Deportation with Assurances: Call for Evidence

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Summary

JUSTICE maintains that negotiating assurances with countries known to use torture is wrong in principle and ineffective in practice. We consider that the current policy of deportation subject to diplomatic assurance is ripe for independent consideration and we welcome this review.

However, we are concerned that the goal of the Home Office instigated review appears designed to explore means to remove existing safeguards against removal to a 'real risk' of torture or other unlawful treatment.

We urge the Independent Reviewer to consider the limitations of the existing procedure, including the unfairness of the operation of closed material proceedings – and the use of secret evidence – to determine the safety of an individual's concern. JUSTICE considers that the starting point for the consideration of the policy – and this review – must be the obligations of the UK in domestic, regional and international law.

Introduction and Background

1. Founded in 1957, JUSTICE is a UK-based human rights and law reform organisation. Its mission is to advance justice, human rights and the rule of law. It is also the British section of the International Commission of Jurists. JUSTICE has significant expertise regarding deportation with assurances ('DWA'), having intervened in the leading cases concerning the policy. These include: *RB (Algeria) (FC) and another v Secretary of State for the Home Department*;[1] *Othman (Abu Qatada) v the United Kingdom*;[2] and most recently *XX v Secretary of State for the Home Department*.[3]

2. JUSTICE has consistently sought to highlight the damaging effect that the pursuit of DWA has on ensuring that the UK Government complies with its international obligations under Article 3 of the UN Convention Against Torture ('UNCAT'), and Article 3 of the European Convention on Human Rights ('ECHR').[4] We have produced detailed analysis on the use of closed material procedures by the Special Immigration Appeals Tribunal and other courts in the UK, in their consideration of cases, including in connection with deportations with assurances.[5]

3. JUSTICE opposes the use of deportation with assurances in respect of countries which routinely use torture. We do not suggest that deportation on national security grounds is an illegitimate means of combating the threat of terrorism, although we note that the 2004 Privy Council review committee recommended against its use as a counter-terrorism measure.[6] Nor do we suggest that the assurance of a foreign government is irrelevant to determining whether a real

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[1] *RB (Algeria) (FC) and another (Appellants) v Secretary of State for the Home Department* [2009] UKHL 10
[2] *Othman v the United Kingdom,* no.8130/09, 17 January 2012
[3] *XX v Secretary of State for the Home Department* [EWCA] Civ. 742
[4] We do not propose that we repeat our earlier concerns in detail in this submission. JUSTICE has most recently commented on the DWA policy in our submission to the UN Committee against Torture in 2013 (http://www.justice.org.uk/data/files/resources/344/JUSTICE-UNCAT-Response-April-2013-FINAL-Edit.pdf) and in our response to the Government's 2010 Review of Counter-Terrorism Policy (http://www.justice.org.uk/resources.php/20/home-office-review-of-counter-terrorism-and-security-powers-justice-response).
[5] We do not propose that we repeat our earlier concerns in detail in this submission. See for example, *Secret Evidence (2009)* and our response to the Justice and Security Act 2013 (available here: http://www.justice.org.uk/resources.php/325/justice-and-security-bill). JUSTICE has intervened in numerous cases on the application of closed proceedings, including in *A and Others v the United Kingdom* [GC] no.3455/05, 16 February 2009.
[6] Privy Counsellor Review Committee, Anti-Terrorism Crime and Security Act 2001 Review: Report, HC 100, 18 December 2003, p54.

risk of ill-treatment exists in the receiving state. We do, however, maintain that negotiating assurances with countries known to use torture is wrong in principle and ineffective in practice. Assurances are incapable of ameliorating a real risk of torture or ill-treatment in such circumstances, no matter how many safeguards may be offered. As we explained in our response to the 2010 Review of Counter-terrorism policy:

> *More generally, the practice of extracting from torturers a promise not to torture in the name of protecting human rights seems to us a discreditable sham, one that does nothing to protect detainees in the receiving state and serves only to cheapen Britain's own reputation in the international fight against torture.*

4. The Independent Reviewer was invited to conduct an Independent Review of the Deportation with Assurances policy by the Home Secretary on 21 November 2013 ("the Independent Review"). Announcing the Independent Review and its terms of reference, the Minister explained that its purpose was to identify recommendations on "how the policy might be strengthened or improved".

