

# **DEPORTATION WITH ASSURANCES**

by

**DAVID ANDERSON Q.C.**

**Independent Reviewer of Terrorism Legislation  
(2011-2017)**

with

**CLIVE WALKER Q.C.**

**Professor Emeritus of Criminal Justice Studies,  
University of Leeds**

JULY 2017



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Presented to Parliament  
by the Secretary of State for the Home Department  
by Command of Her Majesty

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# **EXECUTIVE SUMMARY**

## **PLAN OF THE REPORT**

- Part I of this Report (chapters 1-3), prepared by David Anderson QC, summarises the evolution and operation of DWA in the United Kingdom, assesses its utility and answers the specific questions in the Review's terms of reference.
- Part II (chapters 4-7), prepared by Professor Walker QC, gives a detailed account of the international legal position, together with a comparative survey focusing on Australia, Canada, Israel, New Zealand, the USA, France, Germany, Italy, the Netherlands and Denmark.

## **LEGITIMACY AND UTILITY OF DWA**

- Expectations for the policy of DWA have substantially diminished since the commissioning of this Review was first discussed in Government, for both geopolitical and legal reasons. There are currently no live DWA cases.
- DWA remains potentially capable of playing a significant role in counter-terrorism, especially in prominent and otherwise intractable cases which are worth the cost and effort. But as the UK experience amply demonstrates, it can be delivered effectively and legitimately only if laborious care is taken.

## **ANSWERS TO QUESTIONS IN TERMS OF REFERENCE**

**(see 1.12)**

### **Question 1**

The UK has taken the lead in developing rights-compliant procedures for DWA. It has little to learn either from modes that are available only to states not signatory to the ECHR, or that are practiced by signatory states in violation of its requirements.

## **Question 2**

Some DWA proceedings have been of inordinate length: but delays are inherent in any closed material procedure, and future cases are likely to take less time now that the central legal principles have been established by the highest courts. No suggestions were put to me that would save time without sacrificing the fairness of proceedings.

## **Question 3**

The effect of domestic and international court rulings on the exercise of DWA is considered in chapters 2 and 5. For as long as it remains party to the ECHR, and for as long as it has not sought to derogate from its obligations under (for example) Articles 5 and 6, the provisions of the ECHR will remain binding on the Government in international law.

## **Question 4**

The key consideration to be taken into account in developing safety on return processes is whether compliance with assurances can be objectively verified through diplomatic or other monitoring mechanisms.

## **Questions 5 and 6**

It is not necessary for DWA arrangements to be "*one size fits all*": they can be tailored to particular categories of deportee, or to particular outcomes that are likely to await them in the receiving state. The balance of advantage in negotiating bespoke or all-purpose solutions will depend on all the circumstances, as will the question of whether to identify problem areas and seek to address them with the receiving state at the earliest opportunity.

# **PART I**

## **DEPORTATION WITH ASSURANCES IN THE UK**

**DAVID ANDERSON Q.C.**

## 1. INTRODUCTION TO PART 1

### Deportation with assurances

- 1.1. The policy of deportation with assurances **[DWA]** aims to facilitate the deportation to certain receiving states of foreign nationals suspected of terrorism.
- 1.2. Under a number of international Conventions, including in particular the UN Convention against Torture and the European Convention on Human Rights **[ECHR]**, deportation may not be carried out if there is a real risk that the deportee would be subject to torture, ill-treatment or certain other breaches of their human rights in the country of destination. The objective of DWA is to obtain assurances from the government of the receiving state which are sufficiently credible to allow deportation to take place without infringing the human rights of the deportee or the obligations of the state under international law.
- 1.3. The UK is the country in which the most determined efforts have been made to devise and apply a rights-compliant policy of DWA. Between 2005 and 2011, the Labour and Coalition Governments negotiated generic assurances from six countries: Jordan, Libya, Lebanon, Algeria, Ethiopia and Morocco. By 2011, nine people had been deported in accordance with these arrangements, in each case to Algeria. Since then there have been two further deportations with assurances, to Jordan in 2012 and 2013. A further person was subject to administrative removal to Morocco, with assurances in 2013.
- 1.4. Though now endorsed in principle by the European Court of Human Rights **[ECtHR]**,<sup>1</sup> the policy of DWA has been vigorously attacked from all sides. Thus:
  - (a) Human rights advocates and UN rapporteurs have consistently opposed the notion of doing deals with torturers.
  - (b) Yet politicians and mass media, in the UK and to a lesser extent in other countries,<sup>2</sup> have strongly criticised the strict conditions imposed by the ECtHR on the deportation of foreign national terrorists, portraying them as a needless restriction on national sovereignty.
- 1.5. Attempts to deport under the policy have been incessantly litigated, and the Government has suffered a number of reverses in the courts. These include the determination of both the Special Immigration Appeals Commission **[SIAC]** and the English Court of Appeal that assurances obtained from Colonel Gaddafi's

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<sup>1</sup> Application 8139/09 *Othman (Abu Qatada) v United Kingdom*, ECtHR 17 January 2012.

<sup>2</sup> In February 2015, a group of French MPs relied upon *Othman* and other cases as a reason to end the right of individual petition to the ECtHR: <http://www.assemblee-nationale.fr/14/pdf/propositions/pion2601.pdf>.

Libya were insufficient<sup>3</sup> and, most recently, a similar ruling in relation to Algeria from SIAC.<sup>4</sup>

- 1.6. Legal issues with similarities to those arising under DWA crop up in the extradition context<sup>5</sup> and in a range of other more or less analogous circumstances, some of which are touched upon in Part II of this report but which do not form part of the subject matter of this review. Cases in which it is necessary to consider the safety of a person being transferred elsewhere range from routine country guidance determinations<sup>6</sup> to the transfer of a prisoner of war to the custody of an allied state.

### Context of this review

- 1.7. The Coalition Government elected in 2010 published a Review of Counter-Terrorism and Security Powers in January 2011.<sup>7</sup> In its section on DWA,<sup>8</sup> that review:
  - (a) backed DWA and examined the scope for extending it to more countries, “*notably those whose nationals have engaged in terrorism-related activity here*”;
  - (b) recognised the central role of the courts, both in the UK and the ECtHR, which were said (correctly) to deliver “*intense, detailed scrutiny of our case for deportation*”;
  - (c) considered how the Government might be able to improve the case on safety on return [**SOR**] that it needed to make to the courts, whether by making better use of available expertise or by improved oversight and follow-up mechanisms in the country of deportation; and
  - (d) looked at whether the policy could be better communicated, including to NGOs, and whether best practice could be shared with other countries.
- 1.8. Among other recommendations, the review proposed – somewhat tentatively – that the Government “*consider commissioning an annual independent report into deportations under this policy*”.

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<sup>3</sup> *AS and DD (Libya) v Secretary of State for the Home Department* [2008] EWCA Civ 289, [2008] HRLR 28.

<sup>4</sup> *BB, PP, W, U, Y and Z v Secretary of State for the Home Department*, Appeal Nos. SC/39/2005 &c., 18 April 2016. The Home Secretary has not appealed the ruling.

<sup>5</sup> In respect of which similar factors apply: see, e.g., Application no. 24027/07 and others *Babar Ahmed and others v United Kingdom*, 10 April 2012, para 168.

<sup>6</sup> For a list, see <https://www.judiciary.gov.uk/wp-content/uploads/2011/03/cg-list-last-updated-23-01-17.pdf>.

<sup>7</sup> Cm 8004. The Review was led by the Office of Security and Counter-Terrorism in the Home Office, and subject to the independent oversight of the former Director of Public Prosecutions, Lord Macdonald of River Glaven QC.

<sup>8</sup> Pages 33-35.

- 1.9. No such review was commissioned for almost three years. That period coincided with the culmination of the high-profile case of Abu Qatada, also known as Othman. The judgment of the Grand Chamber of the ECtHR in January 2012 set the ground rules by which DWA must be conducted. Steps were then taken (including the negotiation of a Mutual Legal Assistance Treaty [MLAT] with Jordan) to allow a deportation that would be compliant with that judgment. Abu Qatada eventually left for Jordan in July 2013.<sup>9</sup>
- 1.10. Four months after the departure of Abu Qatada, I was asked by the Home Secretary to conduct this review. It was announced to Parliament on 21 November 2013,<sup>10</sup> and I issued a call for evidence on the same date. In a departure from the original suggestion of 2011, it was not to be an annual review, but rather a one-off consideration of various specific questions.

### Scope of this review

- 1.11. The aim of this Review, as stated in its terms of reference,<sup>11</sup> is:

“To review the framework of the UK’s Deportation with Assurances (DWA) policy to make recommendations on how the policy might be strengthened or improved, with particular emphasis on its legal aspects.”

That formulation led to concerns, on the part of some of those making submissions to the Review, that “*the Review appears to be designed solely to identify means of increasing the administrative utility of the DWA policy*”.<sup>12</sup>

Whilst I reject such a narrow interpretation of my terms of reference, I acknowledge that they direct me to consider only six questions, some of them rather specific.

- 1.12. Those six questions (on which I was not consulted) are as follows:

1. What lessons can be learnt from ***international comparisons and comparative practice*** associated with the removal of individuals to states with a poor human rights record, allowing for the parameters of our legal system?
2. What opportunities are there for HM Government or the Courts to improve the ***quality and speed of the legal procedure*** in DWA cases, including appeals, whilst assuring that the subjects get appropriate legal protection?
3. How do ***legal and procedural conditions*** imposed upon the exercise of DWA by domestic and international courts impact upon the effectiveness

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<sup>9</sup> He was there twice placed on trial for terrorism offences, and acquitted. Details in Part II, para.2.47.

<sup>10</sup> Hansard HC vol 570 col 60WS, 21 November 2013: [Annex 1](#).

<sup>11</sup> <https://www.gov.uk/government/publications/independent-review-of-deportation-with-assurances-terms-of-reference>.

<sup>12</sup> Submission of JUSTICE, February 2014, para 7.

of the policy, and what can be done to influence the future development of such conditions or to give them effect consistently with the fair and efficient operation of DWA?

4. In developing DWA arrangements with other countries, allowing for the fact that arrangements are specific to countries and individual subjects, what are the key considerations that HM Government should take into account in relation to the **safety on return processes**, including conducting assessments and the development of verification mechanisms?
5. Is enough done to distinguish the risks **different categories of persons** might face on return to a particular country or must assurances always be obtained in respect of certain countries for all potential DWA subjects?
6. Given that concerns often relate to the **initial period of detention** on return and the **risk of future detention and/or prosecution**, could the likelihood of these eventualities be more effectively assessed and, if appropriate reduced, in advance of removal, including by improved engagement with the individual's home authorities?

1.13. The merits of individual cases were specifically described by my terms of reference as “*out of scope*”, so as to avoid duplicating or prejudicing the work of the courts. My report was however to include background on how the DWA regime evolved and how arrangements are used. It was to be an unclassified document, and like nearly all my public reports, laid before Parliament. No date was specified for this.

### **Conduct of the review**

1.14. The part-time post of Independent Reviewer, which I occupied for six years until 28 February 2017, is described on the Independent Reviewer's website.<sup>13</sup> Its uniqueness lies in a combination of complete independence from Government (recent Reviewers have been QCs in private practice) and access to classified documents and personnel at a very high level of security clearance. Since the 1970s, the Independent Reviewer has sought, in particular by the issue of regular reports, to inform the public and parliamentary debate on counter-terrorism and civil liberties.

1.15. My regular statutory reports, like those of my predecessors, were generally written unaided.<sup>14</sup> I did however benefit from a special adviser, Professor Clive

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<sup>13</sup> <https://terrorismlegislationreviewer.independent.gov.uk/>.

<sup>14</sup> Though I had the assistance of small part-time teams in the preparation of my one-off investigatory powers reports *A Question of Trust* (June 2015) and *Report of the Bulk Powers Review* (2016). From 2016 the Independent Reviewer has been allocated a budget of £50,000 for assistance with the statutory functions of the role: the first fruits of this, including a self-standing chapter by Professor Walker, were apparent in *The Terrorism Acts in 2015* (December 2016).

Walker QC, who produced regular reading lists and advised me on a range of legal issues. It was agreed at the outset that Professor Walker would contribute to this review his expertise on international and comparative law as it relates to DWA. I am indebted to his knowledge and to his further research on the subject. Part II of this Report is the work of Professor Walker.

1.16. My call for evidence resulted in nine written submissions.<sup>15</sup> I followed these up by:

(a) meetings, in early 2014, with a number of interlocutors from both within Government (Home Office, Foreign Office) and outside it (judiciary, special representatives, barristers, solicitors, Human Rights Watch, Amnesty International);

(b) short visits in early 2014 to Jordan and to Algeria, during which I spoke to Government Ministers and officials, Embassy staff, prison staff and inmates, lawyers, NGO representatives and others; and

(c) an invitation-only seminar, co-organised with Professor Walker and held in central London in September 2014, which brought together a wide variety of voices both supportive of and opposed to DWA, including many who were familiar with its operation either diplomatically or in the courts.<sup>16</sup>

1.17. The original intention was to complete my review and publish a report by the end of 2014. But an unexpected invitation from the Prime Minister in July 2014 to conduct the year-long Investigatory Powers Review forced a change of plan. Reviews required by statute, together with two further specially-requested reports into deprivation of citizenship and the uses of bulk investigatory powers, occupied much of the next 18 months. Further delays after this report had been submitted to the Home Office in draft meant that it was not possible, as I had hoped and expected, for it to be published while I was still in office. For all these reasons this report therefore appears considerably later than intended, though as a consequence it has been able to take account of some significant recent developments.

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<sup>15</sup> From HM Government, the Canadian Government, JUSTICE, the Equality and Human Rights Commission, the Association for Prevention of Torture, Lord Carlile CBE QC, the late Professor Sir Nigel Rodley, J.R.A. Hanratty QC and Natasa Mavronicola.

<sup>16</sup> Professor Walker I am grateful for the contributions of all who presented at the seminar: Martin Chamberlain QC, Phil Douglas, Tíme Eicke QC, Dr Frank Foley, Professor Bibi van Ginkel, Julia Hall, Stephanie Harrison QC, Sir Stephen Irwin, Smardar Ben Natan, Dame Anne Pringle, Professor Kent Roach, Naureen Shah and Dr Rayner Thwaites. Thanks also to Harriet Ware-Austin for an illuminating conversation.

1.18. This report is the 20<sup>th</sup> and last that I prepared as Independent Reviewer of Terrorism Legislation.<sup>17</sup> My successor, Max Hill QC, took over the role on 1 March 2017.

### **Structure of this report**

1.19. Part I of this Report is my own work. It summarises the evolution and operation of DWA in the UK (Chapter 2) and seeks to answer the specific questions in my terms of reference (Chapter 3).

1.20. Part II of this Report is the work of Professor Walker. It consists of an Introduction (Chapter 4), a detailed account of the international legal position (Chapter 5), a comparative survey, focusing on Australia, Canada, Israel, New Zealand, the USA, France, Germany, Italy, the Netherlands and Denmark (Chapter 6), and Professor Walker's conclusions in relation to the matters that he has considered (Chapter 7).

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<sup>17</sup> With one exception, a report on the operational efficacy of Terrorism Prevention and Investigation Measures [TPIMs] produced for the Prime Minister, Deputy Prime Minister and Home Secretary in September 2014, all those reports were published in full and can be found on the website of the Independent Reviewer.

## 2. UK EXPERIENCE

### The Chahal dilemma

2.1. The UK policy of deportation with assurances evolved as a reaction to the landmark case *Chahal v United Kingdom*.<sup>18</sup> In that case, the ECtHR ruled that there would be a risk of torture if Mr Chahal, a Sikh separatist leader who had previously been tortured in Punjab, was sent back to India. To deport him from the UK would be a breach of ECHR Article 3, because:

- (a) “*the Convention prohibits in absolute terms torture or inhuman or degrading treatment, irrespective of the victim’s conduct*”;
- (b) no exception or derogation from Article 3 may be permitted, “*even in the event of a public emergency threatening the life of the nation*”; and accordingly
- (c) “*whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion. In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration.*”<sup>19</sup>

The Court grounded its ruling in the *Soering* case of 1989, from which it was already clear that Article 3 was engaged by the extradition of a fugitive to the United States in circumstances where there was a real risk of him being exposed to the “*death row phenomenon*”.<sup>20</sup>

2.2. It was further ruled in *Chahal* that, by ECHR Article 5(1)(f), a person may be detained with a view to deportation only in circumstances where “*action is being taken with a view to deportation*”.<sup>21</sup> That corresponds to the position previously recognised under UK law, under which immigration detention may not continue once it is apparent that the Secretary of State will not be able to effect deportation within a reasonable period.<sup>22</sup>

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<sup>18</sup> Application 22414/93, ECtHR 1996, 23 EHRR 413. Seven dissenting judges took a different view, considering that national security considerations could be balanced against the risk of ill-treatment where there was “*substantial doubt*” that ill-treatment in another state would eventuate. But the reasoning of the majority was upheld in *Saadi v Italy*, Application 37201/06, ECtHR 2008. See further Chapter 5, below.

<sup>19</sup> *Ibid.*, para 79.

<sup>20</sup> *Soering v United Kingdom*, ECtHR 1989, 11 EHRR 439, paras 81-91

<sup>21</sup> *Chahal v UK* (fn 18 above), para 112.

<sup>22</sup> *R v Governor of Durham Prison ex p Hardial Singh* [1984] 1 WLR 704, discussed and approved by the Supreme Court in *R (Nouazli) v Secretary of State for the Home Department* [2016] UKSC 16, [2016] 1 WLR 1565, paras 63-78.

- 2.3. The combination of these principles struck a painful nerve in the UK, which was being accused at the time of too freely accommodating Islamist radicals who endorsed violence. Many such persons had been granted asylum because they had been adjudged to face a well-founded risk of persecution in their states of origin.<sup>23</sup>
- 2.4. The effect of *Chahal* was to produce a legal environment in which foreign terrorist suspects in the UK who were at risk of torture in their countries of origin could neither be sent back to those countries nor kept in indefinite immigration detention. To put the issue in perspective, neither deportation nor immigration detention was an option for any British citizen, however dangerous.<sup>24</sup> But some lawyers questioned whether it was right in law for the ECHR to be given extra-territorial application in this way.<sup>25</sup> And at a time when Islamist terrorism was still associated predominantly with foreign nationals, others have seen the curbs imposed by *Chahal* as an intolerable constraint on the ability of the UK to deal robustly with terrorism.<sup>26</sup>
- 2.5. Related case law indicated, even before the UK roll-out of DWA, that the risk of violations of human rights other than Article 3 might also have to be taken into account.<sup>27</sup> In particular:
- (a) The ECtHR in 1989 had refused to exclude the possibility that “*an issue might exceptionally be raised under article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country*”.<sup>28</sup>
  - (b) The judicial House of Lords in 2004 applied that reasoning to deportation, holding out the possibility that other rights – those protected by ECHR Articles 2, 4, 5, 7, 8 and 9 – might also be successfully invoked, if only in the

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<sup>23</sup> E.g. the Algerian Rachid Ramda, granted asylum in the UK and eventually extradited to France in 2005 for trial in connection with the 1995 Paris bombings. See, generally, M. Phillips, *Londonistan; How Britain is creating a terror state within* (2007).

<sup>24</sup> Subject only to the possibility that they might first be deprived of that citizenship: for the circumstances in which that has been possible over the years, see D. Anderson, *Citizenship removal resulting in statelessness*, April 2016, chapters 1 and 2.

<sup>25</sup> Lord Phillips of Worth Matravers, former President of the UK Supreme Court, “*shared the reaction that it was abhorrent to send someone off to a country where he would suffer torture or inhuman treatment*”, but expressed “*reservations*” about *Chahal* on the basis that the UN Refugee Convention of 1951, which obliged state parties to grant asylum to those within their territory who would be at risk of persecution in their home countries, made an exception where there were reasonable grounds that a refugee posed a threat to national security: “The elastic jurisdiction of the European Court of Human Rights”, lecture at the Oxford Centre for Islamic Studies, 12 February 2014, p 4.

<sup>26</sup> See, e.g., R. Martin, “One in three cases lost by Britain at the European Court of Human Rights are brought by terrorists, prisoners and criminals”: Mail Online, 18 August 2015.

<sup>27</sup> See Professor Walker’s commentary at 5.19-5.21 and 5.31-5.33 below.

<sup>28</sup> *Soering v United Kingdom*, ECtHR 1989, 11 EHRR 439, para 113; 5.22 below.

case of “a *flagrant denial or gross violation*” of the right, which was to be equated with a “*complete denial or nullification*” of it.<sup>29</sup>

(c) Such a case came before the judicial House of Lords in 2008. It was held that Article 8 precluded the removal of the claimant to Lebanon, where she would be permitted only occasional supervised visits from the child who had spent his entire life with her, because removal would “*destroy the family life of the claimant and her child as it is now lived*”.<sup>30</sup>

2.6. Whilst the logic of that case law is evident, its implications were not universally welcomed. As noted by Lord Phillips, a former President of the UK’s Supreme Court:

“[I]f the Human Rights Convention precluded sending an alien back to a country where his rights under Article 3 would not be respected, why would not the same principle apply in the case of all the other Convention rights? Had Members of the Council of Europe signed up to an obligation to give shelter to aliens whose own countries did not respect fundamental rights?”<sup>31</sup>

2.7. Obligations placed on States by (among others) Articles 5, 6 and 8-10 of the ECHR may in principle be capable of being avoided by derogation.<sup>32</sup> The UK has used the threat of terrorism more than once to justify derogations from Article 5, most recently in 2001 (2.9-2.10, below). The prospects for a UK derogation from the extraterritorial effects of Articles 5 and 6 in cases of expulsion or extradition from the territory of a Council of Europe Member State have been considered, and declared realistic, in a recent article.<sup>33</sup> Any derogation is however justified only in cases of war or public emergency threatening the life of the nation, and to the extent strictly required by the exigencies of the situation.<sup>34</sup>

### **ATCSA 2001: a false start**

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<sup>29</sup> *R (Ullah) v Special Adjudicator* [2001] UKHL 26, [2004] 2 AC 323, per Lord Bingham at para 24 (as explained in *EM (Lebanon) v Secretary of State for the Home Department* [2008] UKHL 64, [2009] 1 AC 1198, para 35); and cf. paras 50, 52, 69-70 of *Ullah*.

<sup>30</sup> *EM (Lebanon) v Secretary of State for the Home Department* [2008] UKHL 64, [2009] 1 AC 1198, per Lord Bingham at para 41.

<sup>31</sup> Lord Phillips of Worth Matravers, “The elastic jurisdiction of the European Court of Human Rights”, lecture at the Oxford Centre for Islamic Studies, 12 February 2014, pp 4-5.

<sup>32</sup> Though some have disputed that fair trial rights can be derogable, because of the inevitable impact on the protection of non-derogable rights: see, e.g., Schmid, Evelyne, The Right to a Fair Trial in Times of Terrorism: A Method to Identify the Non-Derogable Aspects of Article 14 of the International Covenant on Civil and Political Rights (February 18, 2009), Goettingen Journal of International Law, Vol. 1, No. 1, pp. 29-44, 2009, SSRN <https://ssrn.com/abstract=1345809>; UN Counter-Terrorism Implementation Task Force, Right to a Fair Trial and Due Process in the Context of Countering Terrorism, 2014, para 14.

<sup>33</sup> Brian Chang, ‘Flagrant Denials of Justice? The Permissibility of Derogations from the Extraterritorial Effects of the European Convention of Human Rights in Terrorism-Related Emergencies’ (Central European University Voices of a New Generation conference, Budapest, August 2015) (under revision for publication).

<sup>34</sup> ECHR, Article 15.

- 2.8. After the 9/11 attacks of September 2001, the Government moved swiftly to address the *Chahal* dilemma. Part 4 of the Anti-Terrorism Crime and Security Act 2001 [ATCSA 2001] introduced special immigration powers. These allowed the Home Secretary to detain indefinitely, pending deportation, foreign nationals who were suspected of involvement in “*international terrorism*” but who could not be removed from the UK.
- 2.9. Because of the *Chahal* limitation of immigration detention to cases in which action was being taken with a view to deportation, Part 4 required the UK to derogate from Article 5(1)(f) of the ECHR on the basis that there was “*war or public emergency threatening the life of the nation*”.<sup>35</sup>
- 2.10. ATCSA 2001 Part 4 was controversial from the start. The Newton Committee, reporting in December 2003, “*strongly recommended*” that the powers should be “*replaced as a matter of urgency*” by new legislation that:
- (a) dealt with all terrorism, whatever the nationality or origin of its suspected perpetrators, and
  - (b) did not require a derogation from the ECHR.<sup>36</sup>

A year later, in a judgment which has been seen as a high-water mark of judicial resistance to executive power in matters of terrorism,<sup>37</sup> the judicial House of Lords accepted by a majority that the grounds for derogation were made out but unanimously declared Part 4 to be a discriminatory violation of ECHR rights.<sup>38</sup>

### **The genesis of DWA**

- 2.11. The Newton Committee was not only opposed to ATCSA 2001 Part 4, but sceptical more generally of the utility of deportation as a tool against terrorism:

“Seeking to deport terrorist suspects does not seem to us to be a satisfactory response, given the risk of exporting terrorism. If people in the UK are contributing to the terrorist effort here or abroad, they should be dealt with here. While deporting such people might free up British police, intelligence, security and prison service resources, it would not necessarily reduce the threat to British interests abroad, or make the world a safer place more

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<sup>35</sup> Derogation from ECHR Article 5 (unlike Article 3) is permitted pursuant to Article 15, to the extent strictly required by the exigencies of the situation. No other Council of Europe member sought to derogate from its ECHR obligations in response to 9/11.

<sup>36</sup> Privy Counsellor Review Committee, “Anti-Terrorism, Crime and Security Act Review: Report”, December 2003, HC 100, para 203.

<sup>37</sup> A. Tomkins, “National security and the role of the court: a changed landscape?” (2010) 126 LQR 543.

<sup>38</sup> *A v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 65.

generally. Indeed, there is a risk that the suspects might even return without the authorities being aware of it.”<sup>39</sup>

2.12. The Committee suggested that ATCSA 2001 Part 4 be replaced by a variety of measures, directed both to improving the prosecutorial process and introducing executive constraints which did not discriminate on the grounds of nationality or origin.<sup>40</sup>

2.13. It accepted however that deportation might have a place among those measures, provided that sufficient assurances of safety on return could be negotiated:

“In cases where deportation is considered the only possible approach – and we have considerable reservations about it as a way of dealing with suspected international terrorists – we have seen no evidence that it would be illegal for the Government to detain the deportee while taking active steps in good faith to reach an understanding with the destination government to ensure that the deportee’s human rights were not violated on his return. That is what some other countries seem to have been able to do, at least in some cases.”<sup>41</sup>

2.14. Referring to a case in which assurances sought by the government had been judged insufficient,<sup>42</sup> the Committee noted that:

“the Government could seek to establish framework agreements in advance with some of the main countries involved, to minimize the delay in dealing with individual cases. Even if deportation was rarely used in practice in terrorism cases, it might serve to act as a deterrent to international terrorists considering the use of the UK as a base for their activities.”

2.15. That recommendation – though qualified and rather lukewarm – was the impetus for the current policy of DWA.

2.16. The story of the past 13 years has been of significant effort invested by the Government in DWA, incessant litigation but only a handful of positive results.

### **Legal basis for DWA**

2.17. A person who is not a British citizen is liable to deportation from the UK where the Secretary of State deems the person’s deportation to be conducive to the public good, and on limited other grounds.<sup>43</sup>

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<sup>39</sup> Privy Counsellor Review Committee, “Anti-Terrorism, Crime and Security Act Review: Report”, December 2003, HC 100, para 195.

<sup>40</sup> Control orders, replaced in 2011 by Terrorism Prevention and Investigation Measures or TPIMs, had their genesis in para 251(a) of the Newton Report. See my report “Control Orders in 2011” (March 2012) and my subsequent reports on the TPIM regime, most recently “Terrorism Prevention and Investigation Measures in 2014” (March 2015).

<sup>41</sup> Privy Counsellor Review Committee, “Anti-Terrorism, Crime and Security Act Review: Report”, December 2003, HC 100, para 254.

<sup>42</sup> *Singh and Singh v Home Secretary* SC/4/99, SC/10/99, SIAC, 31 July 2000.

- 2.18. The requirement to arrange for assurances in certain cases where deportation could result in violation of human rights is a consequence of the international instruments summarised in Part II of this Report, notably the UN Convention against Torture [**UNCAT**] and the ECHR. No UK legislation provides specifically for DWA, though the Human Rights Act 1998 [**HRA 1998**] gives effect to the ECHR.

### **Negotiation of arrangements**

- 2.19. Intensive negotiations in 2004-05 resulted in arrangements with three countries. They are:

- (a) **Jordan** (Memorandum of Understanding [**MOU**], 10 August 2005)
- (b) **Libya** (MOU, 18 October 2005)
- (c) **Lebanon** (MOU, 23 December 2005).

- 2.20. These were followed by arrangements with three more:

- (a) **Algeria** (Exchange of Letters, 11 July 2006)
- (b) **Ethiopia** (MOU, 12 December 2008)
- (c) **Morocco** (MOU, 24 September 2011).

- 2.21. The Algerian arrangements took the form of an exchange of letters because the government of Algeria was not willing to enter into a MOU.

- 2.22. To date, these remain the only arrangements to have been concluded, save that the MOU with Jordan was supplemented, in order to give effect to the *Othman* judgment of the ECtHR, by a Mutual Legal Assistance Treaty [**MLAT**] signed on 23 March 2013. Negotiations with other countries (e.g. Vietnam) have not resulted in the conclusion of agreements.

- 2.23. The purpose of those arrangements was summarised by a Government Minister as follows:

“Such agreements enable us to obtain assurances that will safeguard the rights of those individuals being returned, including the right to access to medical treatment, to adequate nourishment and to accommodation, as well as to treatment in a humane manner in accordance with internationally accepted standards. By signing an MOU and agreeing to the appointment of

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<sup>43</sup> Immigration Act 1971, s3(5)(6).

a monitoring body – this is an important point that has been raised – Governments make a public commitment to safeguarding the well-being of individuals deported under such memorandums. A memorandum therefore provides an additional layer of protection over and above the provisions in international human rights instruments. ... I believe that the memorandums provide adequate assurances to enable deportation of certain individuals to take place in a manner that is consistent with the UK's human rights obligations."<sup>44</sup>

2.24. Lord Hope, a Justice of the Supreme Court, commented in his judicial capacity in 2009:

"Most people in Britain, I suspect, would be astonished at the amount of care, time and trouble that has been devoted to the question whether it will be safe for the aliens to be returned to their own countries."<sup>45</sup>

2.25. But as the Minister's words imply, the MOUs were negotiated with Article 3 in mind, not (for example) Article 6. The risk that Abu Qatada would be tried on the basis of evidence obtained from others by torture was not dealt with in the initial arrangements, notwithstanding the earlier statement of the ECtHR, in an analogous context, that "*an issue might exceptionally be raised under article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country*".<sup>46</sup> The MOU with Jordan thus had to be supplemented by procedural assurances in the form of an MLAT after the ECtHR's *Othman* judgment of 2012.

### Monitoring mechanisms

2.26. DWA arrangements currently exist with five countries: Algeria, Ethiopia, Jordan, Lebanon and Morocco.

2.27. The arrangements previously in force with **Libya** were deemed insufficient by SIAC and the Court of Appeal in 2008,<sup>47</sup> since when conditions in that country have altered to the point that DWA would be unthinkable.

2.28. In **Algeria**, the monitoring role is performed by the British Embassy in Algiers. This reflects the fact that it was not possible to negotiate for an independent monitoring body to be used. A checklist was prepared in 2007 of actions to be

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<sup>44</sup> Rt Hon Ian McCartney MP (Minister for Trade), Hansard HC 15 June 2006, c354WH.

<sup>45</sup> *RB (Algeria) and others v Secretary of State for the Home Department* [2009] UKHL 10, [2010] 2 AC 110 (the Abu Qatada case), para 209.

<sup>46</sup> *Soering v UK*, ECtHR 1989, 11 EHRR 439, para 113.

<sup>47</sup> *DD and AS v Home Office* [2008] EWCA Civ 289, upholding the SIAC judgment of 27 April 2007 in SC/42 and 50/2005.

taken by the Embassy prior to return, on the day of return, by way of follow-up and if the detainee is detained in police custody and/or charged.<sup>48</sup>

2.29. The arrangements with Algeria continue to be operated in relation to the nine Algerian nationals deported to Algeria on national security grounds between 2006 and 2009. Those arrangements passed muster at first in the courts, but in April 2016 SIAC considered them insufficient to justify further deportations.<sup>49</sup>

2.30. In ***the other four countries***, the monitoring role is earmarked for a local organisation, pursuant to an agreement with the UK Government. Those bodies are:

(a) The Ethiopian Human Rights Commission (Ethiopia);

(b) The Adaleh Center for Human Rights Studies (Jordan);

(c) The Institute for Human Rights of the Beirut Bar Association (Lebanon); and

(d) Organisation Marocaine des Droits Humain or OMDH (Morocco).

It has in some cases been difficult to locate credible organisations prepared to undertake such work. Established UK or international human rights organisations such as Amnesty and Human Rights Watch are unwilling to take it on, since they generally lack faith in the concept of DWA.

2.31. I have studied the terms of reference agreed with each of the above bodies. Each of them spells out the key requirements of:

(a) ***independence from the government of the receiving State***, in terms of its existence, mandate and composition, its personnel, its finances and its ability to produce frank and honest reports; and

(b) ***capacity for the task***, including having expert monitors trained in detecting the physical and psychological signs of ill-treatment, as well as access to sufficient independent lawyers, doctors, forensic specialists, psychologists, and specialists in human rights, humanitarian law, prison systems and the police.

They also contain specific wording regarding the passage of returnees to the receiving State, accessibility to persons not in detention, visits to detainees, fair trial, specific assurances and reporting, as well as references to international standards and guidance.

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<sup>48</sup> The checklist was extensively cited by SIAC in *BB, PP, W. U, Y and Z v Secretary of State for the Home Department*, Appeal Nos. SC/39/2005 &c., 18 April 2016, paras 22-25.

<sup>49</sup> *Ibid.* See further 2.37 and 3.36-3.42 below.

- 2.32. Capacity-building has been undertaken in order to ensure that those bodies can adequately perform the anticipated functions. But it has not been considered realistic to maintain them permanently in readiness for the monitoring of returnees, given the limited use of DWA. Thus, the Adaleh Centre in Jordan was kept busy when two detainees were imprisoned in 2013-14 (2.35 below), but the Government ceased funding it for this purpose in 2016, three years after the deportation of Abu Qatada. The OMDH in Morocco, similarly, was funded for as long as it took to monitor the assurances given on the administrative removal of R1 in 2013. The Ethiopian and Lebanese bodies have never been used for the purposes of DWA. The likely elapse of time between the identification of a potential deportee and the return of that deportee to the receiving state is anticipated by the Government to be sufficient for any further necessary capacity-building to take place.
- 2.33. It is no part of my function to pronounce on the adequacy of the arrangements that have been put in place in the various individual countries to which DWA is envisaged. Indeed it would be foolish of me to do so, since conditions are constantly changing, and no snapshot impression could outweigh the considered verdict of a judicial body (such as SIAC) that has heard all the evidence.
- 2.34. My two visits, to Jordan and Algeria, did however illustrate the variety of challenges – and safety on return mechanisms – that exist in different countries.
- 2.35. While in **Jordan** in March 2014, I met at length with the Adaleh Center as well as with the British Embassy. Both impressed upon me how time-consuming the conscientious conduct of monitoring can be. The only two returnees in Jordan were, at the time, each in (different) prisons. Nonetheless, I was informed that:
- (a) Some 50% of the time of one Embassy employee was concerned with the issue, the demands being particularly heavy in the first six months after deportation.
  - (b) The Embassy spoke to the Adaleh Center on a daily basis, and frequently pursued its concerns with Jordanian Government departments and prison authorities.
  - (c) The Adaleh Center itself had 14 full-time and three part-time employees, with 70% of its work being for the Jordanian Government but 50% of its funding being provided (at the time) by the UK Government.
  - (d) There was friction with the Jordanian authorities regarding such matters as an occasional inability to visit at least weekly, as required by the terms of reference, and the presence of officers and cameras on prison visits.

(e) At the same time, there were points of friction with the UK Embassy in relation to such matters as guarantees of monitors' safety and the efficacy of its interventions with the Jordanian authorities.

(f) The Adaleh Center was also conscious that its work for the UK Government risked jeopardising contracts both with the Jordanian Government and with international NGOs that disapprove of DWA.

2.36. The scope for potential conflicts of interest in an arrangement such as this is obvious, and need to be kept under careful review. But I was struck by the courage, dedication and commitment of the Adaleh Center staff in complying with their terms of reference, and by the commitment of its President and Executive Director not to compromise its reputation.

2.37. The situation in **Algeria**, at the time of my visit in May 2014, was very different. Though nine men had been deported from the UK pursuant to assurances, the absence of an independent monitoring body meant that the only institution responsible for monitoring their safety was the British Embassy. The men had been provided with a contact number at the Embassy, but contact had been very limited and the Embassy told me that it did not know where any of the men were. In the circumstances, no effort or resource was or could be devoted by the Embassy to checking up on them. In the words of the outgoing Ambassador to his successor, a few months later:

“In an Algeria context, there was never a realistic prospect of being able to monitor the whereabouts and well-being of the DWA deportees. That runs into sensitivities about sovereignty.”

