

PROTECTING BRITISH NATIONALS ABROAD FROM HUMAN RIGHTS VIOLATIONS

Principles for a legal right to consular assistance January 2024

SUMMARY

Despite the considerable potential of consular assistance to protect the rights and wellbeing of British nationals detained abroad, its provision by the UK Government remains discretionary. This stands in contrast to the UK's positive obligations under international law, which include, for example, an obligation to use all available means to prevent torture, wherever it occurs.

Consular assistance – founded on freedom of communication and access between consular officials and a detained person – enables the UK Government to provide three key protections to its nationals abroad: preventing human rights abuses; providing redress for human rights abuses when they do occur; and ensuring procedural safeguards to prevent further violations.

Introducing a legal right to consular assistance would not only benefit British nationals who find themselves in dire circumstances while traveling abroad. It would benefit the British State by offering a structured approach for protection of its nationals, and would ensure that British values are respected, even beyond our borders. It would also represent a real opportunity for the UK to show leadership and reinforce its standing on the world stage, and would likely deliver economic benefits due to the increased sense of security that would encourage international travel and commerce.

This report sets out a series of principles to help shape a legal right to consular assistance. Moving consular assistance onto a legislative footing would ensure more robust safeguards for British nationals at risk of human rights abuses abroad and solidify the State's responsibility to secure the rights and wellbeing of its most vulnerable citizens.

BACKGROUND

It is widely accepted that when individuals are detained abroad, the greatest risk of torture, ill-treatment, and other serious human rights violations is within the first 48 hours, particularly when detention is incommunicado or unacknowledged. The UK Government's own figures show that around 100 British nationals are tortured or ill-treated abroad each year. The Foreign Affairs Committee has highlighted that arbitrary detention is a growing phenomenon, increasing the likelihood that citizens become pawns in State-to-State relations.

The provision of consular assistance by the UK Government can provide a crucial – and sometimes the only – link between a detained British national and the outside world, and it is a vital safeguard against human rights violations. Considering the rights inherent in citizenship, consular assistance is a logical extension of the government's responsibility to protect its citizens.

Under international law, consular assistance – founded on freedom of communication and access between consular officials and a detained person – enables the UK Government to provide three key protections to its nationals abroad:

- **preventing human rights abuses**, by identifying and acting on warning signs of potential violations (including, for example, signs of torture) or an imminent risk of such violations;
- **ensuring redress**, including reparation, for any human rights abuses that do occur; and
- **ensuring other procedural safeguards** are in place to mitigate the risk of further violations – for example, access to a lawyer.

Given the protections it provides, consular assistance is particularly important to prevent and respond to cases of serious human rights abuses, such as torture, arbitrary detention, or state hostage taking. Yet the government currently accepts no legal responsibility to support its nationals even when they face such extreme threats to their wellbeing. Not all States have the same approach – there are many examples of States whose laws require them to provide consular assistance in some or all circumstances. Moreover, from an international law perspective, in cases where there have been serious human rights violations (or where there is a risk of them occurring), the UK Government arguably already has an obligation to provide consular assistance.

The UK has ratified the Vienna Convention on Consular Relations (VCCR), which gives individuals the right to communicate freely with their consular officers. But the VCCR does not explicitly require States to provide consular assistance to its own nationals. Given our increasingly globalised world, the evolving nature of travel worldwide, and the growing complexity of international relations which poses increased risks to travellers, a new approach is needed.

REDRESS's 2018 report [Beyond Discretion: The Protection of British Nationals Abroad](#) found that the UK's haphazard approach led to numerous complaints from those detained abroad (or their families) of a lack of effective consular assistance, including failures to respond to allegations of ill-treatment, delayed or infrequent consular visits, a lack of prompt follow-up with detaining authorities, and an insufficient insistence on privacy during consular visits, or (in the case of dual nationals) on gaining access at all.

This briefing sets out a legal framework that would rectify this situation. The principles presented are intended:

- to stop any ongoing violation against a British national, or prevent it from occurring; and
- to enable compensation and reparations (including rehabilitation in appropriate situations) to be provided to British nationals who have suffered human rights violations.

