Intelligence Services Commissioner

Report of the Intelligence Services Commissioner

Supplementary to the Annual Report for 2015

The Rt Hon Sir Mark Waller

Concerns raised by the Intelligence and Security Committee of Parliament about the government's responsibilities in relation to partner counter-terrorism units overseas

Presented to Parliament pursuant to section 60(4) of the Regulation of Investigatory Powers Act 2000

Ordered by the House of Commons to be printed 15 September 2016

Laid before the Scottish Parliament by the Scottish Ministers 15 September 2016

HC 458
SG/2016/95

Intelligence Services Commissioner

Report of the Intelligence Services Commissioner

Supplementary to the Annual Report for 2015

The Rt Hon Sir Mark Waller

Concerns raised by the Intelligence and Security Committee of Parliament about the government's responsibilities in relation to partner counter-terrorism units overseas

Presented to Parliament pursuant to section 60(4) of the Regulation of Investigatory Powers Act 2000

Ordered by the House of Commons to be printed 15 September 2016

Laid before the Scottish Parliament by the Scottish Ministers 15 September 2016

HC 458
SG/2016/95

This publication is available at www.gov.uk/government/publications and www.intelligencecommissioner.com

Any enquiries regarding this publication should be sent to info@iscom.gsi.gov.uk

Print ISBN 9781474135559
Web ISBN 9781474135566

ID 30061602 09/16

Printed on paper containing 75% recycled fibre content minimum

Printed in the UK by the Williams Lea Group on behalf of the Controller of Her Majesty's Stationery Office

CONTENTS

I. INTRODUCTION

1. Terms of reference

1.1 This report has its origins in the brutal murder of Fusilier Lee Rigby of the Royal Regiment of Fusiliers in Artillery Place, Woolwich on 22 May 2013.

1.2 Before going any further, I would wish publicly to acknowledge Fusilier Rigby's service to his country and to join countless others in extending my deepest condolences and sympathies to his family and friends for their loss.

1.3 Two British nationals, Michael Adebolajo and Michael Adebowale, were convicted of the murder on 19 December 2013 and sentenced to life imprisonment on 26 February 2014. At the time of the offence, they were aged 28 and 22 respectively.

1.4 On 25 November 2014, the Intelligence and Security Committee of Parliament ("the ISC") published the open version of its *Report on the intelligence relating to the murder of Fusilier Lee Rigby* (HC 795) ("the ISC report").[1]

1.5 Although the ISC ultimately found that the intelligence services could not have foreseen or prevented the murder it did express concerns about, amongst other things, their response to Mr Adebolajo's arrest in and return from Kenya in November 2010 and his subsequent allegations of mistreatment.[2] These allegations may have related to the conduct of one or more Kenyan counter-terrorism units which work closely with those services, including a unit for which HM government ("HMG") bears some responsibility (referred to in the ISC report and below as "Arctic").

1.6 On 27 November 2014, the Prime Minister announced that he had asked me to examine the concerns raised by the ISC on "the government's responsibilities in relation to partner counter-terrorism units overseas".[3] In doing so, the Prime Minister expressly referred to the ISC's criticisms of the way in which the Secret Intelligence Service ("SIS")[4] responded to Mr Adebolajo's allegations of mistreatment and confirmed that I would have full access to the materials referred to in its report. He asked me, so far as

1 Unfortunately, the initials "ISC" also stand for Intelligence Services Commissioner and so the abbreviation "ISCP" is sometimes used to differentiate my office and the Intelligence and Security Committee of Parliament. I have no need to refer to myself in this report and so have used the shorter abbreviation for the Committee.

2 These issues were not central to or the focus of the ISC investigation or its report.

3 Although the ISC's concerns were raised specifically in connection with Arctic (undoubtedly one of the UK's "partner counter-terrorism units overseas"), another Kenyan counter-terrorism unit was also involved and the lessons arising from this case apply with equal force to various different types of "partnership" for these purposes.

4 Colloquially known as "MI6".

possible, to cover the subject in my next annual report, but it was not possible to meet that objective and I have therefore prepared this report as a supplement to my *Annual Report for 2015* (HC 459).

2. Concerns raised by the ISC

2.1 So far as relevant for the purposes of my review, the ISC concluded that aspects of the intelligence services' response to Mr Adebolajo's arrest, detention and allegations of mistreatment in Kenya were inadequate. In particular, the ISC report was critical of SIS and identified the following shortcomings[5]:

(1) **Arrest**

a failure to record or act on relevant information about a British citizen attempting to travel from Kenya to Somalia to join Al-Shabaab which (the ISC believed) might have related to Mr Adebolajo's travel plans and been available before his arrest (paragraphs 56-60 "Adebolajo's Arrest in Kenya", recommendation G);

(2) **Detention**

a failure to have a sufficient interest and involvement in Mr Adebolajo's case during his detention (paragraph 16(viii) "Jihadi tourism", paragraphs 61-64 "SIS Involvement: Operational Lead", recommendation H); and

(3) **Treatment**

a failure to investigate, assess and notify ministers of Mr Adebolajo's allegations (paragraphs 65-71 and 461-499 "Adebolajo's Return to the UK" and "Allegations of Mistreatment", recommendations ZZ and AAA-GGG).

2.2 On announcing my review on 27 November 2014, the Prime Minister also announced that he was formalising my (hitherto non-statutory) function of reviewing compliance with HMG's *Consolidated Guidance to Intelligence Officers on the Detention and Interviewing of Detainees* dated 6 July 2010 ("the Consolidated Guidance").[6] He did this by issuing the Intelligence Services Commissioner (Additional Review Functions) (Consolidated Guidance) Direction 2014 under section 59A of the Regulation of Investigatory Powers Act 2000.[7]

---

5 The ISC report, paragraphs 497-498 also expressed some concerns about the response of the Foreign and Commonwealth Office saying its response to Mr Adebolajo's allegations, "seems insufficient, particularly when set against the firm commitments made by the Foreign Secretary regarding the mistreatment of detainees by partners overseas".

6 The full title is, *Consolidated Guidance to Intelligence Officers and Service Personnel on the Detention and Interviewing of Detainees Overseas and on the Passing and Receipt of Intelligence Relating to Detainees*. Although described as a "government" publication, the Cabinet Office is the departmental publisher and "owner" (www.gov.uk/government/publications/uk-involvement-with-detainees-in-overseas-counter-terrorism-operations).

7 For a copy see my *Annual Report for 2014* dated 25 June 2015 (HC 225), Appendix 8.

2.3 Given that the Prime Minister referred to the above Direction in connection with his request that I undertake this review, and because he publicly linked both his request and the making of the Direction to the ISC's criticisms of the way in which SIS had handled Mr Adebolajo's allegations of mistreatment, my review has also covered those criticisms, compliance with the Consolidated Guidance in the context of this case and the adequacy and effectiveness of related HMG policies, procedures and practices.

2.4 An overview of the Consolidated Guidance is set out in part 10 below.

2.5 Although not subject to my statutory oversight or the Consolidated Guidance, the Metropolitan Police Service Counter Terrorism Command ("SO15") was involved in the underlying events and the ISC investigation, it has an important role in this area and it would have been artificial to exclude it from my review. Accordingly, following discussions with the Prime Minister's office and SO15, it was agreed that I should expand the scope of my review to cover the involvement of the latter.

3. Other concerns and allegations

3.1 I have further examined allegations that Mr Adebolajo was arrested and mistreated in Kenya by or at the request of HMG, possibly as part of an elaborate plan to recruit him as a covert agent, informant or human intelligence source ("agent"). Claims of this kind had previously been made and reported in the media[8], but I decided to include them within the scope of my review after they were put to me directly and in more detail by a reputable journalist who told me that they were supported by a credible and reliable "inside" source.

3.2 The gist of these allegations is that: Mr Adebolajo was under intelligence service surveillance before, during and after his travel to Kenya; the intelligence services conspired to bring about or were complicit in his arrest and mistreatment; and this was part of a planned prelude to a staged intervention whereby Mr Adebolajo would appear to be "rescued" by UK consular officers, leaving him feeling grateful to HMG and (by reason of this and the effects of the mistreatment) vulnerable to an attempt to recruit him as an agent.

3.3 Furthermore, I have become concerned about the effectiveness of SIS's engagement with both the ISC inquiry and my review and the implications for the discharge of our respective oversight functions more generally. I would immediately stress that I do not think that SIS or any of its staff sought to obstruct or mislead either investigation or otherwise engaged in any kind of "cover up". However, I have reviewed its written and oral evidence to the ISC on the issues covered in this report and consider that it

8 See the ISC report, paragraphs 117-125.

was far from satisfactory, largely because it was based on an inadequate search for and second-hand interpretation of corporate records, as opposed to proper consultation with the individuals directly involved. To a certain extent, these failings continued into my investigation and I think improvements are essential.

4. Matters falling outside the scope of my review

4.1 Having set out my remit, I think it important to make clear, for the avoidance of doubt, what I have not covered.

4.2 First, my role has not been to act on behalf of or as advocate for Mr Adebolajo. I have not had any contact with him and I make no comment on the causes of his radicalisation or what may have motivated him to commit such a crime, other than to say that I have seen no evidence to suggest any influence or responsibility on the part of the intelligence services. The purpose of and public interest in my review resides not in the pursuit or vindication of Mr Adebolajo's personal interests, but in ensuring the transparent accountability and oversight of SIS and the Security Service ("MI5") and the identification of related lessons and improvements.

4.3 Secondly, although the Foreign and Commonwealth Office ("FCO") and the Ministry of Defence ("MOD") co-operated fully with my review and provided documents and information at my request, the relevant parts of FCO fall outside my statutory remit and neither MOD nor any of HM armed forces had any involvement in the underlying events. Accordingly, I have refrained from commenting in detail on their conduct, policies, procedures or practices, save where directly relevant to my own terms of reference.

4.4 Thirdly, although my focus has been on the conduct of the relevant intelligence services, it should be noted that I have not sought to revisit their collection, assessment or handling of intelligence relating to Mr Adebolajo. These more general matters have already been thoroughly investigated by the ISC and I have therefore confined myself to one passing observation on this topic.[9]

4.5 Fourthly, and following on from this, the ISC investigated allegations that MI5 harassed Mr Adebolajo, attempted to recruit him as an agent and "freed" him from detention in Kenya so he could return to the UK and act as such.[10] The open version of the ISC report recorded that it found no evidence of any harassment of Mr Adebolajo or related wrongdoing by MI5, but explained that it would damage national security to make any further

9 See paragraph 16.22 below.

10 See the ISC report, paragraph 117. The ISC's investigation pursued the harassment and recruitment allegations, but did not go further into the allegation that MI5 had freed Mr Adebolajo from detention, no doubt because there was no evidence to support this.

public comment on claims that it had tried to recruit him.[11] I am in complete agreement that the public maintenance of a uniform and consistent "neither confirm nor deny" policy in relation to all issues of agent contact and recruitment is vital to the operational effectiveness of the intelligence services and, therefore, our national security. To the extent that I do touch on such issues, nothing in this report should be taken to go any further than did the ISC in commenting on whether SIS or MI5 recruited or attempted to recruit Mr Adebolajo as an agent.

4.6 I would add one caveat to this. Paragraphs 57, 62 and 117-125 of the open version of the ISC report confirm (correctly in my view) that: neither SIS nor MI5 knew that Mr Adebolajo was in Kenya prior to his arrest there; and SIS had the operational lead thereafter but no contact with him. Given this and the fact that the ISC could not conceivably have said what it did about SIS not engaging properly with the case if MI5 had been in direct contact with Mr Adebolajo at the same time, it seems to me that the ISC report has already confirmed that neither SIS nor MI5 contacted or attempted to recruit Mr Adebolajo *while he was in Kenya in 2010*.

5. Conduct of my review

5.1 In carrying out my review and preparing this report, I was assisted by independent counsel, Oliver Sanders, and my staff, in particular my Head of Secretariat, Susan Cobb. The government helpfully made additional resources available to facilitate the instruction of counsel and I am extremely grateful to it for this and particularly to Mr Sanders for all his hard work.

5.2 In terms of methodology, I have sought to adopt a non-adversarial, inquisitorial approach and, save where otherwise indicated, I have made findings by applying the "balance of probabilities" standard of proof used in civil courts and tribunals. In other words, I have sought to answer questions of fact by asking myself what is more likely than not to have happened.

5.3 Although the process was not without some difficulty, I ultimately received full co-operation from all concerned in gathering relevant evidence and materials and was extremely grateful for this:

(1) I was provided with relevant extracts from:

(a) the unredacted, closed version of the ISC report;

(b) the supporting primary materials and written evidence supplied to the ISC by SIS, MI5 and SO15; and

(c) transcripts of the oral evidence given to the ISC by witnesses from SIS, MI5 and SO15.

11 See the ISC report, paragraphs 117-125 and recommendation L.

(2) I also requested and was provided with further primary materials and written information from SIS, MI5, SO15, FCO and MOD. In this regard, SIS and MI5 carried out electronic searches of their records using search terms provided by me, allowed me to inspect the results and supplied copies of anything relevant.[12] The intelligence services and government departments are required to provide me with such assistance by section 60(1) of the Regulation of Investigatory Powers Act 2000, but, as already mentioned, SO15 did so voluntarily and I was particularly grateful for this.

(3) Mr Sanders and Ms Cobb met representatives of SO15.

(4) Together with Ms Cobb, I interviewed the key SIS personnel involved in 2010 (referred to below as "Desk Officer 1" and "Intelligence Officers 1-3"). Prior to these interviews taking place, SIS told me that Desk Officer 1 and Intelligence Officers 1 and 3 objected to Mr Sanders being present and so he did not attend. I have since been told by SIS that this objection in fact came from its senior management. I very much regret that this was not made clear to me at the time as I would have challenged it. No objection was raised by or in relation to Intelligence Officer 2 and Mr Sanders attended his interview accordingly. The fact that one officer was prepared to give up his time for this purpose, notwithstanding that he has left SIS, was particularly commendable. For the avoidance of doubt, I am quite satisfied that all the individuals I spoke to did their best to answer all my questions honestly and truthfully and to assist with my enquiries. None of them had a perfect recollection of events and there were certain matters they each could not remember, but this was understandable and inevitable and I certainly did not find it suspicious. Indeed, I would have been more concerned if they had all said precisely the same thing or if any of them had purported to remember every single detail of events from such a long time ago.

(5) My team also corresponded with the abovementioned journalist, carried out additional research and made enquiries using various contacts and open sources, particularly when obtaining and reviewing relevant media reports.

(6) The Sub-Saharan Africa Team of MOD's Defence Intelligence Assessment Staff very kindly produced the maps of Kenya at Annex C. I was extremely grateful to it for this assistance because a clear understanding of the relevant geography and the distances involved is important, particularly the respective locations of the Kenyan capital, Nairobi, the south-eastern coastal city of Mombasa and the north-eastern Lamu Archipelago.

12 For a log of the search terms run by SIS, see Annex F below.

5.4 As will be seen, there are points at which I have doubted or disagreed with some of the findings and conclusions in the ISC report and some of what I was told by the intelligence services and the individuals I interviewed. There are a variety of reasons for this – from mistaken recollections, to differences of opinion and interpretation – but I would emphasise that I do not think that any of the organisations or individuals involved in 2010 deliberately gave me erroneous information or otherwise sought to mislead me.

5.5 So far as concerns the ISC report, I would also emphasise that our respective investigations had very different remits and approaches and that I obtained and reviewed a much greater volume of material relevant to the specific subject matter of my review. I was able to take the ISC report as my starting point and then pursue much more targeted and focused lines of enquiry by reference to its findings. Accordingly, I think it unsurprising that our respective investigations came to somewhat different findings and conclusions *on the relatively narrow set of issues dealt with below*. Crucially, the ISC considered it arguable that the Consolidated Guidance did not apply in connection with Mr Adebolajo's detention in Kenya and it did not seek to address any questions of compliance or non-compliance in its report.[13] By contrast, I have formal oversight of the Consolidated Guidance, I am quite clear that it *did* apply and was not followed in this case and I have therefore addressed the issue of compliance in detail below.

5.6 As a matter of form, I have power to make two types of report to the Prime Minister under section 60 of the Regulation of Investigatory Powers Act 2000: annual reports under section 60(2) which are laid before Parliament and published in accordance with section 60(4)-(5); and other *ad hoc* reports under section 60(3) which need not be laid before Parliament or published. As the Prime Minister asked me to report on this review in my next annual report, so far as possible, I have always understood that this report would be laid before Parliament and published and I have therefore prepared it as a supplement to my *Annual Report for 2015* for the purposes of section 60(2) and (4)-(5).

5.7 On this basis, I have sought to produce a non-confidential report suitable for open publication to the greatest extent possible. In many ways, this report goes further in detailing the work of the intelligence services than previous such reports. This has proved inevitable given the particular subject matter. In the context of this review, it was not possible to report on "HMG's responsibilities in relation to partner counter-terrorism units overseas" without making reference to the partnerships and units in question. Similarly, the Consolidated Guidance is addressed to intelligence officers and its application partly depends on the steps they take in seeking, obtaining and assessing the reliability of assurances given "by partner

13 Paragraphs 466-469.

counter-terrorism units overseas". It was not possible to report on compliance with the Consolidated Guidance and related HMG policies, procedures and practices without addressing the involvement of intelligence officers in seeking, obtaining and assessing such assurances.

5.8 That said, I inevitably reviewed a considerable volume of very sensitive and highly classified materials in conducting this review and am obliged to treat their contents with considerable caution. While remaining mindful of the very strong public interest in transparency and accountability in relation to the subject matter of this review, particularly given the circumstances of Fusilier Rigby's murder and the concerns raised by the ISC, I have therefore sought to omit from the main body of my report any information whose publication could reasonably be expected to compromise sources of intelligence or the operational effectiveness of the intelligence services and/or breach legal restrictions or obligations of confidence. I have instead included any information of this kind in footnotes and a small number of confidential annexes.[14] The relevant footnotes will be overtly redacted in the open version of this report and the confidential annexes will be omitted. The Prime Minister will, of course, have access to the full, unredacted text.

5.9 I shared a draft of this report with the ISC, SIS, MI5, SO15, FCO, MOD and the Cabinet Office on a confidential basis and gave each of them an opportunity to comment on its contents and sensitivity and the matters which should be redacted or omitted from the open version. Having considered their responses and consulted as necessary with those concerned and the Prime Minister's office, I am satisfied that the main body of this report, the open footnotes and the open annexes are suitable for publication.[15] For the avoidance of doubt, I have not redacted or omitted any material from the open version of this report in order to avoid embarrassment to or protect the reputation of any individual or organisation. The final decision on publication rests with the Prime Minister under section 60(4)-(5) of the Regulation of Investigatory Powers Act 2000.

5.10 Once this report was in near final draft form, I met and discussed its contents in outline with, on separate occasions, the Independent Reviewer of Terrorism Legislation, David Anderson QC and the Chairman of the ISC, the Rt Hon Dominic Grieve QC MP and I am very grateful to both for their time and assistance.

5.11 Finally, prior to publication of the open version of this report and in liaison with the SO15 family liaison team, I also engaged with representatives of

14 The confidential annexes detail: a *dramatis personae* giving real names and designations of sensitive personnel and organisations (Annex E); electronic search terms applied by SIS at my request (Annex F); and relevant correspondence and documentary materials (Annex G).

15 The open annexes include: a glossary of abbreviations (Annex A); a chronology of events (Annex B); and two maps of Kenya, one small scale showing the country as a whole and one large scale showing the region where Mr Adebolajo was first arrested and detained (Annex C).

Fusilier Rigby's family in order to offer them advance sight of the open version of this report and an opportunity to discuss its contents.

6. Summary of key findings, conclusions and recommendations

Mr Adebolajo was not the victim of a conspiracy, torture or mistreatment

6.1 A full chronology of events appears at Annex B below, but it may help to make clear at the outset that I found that Mr Adebolajo was most definitely not the subject of an intelligence services conspiracy and that his allegations of mistreatment at the hands of the Kenyan authorities were probably untrue. Indeed, I think it highly unlikely that Mr Adebolajo was mistreated by any of the Kenyan police or intelligence units which work with HMG and I certainly do not think that he was mistreated by Arctic.

The response of MI5 and SIS to the arrest and detention was generally good

6.2 I found that the intelligence services did not have available to them, and therefore did not fail to record or act upon, advance information about Mr Adebolajo's travel plans or his presence in Kenya.

6.3 Like the ISC, I also found that the intelligence services were not aware of or involved in Mr Adebolajo's arrest and, in addition to this, I found that there is no reason to think they should have been.

6.4 I found that SIS responded promptly and effectively to notification of Mr Adebolajo's arrest. It undertook and circulated the results of background intelligence checks on Mr Adebolajo, liaised with its Kenyan counterparts, helped arrange for SO15 to interview Mr Adebolajo on his return to the UK and kept consular officers at the British High Commission in Nairobi ("BHCN") up to date. I therefore do not share the ISC's criticism that SIS demonstrated a "deeply unsatisfactory" or "passive" approach to this case or a "lack of interest".[16] To my mind, the disruption of Mr Adebolajo's travel to Somalia represented an effective and satisfactory outcome which served the national security interests of the UK. It is important to remember that the intelligence services are easily criticised for failing to prevent wrongdoing, but rarely able to take credit for the many threats they do prevent. It is impossible to know what Mr Adebolajo might have gone on to do if he had been able to join and train with Al-Shabaab, but one cannot exclude the possibility that it might have been even worse.

16 See the ISC report, paragraphs 61-64.

The response of MI5 and SIS to the arrest and detention suffered from three key defects

6.5 I would highlight three problems with the performance of the intelligence services in connection with Mr Adebolajo's time in Kenya:

(1) Intelligence Officer 1 took a comment by one of his Kenyan counterparts as an indication that Mr Adebolajo had been arrested as the result of intelligence provided by an agent and, by a process of supposition, he came to the conclusion that he knew the identity of the agent. As it happens, there almost certainly was no agent and the arrest was largely the result of happenstance. However, when Intelligence Officer 1 wrote up his notes, he appeared to suggest that Kenyan liaison had told him expressly that intelligence from the agent triggered the arrest and he did not make it clear that this was in fact supposition on his part. The erroneous information about a Kenyan agent ultimately became embedded in and distorted the intelligence services' understanding of the case and may have influenced its prioritisation. In fact, the intelligence services had available to them, by early December 2010, intelligence reports from Arctic and another intelligence service which, first, suggested that Mr Adebolajo was not arrested as the result of agent reporting and, secondly, corroborated the belief that he *was* involved in extremism in Kenya. If Intelligence Officer 1 had more clearly caveated or qualified his original notes and/or if the intelligence services had reviewed their understanding of the case in the light of the abovementioned intelligence reports, they would have better understood the case and might have given it a different prioritisation.

(2) Although SIS claimed to the ISC and me that Intelligence Officers 1-2 sought and obtained assurances from the Kenyans as to the treatment of Mr Adebolajo while he was in custody, I am not satisfied that they did this, although I cannot rule it out. There is no contemporaneous documentary evidence to support this claim and SIS made it without consulting Intelligence Officer 1 at all and after consulting Intelligence Officer 2 only "briefly". I interviewed both officers and, although they both thought they should and would have sought such assurances, neither had any recollection of doing so or telling SIS that they did.

(3) I think the intelligence services had sufficient involvement with Mr Adebolajo's detention after being notified of his arrest to engage the provisions of the Consolidated Guidance. If, as may well have been the case, SIS did not then consider the risk that he would be the subject of unacceptable standards of detention or treatment and/or the need for related assurances, this would have represented a failure properly to apply the Consolidated Guidance. That said, I do not think there were any grounds *at the time Mr Adebolajo was in detention in Kenya* for

concluding that he *was* at a serious risk of being mistreated. Furthermore, I think the relevant Kenyan authorities would have given appropriate, reliable assurances about his treatment if they had been asked.

The response of UK consular officers to the arrest and detention was inadequate

6.6 Consular officers at BHCN failed to respond appropriately to notification of Mr Adebolajo's arrest. FCO policy required them to make contact within 24 hours, but they instead waited just under 30 hours and only spoke to Mr Adebolajo very briefly by telephone immediately before the latter's return to the UK. Indeed, they only made contact at that stage at the prompting of FCO in London and it was by then too late for them to offer any meaningful assistance or advice. Had these officials intervened appropriately while Mr Adebolajo was still in detention, it is likely that the UK authorities would have had available to them much better, contemporaneous information about his treatment in detention and that his allegations could have been pre-empted or disproved.

SO15 performed well in interviewing Mr Adebolajo and handling his allegations of mistreatment, but failed to pass on important information

6.7 Like the ISC, I found that SO15 conducted a thorough and effective interview of Mr Adebolajo on his return to the UK, appropriately recorded his allegations of mistreatment using a helpful questionnaire adapted from a UN template and then summarised these in a formal interview report which it (quite properly) passed on to MI5 and FCO for further action. However, I would make two criticisms of SO15. First, its report did not refer to or annex the questionnaire, leaving recipients unaware of the full detail of Mr Adebolajo's allegations and/or the availability of a record giving further details. Secondly, the questionnaire did not seek the latter's consent to the onward disclosure of his allegations, meaning FCO, applying its policy on such matters, was unable to pursue them with the Kenyan authorities unless and until such consent had been provided. The questionnaire contained important information (not summarised in the interview report) which strongly suggested that the allegations (even if true) were not directed towards any of the Kenyan police or intelligence units which work with HMG, least of all Arctic.

The response of SIS and (to a lesser extent) MI5 to the allegations of mistreatment was inadequate

6.8 Notification of Mr Adebolajo's allegations of mistreatment engaged the provisions of the Consolidated Guidance and the initial response of the intelligence services was prompt and effective and compatible with those provisions: between them, they obtained legal advice and attempted to instigate an investigation into the allegations.

6.9 However, unlike the ISC, I am unable to accept that the allegations *were* the subject of an "informal" assessment which was not properly recorded but which concluded that they were without foundation. (For the avoidance of doubt, I would, of course, agree with the ISC that such an assessment would not have been adequate in any event.)

6.10 In this regard, I found that a crucial email from SIS Head Office in London asking Intelligence Officer 3 to investigate the allegations was blocked by an unnecessarily hidden feature of its IT system. This was not known to any of those involved and so was not disclosed to or discovered by the ISC.

6.11 Had the email not been blocked, things may very well have turned out differently, but its blocking cannot excuse the serious failings which followed. In this regard, I found that the intelligence services thereafter failed to progress the matter at all, an appropriate assessment of Mr Adebolajo's allegations was never undertaken, the notification of senior managers and ministers was not considered and the Consolidated Guidance was not properly followed.

6.12 Although I am satisfied that a contemporaneous investigation of the allegations is likely to have shown that they were false and not directed towards any of HMG's Kenyan counter-terrorism partners in any event, this was a serious failing, particularly as it meant that the formal notification of ministers was not considered when it should have been.

The response of FCO to the allegations of mistreatment was inadequate

6.13 I found the quality of FCO's response to Mr Adebolajo's allegations of mistreatment somewhat mixed. It did attempt to make contact with Mr Adebolajo in order to seek his consent to pursuing the allegations with the Kenyan authorities. However, it did this in a very roundabout way and by means of a somewhat cryptic letter which Mr Adebolajo may not have understood.

6.14 Furthermore, FCO did not follow the matter up when Mr Adebolajo (perhaps understandably) failed to respond and his failure to respond inexplicably led to the allegation not being included in FCO's mistreatment list, reviewed by its mistreatment panel or (therefore) notified to its ministers.

The engagement of SIS with the investigations of the ISC and myself was wholly inadequate

6.15 Both the ISC and I experienced considerable frustrations with the approach of SIS to our investigations. In this regard, SIS demonstrated a troubling tendency to be defensive and unhelpful, it provided inaccurate and incomplete information and generally sought to "fence" with and "close down" lines of enquiry, rather than engage constructively. As already

indicated, I do not think this was done maliciously or with the intention of obstructing or misleading either investigation, but the effects were both significant and unsatisfactory.

6.16 The ISC criticised SIS for failing at the outset to disclose, amongst other things, Arctic's interview with Mr Adebolajo, the report of the same and the email sent by SIS Head Office requesting an investigation into his allegations.[17]

6.17 I eventually discovered that SIS had also failed to discover the blocking of that email and to disclose: the existence of alternative email accounts used by its personnel for non-operational correspondence; the full details of the arrangements in place for sharing intelligence with Arctic; and the existence of other relevant intelligence reports. In addition, SIS strongly implied to the ISC that it had consulted the personnel involved with the case when it had not consulted Intelligence Officer 1 at all and had spoken only "briefly" to Intelligence Officer 2. Despite this, SIS also asserted that Intelligence Officers 1-2 had sought and obtained assurances about Mr Adebolajo's treatment when neither of them has any recollection of doing so. Finally, SIS told me that Intelligence Officers 1-2 would have raised Mr Adebolajo's allegations with their Kenyan counterparts notwithstanding that they did not do so and it had previously said as much to the ISC.

6.18 Naturally, I found the above extremely unsatisfactory and consider that SIS urgently needs to review and improve its engagement with oversight investigations. By stark contrast, the ISC and I both found the engagement of MI5 constructive and helpful. There is no reason why SIS should not be able to follow suit.

Recommendations

6.19 Finally, I am recommending that HMG do the following, involving SO15 as necessary:

(1) review and consult third parties about the Consolidated Guidance with a view to addressing various issues highlighted below;

(2) review, clarify and regularise the role and functions of SO15's Counter Terrorism and Extremism Liaison Officers;

(3) review and amend the SO15 torture and inhuman treatment questionnaire to prompt an automatic attempt to obtain the consent of individuals to the onward disclosure and/or pursuit of allegations of mistreatment;

17 The ISC has told me that it was particularly critical of this because it sought and obtained assurances from each organisation that it had undertaken a thorough and comprehensive search for relevant information and materials.

(4) ensure, whether by software fix or as part of a planned upgrade, that the SIS IT system no longer blocks emails without alerting the sender;

(5) review the extent of the circulation of SIS intelligence reports, particularly from the perspective of the Data Protection Act 1998 and the Human Rights Act 1998; and

(6) consult internally on, produce and adopt a protocol for improving engagement with security and intelligence oversight investigations.

Post-script

6.20 Although I have found that the Consolidated Guidance was not properly followed in this case, it would not be fair to portray this as part of a more general pattern. This was a somewhat atypical case which emerged in the middle of a very busy period for the intelligence services. Its initial resolution was dynamic, rapid and, in my view, effective and the subsequent investigation of Mr Adebolajo's allegations of mistreatment began well enough before being rather blown off course by the hidden blocking of a crucial email. By contrast, my more general experience of intelligence service compliance with the Consolidated Guidance has been much more positive throughout my five and half years as Intelligence Services Commissioner: it is invariably taken very seriously and followed assiduously.[18]

18 See my *Annual Report for 2013* dated 26 June 2014 (HC 304), chapter 8 referring to and summarising the contents of a special, confidential *Report to the Prime Minister following publication of the Report of the Detainee Inquiry* (government request announced by the Rt Hon Kenneth Clarke QC MP on 19 December 2013, report dated 26 February 2014).

