CT.

This is the judgment to be handed down on Wednesday 07 April 2004 at 11.30am in The Central Criminal Court Old Bailey Court No 1. It is confidential to Counsel and Solicitors, but the substance may be communicated to the client not more than one hour before the giving of the judgment.

Case No: T2203 7676

SITTING IN THE CENTRAL CRIMINAL COURT (OLD BAILEY)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07 April 2004

Before :

THE HONOURABLE MR JUSTICE TREACY

R
- v -
ZARDAD

Mr James Lewis QC (7400 6400) & Mr Khawar Qureshi(instructed by **CPS Solicitors**) for the **Crown**
Mr Anthony Jennings QC & Ms Alison McDonald & Marcus Bennell (7404 3447) (instructed by **O'Keefe, Solicitors**) for the **Defence**

Hearing dates: 24.03.04 – 25.03.2004

JUDGMENT and RULINGS PURSUANT TO A PREPARATORY HEARING HELD UNDER s.29 OF THE CRIMINAL PROCEDURE and INVESTIGATIONS ACT 1996

The Honourable Mr Justice Treacy:

1. On 24 and 25 March 2004 at the Central Criminal Court I held a preparatory hearing pursuant to Section 29 of the Criminal Procedure and Investigations Act 1996. The Defence submitted that there were two matters which properly came within the scope of such a hearing. Firstly, the question of whether the Defendant was a public official or person acting in an official capacity for the purposes of the offence of torture contrary to Section 134 of the Criminal Justice Act 1988. Secondly, the issue of admissibility of identification evidence by video procedures in this case.

2. The Defendant Mr Zardad was not present on either of the two days upon which the hearing took place. I was told that he is in custody and was ill but that he was aware of the proceedings and that the proceedings have gone ahead with his knowledge and consent. I have been given that assurance on both days of the hearing.

The "Public Official" issue

3. In relation to torture, the Prosecution are electing to pursue a conspiracy charge, but that will involve a consideration of the provisions of Section 134 of the Criminal Justice Act 1988 since the conspiracy alleged is one which is asserted to involve activity which would necessarily amount to or involve the commission of the offence of torture.

   Section 134 (1) of the Criminal Justice Act 1988 provides that:

   > "A public official or a person acting in an official capacity, whatever his nationality, commits the offence of torture if in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another in the performance or purported performance of his official duties".

4. The point raised by the Defence is that this Defendant, Mr Zardad, is not "a public official or person acting in an official capacity". This is the first case of its kind under English Law. There is therefore no existing domestic precedent to assist me as to the construction of the phrase or as to the application of Section 134 (1).

5. Section 134 was enacted into English Law as a result of the United Kingdom becoming a signatory in March 1985 to the United Nations Convention Against Torture. The compliance of state signatories with the Convention is monitored by the United Nations Committee Against Torture (CAT) which considers state compliance in general terms. It also hears individual complaints through which it has built up a body of case law.

6. Section 134 closely follows the wording of Article 1 of the Convention in its definition of torture, in particular, it provides that torture takes place when severe pain or suffering is inflicted by "a public official or other person acting in an official capacity". The reasoning is no doubt to make crimes committed by public officials or those purporting to act as such punishable within the international community now that the offence of torture has entered the lexicon of international crimes. If the acts are committed by a private individual or person acting in a private capacity then the view is taken that those matters should be dealt with internally by the country or state having authority over the individual concerned.

7. The Defence submission is that there is no evidence, or alternatively insufficient evidence, upon which a properly directed jury could find that Mr Zardad was either a public official or a person acting in an official capacity at the time he is alleged to have committed these offences. Their central argument is that the Defendant was not a public official since (1) there was a recognised government in Afghanistan at the time and (2) the group to which the Defendant belonged was not a part of that government and indeed was actively opposed to it.

8. The Crown says that Mr Zardad was a public official or person acting in an official capacity. They claim that they can demonstrate this from the evidence. They submit that the evidence supports such a finding either on the basis that Mr Zardad was a public official de jure or, alternatively, that he was a person acting in an official capacity de facto.

9. Both parties agree that in order for the Court to come to the correct interpretation of Section 134 (1) it is relevant to look at international material as an aid to interpretation. They agree that the definition of "public official or person acting in an official capacity" should be consonant with that in the Torture Convention. In that context I have been referred to international case law where this issue has arisen.