These principles have been developed in consultation with survivors of torture, their families, and legal experts. They have been endorsed by the following organisations:

British Rights Abroad Group, Free Nazanin Campaign, Hostage International and Prisoners Abroad.



WHY A LEGAL RIGHT IS VITAL

A legal right to consular assistance in cases of human rights violations would have the following benefits for British nationals:

1. It would be an unequivocal commitment to the human rights of British nationals abroad, giving these rights primacy over other foreign policy and trade considerations;
2. It would recognise the crucial role of consular assistance in international law and its role in preventing human rights violations, and solidify the UK's prevention obligations under human rights treaties (such as the UN Convention against Torture);
3. It would change the culture among Foreign, Commonwealth and Development Office (FCDO) and consular staff, as they would be responding to some consular assistance requests within a legal and not a discretionary framework;
4. It would enable British nationals and their families to understand the level of support that they and their families can expect, providing much-needed transparency and consistency (which could be enhanced by the full publication of any related policy matters);
5. It would provide British nationals with a much clearer route to accountability when things do go wrong, given that it is virtually impossible for challenges to UK Government practice in this area to be made in the UK courts.

It has been argued that improvements to the current provision of consular assistance by the UK could be achieved by an overhaul of the existing discretionary policy, including publication of the policy in full (something that has always been resisted by the FCDO). However, this would not provide the broader benefits set out above.

WHO WOULD THE RIGHTS APPLY TO?

Dual nationality has become a particular issue in the provision of consular assistance. Dual nationals have UK nationality and should be treated as full citizens, entitled to the same legal rights and protections as any other British citizen. Predominant nationality (the nationality with stronger ties based on residence, time spent in country, employment, and finances etc) should not be a factor.

A legal right to consular assistance would ensure that dual nationals are aware of their rights and don't have to fear that their dual nationality puts them at a disadvantage. It is especially pertinent if the individual faces discrimination in the country where they are detained due to their other nationality.

SURVIVOR EXPERIENCE

It was not until almost eighteen months after **Nazanin Zaghari-Ratcliffe's** 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]."¹

PRINCIPLE 1: The right would apply to all UK nationals, including dual nationals – even when detained in one of their nationality countries, regardless of predominant nationality.

¹ Foreign and Commonwealth Response to Parliamentary Question, 17 October 2017

HOW WOULD THE RIGHTS BE TRIGGERED?

Human rights violations (actual or potential) are the trigger and the right is not just limited to high-risk individuals (eg journalists) or those in countries considered high-risk for human rights abuses.

Importantly, the right is not limited to those who are in detention, although some of the rights would logically only be applicable to detention settings (see below).

The violations included are those set out in the International Covenant on Civil and Political Rights (ICCPR), which the UK ratified in 1976.

The rights are triggered using a two-stage process:

Stage 1: Principle 2 below would trigger an initial gathering of information (**Principles 3 and 4**).

Stage 2: If this process confirms the initial concerns, there is an additional hurdle in **Principle 5** below which must be fulfilled before the remainder of the obligations come into effect.

PRINCIPLE 2: Trigger (Stage 1)

If an official, consular official, or minister has reasonable grounds to believe that a UK national

- a. **is suffering / has suffered or**
- b. **is at real risk of suffering**

a violation of human rights, there is an Obligation to Inform Consular Officials (Principle 3) and an Obligation to Gather information (Principle 4).

A “violation of human rights” means a violation of the rights contained in International Covenant on Civil and Political Rights (ICCPR) Articles 6 (life), 7 (torture/ill-treatment), 8 (slavery/forced labour), 9 (arbitrary detention), 14 (fair trial), 23(3) (forced marriage).

Any obligation should exist without prejudice to ongoing discretionary forms of consular assistance available to Protected Persons under the VCCR.

INITIAL RESPONSE

The process here requires that, once any initial reports of violations have been authenticated by officials, the issue must be raised promptly at a senior level to ensure that any necessary engagement with the other State (under Principle 7 below) can also be undertaken promptly.