II. BACKGROUND

7. Political, diplomatic and operational context

7.1 In order to protect national security, our intelligence services are required, amongst other things, to monitor and disrupt links between UK extremists and terrorist organisations overseas.

7.2 Irrespective of the more recent emergence of the so-called "Islamic State" in Syria, Iraq and Libya, Islamist extremism in northeast Africa and the Arabian Peninsula has presented a considerable threat to the UK for some time. By 2010, the Al-Shabaab militia in Somalia was particularly active in radicalising, recruiting and training Islamist extremists and in carrying out and sponsoring terrorist activity there and elsewhere.

7.3 Al-Shabaab has posed serious problems in and for the UK and Kenya in particular. First, individuals wishing to join, train with and fight for Al-Shabaab, including potential recruits from the UK, have used Kenya as a gateway into Somalia notwithstanding the closure of their border in 2007. Secondly, and particularly since a joint Kenyan/Somali military operation against Al-Shabaab in October 2011, Al-Shabaab has launched a number of attacks against Kenya's citizens and authorities, most notably the atrocities at the Westgate Shopping Mall, Nairobi in September 2013, in Mpeketoni, Lamu County in June 2014 and at Garissa University in April 2015. Indeed, at the time of writing, the FCO is advising that the threat from terrorism in Kenya is high and that non-essential travel to areas within 60 km of the Kenya/Somalia border and/or Lamu County should be avoided.[19]

7.4 By reason of our shared history and values and various common interests, the UK and Kenya have forged close working relationships in the diplomatic, security, intelligence, military and law enforcement spheres. For a number of years, these have extended to counter-terrorism work and Kenya has become established as one of the UK's most important counter-terrorism partners in the region. One area of joint operational activity has been the detection and disruption of British nationals seeking to pursue extremism in Kenya and/or to use it as a staging post for onward travel to Somalia. In 2010, such individuals were often dealt with by means of a straightforward and effective procedure whereby the Kenyan authorities

19 The FCO travel advice for Kenya in place at the material time in November 2010 (as last updated on 11 November 2010) also rated the threat from terrorism in Kenya as "high" and advised against all but essential travel to within 30 km of the Kenya/Somalia border. For the avoidance of doubt, the FCO travel advice website makes clear that other areas are much safer and more than 100,000 Britons undertake trouble-free visits to Kenya each year.

would detain and deport on immigration grounds, after first revoking any relevant visa.[20]

7.5 Late 2010 was a time of particularly high threat in Kenya and the operational challenges and pressures facing the UK and Kenyan counter-terrorism authorities should not be underestimated. SIS and MI5 personnel in London and Kenya were working at full-stretch on a variety of fronts and the tempo and intensity of operations were very challenging. Indeed, Mr Adebolajo was one of a number of Britons in Kenya in late 2010 who were suspected of extremist activities and whose managed return to the UK was contemplated or implemented. SIS and MI5 had some oversight of or involvement in at least three such cases which I am aware of and I touch briefly on these below by referring to the subjects as "Person A", "Person B" and "Person C".[21] Although the details of these cases are not relevant, the general approach taken to them by the intelligence services is instructive and, in my view, of some reassurance.

7.6 It is also important to note that the Kenyan authorities were under scrutiny even before the intensification of the Al-Shabaab campaign in late 2011. The ISC report noted that Kenya's broader human rights record "had begun to decline towards the end of 2010" and "this had had consequences for security co-operation".[22] In particular, and as the ISC discovered, there was controversy after the Kenyan authorities facilitated the unlawful transfer from Kenya to Uganda of a number of suspects wanted in connection with the terrorist bomb attacks in Kampala during the World Cup final on 11 July 2010 which killed 76 people.[23] An internal FCO email relating to the arrest of Mr Adebolajo dated 23 November 2010 referred to this case in the following terms:

> *There's a local angle to this too as we were recently accused in the local press of complicity in the rendition of a Kampala bombing suspect to Uganda (which we later put straight in the local press, as it was completely off track). So this one needs careful handling both on the UK side and in Kenya, so prudent to prepare some lines.*

20 See paragraphs 9.6-9.7 below. At that time, Kenya did not have any specific counter-terrorism legislation or terrorism-related offences and so this route often represented a more straightforward alternative to prosecution. See now the Kenyan Prevention of Terrorism Act 2012.

21 [text omitted – see report, paragraph 5.8].

22 Paragraphs 481-484.

23 See the decision of the Kenyan High Court ruling that the transfers were unlawful, *Zuhura Suleiman (on behalf of Mohamed Suleiman) v (1) Commissioner of Police, (2) Commandant of the Anti-Terrorism Police Unit, (3) Attorney General of the Republic of Kenya* (judgment of Muchelule J dated 30 September 2010). See also the related decisions of our Divisional Court and Court of Appeal in *R (Omar) v Foreign Secretary* [2013] EWCA Civ 118, [2014] QB 112, [2012] EWHC 1737 (Admin), [2013] 1 All ER 161 (DC).

7.7 An internal MI5 briefing note dated 6 December 2010 prepared for its Director General in advance of a meeting with his Kenyan counterpart said:

> *Kenya has no [counter-terrorism] legislation. A suspect can be held for only 24 hours. There is no crime of planning an attack, membership of terrorist organisations, radicalisation, terrorist training etc. In the absence of this legislation, the Kenyan State are forced to act illegally (detaining in secret for long periods; rendering to other jurisdictions).*

7.8 The legislative position has now changed and there is no suggestion that HMG participated in any illegal activities, but this is plainly a very troubling statement.

7.9 I am very conscious of the need to bear the above background in mind when reviewing and perhaps criticising steps taken and records made on a single case when those involved were simultaneously juggling numerous other priorities. I am particularly mindful of the fact that Mr Adebolajo's case only appears more significant than the cases of Persons A-C in hindsight and because of what he went on to do. At the time, it was registered as one of a number of comparable cases and was approached by the intelligence services in much the same way. They cannot be criticised for this and it is important to measure their performance, and the recollections of busy staff, by reference to realistic and pragmatic standards. Nothing in this report should obscure the fact that the overall picture I gleaned was of committed and professional staff performing to a very high standard in extremely challenging circumstances.

8. UK authorities

8.1 The following domestic authorities were involved in this case:

(1) **The Secret Intelligence Service**

SIS was placed on a statutory basis by the Intelligence Services Act 1994 and is charged with obtaining and providing national security intelligence relating to the actions or intentions of persons overseas. SIS is thus responsible, working in consultation with MI5, for the conduct of overseas intelligence operations and for liaising with overseas intelligence services known as "liaison services". The key SIS personnel involved in this case were Desk Officer 1 and Intelligence Officers 1-2 and, in addition, Intelligence Officer 3 also had a more limited involvement. Desk Officer 1 was the operational lead for Kenya and Somalia in SIS Head Office in London and Intelligence Officers 1-3 were working on the ground in Kenya at the material time[24]:

24 [text omitted – see report, paragraph 5.8].

(a) Intelligence Officer 1 had particular responsibility for coastal and Mombasa issues;

(b) Intelligence Officer 2 had particular expertise in and experience of MI5 counter-terrorism investigations and was a primary point of contact with MI5 Head Office in London; and

(c) Intelligence Officer 3 was responsible for managing any SIS contribution to HMG's close working relationship with Arctic.

(2) **The Security Service**

MI5 was placed on a statutory basis by the Security Service Act 1989 and is charged with protecting national security, particularly against threats from terrorism, espionage, sabotage and actions intended to overthrow or undermine Parliamentary democracy. Amongst other things, MI5 leads on national security intelligence operations within the UK and liaison with domestic law enforcement authorities. MI5 personnel working at its Head Office in London were also involved in this case and the cases of Persons A-C.

(3) **SO15 Counter Terrorism and Extremism Liaison Officer ("CTELO")**

The SO15 International Operations Unit (known in 2010 as the International Liaison Section or "ILS") is responsible for UK co-operation with overseas law enforcement authorities on counter-terrorism.[25] As part of this, the Unit manages the CTELO scheme which began in 1989 and involves the deployment of senior police officers overseas under Home Office terms of reference most recently dated January 2015:

> *CTELOs are UK police officers posted overseas to engage in activity in support of our efforts against global terrorism and extremism, particularly in order to reduce the threat posed against the UK and UK interests abroad…*
>
> *The priority of every CTELO post will be to assist UK police and government departments in furthering their operational enquiries abroad, whether by evidential enquiries supported by international letters of request, by intelligence exchanges or by support to local police on operations of interest to the UK.*

The Horn of Africa CTELO involved with this case was under SO15 line management, but was physically located within BHCN. His principal point of contact within the Kenyan police was within the Kenyan counter-terrorism police unit referred to in paragraph 61 of the ISC

25 The International Operations Section operates under the International Police Counter Terrorism Board which is chaired by the Commander of SO15 and comprises representatives from SIS and MI5, the Office for Security and Counter Terrorism within the Home Office and the Counter Terrorism Department within FCO.

report ("ATPU").[26] SO15 provided the following summary of the CTELO's role:

> *In many of the cases where such activity, or existing capabilities, has resulted in an effective local partner organisation, the CTELOs mentor a local [counter-terrorism] law enforcement unit and work with [SIS] to plan, conceive and deliver operational disruptions abroad, including detention operations. The CTELOs also have a critical role in monitoring human rights compliance during the detention process of those operations mentored by UK agencies and police. This work comprises a crucial aspect of due diligence which is relied on heavily by SIS as part of its submission process under section 7 of the Intelligence Services Act [1994] and its assessment against the Consolidated Guidance.*
>
> *In this sense the police relationship with mentored units mirrors the SIS relationship with local intelligence partners. The operational work is a shared endeavour and human rights compliant disruption based on UK intelligence would, in many cases, be impossible without the police mentored units.*
>
> *This joint operational activity with SIS has achieved its most sophisticated realisation in east Africa, particularly Kenya and Somaliland, where our CTELOs are viewed as a crucial part of a broader multi-agency [effort].*

(4) **SO15 National Ports Office**

This part of SO15 is responsible for conducting "port stop" interviews under section 53 of and Schedule 7 to the Terrorism Act 2000 through police officers posted into "P Squad" as "ports officers". Under Schedule 7, police, immigration and customs officers have the power to stop, question, detain and search any person present at a UK port or border who is suspected of terrorism-related activity. To this end, individuals can be flagged for different types of possible "ports action" on the "Home Office Warnings Index", a United Kingdom Border Force database used by immigration and visa staff screening arrivals and visa applications.[27] Where a flagged individual passes through border control, P Squad may be alerted so that its officers can decide whether to conduct a port stop or take other action.

26 The ISC report, paragraph 61 referred to ATPU as the "Kenyan Police anti-terrorism unit" and "the unit responsible for conducting counter-terrorism policing in Kenya".

27 In 2010, the Home Office Warnings Index was maintained by the then United Kingdom Border Agency.

(5) **FCO**

As will be seen, consular and press officers at BHCN had some involvement in this case, as did staff within the FCO Consular Directorate and Counter Terrorism Department in London.

8.2 An informed reading of the surviving documentary materials from 2010 requires some understanding of the methods of communication and record keeping which were available to HMG and SO15 personnel in the UK and Kenya at the time. In this regard, various telephone and electronic messaging systems allowed the secure communication of sensitive and classified information. The following points should be noted about the systems available for transmitting emails to and from the SIS Intelligence Officers in Kenya at the time:

(1) **Classified emails**

The relevant personnel had access to computers which allowed them to send and receive electronic messages classified at CONFIDENTIAL, SECRET or TOP SECRET level. Classified outgoing and incoming messages were uploaded to and downloaded from this system each day and the way it worked meant that the identity of the individual sender or recipient needed to be clearly marked. If a message required immediate attention, SIS or MI5 Head Office would need to telephone the intended recipient to alert them. This system is no longer in use but, at the relevant time, it was cumbersome and, crucially, it discouraged written communication and led those involved to favour the telephone.

(2) **Lower level emails**

The same personnel also had access to less secure email systems capable of transmitting unclassified messages and those classified RESTRICTED (now known as OFFICIAL SENSITIVE). The accounts used by intelligence officers for these purposes, would not disclose their membership of an intelligence service and were not to be used for communications about operational or classified matters.

9. Kenyan authorities

9.1 So far as is relevant, and adopting the terminology used in my terms of reference, HMG dealt with two Kenyan "partner counter-terrorism units", namely, Arctic and ATPU.

9.2 Arctic is a Kenyan counter-terrorism intelligence unit which has a close working relationship with ATPU, the Kenyan National Intelligence Service

("NIS")[28] and HMG.[29] Although Arctic can and does act independently of HMG and without its knowledge, their relationship appears to be much closer in practice than some of the more formal, theoretical statements about it might suggest.[30] As might be expected, Arctic and HMG have mutually beneficial arrangements in place for the sharing of intelligence.[31]

9.3 As already mentioned, ATPU is a Kenyan counter-terrorism police unit equivalent to SO15 and its principal UK point of contact is the SO15 CTELO based in BHCN.

9.4 Much of the routine work that SIS undertakes with HMG's partner counter-terrorism units overseas is covered by general and class authorisations issued on a bi-annual basis by the Foreign Secretary under section 7 of the Intelligence Services Act 1994.[32] However, these do not authorise detention operations or other detainee-related work or the receipt of information in circumstances where SIS believes that this would encourage or lead to the mistreatment of a detainee.

9.5 Much like our intelligence services, NIS and Arctic have no powers of arrest or detention and ATPU is therefore called upon to carry out "executive action" in the security and intelligence context. Arctic officers may identify or locate the targets of such action (sometimes at the request of the UK or using our intelligence) and may interview them while they are in custody, but ATPU is the key authority from the detainee arrest and management perspective. Although ATPU's principal UK point of contact is the CTELO, there were occasions when SIS intelligence officers needed to communicate directly with the Kenyan police in order to discuss ATPU operations and/or seek assurances about the treatment of detainees. They did this via a senior Kenyan police officer who was able to speak on behalf of ATPU ("the SKPO").[33] It is clear from the evidence I have seen that conversations and meetings between SIS intelligence officers and the SKPO were not uncommon and when I talk about assurances being sought "from" or given "by" ATPU in this case, the relevant discussions were with the SKPO. Such communication was essential given ATPU's central role in detention operations and the fact the Consolidated Guidance is addressed to intelligence officers and requires that they obtain and undertake an informed assessment of assurances from detaining authorities.

---

28 Formerly known as the National Security Intelligence Service or "NSIS". See the Kenyan National Intelligence Service Act 2012 which replaced the Kenyan National Security Intelligence Service Act 1998.

29 [text omitted – see report, paragraph 5.8].

30 [text omitted – see report, paragraph 5.8].

31 [text omitted – see report, paragraph 5.8].

32 See my *Annual Report for 2014* dated 25 June 2015 (HC 225), Appendix 4, p.65.

33 The ISC report, paragraphs 62, 476 and 479 referred to "a senior Kenyan police officer" and I have used "the SKPO" solely for ease of reference – it is not a formal title or abbreviation used more generally by the UK or Kenyan authorities. [text omitted – see report, paragraph 5.8].

9.6 On 18 November 2010 (by chance, three days before Mr Adebolajo was arrested) Intelligence Officer 2 sent an email to Desk Officer 1 in SIS Head Office and to MI5 Head Office summarising the Kenyan laws and procedures on the arrest, detention and deportation of British nationals suspected of extremism. This detailed the power of the Kenyan authorities to revoke a visitor's visa and the consequences of revocation in terms of powers of arrest, detention and deportation. It also outlined the process whereby SIS and MI5 would work together on the identification of targets, HMG would work closely with Arctic on the planning of detention operations and, finally, Arctic would liaise with ATPU on the execution of the plans formulated. ATPU would carry out the arrest itself and then transfer the detainee to the Kenyan immigration authorities pending deportation.

9.7 In particular, Intelligence Officer 2's email confirmed that SIS personnel working in Kenya at the time and the CTELO would routinely seek and obtain assurances from ATPU (as the arresting and detaining authority) once the proposed operation had been approved by Arctic and before it was carried out. The email recorded, "Assurances have always been given and we are confident that ATPU adhere to our requests. [SIS] will not proceed with any arrest or deportation if assurances are not given". It also referred to "basic" and "tough" conditions of detention and "often overcrowded" cells but stressed that these were not "deliberate or designed to be coercive" and were "simply the norm in Kenya". Finally, the email stated that "terror suspects deported from Kenya appear to have established the practice of alleging mistreatment" and while these allegations are taken "very seriously" and investigated with the Kenyans, "this does appear to be a systematic attempt to disrupt our investigation".

10. Policies and procedures relevant to HMG co-operation with partner counter-terrorism units overseas

Overview

10.1 HMG has a well-established policy of compliance with the absolute prohibition in international and national law on the use of torture or cruel, inhuman or degrading treatment or punishment ("CIDT").[34] Its stated policy is to condemn unreservedly and never to condone, encourage, solicit or participate in any form of torture or CIDT in any circumstances or for any purpose. International human rights standards also impose further ancillary positive obligations on all States to prevent, investigate and redress incidents of torture or CIDT.

34 Consolidated Guidance, paragraph 6. See also: Universal Declaration of Human Rights 1948, article 5; International Covenant on Civil and Political Rights 1966, article 7; European Convention on Human Rights 1950, article 3; UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984; and the Criminal Justice Act 1988, s.134.

10.2 In this latter regard, the UN *Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* dated 9 August 1999 ("the Istanbul Protocol")[35] provides:

> *States are required under international law to investigate reported incidents of torture promptly and impartially…*
>
> *The broad purpose of the investigation is to establish the facts relating to alleged incidents of torture, with a view to identifying those responsible for the incidents and facilitating their prosecution, or for use in the context of other procedures designed to obtain redress for victims…*

10.3 Furthermore, it is important to keep in mind that HMG is rightly concerned not only about mistreatment in the form of torture or CIDT, but also in the form of unlawful arrest and detention, procedural unfairness and the denial of access to justice and due process.

10.4 This review is primarily concerned with, first, the appropriate response of the intelligence services to concerns about or allegations of overseas counter-terrorism unit non-compliance with the above standards and, secondly, the propriety and lawfulness of co-operation with such units in circumstances where concerns or allegations of this kind have been or may be raised.

10.5 The above matters are currently the subject of a patchwork of policies and procedures issued by the Cabinet Office, FCO and Crown Prosecution Service ("CPS"), albeit that not all of them were in force in late 2010. Before turning to these, it is important to note that the intelligence services are not solely responsible for the discharge of HMG's obligations in this area. Where national and international law impose negative obligations in the form of prohibitions then these must, of course, be respected by the intelligence services. However, positive obligations to prevent, investigate and redress may fall to be discharged by other State agencies and I would stress that when I refer to the intelligence services "investigating" allegations and concerns of torture or mistreatment, I am not suggesting a formal process in full compliance with the Istanbul Protocol.

35 See paragraphs 74 and 77. The Istanbul Protocol was submitted to and endorsed by the UN High Commissioner for Human Rights and published by his Office as part of its Professional Training Series in 2004 under the reference HR/P/PT/8/Rev.1. The Principles at Annex I to the Istanbul Protocol were annexed to UN Commission on Human Rights resolution 2000/43 dated 20 April 2000 and UN General Assembly resolution 55/89 dated 4 December 2000.

10.6 Returning to the abovementioned policies and procedures, the following are relevant:

(1) FCO, *Consular Assistance Guidance* ("the Consular Guidance") and related FCO publications[36];

(2) HMG, the Consolidated Guidance;

(3) HMG, *Overseas Security and Justice Assistance Guidance* dated December 2011, revised February 2014 ("the OSJA Guidance")[37];

(4) FCO, *Torture and Mistreatment Reporting Guidance* dated March 2011 ("the TM Reporting Guidance")[38]; and

(5) CPS, *War Crimes/Crimes Against Humanity Referral Guidelines* dated July 2011, revised August 2015 ("the CPS Referral Guidelines").[39]

10.7 As already mentioned, the Consolidated Guidance was in force, and HMG's consular responsibilities were the same, at the time of Mr Adebolajo's arrest and detention in Kenya, but the OSJA Guidance, TM Reporting Guidance and CPS Referral Guidelines had not been issued. This is therefore a fast-evolving area and it is right to acknowledge the considerable progress made by HMG in the last six years.

The Consular Guidance

10.8 Although I am not directly concerned with the discharge by HMG of its consular functions, these need to be understood because they overlap and therefore interact with its wider responsibilities relating to torture and mistreatment.

10.9 Article 5 of the Vienna Convention on Consular Relations 1963 defines "consular functions" to include protecting, helping and assisting nationals of the sending State and, in order to facilitate the exercise of these functions, article 36(1) (which codified pre-existing international customary practice) entitles that State's consular officers and nationals to communicate with each other. See article 36(1)(b) in particular:

36 The Consular Guidance is an unclassified but internal FCO document which is accessible to departmental staff, but which is not publicly available. Of particular relevance is chapter 40 "Torture and Mistreatment" dated December 2013 and Annexes 40A-40H variously dated November-December 2013 and January 2014. FCO helpfully provided me with unredacted copies of these after my team found a redacted version of chapter 40 online at www.gov.uk/government/publications/foi-release-consular-internal-and-public-guidance. The latter was apparently published following a request under the Freedom of Information Act 2000 together with copies of: the (former) 2009 and (current) 2014 versions of chapter 12 of the Consular Guidance, previously headed "Courts and Trials", now headed "Prisoners and Detainees – Human Rights Issues"; the (former) 2010 and (current) 2014 versions of chapter 13 of the Consular Guidance, both headed "Prisoners and Detainees"; and the (former) 2009 and 2011 and (current) 2014 versions of the complementary, public FCO document *Support for British Nationals Abroad: A Guide*.

37 www.gov.uk/government/publications/overseas-security-and-justice-assistance-osja-guidance.

38 www.gov.uk/government/publications/fco-strategy-for-the-prevention-of-torture.

39 At the material time in 2010, the CPS Referral Guidelines were still in development and an interim protocol was in place. The first edition was published in July 2011 (cps.gov.uk/publications/agencies/war_crimes%202.html) and the second edition was published in August 2015 (www.cps.gov.uk/publications/agencies/war_crimes.html).

Communication and contact with nationals of the sending State

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

…

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph…

10.10 At the material time in November 2010, FCO aimed to make contact with any British national arrested or held in custody overseas within 24 hours of being informed of their arrest or detention and this remains the case in Kenya.[40] As a matter of policy, such contact is meant to be made whenever an FCO consular authority becomes aware of a British detainee in its host jurisdiction by any means and from any source: a formal request by the detainee or the detaining authority is not necessary as one of the purposes of contact is to explain what assistance is available.[41] If the detainee does request a visit, they will also be given a country-specific "prisoner pack".[42]

10.11 So far as concerns any allegations or suspicions of mistreatment, the relevant FCO policy was formulated as follows in November 2010 and remains in place in broadly similar terms:

Public policy guidance[43]

If appropriate, we will consider approaching the local authorities if you are not treated in line with internationally-accepted standards…

---

40 FCO, *Support for British Nationals Abroad: A Guide* dated March 2009, p.18. The stated policy aim is now to make contact "as soon as possible after being told about your arrest or detention" (FCO, *Support for British Nationals Abroad: A Guide* dated March 2014, p.17). However the BHCN webpage of the gov.uk website states, "We'll do all we can to contact you within 24 hours of being told that you've been detained or arrested and will give you a prisoner pack with information for British prisoners in Kenya" (www.gov.uk/government/world/organisations/british-high-commission-nairobi).

41 FCO, *Support for British Nationals Abroad: A Guide* dated March 2009, p.18 and dated 2014, p.17. The former and current versions of the Consular Guidance, chapter 13 "Prisoners and Detainees" dated February 2010 and March 2014 state that contact should be made "regardless of where the notification came from (official channels, the media or friends/family)".

42 The latest version of the prisoner pack for Kenya dated July 2015 describes conditions in Kenyan police cells and prisons as "basic" and records that the Kenyan authorities "rarely" inform BHCN of the arrest of British nationals and that "this does not always happen" even when they are asked to do so (www.gov.uk/government/publications/kenya-prisoner-pack at pp. 4 and 6). FCO has not retained a copy of the version of this pack in place in November 2010.

43 FCO, *Support for British Nationals Abroad: A Guide* dated March 2009, pp.18-19. The current version of the same document dated 2014 is in similar terms at p.18: "We cannot get you out of prison or detention, nor can we get special treatment for you because you are British. If however you are not treated in line with internationally-accepted standards we will consider approaching local authorities… With your permission, we can consider taking up a complaint about ill treatment, personal safety, or discrimination with the police or prison authorities…"

With your permission, we can take up any justified complaint about ill treatment, personal safety, or discrimination with the police or prison authorities…

Internal policy guidance[44]

- *Check on the prisoner's health and welfare. If a prisoner complains of ill-treatment, always ask them if they want to raise it with the authorities. If there are lots of complaints, or you are aware of a pattern of ill-treatment, consider making high-level representations. Always report any allegations of ill-treatment to the Human Rights Adviser, the Head of Human Rights and Assistance Policy Team, the Head of Assistance Group and relevant desk officer in Consular Directorate and your Head of Mission, whether or not the prisoner wants you to take the matter up with the authorities.*

…

- *Inform Consular Directorate of all detentions lasting 24 hours or more…*

10.12 Since 2010, FCO has elaborated and improved its policy on the handling of allegations of torture and mistreatment. The Consular Guidance now contains a new chapter 40 dated December 2013 which deals specifically with "Torture and Mistreatment". This provides detail to consular officers on reporting allegations of torture or mistreatment using a "mistreatment *pro forma*" which is then sent to the "Human Rights Adviser" in the FCO Consular Directorate in London. This *pro forma* must be completed and sent by consular officers where an individual alleges torture or mistreatment or this is suspected and "even where the individual has requested that you do NOT share the information with anyone including your colleagues". The subject's consent to any further onward disclosure is thereafter required, save in exceptional circumstances[45]:

The main action we can take in response to claims of torture or mistreatment is to bring the case urgently to the attention of the relevant authority, with the individual's consent… There is a strong presumption by HMG that allegations of torture or mistreatment should be raised vigorously with the appropriate authorities, with the consent of the individual concerned…

The FCO may decide to make case-specific representations without express consent where there are exceptional circumstances that justify doing so. An example of this may be where the individual is mentally incapable of giving informed consent. Such cases should be determined

44 The Consular Guidance, chapter 13 "Prisoners and Detainees" dated February 2010. The same text appears at paragraph 26 of the current version dated March 2014.

45 Paragraphs 19 and 31. See also paragraph 28, "We can make representations after an individual has been released from custody and/or returned to the UK, with their consent, if they are unwilling for concerns to be raised at the time".

on a case by case basis, taking the best interests of the individual into account. Again the [Human Rights Adviser in FCO Consular Directorate] should be consulted in all cases.

10.13 Consistently with this, the mistreatment *pro forma* specifically asks whether the individual has given "permission to raise allegations" or "permission to discuss with other people including MP, NOK etc.". In relation to "permission to raise allegations", there is a note, "Say when not obtained permission as seeking advice on whether mistreatment/local process should be used". Furthermore, Annex 40H setting out "Tips on how to approach a case and flowchart" emphasises:

> *Get informed permission from the individual. Ensure that the individual knows we can raise the allegation at any point if they don't want it raised at that time…*
>
> *NB. Consider if the allegation is part of a wider trend and could be used to make more general representations on the issue of mistreatment in that country.*

10.14 Chapter 40 of the Consular Guidance goes on to outline the ways in which allegations can be raised with foreign governments and gives examples of possible diplomatic representations in an annex. Reference is also made to the Istanbul Protocol and the following is said about the scope for pursuing allegations and concerns more formally[46]:

> *One way to raise an allegation is formally through a Note Verbale. The Note should not imply that we are offering any view as to the substance of the allegation but should express concern at the allegations and request that a prompt, impartial investigation be undertaken. The Note will also request that HMG is informed of the result of any investigation undertaken…*
>
> *An individual may request that the British Government 'espouse' their claim of torture – make a formal international claim on behalf of the individual against a foreign government…*

46 Paragraphs 21-27 and 46 and Annexes 40F-40G. Formal diplomatic intervention can also take the form of expressions of interest, diplomatic representations and ministerial representations.

10.15 Consistently with this, the FCO document *Support for British Nationals Abroad: A Guide* dated 2014 now states[47]:

> ***Victims of Torture and Mistreatment***
>
> *We take all allegations or concerns of torture and mistreatment very seriously and will follow up with action, as appropriate.*
>
> *When considering how to act, we will avoid any action that might put you or any other person that may be affected at risk.*
>
> *If you have been tortured or subject to other mistreatment, we can put you or your family in touch with organisations that can assist, in particular REDRESS, a UK charity which assists torture survivors obtain justice and reparation (www.redress.org).*

The Consolidated Guidance

10.16 This Guidance applies to intelligence service and MOD personnel and members of the armed forces and "sets out the principles, consistent with UK domestic law and international law obligations, which govern the interviewing of detainees overseas and the passing and receipt of intelligence relating to detainees".[48] SO15 is not subject to the Consolidated Guidance but, as a matter of policy, it nevertheless endeavours to observe its terms. So far as concerns allegations of torture or CIDT, the Consolidated Guidance says[49]:

> *… We take allegations of torture and cruel, inhuman or degrading treatment or punishment very seriously: we investigate allegations against UK personnel; and we bring complaints to the attention of detaining authorities in other countries except where we believe that to do so might itself lead to unacceptable treatment of the detainee.*
>
> *When we work with countries whose practice raises questions about their compliance with international legal obligations, we ensure that our co-operation accords with our own international and domestic obligations. We take great care to assess whether it is possible to mitigate any such risk. In circumstances where, despite efforts to mitigate the risk, a serious risk of torture at the hands of a third party remains, our presumption would be that we will not proceed…*

---

47 See pp.16-18. Note 8 also says, "We keep and use information in line with the Data Protection Act 1998. We may release information to other UK government departments and public authorities in accordance with relevant exemptions". The version of this guide dated March 2009 which was in place at the material time in November 2010 did not refer expressly to torture or mistreatment or include any of the above passage headed "Victims of Torture and Mistreatment".

48 Paragraph 1. See more generally the decision of the Divisional Court in *R* (*Equality and Human Rights Commission*) *v Prime Minister* [2011] EWHC 2401 (Admin), [2012] 1 WLR 1389 (DC). As a result of this decision, a reference to hooding as a potential form of CIDT was added to paragraph (d)(iii) of the Annex to the Consolidated Guidance with effect from 10 November 2010.

