

# The false promise of assurances against torture

---

**Eric Metcalfe<sup>1</sup>**

*This article examines the British government's use of assurances against ill-treatment in cases involving deportation on national security grounds to countries known for their use of torture. It considers the history of assurances in the context of extradition and deportation, examines the relevant Strasbourg case-law, then considers the various memoranda of understanding negotiated by the government with various North African and Middle Eastern countries and analyses the approach of the UK courts to those assurances.*

Aeschylus once wrote, 'it is not the oath that makes us believe the man, but the man the oath'.<sup>2</sup> The Home Secretary's recent victory in the case of *RB, U and OO* in the House of Lords makes the credibility of promises particularly important.<sup>3</sup> For the Law Lords unanimously upheld the conclusion of the Special Immigration Appeals Commission (SIAC) that it was safe to deport two men to Algeria and one man to Jordan – notwithstanding the reputation of both countries for using torture – because of assurances the UK had received from their governments that that the suspects would be not be ill-treated.

These assurances were, of course, the realisation of Tony Blair's famous announcement following the 7/7 bombings that the 'rules of the game are changing'.<sup>4</sup> Adverting to his long-standing<sup>5</sup> irritation that Article 3 of the European Convention on Human Rights (ECHR) barred the deportation of suspects to countries where they faced a real risk of torture, he spoke of a 'new approach to deportation orders':

*... the circumstances of our national security have self evidently changed, and we believe we can get the necessary assurances from the countries to which we will return the deportees, against their being subject to torture or ill treatment contrary to Article 3.*

Specifically Blair revealed a 'Memorandum of Understanding' (MOU) with Jordan concerning the treatment of suspects and indicated that 'there are around 10 such countries with whom we are seeking such assurances'.<sup>6</sup> Three and a half years later, memoranda have since been concluded with Lebanon, Libya and most recently Ethiopia.<sup>7</sup> Formal negotiations on a memorandum with Algeria collapsed but SIAC nonetheless had regard to assurances from the Algerian authorities that suspects returned from the UK would not be mistreated.

The reliance upon assurances against torture – first by the government and now by the courts – raises a number of questions, the most obvious of which is can they be trusted? Specifically, can the promise of a country with a well-established reputation for torture safely be relied upon to discount the risk of torture to particular individuals whose custody it seeks? This article seeks to answer that question, first by considering the origin of assurances against ill-treatment, then examining the case-law in relation to such assurances. It then turns to look at the various assurances against ill-treatment negotiated by the UK government with various North African and Middle Eastern countries and analyses the approach of the UK courts to those assurances.

## The origin of assurances

Despite the flourish of Tony Blair's announcement in 2005, the use of assurances concerning the treatment of suspects removed from one country to another is not new. On the contrary, the practice of seeking assurances has gone on – in the extradition context at least – for well over a century. In 1876, Lord Derby notably refused to allow the extradition of one Ezra Winslow, wanted for forgery in Boston, unless the US government agreed to provide an assurance that he would not be tried for any other offence:<sup>8</sup>

*Her Majesty's Government do not feel themselves justified in authorising the surrender of Winslow until they have received the assurance of your Government that this person shall not, until he has been restored or had an opportunity of returning to Her Majesty's dominions, be detained or tried in the United States for any offence committed prior to his surrender other than the extradition crimes proved by the facts on which the surrender would be grounded, and requesting that this decision be communicated to this Government.*

This request was prompted by the requirements of the 1870 Extradition Act and the 'speciality' rule which motivated it is now a well-established feature of extradition law generally.<sup>9</sup> The United States, for its part, denied the British request, arguing that the UK had no right to seek assurances above and beyond the terms of the 1842 treaty which, among other things, provided for the mutual extradition of suspects.<sup>10</sup> In response to the British refusal to extradite Winslow, President Grant suspended the treaty for several months until both countries relented (although too late to capture Winslow, who had in the meantime been freed from custody following a successful habeas application and long since fled).<sup>11</sup>

The practice of seeking assurances against ill-treatment in relation to other kinds of removal has a much less principled history, as the following account makes plain:<sup>12</sup>

*In the spring of 1942 about 17,000 Jews were taken from Slovakia to Poland as workers. It was a question of an agreement with the Slovakian Government. The Slovakian Government further asked whether the families of these workers could not be taken to Poland as well. At first Eichmann declined this request.*

*In April or at the beginning of May 1942 Eichmann told me that henceforward whole families could also be taken to Poland. Eichmann himself was at Bratislava in May 1942 and had discussed the matter with competent members of the Slovakian Government. He visited Minister Mach and the then Prime Minister, Professor Tuka. At that time he assured the Slovakian Government that these Jews would be humanely and decently treated in the Polish ghettos. This was the special wish of the Slovakian Government. As a result of this assurance about 35,000 Jews were taken from Slovakia into Poland. The Slovakian Government, however, made efforts to see that these Jews were, in fact, humanely treated; they particularly tried to help such Jews as had been converted to Christianity. Prime Minister Tuka repeatedly asked me to visit him and expressed the wish that a Slovakian delegation be allowed to enter the areas to which the Slovakian Jews were supposed to have been sent. I transmitted this wish to Eichmann and the Slovakian Government even sent him a note on the matter. Eichmann at the time gave an evasive answer.*

*Then at the end of July or the beginning of August, I went to see him in Berlin and implored him once more to grant the request of the Slovakian Government. I pointed out to him that abroad there were rumors to the effect that all Jews in Poland were being exterminated. I pointed out to him that the Pope had intervened with the Slovakian Government on their behalf. I advised him that such a proceeding, if really true, would seriously injure our prestige, that is, the prestige of Germany, abroad. For all these reasons I begged him to permit the inspection in question. After a lengthy discussion Eichmann told me that this request to visit the Polish ghettos could not be granted under any circumstances whatsoever. In reply to my question "Why?" he said that most of these Jews were no longer alive.*

The possibility of using assurances against ill-treatment in the context of removals and deportations was, therefore, well-known to the drafters of the 1951 Refugee Convention (the Refugee Convention) and, later, the 1984 UN Convention Against Torture (the Torture Convention) and it is telling that neither instrument makes reference to their use. By contrast, the 1957 Council of Europe Convention on Extradition made explicit allowance for the use of assurances against the death penalty.<sup>13</sup>

*If the offence for which extradition is requested is punishable by death under the law of the requesting Party, and if in respect of such offence the death-penalty is not provided for by the law of the requested Party or is not normally carried out, extradition may be refused unless the requesting Party gives such assurance as the requested Party considers sufficient that the death-penalty will not be carried out.*

As a US federal court noted in 1958, there was no corresponding requirement in the case of deportations:<sup>14</sup>

*The language of the statute ... is clear. It provides simply for deportation to a country 'willing to accept' the alien. It does not impose upon our Government, as a condition of deportation, an obligation to assure that once accepted the deportee will be granted permanent residence or asylum within the accepting country. Undoubtedly Congress could have required the Attorney General to secure assurances from an accepting country with respect to the continued residence of a deportee; but it has not done so.*

The reasons for the differences in approach taken in extradition cases, on the one hand, and deportation and other kinds of removal, on the other, are not hard to seek. For, unlike deportation and immigration removal, extradition may apply to citizens as well as foreigners and it is almost always a reciprocal procedure. Hence states have historically provided much greater procedural protection against extradition, and shown much greater concern over the fate of those liable to be extradited: the democracy that fails to protect its own citizens from mistreatment in some foreign jail would have to answer for that failure at the ballot box<sup>15</sup> in a way that they rarely do in cases of foreigners liable to deportation or removal. The reciprocity of most extradition arrangements provides further reason to ensure higher standards: as the Winslow case showed, the quid pro quo works best when both sides see the bargain as being an equal one.<sup>16</sup>

In cases of deportation and removal, domestic procedural protections have always lagged well behind those in extradition cases. In the UK, for instance, there was not even a system of statutory appeals for deportation until 1973 and, even then, deportation on grounds of national security was excluded specifically from its scope.<sup>17</sup> It is therefore no surprise that the first notable human rights case involving the reliability of assurances would be an extradition one: the 1989 judgment of the European Court of Human Rights (ECtHR) in *Soering v United Kingdom*.<sup>18</sup>