These rights would benefit the Protected Person and avoid cases not being treated sufficiently seriously or delays in acting on reports of alleged violations, which is an issue of complaint by survivors. It is important that such escalation includes involvement of senior political leaders and not just senior FCDO officials. Equally, the use of a two-stage ‘trigger’ process avoids the risk that the obligations apply to less serious violations.

SURVIVOR EXPERIENCE

Matthew Hedges was detained in the United Arab Emirates, where he was tortured and held in solitary confinement for five months and accused of being a British spy. His wife Daniela Tejada was assigned to a junior caseworker throughout.²

² Written evidence submitted by the APPG on Deaths Abroad, Consular Services and Assistance to the Foreign Affairs Committee inquiry into the FCDO’s approach to state level hostage situations (SLH0015), para. 7, available at: committees.parliament.uk/writtenevidence/108573/pdf/

SURVIVOR EXPERIENCE

Mr Fahmy was a journalist who had been detained in Egypt and expressed concern that his case had not received engagement from more senior levels of the Canadian government, even though there was engagement by consular staff. In more sensitive and politicised cases, only the involvement of senior levels of government will ensure effective consular protection. The discretionary nature of consular services leaves room for discrimination and uncertainty about government handling of any individual case.³

PRINCIPLE 3: Obligation to inform consular officials

Any UK official⁴ who has reasonable grounds to believe that a UK national has suffered or is at real risk of a human rights violation must inform a consular official promptly and in any event within 24 hours of forming this belief.

PRINCIPLE 4: Obligation to gather information

A consular official who has reasonable grounds to believe that a UK national has suffered or is at real risk of a human rights violation must gather information about the person's situation promptly and in any event start gathering information within 24 hours of forming this belief, to determine the situation of that person.

PRINCIPLE 5: Trigger (Stage 2)

Where

- (a) consular officials have reasonable grounds to believe that a UK national has suffered or is at real risk of human rights violations, and
- (b) where the initial gathering of information described in Principles 3 and 4 above has not, to the reasonable assurance of those officials, set aside that risk, and where
- (c) either
 - I. access to that person has been denied, or
 - II. informal complaints from consular staff to the other State have not been addressed promptly (or at all), or
 - III. where there is any other reasonable basis for concern,

the UK national becomes a 'Protected Person' and the remainder of the obligations in Principles 6-21 apply.

PRINCIPLE 6: Obligation to escalate cases

Where a UK national has become a Protected Person, consular officials must inform their Head of Mission (Ambassador or equivalent) and the relevant FCDO Minister.

RAISING THE ISSUE WITH THE STATE

Following on from Principle 4 (gathering information about the allegations) and Principle 6 (escalating knowledge) above, creating an obligation here dramatically reduces the level of discretion available to the FCDO on what action to take in response to such allegations. The

³ Canadian House of Commons Standing Committee on Foreign Affairs and International Development, 2018, "Strengthening the Canadian Consular Service Today and for the Future"

⁴ "Official" refers to a person who holds an administrative, diplomatic or legislative position, who is an official or agent of the FCDO [or other associated bodies], and exercises functions of a public nature – compare use of the term in Bribery Act 2010; Human Rights Act 1998.

presumption would be that the FCDO must make a formal complaint or issue a diplomatic communication as soon as they can, save in limited exceptional circumstances.

There have previously been examples where allegations have not been raised promptly, leading to increased risk and prolonged suffering on the part of the British national.

Upholding human rights is a fundamental principle in international law. The UK has a responsibility to advocate for the protection of its nationals' human rights, regardless of where they are detained.

Opposing human rights violations upholds the fundamental principle of the rule of law. It reinforces the idea that legal processes should be fair, transparent, and in accordance with human rights standards.

A complaint or diplomatic communication shows a commitment to accountability and transparency.

SURVIVOR EXPERIENCE

Nick Tuffney first made allegations of ill-treatment to consular officials in Panama on 24 May 2013, but these were not raised with the Panamanian authorities until a diplomatic communication was sent on 1 August 2013. A subsequent investigation by the Parliamentary and Health Services Ombudsman found that Embassy staff had failed to promptly and adequately respond to his allegations of ill-treatment and that the "[FCDO]'s lack of support would have added to his frustration" and "likely contributed to his beginning to self-harm".

