by Tunisian authorities, provided such grounds, at [146], especially as Tunisia's *notes verbales* had fallen short of an unequivocal undertaking not to use torture, at [147]: the existence of laws protecting rights and accession to international human-rights treaties were not sufficient evidence of effective protection against ill-treatment where "reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention." Even if clear assurances had been given, the Court would have had to decide whether they adequately guaranteed protection, at [148]. As a result, deporting Mr. Saadi would be a violation of Article 3, at [149].

This rejection of attempts by some governments to overturn fundamental principles is welcome. The guidance on the burden of proof is already affecting domestic decision-making: see *AS and another (Libya)* v. *Secretary of State for the Home Department* [2008] EWCA Civ. 289, [2008] All E.R. (D.) 129 (Apr.); and it prompts questions about the majority decision of the House of Lords in *A* v. *Secretary of State for the Home Department (No. 2)* [2005] UKHL 71, [2006] 2 A.C. 221, that a detainee bears the burden of establishing on a balance of probabilities that evidence in his case was obtained by torture abroad. The judgment in *Saadi* reaffirms fundamental values of humanity: a society which fails to treat terrorism suspects with more respect than terrorists have for society forfeits the moral justification for defending itself.

DAVID FELDMAN

QUASHING CONVICTIONS FOR PROCEDURAL IRREGULARITIES

IN 1995, a group of men burst into a pub in Rubery, near Birmingham, and viciously attacked another customer, partly cutting off his hands. For this, Clarke and McDaid were convicted in 1997 for causing grievous bodily harm and sentenced to twelve years apiece. Many years afterwards, the Criminal Cases Review Commission (surprisingly, it might be thought) referred their case back to the Court of Appeal because the indictment on which they had been tried had not been "signed by the appropriate officer", as the law requires. The Court of Appeal dismissed the appeal, holding that this defect in the procedure was what American lawyers neatly term a "harmless error": [2006] EWCA Crim 1196. The House of Lords disagreed. The failure to observe this formality, it said, had made the whole trial void, and the convictions therefore must be set aside: see *R.* v. *Clarke and*

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McDaid [2008] UKHL 8, [2008] 1 W.L.R. 338. No retrial was ordered, because by now the appellants had served their sentences.

Lawyers generally accept that some procedural errors are grave enough to justify the quashing of a conviction, irrespective of the defendant's factual guilt. But the question is, of course, "which ones?" An obvious case is where the court that tried the defendant had no jurisdiction: for example, if the magistrates' court had purported to try a murder. But what, in general terms, is the test by which the courts should decide the cases that are less obvious – in particular, those where, as here, the procedural rule derives from statute?

At one time, the courts asked themselves whether the rule in question was "mandatory", when its non-observance would invalidate the proceedings automatically, or "directory", when it would do so only when the defendant could show that the breach of the rule had actually hampered his defence. But this approach, of course, really only amounted to asking the same question phrased in different terms, and in a series of recent decisions the Court of Appeal – adopting the approach taken by the House of Lords in the related context of irregularly-made confiscation orders (*R.* v. *Soneji* [2005] UKHL 2954, [2006] 1 A.C. 340) – had said the court should ask itself what consequence Parliament had intended to follow if the rule it had enacted was not observed. In *Clarke and McDaid*, the House of Lords, like the Court of Appeal below, endorsed this as the correct approach; but the House of Lords, unlike the Court of Appeal, had no doubt that Parliament, when enacting the statutory requirement that the indictment be signed by the "proper officer" of the court, really did envisage that a failure to observe this formality would make the resulting trial a nullity.

At first sight this conclusion looks surprising. However, on closer examination it is less so. Trial on indictment presupposes, obviously, the existence of "an indictment". Historically, an indictment came into existence when a Grand Jury, presented with a "bill", *i.e.* a draft, examined the key witnesses in the Grand Jury room, and if satisfied that the evidence supported the allegations contained in it, pronounced it "a true bill". This was done with various quaint formalities, originally designed to ensure that the newly-born indictment was not altered before it reached the court. As Lord Carswell reminded us, at [33], "In some assize courts… it was literally handed down from the gallery of the court, placed in a clip at the end of a long pole held by a tipstaff in the body of the court". When Grand Juries were abolished by the Administration of Justice (Miscellaneous Provisions) Act 1933, a new set of formalities was prescribed to replace the old, the central part of which was that the "proper officer" of the court should check the bill to ensure its contents were supported by the

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depositions witnesses had given at the committal proceedings, and certify by his signature that he had done so.