49 Paragraphs 6-7.

10.17 HMG published the Consolidated Guidance together with a *Note of Additional Information from the Foreign Secretary, the Home Secretary and the Defence Secretary* also dated July 2010.[50] This explained the context and purpose of the Consolidated Guidance and its publication and emphasised two important points, first, that it sets out the policy framework within which intelligence officers and service personnel were already operating (the only change was as to its publication) and, secondly, those who apply the Guidance will often refer in practice to consistent, but more detailed, internal policy documents:

> *We currently face a diffuse, diverse and complex threat from international terrorism. This is not a threat we can counter on our own. In order to protect British citizens at home and abroad, including our troops in Afghanistan, it is absolutely essential that our security and intelligence services and armed forces are able to work with partners overseas to combat this threat.*
>
> *This means working in challenging environments where we are not always in total control. This is the reality of combating the cross-border, international terrorist threat we live with today. Nowhere is this reality more acute than in the case of detainees held abroad…*

10.18 As already mentioned, I oversee the operation of the Consolidated Guidance. This oversight was announced by the then Prime Minister on 18 March 2009[51] and placed on an express statutory footing by way of the Intelligence Services Commissioner (Additional Review Functions) (Consolidated Guidance) Direction 2014.[52] Following the introduction of the Consolidated Guidance in July 2010, my immediate predecessor, Sir Peter Gibson, reported on the subject in his annual report for that year and I have done the same since my appointment on 1 January 2011.[53]

10.19 At the outset, Sir Peter confirmed that our oversight of the Consolidated Guidance was limited to intelligence service, MOD and armed forces involvement with detainees held overseas by third parties and did not extend to those detained by UK personnel.[54] After further discussions with the intelligence services, MOD and Cabinet Office, I then elaborated on this in my *Annual Report for 2011*[55]:

---

50 www.gov.uk/government/publications/uk-involvement-with-detainees-in-overseas-counter-terrorism-operations.

51 *Hansard HC*, volume 489, columns S5WS-S6WS.

52 See paragraph 2.3 above.

53 *Annual Report for 2010* dated 30 June 2011 (HC 1240), paragraphs 28 and 36-45; *Annual Report for 2011* dated 13 July 2012 (HC 497), chapter 6; *Annual Report for 2012* dated 18 July 2013 (HC 578), p.15; *Annual Report for 2013* dated 26 June 2014 (HC 304), chapter 8; *Annual Report for 2014* dated 25 June 2015 (HC 225), chapter 4(vi). The relevant chapter in my *Annual Report for 2013* also referred to and summarised the contents of a special, confidential report on compliance with the *Consolidated Guidance*, *Report to the Prime Minister following publication of the Report of the Detainee Inquiry* (government request announced by the Rt Hon Kenneth Clarke QC MP on 19 December 2013, report dated 26 February 2014).

54 In practice, this excludes overseas detention operations conducted by our armed forces on behalf of HMG and/or in support of an international organisation or coalition or a foreign government. See my predecessor's *Annual Report for 2010* dated 30 June 2011 (HC 1240), paragraph 36.

55 *Annual Report for 2011* dated 13 July 2012 (HC 497), p.28.

As a result of these discussions it was agreed that my oversight would be limited to occasions where members of the intelligence services or MoD:

- *had been involved in the interviewing of a detainee held overseas by a third party (this may include feeding in questions or requesting the detention of an individual);*
- *had received information from a liaison service (solicited or not) where there is reason to believe it originated from a detainee;*
- *had passed information in relation to a detainee to a liaison service.*

Most importantly, it was agreed that my remit would not include oversight of adherence to the Consolidated Guidance in relation to MoD detention operations or the subsequent handing over of detainees by the MoD to a host nation for prosecution.

10.20 These limits on my oversight are now reflected in paragraph 6 of the Intelligence Services Commissioner (Additional Review Functions) (Consolidated Guidance) Direction 2014 which confines me to circumstances where intelligence services officers and (so far as they are engaging in "intelligence activities") MOD employees and members of the armed forces:

(a) interview a detainee who is in the custody of a third party;

(b) request a third party to seek information from a detainee in the custody of that party;

(c) pass information to a security or intelligence service of a third party in relation to a detainee held by that party;

(d) receive unsolicited information from a third party which relates to a detainee;

(e) solicit the detention of an individual by a third party.

10.21 The Consolidated Guidance itself applies to "the involvement of UK personnel with detainees overseas in the custody of a liaison service" and for these purposes "involvement" extends to each of the detainee-related circumstances set out above.[56] More detailed, specific guidance on these is given under the four key headings set out immediately below.[57] In my view, it is important to give these a purposive (rather than literal) interpretation and to read them together as complementary and overlapping parts of a coherent whole:

56 Paragraphs 8-11.

57 The Consolidated Guidance, paragraphs 29-30 also cover procedures for interviewing detainees held overseas in UK custody, but such circumstances fall outside my oversight remit and are therefore excluded from the Intelligence Services Commissioner (Additional Review Functions) (Consolidated Guidance) Direction 2014, paragraph 6.

(1) **Soliciting detention by an overseas liaison service**[58]

This not only covers straightforward cases where HMG expressly requests, encourages or proposes the detention of an individual, it also extends to cases where it does so by passing information where it is foreseeable by them that it is likely to bring this about. An example here might be the passing of intelligence about an individual's involvement in a terrorist attack and/or the communication of a strong interest in further information about them. Where this part of the Consolidated Guidance is engaged, the same will often be or become true of (2) and/or (3) below.

(2) **Procedures for interviewing detainees overseas in the custody of a liaison service**[59]

This is an easily recognised circumstance, i.e. HMG personnel "in the room" being given access and putting questions to a detainee directly.

(3) **Seeking intelligence from, or passing intelligence about, a detainee in the custody of an overseas liaison service**[60]

This is the more indirect counterpart of (2) above, i.e. HMG personnel requesting that a third party detaining authority puts one or more questions to a detainee in its custody and reports back on any response(s). However, it also covers requests for information disclosed in and reports of independent interviews and other circumstances where HMG passes information about a detainee, particularly where this is likely to prompt or inform lines of questioning.

(4) **Receiving unsolicited information obtained from a detainee in the custody of an overseas liaison service**[61]

The recognition of this type of circumstance can pose more problems. It is important to understand here that the adjective "unsolicited" qualifies the noun "information" (specifically information obtained from a detainee) and not the verb "receive" or "receiving". This may sound obvious, but the expression could be read as referring only to the unsolicited receipt by HMG of information from a liaison service, when it is in fact intended to capture the receipt of information whose original acquisition from a detainee was not solicited by HMG. Circumstances where HMG requests, encourages or proposes either that a liaison service discloses information it has already obtained from

58 See the Consolidated Guidance, paragraphs 25-26 and the Intelligence Services Commissioner (Additional Review Functions) (Consolidated Guidance) Direction 2014, paragraph 6(e).

59 See the Consolidated Guidance, paragraphs 16-22 and the Intelligence Services Commissioner (Additional Review Functions) (Consolidated Guidance) Direction 2014, paragraph 6(a).

60 See the Consolidated Guidance, paragraphs 23-24 and the Intelligence Services Commissioner (Additional Review Functions) (Consolidated Guidance) Direction 2014, paragraph 6(b)-(c).

61 See the Consolidated Guidance, paragraphs 27-28 and the Intelligence Services Commissioner (Additional Review Functions) (Consolidated Guidance) Direction 2014, paragraph 6(d).

a detainee or that it acquires and then relays such information will be covered by (3) above. The present heading is instead concerned with cases where a liaison service provides information to HMG, the latter appreciates that it came from a detainee and its receipt, or the continued receipt of such information, may appear to approve or condone the standards of treatment or detention applied to that detainee.

10.22 Where a case falls within one or more of (1)-(4) above and the Consolidated Guidance is engaged, HMG personnel must consider whether the actual or proposed detainee(s) may have been or may be subject to unacceptable standards of detention or treatment before any of the following steps are taken:

(1) **Pre-detention**

requesting, or sharing intelligence which may lead to, the detention of the relevant individual(s); or

(2) **During detention or post-detention**

interviewing, seeking or receiving intelligence from, or sharing intelligence about, the relevant individual(s).

10.23 An Annex to the Consolidated Guidance sets out a non-exhaustive list of factors relating to the infliction of torture or CIDT[62] and the lawfulness of arrest or detention[63] which may take the standards of the actual or proposed detention or treatment towards or beyond the point of "unacceptability".

10.24 If, on the face of it, there does appear to be a risk of unacceptable detention or treatment (whether in the form of torture or CIDT or unlawful arrest or detention or procedural unfairness) the Consolidated Guidance requires that consideration is next given to whether any of the following would reduce that risk to an acceptable level:

(1) attaching conditions as to the use to which any information passed by HMG may be put; or

(2) obtaining assurances from the relevant liaison service as to the standards of detention or treatment that have been or will be applied.

62 The Annex to the Consolidated Guidance sets out a non-exhaustive list of practices which "could" constitute CIDT: "(i) use of stress positions, (ii) sleep deprivation, (iii) methods of obscuring vision (except where these do not pose a risk to the detainee's physical or mental health and is [sic] necessary for security reasons during arrest or transit) and hooding; (iv) physical abuse or punishment of any sort; (v) withdrawal of food, water or medical help; (vi) degrading treatment (sexual embarrassment, religious taunting etc.); and (vii) deliberate use of 'white' or other noise".

63 The Annex also sets out a list of considerations relevant to the lawfulness of detention: "(i) '*incommunicado* detention' (denial of access to family or legal representation, where this is incompatible with international law); (ii) whether the detainee has been given the reasons for his arrest; (iii) whether he will be brought before a judge and when that will occur; (iv) whether he can challenge the lawfulness of his detention; (v) the conditions of detention; and (vi) whether he will receive a fair trial".

10.25 Once the risk of unacceptable standards of detention or treatment and (where relevant) the scope for the reduction of any risk have been assessed, consideration must next be given to the level at which a final decision on taking the step in question should be made and, subject to this, whether that step can and should be taken.

10.26 At this point, the Consolidated Guidance differentiates between risks of torture, risks of CIDT and risks relating to lawfulness of arrest and detention and refers to three possible "situations"[64]:

(1) **Where it is known or believed that torture will take place**[65]

Action must not be taken and ministers must be informed and the relevant concerns must be raised with the liaison service or detaining authority in order to try and prevent torture occurring unless in doing this the situation might be made worse.

(2) **Where it is judged that the risk of torture or CIDT is "lower than serious" and the standards of arrest and detention are or will be lawful**[66]

Action may be taken, but the situation must be kept under review.

(3) **In all other circumstances, i.e. (impliedly) there is a serious risk of torture, CIDT or unlawful arrest or detention**[67]

This covers the difficult borderline territory between situations (1) and (2). Ultimately, the case must be brought within the situation (2) bracket for action to be an option, or it will fall within the situation (1) bracket and action will not be possible. So far as concerns moving a case into the situation (2) bracket, this may be done pursuant to a reassessment by senior personnel and legal advisers concluding the risk is not in fact "serious" or the mitigation of risk to below the "serious" threshold through "reliable caveats or assurances". If senior personnel and legal advisers conclude that neither route into situation (2) is open, the final decision will rest with ministers who will need to be briefed and consider whether:

> *it is possible to mitigate the risk of torture or CIDT occurring through requesting and evaluating assurances on detainee treatment;*

64 Paragraphs 10-11.

65 See the table at paragraph 11. The entry for situation (1) refers to cases where "you know or believe torture will take place" without mentioning CIDT, unlawful arrest or detention or procedural unfairness, and their exclusion would appear to have been intentional.

66 The entry for situation (2) refers to "CIDT" but not "torture" but I do not think the exclusion of the latter can have been intentional because the entry for situation (3) expressly contemplates personnel proceeding in cases where there is a lower than serious risk of "torture or CIDT". There is also a switch from the language of *acceptable* standards of *detention and treatment* to that of *lawful* standards of *arrest and detention* but this is not, in my view, significant.

67 The third entry in the table refers to the final situation as "in all other circumstances", i.e. not circumstances within the first or second situations. I take this to mean that it is not judged that torture or CIDT will take place, but there is nevertheless a "serious" risk.

whether the caveats placed on information/questions would be respected by the detainee liaison partner; and whether UK involvement in the case, in whatever form, would increase or decrease the likelihood of torture or CIDT occurring.

10.27 If ministers ultimately conclude that there is a serious risk of torture which cannot be adequately mitigated, they will not be able to authorise the contemplated action and maintain compliance with the absolute prohibition on such conduct. The Consolidated Guidance thus makes clear that, "Consulting ministers does not imply that action will be authorised but it enables ministers to look at the full complexities of the case and its legality".[68] The accompanying *Note of Additional Information from the Foreign Secretary, the Home Secretary and the Defence Secretary* also adds that where there appears to be a serious risk of mistreatment at the hands of a third party and ministers are consulted:

> *It is right that responsibility in these cases lies with the democratically elected government, and that ultimately it is ministers who will make these judgements.*
>
> *There is an absolute ban on and a clear internationally accepted definition of torture. There are no circumstances where we would authorise action in the knowledge or belief that torture would take place at the hands of a third party. If such a case were to arise we would do everything we could to prevent the torture occurring…*
>
> *In circumstances where despite efforts to mitigate the risk, a serious risk of torture remained, our presumption would be that we will not proceed.*
>
> *The decision can be more complicated in relation to other forms of mistreatment…*

10.28 I draw conclusions and make recommendations about the terms of the Consolidated Guidance in parts 19 and 21 below, specifically in relation to, first, its application to cases where there is a risk of unlawful arrest or detention, procedural unfairness or the denial of access to justice or due process, but not torture or CIDT and, secondly, the circumstances in which allegations or concerns should be investigated and/or raised with liaison partners.

The OSJA Guidance

10.29 This Guidance was published in December 2011 and revised in February 2014 and it aims to provide HMG officials with a practical tool to help them ensure that their security and justice work overseas meets human rights standards and "reflects our commitments to strengthen and uphold the record of the UK as a defender and promoter of human rights and

68 Paragraph 14.

democracy".[69] The OSJA Guidance sets out an "assessment and approvals process" covering relevant risks and their mitigation and it annexes two checklists on "Capacity Building Overseas" and "Case Specific Assistance".

10.30 The OSJA Guidance applies to "all departmental and agency project/programme officers and HMG officials making policy decisions on UK engagement in justice and security overseas, including where the actual engagement will be undertaken by external agencies on behalf of HMG and/or with HMG funding".[70] Although both of the checklists have footnotes saying that they are not intended to cover situations already covered by the Consolidated Guidance, the intelligence services have adopted a policy of endeavouring to apply their terms in practice. SIS in particular has produced two documents headed "SIS Compliance with the Overseas Security and Justice Assistance Guidance (OSJA)" and dated July 2014 which are respectively sub-headed "SIS Policy" and "Instructions for Officers".[71] SO15 also considers itself subject to the OSJA Guidance and told me that the police have a significant input into OSJA assessments.

10.31 So far as concerns the terms of the OSJA Guidance, torture, CIDT and unlawful or arbitrary arrest or detention are cited as examples of human rights and international humanitarian law risks which should be considered.[72] The checklist on "Case Specific Assistance" covers assistance which may lead to "individuals being identified, interviewed, investigated, apprehended, detained, prosecuted, ill-treated and/or punished by foreign authorities" and gives as an example "investigative assistance after a terrorist attack or serious crime". Under "Stage 3: Mitigate Risks" the guidance for "Torture and CIDT" and "Fair Trials" provides:

> ***Torture and CIDT***
>
> *10. Terms of reference for the assistance will specify limitations on the role of UK personnel (e.g. in some circumstances this might stipulate that UK personnel will not supervise, instruct or otherwise provide support to investigations where there is a serious risk of torture/CIDT).*
>
> *11. Assurances have been or will be obtained from the host government that detainees will not be ill-treated on arrest or detention, and that any detainees who may be under particular risk whilst in detention will receive effective protection.*

69 See pp.2 and 4.

70 Paragraph 8.

71 Although note the "SIS Policy" document, paragraph 9, "The checklists referred to in Annexes A and B of OSJA are not intended to cover situations already covered by the Consolidated Guidance governing our engagement with liaison detainee issues. But where applicable, we would in any case factor the areas identified on the list into our risk assessment, the most common example being the use of the death penalty".

72 Paragraph 14.

12. Repeated reminders to the host government, at the political and operational/tactical level, of the importance we place on respect of the absolute prohibition on torture and CIDT.

13. FCO post/mission to monitor the assistance and to report immediately to FCO any concerns of torture or CIDT in accordance with the Torture and Mistreatment Reporting Guidance.

…

Fair Trials

16. Repeatedly remind the host government, at the political and operational level, on the importance we place on legal proceedings being conducted in accordance with international fair trial standards (e.g. access to counsel, independent and impartial court, etc.).

17. Assurances have been or will be obtained that access to court proceedings will be given to independent trial monitors, including HMG staff.

The TM Reporting Guidance

10.32 This Guidance applies to all FCO contractors and permanent and temporary staff and all contractors and permanent and temporary staff employed by other government departments who are seconded to FCO or working in "HM diplomatic posts" or Department for International Development country offices.[73] On its face, this does not appear to extend to intelligence service personnel even where they are co-located with overseas diplomatic missions. Furthermore, it is stated that the TM Reporting Guidance is "consistent with the guidance already in place for staff whose work requires job specific instructions, e.g. consular officers, intelligence officers and service personnel" (a clear reference to the Consolidated Guidance) and that it applies "where a particular allegation and/or concern is not already covered by your job specific guidance".[74]

10.33 Subject to this point, the TM Reporting Guidance states that every member of staff covered has "an individual responsibility to report immediately allegations and/or concerns about suspected torture or [CIDT] that occurs overseas, so that such allegations and/or concerns can be acted upon appropriately".[75] Where the allegation or concern involves UK personnel or a specific overseas public authority which HMG is actively assisting, or co-operating or working with, the relevant individual must report it to their line manager and Head of Mission who will inform the relevant Directorate and the FCO Human Rights and Democracy Department in London. Where the alleged or apprehended victim is a British national or someone entitled

73 Paragraph 2.

74 Paragraph 3.

75 Paragraph 1.

to UK consular assistance, the FCO Consular Directorate in London must be notified and where this is not the case the report must go to its Human Rights and Democracy Department.

10.34 The abovementioned Human Rights and Democracy Department also published the FCO, *Strategy for the Prevention of Torture 2011-2015* dated October 2011[76]. This talks about HMG raising allegations of torture, CIDT and unlawful, arbitrary or *incommunicado* detention with other governments where it is "appropriate and safe" to do so.[77]

The CPS Referral Guidelines

10.35 These were agreed between the SO15 War Crimes Team and the CPS Special Crime and Counter Terrorism Division and provide for the pre-investigative scoping of torture and CIDT allegations in accordance with a structured assessment framework.

76 www.gov.uk/government/publications/fco-strategy-for-the-prevention-of-torture.

77 See pp.9 and 14.

III. FINDINGS AS TO EVENTS IN AND AFTER NOVEMBER 2010

11. Sunday 21 November 2010: arrest

11.1 Mr Adebolajo flew from the UK to Kenya with Kenya Airways on the evening of Wednesday 20 October 2010, departing from London Heathrow and arriving at Jomo Kenyatta airport in Nairobi early the following morning. He had a return ticket and was issued with a one month visa on his arrival with an expiry date of 20 November 2010. Three weeks later, on Wednesday 10 November 2010, the Kenyan authorities in Nairobi extended Mr Adebolajo's visa by a further two months to 20 January 2011.

11.2 His movements after his arrival on 21 October 2010 are unclear, but on Sunday 21 November 2010 around 1pm local time, Mr Adebolajo was arrested in Kizingitini, a remote village on Pate Island in the Lamu Archipelago off the north-east coast of Kenya, just over 40 miles from the border with Somalia.[78]

11.3 It appears that Mr Adebolajo, then aged 25, and a group of five Kenyan males were arrested together by five local island police officers. One of Mr Adebolajo's companions (described as the group's guide) was a 28 year old local, but the others were from Mombasa, much younger and aged 17, 17, 18 and 21. The teenagers were current or former pupils at the Sheikh Khalifa Secondary School in Mombasa; two were still enrolled there and the other had recently left.

11.4 There is a considerable body of evidence to suggest that the arrests themselves were largely the result of happenstance, rather than intelligence led.[79] As already mentioned, the arrests were carried out by the local island police rather than ATPU[80] and it appears from a number of sources that the police were in fact called by an uncle of one of the teenagers and possibly some other local residents. The uncle, a Lamu resident, had been told by his nephew's parents that their son was missing and he therefore called the police when he happened to see the boy in Kizingitini with a group of other young males. Local residents may also have called police the same morning, simply because they felt that the presence or demeanour of the group were in some way unusual or suspicious.

78 See the maps of Kenya at Annex C below.

79 See parts 16.3 and 16.18-16.22 below.

80 This is made clear in various Kenyan police reports and papers.

11.5 Contrary to some media reporting, the group were not arrested attempting to board a speed boat or travelling towards or across the border with Somalia. Rather, four of them, including Mr Adebolajo, were resting in the shade of an acacia tree at the time, while two of the teenagers had gone to buy credit for their mobile telephones. The evidence that the group were planning to travel to Somalia was largely circumstantial, but nevertheless compelling and it is likely that the police would have suspected their intentions almost immediately.

11.6 This version of events is broadly consistent with what Mr Adebolajo said when he was interviewed by SO15 ports officers on his return to the UK[81], save that he reported the nephew being taken away by family members the day before:

> ***ADEBOLAJO*** *described that during the only day they were in Lamu (20 November), [the nephew] received some attention from locals who seemed to know him.* ***ADEBOLAJO*** *claims that persons purporting to be [the nephew]'s uncles then came and took him back to Mombasa.*
>
> ***ADEBOLAJO*** *then went on to explain what had happened to him and the rest of the group he was with on 21 November.*
>
> ***ADEBOLAJO*** *claims that he was sitting on the beach with his new found friends when they heard a commotion behind them, when he looked round he remembers seeing the same local male who appeared to know [the nephew] the day before. This male was accompanied by a group of Kenyan males wearing uniforms and carrying automatic rifles (described as 'AK's).*
>
> ***ADEBOLAJO*** *stated that one of his group then said in English 'Police' as they were surrounded.* ***ADEBOLAJO*** *mentioned that he remembers hearing the Kenyan police shouting in Swahili and the only words he recognised were 'you Al-Shabaab' said in English.* ***ADEBOLAJO*** *then described being handcuffed and taken to what he believes to be a police station in Lamu.*

11.7 So far as concerns the circumstantial evidence of an extremist or terrorist agenda, contemporaneous police, intelligence and media reports all point to links between Mr Adebolajo's companions and Aboud Rogo, an extremist Islamist cleric. Mr Rogo was born in Lamu but had moved to Mombasa where he preached at the Masjid Musa mosque. Mr Rogo was known to be an active supporter of and recruiter for Al-Shabaab and, subsequently, on 25 July 2012, the UN Security Council Committee on Somalia and Eritrea added him to the sanctions list maintained under UN Security Council resolutions 751 (1992), 1844 (2008) and 1907 (2009). This was done on the grounds that Mr Rogo had "threatened the peace, security or

81 See part 14 below.

stability of Somalia by providing financial, material, logistical or technical support to Al-Shabaab". Shortly after this, on 27 August 2012, Mr Rogo was killed in a drive-by shooting in Mombasa.

11.8 In addition, it would appear from the same reports that the parents of the teenagers, and of other pupils at the Sheikh Khalifa Secondary School, were concerned that Mr Rogo was radicalising their children and encouraging them to travel to Somalia to join Al-Shabaab. Indeed, on Tuesday 23 November 2010, a number of parents and other moderate Muslims apparently demonstrated against and complained to the police about Mr Rogo and he in turn made an appeal to his supporters for funds to fight any charges brought against those arrested.

11.9 Furthermore: the group's "guide" was suspected of being part of Mr Rogo's network; one of the teenagers had "Alshabaab" as his Facebook password and said that his uncle was an Al-Shabaab fighter[82]; and another of the teenagers was later re-arrested in Lamu as part of another group suspected of attempting to cross the border with Somalia in 2011.

11.10 Whatever prompted the arrests, it appears that the local police almost immediately notified ATPU and agreed to transfer the group to the latter's HQ in Mombasa for questioning. Furthermore, by early the following morning, on Monday 22 November 2010, ATPU was already talking about Mr Adebolajo's early deportation back to the UK within the next few days.

11.11 At this point, it is important to note the provisions of article 49 of the 2010 Constitution of Kenya, which replaced the previous 1963 Constitution with effect from 27 August 2010:

> ***49. Rights of arrested person***
>
> *(1) An arrested person has the right–*
>
> *(a) to be informed promptly, in a language that the person understands, of–*
>
> *(i) the reason for the arrest;*
>
> *(ii) the right to remain silent; and*
>
> *(iii) the consequences of not remaining silent;*
>
> *(b) to remain silent;*
>
> *(c) to communicate with an advocate, and other persons whose assistance is necessary;*
>
> *(d) not to be compelled to make any confession or admission that could be used in evidence against the person;*

82 I have seen some documents suggesting that this individual was or became Mr Rogo's son-in-law, but I am unable to verify this or ascertain whether or not he was in 2010.

(e) to be held separately from persons who are serving a sentence;

(f) to be brought before a court as soon as reasonably possible, but not later than–

(i) twenty-four hours after being arrested; or

(ii) if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day;

(g) at the first court appearance, to be charged or informed of the reason for the detention continuing, or to be released; and

(h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.

(2) A person shall not be remanded in custody for an offence if the offence is punishable by a fine only or by imprisonment for not more than six months.

11.12 Given that Mr Adebolajo was arrested on Sunday 21 November 2010 around 1pm local time and "ordinary court hours" for the purposes of article 49(1)(f)(ii) of the Constitution are, as I understand it, from 9am to 5pm, disregarding the lunch adjournment, it appears to me that Mr Adebolajo and his companions should have been brought before a court by close of play on Monday 22 November 2010.[83]

11.13 Following their arrest on Sunday 21 November 2010, Mr Adebolajo and his companions were taken in custody to local police stations in Kizingitini and then Faza on Pate Island. In Faza, the local police also arrested and detained the owner of a guest-house (where at least three of Mr Adebolajo's group had spent the previous night) together with one of the guest-house owner's wives and a caretaker. The total number of detainees therefore increased to nine.

11.14 Mr Adebolajo told the SO15 ports officers who interviewed him on his return to the UK that he was not questioned at all during the course of his first day in custody, i.e. on Sunday 21 November 2010.

83 Strictly speaking, Kenyan courts do not ordinarily sit between 1pm and 2pm, but I have assumed that this cannot mean that those arrested during that period need not be brought before a court for an additional 27 hours.

12. Monday-Tuesday 22-23 November 2010: detention

12.1 Mr Adebolajo and the other detainees spent the night of 21-22 November 2010 at Faza police station before being transferred early the next morning to the Lamu Police Divisional HQ on Lamu Island, a journey of approximately 20 miles by road and sea.[84]

12.2 The arrests first came to the attention of HMG during the course of Monday 22 November 2010:

(1) That morning, ATPU informed the SO15 CTELO by telephone that a British national, named as Mr Adebolajo, had been arrested near Lamu with a group of Kenyans attempting to enter Somalia and that his deportation back to the UK within the next few days was likely. ATPU also provided Mr Adebolajo's passport number. The CTELO, who was normally based in Nairobi but was visiting the British Embassy in Addis Ababa, Ethiopia at the time, returning 25 November 2010, passed this information on by telephone to Intelligence Officer 1 and SO15 ILS in London.[85] Thereafter the information was passed on to and between the SIS Intelligence Officers in Kenya at the time and the Head Offices of SIS and MI5 in London on 22 November 2010 as follows:

(a) Intelligence Officer 1 immediately informed Intelligence Officer 2 and one of their managers in person;

(b) by way of an email marked "Immediate", sent at around 1.30pm GMT, 4.30pm local time, Intelligence Officer 1 also informed Desk Officer 1 at SIS Head Office, requested an agency-wide search for any intelligence held on Mr Adebolajo and reported that he and Intelligence Officer 2 would notify the consular team at BHCN and call on the SKPO the following morning for a "readout"[86];

(c) Intelligence Officer 2 simultaneously informed MI5 Head Office in London by telephone and requested that it too search for any intelligence on Mr Adebolajo held in its records; and

(d) MI5 recorded and circulated the information and request from Intelligence Officer 2 by way of an internal email marked "Importance Low" (the default priority marking for such messages), also sent at around 1.30pm GMT, 4.30pm local time (this suggested that Mr Adebolajo would be flown back to the UK from Mombasa, possibly on a Monarch Airlines flight to Gatwick).

84 See the maps of Kenya at Annex C below.

85 ILS also documented the information in a formal "cluster message" to MI5 Head Office dated 23 November 2010.

86 Both this email and the internal MI5 email sent around the same time referred to Mr Adebolajo being arrested with four Kenyans, rather than five, but there was some confusion in a number of early documents and media reports about the size of the group and whether Mr Adebolajo counted as part of it or was a "plus one".

(2) As explained at paragraph 10.10 above, the Consular Guidance required the consular officers at BHCN to attempt to make contact with Mr Adebolajo within 24 hours of becoming aware of his arrest. It is therefore relevant to establish when this was and when their 24 hour clock began running. Although Intelligence Officers 1-2 undoubtedly briefed the consular team at BHCN about the arrest on 23 November 2010, there is no record of them having done so the previous day and I therefore accept the submission of SIS and FCO that they did not. The only other way in which the consular officers at BHCN could have become aware of the case on 22 November 2010 was by way of an article headlined "Six Al-Shabaab recruits and Nigerian arrested" which was published by the Kenyan Daily Nation online that day and in print on 23 November 2010. The gist of the article was that six young men (said to include two pupils from the Sheikh Khalifa Secondary School in Mombasa) had been arrested in Kizingitini while being "ferried" to Somalia to join Al-Shabaab "alongside a Nigerian with a British passport" who was "suspected of masterminding the racket". The article did not name any of those arrested but the online version did include a photograph of relatives of "the six young men" praying "at the home of one of the suspects in Tononoka, Mombasa". (It goes without saying that at least some of the families of some of the detainees had therefore been notified of the arrests.) There is no record of the consular officers at BHCN having seen this article before the morning of 23 November 2010 and so the requirement that they attempt to make contact with Mr Adebolajo did not begin to run until that point and/or the briefing by Intelligence Officers 1-2 that morning.

12.3 By around 7.30pm GMT, 10.30pm local time on 22 November 2010: the relevant personnel in the Head Offices of SIS and MI5 had begun searching for information about Mr Adebolajo within their records[87] and liaising by email; it had been established that Mr Adebolajo was indeed a known MI5 "subject of interest"; and this information had been emailed back to Intelligence Officers 1-2 together with a request for any further information about the arrest and the intentions of the Kenyan authorities. All this is clear from emails sent by Desk Officer 1 to Intelligence Officers 1-2 and MI5 Head Office around that time and received and opened at around 4.30am GMT, 7.30am local time on 23 November 2010. Accordingly, I find that the available information about Mr Adebolajo's arrest was quickly and effectively recorded, disseminated and actioned by SIS, MI5 and SO15 and I would cite this as an instance of good practice on the part of all concerned. I would also commend Desk Officer 1 for working late to progress the matter that evening. Had she left it until the following morning UK time, Intelligence Officers 1-2 would have been forced to wait until mid/late

87 The ISC report, paragraph 72 refers to the MI5 tracing process, "A Trace is a request for a check across MI5 indices to determine potential links to [e.g.] Islamist extremist activity". SIS also undertakes similar checks of its records.

morning Kenyan time for confirmation of the information held on Mr Adebolajo.

