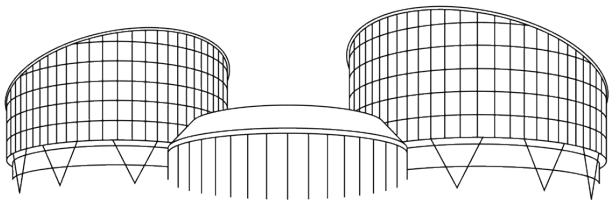

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

Applications nos 6610/09 and 326/12
Salajuddin AMIN against the United Kingdom
and Rangzieb AHMED against the United Kingdom
lodged on 21 January 2009 and 21 December 2011 respectively

STATEMENT OF FACTS

The first applicant, Mr Salajuddin Amin, is a joint British and Pakistan national who was born in Pakistan in 1975 and is currently detained in HMP Whitemoor. His application was lodged on 21 January 2009. He is represented before the Court by Mr R. Bhatt of Bhatt Murphy Solicitors, a lawyer practising in London.

The second applicant, Mr Rangzieb Ahmed, is a British national who was born in Lancashire in 1975 and is currently detained in HMP Full Sutton. His application was lodged on 21 December 2011. He is represented before the Court by Mr T. Ali of Irvine Thanvi Natas Solicitors, a lawyer practising in London.

A. The circumstances of the case

The facts of the case, as submitted by the applicants, may be summarised as follows.

1. The first applicant

The first applicant was born in Pakistan in 1975. In 1994 he moved to the United Kingdom but he returned to Pakistan in November 2001.

On 30 March 2004 six men were arrested in the United Kingdom and charged with conspiracy to cause explosions. The first applicant's uncle, a Brigadier in the Pakistan army who had contacts with the Pakistan authorities, heard that the United Kingdom authorities were seeking the first applicant in connection with the arrest of these six men. He encouraged the first applicant to surrender voluntarily to the authorities in Pakistan.

On or about 3 April 2004, the first applicant handed himself in to the Pakistan authorities. He was detained for the next ten months by the Inter-Service Intelligence Agency ("ISI"). He claims that during these ten

months he was beaten, threatened and abused by ISI interrogators. He was also interviewed eleven times by British agents and questioned by American agents. He submits that the American agents threatened him with rendition to Guantanamo Bay. Although he does not claim to have been ill-treated by the British agents who interviewed him in Pakistan, he submits that when he was taken to meet them he was hooded and handcuffed.

While in detention in Pakistan the first applicant made certain admissions confirming his involvement in the terrorist conspiracy which had led to the arrest of the six men in London.

The first applicant was flown from Pakistan to London on 8 February 2005. He claims to have been told by the authorities in Pakistan that the six men arrested in the United Kingdom had been convicted and sentenced to life imprisonment and that the United Kingdom would not seek to prosecute him in respect of any admissions made to the ISI.

The first applicant was arrested immediately upon his return to London and he was interviewed by the Metropolitan Police between 8 and 11 February 2005. The first applicant was legally represented throughout these interviews and had access to independent legal advice before any questioning began. It was subsequently noted by the domestic courts that the admissions made by the first applicant in Pakistan were never referred to and were never used by the interviewers in the United Kingdom. Nevertheless, the first applicant submits that the first pre-interview disclosure document stated that "in this interview, your client will be asked about admissions he has made in relation to terrorist training he has undertaken in Pakistan".

During questioning in the United Kingdom, in the presence of his solicitor, the first applicant made further admissions regarding his role as an agent for British men coming to Pakistan to finance or train for jihadist activities, his attendance at explosives training with one of the six men arrested in the United Kingdom ("Khyam"), and the provision of information to Khyam on how to create a fertiliser based explosive. On 12 February 2005 he was formally charged with the offence of conspiracy to cause explosions.

On 3 May 2005 the applicant's solicitor wrote to the Crown Prosecution Service ("CPS") requesting disclosure of all records, documents and communications between the authorities of the United Kingdom and the United States of America and the authorities of Pakistan concerning the applicant's apprehension, detention, interrogation and treatment while in custody in Pakistan and all documents concerning his "deportation" to the United Kingdom. Details were requested of any attendance notes made by members of the United Kingdom or United States security forces in Pakistan. A request was also made for a record of all confessions together with any information bearing on the legality of the first applicant's removal from Pakistan to the United Kingdom.

The CPS replied that the material requested was subject to Public Interest Immunity ("PII") and that there was no guidance and comparatively little case-law on the steps to be taken when material was in the hands of agencies outside the United Kingdom.

On 13 June 2005 the defence statement was served. The first applicant denied all involvement in the terrorist conspiracy and asserted that he had

been "treated inhumanely" in detention in Pakistan and tortured to procure false confessions from him. He further alleged that admissions made in police interviews in the United Kingdom were "false admissions which adopted part of previous false admissions extracted from him during his detention in Pakistan".

Shortly afterwards the first applicant's solicitor wrote again to the CPS, repeating the request in the letter of 3 May 2005. A defence skeleton argument was also served which highlighted a number of matters in relation to the first applicant's detention in and departure from Pakistan.

The judge subsequently made an order that the Crown should serve the material bearing on these issues which was already in their possession within seven days.

On 24 October 2005 the Crown made an *ex parte* application for a ruling that the disclosure of certain material in its possession would be injurious to the public interest. The defence were not informed of the substance of the application for PII or whether any order was in fact made.

On 14 November 2005 the Crown served a formal notice of an application for those parts of the evidence that related to the applicant's treatment while in detention in Pakistan – with the exception of the first applicant's own account – to be heard *in camera*, with no public reporting of these matters thereby permitted. The Crown submitted that if this evidence were to be heard in public, there would be a substantial risk to national security. In a decision dated 28 November 2005 the Court accepted that general publication of the evidence in question could give rise to a substantial risk to national security and granted the order sought. The first applicant's appeal against this decision was dismissed on 13 January 2006. Pursuant to Rule 67.2 of the Criminal Procedure Rules 2005, the appeal was determined without a hearing.