10. The evidence upon which I must make my decision is contained in the witness statements and the exhibits thereto and it is on the basis of that material that I must rule. I mention this because each side in the course of the hearing submitted to me various materials garnered from the Internet. Those materials are not supported by witness statements. They purport to give histories of the recent past in Afghanistan and to explain the various developments which took place in the internal politics of that country. Like all history, the matters referred to in these documents are open to interpretation and are likely to reflect inferences and nuances imported by the authors of the documentation itself. Whilst this material has been interesting and informative background material I have not relied on any of it as a basis for the evidential examination which I must undertake at this stage of the case.

11. The factual background as I have gleaned it from the case papers is as follows: In 1989 the Russians left Afghanistan. From that time until 1992 a puppet President, Najibullah, was left in power. He resigned in 1992 and the Afghan Interim Government was formed. That consisted of an uneasy alliance of seven factions of the Mujahedeen-I-Islami. The major factions were the Hezb-I-Islami and the Jamiat-Islami. There was a civil war being fought between those factions. In order to stop the fighting the Pakistani Government put pressure on the factions and a Peace Accord was signed in Islamabad in March 1993. Mr Rabbani of the Jamiat-Islami became President of Afghanistan and, according to the document, Gulbaddin Hekmatyar of the Hezb-I-Islami was to be Prime Minister. In fact Hekmatyar never ventured into Kabul to take up his appointment. The evidence is conflicting as to whether he accepted the post or whether he sent a representative into Kabul to look after his interests, or whether he took up his post at all. The reality is that the signing of the accord had little practical effect. The civil war between the two factions continued. They each had their spheres of influence and control which remained unaffected by the signing of the document. In particular Mr Rabbani and the Jamiat-Islami controlled Kabul and most of Northern Afghanistan. Hekmatyar and his faction controlled the southern- most part of Kabul and the Laghman Province in which the town of Sarobi is located. Those areas of geographical control appeared to have remained relatively static during the period between 1993 and 1996. Civil war

between the factions continued over that period. It only ceased in 1996 when Rabbani, Hekmatyar and others put aside their differences and combined to meet a new threat. The new threat was the incursion of the Taliban which gradually seized control of Afghanistan moving from the south towards Kabul, and eventually taking control of Kabul the second half of 1996.

12. This case is concerned with the period when the Hezb-I-Islami faction was in control of Laghman Province including the area of Sarobi and it represents a period spanning 1992 to 1996. During that period Zardad was a chief commander of the Hezb-I-Islami. Hekmatyar was the leader of the Hezb-I-Islami. Zardad held the post of General and had something like 1,000 men under his command.

13. The town of Sarobi was on one of the two major routes into Kabul from Pakistan. It was of strategic importance. Hekmatyar controlled that route as well as the other main route into Kabul and he also controlled much of the surrounding areas. Part of his strategy in his conflict with Rabbani and the Jamiat-Islami was to prevent convoys reaching Kabul from the south. Zardad played a role as the military controller of Sarobi and controlled therefore one of the checkpoints on the route into Kabul.

14. It is alleged that in the course of his exercise of authority in the Sarobi area that Zardad, together with his subordinates, entered into an agreement to pursue a course of conduct which would necessarily amount to the commission of the offences of torture and hostage taking. There is a substantial body of evidence which would support an allegation that activities such as hostage taking and the meting out of severe violence was a regular occurrence at the Sarobi checkpoints. That represents a very general overview of the situation with which this case is concerned. It will be necessary to return to a more detailed examination of some aspects later in this judgment.

15. The Defence submission, reduced to essentials, is that the existence of the Rabbani government in Kabul at the relevant time operates in effect as a trump card from their point of view. They say that once there was a government in place, then the group of which the Defendant was a member is nothing more than a rebel faction. Thus it is said that the Defendant could not come within the definition of public official.