### **Soering v United Kingdom**

Soering was a German national detained in the UK whose extradition was sought by the US to face charges of murder in Virginia, a state with the death penalty. In accordance with the 1870 Extradition Act and the 1972 US-UK Extradition Treaty, the British government made the following request:<sup>19</sup>

*Because the death penalty has been abolished in Great Britain, the Embassy has been instructed to seek an assurance, in accordance with the terms of ... the Extradition Treaty, that, in the event of Mr Soering being surrendered and being convicted of the crimes for which he has been indicted ... the death penalty, if imposed, will not be carried out. Should it not be possible on constitutional grounds for the United States Government to give such an assurance, the United Kingdom authorities ask that the United States Government undertake to recommend to the appropriate authorities that the death penalty should not be imposed or, if imposed, should not be executed.*

In response, the District Attorney for the county in Virginia where Soering was to be tried swore an affidavit certifying that the UK government's request will be made known to the judge at the time of sentencing. In addition, the US government itself undertook 'to ensure that the commitment of the appropriate authorities of the Commonwealth of Virginia to make representations on behalf of the United Kingdom would be honoured'.<sup>20</sup> In his complaint to the ECtHR, Soering argued that, if convicted, the assurance received by the British government was inadequate to prevent the application of the death penalty and, consequently, a violation of his right to freedom from torture contrary to Article 3 ECHR (because of the so-called 'death row' phenomenon). The court itself noted that, due to the division of powers between the state and federal governments in the US:<sup>21</sup>

*in respect of offences against State laws the Federal authorities have no legally binding power to provide, in an appropriate extradition case, an assurance that the death penalty will not be imposed or carried out. In such cases the power rests with the State. If a State does decide to give a promise in relation to the death penalty, the United States Government has the power to give an assurance to the extraditing Government that the State's promise will be honoured.*

However, the state of Virginia had not given such an assurance in Soering's case. Although the British government maintained that the assurance from the US 'at the very least significantly reduce[d] the risk of a capital sentence either being imposed or carried out',<sup>22</sup> it accepted that there was nonetheless 'some risk' which was 'more than merely negligible' that the death penalty would be

imposed.<sup>23</sup> As Lord Justice Lloyd had noted in earlier judicial review proceedings in the High Court, 'the assurance leaves something to be desired'.<sup>24</sup> The ECtHR concluded that:<sup>25</sup>

*Whatever the position under Virginia law and practice ... and notwithstanding the diplomatic context of the extradition relations between the United Kingdom and the United States, objectively it cannot be said that the undertaking to inform the judge at the sentencing stage of the wishes of the United Kingdom eliminates the risk of the death penalty being imposed. In the independent exercise of his discretion the Commonwealth's Attorney has himself decided to seek and to persist in seeking the death penalty because the evidence, in his determination, supports such action ... If the national authority with responsibility for prosecuting the offence takes such a firm stance, it is hardly open to the Court to hold that there are no substantial grounds for believing that the applicant faces a real risk of being sentenced to death and hence experiencing the 'death row phenomenon'.*

Hence, the court held, the UK's obligation under Article 3 towards Soering was not limited merely to preventing his ill-treatment in or by the UK.<sup>26</sup> It would breach Soering's rights under Article 3 for the UK to allow his extradition to a third country where he would face a real risk of ill-treatment.<sup>27</sup>

### ***Chahal v United Kingdom***

However, it was the extension by the ECtHR of this principle to deportation on national security grounds in *Chahal v United Kingdom* that set the stage for the current debate on assurances against torture. As is well known, the court held that the prohibition on torture under Article 3 ECHR was absolute and, unlike the prohibition in the Refugee Convention,<sup>28</sup> made no exception for suspects who were deemed to pose a risk to national security.<sup>29</sup> The court also found that Mr Chahal faced a 'real risk' of ill-treatment contrary to Article 3 if returned to India, notwithstanding the assurance given by the Indian government that he would not be ill-treated:<sup>30</sup>

*We have noted your request to have a 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. I have the honour to confirm the above.*

However, the assurances of the Indian authorities failed to assuage the court's concerns:<sup>31</sup>

*Although the Court does not doubt the good faith of the Indian government in providing the assurances ... it would appear that, despite the efforts of that government, the [National Human Rights Commission] and the Indian courts to bring about reform, the violation of human rights by certain members of the security forces in Punjab and elsewhere in India is a recalcitrant and enduring problem ... Against this background, the Court is not persuaded that the above assurances would provide Mr Chahal with an adequate guarantee of safety.*

### **Youssef v Home Office**

However, the assurances' failure to convince the ECtHR in *Soering* and *Chahal* did not discourage the British government in its attempts to deport suspected terrorists consistent with the requirements of Article 3 ECHR. In 1999, the government again sought to negotiate assurances against ill-treatment in respect of the return of four Egyptian men suspected of involvement in terrorism. Details of the negotiations subsequently emerged in the 2004 case of *Youssef v Home Office*,<sup>32</sup> the starting point of which was described as follows:<sup>33</sup>

*It was appreciated [by the Home Office] from the outset that given the evidence that detainees were routinely tortured by the Egyptian Security Service it would not be possible to remove Mr. Youssef to Egypt unless satisfactory assurances were obtained from the Egyptian Government that he would not be tortured or otherwise physically mistreated if he were sent back.*

The British Embassy in Cairo was instructed to seek written assurances from the Egyptian government that included the suspects being guaranteed the right to legal advice, due process, a fair trial, regular inspection by the British authorities and independent medical personnel while in detention and – of course – a guarantee against any ill-treatment 'whilst in detention'.<sup>34</sup> The Egyptian government politely declined the British request for an assurance relating to prison visits 'on the ground that they would constitute an interference in the scope of the Egyptian judicial system and an infringement of national sovereignty'.<sup>35</sup> The Home Office then wrote to No 10 Downing Street to inform them of the Egyptian response:<sup>36</sup>

*This letter was read by the Prime Minister who wrote across the top of it "Get them back". He also wrote next to the paragraph that set out the assurances objected to by the Interior Minister "This is a bit much. Why do we need all these things?"*

This was followed by a more formal response from the Prime Minister's Private Secretary to the Home Office:<sup>37</sup>

*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. Can we not narrow down the list of assurances we require?*

In light of the resistance to the proposed assurances from both the Egyptian government and No 10 itself, the Home Secretary wrote to the Prime Minister to explain that only the 'strongest possible assurances' would be likely to satisfy SIAC that the suspects would not face a real risk of ill-treatment on their return to Egypt.<sup>38</sup> The Foreign Office later wrote to explain that:<sup>39</sup>

*In the FCO's view there was no alternative to access by British officials. The [International Committee of the Red Cross] had a permanent presence there but had been refused access to prisoners; it would not visit particular prisoners without a general agreement allowing it access to all prisoners and would not get involved in any process which could in any way be perceived to contribute to, facilitate, or result in the deportation of individuals to Egypt. It was likely that other human rights NGOs would take the same line. FCO had failed to identify any other acceptable impartial third party that could undertake regular visits and the Egyptian Government had not been asked for an assurance that would allow access by a mutually acceptable, impartial third party of international repute because such a third party would be difficult to identify and compared with a specific assurance of access by British officials, an unspecified assurance (access by a party to be identified later) would provide a much weaker argument.*

Blair's frustration with the stalled negotiations became still more evident. He wrote on one Foreign Office letter, 'This isn't good enough. I don't believe we shld [sic] be doing this. Speak to me', and subsequently offered to write to President Mubarek directly to obtain the necessary assurances.<sup>40</sup> Despite advice from both the Foreign Office and Home Office that the matter of assurances should not be pressed, the Prime Minister insisted on one final push:<sup>41</sup>

*the Prime Minister is not content simply to accept that we have no option but to release the four individuals. He believes that we should use whatever assurances the Egyptians are willing to offer, to build a case to initiate the deportation procedure and to take our chance in the courts. If the courts rule that the assurances we have are inadequate, then at least it would be the courts, not the government, who would be responsible for releasing the four from detention. The Prime Minister's view is that we should now*

*revert to the Egyptians to seek just one assurance, namely that the four individuals, if deported to Egypt, would not be subjected to torture. Given that torture is banned under Egyptian law, it should not be difficult for the Egyptians to give such an undertaking.*

Following further inquiries, however, the Home Secretary wrote to the Prime Minister to explain his conclusion that even that single assurance would be insufficient to commence deportation proceedings against the four men:<sup>42</sup>

*You suggested that we should ask the Egyptians for a single assurance on torture. I am not satisfied that an assurance of that sort, even if forthcoming, would be sufficient for me to proceed to issue notices of intention to deport in these cases.*

The four men were released from immigration detention the following day.

