HOUSE OF LORDS

SESSION 2005–06
[2005] UKHL 71

on appeal from: [2004] EWCA Civ 1123

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

A (FC) and others (FC) (Appellants) *v.* Secretary of State for the Home Department (Respondent) (2004)
A and others (Appellants) (FC) and others *v.* Secretary of State for the Home Department (Respondent)
(Conjoined Appeals)

Appellate Committee

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

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Interveners

Sir Sydney Kentridge QC, Colin Nicholls QC, Timothy Otty, Sudhanshu Swaroop and Colleen Hanley (Instructed by Freshfields Bruckhaus Deringer) for the Commonwealth Lawyers Association and two other interveners.

Keir Starmer QC, Nicholas Grief, Mark Henderson, Joseph Middleton, Peter Morris and Laura Dubinsky (Instructed by Leigh Day & Co) for Amnesty International and thirteen other interveners.

Hearing dates:
17, 18, 19 and 20 October 2005
ON
THURSDAY 8 DECEMBER 2005

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LORD BINGHAM OF CORNHILL

My Lords,

1. May the Special Immigration Appeals Commission ("SIAC"), a superior court of record established by statute, when hearing an appeal under section 25 of the Anti-terrorism, Crime and Security Act 2001 by a person certified and detained under sections 21 and 23 of that Act, receive evidence which has or may have been procured by torture inflicted, in order to obtain evidence, by officials of a foreign state without the complicity of the British authorities? That is the central question which the House must answer in these appeals. The appellants, relying on the common law of England, on the European Convention on Human Rights and on principles of public international law, submit that the question must be answered with an emphatic negative. The Secretary of State agrees that this answer would be appropriate in any case where the torture had been inflicted by or with the complicity of the British authorities. He further states that it is not his intention to rely on, or present to SIAC or to the Administrative Court in relation to control orders, evidence which he knows or believes to have been obtained by a third country by torture. This intention is, however, based on policy and not on any acknowledged legal obligation. Like any other policy it may be altered, by a successor in office or if circumstances change. The admission of such evidence by SIAC is not, he submits, precluded by law. Thus he contends for an affirmative answer to the central question stated above. The appellants' case is supported by written and oral submissions made on behalf of 17 well-known bodies dedicated to the protection of human rights, the suppression of torture and maintenance of the rule of law.

2. The appeals now before the House are a later stage of the proceedings in which the House gave judgment in December 2004: *A and others v Secretary of State for the Home Department, X and another v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68. In their opinions given then, members of the House recited the relevant legislative provisions and recounted the relevant history of the individual appellants up to that time. To avoid wearisome repetition, I shall treat that material as incorporated by reference into this opinion, and make only such specific reference to it as is necessary for resolving these appeals.

The Anti-terrorism, Crime and Security Act 2001

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

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

5. Section 25 of the Act enables a person certified under section 21 to appeal to SIAC against his certification. On such an appeal SIAC must cancel the certificate if "(a) it considers that there are no reasonable grounds for a belief or suspicion of the kind referred to in section 21(1)(a) or (b), or (b) it considers that for some other reason the

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

SIAC

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

7. The rules applicable to these appeals are the Special Immigration Appeals Commission (Procedure) Rules 2003 (SI 2003/1034). Part 3 of the Rules governs appeals under section 25 of the 2001 Act. In response to a notice of appeal, the Secretary of State, if he intends to oppose the appeal, must file a statement of the evidence on which he relies, but he may object to this being disclosed to the appellant or his lawyer (rule 16): if he objects, a special advocate is appointed, to whom this "closed material" is disclosed (rule 37). SIAC may overrule the Secretary of State's objection and order him to serve this material on the appellant, but in this event the Secretary of State may choose not to rely on the material in the proceedings (rule 38). A special advocate may make

submissions to SIAC and cross-examine witnesses when an appellant is excluded and make written submissions (rule 35), but may not without the directions of SIAC communicate with an appellant or his lawyer or anyone else once the closed material has been disclosed to him (rule 36). Rule 44(3) provides that SIAC "may receive evidence that would not be admissible in a court of law". The general rule excluding evidence of intercepted communications, now found in section 17(1) of the Regulation of Investigatory Powers Act 2000, is expressly disapplied by section 18(1)(e) in proceedings before SIAC. SIAC must give written reasons for its decision, but insofar as it cannot do so without disclosing information which it would be contrary to the public interest to disclose, it must issue a separate decision which will be served only on the Secretary of State and the special advocate (rule 47).

