Deportation of individuals who may face a risk of torture

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International law places obligations on the UK when deporting individuals to countries where they may face a real risk of torture. Although the Refugee Convention allows refugees to be removed if they pose a risk to national security, the absolute prohibition on torture in the European Convention on Human Rights was interpreted in the case of *Chahal v United Kingdom* as precluding a 'balancing act' between a person's national security risk and the risk that he may be tortured on return.

Initially, it appeared that the Government would intervene in a case before the European Court of Human Rights (*Ramzy v Netherlands*) seeking to overturn the decision in *Chahal*. However, the case was overtaken by events and the issue was considered in a different case, *Saadi v Italy*. In that case the Grand Chamber of the European Court of Human Rights upheld the reasoning in *Chahal*.

The Government has also sought to use Memorandum of Understanding with foreign governments as a means to facilitate the deportation of foreign nationals. This approach has had mixed results, but has been upheld by the courts in some cases.

In a recent court case involving Abu Qatada, the European Court of Human Rights has ruled that the authorities cannot deport him to Jordan, in circumstances where evidence that could be adduced against him is likely to have been obtained by the torture of third parties. The court ruled that this would amount to a breach of Article 6 of the Convention, since allowing the use of evidence obtained by torture during a criminal trial would amount to a flagrant denial of justice. In reaching this decision, the Strasbourg court overruled a (judicial) decision of the House of Lords. After receiving further diplomatic assurances from Jordan, the Government are making renewed legal efforts to deport Abu Qatada.

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1 The legal framework

The international legal framework relating to removal is complex. In particular, the *Geneva Convention*, the *European Convention on Human Rights* (and the *Human Rights Act 1998* which brings the European Convention into UK law) and the *United Nations Convention Against Torture* are all relevant.

1.1 The Geneva Convention

The protection given to refugees by the 1951 UN Convention relating to the Status of Refugees (the Geneva Convention) is not absolute. Refugees may be removed if their presence in the host country is a threat to national security or if their presence is not conducive to the common good.

Article 32 of the Geneva Convention provides that:

> 1. The contracting states shall not expel a refugee lawfully in their territory save on grounds of national security or public order.
>
> 2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.
>
> 3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

Article 33 of the same convention provides that:

> 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 judgment of a particularly serious crime, constitutes a danger to the community of that country.

The term '*non-refoulement'* is a recognised principle in international law under which refugees should not be returned to places where their lives or freedoms could be threatened. However, as can be seen, Articles 32 and 33 do allow the expulsion of refugees in certain circumstances.

1.2 The European Convention on Human Rights and the Human Rights Act

Article 3 of the *European Convention on Human Rights* does not at first glance seem relevant to removals:

Article 3

Prohibition of torture

> No one shall be subjected to torture or to inhuman or degrading treatment or punishment

However, it has been interpreted to demand that not only must governments not subject people to inhuman and degrading treatment, they must also consider the extra-territorial implications – i.e. (in this context) whether deporting someone might put them at risk of inhuman and degrading treatment in the country to which they would be deported. The case-law on this is discussed below.

Unlike the Geneva Convention, there is no exception on national security grounds. Thus someone who had lost or forfeited the protection of the Geneva Convention might still be able to claim the protection of the ECHR. Article 3 also applies to foreign nationals who are not granted refugee status. It cannot be derogated from in times of emergency.

The introduction of the *Human Rights Act 1998* allowed individuals to rely on Convention rights before the UK courts.

1.3 The United Nations Convention Against Torture (UNCAT)

Article 3 of UNCAT sets out the obligation not to return anyone to a state where they face torture. It states that:

> 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.

The Joint Committee on Human Rights (JCHR) has noted that "this obligation mirrors that established in the jurisprudence of the European Court of Human Rights, notably in the case of *Chahal v UK*"[1] (see below). In particular, as with the ECHR, it does not include a national security exemption.

2 The case of Chahal v United Kingdom

The legal basis of the current difficulties the Government has faced in deporting suspected terrorist suspects can be traced back to the case of *Chahal v United Kingdom*[2] (hereafter *Chahal*), which predates the introduction of the *Human Rights Act 1998.*[3]

In the case of *Chahal*, the applicant, who was a Sikh separatist leader, had been detained in custody for deportation, the Home Secretary having determined that he was a threat to national security. His application for asylum was refused. That refusal was quashed by the High Court, but the Home Secretary decided to maintain the refusal of asylum and proceed with deportation. Further legal challenges were unsuccessful. Relying on Articles 3, 5 and 13 of the *European Convention on Human Rights*, the applicant complained, *inter alia*, that his deportation to India would expose him to a real risk of torture or degrading treatment. The European Court of Human rights held (by 12 votes to 7) that in the event of the Secretary of

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[1] Joint Committee on Human Rights, *The UN Convention on Torture*, 19th Report of Session 2005-6, para 95

[2] (1997) 23 E.H.R.R. 413

[3] Deportation contrary to Article 3 was considered also in the earlier case of *Soering v United Kingdom* (1989) 11 EHRR 439 which related to the proposed extradition of a German national from the United Kingdom to the United States (where he would have potentially faced the death penalty).The UK was subsequently able to extradite Jens Soering after obtaining further assurances from the US regarding the death penalty

State's decision to deport the applicant to India being implemented, there would be a violation of Article 3 of the Convention. The Court held that:

> Article 3 enshrines one of the most fundamental values of democratic society. 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.[4]

Subsequently, some States have focused on the dissenting judgment by the minority (7 members) of the Court (see below). In that judgment, the dissenting judges indicated that in their view the prohibition of torture was not absolute in 'extra-territorial' cases: where there was a "substantial doubt" as to whether the person would be subjected to torture or inhuman or degrading treatment on return, the threat to security could be sufficient to justify deportation:

> [While] we agree with the majority that national security considerations could not be invoked to justify ill-treatment at the hands of a Contracting State within its own jurisdiction, and that in that sense the protection afforded by Article 3 (art. 3) is absolute in character. But in our view the situation is different where, as in the present case, only the extra-territorial (or indirect) application of the Article (art. 3) is at stake. There, a Contracting State which is contemplating the removal of someone from its jurisdiction to that of another State may legitimately strike a fair balance between, on the one hand, the nature of the threat to its national security interests if the person concerned were to remain and, on the other, the extent of the potential risk of ill-treatment of that person in the State of destination. Where, on the evidence, there exists a substantial doubt as to the likelihood that ill-treatment in the latter State would indeed eventuate, the threat to national security may weigh heavily in the balance. Correspondingly, the greater the risk of ill-treatment, the less weight should be accorded to the security threat […] The essential difficulty lies in quantifying the risk. In reaching their assessment, the majority of the Court say that they are not persuaded that the assurances given by the Indian Government would provide Mr Chahal with an adequate guarantee of safety and consider that his high profile would be more likely to increase the risk to him than otherwise. It is, however, arguable with equal, if not greater, force that his high profile would afford him additional protection. In the light of the Indian Government's assurances and the clear prospect of a domestic and international outcry if harm were to come to him, there would be cogent grounds for expecting that, as a law-abiding citizen in India, he would be treated as none other than that. It could well be that the existence or extent of any potential threat to him would largely depend on his own future conduct.[5]

3 International approaches

The Joint Committee on Human Rights (JCHR) considered the position of other jurisdictions on the absolute prohibition on deportation to face a risk of torture. It indicated that "the absolute prohibition of deportation to face a risk of torture has been challenged in other

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[4] (1997) 23 E.H.R.R. 413, at 414 and see also the case of *Aksoy v Turkey* (1996) 23 EHRR 553, para 62, in which the court reiterated that "Even in the most difficult of circumstances, such as the fight against organised terrorism and crime, the Convention prohibits in absolute torture or inhuman or degrading treatment or punishment"

[5] Ibid

jurisdictions, notably in Canada".[6] In *Suresh v Canada*,[7] the Canadian Supreme Court, while acknowledging the clear position under international law prohibiting deportations to face torture, nevertheless stated on an application of section 1 of the Canadian Charter of Rights and Freedoms: "[w]e do not exclude the possibility that in exceptional circumstances, deportation to face torture might be justified".[8] In a case decided by the New Zealand Supreme Court in June 2005, however, *Attorney General v Zaoui*[9], the Supreme Court of New Zealand distinguished Suresh as applying only to the interpretation of the Canadian Charter, and held, interpreting the New Zealand Bill of Rights in light of guarantees under the International Covenant on Civil and Political Rights and the Convention Against Torture, that the right not to be deported to face torture could not be balanced against considerations of national security.[10]

US law and practice on deporting when there is a risk of torture

The Eighth Amendment to the Unites States Constitution prohibits "cruel and unusual punishment". In *Furman v. Georgia*, [1972] SCT-QL 2435, the Supreme Court considered whether the death penalty constituted cruel and unusual punishment. Torture, inhuman or degrading treatment is prohibited in the US as a result of its obligations under the UN International Covenant on Civil and Political Rights (ICCPR), the UN *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (Convention Against Torture), by customary international law, and by US domestic law, which prohibits acts of torture both inside and outside the United States, and at both the federal and state levels.