A further PII hearing took place on 15 November 2005. The defence were not told of the outcome of the hearing and no judgment or ruling has been produced to them.

On 5 January 2006 the prosecution disclosed a material summary entitled MS/1. It set out a number of important facts but the first applicant's solicitors described it as "singularly disappointing and unhelpful". On 25 January 2006 a further document entitled MS/2 was disclosed. The first applicant's representatives sought further and better particulars of this document. This resulted in a third disclosure entitled MS/3.

The first applicant applied for the prosecution to be stayed as an abuse of process. In particular, he submitted that United Kingdom agents had been complicit in his torture and inhuman and degrading treatment in Pakistan and that the United Kingdom had made use of the "fruits of this abuse". On 30 January 2006 a hearing into the abuse of process application commenced. This included the hearing of certain evidence from the first applicant by way of a *voir dire*. The first applicant submits that in the course of the *voir dire* the prosecution were permitted to cross-examine him on the basis of material obtained during his interrogation by the ISI in Pakistan.

In the course of the abuse of process hearing, the prosecution disclosed MS/4, MS/5, MS/6, MS/7 and MS/8.

During the course of the abuse of process application, the first applicant applied for the judge to recuse himself as he had already seen a number of

documents not made available to the defence in the course of the PII applications. The application for the judge to recuse himself was dismissed on 31 January 2006. It was renewed in writing but dismissed again on 6 February 2006.

On 17 February 2006 the judge announced his decision not to grant a stay for abuse of process and not to exclude from the evidence under sections 76 and 78 of the Police and Criminal Evidence Act 1984 ("the 1984 Act") confessions obtained from the first applicant in the United Kingdom.

On 23 February 2006 the judge gave his reasons for his decision not to include the confessions made in the United Kingdom. In summary, while he accepted that the first applicant had been treated in Pakistan in a manner that would be wholly unacceptable in the United Kingdom, and which amounted to "oppression" for the purposes of section 76 of the 1984 Act, he did not accept that his treatment was as severe as he had alleged. In particular, he considered it implausible that the nephew of a Brigadier would have been treated as badly as he claimed, that the first applicant would have shown no physical manifestation of such ill-treatment, or that he would have failed to mention such treatment to the British agents who interviewed him. Consequently, the judge did not accept that the severity of the applicant's treatment in Pakistan would have prevented him from explaining at a very early stage that he had been forced into making the confessions made in Pakistan. Therefore, as the confessions made in the United Kingdom were neither directly nor indirectly the product of any abuse, the judge did not consider that it would be unfair to admit them in evidence.

In May 2006 the judge indicated that his reasons for refusing to grant a stay were the same as his reasons for admitting the first applicant's confessions.

The substantive trial of the first applicant commenced in March 2006. At the close of the prosecution case before the jury, following a request by the first applicant's solicitor that the United Kingdom authorities seek disclosure from Pakistan of any records relating to the detention and questioning of the first applicant, the prosecution disclosed MS/9. Two further documents, MS/10 and MS/11, were disclosed on 16 November 2006. Thereafter the first applicant gave evidence before the jury and no further disclosure was sought or given before the end of the trial.

On 30 April 2007, after a trial lasting fourteen months at the Central Criminal Court, the first applicant, together with four of the six men originally arrested, was convicted of conspiracy to cause explosions likely to endanger life or cause serious injury to property contrary to section 3(1)(a) of the Explosive Substances Act 1883. The first applicant was sentenced to life imprisonment with a recommended minimum term of seventeen years and six months.

The first applicant appealed against his conviction and sentence. He submitted, *inter alia*, that the trial judge should have allowed his abuse of process application. More particularly, he complained that the trial judge failed to conduct the pre-disclosure process in a way which minimised the restriction upon equality of arms, that he wrongly approved the outcome of the disclosure process, and that the defence was significantly hampered in investigating material relevant either to the issue of United Kingdom

complicity in the applicant's ill-treatment or to the admissibility in evidence of the first applicant's London interviews.

For the purposes of the first applicant's appeal to the Court of Appeal, documents MS/12 and MS/13 were disclosed by the Crown.

On 23 July 2008 the Court of Appeal dismissed the appeal as it did not consider that the first applicant's criticism of the trial process could be sustained and, consequently, there was no arguable basis for interfering with the judge's decisions. With regard to the respondent Government's complicity in the treatment of the first applicant in Pakistan, the Court of Appeal stated that:

> "Mr O'Connor's submission is that a significant contribution to every aspect of Amin's detention in Pakistan, including, **[redaction]** can be attributed to [**redaction**] the authorities in the UK **[redaction]** Notwithstanding Mr O'Connor's passionate advocacy, we notice that unlike in cases such as *ex parte Bennett, Mullen* and *Latif* UK officials did what they could, within the overall constraint which applied to them seeking to work with officials of a sovereign country, to uphold the principles which obtain in this jurisdiction. Their purpose **[redaction]** was the protection of the safety and right to life of people living in this country, not the obtaining of evidence to establish that he was guilty of any offence or to bring him to trial. At that time the process of the court was not envisaged, let alone engaged. They knew, as the judge found, and was common ground before him, that Amin's surrender to the authorities in Pakistan resulted from the persuasive efforts of his uncle. In our view it cannot realistically be said that Amin's uncle made himself complicit in the ill-treatment to which his nephew was subsequently exposed. In any event however this contention founders on the judge's finding of fact.
>
> Particular areas of concern, such as **[redaction]** might have justified an argument that the results of the interview process should be excluded, but would not constitute a sufficient basis for a successful abuse of process argument. As it is, no attempt was made to introduce the evidence obtained during the Pakistan interviews as part of the prosecution case.
>
> **[redaction]**. Thereafter the interview processes with ISI were reduced and ended in October. Amin was then kept in detention in Pakistan. The authorities in Pakistan were responsible for it. Whether it was lawful or unlawful by the law of Pakistan, and it may well have been unlawful, there is no evidence to suggest that UK authorities sought or procured Amin's continuing detention. He had, when all is said and done, made admissions to complicity in activities which were of direct and immediate concern to the authorities responsible for security in Pakistan: his admissions were far from limited to involvement in this conspiracy. Plainly, Amin's return to this country was "arranged" in the sense that UK authorities must have known when and where he would arrive. Again, there is no shred of evidence that the UK authorities were complicit in any misconduct which may have attended the process which led to Amin's flight to this country. Given the extent of his admissions in Pakistan, it would have been surprising if the authorities there would have been prepared to allow him to travel to the UK, knowing of his admitted involvement in terrorist activity, without informing the authorities in the UK that he was coming. If Amin was given a false impression of the consequences of being allowed to travel to the UK that did not take place at the behest of the UK authorities, who by February 2005 had a very serious legitimate interest in interviewing Amin in connection with this conspiracy. They did not procure his return to this country in disregard of proper extradition or similar processes. Indeed on any realistic assessment of the situation, it would have been entirely remiss of the UK authorities if they had failed to make themselves available at Heathrow in order to arrest Amin. They had ample justification for doing so.
>
> After his close examination of the evidence, neither the careful analysis of the essential facts by the trial judge, nor his conclusion, is open to criticism. On the basis of his findings he was entitled to conclude that there were no transgressions by UK

> officials sufficient to justify an order that the proceedings against Amin should be halted.
>
> We touch briefly on a linked criticism made by Mr O'Connor, namely that even on the judge's findings of oppression and ill-treatment in Pakistan, which must implicitly, it is submitted, have involved treatment offending against article 3 of the ECHR, he should have stayed the case as an abuse of process. No arguable basis for interfering with the judge's decision has been demonstrated."

An unredacted version of this judgment and all of the documents disclosed to the defence were only seen by leading counsel in the domestic criminal proceedings. None of these documents, judgments or decisions have been seen by the first applicant's representatives in the proceedings before this Court.

2. The second applicant

The second applicant was born in Lancashire but spent most of his youth in Pakistan, having been taken there by his father. From 1994 to 2001 he was a prisoner of the Indian authorities after being arrested in Kashmir.

Following surveillance by way of covert listening devices carried out both in Dubai and the United Kingdom, the second applicant was arrested in Pakistan, by the Pakistani authorities, on 20 August 2006.

The second applicant asserted that after his arrest on 20 August 2006 he was held incommunicado without charge, without access to lawyers, or contact with any person outside the prison until December; that he was kept, at least initially, handcuffed and shackled in a cell without daylight or furniture; that he was deprived of sleep and fed poorly; that he was beaten with sticks, a piece of tyre on a handle and electric wire; and that on each of days 7, 9 and 11 his kidnappers had removed one fingernail from his left hand using pliers.

The second applicant claimed that on day 12 of his detention, he was questioned by British officers. He complained to them of his treatment by the Pakistani authorities, but did not specifically mention his fingernails as he still had bandages on his hands and assumed everyone would have known what had been done to him. The second applicant did not allege that he was mistreated in any way by the British officers.

Although he was not interviewed again by British agents, the second applicant claimed that he was regularly interviewed by agents from the United States of America. He claimed that on average, he was interrogated by them two to four times each week, and for two to four hours at a time. The questions that they asked him during the interrogations led him to believe that they had been provided with information by British agents.

The second applicant stated that on 12 April 2007 he was moved to a "safe house", where he remained until his deportation to the United Kingdom in September 2007. During this period he was not seen by any agents of the United States and he was not interrogated.

Following his deportation to the United Kingdom the second applicant was arrested and charged with terrorist offences. At trial, he applied to the judge to stop the prosecution. He contended that it would be an abuse of process of the court to try him because some time after the offences charged were alleged to have been committed he was arrested and tortured in Pakistan. Furthermore, he believed that the British authorities had sufficient

connection to his detention to have been "complicit" in torture. If that was the case, no prosecution of him could properly be allowed to continue without affronting the fundamental principle of international law which outlaws torture.

The judge heard evidence on both sides in a *voire dire*. Some of the evidence was heard *in camera* on grounds of national security. The second applicant was present and fully represented throughout those parts of the trial which were heard *in camera*.

The trial judge accepted that the second applicant's initial detention had been unlawful by Pakistani law. He also accepted that he had been held incommunicado, handcuffed and shackled in a cell without daylight or furniture, and that he may have deliberately been deprived of sleep. However, the trial judge did not consider that these conditions gave rise to torture, although it might be arguable that some of these conditions could constitute cruel, inhuman or degrading treatment.

With regard to the allegations of fingernail extraction, the trial judge heard evidence that long before the second applicant was detained in Pakistan, his brother-in-law had told a police officer that his fingernails had been removed while he was in custody in India. Evidence was also heard from a distinguished forensic pathologist. The effect of the evidence was that whilst the appearance of three of the left-hand fingernails was consistent with sudden removal of the nails, if all three had been damaged at the same time, it could not have happened earlier than about March 2007. Although two of the nails could have been traumatised at any time prior to 2006/2007, there were indications that something had happened to at least one of them after March 2007. The combination of these two pieces of evidence, together with some evidence heard *in camera*, led the judge to conclude that if the second applicant had been subjected to such treatment, it happened much later than he claimed, and some months after his interview with the British officers.