The appellants and the proceedings

8. Of the 10 appellants now before the House, all save 2 were certified and detained in December 2001. The two exceptions are B and H, certified and detained in February and April 2002 respectively. Each of them appealed against his certification under section 25. Ajouaou and F voluntarily left the United Kingdom, for Morocco and France respectively, in December 2001 and March 2002, and their certificates were revoked following their departure. C's certificate was revoked on 31 January 2005 and D's on 20 September 2004. Abu Rideh was transferred to Broadmoor Hospital under sections 48 and 49 of the Mental Health Act 1983 in July 2002. Conditions for his release on bail were set by SIAC on 11 March 2005, and on the following day his certificate was revoked and a control order (currently the subject of an application for judicial review) was made under the Prevention of Terrorism Act 2005, enacted to replace Part 4 of the 2001 Act. Events followed a similar pattern in the cases of E, A and H, save that none was transferred to Broadmoor and notice of intention to deport (currently the subject of challenge) was given to A and H in August 2005, since which date they have been detained. The control orders made in their cases were discharged. B's case followed a similar course to A's, save that he was transferred to Broadmoor under sections 48 and 49 of the 1983 Act in September 2005. In the case of G, bail conditions were set by SIAC in April 2004 and revised on 10 March 2005. His certificate was revoked and a control order made under the 2005 Act on 12 March 2005. He was given notice of intention to deport (which he is challenging) on 11 August 2005, and he has since been detained. His control order was discharged.

9. The appellants' appeals to SIAC under section 25 of the 2001 Act were heard in groups between May and July 2003. During these hearings argument and evidence were directed both to general issues relevant to all or most of the appeals and to specific issues relevant to individual cases. SIAC heard open evidence when the appellants and their legal representatives were present and closed evidence when they were excluded but special advocates were present. On 29 October 2003 judgments were given dismissing all the appeals. There were open judgments on the general and the specific issues, and there were also closed judgments. On the question central to these appeals to the House, raised in its present form when the proceedings before it were well advanced, SIAC gave an affirmative answer: the fact that evidence had, or might have been, procured by torture inflicted by foreign officials without the complicity of the British authorities was relevant to the weight of the evidence but did not render it legally inadmissible. In lengthy judgments given on 11 August 2004, a majority of the Court of Appeal (Pill and Laws LJJ, Neuberger LJ in part dissenting) upheld this decision: [2004] EWCA Civ 1123, [2005] 1 WLR 414. Despite the repeal of Part 4 of the 2001 Act by the 2005 Act, the appellants' right of appeal to the House against the Court of Appeal's decision under section 7 of the 1997 Act is preserved by section 16(4) of the Prevention of Terrorism Act 2005, and no question now arises as to the competency of any of these appeals.

THE COMMON LAW

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

11. It is, I think, clear that from its very earliest days the common law of England set its face firmly against the use of torture. Its rejection of this practice was indeed hailed as a distinguishing feature of the common law, the subject of proud claims by English jurists such as Sir John Fortescue (*De Laudibus Legum Angliae,* c. 1460-1470, ed S.B. Chrimes, (1942), Chap 22, pp 47-53), Sir Thomas Smith (*De Republica Anglorum,* ed L Alston, 1906, book 2, chap 24, pp 104-107), Sir Edward Coke (*Institutes of the Laws of England* (1644), Part III, Chap 2, pp 34-36). Sir William Blackstone *(Commentaries on the Laws of England,* (1769) vol IV, chap 25, pp 320-321), and Sir James Stephen (*A History of the Criminal Law of England,* 1883, vol 1, p 222). That reliance was placed on sources of doubtful validity, such as chapter 39 of Magna

