

RE. NAZANIN ZAGHARI-RATCLIFFE

Legal Opinion

II

Availability of Diplomatic Protection

I. INTRODUCTION

1. In an initial opinion we concluded that Mrs Zaghami-Ratcliffe is detained arbitrarily in Iran and has been subjected to a number of grave violations of her fundamental right to a fair trial and to be treated humanely.
2. In light of those conclusions we have been asked to provide a legal opinion as to whether the United Kingdom may seek a remedy for the injury done to Mrs Zaghami-Ratcliffe, a dual British-Iranian citizen, and exercise diplomatic protection with regard to her case.
3. In summary, we are of the view that the only effective means under international law by which the grave harm suffered by Mrs Zaghami-Ratcliffe may be repaired lies in the UK's right to exercise diplomatic protection on her behalf.

II. DIPLOMATIC PROTECTION

A. GENERAL PRINCIPLES

4. Diplomatic protection is a mechanism according to which a State may secure reparation for injury to one of its nationals, premised on the principle that an injury to a nation is an injury to the State itself. According to the *dictum* of the Permanent Court of International Justice in *Mavrommatis*:

... 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.¹

5. As noted by the International Law Commission (ILC) in its draft Articles on Diplomatic Protection, 2006 [ADP], in reality the State does not only assert its own right, but also the right of its injured national.² For example, the ILC observes that:

¹ *Mavrommatis Palestine Concessions (Greece v UK)* PCIJ Reports 1924, Series A, No.2, 12.

² Commentary to article 1 Articles on Diplomatic Protection ['ADP'], §3.

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.³

6. According to article 1 ADP:

... 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.

(i) *The existence of a discretion*

7. Under international law, the exercise of diplomatic protection is a matter of discretion. The State is under no duty or obligation to exercise diplomatic protection on behalf of one of its nationals. This was made clear by the International Court of Justice in its judgment in the *Barcelona Traction* case:

... within the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, for it is its own right that the State is asserting. Should the natural or legal person on whose behalf it is acting consider that their rights are not adequately protected, they have no remedy in international law. All they can do is resort to municipal law, if means are available, with a view to furthering their cause or obtaining redress... The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case.⁴

(ii) *Identification of a limited duty to consider whether to exercise diplomatic protection*

8. However, domestic legislation and the judicial decisions of domestic courts contain some support for the view that States are under a duty, albeit limited, to protect nationals who have been subjected to serious violations of their human rights. Accordingly, draft article 19 APD, in relevant part, declares that:

A State entitled to exercise diplomatic protection according to the present draft articles, should:

(a) Give due consideration to the possibility of exercising diplomatic protection, especially when a significant injury has occurred;

(b) Take into account, wherever feasible, the views of injured persons with regard to resort to diplomatic protection and the reparation to be sought;...

9. In *Abbası*, the Court of Appeal confirmed the discretionary nature of the exercise of diplomatic protection. The Court went on to consider whether there is

³ Ibid, §4.

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

(limited) scope for judicial review of ‘a refusal to render diplomatic assistance to a British subject who is suffering a violation of a fundamental human right as the result of the conduct of the authorities of a foreign state’.⁵ The Court founded the basis for judicial review of such decisions in the doctrine of legitimate expectation. The Court held that a British subject has a legitimate expectation ‘that [her] request for assistance will be “considered”, and that in that consideration all relevant factors will be thrown into the balance.’⁶

10. Having reviewed policy statements made by the UK government with regard to the exercise of diplomatic protection of nationals, the Court concluded as follows:

99. What then is the nature of the expectation that a British subject in the position of Mr Abbasi can legitimately hold in relation to the response of the government to a request for assistance? The policy statements that we have cited underline the very limited nature of the expectation. **They indicate that where certain criteria are satisfied, the government will “consider” making representations. Whether to make any representations in a particular case, and if so in what form, is left entirely to the discretion of the Secretary of State.** That gives free play to the “balance” to which Lord Diplock referred in GCHQ. The Secretary of State must be free to give full weight to foreign policy considerations, which are not justiciable. However, that does not mean the whole process is immune from judicial scrutiny. **The citizen’s legitimate expectation is that his request will be “considered”, and that in that consideration all relevant factors will be thrown into the balance.**

100. One vital factor, as the policy recognises, is the nature and extent of the injustice, which he claims to have suffered. 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.