Today, when indictments are usually drafted "in house" by the court staff or else by the staff of the CPS, these formalities appear to have little purpose. But 75 years ago, when bills were often submitted by private prosecutors, they would not have seemed so. And, as Lord Bingham pointed out in his speech, our internal legislation must be interpreted in the light of the intention of the Parliament that enacted it; unlike the European Court of Human Rights when interpreting the Convention, our courts do not adopt the "living instrument" approach. Furthermore, until the decision in *R.* v. *Ashton, Draz and O'Reilly* [2006] EWCA Crim 794, [2007] 1 W.L.R. 181 (noted in [2007] C.L.J. 284), which the Court of Appeal had followed in the present case, the courts had always held that trials on an unsigned bill of indictment were a nullity. Parliament, ever active in the area of criminal justice, could have reversed this case-law if it had wanted to, but it had not.

The decision in *Ashton* was part of a group of cases in which the appeal courts, influenced by the fact that the Criminal Procedure Rules 2005 now declare the "overriding objective" of criminal proceedings to be dealing with cases "justly", and add that "justly" involves (*inter alia*) acquitting the innocent and convicting the guilty, have sought to instil a new and less technical approach. This "overriding objective", and the cases that rely on it, have been roundly condemned by traditionally-minded commentators, who say that all of this is heresy and in conflict with the basic principles of "the adversarial system". Their joy at the House of Lords decision in this case is, of course, unbounded.

In my view, it is doubly misplaced. First, although it disagreed with the way the Court of Appeal had applied them in this case, the House of Lords thought that it had stated the relevant principles correctly, and expressed its general sympathy towards a less technical approach. And secondly, although some lawyers may think it excellent that manifestly guilty people should have their convictions quashed because of procedural irregularities that were minor, many ordinary people find this difficult to accept even where the breaches of the rules were gross and shocking. Indeed, with that in mind the Government recently sought to change the law so as to compel the Court of Appeal to uphold the conviction of any appellant of whose factual guilt it had no doubt. This part of the current Criminal Justice and Immigration Bill was eventually dropped: but only in the face of strenuous opposition. The more trivial the errors for which the appeal courts are prepared to quash the convictions of the obviously guilty, the more

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likely it becomes that a crude populist reform of this sort eventually succeeds.

J. R. SPENCER

THE EXECUTIVE, THE PAROLE BOARD AND ARTICLE 5 ECHR: PROGRESS WITHIN "AN UNHAPPY STATE OF AFFAIRS"?

OVER the course of three days, the Court of Appeal heard two applications concerning the functions of the Parole Board and the influence of Article 5 of the European Convention on Human Rights upon the manner in which it discharges its obligations. The functions of the Parole Board have changed considerably in recent years from being purely an advisory body, to one having both advisory and judicial functions. These functions have developed following a series of decisions in Strasbourg including *Weeks* v. *United Kingdom* (1988) 10 E.H.R.R. 293, *Thynne, Wilson and Gunnell* v. *United Kingdom* (1991) 13 E.H.R.R. 666 and *Stafford* v. *United Kingdom* (2002) 35 E.H.R.R. 32, as well as a number of UK judgments. As a result of these decisions, the Board has to determine the lawfulness of the continued detention of an offender following the punishment element of his prison sentence.

The statutory context influencing the applications in the Court of Appeal included *inter alia* the provisions of the Criminal Justice Act 2003 ("the CJA"). The Parole Board is currently established under section 239 and Schedule 19 of the CJA and is an Executive Non-Departmental Government Body, enabling it to perform its functions free of government control. These provisions also deal with the composition of the Board, as well as enabling the Secretary of State to give "directions as to the matters to be taken into account by it in discharging its functions," having regard to the protection of the public, the prevention of further offending and rehabilitation of offenders (s. 239 (6)). The Board is required as part of its decision-making to consider documents supplied by the Secretary of State and "other oral or written information obtained by it" (s.239 (3)). Section 225 of the Act requires the court to impose either life sentences or sentences of imprisonment for public protection ("IPPs") where there is a "significant risk" of "serious harm" associated with "the commission … of further specified offences".

In *R (Brooke)* v. *Parole Board* [2008] EWCA Civ 29 the Secretary of State for Justice appealed against a declaration made by the Divisional Court that the Parole Board fails to meet the requirements of Article 5 (4) ECHR: the entitlement as part of the right to liberty to

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