by torture.

136 According to the appellants, it is an abuse of process for the Home Secretary to produce evidence of a statement obtained by torture in proceedings before SIAC. In my view it is an abuse of language to characterise the Home Secretary's action as an abuse of process. He does

A not instigate the process before SIAC and seeks no order from the commission: he merely seeks to resist an appeal brought against his decision or to withstand a review of that decision. It was perfectly proper for him to rely on the statement when issuing his certificate. There is therefore no abuse of executive power in this country for SIAC to punish by rejecting the statement and it is no part of the function of British courts to attempt to discipline officials of a friendly country. Besides anything else, the idea that B foreign torturers would pause for a moment because of a decision by SIAC to reject a statement which they had extracted verges on the absurd.

137 One therefore comes back to the centuries-old view that statements obtained by torture are unacceptable. To rely on them is inconsistent with the notion of justice as administered by our courts. The Home Secretary does not defile SIAC by introducing such a statement, but he does ask it to C rely on a type of statement which British courts would, ordinarily, reject on broad grounds of public policy. SIAC is, of course, different in many ways, as the relevant legislation and regulations show. Therefore, if there were any sign that Parliament had considered the point when passing the Special Immigration Appeals Commission Act 1997 or the 2001 Act, there might be a case for holding that the necessary implication of sections 21, 25 and 26 of D the 2001 Act was that SIAC should take account of statements obtained by torture in another country. But that particular issue does not arise since Parliament was never asked to consider the question, either when passing these Acts or when approving the 2003 Rules, including the permissive rule 44(3). The point does not appear to have occurred to anyone. In any event, the revulsion against torture is so deeply ingrained in our law that, in my view, a court could receive statements obtained by its use only where this E was authorised by express words, or perhaps the plainest possible implication, in a statute. Here, there are no express words and the provisions actually approved by Parliament do not go so far as to show that the officious bystander who asked whether SIAC could rely on a statement obtained by torture would have been testily suppressed with an "Oh, of course!" from the legislature. I therefore hold that SIAC should not take account of statements obtained by torture.

F 138 The courts' deep-seated objection is to torture and to statements obtained by torture. The rejection of such statements is an exception to the general rule that relevant evidence is admissible even if it has been obtained unlawfully. On the other hand, the public interest does not favour SIAC rejecting statements that have not in fact been obtained by torture. More particularly, the public interest does not favour rejecting statements G merely because there is a suspicion or risk that they may have been obtained in that way. Reports from various international bodies may well furnish grounds for suspicion that a country has been in the habit of using torture. That cannot be enough. To trigger the exclusion, it must be shown that the statement in question has been obtained by torture.

139 I draw support for that general approach from the judgment of the Grand Chamber of the European Court of Human Rights in *Mamatkulov* H *and Askarov v Turkey*, 4 February 2005. The court had to consider allegations that Turkey had violated article 3 of the Convention by extraditing the applicants to Uzbekistan where political dissidents, such as the applicants, were tortured in prison. In support of their allegations, the applicants "referred to reports by 'international investigative bodies' in the

human rights field denouncing both an administrative practice of torture and other forms of ill-treatment of political dissidents, and the Uzbek régime's repressive policy towards dissidents." The Grand Chamber held that, by itself, such generalised information was not sufficient even to establish that there was a real risk that the applicants would be subjected to torture in Uzbekistan. The court said this, at paras 71–73 (internal cross-reference omitted):

> "71. For an issue to be raised under article 3, it must be established that at the time of their extradition there existed a real risk that the applicants would be subjected in Uzbekistan to treatment proscribed by article 3.
>
> "72. The court has noted the applicants' representatives' observations on the information in the reports of international human-rights organisations denouncing an administrative practice of torture and other forms of ill-treatment of political dissidents, and the Uzbek régime's repressive policy towards such dissidents. It notes that Amnesty International stated in its report for 2001: 'Reports of ill-treatment and torture by law enforcement officials of alleged supporters of banned Islamist opposition parties and movements . . . continued . . .'
>
> "73. However, although these findings describe the general situation in Uzbekistan, they do not support the specific allegations made by the applicants in the instant case and require corroboration by other evidence."