The trial judge also found no evidence that the British authorities had assisted or encouraged the Pakistani authorities either to detain the second applicant unlawfully or to ill-treat him in any way. Consequently, he refused the application for a stay of the prosecution.

The second applicant appealed to the Court of Appeal. He submitted that the trial judge ought to have stayed the prosecution either because the United Kingdom authorities had been complicit in an unlawful rendition of the second applicant to the United Kingdom, or that the prosecution was tainted by torture in which the United Kingdom authorities were complicit.

The Court of Appeal also heard some evidence *in camera*, for the same reasons as were given by the trial judge. The second applicant was again present and fully represented throughout.

The Court of Appeal found the trial judge's decision to hear evidence *in camera* to be unimpeachable. It also found no grounds for not accepting his findings of fact.

With regard to the first ground of appeal, the court found as follows:

> "The first limb of Rangzieb's case on the application to stay was that the UK had connived in this case, as in Bennett and Mullen, at his unlawful rendition to this country by the Pakistani authorities for the purpose of putting him on trial here. If that had been so, it would indeed provide a ground for staying the prosecution. There

would be a plain connection between an international wrong, to which the British authorities were party, and the trial. The judge, however, investigated this very thoroughly in the voire dire. It is clear that there was no unlawful rendition. Rangzieb is a British national. He does not enjoy additional Pakistani nationality. He could do so only if either he or his father had registered him with Pakistani authorities and neither did. That was his own evidence, as well as the assertion made by his family. As a result, Pakistan was fully entitled to deport him and no wrong was involved in doing so, whether by Pakistani, English or international law. Pakistan plainly did not wish to keep him, and the deportation was to the country of which he is a national. That the English police, who were in the midst of an investigation into his activities in England, kept in touch with the Pakistani authorities and were told when he would be deported, no doubt facilitated their arrest of him but does not constitute any kind of unlawful rendition. Indeed, although the finding was not necessary to the conclusion, the judge found that Rangzieb positively wished to be sent to England and was aware of the risk that he would be arrested on arrival. This first limb of Rangzieb's application for a stay was correctly rejected by the judge. This appeal depends not on this limb, but on the second, which is based upon his allegation that he was tortured whilst in Pakistan."

With regard to the second ground, it held that:

"We address the issue of principle, remembering as we do that Rangzieb was not tortured by or on behalf of the British, nor with their encouragement and he was not tortured at any time before the single occasion when he said he was seen by British officers. Indeed, whether or not he was tortured at all is not properly resolved. The question of principle is nevertheless important and is this. If intelligence is regularly shared with a State where there exists the possibility that torture may be employed, when should a prosecution against a man who has been in the hands of that State be stayed? That question was, in our view, answered authoritatively by the House of Lords in A v Home Secretary (No 2).

In that case ... [t]heir Lordships expressly accepted that in deciding to certify that he reasonably believes a person to be a risk to national security, the Home Secretary is entitled to rely on material gathered from a foreign source, with which information and intelligence is shared, even if such material might be the product of torture. Likewise, the security services or the police are not required to close their eyes to information which helps to protect the public's safety, such as for example by identifying persons presenting a threat of terrorism, or places where bombs are being made, even if that information comes to them from a foreign source which has used torture. Moreover, if subsequently called upon to justify a person's detention or other actions to control him, the foreign material can be relied upon. What however cannot be done is to rely in court on the information to make a case against someone.

...

As Mr Bennathan rightly submits, the argument in A (No 2) proceeded upon the basis that there was no suggestion of complicity by the UK authorities in any torture which might be in question. But his contention that that provides a reason for distinguishing the reasoning of the House cannot be correct. If anyone had thought that the sharing of information with a regime which might resort (or indeed had actually resorted) to torture constituted complicity in torture that would have been a simple basis for the decision and their Lordships could not have relied on the distinction between what impacts on a court and what does not. The sharing of information was necessarily addressed by the speeches and was specifically endorsed.

...

We are satisfied that the reasoning of the House in A (No 2) correctly reflects the basis on which English courts may stay a prosecution for abuse of process under the second limb of ex p Bennett. The jurisdiction does not exist to discipline the executive, the police or the intelligence services, although it may incidentally do so. It

exists to preserve the integrity of the trial process. The judge was right to hold that what is required for its exercise is a connection between any alleged wrongdoing and the trial. Since no evidence which was the product of any torture (or indeed other ill-treatment) that there might arguably have been was adduced at the trial and since the judge held, after full enquiry, that neither had it impacted upon the trial by way of informing the investigation, he was right to refuse to stay the prosecution. Indeed, the latter part of the test applied by the judge was rather more favourable to the defendants than it need have been. It is apparent from A (No 2) that some impact upon the investigation would be lawful, so long as it did not amount, directly or indirectly, to employing the product of torture to make a case against the appellants.

Torture is wrong. If it had occurred there could be no excuse for it, not even if Rangzieb was a suspected terrorist who might kill people. But the question was not whether it is wrong, but what consequences flow from it if it occurred. Mr Bennathan rightly accepted before us that it is not, and cannot be, the law that every act of torture has the consequence that the tortured person becomes immune from prosecution in every country and for all time, whatever crime he may commit. He contended that there must be a connection between the torture and the prosecution. The issue is the nature of the connection. For the reasons given, we are satisfied that the necessary connection exists where the torture has an impact on the trial, but not otherwise. Even if there had been torture whilst Rangzieb was in Pakistan, it had no bearing on the trial and there was no reason why the question of whether or not he was guilty of an antecedent crime in England should not be decided according to law.

Whilst that is sufficient to resolve this aspect of the appeal, we should record that it is not possible to treat as established law the extended concept of "complicity in torture" which is an essential plank of the appellant's argument at steps (iii) and (iv).

