JUDICIARY OF ENGLAND AND WALES

Mohammed Othman (Abu Qatada) v Secretary of State for the Home Department

Special Immigration Appeals Commission

12 November 2012

SUMMARY TO ASSIST THE MEDIA

The Special Immigration Appeals Commission (Mr Justice Mitting, Upper Tribunal Judge Peter Lane and Dame Denise Holt) has today allowed Mohammed Othman's appeal against the Home Secretary's decision to refuse to revoke the deportation order against him.

Procedural background:

Having unsuccessfully exhausted all avenues in the domestic courts to challenge the Home Secretary's decision to deport him to Jordan, Mr Othman took his case to the European Court of Human Rights (ECtHR). By a judgment handed down on 17 January 2012 which became final on 9 May 2012, the ECtHR unanimously held that the appellant's deportation to Jordan would not violate Articles 3 and 5 of the Convention, but that it would violate Article 6, "on account of the real risk of the admission at the applicant's retrial of evidence obtained by torture of third persons." (para 1)

On 18 May 2012 the Home Secretary notified the appellant of her refusal to revoke the deportation order. The appeal against that decision was heard by SIAC as her decision was based in part on material that it was not in the public interest to disclose. (para 2)

That appeal was heard in October.

The decision of the Strasbourg Court

The ECtHR dealt with four topics, of which three are relevant for the present purposes: Articles 3, 5 and 6. SIAC sets out the relevant points of the Court's decision in relation to these Articles in paragraphs 4 – 16.

The test to be applied [by SIAC] in 'foreign' Article 6 cases

This is discussed in detail in paragraphs 17 – 24.

Counsel for the appellant and defendant "accept that the test which [SIAC] must apply is whether or not there is a real risk that the impugned statements will be admitted at the appellant's trial as proof of his guilt." (para 24)

The history of the Jordanian trials

The history of the Jordanian trials is set out in paragraphs 25 – 49.

Jordanian law

The relevant law is considered in paragraphs 50 – 53.

The critical questions for SIAC

SIAC sets out two critical questions to "determine whether there is a real risk that the impugned statements will be admitted probatively:

i) Irrespective of the means by which they were obtained, are the impugned statements now admissible at all under Article 148.2 of the [Jordanian] Code of Criminal Practice?
ii) If they are, is there a real risk that they will be admitted even though there is a 'real risk' that they have been obtained by torture?" (para 54)

The first question: *Irrespective of the means by which they were obtained, are the impugned statements now admissible at all under Article 148.2 of the [Jordanian] Code of Criminal Practice?*

SIAC considers this in detail in paragraphs 55 – 67.

On this question SIAC concluded:

"Until and unless the [Jordanian] Court of Cassation gives an authoritative ruling on the question, it must remain open. Both views are tenable. …. It is simply impossible for us to resolve these differences. Confronted with two tenable views of what the Jordanian law provides, all that we can do is return to the basic Strasbourg test: has the Secretary of State established that there is not a real risk that he impugned statements will be admitted probatively? To that question there can be only one answer: unless we can be confident that the court would not admit the impugned statements because they were tainted by the 'real risk' of torture, the answer must be negative.

"We must therefore examine and attempt to forecast the approach which the State Security Court would take to statements made by co-defendants to the public prosecutor when allegations that they were obtained by torture have been made." (paras 66 - 67)

The second question: *If they are, is there a real risk that they will be admitted even though there is a 'real risk' that they have been obtained by torture?*

SIAC considers this in detail in paragraphs 68 – 73.

On this question SIAC concluded: "… The only means of eliminating a real risk that statements which may well have been obtained by torture will be admitted probatively at the appellant's retrial would be for the burden of proving, to a high standard, that they were not, to be placed upon the prosecutor. Anything less gives rise to a real risk that they will be." (para 73)

Miscellaneous issues

SIAC considers miscellaneous issues in paragraphs 74 – 77.

Conclusion of Article 6 issue

SIAC concluded: "The Secretary of State has not satisfied us that, on retrial, there is no real risk that the impugned statements of Abu Hawsher and Al-Hamasher would be admitted probatively against the appellant. Until and unless a change is made to the [Jordanian] Code of Criminal Procedure and/or authoritative rulings are made by the Court of Cassation or Constitutional Court which establish that statements made to a public prosecutor by accomplices who are no longer subject to criminal proceedings cannot be admitted probatively against a returning fugitive and/or that it is for the prosecutor to prove to a high standard that the statements were not procured by torture, that real risk will remain." (para 78)

Article 3

In light of SIAC's conclusions on the Article 6 issues, Article 3 issue is dealt with more briefly than would otherwise have been required. It is considered in paragraphs 79 – 88.

SIAC concluded: "… Like the Strasburg Court, we remain satisfied that those assurances provide, in their practical application, a sufficient guarantee that the appellant will be protected against the risk of ill-treatment by or at the behest of Jordanian state agents." (para 87)

Article 5

The implications of the [Jordanian] Crime Prevention Law 7 of 1954 on Article 5 are considered in paragraphs 89 – 92.

SIAC concluded: "[Counsel for Mr Othman] suggests that in the event of an acquittal of the appellant after a retrial, there is a real risk that the Jordanian authorities would invoke this law to secure his detention; and that the possibility that they might do so gives rise to a real risk of a flagrant breach of Article 5 ECHR. We are satisfied that the proposition is far-fetched …" (para 92)

Conclusion

SIAC concludes: "For the reasons given on the Article 6 issue, we are satisfied that the Secretary of State should have exercised her discretion differently and should not have declined to revoke the deportation order. Accordingly, this appeal is allowed." (para 93)

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This summary is provided to assist in understanding SIAC's decision. It does not form part of the reasons for the decision. The full judgment of SIAC is the only authoritative document.