In fact, there was no further evidence to support the applicants' specific allegations. Rather, the other evidence, led on behalf of Turkey, tended to contradict them and the Grand Chamber was unable to conclude that substantial grounds had existed for believing that the applicants faced a real risk of treatment proscribed by article 3. If generalised information about a country is not enough to establish that there is a real risk that a given individual will be tortured there in the future, it cannot be sufficient, either, to establish that a given statement has been extracted there by torture in the past.

140 As my noble and learned friend, Lord Hope of Craighead, has explained, the Hanseatic Oberlandesgericht in Hamburg adopted a somewhat similar approach in *El Motassadeq* 2005 NJW, 2326. There the court was considering whether article 15 of the Convention against Torture prevented it from using summaries of certain witness statements supplied by the United States. Apparently, the witnesses were members of Al Qa'eda, and the suggestion was that the statements had been obtained by torture. The court asked the German government for information, but the relevant government departments were unable to provide any information from the competent American authorities since it had been supplied to them for intelligence purposes only. In that situation, the court could only evaluate the considerable volume of publicly available material suggesting that suspects had been subjected to torture. What the court was looking for was proof that the three witnesses in question had been tortured. The available material referred to only one of them and, while there was quite a lot of general information about the treatment of other suspected Al Qa'eda members, the court noted that none of the information was based on verifiable, named sources. Even taking account of the fact that the United States authorities had prevented the court from having access to more

A reliable sources, the court concluded that it had not been proved that torture had been used in the examination of the three witnesses, especially having regard to certain exculpatory elements in their statements.

141 The reasoning of the court, at pp 2329–2330, is instructive. It was under a duty to discover the truth and so the prohibition on the use of evidence had to remain the exception rather than being elevated into the rule. Therefore, the principle "in dubio pro reo" did not apply and the facts B justifying the prohibition had to be established to the court's satisfaction. If substantial doubts remained, the possible violation had not been proved and the relevant statement could be used. The court therefore took the view that it was their duty to consider the summaries so as to investigate the facts of the case as fully as possible, but they would take the allegations into account in evaluating the evidence.

C **142** In my view the same factors as weighed with the Oberlandesgericht should weigh with the House. Once the House has held that statements obtained by torture must be excluded, the special advocates representing suspects such as the appellants are likely to raise the point whenever information appears to come from a country with a poor record on torture. Special advocates can indeed be expected to ask their clients about possible sources of information against them before they see the closed material. At D the hearing the special advocates will present information provided by international organisations or derived from books and articles to paint the picture of conditions in the country concerned. But that cannot be a sufficient basis for SIAC to be satisfied that any particular statement has been obtained by torture. More is required.

143 Of course, the suspects themselves will not be able to assist the E special advocate in finding more information during the closed hearing. But that is not so great a disadvantage as may appear at first sight, since it is in any event unlikely that they would be able to cast light on the specific circumstances in which a particular statement had been taken by the overseas authorities. So, usually at least, any investigation will have to be done by others. On behalf of the Home Secretary, Mr Burnett explained how those in the relevant departments who were preparing a case for a F SIAC hearing would sift through the material, on the lookout for anything that might suggest that torture had been used. The Home Secretary accepted that he was under a duty to put any such material before the commission. With the aid of the relevant intelligence services, doubtless as much as possible will be done. And SIAC itself will wish to take an active role in suggesting possible lines of investigation, just as the Hamburg court did.

G **144** In the nature of the case and with the best will in the world, there is likely to be a limit to what can be discovered about what went on during an investigation by the authorities in another country. Foreign states can be asked, but cannot be forced, to provide information. How far such requests can be pushed without causing damage to international relations must be a matter for the judgment of the Government and not for SIAC or any court.

