REDRESS

Seeking Reparation for Torture Survivors

Joint Committee on Human Rights
New Inquiry: Counter-terrorism policy and human rights

Submissions of the Redress Trust
14 October 2005

Introduction

1. These submissions are put forward in response to the call for evidence issued by the Joint Committee on Human Rights in respect of its new inquiry into the subject of "counter-terrorism policy and human rights".

2. The Redress Trust (REDRESS) is an international non-governmental organisation with a mandate to ensure respect for the principle that survivors of torture and other cruel, inhuman or degrading treatment and punishment, and their family members, have access to adequate and effective remedies and reparation for their suffering.

3. REDRESS produced a report on the relationship between counter-terrorism measures and the prohibition of torture in July 2004,[1] and is involved in a number of cases in the United Kingdom and elsewhere where this relationship is explored.[2]

Summary of these submissions

4. These submissions will focus on the Government's intention to deport non-UK nationals suspected of terrorism on the basis of diplomatic assurances and the potential conflict with Article 3 of the European Convention on Human Rights, only.

The Government's intention to deport non-UK nationals suspected of terrorism on the basis of diplomatic assurances and the potential conflict with Article 3 ECHR

The absolute prohibition on *refoulement*: fighting terrorism is no excuse

5. International law recognises an absolute prohibition against forcibly sending, transferring or returning a person to a country where he or she may be submitted to torture and other cruel, inhuman or degrading treatment or punishment (*non-refoulement*).[3]

6. Article 3 (2) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment specifies that a state's human rights record is relevant in determining whether a person may be subjected to torture in that state. It provides that: "For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant

[1] The report is available at : http://www.redress.org/publications/TerrorismReport.pdf.

[2] More information on REDRESS' most recent case submissions can be found on its website at : http://www.redress.org/case_submissions.html.

[3] This prohibition is found in the European Convention on Human Rights (ECHR), and has been affirmed in numerous other international and regional instruments, including: article 3 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; article 13 (4) of the Inter-American Convention to Prevent and Punish Torture; article 22 (8) (general clause on *non-refoulement*) of the American Convention on Human Rights; article 8 of the Declaration on the Protection of All Persons from Enforced Disappearance; article 3 (1) of the Declaration on Territorial Asylum; and article II (3) of the Organization of African Unity's Convention Governing the Specific Aspects of Refugee Problems in Africa.

considerations including, where applicable, the existence in the State concerned of a consisted pattern of gross, flagrant or mass violations of human rights."

7. The jurisprudence that has developed within the European human rights system confirms the protection of persons against expulsion to a country where he or she is at risk of torture and inhuman or degrading treatment or punishment.[4] The European Court of Human Rights has held that a State party to the Convention may itself be responsible for violating the prohibition of torture if it sends a person to a State when there are substantial grounds to believe that they may suffer torture.[5]

8. Indications from Government reveal that it is trying to shift the goalposts, and under its legitimate duty to combat terrorism it is seeking to argue that the prohibition against torture is not in fact absolute, but relative, and is to be balanced against other considerations. The Home Secretary Mr Clarke has said:

> "Our strengthening of human rights needs to acknowledge a truth which we should all accept, that the right to be protected from torture must be considered side by side with the right to be protected from the death and destruction caused by indiscriminate terrorism, sometimes caused or fomented by nationals from countries outside the EU."[6]

Speaking in the context of the jurisprudence of the European Court of Human Rights he went on to talk of the balance not being right between the protection of individual rights and the protection of democratic values such as safety and security under the law.[7] The absolute prohibition against torture and other cruel, inhuman or degrading treatment or punishment, and its corollary prohibition against *refoulement* are the bedrock of international and European human rights law, admitting of no balancing at all.

9. Significantly, the speech received a swift riposte from the President of the Parliamentary Assembly of the Council of Europe, Rene van der Linden, who said (correctly in our view) that the ECHR "is the heart and foundation of the Council of Europe's human rights protection system" and "I find it very alarming that a politician may be making statements that could have the effect of undermining the judicial independence of that Court, by stating in advance that an undesired judgement might have negative political consequences."[8]

Diplomatic Assurances

10. The Government has indicated a renewed enthusiasm to go down the road of diplomatic assurances or 'memoranda of understanding' despite the absolute prohibition of *refoulement* contained in article 3 ECHR. The United Nations Special Rapporteur on Torture, in response to the Prime Minister's 5 August 2005 statement, called on Governments to scrupulously observe the principles of *non-refoulement* and not expel any person to frontiers or territories where they run a serious risk of torture and ill treatment. In addition, the Special Rapporteur requested "Governments to refrain from seeking diplomatic assurances and the conclusion of memoranda of understanding in order to circumvent their international obligation not to deport anybody if there is a serious risk of torture or ill treatment." [9]