11. The extent to which the Secretary of State may be required to give more than due consideration to a request for assistance will depend on the facts of each case.⁷
12. Further, the Court of Appeal identified as an ‘extreme case’ circumstances where the FCO, contrary to stated practice, refuses even to consider whether to make diplomatic representations. The Court stated that:

The extreme case where judicial review would lie in relation to diplomatic protection would be if the Foreign and Commonwealth Office were, **contrary to its stated practice, to refuse even to consider whether to make diplomatic representations on behalf of a subject whose fundamental rights were being violated.** In such, unlikely, circumstances we consider that it would be appropriate for the court to make a mandatory order to the Foreign Secretary to give due consideration to the applicant’s case.⁸

⁵ *Abbasi v Secretary of State for Foreign and Commonwealth Affairs* [2003] EWCA Civ 1598, §80.

⁶ *Ibid*, §99.

⁷ *Ibid*, §106 (v).

⁸ *Ibid*, §104.

13. In *Kaunda*⁹ the South Africa Constitutional Court expanded on the duty on a State to take action to protect one of its citizens from a gross abuse of international human rights norms, and the judicial review of a refusal of a request for assistance. The Court stated that:

There may be a duty on government, consistent with its obligations under international law, to take action to protect one of its citizens against a gross abuse of international human rights norms. A request to government for assistance in such circumstances where the evidence is clear would be difficult, and in extreme cases possibly impossible to refuse. It is unlikely that such a request would ever be refused by government, but if it were, the decision would be justiciable and the court would order the government to take appropriate action.¹⁰

B. DUAL NATIONALS

14. According to the UK government's policy, the UK authorities 'will not get involved if someone's arrested in a country for which they hold a valid passport, unless there's a special humanitarian reason to do so.'¹¹
15. In July 2016, it was reported that the FCO had amended its travel advice to dual British-Iranian citizens in light of the continued detention of dual nationals Nazanin Zaghari-Ratcliffe and Kamal Foroughi.¹²
16. The advice, still current on the Foreign Office website, states that:

There's a risk that British nationals and British/Iranian dual nationals could be arbitrarily detained in Iran. In such cases the Foreign and Commonwealth Office has serious concerns that the subsequent judicial process falls below international standards. The Iranian authorities don't recognise dual nationality for Iranian citizens and therefore don't grant consular access for FCO officials to visit them in detention.

...

If you're a dual national and are arrested and detained, the British Embassy won't be able to provide routine consular assistance as Iran doesn't recognise dual nationality.¹³

17. Since April 2017 the FCO travel advice has been further amended to warn British-Iranian nationals travelling to Iran of Iran's failure to meeting its international obligations regarding consular access to arrest foreign nationals. The advice states,

⁹ *Kaunda v President of the Republic of South Africa* (2005) (4) South African Law Reports 235 (CC), ILM, vol 44 (2005), 173.

¹⁰ Ibid, §69.

¹¹ 'Help if you're arrested abroad'. Available at: <https://www.gov.uk/help-if-you-are-arrested-abroad/y/iran>

¹² Saeed Kamali Dehghan, Iran Blog, 20 July 2016. The Guardian. Available at: <https://www.theguardian.com/world/iran-blog/2016/jul/20/foreign-office-warns-british-iranian-nationals-of-detention-risk-in-iran>

¹³ Foreign and Commonwealth Office, Foreign travel advice: Iran, updated 28 February 2017. Current at 6 April 2017. Available at: <https://www.gov.uk/foreign-travel-advice/iran/safety-and-security>

The Iranian authorities have in many cases failed to meet their international obligations to notify embassies when foreign nationals have been detained. If a dual-national is detained the Iranian authorities won't notify the embassy as they view dual nationals as Iranian citizens. **Even if requested, adequate consular access to foreign nationals isn't always granted and is never granted for dual-nationals.** You should therefore keep in close touch with family or friends back home.¹⁴

18. The FCO travel advice, prior to July 2016, stated that Iranian security forces are suspicious of people with British connections but did not mention the risk of arbitrary detention to British nationals, including dual nationals.¹⁵

C. THE PRINCIPLE OF PREDOMINANT NATIONALITY

19. Article 4 of the Hague Convention on Certain Questions Relating to the Conflict of Nationality Law 1930 provides that:

A State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses.