16. Both sides drew attention to the decision of the CAT in *Elmi v Australia* Communication No 120/1998. In that case the CAT had to decide whether a member of a clan which controlled most of Mogadishu, the capital of Somalia, was a public official within the meaning of the Convention. The critical findings of the Committee are set out at paragraph 6.5 of the judgment:

> "The Committee notes that for a number of years Somalia has been without a central government, that the international community negotiates with the warring factions, and that some of the factions operating in Mogadishu have set up quasi-governmental institutions and are negotiating the establishment of a common administration. It follows then that, de facto, these factions exercise certain prerogatives that are comparable to those normally exercised by legitimate governments. Accordingly, the members of those factions can fall, for the purposes of the application of the Convention, within the

> phrase "Public officials or other persons acting in an official capacity" contained in Article 1 of the Convention."

The Defence contended that that decision, which was relied on by the Crown, had to be viewed in the light of the subsequent decision of the CAT in the case of *HMHI v Australia* Communication No. 177/2001. Again the CAT was concerned with the situation in Somalia but by the time of the hearing of this case the situation in Somalia was considerably more stable than that which had existed at the time of the *Elmi* hearing. In particular, in August 2000 a Transitional National Assembly had been elected along clan lines with minority as well as dominant clans represented. In October 2000 the new Prime Minister had been appointed and he appointed a cabinet of ministers from all major clans. The Transitional National Government had been recognised by the international community as the effective government of Somalia.

17. At paragraph 6.4 of its decision the CAT said:

> "In *Elmi v Australia* the Committee considered that in the exceptional circumstance of state authority that was wholly lacking, acts by groups exercising quasi governmental authority could fall within the definition of Article 1.. The Committee considers that with three years having elapsed since the *Elmi* decision, Somalia currently possesses a state authority in the form of Transitional National Government which has relations with the international community within its capacity as central government, though some doubts may exist as to the reach of its territorial authority and its permanence. Accordingly, the Committee does not consider this case to fall within the exceptional situation in *Elmi*, and takes the view that acts of such entities as are now in Somalia commonly fall outside the scope of ..... the Convention."

18. The Defence rely on this latter authority in support of its submission that it is not possible for Zardad, in the circumstances of this case, to be a public official or person acting in an official capacity.

19. The Defence submit that a person can be a public official either de jure or de facto, and that a de jure public official is one who is appointed on the authority of a recognised government. They go on to say that only in exceptional circumstances can a person who is not a de jure public official be a de facto public official for the purposes of the Convention. They say that such exceptional circumstances are confined solely to situations where state authority is "wholly lacking". They say that, if there is a de jure state authority, then, even if doubts exist as to the reach of its territorial authority and its permanence, members of a group which is in effective control of an area beyond the government's authority do not constitute public officials. They submit that effective control is not a sufficient test. There must be effective control and a complete lack of state authority.

20. The Defence therefore argues that it is not sufficient for the Prosecution to claim that since the Defendant was part of a group which exercised control over part of Afghanistan he was a de facto public official. They submit that the Prosecution must show either that there was no state authority in Afghanistan at the relevant time or, if there was a state authority, the Defendant owes his position to that authority. In other

words the concept of a de facto public official only has meaning in the complete absence of a government.

21. They pointed to a significant number of prosecution witnesses who speak of Zardad's side in the conflict as being in opposition to and conflict with the government of Rabbani. Therefore it is argued Zardad cannot be a de jure official because he is not part of Rabbani's government. Secondly, he cannot be a de facto official because Rabbani's government exists and he is merely part of a rebel opposition and cannot hold public office.

22. The Defence further submit that although Hekmatyar signed the accord in March 1993 he never exercised power as Prime Minister, notwithstanding what the accord may say, and in reality, at all material times, was not a part of the Rabbani government but was somebody who was in armed opposition to it and controlling an area of the country as part of that exercise of opposition. Therefore, there could be no question of Zardad holding a de jure appointment as a public official as a result of any appointment made by Hekmatyar.

23. The Prosecution submit that Zardad held a post de jure because Hekmatyar was Prime Minister under the Islamabad accord. Alternatively, they say Zardad held a post as a public official de facto because his faction in the civil war held control of a an area of Afghanistan in such a way as to amount to a governmental authority.

24. The Crown drew attention to the case of *Furundzija* a decision of the International Tribunal for the Territory of Former Yugoslavia, (dated 10 December 1998: IT-95-17 H-T). This was a case where a Croatian community had broken away from the recognised state of Bosnia and Herzegovina and where Mr Furundzija was a Police Officer in the new breakaway state which was involved in armed conflict with the forces of the recognised state. The question of whether Furundzija was a public official or in similar position was an issue for determination by the Tribunal.

