Hilary Term
[2012] UKSC 8
On appeal from: [2010] EWCA Civ 898

JUDGMENT

W (Algeria) (FC) and BB (Algeria) (FC) (Appellants) *v* Secretary of State for the Home Department (Respondent)

PP (Algeria) (FC) (Appellant) *v* Secretary of State for the Home Department (Respondent) (formerly VV (Jordan) (FC) and PP (Algeria) (FC) (Appellants) *v* Secretary of State for the Home Department (Respondent))

Z (Algeria) (FC), G (Algeria) (FC), U (Algeria) (FC) and Y (Algeria) (FC) (Appellants) *v* Secretary of State for the Home Department (Respondent)

before

Lord Phillips, President
Lord Brown
Lord Kerr
Lord Dyson
Lord Wilson

JUDGMENT GIVEN ON

7 March 2012

Heard on 30 January 2012

Appellant
Michael Fordham QC
Stephanie Harrison
(Instructed by Luqmani Thompson & Partners; Birnberg Peirce & Partners; Tyndallwoods)

Respondent
Robin Tam QC
Robert Palmer
(Instructed by Treasury Solicitors)

LORD BROWN

1. From time to time over many years the Secretary of State for the Home Department has been concerned to deport a foreign national on the grounds of national security. Sometimes, indeed with increasing frequency, those facing such deportation decisions have wished to contest them, either by challenging that they present a national security risk, or by invoking the European Convention on Human Rights and contending that they would be at risk of article 3 ill-treatment if returned to their home country.

2. To enable such cases to be properly heard, Parliament, by the Special Immigration Appeals Commission Act 1997 (the 1997 Act) established SIAC and, as will be very familiar to all with any interest in this area of the law, provided for an appeal system which allows where necessary for closed material procedures and the appointment of special advocates. All this has been rehearsed time and again in a succession of judgments – not least, indeed, in paras 4-15 of the judgment below – and no useful purpose would be served by my repeating it all here. Put very shortly, if the Secretary of State wishes to adduce evidence which, for reasons of national security or other sufficient public interest reasons, cannot safely be communicated to the appellant, SIAC's rules and procedures provide for this to be done – just how satisfactorily being a matter of continuing debate into which, happily, there is on this appeal no need to enter.

3. The difficulty raised by the present case is a very different one and, it should be recognised at once, one that faces the court with what can only be regarded as the most unpalatable of choices. It is lesser evils which the court is searching for here, not perfect solutions. The difficulty and dilemma now before us can most easily be illustrated by my immediately sketching out a notional set of facts.

4. Suppose that an appellant before SIAC (A) is a suspected terrorist whom it is proposed to return to Algeria. Such, indeed, is the position of each of the appellants now before us. Suppose – this, too, is no mere supposition; it has been common ground before SIAC in a number of cases – that Algeria is a country where torture is systematically practised by the DRS (Information and Security Department) and that no DRS officer has ever been prosecuted for it; and that: "in the absence of [certain assurances from the Algerian Government] there would be a real risk that on his return to Algeria A (and persons in a similar position) would be tortured or subject to other ill-treatment" (SIAC's judgment of 8 February 2007 in *G v Secretary of State for the Home Department: Appeal No SC/02/05 – G*

being one of the appellants now before us). Suppose that the Algerian authorities are hostile to any independent scrutiny of their actions in the human rights sphere: human rights organisations such as Amnesty and Human Rights Watch are not permitted to operate there; even the International Red Cross is denied access to DRS facilities. And suppose, as is also here the case, that the Secretary of State obtains assurances from the Algerian Government that A's rights will be respected on return, the value of these assurances being the principal question at issue on A's SIAC appeal.

5. Suppose, then, that A wishes to adduce evidence from someone with inside knowledge of the position in Algeria asserting that, notwithstanding the Algerian Government's official assurances, those in A's position on return to Algeria are in fact likely to be subject to torture or other article 3 ill-treatment. Perhaps this prospective witness (W) was himself ill-treated on return. Perhaps W is a "whistleblower" working within the Algerian prison service: an official or an interrogator or a medical practitioner. Perhaps he is a journalist or other outsider who has obtained particular information as to the fate of those like A on their return. Suppose that W (whether or not himself still in Algeria) is in a vulnerable position: he fears future torture or ill-treatment either of himself or of someone near and dear to him. Perhaps at an earlier stage he had raised his concerns internally and been threatened that if ever he voiced them abroad his wife or children would suffer for it.

