

A close-up photograph of a person's hand gripping a grey chain-link fence. The hand is positioned in the center-left of the frame, with fingers wrapped around the metal links. The background is blurred, showing a person's face and a military-style uniform with a beret. The overall tone is somber and evocative.

# **BEYOND DISCRETION**

THE PROTECTION OF BRITISH NATIONALS  
ABROAD FROM TORTURE AND ILL-TREATMENT

**REDRESS**

Ending Torture, Seeking Justice for Survivors





## Beyond discretion:

The protection of British nationals abroad  
from torture and ill-treatment

**January 2018**

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Cover photo by Mitchel Lensink

## About REDRESS

REDRESS is an international human rights organisation based in London and The Hague which seeks justice and reparation for survivors of torture and related international crimes.

The provision of consular assistance and diplomatic protection for nationals facing torture and other acts of cruel, inhuman or degrading treatment or punishment abroad has long been an issue close to the heart of REDRESS. Our organisation was founded in 1992 by Keith Carmichael, a British torture survivor who was in need of help from the UK Government while and after he was arbitrarily detained and tortured abroad.

In 2012, REDRESS published *Tortured Abroad: The UK's obligations to British Nationals and Residents*. We continue to engage regularly with the Foreign and Commonwealth Office in relation to these issues.

Our current work, including on several cases of British (and/or dual) nationals such as **Nazanin Zaghari-Ratcliffe** in Iran and **Andargachew 'Andy' Tsege** in Ethiopia, underpins this report which we hope will inform policy makers and other stakeholders of the gaps in protection, transparency and accountability that exist within the current legislative and policy framework of consular assistance and diplomatic protection. Although this report focuses on the law, policy and practice of the United Kingdom, we hope that it will be of use to all those engaged on these issues internationally.

## **Autumn Light**

*The diagonal light falling on my bed*

*Tells me that there is another autumn on the way*

*Without you*

*A child turned three*

*Without us*

*The bars of the prison grew around us*

*So unjustly and fearlessly*

*And we left our dreams behind them*

*We walked on the stairs that led to captivity*

*Our night time stories remained unfinished*

*And lost in the silence of the night*

*Nothing is the same here*

*And without you even fennel tea loses its odour*

Nazanin Zaghari-Ratcliffe, detained in Evin Prison, Iran, since June 2016



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## List of abbreviations

ACHPR	African Commission on Human and Peoples' Rights
ADP	Draft Articles on Diplomatic Protection
BHC	British High Commission
CIDTP	Cruel, Inhuman or Degrading Treatment or Punishment
CRA	Consular Relations Act (UK)
ECHR	European Court of Human Rights
FAC	Foreign Affairs Committee
FASC	Foreign Affairs Select Committee
FCO	Foreign and Commonwealth Office
FOIA	Freedom of Information Act
HMG	Her Majesty's Government
HRA	Human Rights Act (UK)
HRC	Human Rights Council (United Nations)
IACHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ILC	International Law Commission
MFA	Ministry of Foreign Affairs
PACE	Police and Criminal Evidence Act
PCIJ	Permanent Court of International Justice
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UNCAT	United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
USA	United States of America
VCCR	Vienna Convention on Consular Relations
VCDR	Vienna Convention on Diplomatic Relations
WGAD	United Nations Working Group on Arbitrary Detention



## Executive Summary

The role of the UK Government in protecting and defending the rights and welfare of incarcerated citizens overseas has received growing national attention in the wake of the detention of Mrs. Nazanin Zaghari-Ratcliffe, a British-Iranian dual national who has been unlawfully detained in Iran since April 2016, and who has suffered serious human rights violations as a result. Nazanin's case is one of over a hundred cases each year in which UK nationals allege that they have suffered serious human rights violations abroad such as unlawful arrest and detention, unfair trial or torture and ill-treatment. In REDRESS' experience, anyone can become a victim of unlawful detention and arrest and other human rights violations abroad, irrespective of their reason for travel, raising important questions about the role of the UK Government. What should the UK Foreign and Commonwealth Office do in such cases to protect British nationals detained abroad and to assist their families? How can the UK Government support and help to enforce the rights of UK nationals who currently face or have previously experienced human rights violations while in detention abroad? Is the current framework in place sufficient to protect British nationals abroad?

Under international law, States have a right to provide consular protection (referred to as consular assistance in UK policy and practice) to their detained nationals, in order to ensure that basic needs are met and fundamental human rights are respected. Consular protection or assistance can act as a humanitarian safeguard and provide a crucial – and sometimes the only - link between the detainee and the outside world. It can help prevent human rights violations, including torture or other prohibited ill-treatment. States can enforce the rights of their nationals to consular assistance and to redress for human rights violations suffered abroad through diplomatic protection, a means for a State to take legal or related action against another State in respect of the injury caused to one of its nationals.

In the UK, both consular assistance and diplomatic protection are not enshrined in UK law but instead are regulated as a matter of policy. They are considered to be actions that can be taken at the discretion of the Government. The wide discretion exercised by the Government has led to criticism by some victims of human rights violations perpetrated during detention abroad as well as by some families, advocates and civil society organisations. Arguably, a wide discretion fails to recognise the important role of both concepts under international law and, in some cases, may undermine the protection of British nationals abroad. Significant efforts to assist and protect British nationals abroad in individual cases notwithstanding, the overall practice in this area is inconsistent and lacks transparency. The results can be seemingly weak support from the UK Government to secure remedies for victims of violations. The FCO's policies in this area suggest that the Government considers consular assistance and diplomatic protection as matters separate from human rights. This differentiation seems incongruous with the UK's public positioning on human rights cases regarding other countries' nationals; arguably it also undermines the UK's human rights strategy and weakens the protection of its own citizens.

The often difficult experiences of victims and their families merits a review of the current approach. Instead of considering this merely as a matter of policy, REDRESS argues that current UK law should be amended to introduce a right to consular assistance and an obligation to exercise diplomatic protection in cases where UK nationals (including dual nationals in line with international standards) who have suffered or face a risk of serious human rights violations in detention abroad, request it.

# Recommendations to the Foreign and Commonwealth Office

## CONSULAR ASSISTANCE

- ❖ Enshrine the right to consular assistance for all British nationals in UK law
- ❖ Publicly acknowledge and work towards the implementation of findings and recommendations issued by United Nations and regional human rights bodies concerning all British nationals
- ❖ Recognise unequivocally across all relevant policy documents that a primary role of the FCO's consular assistance is to ensure that British nationals detained abroad are being treated in accordance with international human rights standards
- ❖ Publish the entire Internal Guidance Documents for consular officials on consular assistance and develop clear criteria for a transparent exercise of consular assistance
- ❖ Revise, re-evaluate and thoroughly update the current policy on consular assistance with the aim of achieving an accessible, clear, and well-publicised policy that puts the protection of all British (and dual) nationals from human rights violations abroad at the centre of UK consular assistance
- ❖ In all cases where British nationals, including dual nationals, are detained abroad, insist on regular consular access and private visits
- ❖ Publicly commit to making vigorous complaints with regards to breaches of the Vienna Convention on Consular Relations where the detainee consents and consider bringing cases before the International Court of Justice and other relevant fora if they continue
- ❖ Commit to taking a more proactive approach to identifying and intervening in cases where a British (or dual) national is facing serious human rights violations. All breaches of international human rights law should result in vigorous complaints where the detainee consents. While each case should be considered individually, as a matter of principle, persistent breaches of human rights law should not go unchallenged, and strategies should be geared towards achieving the desired result – ending the violation of the (dual) national's human rights
- ❖ Commit to publishing detailed information on action taken in individual cases – subject to data protection concerns - to uphold the human rights of all British nationals detained abroad in the annual Human Rights and Democracy report

## DIPLOMATIC PROTECTION

- ❖ Introduce an obligation to exercise diplomatic protection in cases of torture and related international crimes, or the threat thereof, where the individuals concerned request it, to enhance the protection of all British nationals detained abroad
- ❖ Support British nationals who have suffered human rights violations abroad, in their quest for justice, including reparation

## I. Context

On 3 April 2016, Iran's Revolutionary Guard arrested British-Iranian dual national Nazanin Zaghari-Ratcliffe at Tehran International Airport as she was returning to the United Kingdom (UK) with her 21-month-old daughter. Nazanin had been in Iran on holiday visiting family for Nowruz, Iranian New Year. She was given no reason for her arrest and was subsequently held in solitary confinement in an undisclosed location in Kerman, 1,000 kilometres south of Tehran. Nazanin was only allowed to see her daughter and family in Iran after five weeks of largely *incommunicado* detention. Following a secret and unfair trial in September 2016, Nazanin was sentenced to five years in prison on unspecified charges relating to national security. She was only given access to a lawyer the day before the trial, and the lawyer was given just five minutes to defend her. In total, Nazanin has spent over eight and a half months in solitary confinement. She is separated from her daughter, who is staying with her parents in Iran, and from her husband, Richard Ratcliffe, who is in the UK. Her mental and physical health has deteriorated as a result of her treatment and time spent in detention – she has suffered from arthritis and has experienced depressive episodes.<sup>1</sup>

To date, the Government of Iran has refused the UK embassy in Tehran consular access to Nazanin entirely. The UK Government has not been able to provide her with consular assistance so as to monitor her welfare and ensure that her rights are being protected. In November 2017, the UK Government confirmed that it was considering whether it will give diplomatic protection to Nazanin, an inter-State process in which Nazanin's interests would be recognised to be the UK's interest.<sup>2</sup>

The provision of consular assistance is recognised in international treaty law and as part of customary international law.<sup>3</sup> At a practical level, the need for consular assistance arises when the individual concerned is still abroad, and serves mainly a preventive and welfare function, whereas diplomatic protection becomes particularly relevant where violations have already occurred. Despite the clear theoretical distinctions between consular assistance and diplomatic protection, the two concepts are often blurred in practice.

There is increasing public attention paid to consular cases worldwide. Nazanin's case for instance has become well-known to the British public. At the time of writing over 1.5 million people have signed a petition calling on the UK Government to intervene in her case.<sup>4</sup> Hers is not the only case. Over 400,000 people signed a petition asking the UK Government to intervene after six former British soldiers were wrongly arrested by Indian authorities in 2013. The 'Chennai Six', as the men became known, were finally released over four years later in November 2017, having been acquitted for the second time.<sup>5</sup>

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<sup>1</sup> For more information see REDRESS, *Nazanin Zaghari Ratcliffe*, available at <https://redress.org/casework/nazanin-zaghari-ratcliffe>.

<sup>2</sup> BBC, *Nazanin Zaghari – Ratcliffe: Government considers diplomatic protection*, 15 November 2017, available at <http://www.bbc.co.uk/news/uk-41992068>.

<sup>3</sup> The Vienna Convention on Consular Relations (1963) (VCCR) defines the framework for consular relations between independent States.

<sup>4</sup> For more information see Change.org, *Petition Free Nazanin Ratcliffe*, available at <https://www.change.org/p/free-nazanin-ratcliffe>.

<sup>5</sup> For more information see Change.org, *Petition Free the 6 British Veterans from Indian jail #CHENNAI6*, available at <https://www.change.org/p/british-foreign-secretary-free-the-6-british-veterans-from-indian-jail>.

Another prominent case is that of British national Andargachew 'Andy' Tsege who was abducted in June 2014 under the orders of Ethiopian authorities while travelling through an international airport in Yemen. His whereabouts were unknown for over two weeks after his abduction, when the Ethiopian Government confirmed that he was being held in Ethiopia. Over the next couple of months he was paraded on Ethiopian State television on three occasions, looking gaunt and exhausted.<sup>6</sup> In total, Andy was held in solitary confinement for over a year before being moved to a federal prison. A prominent figure in Ethiopian opposition politics, Andy remains in prison in Ethiopia on a death sentence imposed after an *in absentia* trial which concluded in 2012.<sup>7</sup> He remains in effective *incommunicado detention* from his partner and children who are living in the UK, except for one single phone call in December 2014. His case has received great public support in the UK, and has frequently been raised in UK Parliament.<sup>8</sup> Many individuals have contacted the UK Government directly, and in response the Foreign Secretary released a series of open letters to Andy's supporters until August 2017.<sup>9</sup>

These are just a few examples of the many cases of British citizens facing human rights violations while detained abroad. Since 2008, an average of 5,800 British nationals have been arrested or detained each year.<sup>10</sup> The number of allegations made by British nationals concerning torture and other forms of mistreatment suffered abroad increased sharply from about 50 cases per year for the period 2005-2010 to an average of almost 120 reported allegations between 2012-2013.<sup>11</sup> In 2016, the Foreign and Commonwealth Office reported that it delivered assistance to 118 British nationals who alleged torture or mistreatment. The number of mistreatment cases is likely to be higher than what has been reported in official documents, as detainees may not always report violations.<sup>12</sup>

Since its establishment in 1992, REDRESS has worked with many survivors who were tortured abroad, and with families who have sought REDRESS' assistance regarding their loved ones detained abroad. In our experience, anyone can become a victim of arbitrary detention and arrest abroad. When this happens, obtaining prompt access to and receiving effective consular assistance and, where required, diplomatic protection, is often the only possibility for those detained to put an end to their detention and to avoid being subjected to human rights violations. However, survivors and their families alike have raised a number of

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<sup>6</sup> REDRESS and Reprieve, *Emergency Complaint submitted to the African Commission on Human and Peoples' Rights, submitted on behalf of Andargachew Tsege and his family, concerning the actions of The Republic of Ethiopia, AND a Request for provisional Measures*, 4 February 2015, para.17.

<sup>7</sup> For more information see, REDRESS, *Andargachew 'Andy' Tsege*, available at <https://redress.org/casework/andargachew-andy-tsege/>.

<sup>8</sup> See, for example, House of Commons Hansard, *Westminster Hall debate: Andy Tsege and other UK nationals imprisoned abroad*, 20 December 2016, available at <https://hansard.parliament.uk/commons/2016-12-20/debates/2952D1B1-A3DD-4277-82A3-D952B3994B94/UKNationalsImprisonedAbroad>.

<sup>9</sup> FCO, *Andargachew Tsege, British national currently detained in Ethiopia: open letter to supporters*, last updated 9 August 2017, available at <https://www.gov.uk/government/publications/andargachew-tsege-british-national-currently-detained-in-ethiopia-open-letter-to-supporters>.

<sup>10</sup> FCO, *FOI release: British nationals detained abroad 2008-2017*, September 2017, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/642076/FOI\\_0497-17\\_-\\_csv.csv/preview](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/642076/FOI_0497-17_-_csv.csv/preview).

<sup>11</sup> Foreign Affairs Committee (FAC), *Supplementary written evidence from Foreign and Commonwealth Office (CON0036)*, October 2014, available at <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/foreign-affairs-committee/fco-consular-services/written/15304.pdf>.

<sup>12</sup> FCO, *Allegations of Torture and Mistreatment of British Nationals Abroad*, FOIA Request Ref. 0457-17, 6 June 2017. Copy on file with REDRESS. No data is available for 2011, 2014 or 2015.

complaints regarding the lack of (effective) consular assistance and diplomatic protection by the FCO in cases involving allegations of serious human rights violations.<sup>13</sup>

For many, what is fundamentally missing is a lack of transparency in the decision-making process, making it unclear under what circumstances and how the FCO will actually provide consular assistance or exercise diplomatic protection. Another consequence of the discretionary policy is the significant challenges in holding the FCO accountable for any arguable shortcomings in the assistance offered. Overall, there is often a frustrating gap in expectations regarding what the UK Government should be doing, and what it actually does in cases where it is clear that an individual has faced or is facing violations of his or her rights. Families can feel like they are in a 'constant battle' with the FCO and 'jumping through hoops' to achieve very little progress in their cases.<sup>14</sup>

The provision of consular assistance to an average of 5,800 British nationals detained abroad each year is not an easy task. It tends to require coordination between multiple departments and authorities in the UK as well as the detaining State and significant resources being deployed to enable assistance to be provided. The FCO's consular services directorate has put in place a sophisticated system that seeks to cater for a broad range of needs of British nationals detained abroad. At the same time, there is more the UK Government should be doing specifically in regards to its nationals who face or have suffered serious human rights abuses abroad.

This report argues for a victim-centred approach which places the individuals affected and the protection of their rights at the heart of policy and practice. It highlights the importance of providing effective human rights protection for British nationals abroad and the fundamental lack of transparency and accountability associated with the UK's current policy of discretion. Finally, it explores the merits of introducing a legal right to consular assistance and diplomatic protection.

The report is based on REDRESS' extensive experience working with British torture survivors and their families. Their experiences, views and perspectives are highlighted throughout the report. Some cases referenced throughout the report have been anonymised to ensure privacy and safety. It is important to emphasise that while families and clients we work with are at times highly critical of the UK's policy framework and overall approach to consular assistance and diplomatic protection, all, without exception, recognise the challenges involved and highly appreciate efforts of consular officials to assist in consular cases. Many have highlighted how important the meetings with consular staff in London (for families) and with consular officials abroad (for those in detention) are for their personal well-being.

The report incorporates responses received from the FCO to Freedom of Information requests and to Parliament. The report was written by Josie Fathers, Advocacy Officer, and Chris Esdaile, Legal Advisor, and edited by Jürgen Schurr and Carla Ferstman. We are grateful for the assistance from our interns, Alice Osborne, Naomi Barker, Tajwar Shelim and Flaminia Delle Cese. We are grateful to the Peoples' Postcode

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<sup>13</sup> The Guardian, T. Siddiq and R. Ratcliffe, *The British government must act now to free Nazanin Zaghari-Ratcliffe*, 14 September 2016, available at <https://www.theguardian.com/commentisfree/2016/sep/14/british-government-nazanin-zaghari-ratcliffe-iran-jail-health-human-rights>; Evening Standard, A. Mitchell, *The Government must help rescue British man Andy Tsege from death row*, 31 October 2017, available at <https://www.standard.co.uk/comment/comment/the-government-must-help-rescue-british-man-andy-tsege-from-death-row-a3672556.html>; The Guardian, F. Perraudin, *Chennai Six's Billy Irving: 'I can never forgive UK government'*, 20 December 2017, available at <https://www.theguardian.com/uk-news/2017/dec/10/chennai-sixs-billy-irving-can-never-forgive-uk-government>.

<sup>14</sup> Interview with REDRESS client, November 2017.

Trust, the Allen & Overy Foundation and the Oakdale Trust for their generous support for our work on consular assistance and diplomatic protection.



## II. The protection of human rights of British nationals detained abroad

Prisoners and detainees are especially vulnerable to torture and ill-treatment and other human rights violations. Many detainees abroad face additional disadvantages compared to the local population by having little or no knowledge of the local language and legal system, at times limited ties to the local community, and because of their separation from family and friends.

One of the links between consular assistance and diplomatic protection is that if consular assistance is properly afforded there will already be a record of what ill-treatment has taken place as consular officials will have been involved in the issues from the start. This should facilitate access to redress at a later stage, including through the exercise of diplomatic protection where necessary. So, although consular assistance is primarily preventative and protective in individual cases, it is also more than that, as it can and should lay the ground for redress which might be pursued at a later stage. Where its nationals have been tortured, the UK Government should do whatever it can to help the survivor obtain redress, including reparation, through the exercise of diplomatic protection where required. Not only would this facilitate justice being obtained for such victims, but it would have a preventative impact for British nationals, other foreigners detained abroad (as well as other detainees) by strengthening the implementation of international norms.

Since 2015, the UK Government has implemented a broad three-pronged approach to its human rights policy: democratic values and rule of law; human rights for a stable world; and strengthening the rules-based international system.<sup>15</sup> This replaced the FCO's previous human rights strategy based on several thematic areas, including a "Strategy for the Prevention of Torture." The 2011-2015 strategy had placed consular issues squarely within its anti-torture strategy, stating that "[T]orture prevention work also reinforces our Consular work when British nationals imprisoned abroad allege mistreatment."<sup>16</sup>

The current lack of a specific strategy addressing consular issues within torture prevention and other human rights issues is of concern. The FCO's 2015 Human Rights & Democracy report did not include a separate section on the human rights of British nationals abroad,<sup>17</sup> although this section was reinstated in the 2016 Human Rights & Democracy report.<sup>18</sup> REDRESS would urge that the FCO's human rights priorities and strategies include consular issues, including diplomatic protection.

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<sup>15</sup> For more information see: FCO Blogs, *FCO Human Rights Work: A New Way Forward (leaving no priorities behind)*, 5 August 2015, available at <https://blogs.fco.gov.uk/robenn/2015/08/05/fco-human-rights-work-a-new-way-forward-leaving-no-priorities-behind/>.

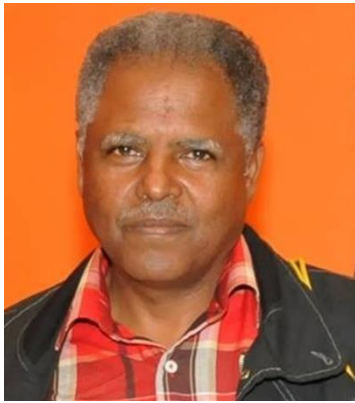
<sup>16</sup> FCO, *Policy paper: FCO Strategy for the Prevention of Torture 2011-2015*, October 2011, p. 3, available at <https://www.gov.uk/government/publications/fco-strategy-for-the-prevention-of-torture>.

<sup>17</sup> FCO, *Human Rights & Democracy Report 2015*, April 2016, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/518658/FCO755\\_Human\\_Rights\\_Report\\_2015\\_-\\_WEB.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/518658/FCO755_Human_Rights_Report_2015_-_WEB.pdf). Consular assistance was embedded into different sections of the report, including 'Consular work and torture.'

<sup>18</sup> FCO, *Human Rights & Democracy Report 2016*, July 2017, p. 31, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/630623/Human\\_Rights\\_and\\_Democracy\\_Report\\_2016\\_accessible.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/630623/Human_Rights_and_Democracy_Report_2016_accessible.pdf).

The following sections highlight three particular cases REDRESS is currently engaged in, and provide an outline of key international obligations and standards regarding fundamental human rights that are at risk for British nationals detained abroad.

## II.1. The case of Andargachew Tsege (Andy)



Andy Tsege, is a UK citizen and father of three from London, who was abducted under the orders of the Ethiopian authorities on 23 June 2014. He has remained in prison on a death sentence imposed *in absentia* in Ethiopia ever since.

Andy is a prominent figure in Ethiopian opposition politics who had been previously detained and assaulted in custody in 2005, and in 2009 and 2012 he was tried and convicted in unfair proceedings *in absentia* under an anti-terrorism proclamation. He was sentenced to death in the first trial, and later life imprisonment during his second trial.

On 23 June 2014, Andy was abducted while transiting through Sana'a airport, Yemen, by what are believed to have been Yemeni intelligence officers acting on the orders of the Ethiopian Government. His whereabouts were unknown until two weeks after his abduction, when the Ethiopian Government confirmed that he was being held in Ethiopia after having being transported from Yemen.

The UK Ambassador to Ethiopia was only allowed to see Andy over 50 days after his abduction. The meeting took place in the police headquarters in Addis Ababa in the presence of Ethiopian security officials, meaning that Andy was unable to speak freely. Andy was not told of the charges against him and had not had access to a lawyer or independent medical examination. Andy was held in solitary confinement and *incommunicado* in an unknown location for over a year. Around July 2015, Andy was transferred to Kality federal prison in Addis Ababa. The UK Ambassador was only informed of his location nearly one month later.

Andy had no access to a lawyer for nearly three years, and is currently not allowed access to the specialised medical treatment he requires, such as a dentist. He is being held in effective *incommunicado* detention from his family in the UK, except from a single phone call back in December 2014, monitored by Ethiopian authorities.

REDRESS along with fellow human rights organisation Reprieve, submitted a complaint to the African Commission on Human and Peoples' Rights, calling for Andy's immediate release and repatriation to the UK. The African Commission subsequently requested Ethiopia to secure Andy's immediate release and repatriation to the UK. However, at the time of writing Andy remains in prison, on death row, without access to his family in London, and with minimal access to a lawyer and the consulate.



## II.2. The case of Nazanin Zaghari-Ratcliffe



Nazanin is a British-Iranian charity worker who has been arbitrarily detained in Iran since she was arrested on 3 April 2016. She remains in prison on unspecified charges, separated from her now three-year-old daughter and her husband in the UK.

Nazanin was returning from a visit to see her parents in Iran with her then 21-months-old daughter Gabriella when she was arrested at Tehran Airport by what is believed to be Iran's Revolutionary Guard. No reason was given for her arrest and Gabriella's passport was confiscated for over a year. Nazanin was then held incommunicado

for 45 days in solitary confinement in a windowless cell around 1.5m<sup>2</sup>.

Nazanin was not allowed to contact her husband and had only restricted and tightly controlled communications with her family in Iran. She was not given access to legal counsel nor to medical treatment, and the lights in her cell remained permanently switched on. As a result, Nazanin experienced great difficulty walking; she experienced weight loss and her hair began to fall out. She has since confessed to her family that as a result she felt suicidal and experienced depression in addition to experiencing arthritis, numbness and limited mobility. Her family in the UK have not been allowed a visa to travel to Iran.

In total, Nazanin spent eight months in solitary confinement in cells. She faced an unfair trial in secret in which she was sentenced to five years in prison for unspecified crimes without evidence. She only had access to her lawyer the day before trial, and the lawyer was only given five minutes to defend her case; this scenario was repeated in the following appeals. In October 2017, Iranian authorities informed Nazanin that she was facing three additional charges and an additional 16 years imprisonment. On 23 November, Iranian authorities further informed her that she would appear in court on 10 December on a charge of "spreading propaganda." The court date was later postponed in the wake of the UK Foreign Secretary's visit to the country, although Nazanin never received formal notification. To date, Nazanin has not been informed of a new court date.