In the case of *Furman*, Justice Marshall set out four criteria that help a Court determine what constituted cruel and unusual punishment:

- Punishments that involve so much physical pain and suffering that civilized people cannot tolerate them (para. 203).
- Punishments that are unusual (i.e., the meaning in the legislation is not clear). If such treatments exist, they must be intended to serve a humane purpose (para. 204).
- Punishments that are excessive and serve no valid legislative purpose (para. 205).
- A punishment may be valid and serve a legislative purpose but it may be invalid if popular sentiment abhors it. This sentiment can be discerned from an examination of the evolving standards of decency that mark the progress of a maturing society (paras. 200 and 206).

The US adheres to the principle that a person should not be deported to a country when there is a risk of torture. The Fourth Periodic Report of US to United Nations Committee on

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[6] Joint Committee on Human Rights, *The UN Convention on Torture,* 19th Report of Session 2005-6, para 23

[7] Manickavasagam Suresh v Minister of Citizenship and Immigration and the Attorney General of Canada (Suresh v Canada), 2002, SCC 1, File No. 27790, January 11, 2002.

[8] Ibid., para 78. Section 1 of the Canadian Charter provides that the rights and freedoms set out in it are guaranteed "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" and has been interpreted by the Supreme Court of Canada as involving an assessment of proportionality in its application to all rights, in contrast to Article 3 ECHR and UNCAT. For more on the case of Suresh, see for example, *International Journal of Refugee Law*, Volume 15, Number 1 (2003) "Re-configuring Non- refoulement? The Suresh Decision, 'Security Relativism', and the International Human Rights Imperative, Obiora Chinedu Okafor and Pius Lekwuwa Okoronkwo and *Third World Quarterly*, Volume 27, Number 5 (2006) "Political Asylum and Torture: a comparative analysis", Wadie E Said

[9] [2005] NZSC 38

[10] Ibid, paras 90-93

Human Rights Concerning the International Covenant on Civil and Political Rights, 30 December 2011 sets out full details on the US position.[11]

4 The proposed *Ramzy v Netherlands* 'test case'

The UK Government was backing a test case at Strasbourg (*Ramzy v Netherlands*), together with the Netherlands, Lithuania, Portugal and Slovakia, to overturn the *Chahal* ruling. The thrust of its argument was that it should be able to balance the risk of harm against national security considerations. The Government has also arranged a number of memoranda of understanding with various countries which are currently said to subject returnees to torture or inhuman or degrading treatment (an issue discussed below).

The *Ramzy* case related to an Algerian national, who was suspected of involvement in an Islamic extremist group in the Netherlands. The European Court of Human Rights issued a short press release on receipt of the application, in which it outlined the facts of the case:

> The applicant claims to be Mohammed Ramzy, an Algerian national who was born in 1982. He resides in the Netherlands, where he is known to the authorities under that name and ten other names. He was arrested in the Netherlands on 12 June 2002 on suspicion of involvement in an Islamic extremist network active in the Netherlands, linked to the Algerian Salafist Group for Preaching and Combat (Groupe Salafiste pour la Prédication et le Combat; "GSPC"). The network's main activities are considered to be: aiding and abetting people who have actively participated in the holy war ("jihad"), forgery of identity papers, the recruitment and preparation of young men in the Netherlands for active participation in the holy war, and drugs trafficking for the purposes of financing its activities. […] The applicant in the case *Ramzy v. the Netherlands* (application no 25424/05) complains under Article 3 (prohibition of torture or inhuman or degrading treatment) of the *European Convention on Human Rights* that, if removed to Algeria, he will be exposed to a real risk of torture or ill-treatment at the hands of the Algerian authorities.[12]

In its report *The UN Convention Against Torture* (UNCAT) the Joint Committee on Human Rights criticised the Government's intervention in the case of *Ramzy*:

> The Government has stated that it does not wish to tamper with the absolute nature of the prohibition of torture or deportation to face torture. Such statements sit uneasily, however, with the argument made in the Government's intervention in *Ramzy*, which advocates the revision of *Chahal* on the grounds that: 'If [the *Chahal*] judgment is accepted as currently understood, in a case in which substantive grounds are shown for believing there is a real risk of ill-treatment in a receiving State, it is not possible to remove a person believed to threaten the Contracting State and its citizens through terrorism'.[…] "Whilst we acknowledge the Government's right to intervene in any appropriate case before the European Court of Human Rights, we are concerned that the intervention in *Ramzy v Netherlands*, in arguing for deportations of terrorist suspects despite a real risk of torture on their return, may send a signal that the absolute prohibition on torture may in some circumstances be overruled by national security considerations. We reiterate our view that the absolute nature of the prohibition on torture precludes any balancing exercise between considerations of national security and the risk of torture. In our view, the principle established in *Chahal*

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11 See also: *European Journal of Social Sciences*, Volume 24, Number 4 (2011), "The Concept of Inhuman and Degrading (Cruel and Unusual) Punishment or Treatment (In the American, European and Arabic legislations)", Shaimaa Attalla, Assistant Professor, Faculty of Law , Zagazig University

12 http://www.echr.coe.int/eng/press/2005/Oct/ApplicationlodgedRamzyvNetherlands.htm

> *v UK* is essential to effective protection against torture, and accordingly should be maintained and respected.[13]

The intervention was also criticised by human rights groups. Liberty suggested that the UK's proposals were unlawful:

> Since the attacks on London in July [2005], the Government has proposed alternatives to undermine the effect of *Chaha*l. It has suggested 'amending' the Human Rights Act and has obtained diplomatic assurances ('Memoranda of Understanding') from states known to use torture with the intention of sending people to those states. Now the Government is intervening in another ECHR case, *Ramzy v the Netherlands*. It concerns the proposed return of Mr Ramzy to Algeria by the Dutch authorities. Mr Ramzy claims he will be tortured if sent to Algeria. The UK Government will argue that the rule which prohibits deporting people to face torture ought to be revisited. Along with other human rights organisations we will also be intervening in the case, arguing against the Government and in defence of protections from torture. As the Government chips away at human rights protections, we risk losing the liberties that form the core of British values. We believe that the UK's proposals are unlawful and at odds with the international consensus. The ban on torture is absolute. Security concerns cannot be used to override it.

A number of human rights groups, including INTERIGHTS, Amnesty International and Human Rights Watch, also intervened in the case to support the original *Chahal* decision. In their submission to the European Court of Human Rights, they argued that international law did not permit a balancing exercise:

> No exceptional circumstances, however grave or compelling, can justify the introduction of a "balancing test" when fundamental norms such as the prohibition on *non-refoulement* in case of torture or ill-treatment are at stake. This is evident from the concluding observations of both HRC [UN Human Rights Committee] and CAT [UN Committee Against Torture] on State reports under the ICCPR [International Covenant on Civil and Political Rights] and UNCAT, respectively.[14] On the relatively few occasions when states have introduced a degree of balancing in domestic systems, they have been heavily criticised in concluding observations of CAT[15], or the HRC.[16][17]

JUSTICE and Liberty also intervened in the case, supporting the original decision in *Chahal*.

The point made by the JCHR about the dangerous signal that amending Chahal might send was put to the then Lord Chancellor in July 2006 by members of the Constitutional Affairs Select Committee. In particular, they addressed the issue as to whether the Government was moving away from an absolute prohibition on deportation to torture towards a balancing between the risk of an individual committing actions that would threaten the lives of British nationals and that of torture if that individual was deported:

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[13] Joint Committee on Human Rights, *The UN Convention on Torture,* 19th Report of Session 2005-6, paras 24 26

[14] E.g. CAT's Concluding Observations on Germany (2004), commending the reaffirmation of the absolute ban on exposure to torture, including through refoulement, even where there is a security risk

[15] See CAT's Concluding Observations on Sweden's Report (2002, §14); and on Canada's Report (2005, § 4(a)).

[16] See also HRC Concluding Observations on Canada's Report (1999, §13) condemning the Canadian Suresh case, which upheld a degree of balancing under Article 3, based on national law, and Mansour Ahani v. Canada, (2002, § 10.10) where HRC also clearly rejected Canada's balancing test in the context of deportation proceedings

[17] Written submission to the European Court of Human Rights from Amnesty International Ltd., The Association For The Prevention of Torture, Human Rights Watch, INTERIGHTS, The International Commission of Jurists, Open Society Justice Initiative and Redress in the case of *Ramzy v Netherlands*

Q274-6 Dr Whitehead: "It is impossible for a signatory to the *European Convention on Human Rights* to deport a foreign national in circumstances where he or she may face inhuman or degrading treatment. […] Do you consider that on human rights grounds that should continue to be the case? What exactly is your view of where the rubbing point is?"