### **Mamatkulov v Turkey**

In 2005, the Grand Chamber of the ECtHR held in the case of *Mamatkulov v Turkey* that the deportation of two suspects from Turkey to Uzbekistan did not violate their rights under Article 3 ECHR.<sup>43</sup> Among other things, it was noted that the Turkish government had received the following assurances from the Uzbek authorities:<sup>44</sup>

*The applicants' property will not be liable to general confiscation, and the applicants will not be subjected to acts of torture or sentenced to capital punishment. The Republic of Uzbekistan is a party to the United Nations Convention against Torture and accepts and reaffirms its obligation to comply with the requirements of the provisions of that Convention as regards both Turkey and the international community as a whole.*

In a dissenting opinion, however, Judges Bratza, Bonello and Hedigan were strongly critical of the weight given to the assurances by the majority:<sup>45</sup>

*an assurance, even one given in good faith, that an individual will not be subjected to ill-treatment is not of itself a sufficient safeguard where doubts exist as to its effective implementation (see, for example, Chahal, cited above, p. 1861, § 105). The weight to be attached to assurances emanating from a receiving State must in every case depend on the situation prevailing in that State at the material time. The evidence as to the treatment of political dissidents in Uzbekistan at the time of the applicants' surrender is such, in our view, as to give rise to serious doubts as to the effectiveness of the assurances in providing the applicants with an adequate guarantee of safety.*

*The same applies to the majority's reliance on the fact that Uzbekistan was a party to the Convention against Torture. In this regard we note, in particular, the finding of Amnesty International that Uzbekistan had failed to implement its treaty obligations under that convention and that, despite those obligations, widespread allegations of ill-treatment and torture of members of opposition parties and movements continued to be made at the date of the applicants' arrest and surrender.*

### **Agiza v Sweden**

If *Youssef* illustrates the problems involved in negotiating assurances against torture, the 2005 case of *Agiza v Sweden* before the UN Committee Against Torture shows the problems involved in their operation.<sup>46</sup> Agiza was an Egyptian national whom the Swedish authorities sought to deport. Prior to his deportation, Swedish officials met with Egyptian government representatives in Cairo:<sup>47</sup>

*the purpose of the visit was to determine the possibility, without violating Sweden's international obligations, including those arising under the Convention, of returning the complainant and his family to Egypt. After careful consideration of the option to obtain assurances from the Egyptian authorities with respect to future treatment, the [Swedish] government concluded it was both possible and meaningful to inquire whether guarantees could be obtained to the effect that the complainant and his family would be treated in accordance with international law upon return to Egypt. Without such guarantees, return to Egypt would not be an alternative. On 13 December 2002, requisite guarantees were provided.*

Less than a week later, Agiza was deported to Cairo. Although he was visited by Swedish authorities approximately once a month, the Committee noted that:<sup>48</sup>

*the visits were short, took place in a prison which is not the one where the complainant was actually detained, were not conducted in private and without the presence of any medical practitioners or experts.*

Following reports of his torture received from other visitors, the Swedish Ambassador visited Agiza in prison in March 2003:<sup>49</sup>

*The complainant allegedly stated for the first time that he had been subjected to torture. In response to the question as to why he had not mentioned this before, he allegedly responded, 'It does no longer matter what I say, I will nevertheless be treated the same way'.*

Following the meeting, the Swedish government requested that the Egyptian authorities arrange an independent and impartial inquiry into the allegations. For its part, the Egyptian government denied the allegations and ‘gave no direct answer’ to the Swedish request for an independent investigation.<sup>50</sup> Taking a different line from a 2003 decision in which it had found assurances to be adequate and noting the recent judgment of the ECtHR in *Mamatkulov*,<sup>51</sup> the Committee held that the Swedish government’s deportation using assurances amounted to a breach of the prohibition against refoulement contrary to Article 3 of the Torture Convention:<sup>52</sup>

*at the outset that it was known, or should have been known, to the [Swedish] authorities ... that Egypt resorted to consistent and widespread use of torture against detainees, and that the risk of such treatment was particularly high in the case of detainees held for political and security reasons.*

The procurement of assurances from Egypt, the Committee held, ‘which ... provided no mechanism for their *enforcement*, did not suffice to protect against this manifest risk’.<sup>53</sup>

### ***Saadi v Italy***

In February 2008, the Grand Chamber of the ECtHR held that Italy’s proposed deportation of Saadi, a Tunisian national, would breach Article 3 ECHR,<sup>54</sup> notwithstanding the assurances of the Tunisian authorities:<sup>55</sup>

*that they are prepared to accept the transfer to Tunisia of Tunisians imprisoned abroad once their identity has been confirmed, in strict conformity with the national legislation in force and under the sole safeguard of the relevant Tunisian statutes.*

And that:<sup>56</sup>

*The Minister of 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.*

The case was notable because it was one in which the UK government had intervened to invite the Grand Chamber to reverse its earlier decision in *Chahal*, arguing that ‘because of its rigidity that principle had caused many difficulties for the Contracting States by preventing them in practice from enforcing expulsion measures’.<sup>57</sup> Instead, the UK urged, the ECtHR should allow the risk of ill-treatment under Article 3 ECHR to be balanced against the threat to national

security posed by a suspect.<sup>58</sup> The Grand Chamber, for its part, rejected the UK submissions on the correct approach to Article 3, labelling it as ‘misconceived’.<sup>59</sup> In respect of the assurances received from Tunisia, the court noted that they did no more than restate Tunisia’s obligations under domestic and international law:<sup>60</sup>

*the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where, as in the present case, reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention.*

The court then identified the correct approach to be taken to assurances under Article 3:<sup>61</sup>

*even if, as they did not do in the present case, the Tunisian authorities had given the diplomatic assurances requested by Italy, that would not have absolved the Court from the obligation to examine whether such assurances provided, in their practical application, a sufficient guarantee that the applicant would be protected against the risk of treatment prohibited by the Convention (see Chahal, cited above, § 105). The weight to be given to assurances from the receiving State depends, in each case, on the circumstances obtaining at the material time.*

The court’s approach, then, is not that assurances against ill-treatment can never be relevant. Indeed, it would be surprising if it held otherwise. Determining the risk of ill-treatment in any particular case is, after all, a question of fact, not law, and it can hardly be said that an assurance from one government to another is factually irrelevant to the question of how a suspect will be treated. The key point that emerges from the Strasbourg jurisprudence is that the mere fact of an assurance is no answer to the court’s inquiry as to risk. An assurance is merely one element among many to be weighed in the balance, and the weight to be given to an assurance will always depend on the particular circumstances of each case. Most of all, an assurance can only be considered ‘sufficient’ if, in the language of *Soering*, it ‘eliminates’ the real risk that a suspect would be ill-treated.