The Ambassador added that in the circumstances the Embassy relied exclusively on assurances received from the Algerians, and that he never doubted those assurances would be honoured.<sup>50</sup>

2.38. The marked difference in the pattern of post-return monitoring in Jordan and Algeria is attributable in part to the fact that both Jordanian deportees were held in custody at various times, whereas seven of the nine Algerians were not even detained briefly on return. But it is also a function of the fact that no independent monitoring mechanism was in place in Algeria. Detention by the Internal Security Service (the DRS) was identified as a particular problem, but was not subject to any external monitoring or inspection regime. There was no contact whatever between Chancery or Consular staff in the British Embassy and the DRS. SIAC concluded in 2016 that there was no robust system of verification of

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<sup>50</sup> Email disclosed by the Government and referred to by SIAC in *BB, PP, W, U, Y and Z v Secretary of State for the Home Department*, Appeal Nos. SC/39/2005 &c., 18 April 2016, para 113.

the sort that was required, given conditions in Algeria at the time.<sup>51</sup> It further concluded that there were substantial grounds for believing that the appellants in that case faced a real risk of being subjected to treatment contrary to Article 3.

### Judicial oversight

2.39. Appeal from a deportation decision where a public interest provision applies lies as of right to SIAC, where it is normally heard by a High Court Judge sitting with a Senior Immigration Judge and a lay member with experience in diplomatic and/or security matters.

2.40. SIAC was created by the Special Immigration Appeals Commission Act 1997 [SIACA 1997]

“in order to provide as effective a remedy as possible for those challenging immigration decisions that involved information that the Secretary of State considered should not be made public because disclosure would be contrary to the public interest.”<sup>52</sup>

2.41. The method chosen to reconcile (so far as possible) the demands of national security and of open justice is a security-cleared special advocate, appointed by the Attorney General’s Office to represent the appellant’s interests. The special advocate sees the entirety of the evidence before the court, and seeks to challenge the Government’s case to the extent that it is based on closed material.<sup>53</sup> But unlike the open advocate who is also instructed on the appellant’s behalf, the special advocate cannot normally take instructions from the appellant once he has become privy to closed material.

2.42. The subject in closed material proceedings is not as well protected as in normal litigation.<sup>54</sup> In particular:

(a) Once the case has gone into closed session, the special advocate is not entitled to take instructions on matters which for national security reasons cannot be disclosed to the subject.

(b) Special advocates find it difficult in practice to obtain security-cleared expert witnesses to comment on the closed material.

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<sup>51</sup> *Ibid.*, para 116.

<sup>52</sup> *RB (Algeria) and others v Secretary of State for the Home Department* [2009] UKHL 10, [2010] 2 AC 110, para 10. As Lord Phillips had explained, SIAC was devised after the ECtHR in *Chahal* commended a similar procedure which it believed (wrongly) to have been introduced in Canada.

<sup>53</sup> SIACA 1997 s 6; SIAC (Procedure) Rules 2003, SI 2003/1034 as amended most recently by SI 2015/867, Part 7. The specific functions of the special advocate are to make submissions at any hearings from which the appellant and his representative are excluded, to adduce evidence and cross-examine witnesses at any such hearings, and to make written submissions to SIAC: *Ibid.*, Rule 35.

<sup>54</sup> See, generally, House of Commons Constitutional Affairs Committee, *The Operation of the Special Immigration Appeals Commission (SIAC) and the Use of Special Advocates* (2004–5 HC 323-1)

- 2.43. However, after a careful review of the relevant procedures, the highest UK court concluded in 2009 that they “*strike a fair balance between the public interest, to which SIAC is required to have regard, and the need to ensure that the hearing is fair*”.<sup>55</sup> It was relevant, in that regard, that in contrast to some other kinds of proceedings, any material withheld from the subject in a DWA case will normally relate not to the subject’s own conduct (which is not a factor to be weighed in the balance) but rather to the likelihood of his safety on return – an issue to which the subject’s personal evidence will normally be of less relevance.<sup>56</sup>
- 2.44. Of crucial importance to SIAC proceedings has been the UK Government’s Special Representative. A former diplomat, the role of the Special Representative is both to negotiate agreements and arrangements with other countries for the deportation of persons involved in terrorism, and to act as the Government’s witness at SIAC. The first Special Representative, Anthony Layden CMG, negotiated the existing arrangements and was highly regarded as a witness by the courts.<sup>57</sup> He was joined before he left office<sup>58</sup> by Dame Anne Pringle DCMG,<sup>59</sup> who in turn was replaced in December 2015 by Michael Ryder CMG. I have met and interviewed all three Special Representatives.
- 2.45. SIACA 1997 s7 confers a right of appeal to the Court of Appeal (in Scotland, the Court of Session) against a final determination of SIAC, “*on any question of law material to that determination*”. The permission of SIAC or (if that is refused) the appellate court is required before an appeal may be brought.
- 2.46. From that appellate court, a further appeal may lie to the Supreme Court, but only if the appellate court or (in practice) the Supreme Court itself considers that the proposed appeal raises an arguable point of law of general public importance that ought to be considered by the Supreme Court at that time.<sup>60</sup>

### **Successful deportations**

- 2.47. The only successful uses of the DWA process to date are:
- (a) the nine Algerian nationals deported to Algeria between 2006 and 2009; and

<sup>55</sup> *Ibid.*, per Lord Phillips at para 103.

<sup>56</sup> *Ibid.*, per Lord Phillips at paras 94-98.

<sup>57</sup> Having cited comments made by SIAC in 2007 (“...*forthright, completely honest, realistic, with a commitment to truth and fairness* ...”), the Court of Appeal in *AS (Libya) v Secretary of State for Home Department* [2008] EWCA Civ 289, [2008] HRLR 28 commented at para 33: “*It would be difficult to imagine a more handsome tribute to a witness.*”

<sup>58</sup> See 2.60(b) below.

<sup>59</sup> The principal case in which Dame Anne Pringle’s evidence was evaluated was *BB, PP, W.U, Y and Z v Secretary of State for the Home Department*, Appeal Nos. SC/39/2005 &c., 18 April 2016.

<sup>60</sup> Supreme Court Practice Direction 3, 3.3.3.

(b) the two Jordanians deported to Jordan in 2012 and 2013.<sup>61</sup>

None of the above chose to pursue their full appeal rights against deportation, causing some to claim that they left voluntarily. It is fair to say though that in most cases, the writing was on the wall when they chose to leave.

### Algerians

- 2.48. Only one of the nine people deported to Algeria was a prisoner convicted of a terrorism-related offence. The other eight were deported on national security grounds. None of these Algerians chose to pursue his full appeal rights against deportation.
- 2.49. The deportees were each given the contact details of the British Embassy in Algiers (which had the checklist referred to at 2.28 above) and told that they, or their next of kin, could contact the Embassy at any time to report any issues of concern.
- 2.50. There were allegations of mistreatment in two of the cases (“Q” and “H”). The details of those allegations, and the subsequent findings of SIAC, are outlined in open decisions.<sup>62</sup>

### Jordanians

- 2.51. The two Jordanians deported to Jordan in 2012 were Abu Qatada (Othman), whose case is described in more detail at 2.57 below, and VV, whom I visited when in Jordan in early 2014.

### **Legal proceedings**

- 2.52. In practically every case in which DWA has been sought, the subject has exercised his right to appeal to SIAC, though in some cases the appeal was withdrawn, or further rights were not exercised. In many cases, the legal proceedings have been complex and time-consuming. In other cases, they are abbreviated only because a subject chooses to accept deportation before his rights of appeal are exhausted.
- 2.53. The longest-lasting case of all is that of the Algerians whose attempted deportation began in 2005 and was renounced only in April 2016.<sup>63</sup> In his last

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<sup>61</sup> The case of R1 (2.60(a) below), who was administratively removed to Morocco subject to assurances and monitored on his return, is also classed by the Government as a successful use of the DWA power.

<sup>62</sup> SC/32/2005 and SC/37/2005.

<sup>63</sup> A summary of that litigation, which featured multiple judgments from SIAC, three appeals to the Court of Appeal (two of them successful) and two to the Supreme Court (one of them successful) is in *BB, PP, W and U v Secretary of State for the Home Department* [2015] EWCA Civ 9, paras 1-3. The only stage subsequent to that judgment was the application by SIAC, in its decision of 18 April 2016, of the principles set out by the Court of Appeal in its judgment of January 2015. That decision was not appealed.

case as Chairman of SIAC, Mitting J ended his judgment of January 2013 (itself successfully appealed on two issues) with a “*post-script*” as follows:

“Except in the case of PP, this litigation has now lasted over seven years. There is, as yet, no end in sight. The objectives of the appellants and of the Secretary of State – respectively, to be able to live free of restrictions and permanently in the United Kingdom and to deport the appellants to Algeria – are nowhere near attainment. Nevertheless, both sides have gained something from the continued litigation: the appellants are still here and the threat which they pose to national security has been contained. In hindsight, if not in foresight, the outcome of this litigation, so far, has been to produce a regime which can, with the unattractive use of acronyms and advertising language, be described as “*ACTSA-lite*”.<sup>64</sup>

- 2.54. Mitting J appeared to be suggesting, in that passage, that each side had something to gain from prolonged legal proceedings. The individuals concerned avoided deportation. The Home Office – for as long as the prospect of deportation remained a live one – retained the power to keep them in immigration detention or on sometimes very strict immigration bail conditions. The end result (though unintended) seemed not too different from the former power under ATCSA 2001, struck down by the courts in 2004, to keep foreign nationals who could not be deported in indefinite immigration detention (2.8-2.10 above).
- 2.55. Several of those to whom I spoke admitted to at least a kernel of truth in that observation. Though it is not suggested that the parties to these cases are engaged in an overt attempt to string things out,<sup>65</sup> it is perversely true that (depending on the circumstances) the length of proceedings may work to the advantage of both sides.

### **The case of Abu Qatada/Othman**

- 2.56. The case of Abu Qatada is not typical, since it made new law both on its journey through the UK system (where it was joined in the Supreme Court with two Algerian cases)<sup>66</sup> and in the ECtHR.<sup>67</sup> Nonetheless, it is notable both as an example of how time-consuming such proceedings may be, and to illustrate how deportation proceedings may operate in conjunction with other measures in order to keep a subject in detention or on stringent immigration bail conditions for

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<sup>64</sup> *U, G, Y, W, Z, BB and PP v Secretary of State for the Home Department*, SIAC, judgment of 25 January 2013, para 66.

<sup>65</sup> Which the courts would not tolerate: see *R v Governor of Durham Prison, Ex parte Hardial Singh* [1984] 1 WLR 704 and compare *MS v Secretary of State for the Home Department* [2016] EWHC 3162 (Admin) and *G v Secretary of State for the Home Department* [2016] EWHC 3232 (Admin).

<sup>66</sup> The cases are reported as *RB (Algeria) v Secretary of State for the Home Department* [2009] UKHL 10, [2010] 2 AC 110.

<sup>67</sup> Application 8139/09 *Othman (Abu Qatada) v United Kingdom*, ECtHR 17 January 2012. See Professor Walker’s detailed account of this case at 5.29-5.35 below.

prolonged periods, even in circumstances where the subject is never placed on trial.<sup>68</sup>

2.57. In summary:

- (a) In December 2001 Abu Qatada was certified under ATCSA 2001 Part 4, and served with certificates in October 2002. He was found to have been properly certified by SIAC in March 2004.
- (b) In March 2005, given the imminent expiry of ATCSA 2001 Part 4, Abu Qatada was served with a Control Order under the Prevention of Terrorism Act 2005 [**PTA 2005**].
- (c) In August 2005, he was detained pending his deportation under the DWA programme.
- (d) His appeal against deportation was dismissed by SIAC in February 2007, upheld by the Court of Appeal in April 2008 and dismissed by the judicial House of Lords in February 2009.
- (e) His application to the ECtHR was made in 2009, heard in December 2010 and the subject of a judgment in January 2012 which became final (because not referred to the Grand Chamber) in April 2012.
- (f) Further litigation ensued in relation to Abu Qatada's ongoing detention, culminating in a SIAC ruling in November 2012 against his continued detention, and his release on bail.
- (g) In March 2013 Abu Qatada was detained once again, and the MLAT with Jordan was signed. The Court of Appeal dismissed the Home Secretary's appeal in the same month, and she applied to the Supreme Court.
- (h) In June 2013 the Home Secretary made a fresh immigration decision, refusing to revoke the deportation order against Abu Qatada and certifying any appeal as clearly unfounded.
- (i) In July 2013 the MLAT came into force and Abu Qatada was deported to Jordan. He could strictly speaking have sought to prolong matters further still, by challenging the immigration decision of June 2013.

2.58. Of general significance are the 11 broad-ranging factors that were identified by the ECtHR as relevant to an assessment of the quality of assurances given

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<sup>68</sup> Abu Qatada was not unique in having been subject to detention under ATCSA 2001 Part 4 and to a control order, before the DWA procedure was activated. The same was true of A, H, I, K, P and Q, all of them deported to Algeria in 2006-2007. Though not deported, B and G (both Algerian) were also Part 4 and control order cases. M (Libyan) was Part 4 only.

(numbers 1-6) and to whether, in the light of the receiving state's practices, they can be relied upon (numbers 7-11).<sup>69</sup> The most problematic of those, in practice, tend to be:

- (a) whether there is an **effective system of protection against torture** in the receiving state, including whether it is willing to cooperate with international monitoring mechanisms (including international human rights NGOs) and whether it is willing to investigate allegations of torture and punish those responsible (number 9); and
- (b) whether **compliance with the assurances can be objectively verified** through diplomatic or other monitoring mechanisms, including providing unfettered access to applicants' lawyers (number 8).

2.59. When Abu Qatada was eventually placed on trial for terrorism offences, it was in Jordan: and he was acquitted of all charges against him in June and September 2014. This is despite the fact that as Professor Walker notes (5.47 below), the agreed arrangements for trial were breached in more than one respect.

### Recent cases

2.60. Since the departure of VV and Abu Qatada to Jordan in 2012-13, the history of DWA from the Home Office point of view has been one of small successes accompanied by several significant reverses. Thus:

- (a) R1, a Moroccan, agreed voluntarily to depart and was administratively removed to Morocco in November 2013. An appeal to SIAC had been struck out after he absconded, and the Court of Appeal had refused him permission to reinstate his appeal in July 2013.
- (b) Two Ethiopian cases were not pursued after Anthony Layden, the Government's Special Representative, refused to defend the decisions because he believed that by seeking to use the MOU with Ethiopia in a case where there was no serious current threat to national security, the Government was acting in bad faith. Anthony Layden then declined to renew his contract as Special Representative.<sup>70</sup>

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<sup>69</sup> Application 8139/09 *Othman (Abu Qatada) v United Kingdom*, ECtHR 17 January 2012, para 189; see 5.35 below for the full list. The list is not necessarily to be treated as exclusive: Professor Walker suggests some other possibly relevant factors at 5.40-5.43 below.

<sup>70</sup> R. Mendick and R. Verkaik, "Anti-terrorism chief quits over failure to expel suspects", Telegraph 21 February 2015. SIAC had referred as early as February 2014 to Mr Layden's "*recently expressed doubts as to the efficacy of the system of Memoranda of Understanding and the conditions under which HMG has sought to invoke the Memorandum of Understanding with Ethiopia*": Appeal no. SC/98/2010 *J1 v Secretary of State for the Home Department*, 28 February 2014, para 15. That expression of his views meant that had J1 (2.60(c) below) been effective, Mr. Layden would have been called as a witness not by the Government but by SIAC itself, potentially exposing him to cross-examination by all parties. SIAC commented in 2016 that "*The material disclosed does*

- (c) Proceedings for the deportation of another Ethiopian, J1, were withdrawn by the Home Secretary in July 2014, for reasons which I am not at liberty to make public for reasons of diplomatic sensitivity (but which are said to be unrelated to concerns expressed by the Government's Special Representative, Anthony Layden, about the cases referred to at 2.60(b) above).
- (d) Proceedings for the deportation of XX to Ethiopia were also withdrawn by the Home Secretary in July 2014, for the same reasons as applied to J1.
- (e) The Home Secretary agreed to pursue DWA against Tsouli, a Moroccan, but papers were not served on him as he subsequently agreed to make a voluntary departure. An "escorted voluntary return" was conducted in May 2015 and he was subsequently excluded.
- (f) Six Algerians (U, W, Q, Z, BB, PP) had their appeals against deportation allowed by SIAC in April 2016, on the basis of the law as it was laid down by the Court of Appeal in January 2015. The Home Office did not appeal. The appeal of another Algerian, G, had been previously allowed in December 2012.
- (g) Proceedings against three further Algerians (AA, Q2 and QJ) were withdrawn by the Home Office, since a consequence of the April 2016 SIAC decision was to render deportation to Algeria effectively impossible in cases where there is a real risk of ill-treatment contrary to Article 3. The Algerian case of B (whose nationality was disputed) is also not being pursued.
- (h) Proceedings against N2, who had served 9 years for terrorism-related offences, were withdrawn in July 2016 after Jordan repeatedly declined to provide assurances under the MOU.

There are currently no live cases in which the Government is seeking to apply the policy of DWA.

2.61. Accordingly, of the six countries which entered into arrangements with the UK for DWA between 2005 and 2011:

- (a) Deportation to Libya was ruled out by the decisions of SIAC and the Court of Appeal in 2007-08 (2.27 above).

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*tend to demonstrate that Mr Layden thought that the policy of DWA was being applied beyond the area, the 'exceptional' area, of national security, and that in some sense this undermined the integrity of the system and the good faith of government.*" BB, PP, W, U, Y and Z v Secretary of State for the Home Department, Appeal Nos. SC/39/2005 &c., 18 April 2016, para 49.

- (b) Deportation to Ethiopia would also appear to be currently infeasible (2.60(c)(d) above).
- (c) Deportation to Algeria was ruled out by the April 2016 decision of SIAC, at least until such time as it might be possible to put more effective monitoring arrangements in place or until the risk of mistreatment is sufficiently reduced (2.53 and 2.60(f)(g) above).

That leaves only Lebanon (to which no DWA has ever been attempted), Morocco (to which there has been a single administrative removal with assurances) and Jordan (the “*Rolls Royce*” candidate for DWA, which however further underlined the difficulties attending the process when it declined to provide the undertakings sought in relation to N2: 2.60(h) above).

### 3. ANSWERS TO THE QUESTIONS UNDER REVIEW

#### Diminished expectations

- 3.1. When the new Coalition Government first contemplated commissioning this review in 2010/11, DWA looked like a tool with the potential for extensive use against foreign national terrorists in the UK. Thus:
- (a) Nine men had been returned to Algeria between 2006 and 2009 on the strength of assurances accepted by SIAC, despite a long tradition of torture in places of detention and the absence of a robust in-country system for monitoring safety on return.
  - (b) A unanimous Supreme Court had ruled that the Government could deport Abu Qatada to Jordan, despite the lack of a “*high degree of assurance*” that evidence obtained by torture would not be adduced against him at trial.<sup>71</sup>
  - (c) The Arab Spring of early 2011 brought hope that credible arrangements for DWA might later be arrived at with more countries in the Middle East and North Africa.
- 3.2. But even at that time, it was evident that DWA was far from plain sailing. Numbers deported under the policy were small, vindicating the prediction of the Newton Committee that the policy might be more useful as a deterrent against settling in the UK than as an enabler of deportations (2.14 above). Opposition on human rights grounds focused both on the risk of torture in the country of deportation and on the imperfections of the UK’s special advocate system. Litigation was intense, prolonged and sometimes unsuccessful for the Government. Both SIAC and the English Court of Appeal had dismissed the value of assurances obtained from Colonel Gaddafi, effectively ruling out DWA under the MOU with Libya.<sup>72</sup>
- 3.3. By 2013/14, when I was first asked to conduct this review, those difficulties had been further increased as a result of geopolitical, legal and administrative factors.
- (a) **Geopolitically**, the end of the Arab Spring and the spread of terrorism across the Middle East and Africa reduced, rather than increased, the number of states which could plausibly be seen as future partners for DWA. For example, an agreement with Egypt seemed out of the question, and another long-sought prize – a credible arrangement with Pakistan – has remained firmly out of reach.

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<sup>71</sup> *RB (Algeria) and others v Secretary of State for the Home Department* [2009] UKHL 10, [2010] 2 AC 110, para 153.

<sup>72</sup> *AS and DD (Libya) v Secretary of State for the Home Department* [2008] EWCA Civ 289, [2008] HRLR 28.

(b) **Legally**, the *Othman* judgment – while it gave its blessing to DWA in principle – set conditions for it that require the government to “*engage deeply with a receptive foreign partner*”<sup>73</sup> and are difficult in practice to satisfy. Though the legal hurdles were eventually surmounted by the signing of an MLAT with Jordan, resulting in the deportation of VV and Abu Qatada, undertakings were subsequently breached notwithstanding the spotlight of public attention.

(c) **Administratively**, the burden for the Home Office and Agencies of servicing DWA cases – in particular, the exculpatory process – was such that as I was told in 2014, the Home Office only had the resources to contemplate the use of DWA in a maximum of two countries at any one time. In addition, effective in-country monitoring is liable to consume huge resources in terms of money and time, as I saw for myself in Jordan.

3.4. The most recent batch of cases has firmly underlined the limitations of the policy, as noted at 2.60 above.

3.5. Almost 12 years after the policy started, only 11 people have been deported (and one administratively removed) under DWA; recent experience has been discouraging; and for the first time since the first MOUs were signed in 2005, not a single set of DWA proceedings is in progress.

3.6. Yet as the perceived utility of DWA has diminished, the political and media atmosphere around it – at its most frenetic during Home Secretary Theresa May’s well-publicised struggle to secure the deportation of Abu Qatada – has also become more muted. Many people continue to believe strongly that it is important to be able to deport foreign nationals suspected of terrorism, including to countries where torture is practised. But:

(a) It is now clear that the principal terrorist threat to the UK comes from UK citizens, who by definition are not eligible for DWA.<sup>74</sup>

(b) The beheading of westerners by the likes of Mohammed Emwazi (“Jihadi John”), and the ease with which extremist ideologies can be seen to cross geographical frontiers, have underlined that national security threats to the

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<sup>73</sup> The formulation of Professor Walker: see 5.47 below.

<sup>74</sup> Of the 628 persons convicted in Great Britain after a charge for a terrorism-related offence over the 15+ years from September 2001 to December 2016, 432 (69%) were British nationals. The other nationalities to reach double figures were Algerian (28), Albanian (17), Pakistani (15) and Somali (14). Source: Home Office, *Operation of police powers under the Terrorism Act 2000, quarterly update to 30 December 2016*, Table A12.c.

UK cannot simply be extinguished by removing suspects from the jurisdiction.<sup>75</sup>

- (c) The power of the UK courts to convict for terrorist offences committed abroad has been expanded, notably in relation to the widely-used offence of conduct in preparation for terrorism under section 5 of the Terrorism Act 2006.<sup>76</sup>
- (d) Other alternatives for dealing with foreign nationals who threaten UK national security have also been developed or refined. In addition to those listed by Professor Walker,<sup>77</sup> these include the simple but effective expedient of waiting until a national security threat leaves the country, then refusing re-entry.

3.7. The policy of deporting foreign terrorist suspects thus has certain similarities with powers to remove citizenship on national security grounds. Like the latter power, it could be described as “*a policy of catch and release, setting up today’s convicts as tomorrow’s foreign fighters*”, encouraged by “*the dangerous delusion that terrorism is (or can be made into) a foreign threat and problem*”.<sup>78</sup> Similar observations were made by the Newton Committee about the policy of seeking to deport terrorist suspects: 2.11 above.

### **Has DWA had its day?**

3.8. The UK’s policy of DWA, in which so much hope and resource has been invested, is at a low ebb. It may legitimately be asked whether – as many have suggested – the time has come to abandon the policy altogether. That question falls outside the strict scope of my terms of reference. But in order to give colour to my specific responses, it can hardly be ignored.

3.9. Attacks on DWA have come from two opposite directions.

3.10. The ***first set of attacks*** emanates from the world of human rights and international law. Vocal opponents of the policy include the NGOs, Special Rapporteurs and others whose views are catalogued by Professor Walker in Chapter 5, below.

3.11. Objections that were pressed on me by various sources include the following:

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<sup>75</sup> Sometimes, indeed, suspects can do at least as much harm abroad: Abu Qatada, the ideologue whose ability to communicate had been severely constrained by immigration bail conditions while in the UK, was able to give regular press conferences from the court in which he was tried in Jordan.

<sup>76</sup> Extra-territorial jurisdiction (subject to the consent of the Attorney-General) was accorded to section 5 by section 81 of the Serious Crime Act 2015.

<sup>77</sup> 5.55 below.

<sup>78</sup> K. Roach and C. Forcese, “Why stripping citizenship is a weak tool to fight terrorism”, *The Globe and Mail*, 3 March 2016, cited in D. Anderson, *Citizenship removal resulting in statelessness*, April 2016, 3.6.

- (a) Specific assurances are either ineffective or redundant: if the government can ensure compliance with one deportees' human rights, it should surely be able to do so across the board.
- (b) Neither the government of the sending state nor the government of the receiving state has any incentive to report mistreatment: if it happens, it may therefore never come to light.
- (c) Safety on return is impossible to guarantee, even where a monitoring scheme is in place: torture is practised in secret and may be undetectable; and victims and their families may be reluctant to report it for fear of reprisals.<sup>79</sup>
- (d) The conduct of UK proceedings is problematic: open advocates cannot read or hear relevant evidence, for example on safety on return, and special advocates have historically been unable to call their own evidence in response to it.

3.12. It should be noted however that the views of international lawyers are not unanimous, as evidenced not only by the *Othman* judgment of the ECtHR but by the response of the late Professor Sir Nigel Rodley to this review. Writing in November 2013, that most distinguished of former UN Special Rapporteurs on Torture recalled that the standing practice of the Human Rights Committee under the International Covenant on Civil and Political Rights was “*to recognise a sliding scale of risk, depending on the gravity of the torture situation in the country to which the person is to be deported and on the stringency of the post-return monitoring measures*”, and offered Jordan as “*an example of a state to which I sensed it could be safe to grant deportation, with the right guarantees*”.

3.13. In any event, the pragmatic answer to the first set of attacks is that the practice of DWA has been given the green light by the ECtHR in *Othman*, albeit on strict conditions. Underlying that judgment, furthermore, are the benefits that DWA arrangements may have in international law terms. As Professor Walker explains at 5.48-5.56 below, these include:

- (a) the possibility that states may be readier to comply with specific commitments given to the government of a friendly state than with general treaties;
- (b) the furtherance of the principle of “*extradite or prosecute*”, which is part of the UN Global Counter-Terrorism Strategy of 2006;

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<sup>79</sup> A case commonly cited for the failure of DWA is that of Mahar Arar (5.14 and 6.8 below) who was tortured in Syria despite Canadian consular officials having been given direct access to him.

- (c) the fact that DWA may be considered more palatable than other methods which western governments have been tempted into using, such as detention without trial or illegal rendition;
- (d) the public interest in returning fugitive terrorists and bringing them to justice, acknowledged in UN Security Council Resolution 1373/2001; and
- (e) the use of an intensive process of engagement to secure changes to legal process and rules in the receiving state, as via the UK-Jordanian MLAT of 2013.
- 3.14. As to (e), such changes may even benefit persons who do not have rights under the ECHR. Practical examples are not easy to come by. But a Jordanian prison governor, obliged by bilateral arrangements not to hood prisoners sent to him from the UK on their regular journeys from prison to court, told me in 2014 that he had ordered the hoods to be removed from all his prisoners making that journey. As he said to me: “Why should I treat them differently because they were not sent from England?”
- 3.15. For all these reasons, and notwithstanding the practical difficulties that attend DWA, I see no reason to accede to the view that the ECtHR in *Othman* has been insufficiently mindful of human rights<sup>80</sup> and that deportation to regimes which practise torture or other flagrant violations of fundamental rights should in all circumstances be ruled out.
- 3.16. I have spoken both to Anthony Layden CMG and to the Foreign Office about the reservations – relating chiefly to an interpretation of the Ethiopian MOU that he felt to be unjustified and in bad faith – that caused Mr Layden to express “*doubts as to the efficacy of the system of Memoranda of Understanding*”.<sup>81</sup> I have great sympathy for the dilemma in which Mr Layden found himself. His scruples confirm the wisdom of the strong emphasis placed by the ECtHR, in its *Othman* ruling, on the quality of assurances.<sup>82</sup> But nothing that I heard from him caused me to conclude that DWA – contrary to the position as declared in *Othman* itself – is so unsatisfactory as a matter of principle that its use should never be tolerated.
- 3.17. The ***second set of attacks*** comes from the opposite direction: those who say, in the polite paraphrase of Lord Hope:

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<sup>80</sup> Though the conditions placed on DWA by the ECtHR can be debated: see the discussion by Professor Walker at 5.40-5.44 below.

<sup>81</sup> Appeal no. SC/98/2010 *J1 v Secretary of State for the Home Department*, 28 February 2014, para 15.

<sup>82</sup> Application 8139/09 *Othman (Abu Qatada) v United Kingdom*, ECtHR 17 January 2012, para 189; see 5.35 below, i-vi.

“Why hesitate, people may ask. Surely the sooner they are got rid of the better. On their own heads be it if their extremist views expose them to the risk of ill-treatment when they get home.”<sup>83</sup>

- 3.18. At its most uncompromising, that view is held by those who see executive power to deport foreign terrorist suspects as an essential element in national self-preservation, and are unwilling to see it trammelled by judicial intervention of any kind. Others may look approvingly to France and Italy, which are sometimes said to deport foreign nationals without regard for the requirements of the ECHR,<sup>84</sup> to the many states that have failed to comply with interim stays under Rule 39 of the Rules of Court of the ECtHR;<sup>85</sup> or to the USA where assurances may be obtained but the courts are rarely inclined to intervene.<sup>86</sup>
- 3.19. More nuanced versions of that view echo in the opinions of those who accept the need for judicial control but would prefer that the law were less demanding. In particular:
- (a) Some have doubted whether it is right that the ECHR should be given “*extraterritorial*” application in this area at all.<sup>87</sup>
  - (b) As recently as the *Chahal* judgment of 1996, a substantial minority of seven ECtHR judges considered that it was legitimate to balance the risk of ill-treatment against national security considerations where there was “*substantial doubt*” that there would be ill-treatment in the receiving state: 2.1 above.
  - (c) Support may be sought from the law of Canada, where judicial caution about over-readiness to accept assurances has been accompanied by an acknowledgment at the highest judicial level that exceptional circumstances might justify deportation to face torture, even if contrary to international law.<sup>88</sup>
  - (d) A prohibition against deportation to face torture may be easier to understand, and to accept, than a prohibition relating to the less serious “*degrading treatment*”, which is also encompassed within Article 3 of the ECHR.<sup>89</sup>
  - (e) Both may be easier to accept than a prohibition relating to breaches of other fundamental rights such as the fair trial guarantee in Article 6 and the qualified rights in Articles 8-11.<sup>90</sup>

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<sup>83</sup> *RB (Algeria) and others v Secretary of State for the Home Department* [2009] UKHL 10, [2010] 2 AC 110, para 209.

<sup>84</sup> Not entirely without reason: see the assessments of Professor Walker at 6.27-6.31 below (France) and 6.39-6.43 below (Italy).

<sup>85</sup> 5.46 below.

<sup>86</sup> 6.17-6.26 below.

<sup>87</sup> See the reservations expressed by the ex-Supreme Court President Lord Phillips, cited at 2.6 above.

<sup>88</sup> 6.6-6.12 below.

<sup>89</sup> See further 3.69 below.

3.20. The strength of these concerns is reduced by an appreciation that deportation of foreign suspects is no panacea for terrorism: 3.6 above. But the principled response to the second set of attacks is Lord Hope's answer to his own rhetorical question (3.17 above):

"That however is not the way the rule of law works. The lesson of history is that depriving people of its protection because of their beliefs or behaviour, however obnoxious, leads to the disintegration of society. A democracy cannot survive in such an atmosphere, as events in Europe in the 1930s so powerfully demonstrated. ... The rights and fundamental freedoms that the Convention guarantees are not just for some people. They are for everyone. No one, however dangerous, however disgusting, however despicable, is excluded. Those who have no respect for the rule of law – even those who would seek to destroy it – are in the same position as everyone else."<sup>91</sup>

In other words, the fact that one may dislike a decision of the referee is no reason for rejecting the rules of the game.

3.21. Some may quite understandably wish that the law were otherwise than it is. But nobody with any regard for the rule of law could countenance flouting it, or turning a blind eye to it. For as long as the United Kingdom remains a party to the UN Torture Convention and the ECHR, it is obliged to comply with their provisions.

3.22. In any event, the *Othman* judgment is far from absolute. It does not prevent the deportation of foreign nationals to countries where there is a real risk of torture: but it does require that risk (and associated risks of other flagrant human rights violations) to be mitigated so far as possible. It represents the best attempts of a Europe-wide court to strike the balance in a place that is both effective and humane.

3.23. To conclude, for all the imperfections of DWA, I reject the conceptual attacks on it from both directions. In Professor Walker's words, with which I respectfully associate myself:

"DWA can play a significant role in counter-terrorism, especially in prominent and otherwise intractable cases which are worth the cost and effort, but it will be delivered effectively and legitimately in international law only if laborious care is taken."<sup>92</sup>

That is the basis upon which I now approach the questions in my terms of reference.

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<sup>90</sup> See the views of the ex-Supreme Court President, Lord Phillips, cited at 2.6 above.

<sup>91</sup> *RB (Algeria) and others v Secretary of State for the Home Department* [2009] UKHL 10, [2010] 2 AC 110, para 210.

<sup>92</sup> 5.56 below.

## International and comparative lessons

3.24. Question 1 of my terms of reference ask:

“What lessons can be learnt from ***international comparisons and comparative practice*** associated with the removal of individuals to states with a poor human rights record, allowing for the parameters of our legal system?”

3.25. Professor Walker has given a comprehensive account in Part II of this report both of international law as it relates to DWA (Chapter 5) and of the practice in Australia, Canada, New Zealand, the USA, France, Germany, Italy, the Netherlands and Denmark (Chapter 6).

3.26. Those states divide roughly into:

- (a) those which do not seek to deport people to countries where there is a real risk of torture, and
- (b) those which do so – sometimes in significantly greater numbers than has been achieved in the UK.

3.27. As to ***the first category***, the states considered by Professor Walker to be most reluctant to make use of DWA are Germany, the Netherlands and Denmark. None has entirely ruled it out, and their reluctance may arise from a variety of factors including their reading of international law, cultural, historical or legal reservations about expulsions and a lack of diplomatic clout or confidence compared to the UK or France.

3.28. The experience of those states serve a reminder that deportation is not the only remedy for dealing with foreign terrorist suspects. Other remedies are available, from criminal trial for acts committed outside the jurisdiction to the imposition of TPIMs.

3.29. This is not however sufficient to require the conclusion that DWA could be painlessly dispensed with. As to that, see 3.10-3.16 above.

3.30. The chief exemplar of ***the second category***, is France, whose practice relates principally to Algeria. That practice reflects, in part, the particular French relationship with that country and its strong commitment to the defence of the Republic.<sup>93</sup>

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<sup>93</sup> For an introduction to the different assumptions underpinning French and UK legal responses to terrorism, see, generally, F. Foley, *Countering terrorism in Britain and France: institutions, norms and the shadow of the past* (CUP, 2014).

- 3.31. This is a more appealing model to those who would like to see the more effective export of foreign terrorists and terrorist suspects. But states which are more successful in achieving deportations risk paying a price in terms of reduced compliance with the rule of law and (in the case of European states) with the binding requirements of the ECHR.<sup>94</sup>
- 3.32. As was confirmed recently in Parliament, it is “*most certainly the intention of this Government*” to remain a signatory to the ECHR.<sup>95</sup> In the circumstances, there seems to be no point in reflecting on models that are available only to states not signatory to the ECHR, or that are practised by signatory states in violation of its requirements.

### **Negotiation of assurances**

- 3.33. Questions 4-6 of my terms of reference ask:

“In developing DWA arrangements with other countries, allowing for the fact that arrangements are specific to countries and individual subjects, what are the key considerations that HM Government should take into account in relation to the **safety on return processes**, including conducting assessments and the development of verification mechanisms?”

“Is enough done to distinguish the risks **different categories of persons** might face on return to a particular country or must assurances always be obtained in respect of certain countries for all potential DWA subjects?”

“Given that concerns often relate to the **initial period of detention** on return and the **risk of future detention and/or prosecution**, could the likelihood of these eventualities be more effectively assessed and, if appropriate reduced, in advance of removal, including by improved engagement with the individual's home authorities?”

- 3.34. The first of these questions (Question 4) may be answered by reference to existing case law; and the second and third (Questions 5 and 6) are of a predominantly diplomatic nature. Though I have discussed all of them with a range of interlocutors, including the Foreign Office, my own lack of diplomatic expertise dictates a degree of modesty in attempting a response to Questions 5 and 6. That is so, particularly, bearing in mind that no assurances have been negotiated for several years and that none appear to be immediately in prospect.

- 3.35. I comment on these questions as follows.

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<sup>94</sup> As Lord Carlile put it in his submission to the Review, such conduct is “*likely to result in a strong undermining of the state's international reputation*”.