Lord Falconer of Thoroton: "One can see a point where one says that if the risk of suffering degrading and inhuman treatment or torture is quite low and the risk of the individual doing something damaging to the people here is quite high the balance may favour deportation. I make it clear that I do not say there should be deportation for torture but deportation where there is a genuine view that the chances of torture are sufficiently small to justify it happening. Indeed, that is broadly the argument that the British Government is running in the case of *Ramzy* before the European Court of Human Rights. It is in effect trying to get back to the pre-*Chahal* position in 1996 before the European Court of Human Rights. It is a difficult balance to strike, but it seems to us that it does not in any way conflict with our absolute prohibition on torture, which we as a nation take, but recognises that some sort of balance needs to be struck."

Q277 Dr Whitehead: "You have slightly anticipated my question about *Ramzy*. It has been said by the Joint Committee on Human Rights that to argue for the deportations of terrorist suspects where there is a real risk of torture on their return may send a signal that the absolute prohibition on torture may in some circumstances be overruled by national security considerations. The Committee has referred to precisely that juxtaposition and talked about national security considerations. How do you respond to that criticism?"

Lord Falconer of Thoroton: "It seems to me to be sensible and fair and not against the absolute prohibition on torture to say that in quite a lot of countries the state will not engage in torture but we recognise that the ability of the state to protect that individual from other agencies, for example, is very much less than it is here. Therefore, if he goes back there is some risk but it is not very high. If an individual is actively threatening the lives of people in this country and there is no ability to prosecute that individual is it legitimate to say that there is a level of risk which does not look as if it will be realised but it exists which that individual should be prepared to take in going back because of the much more real and large threat that that person poses for the people of this country? That does not seem to me either to promote torture, because we make absolutely clear that we abhor it, or to constitute an unbalanced approach to the issue. I make clear we are not saying that in some circumstances torture is justified, but if a person threatens the lives of people in this country it may well be that that person has to endure a higher risk of it than might otherwise be the case. But if it is clear that the person would suffer degrading or human treatment or torture of course he could not be sent back."

Q278 Dr Whitehead: "That appears to be a rather circumlocutory way of saying that there is a trade-off between torture and national security, and indeed the *Ramzy* case suggests that that trade-off is effectively being sanctioned by the British Government?"

Lord Falconer of Thoroton: "If there is any identifiable risk you cannot do it. Are there risks that probably will not mature in relation to that person which, if he threatens the lives of people in this country, he should be asked to take? That seems to me to be a realistic way of looking at it."

Q279 David Howarth: "But is not the weighing in the balance of the link between the risk that the person will be tortured and the threat to lives in this country the heart of the problem? Could not one argue instead that if there was an insubstantial risk of torture the person should be allowed to be deported anyway regardless of the other

side of the balance? Would that not be more clear as a way to avoid giving the impression that one is balancing torture against security?”

Lord Falconer of Thoroton: “If the level of acceptable risk in a sense goes down I cannot query that because it makes no difference in terms of what the result will be in relation to individual cases. But I can see an argument - it is one that we are advancing in the *Ramzy* case and with the Netherlands and other countries - that if an individual is allowed into this country and threatens seriously the lives of people in this country it may well be that there needs to be a clearer risk than at present that he will suffer torture before he can avoid being deported. That does not seem to me to be unreasonable, but I understand what you say. If you are saying that perhaps the answer is to increase the threshold of risk that is another way of reaching the same point […]”

Q281 Chairman: “If we lose the case that we have been discussing, what do we do?”

Lord Falconer of Thoroton: “If we lose we have made it clear at all stages that we will accept whatever the convention says. If at the end of the day there is no further place to go, in the sense that the European Court of Human Rights says, "This is what Article 3 means", we have to accept it. The question of amending the Human Rights Act can arise only in the context of the period prior to any final ruling by the European Court of Human Rights, but if after everything has been gone through, every case has been considered and the conclusion reached is that Article 3 is as *Chahal* described it, we have to accept it. The Prime Minister and everybody else in the Government have made it absolutely clear that we are not leaving the Convention. If we are not leaving the Convention it means we have to accept its terms. I raise one other point. There is a further track in relation to this: a memorandum of understanding. That is an agreement with the government of the country to which deportation is sought whereby assurances are given by that country that the deportee will be treated in such a way that does not constitute degrading or inhuman treatment or torture. It seems to me that these are worthwhile things to get. It is for the courts to determine whether they sufficiently reduce the risk but they are worth having because they have the potential to affect the way that these countries treat not just the deportees about whom we are speaking but others as well. I think that they are a worthwhile track both in terms of dealing with the individual problem for us and in the wider impact that they may have.”

Q282 Mr Khabra: “In the case of a person being removed, with all the guarantees that you mention, if the receiving country later on does not abide by the agreement, what are the implications of it?”

Lord Falconer of Thoroton: “There is little that the court can do in relation to the individual country, but the judgment that the court must make in relation to the memorandum of understanding is whether that agreement is likely to be complied with. If a sovereign state says that it will comply with a particular agreement then, absent any evidence to the contrary, there should not be any reason why that is not accepted, not least for the reason that the country would, having given its word, want to keep it. But you are right that there are no means of enforcement and so a judgment has to be made.”[18]

The Department of Constitutional Affairs also considered the position of the *Chahal* case in its *Review of the Implementation of the Human Rights Act*, which was published in July 2006. The Review noted that the Human Rights Act makes no difference to the way the law is interpreted:

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[18] HC 566-iii

> Two cases highlight the impact which human rights have had upon UK law. First, in *A and Others v The Home Secretary* the House of Lords decided that the detention without trial of foreign nationals under the Anti-Terrorism, Crime and Security Act 2001 was incompatible with Article 14 of the *European Convention on Human Rights* because it discriminated on the grounds of nationality or immigration status […] The other case concerns the UK's ability, in law, to deport or remove those who threaten us or who have entered illegally or whose claim for asylum has failed. A proportion of those eligible for deportation or removal are not removed because the country to which they would be returned is considered unsafe, and because we are not currently able to balance the threat posed by an individual to national security against the risk of mistreatment if the individual concerned is returned to their own country. We are prevented from making this balance by the judgement in the European Court of Human Rights in 1996 in the case of *Chahal v United Kingdom*. We are seeking to change this through our intervention in a case before the European Court of Human Rights. We want to be able to take account of the threat to national security and also to be able to rely on assurances given by the returnee country. However, the Human Rights Act makes no difference in this instance, not only because the *Chahal* decision predates it, but also because it is an example of the Strasbourg Court directly interpreting Article 3 of the *European Convention on Human Rights*.[19]

The Department's Review was inherently critical of the decision in *Chahal*, stating that "there are significant resource implications in servicing the structures set up to deal with dangerous terrorist suspects, these result not from the Human Rights Act, but from decisions of the Strasbourg Court in cases such as *Chahal*."[20]

5 The case of *Saadi v Italy*

In the event, the intervention in the case of *Ramzy v Netherlands* was overtaken by events. The European Court of Human Rights considered the same issues in another case, *Saadi v Italy*.[21] The Grand Chamber of the Court gave judgment February 2008, in essence upholding the earlier principle established by *Chahal* that the prohibition on torture was absolute.

The *Saadi* case related to a Tunisian national who claimed that he was at risk of torture if returned. In 2006, the Italian authorities sought to deport him, stating that the applicant had played an "active role" in an organisation responsible for providing logistical and financial support to persons belonging to fundamentalist Islamist cells in Italy and abroad. Consequently, his conduct was disturbing public order and threatening national security.

The applicant requested political asylum. He alleged that he had been sentenced in his absence in Tunisia for political reasons and that he feared he would be subjected to torture and "political and religious reprisals". The authorities declared this request inadmissible on the ground that the applicant was a danger to national security. The Italian embassy in Tunis sent a *note verbale* to the Tunisian Government requesting diplomatic assurances that if the applicant were to be deported to Tunisia he would not be subjected to treatment contrary to Article 3 of the Convention and would not suffer a flagrant denial of justice.

The UK Government intervened in the case. The Court recorded that the UK Government indicated the difficulties posed to states by the *Chahal* decision and called for a number of changes to it:

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[19] Department for Constitutional Affairs, Review of the Implementation of the Human Rights Act, July 2006, pg3

[20] Ibid, pg 35

[21] *Saadi v Italy* (application no. 37201/06)

117. The United Kingdom observed that in the Chahal case […] the Court had stated the principle that in view of the absolute nature of the prohibition of treatment contrary to Article 3 of the Convention, the risk of such treatment could not be weighed against the reasons (including the protection of national security) put forward by the respondent State to justify expulsion. Yet because of its rigidity that principle had caused many difficulties for the Contracting States by preventing them in practice from enforcing expulsion measures. The Government observed in that connection that it was unlikely that any State other than the one of which the applicant was a national would be prepared to receive into its territory a person suspected of terrorist activities. In addition, the possibility of having recourse to criminal sanctions against the suspect did not provide sufficient protection for the community.

