



HM Government

The Government Response to the Report on Deportation with Assurances by the Independent Reviewer of Terrorism Legislation

October 2018

Cm 9712



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Presented to Parliament
by the Secretary of State for the Home Department
by Command of Her Majesty

October 2018

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Home Office

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Dear Lord Anderson

REVIEW OF THE DEPORTATION WITH ASSURANCES POLICY

Thank you for your review of the Government's use of the Deportation with Assurances (DWA) policy, which you agreed to undertake in November 2013 following an invitation from the then Home Secretary, Mrs May, and which was published on 20 July 2017.

For the benefit of other readers, DWA refers to the approach of seeking diplomatic assurances where we consider that our international obligations, such as those under the European Convention on Human Rights (ECHR), present a barrier to the deportation of a foreign national, but where we consider that this barrier could be removed by those assurances. DWA thus allows us to remove some of those who are otherwise unremovable.

Since August 2005, successive governments have sought to take DWA action against a small number of foreign nationals, usually based on the existence of a live national security risk, but sometimes in respect of foreign nationals who have been sentenced and imprisoned in the United Kingdom for their involvement in terrorism related activities (TRA). It has long been, and remains, the Government's view that DWA properly balances the requirement upon the United Kingdom to, on the one hand, protect public safety and national security, and on the other, ensure compliance with our international obligations, including the prohibition on return to proscribed treatment, and the provision of a fair appeals process. I am therefore grateful to you for considering how we use our powers now, and what we may do differently going forward.

The need for deportation in national security cases

Your review acknowledges that recently there have been barriers preventing the use of DWA, however, in the longer term, the Government remains committed to pursuing DWA in appropriate cases. The Government's priority is to prosecute those

who are involved in TRA, and the police and Crown Prosecution Service continue to do so, but there will continue to be cases where prosecution is not an option. This might be for example because of reliance on intercept evidence. In such cases, there are a range of options, including the power contained in the Immigration Act, 1971, to deport a foreign national whose presence in the United Kingdom is not conducive to the public good.

There is also an obligation upon me, as Home Secretary, to seek to deport foreign nationals who have been convicted in the United Kingdom for a serious offence, including involvement in TRA, under Section 32 of the Borders Act 2007, subject to any barriers to removal. As I mention above, in a small number of cases, DWA has been pursued on the basis of such past convictions irrespective of whether the foreign national poses a current threat to our national security.

The Refugee Convention, 1951, and its 1967 Protocol (“the Refugee Convention”) allows for the exclusion of foreign nationals who are not deserving of protection from its provisions, including for activities contrary to the purposes and principles of the United Nations (under Article 1(f)(c)); or for their “refoulement” (i.e. their forcible return, irrespective of risk posed) for reasons of serious criminality within the country of refuge (under Article 33(2)). However, our long-standing international obligations under the Convention for the Protection of Human Rights and Fundamental Freedoms (“the ECHR”) and the International Convention on Civil and Political Rights (“the ICCPR”) have long been held by our domestic and International courts to prevent the removal of those who pose a threat to public safety and national security in certain circumstances, including where return would expose them to a real risk of torture, inhuman or degrading treatment or punishment (prohibited under Article 3, ECHR and Article 7, ICCPR).

Counter-terrorism based Immigration powers prior to the adoption of DWA

In this respect, *Chahal v UK* (1997) was, as you point out in your review, a landmark judgment by the European Court of Human Rights in Strasbourg. It established that an ECHR signatory could not remove a foreign national, irrespective of the harm they pose to the country in which they are present, and notwithstanding the provisions of the Refugee Convention, if there exists a real risk of treatment contrary to Article 3 ECHR. The court also found against the review mechanism then used in national security cases (commonly referred to as “the three wise men”), leading to the Government’s decision to create the Special Immigration Appeals Commission (SIAC) under the SIAC Act 1997. After *Chahal*, and until the 11 September 2001 attacks on the United States of America, the United Kingdom did not have an effective process for deporting foreign nationals involved in international terrorism who could not be prosecuted if a real risk of treatment contrary to Article 3 ECHR existed in their home country.

In response to the 11 September 2001 attacks, United Nations Security Council Resolution (UNSCR) 1373 of 2001 called upon all member states to “deny safe haven to those who finance, plan, support or commit terrorist acts” (2(b)), and to “ensure, in conformity with international law, that refugee status is not abused by

perpetrators, organisers or facilitators of terrorist acts” (3(g)). On 28 September 2001, this resolution was adopted unanimously.

