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Case No: CO/11949/2008

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/06/2010

Before :

LORD JUSTICE RICHARDS
and
MR JUSTICE CRANSTON

- -

Between :

The Queen (on the application of Maya Evans)	**Claimant**
- and -	
Secretary of State for Defence	**Defendant**

- -
- -

Michael Fordham QC, Tom Hickman and Rachel Logan (instructed by **Public Interest Lawyers**) for the **Claimant**
James Eadie QC, Sir Michael Wood, Marina Wheeler and Karen Steyn (instructed by **The Treasury Solicitor**) for the **Defendant**
Khawar Qureshi QC and Kieron Beal (instructed by **The Special Advocates Support Office of the Treasury Solicitor**) as Special Advocates

Hearing dates: 19-23 and 26-29 April 2010

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Approved Judgment

CONTENTS

	Paragraphs
INTRODUCTION	1-13
THE BROAD FACTUAL CONTEXT	14-24
THE HISTORY OF TRANSFERS: SUMMARY	25-37
THE NATIONAL DIRECTORATE OF SECURITY (THE NDS)	
Status of the NDS	38-39
Role of the NDS	40-42
Transfer of detainees to the NDS	43-48
Independent reports on the NDS	49
The Afghan Independent Human Rights Commission (AIHRC)	50-57
United Nations reports	58-65
NGO reports	66-73
Governmental reports	74-75
UK knowledge of allegations of mistreatment by the NDS	76-84
Evidence of changes within the NDS	85-90
THE MoU AND RELATED ASSURANCES	91
Background to the Memorandum of Understanding (MoU)	92-94
The MoU in outline	95-99
MoUs with other ISAF states	100-104
The Exchange of Letters (EoL)	105-112
The NDS and the MoU/EoL	113-128
Dr Saleh's letter of 25 March 2010	129-131
Hand-over documents	132
IMPLEMENTATION OF THE TRANSFER ARRANGEMENTS	133
Transfer to third party state	134-135
Access by the AIHRC and other independent bodies	136-140
UK visits to detainees	141-144
NDS Lashkar Gah	145-161
NDS Kandahar	162-164
NDS Kabul	165-168
Non-NDS prisons	169-170
Record-keeping and notifications of change	171-180
Transfers between NDS facilities	181-183
Recent and future developments relevant to monitoring	184-186
SPECIFIC ALLEGATIONS BY UK TRANSFEREES	187
Prisoner X: NDS Lashkar Gah	188-195
Prisoner A: NDS Kabul	196-199
Prisoner B: NDS Kabul	200-201
Prisoner C: NDS Kabul	202-203
Prisoner D: NDS Kandahar/Kabul	204-208
Prisoner E: NDS Lashkar Gah	209-215
Prisoner G: NDS Lashkar Gah	216-217
The NDS's investigations and report	218-224
Recent allegations made to an Afghan judge	225-226
THE CANADIAN MATERIAL	227-235
THE LEGAL FRAMEWORK FOR THE ISSUE BEFORE THE COURT	236-250
THE CLAIMANT'S SUBMISSIONS	251-267
THE SECRETARY OF STATE'S SUBMISSIONS	268-286
DISCUSSION AND CONCLUSIONS	287-327

Lord Justice Richards :

INTRODUCTION

1. This is the judgment of the court, to which both members have contributed. The case concerns UK policy and practice in relation to the transfer to the Afghan authorities of suspected insurgents detained by UK armed forces in the course of operations in Afghanistan. The policy is that such detainees are to be transferred to the Afghan authorities within 96 hours or released, but are not to be transferred where there is a real risk at the time of transfer that they will suffer torture or serious mistreatment. The claimant's case is that transferees into Afghan custody have been and continue to be at real risk of torture or serious mistreatment and, therefore, that the practice of transfer has been and continues to be in breach of the policy and unlawful. The claimant seeks, in effect, to bring the practice of transferring detainees into Afghan custody to an end. If detainees cannot be transferred, the likelihood at present is that they will have to be released. Thus the importance of the case lies not only in its subject-matter but also in its implications for security in Afghanistan and the effectiveness of UK operations there.

2. The claimant is a peace activist who is opposed to the presence of UK and US armed forces in Afghanistan. The fact that she may have a wider objective in bringing her claim is, however, an irrelevance. The claim itself is brought in the public interest, with the benefit of public funding. It raises issues of real substance concerning the risk to transferees and, although the claimant's standing to bring it was at one time in issue, the point has not been pursued by the Secretary of State.

3. We wish to pay tribute to the way the case has been handled by all concerned, albeit after a slow start on the part of the Secretary of State.

4. The claim was filed in December 2008. Time was lost in the first half of 2009 through the Secretary of State's firm resistance to the grant of permission. That resistance came to an end, however, in June 2009, following the emergence of fresh allegations of mistreatment of UK transferees, and permission to apply for judicial review was granted by consent on 29 June. In the next few months there were repeated complaints by the claimant's legal representatives about delay by the Secretary of State in serving his detailed grounds and evidence and in making disclosure. The claimant's representatives cannot be faulted for the continued application of pressure, but we have reached no view on whether the particular complaints about delay were justified, since it has not been necessary for us to examine in any detail the matters that were canvassed at a number of directions hearings held in the latter part of 2009 and early 2010.

5. What is clear to us, however, is that by the time of the final hearing the Secretary of State had adopted a commendably conscientious approach towards the discharge of his disclosure obligations and his duty of candour. A massive, costly and time-consuming disclosure exercise had been undertaken, across the range of relevant departments and agencies, covering material in this country and in Afghanistan. By the time of the hearing only minor issues of disclosure remained, and they were largely resolved through the good sense of counsel.

6. In continuing discharge of his obligations, the Secretary of State also produced further material in the course of the hearing and after the hearing had ended, so as to provide the court with an update on recent developments. Although the claimant made some criticism of the speed with which updates were provided after the relevant information became known to the Secretary of State, we do not accept that there are legitimate grounds for complaint, given the need for the Secretary of State to investigate matters first in order to provide the court with as full and accurate an account of them as possible.