25. At paragraph 59 of the decision the Tribunal adopted tests to be applied in determining the existence of an armed conflict as:

> "an armed conflict exists whenever there is resort to armed force between states or protracted armed violence between governmental authorities and organised armed groups or between such groups within a state."

26. The Crown also pointed to paragraph 162 where the Tribunal, whilst recognising that the Article 1 definition of torture applies to any instance of torture whether in time of peace or of armed conflict, went on to say that it is appropriate to identify elements that pertain to torture when considered in relation to armed conflict. One element highlighted by the Crown was:

> "(v) at least one of the persons involved in the torture process must be a public official or must at any rate act in a non-private capacity, e.g. as a de facto organ of a state or any other authority-wielding entity."

27. The Crown submitted that if the government was not controlling the whole of Afghanistan and there was another authority-wielding entity with its own structures in place, that comes within the ambit of Section 134. They submit that the test cannot

simply be one of whether there is a government in place. Merely to apply that test would not face the realities of many a situation and would leave a substantial gap in the implementation of Section 134. They referred to the decision of the United States Court of Appeal for the Second Circuit in the case of *Kadic v Karadzic,* a decision of 13 October 1995. This case, too, concerned a consideration of the Convention Against Torture which had entered United States law. In its judgment the Court said this:

> "The customary international law of human rights, such as the proscription of official torture applies to states without distinction between recognised and unrecognised states .... It would be anomalous indeed if non recognition by the United States which typically reflects disfavour with a foreign regime (sometimes due to Human Rights abuses) had the perverse effect of shielding officials of the unrecognised regime from liability for those violations of international law norms that apply only to state actor. The appellants' allegations entitle them to prove that Karadzic's regime satisfies the criteria for a state for purposes of those international law violations requiring state action. Srpska is alleged to control defined territory, control populations within its power and to have entered into agreements with other governments. It has a president, a legislator and its own currency. These circumstances readily appear to satisfy the criteria for a state in all aspects of international law. Moreover, it is likely that the state action concept, where applicable for some violations like "official" torture, requires merely the semblance of official authority. The enquiry, after all, is whether a person purporting to wield official power has exceeded internationally recognised standards of civilised conduct, not whether statehood in all its formal aspects exist."

28. The Crown therefore submits that for a person to act in an official capacity, that is as a de facto public official, there are the following touchstones: (1) there must be a semblance of official authority, (2) that person must be acting as part of an authority-wielding entity with exclusive de facto power in that area, (3) the person must be acting or purporting to act in a non-private capacity.

29. They rely on paragraph 6.5 of the *Elmi* decision where it indicates that where factions exercise certain prerogatives comparable to those normally exercised by legitimate governments, members of those factions can fall within the phrase "public officials or other persons acting in an official capacity" contained in Article 1. They submit that the phrase contained in paragraph 6.4 of the *HMHI* decision, "exceptional circumstance of state authority that was wholly lacking", should not be construed as if it were the words of a statute. They submit that the Defence has fallen into error in claiming that the mere fact that there exists a central government will necessarily exclude de facto officialdom. They say that to import such a construction into Section 134 would put that section into a straightjacket which is at odds with the purpose and intent of the Convention Against Torture and Section 134 itself. They say that, based on a consideration of the authorities already referred to, what is required is that there must be an authority-wielding entity with exclusive de facto power in a particular area. If that exists, then those who act for or on behalf of that authority or purport so

to do are, within the meaning of Section 134, public officials or persons acting in an official capacity. The Crown submit that they come within the ambit of the latter part of the phrase, namely "persons acting in an official capacity".