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[4] European Court of Human Rights, *Soering v. United Kingdom*, Judgment of 7 July 1989, Series A, Vol.161 (this is the case which established the general principle that the *nonrefoulment* obligation attaches to article 3); *Nsona v. The Netherlands*, Judgment of 28 November 1996, 1996-V, no. 23; *Chahal v. The United Kingdom*, Judgment of 15 November 1996, 1996-V, no. 22; *Ahmed v. Austria,* Judgment of 7 December 1996, 1996-VI, no. 26; *Scott v. Spain* Judgment of 18 December 1996, 1996-VI, no. 27; *Boujlifa v. France*, Judgment of 21October 1997,1997-VI, no. 54*; D. V. The United Kingdom* 02 May 1997, 1997-III, no. 37; *Paez v. Sweden* Judgment of 30 October 1997, 1997-VII, no. 56.

[5] *Loizidou v Turkey* Series A No 310 and *Soering* post; idem. *See also Lawless v Ireland* (No 3) (1961) and *Ireland v UK* (1978) 2 EHRR 25.

[6] Speech to European Parliament 7 September 2005, available from http://www.statewatch.org/news/2005/sep/03clarke.htm.

[7] Ibid.

[8] 9 September 2005, http:// www.coe.int/press.

[9] Press Release, 23 August 2005, available from http://www.unhchr.ch/huricane/huricane.nsf/view01/9A54333D23E8CB81C1257065007323C/opendocument

11. The Special Rapporteur notes further that the fact that assurances are sought shows in itself that the sending country perceives a serious risk of the deportee being subject to torture or ill-treatment upon arrival in the receiving country. Diplomatic assurances are not an appropriate tool to eradicate this risk. Most of the states with which the memoranda might presumably be concluded are parties to the United Nations Convention against Torture (Afghanistan, Algeria, Egypt, Jordan, Libyan Arab Jamahiriya, Morocco, Saudi Arabia, Syrian Arabic Republic, Tunisia and Yemen) and/or to the International Covenant on Civil and Political Rights (Afghanistan, Algeria, Egypt, Iran, Iraq, Jordan, Libyan Arab Jamahiriya, Sudan, Syrian Arab Republic, Tunisia and Yemen) and are therefore already obliged not to resort to torture or ill-treatment under any circumstances. Such memoranda of understanding therefore do not provide any additional protection to the deportees.

12. The Government's policy shift goes against the well-established principles set out in *Chahal v United Kingdom,*[10] where the European Court of Human Rights refused to rely on diplomatic assurances as a safeguard against torture and ill-treatment. Despite India's assurances that Chahal would not be mistreated on return, the Court found that his forced return to India (he was a Sikh activist suspected of involvement in terrorism) would violate the UK's obligations under article 3 of the ECHR. The Court referred to the UN Special Rapporteur on Torture who had described the practice of torture on those in Indian police custody as "endemic" as well as evidence from the Indian National Human Rights Commission's (NHRC) of widespread, often fatal mistreatment of prisoners. Although the Court did not call into question the good faith of the Indian Government in providing the diplomatic assurances, it found that despite the efforts of the Government, the NHRC and the courts "the violation of human rights by certain members of the security forces in Punjab and elsewhere is a recalcitrant and enduring problem."[11] In this context the Court was not persuaded that the assurances would provide Chahal with an adequate guarantee of safety, and the decision established the standard that diplomatic assurances are not adequate for returns to countries where torture is "endemic", or a "recalcitrant or enduring problem", as well as reaffirming the *non-refoulement* obligation in human rights law.[12]

13. UK courts also rejected a request from Russia to extradite two men suspected of having committed crimes in Chechnya.[13] Despite diplomatic assurances from Russia that the men would not be tortured, the court determined that *Mr. Zakaev* faced substantial risk of torture upon his return and relied on evidence given that a witness statement implicating Zakaev was extracted by torture.