20. However, since 1930 the jurisprudence of international tribunals, including the International Court of Justice (ICJ),¹⁶ supports the view that a State is **not prohibited** from exercising diplomatic protection in cases where dual nationals are subjected to injury by the other State of nationality. Rather, a State's right to exercise of diplomatic protection on behalf of a dual national against the other State of nationality is dependent upon the determination that the nationality of the former State is the predominant (also referred to as 'dominant and effective') nationality.
21. Notably, the Iran-US Claims Tribunal has adopted the principle of predominant nationality with regard to the question whether it may exercise jurisdiction over cases concerning claims of Iranian-US dual nationals. In such cases the Tribunal has held that it has jurisdiction to decide claims brought by nationals of the US, who also hold Iranian citizenship, against Iran or Iranian organisations, in circumstances where the person's US citizenship/nationality is dominant and effective.¹⁷
22. As the ICJ observed in the *Nottebohm Case*¹⁸ with regard to the approach of international arbitrators in 'numerous cases' of dual nationality with regard to the question of dual nationality:

¹⁴FCO, Foreign Travel Advice, Iran, 29 April 2017. Available at:
<http://webarchive.nationalarchives.gov.uk/20170429092153/><https://www.gov.uk/foreign-travel-advice/iran/safety-and-security>

¹⁵FCO, Foreign Travel Advice, Iran, 11 June 2016. Available at:
<http://webarchive.nationalarchives.gov.uk/20160611145202/><https://www.gov.uk/foreign-travel-advice/iran/entry-requirements>

¹⁶ *Nottebohm Case (Second Phase) (Liechtenstein v Guatemala)*, Judgment of 6 April 1955, ICJ Reports 1955, 4 at 22.

¹⁷ *Esfahanian v Bank Tejarat*, Iran-USCRT, vol 2 (1983), 166; *Ataollah Golpira v Government of Islamic Republic of Iran*, Iran-USCTR vol 2 (1983) 174 and ILR vol 72, 493.

¹⁸ *Nottebohm Case*, 22.

... They have given their preference to the real and effective nationality, that which accorded with the facts, that based on stronger factual ties between the person concerned and one of the States whose nationality is involved. Different factors are taken into consideration, and their importance will vary from one case to the next: the habitual residence of the individual concerned is an important factor, but there are other factors such as the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc.

23. For the ICJ the question is whether ‘the factual connection between [the individual and country of nationality] in the period preceding, contemporaneous with and following his naturalisation appears to be sufficiently close, so preponderant in relation to any connection which may have existed between him and any other State, that it is possible to regard the nationality conferred upon him as real and effective’.¹⁹
24. Where a State seeks to exercise diplomatic protection of a citizen against a State of which that person is also a national, the relevant dates at which that person must have dominant and effective nationality are the date of injury and the date on which the State officially makes its claim. According to draft article 7 of the International Law Commission’s draft Articles on Diplomatic Protection (ADP):

A State **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.²⁰

25. According to the ILC, the term ‘predominant’ ‘conveys the element of relativity and indicates that the individual has stronger ties with one State rather than another’. The circumstances envisaged by article 7 are exceptional, and the burden of proof is on the claimant State to prove that it is the State of predominant nationality.²¹
26. The ILC did not attempt to provide an exhaustive list of factors that a tribunal would have to take into consideration to determine whether a nationality is predominant. However, the Commentary to draft article 7 observes that authorities indicate that such factors would include the following:²²
 - a. Habitual residence;
 - b. Amount of time spent in each country of nationality;
 - c. Date of naturalization (i.e. the length of the period spent as a national of the protecting State before the claim arose);

¹⁹ Ibid, at 24.