PRINCIPLE 7: Obligation to request the other State to cease to breach the human rights of someone in detention

[This right would only apply to someone in detention]

Where ministers have been notified by consular officials (Principle 6 above) that a UK national has become a Protected Person, then the FCDO must make a formal complaint and/or issue a diplomatic communication (*note verbale* or equivalent) to the receiving State, provided that:

1. The FCDO has used its best endeavours to obtain the Protected Person's consent to the complaint/diplomatic communication where possible, or their family's consent if it was not reasonably practicable to obtain the Protected Person's consent; and
2. The FCDO does not have reasonable grounds to believe that such complaint or communication will worsen the situation of the Protected Person;

Even if consent cannot be obtained, or is refused, the FCDO must still complain or issue a diplomatic communication to the receiving State if the FCDO considers that one or more of the following applies:

- (a) the Protected Person lacks the mental capacity to give consent, or
- (b) such action is likely to prevent further human rights violations (to the Protected Person or others), or
- (c) there are reasonable grounds to believe that the Protected Person may be under duress or being coerced.

INVOLVING THE FAMILY

Families have the right to know about the well-being and whereabouts of their loved ones, not least because this grants them the possibility of offering emotional support. In the case of a detainee, families may be able to provide important information, such as medical history or any special needs, which can be crucial during the detention period. Informing the family allows them to seek legal advice and assistance on behalf of the detained individual.

The family can be important partners in ensuring the well-being and/or securing the release of the protected person, as we have seen through our client work. Promptly informing the family is in line with international human rights standards, which recognize the importance of family contact and support during difficult circumstances, including detention.

The FCDO has strong grounds under the UK GDPR/Data Protection Act 2018 to share the detainee's personal data with the family/loved ones in these circumstances. However, there is a positive obligation included in Principle 8 below because the UK GDPR does not expressly provide for a positive legal obligation on the FCDO to disclose data in this scenario. Note also that FCDO need not rely on the "consent" of the protected person to share the information with the family (as they usually do at present), but could do so on the basis of the UK GDPR Art 6(1)(d)-(f): Vital interests, legitimate interests, or public task, depending on the circumstances.

While the Information Commissioner's Office (ICO) is the UK regulator for privacy/data protection matters and ought to be the one enforcing any failures to disclose information to the family, in practice, the process can be lengthy and is unlikely to be a powerful mechanism in very urgent circumstances. Accordingly, recourse to the ICO should not prevent the family from bringing a GDPR claim or a judicial review, depending on the circumstances. Although judicial review is a remedy of last resort, permission might be given in circumstances where an urgent decision is required and an express statutory provision to this effect will help to clarify that duty.

FAMILY EXPERIENCE

A Government review of complex consular cases in 2019⁵ was prepared following interviews with affected families. The recommendations made regarding the relationship with families included providing greater support for families in the first few weeks after a detention/disappearance, greater proactive engagement with families (including on case strategy), the instilling of a greater sense of partnership with the families, providing more practical assistance where local circumstances are difficult (such as finding legal advice, understanding cultural differences or being put in contact with sources of counselling, and working with relevant NGOs), and proactively arranging meetings for the families to meet with senior FCDO staff.

PRINCIPLE 8: Obligation to inform a Protected Person's family⁶

Officials or consular officials must:

⁵ Dame Judith MacGregor, [Review of Complex Consular Cases](#), June 2019.

⁶ "Family" should be defined broadly, so that the protected person can designate one or more of the following to be the principal point of contact with the family as a whole: (1) Immediate family: a wife or husband; civil partner; parent/step-parent; child or step-child; sibling/step-sibling; niece /nephew; aunt/uncle; grandchild; and/or (2) Loved ones (ie someone with a close relationship of love and affection with the protected person); and/or (3) A designated individual (designated by the protected person) who is not an immediate family member.