[…]

122. […] The United Kingdom argued that, 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. In the first place, the threat presented by the person to be deported must be a factor to be assessed in relation to the possibility and the nature of the potential ill-treatment. That would make it possible to take into consideration all the particular circumstances of each case and weigh the rights secured to the applicant by Article 3 of the Convention against those secured to all other members of the community by Article 2. Secondly, national-security considerations must influence the standard of proof required from the applicant. In other words, if the respondent State adduced evidence that there was a threat to national security, stronger evidence had to be adduced to prove that the applicant would be at risk of ill-treatment in the receiving country. In particular, the individual concerned must prove that it was “more likely than not” that he would be subjected to treatment prohibited by Article 3. That interpretation was compatible with the wording of Article 3 of the United Nations Convention against Torture, which had been based on the case-law of the Court itself, and took account of the fact that in expulsion cases it was necessary to assess a possible future risk.

123. Lastly, the United Kingdom Government emphasised that Contracting States could obtain diplomatic assurances that an applicant would not be subjected to treatment contrary to the Convention. Although, in the above-mentioned Chahal case, the Court had considered it necessary to examine whether such assurances provided sufficient protection, it was probable, as had been shown by the opinions of the majority and the minority of the Court in that case, that identical assurances could be interpreted differently.

The Court recognised the difficulties faced by States in protecting themselves from terrorists, but held nevertheless that Article 3 is absolute, even where the risk of torture is in a third state. A person’s conduct, however, dangerous or undesirable, cannot be taken into account in Article 3 cases as it does not reduce the degree of risk of ill treatment on return. The only relevant question is whether or not ‘substantial grounds’ have been shown for believing that there is a ‘real risk’ of torture in the receiving country:

137. The Court notes first of all that States face immense difficulties in modern times in protecting their communities from terrorist violence (see Chahal, cited above, § 79, and Shamayev and Others, cited above, § 335). It cannot therefore underestimate the scale of the danger of terrorism today and the threat it presents to the community. That must not, however, call into question the absolute nature of Article 3.

138. Accordingly, the Court cannot accept the argument of the United Kingdom Government, supported by the respondent Government, that a distinction must be

drawn under Article 3 between treatment inflicted directly by a signatory State and treatment that might be inflicted by the authorities of another State, and that protection against this latter form of ill-treatment should be weighed against the interests of the community as a whole (see paragraphs 120 and 122 above). Since protection against the treatment prohibited by Article 3 is absolute, that provision imposes an obligation not to extradite or expel any person who, in the receiving country, would run the real risk of being subjected to such treatment. As the Court has repeatedly held, there can be no derogation from that rule (see the case-law cited in paragraph 130 above). It must therefore reaffirm the principle stated in the Chahal judgment (cited above, § 81) that it is not possible to weigh the risk of ill-treatment against the reasons put forward for the expulsion in order to determine whether the responsibility of a State is engaged under Article 3, even where such treatment is inflicted by another State. In that connection, the conduct of the person concerned, however undesirable or dangerous, cannot be taken into account, with the consequence that the protection afforded by Article 3 is broader than that provided for in Articles 32 and 33 of the 1951 United Nations Convention relating to the Status of Refugees (see Chahal, cited above, § 80 and paragraph 63 above). Moreover, that conclusion is in line with points IV and XII of the guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism (see paragraph 64 above).

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. For that reason it would be incorrect to require a higher standard of proof, as submitted by the intervener, where the person is considered to represent a serious danger to the community, since assessment of the level of risk is independent of such a test.

140. With regard to the second branch of the United Kingdom Government's arguments, to the effect that where an applicant presents a threat to national security, stronger evidence must be adduced to prove that there is a risk of ill-treatment (see paragraph 122 above), the Court observes that such an approach is not compatible with the absolute nature of the protection afforded by Article 3 either. It amounts to asserting that, in the absence of evidence meeting a higher standard, protection of national security justifies accepting more readily a risk of ill-treatment for the individual. The Court therefore sees no reason to modify the relevant standard of proof, as suggested by the third-party intervener, by requiring in cases like the present that it be proved that subjection to ill-treatment is “more likely than not”. On the contrary, it reaffirms that for a planned forcible expulsion to be in breach of the Convention it is necessary – and sufficient – for substantial grounds to have been shown for believing that there is a real risk that the person concerned will be subjected in the receiving country to treatment prohibited by Article 3 (see paragraphs 125 and 132 above and the case-law cited in those paragraphs).

141. The Court further observes that similar arguments to those put forward by the third-party intervener in the present case have already been rejected in the Chahal judgment cited above. Even if, as the Italian and United Kingdom Governments asserted, the terrorist threat has increased since that time, that circumstance would not call into question the conclusions of the Chahal judgment concerning the consequences of the absolute nature of Article 3.

Liberty welcomed the judgment:

> If the Grand Chamber had watered down the absolute prohibition against torture there would have been no putting this genie back in the bottle. It would have been a green light for extraordinary rendition and even the direct use of torture as an interrogation technique.
>
> The refusal to compromise on torture distinguishes us from tyrants and terrorists alike. Today's re-statement of the law will aid the battle for hearts and minds, ensuring that suspects are brought to justice and democratic values prevail.[22]

A news report in the Times following the judgment noted some wider implications of the judgment:

> The judgment, from which there is no appeal, binds all countries of the Council of Europe, including Britain. It also threw into question another part of the Government's strategy for trying to remove foreign terrorist suspects. Ministers have sought assurances from several North African and Middle Eastern countries that deportees will not be subject to torture or inhumane treatment. But the ruling said that even if such assurances were given, the European Court of Human Rights still had an obligation to examine whether they provided a sufficient guarantee against the risk of inhumane treatment. A Home Office spokeswoman said: "The Government is disappointed at the ruling by the European Court. We will consider the judgment." [23]

6 Diplomatic Assurances and Memoranda of Understanding

6.1 Background

In December 2005, the then Home Office Minister for Police and Security, Tony McNulty, indicated, in answer to a parliamentary question by Rt Hon Michael Ancram, that the Government was taking a new approach to returning people to countries where there was a risk of torture or ill-treatment:

> "The Government have signed Memoranda of Understanding with Jordan and with Libya to facilitate the deportation of particular individuals consistent with our international human rights obligations, in particular those in the *European Convention on Human Rights* (ECHR). We are discussing similar arrangements with Algeria and the Lebanon. We have said we will make public the names of the other countries to which we are talking when the time is right."[24]

At a press conference in August 2005, however, the then Prime Minister, Rt Hon Tony Blair, indicated progress:

> "We have now concluded a Memorandum of Understanding with Jordan, and we are close to getting necessary assurances from other relevant countries. For example, just yesterday I had very constructive conversations with the leaders of Algeria and Lebanon."[25]

A Memorandum of Understanding was subsequently signed with Lebanon in December 2005.[26]

[22] Liberty, Press Release "ECHR Torture Prohibition", 2008
[23] *The Times*, "European judges thwart attempts to deport foreign terrorist suspects", 29 February 2008
[24] HC Deb, 19 December 2005, c2356-&W
[25] Prime Minister's Press Conference 5 August 2005
[26] Foreign and Commonwealth Office press release, 23 December 2005:

In the same month, Rt Hon Jack Straw, then Foreign Secretary, was questioned about the use of Memoranda of Understanding (MOUs) by the Foreign Affairs Committee, who were considering the issue of rendition. He commented that the existence of an MOU would not be decisive:

> "These agreements are specific. They concern countries where there has been concern in the past about their treatment of prisoners. It may have been torture; it may have been ill treatment. Under these agreements, we gave specific undertakings in respect of the specific prisoners who would be transferred. Were it to be the case that we were invited to agree to a facilitation of a transfer to a Third country whose human rights record was questionable, the law applies in the same way as it does in respect of a transfer or deportation of a prisoner. If it is our responsibility, it is our responsibility. The fact that there was an MOU in respect of asylum deportees or prisoners who had been subject to a deportation order would have some relevance in the case but it would very much depend on what the MOU said and what undertakings you could gain in respect of that particular transferee."[27]

At that evidence session, the Secretary of State also admitted that there was a problem in respect of countries admitting to have used torture:

> The other problem about torture is that those who commit the torture deny it to themselves as much as they deny it to other people, so to track it is very difficult, but we are alive to those countries where we think malpractice of all kinds is used and we seek to deal with it. […] I think, if you go through the list of countries where we and America and other leading human rights NGOs believe that the mistreatment of suspects takes place, I do not think you will find a single one of those countries which says it does take place.[28]

Subsequently in June 2006, Rt Hon Ian McCartney, (Minister for Trade), defended the use of MOUs, indicating that they were of benefit to safeguard the right of deported individuals:

> "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 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. Individuals will retain the right to challenge a decision to deport them in the UK courts. 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."[29]

Human Rights Watch claimed that the use of such diplomatic assurances is widespread throughout Europe. It has identified a number of cases in which such assurances have been sought. These include the extradition case of Mohamed Bilasi-Ashri (from Austria to Egypt) in 2001, the repatriation of seven Sudanese nationals in 1995 by Germany, the case of Metin Kaplan, a "radical Muslim cleric" deported from Germany to Turkey in 2004.[30] The Library Standard Note *Article 3 of the European Convention on Human Rights and Deportation*

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[27] Foreign Affairs Committee, *Developments in the European Union*, 13 December 2005, HC 768(i)
[28] *Ibid*
[29] HC Deb, 15 June 2006, c354WH
[30] http://hrw.org/backgrounder/eca/eu0306/eu0306_diplo.pdf

provides considerable detail about the French approach to the deportation of foreign nationals.