12.4 For the avoidance of doubt, I found no evidence to suggest that any HMG personnel disclosed any information about Mr Adebolajo to any Kenyan authorities, including the information returned pursuant to the above searches.

12.5 During the afternoon and early evening of Monday 22 November 2010, while the above was happening in London, Mr Adebolajo and the other detainees were being taken by sea from Lamu to Mokowe on the Kenyan mainland and then by road south to Mombasa, a journey of more than 200 miles which would have taken approximately five to seven hours. Following their arrival in Mombasa, the detainees were held at the Mombasa Police Provincial HQ in the custody of ATPU Mombasa. Although the point is not entirely clear, it appears likely that the detainees were formally transferred from the custody of the local island police and into ATPU custody in either Lamu or Mokowe on the morning of 22 November 2010.

12.6 Pausing there, I tend to doubt that Mr Adebolajo or any of his companions were subjected to any kind of in-depth questioning prior to their arrival in Mombasa although I cannot rule this out. The logistics of transferring first six and then nine detainees by sea and road from Kizingitini to Faza to Lamu to Mokowe to Mombasa over the course of 36 hours would have left relatively little time for interrogations. Furthermore, and as already mentioned, it appears that ATPU investigative primacy was established almost immediately after the arrests and Mr Adebolajo said he was not questioned at all on his first day in custody. This is consistent with the local island police being principally concerned to deliver the detainees into the custody of ATPU Mombasa as promptly as possible and without themselves conducting any interviews.

12.7 Consistently with the above, the handwritten notes of the SO15 ports officers' interview with Mr Adebolajo on his return to the UK[88] also suggest that the group were not questioned until they arrived at their final destination:

> *Arrested as they believed that the 5 were Al-Shabaab. Kept in Lamu @ police station for 3 days moved from one station to another. Questioning @ last police station – plain clothed officers 6 in total. Kept telling same story until last one where refused to give another statement until able to speak to Embassy. Possibly Mombasa.*

88 See part 14 below.

12.8 The evidence as to whether or not any of the detainees were questioned by ATPU in Mombasa on the evening of Monday 22 November 2010, immediately after their arrival, is somewhat unclear. One ATPU document says that its officers and the detainees were too tired and hungry for questioning and the detainees were simply given some food and then taken to Mombasa central police station for the night. However, SIS records suggest that the SKPO told Intelligence Officers 1-2 at a meeting on 23 November 2010 (see below) that Mr Adebolajo had been questioned by both ATPU and then Arctic on the evening of 22 November 2010. For my part, I tend to think this account is likely to have been correct and I doubt that ATPU would have wanted to wait until the following day. A remand hearing before a magistrate was already overdue and questioning might have yielded grounds for a charge or continued detention.[89]

12.9 I have been provided with notes of interviews conducted by Arctic with Mr Adebolajo and all but one of his companions on the evening of 22 November 2010. It appears that these interviews were conducted by two Arctic officers who each interviewed a single detainee one at a time. One of these officers interviewed Mr Adebolajo's companions (save the teenage schoolboy whose uncle had originally called the local island police), while the other interviewed Mr Adebolajo on 22 November 2010 and then the teenage nephew two days later, on 24 November 2010. The greater attention given to Mr Adebolajo may have reflected some combination of a belief that he had some kind of leadership role or status, the exercise of special care and caution by reason of his status as a foreign national and/or the fact that, as explained below, he was not being co-operative.

12.10 A copy of the Arctic report of its interview with Mr Adebolajo in Mombasa was shared with the SIS Intelligence Officers in Kenya at the time and reviewed by Intelligence Officer 1 relatively early on Tuesday 23 November 2010.[90] The Arctic interview reports for the rest of Mr Adebolajo's group were also available to SIS in the same way, but it is impossible to know whether they were reviewed at that time.[91] I can confirm that there is nothing in any of the Arctic reports to suggest any prior discussion or engagement with SIS or any disclosure by it of information about or questions for Mr Adebolajo or any of his companions: the interviews were routine, given the counter-terrorism context. Although the acquisition of the information within these reports was not therefore "solicited" by SIS, the establishment of the intelligence-sharing arrangements pursuant to which they were made available means that their provision to and receipt by it arguably was.

89 See paragraphs 11.11-11.12 above on the 24 hour time limit in the Constitution of Kenya 2010, art.49.

90 [text omitted – see report, paragraph 5.8].

91 [text omitted – see report, paragraph 5.8].

12.11 The Arctic report of its interview with Mr Adebolajo in Mombasa (referred to therein by his middle name, Olumide) concludes:

> ***Case Officers Comments:***
>
> *The subject was very uncooperative during the interview and always demanded that he be allowed to speak to officials of the British High Commission in Kenya. He played a fool all through by pretending not to remember names of places he was staying in Nairobi, a move meant to hide his true identity.*
>
> ***Comments:***
>
> *It would appear that Olumide was staying with a contact person in Nairobi who prepared him for his possible journey to Somalia. Having been arrested together with youths believed to have been on their way to Somalia, Olumide could be one of the British nationals with a desire to go to Somalia and join Al-Shabaab.*
>
> ***Action points:***
>
> *Due to circumstances surrounding Olumide's stay in the country, it would be prudent to have his visa revoked and be deported back to the UK.*

12.12 The detainees spent the night of 22-23 November 2010 in police custody at the Mombasa central police station and, on the morning of Tuesday 23 November 2010, they were transferred to the Mombasa Law Courts for an overdue remand hearing before the Principal Magistrate, Richard Kirui.[92] The hearing was conducted in English, held in public and reported in the media both at the time and following the murder of Fusilier Rigby. Although some limited television footage from the hearing also remains available online and clips have been broadcast on television, I have been unable to obtain a written transcript or video recording of the full hearing.

12.13 In short, the magistrate granted a police/prosecution application for an order approving the continued detention of all nine detainees without charge until Friday 26 November 2010 and directed that they would each have to be charged or released at that point. The details of the hearing are of some further importance because Mr Adebolajo complained that the group had been mistreated and various claims have since been made in the media about what he in fact said:

(1) The Kenyan Daily Nation reported the hearing in an article published online on 23 November 2010, "Nine terror suspects remanded".

---

92 As already mentioned, the Constitution of Kenya 2010, art.49 confers a right to be brought before a court within 24 hours of arrest. Although there appears to have been a *prima facie* breach of Kenyan law in this regard, it was understandable given the travel distances and times involved and I do not think it was significant or rendered Mr Adebolajo's arrest or detention unlawful.

The article included a photograph of Mr Adebolajo and the eight other detainees in the dock of a court and the following text:

> *One of the suspects claimed that they had not eaten for two days and that they were denied an opportunity to talk to their lawyers.*
>
> *The court directed that they be allowed to talk to their relatives some of whom were in the court.*
>
> *The youths were alleged to have been recruited to join the Somali rebel group Al-Shabaab, which is fighting to topple the government in Mogadishu.*
>
> *...*
>
> *Two of the youths arrested on Monday were students of a Mombasa secondary school. They had allegedly been travelling with a Nigerian who had a British passport. He was identified as Michael Olemindis Ndemolajo.*
>
> *The immigration department was asked on Tuesday to supply detectives with detailed information regarding the Nigerian who was estimated to be aged between 18-22 years...*

(2) The BBC news website reported the hearing in an article published online on 23 November 2010 without mentioning any complaints:

> ***Kenyans arrested 'on way to join Somalia's al-Shabab'***
>
> *Kenyan police have been given until Friday to charge six Kenyans arrested allegedly on their way to join al-Qaeda linked group in Somalia.*
>
> *The group includes two school pupils and one person who also holds a British passport, police told the BBC...*
>
> *The BBC's Jamhuri Mwavyombo in Mombasa says the six Kenyans appeared briefly in court in the coastal city on Tuesday morning.*
>
> *A judge granted a police request for more time to complete their investigation before charges are brought.*
>
> *Coast Province police chief Leo Nyongesa said intelligence reports had led to the arrests.*
>
> *"They are believed to be students in Mombasa... aged between 15 and 30", he told the BBC's Focus on Africa programme...*

(3) The Nigerian Daily Trust reported the hearing in an article published online the following day on 24 November 2010, "Nigeria: Kenya Charges Local, Eight Other 'Al Shabaab' Suspects":

> *Kenyan authorities have charged nine men including a Nigerian with a British passport who were arrested on Sunday on suspicion of attempting to reach neighbouring Somalia to join the militant group al Shabaab.*

They will appear in court on Nov 26, this year.

However, the charges against them were not read out after the police through the prosecutor requested for more time to conduct investigations.

The suspects appeared before Mombasa Principal Magistrate Richard Kirui who ordered the investigations to be done within two days.

One of the suspects decried that they had undergone torture while in custody.

"We are being tortured by the police and we haven't eaten for two days now. We have been denied the right to talk to our family members and lawyer. We are being treated as criminals and we are innocent", the suspect from Nigeria said.

Kirui further directed that the claims made against the police be investigated further and a report over the torture be availed in court…

(4) As already mentioned, I have been able to find limited video footage of the hearing which shows Mr Adebolajo saying, "These people are mistreating us and we are innocent, believe me".

12.14 It would appear from the above that Mr Adebolajo did complain publicly at the remand hearing about mistreatment, a lack of food and being denied access to a lawyer. (The handwritten police notes of Mr Adebolajo's interview with the SO15 ports officers on 25 November 2010 also read, "Taken to court – Press there too. Held in English. Took opportunity to plead in English about conditions & speak to Embassy"). However, I have no reason to think that any HMG personnel were aware of this at the time: the UK media reports I have seen did not refer to any complaints and the Kenyan media reports did not attribute them to "the Nigerian with a British passport" or "Michael Olemindis Ndemolajo"; the speaker on the video footage complaining about mistreatment did have a London accent, but I do not know if any of this was broadcast at the time and have no reason to think it was seen by any HMG personnel; and the only report I have found linking an allegation of "torture" with "the Nigerian with a British passport" appeared in a Nigerian media report.

12.15 Pausing again at this point, SIS and FCO were each involved in two further developments on 23 November 2010, shortly after the court hearing in Mombasa.

12.16 So far as concerns SIS, Intelligence Officers 1-2 discussed the case at a meeting with the SKPO at around midday at the latter's office in Nairobi.[93] The SKPO gave details about those arrested, confirmed that Mr Adebolajo

93 The meeting on 23 November 2010 was apparently requested and arranged by Intelligence Officers 1-2, rather than the Kenyan police, in order to discuss the cases of Mr Adebolajo and Person A (see paragraph 12.2(1)(b) above).

had appeared in court and been remanded in custody until 26 November 2010, but that his visa would be cancelled before then and he would be deported back to the UK on 24 November 2010. The SKPO requested financial assistance with Mr Adebolajo's return air fare from HMG and Intelligence Officer 1 later requested Head Office approval for this.[94] Intelligence Officers 1-2 in turn asked for certain information from Mr Adebolajo's immigration file and the SKPO undertook to provide this.[95] It appears that the Intelligence Officers had by this time seen the Arctic report of its interview with Mr Adebolajo the previous evening in Mombasa. Intelligence Officer 1's note of the meeting thus refers to the Arctic interview having taken place after an interview by ATPU and states, "We will CX the [Arctic] report although it did not reveal much of interest".[96]

12.17 After the meeting, Intelligence Officers 1-2 briefed the CTELO and a senior consular officer and a senior press officer at BHCN ("the BHCN Consular Officer" and "the BHCN Press Officer" respectively). The Consular Officer advised Intelligence Officers 1-2 that his team had not had any contact from Mr Adebolajo, his family or friends and the BHCN Press Officer advised that he had been contacted by the BBC World Service that morning about the first Kenyan Daily Nation article mentioned above.[97] The Consular Officer's comment that his team had not been contacted by Mr Adebolajo, his family or friends should have struck Intelligence Officer 1 as slightly odd given that he had by then seen the Arctic interview report recording that Mr Adebolajo "always demanded that he be allowed to speak to officials of the British High Commission in Kenya".[98] The discussion itself should also have prompted the Consular Officer to attempt to make contact with Mr Adebolajo as required by the Consular Guidance.[99]

12.18 Intelligence Officer 1 documented the content of all these discussions in a detailed email sent to Desk Officer 1 at SIS Head Office, MI5 Head Office and others. This was marked "Immediate", dated 23 November 2010 and sent at around 4pm GMT, 7pm local time.[100] It was natural that it should fall to Intelligence Officer 1 to do this given that he had particular responsibility for coastal and Mombasa issues, where Mr Adebolajo was in ATPU custody and had been interviewed. In his email, Intelligence Officer 1 recorded that the Kenyan police had arrested Mr Adebolajo acting on reporting from a

94 As explained at paragraph 13.2 below, no financial assistance from HMG was ultimately needed.

95 [text omitted – see report, paragraph 5.8].

96 "CX" reports are formal SIS intelligence reports. Although Intelligence Officer 1 had seen the Arctic interview report and the reference to Mr Adebolajo wanting consular assistance by the time of the meeting with the SKPO, there was apparently no discussion of this issue.

97 See paragraph 12.2(2) above. The Associated Press also asked the BHCN Press Officer to comment on the story at around 11am GMT, 2pm local time on 23 November 2010.

98 See further paragraph 16.25 below.

99 See paragraphs 10.10 and 12.2(2) above.

100 A copy of the print version of the Kenyan Daily Nation article and an "Omnibase" print-out of Mr Adebolajo's passport details obtained from the BHCN Consular Officer were also attached to the email.

named agent who had provided details of his travel plans. The name of the agent, and possibly the suggestion that the arrests had been intelligence led, were in fact supposition on the part of Intelligence Officer 1, rather than a record of information expressly provided at the meeting, and the failure to make this clear became a source of confusion later on.[101]

12.19 Other SIS records show that the meeting with the SKPO also covered the proposed arrest and deportation of another British national, Person A. Intelligence Officer 2 wrote up this part of the meeting in an email timed at 1.45pm GMT, 4.45pm local time and it was natural that he should do this given his role and the fact that HMG had asked the Kenyan authorities to locate Person A as a precursor to his arrest by ATPU. Importantly, Intelligence Officer 2's note records that he and Intelligence Officer 1 specifically sought and obtained ATPU assurances with respect to the arrest and detention of Person A at the same meeting. His email thus confirmed that: a "form of words" settled by MI5 had been passed to NIS; Arctic and ATPU had agreed to take forward the arrest and deportation of Person A; and Intelligence Officers 1-2 judged the assurances provided through the SKPO to be credible, "that the arrest and subsequent detention of [Person A] would be in accordance with Kenyan Law and the International Human Rights Act that Kenya is a signatory [sic]".[102]

12.20 I consider it significant that Intelligence Officer 1 made no mention of assurances relating to Mr Adebolajo in his note, while Intelligence Officer 2 expressly documented the assurances sought and obtained in relation to Person A. In interview, both Intelligence Officers struck me as extremely competent and I tend to think that Intelligence Officer 1 would have recorded any assurances given in relation to Mr Adebolajo, if there had been any, not least because the creation of an accurate, matching record was important. Intelligence Officer 2 told me that "any Brit in detention was a huge issue" and so it appears inherently unlikely that any assurances would not have been recorded.[103] On the other hand, the non-documentation of assurances by SIS is not unknown and I have raised the subject with it on a number of occasions.

12.21 This issue is relevant because SIS told the ISC, and then repeated to me, that Intelligence Officers 1-2 had sought and obtained assurances as to the treatment of Mr Adebolajo by ATPU during the course of their meeting with the SKPO on 23 November 2010. Indeed, SIS placed reliance on this claim, submitting written evidence to the ISC stating:

---

101 See paragraphs 16.3(1), 16.18-16.22 and 20.14(3) below.

102 [text omitted – see report, paragraph 5.8].

103 Intelligence Officer 2 was also very clear that it was never awkward or difficult to ask about the treatment of detainees or seek assurances from ATPU and there was therefore no sense in which Intelligence Officers 1-2 might have refrained from raising these issues for fear of causing offence.

One of the officers who attended the meeting has advised that they requested confirmation from a senior Kenyan official that ADEBOLAJO was being treated in accordance with Kenyan and international law… The issue was raised by the officers as ADEBOLAJO was a British national and it was their responsibility as representatives of the High Commission at the meeting to enquire after his welfare.[104]

…

Assurances that ADEBOLAJO would be treated in accordance with the Kenyan legal framework were raised during the meeting with [the SKPO] on the 23 November 2010… One of the officers who attended the meeting recalled that assurance on his welfare was sought because ADEBOLAJO was a British national.[105]

12.22 There is a slight oddity here in that SIS and MI5 have consistently maintained that the Consolidated Guidance was not engaged in this case and, on this view, there would have been no need to seek assurances. Although the ISC had serious concerns about the evidence of SIS on this subject, it accepted what it was told and included the following in its report, "During this meeting, SIS asked for assurances about Adebolajo's treatment while in detention. The Kenyan police gave these general assurances but noted that Adebolajo had already been interviewed (the previous day)".[106]

12.23 Although Intelligence Officers 1-2 told me in interview that they thought they should and probably would have sought assurances relating to Mr Adebolajo from ATPU at their meeting on 23 November 2010, they both candidly admitted having no recollection of doing so. Intelligence Officer 2 also told me that he could not remember saying otherwise to anyone at SIS when he was spoken to "briefly" in September 2013 in connection with the ISC investigation. Furthermore, after some probing, SIS eventually revealed that it had not contacted Intelligence Officer 1 at all in connection with the ISC investigation because he had left the organisation. Indeed, it even contended for a time that Intelligence Officer 1 could not be asked about his recollection of events, or emails he had written, because he was no longer security cleared to an appropriate level.

12.24 On the basis of the evidence I have seen and heard, I am unable to say whether Intelligence Officers 1-2 *did* seek any assurances from the SKPO in relation to the treatment of Mr Adebolajo at their meeting on 23 November 2010. However, I have serious doubts about the evidential basis for SIS's positive assertions to this effect and there is no basis for determining

104 Letter from SIS dated 19 November 2013, Annex, entry 4.

105 Letter from SIS dated 14 January 2013, Annex, answer 2.

106 Paragraphs 62 and 476.

whether any assurances that were sought related to Mr Adebolajo's past treatment up to that point and/or his future treatment going forward.[107]

12.25 In parallel with the above, FCO was prompted to engage with the case after the BHCN Press Officer was contacted by the BBC World Service as already mentioned. The Press Officer in turn contacted FCO colleagues in London seeking advice on a "line" to give the media by way of response to enquiries. This led to an exchange of emails with the first email sent at around 8.45am GMT, 11.45am local time and it was notable that a number of these were copied to, amongst others, the BHCN Consular Officer and a senior SIS Intelligence Officer in Kenya at the time.[108] (Again, this should have prompted consular officers to make contact with Mr Adebolajo in order to offer consular assistance.) There followed a great deal of internal FCO email traffic between expanding and contracting groups of personnel within its Consular Directorate and Counter Terrorism Department and various press officers.

12.26 At around 10.30am GMT, 1.30pm local time, the BHCN Press Officer emailed (copying in the abovementioned senior Intelligence Officer and the BHCN Consular Officer) as follows, "We have since heard that it does indeed involve a Brit, and has potential to become a bigger story, as may well involve deportation. You may want to discuss with [counter-terrorism] colleagues today". This information came from the abovementioned briefing by Intelligence Officers 1-2.

12.27 The remainder of the FCO email traffic was largely irrelevant to my review, but it is interesting to note that: the two most senior officials in the Special Cases Team within its Counter Terrorism Department sent three emails on 23 November 2010 expressly contemplating the possibility that allegations of mistreatment might be made by Mr Adebolajo; and the same Team consulted SIS about the case and then circulated a further email making clear that Mr Adebolajo, "is known to [SIS] who became aware of his detention after the event, and did not (not) request it".

12.28 Returning to events in Mombasa after the remand hearing on 23 November 2010, the detainees were taken back to Mombasa Police Provincial HQ and, once there, they were allowed to talk to relatives before being questioned one at a time before an ATPU interview panel. As already mentioned, I consider it likely that this was not the first set of ATPU interviews. The Kenyan police records I have seen suggest that Mr Adebolajo (mistakenly referred to as "Abudelajo") refused to co-operate:

---

107 Had SIS sought assurances in relation to Mr Adebolajo's treatment up to that point, the SKPO might not have been able to speak to this with any authority in any event. This is because the island police, rather than ATPU, had carried out the arrests and been responsible for the early phases of the subsequent detention.

108 Via the unclassified email system mentioned at paragraph 8.2(2) above.

The suspects were all cooperative except one namely MICHAEL ABUDELAJO who is a British citizen of a Nigerian origin [sic] who claimed that he was told the British Embassy was going to come for him the previous day and so he cannot answer any question without the presence of a solicitor. So MICHAEL ABUDELAJO remained silent but very arrogant whenever he was questioned.

12.29 Following their interrogation, the detainees were transferred back to Mombasa central police station for the night of 23-24 November 2010.

12.30 Back in London, MI5 Head Office sent a minute dated 23 November 2010 responding to both Intelligence Officer 1's earlier email (recording the content of his discussions that day with the SKPO, the BHCN Consular Officer and the BHCN Press Officer) and also the email of the previous evening from SIS setting out progress with its search for information on Mr Adebolajo. I have seen a copy of this minute but the covering email was not retained and I have not therefore been able to verify whether and when it was transmitted by MI5 to or received by SIS. The minute refers to Mr Adebolajo's "apparent refusal to answer questions" and, because the only written reference to this available to the intelligence services up to that point was in the Arctic interview report, this presumably derived directly or indirectly from that report.

12.31 The MI5 minute confirmed that Mr Adebolajo had been placed on the Home Office Warnings Index and SO15 had been asked to port stop him on his return to the UK and pose 19 tailored questions. The minute also provided the results of searches MI5 had carried out against the names of the five Kenyan youths arrested with Mr Adebolajo.[109] The port stop was requested by way of a Ports Circulation Sheet setting out the proposed questions and this had the effect of adding Mr Adebolajo's name to the Home Office Warnings Index so that his next passage through passport control would trigger an automatic referral to SO15. As already mentioned, the power to port stop an individual is conferred on the police by Schedule 7 to the Terrorism Act 2000 and so the Ports Circulation Sheet effectively asked SO15 P Squad to consider exercising this power. In practice, where MI5 submits such a request it will itself, and did in this case, consider whether the proposed action is necessary and proportionate in the interests of national security. Nevertheless, the SO15 records confirm that a senior police officer also independently considered the same question and approved the request.

12.32 In parallel with this, Intelligence Officer 1 sent an email to various colleagues in SIS Head Office dated 23 November 2010, timed around 5pm GMT, 8pm local time. This was not copied directly to anyone at MI5 but

109 [text omitted – see report, paragraph 5.8].

included a request that this be done. The content summarised the intelligence collated on Mr Adebolajo and his arrest up to that point so that SIS Head Office could consider disseminating it by way of a formal CX intelligence report. Intelligence Officer 1 differentiated intelligence from two sources, first, the report of the Arctic interview with Mr Adebolajo in Mombasa on the evening of 22 November 2010 and, secondly, the meeting with Intelligence Officer 2 and the SKPO in Nairobi earlier on 23 November 2010. The bulk of the Arctic interview report was included in a "lightly edited" form, including the reference to Mr Adebolajo being unco-operative but omitting the reference to him demanding consular assistance. I return to the significance of this at paragraphs 16.3(1), 16.18-16.22 and 20.14(3) below.

13. Wednesday 24 November 2010: return

13.1 On the morning of Wednesday 24 November 2010, Mr Adebolajo was transferred by road from Mombasa to ATPU HQ in Nairobi escorted by ATPU Mombasa. The other detainees remained in Mombasa where they (and some of their parents) were questioned again by ATPU, before being released without charge subject to an order binding them over to keep the peace.[110] It appears that Mr Adebolajo began the 300 mile journey to Nairobi at around 4am local time but the roads and traffic between the two cities are notoriously difficult and the journey is still likely to have taken approximately seven hours. During the course of the morning, Intelligence Officer 1 spoke by telephone to the SKPO seeking an update and was briefed about Mr Adebolajo's transfer to Nairobi.

13.2 In particular, Intelligence Officer 1 was advised that Mr Adebolajo had been given the option of staying in detention while his visa was cancelled and his deportation was processed by the courts, or returning to the UK voluntarily and unescorted. Mr Adebolajo had opted for voluntary return and would be departing from Nairobi because ATPU had been able to persuade Kenya Airways to extend the validity of the expired return portion of his original ticket. The relevant flight details were provided.[111] Reference was also made to Mr Adebolajo being questioned again on arrival at ATPU HQ in Nairobi, although it is unclear if a further interview was conducted and I tend to doubt that there was one.

13.3 Intelligence Officer 1 recorded this further information in an email to SIS and MI5 Head Offices in London marked "Immediate", dated 24 November 2010 and sent at around 9am GMT, 12pm local time. The email also alerted its recipients to the fact that Intelligence Officer 1 had sent an intelligence

110 The remaining detainees had all been released by Saturday 27 November 2010 at the latest.

111 As already mentioned, the Kenyan police had previously asked Intelligence Officers 1-2 if HMG could fund a return flight out of Mombasa. The extension of Mr Adebolajo's return ticket by Kenya Airways meant this request fell away.

digest the night before for onward dissemination by way of a formal CX report and confirmed that he had also briefed the BHCN consular team.

13.4 SIS Head Office processed and circulated the resultant CX report shortly thereafter with transmission timed at around 10.30am GMT, 1.30pm local time. No material changes were made to the content of Intelligence Officer 1's digest which was effectively "copied and pasted" into a CX report and forwarded on. Although not strictly relevant to this review, I was disturbed to note that the report was distributed very widely indeed and that the relevant message data and delivery information files cast doubt on whether a significant number of its recipients even opened their copies. I return to the significance of this in part 22 below.

13.5 Mr Adebolajo was escorted to Jomo Kenyatta airport in Nairobi some time during the afternoon or evening of 24 November 2010. It is unclear when or where he was formally released from Kenyan police custody, but he flew back to the UK unescorted on a flight to London Heathrow which departed around 11.45pm local time.

13.6 During the course of Wednesday 24 November 2010, there was further email traffic within FCO regarding consular and media issues, none of which was copied to SIS. This largely petered out when it became apparent that Mr Adebolajo was returning to the UK, but two matters are worthy of note:

(1) FCO Consular Directorate in London suggested that the BHCN Consular Officer in Nairobi formally seek consular access to Mr Adebolajo, even though he (the Consular Officer) had apparently said he felt that this would be difficult to arrange. (Although I did not interview him for the purposes of my review, I took this to mean that the Consular Officer had discussed the scope for contacting Mr Adebolajo and decided not to attempt this, notwithstanding the FCO policy requiring that an attempt be made within 24 hours.) In making its suggestion, the Consular Directorate said the FCO Counter Terrorism Department had "concerns that [Mr Adebolajo] may raise mistreatment when back in UK" (this may have been a reference back to the abovementioned emails of the day before) and a request for consular access would therefore be worthwhile, even if unsuccessful, because FCO "would be able to say we at least requested access". The Consular Officer took this forward and eventually made contact with Mr Adebolajo at around 2.30pm GMT, 5.30pm local time via an ATPU telephone number provided by SIS. By this time, Mr Adebolajo was already at Jomo Kenyatta airport in Nairobi where he had been or was about to be released from custody. According to the Consular Officer's notes, Mr Adebolajo said he was grateful for the call, was being treated well and was flying back on his own ticket, but that "officials in Mombasa" had been "cowboys". The Consular

Officer also informed Mr Adebolajo that FCO had received calls from his sister, Blessing Adebolajo, and obtained his consent to her being called back and brought up to date.

(2) In this latter regard, Ms Adebolajo telephoned the FCO Consular Directorate in London and consular officers at BHCN on a number of occasions on 24 and 25 November 2010 and, possibly, also on 23 November 2010. In one call on 24 November 2010, she said she had been told that Mr Adebolajo had been in court the day before and would be sentenced on 26 November 2010 and that he had been denied legal representation and medical assistance. In a later call the same day, she said she had been told that Mr Adebolajo would be returning to the UK on a Kenya Airways flight on 25 November 2010. She said she had received this information by telephone but the identity of her source is unclear. The FCO Consular Directorate and the BHCN Consular Officer did attempt to assist Ms Adebolajo and, after first obtaining the consent of Mr Adebolajo as above, they called her on 24 November 2010 to update her and discuss her concerns, and on 25 November 2010 to confirm her brother's flight details.

13.7 There appears to have been very little contemporaneous media coverage of the case after the remand hearing on 23 November 2010, but the Kenyan Daily Nation did publish an article online on Sunday 28 November 2010, "Police admit al-Shabaab recruiting Kenyan youth". This included the following:

> *… Six youths among them two secondary school students from Mombasa and a Nigerian with a British passport, were arrested last week in Kizingitini, Lamu, while trying to enter Somalia, allegedly to join al-Shabaab.*
>
> *The five, Mohammed Adam, Juma Khan, Hassan Mohammed, Swaleh Abdul and Mbwana Mohammed were freed on bond to maintain peace as police investigate the racket.*
>
> *Chief Magistrate Rosemelle Mutoka will rule on the matter on December 1. The Nigerian, Mr Michael Olemindis Ndemolajo, is said to have travelled from the UK to join the group.*
>
> *He was, however, deported to the UK after it was established that his travelling documents were genuine and that he lacked a criminal record.*

14. Thursday 25 November 2010: port stop and allegations of mistreatment

14.1 Mr Adebolajo arrived back into London Heathrow unescorted shortly before 6am GMT on Thursday 25 November 2010 and was met by two SO15 ports officers who stopped and interviewed him under Schedule 7 to the

Terrorism Act 2000. The interview lasted just under three hours and the officers posed each of the 19 questions proposed by MI5. No audio-visual record was taken of the interview, but the officers made notes in a document referred to as "Book 500", recorded Mr Adebolajo's belongings and (with his consent) took photographs and DNA samples. The records show that Mr Adebolajo had no luggage and was still wearing the clothes he had on in the courtroom photograph published by the Kenyan Daily Nation on 23 November 2010. Almost immediately after the interview, the ports officers used their notes to compile a formal "port report".

14.2 According to the Book 500 notes, Mr Adebolajo consented to the taking of photographs and DNA samples and did not request a solicitor. These notes are much more abbreviated than the port report, suggesting that the ports officers used them as an aide memoire and produced the report soon after the interview. Nevertheless, and as can be seen from the references I have made to them in this report, the Book 500 notes contain some information which did not find its way into the port report and which I found helpful.