²⁰ *Mergé claim*, Italian-United States Conciliation Commission, ILR vol 22 (1955), 443 and 445. This principle was applied by the Commission in subsequent claims and by the Iran-United States Claims Tribunal. See e.g. *Esfahanian*, 166; *Ataollah Golpira*, 493.

²¹ ILC Commentary to draft article 7, §6.

²² Ibid, §5.

- d. Place, curricula and language of education;
 - e. Employment and financial interests;
 - f. Place of family life;
 - g. Family ties in each country;
 - h. Participation in social and public life;
 - i. Use of language;
 - j. Taxation, bank account, social security insurance;
 - k. Visits to the other State of nationality;
 - l. Possession and use of passport of the other State; and
 - m. Military service.
27. It is stressed that none of the above factors will be decisive ‘and the weight attributed to each factor will vary according to the circumstances of each case’.²³
28. It is important to note with regard to the possession and use of the passport of the other State, that Iran requires Iranian nationals to travel to and from Iran using an Iranian passport.²⁴ Moreover, that according to the FCO travel advice, it is illegal in Iran to hold two nationalities.²⁵ In these circumstances it is arguable that the use of an Iranian passport to travel to and from Iran by a dual citizen should not carry much weight.

III. APPLICATION OF PRINCIPLE OF PREDOMINANT NATIONALITY TO MRS ZAGHARI-RATCLIFFE’S CASE

29. In light of the information provided regarding Mrs Zaghami-Ratcliffe’s personal history and family, employment, financial and other ties to the UK, it is our view that her predominant nationality is British.
30. It is clear from the information we have seen that since 2007 Mrs Zaghami-Ratcliffe’s personal and professional life has been based in the UK and not in Iran. She has sought to visit Iran for a holiday to see her family once a year since she came to the UK, but has not sought to return to live there. On those visits, Mrs Zaghami-Ratcliffe travelled on her Iranian passport. However it must be stressed that this is required under Iranian law. Furthermore, on all other occasions she has travelled on her British passport, since acquiring British citizenship in 2013.

²³ Ibid.

²⁴ Foreign and Commonwealth Office, Foreign travel advice: Iran, updated 28 February 2017. Still current at 6 April 2017. Available at: <https://www.gov.uk/foreign-travel-advice/iran/safety-and-security>

²⁵ Ibid.

31. Mrs Zaghami-Ratcliffe has strong family, professional and financial ties to the UK. Her husband and daughter are British citizens, and the language spoken in the home is English. She co-owns property with her husband (the family home which she shares with her husband and daughter). In addition she is a UK taxpayer and voter, holds shares in UK-based businesses, and her three bank accounts are all in UK banks. Moreover, she is currently employed by a UK-based company, and has been employed in the UK, by UK-based organisations since she graduated from her Masters degree in 2008.
32. Thus we consider that, on the particular facts of her case, the UK is entitled to exercise diplomatic protection on behalf of Mrs Zaghami-Ratcliffe, as the three requirements for diplomatic protection have been met:
 - a. the commission of an internationally wrongful act by Iran (see the above analysis of the numerous human rights violations in her case);
 - b. the exhaustion of local remedies by Mrs Zaghami-Ratcliffe; and
 - c. the proof of predominant British nationality.
33. It is accepted that the UK is not under an obligation to exercise diplomatic protection with regard to a dual national against the other State of nationality. Diplomatic protection is a matter of State discretion. However, it should be recalled that the ILC recommended in draft Article 19 that states “should give due consideration to the possibility of exercising diplomatic protection, especially when a significant injury has occurred.” This recommendation was made because diplomatic protection is seen as an important instrument in the protection of human rights.
34. It is equally important to note that where a dual national’s predominant nationality is British, ***there is nothing in international law that prohibits*** the UK from seeking diplomatic protection of that dual national against the other State of nationality. The State’s entitlement in international law to do so cannot be affected by the position taken by the other State as a matter of its own domestic law.
35. As noted above, according to the UK government’s policy, the UK authorities ‘won’t get involved if someone’s arrested in a country for which they hold a valid passport, unless there’s a special humanitarian reason to do so.’²⁶ The FCO’s guidance on support for British nationals abroad²⁷ states that:

If you are a dual British national in the country of your other nationality (for example, a dual US-British national in the US), we would not normally offer you support or get involved in dealings between you and the authorities of that state.

