

Examining the United Kingdom's use of Diplomatic Assurances: is it fully compatible to the European Convention on Human Rights?

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Abstract

In this piece, I argue that the present use of diplomatic assurance is still not in line with the European Convention on Human Rights. To do this I look at the historical treatment of Asylum Seekers in the UK and how the classification of a “Terrorist” and “Terrorism” impacts the political opinion on when an Asylum Seeker should be classed as a national security risk. I examine the case of *Chahal v UK* (1996) and the Labour Government's response after the 2006 London Bombings to showcase the UK's failed attempts at finding a satisfactory response to foreign terrorist suspects, with some of these responses allowing for an increased acceptance of torture. In illustrating the failings of the past, I will be able to convey the importance of achieving an effective and a non-discriminatory policy for Asylum Seekers. Nevertheless, I conclude from evidence of cases like the *Othman (Abu Qatada) v. the United Kingdom* case and other similar cases that even though the use of diplomatic assurances might be effective on paper they are not effective in achieving a satisfactory response with regards to upholding the European Convention on Human Rights.

Key terms: *Diplomatic Assurances, Asylum Seekers, Human Rights, National Security*

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Introduction

In many ways the UK Government has been trying to find ways to get around the difficulties that the European Convention on Human Rights and the Strasbourg court has on deportation cases, especially in cases of national security and terrorism. There have been many cases, successful and unsuccessful, in where the UK Government has tried to argue the importance of national security and why rights like Article 3 should be allowed to be balance and why they should not be absolute rights in these cases. These successful cases have brought in the use of Diplomatic assurances. This essay will take a look at the historical development in Article 3 and national security cases within the United Kingdom, while also considering whether the use of diplomatic assurances in these cases are an effective solution.

Historical approaches to “Terrorism” and asylum cases in the United Kingdom

Generally, the Conservative Government’s attempts at deporting refugees because they are presumed to be a national security risk have been met with mixed results. There was a significant rise in trying to manage the terrorism crisis during the mid 1990s¹. The Government stated that to do this there shouldn’t be a focus on just people that are engaging in terrorist activities, but also all other political activists who promoted unconstitutional change or destroyed the good relations with other Governments². The government states that the objective of the declaration of deportation is to show and emphasis that the asylum process will not be available for those carrying out terrorist actions or supporting those actions³. When the Government defined terrorism, they stated that it was partly to do with actions which “jeopardies friendly relations among states”⁴. This definition seems to undermine the well-established principle of terrorism in international law, which was redefined in the Terrorism Act 2000 as “the use or threat of one or more of the actions listed

¹ Pierre Makhlouf, ‘What about Human Rights? “Terrorism”, National Security and Immigration ’[1997] Socialist Lawyer 22 <<https://www.jstor.org/stable/42950394>> accessed 7 January 2024.

² Pierre Makhlouf, ‘What about Human Rights? “Terrorism”, National Security and Immigration ’[1997] Socialist Lawyer 22 <<https://www.jstor.org/stable/42950394>> accessed 7 January 2024.

³ Pierre Makhlouf, ‘What about Human Rights? “Terrorism”, National Security and Immigration ’[1997] Socialist Lawyer 22 <<https://www.jstor.org/stable/42950394>> accessed 7 January 2024.

⁴ Pierre Makhlouf, ‘What about Human Rights? “Terrorism”, National Security and Immigration ’[1997] Socialist Lawyer 22 <<https://www.jstor.org/stable/42950394>> accessed 7 January 2024.

below, and where they are designed to influence the government, or to intimate the public⁵.” These actions can be instances of serious violence against a person, serious damage to property or endangering a person’s life and as such⁶, nothing to do with Government’s relationships with other states. This proposes a problem with arguing national security grounds as these people are arguably not a threat to the people of the UK, but just the governments good relationships between other states.

So, there is a question as to whether these people should be seen as terrorists and threatening the security of the UK or just being strong political activists. If this can be argued, then is there really course for deportation for the protection of the public or is this the government trying to come up with arguments to deport asylum seekers from the United Kingdom. There have also been decisions on whether a political activist can be classed as a terrorist, like the UK Government claim that they can be. It is said that a suspect may seek to claim asylum, as a persecuted freedom fighter or political activist rather than a terrorist. If it is found that the claim is valid then they can not be classified as a terrorist but rather a freedom fighter or a political activist. Refoulement will then be forbidden under articles 32 and 33 of the 1951 convention⁷.

During the 1990s, the Government was also refusing asylum applications on the basis that applicants had been involved in an organisation “that has admitted that it has used and intends to continue using violence to achieve political means”⁸. Even though there is concern as to what sort of violence that these asylum seekers may think is generally a normal practice, there seems to be ignorance of any peer pressure or fear for survival that could have caused these individuals to feel it was necessary to attach themselves to these organisations, or maybe even choosing to fight against the oppressive nature of their home country. With the UK Government taking this stance by point blank refusing these applications, they can be seen as ignoring the oppressive measures of states and the reasons as too why a refugee might have been involved in these organisations. However,

⁵ Crown Prosecution Service, ‘Terrorism ’(www.cps.gov.uk2020) <<https://www.cps.gov.uk/crime-info/terrorism>>.