6. Suppose finally that, such being the circumstances, W is not prepared to give evidence in A's appeal to SIAC save only on one unalterable condition, namely that his identity and evidence will forever remain confidential to SIAC and the parties to the appeal (A and the Secretary of State). He is concerned in particular that the Secretary of State might seek to communicate something at least of his evidence to the Algerian authorities (or indeed to others in such a way as may bring him to the attention of the Algerian authorities) if only to seek to assess its veracity and reliability, and that her doing so might place him or his family in peril, something he is simply not prepared to risk. W, therefore, requires an absolute and irreversible guarantee of total confidentiality before he will permit his identity and evidence to be disclosed to the Secretary of State. Is it open to SIAC to make an order providing for such a guarantee? That, as will shortly appear, is the central question now before us.

7. It is not, I should make clear at this stage, the appellants' case that, SIAC having made an absolute and irreversible order giving W the guarantee he seeks, W's evidence will necessarily then have to be regarded by SIAC as properly before them when finally it comes to their determining the disputed issue as to A's safety on return. Rather the appellants propose an intermediate, inter partes hearing, by which time the Secretary of State must have been provided with full information as to W's identity and intended evidence, and at which she will be

able to contend that, for whatever reason, it would be wrong for SIAC to admit W's evidence on the substantive appeal. She may suggest that in reality W has advanced no coherent case for saying that he is at risk of reprisals. Or she may say that W's proposed evidence is inherently implausible and that, without her being afforded the least opportunity to check its authenticity or credibility or reliability it would simply not be right to afford it any weight whatever. Or she may have other arguments to advance. If, having heard them, SIAC then chooses to shut the evidence out, so be it. If, however, SIAC admits the evidence, then, reluctant though doubtless they will be to give it the weight it might have been expected to carry had the Secretary of State been permitted to check it, at least it will be before them (when ex hypothesi it would otherwise not have been) and in the result SIAC will have the benefit of the fullest possible picture on a critically important issue in the appeal: the question of A's safety on return. It is on this basis and in this context that the question now arises: in such circumstances can SIAC ever properly make an absolute and irreversible order (necessarily on an ex parte application by A without the Secretary of State having an opportunity to resist it), prohibiting the Secretary of State from ever disclosing to anyone anything of W's identity or evidence?

8. This question the Court of Appeal on 29 July 2010 answered in the negative: [2010] EWCA Civ 898. Giving the only reasoned judgment (with which Jacob and Sullivan LJJ simply agreed), Sir David Keene (at para 27) concluded that:

> "[I]t is not open to SIAC to make an order giving the absolute and irrevocable guarantee which is sought by the appellants. This may create a difficulty for the appellants, because of the reluctance of their potential witnesses, but it is inescapable. The adverse effect on them can be mitigated by such steps as anonymity orders and hearings in private, but irrevocable orders preventing the Secretary of State from disclosing material to a foreign state in any circumstances cannot properly be made by SIAC in advance of the Secretary of State seeing that material. As counsel for the Secretary of State said at the SIAC hearing, such a proposal is unworkable and in my view falls outside the scope of SIAC's powers to give directions, broad though those powers are."

9. Before turning to the Secretary of State's objections I should observe that, although Sir David there spoke of the appellant's proposals "fall[ing] outside the scope of SIAC's powers", he had earlier, at para 20, recorded that:

> "Mr Tam QC, on behalf of the Secretary of State, accepts that SIAC could give directions under the Procedure Rules preventing the

> Secretary of State from disclosing such material to any other person, including the Algerian authorities. He acknowledges that SIAC's power under rule 39 (1) to 'give directions relating to the conduct of any proceedings' is expressed in wide and unlimited terms and could be used in conjunction with the rule 43(2) power to conduct a hearing in private for any good reason so as to prevent disclosure to other persons, including the authorities of the appellant's country of origin."

And that, indeed, I understand to remain the Secretary of State's position. It is not for want of jurisdiction that SIAC should never make an order of the sort here contended for; rather it is because, so the Secretary of State submits, such an order could never properly be made; it can never be appropriate.

10. Such being the case, I shall not burden this judgment with an exposition and analysis of all the various rules which arguably bear upon SIAC's powers but instead shall turn at once to the Secretary of State's principal reasons for saying that no order of the kind here sought should ever be made, notwithstanding that, for want of it, evidence directly going to the issue of A's safety on return will on occasion not be available to SIAC when otherwise it would have been.