H **145** When everything possible has been done, it may turn out that the matter is left in doubt and that, using their expertise, SIAC cannot be satisfied on the balance of probabilities that the statement in question has been obtained by torture. If so, in my view, SIAC can look at the statement but should bear its doubtful origins in mind when evaluating it. My noble and learned friend, Lord Bingham of Cornhill, proposes, however, that the

statement should be excluded whenever SIAC is unable to conclude that there is not a real risk that the evidence has been obtained by torture. It respectfully appears to me that this would be to replace the true rule, that statements obtained by torture must be excluded, with a significantly different rule, that statements must be excluded unless there is not a real risk that they have been obtained by torture. In effect, the true rule would be inverted. There is no warrant for Lord Bingham's preferred rule in the common law, in article 15 of the Convention against Torture or elsewhere in international law. Moreover, it would run counter to the approach in the two decisions which I have mentioned. The real objection, however, is that, for all the reasons given by the German court, it would be unsound. If adopted, such an approach would ignore the exceptional nature of the exclusion, which requires that the relevant factual basis be established. It would mean that exclusion would be liable to become the rule rather than the exception. It would encourage objections. It would prevent SIAC from relying on statements which were in fact obtained quite properly. It would impede SIAC in its task of discovering the facts that it needs to form its judgment. I would therefore reject that approach and agree with my noble and learned friends, Lord Hope of Craighead and Lord Brown of Eaton-under-Heywood, that SIAC should ask itself whether it is established, by means of such diligent inquiries into the sources as it is practicable to carry out, and on the balance of probabilities, that the information relied on by the Secretary of State was obtained under torture.

LORD CARSWELL

146 My Lords, the abhorrence felt by civilised nations for the use of torture is amply demonstrated by the material comprehensively set out in the opinion of my noble and learned friend, Lord Bingham of Cornhill. While it is regrettably still practised by some states, the condemnation expressed in all of the international instruments to which he has referred is universal. Some of these adjure states to do their utmost to ensure that torture does not take place, while others urge them not to admit in evidence in any proceedings statements obtained by the use of torture.

147 The objections to the admission of evidence obtained by the use of torture are twofold, based, first, on its inherent unreliability and, secondly, on the morality of giving any countenance to the practice. The unreliability of such evidence is notorious: in most cases one cannot tell whether correct information has been wrung out of the victim of torture—which undoubtedly occurred distressingly often in Gestapo interrogations in occupied territories in the Second World War—or whether, as is frequently suspected, the victim has told the torturers what they want to hear in the hope of relieving his suffering. Reliable testimony of the latter comes from Senator John McCain of Arizona, who when tortured in Vietnam to provide the names of the members of his flight squadron, listed to his interrogators the offensive line of the Green Bay Packers football team, in his own words, "knowing that providing them false information was sufficient to suspend the abuse": "Newsweek", 2 November 2005, p 50.

148 The moral issue arises most acutely when it is established from other evidence that the information obtained under torture appears in fact to be true. Should the legal system admit it in evidence in legal proceedings (where as a matter of law such hearsay evidence may be admitted) or should

A it refuse on moral grounds to allow it to be used, despite its apparent reliability? On this issue I entirely agree with your Lordships' conclusion that such evidence should not be admitted, reliable or not, even if the price is the loss of the prospect that some pieces of information relevant to the issue of the activities of the person concerned may be given to the tribunal and relied upon by it in reaching its decision.

B **149** In so holding I am very conscious of the vital importance in the present state of global terrorism of being able to muster all material information in order to prevent the perpetration of violent acts endangering the lives of our citizens. I agree with the frequently expressed view that this imperative is of extremely high importance. I should emphasise that my conclusion relates only to the process of proof before judicial tribunals such as SIAC and is not intended to affect the very necessary ability of the C Secretary of State to use a wide spectrum of material in order to take action to prevent danger to life and property. In the sphere of judicial decision-making there is another imperative of extremely high importance, the duty of states not to give any countenance to the use of torture. Recognising this is in no way to be "soft on terrorism", a gibe too commonly levelled against those who seek to balance the opposing imperatives.