14. Evidence of the Government's attempt to circumvent the *Chahal* principles dates to several years before '9/11'. An examination of the case of *Hani El Sayed Sabaei Youssef and The Home Office*[14] reveals what Human Rights Watch has called "numerous disturbing details regarding the British Government's attempts throughout 1999 to deport [four Egyptian] …men, all asylum seekers determined to have a well-founded fear of persecution should they be returned to Egypt."[15] The case itself was a claim for damages for unlawful detention. In the course of the trial numerous letters of advice were revealed from the Home Office and the Foreign and Commonwealth Office (FCO) to the Prime Minister explaining the significance of the ECtHR decision in *Chahal* in the context of Egypt's negative human rights record, questioning from the start whether it would be reasonable to conclude "that assurances from the Egyptians [that the men would be safe from ill-treatment] could be sufficiently authoritative and credible to diminish the Article 3 risk sufficiently to make removal to Egypt a realistic option."[16] Faced with the Prime

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[10] ECtHR Judgment of 15 November 1996, 1996-V, no 22.

[11] Ibid.

[12] Human Rights Watch, *Still At Risk* : *Diplomatic Assurances No Safeguard Against Torture,* April 2005 Vol. 17, No. 4 (D), at page 15, http://hrw.org/reports/2005/eca0405/

[13] Bow St. Magistrate Court decision of Workman, 13 November 2003.

[14] Case No : HQ03X03052, 2004 EWHC 1884 (QB).

[15] Human Rights Watch, *Still At Risk* : *Diplomatic Assurances No Safeguard Against Torture,* April 2005 Vol. 17, No. 4 (D), at page 70, http://hrw.org/reports/2005/eca0405/

[16] *Hani El Sayed Sabaei Youssef and The Home Office,* supra, fn 14, page 3, para 8.

Minister's determination to deport the men, however, the FCO and Home Office continued to endeavour to obtain assurances from the Egyptian Government to ensure the men would not be tortured, that they would have a fair trial and proper procedural rights. During negotiations the Egyptians effectively refused, but despite this the Prime Minister personally intervened several times, for example, in one letter his Private Secretary wrote to the Home Office as follows:

> "The Prime Minister thinks we are in danger of being excessive in our demands of the Egyptians in return for agreeing to the deportation of the four [men]. He questions why we need all the assurances proposed by the FCO and Home Office Legal Advisers. There is no obvious reason why British officials need to have access to Egyptian nationals held in prison in Egypt, or why the four should have access to a UK-based lawyer. Can we not narrow down the list of assurances we require?"[17]

15. A later letter from the Prime Minister's Private Secretary recorded:

> "The Prime Minister's view is that we should now revert to the Egyptians to seek just one assurance, namely, that the four individuals, if deported to Egypt, would not be subjected to torture. Given that torture is banned under Egyptian law, it should not be difficult for the Egyptians to give such an undertaking."[18]

16. This latter letter also indicated in stark terms that the detainees' post-return welfare was not the main concern:

> "[The Prime Minister] believes that we should use whatever assurances the Egyptians are willing to offer, to build a case to initiate the deportation procedure and to take our chances in the courts. If the courts rule that the assurances we have are inadequate, then at least it would be the courts, not the government, who would be responsible for releasing the four from detention."[19]

17. A later case in which the Government tried to deport two men to India on the basis of diplomatic assurances is *Singh and Singh v Home Secretary*[20] where the court decided that assurances which the UK Government had obtained from the Indian Government did not, in the light of the evidence, provide a sufficient degree of reassurance about the safety of the deportees on their return. In his judgment in 2000 Mr Justice Potts concluded that "in future cases we earnestly urge the [Home Secretary] to consider whether the type of material he relied upon in these appeals is sufficient to do justice to the case."[21]

The Content of Agreements

18. The Home Secretary has indicated that: " No agreement could be made unless it included proper procedures for monitoring the situation."[22] Subsequently, the first published memorandum of understanding is that of 10 August 2005 with Jordan "regulating the provision of undertakings in respect of specified persons prior to deportation." The memorandum asserts that each state understands that their authorities "will comply with their human rights obligations under international law regarding a person returned under this arrangement", and lists eight conditions which will apply to a returnee:

> 1. If arrested, detained or imprisoned following his return, a returned person will be afforded adequate accommodation, nourishment, and medical treatment, and will be

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[17] Ibid, page 5, para 18.

[18] Ibid, page 11, para 38.

[19] Ibid.

[20] SC/4/99 SC/10/99, SIAC, 31 July 2000. The case is cited in the Privy Counsellor Review Committee Report (the 'Newton Report') *Anti-Terrorism, Crime and Security Act 2001 Review,* 18 December 2003 at page 67 para. 256, and footnote 136.