It is no doubt a general principle of law of sufficient universality that a secondary party to a crime is responsible for it in law, just as the principal actor is. So it is unsurprising that Article 4 of the Torture Convention, in requiring States to make torture an offence, stipulates also that the offence created must extend to complicity or participation in torture. On ordinary principles of English law, if A aids or abets (ie assists) B to commit torture, or if he counsels or procures (ie encourages or arranges) torture by B, then A is no doubt guilty, as is B. But simply to receive information from B which is needed for the safety of A's citizens but which is known or suspected to be the product of torture would not, without more, amount in English law to either of these forms of secondary participation. Indeed, A might be doing its best to discourage any ill treatment by B of those B detains. We do not accept Mr Bennathan's submission that the particular type of joint responsibility which arises when X and Y together commit crime 1, and in the course of it Y commits crime 2 (Chang Wang Sui v The Queen, [1985] AC 168, Hui Chi-Ming v The Queen [1992] 1 AC 34, R v Powell and English [1999] 1 AC 1 and R v Rahman [2008] UKHL 45; [2009] 1 AC 129) is analogous; such is an extension of ordinary secondary liability and is founded upon voluntary participation in crime 1.

...

For all these reasons, the judge was right to refuse to stay the prosecution against Rangzieb. Both his principal ground of appeal, and Habib's dependent ground which he advanced in the event that Rangzieb succeeded, must accordingly fail."

On 23 June 2011 the Supreme Court refused to grant the applicant permission to appeal.

B. Relevant domestic law and practice

1. Admission of confessions in evidence

Section 76 of the Police and Criminal Evidence Act 1984 provides as follows:

"(1)In any proceedings a confession made by an accused person may be given in evidence against him in so far as it is relevant to any matter in issue in the proceedings and is not excluded by the court in pursuance of this section.

(2)If, in any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained—

(a)by oppression of the person who made it; or

(b)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,

the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid.

(3)In any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, the court may of its own motion require the prosecution, as a condition of allowing it to do so, to prove that the confession was not obtained as mentioned in subsection (2) above.

(4)The fact that a confession is wholly or partly excluded in pursuance of this section shall not affect the admissibility in evidence—

(a)of any facts discovered as a result of the confession; or

(b)where the confession is relevant as showing that the accused speaks, writes or expresses himself in a particular way, of so much of the confession as is necessary to show that he does so.

(5)Evidence that a fact to which this subsection applies was discovered as a result of a statement made by an accused person shall not be admissible unless evidence of how it was discovered is given by him or on his behalf.

(6)Subsection (5) above applies—

(a)to any fact discovered as a result of a confession which is wholly excluded in pursuance of this section; and

(b)to any fact discovered as a result of a confession which is partly so excluded, if the fact is discovered as a result of the excluded part of the confession.

(7)Nothing in Part VII of this Act shall prejudice the admissibility of a confession made by an accused person.

(8)In this section "oppression" includes torture, inhuman or degrading treatment, and the use or threat of violence (whether or not amounting to torture).

(9)Where the proceedings mentioned in subsection (1) above are proceedings before a magistrates' court inquiring into an offence as examining justices this section shall have effect with the omission of—

(a)in subsection (1) the words "and is not excluded by the court in pursuance of this section", and

(b)subsections (2) to (6) and (8)."

Section 78 of the 1984 Act provides as follows:

"(1)In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

(2)Nothing in this section shall prejudice any rule of law requiring a court to exclude evidence.

(3)This section shall not apply in the case of proceedings before a magistrates' court inquiring into an offence as examining justices."

2. The use of evidence or other information obtained by torture

In *A v Home Secretary (No 2)* [2005] UKHL 71 the House of Lords considered the extent to which the authorities are permitted to use information obtained by torture in a non-member State. In particular, it considered whether the Special Immigration Appeal Tribunal ("SIAC") could, when reviewing the Home Secretary's decision on an immigration matter within its remit, receive evidence which was the product of torture abroad by others without British participation, whether a confession or accusatory material. In holding that SIAC could not receive such material, the House founded upon the critical distinction between, on the one hand, the receipt by a court of such evidence and, on the other, the use which may have to be made of it by non-judicial authorities in discharge of their duties to protect public safety. The former was prohibited by the common law, as well as by public international law through (*inter alia*) Article 15 of the Torture Convention. The latter was not. Their Lordships expressly accepted that in deciding to certify that he reasonably believes a person to be a risk to national security, the Home Secretary is entitled to rely on material gathered from a foreign source, with which information and intelligence is shared, even if such material might be the product of torture. Likewise, the security services or the police are not required to close their eyes to information which helps to protect the public's safety, such as for example by identifying persons presenting a threat of terrorism, or places where bombs are being made, even if that information comes to them from a foreign source which has used torture. Moreover, if subsequently called upon to justify a person's detention or other actions to control him, the foreign material can be relied upon. What however cannot be done is to rely in court on the information to make a case against someone.

Each of their Lordships relied upon this distinction. Lord Bingham put it in this way at paragraphs [47-48]:

> "I am prepared to accept ... that the Secretary of State does not act unlawfully if he certifies, arrests, searches and detains on the strength of what I shall for convenience call foreign torture evidence ...
>
> 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.
>
> 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 public interest immunity prevent him adducing in evidence...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 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."

Lord Nicholls, Lord Hope and Lord Brown went further in explaining the basis of the distinction. The Secretary of State, and likewise the police or intelligence services, have a plain duty to preserve the lives of British citizens and others present in this jurisdiction. Lord Nicholls, having referred to the practical necessity of the sharing of what are often fragments of information, acquired from different sources and pieced together for the purpose of protecting life, whether by finding a bomb or arresting a suspect, confronted the realities of international intelligence at paragraph [69]:

> "In both these instances the executive arm of the state is open to the charge that it is condoning 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."