²⁶ Foreign and Commonwealth Office, ‘Help if you’re arrested abroad’. Available at: <https://www.gov.uk/help-if-you-are-arrested-abroad/y/iran>

²⁷ Foreign and Commonwealth Office, ‘A Guide: Support for British Nationals Abroad’, 30 September 2011, last updated 17 June 2016. Available at: <https://www.gov.uk/government/publications/support-for-british-nationals-abroad-a-guide>

We may make an exception to this rule if, having looked at the circumstances of the case, we consider that you are particularly vulnerable.²⁸

36. The guidance contains the following caveat: ‘However, the help we can provide will depend on the circumstances and the country of your other nationality agreeing to it’.²⁹
37. In our view, a finding that a dual national’s British nationality is predominant is pertinent to this caveat. This is because in these circumstances the UK government does not in international law require the consent of the other State of nationality to act on behalf of the dual national. Thus the UK *may* seek redress for any internationally wrongful act sustained by its citizen for which the other State of nationality is responsible, either through diplomatic or legal means.
38. Therefore the UK government would be required, in such a case, to consider making representations in the exercise of diplomatic protection on behalf of a dual national with predominant British nationality, in accordance with the Court of Appeal’s decision in *Abbasi*.³⁰
39. In Mrs Zaghari-Ratcliffe’s case, the case for the UK government to consider making representations on her behalf is strengthened by the fact that it appears that she has been targeted, and therefore is particularly vulnerable, *because of* her status as a dual British-Iranian citizen:
 - a. It appears from media reports that the charges against Mrs Zaghari-Ratcliffe are based on her work for UK-based organisations and fundraising for projects conducted by the same;
 - b. The family has received messages from the Iranian Ministry of Foreign Affairs that have indicated that there is a willingness to negotiate a deal with the UK government that would result in Mrs Zaghari-Ratcliffe’s release.
40. The UK government has recognised the particular vulnerability of British-Iranian dual nationals. As noted above, in July 2016 it was reported that the Foreign Office had amended its travel advice to dual British-Iranian citizens in light of the continued detention of dual nationals Nazanin Zaghari-Ratcliffe and Kamal Foroughi.³¹ The amended advice, set out above, raises the risk of arbitrary detention for such dual nationals.
41. The FCO advice to dual nationals applies to consular assistance. To be clear, we consider that, although the distinction between consular assistance and diplomatic protection is unclear, this is a case of diplomatic protection. Consular assistance is essentially of a preventive nature and takes place before an internationally wrongful act has occurred and before local remedies have been exhausted. Consuls, while assisting individual nationals, operate at the local level and seek to ensure that the individual is dealt with fairly and lawfully at the local

²⁸ *ibid*, 5.

²⁹ *ibid*.

³⁰ *Abbasi v Secretary of State for Foreign and Commonwealth Affairs* [2003] EWCA Civ 1598, §80.

³¹ Iran Blog, 20 July 2016, *supra* n 69.

level. But once an internationally wrongful act has been established and local remedies have been exhausted the matter is raised to the inter-state level. Representations at this stage are by their very nature diplomatic rather than consular. They constitute ‘diplomatic action’ of the kind contemplated in Article 1 of the Draft Articles on Diplomatic Protection.

IV. CONCLUSION

42. To conclude, we are of the view that the evidence clearly shows that Mrs Zaghami-Ratcliffe is predominantly a British national who has been denied a fair trial and who is arbitrarily detained in Iran. In international law the question whether Iran recognises her British nationality is irrelevant. This means that all the requirements for the exercise of diplomatic protection have been met. The British government is therefore entitled to make representations at a political and diplomatic level rather than at a consular level to remedy her situation in the exercise of diplomatic protection.

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