the satisfaction of Jordanian courts the burden placed on them by local law of proving that the information had been extracted under torture, the Court of Appeal concluded that deportation would create a real risk of a flagrant denial of justice.

The Law Lords, however, held that SIAC had been entitled to conclude that it would not, on the basis that Jordanian law provided machinery for the exclusion of evidence obtained through torture and that it could not be said that it was probable that such machinery would not be properly used. The *risk* that it might not, said Lord Hoffmann, was not enough to make deportation unlawful. He went on to say that the perverse effect of taking any other view would be to hold the Jordanian courts to a higher standard than that which applies domestically. This assertion is based on a somewhat unsubtle reading of *A* v. *Home Secretary (No. 2)* [2005] UKHL 71, [2006] 2 A.C. 221, in which it was held that once litigants in English courts have advanced a "plausible reason" why evidence may have been obtained by torture, it is for the court to investigate the matter and exclude the evidence if satisfied that torture was probably used. A three-judge minority (of which, perplexingly, Lord Hoffmann was a member) went further, arguing that an exclusionary rule would be worthless unless courts were required to exclude material whenever not satisfied that it had *not* been obtained through torture. The fact that Jordan's courts fall short of both of these standards failed to persuade the Law Lords in *RB* that SIAC had not been entitled to conclude that the appellant's deportation would be lawful. It is clear therefore that the protection afforded by the flagrant denial of justice test is largely if not wholly illusory. Whether, in the absence of clear authority from the European Court, the Convention should be interpreted as preventing individuals who are regarded as a threat to national security from being condemned to the prospect of life imprisonment at the hands of a legal regime in which the use of evidence extracted under torture is at least a real risk is not an entirely clear-cut question. But the Appellate Committee's answer to it renders somewhat empty Lord Hope's enthusiastic endorsement of the principle that member states must secure to *everyone* within their jurisdiction the rights set out in the ECHR, such that "aliens" and nationals must be protected alike – without discrimination, and however "dangerous", "despicable" or "disgusting" they might be.

MARK ELLIOTT

EXTRADITION AND LIFE IMPRISONMENT

THE European Court of Human Rights' well-known judgment in *Soering* v. *United Kingdom* (1989) 11 E.H.R.R. 439 established the

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non-refoulement principle within the scope of Article 3 of the European Convention on Human Rights (ECHR): that the surrender or extradition of a person from an ECHR state party to another country where there is a serious risk that this person could be subjected to torture or to inhuman or degrading treatment or punishment would amount to a violation of Article 3. ECHR member states no longer extradite individuals without adequate assurances that they will not be subjected to the death penalty. In *R (Wellington)* v. *Secretary of State for the Home Department* [2008] UKHL 72, [2009] 1 A.C. 335, the House of Lords grappled with the difficult question whether a sentence of life imprisonment imposed by the state seeking extradition raises an issue under Article 3 ECHR.

The appellant was charged in the US state of Missouri with murder in the first degree of two persons. The prescribed penalty for this crime was a mandatory life sentence, without eligibility for probation, parole or release except by an act of the Governor of Missouri. The appellant was arrested in London, and the United States requested his extradition. *Wellington* thus raised two basic issues. First, whether the sentence in question would amount to inhuman or degrading treatment or punishment contrary to Article 3 ECHR if it had been imposed in an ECHR state party, such as the UK. Second, whether the clearly important interest that states have in facilitating extradition has any relevance to whether the risk of the punishment in question could violate Article 3.

On the first issue, their Lordships started their analysis from the leading Strasbourg authority on the matter, *Kafkaris* v. *Cyprus*, Application No 21906/04, 12 February 2008. That case also concerned a mandatory life sentence for murder, from which there could again be no eligibility for parole save for executive clemency. The applicant had argued that, because a life sentence without the possibility of parole denied any prospect that the convicted person could be rehabilitated and reintegrated into society, a necessary condition for the legitimacy of any criminal punishment, such a sentence was inhuman and violated Article 3. In a rather cryptic statement, the Court held that "the imposition of an irreducible life sentence on an adult *may raise an issue* under Article 3" (*Kafkaris*, at [97], emphasis added). However, because Cypriot law allowed for executive clemency, a possibility which existed not only *de jure* but also *de facto*, the life sentence in question was not irreducible, and no Article 3 issue arose (*Kafkaris*, at [102]–[103]).