Lord Hope adverted, in a similar passage of reasoning at paragraph [119] to the existence in the ECHR, alongside the prohibition of torture in Article 3, of the right to life enshrined in Article 2; the duty of the State is to protect the right to life of all those present within its shores who would be at risk from acts of terrorism. Lord Brown, at paragraph [161] said this:

> "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 it would be failing in its duty if it ignores whatever it may learn of fails to follow it up. Of course it 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."

3. Disclosure of evidence by the prosecution

At common law, the prosecution has a duty to disclose any material which has or might have some bearing on the offence charged. This duty extends to any earlier written or oral statement of a prosecution witness which is inconsistent with evidence given by that witness at the trial and statements of any witnesses potentially favourable to the defence.

In December 1981 the Attorney-General issued guidelines, which did not have force of law, concerning exceptions to the common-law duty to disclose to the defence evidence of potential assistance to it ((1982)

74 Criminal Appeal Reports 302 – "the Guidelines")). According to the Guidelines, the duty to disclose was subject to a discretionary power for prosecuting counsel to withhold relevant evidence if it fell within one of the categories set out in paragraph 6. One of these categories (6(iv)) was "sensitive" material which, because of its sensitivity, it would not be in the public interest to disclose. "Sensitive material" was defined as follows:

> "... (a) it deals with matters of national security; or it is by, or discloses the identity of, a member of the Security Services who would be of no further use to those services once his identity became known; (b) it is by, or discloses the identity of, an informant and there are reasons for fearing that the disclosure of his identity would put him or his family in danger; (c) it is by, or discloses the identity of, a witness who might be in danger of assault or intimidation if his identity became known; (d) it contains details which, if they became known, might facilitate the commission of other offences or alert someone not in custody that he is a suspect; or it discloses some unusual form of surveillance or method of detecting crime; (e) it is supplied only on condition that the contents will not be disclosed, at least until a subpoena has been served upon the supplier – e.g. a bank official; (f) it relates to other offences by, or serious allegations against, someone who is not an accused, or discloses previous convictions or other matters prejudicial to him; (g) it contains details of private delicacy to the maker and/or might create risk of domestic strife."

In *R. v. Ward* ([1993] 1 Weekly Law Reports 619), the Court of Appeal stressed that the court and not the prosecution was to decide whether or not relevant evidence should be retained on grounds of public interest immunity. It explained that "... a judge is balancing on the one hand the desirability of preserving the public interest in the absence of disclosure against, on the other hand, the interests of justice. Where the interests of justice arise in a criminal case touching and concerning liberty or conceivably on occasion life, the weight to be attached to the interests of justice is plainly very great indeed".

In *R. v. Davis, Johnson and Rowe* ([1993] 1 Weekly Law Reports 613), the Court of Appeal held that it was not necessary in every case for the prosecution to give notice to the defence when it wished to claim public interest immunity, and outlined three different procedures to be adopted. The first procedure, which had generally to be followed, was for the prosecution to give notice to the defence that they were applying for a ruling by the court and indicate to the defence at least the category of the material which they held. The defence would then have the opportunity to make representations to the court. Secondly, however, where the disclosure of the category of the material in question would in effect reveal that which the prosecution contended should not be revealed, the prosecution should still notify the defence that an application to the court was to be made, but the category of the material need not be disclosed and the application should be *ex parte*. The third procedure would apply in an exceptional case where to reveal even the fact that an *ex parte* application was to be made would in effect be to reveal the nature of the evidence in question. In such cases the prosecution should apply to the court *ex parte* without notice to the defence.

The Court of Appeal observed that although *ex parte* applications limited the rights of the defence, in some cases the only alternative would be to require the prosecution to choose between following an *inter partes* procedure or declining to prosecute, and in rare but serious cases the abandonment of a prosecution in order to protect sensitive evidence would be contrary to the public interest. It referred to the important role performed

by the trial judge in monitoring the views of the prosecution as to the proper balance to be struck and remarked that, even in cases in which the sensitivity of the information required an *ex parte* hearing, the defence had "as much protection as can be given without pre-empting the issue". Finally, it emphasised that it was for the trial judge to continue to monitor the position as the trial progressed. Issues might emerge during the trial which affected the balance and required disclosure "in the interests of securing fairness to the defendant". For this reason it was important for the same judge who heard any disclosure application also to conduct the trial.

In *R. v. Keane* ([1994] 1 Weekly Law Reports 746) the Lord Chief Justice, giving the judgment of the court, held that the prosecution should put before the judge only those documents which it regarded as material but wished to withhold on grounds of public interest immunity. "Material" evidence was defined as evidence which could be seen, "on a sensible appraisal by the prosecution: (1) to be relevant or possibly relevant to an issue in the case; (2) to raise or possibly raise a new issue whose existence is not apparent from the evidence which the prosecution proposes to use; (3) to hold out a real (as opposed to fanciful) prospect of providing a lead on evidence which goes to (1) or (2)".

Once the judge was seized of the material, he or she had to perform the balancing exercise between the public interest in non-disclosure and the importance of the documents to the issues of interest, or likely to be of interest, to the accused. If the disputed material might prove the defendant's innocence or avoid a miscarriage of justice, the balance came down firmly in favour of disclosing it. Where, on the other hand, the material in question would not be of assistance to the accused, but would in fact assist the prosecution, the balance was likely to be in favour of non-disclosure.