⁶ Crown Prosecution Service, ‘Terrorism ’(www.cps.gov.uk2020) <<https://www.cps.gov.uk/crime-info/terrorism>>.

⁷ Clive Walker, ‘The Treatment of Foreign Terror Suspects ’(2007) 70 *Modern Law Review* 427.

⁸ Pierre Makhlouf, ‘What about Human Rights? “Terrorism”, National Security and Immigration ’[1997] *Socialist Lawyer* 22 <<https://www.jstor.org/stable/42950394>> accessed 7 January 2024.

the UK government still won't admit they have been discriminatory in their actions towards these individuals as they have stated that there are no circumstances whatsoever that may justify violence, even in cases of self-defense against tyranny and the oppression of the country⁹. This however seems to ignore the argument that it is possible "to do something wrong in their struggle for survival"¹⁰.

Further to this there are many cases where the United Kingdom has tried to argue that threats to national security should be taken into account when deciding for or against a deportation of a person. In 1995 there was a notice issued to a Kurdish national security detainee from Turkey, which stated that the decision to deport him had been made "in the interest of national security and for other reasons of a political nature, namely the interests of public order and the UK's international and domestic stance against the use of violence and terrorism for political ends"¹¹." It is important to note that in this case there is no suggestion that such individuals must be directly involved in terrorist related activities¹². Therefore, there was no proof that these individuals were a threat to the national security of the United Kingdom and the UK government allowed no route of appeal against a refusal of asylum or deportation order. With the arguable unfair nature, it could also be argued that the UK are in breach of the refugee's article 6 rights, by not given them access to be heard and a right to a fair trial and appeal. This is just another way where the UK Government does not give proper and effective access to the immigration and asylum process to refugees.

Concerns have therefore been raised over the UK's approach to Human Rights for people outside the UK and closely related allies. It also questions if they generally disregard the basic Human Rights of Asylum Seekers in normal circumstances with limited access to justice and work, being some examples. In response to this The Jurisdiction (Conspiracy and Incitement) Bill 1997 was introduced to deal with the issues as to whether it was reasonable or not for people to defend themselves against terror and the suppression of

⁹ Pierre Makhlouf, 'What about Human Rights? "Terrorism", National Security and Immigration '[1997] Socialist Lawyer 22 <<https://www.jstor.org/stable/42950394>> accessed 7 January 2024.

¹⁰ Conor Gearty, *Can Human Rights Survive?* (Cambridge University Press 2006).

¹¹ Pierre Makhlouf, 'What about Human Rights? "Terrorism", National Security and Immigration '[1997] Socialist Lawyer 22 <<https://www.jstor.org/stable/42950394>> accessed 7 January 2024.

¹² Pierre Makhlouf, 'What about Human Rights? "Terrorism", National Security and Immigration '[1997] Socialist Lawyer 22 <<https://www.jstor.org/stable/42950394>> accessed 7 January 2024.

their Human Rights¹³. However, this attempted failed after the second reading¹⁴. Further proof of the lack of regard for Asylum Seekers Human Rights in these such deportation cases. Asylum Seekers and Refugees generally don't have any regarded for protections and rights, so are diplomatic assurances relating to and with the aim of protecting these refugees and Asylum seekers going to have the proposed impact that the European Court of Human Rights claims that they must.

The route to needing Diplomatic Assurances in deportation cases

Diplomatic assurances have become more prominent in deportation cases because of the decision in *Chahal* in 1996¹⁵. In this case, the Court reaffirmed that Article 3 of the European Convention of Human Rights is an absolute right and therefore it is impossible to balance this with issues of national security. The court accepted that the UK wanted to be free of terrorist violence, however the Court ruled in favour of the absolute terms that torture and inhumane treatment or punishment are prohibited irrespective of the person in question¹⁶. Therefore, the UK Government could not deport national security threats where there was a threat of being tortured in their home country.

In Lord Lloyd's inquiry entitled "Inquiry into Legislation Against Terrorism", he stated that the "Government would have no other option but to look for alternative ways of dealing with such people¹⁷." There were options to create a new law where it would be made an offence "to direct any level or to participate in the activities of a terrorist organisation in the United Kingdom¹⁸." He also states that terrorist groups should be named in the United Kingdom, and this should not only be limited to Irish Terrorist groups, but all international terrorist

¹³ Pierre Makhlouf, 'What about Human Rights? "Terrorism", National Security and Immigration '[1997] Socialist Lawyer 22 <<https://www.jstor.org/stable/42950394>> accessed 7 January 2024.