REDRESS filed a complaint to the United Nations Working Group on Arbitrary Detention who deemed her detention as a violation of her most basic fundamental rights. This was followed by six UN experts calling for her release, which was re-iterated in October 2017. In the United Kingdom 261 MPs and Peers jointly signed a letter calling for her release and the Foreign Secretary has visited Iran to discuss the issue. At the time of writing Nazanin remains arbitrarily detained and does not receive UK consular visits as Iran does not recognise her dual nationality. She has no unrestricted access to her family and her lawyer and suffers from psychological issues as a result of her imprisonment.



### II.3. Jagtar Singh Johal (*Jaggi*)



Jaggi is a 30-year-old British citizen from Dumbarton, Scotland, who travelled to India to marry his fiancée in October 2017. While out shopping he was seized by plain-clothed officers, hooded and abducted on 4 November. Following a brief court hearing the subsequent day he was held incommunicado by Indian Police for nine days in an undisclosed location. He remains detained without charge.

Jaggi states that between 5 to 9 November, Indian Police tortured him by the means of electric shock to his ears, nipples and genitals, forcing his limbs into opposite directions and forced sleep deprivation. In a secret hearing on 10 November, witnesses reported that Jaggi had great difficulty in standing or walking and had to be assisted by the police officers escorting him in and out of the courtroom.

During his detention, Indian Police denied him of all private contact with his lawyers, British consular staff and his family in Scotland. He has also been denied an independent medical examination, repeatedly requested by his lawyers.

The British High Commission was only able to meet Jaggi for the first time on 16 November, nearly two weeks after his initial arrest. This meeting was supervised by Indian police. Requests for private consular meetings from Jaggi and the British High Commission have been repeatedly denied. On 21 November, the then-Minister of State at the Foreign and Commonwealth Office and the Department for International Development, Rory Stewart, told UK members of parliament that the UK Government was taking Jaggi's case seriously and would "take extreme action if a British citizen is being tortured."

Jaggi has been brought before multiple court hearings over the past three months, and has been taken in and out of judicial and police custody.

On 18 December 2017, ENSAAF and REDRESS submitted an urgent appeal to the United Nations Special Rapporteur on Torture to call on the Indian Government to ensure Jaggi is protected from further torture and to be provided an immediate independent medical examination.

At the time of writing, Jaggi remains detained without charge or any evidence brought against him, with no access to private consular assistance, limited access to his lawyer, and has not been granted an independent medical examination.



## **II.4. The right to be free from torture and cruel, inhuman or degrading treatment or punishment (CIDTP) and the right to be treated with humanity**

Articles 2 and 16 of the United Nations Convention against torture and other cruel, inhuman or degrading treatment or punishment (UNCAT), Article 7 of the International Covenant on Civil and Political Rights (ICCPR), Article 5 of the Universal Declaration of Human Rights (UDHR) and Article 3 of the European Convention on Human Rights set out the right to freedom from torture under any circumstance. Since UNCAT's entry into force, the absolute prohibition of torture and other cruel, inhuman or degrading treatment or punishment (CIDTP) has become accepted as a principle of customary international law.<sup>19</sup>

According to UNCAT, torture is:

“...any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity...”<sup>20</sup>

Torture and ill-treatment often takes place during the initial phase of arrest and detention. There is no exhaustive list of acts that may constitute torture or ill-treatment. Our clients have experienced being subjected to rape and sexual assault in detention, beatings, electric shocks, mock executions, stretching, threats, sleep deprivation, the withdrawal of medical assistance, prolonged solitary confinement, and conditions of detention constructed deliberately to aggravate mental and physical suffering, among other methods of torture.

CIDTP, or ill-treatment, is the infliction of physical or mental pain or suffering. Harsh conditions of detention – including prolonged solitary confinement, inadequate or insufficient food, hygiene, access to toilets, and access to medical care – may contribute to and form part of ill-treatment that may in some cases constitute torture.<sup>21</sup>

As set out in the case study above, on 4 November 2017, British national Jagtar Singh Johal (Jaggi) was arrested in India where he remains detained without charge. While he was held incommunicado, Jaggi

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<sup>19</sup> See, for example, UN Committee Against Torture, *General Comment No. 2: Implementation of Article 2 by States Parties*, 24 January 2008, CAT/C/GC/2, available at <http://www.refworld.org/docid/47ac78ce2.html>, para. 1.

<sup>20</sup> UNCAT, Article 1 (1).

<sup>21</sup> See further for ill-treatment in the context of detention, European Court of Human Rights, Factsheet: Detention conditions and treatment of prisoners, November 2017, available at [http://www.echr.coe.int/Documents/FS\\_Detention\\_conditions\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Detention_conditions_ENG.pdf); specifically on solitary confinement, the United Nations Special Rapporteur on Torture has noted that: “...the practice of solitary confinement during pre-trial detention creates a de facto situation of psychological pressure which can influence detainees to make confessions or statements against others and undermines the integrity of the investigation. When solitary confinement is used intentionally during pretrial detention as a technique for the purpose of obtaining information or a confession, it amounts to torture as defined in article 1 or to cruel, inhuman or degrading treatment or punishment under article 16 of the Convention against Torture...” UN Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, *Interim Report, A/66/268*, published on August 5, 2011, para. 73.



asserts that Indian police tortured him by means of electric shocks to his ears, nipples and genitals, forcing his limbs into painful positions and forced sleep deprivation.<sup>22</sup>

The right to be treated with humanity and respect for the inherent dignity of the person is closely linked to the corresponding right to freedom from torture and CIDTP. It is enshrined in Article 10 of the ICCPR, which states that “all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”<sup>23</sup> The UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment similarly underlines this right, the first of its principles stating that “all persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person.”<sup>24</sup>

The UN Standard Minimum Rules for the Treatment of Prisoners - readopted as the Nelson Mandela Rules in 2015<sup>25</sup> - are an important source of standards relating to treatment in detention, and are the key framework used by monitoring and inspection mechanisms in assessing the treatment of prisoners.<sup>26</sup> These rules have influenced British policy and practice, for example through the work of Independent Monitoring Boards, the Scottish Human Rights Commission and the HM Inspectorate of Prisons in England, Wales and Scotland.<sup>27</sup>

## **II.5. The right to liberty and security of person and the right to a fair trial**

The right to liberty and security of the person is enshrined under Article 9 of the ICCPR, Article 3 UDHR and also Article 5 of the European Convention on Human Rights (European Convention). These provisions relate to the protection of individuals’ freedom from arbitrary arrest and detention. The UK has further committed itself to guaranteeing its citizens the right to liberty and security under Article 5 of the Human Rights Act.<sup>28</sup>

The right to liberty and security of the person generally requires for any arrest and detention on suspicion of having committed an offence to be lawful, and that those arrested or detained are given reasons for their arrest or detention,<sup>29</sup> are brought before a court,<sup>30</sup> are entitled to bring court proceedings to challenge the lawfulness of their arrest or detention.<sup>31</sup> Victims of arbitrary arrest or detention have a right to compensation.<sup>32</sup>

The right to a fair trial includes the right to a fair hearing, to be tried without undue delay, and to be presumed innocent until proven guilty. Article 14 of the ICCPR states that “all persons shall be equal before the courts

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<sup>22</sup> For more information see REDRESS and Ensaaf, *Rights Groups Call on UN Expert to Intervene in Torture of British National*, 18 December 2017, available at <https://redress.org/news/rights-groups-call-on-un-expert-to-intervene-in-torture-of-british-national/>.

<sup>23</sup> International Covenant on Civil and Political Rights 1976, 999 U.N.T.S. 171, Article 10.

<sup>24</sup> UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment 1988, Principle 1.

<sup>25</sup> UN General Assembly, *UN Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, Res.70/175, 17 December 2015, available at [https://www.unodc.org/documents/justice-and-prison-reform/GA-RESOLUTION/E\\_ebook.pdf](https://www.unodc.org/documents/justice-and-prison-reform/GA-RESOLUTION/E_ebook.pdf).

<sup>26</sup> Penal Reform International, ‘UN Nelson Mandela Rules’, available at <https://www.penalreform.org/priorities/prison-conditions/standard-minimum-rules/>.

<sup>27</sup> Association for the Prevention of Torture, ‘Putting the Nelson Mandela Rules into practice: the work of the UK National Preventive Mechanism’, July 2017, available at <https://www.apt.ch/en/blog/nelson-mandela-rules-uk-npm/>.

<sup>28</sup> Human Rights Act 1998, available at <https://www.legislation.gov.uk/ukpga/1998/42/contents>.

<sup>29</sup> ICCPR, Article 9(3).

<sup>30</sup> *Ibid*, Article 9(3).

<sup>31</sup> *Ibid*, Article 9(4).

<sup>32</sup> *Ibid*, Article 9(5).



and tribunals,” including prisoners and detainees. In 2009, the NGO Fair Trials International published a comparative report on the importance of trial attendance as a form of consular assistance after receiving a number of requests for assistance from detainees wanting consular officials to attend their trials.<sup>33</sup> There is often an assumption that non-national defendants, in this case British nationals abroad, will receive a fairer trial if there is a representative from their government present. Such trial attendance and/or monitoring by consular officials can also support the documentation of fair trial violations.

Frequently, the violation of the right to liberty is followed by or occurs on the basis of a violation of the right to a fair trial. The case of Andy Tsege is a case in point. On 23 June 2014, while in transit at Sana'a international airport, Andy was arrested and rendered to Ethiopia, where he was held in secret detention in solitary confinement for over a year. His whereabouts were unknown for two weeks before Ethiopian officials admitted they had taken him into custody. At the time of publication, Andy is still being held on death row, after he was tried *in absentia* in 2009 while he was at home in London, UK. He was never notified of the proceedings brought against him, nor of his sentence. The United States' Department of State subsequently described his trial as “lacking basic elements of due process” in an act of “political retaliation.”<sup>34</sup> He has never been given the opportunity to challenge the nature of his detention. The Ethiopian Prime Minister and Foreign Minister have both stated that no appeal process is available to Mr Tsege regarding his *in absentia* death sentence.<sup>35</sup>

The United Nations Working Group on Arbitrary Detention (UNWGAD), mandated to investigate cases of deprivation of liberty imposed arbitrarily, has found that both **Andy Tsege** and **Nazanin Zaghari-Ratcliffe** suffered a violation of their right to a fair trial and that both are arbitrarily detained. The UNWGAD called for their immediate release.<sup>36</sup> In both cases, the UN has tasked the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to carry out further investigations. In Andy's case, the African Commission on Human and Peoples' Rights (African Commission) has also granted provisional measures requesting the Government of Ethiopia to release him immediately and allow his repatriation to the UK.<sup>37</sup>

## **II.6. The right to redress for victims of serious human rights violations**

The right to redress for serious human rights violations such as those highlighted in the previous sections is firmly enshrined in international law. Specifically in regards to victims of torture for example, UNCAT provides that “[E]ach State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full

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<sup>33</sup> Fair Trials International, *Consular Assistance and Trial Attendance: A Comparative Examination of the American, Australian, British, Dutch and German Ministries of Foreign Affairs*, 2009, available at [https://www.nuffieldfoundation.org/sites/default/files/files/Fair%20trials%20abroad%20full%20report\(1\).pdf](https://www.nuffieldfoundation.org/sites/default/files/files/Fair%20trials%20abroad%20full%20report(1).pdf).

<sup>34</sup> Wikileaks, *Scenesetter for Codel Meeks visit to Ethiopia: February 16-17, 2010*; cable from US Embassy Addis Ababa, 8 February 2010, available at [https://wikileaks.org/plusd/cables/10ADDISABABA244\\_a.html](https://wikileaks.org/plusd/cables/10ADDISABABA244_a.html).

<sup>35</sup> See for further information, REDRESS, *Andargachew 'Andy' Tsege*, available at <https://redress.org/casework/andargachew-andy-tsege/>.

<sup>36</sup> UNWGAD Opinion No. 28/2016 concerning *Nazanin Zaghari-Ratcliffe (Islamic Republic of Iran)*, UN Doc. A/HRC/WGAD/2016/28, 7 September 2016; UNWGAD Opinion No. 2/2015 concerning *Andargachew Tsege (Ethiopia and Yemen)*, UN Doc. A/HRC/WGAD/2015/2, 8 May 2015.

<sup>37</sup> See joint letter sent by REDRESS and partners to the UK Secretary of State, 26 October 2017, available at <https://redress.org/wp-content/uploads/2017/11/October-2017-AndyJoint-NGO-letter-urging-Foreign-Secretary-to-negotiate-release-of-Andargachew-Tsege.pdf>.

rehabilitation as possible.”<sup>38</sup> The right to redress is set out in detail in international standard – setting texts, such as the UN Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (‘UN Basic Principles and Guidelines’)<sup>39</sup> and General Comment No. 3 on the implementation of Article 14 of UNCAT as adopted by the UN Committee Against Torture.<sup>40</sup>

Accordingly, States need to ensure that their legal and institutional frameworks enable victims to access and obtain redress, including the right to an effective remedy and to adequate reparation, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.<sup>41</sup>

As will be highlighted further below, in consular cases, where the violation has been committed abroad, the exercise of diplomatic protection by the State of nationality is particularly important for victims to obtain full redress in line with international standards.<sup>42</sup> This may take the form of an espousal of the claim, where for instance the UK would take legal action for reparation on behalf of its national against another State.<sup>43</sup> It can also include the UK insisting on the investigation and prosecution of those responsible for the violations committed against its national, in line with international standards such as the Istanbul Protocol - Manual on the effective investigation and documentation of torture and CIDTP (Istanbul Protocol).<sup>44</sup>

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<sup>38</sup> UNCAT, Article 14.

<sup>39</sup> Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law, General Assembly resolution 60/147 of 16 December 2005, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>.

<sup>40</sup> UN Committee Against Torture, General Comment No. 3 of the Committee against Torture, Implementation of article 14 by States parties, CAT/C/GC/3, 19 November 2012, available at [http://www2.ohchr.org/english/bodies/cat/docs/GC/CAT-C-GC-3\\_en.pdf](http://www2.ohchr.org/english/bodies/cat/docs/GC/CAT-C-GC-3_en.pdf).

<sup>41</sup> See e.g. UN Basic Principles and Guidelines, paras.18-23.

<sup>42</sup> See further below, Chapter VIII.

<sup>43</sup> *Ibid.*

<sup>44</sup> Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 9 August 1999, setting out minimum standards States have to comply with when investigating allegations of torture and other prohibited ill-treatment, see <http://www.ohchr.org/Documents/Publications/training8Rev1en.pdf>.

### III. Consular assistance

In this section, we will examine the consular rights relevant to UK nationals detained abroad and how they may be enforced. Such enforcement is complicated by the fact that the UK Government does not provide for a legal *right* to consular assistance, and it is instead treated as a policy commitment, expressed through a consular customer ‘charter’ and Public Guidance, rather than through legislation, rules and regulations.<sup>45</sup> This generally means that, where they exist at all, remedies and enforcement mechanisms tend to be non-binding, weak and inconsistent, making enforcement of consular rights hard to achieve. If *rights* are present, and a State is willing to assert its consular rights on behalf of an individual, this would often be achieved by way of diplomatic protection (dealt with more fully in the next section), thus necessarily blurring consular assistance with diplomatic protection, and emphasising the strong relationship between the two concepts.

The UK Government uses the term ‘consular assistance’ rather than ‘consular protection,’ which is inferred under the VCCR.<sup>46</sup> The UK Government defines consular assistance as “the provision of assistance by consular officials or diplomatic authorities to nationals in difficulty overseas.”<sup>47</sup> This includes cases of death, serious accident or illness, arrest or detention, victims of violent crime, and the relief and repatriation of distressed citizens.<sup>48</sup>

Accordingly, consular assistance can also include diplomatic representations and activities such as *demarches* (a formal diplomatic representation of the official position or views from one government to another), or a *note verbale*. These activities would be representing the interest of the individual and acting in accordance with the VCCR. For example, we have a copy of a draft 2013 *note verbale* which appears to have formed the basis of a representation sent from the British Embassy in connection with a REDRESS client who was at that time detained in a State in Central America.<sup>49</sup> The draft states as follows:

The British Embassy takes mistreatment allegations very seriously and therefore request [sic] that the [Ministry of Foreign Affairs] asks the relevant authorities to promptly open an unbiased investigation regarding the allegations raised. The British Embassy would like to take this opportunity to remind the [Ministry of Foreign Affairs], Prison Service and other relevant authorities that it is our duty to ensure that British prisoners in [X State] are well and treated in a humane and fair way. At the same time, we respect the [State] legislation and sovereignty therefore we will never intend to interfere with the legal processes opened against these British citizens.

Such representations form part of a State’s consular assistance role, as envisaged under international treaty (the VCCR), and customary international law. A State’s right to provide these services to its nationals would not normally infringe on the sovereignty of the other State, and the example draft *note verbale* above makes it clear that no such interference is intended.

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<sup>45</sup> The UK’s ‘charter’ can be found in the public guide *Support for British Nationals Abroad*, 2016, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/584047/FCO\\_Brits\\_Abroad\\_web130117.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/584047/FCO_Brits_Abroad_web130117.pdf), see further below, Chapter IV.

<sup>46</sup> For clarity, we will also use the term “consular assistance” when discussing UK practice in this area.

<sup>47</sup> CARE Project, ‘UK response to the Commission’s Green Paper on Diplomatic and consular protection of Union citizens in third countries’, March 2007, available at <http://www.careproject.eu/database/upload/UKresponseGP/UKresponseGPText.pdf>.

<sup>48</sup> Consular assistance is different to consular services, which can include passport issuance, notarial services and visa applications, and will not be the focus of this report.

<sup>49</sup> The draft *note verbale* was obtained as the result of a subject access request under the Data Protection Act (DPA) 1998.

### III.1. Rights to consular assistance under international law

Consular assistance has been referred to in several international treaties,<sup>50</sup> most importantly in the 1963 Vienna Convention on Consular Relations (VCCR or Vienna Convention)<sup>51</sup> which many commentators agree simply codified what already existed under customary international law.<sup>52</sup> Some States have bilateral treaties (and other agreements) which have the effect of supplementing the VCCR.<sup>53</sup>

#### III.1.1. Vienna Convention on Consular Relations

On a practical level, the ability to provide consular assistance as prescribed by the Vienna Convention is crucial to prevent abuses in detention or put an end to it where it has already occurred. It achieves this by way of three key protections:<sup>54</sup>

- Freedom of communication between consular officials and a detained person
- Freedom of access for consular officials to the detained person
- Notification of the detention to be given by the detaining state to the consulate of the detained person

While the VCCR refers to “protecting” the interests of a State and its nationals as well as helping and assisting them in articles 5(a) and 5(e),<sup>55</sup> the UK Government has generally interpreted “protection” as meaning “assistance.”<sup>56</sup> This reflects the UK Government’s general reluctance to accept the language of rights and rights protection in this area.

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<sup>50</sup> Other treaties containing provisions on consular assistance include: *International Convention on the Protection of the Rights of All Migrant Workers and the Members of Their Families*, U.N.T.S., vol. 2220, p. 93-127, 18 December 1990, available at <https://treaties.un.org/doc/Publication/UNTS/Volume%202220/v2220.pdf> (with 51 States parties to the treaty not including the UK), Art. 16(7); *International Convention for the Protection of All Persons from Enforced Disappearance*, U.N.T.S., vol. 2716, p. 56-74, 20 December 2006, available at <https://treaties.un.org/doc/Publication/UNTS/Volume%202716/v2716.pdf> (with 57 parties to the treaty not including the UK), Art. 17(2). Similar provisions also appear in some non-binding instruments: Principle 16 of the *UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, A/RES/43/173, 9 December 1988, available at <http://www.un.org/documents/ga/res/43/a43r173.htm>; Rule 2(1) of the *UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders* (the Bangkok Rules), Economic and Social Council, Res. 2010/16, 22 July 2010, available at <http://www.un.org/en/ecosoc/docs/2010/res%202010-16.pdf>; Rule 62(1) of the *UN Standard Minimum Rules for the Treatment of Prisoners* (the Nelson Mandela Rules), UN General Assembly, Res.70/175, 17 December 2015, available at [https://www.unodc.org/documents/justice-and-prison-reform/GA-RESOLUTION/E\\_ebook.pdf](https://www.unodc.org/documents/justice-and-prison-reform/GA-RESOLUTION/E_ebook.pdf).

<sup>51</sup> Vienna Convention on Consular Relations (VCCR), U.N.T.S. Nos. 8638-8640, vol. 596, pp. 262-512, 24 April 1963, available at [http://legal.un.org/ilc/texts/instruments/english/conventions/9\\_2\\_1963.pdf](http://legal.un.org/ilc/texts/instruments/english/conventions/9_2_1963.pdf). The UK signed the VCCR on 27 March 1964 and ratified it on 9 May 1972. There are presently 179 States parties to the VCCR.

<sup>52</sup> “Customary international law” is a concept which requires a level of consensus between States, demonstrated by (1) State practice, effectively a widespread repetition by States of similar acts over time, and (2) *opinio juris* – a belief that the actions were carried out due to an underlying legal obligation.

<sup>53</sup> This is allowed under VCCR, Article 73. Examples include those between UK and the US, and the UK and Japan. They are discussed in more detail below.

<sup>54</sup> VCCR, Article 36(1)(a)-(c).

<sup>55</sup> VCCR, Article 5(a) and (e).

<sup>56</sup> The UK Government made this clear in its response to EU initiatives to harmonise consular and diplomatic action in relation to EU nationals abroad who require help. See CARE Project, *Consular and Diplomatic Protection Legal framework in the EU Member States*, December 2010 (CARE Report), available at: <http://www.ittig.cnr.it/Ricerca/ConsularAndDiplomaticProtection.pdf>. At p. 521 it is stated: “From the perspective of the United Kingdom [...] consular assistance is wrongly referred to as ‘consular protection’.” At p. 522 it is noted that the UK Government has said: “It is essential that unnecessary phrases such as ‘consular protection’ [...] should be avoided.” The concept of

The VCCR describes various other consular functions, some of which could also contribute to the protection of the rights of detainees at risk. These include, for example, representing or arranging for legal representation in hearings “for the purpose of obtaining... provisional measures for the preservation of the rights and interests of these nationals” especially where they are vulnerable.<sup>57</sup> This can be particularly relevant in cases where torture or mistreatment has been alleged.

### III.1.2. Enforcing consular rights created by the VCCR

The three key VCCR consular access provisions as set out above (in short: communication, access and notification) effectively create rights which might, at least in theory, be enforceable by the State. Enforcement would normally require the existence of a procedure which is accessible, and which it could use to ensure that the right is effectively

complied with, or that there is some consequence of non-compliance. Ideally this would be through a legal procedure because, ultimately, this will be the only way to bind a State into action. As a way of understanding State practice in relation to VCCR provisions, and the extent to which these provisions are in fact enforceable, it is instructive to consider legal cases which have addressed such issues. These cases indicate the prevailing direction of legal opinion, and help to clarify the applicable standards.

Whether the rights are ostensibly held by the State or by the individual, the mechanisms often involve “diplomatic protection” (considered in more detail below), since this is the legally recognised State to State process employed by the State of nationality when a national suffers “injury” caused by the “internationally

#### VCCR Article 36 (1)

- (a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State (Article 36(1)(a))
- (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph (Article 36(1)(b))
- (c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgement. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action (Article 36(1)(c))

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diplomatic protection will be explored in more detail below, but it is in this regard worth pointing out that the 1961 Vienna Convention on Diplomatic Relations (U.N.T.S., Vol. 500, p. 95, 18 April 1961) to which the UK is also a party, when describing the functions of a diplomatic mission, also refers to “protecting... the interests of the sending State and of its nationals” (Article 3(b)). This tends to further undermine the UK Government’s avoidance of the term “protection”.

<sup>57</sup> VCCR, Article 5(i).

wrongful act” of another State.<sup>58</sup> Therefore, even when the right appears to be one held by the individual, it is usually the individual’s State of nationality that has to advance the claim on their behalf.

An Optional Protocol to the VCCR, concerning the “Compulsory Settlement of Disputes”<sup>59</sup> provides that disputes between States parties to the VCCR can ultimately be settled at the International Court of Justice (ICJ). The ICJ is the primary judicial organ of the UN, which settles disputes between States, issuing binding judgments and providing authoritative advisory opinions on international legal issues. Even those States not party to the Optional Protocol could have a dispute adjudicated by the ICJ if they consent to the ICJ’s jurisdiction in a particular case.<sup>60</sup> International and regional human rights mechanisms have also considered issues related to consular assistance and diplomatic protection.

The African Commission on Human and Peoples’ Rights for instance considered in the case of Andy Tsege that there was a risk he would suffer irreparable harm in detention in Ethiopia and ordered the Government of Ethiopia to adopt a range of provisional measures to prevent such harm, including through “regular and unhindered consular access by the UK government.”<sup>61</sup> The UNWGD has similarly issued a range of Opinions in which it highlighted the lack of consular access as one consideration when assessing the lawfulness of detention.<sup>62</sup>

While several countries have exercised diplomatic protection and intervened on behalf of their nationals, including with a view to asserting their right to consular assistance, the UK Government has been reluctant to follow these examples to date.