5. JUSTICE welcomes the opportunity to participate in the Independent Review. We consider that the conduct of the Government's policy on assurances is ripe for independent consideration and analysis. Nothing in our contribution should be taken as an endorsement of the Government's policy or as tacit approval. We highlight the flaws in the Government's approach below. Our view that the Home Secretary might well consider steps to reduce the unfairness of the existing system or to expand opportunities for review should not be read as tacit approval for the existing policy or the continued use of assurances to secure the return of individuals to countries known to routinely use torture and inhuman and degrading treatment. Where we have not commented on a specific issue, this should not be taken as approval for the current UK Government policy. We include an Annex with summary answers to the questions set out in the Call for Evidence. [7]

[7] This submission has been prepared with the substantial assistance of David Smith, JUSTICE Intern.

The scope of the review

6. JUSTICE has two initial concerns about the scope of the review. The first is the implication by the Home Secretary that the operation of DWA is consistent with the requirements of international law. The Minister has explained that the policy "enables us to deport foreign nationals suspected of terrorism in compliance with our obligations under the European Convention on Human Rights, the UN Convention on Torture and the International Covenant on Civil and Political Rights". This is – in our view – an inaccurate interpretation of the law. It would be regrettable if the Independent Reviewer adopted this analysis as the basis for his review. We hope that this Independent Review will look critically at the operation of the policy of DWA and consider its compatibility with the regional and international obligations of the United Kingdom. A clear understanding of the scope of these obligations will be key to the nature of this review and any subsequent recommendations.

7. Secondly, we are concerned that the review appears to be designed solely to identify means of increasing the administrative utility of the DWA policy. Statements made by the Home Secretary, in parallel with the announcement of this review and the deportation of Abu Qatada, make clear that the intention of the Government, following this process, is to "speed up" deportations which rely upon the operation of the DWA policy.[8] Unfortunately, a corollary of this approach appears to be that the Home Office would like to remove some of the existing safeguards in place.

8. Existing safeguards in this process – to safeguard against deportation to face a real risk of torture and other ill treatment – are limited. Those which do exist – including the provision for limited scrutiny by domestic courts and the European Court of Human Rights ('ECtHR') – are designed to test Ministers' assessment that an individual can safely be returned in any individual case. The Government continues to resist the application of safeguards by both judges and the legislature, whether designed to ensure that the individuals concerned are not removed from the country in violation of our international obligations or to provide for greater transparency and accountability to Parliament at home.

[8] Statement of the Home Secretary to Parliament, 8 July 2013.
https://www.gov.uk/government/speeches/home-secretary-addresses-parliament-on-abu-qatada

Without such oversight, there is a serious risk that individuals will be returned unlawfully and without adequate consideration of their rights in law.

9. We urge the Independent Review to consider the policy of DWA in its wider legal context. We comment on a number of specific issues, below. Firstly, we note key features of the legal framework, which we hope will inform the work of the Independent Reviewer. Secondly, we stress the importance of one of the elements of that legal framework; the requirement for independent verification or monitoring. Thirdly, we consider the limited opportunities which already exist for judicial and extra-judicial scrutiny of diplomatic assurances.

a) The legal framework

10. Both Article 3 ECHR and Article 3(1) of the UNCAT prohibit the deportation of persons to countries where they face a "real risk" of torture.[9] Article 3 ECHR also prohibits removal where the individual would face a real risk of inhuman or degrading treatment. Both the UK courts and the ECtHR have also held that removal may be barred when it would result in a "flagrant breach" of another Convention right, for example, the right to a fair trial under Article 6 ECHR.[10] In each of these cases, the legality of deportation will be a highly fact sensitive issue to be determined according to the particular risks faced by the individual subject to deportation.

11. As recently as December 2013, the UN Rapporteurs on Torture and Counter-terrorism and human rights, Juan Mendez and Ben Emmerson QC, expressed 'dismay' at the ongoing use of diplomatic assurances. Following the deportation of Guantánamo detainees to Algeria by the United States in reliance on assurances, they stated:

> *Diplomatic assurances are unreliable and ineffective in protecting against torture and ill-treatment, and States should not resort to them. We have often seen diplomatic assurances used by Governments to circumvent the absolute prohibition on torture as established in UNCAT. Diplomatic assurances are not [emphasis added] legally binding. It is therefore*

[9] *Soering v United Kingdom* (1989) 11 EHRR 49, at 98
[10] *Othman v United Kingdom* (2012) Application No 8139/09, 17 January 2012

unclear why States that violate obligations under treaty and customary international law should comply with non-binding assurances.[11]