- (a) inform the family of the Protected Person regarding the situation promptly (and in any event within 24 hours of confirming that the Protected Person has suffered or is at real risk of a human rights violation (Principle 5 above)), save in exceptional circumstances (such as clear national security interests, for example a situation in which disclosure would clearly prejudice an ongoing national security investigation); and
- (b) they must regularly communicate any updates or additional information on the status or circumstance of the Protected Person with the family; and
- (c) they must make all reasonable endeavours to contact and update the family within 24 hours of (i) any visit by Consular staff to the Protected Person, or (ii) the emergence of any significant new information about the situation of the Protected Person.

Subject to the above, the frequency of communications with a Protected Person's family must be at least in line with FCDO policy, such policy to be published no less frequently than once a year.

A consular official shall respond promptly to a reasonable request for information from the family of a Protected Person.

The family has the right to appeal to the ICO (Information Commissioner's Office) any FCDO decision infringing the above requirements, including failing to disclose information where required above. However, nothing in this statutory right of appeal shall prevent a family from bringing a claim in judicial review (regarding information sharing) in urgent or serious cases or in any other circumstances where a statutory appeal would not amount to an adequate remedy.

Further, nothing in this statutory right shall prevent a family having the right to submit a claim under UK GDPR for damages (material and non-material damage) from a failure to disclose the information required above.

The UK Information Commissioner's Office must take appropriate action against the FCDO in accordance with infringing the circumstances above, including failing to disclose information where required.

CONTACT, MONITORING AND COMMUNICATIONS IN DETENTION

[The rights in this section would only apply to someone in detention]

Monitoring the condition of detained British nationals by way of regular visits/communications from consular staff is a fundamental expectation of those who have survived such experiences.

Individuals detained abroad are particularly vulnerable to torture, ill-treatment, and other serious human rights violations from the first moment they are detained, especially in States with weak law enforcement and lack of rule of law, while safeguards in the first hours and days of detention have the strongest impact on the incidence of torture.⁷

Any prevention of access to a detained person raises concerns because it can lead to a range of human rights violations. Access to detainees by legal representatives, independent monitors, and human rights organisations is a fundamental right under international law.

Access to the Protected Person is important to prevent/detect signs of torture and ill-treatment, ensure due process, prevent arbitrary detention, protect vulnerable persons, ensure

⁷ Richard Carver and Lisa Handley, *Does Torture Prevention Work?* (Liverpool University Press, 2016), p. 2.

accountability of authorities, support justice and redress if violations occur, and maintain transparency and public trust.

Detention conditions in some States can be very poor. Basic necessities are not always provided by detention authorities, but can be essential to a detainee's survival.

While the frequency of regular communications can be outlined in policy documents, these contacts are often the only link detainees have with the outside world, and they should be provided as a matter of right and not as a matter of discretion.

SURVIVOR EXPERIENCE

Indian police arbitrarily detained **Jagtar Singh Johal**, a British national, in the state of Punjab, India, on 4 November 2017. The FCDO was made aware of his detention immediately by his family members. Consular officials did not see Jagtar until 16 November, almost two weeks after his detention. The British High Commission "raised the case immediately on notification of his detention and continued to press for consular access until it was granted." These interventions are significant and can be hugely important.

Consular officials failed to visit **Nick Tuffney** at all after he was taken to a new Panamanian detention centre, even though he had previously raised allegations of ill-treatment with consular officials. Despite the poor conditions in which he was being held, consular staff did not attempt to contact him directly during this period, instead relying on information from his lawyer and from the prison authorities themselves.

PRINCIPLE 9: Obligation to monitor a detained Protected Person's health and wellbeing

Officials or consular officials must take reasonable steps to gain physical access to the Protected Person (or where this is not possible to otherwise take steps) in order to ascertain the health and wellbeing and/or detention conditions of the Protected Person on a regular basis.

There is an obligation to identify a specific person to act as point of contact for the Protected Person.

During each visit, consular officers must monitor for signs of torture or ill-treatment of the Protected Person.

PRINCIPLE 10: Requirement to communicate with a detained Protected Person

Officials or consular officials must regularly communicate with the Protected Person. The frequency of communications with the Protected Person must be at least in line with FCDO policy, such policy to be published no less frequently than once a year.

Officials or consular officials shall respond promptly to a reasonable request for contact from the Protected Person.