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<sup>58</sup> This is reinforced by the International Law Commission, *Articles on the Responsibility of States for Internationally Wrongful Acts*, annexed to UN Doc. A/RES/56/83 of 12 December 2001, available at [http://legal.un.org/ilc/texts/instruments/english/draft\\_articles/9\\_6\\_2001.pdf](http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf). See, Chapter I, GENERAL PRINCIPLES, Article 1. Responsibility of a State for its internationally wrongful acts: “Every internationally wrongful act of a State entails the international responsibility of that State”.

<sup>59</sup> Optional Protocol concerning the Compulsory Settlement of Disputes, U.N.T.S., vol. 596, p. 487, 24 April 1963, available at: [http://legal.un.org/ilc/texts/instruments/english/conventions/9\\_2\\_1963\\_disputes.pdf](http://legal.un.org/ilc/texts/instruments/english/conventions/9_2_1963_disputes.pdf). There are 51 parties to the Optional Protocol (including the UK).

<sup>60</sup> ICJ Statute, Article 36, available at: [http://legal.un.org/avl/pdf/ha/sicj/icj\\_statute\\_e.pdf](http://legal.un.org/avl/pdf/ha/sicj/icj_statute_e.pdf). “The Optional Protocol procedure would not be available for most potential disputes under the VCCR since both potential parties to the dispute would have to be parties to the Optional Protocol, and there are still relatively few parties (51) to the Optional Protocol.”

<sup>61</sup> African Commission, *Andargachew Tsege and Yemsrach Hailemariam/ their children (represented by Reprieve and REDRESS) v The Peoples’ Republic of Ethiopia*, Communication 507/15, Decision on Seizure, 19 February 2015 (on file with REDRESS).

<sup>62</sup> UNWGD Opinions: No.12/2016 concerning Phan (Sandy) Phan-Gillis (China), 22 June 2016; Opinion No.51/2015 concerning Salim Alaradi, Kamal Ahmed Eldarrat, Momed Kamal Eldarrat, Moad Mohammed al-Hasmi and Adil Rajab Nasif (United Arab Emirates), 29 March 2016; No. 50/2014 concerning Mustafa al-Hawsawi (United States of America and Cuba), 13 February 2015; Opinion No.44/2015 concerning Jason Rezaian (Islamic Republic of Iran), 11 MARCH 2016; Opinion No.50/2016 concerning Robert Levinson (Islamic Republic of Iran), 17 January 2017; Opinion No. 56/2015 regarding Nestora Salgado García (Mexico), 23 March 2016; Opinion No.16/2016 concerning José Daniel Gil Trejos (Nicaragua), 28 June 2016; Opinion No.18/2016 concerning Boniface Muruki Chuma; Ravi Ramesh Ghaghda; Anthony Keya Munialo; Peter Muruki Nkonge and Anthony Mwadime Wazome (South Sudan), 20 June 2016; Opinion No. 45/2017 concerning Hasnat Karim (Bangladesh), 15 September 2017; Opinion No. 47/2017 concerning Ahmad Ali Mekkaoui (United Arab Emirates), 15 September 2017; Opinion No. 53/2016 concerning Laçin Akhmadjanov (Afghanistan and United States of America), 13 July 2017; Opinion No.54/2015 concerning Julian Assange (Sweden and the United Kingdom of Great Britain and Northern Ireland), 22 January 2016; Opinion No.38/2013 concerning Michel Thierry Atangana Abega (Cameroon), 4 April 2014; Opinion No.18/2013 concerning Saeed Abedinialangashi (Islamic Republic of Iran).



**(i) VCCR Rights for States**

Under the VCCR, States have a right to be informed about the arrest, imprisonment or detention of one of their nationals without delay.<sup>63</sup> Furthermore, consular officers of the sending State (the State whose national has been detained) have the right to visit their national in detention in the receiving State (the detaining State) and “to converse and correspond with him and to arrange for his legal representation,” subject to the individual’s consent.<sup>64</sup>

Using the Optional Protocol to the VCCR, a number of cases have been brought before international courts or tribunals for violations of consular rights. For instance, following the 1979 seizure of the American embassy in Tehran and the holding of hostages, the United States of America (USA or US) brought a case against Iran before the ICJ. According to the USA, the VCCR compelled States to provide consular access and a breach of this obligation constituted a grave violation of consular practice and human rights. The ICJ held that Iran had violated the VCCR and other international obligations by failing to permit consular access to the hostages, and also ordered Iran to make reparations.<sup>65</sup>

Proceedings at the ICJ are currently ongoing between India and Pakistan in a case in which India alleges that Pakistan failed to inform them of the detention of Indian national Kulbhushan Sudhir Jadhav, failed to inform him of his rights, and to provide India with consular access and assistance to him since the first requests were made in March 2016.<sup>66</sup> Mr. Jadhav, who had been detained in Pakistan on allegations of espionage and terrorism, has since been tried, convicted and sentenced to death. India alleges that Pakistan has demanded assistance from them in the investigation process as a condition for the granting of consular access. In May 2017, the ICJ made an order granting “provisional measures”, and requiring that Pakistan “take all measures necessary” to ensure that Jadhav is not executed pending a final judgment of the Court.<sup>67</sup>

**(ii) VCCR Rights for individuals**

The provisions of the VCCR also contain various examples of a recognition of individual rights, in particular the right to freedom of communication with consular officers;<sup>68</sup> the right of access to consular officers;<sup>69</sup> the right to have any communication to the relevant consular post forwarded without delay and to be informed about the rights under Article 36 (1) (b) without delay.<sup>70</sup>

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<sup>63</sup> VCCR, Article 36 (1) (b).

<sup>64</sup> *Ibid*, Article 36 (1) (c).

<sup>65</sup> ICJ, *Case Concerning U.S. Diplomatic and Consular Staff in Teheran (U.S. v Iran)*, 1980, ICJ Rep.3 (Judgement of May 24), available at <http://www.icj-cij.org/files/case-related/64/064-19800524-JUD-01-00-EN.pdf>. In its earlier order relating to provisional measures in the same case, the ICJ observed that the VCCR laid down certain standards to be observed by all States parties “ensuring protection and assistance for aliens resident in the territories of other States”. See Order of 15 December 1979, ICJ para. 40, available at <http://www.icj-cij.org/files/case-related/64/064-19791215-ORD-01-00-EN.pdf>.

<sup>66</sup> ICJ, *Jadhav Case (India v Pakistan)*, further details available at <http://www.icj-cij.org/en/case/168>.

<sup>67</sup> ICJ Order, 18 May 2017, available at <http://www.icj-cij.org/files/case-related/168/168-20170518-ORD-01-00-EN.pdf>.

<sup>68</sup> VCCR, Article 36(1)(a).

<sup>69</sup> *Ibid*.

<sup>70</sup> VCCR, Article 36(1)(b).

### ***The right to be informed about rights to consular assistance under Article 36 (1) (b) without delay***

The ICJ considered the rights enshrined in Article 36 (1) (b) VCCR in the *LaGrand case*,<sup>71</sup> brought by Germany against the USA regarding two German citizens on death row who claimed not to have been advised of their rights to consular assistance. The ICJ decided that a failure to notify a foreign national of consular rights under the VCCR constitutes a violation, which requires the receiving State to provide a forum for the review and reconsideration of the case. The ICJ also held that an offending State cannot legitimately use its domestic legal procedures to justify its failure to give full effect to these rights. The ICJ determined:

Based on the text of [VCCR Article 36], the Court concludes that article 36 paragraph 1, creates individual rights, which, by virtue of article 1 of the Optional Protocol, may be invoked in this court by the State of the detained person...<sup>72</sup>

Referring to the rights of nationals as expounded in the *LaGrand Case*, the ICJ in the *Avena Case*<sup>73</sup> (brought by Mexico against the USA) elaborated on the inter-relationship between the rights of the individual and the sending state:

[V]iolations of the rights of the individual under article 36 [of the VCCR] may entail a violation of the rights of the sending State, and [...] violations of the rights of the latter may entail a violation of the rights of the individual. In these special circumstances of the interdependence of the rights of the State and individual rights, Mexico may, in submitting a claim in its own name, request the Court to rule on the violation of rights which it claims to have suffered both directly and through the violation of the individual rights conferred on Mexican nationals under article 36, paragraph 1(b). The duty to exhaust local remedies does not apply to such a request.<sup>74</sup>

The ICJ has again interpreted Article 36(1) (b) in terms of an individual 'right' in the more recent case of *Diallo*<sup>75</sup> in which it found a violation of Article 36(1) (b) by the Democratic Republic of the Congo (DRC), because the DRC authorities failed to inform Mr Diallo 'without delay' of his right to seek assistance from the consular authorities of his country.<sup>76</sup> Following its previous finding in the *Avena* case, the ICJ held that the rights enshrined in Article 36 (1) (b) are not contingent on the detained individual having requested access to the sending State's consular officers. Rather,

It is for the authorities of the State which proceeded with the arrest to inform on their own initiative the arrested person of his right to ask for consulate to be notified; the fact that the person did not make such a request not only fails to justify non-compliance with the obligation to inform which is incumbent on the arresting State, but could also be explained in some cases precisely by the fact that the person had not been informed of his rights in that respect.<sup>77</sup>

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<sup>71</sup> ICJ, *LaGrand Case (Germany v USA)* [2007] ICJ (Judgement of 27 June), available at <http://www.icj-cij.org/files/case-related/104/104-20010627-JUD-01-00-EN.pdf>. In the *LaGrand Case*, despite the ICJ's ruling, the two Germans were executed.

<sup>72</sup> *Ibid*, para. 77.

<sup>73</sup> ICJ, *Case concerning Avena and Other Mexican Nationals, (Mexico v United States of America)* [2004] ICJ (Judgement of 31 March) (ICJ, *Avena case*), available at <http://www.icj-cij.org/files/case-related/128/128-20040331-JUD-01-00-EN.pdf>. After the ICJ ruled in favour of Mexico in this case, in 2005 the US withdrew from the Optional Protocol to the VCCR.

<sup>74</sup> *Ibid*, para. 40.

<sup>75</sup> ICJ, *Case concerning Ahmadou Sadio Diallo, (Republic of Guinea v. Democratic Republic of the Congo)* [2010] ICJ (Judgment of 30 November), available at <http://www.icj-cij.org/files/case-related/103/103-20101130-JUD-01-00-EN.pdf>.

<sup>76</sup> *Ibid*, paras. 90-97.

<sup>77</sup> *Ibid*, para. 95.

The Inter-American Court of Human Rights (IACHR) considered consular assistance under the VCCR in a case filed by two Mexican citizens on death row who were subsequently executed in the USA. The USA authorities failed to notify them of their rights to consular assistance and Mexico sought an advisory ruling from the IACHR on the nature of the obligations under the VCCR. The IACHR held that the right to consular notification and to consular access is a fundamental human right essential to the protection of due process, and its denial renders any subsequent execution arbitrary and illegal under international law.<sup>78</sup> The IACHR found that

The provision recognizing consular communication serves a dual purpose: that of recognizing a State's right to assist its nationals through the consular officer's actions and, correspondingly, that of recognizing the correlative right of the national of the sending State to contact the consular officer to obtain that assistance.<sup>79</sup>

The Inter-American Commission on Human Rights (as distinct from the IACHR, the Court) has also concluded in several cases that the failure to comply with the consular notification requirement constitutes a "serious violation" of fair trial rights, such as to justify a re-trial.<sup>80</sup>

### ***'Free to communicate': the importance of private visits in torture cases***

The VCCR states that nationals should be "free to communicate" and to have access to consular officers.<sup>81</sup> It does not specify how such communication and access should be facilitated, merely stating that it should be "free." The only way to allow an individual in detention the opportunity to raise allegations of torture or other ill-treatment or abuse is to allow visits to be conducted in private. Often, authorities will be present in the room or find other ways of monitoring and controlling any interactions, including the use of recording equipment. Those who have carried out the torture may insist on being there to listen in, and a victim may have been warned that if anything incriminating is mentioned then further torture will be inflicted. Consultations can be suddenly cut short if it is suspected that an attempt has been made to inform a consular official (or other third party) about torture or ill-treatment. Furthermore, consular officials may be prevented from talking openly and explaining to the detainee how allegations of torture or other ill-treatment can be dealt with.

The International Committee of the Red Cross (ICRC) – mandated to carry out prison visits to secure humane treatment and conditions of detention for detainees – recognises that

Private interviews with the prisoners by ICRC delegates and doctors are the essential part of a visit and take up the greatest part of it. The interview makes it possible to document cases of torture and to hear the prisoner's point of view on any other specific problem... The prisoners' confidence also depends on the absolute certainty that no information – no allegation, no

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<sup>78</sup> Inter-American Court of Human Rights (IACHR), Advisory Opinion OC -16/99 requested by Mexico, 1 October 1999, *The right to information on consular assistance in the framework of the guarantees of the due process of law*, (IACHR, Advisory Opinion OC – 16/99), para. 137, available at [http://www.corteidh.or.cr/docs/opiniones/seriea\\_16\\_ing.pdf](http://www.corteidh.or.cr/docs/opiniones/seriea_16_ing.pdf). The Court also ruled that the term "without delay" in Article 36 requires notification of consular rights from the moment of detention, and before any interrogation takes place (para.106).

<sup>79</sup> IACHR, Advisory Opinion OC – 16/99, para. 80.

<sup>80</sup> Inter- American Commission, *Martinez Villareal v USA*, Case No. 11.753, Report No. 52/02, 10 October 2002, paras. 82-86; *Fierro v USA*, Case No. 11.331, Report No. 99/03, 29 December 2003, paras. 38-42.

<sup>81</sup> VCCR, Article 36(1)(a).

complaint - provided by the prisoner in the course of an interview will be reported to the authorities without their express permission.<sup>82</sup>

The UN Committee Against Torture has called on States to “insist on unrestricted consular access to its nationals who are detained abroad, with facility for unmonitored meetings, and, if required, for appropriate medical expertise.”<sup>83</sup> Further, the Nelson Mandela Rules state that foreign nationals shall be allowed “reasonable facilities to communicate with the diplomatic and consular representatives.”<sup>84</sup>

The requirement of private interviews is also reflected in the European Convention on Consular Functions of 1967, which expressly states that consular officials have a right to “interviews [with the detained national] in private.”<sup>85</sup>

A failure to ensure privacy of communication undermines the entire purpose of communication in the framework of consular visits as envisaged by Article 36 (1) of the VCCR. The VCCR requires States to ensure that their “laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended.”<sup>86</sup> Accordingly, where such laws and regulations do not provide for the rights enshrined under Article 36 they are not in compliance with the VCCR and should not be interpreted to accept limitations to the right to consular visits and private interviews.

Several States have put this into practice regarding communication with, and access to, detainees in their own jurisdiction, indicating that they consider “monitoring of the content of communication as a violation of the right of access and contact as between a consul and a national.”<sup>87</sup> The UK is one of those States, as its Prison Service Instructions for visits and providing services to prisoners expressly states that “measures are in place to ensure that official visits – particularly those from legal advisers and consular officials – should take place within sight but out of hearing range of staff, other prisoners, and their official visitors.”<sup>88</sup> However, the importance of private visits notwithstanding, as will be highlighted below, the UK does not consider it necessary to insist on private visits when accessing and communicating with its own nationals detained abroad.<sup>89</sup> This position would appear to be inconsistent with the terms of several bilateral treaties in place between the UK and other States, including a treaty between the US and the UK which provides that consular officials “shall be permitted...to converse privately with... any [detained]

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<sup>82</sup> ICRC, Visits to detained torture victims by the ICRC (I): Management, documentation, and follow – up, in TORTURE, Volume 10, Number 1, pp. 4-7, 2000, available at <https://www.icrc.org/eng/resources/documents/article/other/57jqum.htm>.

<sup>83</sup> UN Committee Against Torture, Concluding Observations on Canada’s State report, CAT/C/CR/34/CAN7, July 2005, para. 5 (d), available at

<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhshvVcmWTul6%2Fu%2BW19YGT VqDkZfKYwfoSo0UPpJshA3m2H9wYAt9kuNI0dDsUexighwLI50awqSqt8KNnF6YSUiDDcwNZkbl59sV1rT9qewC5>.

<sup>84</sup> Nelson Mandela Rules, Rule 62.

<sup>85</sup> European Convention on Consular Functions, 11 December 1967, Article 6 (3), available at <https://rm.coe.int/1680072311>.

<sup>86</sup> VCCR. Article 36(2).

<sup>87</sup> See J. Quigley, W. J. Aceves and S. Adele Shank, *The Law of Consular Access: A Documentary Guide*, p.59. Norway is another example of a State which by statute requires the communication to be private; the US Department of State also considers that only private communication can achieve the purpose of consular access.

<sup>88</sup> National Offender Management Service, *Providing Visits and Services to Visitors*, 2<sup>nd</sup> Revision, 28 April 2016.

<sup>89</sup> See further below, Chapter IV.

national of the sending state...”,<sup>90</sup> and another between Japan and the UK which provides that “the consular officer may... converse privately, in the language of his choice, with the [detained] national...”.<sup>91</sup>

### **III.2. Citizens with dual nationality**

While the VCCR is currently the treaty that sets out most comprehensively rights of the State and its nationals detained abroad, it does have some key gaps. For example, it is silent on the issue of dual nationality, which is a particular issue in certain jurisdictions, complicating or preventing provision of and/or access to consular assistance. Indeed, dual nationality can pose particular challenges in securing consular assistance even to those in the greatest need of the protection it can offer. Where a person with dual nationality is detained in a third country, the situation is relatively straightforward, and local authorities in that State are required to comply with all aspects of VCCR Article 36, including promptly contacting the consulate(s) at the detainee’s request.

However, dual (or plural) nationalities tend to be a particular problem when individuals are detained in a country of which they are also a national as for instance in the case of Nazanin Zaghari-Ratcliffe and other dual Iranian nationals detained in Iran, as Iran does not formally recognise dual nationality.<sup>92</sup>

In the *Avena* case before the ICJ, some of the Mexican nationals bringing the case were dual Mexican – USA nationals. The USA objected to the admissibility of such claims on the basis that Article 36 of the VCCR has no application to a person arrested or detained in the USA (the receiving state), where that person is also a USA national. Whilst the ICJ did not have to determine this issue definitively, it appears to have agreed that, if the Mexican nationals were also nationals of the USA, there would be no breach of treaty obligations in such circumstances.<sup>93</sup>

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<sup>90</sup> Convention between the United States and the United Kingdom of Great Britain and Northern Ireland relating to Consular Officers, 6 June 1951, 3 UST 3426, 165 UNTS 121, Article 16(1).

<sup>91</sup> Consular Convention between the United Kingdom of Great Britain and Northern Ireland and Japan, 4 May 1964, Cmnd. 2833, Article 23(2).

<sup>92</sup> On Dual Nationality, see further below, Chapter IV.3.

<sup>93</sup> ICJ, *Avena* case, paras. 41-42 and 53-57.

## IV. UK consular assistance policy and practice

### IV.1. UK Policy on consular assistance for British nationals

The VCCR was only partially incorporated into UK law by the Consular Relations Act 1968 (the CRA).<sup>94</sup> However, the CRA did not enact into UK law all of the VCCR's provisions, and, for example, Article 36 – setting out the right to consular access, the freedom to communicate with detained individuals and the right to be notified (upon consent) – was not incorporated.<sup>95</sup> The CRA did not therefore create any consular rights for UK nationals - it merely brought the VCCR into force under UK law thereby enabling it to be used as the basis for international consular relations. Large parts of the VCCR remain unincorporated into UK law. As a result, the UK provides consular assistance as a matter of government policy, based on a policy of discretion, rather than as a matter of law.

Existing consular policy can be identified through publications issued by the FCO, travel advice, as well as Ministerial statements. The main sources of public policy are highlighted in *Support for British Nationals Abroad*<sup>96</sup> and *In Prison Abroad*<sup>97</sup> (hereafter both referred to as the Public Guidance). Both documents are available online and outline the basic assistance available to British nationals in difficulties overseas.<sup>98</sup> *Support for British Nationals Abroad*, last updated in 2016, emphasises that “[G]enerally, there is no legal right to consular assistance. All assistance is at our discretion.”<sup>99</sup> However, the FCO does consider that it has “an obligation to *consider* all requests for assistance and we take this obligation very seriously.”<sup>100</sup> Further detailed information for each country can be found in online Prisoner Packs, compiled by the local Embassy or Consulate.

In addition, there are extensive FCO Internal Guidance documents available for consular staff (hereafter referred to as Internal Guidance), some of which was disclosed under the 2000 Freedom of Information Act (FOIA) in 2014, although it is not clear if they have since been updated.<sup>101</sup>

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<sup>94</sup> Consular Relations Act 1968, available at <https://www.legislation.gov.uk/ukpga/1968/18>. Under the UK's dualist system it is necessary for an Act of Parliament to be passed to give effect to an international treaty. The CRA's stated purposes include “...to give effect to the Vienna Convention on Consular Relations; to enable effect to be given to other agreements concerning consular relations and to make further provision with respect to consular relations between the United Kingdom and other countries and matters arising in connection therewith...”

<sup>95</sup> Schedule 1 to the Act lists those provisions of the VCCR having the force of law in the UK.

<sup>96</sup> FCO, *Support for British nationals abroad: A guide*, 17 June 2016, available at <https://www.gov.uk/government/publications/support-for-british-nationals-abroad-a-guide>.

<sup>97</sup> FCO, *In Prison Abroad*, 17 June 2016 available at <https://www.gov.uk/government/publications/in-prison-abroad>.

<sup>98</sup> This basic assistance includes keeping in regular contact with an individual, ensuring that any medical or dental problems are brought to the attention of the authorities, and offering basic information about the local legal and prison system. Upon consent, the FCO will inform and maintain contact with the family and friends of the person detained or imprisoned.

<sup>99</sup> *Support for British nationals abroad*, p. 4. Emphasis in original.

<sup>100</sup> FAC, *Support for British nationals abroad, The Consular Service*, Fifth Report of Session 2014-15, *Written evidence from the Foreign and Commonwealth Office* (CON0019), para 9, available at <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/foreign-affairs-committee/fco-consular-services/written/5422.pdf>. Emphasis added.

<sup>101</sup> The Internal Guidance sets out in detail how consular staff should approach consular cases involving prisoners and detainees, human rights issues and allegations of torture and other prohibited ill-treatment. The guidance regarding allegations of torture or mistreatment was revised in 2014. REDRESS was involved in the initial consultation process and has seen a copy of the complete guidance in this area. See FCO, *FOI release: Consular internal and Public Guidance from 2010 onwards*, FOIA Request Ref: 0606-14, 8 September 2014, available at <https://www.gov.uk/government/publications/foi-release-consular-internal-and-public-guidance>.



According to the Public Guidance, consular staff will tailor consular assistance according to assessments made regarding an individual's vulnerability. The UK customer charter promises to contact "our most vulnerable customers within 24 hours of being notified of your situation."<sup>102</sup> It goes on to state that some cases, including cases of rape and sexual assault, forced marriage and those involving children or young people, will always be treated as vulnerable. The Internal Guidance also identifies vulnerable groups of prisoners and references an individual prisoner checklist, outlining what further support can be given if an individual is found to be vulnerable, including increasing the frequency of visits.<sup>103</sup> It is not clear when such vulnerability assessments are conducted. In one case, such an assessment was apparently only conducted nine months after our client had informed consular officials that he had been ill-treated.<sup>104</sup>

Generally, for those who have been detained or imprisoned, the Public Guidance sets out the FCO's position regarding the rights enshrined under the VCCR. However, overall the language regarding the UK's obligations remain reserved and non-committal, and does not include information about what action it will take to ensure that individuals receive such rights, or in other words, how the UK will assert such rights on behalf of its nationals. Currently, the FCO makes the following commitments regarding the rights of those detained or imprisoned:

- **Notification of detention** – *In Prison Abroad* does stress that individuals should "[I]nsist that the British Consulate be notified. **It is your right.**"<sup>105</sup> However, there is no stated policy in the Public Guidance on what action the UK Government will consider taking in the event of non-notification and denial of consular access in order to remedy the situation.
- **Free to communicate** – The FCO aims to contact individuals identified as vulnerable within 24 hours of being notified of their detention. For those who are not immediately regarded as vulnerable, the Public Guidance states "[W]e will aim to contact you as soon as possible after being told about your arrest or detention so that we can assess how to help you but how soon this is may depend on local procedures."<sup>106</sup> It later states that consular staff will keep in regular contact but does not outline a frequency of contact.
- **Right to consular access** – The Public Guidance does not make any commitment regarding the frequency of consular visits, or even if consular staff will visit at all. The current guidance, updated in 2016, states "[C]onsular staff will keep in regular contact with you, either by visiting personally or by telephone/letter. The frequency of visits will depend on local prison circumstances and your personal circumstances."<sup>107</sup> This is further elaborated on in *In Prison Abroad*, which states "[I]n some countries, especially those where conditions are difficult, consular staff will aim to make regular visits." *In Prison Abroad* also states that consular staff *can* "contact you in prison and visit you if that is what you want."<sup>108</sup> However, there is no commitment to do so. There is no mention of ensuring private access, or privacy of communications.

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<sup>102</sup> Customer Charter, *Support for British nationals abroad*.