14.3 During the course of the SO15 interview, Mr Adebolajo alleged that he had been mistreated by the Kenyan authorities while detained in their custody and these allegations were quite properly listened to and recorded. In this regard, the allegations were summarised in the port report and, as I understand the process, Mr Adebolajo also remained with the officers after his formal release from the port stop interview itself and helped them complete a further document entitled "Questionnaire for SO15 ports officers recording allegations of torture or inhuman treatment". This was done under an interim protocol for processing allegations of overseas torture and CIDT made to ports officers.

14.4 The questionnaire took the form of a structured template apparently adapted by the University of Essex Human Rights Centre from the UN Office of the High Commissioner for Human Rights "Model questionnaire for submitting an allegation of torture to the Special Rapporteur on Torture" (see Annex D below for the text of the questionnaire itself). In my view, the adapted version of this questionnaire is a helpful and valuable tool and I commend its adoption for use in such cases, subject to one point mentioned below regarding individual consent to onward disclosure.

14.5 Mr Adebolajo's questionnaire was completed electronically by the SO15 ports officers and I am unclear whether this was done while he was present or thereafter. The completed answers give a detailed account of Mr Adebolajo's allegations which broadly fits with the chronology set out above.

14.6 In summary, Mr Adebolajo's key allegations of mistreatment, as recorded in the questionnaire, were that he was beaten and kicked about the legs and torso on two occasions and threatened with electrocution and rape on one

occasion by uniformed and plain clothed Kenyan police personnel. For the avoidance of doubt, there is absolutely no suggestion that any UK personnel were present or involved at any time during the course of his detention or questioning or alleged mistreatment.

14.7 In relation to Sunday 21 November 2010, when Mr Adebolajo was arrested and detained in Kizingitini and then Faza, he claimed that he was not questioned but was held in basic conditions and hit around the torso and legs:

> *… He stated that he and 4 of his male associates were arrested by what he described as Kenyan police officers in both uniform and plain clothes on around 21st November 2010.*
>
> *Once under arrest and handcuffed he was taken to an unknown location believed to be near Lamu, Kenya with his associates. Mr Adebolajo stated that he believed the location to be some form of police building, but once inside he was placed into a metal tent-like structure with his associates. He was offered no food or drink or access to legal advice, and alleged that he was hit around the torso and legs, whilst officers with firearms had their guns close to his face. He added that he was not questioned at this point, and was then moved to a single concrete cell approximately 12' x 6', and held effectively 'in communicado', again with no food or drink, with one bottle supplied to urinate in. He stated that there was what he believed to be faeces and blood on the cell walls. This was the first day of his detention.*

14.8 As Mr Adebolajo was, up to this point, in the custody of the local island police on Pate Island, the above allegation cannot have related to the conduct of ATPU or Arctic.

14.9 In relation to Monday 22 November 2010, when Mr Adebolajo was transferred to Lamu, then Mokowe and then Mombasa, he claimed that he was again held in basic conditions and was questioned, kicked around the torso and legs and threatened with electrocution and rape:

> *On the second day of detention Mr Adebolajo was moved to another location and was placed in a 'holding type cell' at a believed police building. He was offered no food or drink, access to legal advice or any nominated person informed of his detention. During transportation there he was handcuffed to another detainee. He stated there were about 30-40 other people in the cell, a mixture of men, women and children with a shared bottle of water between them. The cell measured approximately 20' x 30'.*
>
> *He was questioned by Kenyan police authorities separately from the holding cell area and during questioning was kicked around the torso and*

legs, and threatened verbally with electrocution and anal rape (these threats were not carried out).

14.10 It is unclear from the above account whether the allegation of mistreatment on 22 November 2010 related to events before or after Mr Adebolajo's transfer from Lamu onto the mainland and down to Mombasa. The relevance of this is that Mr Adebolajo was only taken into the custody of ATPU immediately prior to and for the purposes of the journey to Mombasa and he was only questioned by ATPU and Arctic once there. Accordingly, any prior mistreatment is unlikely to have involved ATPU let alone Arctic. Indeed, the reference to alleged mistreatment having taken place separately from a large holding cell containing 30-40 detainees is much more likely to correspond with facilities on Lamu than those at the Mombasa Police Provincial HQ where the questioning by ATPU and Arctic took place.

14.11 The questionnaire does not contain any allegations of mistreatment relating to Tuesday 23 November 2010, when Mr Adebolajo appeared in court and was again questioned by ATPU, or Wednesday 24 November 2010, when he was transferred to Nairobi and escorted to Jomo Kenyatta airport:

On the third day of detention he was taken to some form of law court near Mombasa, and was then supplied with food and water. On being informed that he was going to be sent back to the United Kingdom, he was supplied with a telephone call to the British Embassy en route to Nairobi Airport before departure.

14.12 The above information was set out in answer to question A in section II of the questionnaire and the majority of the other questions in that section were answered in the negative, save for the following:

B. Identity of force(s) or other public officials carrying out the initial detention and/or torture (police, intelligence services, armed forces, paramilitary, prison officials, other). Provide descriptions of the officials concerned including any uniforms that were worn.

Mr Adebolajo stated that the persons who carried out the inhumane treatment were plain clothed and uniformed police authorities of Kenyan ethnicity and male gender.

...

E. What injuries were sustained as a result of the ill-treatment?

None visible but subject stated he had had bruising on his legs which could no longer be seen.

F. What was believed to be the purpose of the ill-treatment?

Not known. The subject was not asked to provide certain information when the threats/assaults were made.

14.13 The questionnaire also included a body diagram for the recording of visible injuries and this was marked, "None visible" and, consistently with this, the Book 500 notes recorded "no" against "Subject ill or injured".[112] According to one of the SO15 ports officers, Mr Adebolajo claimed he had received visible injuries to his legs while in Kenya and so the officers asked to see them. However, on examining Mr Adebolajo's legs, the officers could see no sign of any injuries, whether new, old, healing or healed.

14.14 There is no doubt that the conditions of Mr Adebolajo's detention would have been very basic by comparison with European standards and that he was not allowed access to consular, legal or medical advice or assistance, albeit that I have seen no evidence to suggest he needed the latter. Although I have seen complaints about food and water, and am aware that Kenyan prisoners are often expected to rely on their families for this, I have not seen any suggestion that Mr Adebolajo requested and was refused either.

14.15 A much less detailed summary of Mr Adebolajo's allegations was also included in the port report itself:

> ***ADEBOLAJO*** *mentioned that he and the others were moved to 3 different locations over the course of 3 days, during this time he was not allowed to speak to a solicitor, the British Embassy or to a doctor.* ***ADEBOLAJO*** *believes that they finally ended up in Mombasa.* ***ADEBOLAJO*** *claims that he was beaten, and threatened with electrocution and rape on more than one occasion during his detention.*
>
> ***ADEBOLAJO*** *was asked about his questioning whilst in detention. He replied that at the last location they were taken to, he was interrogated about 3 or 4 times by different plain clothed officers.* ***ADEBOLAJO*** *stated that on each occasion he gave the same story until the last time where he refused to answer any question until he was able to speak to someone from the British Embassy. This he claims was refused and he was taken back to the cell until being taken to court with the rest of his group…*
>
> ***ADEBOLAJO*** *described that a short while after this court appearance the whole group were paraded in front of photographers and press. The next day (24 November) he was told he was being sent back to the UK.* ***ADEBOLAJO*** *claims that this was the first time he was able to speak to someone from the British Embassy, as he was just about to get into a car to be driven to the airport.*

112 Above this, the relevant part of the Book 500 form states, "All examinees must be asked if they are ill or injured", suggesting that "no" was said by Mr Adebolajo in response to a question about this.

14.16 In terms of mistreatment, the port report therefore does little more than record that Mr Adebolajo alleged he was denied access to consular or legal advice or assistance and beaten and threatened with electrocution and rape on more than one occasion. This was a very brief summary which was much less specific about dates and locations than the questionnaire. The port report therefore contained no indication as to whether the allegations might relate to events before or after the transfer to Mombasa or the conduct of the local island police, ATPU or Arctic. Page 1 of the report has a tick box section inviting reference to any attachments and, although this was ticked, the only attachments referred to were "photocopies of passport and pocket litter". It is clear that neither the Book 500 notes nor the questionnaire was attached to the report or forwarded to any of its recipients.

14.17 I do not think the brevity of the summary of the allegations contained in the port report is itself a cause for criticism, but I do think the much more detailed questionnaire answers should have been attached to or, at least, referred to in the report. The failure to do this had significant consequences although I am sure they were not realised or foreseen at the time.

14.18 In this regard, MI5, SIS and FCO were never aware of the existence of the questionnaire or its contents. As a result, the official understanding of what Mr Adebolajo had alleged was unnecessarily limited and any contemporaneous investigation of his allegations would have been correspondingly hampered. Crucially, the contents of the questionnaire strongly link Mr Adebolajo's allegations to his time in the custody of the local island police and (irrespective of their truth or falsity) this points strongly away from both ATPU and Arctic.

15. HMG awareness of and response to allegations of mistreatment

15.1 On Saturday 27 November 2010, SO15 forwarded a copy of the port report relating to Mr Adebolajo (but not the Book 500 notes or the torture and inhuman treatment questionnaire) to MI5.

15.2 To put matters in context, the early part of the week beginning Monday 29 November 2010 saw the intelligence services continuing to work on the case of Person B, another suspected British extremist present in Kenya. Liaison with the appropriate Kenyan authorities about the case had already taken place and Intelligence Officer 2 discussed it with the SKPO by telephone on 29 November 2010. During that conversation, the SKPO confirmed that ATPU would be willing to give suitable assurances about the treatment of Person B should an arrest, detention and deportation operation prove possible and appropriate. This discussion apparently took place in coded terms over an open line and Intelligence Officer 2 therefore indicated

that the parties would need to meet in person to go over the details and confirm the assurances properly. It appears that Arctic in fact began attempting to locate Person B in Nairobi that evening and that he would have been arrested and detained by ATPU had he been found, i.e. at the request of HMG and notwithstanding that formal assurances were not yet in place.

15.3 On Tuesday 30 November 2010, MI5 sought in-house legal advice about whether Mr Adebolajo's allegations of mistreatment required any further action. The relevant MI5 lawyer replied the next day and advised that various others within MI5 Head Office be notified so consideration could be given to the onward notification of senior managers together with officials/ ministers within FCO and/or the Home Office. MI5 then took steps to notify Desk Officer 1 and Intelligence Officers 1-2 of the allegations and to request that SIS in turn notify FCO.

15.4 To this end, MI5 emailed a memo dated 1 December 2010 and headed "Details of recent port stop and summary of intelligence relating to Michael Olumide Adebolajo" and a copy of the port report to the SIS Intelligence Officers in Kenya at the time (marked for the attention of Intelligence Officers 1-2) and copied this to various others including Desk Officer 1 in SIS Head Office. The memo was highly informative and an excellent piece of work. So far as concerns Mr Adebolajo's allegations of mistreatment, it quoted the above summary from the port report and said:

> *Considering the current climate surrounding mistreatment of detainees, we thought it best to bring these allegations to [the attention of the SIS Intelligence Officers]. For info, ADEBOLAJO's port report has already been passed to [Desk Officer 1 in SIS Head Office] who we understand will correspond with the FCO on this matter.*

15.5 The reference to the port report having "already been passed" to Desk Officer 1 is curious because there is no record of this having been done. Nevertheless, the MI5 memo and the port report were received by the relevant SIS personnel in London and Kenya, including Desk Officer 1. Intelligence Officer 2 specifically recalls telephoning MI5 to answer an intelligence related question posed in the memo.[113] There is no record of SIS contacting FCO as suggested by MI5, but I am satisfied that there was a telephone discussion between MI5 and Desk Officer 1 in which this course of action was discussed.

---

113 The ISC report, paragraph 73 said that SIS did not respond to this request. It is true that it did not respond in writing and that MI5 did not document there having been a response, but I am satisfied that Intelligence Officer 2 did telephone MI5 Head Office with a response and that his answer was probably not committed to writing because it was essentially negative, i.e. the SIS Intelligence Officers did not think there was a link between something Mr Adebolajo had said and another operation referred to by the ISC as "Operation HOLLY".

15.6 Later on Wednesday 1 December 2010, and within two hours of receiving the email, memo and port report from MI5 Head Office, Desk Officer 1 sent an email to the SIS Intelligence Officers in Kenya at the time (marked for the attention of Intelligence Officer 3) headed "Michael Olumide ADEBOLAJO ALLEGATIONS OF MISTREATMENT". This was copied to various other SIS addressees and had a copy of the MI5 memo (but not the port report) attached. I suspect that Desk Officer 1 decided to seek the further information requested in the email before formally contacting FCO as agreed with MI5. The email attached a copy of the port report, referred to the summary of Mr Adebolajo's allegations and continued:

> *We obviously need to investigate these allegations, which underline the need for continuing assurances from the Kenyans on the issue of detainee treatment. We would be grateful if you could provide a summary of [the SIS] and [Arctic] involvement in the investigation into ADEBOLAJO and also provide some clarification on the following issues:*
>
> – *Did ADEBOLAJO have consular access during his detention? It appears from reporting that the FCO were fully aware, but can you confirm whether direct meetings took place and how often. Did the Kenyans discuss consular access at the time?*
>
> – *Was ADEBOLAJO aware of any British involvement in his detention? We know that he was questioned by [Arctic] Mombasa but was this the extent of our involvement?*
>
> – *Are you aware of any other details concerning the detention of ADEBOLAJO? Where was he held? By whom?*
>
> *We would be grateful if you would consider this as a matter of urgency. Whilst we continue to work jointly with [Arctic] on potential detention operations we need to maintain clarity on the assurances given to us by the Kenyan authorities and any potential breaches of these.*

15.7 I would commend not only the fact that Desk Officer 1 sent the above message, but also its breadth which sought surrounding information about consular access and so on. It goes without saying that the email asked Intelligence Officer 3 to provide the requested information whether or not the allegations were thought to be credible. Desk Officer 1 told me that she thinks she telephoned Intelligence Officer 3 to discuss the matter and warn him to look out for her email. I accept that it was her usual practice to make such a call, but I am unable to say whether or not she did so on this occasion: Intelligence Officer 3 was not able to remember a call, but if there had been one, this would raise the question as to why he did not then register or follow up the non-delivery/non-receipt of the promised email (to which I will shortly turn).

15.8 It is perhaps interesting that Desk Officer 1 sought to contact Intelligence Officer 3, rather than Intelligence Officer 1 who had led on the case the previous week. Intelligence Officer 3 was not in Kenya when the arrest took place and did not return until 24 November 2010, by which time Mr Adebolajo was already en route to Nairobi. The likelihood is that Desk Officer 1 nevertheless decided to task Intelligence Officer 3 with following up the allegations because the latter was senior to Intelligence Officers 1-2 and because he was responsible for managing any SIS contribution to HMG's close working relationship with Arctic. This may in turn suggest some recognition that those allegations could have related to the conduct of Arctic and, in this regard, it is notable that Desk Officer 1 also treated the involvement of Arctic and SIS as synonymous, "We know that he was questioned by [Arctic] but was this the extent of *our involvement*?"

15.9 The ISC has told me that it saw Desk Officer 1's email as important because it contained an acknowledgment that SIS had a responsibility to investigate allegations of mistreatment which may have related to Arctic and I support that view. The ISC also proceeded on the understandable assumption that the email would have been received and read by the SIS Intelligence Officers. However, and although possibly of less relevance to the ISC's investigation, I have been able to establish that (unbeknown to anyone at SIS) the email was not delivered and its successful transmission was in fact blocked by the SIS IT system. This was discovered by Mr Sanders from an analysis of the message data and delivery information files associated with the email when inspecting soft copies of this and other emails at SIS Head Office in London. At my request, SIS looked into this and explained that the email had been blocked by an "inhibit function" within its email software which prevents recipients from re-sending messages on to other co-recipients using the "forward" button.

15.10 To explain this in more detail, Desk Officer 1 and the SIS Intelligence Officers in Kenya at the time were recipients of the email from MI5 dated 1 December 2010 with the memo and port report attached. Desk Officer 1 then attempted to "forward" the same email back to the SIS Intelligence Officers (and various others within SIS Head Office who had not previously received a copy) with the memo attached and the above covering note added into the body of the email, but with a new title and without the port report attached. Transmission of this forwarded email to the SIS Intelligence Officers in Kenya was then blocked by the SIS IT system applying a rule which assumes that recipients should not receive multiple copies of the same email, irrespective of whether they have a new title, covering note and list of recipients and/or fewer attachments. (This was particularly inappropriate when applied to a shared email account such as the one then being used by the SIS Intelligence Officers in Kenya for classified messages because the MI5 memo and port report were sent to Intelligence Officers

1-2 and Desk Officer 1's request was addressed to Intelligence Officer 3.) There was no error message or notification to alert Desk Officer 1 or the new copy recipients that the message had been blocked in this way: they would all have assumed that the SIS Intelligence Officers had received a request to investigate Mr Adebolajo's allegations of mistreatment.

15.11 In consequence of this somewhat anomalous feature of the SIS email software, it is possible that other important messages have been blocked and, importantly, emails may have been disclosed for the purposes of investigations or litigation on the false assumption that they would have been delivered and read. SIS looked into this and confirmed that a dip sample of other messages unconnected with this case showed that some had been blocked in the same way. It issued an awareness bulletin on its intranet for users of the relevant messaging system and expects the problem to stop occurring when a replacement system is shortly introduced.

15.12 In a joint submission to the ISC dated 30 August 2013, SIS and MI5 suggested that there may have been face to face or telephone discussions between SIS and FCO about Mr Adebolajo's allegations which were reported in "ephemeral messages" which were not then retained. It was explained that this term is used by SIS to refer to electronic documents and messages which contain information of short-term interest and which are purged from SIS systems after three months. Given the subject matter and the nature of the messages which were retained, I think it highly unlikely that any related messages recording such discussions would have been treated as "ephemeral" or deleted. The email from Desk Officer 1 to Intelligence Officer 3 dated 1 December 2010 requesting an investigation into Mr Adebolajo's allegations *was* retained and I think any response to this and/or any independent message from the SIS Intelligence Officers on the subject would have been kept in the same way. Indeed, I am satisfied that there is and was a culture within the intelligence services that materials dealing with assurances or allegations of mistreatment are retained, if and when created, as demonstrated by the bulk of the documents I inspected during the course of my review.

15.13 This is borne out by the fact that Intelligence Officer 2 did document ATPU assurances obtained around the same time on the Person B case. I have thus seen an email from the SIS Intelligence Officers in Kenya to MI5 Head Office dated 1 December 2010 confirming that Intelligence Officer 2 had met with the SKPO that day to follow up their telephone conversation on 29 November 2010. This email recorded assurances being given to the effect that, "the arrest and subsequent detention of [Person B] would be in accordance with Kenyan Law and the International Human Rights Act that Kenya is a signatory [sic]". It also noted, "What followed was a discussion surrounding the precise details of Kenyan legislation with us simply

emphasising the need for Kenyan law to be adhered to throughout the process".

15.14 This brings me to the question what, if anything, SIS did about Mr Adebolajo's allegations after finding out about them on 1 December 2010? In a written submission to the ISC dated 23 April 2014, SIS doggedly maintained:

> *The recollections of officers from that time tell us only that the assessment was reached that there was no substance to the allegation. This would have been based on Adebolajo's credibility; the fact that SIS had already raised the question of Adebolajo's treatment with the Kenyan authorities and had received assurances on this point; SIS knowledge and experience of [Arctic] practices; and CTELO's knowledge and experience of ATPU practices.*

15.15 The above, of course, proceeded on the premise that Intelligence Officers 1-2 *did* seek and obtain (but not document) assurances from the SKPO relating to ATPU's treatment of Mr Adebolajo. In a similar vein, even after it had been discovered that the email from Desk Officer 1 to Intelligence Officer 3 dated 1 December 2010 was blocked and not delivered, SIS maintained to me in a written submission dated 29 September 2015:

> *Accordingly, and having consulted several of the officers involved, it remains SIS's position that Adebolajo's allegations were discussed [by the SIS Intelligence Officers] and would have been raised with Kenyan liaison… and we would caution against placing too much emphasis on the non-delivery of [the email].*

15.16 I do not know the basis for the above statements because none of the SIS personnel I spoke to was able to go as far as saying that Mr Adebolajo's allegations *were* assessed or that they were found to lack substance and no-one suggested they were raised with the SKPO, ATPU or Arctic. I found the assertion that the allegations "would have been raised with Kenyan liaison" particularly odd given that SIS had previously told the ISC this was not done.[114] Desk Officer 1 told me she would have discussed Mr Adebolajo's allegations with MI5 and FCO, but candidly admitted that she had no memory of having done so. On balance, I am satisfied that Desk Officer 1 did have telephone discussions with both on 1 December 2010, but I find it unlikely that there were any further such discussions after that within or between SIS Head Office or the SIS Intelligence Officers in Kenya at the time. The much greater likelihood is that Desk Officer 1 believed that she had passed the matter to Intelligence Officer 3 for action, she then failed to follow it up, as she should have done, and it subsequently "fell off

114 See the ISC report, paragraph 478.

the radar". I am in no doubt that Intelligence Officers 1-2 would have been aware of the allegations and would have felt instinctively that there was nothing in them. However, this cannot be described as an "assessment" and the available evidence suggests that the answer to the above question as to what SIS did about Mr Adebolajo's allegations after finding out about them on 1 December 2010 is "nothing".

15.17 However, it is important to stress that the intelligence services (including the SIS Intelligence Officers) were aware that allegations had been made by Mr Adebolajo and that this awareness did at least feed into their handling of the Person B case. Indeed, the ATPU assurances on that case (given via the SKPO on 29 November and 1 December 2010) were reviewed and reassessed by MI5 in the light of Mr Adebolajo's allegations. Accordingly, an MI5 lawyer asked to comment on the case on 30 November 2010 advised the following day that Mr Adebolajo's allegations needed to be investigated prior to any detention of Person B (albeit that Arctic were by then actively trying to find Person B and ATPU would have arrested him straightaway if he had been found).

15.18 An MI5 Head Office note for file dated 1 December 2010 and headed "Further consideration given to the deportation of [Person B] in light of mistreatment claims by ADEBOLAJO", which was not flagged up to and may not have been reviewed by the ISC, records a subsequent internal discussion between a manager, a case officer and the above mentioned lawyer during which it was decided that "it is unlikely there is a serious risk of mistreatment of [Person B]".[115] After referring to the assurances already provided by ATPU, the note continues:

> *We are content that the Kenyan authorities have, to our knowledge, acted lawfully while undertaking similar operations at the request of the Security Service.*
>
> *ADEBAJO's [sic] deportation was not at the behest of the Security Service and, consequently, no assurances were sought from [sic] HMG. Further work needs to be undertaken to establish whether there is any truth to ADEBAJO's [sic] claims of mistreatment. This work is currently in process and is being undertaken by [MI5 Head Office] and [Desk Officer 1 in SIS Head Office]. It is likely that senior officials or ministers will need to be informed.*

15.19 I have seen an earlier email from the case officer who produced the above note to a colleague tasked with assisting the review saying, "I'd start by chatting this through with [the SIS Intelligence Officers in Kenya at the time], they may well have a view on how we can resolve this. I've seen

115 For reasons which are unclear, a further version of this note for file dated 3 December 2010 but with a paragraph omitted was subsequently sent to SIS Head Office.

ADEBOLAJO's port report and will forward it on". I think it reasonable to assume that this would have been followed up and there was therefore some consultation with the SIS Intelligence Officers in connection with the review. I nevertheless think it suffered from some deficiencies: those involved had access to the summary of the allegations contained in the port report, but not the underlying torture and mistreatment questionnaire (largely because this was not mentioned in or attached to that report); there is no evidence to suggest there was any consultation with SIS Head Office, the CTELO, the SKPO, ATPU or Arctic; and a conclusion was therefore reached without a full understanding of the plausibility of Mr Adebolajo's allegations or whether they could have related to ATPU and/or Arctic.

15.20 Although I am therefore concerned about the extent of the review, it did at least show that an attempt was made to take account of Mr Adebolajo's allegations in an appropriate fashion and consistently with the Consolidated Guidance and, notwithstanding the above deficiencies, I think the conclusion reached was reasonable. In particular, it made sense to attach weight to the fact that no assurances had been sought or obtained in relation to Mr Adebolajo because this at least meant that it was reasonable to take the view that his allegations (even if true) did not cast doubt on the reliability of such assurances or the risk of them being broken.[116]

15.21 In the week beginning 6 December 2010, while Arctic was still attempting to locate Person B, another British national, Person C, was unexpectedly arrested by ATPU while heading towards or attempting to cross the border into Somalia. The SIS Intelligence Officers in Kenya at the time were notified of the arrest the day it took place, possibly via the CTELO, and events unfolded as follows over the next 24 hours: SIS Head Office carried out searches for information in its records on Person C[117]; the results of these were passed on to the SIS Intelligence Officers who relayed them to their Kenyan counterparts[118]; and (on the basis of this information) it was ultimately agreed with ATPU that Person C would be returned to the UK on a flight booked and paid for by HMG. An email recording all of this was almost immediately sent by the SIS Intelligence Officers to the Head Offices of SIS and MI5 and this included the following:

> *We confirm that we have sought and obtained assurances from ATPU. We have also requested from ATPU sight of any interview reports that they have following [Person C]'s arrest.*

116 In the event, Person B could not be located at that point in time and I did not follow up the outcome of his case as this was not relevant to my review.

117 [text omitted – see report, paragraph 5.8].

118 Interestingly, SIS told me, in connection with Mr Adebolajo's case, that "it would be unusual" to share information held by HMG on an individual and returned pursuant to such a search "without explicit instructions from Head Office" and Intelligence Officer 2 said he was "confident" that he would not have done this without such instructions and a "form of words to deploy". I have not seen all the materials relevant to the case of Person C, but was struck by the contrast between what I was told in connection with Mr Adebolajo's case and what happened days later in connection with Person C.

We will see whether [Arctic] are able to conduct an interview with [Person C] when he arrives in Nairobi. Grateful for any questions you would like feeding in for this interview.

15.22 Within a few hours of this, MI5 Head Office had contributed the results of its own search for information and SIS Head Office had replied to the above with a series of 20 questions for Arctic to put to Person C in the event of an interview. Person C had also been placed on ports action with a view to a port stop interview by SO15 P Squad on his return to the UK and MI5 had circulated a list of 24 questions for the SO15 ports officers to pose. MI5 Head Office in particular asked that the SIS Intelligence Officers in Kenya at the time obtain "written assurances from the Kenyans in relation to [Person C]'s detention while he is in Kenya" because it was "very keen to mitigate the risk that [Person C] may claim he was mistreated while in Kenyan detention".

15.23 It appears that the latter request was not carried out, but it was clearly a very fast moving situation: on 7 December 2010 Person C was interviewed by Arctic; and on 8 December 2010 he was flown back to the UK and the SIS Intelligence Officers in Kenya at the time circulated a copy of the Arctic interview report.

15.24 Particularly given the similarities with Mr Adebolajo's case, the approach taken to Person C provides an interesting case study. The same basic deportation/port stop template was followed, but the response of the intelligence services was much more efficient and engaged: they provided information and interview questions for ATPU and Arctic to consider and requested interview reports from both; and they swiftly obtained clear ATPU assurances via the SKPO. The only points of constructive criticism I would raise are that those assurances were not obtained in writing and no express thought appears to have been given to whether assurances should also be sought from Arctic, particularly given that it would be posing questions supplied by, and reporting back to, SIS.

15.25 Returning to the case in hand, SO15 forwarded Mr Adebolajo's port report to the FCO Counter Terrorism Department in accordance with a protocol then in place which required the police and border officials to do this with all reports recording allegations of mistreatment by overseas authorities. The Counter Terrorism Department was in turn required to alert the FCO Consular Special Cases Team and Human Rights and Democracy Department. Such referrals now engage and take place in accordance with the more formal provisions of the TM Reporting Guidance dated March 2011.

15.26 The date on which Mr Adebolajo's port report was sent to the FCO Counter Terrorism Department is unclear, but officials in the latter showed a copy to a representative of the FCO Consular Directorate on Friday 10 December

2010 and he raised it with his colleagues the following week. (It appears that Consular Directorate was notified of Person C's removal at the same time, but his port stop interview had not yet taken place and there was no suggestion that he had alleged mistreatment.)

15.27 FCO has informed me that it is and was standard practice for it to receive a copy of any completed torture and inhuman treatment questionnaire together with port reports containing allegations of mistreatment. It is unclear whether that happened in Mr Adebolajo's case, but I have seen no evidence to suggest that it did and FCO had a copy of the port report in its files, but not the questionnaire.

15.28 On Friday 17 December 2010, FCO Consular Directorate made telephone contact with Blessing Adebolajo, but she was unwilling and/or unable to provide contact details for her brother. Accordingly, FCO wrote to Mr Adebolajo at his father's address, which he had given as his home address during the course of the port stop interview on 25 November 2010. The letter was dated 21 December 2010 and read as follows[119]:

> *Further to my telephone conversation with your sister Blessing on Friday 17 December, I am writing to you about your detention in Kenya in November this year.*
>
> *I would like to pass on my contact details so that you have the opportunity to discuss your experience in detention and let us know if you wish us to raise any matters with the Kenyan authorities. We do not normally raise issues with authorities overseas without the express permission of the individual concerned.*
>
> *If you do not feel able or wish to call, you may prefer to send me a written account. My email contact details are above.*
>
> *I look forward to hearing from you.*

15.29 A draft of the above was shown to and cleared by SIS, and although the precise point of contact is unclear, this does at least suggest that someone there might have been reassured that Mr Adebolajo's allegations were being addressed in some way.

15.30 Mr Adebolajo did not reply to the above letter, FCO did not follow it up and the matter was left there.

---

119 The ISC report, paragraph 497 expressed concern that "it might only have been in response to contact from Adebolajo's sister that the FCO took any action, nearly a month after the allegations were first made". This derived from a statement in a joint MI5/SIS submission dated 30 August 2013 which was itself inaccurate, but having reviewed a greater volume of papers I am satisfied that FCO was in fact acting on its own initiative.

15.31 For completeness, the final documented step taken in relation to Mr Adebolajo's allegations took the form of an SO15 War Crimes Team case review following the introduction of the abovementioned CPS Referral Guidelines in July 2011. The case was thus allocated on 22 December 2011, entered on the system on 8 November 2012 and closed on 12 December 2012. This closure took place because the case did not meet the CPS criteria for progression to a full criminal investigation.

IV. CONCLUSIONS

16. HMG involvement in and adequacy of its response to arrest, detention and return

Was Mr Adebolajo the victim of an intelligence services conspiracy?

16.1 The answer to this question is "no". I found no evidence to suggest that any of the intelligence services knew in advance about Mr Adebolajo's travel to or arrest in Kenya or was involved with or influenced his questioning or treatment while in custody. Neither could I find any evidence to suggest that the intelligence services had him under surveillance, requested his arrest or attempted to recruit him as an agent. Indeed, every relevant document and piece of evidence I reviewed was wholly incompatible with the theory that Mr Adebolajo was the subject of an intelligence services conspiracy. Furthermore, there is no evidence to suggest that Mr Adebolajo, the other detainees or any of their relatives have ever said anything remotely consistent with such a theory, including in various media and police interviews. Such a conspiracy would have required the dishonest and malicious collusion of multiple persons at SIS, MI5, FCO, MOD and SO15, the production of false documents and evidence from those bodies (as well as from the Kenyan police, Arctic and at least one other foreign intelligence service), the circulation of a bogus and misleading CX report by SIS and the concealment, destruction or non-creation of genuine records – all to no discernible purpose. The whole idea is fanciful, implausible nonsense.