¹⁴ Pierre Makhlouf, 'What about Human Rights? "Terrorism", National Security and Immigration '[1997] Socialist Lawyer 22 <<https://www.jstor.org/stable/42950394>> accessed 7 January 2024.

¹⁵ *Chahal v UK* (1996) 23 EHRR 413

¹⁶ Clive Walker, 'The Treatment of Foreign Terror Suspects '(2007) 70 Modern Law Review 427.

¹⁷ Pierre Makhlouf, 'What about Human Rights? "Terrorism", National Security and Immigration '[1997] Socialist Lawyer 22 <<https://www.jstor.org/stable/42950394>> accessed 7 January 2024.

¹⁸ Pierre Makhlouf, 'What about Human Rights? "Terrorism", National Security and Immigration '[1997] Socialist Lawyer 22 <<https://www.jstor.org/stable/42950394>> accessed 7 January 2024.

groups¹⁹. However, Lord Lloyd fails to take into account that terror and violence is also used by oppressive governments to pursue their objectives.

After the failure in deportation cases and the terrorist bombings of London in July 2005, the Labour Government led by Prime Minister Tony Blair claimed that it was more important now than every to get a handle on the situation, with him stating that “the rules of the game are changing²⁰” and he proposed law changes relating mainly to foreign nationals²¹. These changes came in two pieces of legislation namely ‘The Terrorism Act 2006’ and the ‘Immigration, Asylum and Nationality Act 2006’²². After the bombings in 2005, all the efforts of counter-terrorism became more focused on foreign nationals than it ever had been before, even though the London Bombings were carried out by British Nationals²³.

The problem is not that the claim of asylum being rejected in terms of supposed terrorists, with section 54 of the Immigration, Asylum and Nationality Act 2006 seeking to ensure such claims of asylum can be more readily denied²⁴. But also in Article 1F of the 1951 Geneva Convention allowing that a claim of asylum can be disallowed by anyone who ‘A) he has committed a crime against peace, a war crime, or a crime against humanity; B) he has committed a serious non-political crime outside his country of refuge prior to his admission to that country as a refugee; C) has been guilty of acts contrary to the purposed and principles of the UN²⁵. These two examples of acts show that it is not impossible to reject an asylum claim of someone who is a terrorist, and a threat to national security. The issue lies in what happens with these refugees and how to remove them from the United Kingdom.

In the years prior to this the United Kingdom has always struggled to find a satisfactory response to foreign terrorist suspects. By this time there were four responses that the Government tried to implement²⁶. The first one of these was the criminal prosecution model, where if there is sufficient evidence of criminal activity then a criminal prosecution is the

¹⁹ Pierre Makhlouf, ‘What about Human Rights? “Terrorism”, National Security and Immigration’ [1997] Socialist Lawyer 22 <<https://www.jstor.org/stable/42950394>> accessed 7 January 2024.

²⁰ The Times 6 August 2005

²¹ Clive Walker, ‘The Treatment of Foreign Terror Suspects’ (2007) 70 Modern Law Review 427.

²² Clive Walker, ‘The Treatment of Foreign Terror Suspects’ (2007) 70 Modern Law Review 427.

²³ Clive Walker, ‘The Treatment of Foreign Terror Suspects’ (2007) 70 Modern Law Review 427.

²⁴ Clive Walker, ‘The Treatment of Foreign Terror Suspects’ (2007) 70 Modern Law Review 427.

²⁵ Clive Walker, ‘The Treatment of Foreign Terror Suspects’ (2007) 70 Modern Law Review 427.

²⁶ Clive Walker, ‘The Treatment of Foreign Terror Suspects’ (2007) 70 Modern Law Review 427.

legitimate and desirable response²⁷. However, the British Government doesn't want to try and deport proven terrorists alone but also wants to deport people associated with violent political activists. Therefore, a mainly criminal prosecution procedure wouldn't be successful as if there is no evidence that a terrorist crime has been committed then no legitimate criminal prosecution can be completed to meet their aims.

The second response that has been considered is the war model. This response is the total opposite of the criminal procedure. It involves intrusions on liberty and due process by taking a person totally out of the legal model and giving them no trial or proceedings on the matter, while also introducing the applications of war tactics like the application of torture, inhuman and degrading treatment to elicit an agreement to being deported²⁸. This obviously impedes on Article 5 of the convention which protects the Right to Liberty making it seemingly impossible for this right to be taken away. However, it is also important to note that unlike Article 3, Article 5 is not an absolute right but a limited or qualified right in that it may be possible to argue to balance this right between the security and the protection of the public. However, with the introduction of torture into this proposed model, it impedes Article 3 as well.

The third response, the executive measures model falls somewhere in between the criminal prosecution model and the war model. It compromises executive intervention while also making it within the law²⁹. The basis of the model represents detention without a trial, this was condemned as discriminatory by the House of Lords in *A v Secretary of State for the Home Department*³⁰. Which has seen it been replaced with control orders, which allows for monitoring of the refugees' movements and activities³¹. Depending on how proportionate these controls are, there could be an argument that this still impedes Article 5 and sometimes Article 8, with respect to the refugee's privacy.