### ***Ismoilov v Russia***

In April 2008, in the case of *Ismoilov v Russia*, the ECtHR reconsidered the use of assurances from Uzbekistan. In *Ismoilov*, the Russian authorities had agreed to Uzbekistan’s request to extradite twelve Uzbek refugees on the basis of assurances from its First Deputy Prosecutor General that the refugees would

receive humane treatment and a fair trial if returned.<sup>62</sup> By contrast, the ECtHR held that returning the refugees would violate Article 3 ECHR as they faced a real risk of torture or ill-treatment, notwithstanding the assurances received from the Uzbek government:<sup>63</sup>

*In its judgment in the Chahal case the Court cautioned against reliance on diplomatic assurances against torture from a State where torture is endemic or persistent (see Chahal, cited above, § 105). In the recent case of Saadi v. Italy the Court also found that diplomatic assurances were not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where reliable sources had reported practices resorted to or tolerated by the authorities which were manifestly contrary to the principles of the Convention (see Saadi, cited above, §§ 147 and 148). Given that the practice of torture in Uzbekistan is described by reputable international experts as systematic ... the Court is not persuaded that the assurances from the Uzbek authorities offered a reliable guarantee against the risk of ill-treatment.*

## Memoranda of Understanding

Although heralded as a 'new approach' by Tony Blair following the 7/7 bombings, the *Youssef* case showed that negotiation of assurances had been part of the government's strategy to facilitate deportations for some time. Eight months before Blair's 'rules of the game' speech, the Home Secretary told Parliament:<sup>64</sup>

*we have been trying for some time to address the problems posed by individuals whose deportation could fall foul of our international obligations by seeking memorandums of understanding with their countries of origin. We are currently focusing our attention on certain key middle-eastern and north African countries. I am determined to progress this with energy. My noble Friend Baroness Symons of Vernham Dean visited the region last week. She had positive discussions with a number of countries, on which we are now seeking to build.*

The Jordanian MOU was the first to be concluded, and provides the template for all subsequent MOUs against ill-treatment negotiated by the British government. In addition to setting out the understanding that both governments 'will comply with their human rights obligations under international law regarding a person returned under this arrangement', it also provided eight 'further specific' assurances. However, six of the eight 'specific' assurances do no more than restate Jordan's existing obligations under the Torture Convention and the International Covenant on Civil and Political Rights, namely the right of those returned to due process, a fair trial, and religious freedom. The prohibition

against ill-treatment is not referred to directly but instead expressed in terms of a positive obligation on Jordan to provide the detainee:

*adequate accommodation, nourishment, and medical treatment, and [to] be treated in a humane and proper manner, in accordance with internationally accepted standards.*

Of the eight so-called 'specific' assurances, therefore, only two can really be said to contain anything novel. These are as follows:

*If the returned person is arrested, detained or imprisoned within 3 years of the date of his return, he will be entitled to contact, and then have prompt and regular visits from the representative of an independent body nominated jointly by the UK and Jordanian authorities. Such visits will be permitted at least once a fortnight, and whether or not the returned person has been convicted, and will include the opportunity for private interviews with the returned person. The nominated body will give a report of its visits to the authorities of the sending state.*

And:

*Except where the returned person is arrested, detained or imprisoned, the receiving state will not impede, limit, restrict or otherwise prevent access by a returned person to the consular posts of the sending state during normal working hours. However, the receiving state is not obliged to facilitate such access by providing transport free of charge or at discounted rates.*

The substance of the MOU, then, is an assurance of regular visits while in detention from an 'independent body nominated jointly by the UK and Jordanian authorities' and to allow access to the UK consulate while not detained. The MOU makes no provision for adjudication, enforcement or sanction for breach of any kind. The only other relevant provision is that either state may withdraw from the arrangement by giving six months notice but is obliged to continue to apply the terms of the arrangement to any person returned under its provisions. Again, there is no provision for what may happen if this requirement is also breached.

MOUs were subsequently concluded with Lebanon and Libya. The Libyan MOU included additional assurances against trial in absentia and the death penalty but both were otherwise virtually identical to those contained in the Jordanian MOU. The only differences of substance between the two later MOUs and the Jordanian MOU was the scope of the remit given to the monitoring body and the provision of medical examinations: under the Jordanian MOU, the

monitoring body was responsible only for visiting the suspect while detained; under the Libyan and Lebanese MOUs, the monitoring body is responsible for supervising *all* the assurances. The Jordanian MOU also makes no provision for medical inspection, whereas both the more recent MOUs do.

In the case of Algeria, negotiations on an MOU collapsed on the sticking point of post-return monitoring. The failure to agree a memorandum was explained by SIAC in the following terms:<sup>65</sup>

*The Algerian stance on ill-treatment had always been that they objected to repeating, in generic form, commitments which they had entered into in the Convention against Torture and in the International Convention on Civil and Political Rights. But they had no difficulty in committing themselves to treating those returned fully in accord with those obligations. A general reiteration was seen as casting doubt on whether they would abide by commitments which they had already entered into, whereas an individual assurance was seen as applying to an individual the general obligation already undertaken. Their history, that is their colonial past, made them very sensitive about that. No open assurance was more explicit than that given in the December 2005 answers, which said that Y had the right to "respect... for his human dignity" in all circumstances. Representatives of the [Algerian Security Service] and other relevant Ministries had been present at all the talks and had accepted the commitments.*

Following this, the British government relied upon an exchange of letters and notes verbale between Tony Blair and President Bouteflika of Algeria, together with the general terms of the 2005 Algerian Charter for Peace and National Reconciliation, as providing the necessary assurance against ill-treatment of any suspects returned. In other words, it did no more than restate Algeria's existing obligations under domestic and international law. As with the MOUs concluded with Jordan, Libya and Lebanon, it offered no mechanism for enforcement nor justiciable rights of any kind.

## **The approach of UK courts to assurances against torture**

The record of the UK courts on the use of assurances has, thus far, been a decidedly mixed one. In the cases of Algeria and Jordan, the House of Lords upheld the decisions of SIAC that assurances could safely be relied upon to mitigate the risk of torture. The Libyan MOU was, by contrast, beyond the pale even for SIAC and the judgment was upheld by the Court of Appeal.

In case of *RB*, SIAC conceded Algeria's well-established reputation for using torture against detainees, noting that:<sup>66</sup>

*it would be naïve to conclude that no person suspected of terrorist activity, in particular foreign terrorist activity, is at risk of torture or ill-treatment at the hands of Algerian security forces, in particular the DRS [département du Renseignement et de la Sécurité].*

Indeed, the Foreign Office's own Special Representative for Deportation with Assurances gave evidence which SIAC summarised as follows:<sup>67</sup>

*Mr Layden is a realist. He acknowledges that torture still exists, but is getting less. He accepts that the civil authorities do not control the DRS (they report direct to the President as Minister of Defence). He has never seen any report of any prosecution of a DRS official for torture or ill-treatment. He bluntly acknowledged that he was not saying that there would not be a risk of ill-treatment if the United Kingdom Government had not made the special arrangements which it had. However his unshakable view was that the assurances given by the Algerian authorities in the case of BB eliminated any real risk that he would be subjected to torture or ill-treatment.*

SIAC therefore identified four criteria that would have to be satisfied in order for it to be satisfied on the issue of safety on return:<sup>68</sup>

- i) the terms of the assurances had to be such that, if they were fulfilled, the person returned would not be subjected to treatment contrary to Article 3;*
- ii) the assurances had to be given in good faith;*
- iii) there had to be a sound objective basis for believing that the assurances would be fulfilled;*
- iv) fulfilment of the assurances had to be capable of being verified.*

SIAC held that all four criteria were met in RB's case. In particular, it accepted the Foreign Office evidence that Algeria sought to be 'accepted by the international community as a normally-functioning civil society' and that it was 'barely conceivable, let alone likely, that the Algerian Government would put [its UK ties] at risk by reneging on solemn assurances'.<sup>69</sup> In relation to the fourth condition, it held that, despite Algeria's refusal to allow post-return monitoring, the fact that NGOs like Amnesty International were able to gain access to detainees in certain cases meant that there would be sufficient verification:<sup>70</sup>