30. I remind myself that I am not determining the conflicting evidential issues between the parties. I am at this stage considering whether there is shown on the face of the papers sufficient evidence for a properly directed jury to be sure that this Defendant was, at the material time, a public official or a person acting in an official capacity. In relation, first of all, to the question of whether Zardad was a de jure public official, the basis upon which this is put forward is that Hekmatyar was the Prime Minister, and therefore in an official capacity in the government, and since Zardad was his military commander his appointment must therefore be regarded as an official one. There is in fact no clear evidence of any appointment of Zardad by Hekmatyar, let alone one after Hekmatyar signed the Islamabad accord which stated that he was to be Prime Minister. The evidence tends to show an association between the two going back many years prior to 1992 and there was no evidence of any change of status or official appointment of Zardad at any time that is relevant to this indictment. Zardad acted as a military commander for the faction headed by Hekmatyar over a number of years dating back into the 1980's. Further, there is no safe evidence that the accord which was signed affected the realities of the position in Afghanistan. The factions which signed the accord continued to dominate their respective areas, and a national government embracing the Hekmatyar faction simply does not seem to have been formed in any way that is demonstrated by the evidence. The war and civil strife between the factions continued. The factions maintained their control of areas that they had hitherto controlled and hostilities continued until they made their alliance in the face of the Taliban threat in 1996. The evidence further is entirely nebulous in my view as to whether Hekmatyar actually became Prime Minister. Additionally, there is no evidence to show that Zardad was ever acting on behalf of or with the approval of the Rabbani government. Indeed the balance of the evidence shows that he was leading military campaigns opposed to that government, and that from time to time he took hostage those on the government side as part of that campaign. In my judgment the evidence proffered by the Crown is at present wholly insufficient for a jury to come to the conclusion that Zardad was a de jure public official in his holding of a post as a military commander in the Hezb-I-Islami faction. Accordingly, if I were directing a jury I would be directing them in terms that applying the de jure test there was no evidence upon which they could properly find that Zardad was a public official. I so rule.

31. In relation to the question of whether Zardad is to be treated as a public official on a de facto basis, that is, a person acting in an official capacity, I note that the evidence does not all point in the same direction, but it seems to me that there is sufficient to show the following:

i) Hezb-I-Islami, both before and after the accord and until 1996, was a faction controlling a significant area of Afghanistan, including the Sarobi area. They had exclusive control of that area. Governmental authority in the form of the Rabbani government in Kabul did not hold sway in that area at all. Central government had no control of or practical responsibility for law and order there.

ii) The area controlled by Hezb-I-Islami was controlled essentially by military force.

iii) Zardad was in a senior position within that military force.

iv) The military force extended to thousands of men, probably tens of thousands. They were well drilled. They were provided with uniforms. They were very well armed with rifles, tanks, anti-aircraft guns, rocket launchers, jeeps and other military equipment. There was a clear command structure within that military force. The wages of the military force were paid by funds emanating from Hekmatyar.

v) The Defendant was in charge in the Sarobi area and had under his command something approaching 1,000 men.

vi) In Afghanistan tribal structure had been particularly strong for many centuries. The situation has been likened by the witness Alexander Gall to Britain in the 16th and 17th centuries, where a Monarch had to deal with powerful regional Barons who ran their own fiefdoms more or less independently.

vii) Central government control did not in practice extend south of the Kabul area.

viii) Within the area Hekmatyar controlled there were prisons for keeping both hostages and offenders in. They were run by Hezb-I-Islami which represented the only law enforcement authority in the area.

ix) Within that area the Defendant's organisation and the Defendant himself was party to mediating and resolving disputes between individuals.

x) Representatives of international organisations and aid agencies would make representations to the Defendant rather than go to any central government authority if their equipment was seized or delayed at the checkpoints for which this Defendant was responsible.

xi) The victims of maltreatment and alleged torture and hostage taking regarded Zardad and Hekmatyar as the only official authority in the area which was dominated and controlled by them.

xii) In interview the Defendant admitted that he was a general in Hekmatyar's army, that it had a command structure and that it was in charge of a particular area and in control of it. He admitted that he was in a position to arrest people who were lawbreakers. He stated that the government of Rabbani did not control Afghanistan and that the Hezb-I-Islami controlled the area which included Sarobi. He said that he himself had imprisoned wrongdoers whilst exercising his command, and that he himself would go around the area mediating if there were problems between people or helping people under the authority of Hekmatyar.

32. The Prosecution say that those matters which can be gleaned from the papers indicate that Zardad was akin to a Military Governor in control of a province and that he is to be regarded as a quasi-official and amenable to the provisions of Section 134.