12. JUSTICE agrees with this analysis. That diplomatic assurances used in connection with deportation to States which routinely resort to torture have proved to be unreliable and ineffective, one need look no further than the well-documented cases of *Agiza* and *Alzery*. Both individuals were subjected to ill-treatment following their return to Egypt by the Swedish authorities, despite Sweden having obtained assurances from Egypt to the contrary. In *Agiza*, the UN Committee against Torture found Sweden to have violated both the substantive and procedural elements of Article 3 UNCAT.[12] In *Alzery*, the UN Human Rights Committee found that Sweden had violated Article 7 of the International Covenant on Civil and Political Rights ('ICCPR').[13]

13. JUSTICE is concerned that the Government should not treat the decision of the ECtHR in *Othman* on the compatibility of deportation in that case with Article 3 ECHR as providing unqualified support for the continuation of the Government's policy on DWA.[14] While JUSTICE disagrees with the substantive conclusions of the Court in that case on the reliability of the relevant assurances, the decision cannot equate to a clean bill of health for the DWA programme.

14. Notably, the Court acknowledged 'widespread concern within the international community as to the practice of seeking assurances to allow for the deportation of those considered to be a threat to national security'.[15] The Court accepted that the myriad of documents submitted in evidence attesting to systemic torture in Jordanian detention facilities[16] painted a picture of those facilities that was 'as consistent as it was disturbing.'[17] Yet, the Court held that any 'real risk' of ill-treatment was, in fact, removed by the assurances provided by the Jordanian

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[11] *UN rights experts on torture and counter-terrorism concerned about the fate of Guantánamo detainees*, (Geneva, 10 December 2013). Available at: http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14084&LangID=E

[12] *Agiza v Sweden,* Committee Against Torture, Communication No 233/2003, CAT/C/34/D/233/2003 (20 May 2005)

[13] *Alzery v Sweden,* Human Rights Committee, Communication No 1416/2005, CCPR/C/88/D/1416/2005 (10 November 2006)

[14] *Othman (Abu Qatada) v United Kingdom,* Application No 8139/09, 17 January 2012. See our submission in *XX v Secretary of State for the Home Department*, Written Submissions of JUSTICE, at § 3, for further analyis

[15] *Othman,* § 186.

[16] *Ibid,* § 107, UN Committee Against Torture, § 108, UN Human Rights Committee, §§ 109 – 111, Special Rapporteur on Torture, §§ 112 – 115, Amnesty International, §§ 116 – 118, Human Rights Watch

[17] *Ibid,* § 191

authorities. The Court's analysis was closely linked to the very specific features it identified in that case. It was careful to stress that the analysis of any deportation where Article 3 ECHR was engaged would be a highly fact sensitive exercise. An overly broad reading of this decision would represent a step backwards in human rights protection in the context of deportation; and could significantly weaken the application of the *non-refoulement* principle.

15. Importantly, the Court attached significant weight to the 'strong' bilateral relationship between the UK and Jordan, and the fact that Mr Othman's high profile in the media would militate in favour of the Jordanian authorities ensuring that he was properly treated.[18] With respect, JUSTICE considers that the Court's reasoning does not withstand close scrutiny.[19] However, the Court was extremely careful to explain its view that while the use of DWA would not give rise to a violation in every case, clear evidence would be required to illustrate that any assurance would "provide in their practical application, a sufficient guarantee that the applicant will be protected against the risk of ill-treatment". Specific considerations included the relationship between the sending and receiving states; whether compliance "can be objectively verified through diplomatic or other monitoring mechanisms" and the degree to which there is "an effective system of protection against torture in the receiving State, including whether it is willing to cooperate with international monitoring mechanisms".[20]

16. Indeed, the line of authority both pre and post-*Othman* illustrates that the court expects to conduct a robust assessment of the reliability of assurances, and will not shy away from finding a violation, particularly in cases involving an Article 3 claim that the individual faces a 'real risk' of being subjected to inhuman or degrading treatment on his return.[21]

17. The Government has consistently repeated its intention to respect the *jus cogens* nature of the prohibition on torture. The repeated purpose of the DWA