PRINCIPLE 11: Timing of a first consular visit to a detained Protected Person

Consular staff should visit a detained Protected Person as soon as reasonably practicable, and in any event within 24 hours of confirming that the Protected Person has suffered or is at real risk of a human rights violation (using Principle 5 above). If a visit cannot be arranged, then at minimum, a telephone call should be organised within 24 hours of this confirmation, followed by a visit as soon as possible.

Consular staff should always explain to a Protected Person that they have a right to consular assistance and what this means.

Whenever access to a Protected Person is refused, the matter should be escalated as per Principle 6 and Principle 7 above (ie both within the FCDO and to the receiving State).

PRINCIPLE 12: Frequency of consular visits to detained Protected Persons

An initial visit is required within the timeframe in Principle 11 and should then take place as regularly as necessary, in addition to any ad hoc visits which are deemed necessary.

Whenever access to a Protected Person is refused, the matter should be escalated as per Principle 6 and Principle 7 (ie both within the FCDO and to the receiving State).

PRINCIPLE 13: Securing private visits to detained Protected Persons

Where a Protected Person has been detained, consular officials should take reasonable steps to ensure that any consular visits are conducted privately to enable the detained person to speak freely. This should include taking steps, wherever possible, to ensure that visits cannot be overheard or recorded by a third party.

If visits or calls cannot be held in private, the matter should be escalated as per Principle 6 and Principle 7 above (ie both within the FCDO and to the receiving State).

OTHER ASSISTANCE AND SUPPORT IN DETENTION

[The rights in this section would only apply to someone in detention]

Legal representation is a fundamental right in international human rights law. Ensuring that the detained individual has access to legal representation helps protect their rights and ensures a fair legal process.

Legal systems vary between countries and a person detained abroad may not be familiar with the local legal procedures and requirements. Consular officials can provide guidance on the legal process and help the individual or their family understand the importance of obtaining legal representation.

Having legal representation can act as a safeguard against potential mistreatment or abuse during detention. Lawyers can advocate for the well-being of their clients and raise concerns about any violations of their rights. Legal representation can ensure that due process is followed, for example, that evidence obtained under torture is excluded from consideration.

Survivors and their families have stressed the importance (symbolically and practically) of the attendance of consular officials at hearings and trials in which they are involved.

COMPARATIVE EXPERIENCE

Mexico offers a Legal Assistance Program in Cases of Capital Punishment (MCLAP), which offers technical and legal support to defence attorneys and consulates, in addition to collaborating in obtaining documentation and evidence that could be used to mitigate the sentence.

If a national of **the Netherlands** is detained in a country that applies the death penalty, the Ministry of Foreign Affairs provides additional assistance in terms of financial support for legal services.

PRINCIPLE 14: Legal representation

Consular officials must raise the issue of legal representation with a Protected Person or, if communication with the Protected Person is not reasonably practicable, their family. If adequate legal representation is not already available to the Protected Person, the consular

official must place them in contact with an independent lawyer or legal representative if desired (provided the local court process allows for such representation).

In cases where there are reasonable grounds to believe that the Protected Person is a victim of arbitrary detention, State hostage-taking, or in which there is a risk that the death penalty could be imposed, or otherwise if it is deemed necessary, a consular officer must attend all pre-trial hearings and trials (unless they are barred from doing so) and maintain a record.

In cases of financial hardship, the FCDO must consider whether it is reasonable to contribute to the legal fees required (or otherwise themselves to provide legal representation) in order to defend the criminal charges.

PRINCIPLE 15: Provision of other necessities

Consular officials should provide basic necessities for any Protected Person who is detained, including (but not limited to) food, medicine, and reading/writing materials in cases where it is known that these are not provided by the detaining authorities.

Consular officials should provide a translation of [legal] documentation in a language understood by the Protected Person.

REPORTING TO PARLIAMENT

Political leaders in the UK should be held to account for the consular assistance provided to British nationals abroad who suffer (or are at risk of suffering) human rights violations. A certain basic level of information must therefore be provided to Parliament, as the first step to make this possible.