*Verification, however, need not only be achieved by official means. Amnesty International and other non-governmental agencies, who object to reliance on assurances as a matter of principle, can be relied upon to find out if they are breached and publicise that fact. The fact that Amnesty was able to and did speak to both I and V on their release demonstrates the effectiveness of non-official verification. It is, of course, true that a detainee could be*

*tortured by the chiffon method, and refuse to say anything about it afterwards; but such an event could occur even under a monitoring regime. However, in neither case is it realistic to suppose that breaches by the Algerian authorities, or the turning of a blind eye by Central Government to wholesale breaches at lower levels, could occur without the fact of breaches becoming known.*

SIAC's conclusions were much the same in respect of the Jordanian MOU. As with Algeria, the Foreign Office's own country expert did not contest the many reports that the Jordanian authorities – and especially its key security agency, the GID – frequently tortured suspects in custody.<sup>71</sup> This included a report prepared by the Foreign Office itself in 2005, which recounted a number of the key allegations recorded by bodies such as the US State Department and the UN Committee Against Torture.<sup>72</sup> SIAC nonetheless accepted the Foreign Office's contention that the MOU would be honoured in Abu Qatada's case, notwithstanding the general risk of torture. Among other things, it concluded that Qatada's high public profile would itself act as a check:<sup>73</sup>

*If he were to be tortured or ill-treated, there probably would be a considerable outcry in Jordan, regardless of any MOU. The likely inflaming of Palestinian and extremist or anti-Western feelings would be destabilising for the government. The Jordanian Government would be well aware of that potential risk and, in its own interests, would take steps to ensure that that did not happen.*

As with Algeria, SIAC found that Jordan's concern for its own international reputation would lead it to ensure the MOU was honoured:<sup>74</sup>

*the MOU and arrangements are supported at the highest levels and the King's political power and prestige are behind it. It can reasonably be taken that instructions specific to how this Appellant should be treated would be given to the GID which would be known to the GID to have high level and specific interest. The GID would know that the UK Government had a specific interest in how this individual was treated. There would be an awareness that those instructions would be more likely to be followed through, that breaches would be punished and that a climate of impunity which might prevail otherwise would not apply here. This would be a real deterrent to abuses by GID officers. It would not be some general sop to public or world opinion. The Jordanian Government would have a specific interest in not being seen by the UK Government or the public in Jordan in this case as having breached its word, given to a country with which it has long enjoyed very good relations.*

In particular, SIAC held that the monitor appointed under the MOU – the Adalleh Centre, a Jordanian NGO – would provide an additional check against any ill-treatment of Abu Qatada by the Jordanian authorities.<sup>75</sup>

When SIAC came to consider the Libyan MOU, the government followed the same approach as before: admit the general risk of torture but deny the specific risk. Hence, the Foreign Office's Special Representative for Deportation with Assurances was candid about the Libyan regime's use of torture:<sup>76</sup>

*Mr Layden agreed that Libya had a sorry record on torture and stated that if this had not been the case, the United Kingdom government would not have needed to secure the assurances that have been secured about the treatment of Libyan terrorist suspects detained in the UK. In his evidence, he agreed that the sequence of reporting from respectable and reputable NGOs was so consistent that one that simply could not ignore it and, as a consequence, he accepted that but for assurances there was a real risk of torture of the political opponents of Colonel Qadhafi and the regime.*

Nonetheless, the Foreign Office representative maintained that it was 'well nigh unthinkable' that Libya would jeopardise its relationship with the UK and desire for international acceptance generally by breaching the MOU.<sup>77</sup> On this occasion, however, SIAC was – with much apparent reluctance – unable to accept that the threat of international opprobrium and the promise of 'independent' monitoring by the Gadaffi Foundation (an NGO run by Saif Gadaffi, the son of Colonel Gadaffi) would be enough to deter Libya from breaching the MOU. As the Foreign Office Representative himself acknowledged:<sup>78</sup>

*In a conflict between Colonel Qadhafi and what Saif thought was necessary for the MOU to be observed, the father's word would be decisive.*

SIAC found that the Gadaffi Foundation 'was no more independent of the regime than Saif himself and he is not independent'.<sup>79</sup> Noting several times Colonel Gadaffi's 'mercurial personality',<sup>80</sup> SIAC concluded that the 'unpredictability' of his actions meant that, even with the MOU in place, a real risk that those returned would at some point be tortured could not be ruled out.<sup>81</sup> Among other things, it noted the 'willingness of the regime to endure international opprobrium and diplomatic pressure',<sup>82</sup> which may be a polite way of saying that the man who had once been called 'the Mad Dog of the Middle East' by President Reagan was probably prepared to weather whatever diplomatic ill-will might proceed from a breach of the MOU.

Following an unsuccessful challenge to the Court of Appeal, the government opted not to pursue deportations under the Libyan MOU. SIAC's findings in

respect of Jordan and Algeria, by contrast, were the subject of appeals to the House of Lords. Under the 1997 Act, of course, an appeal against SIAC is limited to questions of law, not fact.<sup>83</sup> A key issue in the appeals, therefore, was whether the court's duty under section 6 of the Human Rights Act 1998 to prevent breaches of Convention rights, including Article 3 ECHR, required the Lords to themselves determine the 'real risk' issue by giving anxious scrutiny to the reasoning of SIAC at first instance, or whether the Lords' task was limited to traditional principles of judicial review. The Law Lords unanimously adopted the latter view, confining themselves only to the question of whether SIAC's reasoning at first instance was irrational, ie one no reasonable person could have come to. Accordingly, as Lord Phillips held in respect of Algeria:<sup>84</sup>

*SIAC gave consideration to the reasons why Algeria was not prepared to agree to monitoring and concluded that this was not indicative of bad faith and that there were alternative ways of ascertaining whether there was compliance with the assurances. These conclusions were not irrational.*

In the case of the Jordanian MOU, Lord Phillips similarly concluded:<sup>85</sup>

*SIAC considered in depth the way that Mr Othman was likely to be treated before his trial, during the trial process and after it. The conclusion reached was that there were not substantial grounds for believing that there was a real risk that Mr Othman would be subjected to inhuman treatment. The MOU was not critical to this conclusion. SIAC commented that the political realities in Jordan and the bilateral diplomatic relationship mattered more than the terminology of the assurances. The former matters, and the fact that Mr Othman would have a high public profile, were the most significant factors in SIAC's assessment of article 3 risk. Study of SIAC's lengthy and detailed reasoning discloses no irrationality.*

## **The flaws of assurances against torture**

In his judgment in *RB and U (Algeria)*, Lord Hope offered the following observation, one that bears setting out at length:<sup>86</sup>

*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 ... 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.*

*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. It was to eradicate this evil that the European Convention on Human Rights, following the example of the Universal Declaration of Human Rights by the General Assembly of the United Nations on 10 December 1948, was prepared for the Governments of European countries to enter into. The most important word in this document appears in article 1, and it is repeated time and time again in the following articles. It is the word "everyone". 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.*

*The paradox that this system produces is that, from time to time, much time and effort has to be given to the protection of those who may seem to be the least deserving. Indeed it is just because their cases are so unattractive that the law must be especially vigilant to ensure that the standards to which everyone is entitled are adhered to. The rights that the aliens invoke in this case were designed to enshrine values that are essential components of any modern democratic society: the right not to be tortured or subjected to inhuman or degrading treatment, the right to liberty and the right to a fair trial. There is no room for discrimination here. Their protection must be given to everyone. It would be so easy, if it were otherwise, for minority groups of all kinds to be persecuted by the majority. We must not allow this to happen. Feelings of the kind that the aliens' beliefs and conduct give rise to must be resisted for however long it takes to ensure that they have this protection.*

As correct and as laudable as Lord Hope's observation is, it seems ironic – to say the very least – that it is swiftly followed by his conclusion that the right not to be tortured did not oblige the House of Lords to give any more scrutiny to the actual risk of torture on return than the ordinary principles of appellate review would otherwise require. However much the amount of 'care, time and trouble' may have gone into determining the risk of torture by others, it can hardly be said that the Law Lords' own judgment in *RB* is marked by any 'special vigilance'.