[18] *Othman (Abu Qatada) v the United Kingdom,* App o.8139/09, § 196, 17 January 2012
[19] As the Court acknowledged in the very same paragraph, 'notoriety is of no avail if torture is practised without anybody ever knowing it'. *Ibid*
[20] See § 188-189.
[21] For examples of cases subsequent to the decision in *Othman,* see *inter alia*: *Labsi v Slovakia,* App o.33809, 15 May 2012, *Asimov v Russia*, Appo.67474, 18 April 2013, *Sidikovy v Russia,* App.73455/11, 20 June 2013, *Nizomkhon Dzhurayev v Russia*,App .31890/11, 3 October 2013, *Ermakov v Russia*, no.43165/10, 7 November 2013, *Kasymakhunov v Russia,* no.29604/12, 14 November 2013. See also *Mahmatkulov v Turkey*, App Nos46827/99 and 46951/99, 4 February 2005 (GC).

policy is not to return individuals to torture, but to guard against that possibility, whilst exploring broader opportunities for the lawful deportation of individuals thought to pose a threat to the UK. The effectiveness – and the legality – of the DWA programme must build on this commitment to our international obligations, looking both at the approach of domestic and regional courts and to the assessment of the international community.

18. Following the guidance of the ECtHR and our domestic courts, it is clear that the 'real risk' test, and the assessment of the facts in any individual case, must remain central to the UK Government's deportation and extradition policies.

b) Verification and monitoring

19. JUSTICE has expressed some scepticism about whether compliance with diplomatic assurances can ever be effectively verified in any true sense, not least because verification can only detect torture or ill-treatment after the fact.[22] However, we regret that recent domestic case law has seen the Government invite our courts to retreat from the "essential requirement" of effective verification.[23]

20. JUSTICE considers that the ECtHR made the need for effective verification abundantly clear in *Othman*. In fact, the arrangement made for the involvement of the *Adaleh Centre* in the monitoring of the agreement in place was central to the Court's analysis.[24] This reflects the conclusion of their Lordships in *RB (Algeria)* that "an assurance, the fulfilment of which is incapable of being verified would be of little worth"[25]

21. The ECtHR expressed clearly its views that verification and monitoring will <u>not</u> be effective where:

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[22] *Application no. 8139/09 Omar Othman v the United Kingdom*, Intervention submitted by Amnesty International, Human Rights Watch and JUSTICE, at §§ 24 – 27.
[23] See for example, *XX v Secretary of State for the Home Department,* [EWCA] Civ 7
[24] *XX v Secretary of State for the Home Department*, Written Submissions of JUSTICE, at § 20
[25] *RB (Algeria) (FC) and another (Appellants) v Secretary of State for the Home Department* [2009] UKHL 10, at § 124 Lord Phillips agrees that effective verification is required, but that it can be achieved by means other than monitoring. At § 193 Lord Hoffman agrees that effective verification is required where he states, '[…] in my opinion SIAC was quite right to say that although fulfilment of the assurances *must be capable of being verified* [emphasis added], external monitoring is only one possible form of verification.' He also acknowledged in the same paragraph that 'in the absence of some provision for external monitoring […] assurances may be no more than empty words.' Thus there is nothing to caste doubt on the proposition that effective verification is essential.

(i) by reason of its lack of resources or expertise – including the lack of suitable medical and psychiatric personnel – the monitoring body would not be capable of detecting 'physical or psychological signs of ill-treatment';[26]

(ii) the monitoring body is not provided with private access to the detainee;[27] and

(iii) the monitoring body is under the control of the receiving state.[28]

22. Thus, the Strasbourg Court has set a template for the minimum requirements for monitoring and verification: (a) any body tasked with such arrangements must be sufficiently resourced and experienced; (b) it must have free access to the detainee in private and (c) it must be independent.

23. JUSTICE is concerned that the UK Government has been less than rigorous in ensuring that each of these three criteria is satisfied.[29] We urge the Independent Reviewer to recommend that the UK Government must ensure the effectiveness of independent monitoring arrangements in connection with any future deportation. The terms of reference of the review specifically seek views on how the speed of the legal process might be improved. If truly independent and effective monitoring arrangements were secured in every case, the UK Government might significantly reduce the prospect of complex litigation.