²⁷ Lucia Zedner, 'Securing Liberty in the Face of Terror: Reflections from Criminal Justice '(2005) 32 Journal of Law and Society 507.

²⁸ Clive Walker, 'The Treatment of Foreign Terror Suspects '(2007) 70 Modern Law Review 427.

²⁹ Clive Walker, 'The Treatment of Foreign Terror Suspects '(2007) 70 Modern Law Review 427.

³⁰ *A v Secretary of State for Home Department* [2004] UKHL 56

³¹ Clive Walker, 'The Treatment of Foreign Terror Suspects '(2007) 70 Modern Law Review 427.

However, with entertaining some of these models, Amnesty International stated that the United Kingdom has “creeping acceptance of torture”³². The introduction of these models seems to conflict with the judgement given in *Chahal*, with Government trying to impede a refugee’s rights even more. With the history of the USA using the proposed war model with foreign nationals³³, you start to see where the claim of Amnesty International is routed in. During the Bush Administration, it was seen that they were actively abandoning a person’s Human Rights, an example of this being the acceptance of senior officials “softening up” foreign nationals³⁴, an obvious example of inhumane treatment, that article 3 sees to protect individuals from. As a result of this, there would have had to be a way for the United Kingdom to come up with a solution that best protected the refugees’ rights and was not in line with any suspected inhumane practices from other countries.

Finally, the last proposed model that was found to be unsuccessful was the straight exit model. As the name suggests this was just to deport and remove people out of the country³⁵. In relation to this, the Home Office has the powers to exclude or deport non-UK citizens on the grounds that them being in the UK threatens the security and they are a threat to the public order of the UK, or where a person is suspected of involvement in war crimes or crimes against humanity³⁶. However, even with this power the Government had setbacks involving the fact that the refugees and asylum seekers Article 3 right was still very much protected by the convention. Therefore, there needs to be a way for the Government to deport any such threat to British public while also protecting the rights given to the refugees in the convention.

The Start of Diplomatic Assurances

With failed cases like *Chahal v UK*³⁷ and also the reattempt in *Mohammad Ramzy v Netherlands*³⁸ in trying to get the European Court of Human Rights to balance human rights

³² Derek McGhee, ‘Deportation, Detention & Torture by Proxy: Foreign National Terror Suspects in the UK’ (2008) 29 Liverpool Law Review 99.

³³ Clive Walker, ‘The Treatment of Foreign Terror Suspects’ (2007) 70 Modern Law Review 427.

³⁴ Clive Walker, ‘The Treatment of Foreign Terror Suspects’ (2007) 70 Modern Law Review 427.

³⁵ Clive Walker, ‘The Treatment of Foreign Terror Suspects’ (2007) 70 Modern Law Review 427.

³⁶ Clive Walker, ‘The Treatment of Foreign Terror Suspects’ (2007) 70 Modern Law Review 427.

³⁷ *Chahal v UK* (1996) 23 EHRR 413

³⁸ *Mohammad Ramzy v Netherlands* App no 254424/05

with the right of national security, it became clear that the Government was going to have to reconsider its approach to deportation. The Government set out to get assurances from the origin states of the refugee or asylum seekers³⁹. The notion of a diplomatic assurance follows the precedent of a response in the case of *Soering v United Kingdom*⁴⁰ in where there was a problem about the prolonged periods that suspects would spend on “death row”, this being interpreted as being infringed with the article 3 right⁴¹. However, it is also important to note that assurances made on the death penalty are much easier to manage than assurances against torture of inhumane treatment⁴².

There have been many difficulties in relation of trying to negotiate a diplomatic assurance in terms of abstaining from torture of someone who is due to be deported. This is illustrated well in the case of *Hans El Sayed Sabaei v Home Office*,⁴³ where efforts were made in 1998 and 1999 to reach an agreement with the Egyptian Government. It was initially decided by the prime minister of Egypt that there was a strong need for the use of a diplomatic assurance in this case but that this assurance should be based on the promise not to torture the individual in question⁴⁴. This was argued by the Egyptian government to be taken on face value given the fact that Egypt is part of the UN⁴⁵. However, this was not accepted by the Home Office given the fact that there would be no way of guaranteeing that the obligations would be met and would not satisfy Article 3 of the convention⁴⁶. Even after this, the Egyptian Government still refused to even make a basic assurance during the early stage of the negotiations⁴⁷.

Diplomatic assurances have been used as a solution and a principle before the turn of the century and have been used more often in deportation cases with increased negotiations. Some examples of countries that have engaged in negotiations with the United Kingdom and other States are Jordan and Lebanon⁴⁸. On one hand these assurances have seen

³⁹ Clive Walker, ‘The Treatment of Foreign Terror Suspects ’(2007) 70 Modern Law Review 427.