<sup>103</sup> FCO, *Chapter 13: Prisoners and Detainees*, FOIA Request Ref: 0606-14, 31 July 2014, para 4, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/352149/Consular\\_internal\\_and\\_public\\_guidance\\_Ch\\_13\\_Prisoners\\_and\\_Detainees\\_2\\_FOI\\_ref\\_0606-14.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/352149/Consular_internal_and_public_guidance_Ch_13_Prisoners_and_Detainees_2_FOI_ref_0606-14.pdf).

<sup>104</sup> Confidential case file, obtained through the 1998 Data Protection Act (DPA).

<sup>105</sup> *In Prison Abroad*, p. 1. Emphasis in original.

<sup>106</sup> *Support for British nationals abroad*, p. 17.

<sup>107</sup> *Ibid*, p. 18.

<sup>108</sup> *In Prison Abroad*, p. 1.

Revisions of the Public Guidance since 2014 removed commitments for the FCO to aim to contact all individuals within 24 hours of being notified of an arrest or detention, and to subsequently visit them “as soon as possible” upon the wishes of the individual.<sup>109</sup> It is disappointing that the FCO has appeared to downgrade these previous targets, and that it did not outline such changes upon publication of the new guidance.<sup>110</sup>

## **IV.2. Consular rights in UK practice**

The policies referred to above in the Public and Internal Guidance are detailed and can have a real impact on improving a British national’s situation as long as they are applied in a transparent fashion, consistently and comprehensively. In addition, UK Government and consulate/embassy officials have in the past relied on those policies to raise consular cases “at the highest levels” in bilateral exchanges, pressing for instance for consular access, for legal representation and, in at least one case, for humanitarian release.

While these steps are essential, REDRESS continues to receive complaints from British nationals who have been detained abroad or from families of those who remain in detention about a lack of effective consular assistance. Complaints include the absence of or lack of communication with consular officials as well as belated and infrequent consular visits which do not happen in private. Where consular staff are prevented from visiting British nationals in prison, for instance because of the individual’s dual nationality, families have complained that the FCO has not sufficiently insisted on gaining access. Consular visits to an individual in a detention centre are one of the strongest tools at the UK Government’s disposal to prevent torture and ill-treatment from happening and to stop it from continuing. Visits should take place as soon as possible following arrest and continue regularly.

It is also important that, where possible, the FCO should contact individuals directly in order to establish their own view of the situation, as well as allow the FCO to continuously identify their needs and help ensure that all information is as accurate as possible. In our experience, this has not always happened. For instance, in one case, the consulate maintained contact with our client’s local lawyer, who had not conveyed the serious situation our client was in to the consular officials.<sup>111</sup>

### ***IV.2.1. Asserting consular rights: Non-notification of detention and denial of consular access***

An individual is most likely to be tortured during the early stages of detention.<sup>112</sup> A detaining State which is planning to torture is likely to delay informing an individual of their right to notify their consulate, or fail altogether. A detainee might be held *incommunicado*, frequently for prolonged periods immediately following

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<sup>109</sup> *Support for British nationals abroad* was updated in 2009, 2011, 2014 and 2016. *In Prison Abroad* was updated in 2009, 2011 and 2016. All are available on file. See FCO, *Support for British nationals abroad: a guide*, 2011, p. 17.

<sup>110</sup> The Parliamentary Under-Secretary of State for Foreign and Commonwealth Affairs, Written Statements, *Support for British Nationals Overseas*, 5 June 2014, available at <http://hansard.parliament.uk/Commons/2014-06-05/debates/14060532000030/SupportForBritishNationalsOverseas>.

<sup>111</sup> Testimony from a REDRESS client, 2017.

<sup>112</sup> See, for example, Office of the United Nations High Commissioner for Human Rights, the Association for the Prevention of Torture and the Asia Pacific Forum of National Human Rights Institutions, *Preventing Torture: An Operational Guide for National Human Rights Institutions*, 2010, available at [http://www.ohchr.org/Documents/Countries/NHRI/Torture\\_Prevention\\_Guide.pdf](http://www.ohchr.org/Documents/Countries/NHRI/Torture_Prevention_Guide.pdf). pp. 3-4.

arrest, where there is an increased risk of being tortured.<sup>113</sup> Even if access to the consulate is requested, the authorities may then fail to pass on the request or delay notifying the consulate, or may refuse consular access. Both non-notification and denial of consular access can be delaying tactics, employed to allow torture to take place, to allow physical marks to fade, or to create conditions so that any contact with an individual is tightly controlled.

It is not always possible to determine precisely when a consulate was made aware of an arrest or detention. In many of the cases REDRESS has dealt with over the past decades there was an initial delay of days, if not weeks, before the nearest UK consulate was officially informed that a British national is in custody. In many cases, the FCO would find out through unofficial sources first, such as family, friends, or even the media, which clearly breaches the Vienna Convention's obligation to inform "without delay."

For example, **Nazanin Zaghari-Ratcliffe** was held largely *incommunicado*, in solitary confinement, for six weeks following her initial arrest, in which she was transferred to an unknown detention centre over one thousand kilometres away from Tehran in Kerman, southern Iran. She was only allowed out on one occasion during this period of solitary confinement on 11 May 2016, to visit her Iranian family in a hotel room in Kerman, supervised by Iranian guards. During this visit, Nazanin was quiet and subdued and visibly unwell, and was so weak she was unable to stand up or lift up her daughter. **Andy Tsege** was held *incommunicado*, in solitary confinement, for over a year before he was transferred to Kaliti federal prison. The FCO was unable to visit him until almost two months after he was illegally rendered to Ethiopia on 23 June 2014. In that time Andy was paraded on Ethiopian State television on three occasions, looking gaunt, having lost weight and looking exhausted.<sup>114</sup> The UK Government was not able to gain consular access again until 19 December, over four months after the first visit. To date, over three and a half years after his initial abduction, Andy remains in prison on death row. While UK embassy officials have managed to visit Andy in prison multiple times, these visits are irregular and the UK Government has not been able to secure regular access to him. In addition, all consular visits have been monitored, meaning that Andy is unable to speak freely.

With regards to securing consular access, the Internal Guidance states,

[I]f the local authorities continue to deny access you need to consult London and the political section at post on how you can escalate your request.<sup>115</sup>

If an individual is being held *incommunicado* it states that "[P]osts should consult the HRA [Human Rights Adviser] immediately."<sup>116</sup> In evidence submitted to the Foreign Affairs Committee in 2014, the FCO stated

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<sup>113</sup> See for instance, Office of the High Commissioner for Human Rights, *UN Special Rapporteur on Torture: Methods of Work of the Special Rapporteur on Torture*, Annex to E/CN.4/1997/7, approved by the Commission in resolution 2001/62 (E/CN.4/RES/2001), para.30), para.3.

<sup>114</sup> REDRESS and Reprieve, *Emergency Complaint submitted to the African Commission on Human and Peoples' Rights, submitted on behalf of Andargachew Tsege and his family, concerning the actions of The Republic of Ethiopia, AND a Request for provisional Measures*, 4 February 2015, para.17.

<sup>115</sup> FCO, *Chapter 40: Torture and Mistreatment*, FOIA Request Ref: 0606-14, current at 31 July 2014, para 11, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/352150/Consular\\_internal\\_and\\_public\\_guidance\\_Ch\\_40\\_Torture\\_and\\_Mistreatment\\_FOI\\_ref\\_0606-14.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/352150/Consular_internal_and_public_guidance_Ch_40_Torture_and_Mistreatment_FOI_ref_0606-14.pdf).

<sup>116</sup> FCO, *Chapter 12: Prisoners and Detainees – Human Rights Issues*, FOIA Request Ref: 0606-14, current at 31 July 2014, para 47, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/352144/Consular\\_internal\\_and\\_public\\_guidance\\_Ch\\_12\\_Prisoners\\_and\\_Detainees\\_FOI\\_ref\\_0606-14.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/352144/Consular_internal_and_public_guidance_Ch_12_Prisoners_and_Detainees_FOI_ref_0606-14.pdf).

they experience ‘infrequent’ challenges with regards to accessing detainees and “in such circumstances, we have made diplomatic representations to secure access.”<sup>117</sup>

A recent example occurred when Punjabi police arrested and detained **Jagtar Singh Johal**, a British national, in the state of Punjab, India, on 4 November 2017. The FCO was made aware of his arrest immediately through family members, although it is unclear if and when they were officially notified by Indian authorities. Consular officials did not see Jagtar until 16 November, almost two weeks after his arrest. The British High Commission “raised the case immediately on notification of his detention and continued to press for consular access until it was granted.”<sup>118</sup> These interventions are significant and can be hugely important, however, consular officials have not yet been able to secure regular access, and all contact has been conducted in the presence of Indian police officials. His family have argued that the UK should actively pursue every avenue to prevent further abuse and ensure that he receives redress for any abuse already suffered.<sup>119</sup>

There have also been recent cases where there has been a clear pattern of refusing consular access. The UK has been unable to gain consular access to its dual British-Iranian detainees in Iran, including **Nazanin Zaghari-Ratcliffe**, who was arrested and detained over eighteen months ago. The UNWGAD determined that she has been arbitrarily detained by Iran as part of an ‘emerging pattern’ against dual nationals. Iran does not recognise their dual nationality status and has used that as a basis to consistently refuse consular access, despite, as mentioned in the previous chapter, the VCCR not referencing dual nationality.

REDRESS maintains that the relevant consulate should record information about any breaches of the VCCR – such as a failure to notify about the arrest and detention of a UK national, the failure to grant consular access - and share with the families of those detained where they request for such records. As identified in the previous section, where consular access has been continually denied there are mechanisms available that could be used to help resolve the situation and gain access under the VCCR.<sup>120</sup> There are also a number of diplomatic steps available, which should be explored in their entirety until consular access is granted. This includes using formal and informal diplomatic channels, working with international partners, as well as using multilateral forums under the United Nations, including the General Assembly and the Human Rights Council. To our knowledge, the UK has never used the latter mechanisms to raise issues regarding consular cases.<sup>121</sup>

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<sup>117</sup> FAC, *Supplementary written evidence from Foreign and Commonwealth Office (CON0036)*. FCO Consular Services Inquiry October 2014, available at: <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/foreign-affairs-committee/fco-consular-services/written/15304.pdf>.

<sup>118</sup> FCO Minister Mark Field, *Jagtar Singh Johal: Written question – 113073*, 20 November 2017, available at <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2017-11-14/113073/>.

<sup>119</sup> For more information see REDRESS and Ensaaf, *Rights groups call on UN Experts to Intervene in Torture of British National*, 18 December 2017, available at <https://redress.org/news/rights-groups-call-on-un-expert-to-intervene-in-torture-of-british-national/>.

<sup>120</sup> See above, Chapter III.1.2.

<sup>121</sup> See further below, Chapter VI.1.

#### ***IV.2.2. Belated and infrequent consular visits***

There is no public commitment in respect of the frequency of consular visits to detained individuals, with the Public Guidance providing that “[T]he frequency of visits will depend on local prison conditions and your personal circumstances”.<sup>122</sup> The Internal Guidance further states that all prisoners should be contacted within 24 hours, and that consular staff should “visit as soon as possible, preferably within 48 hours, if the prisoner wishes you to do so.”<sup>123</sup> In cases involving allegations of torture and ill-treatment, the Internal Guidance advises staff to “see the individual as soon as possible, preferably within 24 hours” of finding out about an allegation or torture or ill-treatment.<sup>124</sup> However, the Internal Guidance makes clear the FCO’s view regarding limited visits and expressly provides: ***Do not visit more than is necessary.***<sup>125</sup>

Consular visits are provided based on a set of minimum standards.<sup>126</sup> As stated above, those assessed to be vulnerable can receive increased support, including an increased frequency of visits. Generally, the frequency of visits vary by country, and are outlined in the Prisoners Packs. In many cases this is one visit every three months, such as in many Central and South American countries, but in some cases this can be just every six months. Some Posts do not outline minimum routine visits.<sup>127</sup>

While UK consular officials have sought to access detainees promptly in several cases REDRESS has been working on, in other cases they have failed to undertake visits as soon as they possibly could and to sustain regular visits thereafter. In a case in South Asia, consular staff did not request consular access to our client until at least a week after he was initially detained and only conducted a visit a week after that, after he had returned from being hospitalised as a result of his treatment in detention.<sup>128</sup> In another case, a victim complained of being ‘fobbed off’ when they requested more visits and was told that the consulate was understaffed. In a case in the Middle East, a British national who had worked abroad when she was arrested and imprisoned, observed bitterly that while the British Embassy only visited its nationals once every three months, other countries’ embassies conducted weekly visits and ‘provide[d] real support’ to their nationals, including helping to buy basic necessities.<sup>129</sup>

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<sup>122</sup> *Support for British Nationals Abroad, 2016*. Previous guidance was more specific in this regard, stating “If you are in prison in a European Union country, or in Iceland, Liechtenstein, Norway, Switzerland, Canada, the USA, Australia or New Zealand, we aim to visit you once after sentencing and then after that only if there is a real need. In other countries, while you are in prison we aim to visit you at least once a year, although we may visit you more often if necessary.” This has now been moved to the Internal Guidelines.

<sup>123</sup> FCO, *Chapter 13: Prisoners and Detainees*, FOIA Request Ref: 0606-14, current at 31 July 2014, (FCO, Internal Guidance, Chapter 13: *Prisoners and Detainees*), para 1, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/352149/Consular\\_internal\\_and\\_public\\_guidance\\_Ch\\_13\\_Prisoners\\_and\\_Detainees\\_2\\_FOI\\_ref\\_0606-14.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/352149/Consular_internal_and_public_guidance_Ch_13_Prisoners_and_Detainees_2_FOI_ref_0606-14.pdf).

<sup>124</sup> FCO, *Chapter 40: Torture and Mistreatment*, FOIA Request Ref: 0606-14, current at 31 July 2014, (FCO, Internal Guidance: Chapter 40: *Torture and Mistreatment*) para 10, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/352150/Consular\\_internal\\_and\\_public\\_guidance\\_Ch\\_40\\_Torture\\_and\\_Mistreatment\\_FOI\\_ref\\_0606-14.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/352150/Consular_internal_and_public_guidance_Ch_40_Torture_and_Mistreatment_FOI_ref_0606-14.pdf).

<sup>125</sup> FCO, Internal Guidance, *Chapter 13: Prisoners and Detainees*, para 1, emphasis added.

<sup>126</sup> House of Commons, FAC, *Support for British nationals abroad, The Consular Service*, Fifth Report of Session 2014-15, *Written evidence from the Foreign and Commonwealth Office* (CON0019), para 9.

<sup>127</sup> Including for instance the Maldives, Argentina, Russia.

<sup>128</sup> Statement from REDRESS client, tortured in 2016.

<sup>129</sup> House of Commons, Foreign Affairs Committee, *Support for British nationals abroad, The Consular Service*, Fifth Report of Session 2014-15, *Written evidence from Ellen Powers* (CON0008), available at <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/foreign-affairs-committee/fco-consular-services/written/5341.pdf>.

REDRESS has found that UK consular officials have failed to undertake visits even when there has been evidence of torture or other prohibited ill-treatment. In one case, consular staff failed to make a follow up visit to a REDRESS client until three months after the first visit, even though evidence of torture had been made public during court proceedings two months prior.<sup>130</sup> This is despite assurances made by the Minister of State in the House of Lords that there was “no problem at all about further access” to our client, who had been unable to disclose the treatment during the first meeting as it was being monitored by authorities.<sup>131</sup>

In another case in Central America, consular officials failed to visit our client at all after he was taken to a new detention centre, despite him raising allegations of ill – treatment with consular officials before. During the six weeks our client was detained at the new detention centre, he was chained to a metal pole next to his cot and denied access to the bathroom and drinking water. It is now apparent that during this time consular staff had not attempted to contact our client directly, and instead would receive information from his lawyer and from the prison authorities themselves. Even though the lawyer had in fact informed the consular officials that the facilities were not “fit for purpose’ and were a ‘violation of [our client’s] human rights”<sup>132</sup> they did not meet our client until a scheduled visit after he had been transferred. Our client then informed consular officials that he was subjected to ill-treatment in the previous detention centre.<sup>133</sup>

The FCO later stated:

We responded to [our client] that on several occasions we spoke with his lawyer and that his lawyer never told us of these circumstances at [the new detention centre]. We told him that his lawyer and the authorities are our main points of communication with regards to his wellbeing and that we have to trust that they are relaying the correct information.<sup>134</sup>

It remains unclear why the Embassy did not contact our client directly during this period of detention.

While we welcome the internal policies to visit and contact individuals as soon as possible where there have been allegations of torture or ill-treatment or such treatment is suspected, our experience suggests that this is not always followed in practice, and that visits are not carried out sufficiently or proactively. In some cases it may not be clear that individuals are at risk of torture and so it is essential that consular staff endeavour to visit British nationals as early as possible, rather than relying on scheduled visits or being retroactively informed that torture has taken place. Whenever an individual is transferred to a different detention facility, consular staff should ensure to visit them as soon as possible thereafter to ensure their situation has not worsened.

For some posts, particularly in larger countries with large rural areas, there can be logistical difficulties in visiting prisoners on a regular basis, which can be further hampered by staff shortages. While we acknowledge that there would be little use in introducing standardised rules as to how frequent visits ought to be across all Posts due to the variations in cases and the different conditions and regulations in each

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<sup>130</sup> Testimony from a REDRESS client, tortured in 2010.

<sup>131</sup> Debate in the House of Lords, 2010; copy on file with REDRESS.

<sup>132</sup> Case file obtained under the DPA 1998, REDRESS client, tortured in 2013. Copy on file with REDRESS.

<sup>133</sup> *Ibid.*

<sup>134</sup> *Ibid.*

state, it is important that this policy is robust enough to ensure that sufficient visiting arrangements are in place when there is a possibility of torture.

### ***IV.2.3. Insisting on private visits***

As mentioned above, the UK's Prison Service Instructions for providing visits and service to all prisoners in the UK, including foreign nationals, expressly states that measures are in place to ensure that official visits, including with lawyers and consular officials, should take place with some degree of privacy, "within sight but out of hearing range of staff."<sup>135</sup> However, when it comes to visiting British nationals in detention or prison abroad, the UK has no such stated policy on requesting consular visits in private. In its evidence to the 2014 FAC Consular Services Inquiry, the FCO stated, "[W]here a nation state has laws which stipulate that visits can be monitored, then it is not possible for the British Government to raise objections because of a lack of privacy."<sup>136</sup>

During the same inquiry, the Government also stated that consular staff are able to note any physical signs which could give indications of torture or ill-treatment.<sup>137</sup> This does not recognise that torture can also be psychological, and that in most cases a State will take active steps to hide any visible markers of torture. REDRESS has seen cases where a torture survivor was cleaned up and dressed in new clothes with long sleeves to hide marks from torture before being taken to meet consular officials. Throughout the subsequent meetings, which were supervised by officials, they were unable to divulge the reality of their treatment.

The Internal Guidance states that a consular official "should be able to meet with an individual in private"<sup>138</sup> and should request this, "or at the very least out of earshot of anyone else, to allow for an effective degree of privacy, unless they feel more at ease with someone else present."<sup>139</sup> If this is denied then staff are advised to notify London and discuss possible options for raising the issue "within 48 hours." If private access continues to be denied then staff should consider how this can be escalated.

This suggests that the FCO is acutely aware of the importance of private visits. However, in practice, the FCO's policy regarding private consular visits has not been consistent, and some torture survivors and their families have raised complaints that consular officials have appeared to accept the dictates of the torturers and their colleagues in such matters.

In **Andy Tsege's** case, Andy has to date only had belated and irregular consular access. His consular visits have previously only lasted for 30 minutes and have been tightly controlled and monitored by Ethiopian guards. There are serious concerns that he may not feel able to communicate freely about his treatment. Indeed, given the political nature of the accusations against Andy, and Ethiopia's track record of torture and ill-treatment of political prisoners,<sup>140</sup> there is a real risk that he has been and/or will face (further) torture and other ill-treatment. While he is being denied an independent medical assessment, he was diagnosed via

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<sup>135</sup> National Offender Management Service, *Providing Visits and Services to Visitors*, 2<sup>nd</sup> Revision, 28 April 2016.

<sup>136</sup> Supplementary written evidence from Foreign and Commonwealth Office (CON0036). FCO Consular Services Inquiry October 2014, available at <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/foreign-affairs-committee/fco-consular-services/written/15304.pdf>.

<sup>137</sup> *Ibid.*

<sup>138</sup> FCO, Internal Guidance: Chapter 40: *Torture and Mistreatment*, para 10.

<sup>139</sup> *Ibid.*, para 12.

<sup>140</sup> See for instance, US State Department, *Ethiopia 2016 Human Rights Report*, pp. 3-10, available at <https://www.state.gov/documents/organization/265466.pdf>.

video appearances to exhibit early stages of a post-traumatic stress disorder, the most likely cause of which was his subjection to torture or other trauma whilst in detention.<sup>141</sup>

Despite this, the FCO has publicly defended Ethiopia's position and has not sought to insist on a private visit with Andy, stating in a letter to the Foreign Affairs Committee in March 2017<sup>142</sup> and later in an answer to a written parliamentary question that:

It is not common practice for consular visits to be held in private. During our consular visits to Mr Tsege, an Ethiopian official was present. We consider this presence of an Ethiopian official in accordance with Article 36 of the Vienna Convention on Consular Relations, and in line with local laws and regulations.<sup>143</sup>

The FCO has assured Andy's family and his campaign supporters that their priority in Andy's case is to ensure his wellbeing, including in a series of open letters from the Foreign Secretary, most recently in August 2017.<sup>144</sup> However, it is difficult to align this promise with the FCO's readiness to accept these conditions without protest, as this will continue rendering private visits impossible. In the absence of private visits, it is unclear how the FCO will be able to cater for Andy's wellbeing, if the embassy officials cannot ascertain how he is being treated in prison.

Andy's case is in contrast to the case of British national Jagtar Singh Johal who is currently detained in India. In answer to multiple written parliamentary questions, the FCO has openly set out its priority of seeking a private meeting with Jagtar.<sup>145</sup> The position in Andy's case is also not in line with some of the UK's bilateral treaties with other countries (including with the US and Japan) which allow or require consular officers to "converse privately" with the detained person.

In REDRESS' view the UK's refusal to consistently address private consular visits in all consular cases is an inadequate response reflecting an inadequate policy: all consular officials should indeed demand an effective degree of privacy so the detainee can speak freely, and such demand should be persisted on until granted. Private access to an individual should be at the top of the agenda regarding consular policy.

In such circumstances, the only way to achieve a meeting in which an individual is free to communicate is for the UK Consulate to take every possible step to do so. Where repeated requests for private visits are denied, a diplomatic protest should be lodged and followed up until a satisfactory result is achieved.

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<sup>141</sup> See further, REDRESS and Reprieve, *Emergency Complaint submitted to the African Commission on Human and Peoples' Rights, submitted on behalf of Andargachew Tsege and his family, concerning the actions of The Republic of Ethiopia, AND a Request for provisional Measures*, 4 February 2015, para.17.

<sup>142</sup> Letter from the Foreign Secretary to the Chair of the Foreign Affairs Committee, ref. MIN/106998/2017, 3 March 2017. Copy on file with REDRESS.

<sup>143</sup> Minister of State Rory Stewart, *Andargachew Tsege: Written question – 107994*, 20 October 2017 available at <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2017-10-16/107994/>.

<sup>144</sup> FCO, *Andargachew Tsege, British national currently detained in Ethiopia: open letter to supporters*, last updated 9 August 2017, available at <https://www.gov.uk/government/publications/andargachew-tsege-british-national-currently-detained-in-ethiopia-open-letter-to-supporters>.

<sup>145</sup> Minister of State Mark Field, *Jagtar Singh Johal: Written question – 118289*, 15 December 2017, available at <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2017-12-07/118289/>.



#### ***IV.2.4. Access to legal representation***

Given the inherent difficulties foreign national detainees are facing in detention abroad, including language barriers and lack of knowledge of local legal systems, UK nationals often have to rely on consular officials to obtain legal representation. Although the VCCR does provide for a right of the sending State to provide representation or to arrange appropriate representation for nationals in the receiving State,<sup>146</sup> the FCO makes clear that it will not provide legal representation under any circumstance, even in cases involving human rights violations:

Although we cannot give legal advice, start legal proceedings or investigate a crime, we can offer basic information about the local legal system, including whether a legal aid scheme is available. We can give you a list of local interpreters and local lawyers if you want, although we cannot pay for either. It is important to consider carefully whether you want to have legal representation and to discuss all the costs beforehand with the legal representative. In no circumstances can we pay your legal costs.<sup>147</sup>

This policy, which only requires consular officials to provide detainees with a list of local lawyers, imposing no obligation to arrange for further legal support, has led to complaints by some family members.<sup>148</sup> REDRESS has heard from several torture survivors who believe that the UK Government should at least have an ‘emergency lawyer’ on standby for the most serious situations and for an initial consultation, particularly in cases where the human rights of British nationals are at risk.

REDRESS has previously come across cases where even the limited policy of providing information about local lawyers is not sufficiently implemented. In one case, a detainee facing a serious criminal charge was given a list of civil, not criminal, lawyers; another only received a list of English-speaking lawyers eleven months following arrest. Other torture survivors have complained of out-of-date lists, incorrect contact details, and incorrect information on proficiency in English or expertise.