<sup>95</sup> Lord Keen, Advocate-General for Scotland, Lords Spokesperson, Ministry of Justice: Hansard HL 7 February 2017, vol 778 col.1598, in answer to a question from Lord Rooker.

3.36. As to **Question 4**, the central consideration to be taken into account is that specified in the *Othman* judgment:

*“whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms, including providing unfettered access to the applicants’ lawyers”*.<sup>96</sup>

3.37. That formulation does not amount to a legal requirement for formal independent monitoring, as SIAC emphasised (by reference to its own previous case law and that of the House of Lords) in the recent Algerian cases. The refusal of a receiving state to accept independent monitoring may, in the words of SIAC, *“proceed from their extremely strong sense of national pride and sovereignty”* and *“in itself, is not necessarily a sinister indication”*.<sup>97</sup>

3.38. Diplomatic mechanisms will be a valuable starting point. As to those:

(a) They will be of most value in the context of ongoing settled relations, rather than as an ongoing gambit with new and untested regimes, as Professor Walker states at 5.39 below. They require considerable work on the part of the receiving state, which is more likely to be obtained in the context of a multifaceted relationship in which the receiving state has an incentive to cooperate.

(b) Guidance on the functions that the Embassy may realistically be required to undertake, both before and after a deportation, may be taken from the checklist considered by SIAC in the most recent Algerian case, though as SIAC commented, these presupposed both *“an adequate flow of information to Embassy staff from the Algerian authorities”* and *“active preparation by the Embassy .. in relation to each returnee”*.<sup>98</sup>

3.39. Before determining whether an independent monitoring body is required, SIAC will take into account the extent to which other mechanisms will supplement the diplomatic relationship by providing checks of compliance with governmental assurances. Advanced for this purpose in the Algerian cases were:

(a) the actions and protests of the families of detainees;

(b) the access of lawyers to detainees;

(c) the scrutiny by Ministry of Justice officials of the system;

(d) the press;

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<sup>96</sup> See also the reference at para 203 to medical and psychiatric expertise within a monitoring delegation.

<sup>97</sup> Appeal Nos. SC/39/2005 &c. *BB, PP, U, W, Y and Z v Secretary of State for the Home Department*, 18 April 2016, paras 71.

<sup>98</sup> *Ibid.*, paras 22-26.

(e) international attention and opinion;

(f) scrutiny by NGOs; and

(g) oversight by the British Embassy.<sup>99</sup>

The role of the judiciary in determining allegations of torture might also have been relied upon, but in the Algerian context was not.

3.40. Whether such mechanisms will give rise to sufficient assurance will depend in each case on an assessment both of their effectiveness and of the degree of risk that ill-treatment contrary to Article 3 will be practised. SIAC found that in Algeria there was a real risk of exposure to such ill-treatment, and that in the circumstances such means of verification as are referred to above were not sufficiently robust to satisfy the legal test.<sup>100</sup>

3.41. In such circumstances, the situation may be rescued only by an independent monitoring mechanism of the sort that was not available in Algeria. The ideal monitoring mechanism would be an internationally-reputed NGO: but in view of the general unwillingness of such NGOs to be involved, the best that is likely to be obtained is a national NGO with a strong reputation for independence which is neither in the pocket of the receiving state nor overly dependent on funding from the UK Government. The ECtHR has displayed considerable pragmatism in this regard, approving the Adaleh Centre in Jordan notwithstanding that it had “*no direct experience of monitoring*” (para 203). The monitoring bodies in the other potential receiving states have not yet been commented upon by the courts: indeed only the OMDH in Morocco has thus far been used for monitoring compliance with assurances.

3.42. Whilst the provision of unfettered access to the deportee’s lawyers was singled out by the ECtHR in *Othman* (para 189), it also mentioned (at para 203) the importance of a monitoring delegation having medical and psychiatric personnel, and having private access to detainees (which the Adaleh Centre had to work hard to achieve when I was in Jordan).

3.43. **Question 5** asks me to opine on the relative advantages of:

(a) assurances tailored to the risks that might be faced by different categories of persons on return to a particular country, and

(b) assurances applicable to “*all potential DWA subjects*”.

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<sup>99</sup> *Ibid.*, para 75.

<sup>100</sup> *Ibid.*, para 116.

- 3.44. **Question 6** is of a similar nature: it asks whether, in view of the fact that concerns often relate to specific issues (initial detention or *garde à vue*; later detention with a view to prosecution), it would be appropriate to focus engagement with the receiving state on these particular issues, and to do so in advance of removal.
- 3.45. Both questions ask, in essence, whether it is necessary for DWA arrangements to be “*one size fits all*” or whether it is appropriate to tailor them – either to particular categories of deportee or to particular aspects of the treatment that awaits them in the receiving state.
- 3.46. If it is envisaged that many and varied deportees will be sent to a receiving state, whose safety may be affected in different and unpredictable ways, the ideal solution would no doubt be to negotiate a single, all-purpose set of arrangements for that state. Those arrangements would have to guard against the possible infringement not only of Article 3 but of other human rights provisions that might conceivably be at issue in particular cases, notably Articles 5 and 6. I assume that such wide-ranging arrangements could be relatively difficult for the receiving state to accept, and that they would in any event tend to be more time-consuming to negotiate. They might however be more acceptable to the receiving state if enshrined in an MLAT which could remove the focus from an individual case and bring advantages for the receiving state. The point was also made to me that a broad-reaching agreement could play into broader relations with receiving states under the Foreign Office’s Justice and Human Rights Partnership programme.
- 3.47. If on the other hand it is wished to deport only one person to a country which is not known to have sent other terrorists to the UK, there would be advantages in seeking to negotiate a relatively speedy and bespoke arrangement to guarantee so far as possible the safety on return of that one person. The content of the arrangement would depend on the nature of the receiving state’s interest in that person, and the factors that might affect the risk to that person’s rights: whether (and where) the receiving state will wish to detain the person on arrival, the conditions of detention and incarceration, whether it is wished to place him on trial, whether there is a risk that it might be sought to adduce evidence obtained by torture at that trial and so on. In such circumstances, it may be possible to reach a credible arrangement at operational level, e.g. with the head of an intelligence service which has a working relationship with UK intelligence.
- 3.48. Between those extremes, there is a range of possible scenarios. The scope of any arrangements that it is sought to negotiate will depend on a host of factors including the nature of the proposed deportees, the source of the perceived risks to their safety, and the nature of the existing relationship with the receiving state.

The courts are concerned only that the safety on return of individual deportees should be assured to a sufficient level. Decisions as to what type of agreement needs to be negotiated with a given receiving state are best left to those with knowledge of the identity of likely deportees and of the political and diplomatic background.

- 3.49. Lord Carlile suggested, in his submission to the Review, that the difficulties of relying on national NGOs of variable quality could be surmounted by the UK “*taking charge of the monitoring*” by appointing a “*senior and highly reputable person*” or by establishing an independent body in the UK, reporting to Parliament and tasked with monitoring the evolving political situation in receiving states, amending DWAs for individual cases accordingly, and assigning properly trained caseworkers to monitor each deportee. This would solve some problems, though would not necessarily be enough to guarantee acceptance of independent monitoring by countries (e.g. Algeria) that have historically opposed it. Given current circumstances, there is no present appetite within Government for the idea, but it might perhaps be revisited if more use is made of DWA in the future.
- 3.50. I would add only, in relation to Question 6, that there could plainly be advantages in identifying problem areas and seeking to address them at the earliest opportunity – not least because, if progress does not seem possible in relation to the most contentious issues, it might be decided that there is no future in progressing a set of arrangements. But equally, there might be circumstances in which it is better to build up confidence by negotiating the “*easy wins*” first. All will depend on the circumstances.

### **Legal process**

- 3.51. Questions 2 and 3 of my terms of reference ask:

“What opportunities are there for HM Government or the Courts to improve the **quality and speed of the legal procedure** in DWA cases, including appeals, whilst assuring that the subjects get appropriate legal protection?”

“How do **legal and procedural conditions** imposed upon the exercise of DWA by domestic and international courts impact upon the effectiveness of the policy, and what can be done to influence the future development of such conditions or to give them effect consistently with the fair and efficient operation of DWA?”

### Question 2

- 3.52. Some of the proceedings for DWA have been of inordinate length. The most striking examples are the cases of Abu Qatada (2.57 above: eight years) and the

Algerians (2.53 above: 11 years). It has been suggested by a senior judge that these are cases from whose continuation each side gains something useful: 2.53-2.55 above. But whether or not this is so, headline delays of this order are liable to bring the law into disrepute in the eyes of the public. There may be cases in which they could be reduced by use of mediation (which is not unknown in the national security context): but the appropriateness of this will vary according to the circumstances, and it is not something that could be recommended across the board.

3.53. On closer analysis, the contributing factors to delay in cases such as these can be summarised as:

- (a) the **exculpatory review** of vast quantities of Government material, e.g. emails from the Foreign Office and security and intelligence agencies;
- (b) the operation of **closed material procedures in SIAC**, which involves the instruction of special advocates and raises extra issues in each case about the extent of disclosure and the material that can be heard in open rather than closed session;
- (c) the **possibility of appeal** from SIAC to the Court of Appeal and from there to the Supreme Court (though only where permission to appeal is granted, and only on a point of law);<sup>101</sup>
- (d) the opportunity for a disappointed appellant to **petition the ECtHR** for a remedy; and
- (e) when a case returns to SIAC after the correction by an appellate court of an error of law, the right of the parties to submit further evidence reflecting **changed conditions and altered risk** in the intended receiving state.<sup>102</sup>

3.54. Three points need to be made at this juncture.

3.55. **First**, each of those five factors is the expression of an important issue of principle:

- (a) Exculpatory review can and does throw up evidence that is highly relevant to the issue of safety on return. To attempt to limit it would risk forfeiting the trust of the special advocates and of SIAC itself in the process.

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<sup>101</sup> The Supreme Court further requires any point of law to be of general public importance, and for it to be appropriate to hear the point at that time (Supreme Court Practice Direction 3, para 3.3.3). In practice, permission to appeal to the Supreme Court is granted in fewer than 100 cases annually across all fields of law (84 in 2015/16).

<sup>102</sup> Some cases (e.g. Abu Qatada) have also seen repeated applications for immigration bail.

- (b) The special advocate system, devised after *Chahal*, is required for the purposes of ensuring a fair trial from the point of view of an appellant.<sup>103</sup> Were it not for the special advocate, the case would be decided on the basis of evidence that is shown neither to the appellant nor to anyone tasked with representing him.
- (c) The appeal mechanism is standard across nearly all litigation: it is controlled by the requirement of permission to appeal, by the restriction to points of law and by the very small number of cases which the Supreme Court has time to hear in any given year.<sup>104</sup>
- (d) The right of individual petition to the ECtHR will exist for as long as the UK is a party to the ECHR, which the Government has recently indicated it intends should continue.
- (e) The question of whether a person may safely be deported is not one that can properly be decided on the basis of out-of-date evidence (which might for example relate to a previous regime, or predate the coming to light of new evidence of torture in the receiving state).<sup>105</sup>

3.56. **Secondly**, it may reasonably be expected that future cases will not take as long as Abu Qatada's case and the Algerian cases. The Court of Appeal (and still more so, the Supreme Court) accepts cases only where it is necessary to clarify the law. The first cases on DWA threw up a number of issues relating to the legal standards to be applied, which could only be definitively determined at a high judicial level (Court of Appeal, House of Lords/Supreme Court and/or ECtHR). The legal position being now clear both as to the nature of the assurances that need to be obtained (at least in relation to Articles 3 and 6) and the operation of the special advocate procedure, it is likely that future appeals to the Supreme Court, and petitions communicated to the Government by the ECtHR, will be less frequent than in the past.

3.57. **Thirdly**, none of those who made submissions to this Review made any constructive suggestion for increasing the speed of the procedure. Even the Government, which put Question 2 into my terms of reference, did no more in its response to my call for evidence than refer to a series of already-existing changes and developments:

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<sup>103</sup> See, generally, *A v UK* (2009) 49 EHRR 625; *RB (Algeria) v Secretary of State for the Home Department* [2009] UKHL 10, [2010] 2 AC 110; *Secretary of State for the Home Department v AF (No. 3)* [2009] UKHL 28, [2010] 2 AC 269.

<sup>104</sup> In appropriate cases it might be possible to skip the Court of Appeal stage via a leapfrog: provision has recently been made for this (3.57(d) below).

<sup>105</sup> One person suggested to me that the law might be changed so as to allow changes in factual circumstances to be permitted as additional grounds of appeal. But that would be contrary to long-established principle in appellate courts (*Ladd v Marshall* [1954] 1 WLR 1489); and whilst it might allow some cases to be completed more quickly, it could also lead to longer appeals, and more of them.

- (a) a provision of the Crime and Courts Act 2013 allowing the Home Secretary to certify national security cases where there was no risk of serious, irreversible harm so that the appeal can only be pursued from overseas;<sup>106</sup>
  - (b) various provisions of the Immigration Act 2014 that restrict rights of appeal (though not when human rights concerns are raised, which will be so in any DWA case), route more cases into SIAC and place a duty on appellants to raise an issue with the Government before raising it in an appeal;<sup>107</sup>
  - (c) the 2014 Practice Note of Irwin J, which was intended to encourage the parties to establish the issues relevant to the appeal early in the proceedings;<sup>108</sup> and
  - (d) a provision allowing “*leapfrog*” appeals to be brought in appropriate circumstances straight from SIAC to the Supreme Court.
- 3.58. The Government did note that the Judiciary had “*resisted moves to add national security deportation cases to the list of cases that must be prioritized by the courts*”, on the basis that the number of cases was small and that the Government could still request expedition at the permission to appeal stage. But no recommendation for increasing the speed of proceedings was pressed on me by any of those to whom I spoke, and none occurs to me spontaneously.
- 3.59. Two recommendations were made, by a speaker at the symposium referred to at 1.16(c) above, for increasing the fairness of proceedings. They would not have increased the speed of proceedings, and indeed would be likely to have slowed them further.
- 3.60. ***The first recommendation*** was to extend to DWA cases the obligation, already familiar from other types of closed material proceedings,<sup>109</sup> to provide the gist of the case against an individual not only to the special advocate (who sees all the evidence in any event) but to the individual himself and his open advocate. The gisting requirement already applies to SIAC proceedings where an EU right is in

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<sup>106</sup> Lord Carlile suggested in his submission to the Review that this change might cause the ECtHR to find that “*our DWAs do not go far enough to protect all our rights*”. The new procedure may however not be used when the person in question would, before the appeals process is exhausted, face a real risk of serious irreversible harm if removed. This is likely in practice to render the procedure non-operative in most DWA cases.

<sup>107</sup> Immigration Act 2014, sections 15 and 18.

<sup>108</sup> <https://www.judiciary.gov.uk/publications/practice-note-for-proceedings-before-siac/>. This provides, among other things, for an initial exculpatory review to be undertaken by the Government prior to receipt of the appellant’s first witness statement, and for a schedule of issues (though I was told that in practice it can be difficult to prevent appellants from raising new issues not in the original schedule; and that second exculpatory reviews tend in any event to be required once evidence has been served).

<sup>109</sup> E.g. under the Terrorism Prevention and Investigation Measures (TPIM) Act 2011, where persons can only be subjected to a TPIM if they are given a gist, sufficient to enable them to instruct counsel, of the national security case against them.

issue.<sup>110</sup> The reason it has not hitherto been imposed in SIAC proceedings is because Article 6 of the ECHR, which has been interpreted as requiring a gist, does not apply to decisions in the field of immigration since ‘civil rights’ within article 6 are not involved.<sup>111</sup>

- 3.61. The purpose of providing a gist is to improve the fairness of closed material procedures by helping to bridge the gap between client and special advocate, thus enabling the client not only to understand the bare bones of the national security case against him but also to instruct a special advocate in the knowledge of at least the broad areas that are covered by the national security case. A gist could also in principle be required in relation to issues of safety on return: but the argument for it in that context is less strong, since the individual concerned is most unlikely to have special knowledge of conditions in the receiving state that might, on receipt of a gist, help him instruct the special advocate.<sup>112</sup>
- 3.62. Officials to whom I put this suggestion were resistant to it. They pointed out, correctly, that it would require statutory change (to the SIAC Act 1997), as well as to the SIAC Procedure Rules. More substantively, they noted that the rules already require them to make every effort to place the maximum amount of material into open, and characterised the obligation to gist as an obligation to provide disclosure of material that would risk harming the public interest. They commented that a gisting obligation would tend to lengthen litigation proceedings (which I accept), and referred me to cases in which departmental legal advisers have recommended that executive actions are not taken in some cases, as gisting would not be possible without unacceptable damage to national security.<sup>113</sup>
- 3.63. Those arguments are similar to those which were made unavailingly to the courts in the control order context.<sup>114</sup> They demonstrate that there is, in this area, a potential trade-off between the requirements of fairness and of national security. Inherent in the nature of a trade-off is that national security cannot function as a universal trump card.
- 3.64. Nonetheless, I have decided not to make the suggested recommendation in the light of the decision of the ECtHR in *IR and GT v United Kingdom*. The applicants had been excluded from the UK on national security grounds.

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<sup>110</sup> Case C-300/11 *ZZ v Secretary of State for the Home Department* ECLI:EU:C:2013:363; *ZZ (France) v Secretary of State for the Home Department (no 2)* [2014] EWCA Civ 7.

<sup>111</sup> *RB (Algeria) v Secretary of State for the Home Department* [2009] UKHL 10, [2010] 2 AC 110.

<sup>112</sup> *Ibid.*, per Lord Phillips at paras 94-98, 102.

<sup>113</sup> As I have myself noted, the introduction of a gisting obligation into the control order regime required a few control orders to be revoked, and may have deterred others from being made: D. Anderson, *Control Orders in 2011*, March 2012, 3.76.

<sup>114</sup> *SSH D v AF (No. 3)* [2009] UKHL 28, [2010] 2 AC 269, following the judgment of the ECtHR in *A v UK* (2009) 49 EHRR 625. For a summary, see D. Anderson, *Control Orders in 2011*, March 2012, 3.72-3.77.

Notwithstanding the non-application of Articles 5 and 6, the applicants argued that Article 8 required more specific information to be provided to them than was contemplated in the SIAC Rules as to the nature of the allegations against them and the alleged threat to national security that they posed. Dismissing the application as manifestly ill-founded, the ECtHR:

- (a) recalled its own recent case law delineating the procedural guarantees afforded in the deportation and exclusion context under Article 8 of the Convention;
- (b) held that the scope of those guarantees will vary depending on the context of the case in question;
- (c) noted (distinguishing the control order case *A v UK*) that the structure of the ECHR itself envisaged that the guarantees inherent in Article 8 would not always be as extensive as those provided for under Articles 5 and 6; and
- (d) ruled that the UK procedure offered sufficient guarantees for the purposes of Article 8 taken alone and with Article 13.<sup>115</sup>

In the circumstances, I have concluded that a specific recommendation from me would not be appropriate.

- 3.65. **The second recommendation** was to enable special advocates to call evidence in relation to the issue of safety on return. I agree that this facility is a potentially important one if the equality of arms between the parties is to be ensured (though the calling of additional evidence will tend to lengthen rather than shorten the process). The possibility is however already specifically provided for in the SIAC Procedure Rules 2003, as amended in 2007 (Rule 35(b)). Furthermore, two cases have been drawn to my attention by a member of the Bar in which evidence has been called in response to evidence submitted in closed material proceedings.<sup>116</sup> I do not suggest that this is in practical terms as easy as it might be. Indeed I have in the past made representations to the Attorney General and the Treasury Solicitor in relation to the vital need for the Special Advocates Support Office to be adequately staffed and funded. But it would seem that there is no objection in principle to the calling of evidence in an appropriate case: in the circumstances, no specific recommendation is called for from me.

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<sup>115</sup> Applications 14876/12 and 63339/12 *IR and GT v United Kingdom*, admissibility decision of 28 January 2014, paras 57-67.

<sup>116</sup> The first is *R (K) v Secretary of State for Defence and Secretary of State for Foreign and Commonwealth Affairs* [2016] EWHC 1261 (Admin). Claimants in the High Court instructed an expert who was subsequently allowed to see the closed material. The second, in which the ruling is closed, concerns an application by special advocates to adduce evidence of their own.

### Question 3

- 3.66. Finally, I am asked how legal and procedural conditions imposed upon the exercise of DWA by domestic and international courts impact upon the effectiveness of the policy, and what can be done to influence the future development of such conditions or to give them effect consistently with the fair and efficient operation of DWA.
- 3.67. The effect of domestic and international court rulings on the exercise of DWA is the subject of Chapter 2 above and Chapter 5 below. For as long as the UK remains party to the ECHR (or equivalent human rights protection in domestic law), and for as long as it has not sought to derogate from its obligations under (for example) Articles 5 and 6,<sup>117</sup> its provisions will remain binding on the Government.
- 3.68. It is for the Government's legal service and legal representatives to make such submissions as they think appropriate to courts before which issues relating to DWA will from time to time arise.
- 3.69. One legal distinction of which it might seem that more could be made is the distinction between torture and other forms of ill-treatment covered by Article 3. Being slapped or left in the cold might be thought to amount to the latter but not to the former. It might be envisaged, at least in theory, that the conditions for DWA could be formulated in less onerous terms when there is a real risk of degrading treatment but not of torture.<sup>118</sup> But the scope for that argument now seems limited, in view of the comments of the ECtHR in *Babar Ahmad and others v UK*, where such an argument was mounted unsuccessfully by the United Kingdom Government in the extradition context. Noting that the distinction between torture and other forms of ill-treatment is more easily made in the domestic context, where the acts complained of have already taken place, the ECtHR added:

“Where, as in the extra-territorial context, a prospective assessment is required, it is not always possible to determine whether the ill-treatment which may ensue in the receiving State will be sufficiently severe as to qualify as torture. Moreover, the distinction between torture and other forms of ill-treatment can be more easily drawn in cases where the risk of the ill-treatment stems from factors which do not engage either directly or indirectly the responsibility of the public authorities of the receiving State (see, for example, *D. v. the United Kingdom*, 2 May 1997, Reports of Judgments and

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<sup>117</sup> See, in this regard, 2.7 above.

<sup>118</sup> As Lord Hoffmann, Baroness Hale and Lord Carswell were inclined to do (in the extradition context) in *R (Wellington) v. Secretary of State for the Home Department* [2008] UKHL 72, [2009] 1 AC 335: see the ECtHR's summary of the majority and minority views in Application no. 24027/07 and others *Babar Ahmad and others v United Kingdom*, 10 April 2012, paras 67-69. and compare the comments of Sir Nigel Rodley relating to the “sliding scale of risk”: 3.12 above.

Decisions 1997-III, where the Court found that the proposed removal of a terminally ill man to St Kitts would be inhuman treatment and thus in violation of Article 3).

For this reason, whenever the Court has found that a proposed removal would be in violation of Article 3 because of a real risk of ill-treatment which would be intentionally inflicted in the receiving State, it has normally refrained from considering whether the ill-treatment in question should be characterised as torture or inhuman or degrading treatment or punishment.”<sup>119</sup>

The ECtHR added that Article 7 of the International Covenant on Civil and Political Rights [ICCPR] prevents refoulement both when there is a real risk of torture and when there is a real risk of other forms of ill-treatment, though it went on to affirm that not any form of ill-treatment will act as a bar to removal from a state that is party to the ECHR.<sup>120</sup>

## Conclusion

3.70. As noted above (3.1-3.7), expectations for the policy of DWA have substantially diminished since the commissioning of this Review was first discussed in Government.

3.71. I nonetheless conclude, with Professor Walker, that DWA is capable of playing a significant role in counter-terrorism, especially in prominent and otherwise intractable cases which are worth the cost and effort. But as the UK experience amply demonstrates, it can be delivered effectively and legitimately only if laborious care is taken.

3.72. To summarise my answers to the six specific questions asked of the Review:

### Question 1 (3.24-3.32 above)

The UK has taken the lead in developing rights-compliant procedures for DWA. It has little to learn either from modes that are available only to states not signatory to the ECHR, or that are practiced by signatory states in violation of its requirements.

### Question 2 (3.52-3.65 above)

Some DWA proceedings have been of inordinate length: but some delays are inherent in any closed material procedure, and future cases are likely to take less time now that the central legal principles have been established by the highest

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<sup>119</sup> Application no. 24027/07 and others *Babar Ahmad and others v United Kingdom*, 10 April 2012, paras 170-171.

<sup>120</sup> *Ibid.*, paras 175-179.

courts. No suggestions were put to me that would save time without sacrificing the fairness of proceedings.

**Question 3** (3.66-3.69 above)

The effect of domestic and international court rulings on the exercise of DWA is considered in Chapter 2 (above) and Chapter 5 (below). For as long as it remains party to the ECHR, and for as long as it has not sought to derogate from its obligations under (for example) Articles 5 and 6 of the ECHR, the provisions of the ECHR will remain binding on the Government in international law.

**Question 4** (3.36-3.42 above)

The key consideration to be taken into account in developing safety on return processes is whether compliance with assurances can be objectively verified through diplomatic or other monitoring mechanisms.

**Questions 5 and 6** (3.43-3.50 above)

It is not necessary for DWA arrangements to be “*one size fits all*”: they can be tailored to particular categories of deportee, or to particular outcomes that are likely to await them in the receiving state. The balance of advantage in negotiating bespoke or all-purpose solutions will depend on all the circumstances, as will the question of whether to identify problem areas and seek to address them with the receiving state at the earliest opportunity.

# **PART II**

## **INTERNATIONAL AND COMPARATIVE LAW AND PRACTICE**

**CLIVE WALKER\***

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\* Professor Emeritus of Criminal Justice Studies, University of Leeds. Thanks to the Max-Planck-Institute for Foreign and International Criminal Law, the European University Institute Library (Florence), the Law School Libraries of George Washington University and Georgetown University for facilitating research visits in 2014, the participants at the Home Office, *Symposium on Deportation with Assurances*, 24 September 2014, and the audience at the Australia New Zealand Society of Criminology Annual Conference, Adelaide, 2015. The law is stated as at 1 February 2017.

## 4. INTRODUCTION TO PART II

- 4.1. The objective of Part II is to provide an exposition and analysis of the laws and practices regarding deportation with assurances ('DWA') in international law and comparative law. Part II seeks to assist the reader in forming a judgment as to how UK laws and practices (both present and future) in respect of DWA comply with international law and compare with the spectrum of laws and practices elsewhere.
- 4.2. The issue is of growing importance. As stated by Mr Justice Leveson in *Shankaran v India*,<sup>121</sup> 'the scale both of immigration and of extradition decision-making have made undertakings and assurances not merely normal but indispensable in the operation of English extradition law'. That growth in importance applies to assurances in terrorism cases too, and arises from various trends. One is the trend away from extradition and towards deportation because of the extent of available evidence or the willingness to subject it to criminal process, and also because the receiving countries relevant to terrorism more often do not have operative or at least applicable extradition arrangements. Another trend is that, after 9/11, terrorism has tended to shift from nationalist and localised campaigns towards culturally driven and transnational campaigns.<sup>122</sup> This transnationality has generated the added complexity of contending with cross-jurisdictional crime, whether by one's own nationals or by foreigners, which makes extradition less attractive since such crimes are more difficult to prosecute. The final trend is that the transnational threat has also fostered greater solidarity between nations in their determination to eradicate terrorism. The days of the 'political offence exception' to extradition or political asylum for terrorists have largely passed.<sup>123</sup> Egged on by the UN Security Council Resolutions 1373 onwards, all nations now must 'deny safe haven', 'afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings,' and 'increase cooperation'.<sup>124</sup> The obstacles today are not about whether there should be the facilitation of the transfer of suspects but their due process and safe and fair treatment on return. That is where DWA bites – to give assurance to the courts, to the public, and to the international community that hallowed standards of the treatment of defendant prisoners will not be sacrificed.
- 4.3. The UK is a major site of policy and jurisprudence in regard to DWA – probably the leading country. The UK has alone developed MOUs relating to DWA, rather

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<sup>121</sup> [2014] EWHC 957 (Admin), para.59.

<sup>122</sup> See Gray, J., *Al Qaeda and What It Means to Be Modern* (Faber and Faber, London, 2003); Neumann, P., *Old and New Terrorism* (Polity, Cambridge, 2009); Parker, T. and Sitter, N., 'The four horsemen of terrorism: it's not waves, it's strains' (2016) *Terrorism and Political Violence*.

<sup>123</sup> See Walker, C., *Terrorism and the Law* (Oxford University Press, Oxford, 2011) chap.6.

<sup>124</sup> Paras 2, 3.

than confining itself to individual arrangements for specific cases. As described in Part I of this report, it was after the shock of the bombings on the 7 July 2005 that the UK Government intensified its policy of seeking MOUs with correspondent governments, reflecting its greater experience of terrorism and counter-terrorism than most other countries.<sup>125</sup> Since that time, the UK has been the subject of many international challenges (described in this volume) but remains a resolute advocate. There may be a number of reasons why the UK Government has become so prominent and so dogged in its support of DWA on the international stage.

- 4.4. First, the UK government frequently professes its wish to comply with international law requirements, even at challenging junctures, such as during the prolonged litigation described later relating to Omar Mahmoud Othman (Abu Qatada).<sup>126</sup> This attention to the rule of law is reflected in a willingness to subject official actions to litigation and to comply with court rulings, thereby eschewing summary deportations. The history of deportation practices has not always adhered to these ideals, and serious illegalities and potential shortcomings have been detected by the courts<sup>127</sup> and official reviewers.<sup>128</sup> Nevertheless, the ideals are not denied even in these extreme circumstances.
- 4.5. Second, the UK consciously views itself as a trendsetter in counter-terrorism, not only through its own legislation production and treaty promotion but also through intervention in the disputes of others.<sup>129</sup> Thus, the Home Office claims that 'The UK has led the way internationally on the use of assurances to facilitate removal. Few other states are yet to use assurances other than to prevent the use of the death penalty. However, several other countries have indicated that they wish to

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<sup>125</sup> See Walker, C., 'Terrorism and criminal justice: past, present and future' [2004] *Criminal Law Review* 311.

<sup>126</sup> *Othman v United Kingdom*, App. no. 8139/09, 17 January 2012. See Horne, A., and Gower, M., *Deportation of individuals who may face a risk of torture* (SN/HA/4151, House of Commons Library, 2012); Michaelsen, C., 'The renaissance of non-refoulement? The Othman (Abu Qatada) decision of the European Court of Human Rights' (2012) 61 *International and Comparative Law Quarterly* 750; Middleton, B., 'Deporting terrorist suspects with assurances' (2012) 12 *Connecticut Public Interest Law Journal* 127; Middleton, J., 'Taking rights seriously in expulsion cases' [2013] *European Human Rights Law Review* 520; Guiffré, M., 'An appraisal of diplomatic assurances one year after Othman (Abu Qatada) v United Kingdom (2012)' (2013) 2 *International Human Rights Law Review* 266; Fabbri, F., 'The European Court of Human Rights, extraordinary renditions and the right to the truth' [2014] 14 *Human Rights Law Review* 85.

<sup>127</sup> *Mohamed v Secretary of State for the Foreign and Commonwealth Office* [2008] EWHC 2048, 2100, 2159 (Admin), [2009] EWHC 152, 2048, 2549, 2973 (Admin), [2010] EWCA Civ 65, 158; *R (Aamer) v Secretary of State for the Foreign and Commonwealth Office* [2009] EWHC 3316 (Admin); *Al-Rawi v Security Service* [2011] UKSC 34; *Belhaj v Straw and others; Rahmatullah (No 1) v Ministry of Defence* [2017] UKSC 3.

<sup>128</sup> Intelligence and Security Committee, *The handling of detainees by UK intelligence personnel in Afghanistan, Guantánamo Bay and Iraq* (Cm 6469, London, 2005); Joint Committee on Human Rights, *Allegations of UK complicity in torture* (2008–09 HL 152/HC 230) and Government Reply (Cm 7714, London, 2009); Sir Peter Gibson, *The Report of the Detainee Inquiry* (Cabinet Office, London, 2013).

<sup>129</sup> *Saadi v Italy* App. no. 37201/06, 28 February 2008, para. 138. See Moeckli, D., 'Saadi v Italy: The Rules of the Game Have Not Changed' (2008) 8 *Human Rights Law Review* 534. There was criticism of the intervention in Human Rights Committee, *Consideration of reports submitted by states parties under Article 40 of the Covenant, Sixth Periodic Report, United Kingdom of Great Britain and Northern Ireland* (CCPR/C/GBR/CO/6, Geneva, 30 July 2008) para.12.

learn from our experiences'.<sup>130</sup> Undeniably, very many foreign jurisdictions have been influenced over the years by UK counter-terrorism laws and practices – arguably, it has been the leading national influence in shaping legal counter-terrorism responses both before and after 9/11.<sup>131</sup> Seen in that light, this study of how UK laws and practices are situated with respect to international law and other jurisdictions is not simply a matter of national curiosity but reflects the dynamism of global human rights and the international rule of law.

- 4.6. The third reason for close attention is that the scale and nature of the problem also constantly attracts the attention of the UK Government. As for scale, one might suppose that, with 12 DWAs secured, the pool of potential candidates has been much depleted, especially given that several avenues for admission of new candidates for action have been closed to some extent.<sup>132</sup> Recent developments have closed further avenues (2.60 above). Yet as recently as 2014, 14 further DWA cases were said to be pending.<sup>133</sup> Furthermore, an unofficial estimate supplied to the *Sunday Telegraph* by the Henry Jackson Society claimed in 2015 that the true figure was around 28 cases.<sup>134</sup> Deeper examination of that dossier has revealed that the total of potential candidates (apparently deportable terrorism suspects) probably exceeded 40. Given the recent changes to citizenship deprivation laws,<sup>135</sup> increasing travel to Iraq and Syria for terrorism purposes,<sup>136</sup> and judicial condemnation of the imposition of Restricted Leave to Remain conditions,<sup>137</sup> this figure could now markedly increase. As for the substantive nature of the issue, a number of raw nerves are touched. There are accusations of government mismanagement of borders and immigration, as notably summed up in the ascription of 'Londonistan' to the period of alleged laxity in the decade or so before 9/11, when many extremists entered the country.<sup>138</sup> This toxic denunciation has been aggravated by the frequent resort to human rights ideals and to their enforcement by the domestic and international courts in terrorism cases,<sup>139</sup> which has engendered questions about whether the fundamental structures of human rights protections should be changed. The

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<sup>130</sup> *HM Government's Response to the Call for Evidence in the Independent Review of Deportation With Assurances Policy* (London, 2014) para.1.

<sup>131</sup> See Roach, R., *The 9/11 Effect: Comparative Anti-Terrorism Law* (Cambridge University Press, Cambridge, 2011); Donohue, L., 'Transplantation' in Ramraj, V. et al, *Global Anti-Terrorism Law and Policy* (2<sup>nd</sup> ed., Cambridge University Press, Cambridge, 2012).

<sup>132</sup> See Walker, C., 'The treatment of foreign terror suspects' (2007) 70 *Modern Law Review* 427.

<sup>133</sup> Foreign & Commonwealth Office, *Human Rights and Democracy 2013* (Cm.8842, London, 2014) p.94.

<sup>134</sup> Mendick, R., 'Human Rights Act has helped 28 terrorists to stay in UK' *Sunday Telegraph* 1 February 2015 p.1. The author thanks Robert Mendick and Robin Simcox for further discussions.

<sup>135</sup> See Gower, M., *Deprivation of British Citizenship and Withdrawal of Passport Facilities* (London: SN/HA/6820, House of Commons Library, 2015).

<sup>136</sup> See Anderson D., *The Terrorism Acts in 2015* (Home Office, London, 2016) Annex 2.

<sup>137</sup> See *MS v Secretary of State for the Home Department* [2016] EWHC 3162 (Admin); *G v Secretary of State for the Home Department* [2016] EWHC 3232 (Admin).

<sup>138</sup> Phillips, M., *Londonistan: How Britain is Creating a Terror State from Within* (Gibson Square, London, 2006).

<sup>139</sup> See Walker, C., 'Counter-terrorism and human rights in the UK' in Breen-Smyth, M. (ed.), *The Ashgate Research Companion to Political Violence* (Ashgate, Farnham, 2012).

political prominence of the issue is indicated by the Conservative Party Manifesto 2015:

'We have stopped prisoners from having the vote, and have deported suspected terrorists such as Abu Qatada, despite all the problems created by Labour's human rights laws. The next Conservative Government will scrap the Human Rights Act, and introduce a British Bill of Rights. This will break the formal link between British courts and the European Court of Human Rights, and make our own Supreme Court the ultimate arbiter of human rights matters in the UK.'<sup>140</sup>

- 4.7. In terms of the ambit of this study, the review of international law will be confined to the impact of the removal<sup>141</sup> of persons linked to terrorism<sup>142</sup> under the following treaty requirements: under the aegis of the United Nations, the main instruments are the International Covenant on Civil and Political Rights and the Convention against Torture; for the Council of Europe, the main instruments are the European Convention on Human Rights and Fundamental Freedoms and the Convention against Torture. Important omissions are the Convention relating to the Status of Refugees 1951 and the Protocol relating to the Status of Refugees 1967<sup>143</sup> (and corresponding EU measures).<sup>144</sup> The reason is that those instruments drive the prior issues of the grant or refusal of asylum. Asylum may be refused by reference to Article 1F in the case of suspected terrorists:

'The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

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<sup>140</sup> <https://s3-eu-west-1.amazonaws.com/manifesto2015/ConservativeManifesto2015.pdf>, p.60.