Carta 1215 and *Felton's Case* as reported by Rushworth (*Rushworth's Collections,* vol (i), p 638) (see D. Jardine, *A Reading on the Use of Torture in the Criminal Law of England Previously to the Commonwealth,* 1837, pp 10-12, 60-62) did not weaken the strength of received opinion. The English rejection of torture was also the subject of admiring comment by foreign authorities such as Beccaria (*An Essay on Crimes and Punishments,* 1764, Chap XVI) and Voltaire (*Commentary on Beccaria's Crimes and Punishments,* 1766, Chap XII). This rejection was contrasted with the practice prevalent in the states of continental Europe who, seeking to discharge the strict standards of proof required by the Roman-canon models they had adopted, came routinely to rely on confessions procured by the infliction of torture: see A L Lowell, *"The Judicial Use of Torture"* (1897) 11 Harvard L Rev 220-233, 290-300; J Langbein, *Torture and the Law of Proof: Europe and England in the Ancien Regime* (1977); D. Hope, "Torture" [2004] 53 ICLQ 807 at pp 810-811. In rejecting the use of torture, whether applied to potential defendants or potential witnesses, the common law was moved by the cruelty of the practice as applied to those not convicted of crime, by the inherent unreliability of confessions or evidence so procured and by the belief that it degraded all those who lent themselves to the practice.

12. Despite this common law prohibition, it is clear from the historical record that torture was practised in England in the 16th and early 17th centuries. But this took place pursuant to warrants issued by the Council or the Crown, largely (but not exclusively) in relation to alleged offences against the state, in exercise of the Royal prerogative: see Jardine, *op cit.;* Lowell, *op cit.,* pp 290-300). Thus the exercise of this royal prerogative power came to be an important issue in the struggle between the Crown and the parliamentary common lawyers which preceded and culminated in the English civil war. By the common lawyers torture was regarded as (in Jardine's words: *op cit,* pp 6 and 12) "totally repugnant to the fundamental principles of English law" and "repugnant to reason, justice, and humanity." One of the first acts of the Long Parliament in 1640 was, accordingly, to abolish the Court of Star Chamber, where torture evidence had been received, and in that year the last torture warrant in our history was issued. Half a century later, Scotland followed the English example, and in 1708, in one of the earliest enactments of the Westminster Parliament after the Act of Union in 1707, torture in Scotland was formally prohibited. The history is well summarised by Sir William Holdsworth (*A History of English Law,* vol 5, 3rd ed (1945), pp 194-195, footnotes omitted):

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

As Jardine put in (*op. cit.*, p 13):

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

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

13. Since there has been no lawfully sanctioned torture in England since 1640, and the rule that unsworn statements made out of court are inadmissible in court was well-established by at latest the beginning of the 19th century (*Cross & Tapper on Evidence,* 10th edn (2004), p 582), there is an unsurprising paucity of English judicial authority on this subject. In *Pearse v Pearse* (1846) 1 De G & Sm 12, 28-29, 63 ER 950, 957, Knight Bruce V-C observed:

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

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

Involuntary confessions

14. The appellants relied, by way of partial analogy, on the familiar principle that evidence may not be given by a prosecutor in English criminal proceedings of a confession made by a defendant, if it is challenged, unless the prosecution proves beyond reasonable doubt that the confession had not been obtained by oppression of the person who made it or in consequence of anything said or done which was likely, in

the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof. This rule is now found in section 76 of the Police and Criminal Evidence Act 1984, but enacts a rule established at common law and expressed in such decisions as *Ibrahim v The King* [1914] AC 599, 609-610, *R v Harz and Power* [1967] AC 760, 817, and *Lam Chi-ming v The Queen* [1991] 2 AC 212, 220.

