

OMAR OTHMAN (Respondent) v SECRETARY OF STATE FOR THE HOME DEPARTMENT (Appellant) [2012] EWCA Civ 3138

On appeal from the Special Immigration Appeals Commission, SC/15/2005

Lord Dyson MR, Richards, Elias LJJ

BACKGROUND TO THE APPEAL.

This is an appeal against the Order made by the Special Immigration Appeals Commission (“SIAC”) on 12th November 2012. Mr Omar Othman, better known as Abu Qatada, is a Jordanian national who has been resident in the United Kingdom since September 1993. The United Kingdom government regards Mr Othman as a serious threat to national security. He is also wanted in Jordan for terrorist offences: he has already been tried and convicted in his absence on two charges of conspiracy to cause explosions. It is common ground that Mr Othman will be re-tried if he is deported.

Efforts to secure the deportation of Mr Othman have a protracted history. The Secretary of State for the Home Department (“SSHD”) first served him with a deportation notice on 11 August 2005. His challenge to this notice was eventually dismissed by the House of Lords in 2009. On the same day, the SSHD served a deportation order on him. Mr Othman challenged the lawfulness of this order in the European Court of Human Rights (“ECtHR”) in Strasbourg.

On 17 January 2012, the ECtHR allowed his application on the grounds that, if he were deported to face a retrial in Jordan, there was a real risk that he would suffer “a flagrant denial of justice” in breach of his right to a fair trial under article 6 of the European Convention on Human Rights (“the Convention”). A flagrant denial of justice is a breach of the right to a fair trial that is “so fundamental as to amount to a nullification, or destruction of the very essence” of the right. The basis for the conclusion that there was a real risk of a flagrant denial of justice in this case was that there was a real risk that the evidence which would be admitted against him at the retrial would include statements (“the impugned statements”) which had been obtained by the use of torture.

Following the ECtHR judgment, extensive discussions took place between the UK and the Jordanian governments with a view to ensuring so far as possible that a retrial would be fair. The SSHD took the view that, in the light of assurances given by the Jordanian government, the risk of a flagrant denial of justice had been eliminated. On 17 April 2012, she informed Mr Othman that he would be deported on 30 April 2012. He appealed to SIAC.

On 12 November 2012, SIAC allowed his appeal. It found that, if Mr Othman was deported to Jordan, there still existed a real risk of a flagrant denial of justice. It is against this decision that the SSHD appeals.

SUMMARY OF JUDGMENT.

The Court of Appeal unanimously dismisses the appeal. The SSHD accepts that there is a real risk that Mr Othman will be retried for the two terrorist offences of which he was convicted; and she does not challenge the finding that there is a real risk that the impugned statements were obtained by the use of torture. She does, however, challenge the finding that there is a real risk that the statements will be admitted in evidence against him at the retrial.

The court emphasises that an appeal may only be brought on a question of law and that an appellate court should be slow to interfere with the decision of an expert tribunal such as SIAC ([5]-[6]).

The SSHD accepts that SIAC directed itself properly as to the general legal test that it had to apply and

that the court cannot interfere simply because it would have reached a different conclusion on the facts ([59]). For the reasons summarised below, the court rejects the SSHD's case that SIAC made a number of detailed errors of law.

The court recognises that Mr Othman is regarded as a very dangerous person but emphasises that this is not a relevant consideration under the applicable Convention law. SIAC was entitled to conclude that there is a real risk that the impugned statements will be admitted in evidence at a retrial and that, in consequence, there is a real risk of a flagrant denial of justice ([56]-[57]).

REASONS FOR THE JUDGMENT.

The case involves an assessment of three risks if he is deported: (i) the risk that Mr Othman will be retried for the two offences; (ii) the risk that the impugned statements were obtained by the use of torture and (iii) the risk that the statements will be admitted against him at any retrial ([23]). There is no real dispute as to the first and second risks.

For these reasons, SIAC focussed on the third risk ([24]). As to this, SIAC identified two "critical questions" of Jordanian law: (i) whether the statements would be admissible under article 148.2 of the Code of Criminal Practice ([28]-[29]); and (ii) whether their admissibility would be precluded by the amended version of article 8.2 of the Jordanian Constitution ([30]-[34]). There was conflicting expert evidence on both questions which SIAC was unable to resolve.

The SSHD appealed on two grounds: (i) that SIAC erred in finding that a flagrant denial of justice would exist unless the prosecutor in Jordan was required to prove to a high standard that the statements would not be admitted ([38]); (ii) that SIAC failed to assess the risks in the round and had instead looked at them in separate compartments.

In relation to the first ground of appeal, the SSHD submitted that SIAC applied the wrong test by treating the question of the burden of proof as a determinative factor *as a matter of principle*. The court rejects the submission that this is what SIAC had done. On a reading of the judgment as a whole, it is clear that SIAC did no more than hold that, *on the facts of this case*, the only way of eliminating the real risk that the impugned statements would be admitted in evidence would be to place the burden of proof on the prosecutor to a high standard to show that the statements would not be admitted ([41]-[43]).

An alternative submission on the first ground of appeal was that it was plainly wrong on the facts of this case to hold that the burden of proof should be placed on the prosecutor ([44]). The court considered that this was an attack on SIAC's assessment of the facts and did not disclose an arguable error of law ([45]).

The second ground of appeal was advanced on the basis that SIAC failed to assess the risks cumulatively ([47]). The court dismisses this ground of appeal. First, the risk that the statements had been obtained by torture was not a small risk: there was compelling evidence that they had been so obtained ([48]-[49]). Secondly, although the two critical questions of Jordanian law presented discrete potential obstacles to the admission of the statements in evidence, the only proper conclusion for SIAC to reach in view of the uncertainty of the law was that there was a real risk that the statements would be admitted ([50]).

Thirdly, the court also rejects the submission that SIAC limited itself to a consideration of the two critical questions and failed to consider other matters that were relevant to the risk that the statements would be admitted in evidence. The SSHD had identified a number of possible "outcomes" which, if they had occurred, would have resulted in the impugned statements *not* being admitted. The court holds that SIAC dealt with all these possibilities, save those which were speculative and without evidential

foundation ([52]-[55]).

The court recognises that Mr Othman is regarded by the UK government as a danger to national security and understands that there is a general feeling that his deportation to Jordan to face trial is long overdue. But the legal principles that SIAC had to apply are clear and well established. The fact that Mr Othman is considered to be dangerous is not relevant to the application of these principles any more than it would be relevant if the issue was whether he should be deported to a country where he would be at risk of facing torture himself. This court can only interfere with a decision of SIAC where an error of law had been identified. SIAC was entitled to reach the conclusion that it did on the facts of this case and the SSHD has failed to identify any error of law ([56]-[60]).

NOTE

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