11. Essentially, it seems clear, the Secretary of State's fundamental objection to an order of the sort proposed is this: such an order having been made, the Secretary of State may then find herself in possession of information which (whether or not appreciated by SIAC, A or even W himself) might in one way or another suggest the existence of a terrorist threat abroad or some other risk to national security. Viewed in the context of myriad other pieces of information, it may be seen to form part of a jigsaw or mosaic (one is well familiar with the concept) whereby such risks come to be recognised. Because, however, of SIAC's order, the Secretary of State will be unable to alert the foreign state to the risk, thereby gravely imperilling future diplomatic relations. True, but for the order, the Secretary of State would never have been put in possession of the information in the first place. But, runs the argument, the Secretary of State is in fact worse off with it than without it. Without it she cannot be criticised. But with it, yet bound by SIAC's order to keep it to herself, she may become deeply embarrassed if the risk were then to eventuate.

12. The court below, at paras 24 and 25 of Sir David Keene's judgment, accepted this argument:

> "SIAC cannot, it seems to me, tie its hands in advance and say that, whatever the fresh slant on the material provided by the Secretary of

> State, it will in no circumstances allow disclosure to the authorities of a foreign state. How could it? It might be that the appellant's material, innocuous when seen in isolation, becomes of vital diplomatic importance once combined with material in the possession of the Secretary of State. As was explored in argument, it might reveal a potential terrorist risk within the foreign state. It might indicate that, instead of the appellant having been the perpetrator of a terrorist outrage, as suspected hitherto, the true culprit remains at large in a foreign state and presents a real and immediate threat to that state.
>
> It is no answer for Mr Fordham to argue that, without the cast-iron and irrevocable guarantee of non-disclosure, the British Government would not even come into possession of the information. That is true, but the consequences for the United Kingdom's diplomatic relations differ radically between the two scenarios. If this country's government is in possession of information indicating the existence of a risk of a terrorist outrage in a foreign state with which we have friendly relations and it does not warn that state, the potential impact on the United Kingdom's diplomatic relations with that state could be very serious indeed if it ever became known that our government knew of the risk. If, however, the government does not possess such information, then while the terrorist risk to the foreign state may remain the same, this country could not be accused of withholding vital information, and our diplomatic relations would not be affected."

13. I confess to finding the argument a good deal less persuasive than did the Court of Appeal. Nor to my mind was it made good by a post-hearing note submitted by the Secretary of State at our invitation giving five examples of prospective scenarios (understandably at a high level of generality) suggested to illustrate the problem. In all five examples, as it happens, the Home Secretary's stated concern is at her inability to communicate not with the country to which she proposes deporting A (here Algeria) but rather with some other foreign country (country C) to which, let us suppose, W, a known terrorist mastermind who trains suicide operatives, now says that he has moved (following torture on his return to Algeria), something about which the Secretary of State would wish to inform country C (an example in fact suggested by Lord Kerr during the hearing).

14. Even, however, were such a scenario to play out and culminate in a terrorist atrocity in country C and it were later to emerge that the Secretary of State had known, but failed to warn country C, about W's move there, it must surely be a substantial defence to any diplomatic complaint by country C that the Secretary of

State was subject to a final and absolute court order prohibiting her from acting differently.

15. After all, as the appellants point out, a number of recent international instruments are replete with statements urging states to ensure that witnesses are protected against ill-treatment or intimidation, particularly in a human rights context – see, for example, article 13 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Principle 3(b) of Annex I to the Istanbul Protocol Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; paras 3, 7, 12, 13 and 20 of the 28 July 2010 Report of the United Nations High Commissioner for Human Rights on the Right to the truth; and para 3.2.8 (under the heading, Handling reluctant Sources) of the November 2010 EU common guidelines on (Joint) Fact-Finding Missions.

16. In short, I regard the Secretary of State's concerns at learning more than she is permitted to divulge as an insufficient ground on which to deny A and SIAC the possible benefits of W's evidence. That said, I do not overlook the radical nature of orders of the sort proposed here, nor, indeed, the kinds of difficulty they may bring in their wake. In the first place, such orders could be thought to come perilously close to offending against basic principles of open justice. There is nothing novel, of course, in the making of ex parte orders. But it is difficult to think of any other situation in which a respondent would be unable to seek release from a permanent injunction – in this case, not to communicate his knowledge to others. The respondent can, as indicated, object at the inter partes hearing to the material being used at the eventual substantive hearing. But that is by no means the same thing as seeking to overturn the original order.