<sup>141</sup> For the reverse problems related to detention in the country of nationality based on assurances, see *Hicks v Australia*, CCPR/C/115/D/2005/2010, 19 February 2016. David Hicks claimed breaches of rights arising from his imprisonment and the imposition of a control order after transfer from Guantanamo. Australia was absolved from any blame over his Guantánamo detention but was responsible for his continued imprisonment under transfer arrangements (May-December 2007) which were based on a flagrant denial of justice by the US authorities and so were a breach of liberty (para.4.9).

<sup>142</sup> The conditions of foreign prisons have been routinely considered in non-terrorism cases too as a bar to extradition: House of Lords Select Committee on Extradition, *Extradition* (2014-15 HL 126) para.373. For the refusal of rendition in a case related to terrorism, see *Lithuania v Campbell* [2013] NIQB 19.

<sup>143</sup> See 189 UNTS 150 and the 1967 Protocol (606 UNTS 267).

<sup>144</sup> See on asylum: Council Directive 2004/83/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States ('Qualification Directive'. The UK did not opt into the revised Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted); Asylum Procedures Directives - Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (this instrument was replaced in 2015 by the Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, but the UK did not opt in and so is still governed by the 2005 instrument).

(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) he has been guilty of acts contrary to the purposes and principles of the United Nations.<sup>145</sup>

Even if asylum has been granted, there may still be deportation under Article 32 but subject to Article 33.

'32(1) 'The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

33(1) No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

(2) The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.'<sup>146</sup>

At the point that they are excluded from refugee status, safety on return becomes a live issue and the possibility of DWA so arises. There is no explicit mention of DWA in the Refugee Convention. Indeed, the very process of discussion between states to devise suitable assurances could contravene the notion of asylum by disclosing the identity and allegations of the refugee which is contrary to recommended procedures.<sup>147</sup> Only where the person may be deported under Article 33(2) may DWA legitimately come into play. The UN Human Rights Commission ('UNHCR'), in its *Note on Diplomatic Assurances and International Refugee Protection*, considered that assurances can then be used only if they effectively remove the risk of subjection to human rights violations; DWA can work provided it is '(i) a suitable means to eliminate the danger to the individual concerned, and (ii) if the sending State may, in good

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<sup>145</sup> See United High Commission for Refugees, *Guidelines on International Protection: Application of Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees* (HCR/GIP/03/05, Geneva, 2003). See Gilbert, G., 'Running scared since 9/11' in Simeon, J.C. (ed), *Critical Issues in International Refugee Law* (Cambridge University Press, Cambridge, 2010); Simeon, J.C., 'Ethics and the exclusion of those who are "not deserving" of Convention refugee status' in Juss, S.S., and Harvey, C., *Contemporary Issues in Refugee Law* (Edward Elgar, Cheltenham, 2013).

<sup>146</sup> See, for the UK, Immigration, Asylum and Nationality Act 2006, ss.54, 55: *R (JS) (Sri Lanka)* [2010] UKSC 15; *Secretary of State for the Home Department v DD (Afghanistan)* [2010] EWCA Civ 1407; *SS (Libya) v Secretary of State for the Home Department* [2011] EWCA Civ 1547; *R (Polat) v Secretary of State for the Home Department* [2011] EWHC 3445 (Admin).

<sup>147</sup> UNHCR, *Asylum Processes (Fair and Efficient Asylum Procedures)*, (EC/GC/01/12, 31 May 2001) para 50. See Giuffrè, M., 'Access to Protection: Negotiating Rights and Diplomatic Assurances Under Memoranda of Understanding' in Gauci, J.P., Giuffrè M. and Tsourdi, L., (eds.), *Exploring the Boundaries of Refugee Law* (Brill, Leiden, 2015).

faith, consider them reliable'.<sup>148</sup> Thereafter, safety on return issues arise under the human rights instruments as the directly enforceable instruments governing the situation.<sup>149</sup>

- 4.8. As for the comparative survey, the focus of Part II will be on the following jurisdictions: predominantly within the common law tradition are Australia, Canada, Israel, New Zealand, and the USA; predominantly within the Continental European tradition are France, Germany, Italy, and the Netherlands and Denmark. This selection was affected by the experience and prominence of the jurisdiction, its relationship to the UK, and the availability of materials.

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<sup>148</sup> UNHCR, *Note on Diplomatic Assurances and International Refugee Protection*, 10 August 2006, [www.unhcr.org/refworld/docid/44dc81164.html](http://www.unhcr.org/refworld/docid/44dc81164.html), para 20. See further paras.23-26.

<sup>149</sup> See Weissbrodt, D., *The Human Rights of Non-Citizens* (Oxford University Press, Oxford, 2008) p.136.

## 5. INTERNATIONAL LAW

### A Introduction

- 5.1. Assertions that DWA is either forbidden by international law *per se* or amounts at its best to a practice inherently unable to meet international legal standards are much more commonplace than expressions of support for DWA.<sup>150</sup> In 2006, the UN High Commissioner for Human Rights, Louise Arbour, stated, 'I strongly share the view that diplomatic assurances do not work as they do not provide adequate protection against torture and ill-treatment.'<sup>151</sup> Manfred Nowak, then UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, remarked in 2006 that 'diplomatic assurances with regard to torture are nothing but attempts to circumvent the absolute prohibition of torture and refoulement, and that rather than elaborating a legal instrument on minimum standards for the use of diplomatic assurances, the Council of Europe should call on its member States to refrain from seeking and adopting such assurances with States with a proven record of torture'.<sup>152</sup> In 2013, the UN Special Rapporteurs on Torture, Juan Méndez, and on the promotion and protection of human rights and

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<sup>150</sup> See for critical literature: Human Rights Watch, *Still at Risk: Diplomatic Assurances No Safeguard Against Torture* (New York, 2005); Lester, A and Beattie, K, 'Risking torture' (2005) 6 *European Human Rights Law Review* 565; Ward, B., 'A Fig-Leaf for Torture: The Use of Diplomatic Assurances in the OSCE Region' *OSCE Yearbook 2005* ((Baden - Baden: Nomos, 2006); Hawkins, K.R., 'The promises of torturers: diplomatic assurances and the legality of "rendition"' (2006) 20 *Georgia Immigration Law Journal* 213; Metcalfe, E., 'The False Promise of Assurances against Torture' (2009) 6 *JUSTICE Journal* 63; Noll, G., 'Diplomatic Assurances and the Silence of Human Rights Law' (2006) 7 *Melbourne Journal of International Law* 104; Jones M, 'Lies, Damned Lies and Diplomatic Assurances' (2006) 8 *European Journal of Migration and Law* 9; Jones, K., 'Deportations with Assurances: Addressing Key Criticisms' (2008) 57 *International and Comparative Law Quarterly* 183; Skoglund, L., 'Diplomatic assurances against torture: an effective strategy?' (2008) 77 *Nordic Journal International Law* 319; Droege, C., 'Transfers of detainees: legal framework, non-refoulement and contemporary challenges' (2008) 90/871 *International Review of the Red Cross* 669; Hall, J., *Not the Way Forward* (Human Rights Watch, New York, 2008); Gillard, E-C., 'There's no place like home' (2008) 90/871 *International Review of the Red Cross* 703; Pergantis, V., 'Soft Law, Diplomatic Assurances and the Instrumentalisation of Normativity' (2009) 56 *Netherlands International Law Review* 137; Amnesty International, *Dangerous Deals* (London, 2010); Padmanabhan, V.M., 'To transfer or not to transfer' (2011) 80 *Fordham Law Review* 73; Mouyal, L.W., 'Diplomatic assurances – a permissible tool in the struggle against terrorism?' (2011) 2 *Czech Yearbook of Public & Private International Law* 113; Satterthwaite, M., 'The legal regime governing transfer of prisoners in the fight against terrorism' in van den Herik, L., and Schrijver, N., eds., *Counter-Terrorism Strategies in a Fragmented International Legal Order* (Cambridge University Press, New York, 2013) pp.627-630; Guiffre, M., 'Access to protection' in Gamei, J.P. et al (eds), *Exploring the Boundaries of Refugee Law* (Brill, Leiden, 2015); House of Lords Select Committee on Extradition, *Extradition* (2014-15 HL 126) paras.70-73; Maniar, A., *10 years of deportation with assurances* (One Small Window, <https://onesmallwindow.wordpress.com/>, 2015); Hamdan, E., *The Principle of Non-Refoulement under the ECHR and the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Brill, Leiden, 2016); de Weck, F., *Non-Refoulement under the European Convention on Human Rights and the UN Convention Against Torture* (Brill, Leiden, 2016); Giuffre, M., 'Deportation with Assurances and Non-refoulement: the Case of Persons Suspected or Convicted of Serious Crimes' (2017) *Journal of International Criminal Justice* (pending).

<sup>151</sup> Statement by UN High Commissioner for Human Rights Louise Arbour to the Council of Europe's Group of Experts on Human Rights and the Fight Against Terrorism (DH-S-TER), March 29-31, 2006, on file with Human Rights Watch.

<sup>152</sup> See Report to the UN Commission on Human Rights, E/CN.4/2006/6, para 32. See also M. Nowak, 'Challenges to the Absolute Nature of the Prohibition of Torture and Ill-treatment' (2005) 23(4) *Netherlands Quarterly of Human Rights* 674; *Interim report of Mr. Manfred Nowak, Special Rapporteur of the Commission on Human Rights on torture and other cruel, inhuman or degrading treatment or punishment* (A/60/316, 2005) para.51; Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (A/62/263, 2007) paras.52, 53.

fundamental freedoms while countering terrorism, Ben Emmerson issued the following statement:

'...diplomatic assurances are unreliable and ineffective in protecting against torture and ill-treatment, and States should not resort to them. We have often seen diplomatic assurances used by Governments to circumvent the absolute prohibition on torture as established in UNCAT. Diplomatic assurances are not legally binding. It is therefore unclear why States that violate obligations under treaty and customary international law should comply with non-binding assurances.'<sup>153</sup>

Another sense of the prevailing attitude can be gained from the UN Special Rapporteur on Torture who stated in 2015 that DWA are 'inherently unreliable and ineffective'.<sup>154</sup>

These statements do not accurately represent the position in international law, which is more complex, but do represent the prevailing hostility of most NGOs and international reviewers.

- 5.2. The purpose of this survey of international law is to explore the accuracy of these prevailing and very negative views. It will be shown that the animosity to DWA is understandable given the prevalence of the risks of torture and ill treatment. There is also scepticism that external agency through DWA will change foreign cultures and practices, that, after deportation, ill treatment will be detectable,<sup>155</sup> or that states on both sides will overcome their interest in denying, concealing or minimising any breach of assurances. There are also more practical considerations regarding high costs and limited applicability. However, the proposition that DWA is *per se* contrary to international law is incorrect both in terms of actual decisions, such as *Othman*, and also in jurisprudential logic which suggests that if predictable risk levels of ill treatment can sufficiently be reduced by DWA then they may be a viable option. This reality suggests that a more fruitful approach for Part II is to seek to delineate the requirements of international law and to explore their observance in practice when DWA has been attempted. Simply to accept the prevailing animus against DWA would misrepresent international law to governments, including the UK government, which have mostly reserved the option of DWA as a matter of legality and policy.

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<sup>153</sup> <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14084&LangID=E>. See also (Juan Méndez) *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment* (A/HRC/25/60, 2014) para.57 (stating that DWAs are 'of great concern').

<sup>154</sup> *Interim Report* (A/70/303, 2015) para.69.

<sup>155</sup> See Johnston, J.G., 'The risk of torture as a basis for refusing extradition and the use of diplomatic assurances to protect against torture after 9/11' (2011) 11 *International Criminal Law Review* 1, 23.

- 5.3. Assurances have a lengthy history in the context of the more formalised and judicialised processes of extradition.<sup>156</sup> For instance, the Council of Europe Convention on Extradition 1957, Article 11, envisages the use of assurances against the death penalty following extradition (but not deportation).<sup>157</sup> Their appearance in the realm of extradition is said to reflect the greater procedural protections against extradition which arise from greater concern over the fate of those liable to be extradited because they may be the citizens of the sending state.<sup>158</sup> By contrast, there is no multilateral treating providing for DWA.
- 5.4. The following survey is based on UN and Council of Europe instruments. There are further relevant materials in a range of other sources including the *jus cogens* nature of the prohibition on torture,<sup>159</sup> other regional instruments and reports;<sup>160</sup> the EU Charter of Fundamental Rights,<sup>161</sup> and ‘soft law’ such as guidance on the treatment of detainees or asylum seekers. However, the most decisive judgments about DWA have been almost entirely sustained within the international laws fostered through the UN and the Council of Europe.

## **B United Nations standards**

### **a) International Covenant on Civil and Political Rights (‘ICCPR’)<sup>162</sup>**

- 5.5. While expressive rights and rights to family life may be affected by DWA arrangements, the articles within the ICCPR most likely to be in jeopardy relate to ill treatment and fair trial:

‘Article 7: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. ...

Article 14: 1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. ...’

- 5.6. As for DWA as a response to potential Article 7 abuses in cases of the expulsion of asylum-seekers, the Human Rights Committee (‘HRC’) found against the state

<sup>156</sup> UNHCR, *Note on Diplomatic Assurances and International Refugee Protection*, 10 August 2006, [www.unhcr.org/refworld/docid/44dc81164.html](http://www.unhcr.org/refworld/docid/44dc81164.html); Metcalfe, E., ‘The False Promise of Assurances against Torture’ (2009) 6 *JUSTICE Journal* 63, 64.

<sup>157</sup> See also Extradition Treaty between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America (Cm.5821, London, 2003) art.7.

<sup>158</sup> Metcalfe, E., ‘The False Promise of Assurances against Torture’ (2009) 6 *JUSTICE Journal* 63, 65.

<sup>159</sup> See *R v Bow Street Magistrates; ex parte Pinochet Ugarte (No 3)* [2000] 1 AC 147; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* ICJ Reports 2012, p.422, para.99.

<sup>160</sup> See for example *Wong Ho Wing v Peru*, C 297, 30 June 2015, where the Inter-American Court of Human Rights examined deportation with assurances in the context of an extradition from Peru to China.

<sup>161</sup> (2010/C 83/02).

<sup>162</sup> General Assembly resolution 2200A (XXI) of 16 December 1966.

in *Alzery v. Sweden*.<sup>163</sup> The written assurances provided by the Egyptian authorities to Sweden promised that there would be a fair trial for terrorist activity, that Alzery would not be subjected to torture or other forms of proscribed ill-treatment, that he would not be sentenced to death or executed, that his wife and children would in no way be persecuted or harassed, and Swedish officials would be allowed to attend his trial. The HRC was particularly critical of the fact 'that the assurances procured contained no mechanism for monitoring of their enforcement. Nor were any arrangements made outside the text of the assurances themselves which would have provided for effective implementation.'<sup>164</sup> The HRC noted that visits by the Swedish embassy did not commence for five weeks after Alzery's return, did not involve private access, nor was appropriate medical and forensic expert evidence obtained even after substantial allegations of ill-treatment emerged. Thus, the assurances were too weak and should not have been acted upon summarily.

5.7. At the same time as being critical of weak DWA arrangements, the HRC has also sometimes been critical of a failure to seek DWA in the first place. In *Judge v Canada*,<sup>165</sup> Judge was convicted of capital murder in the US in 1987 but escaped from prison and fled to Canada where he was convicted of robbery. On his release in 1993, deportation was ordered. The HRC did not consider that the deportation of a person from a country which has abolished the death penalty (Canada) to a country where a sentence of death is possible amounts *per se* to a violation of Article 6 (the right to life),<sup>166</sup> but 'there is an obligation not to expose a person to the real risk of its application.'<sup>167</sup> Likewise, in *Ali Aarrass v Spain*,<sup>168</sup> the Audiencia Nacional agreed to the extradition to Morocco for terrorism offences. The court sought assurances as to the penalty to be imposed, which were given but felt it unnecessary to obtain assurances against torture since it was not systematic or widespread; Morocco rejected any possibility of conditions.<sup>169</sup> The Human Rights Committee considered that Spain had not properly considered the credible risk and so violated Article 7.<sup>170</sup>

5.8. Alongside these cases, more general warnings about DWA have been issued. In its *Sixth Periodic Report* on the UK in 2008, the HRC stated:

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<sup>163</sup> Communication no. 1416/2005, CCPR/C/88/D/1416/2005 (2006). See Guild, E., 'Asymmetrical sovereignty and the refugee' in Simeon, J.C. (ed), *Critical Issues in International Refugee Law* (Cambridge University Press, Cambridge, 2010). Thanks to Professor Iain Cameron, University of Uppsala for further information.

<sup>164</sup> Communication no. 1416/2005, CCPR/C/88/D/1416/2005 (2006) para.11.5. See also HRC, *Concluding Observations on Sweden*, 24 April 2002, CCPR/CO/74/SWE, para.12(b).

<sup>165</sup> Communication no. 829/1998, CCPR/C/78/D/829/1998 (2003). See also *US v Burns* 2001 SCC 7; *Judge v Pennsylvania* 611 F. Supp. 2d 415 (USDC ED Pa, 2009) (capital sentence vacated).

<sup>166</sup> *Ibid.*, para.10.2.

<sup>167</sup> *Ibid.*, para.10.4

<sup>168</sup> Communication no. 2008/2010, CCPR/C/111/D/2008/2010, 30 September 2014. See also *Ali Aarrass v Morocco*, Communication no. 477/2011, CAT/C/52/D/477/2011, 25 June 2014.

<sup>169</sup> *Ibid.*, paras.2.5, 2.7, 2.10.

<sup>170</sup> *Ibid.*, para.10.2.

'Furthermore, while the State party has concluded a number of memoranda of understanding on deportation with assurances, the Committee notes that these do not always in practice ensure that the affected individuals will not be subject to treatment contrary to Article 7 of the Covenant.... The State party should ensure that all individuals, including persons suspected of terrorism, are not returned to another country if there are substantial reasons for fearing that they would be subjected to torture or cruel, inhuman or degrading treatment or punishment. The State party should further recognise that the more systematic the practice of torture or cruel, inhuman or degrading treatment, the less likely it will be that a real risk of such treatment can be avoided by diplomatic assurances, however stringent any agreed follow-up procedure may be. The State party should exercise the utmost care in the use of such assurances and adopt clear and transparent procedures allowing review by adequate judicial mechanisms before individuals are deported, as well as effective means to monitor the fate of the affected individuals.'<sup>171</sup>

The HRC's *Concluding Observations on the Seventh Periodic Report of the UK* note that it 'remains concerned' about the resort to DWA and 'recommends that the State party strictly apply the absolute prohibition on refoulement under Articles 6 and 7 of the Covenant; continue to exercise the utmost care in evaluating diplomatic assurances; ensure that appropriate, effective and independent post-transfer monitoring of individuals who are transferred pursuant to diplomatic assurances is in place; refrain from relying on such assurances where the State party is not in a position to effectively monitor the treatment of such persons after their extradition, expulsion, transfer or return to other countries; and take appropriate remedial action when assurances are not fulfilled.'<sup>172</sup>

- 5.9. What emerges is a sliding scale of acceptability, reaching at best a low degree of tolerance and descending into almost total dismissal when a DWA is concluded with any country (as is likely to be the situation) which fits the description of having a systemic practice of torture where the gravity of the risk has not been allayed by the chances of detection (especially as through effective monitoring) and rectification measures.

**b) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 ('UNCAT')**<sup>173</sup>

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<sup>171</sup> Human Rights Committee, *Consideration of reports submitted by states parties under Article 40 of the Covenant, Sixth Periodic Report, United Kingdom of Great Britain and Northern Ireland* (CCPR/C/GBR/CO/6, Geneva, 30 July 2008) para.12.

<sup>172</sup> (CCPR/C/GBR/CO/7, 17 August 2015), para.19.

<sup>173</sup> UNGA Res.39/46, annex, 39 UNGAOR Supp. (No. 51), 197, (UN Doc. A/39/51, 1984). The Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) (UNGA A/RES/57/199, 18 December 2002) establishes an international inspection system for places of detention. See Parsad, K.C., 'Illegal renditions and improper treatment: An obligation to provide refugees remedies pursuant to the Convention Against Torture' (2009) 37 *Denver International Journal of Law and Politics* 681; Wouters, K., *International Legal Standards for the Protection from Refoulement* (Intersentia, Mortsels, 2009) chap.4.

- 5.10. International law against ill treatment is further elaborated by the UNCAT, and two measures are of particular relevance to DWA.

‘Article 3:

(1) No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

(2) For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

Article 15: Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.’

Notably, Article 3 mentions only torture (as defined in Article 1) and not inhuman or degrading treatment, subject to Article 3(2). Furthermore, the Committee against Torture ('ComAT'), to which complaints can be made and which monitors state performance, has held that the substantial danger under Article 3 refers only to violations, by or at the instigation of, or with the consent or acquiescence of, a public official or other person acting in an official capacity.<sup>174</sup>

- 5.11. The *cause célèbre* arose from the complaint of Ahmed Agiza.<sup>175</sup> Along with Alzery, he was deported from Sweden to Egypt, following the written assurances from the Egyptian authorities described earlier. Agiza was tried for terrorist activity before a military court which patently lacked several fundamental requirements of due process, and both Agiza and Alzery complained of torture by the Egyptian agents and inaction on the part of the Swedish authorities.<sup>176</sup> The ComAT found Sweden to be in breach of its obligations, and such assurances as were disclosed, including monthly diplomatic visits, albeit brief and not in private, ‘provided no mechanism for their enforcement [and so] did not suffice to protect against this manifest risk.’<sup>177</sup> The Swedish authorities should have known in view of the consistent and widespread use of torture against security detainees that ‘the procurement of diplomatic assurances, which, moreover, provided no mechanism for their enforcement, did not suffice to

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<sup>174</sup> CAT General Comment No. 1: Implementation of Article 3 of the Convention in the Context of Article 22 (*Refoulement and Communications*) (Document A/53/44, annex IX, 21 November 1997) para 3.

<sup>175</sup> Communication no. 233/2003, CAT/C/34/D/233/2003, 24 May 2005. See also *Attia v Sweden*, Communication no. 199/2002, CAT/C/31/D/199/2002, 24 November 2003 (his wife). See Guild, E., ‘Asymmetrical sovereignty and the refugee’ in Simeon, J.C. (ed), *Critical Issues in International Refugee Law* (Cambridge University Press, Cambridge, 2010).

<sup>176</sup> Human Rights Watch, *Still at Risk: Diplomatic Assurances No Safeguard Against Torture* (New York, 2005) 60.

<sup>177</sup> Communication no. 233/2003, CAT/C/34/D/233/2003, 24 May 2005, para.13.4.

protect against this manifest risk'.<sup>178</sup> Once again, the DWA device had been too weakly applied and should not have been acted upon summarily.

5.12. Likewise, in *Elif Pelit v. Azerbaijan*,<sup>179</sup> which concerned an extradition of a PKK member to Turkey, the ComAT also concluded that the state party did not 'detail with sufficient specificity the monitoring undertaken and the steps taken to ensure that it both was, in fact and in the complainant's perception, objective, impartial and sufficiently trustworthy.' In those circumstances, the ComAT felt that the request for assurances amounted to 'an acknowledgment that, without more, expulsion of the complainant would raise issues of her mistreatment'.

5.13. In *Toirjon Abdussamatov and 28 other complainants v. Kazakhstan*,<sup>180</sup> some of the individuals eventually extradited for alleged involvement in terrorist activities in Uzbekistan had initially been protected as refugees. However, following the changes in its domestic legislation on refugees, the authorities in Kazakhstan requested that the complainants reapplied for refugee status, which was then refused, thus opening the way to their extradition. The ComAT found that the extradition constituted a violation of Article 3 and rules that the withdrawal of refugee status could not serve to justify the breach of Article 3 which is absolute.<sup>181</sup> As for the diplomatic assurances procured by Kazakhstan, the ComAT was dismissive: 'The Committee notes that the State Party failed to provide any sufficiently specific details as to whether it has engaged in any form of monitoring and whether it has taken any steps to ensure that the monitoring is objective, impartial and sufficiently trustworthy.'<sup>182</sup>

5.14. Another notorious failure of DWA occurred in the case of Maher Arar, a Canadian-Syrian dual national, who was suspected by the US of terrorist involvement.<sup>183</sup> When in transit at Kennedy Airport in 2002, he was detained and removed to Syria.<sup>184</sup> Any objection under the UNCAT was said to be answered by assurances received from the Syrian government, despite that state's notorious record of torture and the absence of ongoing relations between the countries. Arar was duly tortured in Syria, and the Canadian government subsequently paid substantial compensation (C\$10.5 million).<sup>185</sup>

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<sup>178</sup> *Ibid.*, para.13.4

<sup>179</sup> Communication no. 281/2005, CAT/C/38/D/281/2005, 29 May 2007, para.11.

<sup>180</sup> Communication no. 444/2010, CAT/C/48/D/444/2010, 1 June 2012.

<sup>181</sup> *Ibid.*, para.13.7.

<sup>182</sup> *Ibid.*, para.13.10.

<sup>183</sup> See *Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar* (Ottawa, 2006) p.176; Office of Inspector General, U.S. Department of Homeland Security, *The removal of a Canadian citizen to Syria* (OIG-08-18, Washington DC, 2008); Forcese, C. and Roach, K., *False Security: The Radicalization of Canadian Anti-terrorism* (Irwin, Toronto, 2015) pp.70-73.

<sup>184</sup> See 8 USC s.1225(c)(2).

<sup>185</sup> The US courts rejected his claim: *Maher Arar v Ashcroft* 585 F.3d 559 (2009).

- 5.15. The ComAT has not completely ruled out the use of DWA but has formulated strict requirements for their effective use including: relying only on diplomatic assurances with regard to States which do not systematically breach the CAT, considering the merits of each individual case; and delineating and implementing clear procedures for obtaining and relying on assurances.<sup>186</sup> Thus, in *Alexey Kalinichenko v. Morocco*,<sup>187</sup> the ComAT affirmed that, '[T]he procurement of diplomatic assurances, in the circumstances of the instant case, was insufficient to protect the complainant against the manifest risk, also in the light of their general and non-specific nature and the fact they did not establish a follow-up mechanism.' Equally, the ComAT has been sceptical about extraditions and expulsions of foreign nationals to members of the Commonwealth of Independent States in Central Asia, including when carried out in reliance on diplomatic assurances, with Russia being told to 'discontinue the practice of relying upon diplomatic assurances concerning the extradition and expulsion of persons from its territory to States where they would face a risk of torture'.<sup>188</sup>
- 5.16. The ComAT expressed concern about the UK policy initiative about DWA at an early stage in the development of the policy in 2004.<sup>189</sup> It would appear that the *Othman* decision has made little impact on the viewpoint of the ComAT, and, without mentioning that judgment, its highly hostile approach prevails:

'The Committee calls on the State party to ensure that no individual – including persons suspected of terrorism, who are expelled, returned, extradited or deported – is exposed to the danger of torture or other cruel, inhuman or degrading treatment or punishment. It urges the State party to refrain from seeking and relying on diplomatic assurances “where there are substantial grounds for believing that [the person] would be in danger of being subjected to torture” (art. 3). The more widespread the practice of torture or other cruel, inhuman or degrading treatment, the less likely the possibility of the real risk of such treatment being avoided by diplomatic assurances, however stringent any agreed follow-up procedure may be. Therefore, the Committee considers that diplomatic assurances are unreliable and ineffective and should not be used as an instrument to modify the determination of the Convention.'<sup>190</sup>

<sup>186</sup> *Concluding Observations on Canada*, UN doc. CAT/C/CR/34/CAN, 7 July 2005, para.5(e); *Concluding Observations on the United States of America*, UN doc. CAT/C/USA/CO/2, 25 July 2006, para.21; *Concluding Observations on the Russian Federation*, CAT/C/RUS/CO/4, 6 February 2007, para.16. See Wouters, K., *International Legal Standards for the Protection from Refoulement* (Intersentia, Morsel, 2009) p.499.

<sup>187</sup> Communication no. 428/2010, CAT/C/47/D/428/2010, 8 January 2012, para.15.6. The case related to financial offences. The circumstances included that the complainant's three close business partners were either found dead or disappeared, two of them while in custody.

<sup>188</sup> ComAT, *Concluding Observations on the Fifth Periodic Report of the Russian Federation* (UN Doc. CAT/C/RUS/CO/5, 11 December 2012) para.17.

<sup>189</sup> ComAT, *Concluding Observations on the United Kingdom of Great Britain and Northern Ireland*, (UN Doc. CAT/C/CR/33/3, 10 December 2004) paras.4, 5.

<sup>190</sup> Committee against Torture, *Concluding observations on the fifth periodic report of the United Kingdom, adopted by the Committee at its fiftieth session* (CAT/C/GBR/CO/5, 24 June 2013) para.18.

The UK Ministry of Justice in its *Follow-up information in response to the Concluding Observations adopted by the Committee Against Torture on the 5th periodic report of the United Kingdom of Great Britain and Northern Ireland* made no response to this instruction.<sup>191</sup> In the absence of any state complaint,<sup>192</sup> no violation of any article has been sustained by UK DWA practices, nor any 'victim' identified under Article 14 of the CAT. In that respect, the statement of the ComAT does not place the UK government in breach for persisting with DWA arrangements, though their application may give rise to a breach.<sup>193</sup> Nevertheless, the evident hostility of the CAT community to DWA persists, and in its draft *Revised General Comment No.1 (2017) on the implementation of Article 3 of the Convention in the context of Article 22*, it warns that DWA is contrary to the principle of non-refoulement and should not be used 'as a loophole', though admits that this statement requires further elaboration.<sup>194</sup>

### **C Council of Europe standards**

- 5.17. The European equivalent to UNCAT, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment 1987 ('ECT')<sup>195</sup> does not add substantively to the catalogue of norms about torture in UNCAT. Instead, the ECT seeks to strengthen the protection of persons in places of state detention. It therefore concentrates on non-judicial mechanisms of inspection and audit through the Committee for the Prevention of Torture ('CPT'). The idea was later copied under the UN's CAT which under its Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 2002 ('OPCAT'), and a Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('SPT') was established in 2007.
- 5.18. In view of the limits of the ECT, the only source being studied in depth here is the European Convention on Human Rights and Fundamental Freedoms 1950 ('ECHR'),<sup>196</sup> which offers two principal standards:

'Article 3: No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

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<sup>191</sup> (CAT/C/GBR/CO/5/Add.1, 2014).

<sup>192</sup> The UK has accepted jurisdiction under article 21 (state complaints) but not article 22 (individual complaints).

<sup>193</sup> Compare Equality and Human Rights Commission, *Response to the Review* (London, 2014) para.4.

<sup>194</sup> (CAT/C/60/R.2, 2017) para.20 and fn.11.

<sup>195</sup> CETS 126. See also Protocols Nos. 1 and 2 (CETS Nos. 151, 152). See Evans, M.D. and Morgan, R., *Preventing Torture: A Study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (Clarendon Press, Oxford, 1998).

<sup>196</sup> ETS 5. See Izumo, A., 'Diplomatic assurances against torture and ill treatment: European Court of Human Rights jurisprudence' (2010) 42 *Columbia Human Rights Law Review* 233; Mole, N. and Meredith, C., *Asylum and the European Convention on Human Rights* (Human rights files, No. 9, Council of Europe, Strasbourg, 2010).

Article 6(1): In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'

In addition, the right to liberty under Article 5 is also relevant. Family rights under Article 8 and expressive rights under Articles 10 and 11 may also be affected by DWA.

5.19. As for family rights, problems are likely to be less acute than under Article 3,<sup>197</sup> since a balancing process between rights and national security is expressly allowed via Article 8(2) and a margin of appreciation is allowed to the state. Nevertheless, the ECtHR has developed the *Boultif* criteria to take account of whether disruption to family life through deportation is disproportionate to the national security or other state interests. These comprise:

- the nature and seriousness of the offence committed by the applicant;
- the length of the applicant's stay in the country from which he or she is to be expelled;
- the time elapsed since the offence was committed and the applicant's conduct during that period;
- the nationalities of the various persons concerned;
- the applicant's family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life;
- whether the spouse knew about the offence at the time when he or she entered into a family relationship;
- whether there are children of the marriage, and if so, their age; and
- the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled.
- the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and
- the solidity of social, cultural and family ties with the host country and with the country of destination.<sup>198</sup>

The serious nature of crimes related to terrorism is likely to weigh heavily against these criteria in Strasbourg jurisprudence,<sup>199</sup> just as it does in English case-

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<sup>197</sup> But severe breaches of family right could themselves amount to a breach of article 3 unless assurances as to future treatment are secured: *Tarakhel v Switzerland*, App. no.29217/12, 4 November 2014, para.120.

<sup>198</sup> See *Boultif v Switzerland*, App. no. 54273/00, 2001-IX, as elaborated in *Üner v Netherlands*, App. no. 46410/99, 18 October 2006, para.57-58; *A.W. Khan v United Kingdom*, App. no. 47486/06, 12 January 2010.

law.<sup>200</sup> Thus, in *Babar Ahmad v United Kingdom*,<sup>201</sup> the Court reiterated that ‘it will only be in exceptional circumstances that an applicant’s private or family life in a Contracting State will outweigh the legitimate aim pursued by his or her extradition ... There are no such exceptional circumstances [in this case], particularly given the gravity of the offences with which they are charged.’ However, an appeal on Article 8 grounds was upheld in *YM v Secretary of State for the Home Department* concerning a Ugandan man (who was married with children) who had served a sentence for attending terrorist training camps (in the UK) but who had maintained no ties with Uganda since arrival in 1991 at the age of six.<sup>202</sup>

5.20. Another aspect in which Article 8 may play a part is as a procedural safeguard in a situation (such as deportation or exclusion) where Article 6 rights are attenuated or non-existent.<sup>203</sup> There must be accorded ‘some form of adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence, if need be with appropriate procedural limitations on the use of classified information’.<sup>204</sup> The independent authority must be able to intervene where the assessment is irrational, unlawful or contrary to common sense and arbitrary.<sup>205</sup> This point was the basis of challenge in *IR (Sri Lanka) v Secretary of State for the Home Department*,<sup>206</sup> where the Court of Appeal considered such challenges by several appellants who had been excluded on grounds of national security. The Court of Appeal emphasised that the standards of fairness demanded under art 8 ‘do not equate with the procedural requirements of Article 5 or Article 6’, and so it concluded that even ‘laconic’ or ‘terse’ levels of disclosure in the context of SIAC can suffice.<sup>207</sup> The ECtHR in *IR and GT v United Kingdom*<sup>208</sup> largely endorsed this approach. Complete concealment of the evidence cannot be warranted, but disclosure to the extent allowed in SIAC was sufficient without applying a minimum threshold as might be required under Articles 5 or 6.<sup>209</sup>

5.21. Expressive rights under Articles 10 and 11 are also qualified and subject to the margin of appreciation. There is also the special proviso in Article 16 that ‘Nothing in Articles 10, 11, and 14 shall be regarded as preventing the High

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<sup>199</sup> See *Bajrultanov v Austria*, App. no. 22689/07, 13 December 2012 (involvement in Chechen conflict).

<sup>200</sup> For English law application, see *HH v Deputy Prosecutor of the Italian Republic* [2012] UKSC 25. That case is thought to have given added weight to article 8 as against the public interest in extradition (see House of Lords Select Committee on Extradition, *Extradition* (2014-15 HL 126) para.48.

<sup>201</sup> App. nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, 10 April 2012, para.252.

<sup>202</sup> [2014] EWCA Civ 1292.

<sup>203</sup> See *Al-Nashif and CG v Bulgaria*, App. no. 50963/99, 20 June 2002.

<sup>204</sup> *Ibid.*, para.123.

<sup>205</sup> *Ibid.*, para.124.

<sup>206</sup> [2011] EWCA Civ 704

<sup>207</sup> *Ibid.*, paras.20, 22, 23 per Lord Justice Maurice Kay.

<sup>208</sup> App. nos. 14876/12 and 63339/12, 28 January 2014.

<sup>209</sup> *Ibid.*, paras.58, 61, 63.

Contracting Parties from imposing restrictions on the political activity of aliens.<sup>210</sup> In *R (Farrakhan) v Secretary of State for the Home Department*,<sup>211</sup> Louis Farrakhan, the spiritual leader of the Nation of Islam, was excluded from the United Kingdom in 2000, because of 'the current tensions in the Middle East and ... the potential impact on community relations in the United Kingdom and in particular to relations between the Muslim and Jewish communities here and a potential threat to public order for that reason.'<sup>212</sup> The Divisional Court again considered that the ban reflected a proportionate balance between the aim of the prevention of disorder and freedom of expression.<sup>213</sup> By contrast, Article 16 was largely written out of existence: 'this Article appears something of an anachronism half a century after the agreement of the Convention. We do not consider that it has direct impact in the present case.'<sup>214</sup>

5.22. Article 3 was first raised in relation to treatment following removal because of the potential application of the death penalty in the US in *Soering v United Kingdom*, not because of execution *per se*<sup>215</sup> but because of the 'death row phenomenon' of prolonged delays pending execution or reprieve.<sup>216</sup> The European Court of Human Rights ('ECtHR') set the bar at where 'substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country.'<sup>217</sup> The death row phenomenon was not sufficiently allayed by assurances from the Federal government when the Virginia authorities would have command of the case.