In their written submissions in the *Ramzy v Netherlands* case, human rights groups such as Amnesty International and INTERIGHTS indicated that MOUs were not enough to offset a risk of torture:

> "States may seek to rely on "diplomatic assurances" or "memoranda of understanding" as a mechanism to transfer individuals to countries where they are at risk of torture and other ill-treatment. In practice, the very fact that the sending State seeks such assurances amounts to an admission that the person would be at risk of torture or ill-treatment in the receiving State if returned. As acknowledged by this Court in *Chahal*, and by CAT in *Agiza*, assurances do not suffice to offset an existing risk of torture.[31] […]Most recently, the UN General Assembly, by consensus of all States, has affirmed "that diplomatic assurances, where used, do not release States from their obligations, under international human rights, humanitarian and refugee law, in particular the principle of *non-refoulement*."[32] Reliance on such assurances as sufficient to displace the risk of torture creates a dangerous loophole in the *non-refoulement* obligation, and ultimately erodes the prohibition of torture and other ill-treatment."[33]

In its report on UNCAT, the JCHR also expressed concerns that the use of MOUs exposed individuals to a real risk of torture:

> The evidence we have heard in this inquiry, and our scrutiny of the Memoranda of Understanding agreed between the Government and the Governments of Libya, Lebanon and Jordan, have left us with grave concerns that the Government's policy of reliance on diplomatic assurances could place deported individuals at real risk of torture or inhuman and degrading treatment, without any reliable means of redress. We […] agree with the UN Special Rapporteur on Torture, the European Commissioner for Human Rights and others that the Government's policy of reliance on diplomatic assurances against torture could well undermine well-established international obligations not to deport anybody if there is a serious risk of torture or ill-treatment in the receiving country. We further consider that, if relied on in practice, diplomatic assurances such as those to be agreed under the Memoranda of Understanding with Jordan, Libya and Lebanon present a substantial risk of individuals actually being tortured, leaving the UK in breach of its obligations under Article 3 UNCAT, as well as Article 3 ECHR. We are also concerned that Memoranda of Understanding lack enforceable remedies in an event of a breach of the terms of the Memoranda.[34]

The Coalition Government set out its approach to MOUs in its Review of Counter-Terrorism Powers (CM 8004) published in January 2011. The paper noted that during the period under review, the UK had generic arrangements with five countries: Algeria, Jordan, Lebanon, Libya and Ethiopia. Nine people had been deported under these arrangements with Algeria, and there were currently fourteen other cases in the appeals process.

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31 *Chahal v. the UK* (1996, § 105); *Agiza v. Sweden* (2005, § 13.4).

32 See UN Declaration (2005, § 8)

33 Written submission to the European Court of Human Rights from Amnesty International Ltd., The Association For The Prevention of Torture, Human Rights Watch, INTERIGHTS, The International Commission of Jurists, Open Society Justice Initiative and Redress in the case of *Ramzy v Netherlands*

34 Joint Committee on Human Rights, *The UN Convention on Torture*, 19th Report of Session 2005-6, paras 129 and 131

The Review did not accept the claims that deportation with assurances provides insufficient protection or that the policy "undermines the absolute prohibition of torture."[35] The Review was also "satisfied that assurances have been upheld, and the people deported under these agreements have not been mistreated." It concluded, amongst other things, that the Government should "actively pursue deportation arrangements with more countries, prioritising those whose nationals have engaged in terrorist related activity here or are judged most likely to do so in future."

6.2 UK cases (including the case of Abu Qatada)

Between 2006 and early 2008, there were several court cases heard by the Special Immigration Appeals Commission (SIAC)[36] and Court of Appeal on the issue of Memoranda of Understanding and diplomatic assurances. These produced mixed results.

In August 2006, SIAC ruled against an individual known as "Y", who had previously been acquitted of involvement in a supposed ricin plot.[37] The Home Secretary, in September 2005, gave notice of his decision to make a deportation order against Y, certifying under s97(1)(a) of the *Nationality, Immigration and Asylum Act 2002* that his decision was taken in the interests of national security. In the course of its judgment, SIAC considered the issue of diplomatic assurances, both on an individual and an overarching level. The Guardian reported the Commission's conclusions:

> In the judgment, SIAC said: "We give some weight to the assurances received in December 2005 about how he would be treated were he returned to face a retrial... and to the verbal assurances which have been received ... We have concluded that they are acting in good faith; the political changes demonstrate their will and the level and consistency of the assurances support that".
>
> It pointed out that there had been a number of "diplomatic, official and high political level" discussions between the two countries.
>
> "It is not conceivable that these are given deceitfully or that the Algerian attitude will change when Y is returned," the judgment added. [38]

The assurances in this case were given in unpublished correspondence between the Prime Ministers of the United Kingdom and Algeria, rather than through a formal MOU.

In a case involving Libyan nationals (prior to the removal of Colonel Gaddafi), *DD & AS v Home Office*, SIAC concluded against deporting suspects to Libya, in part due to the mercurial character of its then leader. It reached the conclusion that there was a real risk of torture despite the MOU. The ruling was upheld by the Court of Appeal.[39]

An MOU with Jordan was considered in the case of Abu Qatada. Qatada has been described by a Spanish judge as "Osama bin Laden's right-hand man in Europe" and by the British authorities as "truly dangerous individual", and it is claimed that he was arrested "with

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[35] For a contrary view, see for example, Eric Metcalfe, *The False Promise of Assurances against Torture*, JUSTICE Journal (2009) Vol 6, No.1

[36] SIAC was established by the *Special Immigration Appeals Commission Act 1997* to provide a special forum for hearing immigration and asylum cases with a national security aspect, in order to allow classified material to be adduced.

[37] *Y v Secretary of State for Home Department*, Appeal No: SC/36/2005, 24 August 2006

[38] *The Guardian* "Algerian loses terror appeal", 24 August 2006

[39] *AS and DD (Libya) v Secretary of State for the Home Department* [2008] EWCA Civ 289

£170,000 cash in his possession, including £805 in an envelope marked 'For the mujahedin in Chechnya'".[40]

SIAC had originally ruled (in February 2007) that Abu Qatada could be deported to Jordan on the following grounds:

- His deportation is necessary in the interests of national security, "by which we mean here that it is necessary as a measure of defence for the rights of those who live here" (para. 88)
- He is guilty of acts which exclude him from the protection of the Refugee Convention (para. 105)
- The Refugee Convention provides him with no protection against removal (para. 110)
- There is no real risk that the Appellant's rights under Article 3 of the European Convention on Human Rights would be breached if he were returned to Jordan, in the period up to the conclusion of a retrial (para. 349)
- There is no real risk that any confession from the Appellant himself would be obtained by treatment which breached Article 3 or gave rise to any concerns about unfairness.
- There is however a high probability that evidence, in respect of which there is a very real risk that it has been obtained in breach of Article 3, would be admitted against the Appellant and would be of considerable, perhaps decisive, importance against him (para. 422)
- There is no risk that the Appellant would be subjected to the passing let alone the carrying out of the death penalty on the charges of which he has been convicted and on which he would face retrial. They simply do not carry the death penalty. (para. 427)
- The possible unfairness of a retrial would not on its own amount to a total denial of the Appellant's rights in such a way that his deportation would breach the UK's obligations (para. 462)
- The conditions of detention, were he to be convicted, would not reach the high level required for a breach of Article 3 (para. 485)
- The British-Jordanian Memorandum of Understanding (MOU) was relevant: if, without the MOU, there were real risks of treatment which breached Article 3, the MOU would reduce the risk sufficiently for removal of the Appellant not to breach the UK's obligations (para. 516)[41]

The Court of Appeal decided that Abu Qatada could not be removed because there was a risk that evidence obtained through torture might be used in a trial in Jordan.[42] In February 2009 the then House of Lords (now the Supreme Court) overturned the Court of Appeal's

[40] *The Daily Telegraph*, "Terror suspect Abu Qatada will not be deported", 14 April 2008

[41] *Omar Othman (aka Abu Qatada) v Secretary of State for the Home Department*, Special Immigration Appeals Commission, Appeal No: SC/15/2005, 26 February 2007: http://www.siac.tribunals.gov.uk/Documents/QATADA-FINAL-7-FEB-2007.pdf

[42] [2008] EWCA Civ 290

decision, ruling that Qatada could be returned to Jordan.[43] Qatada then appealed to the European Court of Human Rights.[44]

The Strasbourg Court considered a series of issues raised by Abu Qatada's lawyers. In their ruling[45], delivered on 17 January 2012, the European Court of Human Rights concluded that Qatada could not be returned to Jordan. The court upheld the MOU which had been negotiated with Jordan indicating that Qatada's rights under Article 3 of the ECHR would not be violated since the agreement between the two Governments was specific and comprehensive. The court considered that the assurances had been given in good faith and that bilateral ties between the UK and Jordan had historically been strong.