Thus, to apply *Kafkaris* in *Wellington*, the House had to answer two questions: (1) whether the life sentence imposed in Missouri was reducible both *de jure* and *de facto*, and (2) if it was irreducible, would this amount to a violation of Article 3 ECHR, even though the European Court had held that this "may raise an issue" under this

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Article, thus implying that an irreducible life sentence would not *necessarily* infringe it. In the opinion of Lord Hoffmann, at [34], who delivered the leading speech, though the possibility of executive clemency for the appellant in Missouri was remote, that did not render his eventual life sentence irreducible anymore than it did in *Kafkaris*. Their Lordships unanimously agreed (Lord Scott at [37]; Baroness Hale at [48]; Lord Carswell at [61]; Lord Brown at [79], though expressing some doubts). Lord Hoffmann further held that, even if the life sentence was irreducible, this did not necessarily mean that it *ipso facto* infringed upon Article 3, though it could indeed do so in the particular circumstances of a given case (at [19]). Their Lordships again agreed (Lord Scott at [43]–[47]; Baroness Hale at [48]; Lord Carswell at [60]; Lord Brown at [81]).

This brings us to the second major issue in *Wellington*. Assuming that the life sentence was irreducible, and that an irreducible life sentence was not a *per se* violation of Article 3, the question still remained whether such a sentence would constitute a violation on the particular facts. At this point the extradition setting becomes relevant. Lord Hoffmann invoked a *dictum* of the European Court in *Soering*, where the Court stated, at [89], that

> [T]he establishment of safe havens for fugitives would not only result in danger for the State obliged to harbour the protected person but also tend to undermine the foundations of extradition. These considerations must also be included among the factors to be taken into account in the interpretation and application of the notions of inhuman and degrading treatment or punishment in extradition cases.

This, in Lord Hoffmann's view, meant that the desirability of extradition should be taken into account in assessing whether the punishment in question reached the "minimum level of severity" needed to violate Article 3 ECHR. Article 3 would apply only in attenuated and relative form – that a particular practice qualified as inhuman or degrading treatment if used in an ECHR member state would not necessarily mean that it should so qualify in an extradition setting (*Wellington*, at [20]–[33], [35]–[36]). Thus, even if an irreducible life sentence was a violation of Article 3 in a domestic setting, it need not be so in an extradition setting. This indeed proved to be the most contentious issue in the case, with two other Law Lords agreeing (Baroness Hale at [49]–[53]; Lord Carswell at [56]–[58]), and two disagreeing (Lord Scott at [37]–[42]; Lord Brown at [85]–[87]), with Lord Hoffmann.

To the present author, their Lordships' unanimous ruling that the life sentence in question was not irreducible, and that even if it was this would not amount to a *per se* violation of Article 3 seems

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unimpeachable – though the Strasbourg case law on the latter point might change in the future. The majority's relativistic approach to defining inhuman or degrading treatment under Article 3 is much more troubling. It is certainly true that Lord Hoffmann found support for his holding in *Soering*. It is likewise true that the issue whether rehabilitation or redemption must be a necessary component of any criminal punishment requires a value judgment, which courts are not equipped to make any better than (foreign) legislatures. But if there is any human right that must be universal, rather than culturally relative, then this is the prohibition of *inhuman* treatment. Lord Scott's critique of Lord Hoffmann's position, as well as his admonishment that the threshold for inhuman treatment consequently must be high to remain universal, thus seem more convincing.

MARKO MILANOVIĆ

NO CURE FOR A BREACH OF THE RIGHT TO BE HEARD

THE Care Standards Act 2000 regulates the conduct of about 900,000 care workers. Most care workers are dedicated professionals, but a small minority may actually pose a threat to the vulnerable adults entrusted to their care. Part IV of the Care Standards Act 2000 therefore provides for such workers to be placed on a list of persons considered unsuitable to work with vulnerable adults (the "POVA list"). Inclusion in the POVA list deprives a person of his employment as a carer and prevents him from obtaining any other care jobs. The question for the House of Lords in *R (Wright)* v. *Health Secretary* [2009] UKHL 3, [2009] 2 W.L.R. 267 was whether it was compatible with Articles 6 and 8 ECHR for a care worker to be provisionally included in the POVA list without first being given a hearing. The case illustrates the importance of the right to be heard and it also establishes limits to the interpretative duty in section 3 of the Human Rights Act 1998.

Under section 82(4) of the 2000 Act if, based on information submitted in a reference made to him, the Secretary of State considered it might be appropriate for a worker to be included on the POVA list, he had to include the worker on the list provisionally pending determination of the reference. Care workers were given a hearing before determination of the reference, but not before provisional listing. The four applicants had been provisionally placed on the POVA list. After more than six months, three of them were informed that the Secretary of State had determined their references and decided not to confirm their names on the list. The fourth applicant's name was confirmed, but she successfully appealed to the Care Standards Tribunal and her name

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