16.2 For the avoidance of doubt, I also made enquiries with MOD about the suggestion that special forces could have been involved with Mr Adebolajo's arrest or detention. Again, I am entirely satisfied that no armed forces, UK or Kenyan, regular or special, had any involvement. Our special forces could not have advised the Kenyans on a detention operation against a British national without the approval of the Director Special Forces and MOD ministers. The idea that members of a highly trained special forces unit might have been despatched to Kenya to arrest Mr Adebolajo and his unarmed companions (some of whom were school children and all of whom were easily detained by the local island police) is, frankly, ludicrous and it only serves to discredit those responsible for its propagation.

Did the intelligence services fail to record or act on (potentially) available information about Mr Adebolajo's travel plans?

16.3 Paragraphs 56-60 of and recommendation G in the ISC report suggested that it found an MI5 note for file dated May 2011 and a police document pointing to the existence of information about Mr Adebolajo's travel plans

"which might have been available to the intelligence services" prior to his arrest. Having considered a much greater volume of evidence and probed these issues further, I am satisfied that no such information was available and that the ISC's suggestion to the contrary resulted from the provision of confused and inaccurate evidence by the intelligence services themselves.

(1) **MI5 note for file dated May 2011**

This recited part of Intelligence Officer 1's email dated 23 November 2010 documenting the meeting he and Intelligence Officer 2 had that day with the SKPO, particularly the statement that reporting from a named agent had led to the arrest of Mr Adebolajo. As already mentioned, this was in fact supposition on the part of Intelligence Officer 1 and it should have been expressly qualified as such. Having spoken with Intelligence Officers 1-2 and having reviewed a considerable volume of material suggesting the arrest was carried out by the local island police pursuant to a chance sighting by one of the group's relatives, I am satisfied that ATPU was not "tipped off" about or otherwise aware of Mr Adebolajo's travel plans. Indeed, Intelligence Officer 2 told me, very believably, that he has a clear recollection of going back to the car with Intelligence Officer 1 after the meeting and the latter having a eureka moment and saying words to the effect, "I bet it came from so-and-so".[120]

(2) **Police document**

The ISC report referred to a police document stating that the CTELO "had knowledge of potentially relevant information" about Mr Adebolajo's travel plans which he obtained from SIS the week before the arrest, albeit that the CTELO later said he was told this information orally and it was more of a "rumour, rather than corroborated or actionable information".[121] First, the CTELO was always clear that the "office rumour" which he had heard the week before the arrest referred only to the travel plans of an unnamed British national and that he simply inferred that this must have been Mr Adebolajo. Secondly, I am satisfied that the CTELO was simply mistaken in retrospectively linking this rumour to Mr Adebolajo. In this regard, Intelligence Officer 2 told me that he was "as close to positive as I can be" that the CTELO's "rumour" derived from an SIS briefing about the movements of another individual (possibly Person A or Person B) which took place during the week in question and which Intelligence Officer 2 remembered very clearly.

120 See further paragraph 12.18 above and paragraphs 16.18-16.22 and 20.14(3) below.

121 The ISC report, paragraph 60.

Did the intelligence services comply with the Consolidated Guidance in connection with Mr Adebolajo's arrest and detention?

16.4 Paragraphs 465-470 of the ISC report addressed the application of the Consolidated Guidance to the circumstances of Mr Adebolajo's detention in Kenya. These passages set out the intelligence services' view that the Guidance was not engaged and described their position as "arguable", but also suggested that HMG might have been "complicit" in any mistreatment by Arctic by reason of their close relationship. Although the ISC's comments about complicity and its accompanying recommendation were not then related back to the terms of the Consolidated Guidance, they reflect a concern, which I share, with the observance of its spirit:

> *ZZ. Where HM Government (HMG) has a close working relationship with counter-terrorism units, they will share responsibility for those units' actions. HMG must therefore seek to ensure that the same legal and moral obligations to which HMG adheres, and guidance which they follow, also apply to such units. Where there is a possibility that an allegation of mistreatment might refer to a unit where HMG has such responsibility, then HMG must investigate as a matter of priority to establish whether the unit is involved.*

16.5 I think there are separate issues here as to compliance with the Consolidated Guidance by the intelligence services in this case and, in the light of this, its adequacy more generally. I return to the latter issue in parts 19 and 21 below and think there are two limbs to the question of compliance: compliance while Mr Adebolajo was in Kenya; and compliance after he had returned to the UK and made allegations. I deal with the first of these limbs in this part of my report and the second in part 18 below.

16.6 In this case, the intelligence services did not interview Mr Adebolajo, request that the Kenyan authorities seek any information from him or pass information about him to those authorities and they were therefore right to say that the Consolidated Guidance could not have been engaged *for any of these reasons* while he was still in Kenya.[122] However, I think the Guidance was potentially engaged at that time on the basis that the intelligence services received unsolicited information about Mr Adebolajo from a third party (i.e. the Arctic interview report) and on the basis that they could be said to have solicited his detention by ATPU.[123] In this regard, I would emphasise that the Consolidated Guidance does not have a "one off" application only at the point of initial detention – it has an ongoing

122 See the Intelligence Services Commissioner (Additional Review Functions) (Consolidated Guidance) Direction 2014, paragraph 6(a)-(c).

123 See the Intelligence Services Commissioner (Additional Review Functions) (Consolidated Guidance) Direction 2014, paragraph 6(d)-(e).

application through every stage of any case. See the following from my *Annual Report for 2011*[124]:

> *I have drawn upon the following principles when working with others to set up the oversight mechanism for monitoring compliance with the detainee guidance… Officers and military personnel should consider whether a detainee may be or have been mistreated on each occasion they seek to pass or receive intelligence related to a detainee or solicit the detention of a detainee by a third party. The role of the guidance specifically is to set out the process that should be followed on occasions where officers assess that there is a risk of torture or CIDT. My oversight is confined to checking whether the process set out in the guidance is being followed…*

16.7 So far as concerns the question whether the intelligence services solicited Mr Adebolajo's detention by ATPU, it goes without saying that they did not do so *in the first instance*. However, they did then become involved in the case and it is necessary to consider whether that involvement extended to active solicitation for the purposes of the Consolidated Guidance, i.e. did the intelligence services ask for or request the continuation of Mr Adebolajo's detention? I think the following factors are relevant here:

(1) the arrest/detain/deport response to cases of this type followed a well-established and relatively routine UK/Kenyan model and it would be artificial to pretend that Mr Adebolajo's return to the UK was simply the result of an independent decision taken by the Kenyan authorities which just happened to come to the advance notice of HMG;

(2) as soon as Intelligence Officers 1-2 were notified on 22 November 2010 of the arrest the day before, they resolved to call on the SKPO the following day "for a readout" (i.e. to obtain information) and presumably took steps to arrange their meeting;

(3) within about 12 hours of Arctic's interview with Mr Adebolajo late on 22 November 2010, Intelligence Officer 1 had reviewed a copy of its report;

(4) at the meeting on 23 November 2010, the Kenyan police requested financial assistance from HMG with Mr Adebolajo's return air fare and Intelligence Officer 1 duly requested SIS Head Office approval for this, referring to a previous case where such assistance had been provided (as it happens, the SKPO did not disclose any information obtained from Mr Adebolajo at this meeting, but Intelligence Officers 1-2 must

124 *Annual Report for 2011* dated 13 July 2012 (HC 497), p.32.

have gone into it knowing that this was at least a possibility and there is no suggestion that they asked him to refrain from doing so);

(5) also at that meeting, Intelligence Officers 1-2 asked for certain information from Mr Adebolajo's immigration file and the SKPO undertook to provide this[125]; and

(6) Intelligence Officer 1 contacted the SKPO on 24 November 2010 in order to get an update and obtain details of Mr Adebolajo's return flight to the UK so that these could be passed on to MI5 and SO15.

16.8 In my view, the above factors point to a degree of active assistance and encouragement on the part of the intelligence services which would have led ATPU and Arctic legitimately to understand that SIS was not only interested and engaged with the case, it was also content with its handling and the proposed plan of action. To my mind, the Kenyan authorities would have taken comfort from the fact that their partners in HMG not only refrained from adverse comment, they were actively supportive. Furthermore, joint arrest, detention and deportation operations were relatively routine business for those involved (see the cases of Persons A-C), Mr Adebolajo's case was in reality part of this business and it was therefore following a familiar course which generally relied on very similar levels of co-operation.

16.9 In the light of the above, I think it is strongly arguable that the provisions of the Consolidated Guidance dealing with the soliciting of detention *were* engaged in this case *while Mr Adebolajo was in detention in Kenya on 22-24 November 2010*. Furthermore, and in common with the ISC, I certainly think that the spirit of those provisions should have been applied and that the intelligence services should have considered the risk of mistreatment and the obtaining of assurances as a means of mitigating any such risk.[126] Had there been any contemporaneous concerns about unacceptable treatment in the context of this case, they should also have reacted in the same way as in a standard Consolidated Guidance case.

16.10 On this basis, the key issue for present purposes is whether the intelligence services complied with paragraphs 9 and 25-26 of the Consolidated Guidance by considering whether to seek and obtain assurances in relation to the treatment of Mr Adebolajo, and/or notify senior managers or ministers, in the light of an assessment of the risk of past or future mistreatment, particularly during the course of the Arctic interview.

125 [text omitted – see report, paragraph 5.8].

126 The ISC report, paragraphs 467-470 and recommendation ZZ likewise focus on the important concerns and themes addressed in the Consolidated Guidance.

16.11 As already mentioned, I am unable to say whether or not Intelligence Officers 1-2 sought and obtained assurances from ATPU during the course of the meeting with the SKPO on 23 November 2010.[127] They both thought they should and would have done this and I would agree that this would have been best practice and that the process of considering the risk of mistreatment should certainly have been undertaken. I also think that appropriate and reliable assurances could and would have been provided if they had been sought.

16.12 Beyond this, I do not think Intelligence Officers 1-2 did in fact have any grounds *while Mr Adebolajo was in detention in Kenya on 22-24 November 2010* for thinking there was a serious risk that he had been or would be mistreated by ATPU or Arctic and so any failure to consider this would have been more a matter of procedure than substance. I would also agree with the submission made to the ISC by SIS that the Consolidated Guidance did not require consultation with or referral to senior managers or ministers in relation to the case *at that time*.

16.13 More generally, I reviewed a wealth of material from the second half of 2010, including on the cases of Persons A-C, confirming that SIS routinely sought assurances primarily from the SKPO (as ATPU was the arresting and detaining authority) but also, where necessary, from Arctic.[128] Indeed, I was encouraged by the degree to which compliance with the Consolidated Guidance, the full engagement of in-house legal advisers and the seeking, obtaining and assessment of assurances were embedded within the culture of FCO, SIS, MI5 and SO15 even at that early stage of the operation of the Guidance.

16.14 That said, although I am conscious that the Consolidated Guidance was in its infancy at the material time in late 2010 and improvements have since been made in its practical operation, I did identify a number of concerns:

(1) Assurances were always obtained from the Kenyan authorities orally and, although documented within internal SIS and MI5 communications, I saw no evidence of them being confirmed in written correspondence with those authorities as they should have been.

(2) The language used in connection with these assurances had a tendency to be somewhat loose and imprecise. For example, I saw a number of references to compliance with "the International Human Rights Act, to which Kenya is a signatory [sic]" when no such instrument exists. The intention was presumably to refer to the UN International Covenant on Civil and Political Rights and while I do not think that the correct

127 See paragraphs 12.20-12.24 above.

128 [text omitted – see report, paragraph 5.8].

identification of particular legislation is itself important, the language used needs to be meaningful if the underlying assurances are to have real value.

(3) There was also a tendency for those involved in London to make statements suggesting some confusion or lack of clarity about the different roles of ATPU, NIS and Arctic and the importance of assurances being obtained from the former as the arresting and detaining authority. References to these units thus tended to be somewhat compendious and interchangeable and separate consideration was not always given to the need for assurances from NIS and Arctic as opposed to ATPU.

(4) I saw no evidence of assurances being sought or obtained from or in relation to the immigration authorities which would take custody of British nationals who were arrested and detained by ATPU and then deported back to the UK on immigration grounds. (These authorities were not involved in Mr Adebolajo's case as he agreed to return to the UK voluntarily rather than await immigration processing and deportation.)

Did the intelligence services fail to have a sufficient interest and involvement in Mr Adebolajo's case while he was in detention?

16.15 Paragraphs 61-64 of and recommendation H in the ISC report suggested that SIS failed to take any "practical" or "substantive" action in relation to Mr Adebolajo and that it demonstrated a "passive approach" and "lack of interest" described as "deeply unsatisfactory".[129] In this regard, the ISC said SIS took no further action after the meeting between Intelligence Officers 1-2 and the SKPO on 23 November 2010 and concluded that it should have done more. I initially read paragraph 62 of the ISC report to imply that SIS should have sought to interview Mr Adebolajo, asked to be involved in any interview by the Kenyans or fed in questions to be put to him.[130] However, the ISC has since told me that this was not its intention and that it was instead referring to "substantive action of the more proactive type the Committee would have expected to see".

16.16 Having conducted my review, I am bound to report that I cannot agree with these criticisms. It is not correct that SIS took no further action in the relatively brief 36 hour period between the meeting on 23 November 2010 and Mr Adebolajo's departure from Kenya the following day. In this regard, and as set out above, SIS did the following during this period: issued a

129 See also the ISC report, p.6, paragraph (viii). In this regard, the ISC said it concluded that SIS "should have been considerably more proactive in [its] approach" and that it failed in considering that "deportation or voluntary departure [provided] a satisfactory resolution to a case of a UK citizen believed to be attempting to join a terrorist organisation overseas".

130 "However, they did not seek to interview Adebolajo, ask to be involved in any interview by the Kenyans, or feed in any questions to be put to him".

helpful CX report; obtained and circulated an update from the SKPO; and provided consular officers with an ATPU telephone number so they could speak to Mr Adebolajo. MI5 was also active in issuing a Ports Circulation Sheet which triggered the port stop interview by SO15 and allowed the ports officers to put all the intelligence services' questions to Mr Adebolajo.

16.17 More generally, I do not think that SIS should be criticised for not having intervened further in the case, albeit that they took a much more proactive approach in connection with the comparable case of Person C.[131] It seems to me that disrupting Mr Adebolajo's travel to Somalia and securing his return to the UK, where he could be port stopped by SO15, fulfilled SIS's operational functions and represented an effective and satisfactory outcome. I do not think it likely that a further in-country interview of Mr Adebolajo or the posing of "fed in" questions by the Kenyan authorities could or would have achieved anything more or made a material difference. As already mentioned, it is impossible to know what Mr Adebolajo might have gone on to do if he had been able to join and train with Al-Shabaab, but one cannot exclude the possibility that it might have been even worse.

Did the intelligence services appropriately process and disseminate the available information about Mr Adebolajo's activities and arrest in Kenya?

16.18 Within a week of the arrests, the intelligence services had available to them independent reporting which, first, contradicted Intelligence Officer 1's conclusion that Mr Adebolajo's arrest had resulted from the supply of information by an ATPU agent and, secondly, corroborated the belief that Mr Adebolajo and his companions *were* acting in pursuit of an extremist agenda. This reporting took the form of an Arctic intelligence report, another foreign intelligence service report and also (for what it was worth) some contemporaneous media coverage.[132] None of this appears to have been fed into the intelligence services' contemporaneous understanding of Mr Adebolajo's activities and neither of the intelligence reports appears to me to have been made available to the ISC. (This Arctic report would have been available to the intelligence services at the time via the intelligence-sharing arrangements mentioned above, but the copy I saw was apparently printed some time later and SIS did not inform me of its existence or provide me with a copy until 1 December 2015.)

16.19 Notwithstanding the above, the understanding that, first, ATPU had arrested Mr Adebolajo on the basis of intelligence provided by one of its agents and, secondly, there was nothing to corroborate the suspicion that he had been travelling to Somalia for jihad, became embedded in the intelligence

131 See paragraphs 15.21-15.24 above.

132 [text omitted – see report, paragraph 5.8].

services' corporate knowledge and their subsequent assessments.[133] They also relayed this understanding to the ISC and me.

16.20 I find that the intelligence services' approach suffered from two cumulative omissions in this regard: first, Intelligence Officer 1 failed properly to caveat or qualify his note of the meeting with the SKPO on 23 November 2010 so as to make clear that the information about the arrest being the result of agent reporting was more supposition than fact[134]; and there was then a collective failure to access or connect the independent reporting mentioned above to Mr Adebolajo's case and/or to review the above understanding in the light of that reporting.

16.21 When I put to SIS that the intelligence services' embedded understanding of Mr Adebolajo's travel plans and arrest was at odds with the independent reporting mentioned above, its response, with little or no explanation, was that the reporting was likely to have been accurate and the embedded understanding was likely to have been wrong.

16.22 I found this surprising. In his oral evidence to the ISC, the Director General of MI5 effectively said that this embedded understanding formed "the reason" for the investigation into Mr Adebolajo (referred to in the ISC report as "Operation BEECH") being graded as "Priority 3" and consequently delayed.[135] I make no comment on whether an earlier review of this understanding in the light of the independent reporting mentioned above might have affected the grading and hence the timing of Operation BEECH, but this appears to me to be a legitimate question. That said, I would also emphasise that Mr Adebolajo was subsequently placed under much more intensive surveillance and this did not reveal a serious risk of harm and was (therefore) ultimately discontinued.[136]

Did the intelligence services hinder or fail to facilitate Mr Adebolajo's consular rights?

16.23 The consular authorities in UK diplomatic missions are not constrained to assist British national prisoners overseas only if and when they have been formally notified of an arrest by their counterparts in the receiving State. The Consular Guidance referred to above makes clear that contact should be attempted and assistance offered within 24 hours of hearing of a detention *from any source*. As already mentioned, the consular officers at BHCN did not attempt to comply with this policy, possibly because they felt it would be difficult to make contact with Mr Adebolajo. Furthermore, when the BHCN Consular Officer did finally contact Mr Adebolajo, shortly before his return flight to the UK, this was done at the prompting of the FCO

133 [text omitted – see report, paragraph 5.8].

134 See paragraphs 12.18 and 16.3(1) above.

135 See the ISC report, paragraphs 79-80 and transcript of evidence dated 17 October 2013, pp.2-3 and 12-13.

136 The ISC report, paragraphs 81-107.

Consular Directorate in London and only because it was felt that it might help deflect later allegations of mistreatment if FCO was "able to say we at least requested access".[137]

16.24 Notwithstanding comments made by the Chief of SIS in his oral evidence to the ISC to the effect that SIS is not "a consular service for wannabe terrorists"[138], Intelligence Officers 1-2 did keep consular officers at BHCN informed of developments and I consider that they were right to do so.[139] I would certainly be disappointed if intelligence service personnel took an overly rigid approach to questions of consular access and did not pass information on to UK consular authorities simply because this is "not their job". ATPU formally notified the CTELO of the arrest and the SKPO discussed it with Intelligence Officers 1-2 and there is no reason to think that the Kenyan authorities should have done more by way of notifying HMG, particularly given that the CTELO was based in BHCN and routinely attended meetings with the SIS Intelligence Officers.[140]

16.25 The only minor criticism I would make of the intelligence services in this regard is that Intelligence Officer 1 failed to register the inconsistency between the Arctic interview report saying Mr Adebolajo "always demanded that he be allowed to speak to officials of the British High Commission in Kenya" and the BHCN Consular Officer telling him that his team had not been contacted by or on behalf of Mr Adebolajo or his family.[141] Furthermore, and although I have no reason to think this was done deliberately, Intelligence Officer 1 edited the above reference out of the intelligence digest he sent to SIS Head Office for dissemination by way of a CX report. This would have precluded any recipients of that report from registering the same point.

17. Was Mr Adebolajo mistreated?

17.1 In my view, Mr Adebolajo's allegations would, if true, suggest that he was the victim of State sponsored CIDT while he was in detention in Kenya, but not "torture" as such. The supporting evidence comprises the claims he made at the court hearing in Mombasa on 23 November 2010, to the BHCN Consular Officer from Jomo Kenyatta airport on 24 November 2010 and to the SO15 ports officers at London Heathrow on 25 November 2010. As well as referring to basic conditions, Mr Adebolajo specifically said he was beaten and kicked around the torso and legs, had guns held in his face and was threatened with electrocution and anal rape. He described the alleged

137 See paragraph 13.6(1) above.

138 Transcript of evidence dated 5 December 2013, p.30. See also the ISC report, paragraph 472.

139 Consistently with this, the Consolidated Guidance, paragraph 18 says as follows, in connection with "Procedures for interviewing detainees overseas in the custody of a liaison service": "The [intelligence services], MOD and UK armed forces cannot act as a consular authority in place of the FCO. Where the detainee is a UK national, the FCO must be briefed about the plans to interview the detainee".

140 [text omitted – see report, paragraph 5.8].

141 See paragraphs 12.17 and 12.32 above.

perpetrators as Kenyan males in plain clothes and uniforms and said the abuse was not applied in order to extract answers to questions.

17.2 It is impossible to know for certain whether or not these allegations were true, but I have come to the conclusion that they were probably false. I do not discount the possibility that Mr Adebolajo was the subject of some fairly uncomfortable "rough handling" in the immediate aftermath of his arrest. However, all the evidence available to me points away from the conclusion that he experienced anything more than that:

(1) Mr Adebolajo was not a credible or reliable witness – he was evasive and dishonest with everyone who interviewed him (ATPU, Arctic and SO15), from telling them that he was Christian to giving an almost certainly false account of his travel to and within Kenya;

(2) Mr Adebolajo did not repeat or substantiate his allegations after 25 November 2010, notwithstanding that he did have at least some access to legal advice (a solicitor telephoned FCO on his behalf around lunchtime that day) and FCO later wrote to him in the terms set out above[142];

(3) the SO15 ports officers could find no visible injuries when they saw Mr Adebolajo on 25 November 2010 and his claim that he had suffered bruising which had already healed, three or four days after the alleged abuse, is inherently implausible;

(4) Mr Adebolajo claimed at the remand hearing on 23 November 2010 that the whole group was being mistreated or tortured, yet none of the other detainees appears to have made any allegations of mistreatment and there was little reason for the Kenyan authorities to single out Mr Adebolajo for different treatment[143]; and

(5) I have seen transcripts of statements apparently signed by the parents of some of Mr Adebolajo's companions and by the Faza guest-house owner, his wife and caretaker, which I accept as genuine, and none of these suggests that there was any mistreatment, indeed the guest-house owner's statement says the detainees were treated very fairly.

17.3 Importantly for present purposes, and for the reasons set out in paragraphs 14.6-14.11 and 14.18 above, the SO15 torture and inhuman treatment questionnaire suggests that Mr Adebolajo's allegations related to his time in the custody of the local island police on Lamu and Pate Islands, rather than

142 [text omitted – see report, paragraph 5.8].

143 In this regard, some media reporting did suggest that there may have been a belief that Mr Adebolajo was the group's "mastermind" (see paragraph 12.2(2) above). However, his status as a British national could equally have led the Kenyan authorities to be more cautious about their treatment of him (see paragraph 12.9 above).

his time in the custody of ATPU in Mombasa. This points very strongly away from any involvement on the part of ATPU or Arctic and I have come to the conclusion that it is highly unlikely that Mr Adebolajo was mistreated by ATPU at any stage and extremely unlikely that he was mistreated by the single Arctic officer who interviewed him late on 22 November 2010.

17.4 It is also important to consider whether Mr Adebolajo suffered any mistreatment in the broader sense of unlawful arrest or detention or procedural unfairness which was incompatible with international human rights standards. In this regard, and as already mentioned, Mr Adebolajo was not brought before a court within the 24 hour deadline set out in article 49 of the Constitution of Kenya 2010[144] and he was also denied access to a lawyer and, less significantly, consular assistance.

17.5 These were not trivial matters, but Mr Adebolajo was brought before a court within 48 hours of his arrest and the hearing appears to have taken place in public before a properly constituted, independent and impartial judicial tribunal and with the media present. Indeed, the Nigerian Daily Trust reported that the presiding magistrate, Mr Kirui, listened to Mr Adebolajo's claims of mistreatment and "directed that the claims made against the police be investigated further and a report over the torture be availed in court".[145] I do not know whether this was taken forward, but it does at least show oversight and engagement on the part of the Kenyan judiciary.[146]

17.6 On balance, I would therefore describe the procedural deficiencies in the management of Mr Adebolajo's custody as irregularities which could have been cured had he been charged and tried, rather than instances of significant unfairness amounting to a material breach of his human rights.

17.7 Finally, the Annex to the Consolidated Guidance cites *incommunicado* detention as a possible feature of unacceptable treatment.[147] I am unable to say whether or to what extent Mr Adebolajo was held in such a condition while he was in custody in Kenya. It is clear that he was not allowed to seek legal or medical assistance and, in my view, this is highly unfortunate because the contemporaneous evidence of a lawyer or doctor would have shed considerable light on his later allegations of mistreatment. The available records further suggest that Mr Adebolajo did not have a mobile telephone with him when he was arrested and that the mobile telephones belonging to his companions were confiscated. Against this, there is at least some suggestion that Mr Adebolajo was able to communicate directly or

144 See paragraphs 11.11-11.12 above.

145 See paragraph 12.12(3) above.

146 The Kenyan Daily Nation reported on 28 November 2010 that Chief Magistrate Rosemelle Mutoka was due to "rule on the matter on 1 December", but Mr Adebolajo had returned to the UK and the other detainees had been released by this point and so I would not be surprised if there were no further hearings, save possibly for a formal disposal by way of mention.

147 Consolidated Guidance, Annex, paragraph b(i).

indirectly with his sister in the UK, the families of at least some of the Kenyan detainees had been informed of the arrests by the local island police by Monday 22 November 2010 and there are records suggesting that family members were allowed to see those detained and give them food and water after the court hearing in Mombasa the following day. (Mr Adebolajo told the SO15 ports officers that the police gave him food and water at this point as well.)

18. Adequacy of HMG response to allegations of mistreatment

When and how should the intelligence services respond to allegations of mistreatment?

18.1 For HMG to comply with its policy of never assisting, condoning, encouraging, soliciting or participating in any form of mistreatment, it must be astute and proactive when it comes to allegations capable of indicating a possible past or future breach of that policy.

18.2 To this end, the intelligence services should undertake some kind of properly documented enquiry into any allegations of mistreatment made against them, or against their overseas liaison partners in cases arising out of or connected with their joint work. In the latter context, allegations which would, if true, suggest breach of a past assurance or cast doubt on the credibility or reliability of an organisation's assurances more generally should be the subject of such an enquiry.

18.3 There are, of course, limits to HMG's ability to investigate the conduct of other States for which it is not responsible, our intelligence services cannot be expected to operate as an international police force investigating allegations made against their overseas counterparts and, in this context, there may be little scope to consult those involved, let alone redress or sanction any apparent wrongdoing.

18.4 Accordingly, the intelligence services are not required to undertake a formal "investigation" following the model set out in the Istanbul Protocol in this context, rather they should seek to establish the facts, assess the credibility and reliability of any allegations and document their findings.[148]

18.5 The principal aim here is for the intelligence services to put themselves in the best possible position to take appropriate action if it appears that there has been some wrongdoing and, more generally, to monitor the conduct of their current or potential liaison partners.

18.6 For these purposes, an appropriate enquiry and assessment may take different forms but, as a bare minimum, ministers should be informed and,

148 See paragraph 10.5 above.

in most cases, I would also expect there to be some discussion with the relevant liaison partner(s). Depending on the response, it may or may not be appropriate to seek assurances about future conduct, suspend or cease co-operation and/or refer or report the matter to another authority for further action. Crucially, any findings and conclusions should be properly recorded so that the intelligence services are better able to comply with the Consolidated Guidance going forward, assess any future assurances and allegations and monitor any trends in the making of allegations.

18.7 Paragraphs 461-499 of and recommendations ZZ and AAA-GGG in the ISC report contained trenchant criticisms of SIS for failing properly to investigate, assess or notify ministers of Mr Adebolajo's allegations, together with some adverse remarks about the contribution of MI5, FCO and SO15. At the time of the ISC investigation, the gist of HMG's response was that everything necessary would have been done and any failings on its part therefore related to poor record keeping. Indeed, the ISC accepted that SIS had evaluated the allegations "informally", although it was critical of this and found it had not been done "adequately".[149] Having investigated the matter in greater depth, I am not only in complete agreement with the conclusions of the ISC, I think the failings on the part of HMG were in fact more serious than first appeared.

Did the intelligence services comply with the Consolidated Guidance in connection with Mr Adebolajo's allegations of mistreatment?

18.8 To put this in context, it is important to start with the Consolidated Guidance because SIS and MI5 disputed its applicability in a joint submission to the ISC dated 30 August 2013[150]:

> *[T]here is specific reference within [the Consolidated Guidance] to cases where agency personnel receive unsolicited intelligence from a liaison service that they know or believe has originated from a detainee, but there is no reference to this particular scenario; where we receive intelligence that an individual, on return to the UK, has made allegations of mistreatment in detention overseas but where we did not have cause to believe that the standards to which the detainee had been subject were unacceptable at the time we received the unsolicited intelligence. Nevertheless, we note the lack of clarity around the passage of information in this case and the appropriate recording of the allegation of mistreatment.*

18.9 Particularly bearing in mind the degree to which the UK and Kenyan authorities co-operated and co-ordinated on the return of Mr Adebolajo to the UK and given the involvement of Arctic and supply of information

149 The ISC report, paragraph 479 and recommendation BBB.

150 See the ISC report, paragraph 466.

obtained from Mr Adebolajo, I think the letter and spirit of paragraphs 6 and 27-28 of the Consolidated Guidance were obviously engaged in this case:

> *6. … We take allegations of torture and cruel, inhuman or degrading treatment or punishment very seriously: we investigate allegations against UK personnel; and we bring complaints to the attention of detaining authorities in other countries except where we believe that to do so might itself lead to unacceptable treatment of the detainee.*
>
> *…*
>
> *27. … However, in the [sic] cases where personnel receive unsolicited intelligence from a liaison service that they know or believe has originated from a detainee, and which causes them to believe that the standards to which the detainee has been or will be subject are unacceptable, senior personnel must be informed. In all cases where senior personnel believe the concerns to be valid, ministers must be notified of the concerns.*
>
> *28. In such instances, [the intelligence services], MOD or UK armed forces will consider whether action is required to avoid the liaison service believing that HMG's continued receipt of such intelligence is an encouragement of the methods used to obtain it. Such action could, for example, include obtaining assurances, or demarches on intelligence on diplomatic channels. They will also consider whether the concerns were such that this would have an impact on engagement with that liaison service in relation to other detainees.*

18.10 Furthermore, although the guidance in paragraphs 20-21 on reporting concerns and complaints comes under the heading "Procedures for interviewing detainees overseas in the custody of a liaison service" and so was not directly applicable, I can see no reason for treating complaints of mistreatment made by a detainee post-release differently from those made pre-release.[151] In either case, it would be equally important to consider whether the concerns were such that this would have an impact on future "engagement with [the relevant] liaison service in relation to other detainees".