During the 2014 FAC Inquiry on Consular Services, the FCO stated it had begun work on improving such lawyers lists, developing new templates and guidance for posts to update them.<sup>149</sup> On a general level this seems to have improved, however some problems reportedly remain. In one case, a family had to wait over 40 days to receive a list containing just four lawyers, each of whom was unsuitable due to the political situation in the country.<sup>150</sup>

#### **Pro bono lawyers panel**

The FCO launched a pro bono lawyers panel in 2002 to work on behalf of British detainees and prisoners overseas in cases where there are doubts whether human rights and due process have been observed. In response to the FAC’s 2014 inquiry into consular services, the FCO stated:

In addition, the FCO Pro Bono Lawyers Panel is available to help promote and protect the human rights of British national detained or imprisoned overseas. The panel can in some

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<sup>146</sup> VCCR, Article 36 (1) (c).

<sup>147</sup> Support for British Nationals Abroad, p. 18.

<sup>148</sup> Interview with family member of a British detainee, December 2017

<sup>149</sup> FCO, *Government Response to the Committee’s Fifth Report of Session 2014-15 (HC516) on FCO’s Consular Services*, 23 January 2015, para. 23, available at: <http://www.parliament.uk/documents/commons-committees/foreign-affairs/consularresponse.pdf>.

<sup>150</sup> Interview with a REDRESS client, December 2017.

cases provide legal expertise and advice to British nationals and their local lawyers where we have concerns about due process or human rights violations.<sup>151</sup>

Aside from this, not much information has been released regarding the activities of the pro bono lawyers panel. Aside from the above, there is no public mention of the panel by the FCO.

The role of the FCO following the referral to a lawyer is largely administrative and logistical. The Internal Guidance makes clear that “[i]t should be remembered at all times that the UK pro bono lawyer is not instructed or appointed by the FCO and is not being asked to provide legal advice to the FCO.”<sup>152</sup>

Aside from this, it is not clear how the pro bono lawyers panel operates, how many lawyers are on the list, or how many cases are referred to them. In recent years our clients have not been made aware of the existence of the panel, and considering the litany of human rights violations faced by British nationals abroad this should be something that the families are actively engaged with.

### **IV.3. Rights for Foreign National Prisoners in the UK**

The UK’s position on consular assistance for its own nationals is in stark contrast with its approach to consular assistance for foreign national prisoners detained in the UK. UK law affords foreign nationals extensive legal rights to consular assistance if they are detained in UK prisons. For instance, UK law requires advisement of consular rights simultaneously with other legal rights and prior to interrogation. The relevant Code of Practice under the Police and Criminal Evidence Act (1984)(PACE)<sup>153</sup> clearly reflects the contents of VCCR Article 36, and provides as follows:

A [foreign] detainee ... has the right, upon request, to communicate at any time with the appropriate High Commission, Embassy or Consulate. That detainee must be informed as soon as practicable of this right and asked if they want to have their High Commission, Embassy or Consulate told of their whereabouts and the grounds for their detention. Such a request should be acted upon as soon as practicable.<sup>154</sup>

Consular officers may, if the detainee agrees, visit one of their nationals in police detention to talk to them and, if required, to arrange for legal advice. Such visits shall take place out of the hearing of a police officer.<sup>155</sup>

These requirements appear to be based on “the provisions of consular conventions”<sup>156</sup> and furthermore, in keeping with the VCCR Article 36(2) requirement that local laws and regulations must give “full effect” to the rights enshrined in Article 36 (1). The Note for Guidance to the Code of Conduct for these instructions states that “the exercise of the rights in this section may not be interfered with,”<sup>157</sup> even if the circumstances of the

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<sup>151</sup> House of Commons, *Government Response to the House of Commons Foreign Affairs Committee’s Fifth Report of Session 2014-15 (HC516)*, *FCO Consular Services*, January 2015, (House of Commons, Government Response, January 2015), para.23, available at <http://www.parliament.uk/documents/commons-committees/foreign-affairs/consularresponse.pdf>.

<sup>152</sup> FCO, *Internal Guidance Chapter 12: Courts and Trials*, 2009, para 39, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/352143/Consular\\_internal\\_and\\_public\\_guidance\\_Ch\\_12\\_Courts\\_and\\_Trials\\_FOI\\_ref\\_0606-14.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/352143/Consular_internal_and_public_guidance_Ch_12_Courts_and_Trials_FOI_ref_0606-14.pdf).

<sup>153</sup> Home Office, *Code C, Revised, Code of Practice for the detention, treatment and questioning of persons by Police Officers*, February 2017, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/592547/pace-code-c-2017.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/592547/pace-code-c-2017.pdf).

<sup>154</sup> *Ibid*, para. 7.1.

<sup>155</sup> *Ibid*, para. 7.3.

<sup>156</sup> *Ibid*, para 7.4.

<sup>157</sup> *Ibid*, Note for Guidance 7A.

case fall within a legal exception that allows the authorities to hold someone incommunicado or to delay the detainee's right of access to an attorney.<sup>158</sup>

#### IV.4. Dual nationality

As outlined in the previous section,<sup>159</sup> there are no specific international legal provisions specifically covering the provision of consular assistance and/or diplomatic protection for those with dual or multiple nationalities. According to UK policy, British nationals are eligible for consular assistance, regardless of whether they live in the UK.<sup>160</sup> Nationals of other European Union countries and Commonwealth nationals who are otherwise unrepresented in a country are also eligible, "but only in certain circumstances."<sup>161</sup>

Dual nationals are eligible for all support if they are in a third country, i.e. a country that they are not also a national of. The 2016 Human Rights and Democracy Report states that dual national overseas prisoners in their country of second nationality will be able to receive assistance in "certain exceptional circumstances," but does not provide any explanation as to what the exceptional circumstances would be.<sup>162</sup>

*Support for British Nationals Abroad* states that dual nationals in their country of other nationality would not normally receive support unless they are found to be "particularly vulnerable."<sup>163</sup> Accordingly, the UK Government will only provide consular assistance to dual nationals detained in their country of other nationality as an exception, having considered the circumstances of the case and found an individual to be "particularly vulnerable." *Support for British Nationals Abroad* goes on to state:

These circumstances **might** include cases involving a murder or manslaughter, children, forced marriage or an offence which carries the death penalty. However, the help we can provide will depend on the circumstances and the country of your other nationality agreeing to it. (emphasis added)<sup>164</sup>

It is disappointing that cases involving torture and other prohibited forms of ill-treatment are not included on this publicly available list of vulnerability, although REDRESS is aware from the Internal Guidance that such cases are included. This should be reflected in the Public Guidance. It is correct that the UK's scope for meaningful action on dual nationality cases can be limited in practice by the position of the country of nationality. However, REDRESS believes this should not preclude the FCO from doing everything it can to provide an individual with as much support as needed to prevent and protect against (further) violations of human rights. **Indeed, there is nothing stopping the UK from acting in such cases on behalf of a dual British national.** Aside from the reference cited above, it is not clear how for example the FCO carries out vulnerability assessments for dual nationals detained abroad, at what stage, what factors are considered, and, crucially, how long such assessments can take. The policy makes clear that even in such cases included in the circumstances above the UK will not be obligated to act on behalf of a dual national.

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<sup>158</sup> *Ibid*, Annex B read in conjunction with Sections 5 and 6.

<sup>159</sup> See above, Chapter III.2.

<sup>160</sup> There are six types of British nationality: a British citizen, a British Overseas Territory citizen, a British overseas citizen, a British national (overseas), a British subject and a British protected person. See <https://www.gov.uk/types-of-british-nationality>.

<sup>161</sup> *Support for British nationals abroad: a guide*, p. 2. The guide does not go into the circumstances.

<sup>162</sup> FCO HRD report, p. 31.

<sup>163</sup> *Support for British nationals abroad: a guide*, p. 5.

<sup>164</sup> FCO, *Support for British nationals abroad*, p. 5. Emphasis added.

REDRESS has heard a client express frustration that UK policy seems to be dictated by the rationales of the other State regarding dual nationality, and by the apparent insistence to define such cases by their dual nationality. Richard Ratcliffe, husband of **Nazanin Zaghari-Ratcliffe**, has commented in November 2016: “The Ministerial talk is always of ‘dual nationals’ somehow implying only ‘part nationals’ that they are not really British enough, a foreign family allowed to suffer a foreign fate...I have to pinch myself – to remind myself that Nazanin and Gabriella are British.”<sup>165</sup> It was not until October 2017, almost eighteen months after her initial arrest, that the UK Government began publicly stating that they consider her to be a British citizen, rather than defaulting to Iran’s position on her dual nationality status: “*Although there is no international legal obligation to recognise dual nationality, we consider [Nazanin] to be British and will continue to request access to [her].*”<sup>166</sup>

Another REDRESS client commented that it seemed to be ‘standard practice’ that the FCO would first question an individual’s dual nationality status ‘if the name doesn’t sound English,’ recalling several email exchanges with the FCO to confirm sole British nationality status. They felt that this was indicative of the FCO’s overall approach: to focus on technicalities rather than on the merits of the case regarding rights violations as a way of escaping any obligation to act decisively.<sup>167</sup>

UK policy should not automatically reflect the position of an unknown State, but should set out its priorities for all nationals, including dual nationals, as well as those with strong connections to the UK. The UK should state publicly that it will defend all forms of British nationality and citizenship, including dual and multiple nationality, as well as permanent residents. There should be no hierarchy of “British-ness” in such cases.

This position is reflected in the law and policy of some States. The United States Department of State Foreign Affairs Manual, provides: “It is the Department’s policy to intervene on behalf of all US citizens and US noncitizen nationals, and make representations on their behalf, *regardless of dual nationality status.*”<sup>168</sup>

In Germany, where there is a legal right to consular assistance, the position of dual nationals is not limited in law and policy. The Federal Foreign Ministry, while recognising that the assistance they can provide might be limited by the circumstances of the second country, provides consular assistance to all German nationals who are detained or imprisoned abroad.<sup>169</sup>

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<sup>165</sup> See Change.org, Statement in response to yesterday’s Sunday Times Report, 21 November 2016, available at [https://www.change.org/p/free-nazanin-ratcliffe/u/18543449?tk=-3NqEMPbLo4KQsiBJXixR3J6p\\_MPNIIHem3Yug72p8k](https://www.change.org/p/free-nazanin-ratcliffe/u/18543449?tk=-3NqEMPbLo4KQsiBJXixR3J6p_MPNIIHem3Yug72p8k).

<sup>166</sup> FCO Response to Parliamentary Question, 17 October 2017, available at <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2017-10-09/106659/>.

<sup>167</sup> Interview with REDRESS client, November 2017.

<sup>168</sup> US Department of State, The Foreign Affairs Manual, 7 FAM 080, Dual Nationality, 12 January 2017, available at <https://fam.state.gov/FAM/07FAM/07FAM0080.html>. Emphasis added.

<sup>169</sup> Law on Consular Officers their Functions and Powers (Consular Law) of 11 September 1974, see Fair Trials International, Consular Assistance and Trial Attendance: A Comparative Examination of the American, Australian, British, Dutch and German Ministries of Foreign Affairs, 2009, available at [https://www.nuffieldfoundation.org/sites/default/files/files/Fair%20trials%20abroad%20full%20report\(1\).pdf](https://www.nuffieldfoundation.org/sites/default/files/files/Fair%20trials%20abroad%20full%20report(1).pdf). These provisions notwithstanding, groups supporting German – Turkish dual national Deniz Yücel, a journalist who is currently detained in Turkey, have highlighted to REDRESS in a meeting in London in December 2017 that in practice, single national Germans receive more comprehensive support than dual nationals.

## V. Intervening in torture and ill-treatment cases

*“We will...of course, take extreme action if a British citizen is being tortured”*  
FCO Minister Rory Stewart, 20 November 2017<sup>170</sup>

*Support for British Nationals Abroad* and *In Prison Abroad* were revised in 2014 and 2016, introducing new sections specifically referring to action that can be taken with regards to cases of torture and ill-treatment.<sup>171</sup> Prior to this the Public Guidance had no mention of such cases, so this in itself is a much welcome improvement. In *Support for British Nationals Abroad*, the FCO states ‘[W]e take all allegations or concerns of torture and mistreatment very seriously and will follow up with action appropriate to the circumstance of the case’.<sup>172</sup> It goes on to outline actions it could take to help ensure an individual’s safety, including:

- Increasing the frequency of consular visits if detained or in hospital;
- Assistance in gaining access to medical treatment;
- Consider supporting a transfer to another wing or facility.

It also outlines how the FCO might approach local authorities regarding allegations of torture and ill-treatment, stating it can demand “an end to the mistreatment, and that the incident is investigated and the perpetrators brought to justice.”<sup>173</sup> The 2016 FCO Human Rights and Democracy report confirms that the FCO can request a “full, transparent and independent investigation, in line with international standards.”<sup>174</sup>

The **Istanbul Protocol** contains specific guidance on the following:

- *ensuring that investigations are prompt, effective, independent and impartial;*
- *allowing access to an independent doctor to effectively document evidence of torture or other ill-treatment (a crucial custodial safeguard);*
- *monitoring places of detention (which may provide documentation of allegations);*
- *effective documentation of allegations (and appropriate understanding of such documentation by prosecutors and the Courts) – this is vital to ensure that forced confessions are not admitted as evidence, to prevent refoulement to torture, to ensure successful prosecutions of perpetrators, and to enable victims of torture and other ill-treatment to obtain redress.*

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<sup>170</sup> In a statement made to the House of Commons in regards to the case of British national Jagtar Singh Johal, see <http://hansard.parliament.uk/Commons/2017-11-21/debates/437B86FF-9E64-4291-BC60-AF5E6BA7C39D/OralAnswersToQuestions>.

<sup>171</sup> *Support for British Nationals* was updated in 2009, 2011, 2014 and 2016. *In Prison Abroad* was updated in 2009, 2011 and 2016. All are available on file.

<sup>172</sup> *Support for British nationals abroad*, p. 16; the Public Guidance also outlines other situations in which the FCO might intervene, including that it *may* consider approaching local authorities “if your trial does not follow internationally-recognised standards for a fair trial or is unreasonably delayed compared to local cases,” see p.18.

<sup>173</sup> *Ibid.*

<sup>174</sup> FCO, Human Rights & Democracy: The 2016 Foreign and Commonwealth Office Report, July 2017, (FCO, 2016 Human Rights & Democracy Report), p.31, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/630623/Human\\_Rights\\_and\\_Democracy\\_Report\\_2016\\_accessible.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/630623/Human_Rights_and_Democracy_Report_2016_accessible.pdf).

Specifically in regards to torture and other prohibited ill-treatment, the Internal Guidance sets out in considerable detail how UK consular officials should deal with allegations of torture or mistreatment of British nationals and dual nationals.<sup>175</sup> It provides further direction on what might constitute torture and other prohibited ill-treatment, places a greater emphasis on the need for urgent action than the Public Guidance, including action out of hours where necessary, outlines a wider range of action to take, indicates the need for keeping detailed records, provides further information on how to approach victims of torture or mistreatment, and encourages posts to develop country-specific information.<sup>176</sup> Following the introduction of the revised Internal Guidance, the FCO additionally introduced new staff training and an e-learning platform to help consular staff identify and act upon allegations of torture and other prohibited ill-treatment.<sup>177</sup>

These are important steps, and if implemented in every case, the Internal Guidance could constitute an important form of consular assistance. However, REDRESS has found that it is not always clear when the torture and mistreatment guidelines will take effect. In one case, the FCO refused to follow its torture and mistreatment guidance, despite clear signs that our client had been suffering from the effects of torture.<sup>178</sup>

The failure to publish the entire Internal Guidance for consular officials prevents individuals and their families from having a fuller understanding of what support can be expected. REDRESS reiterates its recommendation that the Internal Guidance should be made available in their entirety to the public. Those at their most vulnerable, such as those at risk of torture and other prohibited ill-treatment, deserve to know what their government will do to intervene.

<b>Allegations of torture and ill-treatment committed against British nationals abroad<sup>179</sup></b>						
<b>2005</b>	<b>2006</b>	<b>2007</b>	<b>2008-2010</b>	<b>2012</b>	<b>2013</b>	<b>2016</b>
39	69	75	112	142	95	118

The introduction of revised Public and Internal Guidance on torture and other prohibited ill-treatment was a welcome development, as is the continued training of consular staff on matters related to torture and ill-treatment. However, this notwithstanding, we continue to receive negative reports from torture survivors and their families following their experience with the FCO.

### **V.1. Support from consular officials in raising allegations during consular visits**

Some torture survivors have said that consular officials were out of their depth during consular visits – and were not clear enough in explaining what the FCO could do for those who have been tortured.<sup>180</sup>

REDRESS has heard from clients that they have not felt fully supported by consular officials, sensing their commitment to individual welfare to be diminished by wider political, economic or strategic loyalties to the UK Government, and outlined the negative psychological effect.<sup>181</sup>

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<sup>175</sup> FCO, Internal Guidance: Chapter 40: *Torture and Mistreatment*.

<sup>176</sup> *Ibid.*

<sup>177</sup> FCO, *Human Rights & Democracy Report 2015*, April 2016.

<sup>178</sup> Confidential case note, on file with REDRESS.

<sup>179</sup> No data was recorded for 2011, 2014 or 2015.

<sup>180</sup> Interview with a former British detainee abroad, December 2017.

<sup>181</sup> Interview with a REDRESS client, September 2017.

REDRESS welcomes that in 2015 torture and ill-treatment awareness workshops were provided to “help our staff take appropriate action in high-risk countries.”<sup>182</sup> Such workshops can help make consular officials more aware of the complexities and consequences of torture and ill-treatment and help officials to better respond to allegations. However, it is not clear what information was provided during the workshops, nor how many of such workshops have been carried out, in which countries and whether they are organised regularly.

Furthermore, training and awareness workshops alone will not suffice. As outlined above, in order to provide effective support individuals must be free to communicate as set out in the VCCR. Not only must victims feel confident in providing relevant information, consular officials must then also be able to respond without risking to be overheard by local officials. In one recent case, during a consular visit by UK consulate officials of a British national in detention under supervision of local authorities, the individual managed to quietly mention that he had been tortured. The consular official responded by asking for permission to raise it with the local authorities. There was no time for the individual to ask further questions, and the prospect of the UK directly approaching the torturers – some of which were in the room – was seen as particularly unhelpful, and likely to antagonise the situation more. Had the visit been conducted with an effective degree of privacy there could have been opportunity for a more open discussion on the options available.<sup>183</sup>

## **V.2. Raising allegations on behalf of a British national and support making formal complaints**

Article 13 of the UNCAT provides that any individual who alleges that he or she has been subjected to torture has the right to complain to authorities and a right to protection against all ill-treatment or intimidation as a consequence of the complaint.<sup>184</sup> Accordingly, consular officials should provide all possible assistance to ensure that those who allege torture are able to exercise this right, including by considering the consulate’s ability to contribute to the victim’s protection.

The Public Guidance outlines how the FCO might approach local authorities regarding allegations of torture and ill-treatment, stating it can demand “an end to the mistreatment, and that the incident is investigated and the perpetrators brought to justice.”<sup>185</sup> The Internal Guidance provides that “there is a strong presumption by HMG that allegations of torture or mistreatment should be raised vigorously with the appropriate authorities, with the consent of the individual involved.”<sup>186</sup>

Consulate officials should inform individuals about how to make a formal complaint themselves, and should offer to be present when they report the allegation if needed to offer emotional support.<sup>187</sup> When advising detainees, consulate staff should regularly assess potential positive and negative consequences of raising an allegation or making a complaint in the country they cover.<sup>188</sup> This is particularly important in regards to torture and ill-treatment committed in detention, as detainees are particularly vulnerable to intimidation and reprisals by fellow prison inmates and prison officials. Similarly, if a police officer was involved in torture, the victim may be at risk of further abuse if they were to report the crime to the police. The victim may also

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<sup>182</sup> FCO, 2016 Human Rights & Democracy Report, p. 31.

<sup>183</sup> Statement of former British detainee abroad, December 2017.

<sup>184</sup> UNCAT, Article 13.

<sup>185</sup> FCO, Support for British nationals abroad, p. 16.

<sup>186</sup> FCO, Internal Guidance: Chapter 40: *Torture and Mistreatment*, para. 19.

<sup>187</sup> *Ibid*, para 17.

<sup>188</sup> *Ibid*, para 10.

be in danger of significant re-traumatisation by the process of making a complaint if it is handled badly by local authorities.

Some countries have specific mechanisms for reporting torture and other human rights violations to the authorities which may be easier for the victim to access and which may result in the payment of compensation without formal criminal proceedings. Each post should have information as to whether such mechanisms exist in the country they cover, and if so, the victim should be made aware of them and given details of lawyers or specialised NGOs which can assist in accessing those mechanisms.

REDRESS has also come across recent cases where the individual was not properly informed of the established human rights procedure available, instead delegating responsibility to the local lawyer: “we have not informed [our client] about local complaint procedures, but he does have a lawyer.”<sup>189</sup> Our client was for instance unaware of the Ombudsman process in the country concerned, and it was not until seven months after the initial complaint of ill-treatment that the Ombudsman was contacted. When the Ombudsman did visit the detention centre some four months he had been contacted, it was clear that he was there to take general notes on torture and ill-treatment cases, rather than his specific case.<sup>190</sup>

### **V.3. Maintaining contact with detainees and following up on action taken**

REDRESS has continued to find that our clients have indicated inadequate feedback from the FCO on what steps have been taken or attempted, what the response was, and further follow-up to be taken to resolve issues. A number of issues have been raised in which detainees expected reports on progress, including cell conditions (such as overcrowding, solitary confinement, threats and assaults from other inmates), lack of access to books, newspapers, radio, television and writing materials, restraints on communication, lack of exercise and money issues, shackles, restrictions on visits from family and friends.<sup>191</sup>

In one case, after initial delays of over seven months before requesting the involvement of the local Ombudsman procedure, which investigated the matter a couple of months after that, the FCO failed to pass on the results of the investigation until over three years later, despite repeated requests.<sup>192</sup>

### **V.4. The right to redress: Following up on allegations until their conclusion**

The Public Guidance states “[I]f you do not want to raise the allegations [of torture and mistreatment] right away, we can still help you to do so at a later date – e.g. after you have returned to the UK.”<sup>193</sup> The Internal Guidance expands on this, stating that “[T]here is no prescribed time limit for making an allegation although some countries may have local laws which require reporting within a time frame... Making an allegation early can help towards an effective investigation.”<sup>194</sup> Violations by detaining states should be followed-up by the UK Government, including in those instances in which an inquiry carried out by the detaining state has concluded that the allegations are unfounded.

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<sup>189</sup> Confidential case file obtained under the DPA.

<sup>190</sup> *Ibid.*

<sup>191</sup> See *Tortured Abroad*, p. 19.

<sup>192</sup> Confidential case note, on file with REDRESS.

<sup>193</sup> *Support for British nationals abroad*, p. 16.

<sup>194</sup> FCO, Internal Guidance: Chapter 40: *Torture and Mistreatment*, para .28.



In one case, the FCO offered to make diplomatic representations raising allegations of torture and requesting the local authorities to investigate allegations of torture following the return of a British national to the UK.<sup>195</sup> These representations are currently on-going.

If continued diplomatic representations fail to resolve the situation, the UK Government has an option to escalate the claim and pursue a legal claim for torture damages, in other words *espousing* a claim of torture by a British national, though as highlighted below, the UK Government has yet to go so far as to institute legal proceedings in a case where a British national has been subjected to torture or other ill-treatment.<sup>196</sup> The UK Government should develop its follow-up policy and practice on the treatment of UK nationals tortured abroad, including through the exercise of diplomatic protection. It is REDRESS' view that this link to diplomatic protection should be more readily deployed in cases where British nationals have been subjected to torture and other prohibited ill-treatment.

### **V.5. Ensuring timely, independent, medical examinations**

A torture survivor needs to be properly examined and treated by a competent and independent medical expert as soon as possible after the torture occurred. This is a basic issue that both a consular official and a lawyer should work towards. Such an examination can provide evidence of the torture and go towards preventing further abuse as well as allowing an opportunity for treatment and relief of some of the immediate physical and psychological consequences.

States which torture usually make it difficult, if not impossible, for such an examination to take place, but consular officials should do everything possible to insist on access to a proper independent doctor where detainees have raised allegations of torture or other prohibited ill-treatment. In such cases, the FCO should act proactively and request that such examinations take place. Some clients have claimed that no effort was made by consular officials to be present during medical examinations conducted by State doctors in prison, or to insist on seeing the results or talking to the doctors concerned, even when asked to do so, or when it was clearly in the best interests of the detainee.

There have been some developments in the Internal Guidance over the past few years and consular officials are now encouraged to consult with the FCO's Human Rights Adviser if they have been asked to attend a medical assessment, "as it may be beneficial in some circumstances."<sup>197</sup>

The part of the Internal Guidance that was released following a Freedom of Information request does not include any information on the need to *request* independent medical assessments. It is, however, important for detainees who raise allegations of torture and other prohibited ill-treatment to know, for instance, when consular officials have concerns about the independence and/or qualifications of a particular doctor, about possibilities to request an independent medical assessment as well as the coverage of costs of such a treatment. The Public Guidance should be amended accordingly and it should form part of consular practice to inform detainees about the possibilities of independent medical treatment where those exist, and to cover the costs of such treatment.

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<sup>195</sup> Confidential case file, on file with REDRESS.

<sup>196</sup> See below, Chapter VIII.3.

<sup>197</sup> FCO, Internal Guidance: Chapter 40: *Torture and Mistreatment*, para. 28.