Still, if the judgment of the House of Lords in *RB* is distinguished by the Law Lords' profound reluctance to scrutinise the evidence at hand, that is nothing compared to the facile reasoning of SIAC at first instance. A superficial consideration of SIAC's judgments might lead one to conclude that its rejection of the Libyan MOU was proof of the overall reasonableness of its approach.

Nothing could be further from the truth. The fact that even SIAC found a promise from Colonel Gaddafi too weak an assurance against torture is proof only that its members are not entirely bereft of reason, not that their judgment is therefore to be commended.

The starting point is, of course, that assurances against torture are only relevant in circumstances where the state has already established a reputation for using torture. As the UN Special Rapporteur Against Torture pointed out in 2005:<sup>87</sup>

*The fact that such assurances are sought shows in itself that the sending country perceives a serious risk of the deportee being subjected to torture or ill treatment upon arrival in the receiving country.*

The seriousness of this risk is not merely something to be reduced by assurances, however. It goes to the very credibility of the assurances themselves. For Algeria, Jordan and Libya are all countries that have signed and ratified the UN Convention Against Torture – a more formal and solemn international instrument than any memoranda between states – and yet each is acknowledged by the Foreign Office to be regularly in breach of it. The factual backdrop for assessing assurances is, therefore, not simply the fact that Algeria et al have used torture, but that they have continued to do so for many years in breach of their international obligations, and in the face of international opprobrium for having done so. The significance of Algeria, Jordan and Libya giving assurances against torture must be measured against the fact that they have already done so, and breached those assurances on many occasions. It is therefore hardly ‘unthinkable’ that Algeria or Jordan would breach their assurances not to ill-treat suspects because of the international outcry that would result: their repeated breaches of their promises under the Torture Convention make it all too easy to imagine. However obvious this might seem, it is a consideration that SIAC gave little weight to. In the Abu Qatada case, for instance, it expressed puzzlement as to the UN Special Rapporteur’s criticisms:<sup>88</sup>

*For our part, we have some difficulty in seeing why ... [the UN Special Rapporteur against Torture] ... regards it as being unclear why a bilateral agreement in the form of an MOU would be adhered to, where a multilateral human rights agreement with reporting arrangements has been breached. The answer here as set out above is precisely that it is bilateral, and is the result of a longstanding and friendly relationship in which there are incentives on both sides to comply once the agreement was signed. The failure of those who regard these arrangements as unenforceable, in some asserted but not altogether realistic comparison with international human rights agreements, is a failure to see them in their specific political and diplomatic context, a context which will vary from country to country.*

SIAC's failure to have regard to the long history of broken promises by Algeria et al is all the more striking, given how little the assurances themselves are directed to the issue at hand (especially in the case of Algeria whose assurance was limited to promising that 'human dignity will be respected under all circumstances'). Before SIAC, the Foreign Office bluntly admitted the use of torture by Jordan, Algeria and Libya but this candour is nowhere reflected in the assurances received. One might have thought that, at the very least, an assurance against torture would include the word 'torture' or at least advert to the prohibition against inhuman or degrading treatment and punishment. The Grand Chamber in *Saadi* was of course correct to note that assurances that merely restate existing domestic and international obligations add nothing. But there is a patent air of unreality in assurances that do not even acknowledge the *existence* of those obligations, still less the very harm that they are designed to address and prevent. As Lord Bingham noted:<sup>89</sup>

*a country that promises not to torture anybody we have detained, is most unlikely to admit they ever have tortured anybody. So it is like an alcoholic saying, I'm a reformed alcoholic without ever admitting their alcoholism.*

This air of unreality extends to SIAC's so-called 'rigorous scrutiny' of the facts at first instance.<sup>90</sup> First, SIAC showed little awareness of the substantial difficulties involved in *detecting* torture and ill-treatment, focusing almost completely on treatment involving direct violence against the person and ignoring or excluding the possibility of 'non-physical' techniques such as sensory deprivation and sensory bombardment, solitary confinement, humiliating treatment, threats and intimidation.<sup>91</sup> Added to this is the obvious point that detection depends to a large extent on the co-operation of the individual detainee who is entirely in the hands of the state responsible for his treatment. A detainee who has been the victim of ill-treatment may therefore refuse to report it to outside visitors for fear of reprisals, either against him or family members.

In *Agiza's* case, for instance, the allegation of torture by the Egyptian authorities only came to light when – in his words – it 'no longer matter[ed] what [he] said' to the Swedish officials who visited him every month. The Jordanian MOU makes provision for fortnightly visits from the Adaleh Centre but no provision for medical examination, raising serious doubts about the Centre's ability to detect physical – let alone psychological – ill-treatment. In the Algerian cases, of course, there was not even the assurance of monitoring – SIAC instead concluded that the British Embassy would be able to 'maintain contact' with any detainee and NGOs such as Amnesty International 'can be relied upon to find out if [assurances] are breached and publicise that fact'.<sup>92</sup> In *RB*, SIAC did concede that at least one method of torture might not leave physical marks:<sup>93</sup>

*It is, of course, true that a detainee could be tortured by the chiffon method, and refuse to say anything about it afterwards but such an event could occur even under a monitoring regime.*

But the fact that non-detection would occur even with a monitoring regime is only an argument that shows the inadequacy of monitoring regimes in general: it is hardly an argument that supports sending a suspect back to a country without one.

Secondly, SIAC failed to appreciate problems surrounding the *deniability* of torture, especially 'non-physical' techniques. Denial is, after all, the default position in such cases. In *Agiza*, for instance, the allegation of torture was immediately denied by the Egyptian authorities. And, despite the wealth of evidence available, Algeria, Jordan and Libya have never admitted using torture.<sup>94</sup> There is, of course, a genuine problem for a state that has previously used torture, in that even if it is telling the truth in a particular case it is unlikely to be believed. But this does not mean that such states deserve, as SIAC gave them, the benefit of the doubt. Indeed, the potential for false allegations of torture undermines one of SIAC's key conclusions concerning the return of Abu Qatada:<sup>95</sup>

*If he were to be tortured or ill-treated, there probably would be a considerable outcry in Jordan, regardless of any MOU. The likely inflaming of Palestinian and extremist or anti-Western feelings would be destabilising for the government. The Jordanian Government would be well aware of that potential risk and, in its own interests, would take steps to ensure that that did not happen.*

But, as SIAC also concluded, 'a serious publicised allegation, true or not, could be as de-stabilising as proof that the allegation was correct'.<sup>96</sup> In other words, an allegation would be destabilising whether it was true or false and – in the case of a false allegation – the legitimate denial of the Jordan government would carry as little weight as their previous false denials. So SIAC's conclusion that the authorities would have reason to protect Abu Qatada because of his high-profile holds no water. On the contrary, they have nothing to lose from torturing him because (i) such torture – especially 'non-physical' methods – would be difficult to detect (especially given the MOU's lack of any provision for independent medical inspection) and (ii) any denials on their part would be unlikely to be believed in any event.