Soon after the 11 September 2001 attacks, the Government adopted Part 4 of the Anti-terrorism, Crime and Security Act 2001 (“the ATCSA”). Part 4 ATCSA was underpinned by derogations from Article 5(1)(f) ECHR and Article 9(1) ICCPR, which both protect the individual against unlawful detention, accompanied by the Government’s declaration of ‘a state of public emergency threatening the life of the nation’. These derogations allowed the Government to effectively suspend the *Hardial Singh* principles – the caselaw which governs detention on immigration grounds – in respect of a small number of foreign nationals who were suspected of involvement in International terrorism. The *Hardial Singh* principles required there to be a reasonable prospect of removal within a reasonable timescale in order to justify Immigration-based detention. Part 4 ATCSA instead provided for Immigration-based detention, pending deportation, even though there was not an enforced removal avenue available to the Government at that time, for a very small number of foreign nationals – 16 people certified and detained and one other certified, but detained under other powers. Those who were certified under the ATCSA power (as a suspected international terrorist to whom either Article 1(f)(c) or 33(2) of the Refugee Convention applied) and subject to detention arising from their certification, had an initial appeal route to SIAC as a court of first instance, followed by a regular, ongoing review process regarding the necessity of detention, also adjudicated by SIAC. As you identify in your review, these powers were found to be discriminatory and disproportionate by the House of Lords, then our highest domestic court, in December 2004 and, as a result, the Government did not seek to renew the power in March 2005 when it was next due for annual renewal by Parliament. Instead, the Government introduced Control Orders under the Prevention of Terrorism Act 2005. Control Orders were intended to address the House of Lords “discriminatory” finding, by applying to both foreign nationals and British citizens, and their “disproportionate” finding, by adopting a power short of deprivation of liberty and instead imposing measures, such as curfews, residence requirements, and restrictions on visitors, communications, and access to goods and services which could be applied to people living in the community. Control Orders were imposed immediately on those detained under Part 4 ATCSA and subsequently applied to other subjects following their adoption in March 2005.

Five months later, following the July 2005 (actual, and then attempted) attacks on London, the Government formally adopted DWA to address the longstanding inability to remove foreign nationals where our international obligations imposed a barrier to removal. The Government intensified its efforts to negotiate Memoranda of Understanding, or bilateral agreements, which would allow the UK to request formal, diplomatic assurances from a foreign government, providing for the fair treatment of a foreign national on return to their home country. The then Government negotiated with countries who, it was assessed, were able and willing to both agree and enforce such assurances. In parallel, where possible at that time, the Government sought to negotiate agreements with a number of in-country monitoring bodies in order to provide an independent means of verification following return of the individuals.

These generic agreements would then provide a route for the Government to request individualised, specific assurances in relation to particular foreign nationals. Should the Government therefore assess that assurances are needed, but are obtainable, and are sufficient to offer adequate protection against a real risk of prohibited treatment, the Government might then choose to take a decision to remove.

The Special Immigration Appeals Commission (SIAC)

Such a decision will generate an appeal avenue to SIAC. In all such appeals, the Government is very likely to need to rely on sensitive material, the disclosure of which is not in the public interest. This could be, for example, sensitive intelligence reporting which demonstrates that a foreign national's presence in the United Kingdom is not conducive to the public good, in accordance with the Immigration Act, 1971, or diplomatic material relating to the strength of the bilateral relationship between the United Kingdom and the country providing assurances. As such, any appeal route will always be to SIAC as the Court of first instance.

SIAC is a superior Court of Record, chaired by a High Court judge, and composed of an expert panel comprising a chairman who holds or has held high judicial office, an immigration judge and a lay member. In SIAC, the appellant can instruct his lawyers of choice in open session, and his interests will be protected once in closed session by a Special Advocate who is appointed by the Attorney General. I am generally satisfied that, by utilising the closed mechanism's available to me under the SIAC rules, I can (subject to any specific disclosure requirements following a judgment of the CJEU in the case of ZZ) demonstrate the case for removal (i.e. the "national security" element of the case) and the reasons why I consider that this removal will be in accordance with the United Kingdom's international obligations (i.e. the "safety on return" element of the case).

Whilst protecting sensitive Government material, SIAC also provides for a fair appeal mechanism, through means such as the specialist, three member panel which provides a range of expertise specific to the issue; the requirement upon the Government to prove the necessity for withholding sensitive material from open disclosure; the Special Advocate process which protects the interests of the appellant once SIAC goes into closed; and the exculpatory process which requires the Government to provide material it holds (both in open and in closed) which undermines the Government's case or support the appellants case. I consider SIAC an expert tribunal and the SIAC process, which is used more widely than just DWA cases, strikes the correct balance between protecting the rights of the individual and protecting sensitive material.

The Government's use of the DWA power

Successive governments have used DWA in a small number of cases. As above, in the vast majority of cases, the subjects of the power were considered to pose a current national security risk at the time that we commenced deportation. In all cases, the Government instigated DWA action because it was believed that an individual could be safely deported, with the benefit of assurances, within our

international obligations. In most cases, SIAC supported the Government's position at the initial appeal.