7. In any event, we are satisfied that no order for further disclosure was or is needed.

8. Moreover, procedures were put in place to ensure that material covered by public interest immunity or by statutory restrictions on disclosure could be taken fully into account by the court. This was achieved in part by disclosure to the claimant's legal representatives on the basis of appropriate undertakings, and in part by the appointment of special advocates to deal with material that could not be disclosed to the claimant's legal representatives. The claimant's legal representatives co-operated with the process in a highly responsible fashion. The process meant that the court had to split the hearing into three categories: open sessions, semi-closed sessions (in which the public were excluded but the claimant's counsel and counsel for the Secretary of State addressed the court, with the special advocates also present), and closed sessions (in which the public and the claimant's team were excluded but the special advocates and counsel for the Secretary of State addressed the court).

9. The evidence before the court includes a large number of witness statements, together with exhibits, on behalf of the claimant and the Secretary of State. Some of the claimant's evidence has the status of expert evidence but the factual material relied on is in practice more important. We will refer to the statements as appropriate in the course of our judgment, without setting out here who all the witnesses are or the matters that they cover. There are also numerous files of documents disclosed by the Secretary of State, to which extensive reference was made in the course of submissions. We have thought it necessary to set out the relevant facts at considerable length because the case ultimately depends on an assessment of risk in the light of the factual circumstances taken as a whole; but we have endeavoured not to overload the judgment with detailed references to the individual documents.

10. By orders made at previous directions hearings, the question whether there should be cross-examination of the Secretary of State's witnesses was left over to the hearing before us, and the Secretary of State was directed to ensure so far as possible that his witnesses were available to attend the hearing. The possibility of cross-examination remained a live one until late in the hearing. The claimant's skeleton argument identified various issues which were submitted to be suitable for cross-examination. At the outset of the hearing Mr Fordham QC indicated that he would seek a ruling once the court had heard opening submissions on the substantive issues from both counsel in open and semi-closed sessions. When that time came, however, Mr Fordham all but abandoned the application for cross-examination. He acknowledged that he was not impugning the good faith of any witness or seeking a ruling on any disputed issue of fact, that there was nothing he would put to the witnesses that he had been unable to put by way of submission, and that he could not contend that cross-examination was necessary in order to deal fairly with the claim.

11. We had no difficulty in concluding in those circumstances that the application for cross-examination should be refused, essentially for the reasons conceded by Mr Fordham. It appears that the reason why the issue had been kept open was to guard against the possibility of an argument on behalf of the Secretary of State that the court should not depart from the assessments or judgments made by the various witnesses unless the claimant's criticisms of those assessments or judgments had been put to the witnesses themselves. Mr Eadie advanced no such argument, and it seems to us that the concern was an unreal one from the outset.

12. This is the open judgment of the court, in which we deal with material that can properly be disclosed in a judgment open to the public and we set out the conclusions that we draw from that material. We also indicate the effect on those conclusions of the evidence considered in semi-closed and closed sessions. The details of the evidence covered in those semi-closed and closed sessions are, however, covered in a separate, closed judgment.

13. We were asked by counsel for the claimant and by the special advocates to consider putting some of the closed evidence into the public domain by means of this judgment. We have decided against that course. There are legitimate reasons of public interest for protecting the closed evidence from publication. Through the procedures adopted in this case, it has been possible for all of it to be taken properly into account by the court. It is consistent with the conclusions we have reached in any event by reference to the open material. It contains nothing of such concern as to call for public disclosure in the interests of justice. In those circumstances the balance comes down in favour of its continued protection from publication.

THE BROAD FACTUAL CONTEXT

14. There are currently about 9,000 UK armed forces personnel in Afghanistan. The vast majority of them, and the only ones involved in the capture and transfer of detainees, operate under the command of the International Security Assistance Force ("ISAF"). They are present in the country pursuant to a UN mandate and with the consent of the Government of Afghanistan in order to assist that government in the maintenance of security and in reconstruction. The UK is one of 42 nations contributing troops to ISAF.

15. ISAF was established at the end of 2001 at the request of the Government of Afghanistan, following UN talks which led to the Bonn Agreement of 5 December 2001. In an annex to the Bonn Agreement, the participants in the UN talks requested that the UN Security Council consider authorising the early deployment to Afghanistan of a UN mandated force. Shortly thereafter, in UNSCR 1386 (2001), the UN Security Council, acting under Chapter VII of the Charter of the United Nations, authorised the establishment of ISAF. The Council has extended ISAF's mandate in successive resolutions, in recognition of the fact that the situation in Afghanistan continues to constitute a threat to international peace and security. Since August 2003 ISAF has operated under the command of NATO.

16. Afghanistan is a sovereign state and, as the UN Security Council resolutions make clear, the international community has pledged to support Afghan sovereignty over its entire territory and to ensure respect for that sovereignty even in the context of military operations within the country. Afghanistan has jurisdiction over all persons

in its territory, save to the extent that it has expressly agreed that ISAF and supporting personnel will be subject to the exclusive jurisdiction of their national elements.

17. The law of armed conflict applies to military operations conducted in internal armed conflict and, subject to compliance with that law, UK armed forces operating in Afghanistan are authorised to kill or capture insurgents. Indeed, a vital element of fulfilling the UN mission is the capture of persons who threaten the security of Afghanistan. The power to capture insurgents extends to a power to detain them temporarily. In the absence of any express authorisation in the UN Security Council resolutions, however, the Secretary of State takes the view that the UK has no power of indefinite internment. That is why the issue of transfer to the Afghan authorities is of such importance.

18. Insurgents may have committed offences under Afghan law, notably the 1987 Law on Crimes against Internal and External Security and the 2008 Law on Combat against Terrorist Offences. The Afghan Government is entitled to prosecute those within its jurisdiction who are believed to have committed offences. Successful prosecutions are an important element of the strategy for securing the rule of law and bringing security to Afghanistan. Accordingly, where captured insurgents are believed to have committed offences against Afghan law, sound reasons exist for their transfer into the custody of the Afghan authorities for the purposes of questioning and prosecution.

19. Under ISAF standard operating procedures, the only grounds upon which a person may be detained are that the detention is necessary for ISAF force protection, for the self-defence of ISAF or its personnel, or for the accomplishment of the ISAF mission. Such persons should be detained for no longer than 96 hours, subject to the possibility of an extension in certain circumstances. They must then be released or transferred to the Afghan authorities. The standard operating procedures explain that the Government of Afghanistan has overall responsibility for the maintenance of law and order within the country and that when transferring a detainee ISAF cannot seek to constrain the freedom of action of the Afghan authorities. Bilateral agreements may, however, be concluded with the Afghan Government (and the actual memoranda of understanding entered into between the Government of Afghanistan and the UK and other ISAF states are discussed below). Further, the procedures state that "[c]onsistent with international law, persons should not be transferred under any circumstances in which there is a risk that they be subjected to torture or other forms of ill treatment".