Thirdly, there is a glaring disparity between the weight that SIAC gave to *verification* procedures, on the one hand, and the absence of *enforcement* procedures, on the other. In determining whether assurances could remove

a real risk of torture, SIAC placed considerable weight on the possibility of verification of assurances by an independent monitor (cf Mitting J's fourth criterion that 'fulfilment of assurances had to be capable of being verified'). Even the denuded Algerian assurance, SIAC reasoned, was capable of being verified by NGOs such as Amnesty International who had been able to secure access in respect of previous returnees.<sup>97</sup> By contrast, SIAC gave no weight to the lack of any mechanism for *enforcing* any of the assurances, other than the diplomatic consequences that would follow from a breach being discovered. For the assurances themselves make no mention of enforcement of any kind, still less of any remedy for the detainee who is discovered to be a victim of torture. One would think that this lack of any provision for enforcement went directly to the question of the reliability of assurances. We would not say, for instance, that a contract under ordinary law which did not contain any sanction for breach or remedies would be one that could safely be relied upon in any serious matter. Still less would we take seriously a criminal law that did not provide any punishment for its breach. And yet the absence of any formal provision for enforcement of the assurances drew no adverse comment or note of concern from SIAC:<sup>98</sup>

*whilst it is true that there are no specific sanctions for breaches, and the MOU is certainly not legally enforceable, there are sound reasons why Jordan would comply and seek to avoid breaches. The MOU would be an important factor in the way in which Jordan conducted itself.*

SIAC instead accepted the Foreign Office's evidence that the Algerian and Jordanian governments set great store in their relations with the UK and would not breach their assurance for fear of jeopardising those relations and, as the Foreign Office expert described it, their own sense of honour:<sup>99</sup>

*[The Jordanian authorities] ... were men of honour and ... [the Foreign Office expert] ... did not believe that they would lightly not implement the commitment they had given or turn a blind eye whilst others did not implement it.*

Of course, the desire to maintain good relations would equally count as an additional reason why Jordan and Algeria would wish to *conceal* any breach that did occur and deny any breach that was detected. SIAC considered the argument that both the UK and Jordan 'would have an incentive not to explore the existence of any breaches' but concluded that:<sup>100</sup>

*The incentives which are present for both parties to the MOU would bite when an allegation was made and not just when the breach was proved. Take the desire of the UK to return Islamist extremists to Middle East and*

*North African countries: that process would be inhibited by any failure to provide proper answers to well-founded allegations of a breach and if there were allegations that the Centre had been prevented from fulfilling its functions, that would be a very serious matter.*

This does not, however, answer the point for it continues on the assumption that the processes of detection and monitoring will work effectively to bring torture to light, when both parties have an interest in non-detection. More generally, it is difficult to reconcile SIAC's conclusions about the importance of diplomatic ties with any appreciable reality. The mere fact that the governments of Jordan and Algeria are sensitive about protecting their reputations on the international stage proves nothing – all governments are jealous of slights to their dignity and it is often the governments with the worst reputations that are the most protective of them. There can be no better illustration of this than that, even in the midst of the Final Solution, there were still SS officers worried that breach of an assurance to the Slovakian government would 'seriously injure the ... prestige of Germany abroad'. It may indeed be true that the Jordanians who negotiated the MOU with Britain think themselves 'men of honour' but that honour counts for little when one considers the methods of their General Intelligence Department. SIAC's conclusion that the receiving states' fear of damage to their reputation would be sufficient to protect detainees from torture is not only irrational in the public law sense: it actively beggars belief.

Equally fatuous is SIAC's finding that the UK government would be vigilant in ensuring that the assurances were honoured by Algeria and Jordan, including the threat of cutting ties, loss of economic co-operation, etc, in the event that breaches were discovered. For if it were true that the UK was prepared to use its diplomatic weight to prevent the use of torture by both countries, it surely has been a course of action that has been open to it on a unilateral basis for many a year. The UK does not appear hitherto to have threatened either Algeria or Jordan with negative consequences for their many breaches of the Torture Convention, so why is it credible to think that it will do so in the context of bilateral memoranda? On the contrary, the weight of recent evidence suggests that the human rights and rule of law concerns of the UK government are all too easily subordinated to its other foreign interests. In the *Corner House* case, for instance, the Prime Minister and the Attorney General each made clear that the importance of UK co-operation with Saudi Arabia on national security matters took precedence over a criminal investigation into corruption and bribery claims.<sup>101</sup> And in the *Binyam Mohamed* case currently before the High Court, the importance of US intelligence-sharing has been cited as grounds for refusing to disclose evidence showing potential complicity by UK officials in the torture of a British resident in an interrogation in Pakistan.<sup>102</sup> SIAC accepted the Foreign Office's evidence that Jordan is 'a valued partner in the Middle East' whose

relations include 'defence and security cooperation'.<sup>103</sup> SIAC similarly accepted that 'there are significant and strengthening mutual ties between Algeria and the United Kingdom' including 'the exchange of security and counter-terrorism information'.<sup>104</sup> Even if the UK were diligent in monitoring compliance with the assurances, it is not difficult to imagine a similar threat from either Algeria or Jordan to withdraw co-operation on counter-terrorism matters in the event that a breach were discovered.

## Conclusion

The fate of the Algerian returnees and Abu Qatada is almost certain to be decided by the ECtHR: interim measures under rule 39 have already been issued in the latter's case. One can predict with equal certainty that the Strasbourg court will not be as credulous as SIAC or as complacent as the House of Lords were on the issue of safety on return. The point is not that an assurance against ill-treatment from a foreign government is never a relevant consideration in determining whether a person will face a real risk of ill-treatment contrary to Article 3 ECHR on return. After all, Article 3 ECHR covers a much broader range of treatment than torture at the hands of the state, and it would be unusual if – for example – one could not place some weight on an assurance from another EU country, in the knowledge that the framework of the EU and the Council of Europe as well as domestic law would provide a degree of security. The point is that an assurance from a country such as Algeria or Jordan can never be credible, for promises against torture from a government that tortures its own citizens are worth nothing. It is, as Aeschylus reminds us, not the promise that makes us believe the man, but the man the promise.

But the failure of the courts to properly scrutinise the use of assurances against torture is only one part of the story. The ultimate responsibility lies with the UK government in its dishonourable pursuit of assurances in the first place. After all, post-return monitoring seems a fine idea until one remembers that Eichmann was willing to consider it too. Indeed, one might have thought that that example would be reason enough for the British government to choose a different path. But to solicit such promises under the fresh guise of protecting human rights is an even more discreditable sham, one that does nothing to protect detainees in the receiving state and serves only to cheapen Britain's own reputation in the international fight against torture.

***Eric Metcalfe is Director of Human Rights Policy at JUSTICE.***

## Notes

1 Director of human rights policy, JUSTICE. I am grateful to Julia Hall of Human Rights Watch, our co-intervenor in *RB & U (Algeria)*, n3 below, and Lord Pannick QC, Helen Mountfield, Tom Hickman and Herbert Smith LLP who acted for both organisations in the intervention, for much of the material that formed the basis of this article.

2 Fragment 385, trans MH Morgan (1895).

3 *RB & U (Algeria) and OO (Jordan) v Secretary of State for the Home Department* [2009] UKHL 10. JUSTICE and Human Rights Watch were joint interveners in the appeal.

4 Prime Minister's press conference, 5 August 2005.

5 See the discussion of *Yousef v Home Office* below.

6 Other countries understood to be the subject of negotiations were Egypt, Morocco, Tunisia and Saudi Arabia.

7 Written statement of Lord West, *Hansard*, 20 January 2009, col WS161.

8 'Winslow's extradition; His released again opposed by the British government', *New York Times*, 13 May 1876.

9 Section 10 of the 1870 Act provides: '*In the case of a fugitive criminal accused of an extradition crime, if . . . such evidence is produced as . . . would, according to the law of England, justify the committal for trial of the prisoner if the crime of which he is accused had been committed in England, the police magistrate shall commit him to prison, but otherwise shall order him to be discharged*'.

10 Article 10 of the 1842 Treaty, better known as the Webster-Ashburton Treaty, was the first formal extradition treaty concluded by the US. The treaty is better known for its settlement of a number of boundary issues between the US and British North America and the suppression of the slave trade.

11 See T Wu, 'Treaties Domains' [2007] 93 *Virginia Law Review* pp572-649 at pp624-625.

12 Testimony of SS-Hauptsturmfuehrer Dieter Wisliceny to the International Military Tribunal at Nuremberg, 3 January 1946.

13 Article 11. See also eg Article 9 of the 1981 Inter-American Convention on Extradition: '*The States Parties shall not grant extradition when the offense in question is punishable in the requesting State by the death penalty, by life imprisonment, or by degrading punishment, unless the requested State has previously obtained from the requesting State, through the diplomatic channel, sufficient assurances that none of the above-mentioned penalties will be imposed on the person sought or that, if such penalties are imposed, they will not be enforced*'.