In the case of *R. v. Turner* ([1995] 1 Weekly Law Reports 264), the Court of Appeal returned to the balancing exercise, stating, *inter alia*:

> "Since *R. v. Ward* ... there has been an increasing tendency for defendants to seek disclosure of informants' names and roles, alleging that those details are essential to the defence. Defences that the accused has been set up, and allegations of duress, which used at one time to be rare, have multiplied. We wish to alert judges to the need to scrutinise applications for disclosure of details about informants with very great care. They will need to be astute to see that assertions of a need to know such details, because they are essential to the running of the defence, are justified. If they are not so justified, then the judge will need to adopt a robust approach in declining to order disclosure. Clearly, there is a distinction between cases in which the circumstances raise no reasonable possibility that information about the informant will bear upon the issues and cases where it will. Again, there will be cases where the informant is an informant and no more; other cases where he may have participated in the events constituting, surrounding, or following the crime. Even when the informant has participated, the judge will need to consider whether his role so impinges on an issue of interest to the defence, present or potential, as to make disclosure necessary ..."

The requirements of disclosure have since been set out in a statutory scheme. Under the Criminal Procedure and Investigations Act 1996 (CIPA), which came into force in England and Wales immediately upon gaining Royal Assent on 4 July 1996, the prosecution must make "primary disclosure" of all previously undisclosed evidence which, in the prosecutor's view, might undermine the case for the prosecution. The defendant must then give a defence statement to the prosecution and the court, setting out in general terms the nature of the defence and the matters

on which the defence takes issue with the prosecution. The prosecution must then make a "secondary disclosure" of all previously undisclosed material "which might reasonably be expected to assist the accused's defence as disclosed by the defence statement". Disclosure by the prosecution may be subject to challenge by the accused and review by the trial court.

4. "Special Counsel"

Following the judgments of the European Court of Human Rights in *Chahal v. the United Kingdom* (15 November 1996, *Reports of Judgments and Decisions* 1996-V) and *Tinnelly & Sons Ltd and Others and McElduff and Others v. the United Kingdom* (10 July 1998, *Reports* 1998-IV), the United Kingdom introduced legislation making provision for the appointment of a "special counsel" in certain cases involving national security. The provisions are contained in the Special Immigration Appeals Commission Act 1997 ("the 1997 Act") and the Northern Ireland Act 1998 ("the 1998 Act"). Under this legislation, where it is necessary on national security grounds for the relevant tribunal to sit in camera, in the absence of the affected individual and his or her legal representatives, the Attorney-General may appoint a special counsel to represent the interests of the individual in the proceedings. The legislation provides that the special counsel is not however "responsible to the person whose interest he is appointed to represent", thus ensuring that the special counsel is both entitled and obliged to keep confidential any information which cannot be disclosed. The relevant rules giving effect to the 1997 and 1998 Acts are set out in the Court's judgment in *Jasper v. the United Kingdom* ([GC], no. 27052/95, § 36, 16 February 2000).

In December 1999 the Government commissioned a comprehensive review of the criminal justice system, under the chairmanship of a senior Court of Appeal judge, Sir Robin Auld. The report, published in September 2001 after extensive consultation and entitled "The Review of the Criminal Courts in England and Wales" ("the Auld Report"), recommended, *inter alia*, the introduction of a "special counsel" scheme in cases where the prosecution wished to seek, *ex parte*, non-disclosure on grounds of public interest immunity. The recommendation was explained in the Auld Report as follows (footnotes omitted):

> "193. The scheme [developed by the common law since *R. v. Ward* and reflected in the Criminal Procedure and Investigations Act 1996: see above] is an improvement on what went before and has been generally welcomed on that account. But there is widespread concern in the legal professions about lack of representation of the defendant's interest in the [*ex parte*] forms of application, and anecdotal and reported instances of resultant unfairness to the defence. ... A suggestion, argued on behalf of applicants in Strasbourg and widely supported in the Review, is that the exclusion of the defendant from the procedure should be counterbalanced by the introduction of a 'special independent counsel'. He would represent the interest of the defendant at first instance and, where necessary, on appeal on a number of issues: first, as to the relevance of the undisclosed material if and to the extent that it has not already been resolved in favour of disclosure but for a public interest immunity claim; second, on the strength of the claim to public interest immunity; third, on how helpful the material might be to the defence; and fourth, generally to safeguard against the risk of judicial error or bias.

194. In my view, there is much to be said for such a proposal, regardless of the vulnerability or otherwise of the present procedures to Article 6. Tim Owen QC, in a paper prepared for the Review, has argued powerfully in favour of it. It would restore some adversarial testing of the issues presently absent in the determination of these often critical and finely balanced applications. It should not be generally necessary for special counsel to be present throughout the trial. Mostly the matter should be capable of resolution by the court before trial and, if any question about it arises during trial, he could be asked to return. If, because of the great number of public interest immunity issues now being taken in the courts, the instruction of special counsel for each would be costly, it simply indicates, as Owen has commented, the scale of the problem and is not an argument against securing a fair solution.

195. The role would be similar to that of an *amicus curiae* brought in to give independent assistance to a court, albeit mostly on appeal. In rape cases, where an unrepresented defendant seeks to cross-examine a complainant, the court must inform him that he may not do so, and should he refuse to instruct counsel, the court will appoint and instruct one. After the decisions of the European Court of Human Rights in *Chahal* and *Tinnelly*, the government introduced such a procedure in immigration cases involving national security. Although such cases are extremely rare, it is sufficient that the principle of a 'third' or 'special' counsel being instructed on behalf of a defendant has been conceded in a number of areas.

196. The introduction of a system of special independent counsel could, as Owen has also noted, in part fill a lacuna in the law as to public interest immunity hearings in the absence of a defendant appellant in the Court of Appeal, to which the 1996 Act and supporting Rules do not apply. Where there has been a breach of Article 6 because a trial judge did not conduct a public interest immunity hearing due to the emergence of the material only after conviction, the European Court of Human Rights has held that the breach cannot be cured by a hearing before the Court of Appeal in the absence of the appellant. The Court's reasons for so holding were that the appeals court is confined to examining the effect of non-disclosure on the trial *ex post facto* and could possibly be unconsciously influenced by the jury's verdict into underestimating the significance of the undisclosed material.