⁴⁰ *Soering v United Kingdom* (1989) 11 EHRR 439

⁴¹ Clive Walker, ‘The Treatment of Foreign Terror Suspects ’(2007) 70 Modern Law Review 427.

⁴² Clive Walker, ‘The Treatment of Foreign Terror Suspects ’(2007) 70 Modern Law Review 427.

⁴³ *Hans El Sayed Sabaei v Home Office* [2015] EWHC

⁴⁴ Clive Walker, ‘The Treatment of Foreign Terror Suspects ’(2007) 70 Modern Law Review 427.

⁴⁵ Clive Walker, ‘The Treatment of Foreign Terror Suspects ’(2007) 70 Modern Law Review 427.

⁴⁶ Clive Walker, ‘The Treatment of Foreign Terror Suspects ’(2007) 70 Modern Law Review 427.

⁴⁷ Clive Walker, ‘The Treatment of Foreign Terror Suspects ’(2007) 70 Modern Law Review 427.

⁴⁸ Clive Walker, ‘The Treatment of Foreign Terror Suspects ’(2007) 70 Modern Law Review 427.

significant improvement since the negotiations between the Egyptian government in the *Hans El Sayed Sabaei case*⁴⁹. However there is still cause to argue that in the agreement reached with the UK and Jordan in August 2005, there are still ways that do not adequately protect the rights of the refugee, with no provisions being included for the recording of interrogations of the refugee, regular and independent medical checks by the means of an independent body conducting unannounced checks on the treatment of the refugee⁵⁰. In this agreement there was also still no specific guarantee that the death penalty would not be used. However, in an agreement signed between the UK and Libya in October of 2005, this was amended to include an assurance that the death penalty would not be considered for the refugee in question⁵¹.

Since the 1990s, even though attempts at diplomatic assurances have been shown to have made significant improvement, there has still been some failed attempts at trying to agree terms in a diplomatic assurance. Cases that can illustrate this are the cases of *Ahmed Agiza and Mohammed Al-Zari v Sweden*⁵². These Asylum Seekers were deported from Sweden to Egypt, following assurances given by the Egyptian Government that they would not be subjected to torture and ill-treatment and would not be sentenced to the death penalty. After they were deported both men reported to the UN that they have been subjected to torture and ill-treatment, even with the diplomatic assurance agreed between the two governments. The UN committee found that that the Swedish Government had been in breach of their obligations to the refugees⁵³. When analysing the problems that lie within this case, it is important to note that simple assurances and promises with no safeguards on how to keep check on the assurance, are simply not effective.

However, despite the issues of the various cases on diplomatic assurance, it is still argued that they should not be disregarded⁵⁴. The use of diplomatic assurances may serve wider policy goals in setting standards in foreign countries for issues of human rights. Taking this into account, it would be problematic to state that there are no circumstances where the use of a diplomatic assurance can not be used in gaining protections for a refugee's article 3

⁴⁹ Clive Walker, 'The Treatment of Foreign Terror Suspects' (2007) 70 Modern Law Review 427.

⁵⁰ Clive Walker, 'The Treatment of Foreign Terror Suspects' (2007) 70 Modern Law Review 427.

⁵¹ Clive Walker, 'The Treatment of Foreign Terror Suspects' (2007) 70 Modern Law Review 427.

⁵² Ahmed Agiza and Mohammed al-Zari v Sweden CAT/C/34/D/233/2003, 24 May 2005.

⁵³ Clive Walker, 'The Treatment of Foreign Terror Suspects' (2007) 70 Modern Law Review 427.

⁵⁴ Clive Walker, 'The Treatment of Foreign Terror Suspects' (2007) 70 Modern Law Review 427.

rights as there are cases within the UK that show successful diplomatic assurances in use. The following case example of *Othman (Abu Qatada) v United Kingdom* shows that assurances can be gained, even though there are still questions as to the effectiveness of the assurance in this case and generally.

Othman (Abu Qatada) v United Kingdom

The *Abu Qatada case*⁵⁵ shows the serious negotiations that the United Kingdom took over 11 years to establish that the use of a diplomatic assurance in this case would be an effective way of protecting any breach of article 3 that may occur in Jordan⁵⁶. The case of Abu Qatada was generally the first case which asked a court to consider and appraise the reliability of diplomatic assurances⁵⁷. After 10 years of repeated failed attempts by the United Kingdom to deport Mr Omar Othman to Jordan, on the 17th January 2012, the European Court of Human Rights once again determined that the deportation of him would amount to violations of his human rights, but they also stated that his return to Jordan would not expose him to a real-risk of ill-treatment, therefore for that reason his return would not violate his rights under the convention⁵⁸. As a result, Theresa May, who was the Home Secretary at the time attempted to gain reassurances from Jordan⁵⁹.