20. The UK's policy reflects that of ISAF. There are detailed standard operating instructions on how to detain individuals, look after them in detention and, where appropriate, manage their onward transfer to the Afghan authorities. The key point for present purposes is that detainees are not to be transferred into Afghan custody if there is a real risk that they will suffer torture or serious mistreatment.

21. That is set out with particular clarity in a March 2010 written policy statement by the Secretary of State which has been lodged in the House of Commons library. It is an up-to-date statement of general application, but it is not in dispute that it encapsulates, so far as relevant, the policy that has applied at all material times to UK operations in Afghanistan:

> "1.2 This Policy Statement, which is to be observed whenever UK Armed Forces undertake detention in an operational theatre reflects the importance which I attach to ensuring the humane treatment of those it is necessary to detain in the course of our operations. …
>
> 2.1 This policy applies across the MOD and the Armed Forces and to all detention activities undertaken in military theatres of operation. It sets out the minimum standards which must be applied. …
>
> 3.1 I require the Ministry of Defence and Armed Forces to:
>
> …
>
> (f) Ensure that Detained Persons are not transferred from UK custody to any nation where there is a real risk at the time of transfer that the Detained Person will suffer torture [or] serious mistreatment …."

22. The practice of transferring UK detainees to the Afghan authorities commenced in July 2006 and, subject to certain moratoria applied from time to time in respect of transfers to specific Afghan detention facilities, has continued to date. The detailed arrangements in place concerning such transfers are discussed later. Transfers have been made on the basis of a continuing assessment that there is no real risk that the persons transferred will suffer torture or serious mistreatment while in Afghan custody. The claimant contends that that assessment has been wrong and unfounded throughout and that transfers should not have been made and should not now be made.

23. The Secretary of State's evidence points to the vital importance of detention operations to UK armed forces operating in southern Afghanistan, in particular Helmand province. The counter-insurgency campaign in southern Afghanistan is challenging and highly dangerous, with a particularly high threat from improvised explosive devices, ambushes and snipers. Hundreds of UK service personnel have been killed or wounded. There have also been many civilian casualties. Detention operations are central to the efforts of UK forces to protect themselves and local civilians from such attacks. They are also crucial to the UK's wider contribution to assisting the Afghan Government to bring security and stability to the country, for example by enabling insurgents to be prosecuted before the Afghan courts and by providing the opportunity for the gathering of intelligence. If it were not possible to transfer detainees to Afghan custody, the consequences would be very serious. Detainees would have to be released after a short time, leaving them free to renew their attacks and cause further death and injury. The opportunity to prosecute them and to gain intelligence would be lost. There would be a severe impact on the counter-insurgency strategy generally. There would also be a significantly detrimental effect on UK-Afghan relationships across many levels, damaging the ability of UK armed forces effectively to train and mentor Afghan forces and to increase Afghan capacity.

24. None of those considerations can affect the standard to be applied when determining whether the transfer of detainees to the Afghan authorities is lawful; and if and to the extent that the claimant's case is well founded the transfer of detainees must be halted notwithstanding the consequences for UK operations and the UN mandate in Afghanistan. But the seriousness of the potential consequences underlines the need to evaluate the claimant's case with the utmost care.

THE HISTORY OF TRANSFERS: SUMMARY

25. It may provide a useful reference point if, before examining the factual evidence in detail, we provide a very brief summary of the history of transfers of UK detainees. This is far from being a full chronology. Nor does it attempt to weave in, for example, the various allegations reported by non-governmental organisations concerning ill-treatment of detainees in Afghanistan or the evidence concerning ill-treatment of detainees transferred by Canadian forces.

26. On 23 April 2006 a Memorandum of Understanding ("MoU") was entered into between the UK and the Government of Afghanistan concerning the transfer by UK armed forces to the Afghan authorities of persons detained in Afghanistan.

27. UK transfers started in July 2006 and have continued to date, subject to certain moratoria in relation to transfers to individual facilities. The great majority of transfers (a total of over 400 detainees) have been made into the custody of Afghanistan's National Directorate of Security ("the NDS"). A small number of transfers have been made to the Afghanistan Counter-Narcotics Police, but they are not material to this case.

28. There are three relevant NDS facilities, namely those at Kabul (a facility often referred to as "Department 17", which is the investigating branch of the NDS in Kabul), at Kandahar (the capital of Kandahar province) and at Lashkar Gah (the capital of Helmand province, where UK armed forces have been particularly active). It is also relevant to note the existence of prisons under the control of the Ministry of Justice, where convicted prisoners are held and to which some detainees have also been transferred by the NDS pre-trial. The prisons are Pol-i-Charki (sometimes spelled Pol-e-Charki) prison in Kabul, Sarposa prison in Kandahar, and Helmand provincial prison in Lashkar Gah.

29. In September/October 2007 there was an Exchange of Letters ("the EoL") between the UK and other ISAF states on the one hand and the Government of Afghanistan on the other hand, making additional provision about access to the Afghan facilities by personnel of the transferring states and by non-governmental and international bodies.

30. In September 2007 an allegation was made by a UK transferee at NDS Lashkar Gah that he had been ill-treated while in detention there. The allegation was investigated by UK personnel, who reached the conclusion that it was unsubstantiated.

31. In November 2007 the UK rejected a call for a moratorium on transfers following the suspension of transfers by Canada (as a result of allegations of ill-treatment of Canadian transferees) and the publication of a report by Amnesty International recording allegations of torture and ill-treatment of detainees by the NDS and recommending a moratorium.

32. In December 2008 the UK imposed a moratorium on transfers to NDS Kabul as a result of the NDS's refusal of access to that facility for the purpose of visiting transferees. The moratorium in respect of Kabul has remained in place since then, save for an exceptional case involving the transfer of one UK-captured detainee to Kabul in January 2010.