33. The Defence say that those matters are in effect irrelevant because the Rabbani government existed in Kabul and it had a recognised Ambassador to the United Nations. However, international recognition may be an indication of state authority but it seems plain to me that it is not conclusive. One only has to think back to the

situation which existed when Communist China was not recognised for many years by many countries as the Government of China. Yet no one would deny that in reality it had all the attributes of statehood. It seems to me that what needs to be looked at is the reality of any particular situation. Is there sufficient evidence that Hezb-I-Islami had a sufficient degree of organisation, a sufficient degree of actual control of an area and that it exercised the type of functions which a government or governmental organisation would exercise? It seems to me that I have to take care not to impose Western ideas of an appropriate structure for government, but to be sensitive to the fact that in countries such as Afghanistan different types of structure may exist, but which may legitimately come within the ambit of an authority which wields power sufficient to constitute an official body.

34. I reject the Defence submission which is to the effect that the mere fact that there is a central government in existence precludes there being a de facto authority of which a person might be a public official or in similar capacity.

35. The material to which I have referred in this judgment leaves it open for a jury to conclude that Mr Zardad was a de facto public official in an area which was totally controlled by Hezb-I-Islami and controlled by them with a degree of permanence. There is no evidence to show that at any material time the central government exercised any governmental function over the area controlled by Hezb-I-Islami. Such evidence as there is tends to show that Hezb-I-Islami had total control of the area in question. There is evidence that the Hezb-I-Islami faction exercised functions which would be functions of a state authority.

36. It would, of course, remain open to the Defence to argue to the contrary, and to argue that the actions of Hezb-I-Islami should be seen simply as the activities of a rebel faction which has not acquired a sufficient degree of control, permanence, authority or organisation to fulfil criteria sufficient for it to be recognised as an authority wielding official or quasi-official powers.

37. However, that issue is essentially one of fact for a jury to determine on evidence produced. Distinct from the question of whether Zardad was de jure a public official is the question of whether he was de facto acting in a public capacity. There is in my judgment evidence which a jury could accept and which would enable them to come to the conclusion that Zardad was "a person acting in a public capacity" within s.134(1).

38. I have construed the wording of Section 134 (1) as not only applying to those who are de jure officials but those who are de facto officials. I have construed it, having had regard to the purpose of the Convention and the international authorities which have been drawn to my attention, as including in the phrase "person acting in a public capacity", those people who are acting for an entity which has acquired de facto effective control over an area of a country and is exercising governmental or quasi governmental functions in that area. To hold otherwise would be to ignore the latter part of the phrase in Section 134 (1), namely "or person acting in a public capacity", which is plainly intended to deal with situations which arise de facto as opposed to de jure. To adopt the construction contended for the Defence would be to leave a substantial loop-hole in the enforcement of an international obligation, and in the attempt to penalise the international crime of torture where it is committed by those who are in authority either under the force of the law, or who are in reality in authority as a result of a situation which has come about or which they have created.

39. A trial, of course, is a developing process and I have simply ruled on the basis of the materials as they are disclosed to me at present. It may well be that the balance of the evidence will alter. I remind myself and the parties that the ruling which I give at this stage is a ruling which will operate until further order, but that by reason of Section 31 (11) of the 1996 Act, this ruling may be varied by me if the interests of justice so require it on the application of either party.

The Identification Issue

40. The second matter arising for a ruling is the admissibility of certain evidence under video identification procedures.

41. Zardad admits that he was the person referred to as Commander Zardad at Sarobi, but denies involvement in or knowledge of acts of torture and hostage taking.

42. The Crown has a number of witnesses who say that Zardad was personally involved in such acts.

43. They therefore put into place identification procedures to enable those persons to identify whom they meant when they referred to Zardad.

44. The procedure relied upon was to cover two phases:

    i) A video identification process based on images of Zardad and others taken in 2003.

    ii) In the event of a recognition or partial recognition of Zardad by the first process, or an indication that a recognition could be made if more contemporaneous material was shown, those who so recognised or indicated were shown a compilation of stills derived from a video made in 1996 and found in Zardad's house on arrest in 2003.

45. The Crown decided to adopt this procedure as they felt that by proceeding straight to phase 2 there might be problems if those viewing the images recognised individuals other than Zardad in the stills, thus reducing the pool of images for consideration.