D **150** I have to conclude, in agreement with your Lordships, that the duty not to countenance the use of torture by admission of evidence so obtained in judicial proceedings must be regarded as paramount and that to allow its admission would shock the conscience, abuse or degrade the proceedings and involve the state in moral defilement (Lord Bingham's opinion, para 39). In particular, I would agree with the statement of Mr Alvaro Gil-Robles (cited, at para 35) that: "torture is torture whoever does it, judicial E proceedings are judicial proceedings, whatever their purpose—the former can never be admissible in the latter." In following this course our state will, as Neuberger LJ observed in the Court of Appeal (para 497), retain the moral high ground which an open democratic society enjoys. It will uphold the values encapsulated in the judgment of the Supreme Court of Israel in *Public Committee Against Torture in Israel v Israel* (1999) 7 BHRC 31, 54, F para 39:

> "Although a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand. Preserving the rule of law and recognition of an individual's liberty constitutes an important component in its understanding of security. At the end of the day, they strengthen its spirit and its strength and allow it to overcome its difficulties."

G **151** It then has to be considered by what means it may be possible to give effect in our law to this moral imperative. It was argued on behalf of the appellants that it may be done by accepting that the principles of the United Nations Convention Against Torture ("UNCAT") form part of our law, by resort to article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") or by regarding it as a valid principle of the common law. I do not find it necessary to explore either of H the first two avenues, which are not without their difficulties, for I am satisfied that the common law can accommodate the principles involved.

152 Some of your Lordships have expressed the opinion that the common law as it stands would forbid the reception in evidence of any statement obtained by the use of torture: see the opinions of my noble and

learned friends, Lord Bingham of Cornhill, at para 52, and Lord Hope of Craighead, at para 112. This view may well be justified historically, but even if it requires some extension of the common law I am of the clear opinion that the principle can be accommodated. We have long ceased to give credence to the fiction that the common law consists of a number of pre-ordained rules which merely require discovery and judicial enunciation. Two centuries ago Lord Kenyon recognised that in being formed from time to time by the wisdom of man it grew and increased from time to time with the wisdom of mankind: *R v Rusby* (1800) 2 Pea 189, 192. Sir Frederick Pollock referred in 1890 in his Oxford Lectures, p 111 to the "freshly growing fabric of the common law" and McCardie J spoke in *Prager v Blatspiel, Stamp and Heacock Ltd* [1924] 1 KB 566, 570 of the demand of an expanding society for an expanding common law. Similarly, in the US Supreme Court 121 years ago Matthews J said in *Hurtado v California* (1884) 110 US 516, 531 that:

> "as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mould and shape it into new and not less useful forms."

As Peter du Ponceau said of the common law *(A Dissertation on the Nature and Extent of the Jurisdiction of the Courts* (1824), Preface):

> "Its bounds are unknown; it varies with the successions of ages, and takes its colour from the spirit of the times, the learning of the age, and the temper and disposition of the judges. It has experienced great changes at different periods, and is destined to experience more. It is by its very nature uncertain and fluctuating; while to vulgar eyes it appears fixed and stationary."

I am satisfied that, whether or not it has ever been affirmatively declared that the common law declines to allow the admission of evidence obtained by the use of torture, it is quite capable now of embracing such a rule. If that is any extension of the existing common law, it is a modest one, a necessary recognition of the conclusions which should be drawn from long established principles. I accordingly agree with your Lordships that such a rule should be declared to represent the common law. It is only right that this should be done in what Tennyson described as

> "A land of settled government,
> A land of just and old renown,
> Where Freedom slowly broadens down
> From precedent to precedent." *You Ask Me, Why* (1842), verse iii.

153 The issue on which I have found it most difficult to reach a satisfactory principled conclusion is that of the approach which SIAC should take to deciding when a statement should be rejected, an issue on which your Lordships have not found it possible to speak with one voice. I have been much exercised by the difficulties inherent in the acceptance of either of the views which have been expressed, but I am conscious of the importance of laying down a clearly defined and workable rule which can be applied by SIAC (or similar bodies which may have to deal with the same problem).