These assurances were brought before the Special Immigration Appeal Commission (SIAC) who again were not satisfied with the protections and the assurances obtained by the United Kingdom and Jordan⁶⁰. After this decision the Home Secretary tried to overturn SIAC's decision however this failed⁶¹. However, a final decision was made on 7th July 2013 with Abu Qatada agreeing to return to Jordan following ratification of the diplomatic

⁵⁵ *Othman (Abu Qatada) v. the United Kingdom* -8139/09

⁵⁶ Mariagiulia Giuffré, 'An Appraisal of Diplomatic Assurances One Year after *Othman (Abu Qatada) v United Kingdom* (2012)' (2013) 2 International Human Rights Law Review 266.

⁵⁷ Mariagiulia Giuffré, 'An Appraisal of Diplomatic Assurances One Year after *Othman (Abu Qatada) v United Kingdom* (2012)' (2013) 2 International Human Rights Law Review 266.

⁵⁸ Mariagiulia Giuffré, 'An Appraisal of Diplomatic Assurances One Year after *Othman (Abu Qatada) v United Kingdom* (2012)' (2013) 2 International Human Rights Law Review 266.

⁵⁹ Mariagiulia Giuffré, 'An Appraisal of Diplomatic Assurances One Year after *Othman (Abu Qatada) v United Kingdom* (2012)' (2013) 2 International Human Rights Law Review 266.

⁶⁰ Mariagiulia Giuffré, 'An Appraisal of Diplomatic Assurances One Year after *Othman (Abu Qatada) v United Kingdom* (2012)' (2013) 2 International Human Rights Law Review 266.

⁶¹ Mariagiulia Giuffré, 'An Appraisal of Diplomatic Assurances One Year after *Othman (Abu Qatada) v United Kingdom* (2012)' (2013) 2 International Human Rights Law Review 266.

assurance and entry into a “mutual legal assistance agreement” between the United Kingdom and Jordan⁶². The court was satisfied that the final agreement and assurances obtained by the United Kingdom and Jordan were acceptable given: the strong relationships between the two countries, the high degree of formality, assurances were given in good faith, assurances were given at the highest level, in this situation the King⁶³.

Various Human Rights Organisations have argued that in cases with similar circumstances, the use of diplomatic assurances should not be used in the risk assessment of return decisions. They argue that diplomatic assurances should never be used with countries that are known for their widespread use of torture⁶⁴. Even though these assurances are known to be legally permissible and are known to reduce the risk of refoulement. However, arguments have been made as to the effectiveness of the assurances in practice due to the fact that torture is not likely to be disclosed, and mostly likely to remain as secretive as possible. The ‘unsafe nature of a diplomatic assurance has been criticised by Mariagiulia Giuffrè by her saying “Even if assurances are phrased in very specific terms with the activation of mechanisms to monitor compliance, I believe they cannot be considered reliable in this context where torture is pervasive”⁶⁵. This seems to contradict the decision of the European Court of Human Rights in this case. So, it can be argued that diplomatic assurances are better in theory than in practice.

Analysing diplomatic assurances

There are many reasons not to trust diplomatic assurances in cases where countries have a history of using torture. Overall, these assurances could be seen as empty promises that are unenforceable and unreliable⁶⁶. Many are also worried about the fact that they are

⁶² Mariagiulia Giuffrè, ‘An Appraisal of Diplomatic Assurances One Year after Othman (Abu Qatada) v United Kingdom (2012) ’(2013) 2 International Human Rights Law Review 266.

⁶³ Mariagiulia Giuffrè, ‘An Appraisal of Diplomatic Assurances One Year after Othman (Abu Qatada) v United Kingdom (2012) ’(2013) 2 International Human Rights Law Review 266.

⁶⁴ KR Hawkins, ‘The Promise of Torturers: Diplomatic Assurances and the Legality of Rendition ’(2006) 20 (2) Georgetown Immigration Law Journal.

⁶⁵ Mariagiulia Giuffrè, ‘An Appraisal of Diplomatic Assurances One Year after Othman (Abu Qatada) v United Kingdom (2012) ’(2013) 2 International Human Rights Law Review 266.

⁶⁶ Derek McGhee, ‘Deportation, Detention & Torture by Proxy: Foreign National Terror Suspects in the UK ’(2008) 29 Liverpool Law Review 99.

trusting 'habitual torture states' not to torture⁶⁷. The European Council Commissioner for Human Rights has suggested that the weakness of diplomatic assurances is the fact there is need for a need for diplomatic assurances in the first place⁶⁸. If the United Kingdom was sure that these states were a safe state to return a refugee, why would there be any need to gain an assurance from them⁶⁹.