33. In March 2009 and subsequent months, in the course of visits by UK personnel to Pol-i-Charki prison (carried out in order to check on UK transferees who had been transferred on by the NDS without prior notification to the UK), allegations were made by a number of transferees that they had been ill-treated while in detention at NDS facilities in the period 2007-2008. Most of the complaints related to Kabul, but there were also complaints about Kandahar and Lashkar Gah. The circumstances in which these complaints were made, the investigation of them and the conclusions drawn are important features of the case.

34. The allegations led to the imposition of an immediate moratorium on UK transfers to Kandahar (a moratorium on transfers to Kabul already being in place). Transfers to Lashkar Gah continued.

35. The moratorium on transfers to Kandahar was lifted in February 2010 but no further transfers have in fact been made to that facility.

36. On 25 March 2010 the head of the NDS sent a letter to the British Ambassador in Kabul to provide further assurances in respect of the treatment of, and access to, detainees transferred by the UK into NDS custody.

37. Between February and April 2010 there were substantial difficulties in gaining access to NDS Lashkar Gah. Those difficulties have now been resolved. The UK has continued to make transfers to that facility.

THE NATIONAL DIRECTORATE OF SECURITY (THE NDS)

Status of the NDS

38. The NDS is Afghanistan's external and domestic intelligence agency. It succeeded KHAD, which was the security agency created when the Soviet Union was in Afghanistan and which had a reputation for its network of neighbourhood informers and the use of torture. The NDS conducts intelligence gathering, surveillance, arrest and detention of those suspected of crimes against national security. It acts, in particular, pursuant to the 1987 Law on Crimes Against External and Internal Security and under the 2008 Law on Combat against Terrorist Offences. Its precise status is a matter of some doubt. Its powers are said to be based at least in part on an unpublished Presidential decree. On one account the decree is administrative in nature. The UN and NGO reports summarised below include repeated expressions of concern about the NDS's lack of transparency and accountability.

39. The Afghan Constitution and the Afghan Penal Code prohibit all acts of torture and inhuman punishment. For example, Article 29 of the Afghan Constitution provides that "No one shall be allowed to order torture, even for discovering the truth from another individual who is under investigation, arrest, detention, or has been convicted to be punished", and Article 30 provides that a statement, confession or testimony

obtained by means of compulsion shall be invalid. Those provisions apply to all agencies in Afghanistan, including the NDS. The NDS is also said to regard itself as bound by Afghan law on prisons and detention centres, though there is some evidence that the provisions of the 2005 Prison Law do not apply in terms to NDS detention facilities. In any event a central question in the case is whether the constitutional and legal requirements are observed by the NDS in practice.

Role of the NDS

40. The NDS investigates security and terrorist offences. If the NDS concludes that there is insufficient evidence of insurgent terrorist activity, the detainee is handed over to the normal criminal court system or released. If the NDS considers there to be sufficient evidence, detainees are dealt with in the special security court system. This runs in parallel with the normal criminal courts. Prosecutions in the security courts are under the authority of the Attorney General. The security courts themselves are under the authority of the Supreme Court.

41. As already mentioned, there are NDS detention facilities in Kabul, Kandahar and Lashkar Gah. All three have interrogation facilities. There are separate, non-NDS prisons in each location. Pol-i-Charki prison in Kabul is the most important. It houses some 4,500 prisoners and contains a high security wing.

42. The majority of NDS cases are processed and prosecuted in the provinces where the arrest and detention takes place, or where persons are handed over to the Afghan security forces. High-value detainees or those deemed dangerous or likely to escape are transferred to Kabul.

Transfer of detainees to the NDS

43. We have already referred to ISAF and UK policy concerning the transfer of detainees to the Afghan authorities. ISAF standard operating procedures provide that the NDS should be considered as the preferable reception body for ISAF detainees. That, it is explained, is in order to ensure common processing and tracking of the detainee, once handed over. The procedures state that whenever time, safety considerations and circumstances permit it, detaining forces should make every reasonable effort either to release detainees or to transfer them to the custody of the NDS office in their region.

44. ISAF policy is reflected in the standard operating instructions for UK armed forces. The instructions identify the NDS as the correct Afghan authority to which detainees will be transferred, and set out procedures for how that is to be effected.

45. Under the instructions the actual transfer of the detainee to the Afghan authorities is to be conducted, so far as operations in Helmand province are concerned, at Lashkar Gah. On transfer the Royal Military Police hand over the detainee, together with physical evidence and detainee property, and obtain a signature for the transfer from the senior NDS officer present. Once translated, the detainee file must be forwarded to the NDS at Lashkar Gah within 72 hours of the handover in order that the NDS is able to make an informed decision to charge or release the detainee.

46. The instructions provide that if there are specific grounds to believe that a detainee may be mistreated by the Afghan authorities on or after transfer, such concerns should

be raised with the legal adviser to UK forces and the Force Provost Marshal (the staff of the Force Provost Marshal includes those whose speciality is custody and detention). Any decision to cease or continue with transfer will be taken at the Permanent Joint Headquarters.

47. The International Committee of the Red Cross ("the ICRC") is to be informed of such transfers as soon as practicable. Wherever possible the Afghanistan Independent Human Rights Commission ("the AIHRC") should be informed at the same time. The instruction explains that this is to ensure that there is additional scrutiny and oversight of the assurances contained in the MoU the UK has with the Government of Afghanistan (a topic we consider later).

48. At the date of the hearing some 418 of those persons detained by British forces in Afghanistan had been transferred to the NDS, and a further 8 to the Afghanistan Counter-Narcotics Police. Of the 410 persons detained by British forces and transferred to the NDS between July 2006 and March 2010, 357 went to Lashkar Gah, 34 to Kandahar and 19 to Kabul. There are some instances where individuals transferred to one facility were subsequently moved by the NDS to another of its facilities.

Independent reports on the NDS

49. The NDS is thus an important element in our consideration of the practice of detainee transfer under challenge in this case. A considerable volume of evidence before the court is directed at the nature of the NDS and its record of treatment of detainees. A starting point for considering this material is the reporting of the AIHRC, a body established under Article 58 of the Afghanistan Constitution to monitor and promote human rights and to refer for investigation complaints received about the violation of human rights. We will then consider the reports of various United Nations agencies and NGOs. Some of the material focuses specifically on the NDS, some of it looks at Afghan authorities more generally, but even that more general material may have some bearing on an assessment of the NDS.