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[26] *Othman v the United Kingdom,* § 204
[27] *Ibid*
[28] *Ibid*, § 203. This conclusion is also supported by the fact that the Court viewed with favour the requirement in the terms of reference for the Adaleh Centre for the monitoring body to be 'operationally and financially independent of the receiving state' and for it to be able to produce 'frank and honest' reports.
[29] See the *obiter* comments of Richards LJ in *XX v Secretary of State for the Home Department*. Whilst his Lordship was not required to decide whether effective verification was an 'essential ingredient' in determining whether assurances could be relied upon, he opined that: 'If effective verification is an essential ingredient, *there is a serious problem about SIAC's acceptance of the MOU in the present case as providing a sufficient safeguard against ill-treatment* [emphasis added], since on SIAC's own findings the Ethiopian Human Rights Commission was the only relevant monitoring body, yet it provided only a partial safeguard [as it was not independent and effectively beholden to the Government of Ethiopia]. He continued: 'I confess to a degree of unease about reliance on assurances where there is an apparent gap in the means of verification of compliance and SIAC have to rely […] on the proposition that 'if [XX] is detained, and no contact occurs, it will be obvious that something has gone wrong', and more generally on their finding that it was, and would be perceived by the Ethiopian Government to be in the interests of that government to ensure that the assurances were fulfilled.' (See §71, 73, 75). JUSTICE intervened in this case to point out the limited value of an assumption that assurances were being respected despite an acknowledgement by SIAC that the monitoring and verification arrangements lacked independence. The issue was not ultimately decided by the Court of Appeal.

Other mechanisms for oversight and review

24. The House of Commons Foreign Affairs Committee ("FAC") considered DWA in its Report on the Human Rights work of the Foreign and Commonwealth Office in 2011.[30] The Committee considered that effective verification was 'essential' if arrangements for deportation with assurances were to be trusted.[31] However, it then went further, suggesting that:

> *arrangements for deportation with assurances would command greater confidence if both parties to the agreement were to have signed the Optional Protocol to the UNCAT ('OPCAT'), which would signify that the states concerned permitted regular independent monitoring of places and conditions of detention.*[32]

25. It was observed by the Committee that Lebanon was the only country with which the UK had agreed arrangements for deportation to have signed OPCAT.[33] Unfortunately, this remains the case at the time of writing.[34] We welcome the conclusions of the Foreign Affairs Committee in this regard, and note that this statement accords with the views of the former UN High Commissioner for Human Rights, Louise Arbour, when she stated that countries cannot give credible assurances where they have not accepted independent monitoring under OPCAT.[35] Unfortunately, the Government has resisted this recommendation and others designed to enhance the transparency and accountability of the DWA policy. We return to this issue, below.

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[30] House of Commons Select Committee on Foreign Affairs, *'The FCO's Human Rights Work in 2011 – Third Report of Session 2012 – 2013',* (October 2012) HC 116, § 64. Available at: http://www.publications.parliament.uk/pa/cm201213/cmselect/cmfaff/116/116.pdf
[31] *Ibid*, at § 63
[32] *Ibid,* at § 64
[33] *Ibid*
[34] *Optional Protocol to the UN Convention Against Torture*, Signatories and Ratification. Available at: https://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-9-b&chapter=4&lang=en
[35] UN High Commissioner for Human Rights Louise Arbour, *'Statement before the Council of Europe Group of Specialists on Human Rights and the Fight Against Terrorism'*, (29 – 31 March 2006). Available at: http://www.unhchr.ch/Huricane/Huricane.nsf/60a520ce334aaa77802566100031b4bf/c19c689539c57eabc1257146002ce1b9?OpenDocument

c) Oversight, transparency and accountability

Judicial oversight, SIAC and disclosure

26. JUSTICE has long expressed its concerns about the limitations faced by individuals raising claims before SIAC. Our principal concerns relate to the inherent unfairness of the operation of the Closed Material Procedure ('CMP'), with which the Independent Reviewer is familiar. In *Secret Evidence,* we explored the specific limitations faced by individuals and their legal teams as a result of the use of the CMP mechanism and its development by SIAC.[36] We last highlighted the damaging effects of CMP in our response to the Government's Justice and Security Green Paper.[37] The use of secret evidence seriously limits the ability of individuals facing removal pursuant to the DWA policy to challenge the Government's assessment that they will not face a 'real risk' of torture on return.[38]

27. It is unacceptable that a deportee should be removed without ever knowing the reasons for his removal and being able effectively to challenge those reasons. For this reason, we consider the issue of "A-type" disclosure to be of particular importance in the context of DWA. Enhanced – or "A-type" disclosure refers to the recognition of the ECtHR, subsequently endorsed by domestic courts that Article 5 of the Convention requires that an individual must be given sufficient information about the case against him to enable him to give effective instructions.[39] While the Government has argued to restrict "A-type" disclosure to cases involving deprivation of liberty, subsequent courts have confirmed that wider disclosure obligations may apply by virtue of the application of the ECHR or the Charter of Fundamental Rights of the European Union, to both asset freezing claims and immigration decisions.[40] The scope of the disclosure requirement remains subject to argument.