5.23. One should guard against equating the contexts of extradition and deportation, but Article 3 applies with equal force regardless of the choice of legal basis for removal.<sup>218</sup> Assurances when the death penalty is involved, though perhaps less so in regard to other risks, are more straightforward than assurances against torture and so on. The death penalty issue is more likely to arise in connection with extradition (with a view to future legal process) than deportation (which may

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<sup>210</sup> See *Piermont v France*, App. nos. 15773/89; 15774/89, Ser A 314 (1995) para.64. Compare *Adams and Benn v United Kingdom*, App. nos. 28979/95; 30343/96, 88A D & R, 137 (1997).

<sup>211</sup> [2002] EWCA Civ 606.

<sup>212</sup> *Ibid.*, para.2.

<sup>213</sup> *Ibid.*, para.79.

<sup>214</sup> *Ibid.*, para.70.

<sup>215</sup> Protocol 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty (ETS 114) was not ratified by the UK until 1999.

<sup>216</sup> App. no. 14038/88, Ser. A 161 (1989) para.91. See Van den Wyngaert, C., 'Applying the European Convention on Human Rights to extradition: Opening Pandora's Box?' (1990) 39 *International & Comparative Law Quarterly* 757; Lillich, R.B., 'The Soering Case' (1991) 85 *American Journal of International Law* 128; Lambert, H., 'Protection against *Refoulement* from Europe' (1999) 48 *International & Comparative Law Quarterly* 515. Later judgments have accepted more tailored US assurances: *Aylor-Davis v France*, App. no. 22742/93, 20 January 1994; *Nivette v France*, App. no. 44190/98, 2001-VII; *Einhorn v France*, App. no. 71555/01, 2001-XI.

<sup>217</sup> App. no. 14038/88, Ser. A 161 (1989), para.90.

<sup>218</sup> See *Babar Ahmad v United Kingdom*, App. nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, 10 April 2012, para.168.

or may not involve such a prospect).<sup>219</sup> Death penalty assurances are easier to monitor, since the death penalty will normally be applied following solemn process with high-level official approval and public notification. In addition, the nullification of the death penalty does not potentially undermine the viability of legal processes which may have already been tainted by reliance on torture during the investigation. Assurances applied to the torture of terror suspects following deportation can stumble over the ability to secure credible and detailed safeguards against practices which are often denied, hidden, localised, or embedded despite the best of official intentions.<sup>220</sup> Furthermore, the transfer of the issue into the diplomatic sphere means that individual human rights are no longer the sole or perhaps predominant issue. The maintenance of cordial relations may mute the reactions to allegations of mistreatment: 'The tender arts of negotiation and compromise that characterize diplomacy can undermine straightforward and assertive human rights protection.'<sup>221</sup>

- 5.24. The breach of Article 3 was first sustained in the case of the deportation to India of a suspected terrorist in *Chahal v United Kingdom*.<sup>222</sup> The application followed a somewhat half-hearted 'formal assurance to the effect that, if Mr Karamjit Singh Chahal were to be deported to India, he would enjoy the same legal protection as any other Indian citizen, and that he would have no reason to expect to suffer mistreatment of any kind at the hands of the Indian authorities.'<sup>223</sup> The ECtHR was not convinced because of the 'recalcitrant and enduring problem' of the ill-treatment of detainees, especially Sikh extremists in the Punjab.<sup>224</sup> This ruling can benefit a suspected terrorist, no matter how 'undesirable or dangerous', and national security cannot be balanced against the absolute demands of Article 3,<sup>225</sup> as had been enunciated even in a situation of emergency in *Ireland v United Kingdom*.<sup>226</sup> The state thus has an obligation not to subject a person to the real risk of Article 3 treatment through refoulement even if other rights (such as the right to life) are also at risk. Thus, the correct approach for public authorities is to treat both as absolute objectives without

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<sup>219</sup> See *ibid.* for examples of 'disguised' extradition. These circumstances might give rise to an abuse of process: *R v Mullen* [2000] QB 520; compare *Öcalan v Turkey*, App no 46221/99, 12 May 2005.

<sup>220</sup> This distinction is emphasised by Nowak, M., 'Extraordinary rendition, diplomatic assurances and the principle of non-refoulement' in Kälin, W., et al, *International Law, Conflict and Development* (Nijhoff, Leiden, 2010) p.130: torture assurances are 'totally unreliable and constitute nothing but attempts to circumvent the absolute prohibition of torture and refoulement'. His further claim that there has been not one single case in which it is proven that assurances have protected against torture (p. 134) is not sustainable.

<sup>221</sup> Human Rights Watch, *Still at Risk: Diplomatic Assurances No Safeguard Against Torture* (New York, 2005) p.19.

<sup>222</sup> App. no. 22414/93, 1996-V.

<sup>223</sup> *Ibid.*, para.30.

<sup>224</sup> *Ibid.*, para.105.

<sup>225</sup> *Ibid.*, paras.76, 80. See den Heijer, M., 'Whose rights and which rights? The continuing story of non-refoulement under the European Convention on Human Rights' (2008) 10 *European Journal of Migration and Law* 277; Turner, I., 'Human Rights and Antiterrorism' (2012) 35 *Studies in Conflict & Terrorism* 760; Prasanna T., 'Taking remedies seriously: the normative implications of risking torture' (2012) 50 *Columbia Journal of Transnational Law* 370; Mavronicola N. and Messineo F., 'Relatively absolute? The undermining of Article 3 ECHR in *Ahmad v UK*' (2013) 76 *Modern Law Review* 589.

<sup>226</sup> App. no. 5310/71, Ser A 25 (1978) para.163.

compromise and certainly not to plan to offer sacrifices as a matter of policy.<sup>227</sup> Since *Chahal*, the ECtHR has applied a varied degree of scrutiny to assurances,<sup>228</sup> pointing to the need to consider both the general circumstances of the receiving state and also the particular circumstances of the subject,<sup>229</sup> including membership of an oppressed or hostile group.<sup>230</sup>

5.25. The discouraging message from *Chahal* was duly noted by UK government departments which became justly cautious about further efforts to deport or extradite terrorist suspects. A flavour can be found in 2004 from *Youssef v Home Office*,<sup>231</sup> where the prospects of persuading a court as to the sufficiency of a simple promise not to torture from a state (Egypt) where the security forces systematically tortured political detainees was estimated by officials to be 'bleak indeed'. Reflecting the political friction explained in the introduction to this paper, the civil servants' hesitation was not matched by the attitude of Prime Minister Tony Blair, whose Private Secretary told the Home Office in 2004, after years of negotiations with the Egyptian Government, that:

'The Prime Minister thinks we are in danger of being excessive in our demands of the Egyptians in return for agreeing to the deportation of the four Islamic Jihad members. He questions why we need all the assurances proposed by FCO and Home Office Legal Advisers. There is no obvious reason why British Officials need to have access to Egyptian nationals held in prison in Egypt, or why the four should have access to a UK- based lawyer.'<sup>232</sup>

Nevertheless, a more nuanced picture eventually emerged from the ECtHR, as governments, including the UK Government, learnt the post-*Chahal* 'rules of the game'.<sup>233</sup>

5.26. Some assurances have been accepted as decisive. Examples include *Mamatkulov and Askalov v Turkey*,<sup>234</sup> involving the deportation from Turkey of two fugitives who were wanted for causing injuries by an explosion in Uzbekistan and an attempted attack on the President of Uzbekistan on the basis of an assurance little more than in *Youssef*. However, the judgment occurred long after

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<sup>227</sup> Home Secretary, Charles Clarke, depicted the ECHR as valuing rights and security in a 'balance ... not right for the circumstances which we now face'. (European Parliament, Plenary Session, P6\_PV(2005)09-07 (2), 7 September 2005).

<sup>228</sup> See Wouters, K., *International Legal Standards for the Protection from Refoulement* (Intersentia, Mortsel, 2009) pp.293-304.

<sup>229</sup> *Othman (Abu Qatada) v United Kingdom*, App. no. 8139/09, 17 January 2012, para.187.

<sup>230</sup> See *Ergashev v Russia*, App. no. 49747/11, 16 October 2012.

<sup>231</sup> [2004] EWHC 1884 (QB) para.78. See further *MM v Secretary of State for the Home Department* [2015] EWHC 3513 (Admin) (the treatment of his family), *Youssef v Secretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 3 (financial sanctions), and *Youssef v Secretary of State for the Home Department* [2016] UKUT 137 (IAC) (exclusion from refugee protection under Article 1F(c) of the Refugee Convention).

<sup>232</sup> *Ibid.*, para.18.

<sup>233</sup> The phrase was given prominence by Tony Blair in response to the 7 July 2005 bombings: *The Times* 6 August 2005, p 1.

<sup>234</sup> App. nos. 46827/99, 46951/99, 4 February 2005.

the return of the prisoners, and so there was actual medical evidence and report of one diplomatic visit (two years after their extradition) as opposed to conjecture based on general evidence of practices of abuse. Bare assurances from Uzbekistan were later rejected in three other cases, not least because of the systematic torture prevailing there.<sup>235</sup> In *Chentiev and Ibragimov v Slovakia*,<sup>236</sup> two Russian nationals of Chechen ethnic origin were to be extradited from involvement in banditry with unlawful groups. Assurances from the Office of the Prosecutor General of the Russian Federation as to fair trial procedures and humane treatment contrary to Article 3 of the Convention including the death penalty were accepted since ‘a possible failure to respect such assurances would seriously undermine that State’s credibility’.<sup>237</sup> However, the reputation of Russia has not always been unsullied, and it does not appear that receiving states within the Council of Europe are accorded any special presumption of compliance, unlike in UK law<sup>238</sup> and European Union law.<sup>239</sup> In *Shamayev and 12 Others v Georgia and Russia*,<sup>240</sup> the extradition of 13 applicants (Chechens) to Russia by Georgia was at stake. Five of the 13 had already been extradited when the ECtHR considered the case.<sup>241</sup> The Russian authorities, through the highest prosecuting authority, subsequently offered ‘all the necessary guarantees’ concerning the treatment of the five extradited applicants, including unhindered access for the applicants to medical treatment, legal advice and access to the Court itself, and gave assurances that they would not be sentenced to death.<sup>242</sup> The ECtHR found the assurances to be credible because of the rank of the issuing authority and because those extradited had not been treated to the contrary. However, the general situation in Chechnya, the obstruction of international monitoring, and the fact that ‘individuals of Chechen origin who have lodged an application with the Court are being subjected to

<sup>235</sup> *Ismoilov v Russia*, App. no. 2947/06, 24 April 2008; *Yuldashev v Russia*, App. no. 1248/09, 8 July 2010; *Sultanov v Russia*, App. no. 15303/09, 4 November 2010. See also *Gaforov v Russia*, App. no. 25404/09, 21 October 2010; Amnesty International, *Return to Torture: Extradition, forcible returns and removals to Central Asia* (EUR04/001/2013).

<sup>236</sup> App. nos. 21022/08, 51946/08, 14 September 2010. See also App. no. 65916/10, 21 February 2012; *Chentiev v Slovakia*, App. no. 27145/14, 15 April 2014.

<sup>237</sup> *Ibid.*, p.15. The status of prosecutor may not offer sufficient authority for assurances to be relied upon in all cases: *Baysakov and others v Ukraine*, App. no. 54131/08, 18 February 2010, para.51.

<sup>238</sup> See *Targonsinski v Judicial Authority for Poland* [2011] EWHC 312 (Admin); *Agius v Court of Magistrates Malta* [2011] EWHC 759 (Admin); *Krolik and others v Several Judicial Authorities of Poland* [2012] EWHC 2357 (Admin). The presumption seems to have faded in regard to detention condition, the conditions of which have prompted the Home Office to seek assurances as to the precise facility in which the applicant is to be held: *Badre v Court of Florence, Italy* [2014] EWHC 614 (Admin); *Elashmawy v Court of Brescia, Italy* [2015] EWHC 28 (Admin).

<sup>239</sup> *NS v Secretary of State for the Home Department* (C-411/10 and 493/10, 21 December 2011), para.83.

<sup>240</sup> App. no. 36378/02, 12 April 2005.

<sup>241</sup> Assurances in these circumstances of an extradition having occurred without apparent mishap were accepted in *Abu Salem v Portugal*, App. no. 26844/04, 9 May 2006 and *Al-Moayad v Germany*, App. no. 35865/03, 20 February 2007. The ECtHR will consider facts at the time of the expulsion (*Cruz Varas and others v Sweden*, App. no. 15576/89, Ser A 221, 1991, para.76) and information which comes to light subsequent to the expulsion (*Vilvarajah v United Kingdom*, App. nos. 13163/87, 13164/87, 13165/87, 13447/87, 13448/87, Ser A 215, 1991, para.107). Where the extradition or expulsion has not yet taken place, the material point in time for testing the arrangements is that of the Court’s consideration of the case: *Ahmed v Austria*, App. no. 25964/94, 1996-VI, para 43; *Venkadajalasarma v Netherlands*, App. no. 58510/00, 17 February 2004, para.63.

<sup>242</sup> App. no. 36378/02, 12 April 2005, paras.18, 76.

persecution and murder' prompted a rejection of assurances in one case.<sup>243</sup> The ECtHR emphasized the importance of post-return monitoring arrangements in an extradition to Russia in *Gasayev v. Spain*.<sup>244</sup> The Prosecutor General of Russia guaranteed that the UN Committee Against Torture would be able to have private visits with the applicant, that the detention conditions would meet the requirements of Article 3, and that capital punishment would not be imposed. Monitoring was undertaken by Spanish diplomatic personnel in Moscow. Wider factors were also raised in *Saoudi v Spain*,<sup>245</sup> where the Algerian government gave guarantees for extradition. The ECtHR here stressed 'the need to maintain international legal cooperation and, in particular, during prosecution of crimes such as terrorism, without it being assumed that Algeria will not respect its own laws.'<sup>246</sup> Impressive features were the clarity of the contents of the certificate of the court official and that Algerian law does not provide for capital punishment for the offenses in question.

- 5.27. Other DWA arrangements have been rejected as insufficiently impacting on the degree of risk under Article 3. This stance applies to general assurances unrelated to the particular circumstances, particularly where the receiving state engages in systematic or persistent rights abuses. In *Saadi v Italy*,<sup>247</sup> the proposed deportation to Tunisia would breach Article 3, despite assurances of strict compliance with Tunisian law. The mere words of domestic laws and accession to international treaties guaranteeing respect for fundamental rights provided insufficient assurance to counteract documented practices of ill-treatment.<sup>248</sup> This verdict was delivered despite arguments by Italian and UK governments that a signatory State should not be held indirectly responsible for treatment by the receiving State or that protection against ill-treatment should be balanced against the protection of the public from terrorism; Article 3 was to be viewed as absolute even in the context of terrorism.<sup>249</sup>
- 5.28. The receptivity of the ECtHR to assurances has occasionally even extended to questioning States parties about their absence. In *Bader v Sweden*,<sup>250</sup> the principal applicant was sentenced to death in criminal proceedings in Syria, and the question arose whether they could be re-opened after his return or whether the death penalty would be sought. The Swedish Embassy had made inquiries

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<sup>243</sup> *Ibid.*, paras.49, 364, 366.

<sup>244</sup> App. no. 48514/06, 17 February 2009.

<sup>245</sup> App. no. 22871/06, 8 September 2006 (inadmissible).

<sup>246</sup> *Ibid.* pp.5-6 (trans.). Compare *BB et al v Secretary of State for the Home Department*, SC/39/2005, 18 April 2016.

<sup>247</sup> App. no. 37201/06, 28 February 2008. See de Londras, F., 'International decision: *Saadi v Italy*' (2008) 102 *American Journal of International Law* 616; Moeckli, D., '*Saadi v Italy*: The rules of the game have *not* changed' (2008) 8 *Human Rights Law Review* 534.

<sup>248</sup> *Ibid.*, para.147. See also *Khaydarov v Russia*, App. no. 21055/09, 20 May 2010, para.111.

<sup>249</sup> *Ibid.*, para.127. The Court also rejected the argument that there should be a higher standard of proof of risk of ill-treatment in national security cases: para.140.

<sup>250</sup> App. no. 13284/04, 8 November 2005, para.45.

but without clear responses or follow-up official contacts, a matter on which the ECtHR commented adversely. Next, in *Garabayev v Russia*,<sup>251</sup> the Russian authorities were viewed as being deficient for not considering Article 3 in the context of and extradition to Turkmenistan, and the ECtHR criticised the absence of a request for assurances. In *Ouabour v Belgium*,<sup>252</sup> the absence of resort to DWA again was noted quizzically: 'The Court also considers useful to observe that it is not clear from the observations submitted to it that the Belgian authorities had made any diplomatic move with the Moroccan authorities in order to obtain these guarantees or assurances that the applicant would not be exposed after his extradition to inhuman and degrading treatment.'

5.29. So far as ECtHR applications regarding DWA arising from UK cases are concerned, the leading decision arose after assurances from Jordan were accepted by the UK House of Lords in *RB (Algeria) and OO*,<sup>253</sup> resulting in the later verdict of the ECtHR in *Othman*.<sup>254</sup> That decision demonstrated that DWAs could be sufficient to lower the risk of torture under Article 3 even in the case of a receiving country where there was 'disturbing' evidence attesting to systemic torture in detention facilities,<sup>255</sup> though the decision was adverse in relation to Article 6, since insufficient safeguards had been put in place to stop the 'flagrant breach' through the use of evidence obtained by torture.

5.30. The notion of 'flagrant breach' was first raised in *Soering v United Kingdom*.<sup>256</sup> According to *Mamatkulov and Askarov v Turkey*,<sup>257</sup> '... what the word 'flagrant' is intended to convey is a breach ... which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed ...'. It was here that the *Othman* case broke new practical ground by actually applying the rule to condemn a proposed DWA. However, this aspect of the judgment had not, contrary to the assertion of the Home Secretary, 'moved the goalposts by establishing new, unprecedented legal grounds'.<sup>258</sup> In fact, *Othman* followed enunciated legal doctrine and applied 'a stringent test of unfairness' requiring some feature which is 'so fundamental as to amount to a

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<sup>251</sup> App. no. 38411/02, 7 June 2007, para.79.

<sup>252</sup> App. no. 26417/10, 2 June 2015 para.77.

<sup>253</sup> [2009] UKHL 10. See Garrod, M, 'Deportation of suspected terrorists with "real risk" of torture' (2010) 73 *Modern Law Review* 631; Tooze, J., 'Deportation with assurances: the approach of the UK courts' [2010] *Public Law* 362. Later verdicts have been more hostile to the assurances from Algeria: *BB et al v Secretary of State for the Home Department*, SC/39/2005, 18 April 2016.

<sup>254</sup> *Othman (Abu Qatada) v United Kingdom*, App. no. 8139/09, 17 January 2012.

<sup>255</sup> *Ibid.*, paras.107, 191.

<sup>256</sup> App. no. 14038/88, Ser. A 161 (1989) para.113.

<sup>257</sup> App. nos. 46827/99 and 46951/99, 4 February 2005, para.OIII 14.

<sup>258</sup> Hansard (House of Commons) vol 566 col.23 8 July 2013, Theresa May. See also *HM Government's Response to the Call for Evidence in the Independent Review of Deportation With Assurances Policy* (London, 2014) para.10.

nullification, or destruction of the very essence, of the right guaranteed by that Article.<sup>259</sup>

5.31. As for Article 5, the ECtHR gave the following examples:

‘A flagrant breach of Article 5 would occur only if, for example, the receiving State arbitrarily detained an applicant for many years without any intention of bringing him or her to trial. A flagrant breach of Article 5 might also occur if an applicant would be at risk of being imprisoned for a substantial period in the receiving State, having previously been convicted after a flagrantly unfair trial.’<sup>260</sup>

Whether the application in the receiving state of some stringent executive security measure, such as detention without trial or house arrest, would also fall foul of the rule is not clear. In *Othman*, the Article 5 issue depended wholly on whether detention was justified by a fair trial process.

5.32. As for Article 6, examples of ‘flagrant breaches’ included:

- ‘- conviction in absentia with no possibility subsequently to obtain a fresh determination of the merits of the charge ...;
- a trial which is summary in nature and conducted with a total disregard for the rights of the defence...;
- detention without any access to an independent and impartial tribunal to have the legality the detention reviewed...;
- deliberate and systematic refusal of access to a lawyer, especially for an individual detained in a foreign country....’<sup>261</sup>

In *Othman*, the ECtHR sustained that it would be a flagrant breach of Article 6 to deport Othman to Jordan on the basis that evidence derived from the torture of two co-conspirators might be admissible against him.<sup>262</sup> Here, the ECtHR departed somewhat from the balance of probabilities test, as applied by the majority of the House of Lords in *A v Secretary of State for the Home Department (no.2)*.<sup>263</sup> Having due regard to the special difficulties in proving allegations of torture, it was sufficient that the applicant had sufficiently raised the issue of a ‘real risk’ of a flagrant breach and that there had been the absence of clear evidence of a proper and effective official examination of the allegations of the co-conspirators who might appear as witnesses.<sup>264</sup> Other instances of flagrant abuse might include a prolonged period of pre-trial detention or the

<sup>259</sup> *Othman (Abu Qatada) v United Kingdom*, App. no. 8139/09, 17 January 2012, para.260.

<sup>260</sup> *Ibid.*, para.233. Pre-trial detention of 50 days was not a flagrant breach: para.235.

<sup>261</sup> *Ibid.*, para.259.

<sup>262</sup> *Ibid.*, para.267. The High Court endorsed this view: *Othman v Secretary of State for the Home Department* [2012] UKSIAC 15/2005-2.

<sup>263</sup> [2005] UKHL 71.

<sup>264</sup> *Othman (Abu Qatada) v United Kingdom*, App. no. 8139/09, 17 January 2012, paras.280, 285.

prospect of trial in courts which lack independence. The latter issue arose in the extradition of Vincent Brown and others to Rwanda.<sup>265</sup> The extradition was blocked on the grounds of Article 6. The Rwandan government has given assurances the defendants would not face the death penalty.<sup>266</sup> But the absence of defence representation, the difficulty of finding willing defence witnesses, and the risk of interference by ministerial comments created a flagrant denial of justice, especially on the first cause. The court doubted that this hurdle could be overcome by any further DWA: 'The evidence I have read and heard leave me with considerable reservations about whether the assurances given by the [Government of Rwanda] to Canada are being respected ....'<sup>267</sup>

- 5.33. The other aspect of Article 6 which might be impugned in connection with DWA arrangements is the ability to test forensically the assurances in the judicial system of the sending state. For the UK, this process will normally take place in the Special Immigration Appeals Commission ('SIAC'). However where, as is likely, the disclosure of information could affect national security or other public interests, the hearings in SIAC can become subject to its version of a Closed Material Procedure ('CMP') by which evidence is heard in the absence of the suspects and their legal teams (but with the operation of a special advocate).<sup>268</sup> The use of secret evidence by the government limits the ability to challenge an assessment that DWA arrangements avert any 'real risk' of torture on return.<sup>269</sup> The legitimacy of CMP was considered in *A v United Kingdom*, where the ECtHR found that restrictions could be imposed upon adversarial process in the interests of national security<sup>270</sup> but sustained breaches of Article 6 in that case where the right of liberty was at stake and where disclosure had been insubstantial or non-existent.<sup>271</sup> However, the standard of testing in cases of deportation may not be so high, according to in *IR and GT v United Kingdom*.<sup>272</sup>
- 5.34. Aside from the details of the decision itself, the enduring importance of *Othman* relates to the acceptance of the principle of the potential sufficiency assurances

<sup>265</sup> *VB v Rwanda* [2009] EWHC 770 (Admin); *Government of the Republic of Rwanda v Vincent Brown & others*, Westminster Magistrates' Court (<https://www.judiciary.gov.uk/judgments/government-of-the-republic-of-rwanda-v-vincent-brown-others-extradition/>, 21 December 2015). An appeal is pending: <http://www.newtimes.co.rw/section/article/2016-11-28/205753/>.

<sup>266</sup> Foreign & Commonwealth Office, Memorandum of Understanding with Rwanda concerning the extradition of VB (2013).

<sup>267</sup> *Ibid.* para.461 per Deputy Senior District Judge Emma Arbuthnot (Westminster Magistrates' Court). Assurances from Rwanda also arose in *Ahorugeze v. Sweden*, App. no. 37075/09, 27 October 2011: it was safe to extradite a Rwandan genocide suspect arrested in Sweden and 'The Court therefore concludes that there is no sufficient indication that the Rwandan judiciary lacks the requisite independence and impartiality.' (para.125)

<sup>268</sup> See Special Immigration Appeals Commission Act 1997.

<sup>269</sup> Conversely, the Home Office has expressed concern about 'Irrevocable Confidentiality Orders' which can allow the subject or a witness on their behalf to give 'protected evidence' which can never be revealed beyond named government officials (see *W (Algeria) v Secretary of State for the Home Department* [2012] UKSC 8) and which are said to create problems for testing or rebuttal: *HM Government's Response to the Call for Evidence in the Independent Review of Deportation With Assurances Policy* (London, 2014) para.12.

<sup>270</sup> App. no 3455/05, 19 February 2009, para.205.

<sup>271</sup> *Ibid* at paras.220, 223, 224.

<sup>272</sup> App. nos. 14876/12 and 63339/12, 28 January 2014.

(which was sustained on the Article 3 issue) and then the elaboration of a jurisprudence of assurances. As for the principle, generalisations on the basis of the *Othman* case are tricky because of the prominence of the subject and the political pressures surrounding the role of the ECtHR within the UK, though these circumstances were not unique.<sup>273</sup> Those pressures may have already have resulted in the conciliatory statement by the ECtHR in *A v United Kingdom*, that it is ‘acutely conscious of the difficulties faced by states in protecting their populations from terrorist violence’.<sup>274</sup> The ECtHR itself stated that the DWA arrangements in *Othman* were ‘superior in both its detail and its formality to any assurances which the Court has previously examined’.<sup>275</sup> But propositions that DWA is never a reputable device in international law when dealing with countries whose ‘assurances against torture must be measured against the fact that they have ... breached those assurances on many occasions’<sup>276</sup> have been rejected. The decision in *Othman* made clear that a real risk of a breach of Article 3 would have been sustained but for the operation of the DWA arrangements.<sup>277</sup> The issue is not whether DWAs are legitimate in principle but whether they are fair, workable and effective in a given set of circumstances. The result is legally pragmatic rather than dogmatic. The safeguards which form the DWA will be tested according to the facts of the case rather than being ruled out *ab initio*. Furthermore, the decision attempted to be pragmatic in political terms – the ECtHR did not lose sight of the demand to safeguard national security even within the context of the protection of absolute rights, though its assuaging efforts in the circumstances of *Othman* remained unpalatable to the Home Office.

5.35. As for the jurisprudence of assurances, the tests suggested by UK courts<sup>278</sup> have been considerably elaborated by the judgment of the ECtHR in the *Othman* case, which points to many more ‘factors’:

- i. whether the terms of the assurances have been disclosed to the Court ...;
- ii. whether the assurances are specific or are general and vague ...;
- iii. who has given the assurances and whether that person can bind the receiving State ...;

<sup>273</sup> Compare *Öcalan v Turkey*, App. no. 46221/99, 2005-IV, para.192.

<sup>274</sup> *A v United Kingdom*, App. no. 3455/05, 19 February 2009, para.126.

<sup>275</sup> *Othman (Abu Qatada) v United Kingdom*, App. no. 8139/09, 17 January 2012, para.194.

<sup>276</sup> Metcalfe, E., ‘The False Promise of Assurances against Torture’ (2009) 6 *JUSTICE Journal* 63, 83. Compare *Omar Othman (aka Abu Qatada) v Secretary of State for the Home Department* (SC/15/2005, 26 February 2007), para.508.

<sup>277</sup> *Ibid.*, para.192.

<sup>278</sup> *BB v Secretary of State for the Home Department* (SC/39/2005, 2006), para.5. See further *RB (Algeria) v Secretary of State for the Home Department* [2009] UKHL 10, para.23; *Lodhi v Secretary of State for the Home Department* [2010] EWHC 567 (Admin); *R (Maya Evans) v Secretary of State for Defence* [2010] EWHC 1445 (Admin); *XX v Secretary of State for the Home Department* [2012] EWCA Civ 7, paras.2-76.

- iv. if the assurances have been issued by the central government of the receiving State, whether local authorities can be expected to abide by them ...;
- v. whether the assurances concerns treatment which is legal or illegal in the receiving State ...;
- vi. whether they have been given by a Contracting State ...;
- vii. the length and strength of bilateral relations between the sending and receiving States, including the receiving State's record in abiding by similar assurances ...;
- viii. whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms, including providing unfettered access to the applicant's lawyers ...;
- ix. whether there is an effective system of protection against torture in the receiving State, including whether it is willing to cooperate with international monitoring mechanisms (including international human rights Non-Government Organisations), and whether it is willing to investigate allegations of torture and to punish those responsible ...;
- x. whether the applicant has previously been ill-treated in the receiving State ...; and
- xi. whether the reliability of the assurances has been examined by the domestic courts of the sending/Contracting State ....<sup>279</sup>

5.36. Three further Strasbourg cases relating to assurances (but on extradition rather than deportation) have followed in the wake of *Othman*. Issues involving the US treatment of terrorist suspects (Babar Ahmad, Syed Talha Ahsan, Adel Abdul Bary and Khaled al-Fawwaz<sup>280</sup>) arose in *Babar Ahmad v United Kingdom*.<sup>281</sup> Their complaints related to prospective breaches of Article 3 arising from the special administrative measures conditions they would experience if held at the 'supermax' prison at ADX Florence, Colorado. They also complained that, if convicted, they would face sentences of life imprisonment without parole and/or extremely long sentences of determinate length in violation of Article 3 of the Convention. Those conditions were not viewed by the ECtHR as contravening

<sup>279</sup> *Othman v United Kingdom*, App. No.8139/09, 17 January 2012, para.189. See for illustrations, Volou, V., 'Are diplomatic assurances adequate guarantees of safety against torture and ill-treatment? The pragmatic approach of the Strasbourg court' (2015) 4 *UCL Journal of Law and Jurisprudence* 32

<sup>280</sup> See also *R (Fawwaz) v Secretary of State for the Home Department* [2014] EWHC 4551 (Admin); *Al Fawwaz v Secretary of State for the Home Department* [2015] EWHC 166 (Admin), *Al Fawwaz v Secretary of State for the Home Department* [2015] EWHC 469 (Admin).

<sup>281</sup> App. nos.24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, 10 April 2012. Note also *Mustafa Kamal Mustafa (Abu Hamza) (No. 1) v United Kingdom*, App. no. 31411/07, 18 January 2011; *Hamza v Secretary of State for the Home Department* [2012] EWHC 2736 (Admin); *US v Mustafa Kamel Mustafa a/k/a Abu Hamza al-Masri*, <http://www.fbi.gov/newyork/press-releases/2015/mustafa-kamel-mustafa-a-k-a-abu-hamza-sentenced-in-manhattan-federal-court-to-life-in-prison>, 9 January 2015; Arnell, P., 'Lessons from the case of Abu Hamza' (2015) 179 *Justice of the Peace* 709.

Article 3: 'The range of activities and services provided goes beyond what is provided in many prisons in Europe.'<sup>282</sup> As for concerns about military trials or rendition to detention outside the US:

'On 13 April 2004, the United States Embassy in London issued Diplomatic Note No. 018, which gave assurances that the United States Government would neither seek nor carry out the death penalty against the fifth and sixth applicants. It also gave assurances that they would be tried before a federal court and that they would not be prosecuted by a military commission or designated as enemy combatants. On 18 January 2008, the United States Embassy issued Diplomatic Note No. 002, which assured the United Kingdom Government that, if either applicant were acquitted or completed any sentence imposed or if the prosecution against them were discontinued, the United States authorities would return the men to the United Kingdom, if they so requested.'<sup>283</sup>

These complaints were all rejected without consideration of the strength of the assurances.<sup>284</sup>

5.37. Judgment on a related applicant, Haroon Aswat, was deferred for a year because of his mental condition. Eventually, in *Aswat v United Kingdom*,<sup>285</sup> the extradition of the applicant to the USA on terrorism charges was adjudged a potential breach Article 3 because of the potential conditions of detention. It was noted that there had been no diplomatic assurances that he would not be detained in ADX Florence, despite the severity of his mental illness.<sup>286</sup> Following the decision, the Home Secretary decided not to withdraw proceedings for extradition. Aswat complained about the failure to afford any opportunity to make representations prior to that decision. The High Court instead quashed the decision on the basis that it would breach Article 3 and that the only way forward would be diplomatic assurances from the US about treatment on arrival.<sup>287</sup> The UK government then obtained further assurances, and the High Court approved the extradition to the US.<sup>288</sup> In the meantime, Aswat brought a further application to the ECtHR,<sup>289</sup> which included a Rule 39 request which was granted until 23 September 2014, when a Chamber (having considered the assurances provided by the US Government) lifted the measure. Aswat was subsequently extradited

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<sup>282</sup> *Ibid.*, para.222.

<sup>283</sup> *Ibid.*, para.51.

<sup>284</sup> *Ibid.*, para.253. For the subsequent conviction and sentencing of Ahmad and Ahsan, see *US v Ahmad and Ahsan*, USDC, <http://www.sacc.org.uk/sacc/docs/14-07-16-ahmad-ahsan-sentencing.pdf>, 16 July 2014. For Bary, see USDC SDNY, <https://www.justice.gov/opa/pr/international-terrorism-defendant-sentenced-manhattan-25-years-prison>, 6 February 2015. For Al-Fawwaz, see *US v Khaled Al-Fawwaz*, 98-cr-1023, USDC SDNY, 26 February 2015, <https://www.justice.gov/opa/pr/high-ranking-al-qaeda-terrorist-sentenced-conspiring-kill-americans-and-other-terrorism>, 15 May 2015.

<sup>285</sup> App. no. 17299/12, 16 April 2013.

<sup>286</sup> *Ibid.*, para.56.

<sup>287</sup> *R (Aswat) v Secretary of State for the Home Department and the Government of the USA* [2014] EWHC 1216 (Admin) para.38. Compare *Pham v Government of the USA* [2014] EWHC 4167 (Admin).

<sup>288</sup> *R (Aswat) v Secretary of State for the Home Department* [2014] EWHC 3274 (Admin).

<sup>289</sup> *Aswat v United Kingdom*, App. no. 62176/14.

to the US on 21 October 2014.<sup>290</sup> Those assurances were later considered by the ECtHR to have dealt with its earlier concerns 'clearly and judiciously'.<sup>291</sup>

5.38. Next, in *Trabelsi v. Belgium*,<sup>292</sup> the applicant, having been convicted of terrorism offences in Belgium and having served out his term of imprisonment, became the subject of an extradition request from the USA on further serious terrorism related charges. By a diplomatic note in 2008, the US authorities gave assurances that he would not be prosecuted before a military commission and would not be detained or incarcerated in any facility other than a civilian facility in the United States. By a diplomatic note in 2010, the US authorities confirmed that the applicant would not be liable to the death penalty or be extradited to any third country without the agreement of the Belgian Government.<sup>293</sup> However, the US authorities at no point assured that the applicant would be spared a life sentence without any possibility of reduction or commutation of sentence,<sup>294</sup> meaning, in the view of the ECtHR, that the irreducibility of a potential whole life sentence would breach Article 3. Consistency with the *Ahmad* case, or indeed clarity of reasoning, did not infuse this decision.<sup>295</sup> However, *Trabelsi* was further interpreted in *R (Harkins) v Secretary of State for the Home Department*.<sup>296</sup> The case involved a non-terrorist extradition to Florida on a charge of murder. The High Court emphasised two important points. First, in the light of previous Strasbourg case law, treatment that might violate Article 3 in a Contracting State might not attain the minimum level of severity so as to be a violation of Article 3 in an extradition case.<sup>297</sup> Second, the High Court's view of *Trabelsi* was that the decision was an unexplained departure from previous decisions, resulting in 'no clear and constant jurisprudence' which the High Court could follow.<sup>298</sup>

5.39. Based on *Othman* as the leading case, what conclusions can be reached about this 'jurisprudence of assurances'? As with any litigation, the outcome depended on the specific circumstances of that case, including the enduring nature of Anglo-Jordanian relations, the notoriety of the suspect, the effectiveness of national verification mechanisms, and the degree of willingness to cooperate with international audit mechanisms. Thus, this judgment might establish the availability of DWA as a potentially legitimate solution, but it cannot be viewed as a *carte blanche* for DWA in any circumstances. The ECtHR pointed out several potential pitfalls. National verification mechanisms will be carefully scrutinised for sufficient legal, medical and psychiatric resources and expertise, the degree of

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<sup>290</sup> For conviction and sentencing, see *US v Aswat*, USDC SDNY, <https://www.justice.gov/usao-sdny/pr/haroon-aswat-abu-hamza-co-conspirator-sentenced-manhattan-federal-court-20-years-prison>, 16 October 2015).

<sup>291</sup> *Aswat v United Kingdom*, App. no. 62176/14, para.31.

<sup>292</sup> App. no. 140/10, 4 September 2014.

<sup>293</sup> *Ibid.*, paras.17, 27.

<sup>294</sup> *Ibid.*, para.135. A Presidential pardon was possible but had never been awarded to a terrorist.

<sup>295</sup> See the critical opinion of Judge Yudkivska.

<sup>296</sup> [2014] EWHC 3609 (Admin).

<sup>297</sup> *Ibid.*, paras.76, 92.

<sup>298</sup> *Ibid.*, para.120.

private access to the detainee, and the degree of independence from the receiving state.<sup>299</sup> Presumably, in view of the statements made about Anglo-Jordanian relations, DWAs might be most feasible in the context of ongoing settled relations, rather than as an opening gambit with new and untested correspondent regimes.