17. There is, moreover, as the respondent points out, the further difficulty that, even though theoretically it will be open to SIAC at the inter partes hearing to rule out W's evidence, it may be difficult for them to ignore it entirely. SIAC are, after all, required by section 5(6)(a) of the 1997 Act and by rule 4(3) of their 2003 Rules to ensure that on the material before them they can properly determine the proceedings. And there could hardly be a more important issue in those proceedings than that of A's safety on return. It is that consideration, indeed, which weighs so very heavily in A's favour in justifying the making of these proposed orders in the first place, given that without them SIAC will by definition never see the material. There is the obvious further problem with regard to evidence adduced on the basis proposed that the Secretary of State will be largely unable to investigate it and will find it difficult, therefore, to explain or refute it. Accordingly, the very making of the initial order must to a degree undermine the likely weight of the evidence and devalue its overall worth.

18. In the last analysis, however, none of these considerations to my mind outweighs the imperative need to maximise SIAC's chances of arriving at the correct decision on the article 3 issue before them and their need, therefore, to obtain all such evidence as may contribute to this task.

19. I would rule, therefore, that it is open to SIAC to make such absolute and irreversible ex parte orders as are here contended for and that on occasion it may be appropriate to do so. This is, I conclude, the least worst option open to us – the lesser of two evils as I put it at the outset. But at the same time I should make plain that I am far from enthusiastic about such orders and would certainly not expect a rash of them. Rather it would seem to me that the power to make them should be most sparingly used. There is, of course, the risk that the very availability of such orders may be exploited by the unscrupulous in the hope that SIAC may thereby be induced to receive untruthful evidence which, had it in the ordinary way been subject to full investigation, would have been exposed as such.

20. I would advocate that before making one of these proposed ex parte orders, SIAC should require the very fullest disclosure from A of (a) W's proposed evidence (namely a detailed final statement or proof of evidence depending upon whether it is proposed to adduce the evidence orally or in writing, and if the latter why in writing), (b) the particular circumstances in which W claims to fear reprisals, and (c) how A and his legal advisers came to hear about W's proposed evidence and what if any steps they have taken to encourage him to give that evidence in the usual way subject to the usual steps generally taken to safeguard witnesses in these circumstances, namely by anonymity orders and hearings in private.

21. If, moreover, one of these orders is made and it does then come to appear to the Secretary of State that the information disclosed may indeed be of some importance with regard to national security concerns, whether here or abroad, it should be open to the Secretary of State to try to persuade SIAC either to seek from A and W a sufficient waiver of the ex parte order forbidding any further communication of the information to enable these national security concerns to be met or, if such waiver, unreasonably in SIAC's view despite their recognition of W's fears, proves unobtainable, to shut out (or regard with additional scepticism) the evidence submitted. This power, in other words, should be exercised sensibly as well as sensitively, there being ample room for flexibility in its operation notwithstanding the absolute and irreversible nature of whatever order may initially be made.

22. I should perhaps add this. In striking the balance in this way, I am in no way influenced by the consideration that, as earlier stated, there are circumstances in which the Secretary of State for her part is on occasion entitled to adduce evidence

in closed proceedings divulged only to a special advocate and not to A. I do not see the scope for orders of the sort contended for here as, so to speak, "levelling the playing field" or "providing equality of arms" between the parties. The plain fact is that the Secretary of State is acting in these cases in the wider public interest, not as an interested party. She is, for example, obliged (now under the rules) to search for and disclose material, both open and closed, which may possibly assist A's case. (He, of course, is under no corresponding duty towards the Secretary of State.) And the special advocate will to the best of his ability serve A's interests, procuring on occasion rulings which may preclude the Secretary of State from relying on material however apparently damning to A's cause. As Sir David Keene observed below (at para 26): "The reality is that the position of an appellant and the position of the Secretary of State are not comparable, because of the public responsibilities of the latter."

23. Since completing this judgment I have seen in draft the judgment of Lord Dyson and agree with him also.

24. I would accordingly allow these appeals to the extent indicated. It must, of course, now be for SIAC to consider what, if any, impact our decision has upon the outcome of these appellants' individual appeals: whether there is a need now to reopen them and what, if any, orders should now be made. It is to be hoped that no further order (save as to costs as to which the parties may have 28 days for written submissions) is required from this court.