46. No complaint is made regarding phase 1. I have viewed the images. They represent a good and fair selection. Those who could not make an identification were eliminated from the procedure. Those who made a form of identification of Zardad or gave an indication as to their ability to recognise, if shown contemporaneous material, moved on to phase 2. I have viewed the phase 2 (1996) material. It consists of 11 head and shoulders images of Afghan men taken from a video of an event in 1996. Zardad looks younger than in the 2003 video. In addition his hair and beard are much longer than in the 2003 video. His appearance in the 1996 video will much more closely resemble the man who was the commander at Sarobi in the period covered by the indictment.

47. The Defence make various complaints which they say would make it unfair to admit this evidence under s. 78.

48. They submit that there are breaches of Annex A to Code D:

    i) Dissimilarity in appearance - D.2.

ii) Zardad alone has a cup in his hand - D.3.

iii) Two of the identifying witnesses recognised others known to them in the 1996 video stills - D.2

iv) Zardad alone appears in both phase 1 and phase 2 material so that he is thereby drawn to the viewer's attention. - D.13.

v) The witness Ghaffoor had previously seen a photograph of Zardad on the Internet and did not mention this to the Officer conducting the procedure. - D.14.

49. The Defence argue that individually and cumulatively the admission of evidence obtained in this manner would be unfair. They go on to add that Code D does not provide for the procedure which was adopted.

50. There is no suggestion that the procedures were carried out in bad faith. It is also acknowledged that the Defence solicitors then acting were made aware in advance of the Crown's proposed actions and did not object.

51. The procedures with Ghaffoor were carried out in Blackpool, Lancashire. The procedures with the other four witnesses relevant to this point took place at the British embassy in Kabul. In each case British Police carried out the procedures.

52. The Crown does not seek to argue against taking Code D as a starting point even though procedures were carried out abroad.

53. In response to the Defence complaint the Crown asserts that it has adopted a procedure which is, in the circumstances, fair. The use of phase 1 as a type of filter was not criticised; the procedures undertaken in phase 2 must be viewed in the context of the circumstances of this case where Zardad's appearance in 2003 differs from his appearance in the mid-1990s. They acknowledge that the phase 2 procedure does not feature in Code D, but say that that cannot be conclusive on the issue of fairness; they add that the unreported decision of the Court of Appeal in *R v Smith (Hugh Allen)*, 89/2685/W2, 26 March 1991, demonstrates that a second identification parade is neither necessarily inadmissible or unfair. There was no concession that any element of Code D had been breached, but if it had, the Court still has to look at the issue of fairness in the context of all the circumstances as required by s.78.

54. I will now deal with the individual aspects of Annex A to Code D which were relied on and summarised at Paragraph 48 above.

i) <u>D2 – Dissimilarity</u>

It seemed to me that a fair viewing of the 11 Afghan men on the phase 2 video showed images which represented a fair selection. I do not consider that any breach is demonstrated. I note that in any event the selection of images is to resemble the suspect "as far as possible", and I consider that this has been achieved. A suggestion was made that other images (e.g. TV footage) might have been used. This compilation has the advantage of using stills culled from the same event so that homogeneity of background is achieved. In any event a jury can assess whether the selection was fair or not.

ii) D3 – Cup

There is no sensible point. True it is that Zardad holds a cup. Two other men hold a microphone. Nothing about Zardad or those men in any way attracts attention to them. Again, the phrase "as far as possible" is used on this part of the Code. I see no basis for a complaint of breach of the Code or of unfairness. Again, a jury can consider the point if need be.

iii) D2. Two of the identifying witnesses recognised others known to them on the phase 2 parade.

Whilst this is true, Mr Bennell, for Zardad concedes that if those others recognised were deducted from the 11 images on the phase 2 procedure, there was still a sufficient number as required by D2 – i.e. the suspect and at least eight other people. Accordingly, there was no breach. Even if the number had fallen to eight including the suspect, the difference would not have been so major as to amount to unfairness in the circumstances.

iv) D13 – Zardad appears in both Phase 1 and Phase 2.