The court also said that the claimant's high profile would make the Jordanian authorities careful to ensure that he was properly treated and that there would be monitoring by an independent human rights organisation.

Nonetheless, the court refused to allow Qatada's deportation, on the basis that the use of evidence obtained by torture during a criminal trial would amount to a flagrant denial of justice. The court found that the use of torture was widespread in Jordan and that two of the claimant's co-defendants had complained of torture. The court considered that there was a high probability that incriminating evidence from these co defendants would be admitted at the claimant's re-trial and that it could be of decisive importance. In the absence of any assurance by Jordan that the torture evidence would not be used, the court concluded that his deportation to Jordan would give rise to a breach of Article 6 of the ECHR. It acknowledged that this was the first time that an expulsion would be in violation of Article 6 (which reflects an "international consensus that the use of evidence obtained through torture makes a fair trial impossible.")[46]

The case has received extensive media commentary. Joshua Rozenberg, a well known legal commentator, has said that: "the government should be relieved that its elaborate system of diplomatic assurances has withstood scrutiny from Strasbourg. But it still has to get round the Article 6 point. The next stage is presumably for the Foreign Office to ask Jordan whether it can put Abu Qatada on trial without relying on evidence obtained through torture. It would be in everyone's interests for the Jordanians to be able to reply in the affirmative."[47]

Dr Eric Metcalfe, a barrister and former Director of Human Rights Policy at JUSTICE, criticised the judgment. He argued that it "weakens the international prohibition against torture" (by accepting the use of the MOU) while at the same time it is "certain to provoke fresh outrage from government ministers and tabloids."[48]

In contrast political commentator, Matthew d'Ancona, criticised the judgment for different reasons, asking "how far does the extra-territorial responsibility of the British state and the British citizen stretch?" He contended that the "modern notion of human rights has noble roots: a determination never again to repeat the evil of Auschwitz and the gulag. But as the

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[43] [2009] UKHL 10 See also: *The Guardian*, "Here for now - but Jordan awaits", 19 February 2009
[44] See for example: *BBC Online*, Q&A: Abu Qatada and terrorism deportations, 17 January 2012
Othman (Abu Qatada) v UK, (Application no. 8139/09) 17 January 2012. See also, *BBC Online*, "ECHR's Clare Overy: Why Qatada Won Appeal", 17 January 2012
[46] European Court of Human Rights, Press Release, 17 January 2012
[47] *Guardian*, "Ruling still allows Britain to deport other foreign nationals", 17 January 2012
[48] *Guardian*, "Tortuous ruling may fuel demands for secret trials", 17 January 2012

decades have passed, this ethical currency has been appallingly devalued, to the extent that it has become an all-purpose aid to the vexatious litigator."[49]

Following the ruling, the Home Secretary, Theresa May, said that "this is not the end of the road, and we will now consider all the legal options available to us." She added: "In the meantime, Qatada will remain in detention in the UK. It is important to note that this ruling does not prevent us seeking to deport other foreign nationals."[50] The Government had three months to appeal the decision of the Strasbourg Court to the Grand Chamber.

Qatada was granted a bail hearing in February 2012, and the judge at the Special Immigration Appeals Commission, Mr Justice Mitting, ruled that he should be bailed, on strict conditions, pending further negotiations with the authorities in Jordan.[51] Qatada had previously been bailed in 2008[52], however he was quickly recalled to prison following a hearing at SIAC in which evidence from the security services, heard in secret, convinced the judges that there was an increased risk of him absconding.[53]

The restrictions[54] included a 22 hour curfew, an electronic tag, MI5 vetting of all his visitors (except for immediate family), and monitoring of his communications. Mr Justice Mitting ruled that the restrictions could be lifted if the Home Secretary failed to show, within three months, that progress was being made in negotiations with Jordan regarding his extradition. If Qatada were released, it might be possible to place him under Terrorism Prevention and Investigation Measures (TPIMS)[55] or to attempt to prosecute him (if he has committed an offence).[56]

In response to the decision, the Attorney General, Dominic Grieve QC, said that: "We obviously don't have indefinite internment without trial in this country. Individuals enjoy the right to liberty and government is bound by the rule of law and has to observe it." He added:

> The government is obviously very concerned about this case and very much wishes to see Abu Qatada deported to Jordan and, when he is in Jordan, tried fairly if the Jordanian authorities wish to put him on trial. He cannot be deported unless the assurances which are required following the judgment in the European Court of Human Rights can be secured.[57]

A Home Office spokesperson is quoted as having said: "This is a dangerous man who we believe poses a real threat to our security and who has not changed in his views or attitude to the UK."[58] The Government's former Security Minister, Baroness Pauline Neville Jones and former Independent Reviewer of Terrorism Legislation, Lord Carlile QC, both warned that Qatada remained a danger.[59]

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[49] *Evening Standard*, "The Abu Qatada case proves it's time to rethink human rights", 18 January 2012

[50] *BBC Online*, "Abu Qatada wins Jordan deportation appeal", 17 January 2012

[51] *Daily Telegraph*, "Abu Qatada could be entirely free within two years says Government adviser", 7 February 2012; *The Guardian*, 'Why has Abu Qatada not stood trial in the UK?, 6 February 2012'

[52] *Daily Telegraph*, "Abu Qatada: Bail terms and conditions", 8 June 2008

[53] *The Guardian*, "Abu Qatada bail revoked", 3 December 2008

[54] For the full bail conditions, see: Special Immigration Appeals Commission, Bail Order, February 2012

[55] *Daily Telegraph*, "Abu Qatada could be entirely free within two years says Government adviser", 7 February 2012

[56] *The Guardian*, "Why has Abu Qatada not stood trial in the UK?", 6 February 2012

[57] *The Guardian*, "Abu Qatada: attorney general says government must follow rule of law", 7 February 2012

[58] *Ibid*

[59] *Daily Telegraph*, "Send Abu Qatada Back to Jordan, urges former security minister ", 14 February 2012 and *Daily Telegraph, "Lord Carlile: Abu Qatada release is deeply unattractive",* 13 February 2012

6.3 What happens next in the case of Abu Qatada?

On 7 February 2012, an urgent question was posed in relation to the next steps the Government was planning to take in response to the decision to bail Abu Qatada. Theresa May said:

> Since December 2001, successive British Governments have sought to deport Abu Qatada to Jordan, his home country, because he poses a serious risk to our national security. Qatada has a long-standing association with al-Qaeda. British courts have found:
>
> "His reach and the depth of his influence…is formidable…He provides a religious justification for…acts of violence and terror".
>
> In Jordan, he has been tried and found guilty in absentia of terrorism offences including conspiracy to cause explosions at western and Israeli targets and involvement in the bombings of the American school and the Jerusalem hotel in Amman in 1998.
>
> The House of Lords agreed with the Government that Qatada can be deported to Jordan to face a retrial because of the diplomatic assurances negotiated by Britain and the Jordanian Government. That agreement ensures that individuals deported to Jordan will not be tortured upon their return. Despite the House of Lords agreement that Qatada should be deported, and despite accepting that he would not face mistreatment in Jordan, the European Court of Human Rights ruled last month against his deportation. It did so on the grounds that deportation would violate article 6 of the convention, the right to a fair trial, due to the risk that evidence obtained from the torture of others would be used against him. Hon. Members should be aware that that argument had already been considered by a British court and rejected.
>
> I hardly need tell the House that the Government disagree vehemently with Strasbourg's ruling. We believe that Abu Qatada should be deported. We are considering all the legal options available, including whether to refer the case to the Grand Chamber. As we do so, we will continue to negotiate with the Jordanians to see what assurances they can give us about the evidence used against Qatada in their courts. Following the Strasbourg ruling, Qatada's lawyers appealed to the Special Immigration Appeals Commission for bail. We opposed that appeal vigorously, but yesterday it was granted, and bail will start within a week.
>
> The bail conditions are among the most stringent imposed on anybody facing deportation from the UK, and reflect the conditions set out when Qatada was bailed in 2008. He will be under a 22-hour curfew. He will not be allowed to access the internet or any electronic communication devices. He will not be allowed to travel outside an approved boundary. Visitors will need to be approved, under very strict conditions. He will be subject to a specific condition preventing him from attending mosques and leading group prayer. If any of those conditions are breached, he will be re-arrested and we will seek his immediate re-detention. But however strict the bail conditions, I continue to believe that Qatada should remain behind bars.
>
> It is simply not acceptable that after the Jordanians have guaranteed his treatment, after British courts have found that he is dangerous and after his removal has been approved by the highest courts in our land, we still cannot deport such a dangerous foreign national. We continue to consider the case for a British Bill of Rights, and the Prime Minister is leading the Government's attempts to reform the European Court of Human Rights.
>
> The right place for a terrorist is a prison cell. The right place for a foreign terrorist is a foreign prison cell, far away from Britain. That is why we will do everything that we can