A 154 Several possible ways of approaching the issue were mooted in the course of argument. Counsel for the appellants advanced the proposition that once the issue has been raised that a statement may have been obtained by the use of torture the onus should rest upon the Secretary of State to prove beyond reasonable doubt that it was not so obtained. I would unhesitatingly reject this proposition as unsustainable. That is confirmed by experience of inordinately long voir dires in terrorist cases in which the admissibility of B confessions has been contested. Not only would the process severely disrupt the course of work in SIAC, it would be wholly impossible for the Secretary of State to obtain the evidence of the parade of witnesses commonly called in such voir dires—gaolers, doctors, interviewers etc—to cover in minute detail the time spent in custody by the maker of the statement. The opposite extreme suggested on behalf of the Secretary of State was that the appellant C should have to prove on the balance of probabilities that a challenged statement was obtained by the use of torture before it is rejected. The objections in principle and practice to the imposition of such a burden on an appellant are equally conclusive. He may not even know what material has been adduced before SIAC. The special advocate is given the material, but he has little or no means of investigation and is not permitted to disclose the D information to the appellant or his solicitors, so has no one from whom to obtain sufficient instructions.

155 I agree with your Lordships that consideration of this question by the conventional approach to the burden of proof is both unhelpful and inappropriate. It seems to me rather to equate to the process described by Lord Bingham in *R v Lichniak* [2003] 1 AC 903, para 16 as "an administrative process requiring the board to consider all the available E material and form a judgment"; cf *In re McClean* [2004] NICA 14, para 77, where McCollum LJ said of a similar process that it was "not the establishment of a concrete fact but rather the formulation of an opinion or impression", which was not capable of proof in the manner usually contemplated by the law of evidence. I accordingly agree with the view expressed by Lord Bingham (para 56 of his opinion) and Lord Hope (para 116) that once the appellant has raised in a general way a plausible reason F why evidence adduced may have been procured by torture, the onus passes to SIAC to consider the suspicion, investigate it if necessary and so far as practicable and determine by reference to the appropriate test whether the evidence should be admitted and taken into account.

156 What that test should be is the issue on which your Lordships are divided. Lord Bingham is of the opinion (para 56) that if SIAC is unable to G conclude that there is not a real risk that the evidence has been obtained by torture, it should refuse to admit it. Lord Hope, on the other hand, has propounded a different test, which he describes as putting the question which SIAC has to decide positively rather than negatively. It has to be established on the balance of probabilities that the particular piece of evidence was obtained by the use of torture; and unless it has in SIAC's judgment been so established, after it has completed any investigation H carried out and weighed up the material before it, then it must not reject it on that ground.

157 I have found the choice between these tests the most difficult part of this case. Lord Bingham has cogently described the difficulties facing an appellant before SIAC and the potential injustice which he sees as the

consequence if the Hope test is adopted. Lord Hope for his part places some emphasis on the severity of the practical problems which would face SIAC in negativing the use of torture to obtain any given statement, and expresses his concern that it would constitute "an insuperable barrier for those who are doing their honest best to protect us". In support of his view Lord Hope points in particular to the terms of article 15 of UNCAT, which requires states to ensure that any statement "which is established to have been made as a result of torture" shall not be invoked in any proceedings.

158 After initially favouring the Bingham test, I have been persuaded that the Hope test should be adopted by SIAC in determining whether statements should be admitted when it is claimed that they may have been obtained by the use of torture. Those who oppose the latter test have raised the spectre of the widespread admission of statements coming from countries where it is notorious that torture is regularly practised. This possibility must of course give concern to any civilised person. It may well be, however, that the two tests will produce a different result in only a relatively small number of cases if the members of SIAC use their considerable experience and their discernment wisely in scrutinising the provenance of statements propounded, as I am confident they will. Moreover, as my noble and learned friend, Lord Brown of Eaton-under-Heywood, points out in para 166 of his opinion, intelligence is commonly made up of pieces of material from a large number of sources, with the consequence that the rejection of one or some pieces will not necessarily be conclusive. While I fully appreciate the force of the considerations advanced by Lord Bingham in paras 58 and 59 of his opinion, I feel compelled to agree with Lord Hope's view in para 118 that the test which he proposes would, as well as involving fewer practical problems, strike a better balance in the way he there sets out.