AIHRC reports

50. In 2005 the AIHRC documented 66 cases of torture in Kabul province, including cases as severe as the amputation of limbs. According to the AIHRC it was unlikely that any of the police officers involved in such cases had been reprimanded.

51. The AIHRC expressed particular concern about a cover-up by the police and the Attorney General's office of a case of torture resulting in death of a detainee in Kabul police custody, which implicated the Kabul police commander and the Kabul director of criminal investigation. In late 2005, a person was arrested by Police District 13 in Kabul on allegations that he had raped two young girls. Three days later, he was taken to a hospital where he died. Investigations by the AIHRC suggested that he had been severely tortured. The Ministry of Interior investigation conducted shortly after his death acknowledged torture but mentioned a heart attack as the cause of death. The investigation implicated the moral crimes department of the criminal investigation department of police headquarters, an accusation that the AIHRC found credible. Subsequently the Attorney General's Office issued a third report, clearing police headquarters of all involvement and blaming Police District 13.

52. Of major importance is the AIHRC's April 2009 report on "Causes of torture in law enforcement institutions". The research was begun in 2006/2007 and completed in 2007/2008. It used 18 professional human rights researchers and interviewers to conduct interviews with victims of torture or their relatives. The sample for the research from the Commission's database of 10,000 persons consisted of 398 victims of torture in prisons and other detention centres. Questionnaires were sent to 100 families of victims and to 100 officials and experts. Over 28 provinces and most ethnic groups were included. The report explains that few cases of torture in Afghanistan are investigated. Not all victims complain. Another constraint on the research was that prison or detention centre officials kept victims away from the Commission's researchers.

53. The findings of the research were that torture and other cruel, inhuman or degrading treatment were a commonplace practice in the majority of law enforcement institutions in Afghanistan. At least 98.5% of interviewees believed they had been tortured by these institutions. The causal factors of torture in law enforcement institutions included obtaining confessions and testimony from a suspected or accused person, the absence of techniques in collecting evidence and documents to prove crime, personal enmities and the influence of powerful persons, and the impunity of torturers because there is no monitoring institution. In most cases, suspected or accused persons do not have sufficient awareness of their human rights to raise them in court. No one had been prosecuted for torture. Institutions where torture was common included the police (security, justice, traffic), national security, detention centres, prisons, prosecution offices, and the national army.

54. Statistically, most torture and other cruel, inhuman or degrading treatment was in the police (259 of the 398 interviewees). The next highest category was 59 persons who said that they had been tortured in the offices, departments and sections of national security (the NDS). Methods of torture were physical attack, beating by rod and cable, electric shock, deprivation of sleep, water and food, scorching and abusive language. Of all interviewed victims, 21 exhibited physical signs of torture on their heads. The effects of torture were observable on the feet and other parts of the majority of victims.

55. The 398 interviewees in the research named 24 provinces or districts of Afghanistan as the places where they were tortured. The incidents had usually taken place during the previous six years. Most incidents occurred in Kapisa province (119 cases). Herat province was in second place, with 67 cases, and Kandahar province was in third place, with 47 cases.

56. To address the complaints, the Commission had collected evidence to verify them and sought the opinion of doctors about the effects of torture when necessary. The Commission then referred the complaints to the relevant prosecution offices and other relevant authorities to take legal action against the alleged perpetrators. Most of the authorities, except national security, had to some extent cooperated with the Commission. The Commission's monitoring and follow-up had partially and gradually decreased torture in some of the agencies, except national security.

57. While the research for the "Causes of torture" report was being completed, in December 2008 the AIHRC offered a league table of its five major concerns for 2008. At the top of the list was civilian casualties. Torture had dropped from second to third

place. The AIHRC had received 398 reports of torture in 2008, mostly at the hands of the police and NDS (though there is a puzzling coincidence between that figure and the 398 people interviewed for the "Causes of torture" report). That was a reduction on the previous year's figure. The AIHRC noted in positive vein that the authorities generally allowed the AIHRC to investigate reports of torture.

United Nations reports

58. United Nations reports have raised concerns about torture and other inhuman treatment by the NDS. In April 2004 the UN Secretary General appointed Professor Cherif Bassiouni as the independent expert on human rights in Afghanistan. His report of March 2005 was based, inter alia, on two missions to the country. In the report he recognised the importance of national security, but drew attention to allegations that the coalition forces and special units of the Afghan security agencies and police engaged in arbitrary arrests and detentions and committed abusive practices, including torture. The independent expert received testimony from former detainees about such abuses and had communicated his concerns to officials of the governments of Afghanistan and the United States. He identified the absence of due process in the arrest and detention of persons and the use of torture by various government intelligence entities, including those associated with the NDS, the Ministry of Defence and the Ministry of the Interior.

> "The independent expert notes that there are multiple security institutions managed by the National Security Directorate, the Ministry of the Interior and the Ministry of Defence, which function in an uncoordinated manner, lack central control and have no clear mechanisms of formal accountability. The independent expert has received complaints regarding serious human rights violations committed by representatives of these institutions, including arbitrary arrest, illegal detention and torture. He draws attention to the Kakchul case, in which an individual was detained, allegedly tortured and died in custody in November 2004 and which requires a thorough, transparent and public investigation".

59. The Afghanistan Justice Sector Overview, prepared by the United Nations Assistance Mission in Afghanistan ("UNAMA") in March 2007, noted that the requirement to maintain national security while also safeguarding human rights was a challenge in Afghanistan. Coalition forces, special units of the Afghan security agencies, in particular the NDS, and the police, had reportedly acted outside the rule of law by engaging in arbitrary arrests and detentions and abusive practices, sometimes amounting to torture. The NDS continued to run detention centres without adequate judicial oversight, and access granted to the ICRC and the AIHRC was unreliable.

60. In March 2007 the UN High Commissioner for Human Rights reported to the UN Human Rights Council on the situation of human rights in Afghanistan and on the achievements of technical assistance in the field of human rights. At paragraph 66 the High Commissioner noted that reports of the use of torture and other forms of ill-treatment by the NDS were frequent. Individuals were documented as having "disappeared" when they were arrested by NDS officials, and access to the facilities where they were held had been problematic for the AIHRC and the United Nations.

In the current climate of instability and conflict, the lack of oversight mechanisms, the absence of scrutiny of the intelligence service mandate and the lack of access to their facilities were of serious concern. A promising step had been taken in January 2007 with the first human rights training programme for NDS officers organised by the United Nations, the AIHRC and others.