With cases like *Hans El Sayed Sabaei v Home Office*⁷⁰, where a historically known "habitual torture state" refused to agree to any assurances as to not torture the refugee upon their return due to their membership of the UN and wanted it to be accepted on face value, why should any assurance be trusted that a returning refugee's rights would be upheld⁷¹. However, with using diplomatic assurance between countries, it may be possible that these states would be more concerned about the scrutiny and damage of diplomatic relationships if a breach occurs⁷², which is like the argument and later acceptance of the deportation order in *Abu Qatada*. The Home Office have also commented that they would only enter into a diplomatic assurance with countries that they are sure will comply, but it could also be argued that it matters less on the legal status of the diplomatic assurance but more of the financial penalties or diplomatic good will they would lose if they failed to comply with the assurances⁷³. It is also arguable that to make the matter one of diplomatic relationships between two states means that the emphasis is no longer on the Human Rights, meaning that there are questions to that fact that the reporting may not solely be on the lack of regard to the refugees human rights it is instead going to focus of the fact that this country has broken a diplomatic agreement. Meaning that the Human Rights issues of a country is not going to be talked about as often or is not going to be the sole thing that will be reported on, this can be shown as it is states that "the acts of negotiation and compromise that characterise diplomacy can undermine straightforward and assertive human rights

⁶⁷ Derek McGhee, 'Deportation, Detention & Torture by Proxy: Foreign National Terror Suspects in the UK '(2008) 29 Liverpool Law Review 99.

⁶⁸ Derek McGhee, 'Deportation, Detention & Torture by Proxy: Foreign National Terror Suspects in the UK '(2008) 29 Liverpool Law Review 99.

⁶⁹ Kate Jones, 'Deportation with Assurances: Addressing Key Criticisms '(2008) 57 International and Comparative Law Quarterly 183.

⁷⁰ *Hans El Sayed Sabaei v Home Office* [2015] EWHC

⁷¹ Clive Walker, 'The Treatment of Foreign Terror Suspects '(2007) 70 Modern Law Review 427.

⁷² Kate Jones, 'Deportation with Assurances: Addressing Key Criticisms '(2008) 57 International and Comparative Law Quarterly 183.

⁷³ Kate Jones, 'Deportation with Assurances: Addressing Key Criticisms '(2008) 57 International and Comparative Law Quarterly 183.

protection”⁷⁴. Could it be argued in this way that trying to negotiate Human Rights protection for refugees in the way of a diplomatic assurance has made the human rights issues a less prominent and less important discussion. If this is the case how far does a diplomatic assurance go to be an effective way to protect the rights of a refugee. The cases above argue to the fact that diplomatic assurance is not as effective as the UN or the Convention requires it to be.

To assess whether a diplomatic assurance is unreliable, the court in *Y v SSHD*⁷⁵ has since concluded that assurances must be assessed based on the facts of each case entirely on their own⁷⁶, as it would be unreasonable to assume that every diplomatic assurance, would be unreliable. As in the cases of *Chahal* and *Mamatkulov v Turkey*, there is an acknowledgment that the use of diplomatic assurances can actively reduce the risk of a breach of article 3 under the threshold level⁷⁷. However, the European Court of Human Rights in *MT (Algeria)*⁷⁸ acknowledged the fact that diplomatic assurances by themselves are not effective in reducing the risk of treatment that would breach Article 3⁷⁹. Instead, they stated that it would be the way in which the assurance was made that would bear more weight. Stating that if it included elements like discussions being held at the highest level, placing the assurances at the heart of the bilateral agreement. Considerable detail about what will happen on the return of the refugee and lastly independent monitoring arrangements to check of the status of the refugee in their home country⁸⁰. Since that ruling, the UK have tried to include this in each diplomatic assurance case.

However, a different view was taken entirely in the Libyan case of *DD&AS v SSHD*⁸¹, where SIAC did not accept the use of diplomatic assurances based on the Home Offices

⁷⁴ Clive Walker, ‘The Treatment of Foreign Terror Suspects ’(2007) 70 Modern Law Review 427.

⁷⁵ *Y (Sri Lanka) v SSHD* [2009] EWCA Civ 362

⁷⁶ Kate Jones, ‘Deportation with Assurances: Addressing Key Criticisms ’(2008) 57 International and Comparative Law Quarterly 183.

⁷⁷ Kate Jones, ‘Deportation with Assurances: Addressing Key Criticisms ’(2008) 57 International and Comparative Law Quarterly 183.

⁷⁸ *MT (Algeria)* [2007] EWCA Civ 808

⁷⁹ Kate Jones, ‘Deportation with Assurances: Addressing Key Criticisms ’(2008) 57 International and Comparative Law Quarterly 183.

⁸⁰ Kate Jones, ‘Deportation with Assurances: Addressing Key Criticisms ’(2008) 57 International and Comparative Law Quarterly 183.