159 On this basis I would accordingly allow the appeals and make the order proposed.

LORD BROWN OF EATON-UNDER-HEYWOOD

160 My Lords, torture is an unqualified evil. It can never be justified. Rather it must always be punished. So much is not in doubt. It is proclaimed by the Convention against Torture and many other international instruments and now too by section 134 of the Criminal Justice Act 1988. But torture may on occasion yield up information capable of saving lives, perhaps many lives, and the question then inescapably arises: what use can be made of this information? Unswerving logic might suggest that no use whatever should be made of it: a revulsion against torture and an anxiety to discourage rather than condone it perhaps dictate that it be ignored: the ticking bomb must be allowed to tick on. But there are powerful countervailing arguments too: torture cannot be undone and the greater public good thus lies in making some use at least of the information obtained, whether to avert public danger or to bring the guilty to justice.

161 Several of your Lordships have remarked on the tensions in play and have noted the balances struck by the law, different balances according to whether one is focusing on the executive or the judicial arm of the state. Essentially it comes to this. Two types of information are involved: first, the actual statement extracted from the detainee under torture ("the coerced statement"); second, the further information to which the coerced statement,

A if followed up, may lead ("the fruit of the poisoned tree" as it is sometimes called). Generally speaking it is accepted that the executive may make use of all information it acquires: both coerced statements and whatever fruits they are found to bear. Not merely, indeed, is the executive entitled to make use of this information; to my mind it is bound to do so. It has a prime responsibility to safeguard the security of the state and would be failing in its duty if it ignores whatever it may learn or fails to follow it up. Of course it B must do nothing to promote torture. It must not enlist torturers to its aid (rendition being perhaps the most extreme example of this). But nor need it sever relations even with those states whose interrogation practices are of most concern. So far as the courts are concerned, however, the position is different. Generally speaking the court will shut its face against the admission in evidence of any coerced statement (that of a third party is, of C course, in any event inadmissible as hearsay); it will, however, admit in evidence the fruit of the poisoned tree. The balance struck here ("a pragmatic compromise" as my noble and learned friend, Lord Bingham of Cornhill, describes it at para 16 of his opinion) appears plainly from section 76 of the Police and Criminal Evidence Act 1984. There is, moreover, this too to be said: whereas coerced statements may be intrinsically unreliable, the fruits they yield will have independent evidential value.

D **162** All this is entirely understandable. As several of your Lordships have observed, the functions and responsibilities of the executive and the judiciary are entirely different, a difference reflected indeed in article 15 of the Torture Convention itself. Article 15's concern is with the use of "any statement . . . made as a result of torture . . . as evidence in any proceedings". It creates no bar to the use of coerced statements as a basis for E executive action. And, of course, it says nothing whatever about the fruits of the poisoned tree.

163 None of this is contentious. The dispute arising on these appeals concerns only a single, comparatively narrow issue: the use of certain coerced statements on appeals before the Special Immigration Appeals Commission (SIAC) under section 25 of the Anti-terrorism, Crime and Security Act 2001. The statements in question are those made by detainees F abroad, coerced by the authorities of a foreign state without the complicity of any British official. It is the Crown's case that strictly speaking these are admissible in evidence before SIAC, a tribunal charged not with adjudicating upon the appellant's guilt but only with deciding whether reasonable grounds exist for suspecting him to be an international terrorist and for believing his presence here to be a risk to national security.