15. Plainly this rule provides an inexact analogy with evidence obtained by torture. It applies only to confessions by defendants, and it provides for exclusion on grounds very much wider than torture, or even inhuman or degrading treatment. But it is in my opinion of significance that the common law (despite suggestions to that effect by Parke B and Lord Campbell CJ in *R v Baldry* (1852) 2 Den 430, 445, 446-447, 169 ER 568, 574, 575, and by the Privy Council, in judgments delivered by Lord Sumner, in *Ibrahim v The King* [1914] AC 599, 610 and Lord Hailsham of St Marylebone in *Director of Public Prosecutions v Ping Lin* [1976] AC 574, 599-600) has refused to accept that oppression or inducement should go to the weight rather than the admissibility of the confession. The common law has insisted on an exclusionary rule. See, for a clear affirmation of the rule, *Wong Kam-ming v The Queen* [1980] AC 247.

16. In *R v Warickshall* (1783) 1 Leach 263, 168 ER 234, this rule was justified on the ground that involuntary statements are inherently unreliable. That justification is, however, inconsistent with the principle which the case established, that while an involuntary statement is inadmissible real evidence which comes to light as a result of such a statement is not. Two points are noteworthy. First, there can ordinarily be no surer proof of the reliability of an involuntary statement than the finding of real evidence as a direct result of it, as was so in *Warickshall's* case itself, but that has never been treated as undermining the rule. Secondly, there is an obvious anomaly in treating an involuntary statement as inadmissible while treating as admissible evidence which would never have come to light but for the involuntary statement. But this is an anomaly which the English common law has accepted, no doubt regarding it as a pragmatic compromise between the rejection of the involuntary statement and the practical desirability of relying on probative evidence which can be adduced without the need to rely on the involuntary statement.

17. Later decisions make clear that while the inherent unreliability of involuntary statements is one of the reasons for holding them to be

inadmissible there are other compelling reasons also. In *Lam Chi-ming v The Queen* [1991] 2 AC 212, 220, in a judgment delivered by Lord Griffiths, the Privy Council summarised the rationale of the exclusionary rule:

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

Lord Griffiths described the inadmissibility of a confession not proved to be voluntary as perhaps the most fundamental rule of the English criminal law. The rationale explained by Lord Griffiths was recently endorsed by the House in *R v Mushtaq* [2005] UKHL 25, [2005] 1 WLR 1513, paras 1, 7, 27, 45-46, 71. It is of course true, as counsel for the Secretary of State points out, that in cases such as these the attention of the court was directed to the behaviour of the police in the jurisdiction where the defendant was questioned and the trial was held. This was almost inevitably so. But it is noteworthy that in jurisdictions where the law is in general harmony with the English common law reliability has not been treated as the sole test of admissibility in this context. In *Rochin v California* 342 US 165 (1952) Frankfurter J, giving the opinion of the United States Supreme Court, held that a conviction had been obtained by "conduct that shocks the conscience" (p 172) and referred to a "general principle" that "States in their prosecutions respect certain decencies of civilized conduct" (p 173). He had earlier (p 169) referred to authority on the due process clause of the United States constitution which called for judgment whether proceedings "offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses." In *The People (Attorney General) v O'Brien* [1965] IR 142, 150, the Supreme Court of Ireland held, per Kingsmill Moore J, that "to countenance the use of evidence extracted or discovered by gross personal violence would, in my opinion, involve the State in moral defilement." The High Court of Australia, speaking of a discretion to exclude evidence, observed (per Barwick CJ in *R v Ireland* (1970) 126 CLR 321, 335), that "Convictions obtained by the aid of unlawful or unfair acts may be obtained at too high a price." In *R v Oickle* [2000] 2 SCR 3, a large majority of the Supreme Court of Canada cited with approval (para 66) an observation of Lamer J that "What should be

repressed vigorously is conduct on [the authorities'] part that shocks the community" and considered (para 69) that while the doctrines of oppression and inducements were primarily concerned with reliability, the confessions rule also extended to protect a broader concept of voluntariness that focused on the protection of the accused's rights and fairness in the criminal process.