PRINCIPLE 16: There should be an obligation on the FCDO to:

- (a) Publish general information and statistics on Protected Persons' situations annually, and
- (b) Submit an annual report to Parliament with information on the actual number of Protected Persons abroad who have suffered or have been at real risk of suffering a human rights violation, including legal and other efforts taken and next steps.

REPATRIATION OF THOSE IN DETENTION

[The rights in this section would only apply to someone in detention]

In some circumstances, the best and most appropriate way for a person to be protected from a situation where they are at risk, or have already suffered, human rights violations is for them to be removed completely from that situation. This may not always be possible, but it should be an option.

PRINCIPLE 17: If the Secretary of State has reasonable grounds to believe that

- (a) a detained Protected Person has suffered a human rights violation, and/ or
- (b) his/her detention is arbitrary⁸ (including but not exclusively where the UN WGAD has ruled that their detention is arbitrary),

⁸ "Arbitrary detention" is defined in accordance with definition adopted by the UN Working Group on Arbitrary Detention in their Fact Sheet No26, available from: <https://www.ohchr.org/sites/default/files/Documents/Publications/FactSheet26en.pdf>, Section IV(B)

the FCDO must make a request for the repatriation of the Protected Person.

If repatriation is denied, the Secretary of State must have due regard to other available mechanisms in international law to secure the repatriation.

The Protected Person, family, consular official, legal representatives, or NGOs have a right to ask the Secretary of State to request repatriation of a Protected Person from the receiving State, if the Protected Person has suffered or is at real risk of a human rights violation. Written reasons must be given if the Secretary of State declines to request repatriation. Any refusal to request repatriation should not be unreasonable.

ENFORCING THE RIGHTS

Where legal obligations exist as a result of these Principles, it is important that it is clear how they can be enforced if they are not being complied with, or if decisions are made which need to be challenged.

The two options suggested below in Principle 18 are alternatives – the advantage of the statutory appeals process is that it would be simpler and less costly and could probably be achieved without recourse to lawyers, but the disadvantage is that it would probably require the creation of a separate mechanism.

In some circumstances, the Government should be obligated to raise a dispute with the other State to the level of a formal legal dispute – known as ‘diplomatic protection’ – and pursue the case on behalf of the British national in an international court or other complaints mechanism. Principle 19 would make ‘diplomatic protection’ mandatory in certain limited circumstances. (It is currently entirely discretionary, even where all other remedies have been exhausted.)

SURVIVOR EXPERIENCE

Mr H, a British citizen, obtained a decision in 2003 from the UN Human Rights Committee (HRC) which confirmed that he had been tortured abroad in a country in Southeast Asia. The HRC advised the Government concerned to provide Mr H with an appropriate remedy, including compensation and the investigation and prosecution of those responsible. The State failed to do so. Mr H subsequently brought a case in the country concerned, seeking to enforce the HRC decision, but this case was rejected. 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. Therefore, the only way in which the UK can support Mr H’s right to redress is if it grants Mr H ‘diplomatic protection’ and takes up the case, or ‘espouses’ it, against the relevant State concerned. However, this process is entirely discretionary and the UK Government has, to date, refused to take this step.

PRINCIPLE 18: Enforcing the rights to consular assistance

Either (1) No new processes (judicial review would still be available, as now), or (2) the introduction of a new statutory appeals process.

PRINCIPLE 19: Diplomatic protection

If requested by the Protected Person, the State must raise complaints, escalate complaints, and where appropriate and practicable, litigate cases before an international complaints mechanisms (eg the International Court of Justice) where other routes are unavailable or exhausted.

CLAIMS FOR COMPENSATION

Evidence shows that survivors of torture want to achieve justice for the wrongs done to them.⁹ Accountability and prevention are paramount to this. Acknowledgement and recognition of harm done is important for rehabilitation, especially when survivors may face obstacles to accountability in the State where they were detained.

Compensation is important for survivors, given the significant challenges that many survivors face due to torture, including health and financial problems. However, it is not the only relevant form of reparation.

The scheme proposed would apply to any Protected Person who has suffered human rights violations, regardless of FCDO fault. It could be modelled on the UK Criminal Injuries Compensation Scheme. Additional damages (and the possibility of bringing a civil claim) are intended to reflect the responsibility the FCDO has for additional losses incurred as a result of its failures/negligence.