G **164** In common with the other members of this Committee and essentially for the reasons they give, I too would reject the Crown's contention. In question here is not the power of the executive but rather the integrity of the judicial process. SIAC is a court of law (indeed a superior court of record). And as was pointed out in *M v Secretary of State for the Home Department* [2004] 2 All ER 863, SIAC's function on an appeal under section 25 is not to review the exercise by the Secretary of State of his power H of certification under section 21, but rather to decide for itself whether, at the time of the hearing, there are "reasonable grounds" for the suspicion and belief required under section 21. True it is that the statements in question are sought to be relied upon not to convict the appellant of any offence but rather to found such suspicion and belief as would justify his continued

detention under section 23. It is difficult to see, however, why this consideration should strengthen rather than weaken the Crown's argument: no court will readily lend itself to indefinite detention without charge, let alone trial. (Parliament, indeed, has recently demonstrated its own unease in this area by refusing to legislate for up to 90 days detention of arrested terrorist suspects prior to charge.) At all events, for the detention to continue under the 2001 Act, Parliament required that SIAC must independently sanction this deprivation of liberty.

165 In short, I would hold that SIAC could never properly uphold a section 23 detention order where the sole or decisive evidence supporting it is a statement established to have been coerced by the use of torture. To hold otherwise would be, as several of your Lordships have observed, to bring British justice into disrepute. And this is so notwithstanding that the appellant was properly certified and detained by the Secretary of State in the interests of national security, notwithstanding that the legislation (now, of course, repealed) allowed the appellant's continuing detention solely on the ground of suspicion and belief, notwithstanding that the incriminating coerced statement was made not by the appellant himself but by some third party, and notwithstanding that it was made abroad and without the complicity of any British official.

166 To what extent, it is perhaps worth asking, does such a ruling impede the executive in its vitally important task of safeguarding the country so far as possible against terrorism? To my mind to a very limited extent indeed. In the first place it is noteworthy that the ruling will merely substitute an exclusionary rule of evidence for the Secretary of State's own publicly stated policy not in any event to rely on evidence which he knows or believes to have been obtained by torture abroad. Secondly, the intelligence case against the suspect would, we are told, ordinarily consist of material from a large number of sources—a "mosaic" or "jigsaw" of information as it has been called; it is most unlikely that the sole or decisive evidence will be a coerced statement. It follows, therefore, that the possibility of a detention order under section 23 being discharged on a section 25 appeal to SIAC because of the rejection of a coerced statement is comparatively remote. And certainly there is nothing in SIAC's open determination in relation to E's appeal (the first in which Mr Emmerson submitted that information extracted by torture should be excluded by rule of law rather than merely afforded less weight) to suggest the contrary:

> "There is no sufficient material which persuades us that we can conclude either that torture or other treatment contrary to article 3 of the European Convention on Human Rights was used or even that it may have been used . . ."

167 But theoretically it could happen and in that event, it is suggested, the Secretary of State would be disadvantaged in two distinct ways. Most obviously, perhaps, he would be unable to continue to detain someone whose detention he judged necessary on grounds of national security. To the straightforward response "so be it, the rule of law so requires", I would add this. There is a certain unreality in discussing the discharge of detention orders as the legislation now stands. The power to detain suspected international terrorists under section 23 of the 2001 Act is now a matter of history. In December 2004 your Lordships in *A v Secretary of State for the*

A *Home Department* [2005] 2 AC 68, declared section 23 to be incompatible with articles 5 and 14 of the European Convention on Human Rights and with effect from 14 March 2005 the whole of Part 4 of the Act was repealed by section 16 of the Prevention of Terrorism Act 2005 (save only with regard to extant appeal proceedings, preserved by section 16(4) of the 2005 Act).

168 No doubt the effects of your Lordships' judgment will spill over into other court proceedings designed to provide a judicial check on the B exercise of other executive powers to place constraints of one sort or another on terrorist suspects in the interests of national security—most notably appeals to SIAC under section 2 of the Special Immigration Appeals Commission Act 1997 against deportation orders, and statutory applications to the Administrative Court challenging control orders under the Prevention of Terrorism Act 2005. For the reasons already given, C however, it seems unlikely that the exclusionary rule concerning coerced statements, even assuming that it applies equally in these related contexts (which was not the subject of specific argument before us) will affect many, if any, individual cases.