Abuse of process

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

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

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

> My Lords, I have no doubt that the judiciary should accept this responsibility in the field of criminal law. . . ."

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

> "that the court, in order to protect its own process from being degraded and misused, must have the power to stay proceedings which have come before it and have only been made possible by acts which offend the court's conscience as being contrary to the rule of law. Those acts by providing a morally unacceptable foundation for the exercise of jurisdiction over the suspect taint the proposed trial and, if tolerated, will mean that the court's process has been abused."

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

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

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

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

22. The fourth authority relied on for its statements of principle was *R v Looseley, Attorney General's Reference (No 3 of 2000)* [2001] UKHL 53, [2001] 1 WLR 2060, which concerned cases of alleged entrapment. At the outset of his opinion (para 1) my noble and learned friend Lord Nicholls of Birkenhead declared that:

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

A stay is granted in a case of entrapment not to discipline the police (para 17) but because it is improper for there to be a prosecution at all

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

THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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

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

25. Article 6 of the Convention guarantees the right to a fair trial. Different views have in the past been expressed on whether, for purposes of article 6, the proceedings before SIAC are to be regarded as civil or criminal. Rather than pursue this debate the parties are agreed that the appellants' challenge to their detention pursuant to the Secretary of State's certification in any event falls within article 5(4). That provision entitles anyone deprived of his liberty by arrest or detention to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful. It is well-established that such proceedings must satisfy the

basic requirements of a fair trial: *Garcia Alva v Germany* (2001) 37 EHRR 335; *R (West) v Parole Board, R (Smith) v Parole Board (No 2)* [2005] UKHL 1, [2005] 1 WLR 350. Sensibly, therefore, the parties are agreed that the applicability of article 6 should be left open and the issue resolved on the premise that article 5(4) applies.

26. The Secretary of State submits that under the Convention the admissibility of evidence is a matter left to be decided under national law; that under the relevant national law, namely, the 2001 Act and the Rules, the evidence which the Secretary of State seeks to adduce is admissible before SIAC; and that accordingly the admission of this evidence cannot be said to undermine the fairness of the proceedings. I shall consider the effect of the statutory scheme in more detail below. The first of these propositions is, however, only half true. It is correct that the European Court of Human Rights has consistently declined to articulate evidential rules to be applied in all member states and has preferred to leave such rules to be governed by national law: see, for example, *Schenk v Switzerland* (1988) 13 EHRR 242, para 46; *Ferrantelli and Santangelo v Italy* (1996) 23 EHRR 288, para 48; *Khan v United Kingdom* (2000) 31 EHRR 1016, para 34. It has done so even where, as in *Khan*, evidence was acknowledged to have been obtained unlawfully and in breach of another article of the Convention. But in these cases and others the court has also insisted on its responsibility to ensure that the proceedings, viewed overall on the particular facts, have been fair, and it has recognised that the way in which evidence has been obtained or used may be such as to render the proceedings unfair. Such was its conclusion in *Saunders v United Kingdom* (1996) 23 EHRR 313, a case of compulsory questioning, and in *Teixeira de Castro v Portugal* (1998) 28 EHRR 101, para 39, a case of entrapment. A similar view would have been taken by the Commission in the much earlier case of *Austria v Italy* (1963) 6 YB 740, 784, had it concluded that the victims whom Austria represented had been subjected to maltreatment with the aim of extracting confessions. But the Commission observed that article 6(2) could only be regarded as being violated if the court subsequently accepted as evidence any admissions extorted in this manner. This was a point made by my noble and learned friend Lord Hoffmann in the much more recent devolution case of *Montgomery v H M Advocate, Coulter v H M Advocate* [2003] 1 AC 641, 649, when he observed:

> "Of course events before the trial may create the conditions for an unfair determination of the charge. For example, an accused who is convicted on evidence obtained from him by torture has not had a fair trial. But the breach of article 6(1) lies not in the use of torture