- 5.40. Even though extensive ‘factors’ are listed by the *Othman* decision, extra or more specific hurdles can always be suggested, though it is undoubtedly the situation that ‘The very nature of assurances is such that it is difficult to put in place a one-size-fits-all model that is going to apply in all circumstances.’<sup>300</sup> For instance, in regard to monitoring, which is probably the most crucial aspect,<sup>301</sup> while the ECtHR readily thinks of access to lawyers, there is no mention of medical or psychiatric involvement. More stringent independence rules could be satisfied, whereby the monitoring body has a record of qualified personnel and achievement and is not substantially reliant for funding on either state.<sup>302</sup> Its visits should be specified as being in private, potentially unannounced, with full access to records, and of a minimum specified frequency and duration.<sup>303</sup> Diplomatic monitoring is mentioned as a possibility rather than a necessity, allowing for the shifting of responsibility from the sending state after the event. The requirement to publicise complaints might be a further safeguard in view of the diplomatic inclination otherwise.<sup>304</sup> Furthermore, a willingness to cooperate with international audit mechanisms might also be translated into practical indicators, such as, perhaps, the ratification of OPCAT.<sup>305</sup> However, only Lebanon and Morocco have so agreed out of countries with UK DWA arrangements,<sup>306</sup> suggesting that it is not a foolproof legal test.<sup>307</sup>
- 5.41. Moreover, the ECtHR makes no mention of enforcement. Without a treaty, it may be hard to envision what ‘enforcement’ would entail. The sending state can of course refuse to render any more prisoners, if one is abused, which might be a source of irritation to the receiving state. But the irritation of the sending state in not being able to remit troublemakers will probably be the greater. More to the point

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<sup>299</sup> *Othman v United Kingdom*, App. No.8139/09, 17 January 2012, paras.203-204.

<sup>300</sup> Theresa May as quoted in House of Lords Select Committee on Extradition, *Extradition* (2014-15 HL 126) para.84.

<sup>301</sup> See House of Lords Select Committee on Extradition, *Extradition* (2014-15 HL 126) paras.91-94.

<sup>302</sup> In *Othman*, the ECtHR accepted looser qualifications in respect of the Adaleh Centre for Human Rights Studies: App. No.8139/09, 17 January 2012, paras.202-204.

<sup>303</sup> Compare Coroners and Justice Act 2009, s.117; Home Office, Code of Practice on Independent Custody Visiting 2013.

<sup>304</sup> The confidentiality maintained by the ICRC was a significant factor against DWAs in: *Saadi v Italy*, App. no. 37201/06, 28 February 2008, para.146; *Ben Khemais v Italy*, App. no. 246/07, 24 February 2009, para.54

<sup>305</sup> House of Commons Foreign Affairs Committee, *The FCO's Human Rights Work in 2011* (2012-2013 HC 116) para.64. Lack of submission to international audit by Turkmenistan was raised as an adverse factor in *Soldatenko v Ukraine*, App. no. 2440/07, 23 October 2008, para.73.

<sup>306</sup> JUSTICE, *Submission to the Review*, para.25.

<sup>307</sup> Compare UN High Commissioner for Human Rights (Louise Arbour), *Statement before the Council of Europe Group of Specialists on Human Rights and the Fight Against Terrorism* (29–31 March 2006); APT, *Submission to the Review*, para.3.

is how any remedy for broken promises would avail the subject rather than repairing diplomatic relations and reputation of the relevant states. Once the transfer is enforced,<sup>308</sup> it will be hard to impose any effective remedy which will benefit the returnee. Even under the expanded jurisdiction recognised in *Banković v Belgium*<sup>309</sup> which was expanded to foreign sites of detention in *al-Jedda v United Kingdom*,<sup>310</sup> *Al-Skeini v United Kingdom*,<sup>311</sup> *Al-Saadoon and Hussain Mufdhi v United Kingdom*,<sup>312</sup> and *Hassan v United Kingdom*,<sup>313</sup> the filling in of legal black holes in foreign disputes has primarily involved responsibility for treatment in foreign sites run by the host nation. The further cases of unlawful rendition by the US which was connived at by various Council of Europe member states, *El-Masri v FYR Macedonia*,<sup>314</sup> *Al Nashiri v Poland*,<sup>315</sup> *Husayn (Abu Zubaydah) v Poland*,<sup>316</sup> and *Nasr and Ghali v Italy*,<sup>317</sup> now demonstrate that responsibility can also arise under Article 3 for allowing the person to pass into foreign hands where wrongful treatment has predictably occurred. However, the result has been the payment of modest compensation years after the events. The case of *Yunus Rahmatullah* gives further pause for thought.<sup>318</sup> A prisoner of the British Army in Iraq was passed on to US authorities and was then transferred to Bagram in Afghanistan. The MOU between the US and UK forces allowed for the return of the prisoner on request, reflecting the Fourth Geneva Convention, Article 45, or, if POW status was recognised, under the Third Geneva Convention, Article 12.<sup>319</sup> Following allegations of mistreatment in Bagram, the UK sought his return but the US refused. R's lawyers obtained a grant of habeas corpus by the Court of Appeal, upon which the UK government sent a short letter of request to the US authorities. The request was ignored. The result is that the UK government acted unlawfully, unable to convince a close ally to keep its promise or respect its legal decisions. One can hardly expect that countries with much less shared history could impose remedies on one another.

5.42. The sending state cannot be made a guarantor of perfect behaviour where dealings are undertaken with a third state, as was the judgment even in regard to

<sup>308</sup> A voluntary returnee is viewed as in a different position: *Khan v United Kingdom*, App. no. 11987/11, 28 January 2014.

<sup>309</sup> App. no. 52207/99, 2001-XII.

<sup>310</sup> *R (al-Jedda) v Secretary of State for Defence* [2007] UKHL 58; *al-Jedda v Secretary of State for Defence* [2010] EWCA Civ 758; *Al-Jedda v United Kingdom*, App. no. 27021/08, 7 July 2011.

<sup>311</sup> *R (Al-Skeini and Others) v Secretary of State for Defence* [2007] UKHL 26; *Al-Skeini v United Kingdom*, App. no. 55721/07, 7 July 2011.

<sup>312</sup> *R (al-Saadoon) v Secretary of State for Defence* [2009] EWCA Civ 7; *Al-Saadoon and Mufdhi v United Kingdom*, App. no. 61498/08, 2 March 2010 (judgment).

<sup>313</sup> App. no. 29750/09, 16 September 2014. See further *Al Waheed v Ministry of Defence and Serdar Mohammed v Ministry of Defence* [2017] UKSC 2.

<sup>314</sup> App. no. 39630/09, 13 December 2012.

<sup>315</sup> App. no. 28761/11, 24 July 2014.

<sup>316</sup> App. no. 7511/13, 24 July 2014.

<sup>317</sup> App. no. 44883/09, 23 February 2016.

<sup>318</sup> [2012] UKSC 48. For subsequent civil actions, see *Belhaj v Straw and others*; *Rahmatullah (No 1) v Ministry of Defence* [2017] UKSC 3; *Rahmatullah (no.2) v Ministry of Defence*, *Mohammed v Ministry of Defence* [2017] UKSC 1.

<sup>319</sup> *Ibid.*, para.34.

the behaviour of a third party such as Italy, a serial offender under Rule 39, in *Ignoua v UK*.<sup>320</sup> In that case, the English courts authorised the execution of a European Arrest Warrant issued in Italy for suspected Tunisian terrorists in Britain. They found no reasonable likelihood of a return to Tunisia, a fate which at the time of extradition in 2008 would have breached Article 3. In fact, the suspects were tried and acquitted in Italy, and only then did deportation arise (in 2010) since the UK refused their readmission. In this case, Italy observed the Rule 39 order and, given the regime change in Tunisia in 2012, no problem remained by the time of the decision in 2014. In any event, the imposition of too strict a version of liability for the treatment of a transferred person may be a mixed blessing. The more extensive the assurances, interventions and audits which are agreed diplomatically, the greater force will be imparted to the argument that State Agent Authority is conferred upon the sending state. As such, a real but unavoidable dilemma is created for well-intentioned diplomats who genuinely wish to protect human rights but do not wish to assume responsibility for the misdeeds of other states.

5.43. Two further conditions might be emphasised. First, the receiving state should demonstrate sustained and practical reforms, preferably both legal and political, which give confidence that their promises can be delivered in reality. Secondly, there should be a degree of verification of the receiving state's criminal justice and penal processes which goes well beyond what has been on offer to date — including effective record-keeping and independent legal and medical access in general and not just for DWA purposes.

5.44. Detailed precepts were devised by the Council of Europe Committee of Ministers in their guidelines on forced returns.<sup>321</sup> The first Guideline relates to the promotion of voluntary return: 'The host state should take measures to promote voluntary returns, which should be preferred to forced returns. It should regularly evaluate and improve, if necessary, the programmes which it has implemented to that effect.' Guideline 2 (1) states that:

'1. A removal order shall only be issued where the authorities of the host state have considered all relevant information that is readily available to them, and are satisfied, as far as can reasonably be expected, that compliance with, or enforcement of, the order, will not expose the person facing return to:

(a) a real risk of being executed, or exposed to torture or inhuman or degrading treatment or punishment;

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<sup>320</sup> App. no. 46706/08, 18 March 2014.

<sup>321</sup> Committee of Ministers, *Forced Returns* (925th Meeting of the Ministers' Deputies, Strasbourg, 4 May 2005). See also Human Rights Watch, *Still at Risk: Diplomatic Assurances No Safeguard Against Torture* (New York, 2005) 15-18.

- (b) a real risk of being killed or subjected to inhuman or degrading treatment by non-state actors, if the authorities of the state of return, parties or organisations controlling the state or a substantial part of the territory of the state, including international organisations, are unable or unwilling to provide appropriate and effective protection; or
- (c) other situations which would, under international law or national legislation, justify the granting of international protection.'

These basic principles are backed up by 18 other detailed rules.

5.45. The other aspect of the jurisprudence of assurances to have been developed by the ECtHR concerns the burden and standard of proof under Article 3. As for the burden, the ECtHR expects the applicant to present a credible claim of a 'real risk',<sup>322</sup> and then the state must dispel that evidence and any material obtained *ex proprio motu* such as through NGOs.<sup>323</sup> The 'real risk' is considered in terms of the general situation in the receiving country and may not necessarily be particular to the individual,<sup>324</sup> though factors specific to the applicant, especially previous ill-treatment of the applicant,<sup>325</sup> are of course important. In terms of dispelling the 'real risk', assurances can only have weight if fully disclosed<sup>326</sup> but, if so, they were viewed with more sympathy by the ECtHR in *Othman* compared to other international institutions and commentators:

'First, the Court wishes to emphasise that, throughout its history, it has been acutely conscious of the difficulties faced by States in protecting their populations from terrorist violence, which constitutes, in itself, a grave threat to human rights.... Second, as part of the fight against terrorism, States must be allowed to deport non-nationals whom they consider to be threats to national security. ....'<sup>327</sup>

Yet, the position remains that 'assurances are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment.'<sup>328</sup> Thus, the eleven listed 'factors' rather than their pronouncement *per se* must be considered so as to overcome the 'prima facie scepticism'.<sup>329</sup> But the ECtHR does emphasise its willingness to be persuaded and that there is no absolute bar against assurances, for 'it will only be in rare cases that the general situation in a country

<sup>322</sup> 'Real' must involve more than a 'mere possibility': *Vilvarajah v United Kingdom*, App. nos. 13163/87, 13164/87, 13165/87, 13447/87, 13448/87, Ser A 215, 1991, para.111.

<sup>323</sup> See *Mamatkulov and Askalov v Turkey*, App. nos. 46827/99, 46951/99, 2005-I, paras.67-69; *Hirsi Jamaa v Italy*, App. no. 27765/09, 23 February 2012, para.116.

<sup>324</sup> *Sufi and Elmi v United Kingdom*, App. nos. 8319/07, 11449/07, 28 June 2011, para.219.

<sup>325</sup> See *Koktysh v Ukraine*, App. no. 43707/07, 10 December 2009.

<sup>326</sup> See *Muminov v Russia*, App. no. 42502/06, 11 December 2008, paras.97-98.

<sup>327</sup> *Othman v United Kingdom*, App. no.8139/09, 17 January 2012, paras.183, 184.

<sup>328</sup> *Ibid.*, para.187.

<sup>329</sup> See Mavronicola, N., *Submission to the Review* (2014) p.6

will mean that no weight at all can be given to assurances'.<sup>330</sup> Perhaps those 'rare cases' could be defined for United Kingdom practice on assurances by reference to 'Countries of Concern' designated each year by the Foreign & Commonwealth Office because of their human rights records.<sup>331</sup> The standard of proof which emerges is less strict than 'beyond reasonable doubt'<sup>332</sup> and is more comparable to the 'substantial grounds' as in asylum cases. Therefore, the practice of the ECtHR does not amount to requiring that assurances reduce the risk to 'negligible proportions'.<sup>333</sup>

5.46. Finally, an important procedural issue which should be noted concerns the issuance of a stay of removal as an interim measure under Rule 39 of the Rules of Court pending the resolution of proceedings before the ECtHR. The UK government has almost always complied with these orders in terrorism cases,<sup>334</sup> despite calls otherwise and much contrary behaviour elsewhere.<sup>335</sup> The Home Office reports that it does not consider problematic either the number of these orders or the delays created by this interim process.<sup>336</sup>

5.47. In conclusion, detailed precepts for DWA under the ECHR have now been set out in *Othman* in a way which shows that the ECtHR is rather more receptive to the device than most other international overseers.<sup>337</sup> *Othman* confirms that the avenue is open for administrations which are prepared to engage deeply with a receptive foreign partner. But with so many factors in play, it is not possible to design a straightforward ECHR-compliant DWA blueprint, and there have been failures since *Othman*.<sup>338</sup> If certainty is demanded by government, then DWA is

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<sup>330</sup> *Othman v United Kingdom*, App. no. 8139/09, 17 January 2012, para.188. It came close to this position in regard to Uzbekistan: *Ismoilov v Russia*, App. no. 2947/06, 24 April 2008; *Yuldashev v Russia*, App. no. 1248/09, 8 July 2010; *Sultanov v Russia*, App. no. 15303/09, 4 November 2010.

<sup>331</sup> Foreign & Commonwealth Office, *Human Rights and Democracy: The 2013 Foreign & Commonwealth Office Report* (Cm. 8870, London, 2014) Section XI. Other surveys are also available: Freedom House, *Freedom in the World* (<https://freedomhouse.org/report/freedom-world/freedom-world-2016>); UNDP, *Human Development Report 2015* (<http://hdr.undp.org/sites/default/files/ranking.pdf>); World Justice Project Rule of Law Index (<http://worldjusticeproject.org/rule-of-law-index>).

<sup>332</sup> See *Shamayev v Georgia and Russia*, App. no. 36378/02, 12 April 2005, para.338; *Garabayev v Russia*, App. no. 38411/02, 7 June 2007, para.76.

<sup>333</sup> Compare Wouters, K., *International Legal Standards for the Protection from Refoulement* (Intersentia, Mortsel, 2009) p.304.

<sup>334</sup> The notable exception is *Al-Saadoon and Mufdhi v United Kingdom*, App. no. 61498/08, 2 March 2010.

<sup>335</sup> See *Mamatkulov and Askalov v Turkey*, App. nos. 46827/99, 46951/99, 2005-I; *Shamayev v Georgia and Russia*, App. no. 36378/02, 2005-III; *Olaechea Cahuas v Spain*, App. no. 24668/03, 10 August 2006; *Muminov v Russia*, App. no. 42502/06, 11 December 2008; *Ben Khemais v Italy*, App. no. 246/07, 24 February 2009; *Trabelsi v Italy* App. no. 50163/08, 13 April 2010; *Kamaliyev v Russia*, App. no. 52812/07, 3 June 2010; *Toumi v Italy*, App. no. 25716/09, 5 April 2011; *Mannai v Italy*, App. no. 9961/10, 27 March 2012; *Abdulkhakov v Russia*, App. no. 14743/11, 2 October 2012; *Zokhidov v Russia*, App. no. 67286/10, 5 February 2013; *Savriddin Dzhurayev v Russia*, App. no. 71386/10, 25 April 2013; *Trabelsi v Belgium*, App. no. 140/10, 4 September 2014.

<sup>336</sup> *HM Government's Response to the Call for Evidence in the Independent Review of Deportation With Assurances Policy* (London, 2014) para.13.

<sup>337</sup> This stance is said to be reflected in other aspects of the ECtHR's jurisprudence in recent times: Sicilianos, L-A., 'The European Court of Human Rights at a time of crisis in Europe' [2016] *European Human Rights Law Review* 121.

<sup>338</sup> See for example, post-*Othman*, *Kasymakhunov v Russia*, App. no. 29604/12, 14 November 2013, para.127; *Fozil Nazarov v Russia*, App. no.74759/13, 11 December 2014; *Eshonkulov v Russia*, App. no. 68900/13, 15 January 2015.

not the best solution. With just 12 removals under DWA from 2001 to 2014 from the UK,<sup>339</sup> if certainty and speed are demanded by a government, then DWA is not the best solution, though other factors, including securing a just outcome, are important too. The MOU with Jordan might be described as the 'Rolls Royce' of MOUs. Even so there were allegations of breaches in terms of the implementation of the agreed arrangements. A military judge was selected for the initial panel, though this was later remedied. More seriously, evidence of a confession affected by torture (of Othman's alleged co-conspirator, Abd al-Nasser al-Khamaiseh) was admitted as evidence in two trials in 2014.<sup>340</sup> Yet, Othman was acquitted in both trials, even though the required arrangements as to due process had not been formally translated in any way into Jordanian law ahead of the affected trials.<sup>341</sup>

#### **D Potential benefits of DWA with reference to international law**

- 5.48. While the operation of any DWA scheme may be fraught with international law pitfalls, the potential benefits of such arrangements in international law terms should also be taken into account. They assume effective implementation which, as shown in the case of Jordan, cannot be taken for granted even after DWA arrangements are agreed.
- 5.49. First, DWA inherently produces more specific and more transparent human rights arrangements over and above those in underlying international law. There may also arise greater enticement to comply with a package of specific incentives and commitments within DWA than in legally binding general treaties.<sup>342</sup> As stated by the UK Ministry of Justice in its *Seventh Periodic Report* to the Human Rights Committee:

'Bilateral arrangements on DWA enable the Government to obtain assurances that will safeguard the rights of individuals being returned, for example in relation to humane treatment, access to medical care, adequate nourishment and accommodation, in accordance with internationally accepted standards - in particular Article 3 of the ECHR (prohibition of torture or inhuman or degrading treatment). The specificity of bilateral arrangements, including in relation to particular individuals, mean that they provide an

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<sup>339</sup> Source: Home Office, *Symposium on Deportation with Assurances*, 24 September 2014. 9 out of 12 DWAs have been with Algeria.

<sup>340</sup> <http://www.hrw.org/news/2014/07/11/abu-qatada-trial-showed-ukjordan-torture-treaty-worthless>.

<sup>341</sup> <http://www.hrw.org/news/2014/10/27/abu-qatada-case-no-victory-london>. It was reported that 'Abu Qatada's lawyer, Edward Fitzgerald QC, then unexpectedly told the special immigration appeals commission (Siac) that his client was prepared to leave if the treaty was enshrined in law.' (Booth, R. and Malik, S., 'Abu Qatada arrives in Jordan after eight-year deportation battle' <https://www.theguardian.com/world/2013/jul/07/abu-qatada-jordan-deportation-battle>, 7 July 2013).

<sup>342</sup> See Skoglund, L., 'Diplomatic assurances against torture: an effective strategy?' (2008) 77 *Nordic Journal of International Law* 319, 355.

additional level of protection over and above that provided by international agreements.<sup>343</sup>

- 5.50. Second, the facilitation of deportation can offer a more certain future compared to detention or restrictions pending deportation or even temporary refugee protection. This period of limbo may itself adversely affect a number of internationally recognised rights, especially when detention is applied. The multiple decisions in the domestic treatment of *Othman* illustrate the plight of those whose liberty and family status is fragile.<sup>344</sup> For suspects who command media attention (as will often be the situation), there may even be threats to safety. In *Othman v English National Resistance*,<sup>345</sup> a non-harassment order and non-disclosure order was issued against protestors.
- 5.51. A third potential gain in international law terms relates to the promotion of legal process in combination and cooperation with other countries. In this way, the principle of legality is advanced through the facilitation of formal deportation (or extradition) rather than resort to less palatable (but apparently so tempting) methods such as detention without trial or illegal rendition. Lord Hope expressed the sentiment as follows: 'Surely the sooner they are got rid of the better. On their own heads be it if their extremist views expose them to the risk of ill-treatment when they get home. .... That however is not the way the rule of law works.'<sup>346</sup> This point is claimed in aid by the UK Government in its *Sixth Periodic Report* to the Human Rights Committee:

'The British Government has responsibility to the public to take action to reduce the threat of terrorism in the United Kingdom and to consider all options for doing so. MoUs on Deportation with Assurances are an important tool in this respect, which enable the Government to remove individuals who are foreign nationals and pose a terrorist threat to the United Kingdom, thereby providing a means of disrupting their activity and reducing the threat to national security.'<sup>347</sup>

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<sup>343</sup> Ministry of Justice, *International Covenant on Civil and Political Rights Seventh Periodic Report from the United Kingdom, the British Overseas Territories, the Crown Dependencies December 2012* (<http://www.justice.gov.uk/downloads/human-rights/ccpr-7th-periodic-report.pdf>) para.493.

<sup>344</sup> *Othman v Secretary of State for the Home Department* [2012] UKSIAC B1; *Othman v Secretary of State for the Home Department (no.2)* SC/15/2005; *R v Othman* v SIAC [2012] EWHC 2349 (Admin); *Othman v Secretary of State for the Home Department* (2013) *The Times* 21 May p.13.

<sup>345</sup> [2013] EWHC 1431 (QB).

<sup>346</sup> *RB & U (Algeria) and OO (Jordan) v Secretary of State for the Home Department* [2009] UKHL 10 paras.209-210.

<sup>347</sup> Human Rights Committee, *Consideration of reports submitted by states parties under Article 40 of the Covenant, Sixth Periodic Report, United Kingdom of Great Britain and Northern Ireland* (CCPR/C/GBR/6, Geneva, 18 May 2007) para.57. The same point is made in the Seventh Periodic Report: Ministry of Justice, *International Covenant on Civil and Political Rights Seventh Periodic Report from the United Kingdom, the British Overseas Territories, the Crown Dependencies December 2012* (<http://www.justice.gov.uk/downloads/human-rights/ccpr-7th-periodic-report.pdf>) para.494.

Resort to deportation or extradition also averts the criticism that security risks are simply being dumped abroad, though this gain ensues only if deportation is to facilitate legal process abroad, otherwise, as stated by the Newton Committee:

'Seeking to deport terrorist suspects does not seem to us to be a satisfactory response, given the risk of exporting terrorism. If people in the UK are contributing to the terrorist effort here or abroad, they should be dealt with here. While deporting such people might free up British police, intelligence, security and prison service resources, it would not necessarily reduce the threat to British interests abroad, or make the world a safer place more generally. Indeed, there is a risk that the suspects might even return without the authorities being aware of it.'<sup>348</sup>

In the context of what became the Immigration, Asylum and Nationality Act 2006, the Government promised by contrast that 'we shall not ... export risk'.<sup>349</sup> Though there can be no guarantee as to outcome, DWA often involves the prospect of legal action in the receiving state, whether by trial or by administrative restraints. Arguably, in the light of the Newton Committee's valid point, there should be no DWA unless legal process is assured. However, pushing this precept too far may be an encouragement to forms of executive detention which would not be palatable under Articles 5 and 6.

- 5.52. Fourth, the pursuit of deportation in combination with legal process in a third country could be said to transact the edicts in UN Security Council Resolution 1373 of 28 September 2001 which:

'2. Decides also that all States shall ...

(c) Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens;

(f) Afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings...'

Failure to return fugitive terrorists has been a source of international friction over many decades.

- 5.53. As well as enhanced comity between nations, a fifth potential gain may be located in more practical improvements in the level of respect for international law through bilateral engagement over DWA arrangements. Thus, DWA arrangements may heuristically serve wider policy goals of general development towards better adherence to human rights standard-setting, thereby answering

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<sup>348</sup> Privy Counsellor Review Committee, *Anti-terrorism, Crime and Security Act 2001 Review: Report* (2003-04 HC 100) Pt.D. para.195.

<sup>349</sup> House of Commons Standing Committee E col 271 25 October 2005, Tony McNulty.

the criticism that returnees are somehow receiving privileged status.<sup>350</sup> Thus, Lord Macdonald commented that:

'It seems to me that the very process of engaging with other countries on the issue of the appropriate treatment of prisoners, and obtaining guarantees in that regard, is likely to have a positive effect upon the regimes in question. I cannot see how UK government insistence upon the proper treatment of detainees encourages torture and I conclude that it does not.'<sup>351</sup>

This potentially beneficial process of engagement was arguably witnessed following the *Othman* case, whereby, with the spotlight on its criminal justice processes, Jordan altered its legal rules, even after what were viewed as major reforms in the Constitutional Amendments of 2011 which reflected the Royal Committee on Constitutional Review in 2011. Those changes were considered to be aimed at democratisation, human rights, and the rule of law as a response to the 'Arab Spring' rather than pressure from the *Othman* case.<sup>352</sup> By Article 8:

'1 No person may be arrested, detained, imprisoned, have his/her freedom restricted or prevented from free movement except in accordance with the provisions of the law.

2 Every person who is arrested, imprisoned or his/her freedom is restricted, must be treated in a way that preserves his/her human dignity. It is forbidden for him/her to be tortured (in any form) or harmed physically or mentally, as it is forbidden to detain him/her in places outside of those designated by the laws regulating prisons. Any statement extracted from a person under duress of anything of the above or the threat thereof shall neither bare any consideration nor reliability.'<sup>353</sup>

The 2012 ruling in *Othman v Secretary of State for the Home Department*<sup>354</sup> concluded that there remained a substantial risk of a flagrantly unfair trial. The statements obtained in circumstances of torture from two witnesses who had been co-defendants might still be admissible under the Article 148 of the Jordanian Code of Criminal Procedure in the retrial of Othman.<sup>355</sup> In response to that concern, DWA arrangements could not help in the sense that no further formula of words could be binding or decisive where what is required is judicial

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<sup>350</sup> See Nowak, M., 'Challenges to the Absolute Nature of the Prohibition of Torture and Ill-treatment' (2005) 23(4) *Netherlands Quarterly of Human Rights* 674, 687.

<sup>351</sup> Macdonald, Lord K., *Review of Counter Terrorism and Security Powers* (Cm.8003, London, 2011) pp.8-9. See also Home Office, *Review of Counter Terrorism and Security Powers* (Cm.8004, London, 2011) para.17.

<sup>352</sup> <http://www.jordanoholic.com/blog/news/jordan-constitution-amendments-2011>.

<sup>353</sup> The previous version stated: 'No person may be detained or imprisoned except in accordance with the provisions of the law.'

<sup>354</sup> [2012] UKSIAC 15/2005-2, paras.69, 71.

<sup>355</sup> By Article 159 of the Jordanian Code of Criminal Procedure, any evidence or statement obtained by physical or mental coercion and in the absence of the public prosecutor shall be considered legally invalid unless the prosecution provides evidence of the circumstances under which it was obtained and the court is convinced that the defendant has provided such evidence or statement voluntarily (see Committee against Torture, *Consideration of reports submitted by States parties under article 19 of the Convention pursuant to the optional reporting procedure* (CAT/C/JOR/3, 20 August 2014 para.9). Compare *A v Secretary of State for the Home Department* (no.2) [2005] UKHL 71.

compliance rather than executive compliance (as in the case of Article 3 undertakings). Article 97 of the Jordanian Constitution states that ‘Judges are independent, and in the exercise of their judicial functions they are subject to no authority other than that of the law.’<sup>356</sup> So, Mr Justice Mitting was correct to suggest a change of Code or authoritative court ruling would be required and that MOUs would not suffice at that stage.<sup>357</sup> What followed in response in 2013 was the *Treaty on Mutual Legal Assistance in Criminal Matters between the United Kingdom of Great Britain and Northern Ireland and the Hashemite Kingdom of Jordan*.<sup>358</sup> By Article 27.3:

‘Where there are serious and credible allegations that a statement from a person has been obtained by torture or ill-treatment by the authorities of the receiving State and it might be used in a criminal trial in the receiving State referred to in paragraph 1 of this Article, then the statement shall not be submitted by the prosecution nor admitted by the Court in the receiving State, unless the prosecution submits evidence on the conditions in which the statement was obtained, and the Court is satisfied to a high standard that such statement has been provided out of free-will and choice and was not obtained by torture or ill treatment by the authorities of the receiving State.’

It was possible that the UK courts or the ECtHR would still have wanted to be assured by evidence of practice rather than a paper promise, but having previously emphasised the good faith of both state parties, further objections were unlikely even though the treaty had not been implemented at the time of the decision by Othman to return to Jordan on 6 July 2013 nor at the time of his trials. Despite these shortcomings,<sup>359</sup> human rights were championed in a jurisdiction in which there were endemic practices of unfairness in political cases.<sup>360</sup> The process began with the pursuit of DWA, though the desired goal could not be solved by DWA alone. Furthermore, the objectives of criminal justice and human rights development can only be served if the DWA is accompanied by engagement across a wider field than just the problem case at issue - thus, solutions are multilateral rather than bilateral. Such engagement brings its own ethical problems when dealing with unstable, militarised, or corrupt, governments,<sup>361</sup> but relevant modes of engagement might involve, for example, Foreign & Commonwealth Office Strategic Partnership agreements

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<sup>356</sup> See further Independence of the Judiciary Act No. 29 of 2014.

<sup>357</sup> [2012] UKSIAC 15/2005-2, para.78.

<sup>358</sup> Cm.8612, London, 2013. The treaty was agreed on 24 March 2013.

<sup>359</sup> Further safeguards are still required in the view of the Committee against Torture, *Concluding observations on the third periodic report of Jordan* (CAT/C/JOR/CO/3, 29 January 2016) para.49. 50.

<sup>360</sup> See <http://www.amnesty.org/en/news/jordan-protests-2012-10-10>;  
<http://www.hrw.org/news/2011/11/21/flaws-jordan-s-largest-terrorism-trial>.

<sup>361</sup> See *R (Nour) v Secretary of State for Defence* [2015] EWHC 2695 (Admin): N claimed that the Overseas Security and Justice Assistance Human Rights Guidance was being breached by UK aid to the Sudanese armed forces. The claim revealed some details as to the four-stage by which risk is assessed (risk to a breach of human rights as well as political risk). It was held that political risk was not justiciable, but otherwise the decision was not irrational.

which have been signed even with ‘countries of concern’<sup>362</sup> or a more specific Justice and Human Rights Partnership (JHRP) which ‘seeks to reduce the threat to the UK and its interests by developing the capacity of countries from which terrorist threats originate to investigate and prosecute terrorists with full respect for human rights.’<sup>363</sup> The Foreign & Commonwealth Office’s Strategic Programme Fund is also designed to assist the development of human rights as well as protective security and counter radicalisation.<sup>364</sup> Wider engagement would also offer a sounder platform for the involvement of independent monitors, who will usually refuse to engage with DWA arrangements alone because they are seen as a compromise to independence and contrary to their mission of seeking systemic adherence to international law for the benefit of all.<sup>365</sup>

- 5.54. The sixth potential benefit from DWA may accrue to the victims of terrorism. The Preamble to the European Convention on the Compensation of Victims of Violent Crimes 1983<sup>366</sup> requires a state response which promotes ‘equity and social solidarity’. Equally, the United Nations Global Counter-Terrorism Strategy 2006 commits states:

‘IV.4. To make every effort to develop and maintain an effective and rule of law-based national criminal justice system that can ensure, in accordance with our obligations under international law, that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in support of terrorist acts is brought to justice, on the basis of the principle to extradite or prosecute, with due respect for human rights and fundamental freedoms, and that such terrorist acts are established as serious criminal offences in domestic laws and regulations.’<sup>367</sup>

- 5.55. A final point in the estimation of the value of the DWA policy is that alternatives to DWA are often not evidently more feasible, more ethically sound, or more appealing to victims. There are several other approaches to the removal from the state of a terrorist suspect (which may sometimes be used in combination and which may or may not be viewed as preferable to DWA). Eight alternatives should be mentioned.<sup>368</sup> One is the extension of grounds for deportation or

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<sup>362</sup> See Foreign & Commonwealth Office, *Human Rights and Democracy 2013* (Cm.8842, London, 2014): The report mentions the partnerships alongside the Counter Terrorism Programme but does not specify which countries (p.93).

<sup>363</sup> Home Office, *Response to the Seventeenth Report from the Home Affairs Committee Session 2013-14 HC 231: Counter-Terrorism* (Cm.9011, London, 2015) p.6

<sup>364</sup> Foreign & Commonwealth Office, *Annual Human Rights and Democracy Report 2014* (Cm.9027, London, 2015) p.67; <https://www.gov.uk/government/organisations/foreign-commonwealth-office/about>.

<sup>365</sup> See APT, *Submission to the Review*, para.4. For refusals, see *Youssef v Home Office* [2004] EWHC 1884 (QB) para.26 (ICRC); *Othman v United Kingdom*, App. no. 8139/09, 17 January 2012, para.85 (National Centre for Human Rights).

<sup>366</sup> CETS 116.

<sup>367</sup> A/RES/60/288.

<sup>368</sup> See further Walker, C., ‘The treatment of foreign terror suspects’ (2007) 70 *Modern Law Review* 427; Walker, C., *Terrorism and the Law* (Oxford University Press, Oxford, 2011) chap.7.

exclusion.<sup>369</sup> Second is extending exceptions to non-refoulement under Article 32 and 33 of the 1951 Convention relating to the Status of Refugees.<sup>370</sup> But these two proposals cannot affect international law requirements which have remained immutable even after 9/11, and so such changes would conflict with the desire for compliance with the international rule of law so vaunted by the UK Government. The third alternative is the withdrawal of citizenship from naturalised citizens as a prelude to deportation or exclusion.<sup>371</sup> This tactic is being adopted, as already mentioned, but runs up against limits in terms of the avoidance of statelessness<sup>372</sup> and the fact that some of the forgoing candidates for extradition were British citizens. The fourth option is relocation to a third country with the formal consent of the receiving state and the subject. A notable example relating to the UK was the case of Mohammad Al-Massari, a Saudi political dissident who had been granted asylum in 1994 but then was the subject of (unsuccessful) attempts to persuade him to leave and then to deport him to the Dominican Republic.<sup>373</sup> The obvious problem here is to find a willing recipient state and a consenting subject.<sup>374</sup> Fifth is to encourage another state to seek extradition, subject to proportionality.<sup>375</sup> Several extraditions to the US of suspected terrorists who have been resident in the UK and have never visited the US have been unsuccessfully challenged as to choice of venue.<sup>376</sup> The choice of venue may not wholly avert the need for DWA but may make that process more readily acceptable, depending on the jurisdiction concerned. Sixth is to negotiate broader treaty arrangements for mutual legal cooperation, as eventually occurred in *Othman*, which are not confined to DWA. This approach seems attractive in terms of clarity and providing benefits to both countries. But greater costs are occurred in terms of negotiations which are less likely to be finalised than special arrangements for one individual. In addition, while treaties are enforceable between states, the remedies for breach are no more likely to avail a returnee than are those for a breach of DWA arrangements. Seventh is the use of executive security measures in the UK, such as Terrorism Prevention

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<sup>369</sup> See Home Office, *Exclusion or Deportation from the UK on Non-Conducive Grounds* (London, 2005); Immigration, Asylum and Nationality Act 2006, s.7; Crime and Courts Act 2013, s.54.

<sup>370</sup> Immigration, Asylum and Nationality Act 2006, s.54,

<sup>371</sup> Immigration, Asylum and Nationality Act 2006, ss.56-58; Immigration Act 2014, s.66. See Gower, M., *Deprivation of British Citizenship and Withdrawal of Passport Facilities* (SN/HA/6820, House of Commons Library, London, 2015).

<sup>372</sup> See for example *Abu Hamza v Secretary of State for the Home Department* [2010] UKSIA 23/2005, 5 November 2010.

<sup>373</sup> *The Times* 6 March 1996, 19 April; *Mail on Sunday* 3 July 2001.

<sup>374</sup> The tactic has been used by the US in respect of Guantanamo detainees such as Uyghers who were sent to Slovakia, Bermuda, El Salvador, Palau and Switzerland. See *Kiyemba v Obama*, 605 F.3d 1046 (USCA DC, 2010).

<sup>375</sup> Anti-Social Behaviour, Crime & Policing Act 2014, s.157 (inserting the Extradition Act 2003, s.21A, into the scheme for Part I extradition under the European Arrest Warrant. Express factors in that calculation include the seriousness of the conduct alleged to constitute the extradition offence and the likely penalty that would be imposed in the event of conviction, both of which would weigh heavily in most terrorism cases.