61. The High Commissioner for Human Rights visited Afghanistan in November 2007. A press release at the conclusion of the visit recorded that she had shared her concerns regarding the treatment of detainees with the government, ISAF and representatives of contributing states. Transfers to the NDS were particularly problematic, "given that it is not a regular criminal law enforcement body and operates on the basis of a secret decree". The High Commissioner urged the President of Afghanistan to ensure greater transparency of, access to and accountability for the NDS, starting with the publication of the decree on which its powers are based.

62. The High Commissioner's report for 2008 returned to the subject. Effective rule of law required a mechanism to hold the NDS accountable for its actions, while still respecting the complex demands of protecting domestic security. Unlike the police force, which was legally mandated to identify crimes and arrest suspects, the NDS operated under a presidential decree, which had not yet been made public. Apparently accountable only to the President, the NDS had not been the object of reforms. It also operated detention centres without adequate judicial oversight, with only sporadic access granted to independent monitoring bodies. UNAMA and the AIHRC had received reports of torture and illegal and arbitrary arrests. The High Commissioner had raised these concerns with relevant authorities and was encouraged by their assurances that UNAMA would be given free and unrestricted access to NDS facilities, and that it would also be advised of the identities of those detained by the NDS so that families of the detainees could be duly informed. The High Commissioner was also pleased by the government's decision to investigate allegations of torture and ill-treatment of detainees and looked forward to the publication of its findings. Apparently no such report has been published.

63. In the January 2009 annual human rights report, the UN High Commissioner again reiterated the view that there was little information on the conditions and treatment of detainees. The NDS continued to operate without a public legal framework clearly defining its powers of investigation, arrest and detention, and the rules applicable to its detention facilities. UNAMA had received complaints from individuals previously detained by the NDS that they were tortured. The treatment of detainees by the NDS, including those transferred from the control of international military forces, raised questions concerning the responsibility of the relevant troop contributing countries under principles of international humanitarian and human rights law.

64. In February 2009, Afghanistan submitted a National Report to the Human Rights Council of the UN General Assembly. In a short section on the NDS, the report noted that the NDS had tried to observe human rights standards in some aspects of its performance, including allowing its detention centres to be monitored by some human rights organisations. "Likewise, there are still some criticisms of mistreatment and torture of prisoners and intimidation of some journalists and human rights activists" (para. 16).

65. These human rights concerns have been repeated in the regular reports on Afghanistan by the Secretary-General of the UN to the General Assembly, pursuant to the Security Council mandate of the United Nations Mission in Afghanistan. Thus in March 2007, under the heading "Human rights and the rule of law", the Secretary-General referred to ill-treatment and torture to force confessions in the justice system, and specifically to the problems of access for the AIHRC and UNAMA to NDS and Ministry of Interior detention facilities. The September 2007 report repeated the concerns although it did not mention the NDS specifically. However, the March 2008 report did so, stating: "Cases of torture and ill-treatment of detainees held by the Afghan authorities continue to be reported. In this regard, the absence of effective oversight of the NDS is of particular concern".

NGO reports

66. A number of international NGOs have criticised the NDS for using torture and other inhuman methods on persons it has detained.

67. Amnesty International ("Amnesty") published a report in November 2007 entitled "Afghanistan detainees transferred to torture: ISAF complicity?" The report's summary begins that Amnesty had received reports of torture, other ill-treatment, and arbitrary detention by the NDS. By transferring individuals to a situation where there was a grave risk of torture and other ill-treatment, ISAF states might be complicit in this treatment and were breaching their international legal obligations. After reviewing the context, the international framework and memoranda of understanding, the report turns in chapter 5 to torture. The second part of chapter 5 addresses concerns about the NDS and reads, in part:

> "Over the past two years, Amnesty International has received repeated reports of torture and other ill-treatment of detainees by the NDS from alleged victims and their relatives, as well as a range of organisations including UN agencies. The organisation is gravely concerned [that in] the absence of effective investigations and prosecution of those responsible, a culture of impunity persists with victims having little hope of justice or redress. …"

No specific case of torture of a person transferred from ISAF to the NDS is mentioned. Chapter 6 of the report registers Amnesty's concern that the reported patterns of NDS abuse remain difficult to monitor effectively. Among the report's recommendations to ISAF was an immediate moratorium on further transfers, and among the recommendations to the Afghan government was reform of the NDS to ensure that its operations were properly regulated in transparent legislation, which separated the functions of custody and interrogation, and put an end to human rights violations by NDS officials.

68. The UK response to the Amnesty report was to set out the arrangements in place to ensure that detainees transferred were not tortured or ill-treated, and to state that there was no evidence that any person detained by British forces and transferred had been tortured or ill-treated.

69. Amnesty's report for 2008 referred to the NDS's opaque mandate and the lack of separation of functions such as detention, interrogation, investigation, prosecution and sentencing. That contributed to impunity for perpetrators of human rights violations. There were consistent reports of torture and other ill-treatment of NDS detainees. Amnesty returned to the issue in its 2009 report, referring to scores of detainees having been tortured.

70. We turn next to Human Rights Watch. In November 2006, in anticipation of a NATO summit meeting in Latvia, Human Rights Watch sent a three page open letter to the NATO Secretary General. It was designed to draw attention to the deteriorating human rights situation in Afghanistan. Human Rights Watch said that it had received credible reports about the mistreatment of detainees transferred to Afghan authorities. These included credible reports of detainees being mistreated by the NDS (with the mistreatment amounting in some cases to torture), although the NDS had made efforts to dissociate itself from its predecessor, KHAD, which was notorious for torture. Furthermore, Human Rights Watch had recently learned that on at least one occasion the NDS hid from the ICRC a detainee who had been handed over by ISAF.

71. In a two page statement in December 2009, Human Rights Watch called for an investigation into the death of Abdul Basir in NDS Department 17 in Kabul earlier in the month. The NDS had detained Basir in connection with an attack in October on a Kabul guesthouse housing many United Nations staff, in which eight civilians died. Basir's father and two brothers were also detained and remained in custody. An NDS official told family members that Basir's father signed a statement confirming that Basir had committed suicide and that an autopsy was not required. The family told Human Rights Watch that NDS officials told them that if they buried the body Basir's brothers and father would be released. Human Rights Watch reported that it had received many reports of torture during interrogations at NDS Department 17.