## Pro-bono medical panel

Similar to the pro bono lawyers panel, the FCO set up a pro bono medical panel in 2002 to advise the FCO in relation to serious medical cases involving British nationals in prison overseas.<sup>198</sup> Previous Internal Guidance that has been disclosed has stated that the panel has about thirty medical specialists, and its responsibilities include “to warn the prisoner in cases where local treatment is likely to be insufficient and where serious consequences may follow.” It also advises the FCO on specific medical conditions of prisoners.<sup>199</sup>

In an answer to a written parliamentary question regarding the case of Nazanin Zaghari-Ratcliffe, the FCO outlined that “[W]here appropriate, the pro bono medical panel members can provide advice to British nationals in detention overseas, via the Foreign & Commonwealth Office, about their medical condition following an assessment of their medical records. This is not limited to those cases where torture and/or mistreatment has been alleged. We do not keep statistics of the number or type of referrals made.”<sup>200</sup>

Similar to the pro bono lawyers panel, there is no public mention of the medical panel by the FCO and it is not clear how it operates. When asked about how many cases the FCO has consulted the panel in relation to torture and other human rights abuses since 2010, the FCO answered: “We do not keep statistics of the number or type of referrals made.”<sup>201</sup> In recent years our clients have not been made aware of the existence of the panel, and considering the prevalence of medical issues arising as a result of torture or other prohibited ill-treatment faced by British nationals abroad this should be something that the families are actively engaged with.

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<sup>198</sup> BBC, *Doctors to aid British prisoners overseas*, 11 February 2002, available at <http://news.bbc.co.uk/1/hi/health/1814757.stm>.

<sup>199</sup> FCO, *Internal Guidance Chapter 13: Prisoners and Detainees*, February 2010, para 75, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/352148/Consular\\_internal\\_and\\_public\\_guidance\\_Ch\\_13\\_Prisoners\\_and\\_Detainees\\_1\\_FOI\\_ref\\_0606-14.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/352148/Consular_internal_and_public_guidance_Ch_13_Prisoners_and_Detainees_1_FOI_ref_0606-14.pdf).

<sup>200</sup> FCO response to Parliamentary Question, 20 November 2017, available at <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2017-11-14/112980/>.

<sup>201</sup> *Ibid.*

## VI. Managing consular cases

### VI.1. Acknowledgement of human rights violations and supporting international and regional human rights mechanisms

Multiple REDRESS clients and their families have expressed frustration at the apparent reluctance of the FCO to acknowledge and recognise, in public and in private, human rights violations in their (loved ones') cases. Some have commented that, although the FCO has been happy to raise concerns about their case, there seems to be more reservations about acknowledging the reality of the situation: that these are British nationals whose human rights have been violated.<sup>202</sup>

In a case where a British national was detained and abused in a Gulf State, the national expressed her frustration about the lack of FCO action. According to her, the FCO "do not take any interest in whether justice is being served or not ... where there are situations of wrongful arrest, total injustice and imprisonment, the UK consul does nothing and will not get involved in any 'criminal' cases."<sup>203</sup>

The FCO frequently refuses to acknowledge and support the findings of human rights violations of British nationals from international and regional human rights bodies, for example the United Nations Working Group on Arbitrary Detention (WGAD), UN Special Procedures or the African Commission. This is the case for both **Nazanin Zaghari-Ratcliffe** and **Andargachew Tsege**, who have both received multiple decisions from human rights bodies and human rights experts calling for their immediate release on the basis of the multiple grave violations that they have faced.<sup>204</sup> The WGAD for instance has reached out to the UK Government to discuss its findings, despite its role in both cases, it is not clear to REDRESS what, if any steps the FCO has undertaken or plans to take in supporting and enforcing the decisions of the WGAD.<sup>205</sup> In response to a written parliamentary question regarding Nazanin's case, the FCO Minister of State did not refer to the decision in her case, stating in more general terms: "I encourage the Iranian authorities to cooperate and engage fully with the United Nations regarding the conclusions and recommendations of reports published by the UN Working Group on Arbitrary Detention."<sup>206</sup> The Minister did not, however, indicate what steps the FCO is planning on taking to support the WGAD's findings.

In another case, the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (Special Rapporteur on Torture) concluded that Panama had subjected a British citizen to conditions of detention which constituted inhuman or degrading treatment contrary to articles 1 and 16 of the UNCAT.<sup>207</sup> He had been subjected to abuse by the authorities and detained in detention facilities which

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<sup>202</sup> Interview with a REDRESS client, September 2017.

<sup>203</sup> House of Commons, Foreign Affairs Committee, Support for British nationals abroad, The Consular Service, Fifth Report of Session 2014-15, Written evidence from Ellen Powers (CON0008), available at <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/foreign-affairs-committee/fco-consular-services/written/5341.pdf>.

<sup>204</sup> See UNWGAD Opinion No. 28/2016 concerning Nazanin Zaghari-Ratcliffe (Islamic Republic of Iran), UN Doc. A/HRC/WGAD/2016/28, 7 September 2016; UNWGAD Opinion No. 2/2015 concerning Andargachew Tsege (Ethiopia and Yemen), UN Doc. A/HRC/WGAD/2015/2, 8 May 2015.

<sup>205</sup> Discussions between REDRESS and the UNWGAD, 28 November 2017.

<sup>206</sup> FCO, Response to Parliamentary Written Question, 19 October 2017, available at <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2017-10-16/107759/>.

<sup>207</sup> Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/31/57/Add.1, 24 February 2016, paras. 443-445 (in Spanish).

were overcrowded, inappropriate and unsanitary; without access to adequate food, water, healthcare, and shelter. The Special Rapporteur urged the Government of Panama to investigate and prosecute those responsible for his treatment.<sup>208</sup>

The FCO has not undertaken any steps to publicly acknowledge and support the enforcement of the findings and recommendations of the various mechanisms. Overall, there appears to be a reluctance by the FCO to set a precedent regarding consular cases, with regards to publicly (and privately) endorsing the findings of such mechanisms and supporting the enforcement of those mechanisms' decisions.

For example, to our knowledge, the UK Government has never raised specific consular cases at the UN Human Rights Council (HRC), the inter-governmental body within the UN "responsible for the promotion and protection of all human rights around the globe."<sup>209</sup> The UK Government "do[es] not judge it to be the right forum" to raise such cases."<sup>210</sup> This is surprising, given that the responsibility of the HRC is to strengthen "the promotion and protection of human rights around the globe and for addressing situations of human rights violations and make recommendations on them."<sup>211</sup> It would seem to be a relevant forum to raise human rights concerns in relevant consular cases.<sup>212</sup> There is some precedent for this from other countries raising consular cases on behalf of their nationals, which demonstrates that this does not have to work against a strategy of private diplomacy. Denmark for instance has raised the case of detained Danish-Bahraini national Abdulhadi al-Khawaja several times at the UN Human Rights Council.<sup>213</sup>

The UN General Assembly (UNGA) – bringing together all 193 UN member states – is another forum in which the FCO could raise consular cases in which the UN has found that human rights violations have been committed against British nationals. It has not always done so. For example, when the Special Rapporteur on the human rights situation in Iran presented her annual report to the UN General Assembly, she highlighted the "emerging pattern of targeting dual nationals" for arrest and detention in Iran, identifying British national Nazanin Zaghari-Ratcliffe's ongoing detention. In its subsequent commentary on the Special Rapporteur's report, the United Kingdom failed to acknowledge or raise the case.<sup>214</sup> The UK Government, however, has raised Nazanin's case with Iranian counterparts on the margins of the UNGA, in New York, where her husband was actively campaigning.<sup>215</sup>

The FCO also does not acknowledge the serious human rights violations committed against its nationals abroad in its own reports. While there is a section on Consular Assistance to British Nationals Abroad in its

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<sup>208</sup> *Ibid*, para. 445.

<sup>209</sup> See further, UN Human Rights Council, available at <http://www.ohchr.org/en/hrbodies/hrc/pages/hrcindex.aspx>.

<sup>210</sup> Email from FCO to REDRESS client, September 2014, on file with REDRESS.

<sup>211</sup> See UN Human Rights Council, available at <http://www.ohchr.org/en/hrbodies/hrc/pages/hrcindex.aspx>.

<sup>212</sup> *Ibid*.

<sup>213</sup> See, for example, Permanent Mission of Denmark to UN Geneva, *HRC33: Denmark directs Human Rights Council's attention to human rights situation in Syria, South Sudan, Democratic People's Republic of Korea, OPT, Bahrain, Egypt, Iran, Burundi, and Eastern Ukraine & illegally annexed Crimea*, Statement by Denmark at the 33<sup>rd</sup> Session of the United Nations Human Rights Council Item 4: General Debate, 19 September 2016, available at <http://fngeneve.um.dk/en/news/newsdisplaypage/?newsid=3bd2b3a2-4369-492a-a4f5-8ff179ded733>.

<sup>214</sup> Third Committee, 31st meeting - General Assembly, 72nd session, Promotion and protection of human rights (A/72/40 and A/C.3/72/9) [item 72]. See: <http://webtv.un.org/search/third-committee-31st-meeting-general-assembly-72nd-session/5624821411001/?term=2017-10-25&lan=English&cat=Meetings%2FEvents&sort=date>, around 2:47:30

<sup>215</sup> FCO Response to Parliamentary Question, 17 October 2017, available at <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2017-10-09/106658/>.

annual Human Rights and Democracy Report, this section does not reference specific cases or countries or any action taken, instead describing the UK consular assistance policy in general terms.<sup>216</sup> Similarly, the chapter on Iran does not reference the unlawful arrest, detention and ill-treatment of its citizens, such as Nazanin Zaghari-Ratcliffe.<sup>217</sup> In response to a written parliamentary question, the FCO stated that “in line with our customary practice, the Annual Human Rights and Democracy Report will not mention individual consular cases.”<sup>218</sup>

The reluctance of acknowledging human rights violations committed against its own nationals abroad seems to suggest that the UK considers consular assistance as a matter separate from human rights. It does not mainstream these cases into its human rights strategy. This not only undermines its own human rights strategy, but furthermore seriously weakens the protection of its own nationals. A failure to speak out in the face of serious human rights violations committed against its nationals, such as unfair trials and abuse of due process, risks legitimising such abuses. The UK Government, and in particular the FCO, should use all tools at its disposal, including relevant international and regional fora, to stand up for the rights of its citizens, even more so where relevant mechanisms have found that serious violations have been committed against them. It should also develop country specific consular assistance strategies for countries of concern, taking into account a country’s overall human rights record as well as violations of UK nationals’ human rights, including their right to consular assistance.

## **VI.2. The principle of non-interference**

As outlined in the previous chapter on the rights of States and of individuals under the VCCR, the UK Government has a right to intervene on matters concerning its nationals abroad, including and indeed particularly, when the human rights of its nationals are at stake.

The UK Government makes it clear that it will not interfere in the internal affairs of another country when it comes to British nationals. *Support for British Nationals Abroad* states that the UK Government cannot “interfere in criminal or civil court proceedings because we cannot interfere in another country’s processes and must respect their systems, just as we expect them to respect the UK’s laws and legal processes.”<sup>219</sup> In its open letters to supporters of Andy Tsege, the FCO has stated:

Our consular priorities continue to be Mr Tsege’s wellbeing, his access to legal representation, and to ensure that the death sentence will not be carried out. Britain does not interfere in the legal systems of other countries by challenging convictions, any more than we would accept interference in our judicial system.

However, there is a lack of clarity with regards to outlining the difference between *intervention* and *interference*. Our clients have told REDRESS that sometimes this lack of clarity can be used as a defence for not pursuing a particular action, including refusing to consistently call for the release of a British national unlawfully detained abroad, or publicly highlighting concerns about unfair court proceedings

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<sup>216</sup> FCO, 2016 Human Rights & Democracy Report, p. 31.

<sup>217</sup> *Ibid*, p. 39.

<sup>218</sup> FCO Response to Parliamentary Question, 24 November 2017, available at <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2017-11-16/113626/>.

<sup>219</sup> *Support for British nationals abroad*, p. 3.

against UK nationals, particularly in cases where international or regional mechanisms have found detention to be unlawful and/or proceedings to have been unfair.

The UK Government's reluctance to make public representations with regards to its own nationals is also at odds with its public positioning on human rights cases regarding other countries' nationals. In recent years, the UK for instance has publicly called for the release of a number of non-UK nationals arbitrarily detained, for example, of political prisoners in Belarus,<sup>220</sup> Israeli soldier Gilad Shalit,<sup>221</sup> Iranian opposition figures<sup>222</sup> and Baha'i leaders<sup>223</sup> an Estonian security officer<sup>224</sup>, and recently of Crimean Tatar leader Akhtem Chiygoz.<sup>225</sup>

Some notable exceptions to the UK Government's overall reluctance to intervene publicly in consular cases exist. The UK Government has for instance publicly called for the release on humanitarian grounds of dual British nationals currently detained in Iran.<sup>226</sup> In a case of Egyptian and international journalists, including two British journalists, who had been arrested, prosecuted and convicted for "spreading false news" in Egypt in June 2013, the FCO and British embassy in Cairo took several consular steps to ensure that their human rights were respected. Embassy staff in Cairo attended most sessions of the trial and then Foreign Secretary William Hague issued a statement in which he said "he was appalled by the verdicts, and urged the Egyptian government to demonstrate its commitment to freedom of expression by reviewing this case as a matter of urgency."<sup>227</sup> The FCO also summoned the Egyptian Ambassador to the UK to express its "deep concern by the verdicts, along with the procedural shortcomings seen during the trials."<sup>228</sup> The case was subsequently also raised with President al-Sisi, "pressing for clemency and assurances that due legal process will be respected in the appeal process."<sup>229</sup>

**VI.3. The impact of public campaigning and the media and the need for a proactive approach**  
REDRESS works closely with some of the families of those who have been arbitrarily detained abroad and who have suffered and/or face (further) grave human rights violations. Our clients have greatly appreciated meeting consular officials and exchanging information about their cases. However, some have commented that the FCO's approach to their cases has been entirely reactive, rather than proactive.

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<sup>220</sup> FCO, Foreign Secretary calls for the release of all political prisoners in Belarus, 27 May 2011, available at <https://www.gov.uk/government/news/foreign-secretary-calls-for-the-release-of-all-political-prisoners-in-belarus>.

<sup>221</sup> FCO, Foreign Secretary calls for Gilad Shalit's immediate release, 22 June 2011, available at <https://www.gov.uk/government/news/foreign-secretary-calls-for-gilad-shalit-s-immediate-release>.

<sup>222</sup> FCO calls for release of Iranian opposition figures, 14 February 2013, available at <https://www.gov.uk/government/news/fco-calls-for-release-of-iranian-opposition-figures>.

<sup>223</sup> FCO, Foreign Office calls for release of 7 Bahá'í leaders held in Iran, 14 May 2014, available at <https://www.gov.uk/government/news/foreign-office-calls-for-release-of-7-bahai-leaders-held-in-iran>.

<sup>224</sup> FCO Minister calls for release of Eston Kohver in Russia, 19 August 2015, available at <https://www.gov.uk/government/news/minister-calls-for-release-of-eston-kohver-in-russia>.

<sup>225</sup> FCO, Minister for Europe concerned by the conviction and sentencing of Crimean Tatar leader by 'de-facto' Russian authorities, 11 September 2017, available at <https://www.gov.uk/government/news/minister-for-europe-concerned-by-the-conviction-and-sentencing-of-crimean-tatar-leader-by-de-facto-russian-authorities>.

<sup>226</sup> FCO, Foreign Secretary to visit Oman, Iran, and United Arab Emirates, 8 December 2017, available at <https://www.gov.uk/government/news/foreign-secretary-to-visit-oman-iran-and-united-arab-emirates>.

<sup>227</sup> See FCO, *Case study: Egypt – Country case study update*, 16 October 2014, available at <https://www.gov.uk/government/case-studies/egypt-country-case-study-update>.

<sup>228</sup> *Ibid.*

<sup>229</sup> *Ibid.*

In response to numerous submissions indicating that public campaigning and media coverage led the FCO to become more proactive in consular cases, the FAC concluded during its 2014 Consular Services Inquiry:

Press interest should not affect the FCO's decision making, but we have repeatedly been informed that media interest generates a more active response from the FCO. If true, this is unacceptable, as decisions about protecting prisoners should be made on the needs of each case, rather than how many people are watching. If the FCO has in fact been working behind closed doors on the national's behalf, it must improve its communication with the prisoner and their family to make them aware of this.<sup>230</sup>

Regarding the involvement of the media, the official consular policy is to "provide advice, when requested, on what the consequences of speaking or not speaking to the media could be, but we would not recommend a particular course of action."<sup>231</sup> However, REDRESS has found in the majority of cases the FCO has asked or strongly inferred on our clients to keep their cases private and avoid contact with the media as public campaigning may harm the UK Government's efforts in their cases. However, to our knowledge, there is no evidence that public campaigning has contributed to the worsening of the situation of family members detained abroad.

Those of our clients who have decided to publicly campaign for their detained family members' release have expressed that one of the reasons for doing so was to increase pressure on the UK Government to act decisively in their cases to bring about a resolution. As there is no obligation for the UK to act, families have felt that they must create an impetus for action through public pressure. Only by being "loud" have some families seen some progress in their cases.

#### **VI.4. Communication with families of those detained: a lack of transparency**

Some of our clients have found that, although they would receive high levels of sympathy and the sense of a real desire to help in their cases from individual FCO staff members, progress in their cases would be hamstrung by policy decisions from 'above'.

Communication between the FCO and family members of those detained was generally described as good once assigned to senior caseworkers or to the Special Cases unit (for the most extreme cases), with daily or weekly communication and regular in-person meetings. Our clients highlighted their appreciation of those meetings and how the meetings are important not only to receive and share information but also to know that their case is not being forgotten.<sup>232</sup> However, in one case, our client described his frustration at being assigned a fourth caseworker in under three months, and the lack of consistency in the approach of each caseworker. Rather than moving forward it seemed like things were going "back to basics," having to re-negotiate agreements that had already been made with the previous caseworker.<sup>233</sup> For example, instead of providing detailed reports of consular meetings to the family member, in accordance to what had been agreed, the new caseworker would only provide summarised information, stating:

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<sup>230</sup> House of Commons, Foreign Affairs Committee, Support for British nationals abroad, The Consular Service, Fifth Report of Session 2014-15, para. 29.

<sup>231</sup> FCO, Response to Parliamentary Question, 20 November 2017, available at <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2017-11-13/112573/>.

<sup>232</sup> Interview with a REDRESS client, November 2017.

<sup>233</sup> Interview with a REDRESS client, January 2018.

[T]he usual practice in all consular cases is to provide the detail, but not copies of any official correspondence, and that is how we have been passing details on your [relative's'] case to you and will continue to keep you updated in that way.<sup>234</sup>

The overall good communication between FCO and family members notwithstanding, there have also been serious shortcomings in particular during the initial period after arrest. One client complained bitterly of being bounced between junior caseworkers during the initial period after arrest, who would not be aware of the details of the case and would not be in a position to pursue further action.<sup>235</sup> In another case, the family member had to learn from media reports, rather than directly from the FCO, about the detainee's hospitalisation due to serious loss of weight in prison.

Multiple family members have described that, although communication would be open, the information provided to them would be limited. For example, although family members would be informed that their case was raised during high-level meetings between officials, including ministers, they would not be told whether the engagement was positive or negative, or how it progressed the situation.<sup>236</sup> In one case a family member felt that this signalled a lack of knowledge of the situation, whether this was due to poor communication with the Embassy on the ground or just a general lack of awareness.<sup>237</sup> In another it was felt that this was part of a general desire to preserve ambiguity as much as possible and as a way to avoid commitments.<sup>238</sup> One client however stated how they understood that the FCO could not be fully transparent about steps taken so as to preserve all diplomatic options.<sup>239</sup>

REDRESS works on several cases where the detainees' communication from detention with the outside world has been severely restricted, and in some cases, there is no direct contact allowed with family members or representative organisations. In such cases, the FCO are the only link between family members, and are in control of information flow. Clients in these situation have felt that the FCO provided insufficient details of the meetings with the loved one detained abroad, for example on the possibility of ill-treatment having been committed and that the language has been sanitised.<sup>240</sup> In addition, family members in such situations depend on the FCO to provide comprehensive information to the British national detained abroad. This seems to not always happen. For instance, in Andy Tsege's case, in which the FCO provides the only real link to the outside world, REDRESS has found that the FCO has been reluctant to inform him of developments in his own case outside of the country – for example, of decisions from the WGAD or from the African Commission.

Some clients have also expressed that the FCO has been reluctant to discuss all the options and resources available in each case.<sup>241</sup> While it would be easiest to be able to rely on the FCO to do what is necessary, this approach may not help progress a specific case and may prevent families' from being kept informed. A lack of clarity from the Public Guidance as to how and what action the FCO will take on behalf of its citizens detained abroad and under what circumstances, combined with a lack of consistency and different

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<sup>234</sup> Email from FCO to a REDRESS client, January 2018. Copy on file with REDRESS.

<sup>235</sup> Interview with a REDRESS client, November 2017.

<sup>236</sup> Interview with REDRESS clients, December 2017.

<sup>237</sup> Interview with a REDRESS client, December 2017.

<sup>238</sup> Interview with a REDRESS client, December 2017.

<sup>239</sup> Interview with a REDRESS client, December 2017.

<sup>240</sup> Interviews with REDRESS clients, November-January 2018.

<sup>241</sup> For example, most of our clients were unaware of the existence of a pro-bono lawyers panel or a pro-bono medical panel within the FCO.



approaches taken in different cases often makes it difficult for families to know what to ask for in meetings with the FCO. Some families felt they needed to be 'savvy' enough to know exactly what action to ask the FCO to take, and how to ask for such action.<sup>242</sup> REDRESS has also experienced that the FCO has a general reluctance to engage directly with organisations working on specific cases. Over the past six months for instance the FCO has refused to meet with us regarding three separate cases, as well as refused to facilitate communication with officials on the ground. This is unacceptable.

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<sup>242</sup> Interviews with REDRESS clients, December-January 2018.

## VII. Redressing failures in consular assistance

Perhaps not surprising given the limited legal framework available in the UK, “the United Kingdom is very rarely challenged legally for its consular services.”<sup>243</sup>

### VII.1. Legitimate expectation

The doctrine of ‘legitimate expectation’ was set out in the landmark 1984 House of Lords ruling in *Council of Civil Services Unions and others v Minister for the Civil Service*. The House of Lords held that:

...even where a person claiming some benefit or privilege has no legal right to it, as a matter of private law, he may have a legitimate expectation of receiving the benefit or privilege, and, if so, the courts will protect his expectation by judicial review as a matter of public law.<sup>244</sup>

In this context, a claim for legitimate expectation would be based on the fact that a public body (such as the FCO) had made a statement or published a policy which stated that it would do or not do something, and that a person had reasonably relied on that statement or policy, and should therefore be entitled to enforce it – if necessary through the courts. Although each case would depend on its individual facts, three key elements are usually examined as part of any such legal challenge.

Firstly, a statement or policy would need to be identified that was “clear, unambiguous and devoid of relevant qualification.”<sup>245</sup> In the context of consular assistance, the challenge is that many statements in this area are deliberately qualified. For example, the (broad) statement in 2014 that “British nationals can expect consular services to be as described in our public statements,”<sup>246</sup> is followed by fairly comprehensive qualification:

Whilst we do not have a legal obligation to provide consular assistance, such an obligation may be created when we create a **legitimate expectation** that certain assistance will be provided. This can be done by way of policy statements which indicate that assistance will be provided in certain circumstances. We are careful not to create such legitimate expectations by using suitable language in our public guidance, for example: **Often there are good legal, diplomatic or other reasons why we cannot do everything British nationals would like. Often, this is about ensuring other governments fulfil their own duties and avoiding interference which we ourselves would not accept from another government. Sometimes our policy is also based on resources and the importance of consistency: if we do a lot for a British national in one country, another somewhere else will rightly expect the same, creating unmanageable pressures.**<sup>247</sup> [emphasis in original]

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<sup>243</sup> CARE Report, p. 532.

<sup>244</sup> House of Lords, *Council of Civil Service Unions v Minister for the Civil Service* [1984] 1 AC 374 at 401, available at <http://www.careproject.eu/database/upload/UKcase001/UKcase001Text.pdf>.

<sup>245</sup> This wording appears in various cases: see, for example, Bingham LJ in *R v Inland Revenue Commissioners, Ex p MFK Underwriting Agents Ltd* [1990] 1 WLR 1545, at p. 1569.

<sup>246</sup> House of Commons Foreign Affairs Committee, Support for British nationals abroad, The Consular Service, Fifth Report of Session 2014-15, *Written evidence from the Foreign and Commonwealth Office* (CON0019), para. 38, available at <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/foreign-affairs-committee/fco-consular-services/written/5422.pdf>.

<sup>247</sup> *Ibid*, para. 41.

Secondly, it may be necessary to show that the person has relied in some way on the statement or policy, and even that they have acted, as a result, to their detriment.<sup>248</sup>

Thirdly, the court will take into account wider policy issues,<sup>249</sup> which, in this context, might include the kind of legal or diplomatic issues referred to in the extract above as justifying an inability to act.