The matter complained of is that by reason of Zardad's appearance on both sets of images, attention would have been drawn to him. Given the seven year gap between the two sets of images, and the changes in Zardad's appearance over that period of time, taken with my own viewing of the images, I do not consider that it can fairly be said that anything occurred which directed a witness' attention to Zardad. I do not consider that a breach of D13 is demonstrated. However, it seems to me that I should also test the matter by the criterion of fairness contained in s.78 of the Police and Criminal Evidence Act 1984 (PACE).

Nothing overt was done to direct attention to Zardad or indicate his identity, but the Defendant's case is that the very procedure adopted carried that risk. In that context I do not consider that the absence of reference in the code to a second parade assists his argument. Code D cannot cover every eventuality, and, given the lapse of time and change of appearance referred to, it was in my view fair and reasonable to follow the procedure adopted in relation to those who had indicated an ability to recognise through phase 1. The mere fact that a witness has previously seen an image of the suspect does not preclude his seeing a parade under Code D. Indeed, D13 and D14 in Annex A clearly contemplate such an event as occurring.

Further, the Defence will be able to challenge the validity of the identification in cross-examination and to elicit the fact that the witness had seen phase 1 images prior to identifying in phase 2. The jury can see the witness and the respective images, and assess whether this may not have been a true identification but one conditioned by seeing the earlier set of images. In addition it would be the duty of the judge to direct the jury carefully on identification issues and on criticisms raised by the Defence.

A further relevant factor, although not a major one, is that the Defence solicitors then acting had notice of those procedures and thus the opportunity to make representations had they wished.

This phase 2 evidence does not stand alone. Several witnesses make the identification, having made admissible indications in phase 1. Further, Zardad admits that he was the Commander Zardad who controlled the Sarobi checkpoint. Accordingly this is not a case where, for example, there is an identification from a single witness in questionable circumstances. The other evidence provides a degree of support for individual identifications.

The adoption of the phase 1 procedure prior to phase 2 seems to me to have been a safeguard which benefited the Defence, and was, if anything, arguably less than fair to the Crown. The Crown took this step since they were unsure whether by going straight to phase 2 (1996) material they might find that numbers of other men were recognised. The combination of the filter effect of phase 1 and the actual experience of limited recognition of other men has prevented any unfair diminution in the number of real choices available from the phase 2 images.

I consider that the Crown attempted to employ the best methods available in the circumstances. It was not unfair to do what they did given the time lapse between the events they describe and the date of the identification procedures. Nor do I consider that there was anything unfair in the way in which those procedures were put into effect. For the reasons rehearsed in the preceding paragraphs I hold that s.78 does not operate so as to exclude this evidence.

v) D14 – Ghafoor's failure to mention previous sight of an Internet image

This is an argument referable only to Abdul Ghafoor. At the identification procedures in Autumn 2003 he gave a negative answer to a question correctly put under Annex A D14 as to whether he had previously seen a photograph of Zardad. It is, however, clear from the papers that on 31.10.2002, (i.e. about a year before the identification procedures), he had made a witness statement which made reference to his having seen an image of Zardad on the Internet. It is said this must taint his identification. I disagree.

As previously observed the Code does not prevent identification procedures taking place where a photograph has previously been seen. What is required is that that fact is recorded, no doubt so that the Defence know the context in which any subsequent identification is made.

The fact is that the Defence have in witness statement form the information that this witness had previously seen an image of Zardad. They can explore the significance of this with him, as they can explore his negative response when questioned on the topic at the identification parade. They are in no worse position that if he had responded positively to the D14 question. The fact of his viewing an image in the past does not of itself make the identification inadmissible, and as I have already pointed out, parts of Annex A expressly contemplate identification after such a viewing. In my judgment there is no breach of D14 to Annex A, nor is it unfair to admit the evidence which can be examined in context by the jury.

55. It follows that I reject all the submissions as to exclusion of the identification evidence.

Summary:

56. (1). There is insufficient evidence for a properly directed jury to conclude that the Defendant was a de jure "public official" within s.134 of the Criminal Justice Act 1988.

(2). There is sufficient evidence for a properly directed jury to conclude that the Defendant was de facto "acting in a public capacity" within s.134 of the Criminal Justice Act 1988.

(3) The evidence of video identification procedures relating to the Defendant is admissible and does not fall to be excluded under s.78 of the Police and Criminal Evidence Act 1984.