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[36] *Secret Evidence,* pages 37 – 76.
[37] JUSTICE, *Justice and Security Green Paper (Cm 8194): Consultation Response,* (January 2012). Available at: http://consultation.cabinetoffice.gov.uk/justiceandsecurity/wp-content/uploads/2012/25_JUSTICE.pdf
[38] *Ibid,* § 6
[39] *A and Ors v United Kingdom*, App no. 3455/05, 19 February 2009.
[40] See for example, ZZ, C-300/11 Unreported June 4 2013, ECJ.

28. JUSTICE considers that there is a clear case for *A-type* disclosure being available to deportees as a minimum requirement in the context of DWA:
    (i) In many cases the deportee may face a lengthy deprivation of liberty in the return state if he faces trial and is convicted.
    (ii) Secondly, the UK Government is exercising a formidable coercive power with significant scope for misuse. Only by allowing the deportee to test the evidence used against him can there be any equality of arms.
    (iii) Thirdly, the individual in question is being returned to a state with a poor record of respecting basic human rights, with the factual assessment of whether he faces or does not face a 'real risk' of torture or inhuman or degrading treatment key to his lawful return. In these circumstances, the importance of the Government's case being subject to effective challenge means that an individual must be given a sufficient opportunity to understand the Government's case and to challenge it effectively.

29. Clearer consideration should be given to the proper limits of CMP, with the provision of "A-type" disclosure, the norm in DWA cases. Not least, the time taken by both closed and open legal teams trying to challenge evidence either without information or instructions is substantial. We consider some limited examples in *Secret Evidence*. This exercise is what Lord Bingham famously called taking "blind shots at a hidden target" and takes some significant time in practice.[41] A more balanced approach to disclosure is likely to enable SIAC and domestic courts to more efficiently identify and resolve the issues at dispute in these cases fairly.

30. The Special Advocates appointed to act in SIAC cases have themselves clearly identified a number of practical problems that undermine their ability to defend their clients. These included, but were not limited to: the bar on communication through limitations on the capacity to call reliable evidence; the lack of formal rules in CMP; and the prejudicial impact of late disclosure by Government agencies.[42] The cumulative impact of these limitations may seriously inhibit the efficacy of the judicial oversight of the Minister's decision to deport pursuant to DWA. A deportee may face some, or all of these difficulties in a hearing before SIAC. The wider procedural difficulties identified by the Special Advocates are

[41] *Roberts v Parole Board* [2005] UKHL 45, at 18
[42] Special Advocates Justice and Security Green Paper Response, §17 and JUSTICE Consultation response at § 35.

attributable both to systemic problems and to failures on the part of the Government to act reasonably or expediently in preparing and presenting its case, including in response to any appeal.

31. JUSTICE considers that if the Government wishes to examine procedural issues to reduce delay, it should begin by examining procedures within Government for responding to challenges efficiently and reasonably. This should include a re-examination of the concerns raised by the Special Advocates with a view to making their role more effective and the role of the SIAC and the domestic courts easier.

Parliamentary and political oversight

32. While the opportunities for judicial oversight are inherently limited by the operation of CMP, the wider political scrutiny of the DWA programme has generally been resisted by Government.

33. The FAC has also recommended that Parliament must be informed of the details of any independent body tasked with monitoring DWA and the arrangements for such follow-up monitoring. They also recommended that – like treaties – MOU should be laid before Parliament and should not take effect for a set period, to allow Parliamentarians to raise concerns and objections. These and numerous other provisions might be considered to increase the transparency and accountability of the arrangements made under the DWA Policy through parliamentary and political monitoring. For example, it would yet be open to the FAC to call Ministers and officials from the FCO to account on a regular basis for the treatment of individuals subsequent to their deportation, whether by written report or oral evidence.