SURVIVOR EXPERIENCE

Nick Tuffney had to go through a two-year process via the Parliamentary and Health Service Ombudsman to obtain compensation for the failures in his case on the part of the FCDO. He claimed that as a result of the FCDO's failings, he has been caused "ongoing anxiety, frustration and increased feelings of isolation adding to an already very stressful and traumatic situation and has self-harmed." The Ombudsman agreed with him finding that the "[FCDO]'s lack of support would have added to his frustration" and "likely contributed to his beginning to self-harm". The Ombudsman recommended that the FCDO apologise to Tuffney, provide him and his family with financial compensation (although this was a relatively small sum), and explain what they intend to do to prevent a recurrence.

PRINCIPLE 20: Right to compensation

If a Protected Person has suffered a human rights violation which has triggered any of the obligations here, and that person has sustained a relevant injury as a direct result of that human rights violation, then that person can make a claim within [2 years] of [their release/return to the UK]. A tariff of injuries would include different physical and mental injuries and provide a range of awards depending on the severity/duration of the injuries.

These damages are payable purely on the basis of evidence of the sustaining of a relevant injury irrespective of FCDO fault.

Additional damages

Where the obligations here have been triggered under Principles 2 and 5 above, the FCDO owes a Protected Person a duty to take such care as is reasonable in all the circumstances to see that they are reasonably safe from personal injury caused by the FCDO's actions (or inaction). Where the FCDO fails to comply with these duties, additional damages (set out in a tariff) may be paid under the scheme.

The scheme will clarify that nothing in the scheme is intended to exclude a claim for damages for personal injury, including for loss of earnings, if the FCDO fails to fulfil its obligations and this leads to physical or psychological injury on the part of the Protected Person. However,

⁹ See REDRESS, [Whose Justice: Reflections from UK-Based Survivors of Torture](#), 2022.

where a payment has been made under the compensation scheme, the amount of damages to be paid will be reduced to reflect any payment under the compensation scheme.

REHABILITATION FOR SURVIVORS

Rehabilitation is deliberately separated from the damages remedy above, as a result of stakeholder and survivor input to the development of these Principles. The provision of rehabilitation would not relate only to cases where there had been FCDO failures, but to all cases where someone was able to demonstrate that they had suffered a human rights violation abroad.

Details of the mode of delivery would have to be explored further as a matter of policy implementation.

PRINCIPLE 21: Rehabilitation

If a Protected Person has suffered a human rights violation in respect of which any of the obligations here have been triggered, they shall have the right to a medical examination and a reasonable level of rehabilitation from the impacts of the violation(s).

SANCTIONS

For many survivors of serious human rights violations or members of affected communities, targeted sanctions can represent a form of reparation, effectively acknowledging the violations and providing public condemnation.

Due to their public nature, targeted sanctions have the potential to acknowledge the harms which have taken place against marginalised or oppressed groups. Particularly clear statements of reasons and announcements by sanctioning authorities can contribute to recognition of violations. They can also plug gaps where other accountability processes are failing or support ongoing or future international or domestic processes.¹⁰

No specific provisions are suggested to sit alongside the other consular assistance Principles, since targeted sanctions are best developed as a matter of policy rather than obligation.

CONCLUSION

Consular assistance is a vital tool that enables the UK Government to offer crucial protections to its nationals detained overseas. However, the discretionary nature of consular assistance stands at odds with the UK's international obligations and falls short of the protection its nationals deserve. Establishing a legal mandate for consular assistance will provide benefits not only to British nationals facing dire circumstances abroad, but also to the British State, showing that British values do not stop at our borders. Transforming consular assistance from a mere discretion into a legal obligation, using the Principles outlined in this report, would ensure more robust safeguards for British nationals at risk of human rights abuses abroad and solidify the State's responsibility to secure the rights and wellbeing of its most vulnerable citizens.

¹⁰ REDRESS, [Evaluating Targeted Sanctions: A Flexible Framework for Impact Analysis](#), November 2023.

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