> within the existing legal regime to deport Qatada, and we are doing everything that we can to reform that regime to avoid such cases in future.[60]

In response, the Shadow Home Secretary, Yvette Cooper, supported efforts to deport Qatada. She also noted that the Government had made a decision to "weaken British counter-terror powers" by abolishing control orders and that (if he were freed) it would not be able to impose the same level of restrictions on Qatada under the Terrorism, Prevention and Investigation Measures Act 2011.[61]

At Prime Minister's Questions on 8 February 2012, David Cameron said that:

> We are doing everything we can to get this man out of the country. The absolutely key thing is to get an agreement with Jordan about the way he will be treated, because the European Court of Human Rights has made a very clear judgment. I happen to think it is the wrong judgment, and I regret that judgment. This guy should have been deported years ago. Nevertheless, if we can get that agreement with Jordan, he can be on his way.[62]

Subsequent press reports said that the Prime Minister had telephoned the King of Jordan to try to obtain the necessary assurances and that Home Office Minster, James Brokenshire would fly to Jordan to try to negotiate a deal.[63] It has also been reported that Jordan recently passed an amendment into its domestic law, banning evidence obtained via torture. The article quotes the Jordanian Justice Minister as having said: "we are confident that once we have the chance to make this statement through the diplomatic channels … [it] will be taken into consideration."[64] The Home Secretary visited Jordan in March 2012 and stated that official talks were "moving in the right direction".[65]

On 17 April 2012, the Home Secretary made a further statement to Parliament.[66] She said that the Government would not be pursuing an appeal to the Grand Chamber, but that it would be seeking to deport Qatada, having obtained fresh assurances from the Jordanian authorities.

There was speculation that the Government did not pursue an appeal to the Grand Chamber because the original Strasbourg ruling had upheld the general right to try to deport international terror suspects with diplomatic assurances about their future treatment. The Guardian reported that "Home Office officials feared that this important principle could be lost" if an appeal to the Grand Chamber was unsuccessful and that "several other deportation cases could have been put at risk if an appeal failed."[67] The Home Secretary confirmed that this was a consideration:

> The other option available to us, which is to refer the case to the Grand Chamber of the European Court of Human Rights, could take even longer and would risk reopening our wider policy of seeking assurances about the treatment of terror suspects in their home countries. That policy was upheld by the European Court's judgment in January,

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[60] HC Deb 7 February 2012, c165

[61] HC Deb 7 February 2012, c168

[62] HC Deb 8 February 2012:, c302

[63] *Evening Standard*, "'Furious' Cameron telephones King of Jordan in fight to get Qatada deported", February 2012; The Guardian, "UK and Jordan agree to make deal on Qatada", 9 February 2012

[64] *Daily Telegraph*, "Send Abu Qatada Back to Jordan, urges former security minister ", 14 February 2012 and *The Guardian*, "Abu Qatada row: UK and Jordan hold talks in Amman", 14 February 2012

[65] *The Guardian*, "Abu Qatada talks moving in right direction, says Theresa May", 7 March 2012

[66] HC Deb 17 April 2012, c173

[67] *The Guardian*, "Abu Qatada arrested ahead of fresh deportation attempt" 17 April 2012

> and it is crucial if we want to be able to deport terror suspects to countries where the courts have concerns about their treatment. There are 15 other such cases pending. I confirm that the Government have therefore not referred the Abu Qatada case to the Grand Chamber.[68]

On the same day that the Home Secretary made her statement to Parliament, Abu Qatada was arrested.[69] A Home Office spokesman indicated that "UK Border Agency officers have today arrested Abu Qatada and told him that we intend to resume deportation proceedings against him."[70] SIAC granted the Home Secretary's request to revoke Abu Qatada's bail on 17 April 2012 on the ground that given that his deportation was imminent, there was an increased risk if he were allowed to remain on bail.[71] Mr Justice Mitting indicated in the determination that, depending on both parties' next courses of action, the outstanding issues in the case might be quickly resolved.[72] He noted that a deportation order had been made against Abu Qatada in January 2009. A deportation order remains in force from the date it is signed until such a time that it is revoked.[73] A request to revoke a deportation order must be made in writing.[74] If an application to revoke a deportation order is refused, there is a right of appeal.[75] However, if an asylum or human rights claim (or both) has been made, and the Secretary of State has certified the claim as 'clearly unfounded', the right of appeal may not be exercised whilst the person is in the UK.[76] Following the publication of the revocation of bail decision by SIAC, the *Guardian* newspaper reported that this was an attempt to "short circuit" any avenues of appeal.[77]

During the course of her statement, the Home Secretary acknowledged that since it would be open to Qatada to appeal against his deportation, the case could still take many months.

Yvette Cooper welcomed the renewed effort to deport Qatada, but criticised the fact the information had been provided to the media, before Parliament. She noted that there had been "a troubling level of confusion" and questioned whether the SIAC proceedings had been organized in a rush to coincide with the Home Secretary's statement.[78]

Following the Home Secretary's statement, it emerged that Qatada's lawyers had lodged an appeal against the January 2012 judgment of the European Court of Human Rights with the Grand Chamber of that court. The Home Secretary argued that this application had been made out of time and was, in effect, a delaying tactic.[79] Other legal commentators quickly made plain that the answer to the question as to whether the appeal had been lodged in time

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[68] HC Deb 17 April 2012, c175
[69] *BBC Online*, "May intends to deport cleric Abu Qatada in days'" 17 April 2012
[70] *Ibid*
[71] *Omar Othman (aka Abu Qatada) v Secretary of State for the Home Department*, Special Immigration Appeals Commission, Revocation of Bail decision, 17 April 2012
[72] *Mohammed Othman v Secretary of State for the Home Department*, Special Immigration Appeals Commission, Appeal No: SC/15/2005, 17 April 2012, para 6
[73] UKBA, *Immigration Directorates' Instructions*, chapter 13 section 1 - Deportation [Dec 07; accessed on 20 April 2012]
[74] UKBA, *Immigration Directorates' Instructions*, chapter 13 section 5 - Revocation of deportation orders [undated; accessed on 20 April 2012]
[75] *Nationality, Immigration and Asylum Act 2002* (as amended), s82(1); s82(2)(k)
[76] *Nationality, Immigration and Asylum Act 2002* (as amended), s94(2)
[77] *The Guardian*, "How Theresa May came close to deporting Abu Qatada", 19 April 2012
[78] *The Guardian*, "Politics Live", 17 April 2012
[79] *BBC Online*, "Abu Qatada appeal: May defends removal delay", 19 April 2012

was not entirely clear.[80] Following continued speculation about the case[81] the European Court of Human Rights issued a press notice:

> **Grand Chamber referral request in Abu Qatada case**
>
> On 17 January 2012 a Chamber of the European Court of Human Rights delivered ajudgment1 in the case Othman (Abu Qatada) v. the United Kingdom (applicationno. 8139/09) in which it found that diplomatic assurances would protect Abu Qatada from torture but that he could not be deported to Jordan while there remained a real risk that evidence obtained by torture would be used against him.
>
> At 11 p.m. French time on Tuesday 17 April 2012, the Court received a letter from Omar Othman asking for his case to be referred to the Grand Chamber. Mr Othman considered that the Chamber, in its judgment of 17 January 2012, was wrong to decide that he would not be at risk of torture if deported to Jordan.
>
> The Panel will decide on whether the referral request complies with the conditions laid down in Article 43 of the European Convention on Human Rights for the admissibility of a referral request and, if so, whether the case should be referred to the Grand Chamber.
>
> Information about the working methods of the Grand Chamber Panel is set out in this document.[82]

Yvette Cooper posed an urgent question on the issue on 19 April 2012. In response to the request for a statement, Theresa May said:

> Yesterday, the European Court of Human Rights informed the Government that, late on Tuesday evening, Abu Qatada applied for a referral of the judgment in his case to the Court's Grand Chamber. He did so on the grounds that he would be at risk of torture if he returned to Jordan. The British courts and the European Court have found that, because of the assurances we have received from the Jordanian Government, there is no such risk.
>
> The Government are clear that Qatada has no right to refer the case to the Grand Chamber of the European Court of Human Rights, since the three-month deadline to do so lapsed at midnight on Monday. Article 43 of the European convention on human rights explains that a request for referral to the Grand Chamber must be made:
>
> "Within a period of three months from the date of the judgement of the Chamber".
>
> The letter that communicated the European Court's judgement, dated 17 January, confirmed that, saying that
>
> "any request for the referral of this judgement to the Grand Chamber must be duly reasoned and reach the Registry within three months of today's date."
>
> Therefore, the deadline was midnight, Monday 16 April.
>
> Because the European Court has no automatic mechanism to rule out an application for a referral based on the deadline, Qatada's application will be considered by a panel of five judges from the Grand Chamber. They will take into account the deadline, as set out in article 43 of the convention, as part of their consideration. The Government have

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[80] *The Guardian*, "Is Theresa May right about the Abu Qatada deadline?" 19 April 2012

[81] *Daily Telegraph*, "Abu Qatada deportation: appeal was made 'just in time'", 19 April 2012

[82] European Court of Human Rights Press Release, *Grand Chamber referral request in Abu Qatada case*, 19 April 2012

> written to the European Court to make clear our case that the application should be rejected because it is out of time.
>
> The Government believe that the case should be heard instead in the Special Immigration Appeals Commission court, as I outlined in the House of Commons on Tuesday. However, until the panel of the Grand Chamber makes its decision, a Rule 39 injunction preventing the deportation of Abu Qatada remains in place. That means that the deportation process and any potential SIAC appeal is put on hold, but we will resume the process as soon as the injunction is lifted. In the meantime, we will continue to build our case, based on the assurances and information we have received from the Jordanian Government. Abu Qatada remains in detention, and the Government will resist vigorously any application he might make to be released on bail.
>
> As I said in the House of Commons on Tuesday, despite the progress we have made, the process of deporting Qatada is likely to take many months. The fact that he is trying to delay that process by applying for a referral to the Grand Chamber after the deadline has passed, and after he has heard our case in SIAC, is evidence of the strength of our arguments, the weakness of his, and the likelihood of our eventual success in removing him from Britain for good.[83]

The Home Secretary was repeatedly questioned about the assurances that had been sought from the European Court of Human Rights and the communications between the Home Office and the court.[84] On 23 April 2012, the Prime Minister told the BBC Today Programme that the Home Office had checked the deadline date for Abu Qatada's deportation appeal with the court: "They were told, throughout, that the deadline expired on the Monday night," he told John Humphrys.[85]

Given the additional delay that the appeal is likely to cause, it is thought that Qatada may make a renewed application for bail[86] since Mr Justice Mitting had ruled that:

> If it is obvious after two or three weeks have elapsed that deportation is not imminent, either because the secretary of state has not certified or because, having done so, a certificate is struck down by the Divisional Court, then I will reconsider bail along the basis of a more leisurely timetable.[87]

6.4 Can Abu Qatada be deported despite the ruling of the European Court of Human Rights?

It has been suggested by some critics of the current judgment that it is possible to ignore the decision of the European Court of Human Rights and deport Abu Qatada[88], since the UK's highest domestic court had previously ruled in favour of deportation. Former Security Minister, Baroness Neville Jones, has been reported as having said that the Government shouldn't rule out such an approach in the "long term" if current negotiations were not successful.[89]

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[83] HC Deb, 19 April 2012, c507-8

[84] *Daily Telegraph*, "Theresa May and the 14 dodged Abu Qatada questions", 20 April 2012

[85] *BBC Online* PM: Home Office checked Qatada date, 23 April 2012

[86] BBC Online, "Will Abu Qatada be released?", 20 April 2012

[87] *Omar Othman (aka Abu Qatada) v Secretary of State for the Home Department*, Special Immigration Appeals Commission, Revocation of Bail decision, 17 April 2012

[88] *Daily Mail*, Kick Qatada out now, 10 February 2012 and *Daily Telegraph*, "Boris Johnson: On top of everything else Abu Qatada costs us a small fortune", 13 February 2012

[89] *Daily Telegraph*, "Send Abu Qatada Back to Jordan, urges former security minister ", 14 February 2012

This would not be legal under international law (founded on the UK's treaty obligations). Most legal experts confirm that while the UK remains a member of the Council of Europe and a State Party to the European Convention on Human Rights, it must fulfil the human rights obligations stemming from Court judgments. A short article by Douglas Murray in the Spectator notes the actions of the Italian Government in the case of Essid Sami Ben Khemais (who was deported to Tunisia despite an interim measures ruling by the European Court of Human Rights that he remain in Italy). The Strasbourg court ruled that the Italian Government had breached Articles 3 and 39 of the European Convention on Human Rights by deporting Khemais. It awarded the applicant 10,000 Euros in respect of non-pecuniary damage and 5,000 Euros for costs and expenses under Article 41 of the Convention.[90]

This approach was considered by the NGO Statewatch, which noted that Khemais's case was the fourth case since 2005 in which the Italian authorities took measures in disregard of the Strasbourg court's orders. The Chair of the Council of Europe's Legal Affairs Committee was highly critical of the Italian Government's actions, describing them as "disgraceful".[91] Murray argued that the practical consequences of defying the Court were not significant.[92]

In his February judgment on the issue of bail, Mr Justice Mitting seems to indirectly accept that this is an option, since he notes that "unless the United Kingdom Government is prepared to accept the political and reputational cost of defying a judgment of the Strasbourg Court, deportation would not be possible."[93] This possibility was raised by David Ruffley. In response, Theresa May said:

> As I made clear in my earlier responses, we are looking at every option available to us under the current legal regime in order to deal with this issue. We wish to be able to deport Abu Qatada; we do not believe he should be in the United Kingdom, but we are looking at all options under the existing legal regime.[94]

As noted above, the Attorney General had previously indicated that Qatada would not be deported in violation of the law. For more detailed information on this subject, see: European Court of Human Rights rulings: are there options for governments? - Commons Library Standard Note 5941.

In her statement on 17 April 2012, Theresa May said:

> Members are frustrated by Strasbourg's ruling and by the time that it is taking to deport him. I share their frustration entirely. I know that a number of hon. Members have specific concerns, which I want to address head-on.
>
> The first is why we cannot just ignore Strasbourg and put Qatada on a plane. In reality, we simply could not do that. As Ministers, we would not just be breaking the law ourselves, but would be asking Government lawyers, officials, the police, law enforcement officers and airline companies to break the law too. As soon as we issued a deportation notice to Qatada, his lawyers would win an immediate injunction

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[90] See also, Fraser Nelson, 'The case for ignoring Strasbourg', *Spectator Coffee House*, 22 April 2012

[91] Council of Europe, Press Release, "Herta Däubler-Gmelin and Christos Pourgourides: blatant disregard yet again, by Italy, of binding interim measures ordered by the ECHR", August 2009

[92] Other cases have also been reported. Most notably, Slovakia returned an asylum-seeker, Mustafa Labsi, to Algeria in April 2010, even though European Court of Human Rights had issued an order for interim measures in August 2008 requiring the authorities not to extradite him, until the appeals on his asylum claim had been completed

[93] *Othman v Secretary of State for the Home Department*, Special Immigration Appeals Commission, 6 February 2012, para 7

[94] HC Deb 7 February 2012, c171

preventing us from removing him. Even if we somehow succeeded in deporting him against the wishes of the courts, we would be ordered to bring him back to Britain and perhaps even to pay compensation. Instead, our approach will bring an enduring solution. The truth is that of all people and institutions, the Government must obey the law. That means that as long as we remain a signatory to the European convention, we have to abide by Strasbourg's rulings.

The second concern is why we cannot deport Qatada when other countries have recently deported foreign nationals. The truth is that although all legal systems and all cases are different, no Council of Europe member state now ignores rule 39 injunctions, which Strasbourg issues to prevent deportations. The recent cases of foreign nationals being deported from France did not involve an appeal to the European Court of Human Rights. Italy has confirmed that it will no longer deport foreign nationals in defiance of rule 39 injunctions. I am keen to learn from the experience of other countries in Europe, so we will be examining the processes and procedures used in France, Italy and elsewhere to see whether our legislation might be changed to enable us to deport dangerous foreign nationals faster.[95]

[95] HC Deb 17 April 2012, c174. See also: *The Guardian*, "The rule of law: why Abu Qatada's release matters", 13 February 2012