18.11 The fact that Mr Adebolajo's allegations *could* have related to the conduct of the Arctic interview in Mombasa on 22 November 2010 (albeit that I think it highly unlikely that they did) is particularly pertinent given its close working relationship and intelligence-sharing arrangements with HMG. If an officer within a unit of this kind, acting with the benefit of UK support, mistreats a detainee, then depending on the nature of the relationship, there may be an issue as to whether this was in any way allowed or assisted by the contribution of HMG. Furthermore, if that officer then produces an

151 I, of course, recognise that pre-release allegations can raise additional considerations as any mistreatment may be continuing or recur and there may be scope for securing its cessation or preventing its recurrence.

intelligence report which is or may be made available to HMG and which contains information obtained from the mistreated detainee, the provisions in the Consolidated Guidance on seeking information and/or receiving unsolicited information from a detainee are obviously engaged.

18.12 In theory, there is no prohibition on HMG co-operating with States whose organs engage in mistreatment, provided it does not itself assist, condone, encourage, solicit or participate or otherwise become responsible for such conduct. So, if our intelligence services and SO15 co-operate with their counterparts in Country A, the fact that Country A also operates other police units which do mistreat detainees would not necessarily put HMG in breach of its policy or its legal obligations or require the investigation of related allegations by the intelligence services.

18.13 In practice, however, there may be grey areas. For example, and in common with the ISC, I consider that any allegations of mistreatment made against Arctic would be of concern to HMG irrespective of whether it co-operated in or was aware of the underlying operation because of their close working relationship and intelligence-sharing arrangements. Moreover, although the analysis here starts to become more tenuous, a more general allegation of mistreatment against a foreign intelligence service which is not connected with HMG liaison work *could* nevertheless still be of concern to HMG if that service's officers are routinely seconded to one of HMG's partner counter-terrorism units, such as Arctic, and/or may be using knowledge acquired while on such secondment.

18.14 Part 15 above sets out my findings on HMG's response to Mr Adebolajo's allegations of mistreatment and I must now turn to my assessment of what happened and whether the provisions of the Consolidated Guidance were properly followed.

(1) **SIS Head Office**

As already mentioned, I was impressed by Desk Officer 1's email to Intelligence Officer 3 requesting that the latter investigate Mr Adebolajo's allegations of mistreatment. A written request along these lines was appropriate and the level of detail was commendable. Had it not been blocked, and one cannot blame the relevant staff for not being aware that it had, I suspect the matter would have been actioned. However, Desk Officer 1 was at fault in not following up on the email when there was no reply. SIS Head Office should have insisted on a full assessment in writing covering the likelihood and circumstances of any mistreatment and whether assurances could be relied on in relation to different Kenyan bodies, including the local island police, ATPU and Arctic. Furthermore, it also failed to notify, or consider notifying, its senior managers and/or ministers of the allegations.

(2) **The SIS Intelligence Officers in Kenya at the time**

The above were also at fault for not making and recording an assessment of Mr Adebolajo's allegations irrespective of the non-delivery of the email from Desk Officer 1. If Desk Officer 1 is right in recollecting a telephone call to Intelligence Officer 3 warning him to expect and check for an email, then he too should have followed this up when nothing arrived. In any event, the SIS Intelligence Officers knew of the allegations and were negotiating assurances on other cases and they therefore needed to assess the likelihood of mistreatment having taken place and, if so, by whom and to record whether their assessment had any effect on the reliability of such assurances. The fact that HMG had a close and ongoing working relationship with Arctic and ATPU made it all the more important that an assessment be made and recorded.

(3) **MI5**

On the whole, MI5's performance was much stronger. Its Head Office appropriately reviewed the port report on receipt, took legal advice on the allegations of mistreatment, flagged these up to SIS and requested that it notify FCO. It also recognised the relevance of the allegations to its assessment of the assurances being sought in connection with Person B and conducted a review of these. As already mentioned, I consider that this review was somewhat lacking because it appears not to have involved any consultation with SIS Head Office, the CTELO, the SKPO, ATPU or Arctic. In addition, MI5 Head Office did not follow up every suggestion set out in the helpful written advice provided by one of its in-house legal advisers, notify its senior management or consider notifying ministers of Mr Adebolajo's allegations. Furthermore, MI5, like SIS, quickly lost sight of those allegations and the need to investigate them and failed to bring them forward for reconsideration or a progress-check. Accordingly, although it might be said that a decision on the notification of senior managers and/or ministers could reasonably have awaited an assessment of the allegations, the lack of any follow up meant this was not ultimately considered.

18.15 As already indicated, I think a contemporaneous investigation would have come to the conclusion that Mr Adebolajo's allegations were not credible or reliable and so the above failings were, in some ways, more procedural than substantive. However, it does not follow that they were not significant or serious because the process is itself important and a properly documented review would have assisted with the assessment of other proposed detention operations in Kenya and any future allegations. Furthermore, such a review would have facilitated, and possibly prompted, a properly considered decision on the notification of senior managers and/or ministers and it could also have informed and improved the bi-annual submission

process under section 7 of the Intelligence Services Act 1994.[152] I have thus come to the conclusion, similar to that reached by the ISC, that, given HMG's close working relationships with ATPU and, in particular, Arctic, SIS's response to Mr Adebolajo's allegations of mistreatment fell short of what was required by the Consolidated Guidance.

18.16 On a subsidiary matter, paragraphs 480-483 of and recommendation CCC in the ISC report expressed the view that there was "relevant background that SIS failed to take into account" when "considering Adebolajo's allegations of mistreatment" and stated that the ISC "did not agree with SIS's assessment that this evidence was irrelevant". For my part, I do not agree with the ISC that there was a failure to take account of relevant background material for the simple reason that I do not think there was any assessment of the allegations. Furthermore, I should make clear that I do agree with SIS that the evidence in question would not have assisted a proper review of Mr Adebolajo's allegations in any event. The extent of the redactions to this part of the open version of the ISC report make it obvious that some sensitivity and secrecy attached to the evidence in question and it is therefore difficult for me to comment further in this report which is intended to be largely suitable for open publication.[153]

SO15

18.17 In general terms, I consider that SO15 performed well in this case. Mr Adebolajo's allegations of mistreatment were suitably summarised and highlighted in the port report and copies of this were promptly passed to MI5 Head Office and the FCO Counter Terrorism Department for action.[154]

18.18 The only adverse comment I would make concerning the performance of SO15 concerns its failure to ensure that the port report referred to or annexed a copy of the completed torture or inhuman treatment questionnaire setting out the allegations in more detail. This undoubtedly hampered MI5's review of the assurances given in the case of Person B and would have hampered any investigation by the intelligence services into Mr Adebolajo's claims. Indeed, I suspect that sight of the questionnaire would have allayed concerns that the allegations could have related to the conduct of ATPU or Arctic.

FCO

18.19 As mentioned in the footnote to paragraph 2.1 above, paragraphs 497-498 of the ISC report expressed some concern about the adequacy of FCO's response to Mr Adebolajo's allegations of mistreatment. I have touched on the failure of consular officers to attempt to make contact with

152 See paragraph 9.4 above.

153 [text omitted – see report, paragraph 5.8].

154 The ISC report, paragraph 492 records that SO15 said it did not keep a record of the port report's transmission to FCO, but this has since been confirmed.

Mr Adebolajo in accordance with the FCO Consular Guidance and the fact that the call that was eventually made to him came at a point when he had been or was about to be released from custody, his return to the UK was imminent and there was therefore very little scope for offering any meaningful consular advice or assistance.[155]

18.20 FCO's obligation to follow up Mr Adebolajo's allegations existed independently of the intelligence services' obligation to do the same and served different objectives and so falls outside my remit. Accordingly, I make only three comments about its performance.

18.21 First, the FCO process ground to an early halt because its policy provided that, absent exceptional circumstances, it should not proceed to contact the Kenyan authorities without the consent of the person making the allegations of mistreatment. In part 21 below, I recommend that more could and should be done to obtain such consent at the point when allegations are made and, in particular, the SO15 torture and inhuman treatment questionnaire should be amended to include a standard request to achieve this.

18.22 Secondly, SIS suggested in its evidence to the ISC that FCO's letter to Mr Adebolajo dated 21 December 2010 invited him to substantiate his allegations of mistreatment so that they could be pursued with the Kenyan government and his failure to respond then made any further action impossible. This argument does not in fact assist SIS and I think it overstates the importance of the FCO letter in any event. The letter said no more than that FCO was willing to listen to Mr Adebolajo and that "raising" matters or issues with the Kenyan authorities was an option. There was no explanation of what this might mean or achieve and I suspect that many lay readers would have found the words used somewhat opaque and obscure. Furthermore, Mr Adebolajo had already given a detailed account of his allegations to the SO15 ports officers and would have seen them taking detailed notes. Given that he may well have regarded police officers and FCO officials as different representatives of "the government", I think it would have been understandable if (assuming he read the letter) he had been unclear as to what further information he could provide or the purpose of doing so. Given that FCO will send letters of this kind to individuals who may have been tortured or mistreated overseas, I think the department could usefully consider a more appropriate wording.

18.23 Thirdly, the Consular Guidance provides as follows at paragraph 44 and in Annex 40I:

155 See paragraph 13.6(1) above.

Mistreatment Panel and reporting to Ministers

A mistreatment panel in Consular Directorate will carry out a quarterly review of all cases. The panel will normally consist of the [Consular Directorate Human Rights Adviser], Prisoner Policy Team, relevant [Country Casework Team] mistreatment champion and one post dialling in. The panel will consider whether action/further action should be taken, and if so, what that action should be. The review includes cases where the individual has returned to the UK.

You must remember that action can be taken before the mistreatment panel meets, as long as the relevant contacts (see above) are consulted. Further information on the panel can be found at Annex 40I.

The Prisoner Policy Team will ensure that all allegations of torture or mistreatment are reported to the relevant minister(s) in their mistreatment update every 3 months. The allegations are collated in [Country Casework Team] by the mistreatment champion for each [Country Casework Team] section and sent to the prisoner desk officer to prepare an update for ministers following a mistreatment panel review. In the most urgent and serious cases the [Country Casework Team] desk officer responsible for the case should update ministers more frequently and when required.

18.24 These arrangements were in place in 2010, but FCO informed me that Mr Adebolajo's allegations were never added to its mistreatment list or reviewed by its mistreatment panel because (in the absence of Mr Adebolajo's express consent) they were not pursued with the Kenyan authorities.[156] Although unconnected with the work of the intelligence services, I found this troubling and unsatisfactory. An individual may very well not want FCO to pursue their case with a foreign government and they may or may not have understandable reasons for taking this position. However, FCO recognises that there may be circumstances where an allegation should be pursued even without consent, possibly on an anonymous basis or by way of more general representations, and consent is irrelevant when it comes to the notification of ministers. These issues are surely something the mistreatment panel could usefully consider and it would also seem to me important that it is made aware of all allegations irrespective of consent issues so that it can consider further action and monitor trends in accordance with the FCO policy set out at paragraphs 10.12-10.13 above.

156 I did ask FCO for copies of the mistreatment list(s), mistreatment panel reviews and Prisoner Policy Team mistreatment updates covering North East Africa for the two quarters subsequent to November 2010, so I could get a sense of their typical contents and the number of cases covered. However, it was unable to locate copies and could only find a related memo dated 13 April 2011 and headed "Alleged Mistreatment of British Nationals in Detention: Update". This contained some information from a mistreatment review conducted within FCO on 22 March 2011.

19. Adequacy of the Consolidated Guidance

Application of the Consolidated Guidance to unlawful arrest or detention or procedural unfairness as forms of mistreatment

19.1 The express focus of the Consolidated Guidance is on torture and CIDT and this is consistent with there being an absolute prohibition in national and international law on any such conduct and with the fact that the practical concern is with extremely vulnerable individuals, namely, those in State detention outside the UK.

19.2 However, the Consolidated Guidance also refers to "unacceptable standards of detention or treatment" and its Annex extends this expression to unlawful arrest or detention and procedural unfairness.[157] Although the latter are not the subject of an absolute prohibition in the same way as torture and CIDT, the reality is that national and international law only allow the State detention of individuals where this is lawful and subject to review by a reasonably accessible, fair and impartial judicial body which is independent of and has power over the detaining authority. From the human rights perspective, certain breaches of standards relating to arrest, detention and due process are undoubtedly less serious and may be tolerable, e.g. delays in giving reasons for arrest, bringing a detainee before a court or providing access to a lawyer. By contrast, wholly unlawful or arbitrary deprivations of liberty are no less important or serious than torture or CIDT. Indeed, the Consolidated Guidance talks about the fundamental importance of detainees being treated fairly, humanely and with dignity and respect.[158]

19.3 Notwithstanding the above, I think the Guidance is itself inconsistent and vague about its application to mistreatment taking the form of unlawful arrest or detention or procedural unfairness as opposed to torture or CIDT:

(1) when introducing situations (1)-(3), paragraph 11 refers only to risks of torture or CIDT:

> *Officers should use the following table (see next page) when considering whether to proceed with action when there is a risk of torture or CIDT occurring at the hands of a third party.*

157 The Annex to the Consolidated Guidance sets out a list of considerations relevant to the lawfulness of detention: "(i) '*incommunicado* detention' (denial of access to family or legal representation, where this is incompatible with international law); (ii) whether the detainee has been given the reasons for his arrest; (iii) whether he will be brought before a judge and when that will occur; (iv) whether he can challenge the lawfulness of his detention; (v) the conditions of detention; and (vi) whether he will receive a fair trial". A list of practices which "could" constitute CIDT is also given: "(i) use of stress positions, (ii) sleep deprivation, (iii) methods of obscuring vision (except where these do not pose a risk to the detainee's physical or mental health and is necessary for security reasons during arrest or transit) and hooding; (iv) physical abuse or punishment of any sort; (v) withdrawal of food, water or medical help; (vi) degrading treatment (sexual embarrassment, religious taunting etc.); and (vii) deliberate use of 'white' or other noise".

158 Paragraph 19.

(2) within the relevant table:

(a) situation (1) refers only to torture (no reference to CIDT, unlawful arrest or detention or procedural unfairness);

(b) situation (2) refers to cases where it is judged that there is "a lower than serious risk of CIDT taking place" and "standards of arrest and detention are lawful" (no reference to procedural unfairness);

(c) situation (3) refers to "all other circumstances", but its text is then directed to risks of torture or CIDT (no reference to unlawful arrest or detention or procedural unfairness);

(3) somewhat confusingly, paragraph 17 suggests that paragraph 11 "explains what personnel should do if there is a serious risk that a detainee has been or will be subject to unacceptable standards" and the bulk of the Guidance then refers to unacceptable standards in general terms, but paragraphs 17, 21, 24 and 26 only require that ministers be consulted about serious risks of torture or CIDT;

(4) by contrast, paragraphs 27-28 envisage ministers being notified of concerns in cases where unsolicited information has been obtained from a detainee who has been subjected to unacceptable standards more generally; and

(5) paragraph 19 refers to acceptable standards and the essential requirement that detainees "be treated fairly, humanely and with dignity and respect", but then does not go further than saying "interviews must not involve torture or [CIDT]".

19.4 I believe that intelligence officers are careful to apply the Consolidated Guidance in cases raising risks of torture or CIDT and that they do consider due process issues. However, it is much more difficult to assess the likely impact and acceptability of a failure to meet standards of lawfulness or fairness. Furthermore, the application of the Consolidated Guidance to risks of unlawful arrest or detention or procedural unfairness is not as clear as it should be. I consider that these issues should be addressed.

Application of the Consolidated Guidance in the context of very close overseas counter-terrorism partnerships

19.5 The Consolidated Guidance was expressly intended to offer "overarching" guidance to members of the intelligence services and the armed forces on overseas detention operations and the passing and receipt of information about detainees. At the end of the Guidance a "note on the text" makes clear that different organisations will continue to provide more detailed advice relevant to their own "structures".

19.6 The Consolidated Guidance thus stands as a "one size fits all" document and proceeds on the assumption that it will be applied on a case-by-case basis. However, close analysis of its application to the case study presented by this review raised questions in my mind about whether it adequately "fits" situations where HMG has a close and ongoing working relationship with partner counter-terrorism units overseas such as Arctic. In my view the relationship and degree of intelligence-sharing between HMG, on the one hand, and ATPU and Arctic, on the other, mean that any allegations of mistreatment made against the latter should be followed up much more effectively and with the functioning of the relationship in mind just as much as the specific case. Notwithstanding this, the Consolidated Guidance does not directly address or contain express guidance on this situation.

19.7 In my view, the differentiation in the OSJA Guidance between case-specific and capacity-building/structural matters may represent a useful alternative model for approaching this subject.

Application of the Consolidated Guidance to co-operation with overseas police and military units

19.8 The application of the Consolidated Guidance to liaison with partner units overseas which are not intelligence services is somewhat unclear, e.g. special police units equivalent to SO15 or military units. Paragraph 3 defines "liaison services" to mean overseas security and intelligence services and paragraph 4 says MOD and the armed forces may also need to work with "military partners within a coalition where appropriate". However, the references to detainees in the custody of a liaison service are not well-suited to the reality that many such services, in common with our intelligence services, do not themselves have executive powers of arrest or detention.

19.9 An internal MI5 policy document *Security Service Guidance on Liaison with Overseas Security and Intelligence Services and on Interviewing Detainees Overseas* dated 25 January 2012 states at chapter 1, "In this context and throughout the guidance, the same principles apply to any other foreign organisation (such as an overseas police service)". The equivalent SIS guidance does not make the same point, but it was absolutely plain that it treated ATPU in the same way as it would a "liaison service" for the purposes of the Consolidated Guidance and that it was right to do so.

20. Are there lessons to be learned from the criticisms of SIS in the ISC report and in this report?

20.1 If one considers, on the one hand, the likelihood that Mr Adebolajo was not mistreated in Kenya and the fact that SIS performed to a reasonably high standard in connection with his arrest and detention, against, on the other hand, the trenchant criticisms of its handling of his allegations of

mistreatment made in the ISC report and in this report, one must ask whether there are lessons to be learned?

20.2 I say straightaway that on my inspections and at face to face meetings with SIS, I have received the greatest co-operation and openness. Ultimately, I believe my team and I received similar co-operation in the writing of this report, but at times it was not easy and it is important for SIS to recognise that in some ways it has brought criticism on itself. The comments below should be read in the light of this and on the understanding that they are intended to be constructive.

20.3 In order to operate effectively, the intelligence services must be "secret services" and they must "operate under and be protected by a cloak of secrecy".[159] As a result, they only disclose information on a "need to know" basis, they take a "neither confirm nor deny" approach to a great many questions and, in general terms, they play their cards very close to their chests.

20.4 There is an obvious, inherent tension between secrecy and oversight because effective oversight requires transparency, independence and an understanding of the context. Oversight bodies comprised of outsiders, such as myself and the members of the ISC, need not only to be shown all the cards in the relevant service's hand "face up on the table", they need to be talked through the hands of every other player, the available cards in the deck and the rules of the game.

20.5 I consider that the intelligence services have a duty to work with persons reporting on them such as myself and adopt a constructive and expansive approach to their investigations which answers the spirit, as well as the letter, of questions and which seeks to illuminate the surrounding landscape and other possible lines of enquiry.[160] I believe that SIS takes such an approach when I carry out my inspections, but that it has failed to act in the same way when engaging with the ISC inquiry and my review.

20.6 The investigations undertaken by the ISC and myself in connection with this case have been heavily document-based and I am bound to report that it has been a difficult and lengthy exercise which could have been better assisted by SIS. As I said at the outset, I do not think SIS sought to obstruct or mislead either investigation and I am satisfied that all my requests for information and materials were eventually answered. Furthermore,

---

159 See *Attorney General v Guardian Newspapers Ltd (No.2)* [1990] 1 AC 109 (HL), per Lord Griffiths at p.269 and *R v Shayler* [2002] UKHL 11, [2003] 1 AC 247, per Lord Bingham at [25] and per Lord Hutton at [98].

160 This is reflected in paragraph 21 of the *Memorandum of Understanding Agreed Between the Prime Minister and the Intelligence and Security of Parliament* published under the Justice and Security Act 2013, s.2, "The responsibility for ensuring the ISC has access to relevant information consistent with its remit will fall to the appropriate agency or department, who will make available the information the ISC needs" (see the ISC's *Annual Report 2013-2014* (HC 794), Annex A).

witnesses were ultimately made available to me and even one who was no longer with SIS attended for interview for which I was very grateful.

20.7 However, both the ISC's inquiry and my review encountered difficulties with SIS and the ISC Chairman voiced these as follows when questioning the Chief of SIS after he was recalled for an additional live evidence session on 5 December 2013, his original evidence having proved unsatisfactory[161]:

> *We are saying there is something wrong with your system that when we seek information, you seem to respond in such a narrow, specific way (unlike other agencies) that things are left out which are then discovered subsequently… I don't want to suggest you took a conscious decision. That would be, I think, unreasonable and unfair because I have absolutely no reason to believe that it was a deliberate decision, so let me make that clear. But, I am saying there seems to be something wrong with the way in which you respond to the Committee's need for a full response. I mean, when we are conducting an investigation, obviously we cannot know, at the beginning, every single detailed question to ask. "We don't know what we don't know" – the famous phrase. The other agencies seem to reflect that in the way they respond and you have not done so…*

20.8 I experienced the same frustrations in this case and would echo the view that this was in contrast to the approach taken by MI5 which was materially different and much more constructive.

20.9 In a similar vein, SIS also appeared to demonstrate a mind-set in connection with both investigations which was both defensive and dismissive and where its objective was very much one of rebuttal, rather than engagement. So, if I raised a criticism with SIS it would tend to resist this or tell me that the point was unimportant or did not make any difference to the outcome. For example, I asked SIS whether the discovery that Desk Officer 1's email to Intelligence Officer 3 had been blocked changed its view that Mr Adebolajo's allegations would have been followed up or whether this may have led to a shared misapprehension on the part of SIS Head Office and the SIS Intelligence Officers in Kenya at the time that the ball was in the other's court. SIS responded that because Intelligence Officers 1-2 did receive the memo dated 1 August 2010 and port report from MI5, "it remains SIS's position that Adebolajo's allegations were discussed [by the SIS Intelligence Officers in Kenya at the time] and would have been raised with Kenyan liaison" and "we would caution against placing too much emphasis on the non-delivery of [Desk Officer 1's email to Intelligence Officer 3]". I am bound to say that I was dismayed to receive this: SIS told

161 Transcript of evidence, pp.11-13, 16-17 and 41. The quoted passage is on p.16.

the ISC that the allegations were not raised with the Kenyan authorities and there is no evidence to suggest that they were.[162]

20.10 In resisting criticisms, SIS also showed a troubling inclination to seize upon and then cling to superficially attractive answers; for example, the claim that the SIS Intelligence Officers might have investigated Mr Adebolajo's allegations and recorded the outcome in an "ephemeral message" which was later deleted[163] and the claim made by its Chief in his oral evidence to the ISC that it was for FCO, not SIS, to follow up those allegations[164]:

> *But what I am satisfied is that a process was followed by the consular officer, which was the appropriate process, and that ADEBOLAJO did not substantiate his initial rather broad-brush allegation when he had an opportunity to do so… What I am satisfied with was that had ADEBOLAJO felt strongly about this, then he had all the opportunity to pursue it…*
>
> *As I say, I think the answer is that ADEBOLAJO has an opportunity to substantiate his allegations. This was a matter for the consular section of the High Commission; and I think they followed their responsibilities in the right way. We have worked closely with the Kenyans over a number of years. It is a far from perfect place… We did not believe that there was a substantial track record of failing to adhere to assurances they had given us. I think if there had been – if this was part of a pattern, then that would have alerted us to a wider problem, but it wasn't.*

20.11 As already indicated, I find it difficult to believe that anything relating to assurances or allegations of mistreatment would have been recorded in an "ephemeral message" or otherwise deleted, particularly having regard to the materials which *were* retained in this case and in the cases of Persons A-C. Furthermore, Mr Adebolajo set out his allegations in some detail during his port stop interview with SO15, the FCO's letter did not invite him to amplify or substantiate them and, crucially, the intelligence services had a free-standing obligation to follow up not just the truth of those allegations but the other questions very thoroughly set out in the (blocked) email which Desk Officer 1 attempted to send to Intelligence Officer 3 on 1 December 2010.

20.12 To borrow a phrase sometimes used in connection with findings of maladministration by ombudsmen, SIS often appeared "merely to fence" with both investigations, rather than seriously considering and engaging

---

162 See the ISC report, paragraph 478.

163 See paragraph 15.12 above and the ISC report, p.157 (immediately above recommendation AAA).

164 Transcript of evidence dated 5 December 2013, pp.31-33. See also the ISC report, paragraph 474 for its views and the Chief's claim that, "it is not an SIS responsibility".

with their merits.[165] I gained the strong impression that I was sometimes being given answers calculated to "close down" my enquiries.

20.13 The ISC report criticised SIS for failing to disclose the following at the outset: the fact that Mr Adebolajo was interviewed by, and so his allegations of mistreatment could have related to, Arctic as well as ATPU[166]; the email from Desk Officer 1 to Intelligence Officer 3 dated 1 December 2010 requesting an investigation into Mr Adebolajo's allegations of mistreatment[167]; an additional operational background matter which the ISC considered relevant[168]; and the abandonment of the FCO country assessments project referred to at paragraphs 21.7-21.9 below.[169]

20.14 Without going into unnecessary detail, I also identified the following issues with SIS's engagement with both investigations going beyond mere slips and mistakes:

(1) **Provision of incomplete/inaccurate information about available records**

SIS did not disclose that it had and still has access to Arctic intelligence reports of its interviews with Mr Adebolajo and those arrested with him and another relevant intelligence report.[170] In addition to this, SIS did not disclose to me or the ISC that its personnel had separate email accounts for non-sensitive, non-operational messages classified at or below RESTRICTED level (even when I asked for details of the systems available to them). These accounts are hosted by another government department and I only discovered their existence when FCO disclosed emails to me which had been copied to a senior SIS Intelligence Officer in Kenya at the time. SIS explained this as follows:

> *the disclosure of documents is the responsibility of the department which owns and administers the system on which the documents originated and are stored. SIS did not, therefore, search any [of the host's] email accounts in connection with either the [ISC] investigation or the Commissioner's investigation, believing this to be the [host]'s responsibility. We did not consider asking the [host] to search their systems, as we believed that all the relevant material pertaining to SIS was on our record.*

As it happens, I doubt that anything of particular importance to my review would have been sent by way of these accounts and I can

165 *Swansea City and County v Johnson* [1999] Ch 189, per Hart J at p.202D-E.

166 Paragraphs 467-469.

167 Paragraphs 473-475. One could add that there was a failure to check whether this had in fact been received or read by its intended recipient.

168 Paragraphs 481-484. See paragraph 18.16 above.

169 Paragraphs 485-487.

170 See paragraph 16.18 above.

understand why SIS assumed that they would not contain anything relevant. However, FCO emails about the consular and media implications of Mr Adebolajo's arrest *were* copied to the abovementioned senior officer on this system and I would have preferred to verify that there was nothing further on any other accounts. In the event, I was told that this would not be possible because the passage of time meant that any potentially relevant emails had been irretrievably deleted.

(2) **Failure to consult key personnel or make clear that this had not been done**

Intelligence Officers 1-2 were the key persons on the ground in Kenya in November 2010. However, SIS did not speak to Intelligence Officer 1 at all in connection with the ISC inquiry, because he had left the service in mid-2013, and it only spoke "briefly" to Intelligence Officer 2 in September 2013. This was not made clear to and so not pursued by the ISC and I only discovered it when I asked about it directly. Furthermore, SIS made a number of statements to the ISC orally and in writing about the recollection of its "officers" which strongly implied that all those involved had been consulted. These officers were ultimately made available to speak to me.

(3) **Provision of incomplete/inaccurate information about the reasons for Mr Adebolajo's arrest**

SIS told the ISC that the Kenyan police were acting on intelligence supplied by an agent when they arrested Mr Adebolajo and his companions. This derived from a comment in Intelligence Officer 1's note of his meeting on 23 November 2010 with the SKPO, but was inconsistent with other intelligence available to SIS and the service now accepts that it was probably incorrect.[171] Had SIS spoken directly to Intelligence Officers 1-2 and/or cross-referred to the contradictory intelligence which it held, it would have realised that Intelligence Officer 1's comment about an ATPU agent was supposition on his part. In this regard, Intelligence Officer 1 thought a tip-off was being hinted at and he went on to infer that this was likely to have come from a particular agent who was also known to SIS. However, Intelligence Officer 1's comment reads as if it came directly from the SKPO, it should have been qualified by a suitable caveat and SIS mistakenly elevated it to a proven fact in its dealings with the ISC and myself.

171 See paragraphs 12.18, 16.3(1) and 16.18-16.22 above.

(4) **Provision of incomplete/inaccurate information about the meeting with the SKPO on 23 November 2010**

As already mentioned, SIS made very firm assertions to the ISC and myself to the effect that Intelligence Officers 1-2 sought and obtained assurances from ATPU about the treatment of Mr Adebolajo at the above meeting when in fact neither of them has any recollection of having done so. SIS then built on this claim in suggesting that Mr Adebolajo's subsequent allegations of mistreatment would, in part, have been assessed against these assurances, notwithstanding that it is not clear that any were given and the allegations of mistreatment pre-dated 23 November 2010 in any event. Again, I consider that a detailed, prior discussion with Intelligence Officers 1-2, rather than just the interpretation of their records, would have enabled SIS to provide much more reliable evidence.

20.15 It seems to me that the above difficulties had the following principal causes:

(1) over-reliance on an informed but second-hand interpretation of contemporaneous records when answering questions, rather than on consultation with the first-hand participants;

(2) a defensive mind-set which concentrated on the deflection and rebuttal of potential criticisms;

(3) a tendency to over-state or over-simplify answers in order to pre-empt or rebut potential criticisms; and

(4) a narrow, sparing and over-literal approach to written questions and requests for information when a more imaginative approach would have brought out helpful contextual features.

20.16 I recognise that the intelligence services are concerned to avoid, first, public criticism which they are unable to defend themselves against publicly and which may damage the trust and confidence of third parties upon whom they rely for information and, secondly, the undue expenditure of limited resources on the facilitation of ancillary compliance, oversight and litigation, rather than the discharge of their primary operational functions. However, the former concern cannot excuse a defensive approach to oversight and I would counter that demonstrably effective oversight mechanisms are essential to trust and confidence in the services themselves. Furthermore, the latter concern cannot excuse non-consultation with the personnel who know the answers to important oversight questions and it is for government to ensure that the intelligence services are sufficiently resourced to accommodate this.

