

Terms of Reference for the Independent Review of Deportation with Assurances

Reviewer

- David Anderson QC, Independent Reviewer of Terrorism Legislation

Timing

- Commissioned November 2013.
- Provisionally, report published late 2014.
- Provisionally, Government response early 2015.

Aim

- 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.

Context

- DWA enables the UK to deport foreign nationals suspected of terrorism in compliance with its obligations under the European Convention on Human Rights, the UN Convention on Torture and the International Covenant on Civil and Political Rights.
- Jurisprudence in this area has developed as cases are tested in the domestic and international courts. Some elements of the legal context for the operation of the DWA policy are set out in appendix A.

Key questions

- 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?
- 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?
- 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?

Out of scope

- Merits of individual cases, to avoid duplicating or prejudicing the work of the courts.

Report

- To include background on how the DWA regime, including the negotiation of arrangements, evolved and how arrangements are used.
- Unclassified.
- To be laid in Parliament.
- Separate annex on international comparisons.

Legal context for the Deportation With Assurances Policy

- In *Chahal v the United Kingdom (1996)* the European Court of Human Rights Court (ECHR) stated that:

‘The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim’s conduct. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 even in the event of a public emergency threatening the life of the nation.
- In *Saadi v Italy (2008)* the Court observed that:

‘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... reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention.

‘...if, ..., 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*). The weight to be given to assurances from the receiving State depends, in each case, on the circumstances prevailing at the material time.’
- In *Othman v the United Kingdom (2012)* the ECtHR stated that:

‘In assessing the practical application of assurances and determining what weight is to be given to them, the preliminary question is whether the general human rights situation in the receiving State excludes accepting any assurances whatsoever. However, it will only be in rare cases that the general situation in a country will mean that no weight at all can be given to assurances.

‘...the Court will assess first, the quality of the assurances given and, second, whether in light of the receiving State’s practices they can be relied upon. In doing so the Court will have regard, inter alia, to the following 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;
 - 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.'
- In *BB v the Secretary of State for the Home Department (2006)* the Special Immigration Appeals Commission (SIAC) stated that:
 - 'Without attempting to lay down rules which must apply in every case, we believe that four conditions must, in general, be satisfied:
 - i. the terms of the assurances must be such that, if they are fulfilled, the person returned will not be subjected to treatment contrary to Article 3;
 - ii. the assurances must be given in good faith;
 - iii. there must be a sound objective basis for believing that the assurances will be fulfilled; [and]
 - iv. fulfilment of the assurances must be capable of being verified.'
 - Also in *BB v SSHD (2006)* SIAC concluded that:
 - '...verification can be achieved by a variety of means, both formal and informal and by a variety of agencies, both governmental and non-governmental. "Monitoring" is one means of verification, but not the only one.'