The present legal position can be summarised in this recent re-statement of the legitimate expectation principle, from which it is clear that such a legal challenge in the area of consular assistance would be faced with significant legal obstacles:

Where a promise or representation, which is “clear, unambiguous and devoid of relevant qualification”, has been given to an identifiable defined person or group by a public authority for its own purposes, either in return for action by the person or group, or on the basis of which the person or group has acted to its detriment, the court will require it to be honoured, unless the authority is able to show good reasons, judged by the court to be proportionate, to resile from it. In judging proportionality the court will take into account any conflict with wider policy issues, particularly those of a “macro-economic” or “macro-political” kind.<sup>250</sup>

## **VII.2. Redressing failures in consular assistance through the Parliamentary Ombudsman**

The absence of any ‘right’ to consular assistance means that individual claims or complaints about the impacts of failures to act (or alleged inadequacies of the actions) would not normally be determined by the courts, but rather by way of a complaint to the Parliamentary and Health Service Ombudsman (the Parliamentary Ombudsman). This is in contrast to the possibility of judicially reviewing FCO decisions not to act in cases of diplomatic protection (see the cases discussed below, Chapter VIII.2). In broad terms, a complaint to the Parliamentary Ombudsman can only be brought after the FCO’s own complaints process has been completed,<sup>251</sup> and then can only consider complaints where the FCO’s or one of their Consulates’/Embassies’ conduct had a negative effect on the complainant. The Parliamentary Ombudsman will consider:<sup>252</sup>

*What should have happened:*

- *How the FCO was expected to act at the time of the events*
- *Standards, legislation and established good practice “in place at the time”*
- *The Ombudsman’s “Principles of Good Administration” and “Principles of Good Complaint Handling”<sup>253</sup>*

*What did happen*

- *What mistakes have been made*
- *Whether a poor service was provided*

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<sup>248</sup> There may have to be exceptional circumstances for this not to be required: see *R v Department Of Education & Employment, ex parte Begbie* [1999] EWCA Civ 2100, at para. 48, available at <http://www.bailii.org/ew/cases/EWCA/Civ/1999/2100.html>.

<sup>249</sup> Judicial Committee of the Privy Council, *United Policyholders Group v Attorney General of Trinidad & Tobago* [2016] UKPC 17, at para. 100, available at <http://www.bailii.org/uk/cases/UKPC/2016/17.html>.

<sup>250</sup> *Ibid*, para. 121.

<sup>251</sup> For further details see FCO, *Complains procedure*, available at <https://www.gov.uk/government/organisations/foreign-commonwealth-office/about/complaints-procedure>.

<sup>252</sup> Parliamentary and Health Service Ombudsman, *How we look into complaints: What happens when we investigate* (undated), available at [https://www.ombudsman.org.uk/sites/default/files/PHSO\\_Step\\_Three\\_Info\\_leaflet.pdf](https://www.ombudsman.org.uk/sites/default/files/PHSO_Step_Three_Info_leaflet.pdf).

<sup>253</sup> Available on the Parliamentary and Health Service Ombudsman’s website at: <https://www.ombudsman.org.uk/about-us/our-principles>.

- *Whether the FCO acted properly or fairly*

In determining potential maladministration, the Ombudsman will take into account the complainant's comments and the FCO's comments, the impact on the complainant and *whether the FCO has put things right already*.

The Ombudsman procedure can to some extent fill an accountability gap in that it can lead to a finding by the Ombudsman of maladministration by the FCO and in some circumstances also lead to the recommendation of some compensation and/or change of policy.

In one case, REDRESS assisted a British aid worker who was raped by a military officer in Egypt at a checkpoint in May 2011.<sup>254</sup> She had contacted the British embassy in Cairo for help, yet received only minimal support at the time. Contrary to the FCO's Internal Guidance for such cases as outlined above, consular staff did not offer to accompany her to report the rape to the police in Egypt, despite her fears of having to report the crime to the same authorities responsible for it. When she subsequently did report the crime, she was held against her will by the military. The consulate also failed to provide any assistance in arranging for a medical examination. Upon her return from Egypt, and with the help of REDRESS, she complained to the FCO and following an insufficient response, turned to the Ombudsman for help. The Ombudsman carried out a full investigation into her complaint and on 26 November 2013 upheld her complaint, finding multiple examples of maladministration by the FCO. The Ombudsman found for instance that

Ms M [the victims]'s expectation that the FCO would be able to help her after she had been assaulted was a reasonable one; they were the people who were supposed to support her and provide her with high-quality help. Ms M was far away from home, she had been through a terrifying ordeal, and the FCO were the only authority she could approach for help. She should have been able to rely on them to fulfil their role and assist her when she was at her most vulnerable. We have concluded, however, that the FCO failed to give Ms M [the victim] the assistance she should have reasonable expected to receive.<sup>255</sup>

In response, the FCO provided a full apology and monetary compensation to our client. The FCO also changed their guidance on handling sexual violence complaints, agreed to change guidance on torture and ill-treatment and to improve training of their consular staff.<sup>256</sup>

### **VII.3. Redressing failures in consular assistance through judicial review proceedings**

Judicial review is a type of court proceeding in which complainants request a judge to review the lawfulness of a decision or action/inaction by a public body, including the government. It provides an avenue for legal redress against a public authority where no other remedy is available. An individual who has an interest in the relevant matter can apply for judicial review after having exhausted all other remedies, and must then obtain the consent from the (High Court) judge in order to launch a claim. The claim must be brought within

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<sup>254</sup> Randeep Ramesh and Patrick Kingsley, *Foreign Office apologises over rape of British woman by Egyptian army officer*, The Guardian, 27 November 2013, available at: <https://www.theguardian.com/world/2013/nov/27/egypt-rape-foreign-office-apology>.

<sup>255</sup> Parliamentary and Health Service Ombudsman, *Sexual assault abroad: A report by the Parliamentary Ombudsman on an investigation into a complaint about the Foreign and Commonwealth Office*, 26 November 2013, para. 143, available at: [https://www.ombudsman.org.uk/sites/default/files/Sexual\\_assault\\_abroad\\_A\\_report\\_by\\_the\\_Parliamentary\\_Ombudsman\\_on\\_a\\_n\\_investigation\\_into\\_a\\_complaint\\_about\\_the\\_FCO.pdf](https://www.ombudsman.org.uk/sites/default/files/Sexual_assault_abroad_A_report_by_the_Parliamentary_Ombudsman_on_a_n_investigation_into_a_complaint_about_the_FCO.pdf).

<sup>256</sup> *Ibid*, paras. 139-142 and Annex C.

three months of the decision which gave rise to the claim.<sup>257</sup> The judge may allow for the review to proceed, in which case the claim for judicial review proceeds to be heard on the substance. Where the judge refuses the request for judicial review, the claimant can apply for reconsideration within seven days from the date of the order refusing permission.<sup>258</sup>

Judicial review is rarely resorted to as a remedy in consular assistance cases, given the discretionary nature of consular assistance.

A notable exception is the case of Andy Tsege, where Andy's then nine year old daughter had filed a request for a judicial review of the UK Government's handling of her father's case with a high court judge in 2016. According to the request for review, the UK Government's focus on ensuring due process for Mr Tsege was unlawful, as it was impossible for him to obtain due process in light of what the Government of Ethiopia has told the British Government, namely that Mr Tsege had no right to challenge his *in absentia* convictions. Instead, the UK Government should (have) focus(ed) on ensuring and publicly calling for his release.<sup>259</sup> The judge refused the request for review, finding that there were no grounds for review.<sup>260</sup>

#### **VII.4. Comparative approaches to the provision of consular assistance**

In interpreting consular assistance not as an entitlement or a right but as a matter of policy exercised on the basis of discretion, the UK's legal framework lags behind other European States. For example, the right to consular assistance is effectively enshrined in Article 14 of the Portuguese Constitution,<sup>261</sup> Article XXVII of the Hungarian Constitution,<sup>262</sup> Article 13 of the Estonian Constitution,<sup>263</sup> and Article 17 of the Romanian Constitution.<sup>264</sup> Additionally, other States (such as Bulgaria<sup>265</sup>) have no specific law on consular assistance, but such a right can be established through legal interpretation. Other countries upholding a partial but still significant guarantee of consular assistance include Germany,<sup>266</sup> Lithuania,<sup>267</sup> Ireland<sup>268</sup> and Malta.<sup>269</sup>

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<sup>257</sup> Judiciary for England and Wales, *The Administrative Court Judicial Review Guide 2017*, July 2017, para. 5.4.1, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/647052/Admin\\_Court\\_JRG\\_2017\\_180917.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/647052/Admin_Court_JRG_2017_180917.pdf).

<sup>258</sup> *Ibid*, Section 8.4.2.

<sup>259</sup> High Court, *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Menabe Andargachew* [2016] EWHC 2881 (Admin), para. 1.8.

<sup>260</sup> *Ibid*, para. 1.16.

<sup>261</sup> Article 14 of Portugal's Constitution of 1976 with Amendments provides: "Portuguese citizens who find themselves or who reside abroad shall enjoy the state's protection in the exercise of such rights and shall be subject to such duties as are not incompatible with their absence from the country," available at [https://www.constituteproject.org/constitution/Portugal\\_2005.pdf](https://www.constituteproject.org/constitution/Portugal_2005.pdf).

<sup>262</sup> Article XXVII of Hungary's Constitution of 2011 (with amendments) provides that "[E]very Hungarian citizen shall have the right to enjoy the protection of Hungary during his or her stay abroad," available at [https://www.constituteproject.org/constitution/Hungary\\_2013.pdf?lang=en](https://www.constituteproject.org/constitution/Hungary_2013.pdf?lang=en).

<sup>263</sup> Article 13 of Estonia's Constitution of 1992 provides that "E]veryone is entitled to protection by the government and of the law. The Estonian government also protects its citizens abroad," available at <https://www.president.ee/en/republic-of-estonia/the-constitution/>.

<sup>264</sup> Article 17 of Romania's Constitution states that "Romanian citizens while abroad shall enjoy the protection of the Romanian State and shall be bound to fulfil their duties, with the exception of those incompatible with their absence from the country," available at [http://www.cdep.ro/pls/dic/site.page?den=act2\\_2&par1=2#2c1s0sba17](http://www.cdep.ro/pls/dic/site.page?den=act2_2&par1=2#2c1s0sba17).

<sup>265</sup> Articles 25(5) and 26(1) of the Bulgarian Constitution can be interpreted to impose state obligations for the protection of citizens abroad, with Article 26 (1) for instance providing that "[I]rrespective of where they are, all citizens of the Republic of Bulgaria shall be vested with all rights and duties proceeding from this Constitution," available at <http://www.parliament.bg/en/const>.

<sup>266</sup> CARE Report, pp. 193, 197-198.

<sup>267</sup> *Ibid*, pp. 301-304.

<sup>268</sup> *Ibid*, pp. 240-244.

<sup>269</sup> *Ibid*, pp. 333-339.

The UK Government would therefore not be isolated in legal terms were it to afford its nationals a 'right' to consular assistance. Indeed, affording its own nationals a 'right' to consular assistance would not only provide its nationals with greater protection, but also further the UK Government's stated commitment to "...safeguarding, promoting and defending human rights... [which] is a key and integral part of the work of the Foreign and Commonwealth Office."<sup>270</sup>

The emphasis on discretion runs counter to the rights established and accepted by the UK in international human rights law, including in relation to human rights such as the right to freedom from torture and CIDTP, the right to liberty and the right to a fair trial. It is at odds with the repeated statements of the UK Government in relation to the protection of the interests of its nationals when they are travelling abroad. It is also at odds with the UK's legal framework on consular assistance for foreigners detained in the UK.

### **VII.5. Moving from discretion to a right to consular assistance**

While many areas of consular policy have been strengthened over the past few years, all interventions are considered on a case-by-case basis and the public policy (and Internal Guidance) remain non-committal in language.

The public policy and Internal Guidance currently in place emphasise that consular assistance is entirely based on a policy of discretion, including in cases where British nationals have been subjected to or face a risk of serious human rights violations. In the absence of a right to consular assistance or binding rules and regulations that identify criteria on how the current discretion is to be exercised, the UK Government has faced criticism from some families and NGOs that foreign policy considerations may override taking action for British nationals whose fundamental rights have been violated.<sup>271</sup>

The current policy of discretion should be replaced by providing for a right to consular assistance in every case where there is evidence of serious human rights violations such as torture or other prohibited ill-treatment. This will help to ensure that a denial of consular rights and human rights violations by the receiving State always results in vigorous complaint and/or protest, subject to the individual's expressed consent.

As the key provisions on consular assistance enshrined in Article 36 (1) of the VCCR are not incorporated into UK law, it is currently challenging to (a) ensure the UK Government will act on these unincorporated provisions, and (b) argue that the UK Government had any legal responsibility (liability) for not acting in relation to these unincorporated provisions. The introduction of a right to consular assistance in such cases will provide greater protection to UK nationals; it would arguably help to make the procedures more transparent and assist UK nationals to hold the UK Government to account for a failure to provide effective consular assistance.

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<sup>270</sup> FCO, *The 2016 Foreign & Commonwealth Office Report* (July 2017), p. vi, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/630623/Human\\_Rights\\_and\\_Democracy\\_Report\\_2016\\_accessible.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/630623/Human_Rights_and_Democracy_Report_2016_accessible.pdf).

<sup>271</sup> Various interviews with REDRESS clients, 2017.

## VIII. Diplomatic protection

Diplomatic protection is a formal State-to-State process employed by the State of nationality when a national suffers injury as a result of an internationally wrongful act committed, either directly or indirectly, by another State.<sup>272</sup> It is a procedure intended to secure protection of the national, and to obtain reparation for the wrongful act committed.<sup>273</sup> As recognised by the ICJ, diplomatic protection may be achieved by way of either “diplomatic action” or “international judicial proceedings.”<sup>274</sup>

Whilst consular assistance provides the framework to ensure that human rights are respected while a person is in custody, diplomatic protection provides the tools to seek to enforce that framework, and to seek redress when, despite the protections in place, mistreatment occurs. REDRESS’ own client, Mr H, provides a useful example of where diplomatic protection might be required to achieve redress for British nationals for human rights violations committed against them abroad. In 2002, REDRESS filed a claim with the UN Human Rights Committee, submitting that Mr H’s experiences in a country in Southeast Asia amounted to torture. The Human Rights Committee agreed, and advised the relevant Government to provide Mr H with an appropriate remedy, including compensation for the harm suffered. In light of the ongoing failure of the Government to respond to the Human Rights Committee’s Views, in June 2004 REDRESS formally requested “the urgent intervention of the UK government on [Mr H’s] behalf to obtain compliance by the [relevant] Government of its obligations.” The UK Government insisted that Mr H first exhaust all domestic legal remedies in the relevant country, a process completed in late 2016, and Mr H maintains that he now has no way of seeking redress unless the UK Government commences legal action itself against the relevant Government. The wrong committed against Mr H thus, in legal terms, becomes the wrong committed against the UK Government itself.<sup>275</sup>

Diplomatic protection is therefore clearly distinguished from consular assistance:

...[Diplomatic protection] ... is conducted by the representatives of the State acting in the interest of the State in terms of a rule of general international law, whereas consular assistance is, in most instances, carried out by consular officers, who represent the interests of the individual, acting in terms of the [VCCR]. Diplomatic protection is essentially remedial

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<sup>272</sup> International Law Commission (ILC), *Draft Articles on Diplomatic Protection* (ADP)(2006), text adopted by the International Law Commission at its fifty-eighth session and submitted to the General Assembly as a part of the Commission’s report covering the work of that session (A/61/10), version with commentaries available at <http://www.refworld.org/pdfid/525e7929d.pdf>. Art. 1 ADP states that “diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.”

<sup>273</sup> Dugard, John, *Diplomatic Protection*, in, *Max Planck Encyclopaedia of Public International Law*, May 2009 (Dugard, *Diplomatic Protection* in MPEPIL), para. 1.

<sup>274</sup> ILC, ADP, Commentary to Article 1, para. 8. Subject to the concerned State’s consent, claims for diplomatic protection may be adjudicated by the ICJ, arbitration tribunals or mixed claims commissions. Diplomatic action can include negotiation, protest, mediation, request for an inquiry, retorsion, severance of diplomatic relations, countermeasures, and economic pressure. Importantly, diplomatic action does not include *demarches* or any other diplomatic action that does not involve the invocation of the legal responsibility of another State.

<sup>275</sup> In 1924, the Permanent Court of International Justice (the forerunner to today’s ICJ) stated that “by taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right, the right to ensure, in the person of its subjects, respect for the rules of international law,” in *Mavrommatis Palestine Concessions (Greece v UK)* PCIJ Reports 1924, Series A, No.2, 12.

and is designed to remedy an internationally wrongful act that has been committed; while consular assistance is largely preventive and mainly aims at preventing the national from being subjected to an internationally wrongful act.<sup>276</sup>

According to John Dugard, the former Special Rapporteur on Diplomatic Protection for the International Law Commission (ILC), diplomatic protection is the most effective means for an individual to secure redress for an injury suffered abroad.<sup>277</sup> Under international law, a State has the right to exercise diplomatic protection on behalf of a national, although it is under no obligation to do so.<sup>278</sup> Consequently, a State will make a political decision whether to exercise diplomatic protection. This decision will factor in “its political and economic relations with the respondent State, the gravity of the injury to the national, the reputation of the justice system of the respondent State, its own reputation as a State that demands respect for its nationals, and the degree of support for the injured national in the claimant State.”<sup>279</sup>

Article 1 of the ILC’s Draft Articles on Diplomatic Protection (ADP) provides that

... diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.<sup>280</sup>

The ILC’s commentary to the ADP notes that the State does not only assert its own right, but also the right of its injured national.<sup>281</sup> Moreover, the ILC observes that:

Diplomatic protection conducted by a State at inter-State level remains an important remedy for the protection of persons whose human rights have been violated abroad.<sup>282</sup>

When the ILC proposed its ADP in 2006, effectively its proposal for a Convention on Diplomatic Protection, it did not take forward the recommendation of the then Special Rapporteur of the ILC on this topic that States should be obliged to guarantee an individual right to diplomatic protection in certain circumstances.<sup>283</sup> This does not, however, stop States from including an obligation to exercise diplomatic protection in their respective legal systems. Indeed, several States have enacted obligations to consider requests for diplomatic protection as a matter of their citizens’ constitutional rights.<sup>284</sup> In 2000, in his First Report on Diplomatic Protection,<sup>285</sup> the Special Rapporteur of the ILC was able to point out that a number of States

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<sup>276</sup> ILC, ADP, Commentary to Art. 1, para. 9.

<sup>277</sup> Dugard, *Diplomatic Protection* in MPEPIL, para. 10.

<sup>278</sup> ICJ, Case concerning the *Barcelona Traction Light and Power Company Limited (Belgium v Spain)*, Second Phase, Judgment, ICJ Reports 1970, 4 at 44.

<sup>279</sup> Dugard, *Diplomatic Protection* in MPEPIL, para. 68.

<sup>280</sup> ILC, ADP, Art. 1.

<sup>281</sup> ILC, ADP, Commentary to Art. 1, para. 3.

<sup>282</sup> *Ibid*, para.4.

<sup>283</sup> For a full articulation of his position, see Dugard, J, *Diplomatic Protection and Human Rights: The Draft Articles of the International Law Commission*, (2005) 24 Australian Year Book of International Law 75.

<sup>284</sup> For example, the Hungarian Constitution provides: “Every Hungarian citizen is entitled to enjoy the protection of the Republic of Hungary, during his/her legal staying abroad.” Other Constitutions providing for such a right are those of Albania, Belarus, Bosnia and Herzegovina, Bulgaria, Cambodia, China, Croatia, Estonia, Georgia, Guyana, Italy, Kazakhstan, Lao People’s Democratic Republic, Latvia, Lithuania, Poland, Portugal, Republic of Korea, Turkey, Ukraine and Vietnam.

<sup>285</sup> *First Report on Diplomatic Protection*, by Mr. John E. Dugard, Special Rapporteur, ILC, 52nd session, 7 March 2000, A/CN.4/506, available at [http://legal.un.org/ilc/documentation/english/a\\_cn4\\_506.pdf](http://legal.un.org/ilc/documentation/english/a_cn4_506.pdf).



had by that time recognised the individual's right to receive diplomatic protection for injuries suffered abroad.<sup>286</sup>

Providing for an obligation to exercise diplomatic protection would be an important step in strengthening human rights protection for a country's nationals. The ILC for instance observed that "diplomatic protection... remains an important remedy for the protection of persons whose *human rights* have been violated abroad" [our emphasis].<sup>287</sup> This recognises that it is in the area of human rights that diplomatic protection is increasingly being relied upon. This is consistent with the view of the ICJ which explained the issue in the 2007 *Diallo* case as follows:

Owing to the substantive development of international law over recent decades in respect of the rights it accords to individuals, [...] diplomatic protection, originally limited to alleged violations of the minimum standard of treatment of aliens, has subsequently widened to include, inter alia, internationally guaranteed human rights.<sup>288</sup>

In the same case, the ICJ considered that reparation for human rights violations, usually in the form of compensation, obtained as a result of diplomatic protection, is generally intended for the benefit of the individual victim.<sup>289</sup> As explained in a significant separate declaration by Judge Greenwood, who was part of the 15-1 bench awarding compensation:

Although Guinea has brought this case in the exercise of its right of diplomatic protection, the case is in substance about the human rights of Mr. Diallo. The damages which the Court has ordered the DRC to pay to Guinea are calculated by reference to the loss suffered by Mr. Diallo and are intended for his benefit, not that of the State.<sup>290</sup>

### **VIII.1. Exercising diplomatic protection: the requirements**

Three basic requirements need to be met for diplomatic protection to be exercised: firstly, the establishment of an internationally wrongful act; secondly, the fulfilment of certain nationality criteria; and thirdly, the exhaustion of local domestic remedies.

#### **(i) Internationally wrongful act**

A State action or omission amounts to an internationally wrongful act when it:

- (a) *is attributable to the State under international law; and*
- (b) *constitutes a breach of an international obligation of the State.*<sup>291</sup>

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<sup>286</sup> *Ibid*, para. 80.

<sup>287</sup> ILC, ADP, Commentary to Art. 1, para. 4

<sup>288</sup> *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Preliminary Objections, Judgment of 24 May 2007, para. 39, available at <http://www.icj-cij.org/files/case-related/103/103-20070524-JUD-01-00-EN.pdf>.

<sup>289</sup> *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, ICJ Reports, 19 June 2012, available at <http://www.icj-cij.org/files/case-related/103/103-20120619-JUD-01-00-EN.pdf>. This (last) judgement in the case dealt with the quantum of damages, para. 4.

<sup>290</sup> *Declaration of Judge Greenwood*, para.1, available at <http://www.icj-cij.org/files/case-related/103/103-20120619-JUD-01-03-EN.pdf>. The merits were decided in the earlier judgment *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, ICJ Reports 30 November 2010, available <http://www.icj-cij.org/files/case-related/103/103-20101130-JUD-01-00-EN.pdf>.

<sup>291</sup> ILC, *Articles on the Responsibility of States for Internationally Wrongful Acts*, annexed to UN Doc. A/RES/56/83 of 12 December 2001, Article 2, available at <https://www.ilsa.org/jessup/jessup11/basicmats/StateResponsibility.pdf>.

The essence of an internationally wrongful act lies in a State's failure to ensure that its conduct complies with international obligations, including for instance obligations under international human rights law. In the context of diplomatic protection, this includes breaches of the right to liberty, right to a fair trial and the right to freedom from torture and other prohibited ill-treatment. It also includes, as illustrated above, the failure to fully comply with the rights enshrined in the VCCR, such as the failure to inform foreign nationals detained abroad about their rights under the VCCR.

## (ii) Nationality requirements

Diplomatic protection would normally be exercised by the State of nationality.<sup>292</sup> The provisions of the ADP, whilst not binding, tend to suggest that nationality requirements have become more flexible than this, facilitating an enhanced protection of individual rights. The ADP examine nationality requirements in Articles 4 – 7..

Firstly, Article 4 of the ADP provides that, for the purposes of diplomatic protection, “a **State of nationality** means a State whose nationality that person has acquired, in accordance with the law of that State, by birth, descent, naturalization, succession of States, or in any other manner, not inconsistent with international law.” The ADP Commentary to Article 4 makes it clear that Article 4 “does not require a State to prove an effective or genuine link between itself and its national...as an additional factor for the exercise of diplomatic protection, even where the national possesses only one nationality.”<sup>293</sup> It reasoned that the effective link requirement would otherwise unduly exclude millions of persons from the benefit of diplomatic protection.<sup>294</sup>

Secondly, there is also increased flexibility regarding the **continuous nationality** of a natural person. In this regard, Article 5 of the ADP provides that a State may exercise diplomatic protection in respect of a person who was a national at the date of the official presentation of the claim but not at the time of the injury, provided certain conditions are met.

Thirdly, while some domestic legal systems prohibit their nationals from acquiring dual or multiple nationality,<sup>295</sup> Article 6 of the ADP specifically tackles this issue, recognising that two or more States of nationality may **jointly exercise diplomatic protection** in respect of a dual or multiple national against a State of which the person is not a national.

Finally, Article 7 refers to the concept of **predominant nationality** regarding claims against a State of nationality where a person with multiple nationality is concerned. It provides that “[A] State of nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national unless the nationality of the former State is predominant, both at the date of injury and at the date of the official presentation of the claim.”<sup>296</sup> This would also accord with developments in international human

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<sup>292</sup> This is the position set out in ADP, Article 3, and is generally thought to be reflective of the current position in international law. The traditional general rule in its pure form was set out in the *Panevezys-Saludutiskis Case, Estonia v Lithuania* (1939) PCIJ Reports, Series A/B, No. 76.