72. The Human Rights Watch Country Summary for January 2010 reiterated that there were persistent reports of torture and abuse of detainees being held by the NDS, with human rights officials receiving only erratic access to detention facilities where abuses were believed to be taking place.

73. Human Rights First is an international human rights organisation based in New York and Washington. In November 2009 it published a report concerning the detention and trials of detainees at Bagram Airbase in Parwan province. Its researchers interviewed a number of persons whom the United States had held there but subsequently released as not being a threat. In the course of the report the organisation referred more generally to the rule of law and to detention in Afghanistan, stating in particular that individuals held by the NDS are subjected to ill-treatment and held arbitrarily. Reference was made to the conclusions of the UN High Commissioner for Human Rights.

Governmental reports

74. The work of the UN agencies and the NGOs on torture in Afghanistan has been utilised in government reports. Thus a US State Department report on Afghanistan in March 2008 recalled that human rights organisations had reported that local authorities in Herat, Helmand, Badakhshan and other locations continued to torture and abuse detainees. It referred specifically to UN and Amnesty reports to single out

the NDS and its use of torture and ill-treatment. The UK Border Agency's country of origin information reports on Afghanistan have also referred to the relevant material in the UN and NGO reports.

75. In its Human Rights Annual Report 2008, the Foreign Affairs Committee of the British House of Commons referred to evidence from Redress and concluded that the potential treatment of detainees transferred by UK forces to the Afghan authorities gave cause for concern, given that there was credible evidence that torture and other abuses occur within the Afghan criminal justice system. It recommended that the government institute a more rigorous system for checking on the welfare of transferees in Afghanistan on an individual basis.

UK knowledge of allegations of mistreatment by the NDS

76. It is not in issue that the UK has been aware of the various reports detailed above concerning torture and mistreatment of detainees by Afghan agencies, including the NDS. The Secretary of State's position is that, notwithstanding that general background, the specific circumstances relating to UK transferees are such as to ensure adequate safeguards for them. Those specifics are examined later. We think it right nevertheless to refer here to a few passages in the documents that touch on the issue of UK knowledge but do not fit conveniently elsewhere. We bear in mind that views expressed by individual officials in these and other documents are not necessarily to be taken as expressions of official policy.

77. The UK was aware of the Kakchul case, mentioned in the 2005 report of Professor Bassiouni, the UN Secretary-General's human rights expert in Afghanistan in 2004 and 2005 (see [57] above). The British Embassy in Kabul regarded the Afghan report into the Kakchul case as a whitewash and considered that he was most likely tortured.

78. There was a UK visit to the NDS detention facility in Lashkar Gah in November 2005, which at the time housed 9 prisoners. During the tour of the facility the party was given access to the prisoners. There were two brothers from a village in Naway District, detained approximately 20 days previously on the basis of intelligence. They had been stopped in front of the NDS compound and an AK 47 had been found concealed in a bale of cotton. Under interrogation one of them admitted that his brother had links to the Taliban. Both brothers claimed that the admission had been given as the result of beatings and electric shocks during the interrogation. One showed the team his back, but there were no signs of bruising. The brothers did seem nervous during the visit but were prepared to make the allegations of torture while the NDS guards were present. Another prisoner was detained in relation to an attack involving an improvised explosion device. He had confessed to taking part in the attack and also of taking part in "missile" attacks. He claimed that he had now seen the error of his ways and that he was assisting the NDS in identifying other insurgents. This was confirmed by the NDS. Despite this he was in leg irons and looked quite nervous. In the report writer's view the visit served to underline the necessity of a stronger tie between UK forces and the NDS. The NDS appeared to be cooperative and relatively professional and the report writer opined that it should be a useful source of information and intelligence in the future.

79. In a briefing to the Minister for the Armed Forces in March 2006, the existence of controversy over the detention of persons was highlighted, although this was said to

be because of the easy link to detention at Guantanamo, the lingering effects of the Abu Ghraib scandal, current speculation over US rendition practices and recent serious unrest in Pol-i-Charki prison in Kabul.

80. In January 2007 a UK representative raised with the Afghanistan Attorney General allegations of torture at Pol-i-Charki prison. The Attorney General said he had sent prosecutors to investigate. They had uncovered 41 incidents of torture and abuse, and 21 of the individuals concerned displayed scars or other injury. He had referred the matter to the UN to investigate, report and monitor. The incidents could have been racially motivated.

81. In the first part of 2007 there were allegations of mistreatment of detainees in Kandahar, where the Canadian contribution to ISAF was centred. This gave rise to extensive press coverage in Canada and to litigation, discussed in greater detail below. As a result, specific questions were raised among UK officials about the treatment of detainees handed over by UK forces in Helmand. In one response, dated 30 April 2007, the limitations on the UK visits to detainees was acknowledged. It continued:

> "Despite the limitations, we are not aware of any reports of mistreatment at Lashkar Gah and the prisoners we have visited have all appeared to be in good health. Furthermore, the NDS appear to have a semblance of a system for handling people … Against this, however, it should be borne in mind that all convictions in Helmand are obtained on the basis of confession evidence, and the rule of law is considered the weakest sector within plans for the development of governance within the province. We therefore need a sense of balance in that the positive indicators above are against a pretty woeful backdrop insofar as respect for human rights and respect for the judicial process is concerned."

82. In July 2007 the United Nations, along with the Italian and Afghan governments, convened a conference in Rome on the rule of law in Afghanistan. Professor Bassiouni and Daniel Rothenberg prepared a policy paper entitled "An Assessment of Justice Sector and Rule of Law Reform in Afghanistan and the Need for a Comprehensive Plan". That referred to serious allegations of torture by the NDS, "which is generally feared by many Afghans". There was also a discussion paper prepared for the panel discussion on Access to Justice. It recalled that UNAMA and the AIHRC continued to receive and verify complaints of ill-treatment and torture used to force confessions. Reports of the use of torture and other forms of ill-treatment by the NDS were frequent. Individuals were documented as having "disappeared" when arrested by NDS officials and access to their facilities had been problematic for the AIHRC and United Nations. We mention this here because it seems a fair inference that the conference was attended by UK officials. Copies of the papers were included in the documents disclosed by the Secretary of State.