LORD DYSON

25. National security issues continue to present difficult challenges to the courts. Lord Brown has explained the problem that is raised by the facts of the present case. The appellants are all Algerian nationals whom the Secretary of State for the Home Department decided under section 3(5)(a) of the Immigration Act 1971 to deport to Algeria on the basis that their presence in the United Kingdom is not conducive to the public good on grounds of national security. They appealed to the Special Immigration Appeals Commission (SIAC) who held that they posed a risk to national security and that the decisions to deport them were lawful and compatible with the European Convention on Human Rights ("the Convention"). Their appeals were dismissed by the Court of Appeal.

26. The issue in all these cases is whether, if returned to Algeria, there is a real risk that the appellants would be subjected to ill-treatment at the hands of the Algerian Authorities (AAs) contrary to article 3 of the Convention. One of the appellants (Z) was in a position to put forward material from a source or sources in

Algeria which was relevant to safety on return. But the source(s) feared reprisals in Algeria if there were to be any disclosure of their identity to the AAs. They were willing to tell their story to SIAC (and indeed to the Secretary of State), but only on an absolute and irrevocable assurance that there would be no onward disclosure to the AAs.

27. Rule 4(1) of the Special Immigration Appeals Commission (Procedure) Rules 2003 (SI 2003/1034) ("the SIAC Rules") provides that, when exercising its functions, SIAC shall secure that information is not disclosed "… in any other circumstances where disclosure is likely to harm the public interest". Rule 39(1) confers on SIAC the power to give directions "relating to the conduct of any proceedings". Subrule (2) provides that the power to give directions is to be exercised subject to the obligation in rule 4(1); and subrule (5) provides that directions under rule 39(1) may in particular "(e) relate to any matter concerning the preparation for a hearing". Rule 43(2) enables SIAC to conduct a hearing or part of a hearing in private for any good reason (in addition to the reason identified in rule 43(1) which is not material to the appeal). It is common ground that these rules are wide enough to give SIAC the jurisdiction to make an absolute and irrevocable order prohibiting the Secretary of State from disclosing material to any person and to do so at or after a hearing from which the Secretary of State is excluded. The question is in what circumstances (if any) it may be appropriate to make such an order (which I shall refer to as "an irrevocable non-disclosure order").

28. For the appellants, Mr Fordham QC submits that SIAC has the power to make such an order although it has not received informed representations from the Secretary of State as to whether the order should be made. It is able subsequently to hear informed representations from the Secretary of State as to the admission of the material in evidence.

29. For the Secretary of State, Mr Tam QC accepts that there may be cases where an appellant is found to have good reasons for wishing to keep certain material confidential and this might provide a sound basis for SIAC to exercise its power to hold a private hearing under rule 43 and make an irrevocable non-disclosure order. But he submits that it is never appropriate to make such an order on the basis of a hearing from which the Secretary of State is excluded and she should always be given the opportunity to apply subsequently to vary or discharge the order.

30. In testing these submissions, it should be borne in mind that, as is illustrated by the circumstances of the present appeals, two conflicting considerations are in play here. On the one hand, the appellants say that, unless the order that they seek is made, they will be unable to place material before SIAC which may be crucial to

their case that, if returned to Algeria, they face a real risk of ill-treatment by the AAs contrary to article 3 of the Convention. If they are able to persuade SIAC of this risk, their appeals will succeed. Thus, the appellants say that it is essential to their case that they are able to place this evidence before SIAC: the stakes could hardly be higher for them (short of a risk to life itself). They also rely on rule 4(3) of the SIAC Rules which provides that subject to paragraphs (1) and (2), SIAC "must satisfy itself that the material available to it enables it properly to determine proceedings". In other words, it has a duty to ascertain all relevant facts.

31. On the other hand, it is said on behalf of the Secretary of State that there are important countervailing considerations both in relation to the conduct of the appeals and more generally. So far as the conduct of the appeals is concerned, the ability of the Secretary of State to participate in them effectively may be seriously undermined by an irrevocable non-disclosure order. There are two aspects to consider. First, the cogency and validity of the reasons asserted by the source(s) in support of the claimed need for confidentiality may be open to question, but the Secretary of State will be denied the ability to test the reasons or to obtain information and/or adduce evidence from or with the assistance of the AAs to demonstrate that the asserted reasons for the claim to confidentiality are groundless.