<sup>293</sup> ADP Commentary to Article 4, para. 5.

<sup>294</sup> *Ibid.*

<sup>295</sup> The UK has no such prohibition.

<sup>296</sup> Such a position is also reflected in for example the case of *Carnevaro (Italy v Peru)* (1912), Permanent Court of Arbitration, 11 RIAA 397. The Iran-United States Claims Tribunal has also applied the principle of dominant and effective nationality in a number of cases - See *Esphahanian v Bank Tejarat* (1983) 2 Iran-US CTR 157; also, the United Nations Compensation

rights law which afford legal protection to individuals even against a State of which they are not nationals. Nonetheless, such developments have not prevented this being a significant issue in the case of British-Iranian national Nazanin Zaghari-Ratcliffe, where it was almost eighteen months after her initial arrest before the UK Government began stating publicly that they considered her to be a British citizen, rather than defaulting to Iran's position on her dual nationality status: "Although there is no international legal obligation to recognise dual nationality, we consider [Nazanin] to be British and will continue to request access to [her]."<sup>297</sup> REDRESS, together with her husband Richard Ratcliffe and a team of lawyers, are currently urging the FCO to consider exercising diplomatic protection on behalf of Nazanin, in light of the human rights abuses committed against her by Iran, and her nationality being predominantly British.<sup>298</sup>

The concept of predominant nationality reflects more progressive practice regarding stateless persons and refugees, which indicates that the appropriate State to protect such persons is the State of "lawful and habitual residence."<sup>299</sup> A number of conventions on stateless persons<sup>300</sup> and refugees<sup>301</sup> have been adopted in this respect, and Article 8 of the ADP deals with the diplomatic protection of stateless persons and refugees.<sup>302</sup>

Diplomatic protection for refugees by the State of residence is particularly important as refugees are "unable or unwilling to avail [themselves] of the protection of [the State of nationality]"<sup>303</sup> and, if they do, run the risk of losing refugee status in the State of residence. It should be noted that the term "refugee" is not limited to refugees as defined in the 1951 Convention, and allows a State to extend diplomatic protection to any person that it considers and treats as a refugee. This is particularly important for refugees in States not party to existing or regional instruments. It is worth noting that Article 8(3) of the ADP provides that the State of refuge may not exercise diplomatic protection in respect of a refugee against the State of nationality of the refugee.

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Commission established to provide for damages caused by the Iraqi invasion and occupation of Kuwait – see United Nations document S/AC.26/19991/Rev.1, para.11. The condition applied by the Commission for considering claims of dual citizens possessing Iraqi nationality is that they must possess bona fide nationality of another State; indicators to suggest that a nationality is predominant include habitual residence of the individual; amount of time spent in each country of nationality; date of naturalization; place, curricula and language of education; employment and financial interests; place of family life; family ties in each country; participation in social and public life; use of language; taxation, bank account, social security insurance; visits to the other state of nationality; possession and use of passport of the other State; and military service, see Dugard SC, J, Eatwell, T, MacDonald QC, A, *Legal Opinion Re. Nazanin Zaghari - Ratcliffe – Availability of Diplomatic Protection*, 16 October 2017 (John Dugard, Tatyana Eatwell and Alison MacDonald, Nazanin Legal Opinion), available at [https://redress.org/wp-content/uploads/2017/11/16.10.17-Zaghari-Ratcliffe-Opinion-Diplomatic-Protection\\_for-web.pdf](https://redress.org/wp-content/uploads/2017/11/16.10.17-Zaghari-Ratcliffe-Opinion-Diplomatic-Protection_for-web.pdf).

<sup>297</sup> FCO, Response to Parliamentary Written Question, 17 October 2017, available at <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2017-10-09/106659/>.

<sup>298</sup> See, John Dugard, Tatyana Eatwell and Alison MacDonald, Nazanin Legal Opinion and REDRESS, Nazanin Zaghari-Ratcliffe.

<sup>299</sup> ILC, ADP, Article 8 (1).

<sup>300</sup> Such as the Convention on the Reduction of Statelessness (1961), 989 UNTS, p. 175.

<sup>301</sup> Such as the Convention on the Status of Refugees (1961), 189 UNTS, p. 150.

<sup>302</sup> The ADP does not define stateless persons. Such definition is to be found in the 1954 Convention Relating to the Status of Stateless Persons - 360 UNTS, p.117, which in article 1 defines a stateless person "as a person who is not considered as a national by any State under the operation of its law."

<sup>303</sup> Article 1 (A) (2) of the Convention Relating to the Status of Refugees, 189 UNTS, p. 137.

The UK Court of Appeal decision in *Al Rawi*<sup>304</sup> is at odds with the progressive developments giving protection to persons with lawful and habitual residence. In this case men held at Guantanamo Bay who were not UK nationals but who had refugee or long-term residency rights in the UK, asked the Court to order the UK Government to make a formal request to the USA for their release. This was refused despite it having been argued on behalf of the United Nations High Commissioner for Refugees (UNHCR), which made reference to Article 8 of the ADP as well as Article 16 of the Refugee Convention, “challeng[ing] the correctness of the rule of international law...that a State only enjoys a right – recognised and enjoyed by every State – to afford diplomatic protection for its own nationals by means of a State to State claim.”<sup>305</sup> The Court decided the UK did not have standing to exercise diplomatic protection, rejecting several arguments to the contrary, and stated that it found Article 8 of the ADP “something of a distraction”.<sup>306</sup>

### **(iii) Exhausting local remedies**

The exercise of diplomatic protection generally requires that the injured person first exhausts “all local remedies.” This means that the injured person must first have exhausted all judicial or administrative remedies in the State where the harm occurred, before the person’s State of nationality can take on the case on that person’s behalf. In many contexts this rule makes perfect sense: domestic remedies are generally easier and cheaper to access, local judges are usually more familiar with the context of the claim or complaint and the courts can proceed more quickly, leaving international mechanisms as a last resort. However, the rule is more problematic in the context of violations of human rights, since the injured person would be expected first to seek redress through the judicial or administrative organs of the very State against whom the wrong-doing is alleged, with the obvious risks that this would entail.

The problems and delays which the rule can cause are readily apparent from the case of REDRESS’ client, Mr H. Following his experience of torture in the local prison system, Mr H commenced his efforts to seek a remedy through the domestic courts in the country concerned in 2009, but it was only in December 2016 that the Supreme Court of that country rejected his Petition, enabling him then to explore the possibility of diplomatic protection.

Article 14 of the ADP seeks to codify the customary international rule requiring the exhaustion of local remedies as a prerequisite for the presentation of an international claim. However, this general rule is subject to a range of exceptions which commonly exist in international legal tribunals, and which are summarised in Article 15 of the ADP which states that:

Local remedies do not need to be exhausted where:

- (a) There are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress;
- (b) There is undue delay in the remedial process which is attributable to the State alleged to be responsible;
- (c) There was no relevant connection between the injured person and the State alleged to be responsible at the date of injury;
- (d) The injured person is manifestly precluded from pursuing local remedies; or

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<sup>304</sup> *Al Rawi and Others v Secretary of State for Foreign Affairs and Another* [2006] EWHC 458 (Admin) (*Al Rawi and Others v Secretary of State for Foreign Affairs and Another*), available at <http://www.bailii.org/ew/cases/EWCA/Civ/2006/1279.html>.

<sup>305</sup> *Ibid*, para. 115.

<sup>306</sup> *Ibid*, para. 120. *Al Rawi* was appealed to the House of Lords (as it then was), and REDRESS and a group of other NGOs were granted leave to make a third party intervention. However, before the appeal was heard the FCO sought the release and return of the detainees, who subsequently withdrew their appeal.

(e) The State alleged to be responsible has waived the requirement that local remedies be exhausted

## VIII.2. Legal efforts to oblige the UK to exercise diplomatic protection

Like consular assistance, the UK Government does not regard diplomatic protection as a legal right to which UK nationals are entitled:

The United Kingdom provides diplomatic protection (and diplomatic representation) as a matter of published policy and not on the basis of a legal right to such protection.<sup>307</sup>

The main policy document pertaining to the exercise of diplomatic protection by the UK is the “Rules applying to international claims”, updated in 2014 (the Rules) and related guidance.<sup>308</sup> The following key provisions set out the conditions for the UK to take up a claim:

I: HMG will not take up the claim unless the claimant is a British national and was so at the date of the injury.

II: Where the claimant has become or ceases to be a British after the date of the injury, HMG may in an appropriate case take up the claim in concert with the government of the country of his former or subsequent nationality.

III: Where the claimant is a dual national, HMG may take up his claim (although in certain circumstances it may be appropriate for HMG to do so jointly with the other government entitled to do so). HMG will not normally take up the claim as a British national if the respondent State is the State of his second nationality, but may do so if the respondent State has, in the circumstances which gave rise to the injury, treated the claimant as a British national.

VII: HMG will not normally take over and formally espouse a claim of a British national against another State until all the legal remedies, if any, available to him/her in the State concerned have been exhausted.

VIII: If, in exhausting any municipal remedies, the claimant has met with prejudice or obstruction, which are a denial of justice, HMG may intervene on his behalf to secure redress of injustice.

IX: HMG will not take up a claim if there has been undue delay in its presentation to them unless the delay results from causes outside the control of the claimant, but no time limits are fixed and they are subject to equitable rather than legal definition.

There are a number of examples of UK courts grappling with the concept of diplomatic protection and when it could, should or must be exercised. A leading decision in the UK is the 2002 Court of Appeal case of *Abbasi*.<sup>309</sup> Mr Abbasi, one of a number of British nationals who had been held in Guantanamo Bay, was seeking by judicial review, to compel the Foreign Office to make representations on his behalf to the United States Government for his release, for him to be brought before a proper court, to take other appropriate

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<sup>307</sup> CARE Report, p. 525.

<sup>308</sup> *Written evidence [to Foreign Affairs Committee] from Ross Allen, Head of Consular Assistance Department, Foreign and Commonwealth Office (CON0033)*, Ordered to be published 4 November 2014, available at: <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/foreign-affairs-committee/fco-consular-services/written/15301.html>.

<sup>309</sup> Court of Appeal, *Abbasi and Another v Secretary of State for Foreign Affairs and Another* [2002] EWCA Civ.1598, (Court of Appeal, *Abbasi and Another v Secretary of State for Foreign Affairs and Another*) available at <http://www.bailii.org/ew/cases/EWCA/Civ/2002/1598.html>.

action or to give an explanation as to why this has not been done.<sup>310</sup> The Court of Appeal considered the ILC Special Rapporteur's work on a draft article imposing a *duty* on States to exercise diplomatic protection when nationals have suffered a breach of a *jus cogens* norm<sup>311</sup>, but noted his point that many States did not accept that such a right either exists in international law or could be introduced at this stage on the basis of "progressive development."<sup>312</sup>

While the UK Government is not therefore obliged to exercise diplomatic protection (a position obviously reiterated in the Rules referred to above), there remains scope to judicially review any refusal to do so.<sup>313</sup> One of the grounds which has been used for this is based on the doctrine of "legitimate expectation" discussed earlier in this report. This was one of the arguments advanced by Mr Abbasi, however, although the Court of Appeal did recognise that the relevant FCO policy was "capable of giving rise to a legitimate expectation,"<sup>314</sup> the Court considered that in his case the FCO had effectively complied with the obligatory element.<sup>315</sup>

In *Abbasi* the Court of Appeal recognised that it is vital that the Government examines the nature and extent of the injustice claimed so that a balance can be struck between the interest of the individual and foreign policy considerations:

Even where there has been a gross miscarriage of justice, there may perhaps be overriding reasons of foreign policy which may lead the Secretary of State to decline to intervene. However, unless and until he has formed some judgment as to the gravity of the miscarriage, it is impossible for that balance to be properly conducted.<sup>316</sup>

This echoes the jurisprudence in other countries<sup>317</sup> and emphasises the fact that, the more egregious the mistreatment or injustice alleged on the part of the affected individual, the more the balance will be tipped in favour of the recognition of an obligatory element in the protection offered. Following the *Abbasi* decision, the FCO continued to visit the UK detainees and also began to make representations to the US Government

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<sup>310</sup> *Ibid*, para. 1.

<sup>311</sup> A fundamental principal of international law from which no derogation is permitted.

<sup>312</sup> Court of Appeal, *Abbasi and Another v Secretary of State for Foreign Affairs and Another*, para. 41. The Court also found (at paras. 41-79) that neither the European Convention on Human Rights nor the Human Rights Act imposed such an obligation; Strasbourg cases examined included *Al Adsani v UK* (2002) 34 EHRR 11 (Application no. 35763/97), *Soering* [1989] 11 EHRR 439 (Application no.14308/88), *Bankovic and Others v Belgium and Others* 11 BHRC 435 (App. No. 52207/99) and *Bertrand Russell Peace Foundation v United Kingdom* (Commission decision 2 May 1978.) It thus concluded (para 79) that neither treaties, legislation nor case law "afford[ed] any support to the contention that the Foreign Secretary owes Mr Abbasi a duty to exercise diplomacy on his behalf."

<sup>313</sup> Such a claim is by definition likely to be undertaken on an urgent basis, but must be started "promptly... and in any event not later than 3 months after the grounds to make the claim first arose" (Civil Procedure Rules, Rule 54.5(1), available at <http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part54#54.2>).

<sup>314</sup> Court of Appeal, *Abbasi and Another v Secretary of State for Foreign Affairs and Another*, para. 87.

<sup>315</sup> *Ibid*, para.107.

<sup>316</sup> *Ibid* para. 100.

<sup>317</sup> See in particular Constitutional Court of South Africa, *Kaunda and Others v President of the Republic of South Africa and Others* [2004] ZACC 5, available at <http://www.saflii.org/za/cases/ZACC/2004/5.html>; and Canada, Federal Court of Appeal, *Canada (Prime Minister) v. Khadr* (2009) FCA 246, available at <https://decisions.fca-caf.gc.ca/fca-caf/decisions/en/36526/1/document.do> (although this decision was overturned by the Canadian Supreme Court on appeal).

that they either face a fair trial or be sent back to the UK.<sup>318</sup> However, these interventions were not based on any explicit recognition of the right of citizens to diplomatic protection.

The position set out in *Abbasi* was confirmed in *Al Rawi*. While *Abbasi* concerned a UK *national* detained at Guantanamo Bay, *Al Rawi* involved a number of UK *residents* detained there giving rise to efforts to persuade the UK Government also to intervene on their behalf.<sup>319</sup> As discussed above, the traditional rule in international law is that diplomatic protection is only exercisable on behalf of nationals, which was the position taken by the UK Government in respect of these non-nationals: the UK had no right in international law to exercise diplomatic protection on behalf of such persons, it argued. Therefore, unlike the approach the UK Government had eventually taken in calling for the fair trial or release of its nationals, in respect of these non-nationals its representations were more limited:

[O]n 27 April 2005, [the Foreign Office Minister responsible] met senior officials from the United States Embassy in order to pass on the concerns of the detainee claimants' families and lawyers. Although she made no specific request for their return, she expressed concern about the reasons for their detention, the fact that they had not been charged, and the families' anxiety that they might be returned to countries where they might face torture. She raised the allegations of mistreatment – and torture – which had been put to her at the meetings and asked for assurances as to the conditions in which the detainee claimants were being held. The matter was followed up by British officials in Washington but there has been no formal response to the representations that were made.<sup>320</sup>

Mr Al-Rawi and two other detainees and their families sought a judicial review of the UK's refusal to formally intervene on their behalf, arguing that:

[T]he Foreign Secretary is under a duty to make a formal and unequivocal request of the United States for the release and return of the detainee claimants to this country; and/or... that the Foreign Secretary is under a duty to make the same representations to the United States of America in respect of the detainee claimants as have been made in respect of British citizens detained at ...Guantanamo...<sup>321</sup>

In arguing that the exercise of diplomatic protection was not possible for non-nationals, the UK set out the traditional international law view as to why it could not intervene with the US more strenuously – the lack of a recognised right to do so.<sup>322</sup> Before the case was heard in the Court of Appeal the UK Government had in

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<sup>318</sup> See, for example, Foreign and Commonwealth Office, 'Statement on the British Nationals Detained in Guantanamo Bay' (10 March 2003); Foreign and Commonwealth Office, 'Statement on British Guantanamo Bay Detainees' (20 May 2003).

<sup>319</sup> Six such persons were: Shaker Aamer (a Saudi national and long-term UK resident); Jamil El Banna (a Jordanian national with indefinite leave to remain in the UK and refugee status); Omar Deghayes (a Libyan national with indefinite leave to remain in the UK and refugee status); Binyam Mohamed (an Ethiopian national with leave to remain in the UK while his application for political asylum was being processed); Bisher Al-Rawi (an Iraqi national who fled Iraq to the UK with his family in 1983; though his family members became UK citizens he retained his Iraqi nationality as the family felt this might help them in recovering property appropriated in Iraq); Abdennour Sameur (an Algerian national with indefinite leave to remain in the UK as a refugee).

<sup>320</sup> *Al Rawi and Others v Secretary of State for Foreign Affairs and Another*, para. 22. Initially, the UK Government had declined to make any representations at all. Thus, in September 2002 Baroness Symons wrote to the family of Mr Deghayes saying that, "[h]is detention and welfare are matters for the United States and Libya. I can only advise that you contact the Embassies of the United States and Libya in London and seek information from them." In January 2003 in relation to Mr. Al Rawi, she wrote that "[i]f he was travelling on Iraqi documentation, then clearly it is the role of the Iraqi authorities to provide assistance either directly or through a country which they have indicated they wish to represent their interest" - *ibid*, para. 19.

<sup>321</sup> *Al Rawi and Others v Secretary of State for Foreign Affairs and Another*, para. 30. The detainees alleged that they had been tortured and ill-treated.; the Court of Appeal proceeded on the premise that they had been subjected at least to inhuman and degrading treatment, para. 3.

<sup>322</sup> *Ibid*, para. 28-29.

fact formally requested Mr Al Rawi's release, explaining that this was on the basis of "some reasonable prospect of success, and without causing [...] significant counterproductive effects more generally [...] the matters referred to do not give rise to a legal obligation on [the UK] to make any request at all."<sup>323</sup>

The Court of Appeal found that the refusal to make representations' on behalf of the other detainees did not constitute a violation of the rights of their family members under the ECHR;<sup>324</sup> that not making the same representations for non-nationals as had been made for nationals did not constitute unlawful discrimination under the Race Relations Act;<sup>325</sup> that there had been no breach of legitimate expectations;<sup>326</sup> that the UK's position on State to State claims in international law and the primacy of nationality was not mistaken. In particular, it considered that Article 8 of the ADP, which recognised that the State in which a non-national was habitually and lawfully resident could exercise diplomatic protection, did not constitute customary international law and therefore the UK did not have standing to make formal representations on behalf of the non-nationals.<sup>327</sup>

The Court was also especially concerned with the efficacy and practicality of the called-for interventions, perhaps even more than any legal basis, and did not accept the argument that the Government's judgment in this regard was flawed; thus in regard to the ADP as well as arguments under Article 16 of the Refugee Convention, the Court said:

[They] do not in truth engage the core of the case: the [UK Government's] judgment that any formal representations to the US authorities on behalf of the detainee claimants would be ineffective and counterproductive.<sup>328</sup>

The case was appealed to the House of Lords, but shortly before it was due to be heard the Government decided to request the release and return of the two remaining appellants as well as the other UK residents still held, and thus the appeal was withdrawn. The UK was still not prepared to raise the same issues as it had eventually done on behalf of the UK nationals, such as trial by military commission, and instead characterised its intervention on a different basis altogether:

[The UK Government] decided to seek the release of the five in light of work by the US government to reduce the number of those detained at Guantanamo and our wish to offer practical and concrete support to those efforts. In reaching this decision we gave full consideration to the need to maintain national security and the Government's overriding responsibilities in this regard.<sup>329</sup>

### **VIII.3. UK 'Espousal' of cases of British nationals subjected to human rights violations abroad**

The act of a State taking on a legal case on behalf of an individual against another State for reparation is commonly called the "espousal" of the case, and it is this term which is used in Rule VII of the Rules

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<sup>323</sup> *Ibid*, para. 38.

<sup>324</sup> *Ibid*, para. 91 et seq.

<sup>325</sup> *Ibid*, para. 65 et seq.

<sup>326</sup> *Ibid*, para. 88 et seq.

<sup>327</sup> *Ibid*, para. 115 et seq.

<sup>328</sup> *Ibid*, paras. 120,122.

<sup>329</sup> Foreign and Commonwealth Office, *David Miliband: Written Ministerial Statement on Guantanamo Bay: Return of UK Residents*, 13 December 2007.



reproduced above. The espousal of a case is one possible way of exercising diplomatic protection. In cases involving allegations of torture and ill-treatment, UNCAT, to which the UK is a party provides an important framework on the rights of victims of torture and other ill-treatment to redress. As highlighted above, UNCAT requires each State Party to ensure that a victim of torture obtains redress.<sup>330</sup> The UN Committee Against Torture in its General Comment 3 states that “[u]nder article 14 [of the Convention] a State party shall ensure that victims of any act of torture or ill-treatment under its jurisdiction obtain redress. States parties have an obligation to take all necessary and effective measures to ensure that all victims of such acts obtain redress.”<sup>331</sup>

However, these provisions notwithstanding, in our experience, the UK Government is reluctant to espouse claims on behalf of its citizens against another State even in regard to serious human rights violations such as torture. It is unclear how many of the hundreds of individuals who had alleged torture and other prohibited ill-treatment in previous years, have requested the UK Government to espouse their claim. REDRESS is aware of only a few cases in which it has had some involvement. However, to our knowledge, the UK Government has not espoused by way of initiating a legal suit for redress for torture on behalf of its nationals, and despite the recommendation from the House of Commons Foreign Affairs Committee in 2014 that the UK Government should “keep records of the number of complaints about alleged mistreatment it pursues with authorities abroad”,<sup>332</sup> a Parliamentary Written Answer in November 2017 confirmed that no statistics exist for the number of claims espoused by the UK Government since 1 April 2005.<sup>333</sup>

The lack of espousal will usually mean that British nationals subjected to torture and ill-treatment abroad will be denied access to justice, including compensation and other forms of reparation.

In the case of our client, Mr H, a British national who the UN Human Rights Committee has confirmed had been tortured abroad in a country in Southeast Asia, the Committee advised the Government concerned to provide Mr H with an appropriate remedy, including compensation and the investigation and prosecution of those responsible. In the light of the ongoing failure of the relevant Government to respond to the Human Rights Committee, in June 2004, REDRESS formally requested “the urgent intervention of the UK government on [Mr H’s] behalf to obtain compliance by the [responsible] Government of its obligations”.

Although the FCO subsequently confirmed that it had raised the case with the relevant Government “on several occasions”, they explained that the Government had on 12 May 2005 “rejected the findings of the Human Rights Committee on the facts of [Mr H’s] case.” The FCO also confirmed that:

...[The UK Rules on International Claims] do not give rise to a legitimate expectation that the UK Government will formally espouse a claim, nor is there any duty under international law for a State to exercise diplomatic protection. Therefore, even in the event that all the Rules on International Claims are satisfied, the UK still has an absolute discretion as to whether to espouse a claim...[I]t is not the case that [Mr H] has a legitimate expectation that

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<sup>330</sup> UNCAT, Article 14(1).

<sup>331</sup> CAT, General Comment 3: *Implementation of article 14 by States parties*, UN Doc. CAT/C/GC/3, 13 December 2013, para. 27, available at <http://www2.ohchr.org/english/bodies/cat/comments.htm>.

<sup>332</sup> House of Commons Foreign Affairs Committee, *Support for British nationals abroad: The Consular Service, Fifth Report of Session 2014–15* (2014), para. 25, available at <https://publications.parliament.uk/pa/cm201415/cmselect/cmfaff/516/516.pdf>.

<sup>333</sup> Written Question 115983, answered on 30 November 2017, available at <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2017-11-27/115983/>.

the UK Government will use all available means at the international law level to see that his human rights are protected..." [letter from FCO to REDRESS dated 17 May 2005]

... under the UK's Rules Applying to International Claims and consistent with international law, HMG will not formally espouse a claim of a UK national against another State until all the legal remedies, if any, available to him in the State concerned have been exhausted... [letter from FCO to REDRESS dated 6 February 2006]

Mr H subsequently pursued domestic remedies in the country concerned, lodging his Petition in 2009 seeking to enforce the Human Rights Committee Views against the relevant Government. However, unfortunately the country's Supreme Court rejected this petition as being "without merit" in December 2016, and Mr H's efforts to seek redress continue.

As the law presently stands Mr H cannot sue the State concerned in the UK courts for redress for the damage done to him, since the State concerned and its officials have immunity from suit.<sup>334</sup> Therefore the only way in which the UK can support Mr H's right to redress is if it takes up the case, or 'espouses' it, against the relevant the State concerned, the State which has been found to be responsible for Mr H's torture.

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<sup>334</sup> House of Lords, *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia)*, 14 June 2006, [2006] UKHL 26, available at <http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd060614/jones-1.htm>, a decision found by the European Court of Human Rights not to be "manifestly erroneous" in *Case of Jones and others v UK* (Applications nos. 34356/06 and 40528/06), 14 January 2014, at para. 214, available at <http://www.redress.org/downloads/case-of-jones-and-others-v.-the-united-kingdom.pdf>.





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