[21] Ibid

[22] Ibid, answer to Question 17.

treated in a humane and proper manner, in accordance with internationally accepted standards.

2. A returned person who is arrested or detained will be brought promptly before a judge or other officer authorised by law to exercise judicial power in order that the lawfulness of his detention may be decided.

3. A returned person who is arrested or detained will be informed promptly by the authorities of the receiving state of the reasons for his arrest or detention, and of any charge against him.

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

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

6. A returned person will be allowed to follow his religious observance following his return, including while under arrest, or while detained or imprisoned.

7. A returned person who is charged with an offence following his return will receive a fair and public hearing without undue delay by a competent, independent and impartial tribunal established by law. Judgment will be pronounced publicly, but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

8. A returned person who is charged with an offence following his return will be allowed adequate time and facilities to prepare his defence, and will be permitted to examine or have examined the witnesses against him and to call and have examined witnesses on his behalf. He will be allowed to defend himself in person or through legal assistance of his own choosing, or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.

19. The envisioned monitoring mechanism is set out in paras. 4-5. The only safeguard that goes beyond what states are obliged in any event to observe, is contact with, and then 'prompt and regular visits' by, a representative of an independent body nominated by both states, which body will be able to see the returnee in private. This mechanism, and this mechanism alone, will stand between the returnee and a potential torturer. A non-exhaustive list of serious questions arise as follows:

- How is the independent body to be agreed upon, and what would happen, for example, if no agreement could be reached;
- Is the independent body to be agreed before anyone is returned, or afterwards;
- What, in any event, would constitute an independent body, even if both states agreed on it. There already are well-established independent bodies such as the European Committee for the Prevention Against Torture – what is the likelihood of their co-operating (or any other genuinely independent body) in the context of 'lending legitimacy' to a process fraught with difficulties;
- What expertise in torture issues, if any, will the representative be required to have;
- What happens if the receiving state fails to co-operate with the representative, and does not (again, this is non-exhaustive) afford proper visits, private or otherwise, and/or does not afford independent medical examination of the returnee if the representative wants such to take place;
- What is the mandate of the representative, other than to report to the states;
- If the representative is told or suspects that torture has taken place, what can he/she do about it, and what is he/she expected to do about it, and how;

- If an allegation of torture is raised with the receiving state by the representative and the receiving state ignores it, how is the interest of the returnee to be protected

20. The memorandum also allows each Government to withdraw from it on six months notice, the arrangement continuing to apply to anyone who had been returned in accordance with it. The fundamental problem remains: how to enforce the arrangement, and there is nothing at all in the memorandum which effectively deals with this. The arrangement depends entirely on the good faith of the receiving state, and if there is a breach there is nothing that can be done about it.

21. The memorandum does nothing to deal with the fundamental problems of diplomatic assurances:

- Resorting to diplomacy to ensure compliance with the absolute prohibition against torture is not an obviously proper method In order for torture and other ill-treatment to be prevented, effective legislative, judicial, and administrative safeguards must be in place on a state-wide basis**.** Visits aimed at ensuring compliance with diplomatic assurances might be helpful depending on the circumstances of each case, but are no guarantee against prohibited treatment, in particular because there are no available remedies to enforce the assurances.
- Even the best, unhindered monitoring mechanisms using trained monitors can nonetheless be ineffective in preventing acts of torture. This is because torture is almost always practiced secretly; states that torture are very familiar with how to cover their tracks. They generally use 'trained' torturers who leave little trace of their work and operate with medical assistance to disguise the results.
- When diplomatic assurances fail to protect returnees from torture and other ill-treatment, there is no mechanism that would enable a person subject to the assurances to hold the sending or receiving governments accountable. Diplomatic assurances have no legal effect and the person they aim to protect has no effective recourse if the assurances are breached. Furthermore, the sending government has no incentive to find that torture and other ill-treatment has occurred following the return of an individual - doing so would amount to an admission that it has violated its own *non-refoulement* obligation. As a result, both the sending and receiving governments share an interest in creating the impression that the assurances are meaningful rather than establishing factually that they actually are.

Conclusion

22. In sum, REDRESS submits that any attempts by the executive to weaken the absolute nature of article 3, as interpreted in the jurisprudence of the ECtHR, through diplomatic assurances, memoranda of understanding or any similar arrangements are to be deprecated, and should be strenuously resisted.

All of which is respectfully submitted

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On behalf of REDRESS