197. However, even the introduction of special counsel to such hearings would not solve the root problem to which I have referred of police failure, whether out of incompetence or dishonesty, to indicate to the prosecutor the existence of critical information. Unless, as I have recommended, the police significantly improve their performance in that basic exercise, there will be no solid foundation for whatever following safeguards are introduced into the system.

I recommend the introduction of a scheme for instruction by the court of special independent counsel to represent the interests of the defendant in those cases at first instance and on appeal where the court now considers prosecution applications in the absence of the defence in respect of the non-disclosure of sensitive material."

In *R. v. H.; R. v. C.* [2004] United Kingdom House of Lords Decisions 3, decided on 5 February 2004, the Judicial Committee of the House of Lords held, *inter alia*:

"The years since the decision in *R. v. Davis* [see paragraph 37 above] and the enactment of the CIPA [see paragraph 42 above] have witnessed the introduction in some areas of the law of a novel procedure designed to protect the interests of a party against whom an adverse order may be made and who cannot (either personally or through his legal representative), for security reasons, be fully informed of all the material relied on against him. The procedure is to appoint a person, usually called a 'special advocate', who may not disclose to the subject of the proceedings the secret material disclosed to him, and is not in the ordinary sense professionally responsible to that party but who, subject to those constraints, is charged to represent that party's interests. ...

> There is as yet little express sanction in domestic legislation or domestic legal authority for the appointment of a special advocate or special counsel to represent, as an advocate in PII [public interest immunity from disclosure] matters, a defendant in an ordinary criminal trial ... But novelty is not of itself an objection, and cases will arise in which the appointment of an approved advocate as special counsel is necessary, in the interests of justice, to secure protection of a criminal defendant's right to a fair trial. Such an appointment does however raise ethical problems, since a lawyer who cannot take full instructions from his client, nor report to his client, who is not responsible to his client and whose relationship with the client lacks the quality of confidence inherent in any ordinary lawyer-client relationship, is acting in a way hitherto unknown to the legal profession. While not insuperable, these problems should not be ignored, since neither the defendant nor the public will be fully aware of what is being done. The appointment is also likely to cause practical problems: of delay, while the special counsel familiarises himself with the detail of what is likely to be a complex case; of expense, since the introduction of an additional, high-quality advocate must add significantly to the cost of the case; and of continuing review, since it will not be easy for a special counsel to assist the court in its continuing duty to review disclosure, unless the special counsel is present throughout or is instructed from time to time when need arises. Defendants facing serious charges frequently have little inclination to cooperate in a process likely to culminate in their conviction, and any new procedure can offer opportunities capable of exploitation to obstruct and delay. None of these problems should deter the court from appointing special counsel where the interests of justice are shown to require it. But the need must be shown. Such an appointment will always be exceptional, never automatic; a course of last and never first resort. It should not be ordered unless and until the trial judge is satisfied that no other course will adequately meet the overriding requirement of fairness to the defendant. ..."

COMPLAINTS

The first applicant complains that the conduct of the criminal proceedings violated his rights under Article 6 of the Convention, read alone and together with Article 13. In particular, he claims that the decision to interview him in the United Kingdom was based on incriminating evidence which the British authorities knew or ought to have known was obtained through the use of torture and inhuman and degrading treatment and punishment. Moreover, he complains that he was denied access to all or a substantial portion of the relevant material that went to the United Kingdom authorities' knowledge of the conditions of his detention. The first applicant further complains that the judge's handling of the issue of disclosure not only hindered his defence case but also resulted in a situation where the prosecution and the judge had access to a substantial volume of material which was entirely kept from the defence. In fact, the first applicant submits that as some disclosure took place after the *voir dire*, he was deprived of the opportunity of making submissions on the basis of it. Finally, the first applicant complains under Article 6 of the Convention that the trial judge should have appointed a special advocate, which would have represented a less restrictive means of handling the PII procedure.

The first applicant further complains under Article 3 of the Convention that the United Kingdom authorities failed to carry out an effective investigation into his allegations of torture and ill-treatment.

The second applicant complains that he was subjected to treatment in violation of Article 3 of the Convention and unlawful detention in violation of Article 5 of the Convention as a direct result of the actions of the British authorities and/or with British complicity in that treatment and unlawful detention. In particular, he complains that the respondent State provided information to Pakistan which facilitated his arrest without first seeking assurances that he would not be ill-treated, and that it supplied intelligence to the Pakistan authorities and to the United States authorities which it knew would be used by interrogators.

The second applicant further complains under Article 6, read alone and together with Article 13 of the Convention, that he was not provided with a fair trial in the United Kingdom because the criminal investigation there was informed by the interrogation undertaken in Pakistan and because he was denied access to all or a substantial proportion of the relevant material that went to the United Kingdom authorities' knowledge of the conditions of his detention in Pakistan following a grant of public interest immunity.

QUESTIONS TO THE PARTIES

1. Did the United Kingdom have jurisdiction over the applicants at the time of their alleged ill-treatment in Pakistan?

2. Were the agents of the respondent State aware – or ought they to have been aware – of the applicants' alleged ill-treatment? If so, did the agents' continued co-operation with the authorities in Pakistan violate Article 3 of the Convention?

3. Was the respondent State under a procedural obligation under Article 3 of the Convention to investigate the applicants' allegations of complicity by British agents in their ill-treatment in Pakistan? If so, has the respondent State satisfied the requirements of this obligation?

4. Did the grant of Public Interest Immunity in respect of evidence requested by the defence violate the applicants' rights under Article 6 of the Convention?