⁸¹ *DD&AS v SSHD* Appeal No: SC/42 and 50/2005

assessment of the facts⁸². SIAC agreed that the diplomatic assurance was made based of the good faith of both of the parties, with both having genuine interests to comply⁸³. With instructions on how the refugees would be treated upon return. However, in SIAC's view in this case there was more of a real risk that the position could change upon return of the refugee⁸⁴. Especially if the refugee once again threatened the leadership in the country. As a result of this SIAC disregarded the use of a diplomatic assurance as they thought there would be a real risk of treatment in breach of the refugee's article 3 right⁸⁵.

It would be arguable to conclude that it would be impossible to monitor and verify compliance with the assurance, because torture is likely to take place in secret, while using methods that would be hard to detect⁸⁶. Even if a monitoring body is used to verify this will not be a sufficient to detect any torture⁸⁷. Refugees would also be too scared or silenced into speaking out against any torture with risk to what would happen to their families. From this is could be reasonable to assume that many people would not feel comfortable speaking to the monitor⁸⁸. The majority of these people are coming to places like the United Kingdom in order to claim asylum due to the violence and persecution that they have faced previously in the same home country. It is questionable to assume that assurances made will totally reverse how that refugee is treated in the same country. Because of this any breach of an assurance is likely to pass unreported because it is not in the country interest to find a breach can be seen as violating the assurance.

The Rwanda Judgment and what that means for diplomatic assurances today

⁸² Kate Jones, 'Deportation with Assurances: Addressing Key Criticisms '(2008) 57 International and Comparative Law Quarterly 183.

⁸³ Kate Jones, 'Deportation with Assurances: Addressing Key Criticisms '(2008) 57 International and Comparative Law Quarterly 183.

⁸⁴ Kate Jones, 'Deportation with Assurances: Addressing Key Criticisms '(2008) 57 International and Comparative Law Quarterly 183.

⁸⁵ Kate Jones, 'Deportation with Assurances: Addressing Key Criticisms '(2008) 57 International and Comparative Law Quarterly 183.

⁸⁶ Kate Jones, 'Deportation with Assurances: Addressing Key Criticisms '(2008) 57 International and Comparative Law Quarterly 183.

⁸⁷ Kate Jones, 'Deportation with Assurances: Addressing Key Criticisms '(2008) 57 International and Comparative Law Quarterly 183.

⁸⁸ Kate Jones, 'Deportation with Assurances: Addressing Key Criticisms '(2008) 57 International and Comparative Law Quarterly 183.

During 2023 there was an important ruling in relation to how diplomatic assurances are still viewed today. The United Kingdom Government attempted to gain access for all refugees to be deported out of United Kingdom to have their asylum cases be heard and decided in Rwanda. During their judgment in Nov 2023 the Supreme Court held that this was unlawful⁸⁹.

The Law Society has previously questioned the compatibility of the policy with the refugee convention and the Human Rights Convention⁹⁰. The court found that there were substantial grounds for believing that asylum-seekers sent to Rwanda would face a real risk of ill-treatment, in breach of their Article 3 rights, that are written under the convention⁹¹. The court also concluded that this treatment would be in result of refoulement, which is prohibited by the Human Rights Convention⁹².

Conclusion

The Rwanda Judgment and other cases of diplomatic assurances shows that during the 30 years that the United Kingdom has tried to find a way to implement diplomatic assurances as an effective means of deporting refugees in a way that can both balance Human Rights obligations and then also the safety and security obligation of the country. Is one that can never be safely assumed to be one hundred percent effective. This is due to the uncertain and untimely unenforceable nature of a diplomatic assurance in torture cases. Even with implementing certain safeguards features in theory. The secretive practice of torture is one that means that in practice diplomatic assurances are in reality not as an effective as they should be to protect a refugees Human Rights.

⁸⁹ Law Society, 'Supreme Court Ruling End of the Line for Rwanda Policy' (www.lawsociety.org.uk 15 November 2023) <<https://www.lawsociety.org.uk/contact-or-visit-us/press-office/press-releases/supreme-court-ruling-end-of-the-line-for-rwanda-policy>> accessed 7 January 2024.

⁹⁰ Law Society, 'Supreme Court Ruling End of the Line for Rwanda Policy' (www.lawsociety.org.uk 15 November 2023) <<https://www.lawsociety.org.uk/contact-or-visit-us/press-office/press-releases/supreme-court-ruling-end-of-the-line-for-rwanda-policy>> accessed 7 January 2024.

⁹¹ Sir Johnathan Jones, 'The Supreme Court's Rwanda Verdict and Rishi Sunak's Response: What Happens Next?' (*Institute for Government* 16 November 2023) <<https://www.instituteforgovernment.org.uk/comment/supreme-court-rwanda-rishi-sunak-response>>.

⁹² Sir Johnathan Jones, 'The Supreme Court's Rwanda Verdict and Rishi Sunak's Response: What Happens Next?' (*Institute for Government* 16 November 2023) <<https://www.instituteforgovernment.org.uk/comment/supreme-court-rwanda-rishi-sunak-response>>.

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