<sup>376</sup> Trial in the USA was a more acceptable disposal than deportation to Pakistan in *Naseer v Secretary of State for the Home Department* (SC/77, 80-83/2009, 18 May 2010); *Government of the USA v Naseer* [2011] EW Misc 4 (MC).

and Investigation Measures,<sup>377</sup> whereby public proof of guilt is not necessary. However, this solution would surely be less appealing prospects for victims if not for suspects.<sup>378</sup> It may secure risk management, but it does not secure justice. The eighth alternative is to extend domestic jurisdiction to allow for prosecution in the UK. This policy has been implemented through the Terrorism Act 2006, section 17.<sup>379</sup> Prosecution is the prime official counter-terrorism policy and is perhaps viewed as the soundest ethical course of action,<sup>380</sup> but the difficulties of arranging for the evidence and witnesses to be transported or transposed are formidable in most instances. In any event, domestic prosecution does not wholly avert DWA since the urge to deport might be resurrected after the completion of the sentence.<sup>381</sup>

- 5.56. DWA is not a quick and easy solution to the attainment of national security with justice for foreign terrorist suspects, but it may be a solution which has more attractions than many of the foregoing options. In this way, DWA can play a significant role in counter-terrorism, especially in prominent and otherwise intractable cases which are worth the cost and effort, but it will be delivered effectively and legitimately in international law only if laborious care is taken.

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<sup>377</sup> See Walker, C.P., *The Anti-Terrorism Legislation* (Third edition, Oxford University Press, Oxford, 2014) chap.7.

<sup>378</sup> In the case of Jordan, see the Crime Prevention Law 1954, as reported by <http://www.amnesty.org/en/region/jordan/report-2010> and <http://www.hrw.org/news/2013/09/30/jordan-upr-submission-september-2013>. DWA in the *Othman* case did not envisage the potential application of the 1954 Law rather than prosecution, though, if it had been so directed, objections may again have been sustained under arts. 5 and 6. In *Othman v Secretary of State for the Home Department* [2012] UKSIAC 15/2005-2, para.44, it was suggested by the FCO that the Jordanian authorities might want to use the criminal trial as a demonstration of the fairness of their proceedings.

<sup>379</sup> As amended by the Serious Crime Act 2015, s.81.

<sup>380</sup> See Walker, C., 'Terrorism prosecution in the United Kingdom: Lessons in the manipulation of criminalisation and due process' in Gross, O., and ni Aolain, F., *Guantanamo and Beyond: Exceptional Courts and Military Commissions in Comparative and Policy Perspective* (Cambridge University Press, Cambridge, 2013).

<sup>381</sup> UK Borders Act 2007, s.32.

## 6. COMPARATIVE SURVEY

### A Common law jurisdictions

#### (a) Australia

- 6.1. Deportation with assurances has arisen in Australia, particularly in connection with deportations to Sri Lanka of Tamils. One terrorist-related case<sup>382</sup> concerned *Santitarajah v Attorney General (Cth)*.<sup>383</sup> The applicant was alleged by US authorities to have exported military weapons from the US to be acquired by the Liberation Tigers of Tamil Eelam ('LTTE'). When ordering extradition, the Attorney-General under section 22 of the Extradition Act 1988 (Cth) relied on an assurance by the US government that 30 days' notice would be given if the US decided to refooul him to Sri Lanka. The decision was quashed. The offences had been wrongly categorised as non-political, but, in addition, the Attorney General had not sufficiently accounted for the higher standard of proof as required by the US that it is more likely than not that a person would be in danger of being subjected to torture. Furthermore, the applicant was entitled to be advised of the negotiation of the assurances, otherwise there was a failure of procedural fairness.
- 6.2. The absence of further terrorism-related case-law on deportation or extradition is partly attributable to the alternative methods of handling security risks. Given that asylum seeking was called 'a pipeline for terrorists' by the Defence Minister, Peter Reith, in 2001,<sup>384</sup> the Australian courts have accepted that detention powers for the purpose of deportation under the Migration Act 1958 (Cth) can be legitimately exercised on an indefinite basis in order to serve security purposes. This linkage was sustained in *Al Kateb v Goodwin*.<sup>385</sup> But in *Plaintiff M47/2012 v Director General of Security*,<sup>386</sup> indefinite detention was confined by procedural requirements which cannot be evaded by detaining the suspects abroad (such as on Christmas Island) as security risks. The government reacted by amendments to the Migration Act 1958, which expressly inserted an extra criterion for grant of a protection visa into section 36, that the applicant is not assessed by the Australian Security Intelligence Organisation to be directly or indirectly a risk to security (within the meaning of section 4 of the Australian

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<sup>382</sup> For non-terrorist cases where assurances about the death penalty were accepted, see for example: *GT v Australia*, Communication No. 706/1996, CCPR/C/61/D/706/1996, 4 November 1997; *FTZK v Minister for Immigration and Border Protection* [2014] HCA 26.

<sup>383</sup> [2012] FCA 940.

<sup>384</sup> Grewcock, M., *Border Crimes* (Institute of Criminology Press, Sydney, 2006) p.166. See further Vrachnas, J. et al (eds.), *Migration and Refugee Law* (3<sup>rd</sup> ed., Cambridge University Press, Cambridge, 2011).

<sup>385</sup> [2004] HCA 37. See further Thwaites, R., *The Liberty of Non-Citizens* (Hart, Oxford, 2014) chaps. 2-4.

<sup>386</sup> [2012] HCA 46.

Security and Intelligence Organisation Act 1979).<sup>387</sup> Powers of interception and detention on the high seas have also been put in place.<sup>388</sup>

- 6.3. Though the government has thereby minimised any degree of acceptance of those deemed to be risks to security, the non-refoulement obligations remain in international law and so the problem of interim status remains. In practice the detainees are eventually released under strict conditions on the basis of temporary protection visas such as the 'removal pending bridging visa' or more recently the Temporary Safe Haven visa (valid for seven days) and the Temporary (Humanitarian Concern) visa (valid for three years) under section 195A of the 1958 Act. These practices have encountered legal difficulties. The High Court of Australia decided in *Plaintiff S4/2014* that the use of a temporary visa in order to prohibit making a valid application for a more permanent protection visa was unlawful.<sup>389</sup>
- 6.4. Another government move to make removal easier without resort to DWA concerns level of probability of harm on return that has to be proven. In *SZQRB*, the Federal Court held that the 'real chance' standard contained in the statutory criterion for complementary protection was analogous to the 'real risk' standard applied in refugee cases.<sup>390</sup> The government had argued that the test to be applied in the complementary protection context was 'more likely than not', interpreted as a more than 50% chance of suffering significant harm – in other words, higher than a 'real risk'. The standard was then depicted as a 'real chance' in the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014,<sup>391</sup> but the opportunity was taken to provide for a definition of 'refugee' that is narrower than that under the Refugee Convention, and to amend the Migration Act so that an officer must remove an 'unlawful non-citizen' under section 198, even if removal will violate Australia's non-refoulement obligations, though the Minister retains discretion to grant a visa in the public interest if there is a risk that removal will breach Australia's non-refoulement obligations..<sup>392</sup> The Parliamentary Joint Committee on Human Rights argued that, 'as a principle of international law, it is not open for a State party to a treaty to unilaterally reinterpret its obligations'.<sup>393</sup>

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<sup>387</sup> Migration Act 1958, s.36(1B), as inserted by the Migration Amendment Act 2014, Schedule 3.

<sup>388</sup> Maritime Powers Act 2013 (Cth); *CPCF v Minister for Immigration and Border Protection* 2015 HCA 1.

<sup>389</sup> *Plaintiff S4/2014 v Minister for Immigration and Border Protection* [2014] HCA 34.

<sup>390</sup> *Minister for Immigration and Citizenship v SZQRB* [2013] FCAFC 33.

<sup>391</sup> A 'real chance' has been described by the High Court as a substantial chance, as distinct from a remote or far-fetched possibility, but it may be well below a 50 per cent chance: *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379; *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559.

<sup>392</sup> See Sched.5, paras2, 7: Clarifying Australia's International Obligations. Compare *Plaintiff M70/2011 v Minister for Immigration and Citizenship* [2011] HCA 32; *Minister for Immigration and Citizenship v SZQRB* [2013] FCAFC 33.

<sup>393</sup> *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011: Bills Introduced 1-4 September*, 12<sup>th</sup> Report of the 44<sup>th</sup> Parliament (Canberra, 2014), para.1.97. There is also criticism

6.5. Reflecting on these experiences, DWA has not appeared prominently in Australian security practice. Resort has been made instead to the imposition of personal restrictions through complex reforms to asylum and immigration law, much of which has been continually challenged in court. In short, this executive management via asylum and immigration laws is not an appealing alternative to DWA for those persons who are suspected of terrorist crimes since it represents an avoidance of the justice process and at times has been shown to be unjust as a process in itself.

**(b) Canada**

6.6. Speaking before a Senate Committee in 2005, Daniel Therrien, Acting Assistant Deputy Attorney General, Legal Services, Citizenship and Immigration Canada, described the process for seeking and assessing assurances in the following terms:

'Before seeking assurances, there would be a determination of whether what would be sought might be reliable and credible. I will not answer specifically with respect to countries, but the process of seeking assurances, even before they are sought, requires an assessment of whether the document received will be reliable. ....

The decision to seek assurances is made, in the first instance, by a committee of a number of departments, including Foreign Affairs Canada, the Canada Border Services Agency and Citizenship and Immigration Canada. When the assurances are received, they are assessed by the delegate of the Minister of Immigration. ....

When the assurances are received, they are assessed by the delegate of the Minister of Immigration. ....

... these assurances are not used systematically. For instance, when it is possible to determine, based on other information, that the individual is not at substantial risk of torture, Canada will not necessarily seek assurances from the third state.<sup>394</sup>

6.7. In *Suresh v Canada*,<sup>395</sup> the Canadian Supreme Court considered the impact of assurances in relation to the applicant, a Sri Lankan who had been denied asylum in 1995 because he was a security risk by reason of his links to the

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by the CAT, *Concluding observations on the combined fourth and fifth periodic reports of Australia* (CAT/C/AUS/CO/4-5, 23 December 2014) para.15.

<sup>394</sup> Proceedings of the Special Senate Committee on the Anti-terrorism Act, Parliament of Canada, 14 November 2005, [http://www.parl.gc.ca/Content/SEN/Committee/381/anti/19evaluation.htm?Language=E&Parl=38&Ses=1&comm\\_id=597](http://www.parl.gc.ca/Content/SEN/Committee/381/anti/19evaluation.htm?Language=E&Parl=38&Ses=1&comm_id=597).

<sup>395</sup> [2002] 1 SCR 3, para.78. See Roach, K., 'Did September 11 really change everything?' (2002) 47 *McGill Law Journal* 894; Okafor, O.C. and Okoronkwo, P., 'Re-Configuring Non-Refoulement?' (2003) 15 *International Journal of Refugee Law* 30; Forcese, C., *National Security Law: Canadian Practice in International Perspective* (Irwin Law, Toronto, 2007) pp.567-68; Jenkins, D., 'Rethinking Suresh: Refoulement to Torture Under Canada's Charter of Rights and Freedoms' (2009) 47 *Alberta Law Review* 125; Padmanabhan, V.M., 'To Transfer or Not to Transfer' (2011) 80 *Fordham Law Review* 73.

LTTE. The Supreme Court warned against placing reliance on assurances: 'We would signal the difficulty in relying too heavily on assurances by a state that it will refrain from torture in the future when it has engaged in illegal torture or allowed others to do so on its territory in the past.'<sup>396</sup> It further (and correctly) noted that the notable distinctions between assurances regarding the death penalty and torture, the former being easier to monitor and generally more reliable than the latter. As a result, the Court suggested some factors that the Minister may take into account in evaluating assurances given by a foreign government with regards to torture:

'In evaluating assurances by a foreign government, the Minister may also wish to take into account the human rights record of the government giving the assurances, the government's record in complying with its assurances, and the capacity of the government to fulfill the assurances, particularly where there is doubt about the government's ability to control its security forces. In addition, it must be remembered that before becoming a Convention refugee, the individual involved must establish a well-founded fear of persecution (although not necessarily torture) if deported.'<sup>397</sup>

At the same time, the decision in *Suresh* is notorious for its interpretation of section 1 of the Canadian Charter of Rights and Freedoms which culminated in the singular conclusion that, in 'exceptional circumstances' where the person constitutes a danger to the security of Canada, 'deportation to face torture might be justified' even if contrary to international law.<sup>398</sup> By way of resolution of his case, the Court found that Suresh had compiled a *prima facie* case that he would be subject to torture on return. Because he had been denied procedural fairness in assessing his claim, the case was remitted to the Minister for reconsideration. Clearly, the possibility of deportation despite the risk of torture decreases any inclination to bother with DWA, and this stance may be reinforced by the fact that the Canadian courts (as in Australia) have accepted that detention pending deportation can be indefinite, though reviews and procedural safeguards are stricter than in Australia.<sup>399</sup>

- 6.8. The contrast with the jurisprudence of the ECtHR (which was ignored in *Suresh*) is stark. The *Suresh* formula may suit the Canadian government, which has sometimes shown a willingness to render beyond the limits of international law, as revealed by the Arar case.<sup>400</sup> Yet, this invitation to depart from international law is not accepted by any international law body,<sup>401</sup> nor even has it been

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<sup>396</sup> *Ibid.*, para.124.

<sup>397</sup> *Ibid.*, para.125.

<sup>398</sup> *Ibid.*, para.78.

<sup>399</sup> *Charkaoui v Canada* 2007 SCC 9. See further Thwaites, R., *The Liberty of Non-Citizens* (Hart, Oxford, 2014) chaps. 8, 9.

<sup>400</sup> *Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar* (Ottawa, 2006).

<sup>401</sup> See ComAT, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Conclusions and Recommendations of the Committee Against Torture: Canada* (CAT/C/CR/34/CAN, 2005)

endorsed in practice as a basis for deportation by any subsequent case in the Canadian courts.<sup>402</sup> In practice, the courts have largely decided cases by reversing the factual determinations underlying the government's removal decision.<sup>403</sup> In *Mahjoub v. Canada*,<sup>404</sup> the applicant was linked to the terrorism in Egypt to where he was to be returned. The court held that insufficient weight had been given to the potential unreliability of the assurances. In *Sing and Ma v Canada*,<sup>405</sup> a corruption case arising from China, assurances had been given five years previous to the decision and so further consideration needed to be given to changed circumstances.

- 6.9. One exceptional case which reached the balancing stage was *In re Jaballah*,<sup>406</sup> where the court decided that the applicant, who was found to have facilitated communications related to the 1998 US Embassy bombings in Tanzania and Kenya and to have trained and conducted other activities related to Al-Qa'ida, should not be deported to Egypt where there was a substantial risk of torture. His case did not reach the level of 'exceptional circumstances' because he did not directly commit acts of violence.<sup>407</sup>
- 6.10. Balancing exercises as in *Suresh* should be distinguished from DWA arrangements.<sup>408</sup> DWA arrangements must reduce the risk of ill-treatment below the level of 'real'. Thus, there is no trade off as such because of the absolute priority for the rights against ill treatment.
- 6.11. Assurances arose, without resort to any balancing test, in *Mugesera v Canada (Minister of Citizenship and Immigration)*,<sup>409</sup> where the applicant was returned to Rwanda to face charges of incitement in 1992 to hatred, genocide and murder against the Tutsi which contributed to the genocide in 1994. In 2005, the Supreme Court of Canada affirmed the decision that the Minister of Citizenship and Immigration Canada had discharged his burden of proving that the applicant was inadmissible to Canada. To assist the decision to deport, the Rwandan government provided diplomatic assurances regarding fair treatment and respect for rights. The Federal Court in 2012 decided that good faith on the part of the Rwandan government must be presumed, since there was no evidence that it

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paras.4, 5; *Interim report of Mr. Manfred Nowak, Special Rapporteur of the Commission on Human Rights on torture and other cruel, inhuman or degrading treatment or punishment (A/60/316, 2005) para.33; UN Human Rights Committee, Report of the Human Rights Committee (A/61/40, 2006) para.15; Mansour Ahani v Canada, Communication No. 1051/2002, U.N. Doc. CCPR/C/80/D/1051/2002 (2004) para.10.10.*

<sup>402</sup> See *Charkaoui v Canada (Citizenship and Immigration)* 2007 SCC 9.

<sup>403</sup> See Padmanabhan, V.M., 'To Transfer or Not to Transfer: Identifying and Protecting Relevant Human Rights Interests in Non-Refoulement' (2011) 80 *Fordham Law Review* 73, 98.

<sup>404</sup> 2006 FC 1503.

<sup>405</sup> 2007 FC 361.

<sup>406</sup> 2006 FC 1230.

<sup>407</sup> *Ibid.*, paras.81-82.

<sup>408</sup> For Canadian perspectives on rendition (mostly irregular rendition), see Forcese, C. and Roach, K., *False Security: The Radicalization of Canadian Anti-terrorism* (Irwin, Toronto, 2015) pp.70-73, 256-257.

<sup>409</sup> 2005 SCC 40, 2012 FC 32.

had not complied with past commitments; furthermore, the applicant had a high political and media profile, making his destiny more transparent than normal.<sup>410</sup> Léon Mugesera was deported in 2012 and is currently undergoing trial in Rwanda. His plight in the trial process was one of the examples used by the Westminster Magistrates' Court in *Government of the Republic of Rwanda v Vincent Brown & others* to test the potential efficacy of DWA in Brown's case; the Court concluded that it had 'considerable reservations about whether the assurances given by the GoR to Canada are being respected and whether Dr Mugesera's trial is fair'.<sup>411</sup>

- 6.12. In summary, Canada has deployed a mixture of laws to handle foreign residents who are suspected of involvement in terrorism. As with Australia, immigration detention law has been stretched at some considerable cost in terms of creating uncertainties in the law and also inflicting breaches of norms regarding liberty and non-discrimination. There has also been stretching in relation to the norms against torture; though so far confined largely to the statement of a principle, it has still attracted international opprobrium. The experience with DWA has been mixed. The summary application of DWA in the case of Maher Arar went disastrously wrong, but judicially managed DWA has had a more mixed reception. It remains both controversial and far from speedy, and the case of Mugesera illustrates that it does not remove all risks.

**(c) Israel**

- 6.13. For those held under administrative detention, deportations to adjoining territories (including Gaza) have been substantial.<sup>412</sup> Whether judicial or administrative deportation is involved, the process can create acute dangers for the subjects. Israel maintains no diplomatic relations with most of its neighbours in the region, so formal assurances are unattainable. Furthermore, those to be deported are often unwelcome and often stateless persons in the receiving states. They may face dangers on their release, coming under suspicion as collaborators, a possibility which can be examined by the authorities in Israel and result in leave to stay in Israel.<sup>413</sup> It was recognised in *Al-Tay v Israel* that non-refoulement rights applied to enemy alien Iraqis who were to be released from administrative detention.<sup>414</sup> So, efforts are sometimes made to find suitable third countries.<sup>415</sup>

<sup>410</sup> 2012 FC 32, paras.24, 25, 52, 53.

<sup>411</sup> (<https://www.judiciary.gov.uk/judgments/government-of-the-republic-of-rwanda-v-vincent-brown-others-extradition/>, 21 December 2015) para.461. Lack of legal aid was the main shortcoming. Several other similar cases were also examined but none involved assurances.

<sup>412</sup> Since 1967 Israel has deported 1,522 Palestinians from the occupied territories under the Defense (Emergency) Regulations, 1945, r.112: <http://www.btselem.org/topic/deportation>.

<sup>413</sup> See *HCJ 4982/11 Anonymous v Ministry of Interior* (2013).

<sup>414</sup> *HCJ 4702/94 Al-Tay v Israel* (1995).

<sup>415</sup> See <http://www.israelnationalnews.com/News/News.aspx/23176#.VM9WuS7jy8A>.

6.14. An exceptional diplomatic arrangement in a non-security situation arose with the *Migrant Workers Case* in 2011, when an arrangement with Egypt for the ‘Coordinated Return’ of (mainly Sudanese and Eritrean) migrants found in proximity to the Sinai border was determined to offer insufficient protection for safe return.<sup>416</sup> The policy was suspended before judgment but was later resumed after amendments to the Anti Infiltration Law 5714-1954 were passed.<sup>417</sup> That legislation was struck down by the Israel courts in 2013 and again in 2014 on the grounds that three years’ detention or, in the later version, detention for one year followed by assigned residence under strict terms was not permissible, given that there was no prospect of deportation.<sup>418</sup> While nearly 7,000 migrants have returned, around 44,000 remain.<sup>419</sup> The next response to the adverse judgments, the Law for Prevention of Infiltration and Ensuring the Departure of Infiltrators from Israel (Amendment no.5) 2483-2014, specified that new arrivals will be detained for three months (reduced from one year). Following detention (and this also applies to those dealt with under previous legislation), they are subject to assigned residence under strict conditions for 20 months (as opposed to indefinitely). In turn, this provision was clipped back in August 2015 in *Desta v Minister of Interior*,<sup>420</sup> when the Israeli Supreme Court sitting as the High Court of Justice heard a challenge to the constitutionality of the 2014 Law. Article 30A, which specifies that an “infiltrator” entering Israel without authorization should be subject to a deportation order and detained for three months, was upheld as a constitutional limit on the right to liberty (Article 5 of Basic Law: Human Dignity and Liberty) and was proportional under Article 8 of the Basic Law. In addition, Chapter IV of the 2014 Law, authorizing a border control supervisor to impose residence at a ‘residence centre’ (meaning in practice Holot, a former military base in the Negev desert and managed by the Israeli Prison Service) was also constitutional in outline, save that the maximum residence period of 20 months was disproportionate since it went beyond 12 months which would be acceptable. Any Holot resident held for over 12 months had to be released (and hundreds were freed, subject to other conditions),<sup>421</sup> and the Knesset was asked to revise the legislation within six months. On 8 February 2016, the Knesset passed the Prevention of Infiltration (Offences and

<sup>416</sup> *HCJ 7302/07 Hotline for Migrant Workers v Minister of Defense* (2011).

<sup>417</sup> Law for the Prevention of Infiltration (Offenses and Judging) (Amendment No. 3 and Temporary Order) 5772-2012; Law for the Prevention of Infiltration (Amendment No. 4) 5773-2013.

<sup>418</sup> *HCJ 7146/12 Adam v Knesset* (16 September 2013); *HCJ 7385/13 Eytan v Government of Israel*, (16 September 2014); *HCJ 8425/13 Gebrselassie v Knesset*, (22 September 2014). See Ziegler, R., ‘The Prevention of Infiltration Act in the Supreme Court: Round Two’ (<http://en.idi.org.il/analysis/articles/the-prevention-of-infiltration-act-in-the-supreme-court-round-two/>, 2014) and ‘Detention of African asylum seekers in Israel: Welcome to Round Three’ (OxHRH Blog, <http://humanrights.dev3.oneltd.eu/?p=15212>, 2014).

<sup>419</sup> Human Rights Watch, *“Make Their Lives Miserable”: Israel’s Coercion of Eritrean and Sudanese Asylum Seekers to Leave Israel* (New York, 2014) pp.3, 6.

<sup>420</sup> *HCJ 8665/14*, 11 August 2015. See Ziegler, R., ‘In the land of hidden legislative aims: *HCJ 8665/14* (detention of asylum-seekers in Israel- round 3)’, <http://versa.cardozo.yu.edu/viewpoints/land-hidden-legislative-aims-hcj-866514-detention-asylum-seekers-israel-round-3#sthash.YGU5faVh.dpuf>, 2015.

<sup>421</sup> See Winer, S., ‘Freed migrants banned from Tel Aviv and Eilat’ *The Times of Israel* <http://www.timesofisrael.com/shalom-bans-freed-migrants-from-tel-aviv-and-eilat/>, 23 August 2015.

Jurisdiction) Law (Amendment No. 5 and Temporary Amendment) 5776-2016, effective for three years, allowing a period of detention of an ‘infiltrator’ in a detention centre limited to twelve months.<sup>422</sup>

- 6.15. The Israeli experience, emanating from extreme security circumstances, demonstrates that when return is not possible, migrants must sometimes be accommodated even in the absence of a valid asylum claim. The conditions and policies of accommodation will then become much more important than any attention to DWA, though the device has latterly been explored to encourage returns to Rwanda and Uganda.<sup>423</sup>

**(d) New Zealand**

- 6.16. In *Attorney General v Zaoui*,<sup>424</sup> Zaoui had stood for Parliament for the Islamic Salvation Front in Algeria in 1991. The elections were cancelled, and he fled the country, reaching New Zealand in 2002. He was denied refugee status as a security risk and was to be deported. Zaoui was successful in his 2003 application for judicial review of the Inspector-General’s certificate on grounds that the basis of the conclusion that he posed a security risk was not sufficiently disclosed.<sup>425</sup> The Court of Appeal held that the criteria for issuing a certificate require objectively reasonable grounds that the subject constitutes such a serious danger that it justifies deportation.<sup>426</sup> The Supreme Court broadly agreed: the person must pose a serious threat to security, the threat must be based on objectively reasonable grounds, and the threatened harm must be substantial. However, the Inspector-General was not required to consider issues of safety on return which were for the Minister and the Executive Council to decide. The Supreme Court rejected the Canadian route of balancing as outlined in *Suresh* and stated that Zaoui could not be deported if it would result in his being in danger of being arbitrarily deprived of life or of being subjected to torture or cruel, inhuman or degrading treatment or punishment. The security risk certificate was removed in 2007 without any attempt to proceed by way of DWA.

**(e) USA**

- 6.17. ‘Assurances play a significant role in US counterterrorism practices.’<sup>427</sup> However, that set of practices is complicated by the fact that assurances arise in distinct

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<sup>422</sup> A bill was passed in February 2016: [https://www.knesset.gov.il/spokesman/eng/PR\\_eng.asp?PRID=11936](https://www.knesset.gov.il/spokesman/eng/PR_eng.asp?PRID=11936).

<sup>423</sup> See Harcombe, K., ‘Israel’s unwanted African migrants’ <http://www.bbc.co.uk/news/magazine-35475403>.

<sup>424</sup> [2005] NZSC 38.

<sup>425</sup> *Zaoui v Attorney General* [2004] 2 NZLR 339 (HC).

<sup>426</sup> *Zaoui v Attorney-General (No 2)* [2005] 1 NZLR 690.

<sup>427</sup> Shah, N., *Promises to Keep: Diplomatic Assurances Against Torture in US Terrorism Transfers* (Columbia Law School Human Rights Institute, New York, 2010) p.9. See also Satterthwaite, M.L., ‘Rendered meaningless’ (2007) 75 *George Washington Law Review* 1336; Garcia, M.J., *Renditions: Constraints Imposed by Laws on Torture* (CRS RL32890, Washington DC, 2009); Zimmer, B.M. (ed.), *Extradition and Rendition* (Nova, New York, 2011); Clarke, A., *Rendition to Torture* (Rutgers University Press, Piscataway, 2012); Paz, M., ‘Asylum and terrorism’ (2016) 102 *Iowa Law Review Online* 41.

contexts: the transfer of detainees from detention in Guantánamo Bay and other facilities connected with the 'war on terror'; the transfer of prisoners via extra-legal rendition for the purposes of investigation or criminal prosecution by foreign authorities; and the legal deportation or extradition of individuals. As already noted in the survey of the ECHR, some legal disputes have arisen around the second instance of assurances. Disputes within the US have also been prolonged regarding the first instance of assurances. However, this commentary will concentrate on the third instance of assurances. As regards the first instance, the UK does not officially recognise the 'war on terror' as a juristic concept.<sup>428</sup> Equally, the UK government does not officially endorse any practice of extra-legal rendition, though the *Gibson Report* in 2013 identified some potential examples of collusion in the US programme.<sup>429</sup>

- 6.18. US obligations under the CAT are reflected in the Foreign Affairs Reform and Restructuring Act 1998 ('FARRA'), which requires agencies 'not to expel, extradite or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.'<sup>430</sup> As already mentioned, when ratifying the CAT, the US government construed Article 3's 'substantial grounds for believing' grounds as only requiring non-refoulement where 'the United States determines whether it is more likely than not that a person would be tortured'.<sup>431</sup> This standard is at variance with the 'real risk' of torture standard elsewhere, though it was made clear by Presidential Executive Order 13491 of 22 January 2009 that 'enhanced' interrogation methods are unacceptable.<sup>432</sup> That standard is used by U.S. courts when determining whether to withhold an alien's removal for fear of persecution but is more demanding than lower standard for determining whether an alien is eligible for consideration for asylum based on a 'well-founded fear of persecution' which standard can be met by an alien where the fear is reasonable, not that it is based on a clear probability of persecution.<sup>433</sup> In addition, the United States government disputes the Human Rights Committee's view that the Convention has extraterritorial effect.<sup>434</sup>

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<sup>428</sup> See *The Guardian*, 15 January 2009, p.29.

<sup>429</sup> Sir Peter Gibson, *The Report of the Detainee Inquiry* (Cabinet Office, London, 2013). See further *Belhaj v Straw and others; Rahmatullah (No 1) v Ministry of Defence* [2017] UKSC 3.

<sup>430</sup> Public Law No.105-277 s.2242; 8 USC s.1231 note.

<sup>431</sup> Sen. Exec. Rpt. 101-30, Resolution of Advice and Consent to Ratification, (1990) at II.(2). See generally *INS v Stevic* 467 U.S. 407 (1984).

<sup>432</sup> A draft Executive Order (<https://assets.documentcloud.org/documents/3415371/Read-the-draft-of-the-executive-order-on-CIA.pdf>, 2017) proposes to repeal Executive Order 13491 and revive Executive Order 13441. Note that the National Defense Authorization Act for Fiscal Year 2015, s.1045, also limits interrogation techniques.

<sup>433</sup> See *INS v Cardoza-Fonseca* 480 U.S. 421 (1987).

<sup>434</sup> Clarke, A., *Rendition to Torture* (Rutgers University Press, Piscataway, 2012) p.64.

- 6.19. As applied to extradition cases,<sup>435</sup> the risk of torture is considered by the Department of State, and the courts tends to be deferential because of the 'rule of non-inquiry' by which it is considered an issue for the executive rather than the courts to ensure that extradition would be appropriate.<sup>436</sup> Once an executive decision is made, and it may be taken on the basis of assurances obtained by the executive,<sup>437</sup> the extradition should occur within two months,<sup>438</sup> though the deadline is extended if a habeas corpus petition is filed.<sup>439</sup>
- 6.20. As applied to deportation, assurances are 'rare'.<sup>440</sup> Administration of the system is handled by the Department for Homeland Security ('DHS'). This process may be cut short by section 235(c) of the Immigration and Nationality Act which authorizes the US government to remove an 'arriving alien" on the basis of undisclosed evidence, and without administrative or judicial review, if the DHS Secretary determines that the subject is inadmissible on security-related grounds, including participation in terrorism-related activity.<sup>441</sup> However, even this expedited provision may be subject to a bar on removal under 8 CFR section 235.8(b)(4) 'under circumstances that violate ... Article 3 of the Convention Against Torture.'<sup>442</sup> Section 235(c) was invoked in 2002 to render Maher Arar from John F. Kennedy airport to Syria and to bypass any administrative hearing about the removal, including the strength of the assurances.<sup>443</sup> Under non-expedited procedures under the Immigration and Nationality Act, section 240,<sup>444</sup> there may be a withholding or deferral or removal if objections are brought.<sup>445</sup>

<sup>435</sup> See 18 USC s.3181 et seq.

<sup>436</sup> See 18 USC s.3186; *Arnbjornsdottir-Mendler v US* 721 F.2d 679 (9th Cir., 1983); *Hoxha v Levi* 465 F.3d 554 (3d Cir., 2006); Semmelman, J., 'Federal courts, the constitution and the rule of non-inquiry in international extradition proceedings' (1991) 76 *Cornell Law Review* 1198; Topiel, M.S., 'The doctrine of non-inquiry and the preservation of human rights' (2001) 9 *Cardozo Journal of International and Comparative Law* 389; Kim, J.C., 'Note: nonrefoulement under the convention against torture' (2007) 32 *Brooklyn Journal of International Law* 1227; Murchison, M., 'Note: extradition's paradox: duty, discretion, and rights in the world of non-inquiry' (2007) 43 *Stanford Journal of International Law* 295; Parry, J.T., 'International Extradition, the Rule of Non-Inquiry, and the Problem of Sovereignty' (2010) 90 *Boston University Law Review* 1973; Shah, N., *Promises to Keep: Diplomatic Assurances Against Torture in US Terrorism Transfers* (Columbia Law School Human Rights Institute, New York, 2010) p.47; Vladeck, S.I., 'Normalizing Guantanamo' (2011) 48 *American Criminal Law Review* 1547; Slawter, K.E., 'Note: Torturous Transfers' (2013) 70 *Washington & Lee Law Review* 2487.

<sup>437</sup> See *Sindona v Grant* 619 F.2d 167 (2d Cir., 1980), cert. denied, 451 U.S. 912 (1981); *Demjanjuk v Petrovsky* 776 F.2d 571 (6th Cir., 1985) cert. denied, 475 U.S. 1016 (1986).

<sup>438</sup> 18 USC s.3188.

<sup>439</sup> See *Khouzam v Ashcroft* 361 F.3d 161 (2d Cir., 2004); *Khouzam v Hogan* 529 F.Supp.2d 543 (M.D. Pa. 2008); *Trinidad y Garcia v Thomas* 683 F.3d 952, 952 (9th Cir., 2012); Stover, C., Note: torture and extradition' (2013) 45 *Columbia Human Rights Law Review* 325.

<sup>440</sup> Department of Homeland Security Office of Inspector General, *DHS Detainee Removals and Reliance on Assurances* (OIG-11-100, Washington DC, 2011) p.4.

<sup>441</sup> See 8 USC. s.1225(c); 8 CFR s.235.8(b)(3).

<sup>442</sup> See also 8 CFR s.208.18(d).

<sup>443</sup> See Office of Inspector General, U.S. Department of Homeland Security, *The removal of a Canadian citizen to Syria* (OIG-08-18, Washington DC, 2008) p.22.

<sup>444</sup> The full grounds relating to terrorism are set out at 8 USC s 1182(3)(B).

<sup>445</sup> Immigration and Nationality Act, s.241(b)(3) (8 USC s.1231).

6.21. The Department of State takes the leading role in negotiating and evaluating assurances.<sup>446</sup> In extradition cases under 22 CFR section 95.3(b), the Department of State must consider 'allegations relating to torture', and the Secretary of State may 'surrender the fugitive subject to conditions.' As for assurances in immigration cases, under 18 CFR section 208.18(c) the Secretary of State 'may forward to the Secretary of Department of Homeland Security assurances that the Secretary has obtained from the government of a specific country that an alien would not be tortured there if the alien were removed to that country.' The Secretary of the DHS, in consultation with the Secretary of State, decides whether the assurances are sufficiently reliable to permit the transfer without breach of the CAT. Some case law suggests that the individual must be given the due process right to challenge the assurances,<sup>447</sup> subject to the 'rule of non-inquiry'. The DHS was directed in 2017 to ensure that all its diplomatic efforts and negotiations include a condition that states will accept the return of their own nationals.<sup>448</sup>

6.22. The US State Department concentrates on three main factors in determining the sufficiency of assurances:

- [T]he extent to which torture may be a pervasive aspect of its criminal justice, prison, military or other security system;
- the ability and willingness of that country's government to protect a potential returnee from torture;
- and the priority that government would place on complying with an assurance it would provide to the United States government (based on, among other things, its desire to maintain a positive bilateral relationship with the United States government).<sup>449</sup>

Additional evaluation will be based on 'the identity, position or other relevant information concerning the official relaying the assurances; information concerning the judicial and penal conditions and practices of the country providing assurances; political or legal developments in that country that would provide context for the assurances provided; that country's track record in complying with similar assurances previously provided to the U.S. or another country; and that country's capacity and incentives to fulfill its assurances to the United States.'<sup>450</sup> The notable omission from these lists is any mention of post-

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<sup>446</sup> For the process, see Shah, N., *Promises to Keep: Diplomatic Assurances Against Torture in US Terrorism Transfers* (Columbia Law School Human Rights Institute, New York, 2010) p.10.

<sup>447</sup> Failure to do so by summary removal was a breach in *Khouzam v Ashcroft* 361 F.3d 161 (2nd Circ, 2004).

<sup>448</sup> Executive Order 13768 of 25 January 2017, Enhancing Public Safety in the Interior of the United States, s.12.

<sup>449</sup> Diplomatic Assurances and Rendition to Torture: The Perspective of the State Department's Legal Advisor. Hearing before the Subcomm. on Int'l Organizations, Human Rights, and Oversight, 110th Cong. 12 (2008), (statement of John B. Bellinger, III, Legal Advisor, State Department, p.15, available at [www.fas.org/irp/congress/2008\\_hr/rendition.pdf](http://www.fas.org/irp/congress/2008_hr/rendition.pdf)).