34. The FAC returned to this issue in its 2012 report on the human rights work of the FCO. It noted that it had only recently received information from the Government on the arrangements for monitoring and verification subject to DWA, which it had requested the previous year. It noted the Government's rejection of each of its other recommendations for greater transparency and welcomed the announcement of this review. Importantly, we note that the FAC asked for further information about the consequences should an individual be mistreated. They were extremely sceptical about the Government's response:

[The Minister] believed that the terms of the agreements would allow the UK to gain access to the individual and to make its concerns known. That would seem to us to be an optimistic view…there is no certainty that the UK could do anything for the person who had been maltreated while in detention.[43]

35. As outlined above, numerous international bodies have expressed general and more specific concerns about the use of DWA by the UK Government. In our view, the Government has failed to engage seriously with these concerns. For example, in the most recent observations by the UN Committee Against Torture, the Committee observes:

diplomatic assurances are unreliable and ineffective and should not be used as an instrument to modify the determination of the Convention.[44]

36. While JUSTICE remains sceptical about the effectiveness and propriety of DWA, we hope the Independent Reviewer will consider the Government's limited engagement with wider calls for greater transparency and accountability in the operation of the DWA policy, including by Parliament and international monitoring bodies. The limited opportunity for external oversight, including of any verification or monitoring arrangements, vitiates against any arguments for any further limitation of existing safeguards, including opportunities for judicial oversight.

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[43] Fourth Report of Session 2013 – 2014, *The FCO's human rights work in 2012*, HC 267, paras 56 – 66. http://www.publications.parliament.uk/pa/cm201314/cmselect/cmfaff/267/267.pdf
[44] http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/GBR/CAT_C_GBR_CO_5_16598_E.doc

Annex: JUSTICE Response to Call for Evidence Questions

Q1: What lessons can be learned from international comparisons and comparative practice associated with the removal of individuals to states with a poor human rights record, allowing for the parameters of our legal system?

1. The ECtHR noted in *Othman* that the MOU in that case was the 'superior in both its detail and its formality' to any assurances previously examined by the Court. It was also stated that the MOU appeared to be 'superior to any assurances examined by the UN Committee Against Torture and the UN Human Rights Committee.'[45] Other than the case of *Othman,* there is little support for the continued use of DWA in connection with States known to torture (we refer again to the analysis in the cases of *Agiza* and *Alzery,* above).

2. In our view, there is little useful material to be drawn from wider international comparative material on DWA, unless the object of the exercise is to further reduce judicial scrutiny and human rights protection. For example, in the United States, decisions to deport or extradite where allegations of terrorism are concerned remain by and large the non-justiciable domain of the executive.

3. In these circumstances, we consider that the application of the international legal framework – and the consideration of the domestic and regional courts – is more significant to this review than the operation of comparative diplomatic practice.

Q2: What opportunities are there for HM Government or the courts to improve the quality and speed of the legal procedure in DWA cases, including appeals, whilst assuring that the subjects get appropriate legal protection?

4. While we recognise that there are benefits in ensuring that unnecessary delay is removed from the process of deportation, both for the Government, the deportee (who is likely to be in detention) and the taxpayer, the review must draw a clear distinction between undue delay and the proper process of law

[45] *Othman v the United Kingdom,* § 194

necessary to ensure that any individual is removed only in compliance with domestic and international standards. These processes – although they may take time – should not be viewed as "tick-box" exercises but an essential part of any deportation process. In our view the potential for increasing the "speed" of any deportation is limited while continuing to ensure that the right to a fair hearing is guaranteed in so far as possible.

5. We have suggested that the quality of procedure could be significantly improved by affording "A-type" disclosure to deportees in DWA cases, and that the case for doing so is compelling. The Special Advocates in their response to the Justice and Security Green Paper highlighted a further issue with CMP that we believe causes delays to the speed of the legal procedure, that is 'a systematic problem with prejudicially late disclosure [of closed material] by the Government'.[46] Ultimately, greater openness by Government, in so far as possible, would reduce the complexity of hearings and may increase the speed of the relevant proceedings.

Q3: How do legal and procedural conditions imposed upon the exercise of DWA by domestic and international courts impact upon the effectiveness of the policy, and what can be done to influence the future development of such conditions or to give them effect consistently with the fair and efficient operation of DWA?

6. We are concerned that the legal and procedural protections currently afforded to those subject to deportation pursuant to this policy – and the corresponding conditions applied to the use of DWA – are already seriously limited. We would advise against any reduction of what is currently in place. Removal of any existing safeguards are likely to exacerbate the risk that the operation of the programme will lead to violations of individual rights in practice, in violation of the international law obligations of the UK.

7. As is clear from the analysis of the ECtHR in *Othman*, the conditions in place are necessary to assess whether in any individual case an individual will face a 'real risk of torture' on deportation. Without clear consideration of these conditions, it is difficult to see how a Government might hope to remove an

[46] Justice and Security Green Paper, *'Response to Consultation from Special Advocates'*, (16 December 2011), § 17

individual to a State with a long record of torture and remain confident of their compliance with international law. The suggestion that the conditions imposed by domestic and international law limit the effectiveness of the policy is misconceived. Without the conditions, there could be no question that any operation of the policy would be inconsistent with our international obligations.