20.17 The above criticisms are intended to be constructive. I hope they will be taken as such and will not become the focus of public or media attention, particularly in circumstances where my more targeted review has, I hope, allayed at least some of the concerns about SIS expressed by the ISC and, crucially, shown that there is no evidence to suggest that it was complicit in any mistreatment of Mr Adebolajo. This part of my report contains some uncomfortable reading for SIS, but I hope it also contains some valuable lessons about its engagement with oversight bodies moving forward. I have endeavoured to reinforce these with the practical proposals and recommendations set out in part 23 below.

V. RECOMMENDATIONS

21. Policies and procedures

Review of the Consolidated Guidance

21.1 For the avoidance of doubt, I do not think that the Consolidated Guidance is fundamentally defective or not fit for purpose. Rather, I think it has been in operation in its current form for approximately six years and this period has revealed room for improvement, particularly in the areas identified at part 19 above. Accordingly, I would recommend that the Cabinet Office reviews the Consolidated Guidance in consultation with the ISC, the intelligence services, MOD, FCO and the Home Office and (subject to what follows) also with SO15.

21.2 In order to improve transparency and accountability, I would further suggest that the Cabinet Office invites and considers contributions from others with an interest in this subject, e.g. the Equality and Human Rights Commission, Fair Trials Abroad, Prisoners Abroad, Redress and Reprieve.

21.3 I would, of course, be happy to contribute to this process. In addition to the points made in part 19 above, which I will not repeat here, I would recommend that thought be given to:

(1) express provisions directed towards the issues mentioned at paragraph 16.14 above, i.e. documentation of and language used in assurances, differentiation of different liaison services involved in relevant operations and recognition that separate assessments of risk and assurances may be appropriate;

(2) following the OSJA Guidance model where a distinction is drawn between case-specific guidance, on the one hand, and capacity-building/structural guidance for closer, ongoing relationships and partnerships, on the other;

(3) much clearer guidance on the appropriate approach to take respectively to concerns about torture and CIDT, on the one hand, and unlawful arrest or detention and procedural unfairness, on the other;

(4) the incorporation of guidance akin to the TM Reporting Guidance and its differential application to concerns about torture and CIDT, on the one hand, and unlawful arrest or detention and procedural unfairness, on the other;

(5) the establishment of a central record-keeping hub capable of tracking and monitoring all relevant allegations of torture, CIDT, unlawful arrest or detention and procedural unfairness and the steps taken in response; and

(6) direct application of the Consolidated Guidance to SO15, particularly CTELOs working closely with the intelligence services.[172]

21.4 If there were a review of the Consolidated Guidance, I would also suggest that it address one somewhat extraneous matter. In this regard, I have for some time advised the intelligence services that they should apply the spirit of the Consolidated Guidance in cases where information about or from a detainee is disclosed to them directly by a liaison service which is not suspected of mistreatment but which obtained that information indirectly from a third party which is. In my view, the Consolidated Guidance should expressly deal with cases of this type.

Lack of clarity over the role, powers and responsibilities of CTELOs

21.5 In my view, there is a lack of clarity as to the legal basis for the overseas work of the SO15 CTELOs and the extent to which they are covered by the Consolidated Guidance, the OSJA Guidance and/or the TM Reporting Guidance. I also saw some correspondence suggesting internal doubts within SIS about the involvement of CTELOs in the process of obtaining assurances. Furthermore, in a letter to me dated 18 February 2015, SO15 said:

> *The practical effect of these differing processes mean that during a joint operation involving [intelligence service] staff and CTELOs, submissions to two separate ministers will be made, based on separate legal frameworks with only some parties formally required to take into account the Consolidated Guidance*.

21.6 The above strikes me as unsatisfactory and I would recommend that the role and functions (including powers and duties) of the CTELOs be clarified and, if necessary, regularised.

Country assessment reports

21.7 Paragraphs 484-487 of and recommendation DDD in the ISC report criticised the abandonment of the government's country assessments programme and suggested that it left the intelligence services without "an evidence base against which to consider their work with liaison partners". For my part, I do not agree with this conclusion. It seems to me that the intelligence services must focus on specific units when considering the risks of mistreatment and the credibility and reliability of their assurances.

---

172 See paragraph 10.16 above.

When they do this, they will often be faced with very dynamic, fast-moving and sometimes volatile situations and will need to have regard to the current situation and the personalities of those involved. I doubt very much that a generic country assessment on Kenya would have told the SIS Intelligence Officers working there at the time anything that was not already well-known to them or that could have assisted with their assessment of the individuals in the Kenyan police and Arctic with whom they were in regular contact. If anything, I imagine the maintenance of such a country assessment would inevitably require input from operational SIS personnel and thereby prove an unwelcome distraction.

21.8 Paragraph 8 of the abovementioned SIS policy document "SIS Compliance with the Overseas Security and Justice Assistance Guidance (OSJA) – SIS Policy" makes the point very well:

> *The well-defined nature of our operational work and relationship with our partners brings us into close proximity to where the risk lies and provides us, along with other coverage, both with visibility and influence over their conduct. As such our ability to assess, mitigate and monitor our exposure to risk allows for a more forensic analysis than other parts of HMG are afforded with regard to what the risk really looks like and the degree of confidence we can have in our mitigation processes*.

21.9 Furthermore, paragraph 14 of the Consolidated Guidance says, "Personnel should make themselves aware of departmental views on the legal framework and practices of States and liaison services with which UK personnel are engaged". In this case, I saw a great deal of correspondence between SIS and MI5 which demonstrated regular communication about and updating of their collective understanding of the position on the ground in Kenya.[173]

Obtaining consent to the onward disclosure/pursuit of allegations

21.10 As already mentioned, I think it unfortunate that the SO15 torture and inhuman treatment questionnaire used by the ports officers did not include a tick-box section directing them to ask anyone making an allegation to consent to the matter being taken forward by FCO. The abovementioned "mistreatment *pro forma*" at Annex 40C to chapter 40 of the Consular Guidance does seek such consent and the related policy guidance emphasises the importance of this.[174] (In general terms, I would expect a great many people taking the trouble to report mistreatment to the police after they have been released and on their return to the UK to be more than willing to see this taken forward on their behalf.)

---

173 See, e.g. paragraph 9.6 above.

174 See paragraphs 10.13 and 18.21 above.

22. Record keeping and data processing

22.1 The maintenance of effective means of national and international electronic communication within and between the intelligence services and their partners and the routine creation of an auditable trail of documents recording their decisions and activities are essential to the facilitation of both their internal operation and management and their external oversight by bodies such as myself. Without proper records, internal managers and external bodies cannot properly know or understand what has happened, how and why it happened or with what results.

22.2 In this report, I have found defects in the record keeping of SIS, the IT systems allowing classified emails to be sent to and by the SIS Intelligence Officers in Kenya at the time and the operation of an anomalous and hidden "inhibit function" within those systems which silently blocked the transmission of a crucial message.[175] I would obviously recommend that all of these be remedied as soon as possible and, to a large extent, I am satisfied that this work is in hand.

22.3 I took over as Intelligence Services Commissioner on 1 January 2011, immediately after the events underlying this report, and I am satisfied that all the intelligence services have improved their record keeping during my time in office. I have highlighted the importance of this and noted a number of improvements in my annual reports, including in connection with detention operations and the Consolidated Guidance.[176] In confidential reports to the Prime Minister and discussions with the intelligence services, I have also emphasised the importance of recording assurances in writing if they are to be relied upon and of undertaking and recording a considered assessment of such assurances and compliance with them.

22.4 In my *Annual Report for 2013*, I reported that each intelligence service has an internal policy on the application of the Consolidated Guidance and said[177]:

> *Looking forward I have tasked the agencies to find ways to capture instances where the Consolidated Guidance has been discussed or considered at an early stage but a decision has been taken not to proceed.*

22.5 As recommended by me, SIS introduced an internal *Policy for applying the Consolidated Guidance* dated July 2013.[178] This set out new procedures for recording and capturing all correspondence relating to the Consolidated

175 See paragraphs 8.2 and 15.9-15.11 above.

176 *Annual Report for 2011* dated 13 July 2012 (HC 497), pp.28-29 and 33; *Annual Report for 2013* dated 26 June 2014 (HC 304), pp.43 and 50; *Annual Report for 2014* dated 25 June 2015 (HC 225), pp.25, 29-31 and 47.

177 *Annual Report for 2013* dated 26 June 2014 (HC 304), pp.42-44 and 50.

178 *Annual Report for 2013* dated 26 June 2014 (HC 304), p.43.

Guidance and liaison assurances. It also made clear that written assurances are always preferable and that, in the absence of these, a note of any oral assurances should be sent to the giver on the basis that acceptance of the note can be treated as agreement with its contents. Moreover, the following guidance is given:

> *Officers can rely on previously supplied assurances on the condition that they know or believe that they continue to be understood and respected by liaison. Where such assurances are being relied upon to engage with liaison on detainee-related business, the relevant liaison authority should be referred to in a substantive message*.

22.6 There is one further matter which I would raise under this heading. This arises out of the issue I noted above with regard to the possible over-circulation by SIS of the CX report it sent out relating to Mr Adebolajo's arrest and detention in Kenya.[179]

22.7 The intelligence services have wide common law, prerogative and statutory powers to disclose information so far as necessary for the purpose of discharging their functions and provided they act compatibly with the Data Protection Act 1998 and, arguably, the Convention rights set out in Schedule 1 to the Human Rights Act 1998.[180] Without going into a detailed analysis of the law in this area, it follows that considerations of necessity must to some extent govern the disclosure by the intelligence services of personal data relating to individuals. I was therefore particularly concerned to note, first, that the CX report on Mr Adebolajo's arrest and detention in Kenya was disseminated to such a wide range of recipients and, secondly, that a number of them may not have received or opened the email to which it was attached. This must, at the very least, raise questions as to whether those recipients needed to receive that report. The answer may be that each recipient needed to have a copy on their system in case its contents met a future electronic search for key words, but I would not be willing to assume that this was the case.

22.8 Given this, I would recommend that all three intelligence services look at this issue (from a general perspective, rather than by reference to the CX report on Mr Adebolajo) and report back to me so that I may discuss it with them further. Depending on the outcome of this, my successor as Intelligence Services Commissioner, due to be appointed with effect from 1 January 2017, may also wish to return to this issue in a future annual report.

---

179 See paragraph 13.4 above.

180 See the Security Service Act 1989, s.2, the Intelligence Services Act 1994, ss.2 and 4 and the Counter-Terrorism Act 2008, ss.19-21. Note that the Counter-Terrorism Act 2008, s.19(6)(b) provides that disclosures under that section do not breach "any other restriction on the disclosure of information (however imposed)", but s.20 makes this subject to the provisions of the aforementioned provisions of the Security Service Act 1989 and the Intelligence Services Act 1994, the Data Protection Act 1998 and the Regulation of Investigatory Powers Act 2000, Pt 1. The question therefore arises as to whether the Counter-Terrorism Act 2008, s.19(6)(b) operates to exclude "restrictions on the disclosure of information" which would otherwise arise by virtue of the Human Rights Act 1998, s.6.

23. Effective oversight investigations

23.1 Following on from part 20 above, I have come to the conclusion that the adoption of a protocol setting out certain basic matters may be of assistance to those responsible for and subject to future case-specific security and intelligence oversight investigations of this kind.

23.2 I would not wish to impose any kind of draft or template in this regard because different considerations may apply to different services and I think some degree of consultation about this would be appropriate. The model set out below is very much geared to relatively discrete, case-specific oversight investigations of the kind dealt with in this report and I recognise that it may not be workable in connection with larger scale, thematic reviews. Any protocol of this kind would therefore need to be flexible and allow for the agreement of different parameters in different types of case.

23.3 That said, I have highlighted below the categories of information whose early provision would, in my view, have greatly helped the ISC and myself conduct our enquiries in this case:

(1) the names and designations of each person and organisation potentially involved in the subject matter of the investigation;

(2) confirmation of the current whereabouts, employment status and availability of each such person and, in the case of any said to be unavailable, confirmation of the reasons for this;

(3) a description of each computer, email, telephone or other communications device or system available to each person and organisation involved at the material time, including landline and mobile telephones, desktop and portable computers, pagers etc.;

(4) a description of each means of recording information used by each person and organisation involved at the material time, including manual and electronic diaries and notebooks, paper and electronic files, emails, letters, minutes, notes and submissions, leave records, expenses forms, personnel files, visitors books etc.; and

(5) confirmation in broad terms of the current whereabouts, availability and searchability of any records falling within (4) above and, in the case of any records said to be unavailable, the reasons for this.

23.4 It is essential that this information be collated pursuant to a search of both corporate records and some discussion with the persons falling within (1) above.

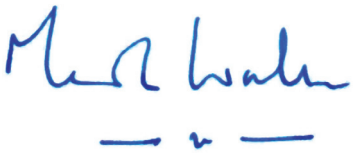
23.5 For the avoidance of doubt, I would not suggest that a search for or disclosure of every document falling within (1)-(5) above would necessarily be proportionate or even helpful in every case. Rather, the aim would be for the services involved to provide an overview of the landscape so that the investigator(s) can understand and consider the areas and landmarks they might wish to explore in greater detail. The reasonableness and proportionality of any proposed exploration would be a matter for discussion between those involved, but the key is that there should be scope for such a discussion to take place in advance and on an informed basis.

23.6 In addition, I think it would also help if a template could be agreed for the provision of "corporate" answers by the intelligence services in response to oversight body requests for evidence and information. In particular, I think it will often assist if such answers are accompanied by routine confirmation of:

(1) whether and to what extent they derive from an informed reading or interpretation of contemporaneous primary materials and/or consultation with the maker(s) or recipient(s) of those materials or any other person falling within (1) above; and

(2) if relevant, details of those consulted and whether that consultation was conducted or recorded in writing.

23.7 By way of recommendation under this heading, I would suggest that the intelligence services and SO15 liaise with each other and produce joint or separate proposals for a protocol along the above lines together with a memorandum of understanding providing a more formal basis for SO15 participation.



The Right Honourable Sir Mark Waller
Intelligence Services Commissioner

11 July 2016

VI. OPEN ANNEXES

A. Glossary of abbreviations

Abbreviation	Meaning
"agent"	a covert agent, informant or human intelligence source
"Arctic"	a Kenyan counter-terrorism intelligence unit
"ATPU"	the Kenyan Anti-Terrorism Police Unit
"BHCN"	the British High Commission in Nairobi
"the BHCN Consular Officer"	a senior consular officer at BHCN
"the BHCN Press Officer"	a senior press officer at BHCN
"CIDT"	cruel, inhuman or degrading treatment or punishment
"the Consolidated Guidance"	HMG, *Consolidated Guidance to Intelligence Officers and Service Personnel on the Detention and Interviewing of Detainees Overseas and on the Passing and Receipt of Intelligence Relating to Detainees* dated 6 July 2010
"the Consular Guidance"	FCO, *Consular Assistance Guidance* dated 2013-2014
"CPS"	the Crown Prosecution Service
"the CPS Referral Guidelines"	CPS, *War Crimes/Crimes Against Humanity Referral Guidelines* dated July 2011, revised August 2015
"CTELO"	Counter Terrorism and Extremism Liaison Officer
"CX"	SIS intelligence report
"FCO"	the Foreign and Commonwealth Office
"HMG"	HM government
"ILS"	SO15 International Operations Unit (formerly International Liaison Section)
"the ISC"	the Intelligence and Security Committee of Parliament
"the ISC report"	the ISC's *Report on the intelligence relating to the murder of Fusilier Lee Rigby* (HC 795)

Abbreviation	Meaning
"the Istanbul Protocol"	UN, *Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* dated 9 August 1999
"JKIA"	Jomo Kenyatta International Airport, Nairobi
"LHR"	London Heathrow Airport
"MI5"	the Security Service
"MOD"	the Ministry of Defence
"NIS"	the Kenyan National Intelligence Service (formerly the Kenyan National Security Intelligence Service)
"the OSJA Guidance"	HMG, *Overseas Security and Justice Assistance Guidance* dated December 2011, revised February 2014
"ports officer(s)"	police officer(s) posted into SO15 P Squad
"SIS"	the Secret Intelligence Service (also known as MI6)
"the SKPO"	the Senior Kenyan Police Officer able to speak on behalf of ATPU
"SO15"	the Metropolitan Police Service Counter Terrorism Command
"the TM Reporting Guidance"	FCO, *Torture and Mistreatment Reporting Guidance* dated March 2011

B. Chronology of events

Date	GMT	Nairobi Time	Event
06/07/10	–	–	Publication of Consolidated Guidance
20/10/10	evening	evening	Mr Adebolajo outbound flight LHR to JKIA departs
21/10/10	am	am	Mr Adebolajo outbound flight LHR to JKIA arrives
10/11/10	–	–	Publication of revised Consolidated Guidance
10/11/10	–	–	Mr Adebolajo visa extended by two months Nairobi
21/11/10	10:00	13:00	Mr Adebolajo & others arrested by the local island police Kizingitini, Pate Island
21/11/10	11:00	14:00	Mr Adebolajo & others transferred to Faza police station, Pate Island but not questioned
22/11/10	02:00	05:00	Mr Adebolajo & others transferred to Lamu Divisional Police HQ, Lamu Island, possibly questioned by the local island police
22/11/10	am	am	ATPU notifies CTELO of arrest by telephone • CTELO notifies Intelligence Officer 1 and ILS of arrest by telephone • Intelligence Officer 1 notifies Intelligence Officer 2 and one of their managers of arrest in person • Intelligence Officers 1-2 agree and possibly arrange to meet the SKPO on the morning of 23/11/10 • Intelligence Officer 1 notifies Desk Officer 1 of arrest by telephone and email • Intelligence Officer 2 notifies MI5 Head Office of arrest by telephone
22/11/10	09:00 – 17:30	12:00 – 20:30	Mr Adebolajo & others transferred to Mokowe and then to Mombasa Police Provincial HQ, Mombasa
22/11/10	13:30	16:30	MI5 Head Office initiates search for information on Mr Adebolajo
22/11/10	–	–	Kenyan Daily Nation article "Six al-Shabaab recruits and Nigerian arrested"

Date	GMT	Nairobi Time	Event
22/11/10	19:30	22:30	Desk Officer 1 circulates note of the results of SIS and MI5 searches for information on Mr Adebolajo to Intelligence Officers 1-2 and MI5 Head Office
22/11/10	evening	evening	Mr Adebolajo & others interviewed by ATPU and Arctic on arrival at Mombasa Police Provincial HQ and then transferred to Mombasa central police station for the night
23/11/10	am	am	Intelligence Officer 1 reads Arctic report of interview with Mr Adebolajo
23/11/10	07:00	10:00	Mr Adebolajo & others transferred to Mombasa Law Courts, Mombasa for hearing at which they are remanded in custody until 26 November 2010 pending a charging decision
23/11/10	09:00	12:00	Mr Adebolajo & others transferred to Mombasa Police Provincial HQ, Mombasa for further ATPU questioning and then transferred to Mombasa central police station for the night
23/11/10	am	pm	Intelligence Officers 1-2 meet the SKPO and brief CTELO, BHCN consular team and BHCN Press Officer
23/11/10	am	pm	MI5 Head Office issues Ports Circulation Sheet to SO15 P Squad and 19 port stop questions for Mr Adebolajo
23/11/10	am/pm	pm	Media coverage of remand hearing: • Kenyan Daily Nation article "Nine terror suspects remanded" • BBC news website "Kenyans arrested 'on way to join Somalia's al-Shabab'"
23/11/10	08:45 – 17:00	11:45 – 20:00	FCO email traffic re media enquiries copied to (amongst others) a senior SIS Intelligence Officer in Kenya at the time
23/11/10	16:00	19:00	Intelligence Officer 1 updates Desk Officer 1 and MI5 Head Office by email
23/11/10	17:00	20:00	Intelligence Officer 1 emails intelligence digest on arrest of Mr Adebolajo to SIS Head Office for dissemination by CX report
23/11/10	–	–	MI5 Head Office updates Intelligence Officers 1-2 by memo attached to email

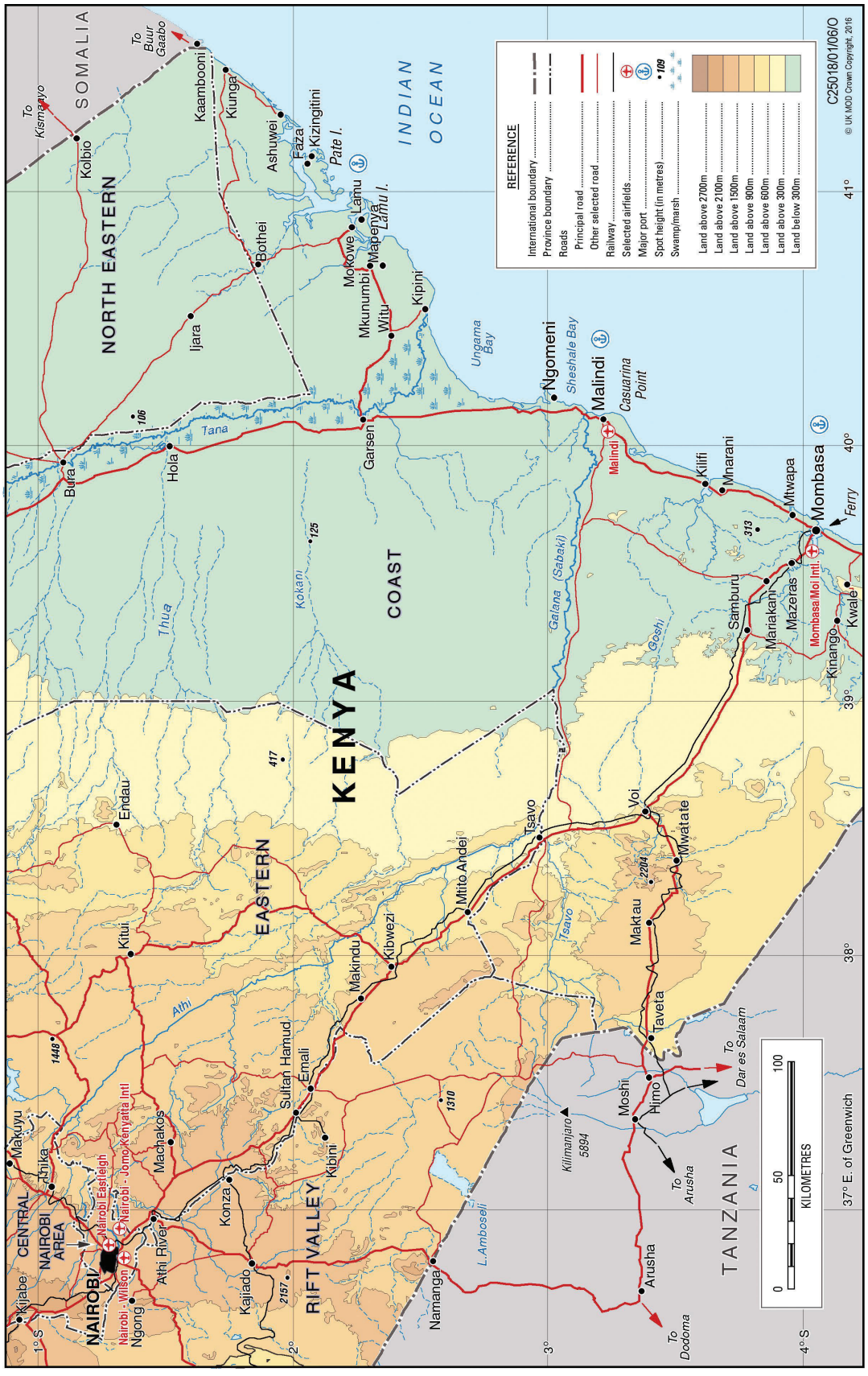
Date	GMT	Nairobi Time	Event
24/11/10	01:00 – 09:00	04:00 – 12:00	Mr Adebolajo transferred to ATPU HQ, Nairobi
24/11/10	am	am	Further media coverage of remand hearing: • Nigerian Daily Trust article "Nigeria: Kenya Charges Local, Eight Other 'Al Shabaab' Suspects"
24/11/10	am	am	Intelligence Officer 1 telephones the SKPO and briefs BHCN Consular Officer
24/11/10	09:00	12:00	Intelligence Officer 1 updates Desk Officer 1 and MI5 Head Office by email
24/11/10	10:30	13:30	SIS Head Office circulates CX report on arrest of Mr Adebolajo
24/11/10	am	pm	Mr Adebolajo transferred to JKIA
24/11/10	10:30 – 16:00	13:30 – 19:00	FCO email traffic re media enquiries and consular contact with Mr Adebolajo and his sister Blessing (not copied to SIS)
24/11/10	pm	pm	Further correspondence between MI5 Head Office and SO15 re proposed/planned port stop interview of Mr Adebolajo
24/11/10	14:30	17:30	BHCN Consular Officer contacts Mr Adebolajo at JKIA and then Blessing Adebolajo by telephone
24/11/10	evening	evening	Mr Adebolajo return flight JKIA to LHR departs
25/11/10	05:45	08:45	Mr Adebolajo return flight JKIA to LHR arrives
25/11/10	06:00 – 09:00	09:00 – 12:00	SO15 port stop interview of Mr Adebolajo, allegations of mistreatment in Kenya made
25/11/10	10:00	13:00	BHCN Consular Officer and FCO Consular Directorate update Blessing Adebolajo by telephone
25/11/10	–	–	Arctic intelligence report corroborates that the arrest of Mr Adebolajo was happenstance, not intelligence led, and that Mr Adebolajo *was* seeking to travel to Somalia for extremism
27/11/10	–	–	SO15 sends port report of interview with Mr Adebolajo (but not torture and inhuman treatment questionnaire) to MI5 Head Office and (possibly at a later date) FCO Counter Terrorism Department

Date	GMT	Nairobi Time	Event
30/11/10	14:45	–	MI5 Head Office seeks in-house legal advice on allegations of mistreatment in port report by email
01/12/10	12:00	–	MI5 legal adviser advises on allegations of mistreatment by email
01/12/10	15:30	18:30	MI5 Head Office forwards memo and port report, highlighting allegations of mistreatment, to Intelligence Officers 1-2 and Desk Officer 1 by email At some point Intelligence Officer 2 telephones MI5 Head Office to answer a question posed in the memo
01/12/10	17:30	20:30	Desk Officer 1 attempts to task Intelligence Officer 3 with following up allegations of mistreatment by email, but SIS IT system blocks transmission
01/12/10	–	–	Desk Officer 1 has telephone discussions with MI5 Head Office, FCO and (possibly) an SIS Intelligence Officer (possibly Intelligence Officer 3) about allegations of mistreatment
04/12/10	–	–	A foreign intelligence service report corroborates that the arrest of Mr Adebolajo was happenstance, not intelligence led, and that Mr Adebolajo *was* seeking to travel to Somalia for extremism
10/12/10	–	–	FCO Counter Terrorism Directorate shows port report to Consular Directorate and provides it with a copy the following week
17/12/10	–	–	FCO Consular Directorate attempts unsuccessfully to get contact details for Mr Adebolajo from Blessing Adebolajo by telephone
21/12/10	–	–	FCO Consular Directorate sends letter to Mr Adebolajo about his allegations of mistreatment, letter cleared in draft with SIS
Mar 11	–	–	Publication of TM Reporting Guidance
Jul 11	–	–	Publication of CPS Referral Guidelines
Oct 11	–	–	Publication of FCO *Strategy for the Prevention of Torture 2011-2015*
Dec 11	–	–	Publication of OSJA Guidance

Date	GMT	Nairobi Time	Event
22/12/11	–	–	SO15 War Crimes Team review of case under CPS Referral Guidelines allocated
08/11/12	–	–	SO15 War Crimes Team review of case under CPS Referral Guidelines entered on system
12/12/12	–	–	SO15 War Crimes Team review of case under CPS Referral Guidelines closed
22/05/13	–	–	Murder of Fusilier Rigby
19/12/13	–	–	Conviction of Mr Adebolajo and Mr Adebowale
26/02/14	–	–	Sentencing of Mr Adebolajo and Mr Adebowale
Feb 14	–	–	Publication of revised OSJA Guidance
25/11/14	–	–	Open version of the ISC report published
27/11/14	–	–	PM makes Intelligence Services Commissioner (Additional Review Functions) (Consolidated Guidance) Direction 2014 and announces review covered in this report
Aug 15	–	–	Publication of revised CPS Referral Guidelines

C. Maps

C.1 Kenya (small scale)



C.2 Lamu Archipelago (large scale)

D. Questionnaire for SO15 ports officers recording allegations of torture or inhuman treatment

I. Identity of the person(s) subjected to ill-treatment

A. Family Name:

B. First and other names:

C. Sex (Male or Female):

D. Birth date or age:

E. Nationality:

F. Occupation:

G. Identity card number or Passport Number (if applicable):

H. Activities (trade union, political, religious, humanitarian/solidarity, press, etc.):

I. Residential and/or work address:

J. Contact telephone number:

K. Email address:

II. Circumstances surrounding ill-treatment

A. Date (at least to the month and year) and place (if known) of arrest and subsequent torture

- *Describe how the victim came into the hands of the public officials*
- *Method of arrest or abduction*
- *Any restraint method used*
- *How long they were held for at each venue(s)*
- *Description of place(s) held*
- *Describe what the holding conditions were like – access to water, food, ventilation and climatic conditions of where kept*

B. Identity of force(s) or other public officials carrying out the initial detention and/or torture (police, intelligence services, armed forces, paramilitary, prison officials, other). Provide descriptions of the officials concerned including any uniforms that were worn.

C. *Were any person, such as a lawyer, relatives or friends, permitted to see the victim during detention? If so, how long after the arrest?*

D. *Describe the methods of ill-treatment used*

E. *What injuries were sustained as a result of the ill-treatment?*

F. *What was believed to be the purpose of the ill-treatment?*

G. *Was the victim was examined by a doctor at any point during or after the incident? If so, when? Was the examination performed by a prison or government doctor?*

H. *Was appropriate treatment received for injuries sustained as a result of the ill-treatment?*

I. *Was the medical examination performed in a manner which would enable the doctor to detect evidence of injuries sustained as a result of the ill-treatment? Were any medical reports or certificates issued? Is so, what did the reports reveal?*

J. *If the victim died in custody, was an autopsy or forensic examination performed and what were the results?*

K. *Are there witnesses to any of the events described above?*

III. Remedial action

Were any domestic remedies pursued by the victim or his/her family or representatives (complaints to the forces responsible, the judiciary, political organs, etc.)? If so, what was the result?

VII. CONFIDENTIAL ANNEXES

E. Dramatis personae

[text omitted – see report, paragraph 5.8].

F. Log of SIS search terms

[text omitted – see report, paragraph 5.8].

G. Log of documentary materials

[text omitted – see report, paragraph 5.8].

ISBN 978-1-4741-3555-9