32. Secondly (and of perhaps even greater importance) is the fact that the Secretary of State may be seriously disadvantaged in her ability to test and challenge the substance of the evidence of the witness(es). The effect of the order may be to deprive the Secretary of State of the ability to place before SIAC relevant evidence which it should properly consider in deciding the substantive issues arising in the appeals. This would occur, for example, if the AAs were able to provide information bearing on the issue of safety on return of the appellants, but could not do so unless the identity of the witness(es) and what they have to say are disclosed to them. Once the authorities know the identity of the witness(es) and the substance of their evidence, the authorities might be able to demonstrate that what is said about the risk to the appellants on return to Algeria is false. I should add that the SIAC Rules do not make provision for the appointment of special advocates to represent the interests of the Secretary of State and it is (rightly) not suggested that SIAC could appoint special advocates under any of the powers conferred by the general rules. It follows that the difficulties to which the Secretary of State draws attention cannot be overcome or even mitigated by the appointment of a special advocate.

33. In addition to the problems that are likely to be suffered by the Secretary of State in relation to the appeals, she says that irrevocable non-disclosure orders may also cause collateral prejudice. It became clear during the course of the argument that this prejudice is the potential risk of harm to future diplomatic relations with a

friendly foreign state. This is a factor which carried considerable weight with the Court of Appeal and which Lord Brown deals with at paras 11 to 15.

34. In weighing these competing considerations, I have no doubt that the scales come down in favour of making an irrevocable non-disclosure order where SIAC is satisfied that such an order is necessary in the interests of justice. I agree entirely with what Lord Brown says at paras 19 to 21 as to how the power to make an order should be exercised. SIAC should be astute to guard against the danger of abuse and should scrutinise with great care and test rigorously the claimed need for an order. But if SIAC (i) is satisfied that a witness can give evidence which appears to be capable of belief and which could be decisive or at least highly material on the issue of safety of return and (ii) has no reason to doubt that the witness genuinely and reasonably fears that he and/or others close to him would face reprisals in Algeria if his identity and the evidence that he is willing to give were disclosed to the AAs, then in my view an irrevocable non-disclosure order should be made.

35. I accept that to make such an order is a striking step for any court to take and is contrary to the instincts of any common lawyer. It is inimical to the fundamental principles which we rightly cherish of open justice and, above all, procedural fairness. To make an order without giving the Secretary of State an opportunity to be heard is a clear breach of the principles of natural justice. Any such order requires compelling justification.

36. Regrettably, however, the circumstances of a case sometimes call for unusual and undesirable remedies. Ultimately, the court has to decide what is demanded by the interests of justice. In weighing the prejudice that the Secretary of State may suffer in the appeal process as a result of an irrevocable non-disclosure order, it should not be overlooked that the appeals themselves will be conducted entirely inter partes. In particular, no material that is placed before SIAC by the appellants will be withheld from the Secretary of State. She may be able to demonstrate that the claimed need for confidentiality is without foundation and to persuade SIAC to give the evidence little or no weight for that reason alone. She may also be able to test the evidence of the witness(es) effectively even though she has been unable to discuss it with the AAs. For example, she may be able to show on the basis of objective general material about the conditions in Algeria that the evidence of the witness is unlikely to be true; and even where the evidence is more specific, she may be able to obtain information from the AAs which will enable her to rebut the evidence without divulging the name or identity of the witness or saying anything which might lead to his or her identification. It will, of course, depend on the nature of the evidence to be given by the witness. I do not wish to suggest that the effect of an irrevocable non-disclosure order may not inhibit the ability of the Secretary of State to resist the appeals. In some cases, such an order will undoubtedly have that effect. But it cannot safely be said that it is bound to do so in every case.

37. As regards the collateral prejudice claimed by the Secretary of State, like Lord Brown I consider that this has relatively little weight for the reasons that he gives.

38. In my view, if SIAC concludes that the two conditions to which I have referred at para 34 above are satisfied, then the countervailing considerations relied on by the Secretary of State should not outweigh the need to ensure that the appellants are able to deploy any material which might show that, on return to Algeria, they would face a real risk of treatment contrary to article 3 of the Convention. The same considerations and the same result would follow if the case raised a question under article 2 of the Convention. But if the ground on which an appellant is resisting deportation is an alleged risk of breach of some other article of the Convention, the balance will almost certainly be struck the other way. For example, in many appeals against orders for deportation, the ground of appeal is that to deport the appellant would involve a breach of his or her article 8 rights. I find it difficult to conceive of a case in which it would be appropriate to make an order in order to protect the wish for confidentiality of a witness in those circumstances.

39. For these reasons as well as those given by Lord Brown (with which I am in entire agreement), these appeals should be allowed to the extent indicated.

LORD PHILLIPS, LORD KERR AND LORD WILSON

40. We agree with both the judgments of Lord Brown and Lord Dyson.