14 *United States ex rel Tie Sing Eng v Murff*, 165 F.Supp. 633 at 634 (SDNY 1958). See also *Chong Chak v Murff*, 159 F. Supp. 484 (SDNY 1958).

15 Indeed, this presumably explains why several states provide a constitutional bar against their citizens being extradited.

16 Cf the continuing public outcry in Britain over the 2003 UK-US Extradition Treaty which requires the British government to show probable cause when requesting the extradition of US suspects but does not require the US government to show a prima facie case when requesting the extradition of UK suspects. See eg, 'US-UK extradition deal attacked', BBC News website, 14 February 2008; 'Ian Norris wins appeal against US extradition', *Daily Telegraph*, 14 March 2008.

17 As the Home Secretary told Parliament in 1971: '*Whether an individual's presence in this country is a danger to this country is not a legal decision. It is not a justiciable issue or a matter of law; it is a matter of judgment. Judgment should be exercised by the Government, subject to the House of Commons, and not by a tribunal which is not under the control of the House*' (*Hansard*, HC Debates, 15 June 1971, col 392).

18 11 EHRR 439.

19 *Ibid*, para 15.

20 *Ibid*, para 20.

21 *Ibid*, para 69.

22 *Ibid*, para 93.

23 *Ibid*.

24 *Ibid*, para 22.

25 *Ibid*, para 98. Emphasis added.

- 26 Ibid, paras 90-91.
- 27 Ibid, para 111.
- 28 1951 Convention on the Status of Refugees, article 32(1): *'[t]he Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order'*. Article 33(2) provides: *'[t]he benefit of the ... [obligation of non-refoulement] ... 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 judgment of a particularly serious crime, constitutes a danger to the community of that country'*.
- 29 (1996) 23 EHRR 413, paras 79-82.
- 30 Ibid, para 37.
- 31 Ibid, para 105.
- 32 [2004] EWHC 1884.
- 33 Ibid, para 6.
- 34 Ibid, para 13.
- 35 Ibid, para 14.
- 36 Ibid, para 15.
- 37 Ibid, para 18.
- 38 Ibid, para 23.
- 39 Ibid, para 26.
- 40 Ibid, para 29.
- 41 Ibid, para 38.
- 42 Ibid, para 51.
- 43 (2005) 41 EHRR 494.
- 44 Ibid, para 28. A further assurance from the Uzbek Ministry of Foreign Affairs maintained that *'The assurances given by the Public Prosecutor of the Republic of Uzbekistan concerning Mr Mamatkulov and Mr Askarov comply with Uzbekistan's obligations under the [UN Convention Against Torture]'*.
- 45 Ibid, para 10 of dissenting judgment.
- 46 CAT/C/34/D/233/2003, 20 May 2005.
- 47 Ibid, para 4.12.
- 48 Ibid, para 3.4.
- 49 Ibid, para 2.10.
- 50 Ibid, para 11.3.
- 51 Ibid, para 13.5. Cf *Attia v. Sweden*, Case No 199/2002, Decision adopted on 17 November 2003.
- 52 Ibid, para 13.4.
- 53 Ibid. Emphasis added.
- 54 *Saadi v Italy*, application no 37201/06, judgment 28 February 2008.
- 55 Ibid, para 54.
- 56 Ibid, para 55.
- 57 Ibid, para 117. This followed an earlier intervention by the UK in the case of *Ramzy v Netherlands*, which has yet to be heard.
- 58 Ibid, paras 117-123: *'in cases concerning the threat created by international terrorism, the approach followed by the Court in the Chahal case (which did not reflect a universally recognised moral imperative and was in contradiction with the intentions of the original signatories of the Convention) had to be altered and clarified'*.
- 59 Ibid, para 139: *'The Court considers that the argument based on the balancing of the risk of harm if the person is sent back against the dangerousness he or she represents to the community if not sent back is misconceived. The concepts of "risk" and "dangerousness" in this context do not lend themselves to a balancing test because they are notions that can only be assessed independently of each other. Either the evidence adduced before the Court reveals that there is a substantial risk if the person is sent back or it does not. The prospect that he may pose a serious threat to the community if not returned does not reduce in any way the degree of risk of ill treatment that the person may be subject to on return'*.
- 60 Ibid, para 147.
- 61 Ibid, para 148.
- 62 Application 2947/06, 24 April 2008, at para 34.

- 63 Ibid, para 127.
- 64 *Hansard*, HC Debates, 26 January 2005, col 307.
- 65 *Y v Secretary of State for the Home Department* (SC/36/2005, 24 August 2006), para 256 per Ouseley J.
- 66 *BB v Secretary of State for the Home Department* (SC/39/2005, 5 December 2006), para 9. Note that *BB* was subsequently retitled *RB*.
- 67 Ibid, para 11.
- 68 Ibid, para 5.
- 69 Ibid, para 18.
- 70 Ibid, para 21. Emphasis added.
- 71 *Omar Othman* (aka *Abu Qatada*) *v Secretary of State for the Home Department* (SC/15/2005, 26 February 2007), paras 129-153.
- 72 Ibid, paras 139-145.
- 73 Ibid, para 356.
- 74 Ibid, para 362.
- 75 Ibid.
- 76 *DD and AS v Secretary of State for the Home Department* (SC/42 and 50/2005, 27 April 2007), para 145.
- 77 Ibid, para 275.
- 78 Ibid, para 284.
- 79 Ibid, para 330.
- 80 Ibid, paras 187, 290, 310, 346 and 347.
- 81 Ibid, para 371.
- 82 Ibid, para 351.
- 83 7 Special Immigration Appeals Commission Act 1997.
- 84 *RB & U*, n3 above, para 124.
- 85 Ibid, para 126.
- 86 Ibid, paras 209-211.
- 87 'Diplomatic assurances' not an adequate safeguard for deportees UN Special Rapporteur Against Torture warns', United Nations press release, 23 August 2005.
- 88 *Omar Othman* (aka *Abu Qatada*), n71 above, para 508.
- 89 New Zealand press interview, 8 December 2008, see [www.scoop.co.nz](http://www.scoop.co.nz).
- 90 See eg *RB & U*, n3 above, para 66.
- 91 See eg M Basoglu, M Livanou, C Crnobar, 'Torture vs Other Cruel, Inhuman and Degrading Treatment – Is the Distinction Real or Apparent?', (2007) 3 *Archives of General Psychiatry* 64: 'In conclusion, aggressive interrogation techniques or detention procedures involving deprivation of basic needs, exposure to aversive environmental conditions, forced stress positions, hooding or blindfolding, isolation, restriction of movement, forced nudity, threats, humiliating treatment, and other psychological manipulations conducive to anxiety, fear, and helplessness in the detainee do not seem to be substantially different from physical torture in terms of the extent of mental suffering they cause, the underlying mechanisms of traumatic stress, and their long-term traumatic effects'. See also the discussion of the psychological effects of isolation, sensory bombardment/deprivation and witnessing torture of others in the report of Physicians for Human Rights, *Broken Laws, Broken Lives: Medical Evidence of Torture by US Personnel and Its Impact*, June 2008.
- 92 *BB*, n66 above, at para 21.
- 93 Ibid.
- 94 Indeed, such governments go further, accusing their accusers of making false allegations - see eg the US State Department Report on Jordan for 2005: 'Government officials denied many allegations of detainee abuse, pointing out that many defendants claimed abuse in order to shift the focus away from their crimes. During the year, defendants in nearly every case before the State Security Court alleged that they were tortured while in custody' (para 128).
- 95 *Omar Othman* (aka *Abu Qatada*), n71 above, para 356.
- 96 Ibid.
- 97 *BB*, n66 above, para 19.
- 98 Ibid, para 507.

99 *Ibid*, para 285.

100 *Ibid*, para 504.

101 *R (Corner House Research and others) v Director of the Serious Fraud Office* [2008] UKHL 60.

102 See eg *R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 4)* [2009] EWHC 152 (Admin).

103 *Omar Othman (aka Abu Qatada)*, n71 above, para 277.

104 *BB*, n66 above, para 18(ii).