169 The other way in which it has been suggested that the Secretary of State may be disadvantaged by your Lordships' ruling is in the event that he has to defend himself against a civil claim, for example for false D imprisonment. With regard to this possibility I find myself in strong agreement with the view expressed by Lord Nicholls of Birkenhead, in para 72 of his opinion: it would make no sense to allow (indeed encourage) the Secretary of State to make use of all information available to him in deciding how to exercise his executive power in the public interest and then prohibit his reliance upon part of that information (coerced statements) E when faced with a claim for false imprisonment. Rather he should be permitted to refer to such statements, not of course, in reliance upon their truth, but merely to explain his state of mind at the time he took the action impugned.

170 Perhaps, however, a better answer to this particular difficulty is after all to be found in section 21(9) of the 2001 Act (although no argument was in fact addressed upon it):

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> "An action of the Secretary of State taken wholly or partly in reliance on a certificate under this section may be questioned in legal proceedings only by or in the course of proceedings under—(a) section 25 or 26, or (b) section 2 of the Special Immigration Appeals Commission Act 1997."

A comparable provision with regard to control orders is, one notes, to be G found in section 11(1) of the 2005 Act.

171 It follows from all this that your Lordships' decision on these appeals should not be seen as a significant setback to the Secretary of State's necessary efforts to combat terrorism. Rather it confirms the right of the executive to act on whatever information it may receive from around the world, while at the same time preserving the integrity of the judicial process and vindicating the good name of British justice.

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172 I turn finally to the burden of proof. I agree with Lord Hope of Craighead (at para 121 of his opinion) that SIAC should ask itself whether it is "established, by means of such diligent inquiries into the sources that it is practicable to carry out and on a balance of probabilities, that the information relied on by the Secretary of State was obtained under torture".

Only if this is established is the statement inadmissible. If, having regard to the evidence of a particular state's general practices and its own inquiries, SIAC were to conclude that there is no more than a possibility that the statement was obtained by torture, then in my judgment this would not have been established and the statement would be admissible.

173 The difficulty I have with the "real risk" test espoused by certain of your Lordships, apart from the fact that classically such a test addresses future dangers (as, for example, the risk of torture or other article 3 ill-treatment which the European Court of Human Rights in *Soering v United Kingdom* (1989) 11 EHRR 439 understandably refused to countenance) rather than past uncertainties, is that it would require SIAC to ignore entirely (rather than merely discount to whatever extent it thought appropriate) any statement not proved to have been made voluntarily. That, at least, is how I understand the "real risk" test to apply: if SIAC were left in any substantial (i e other than minimal) doubt as to whether torture had been used, the statement would be shut out, however reliable it appeared to be and notwithstanding that SIAC concluded that it had probably been made voluntarily. That seems to me a surprising and unsatisfactory test. If I have misunderstood the proposed test and if all that it involves is SIAC shutting out a statement whenever they simply cannot decide one way or the other on the balance of probabilities whether it has been extracted by torture (a rare case one would suppose given the expertise of the tribunal) then my difficulty would be substantially lessened although I would still prefer the test favoured by Lord Hope of Craighead and Lord Rodger of Earlsferry.

174 It is one thing to say, as in *Soering*, that someone cannot be deported whilst there exists the possibility that he may be tortured—or, indeed, as the dissentient minority said in *Mamatkulov and Askarov v Turkey* 41 EHRR 494, if they run a real risk of suffering a flagrant denial of justice—quite another to say that the integrity of the court's processes and the good name of British justice requires that evidence be shut out whenever it cannot be positively proved to have been given voluntarily.

175 For these reasons, and for the reasons given by Lord Bingham and others of my noble and learned friends, I too would allow these appeals and make the order proposed.

Appeals allowed.
Cases remitted to Special Immigration Appeals Commission for reconsideration.

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D E C P