<sup>450</sup> *Ibid.*, p.17.

return monitoring – its omission would be viewed as a decisive defect in ECtHR jurisprudence, but some claim that the US practice is in fact to seek monitoring arrangements.<sup>451</sup> Monitoring by human rights NGOs or embassy staff was seen as important in the extradition to India of Kulbir Singh Barapind in 2006 for activities related to the Khalistan Commando Force.<sup>452</sup> A statement in 2011 by the Department of State specified that, at a minimum, the guarantees should: 'Be in writing, Be explicit as to protection against torture, Originate at the cabinet level or above, Be provided by the ministry that will keep the alien in custody, and include some kind of monitoring'.<sup>453</sup>

- 6.23. In its role, the DHS does not have formal additional guidelines on assurances, but monitoring is an issue.<sup>454</sup> However, there are no standardized requirements for monitoring bodies or monitoring procedures. Furthermore, published details are sketchy.<sup>455</sup> One detail which has been divulged concerns those countries which, *per se*, are ruled out because of human rights conditions or reports of mistreatment to previously returned detainees; the list in 2010 was said to comprise China, Syria, Tunisia, and Uzbekistan.<sup>456</sup>
- 6.24. There were fewer than 20 uses of assurances between 1994 and 2004, but it is not revealed how many related to deportation or extradition, which countries were involved, or what assurances were obtained.<sup>457</sup> All were claimed to be faithfully observed, but this assertion is plainly wrong in the case of Maher Arar and other instances of breaches have also occurred.<sup>458</sup> Four cases existed in 2004 (three relating to Rwanda).<sup>459</sup>
- 6.25. Some Congressional Bills have sought to regulate further the conditions of refoulement in order to correct the US 'defective moral compass'.<sup>460</sup> By the National Security with Justice Bill 2007,<sup>461</sup> the issue was to be investigated by

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<sup>451</sup> *Ibid.*, p.18.

<sup>452</sup> *In the matter of the extradition of Kulbir Singh* 2005 U.S. Dist. LEXIS 42969; *Barapind v Enomoto* 400 F.3d 744 (9th Cir, 2005); *Barapind v Government of the Republic of India* 2014 U.S. Dist. LEXIS 136444.

<sup>453</sup> Department of Homeland Security Office of Inspector General, *DHS Detainee Removals and Reliance on Assurances* (OIG-11-100, Washington DC, 2011) p.21.

<sup>454</sup> *Ibid.* p 22.

<sup>455</sup> Shah, N., *Promises to Keep: Diplomatic Assurances Against Torture in US Terrorism Transfers* (Columbia Law School Human Rights Institute, New York, 2010) p.20.

<sup>456</sup> Shah, N., *Promises to Keep: Diplomatic Assurances Against Torture in US Terrorism Transfers* (Columbia Law School Human Rights Institute, New York, 2010) p.38. But see in the case of Uzbekistan, *Yusupov v Attorney General*, 518 F.3d 185 (3d Cir. 2008).

<sup>457</sup> Diplomatic Assurances and Rendition to Torture: The Perspective of the State Department's Legal Advisor: Hearing before the Subcommittee on Int'l Organizations, Human Rights, and Oversight, 110th Cong. 12 (2008), (statement of John B. Bellinger, III, Legal Advisor, State Department) p.12.

<sup>458</sup> Shah, N., *Promises to Keep: Diplomatic Assurances Against Torture in US Terrorism Transfers* (Columbia Law School Human Rights Institute, New York, 2010) p.52.

<sup>459</sup> Department of Homeland Security Office of Inspector General, *DHS Detainee Removals and Reliance on Assurances* (OIG-11-100, Washington DC, 2011) p.14. The Rwandans were Leonidas Bimenyimana, Gregoire Nyaminani, and Francois Karake. The assurances from the Rwanda Government are revealed at Wikileaks Ref: 08KIGALI563, 19 August 2008.

<sup>460</sup> Clarke, A., *Rendition to Torture* (Rutgers University Press, Piscataway, 2012) p.179.

<sup>461</sup> S1876, 110th Congress.

the Foreign Intelligence Surveillance Court<sup>462</sup> which would be able to take evidence in closed session. The Torture Outsourcing Prevention Bill 2007<sup>463</sup> aimed to require the State Department to provide an annual report on countries which are considered to be unacceptable risks for rendition because of torture practices and then transfers would be forbidden.

6.26. The US government has expressed firm faith in the system of assurances:

‘55. The United States is not aware of any cases in which humane treatment assurances have not been honored in the case of an individual transferred from the United States or Guantanamo since the Special Task Force report was issued.

56. Where individuals are transferred subject to diplomatic assurances, the United States would pursue any credible report and take appropriate action – including possible corrective steps – if it had reason to believe that those assurances would not be, or had not been, honored. Where specific concerns about the treatment could not be resolved satisfactorily, the United States has declined to transfer the individual to the country of concern.<sup>464</sup>

However, assurance processes remain often *ad hoc* and of uncertain impact. The disinclination to seek more formal arrangements, comparable to UK MOUs, may relate to the greater ability to extradite or deport based on more summary procedures, the greater influence of the US over foreign partners, the greater disinclination on the part of the courts to intervene, and the higher priority given to security against terrorism whatever the cost.

## **B Continental European jurisdictions**

### **(a) France**

6.27. Expulsion of an alien who is a threat to public order occurs by an administrative decision.<sup>465</sup> In cases involving aliens who are covered by the exceptions of protection (such as lengthy residence or marriage to a citizen),<sup>466</sup> or in cases heard under the expedited procedure, the Minister of the Interior takes the decision, otherwise it is the local prefect. Prior to a decision, the alien is called to a hearing before a committee consisting of three judges, who give an advisory opinion. In cases heard under the special emergency procedure (where the Minister provides evidence of the circumstances, such as the release of

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<sup>462</sup> 50 USC 180.

<sup>463</sup> HR1352.

<sup>464</sup> CCPR/C/USA/Q/4/Add.1, 13 September 2013.

<sup>465</sup> See Ordonnance 45-2658 du 2 novembre 1945; Loi n° 2003-1119 du 26 novembre 2003 relative à la maîtrise de l'immigration, au séjour des étrangers en France et à la nationalité; Loi n° 2007-1631 du 20 novembre 2007 relative à la maîtrise de l'immigration, à l'intégration et à l'asile; Freedman, J., *Immigration and Insecurity in France* (Ashgate, Aldershot, 2004).

<sup>466</sup> See Ordonnance 45-2658 of 2 novembre 1945, art.26 (as amended by Loi n° 2003-1119 du 26 novembre 2003 relative à la maîtrise de l'immigration, au séjour des étrangers en France et à la nationalité, art.38).

imprisoned foreigners or aliens with an affiliation to terrorist organizations), the committee is not involved. Decisions by the Minister can be appealed to the administrative courts, but the appeal is non-suspensive. The courts may in terrorist cases refer to *notes blanches* (anonymised evidence). The procedure is written, except in urgent cases. The fact that rights of appeal are non-suspensive and that any application against removal is required within five days of notice were the subject of criticism by the ComAT in 2010.<sup>467</sup>

- 6.28. France has made regular use of assurances in extradition, with two major cases before the ECtHR. In *Nivette v France*,<sup>468</sup> the applicant was an American citizen who was suspected of murder in California. The American authorities made an extradition request, and the Court of Appeal of Colmar gave a favourable opinion given that the Attorney General of Sacramento County had stated that no 'special circumstance' was applicable, meaning that there was 'a commitment by my Department not to seek the death penalty'. Additional written statements were later provided by the State of California under oath that the death penalty was neither requested nor to be used. These were sufficient to avoid either the death penalty or other punishment contrary to Article 3. *Einhorn v France*<sup>469</sup> was a similar case (an extradition for the murder of a girlfriend in Pennsylvania). Formal assurances had been obtained from the American authorities that the death penalty would not be sought, imposed or carried out. It was also noted that the applicant had not been sentenced to death at his previous trial in absentia in Pennsylvania and that the killing had been committed before a statute restoring the death penalty came into force, suggesting that there would be US Constitutional objections to the application of the death penalty. The application was manifestly ill-founded.
- 6.29. Deportation cases have not reached the ECtHR, even though there have been many deportations of extremists to Algeria and up to 129 removals overall between 2001 and 2011.<sup>470</sup> One reason is argued to be that French authorities share a strong sense of collective mission to protect the constitution and so act with relative haste, local discretion, and consensus as to values (with 'security first') in order to execute any order, thereby pre-empting further legal action.<sup>471</sup>

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<sup>467</sup> *Concluding observations on the Fourth to Sixth Periodic Report* (CAT/C/FRA/CO/4-6, 20 May 2010), paras.15, 16. Under emergencies laws imposed in 2015, the powers to impose assigned residence on non-EU nationals against whom an expulsion order has been issued but which cannot be immediately implemented have been made subject to less stringent conditions. The order may be imposed by the Ministry of the Interior where 'there are serious reasons to believe that a person's behaviour constitutes a threat to security and public order'. Compare Article 6 of Law 55-385 of 3 April 1955 with Article 561-1 of the Code on Entry and Residency of Foreign Nationals and on Asylum. See further Amnesty International, *Upturned Lives* (EUR 21/3364/2016, London, 2016) p.16.

<sup>468</sup> App. no. 44190/98, ECHR 2001-VII.

<sup>469</sup> App. no. 71555/01, 2001-XI.

<sup>470</sup> See Foley, D., *Countering Terrorism in Britain and France* (Cambridge University Press, Cambridge, 2013) p.304.

<sup>471</sup> *Ibid.*, pp.5, 304, 309.

Another reason is that French courts have viewed Algeria as a 'safe' country since 1999 (when President Bouteflika came to power).<sup>472</sup>

- 6.30. One most prominent example in the terrorism field involved Abdelkader Bouziane, imam of the El Forquan mosque in Vénissieux in Lyon, who was expelled twice from France in 2004.<sup>473</sup> On 26 February 2004, the Interior Minister issued an expulsion order stating that Bouziane 'openly incites hatred and violence... appears to be one of the principle vectors of Salafist ideology in the Lyon area... [and] appears to entertain in an active manner contacts with very determined members of the fundamentalist Islamist movement in the Lyon area and internationally in relation with organizations that promote terrorist acts.'<sup>474</sup> On 20 April, Bouziane was notified of the expulsion order and detained. He was expelled to Algeria the following day. On 23 April 23, the Lyon Administrative Court upheld Bouziane's petition for suspension on the grounds that the intelligence reports did not convincingly demonstrate that the expulsion was justified; the decision was confirmed on 26 April after further evidence was considered. Bouziane returned to France on 21 May. In the meantime, the Interior Minister appealed to the *Conseil d'État*, which ruled in his favour on 4 October, and Bouziane was expelled again on 6 October. The Lyon Administrative Court rejected Bouziane's appeal in 2005, and the *Cour d'Appel* confirmed that ruling in 2006.<sup>475</sup>
- 6.31. Coordinated action between the executive and judicial branches seems to be crucial in France to achieve speedy and decisive deportations. However, those results can only be delivered on the assumption that DWA is irrelevant because the situation in north African countries, especially Algeria, does not give rise to any concern. The stronger separation of powers in the UK and the greater willingness of the courts to review thoroughly in security cases shows that it would be hard to apply French professional, political and legal cultures without more substantive changes to the substantive and procedural rules of judicial review.

**(b) Germany**

- 6.32. Under the Residence Act (*Aufenthaltsgesetz*, as amended in 2009),<sup>476</sup> section 5(4), residence entitlement shall be refused if the foreigner: belongs to, or has belonged to. an organisation which support terrorism or supports or has

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<sup>472</sup> *Ibid.* p.305.

<sup>473</sup> Human Rights Watch, *In the Name of Prevention: Insufficient Safeguards in National Security Removals* (New York, 2007) p.56.

<sup>474</sup> Ministerial expulsion order, February 26, 2004, DA No. 002572056/No. 280.

<sup>475</sup> Arrêt de la CAA de Lyon n° 05LY01526, 16 November 2006.

<sup>476</sup> <http://www.iuscomp.org/gla/statutes/AufenthG.htm>. Some of the changes in 2009 were made by regulations which expressly provide for the use of assurances: Gemeinsames Ministerialblatt, 30 October 2009 (GMBI 42-61, S. 877ff.).

supported such an organisation; or endangers the democratic basic order or the security of the nation, participates in acts of violence or publicly incites to violence in pursuit of political objectives or threatens the use of violence.<sup>477</sup> Exemptions may apply if the foreigner divulges such activities or allegiances and credibly disowns such past actions. This provision is backed by similar terms in section 47, 'Prohibition and restriction of political activities', regarding forbidden activities during residence in Germany. Grounds for expulsion are set out in sections 54 to 56. They include: in section 54, links to international terrorism; in section 55, if the person's presence is detrimental to public safety and law and order or other substantial interests or if the person publicly, at a meeting or by disseminating literature, endorses or promotes a crime against peace, a war crime, a crime against humanity or terrorist acts of comparable importance in a manner conducive to disturbing public safety and order or incites hate against sections of the population or calls for violence or arbitrary measures against the same in a manner conducive to disturbing public safety and order or attacks the human dignity of others by insulting, maliciously disparaging or slandering sections of the population; in section 56, which relates to serious grounds pertaining to public security and law and order. In an emergency security or terrorism case, either the State Authorities or the federal Interior Ministry has jurisdiction to order deportation. Appeals to the administrative courts generally have a suspensive effect, though the authorities may ask the court to lift the suspensive effect.

6.33. Any deportation is subject to the prohibitions in section 60:

'(1) ... a foreigner may not be deported to a state in which his or her life or liberty is under threat on account of his or her race, religion, nationality, membership of a certain social group or political convictions. ...

(2) A foreigner may not be deported to a state in which a concrete danger exists of the said foreigner being subjected to torture or inhumane or degrading treatment or punishment.

(3) A foreigner may not be deported to a state in which he or she is wanted for an offence and a danger of imposition or enforcement of the death penalty exist ...

...

(5) A foreigner may not be deported if deportation is inadmissible under the terms of the Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms (Federal Law Gazette 1952 II, p. 685).

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<sup>477</sup> See Gornig, G.H. and Murswiek, D. (eds.), *Das Recht auf die Heimat* (Duncker & Humblot, Berlin, 2006); Klusmeyer, D.B. and Papademetrious, *Immigration Policy in the Federal Republic of Germany* (Berghahn Books, New York, 2009); Bergmann, J. et al, *Ausländerrecht* (10<sup>th</sup> ed., CH Beck, Nördlingen, 2013).

(6) The general danger that a foreigner may face prosecution and punishment in another state and, in the absence of any provisions to the contrary in sub-section 2 to 5, the concrete danger of lawful punishment under the legal system of another state shall not preclude deportation.

(7) A foreigner should not be deported to another state in which a substantial concrete danger to his or her life and limb or liberty applies. A foreigner shall not be deported to another state in which he or she will be exposed, as a member of the civilian population, to a substantial individual danger to life or limb as a result of an international or internal armed conflict. Dangers pursuant to sentence 1 or sentence 2 to which the population or the segment of the population to which the foreigner belongs are generally exposed shall receive due consideration in decisions pursuant to Section 60a (1), sentence 1.

(8) Sub-section 1 shall not apply if, for serious reasons, the foreigner is to be regarded as a risk to the security of the Federal Republic of Germany or constitutes a risk to the general public because he or she has been sentenced without the possibility of appeal to a prison term of at least three years for a crime or a particularly serious offence. The same shall apply if the foreigner meets the conditions stipulated in Section 3 (2) of the Asylum Procedure Act. ...'

The use of DWA in response to section 60 has been confined to a few specific cases. None has been accepted since 2007.

- 6.34. As regards extradition, the Federal Government retains the view that diplomatic assurances can in some cases offer a suitable means of helping to enforce human rights standards.<sup>478</sup> The Federal Foreign Office examines the risks, and in order to be able to monitor compliance with the assurance, consular involvement is expected. Much the same applies to deportation, where the Federal Government believes that diplomatic assurances are a suitable instrument.<sup>479</sup>
- 6.35. Cases arising include the extradition case of *Al-Moayad v Germany*.<sup>480</sup> A Yemeni national suspected of terrorist activities, was extradited to the US. The danger raised was that he might thereafter be rendered to Guantánamo Bay or some other external detention facility. The ECtHR was satisfied by the diplomatic assurances given by the US, given that: US assurances had been faithfully observed in previous cases; a *note verbal* given by the US embassy in Germany was enforceable in international law; the extradition was legally based on these conditions; and (perhaps most persuasive of all), following the applicant's extradition that there had been no breach of the assurances. Other examples

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<sup>478</sup> CAT/C/DEU/5, 15 February 2011, para 72.

<sup>479</sup> *Ibid.*, para 79.

<sup>480</sup> App. no. 35865/03, 20 February 2007.

include the case of Metin Kaplan,<sup>481</sup> a Muslim cleric who was leader of the Kalifatsstaat movement which was prohibited in 2001 and was sometimes known as the 'Caliph of Cologne'. His extradition to Turkey was halted by a court in 2003 because of human rights concerns, including the insufficiency of Turkish diplomatic assurances. The German authorities sought enhanced assurances and the transfer went ahead in 2004. In 2005, Metin Kaplan was sentenced to life in prison in Turkey for plotting the overthrow of the state. That verdict was overturned on appeal, but he was sentenced to 17 and a half years imprisonment on a retrial in 2010.<sup>482</sup>

- 6.36. Even after the 2009 legislative amendments, DWA has not been decisive since 2007. Examples include the case of a Jordanian whose deportation was stopped in 2009 by the Administrative Court in Düsseldorf, North Rhine-Westphalia; no assurances had been sought from the Jordanian authorities, but the Court stated that they would have made no difference.<sup>483</sup> The same Court ruled in 2009 against the deportation of a Tunisian; here, the diplomatic assurances from the Tunisian authorities were 'not legally binding...and by nature hardly trustworthy or verifiable'.<sup>484</sup>
- 6.37. One other feature of note in Germany concerns the ability to prosecute domestically for terrorism abroad. In *Faruk Ereren v Germany*,<sup>485</sup> a leading activist of the DHKP-C who was linked to terrorist murders in Turkey in 1993, 2001, and 2005, was prosecuted in Germany. The issue before the ECtHR was the length of proceedings (including a retrial) which had lasted from 2007 to 2014; there was no breach of Article 6. Of greater interest is that fact that Germany chose not to go down the path of extradition or deportation but instead prosecuted under section 129b of the Criminal Code, which allows for the prosecution of membership of terrorist organisations abroad.
- 6.38. In summary, the German practice shows a high degree of judicial scepticism towards DWA but an abiding interest on the part of the executive and legislature. In practice, however, DWA has delivered few results and domestic prosecution may be a more likely response where there are strong links with the other country affected (which often means Turkey). Even so, the reluctance to deport

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<sup>481</sup> Human Rights Watch, *Commentary on State Replies: CDDH Questionnaire on Diplomatic Assurances* (New York, 2006) p.4.

<sup>482</sup> Agence France Presse, 2 July 2010

<sup>483</sup> Administrative Court Düsseldorf, 21 K 3263/07.A, 16 January 2009. See Amnesty International, *Briefing to the Committee against Torture 2011* (EUR 23/002/2011) p 26; *Hasan Atmaca v Germany*, App. no. 45293/06, 6 March 2012.

<sup>484</sup> Administrative Court Düsseldorf, 11 K 4716/07.A, 4 March 2009, p 18. See further Higher Administrative Court North Rhine-Westphalia, 17 May 2010, 11 A 960/09 A.

<sup>485</sup> App. no. 67522/09, 6 November 2014.

or extradite, whether under DWA or not, is at the cost of periodic criticisms from Turkey.<sup>486</sup>

**(c) Italy**

- 6.39. The Italian Interior Minister may order the deportation of aliens on grounds of public order or national security (*espulsione amministrativa*).<sup>487</sup> Articles 9 and 13 of Legislative Decree no. 286/98 (as amended by Law no. 189 of 2002) generally provide for the deportation of a foreigner on grounds of public order and security, and additional ground was introduced by Article 3 of the Law of 31 July 2005, no. 155 '*Conversione in legge, con modificazioni, del decreto legge 27 luglio 2005, n. 144, recante misure urgenti per il contrasto del terrorismo internazionale*' – sometimes called the Pisanu Decree. The Interior Minister or the *prefetto* (the state representative in each province with responsibility for public safety) can order expulsion of an alien where there is reasonable suspicion that the person is involved with the promotion of terrorist organizations or activities. This measure is applied where there is sufficient evidence of the 'dangerousness' of the person being expelled. In such a case, deportation is immediately enforceable. Law no. 155 of 2005 cannot apply if the alien is under 18, or has regular residence permit, or lives with a relative of Italian nationality, or is a pregnant or recently pregnant woman. By Decree Law no. 249 of December 2007, the authorities do not need to request the authorization of any judicial authorities even if there are criminal proceedings pending against the alien – thus, there is no priority for prosecution.<sup>488</sup> Normally, it would be necessary to wait for the issuance of a decision of the Regional Administrative Court (*tribunale amministrativo regionale* – 'TAR'). An application can be submitted but is non-suspensive. This provision expired in 2007,<sup>489</sup> so the order is now submitted to a single judge Court for approval but is still non-suspensive.<sup>490</sup> The ComAT expressed criticism of the Pisanu Decree in its report in 2007 because of the immediate enforcement of these expulsion orders, without any judicial review.<sup>491</sup>

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<sup>486</sup> See <http://www.dw.de/security-cooperation-with-turkey-could-be-better/a-16620212>, 2013. Turkey's Financial Crimes Investigative Board (MASAK) and Germany's Bundeskriminalamt (Federal Criminal Police Office) signed an MOU in 2013 to share intelligence: <http://www.hurriyetdailynews.com/germany-turkey-sign-anti-terrorism-pact.aspx?pageID=238&nid=42936>.

<sup>487</sup> See Savino, M., "Enemy aliens" in Italy? The conflation between terrorism and immigration' [http://www.law.yale.edu/documents/pdf/8\\_b.\\_Savino\\_Enemy\\_Aliens\\_in\\_Italy.pdf](http://www.law.yale.edu/documents/pdf/8_b._Savino_Enemy_Aliens_in_Italy.pdf); Hein, C. (eds.), *Rifugiati* (Donzelli, Rome, 2010).

<sup>488</sup> See Bonetti, P., 'Terrorismo e stranieri nel diritto italiano. Disciplina legislativa e profili costituzionali – Il parte. Il terrorismo nelle norme speciali e comuni in materia di stranieri, immigrazione e asilo' (2005) *Diritto immigrazione e cittadinanza* 23 s; Rosi, E., 'La lotta al terrorismo non ammette deroghe alla tutela dei diritti umani' (2008) *Amministrazione civile* 105.

<sup>489</sup> See Art 3.6; Decree no. 104 of 2 July 2010, Article 4, para. 1, no. 3, of Annex 4 . Some of these issues were raised but not decided in Constitutional Court, no.432, 10 December 2007 .

<sup>490</sup> See Pisani, N., 'Lotta al terrorismo e garanzie giurisdizionali per lo straniero nella recente prassi italiana: le espulsioni per motivi di ordine pubblico e sicurezza dello Stato', in Gargiulo, P., and Vitucci, M.C., *La tutela dei diritti umani nella lotta e nella guerra al terrorismo* (Editoriale Scientifica, Naples, 2010).

<sup>491</sup> *Conclusions and recommendations* (CAT/C/ITA/CO/4, 16 July 2007) para.12.

- 6.40. An example of these measures in action concerned the ministerial order of expulsion in 2004 against Fall Mamour, a Senegalese resident in Italy for 16 years, which followed some public speeches which warned of terrorism threats resulting from Italian participation in the Iraqi war. The TAR Lazio annulled the ministerial order, holding that none of the government's allegations was sufficient to prove that Mamour's conduct amounted to a 'concrete threat' to the public order or the national security.<sup>492</sup> The Council of State overturned that ruling since the power to deport aliens for public order or security reasons is within the sphere of 'high administrative discretion' in which the judiciary should show deference unless there is evidence of improper purposes, illegality, illogicality or arbitrariness.<sup>493</sup> Next, the administrative court of first instance upheld a ministerial expulsion order issued against Ben Said Faycal ('the Imam of Varese').<sup>494</sup>
- 6.41. Another case of interest is that of Fadhal Saadi, a Tunisian citizen living in Milan who was allegedly involved in a militant Islamist network. His case was decided by the ECtHR following his order for deportation on 4 August 2006.<sup>495</sup> On 5 October 2006, the European Court ordered the Rule 39 suspension of the expulsion: the Italian government complied but then sought diplomatic assurances. The response came via a *note verbale*, dated 10 July 2007 (the day before the Grand Chamber hearing):

'The Minister for Foreign Affairs hereby confirms that the Tunisian laws in force guarantee and protect the rights of prisoners in Tunisia and secure to them the right to a fair trial. The Minister would point out that Tunisia has voluntarily acceded to the relevant international treaties and conventions.'<sup>496</sup>

In 2008, the ECtHR expressed itself as underwhelmed by a mere reiteration of the existence of domestic laws and accession to international treaties guaranteeing fundamental rights where reliable sources have reported practices which were manifestly contrary to those rights.<sup>497</sup> It concluded that deportation would constitute a violation of Article 3 ECHR. Following that adverse judgment, the Italian government began to disregard Rule 39 orders, as in the *Ben Khemais* case.<sup>498</sup>

<sup>492</sup> TAR Lazio, no. 15536, 11 November 2004. See also the case of Hemmam Abdelkrim, TAR Lazio, no. 3146, 7 April 2005.

<sup>493</sup> Council of State, no. 88, 16 January 2006.

<sup>494</sup> TAR Lazio, no. 5070, 23 March 2006.

<sup>495</sup> App. no. 37201/06, 28 February 2008.

<sup>496</sup> *Ibid.*, para.55.

<sup>497</sup> *Ibid.*, para.147.

<sup>498</sup> *Ben Khemais v Italy*, App. no. 246/07, 24 February 2009. Other instances (decided on the same day) were: *Adbelhedi v Italy*, App. no. 2638/07, *Ben Salah v Italy*, App. no. 38128706, *Bouyahia v Italy*, App. no. 46792/06, *C.B.Z. v Italy*, App. no. 44006/06, *Hamraoui v Italy*, App. no. *O. v Italy*, App. no. 37257/06, *Soltana v Italy*, App. no. 37336/06. Note also *Toumi v Italy*, App. no. 25716/09, 5 April 2011. See Palermo, P., 'Dal terrorismo alla tortura attraverso le procedure di espulsione. Una sentenza della Corte di cassazione' (2010) *Rivista penale* n.10, p.1277

- 6.42. Italy maintains no standing agreements with other countries concerning DWA, but they have been used in specific instances. In the *Ben Khemais* case,<sup>499</sup> the Tunisian authorities, on request, offered assurances regarding visits from lawyers, family, diplomats, and doctors, and also guaranteed a fair trial, including the exclusion of evidence obtained by torture.<sup>500</sup> These assurances followed his forced return, and the ECtHR was not convinced by them. It was sceptical whether the Advocate General at the Court Services Branch in Tunisia was competent to give such assurances, and it was concerned that allegations of abuse were not properly investigated and that the Tunisian authorities showed a reluctance to cooperate with the independent advocacy organizations human rights or independent monitors.<sup>501</sup> Even though the applicant had received numerous visits from his family and his Tunisian lawyer who said that his client had not alleged abuse, as confirmed by the medical report attached to diplomatic assurances, these facts demonstrated that the applicant has not suffered a breach of Article 3 to date but gave ‘no guarantee of fate of the individual in the future’.<sup>502</sup>
- 6.43. In summary, there has been constant interest in DWA but neither the executive authorities nor the courts have comprehensively explored that option. The impetus to deport or extradite summarily seems to have overtaken any serious attention to DWA, with adverse consequences to the rule of law.

**(d) Netherlands and Denmark**

- 6.44. The next comparator is the Netherlands, which offers an example of a country which does not resort to DWAs. This rejection is more a matter of practice than law.
- 6.45. As far as the courts are concerned, in the case of Nuriye Kesbir,<sup>503</sup> on 15 September 2006, the Hoge Raad affirmed a Court of Appeal ruling of 20 January 2005 that prohibited the extradition of a Kurdish woman wanted in Turkey for crimes committed as a PKK member. The original decision in 2004 in the district court had determined that her fears of torture and unfair trial in Turkey were not completely unfounded but did not amount to a sufficient level of risk to block the extradition. However, the district court did advise the Dutch minister of justice to

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<sup>499</sup> *Ben Khemais v Italy*, application no. 246/07, 24 February 2009. Other instances (decided on the same day) were: *Adbelhedi v Italy*, application no. 2638/07, *Ben Salah v Italy*, application no. 38128706, *Bouyahia v Italy*, application no. 46792/06, *C.B.Z. v Italy*, application no. 44006/06, *Hamraoui v Italy*, application no. 16201/07, *O. v Italy*, application no. 37257/06, *Soltana v Italy*, application no. 37336/06. Also note *Toumi v Italy*, application no. 25716/09, 5 April 2011. See P. Palermo, ‘Dal terrorismo alla tortura attraverso le procedure di espulsione. Una sentenza della Corte di cassazione’ (2010) *Rivista penale* n. 10, p. 1277

<sup>500</sup> *Ibid.* para.27.

<sup>501</sup> *Ibid.*, paras.59-60.

<sup>502</sup> *Ibid.*, para.64.

<sup>503</sup> Human Rights Watch, *Still at Risk: Diplomatic Assurances No Safeguard Against Torture* (New York, 2005) pp.72-76.

seek diplomatic assurances against torture and unfair trial from Turkey. However, the Court of Appeal considered that diplomatic assurances could not guarantee against torture. This point was in turn upheld by the Supreme Court: 'an extradition could result in a breach of European human rights laws' since Kesbir 'runs a real risk of being tortured or suffering inhumane or humiliating treatment'.<sup>504</sup>

- 6.46. Next, the Advisory Council on International Affairs ('AIV') in its report on *Counterterrorism from an International and European Perspective*<sup>505</sup> underlined the then prevalent international opposition to DWA arrangements and voiced both practical and moral objections. In May 2007, a delegation from the Netherlands stated to the Committee Against Torture that the government had never transferred an individual to a risk of torture on the basis of diplomatic assurances; it 'was aware of the limitations of such a method, but it left open the possibility because it might prove useful as part of a set of protection measures'.<sup>506</sup> This cautious approach was praised by the Committee against Torture.<sup>507</sup> There the matter has rested.
- 6.47. Most remaining European countries likewise follow a cautious line, though some have expressly reserved the right to resort to the DWA option. An example is Denmark.<sup>508</sup> The Aliens Act (Udlændingeloven) no. 487 of 12 June 2009 envisages new forms of judicial review over what had previously been purely administrative arrangements for the expulsion of terrorist suspects.<sup>509</sup> Amongst the innovations which might become subject to judicial review are diplomatic assurances. According to the explanatory notes to the Bill, the receiving country must have a stable and effective government, and the agreement must be precise, detailed and specific and include provision for monitoring by an independent, qualified person who is able to visit the returned person without prior notice and to question the returned person in private.<sup>510</sup> The issue arose in the case of Niels Holck,<sup>511</sup> who was wanted under an Indian request for extradition in 2002 in connection with the supply in 1995 of weapons to armed groups in Purulia, West Bengal. The Danish Ministry of Justice had decided that the conditions for extradition were fulfilled. However, the assurances were

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<sup>504</sup> 'Dutch Court Blocks Extradition of PKK Leader' *Reuters News* 15 September 2006.

<sup>505</sup> No. 49, September 2006, <http://aiv-advice.nl/download/7d5f718f-6584-4665-82af-e237763f0d85.pdf>, p 46.

<sup>506</sup> CAT/C/SR.766, 13 October 2008, para 5

<sup>507</sup> CAT/C/NET/CO/4, 3 August 2007, p 2.

<sup>508</sup> See Ministeriet for Flygtninge, Indvandrere og Integration, *Betænkning om administrativ udvisning af udlændinge, der må anses for en fare for statens sikkerhed* (Copenhagen, 2009). Allegations of Danish involvement in CIA rendition flights were unsubstantiated: Ministry of Foreign Affairs of Denmark, *Sixth Periodic Report of Denmark concerning the International Covenant on Civil and Political Rights* (<http://www.ft.dk/samling/20142/almdel/reu/bilag/84/1550011.pdf>, 2015) para.61-65

<sup>509</sup> See now Aliens (Consolidation) Act No. 785 of 10 August 2009, s.3.

<sup>510</sup> Bill L 209 of 28 April 2009. See Human Rights Watch, *Denmark: Human rights violations and concerns in the context of counter-terrorism, immigration-detention, forcible return of rejected asylum-seekers and violence against women* (EUR 18/001/2010, New York, 2010) p.3.

<sup>511</sup> 30 June 2011, *Ugeskrift for Retsvæsen* 2904 H. Thanks to Peter Vedel Kessing for this information.

rejected as insufficient under the ECHR, Article 3, by the Eastern High Court. With reference to section 6(2) of the Act on Extradition 2005,<sup>512</sup> the Eastern High Court of Denmark decided that Holck could not be extradited. A diplomatic row ensued, especially since no appeal to the Danish Supreme Court was pursued.<sup>513</sup>

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<sup>512</sup> No 833 of 25 August 2005, s.6(2): 'Extradition shall also not take place if there is a danger that the after extradition will be subject to torture or other inhuman or degrading treatment or punishment.'

<sup>513</sup> See <http://www.hindustantimes.com/India-news/NewDelhi/India-to-scale-down-diplomatic-ties-with-Denmark/Article1-887814.aspx>, 13 July 2012.

## 7. CONCLUSIONS

- 7.1. It is not the objective of Part II to offer recommendations for UK law and practice, but due account of the foregoing lessons of international law and comparative law experiences is surely worthwhile.
- 7.2. So far as principle of DWA is concerned, the prevalent denunciations by the international and academic commentariat to the effect that DWA inevitably involves breaches of international law should be tempered by two considerations. The first is that the attitudes to DWA by international review bodies vary significantly. While the ComAT and the HRC have been unfailingly hostile (though not to the point of prohibition), the ECtHR has displayed receptivity to DWA in principle and has considered the worth of its application as a matter of practicalities. As a result, the international law status of DWA was greatly clarified in *Othman*, albeit that later judgments have failed to further the level of understanding. The second point is that there is also variation in the enthusiasm of governments for DWA. Nevertheless, even relatively agnostic governments have often reserved the possibility of resort to DWA.
- 7.3. The issue of principle can also be judged in the light of the potential advantages of DWA which have been outlined and also the potential disadvantages in alternative approaches. Whilst domestic prosecution is rightly presented as the more desirable alternative, it raises substantial difficulties in terms of evidence-gathering from another jurisdiction and ultimately does not avert the eventual urge to deport foreign convicts. Next, it might be argued that a Mutual Legal Assistance treaty ('MLAT') offers a more comprehensive and enforceable solution than DWA, though as the *Othman* case demonstrates, one might helpfully become a stepping stone to the other. Conversely, the alternative of doing nothing is unappealing. In reality, suspected terrorists are often subjected to restrictive and intrusive conditions of residence and are thus left in a state of limbo regarding their residence status which is not conducive to humane conditions either for progress in their own lives or for those of their family. Furthermore, the international community (as expressed by the UN Security Resolution 1373) and, no doubt, the domestic audience expect that a suspected terrorist should be 'brought to justice' one way or another.<sup>514</sup>
- 7.4. As for what was referred to earlier in Part II of this Report as the emergent 'jurisprudence of assurances', the *Othman* decision represents a major step forward in delineating the building blocks. The eleven factors mentioned are surely all worthy of serious reflection. But one can still argue about their breadth and depth of coverage. A counsel of perfection would be a futile expectation in the sphere of diplomacy, but this Part has suggested that the eleven factors

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<sup>514</sup> UNSCR 1373, Art.2(e). See also UNSCR 2178 of 24 September 2014, art.6.

could be improved in several respects, especially in the aspect of implementation. For example, in terms of coverage, it was suggested that enforcement and sanctions need more weight and that a wider perspective needs to be taken of the performance of the receiving state in the standards of its criminal justice system and not just in relation to a given subject. Equally, it would be desirable to be more specific in regard to visits, the role of international audit mechanisms, and monitoring, including the professions to be involved and the gradations of their independence. The enhancement of the transparency of the arrangements on paper and in practice would also provide a valuable safeguard.

- 7.5. This package of assurances can be delivered more satisfactorily through a collective MOU than via an individually tailored arrangement. The more legislative nature of even a bilateral MOU may be more likely to be comprehensive, to be publicised, and to foster a continuing relationship in which pressure can be exerted. Perhaps a multilateral DWA blueprint treaty would be better still. However, the faltering attempts to secure such a document in the Council of Europe as a result of UK diplomatic efforts in 2006 and 2007 came to naught.<sup>515</sup> The comparative survey has revealed much more caution and resort to alternatives rather than demands for DWA on the part of most states, and a multilateral agreement might in any event not offer much more than the eleven factors in *Othman*.
- 7.6. It is right to end this assessment on a negative note. After all, much is stake with DWA – not only the reputations of two states and the moulding of their criminal justice systems but also, and more crucially, the protection of vulnerable individuals from torture and other outlawed treatment. The survey has found that doubts and problems abound about the DWA project. To deliver the DWA will be challenging enough in terms of negotiations and the delays caused for the suspected terrorists and their potential victims. Yet, the DWA is not the end of the affair but represents a considerable commitment for the future. Will it work? In principle and logic it can, and the Home Office has been keen to state that, in practice too, the DWAs to date have not given rise to credible evidence of breach,<sup>516</sup> though this claim has been questioned in regard to the ‘Rolls Royce’ DWA in *Othman* itself. At the same time, the effective reduction of risk of torture is always going to leave some residual level risk in receiving states where some agencies remain untrustworthy and where the human rights situation may not be settled. Furthermore, DWA is not at all realistic for chronically ‘problematic’ countries (which could be translated as designated ‘countries of concern’). In this way, DWA can play a significant role in counter-terrorism, especially in

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<sup>515</sup> Hall, J., *Not the Way Forward* (Human Rights Watch, New York, 2008) pp.26-27.

<sup>516</sup> Home Office, *Symposium on Deportation with Assurances*, 24 September 2014.

prominent and otherwise intractable cases, but it will be delivered effectively and legitimately in international law only if great care is taken.

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