When the Government first initiated DWA proceedings in August 2005, it was not anticipated that the appeals process would become so drawn out, with SIAC finally finding against HM Government in the "W and Others" group of Algerian DWA cases in 2016, despite having first found in the Government's favour, in the individual appeals of the same individuals, from 2006 onwards. That these cases would progress to the House of Lords (as "RB and U") in February 2009, with their Lordships finding in the Government's favour, but would nevertheless continue to bounce between the domestic courts for a further seven years was totally unexpected.

Undoubtedly, the power's biggest success was the deportation of Abu Qatada. Abu Qatada was formerly detained under Part 4 ATCSA, and then made the subject of a Control Order, before a Notice of Intention to Deport (as was then required under the rules) was imposed upon him in August 2005. With the benefit of assurances from the Jordanian Government, and ultimately the signing of a Mutual Legal Aid Treaty ("MLAT") negotiated by the then Home Secretary, by the British and Jordanian Governments, Abu Qatada finally suspended his appeal proceedings, permitting his deportation in July 2013. It is notable that, whilst the European Court of Human Rights had previously refused permission to deport Abu Qatada (on the grounds that he could face a criminal prosecution featuring evidence obtained through the torture of third parties, a risk which was subsequently addressed by the MLAT), in deciding the case, the Court supported the concept of assurances and established helpful caselaw regarding the sort of questions a government looking to deport, and our domestic courts when adjudicating on its actions, need to consider. You have helpfully referenced these indicators in your report. I am satisfied that we have a proven ability to meet these indicators, and that we have a valuable and functioning process, which we are able to maintain on the back of your very helpful report into its operation.

Your responses to the questions asked of you in November 2013

As I wrote above, I am grateful for your considered views in relation to the specific terms of reference. I hope you will agree that, considering the answers you have provided, the United Kingdom's approach to DWA is on the right lines. I note your comment that states which are more successful in achieving deportations pay a price in terms of reduced compliance with the rule of law. As you will be aware, successive Governments have pressed for the deportation of those who threaten our country without ignoring judgments they don't like, and without acting outside the law. However the significant length of proceedings has concerned me. I am reassured by your view that whilst this is an unavoidable consequence of the appeal process, we may reasonably expect that future cases will occupy less time as the law is now clear.

In response to our loss in W and Others, where we did not have independent monitoring, I am grateful for your view that where an embassy is properly prepared and equipped, diplomatic monitoring may have a role, although, as SIAC found in

Algeria, a more formal, independent monitoring approach remains preferable when possible. It remains my intention, when seeking DWA agreements, to seek independent monitoring where necessary and possible, but where this is not possible, we will keep in mind your advice when considering the appropriateness of our measures.

I share your view that as regards generic agreements, one size doesn't necessarily fit all and as a result, whether and how we may negotiate a bespoke or a generic agreement will be fact specific. I set out below my intentions for the future use of the power and such a flexibility of response correlates with my intention to use the power more flexibly going forward.

Future of the power

The resources devoted to DWA will fluctuate subject to demand. For example, we have previously managed DWA removals in respect of several countries simultaneously, when the demand from operational colleagues required us to do so. This Government remains committed to the use of DWA in low volume, high profile, high harm cases. There continues to be a range of options available to us when tackling terrorism, and deportation will continue to be one of those options, utilising assurances where it is assessed to be necessary, viable and proportionate for us to do so.

In the past, we sought country-to-country DWA agreements on an "if needed" basis. Some of these, such as the Lebanon agreement, have never been used. In parallel, we have had to seek urgent agreements where operationally required.

For the present, I have agreed that we will seek to respond to operational needs. Subject to demand from the security and intelligence agencies, this may mean a more flexible, adaptable DWA approach, with urgently negotiated agreements as needed, and potentially with more of a focus on the specific issues in hand, whilst recognising that cases will develop over time. There are at the time of publication no cases where operational partners are seeking a deportation to a country where assurances would be required and where those assurances would be sufficiently reliable to satisfy the courts to permit deportation to proceed, as per the DWA process outlined above. But to be clear - where I consider DWA to be an appropriate response, I will use it.

Conclusion

There remains an ongoing need to address terrorist related activity which cannot be evidenced in the criminal courts. As the Prime Minister announced following the Manchester and London attacks, we are reviewing our counter terrorism laws more widely, including sentencing, to ensure that the police and intelligence agencies have the powers they need to keep the public safe. But I am clear that deportation will remain one of the ways of doing this, and assurances will sometimes be necessary in light of the case law that a foreign national may not be returned to their own country where there is a real risk that they would face a flagrant denial of their ECHR rights. I therefore consider that DWA remains appropriate in relevant cases, and will remain one of the tools available to this Government.

I will be publishing this response on the Government's website and placing copies in the Vote Office.

A handwritten signature in black ink, appearing to read 'S. Javid', with a small comma at the end.

The Rt Hon Sajid Javid MP
Home Secretary