8. The Government already argues in many cases for a looser interpretation or application of existing conditions imposed by domestic and international courts, in individual cases. In a number of cases, JUSTICE has intervened to argue against the Government's submissions. We can see no other reliable means to test the necessity for the individual conditions than through legal argument in individual cases and before the international bodies which monitor the implementation of our international obligations.

Q4: In developing DWA arrangements with other countries, allowing for the fact that arrangements are specific to countries and individual subjects, what are the key considerations that HM Government should take into account in relation to the safety on return processes, including conducting assessments and the development of verification mechanisms?

9. We have outlined our recommendations for the development of effective verification mechanisms at paragraphs 22 and 23, and contend that these must focus on independent monitoring. We support the views expressed by Louise Arbour to the effect that countries that have not ratified OPCAT cannot give credible assurances.

Q5: Is enough done to distinguish the risks different categories of persons might face on return to a particular country, or must assurances always be obtained in respect of certain countries for all potential DWA subjects?

10. JUSTICE stresses that an individual assessment of the legality of any individual deportation is required in every case. We do not consider it possible to set blanket rules which would apply to individual categories of person. Even proponents of DWA have acknowledged:

'While States will possess human rights reporting regarding the general conditions in a receiving State, often that reporting will reveal little about whether a particular alien is in danger of mistreatment.'[47]

11. Distinguishing the risks that might be faced by different categories of persons on return is an inherently difficult exercise, which requires a thorough and cautious approach.In our view the legal position is clear. In *Othman*, the ECtHR stated:

'In any examination of whether an applicant faces a real risk of ill-treatment in the country to which he is to be removed, the Court will consider both the general human rights situation in that country and the particular characteristics of the applicant. In cases where assurances have been provided by the receiving State, those assurances constitute a further relevant factor which the Court will consider.'[48]

12. Later the Court stated:

'The preliminary question is whether the general human rights situation in the receiving State excludes accepting any assurances whatsoever […]. More usually, the Court will assess first, the quality of the assurances, and second, whether, in light of the receiving State's practices they can be relied upon [emphasis added]'.[49]

13. Significantly, it was accepted by both sides in *Othman* that absent the assurances there would have been a real risk of ill-treatment in that case.[50]

14. Any attempt to adopt a more categorical approach to the use of assurances is, in our view, unlikely to reduce the need for judicial oversight. On the contrary, it is likely that closer scrutiny will be justified, in order to closely examine the impact of any assurance on an individual case. The Government's assessment of the risks will still fall to be reviewed by SIAC, and ultimately by Strasbourg.

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[47] Padmanabhan, V. M., *'To transfer or not to transfer: identifying and protecting relevant Human Rights interests in non-refoulement'*, at p.117
[48] *Othman v the United Kingdom,* § 187
[49] *Ibid,* §§ 188 - 189
[50] *Ibid,* § 192

Q6: Given that concerns often relate to the initial period of detention on return and the risk of future detention and/or prosecution, could the likelihood of these eventualities be more effectively assessed and, if appropriate reduced, in advance of removal, including by improved engagement with the individual's home authorities?

15. We consider effective independent monitoring, above. However, this question goes to the heart of our objection in principle to the continued, and expanded, use of DWA. Many of the legal barriers to deportation are likely to arise as a result of the home-State's failure to meet its existing obligations, in violation of international law standards. We are concerned that the devotion of increased resources to the establishment of specific guarantees for a single individual and for the monitoring of that person's treatment do little to address wider systemic problems, but could divert resources away from the improvement of practice for all.

16. In terms of improved engagement with the individual's home authorities, in our view, diplomatic engagement should focus on negotiating robust treaties, improving policies and conditions on the ground in the receiving state and ensuring that individual States respect their existing international obligations in practice.

17. We further note that the FAC recently welcomed the use by the UK Government of treaty-based assurances in the case of Mr Othman, as opposed to reliance on an MOU.[51] In our opinion, this example gives weight to the argument that diplomatic time would be better spent on negotiating robust treaties with receiving states, as opposed to attempting to deport an individual on the basis of a weak MOU, and subsequently facing the prospect of lengthy litigation.

[51] House of Commons Select Committee on Foreign Affairs, *'The FCO's Human Rights Work in 2011 – Third Report of Session 2012 – 2013',* § 65