83. In September 2008 UK officials were aware of a statement by the head of the Judicial Commission of the Afghan Lower House of Parliament, that inmates at detention centres of the NDS were being beaten and forced to confess their crimes. There is also a "challenges and key issues" document, prepared by UK officials in January 2009, which refers to the need to ensure the human rights compliance of the NDS.

There were concerns about NDS human rights compliance in the country as a whole. "For example, judges in Helmand have told us that they have personally witnessed evidence of torture when defendants have been brought before them".

84. The specific allegations of mistreatment by the NDS which have been made to UK officials by individual transferees are addressed later in this judgment.

Evidence of changes within the NDS

85. The Secretary of State has filed evidence, notably in the witness statement of Mr Dodd, Deputy Ambassador at the British Embassy in Kabul, that the NDS as an institution has undergone considerable change in recent years. It has received intense international focus and assistance, as a result of which the three NDS facilities where UK-captured insurgents are held are good in comparison with other detention facilities in Afghanistan. There is also a high regard for the quality of NDS officers, owing to attractive job opportunities and international training programmes. Many of the changes have been introduced by new personnel brought into the NDS. The UK has established a very constructive relationship with a number of these individuals, including the head of the NDS (Dr Saleh), the NDS Liaison Officer based at Kabul, the head of NDS Lashkar Gah and other senior NDS officials.

86. Mr Dodd states that Dr Saleh was appointed by the President of Afghanistan in 2004, and that part of his remit is understood to have been to reform the NDS amid allegations that his predecessor had abused his power and the organisation had committed and condoned human rights abuses. The British Embassy's assessment is that he has tackled his remit with determination and has been effective in using international support and capacity building assistance where appropriate. Among other things, he has requested and overseen the training of NDS detention staff in human rights and custody techniques; and training for investigative officers has also been requested and undertaken. The Embassy's view is that he is committed to further improvement.

87. The NDS has assigned to the UK an NDS liaison officer in Kabul as the first point of contact for key issues including detentions. There were constructive meetings with him in August 2009 and January 2010. The view of the British Embassy in Kabul is that the liaison officer has a genuine understanding of and commitment to working to promote human rights. The liaison officer accepts that the history of NDS may have been associated with human rights abuses but states that this is not the organisation he currently works for. In January 2010 he reported that NDS officers now complete two days of human rights training as part of their induction. The British Embassy has a constructive working relationship with the liaison officer.

88. A good relationship has also been established, according to Mr Dodd, with the NDS head of training and with the head of Department 17 at Kabul. There are meetings at least once a month to discuss ongoing training requirements and general issues such as capacity building work and NDS requests for humanitarian assistance. The assessment is that both individuals fully understand and are committed to ensuring the human rights of detainees within their care. There are plans for the UK to build a new NDS detention training facility, and training in internal investigations is scheduled for the coming financial year. Later in his statement Mr Dodd gives fuller details of the

work of capacity building, in particular by way of training of detention officers and prosecutors.

89. Whilst the relationship with the NDS is described as constructive, Mr Dodd makes the point that it is also highly complex owing to the nature of NDS work and sensitivities surrounding issues of sovereignty. He observes that the means used when dealing with difficulties are diplomatic: the UK presses politely but firmly for the outcome it wishes to achieve.

90. Not long before the completion of this judgment we were informed by the parties that Dr Saleh resigned on 6 June 2010 as head of the NDS. A letter dated 8 June 2010 from the Treasury Solicitor states that his resignation, along with that of the Minister of the Interior, followed a meeting with President Karzai about the security failure that allowed a rocket attack on the Peace Jirga on 2 June. Ibrahim Spinzada, the deputy head of the NDS, has replaced Dr Saleh temporarily. It is not yet clear who will replace him on a permanent basis or when a permanent appointment will be made. The letter also states that the UK will continue to work closely with the NDS, and that staff of the British Embassy in Kabul remain in regular contact with the NDS liaison officer and will continue to closely monitor and report back to the UK any further changes in personnel or relations with the NDS.

THE MoU AND RELATED ASSURANCES

91. On 23 April 2006 the UK Secretary of State for Defence and his counterpart, the Minister of Defence of Afghanistan, signed a Memorandum of Understanding (the MoU) concerning transfer by the United Kingdom Armed Forces to Afghan authorities of persons detained in Afghanistan. The MoU was originally confidential, although by July 2006 a copy had been given to the House of Commons Select Committee on Defence on a confidential basis. The MoU was also given to members of the Select Committee on Foreign Affairs of the House of Commons in November 2006 and published by that Committee on 10 January 2007 in a report which focused on the United States detention centre at Guantanamo Bay. A year later the MoU was followed by an Exchange of Letters (the EoL) between Afghanistan, the United Kingdom and some other member countries of ISAF.

Background to the MoU

92. The operational background to the MoU was the major phase of deployment of UK forces in Afghanistan in early 2006. In Spring 2006 3,500 UK troops arrived in Helmand province. There was thus the greater chance that there would be no option but to detain persons apprehended by UK forces for reasons of force protection. Before that the policy in Afghanistan was to avoid detaining individuals, wherever possible. The security environment in Helmand province, where the forces were to be located, led to the change.

93. We have already touched on the limitations on the UK's powers of detention. The legal basis on which the UK might detain persons differed between Afghanistan and Iraq. In Iraq, beginning with UNSCR 1546 of 8 June 2004, there was an explicit right to intern civilians for imperative reasons of security. In Afghanistan, UNSCR 1386 of 20 December 2001 did not make reference to detention. Its authorisation for ISAF forces to use "all necessary measures" to fulfil its mandate was taken as authority only

for temporary detention. Yet it was expected that, as in Southern Iraq, UK forces were likely to need to detain individuals suspected of committing criminal offences, in line with ISAF policy. It was also likely that there would be a need to detain others who, as in Iraq, were judged to pose a substantial and imminent threat to UK forces but who might not have committed a criminal act. There might also be a strong interest in interrogating detainees to develop further the intelligence picture. Legal advice confirmed that there was no basis upon which UK forces could legitimately intern such individuals but they must be transferred to the Afghan authorities.

94. As well as the need for access to obtain intelligence information after transfer, the UK realised that transferring individuals might engage its obligations under the ECHR. The UK officials involved in negotiating the MoU wrote that it was structured to avoid the risk of a breach of the UK's Convention obligations which might be applicable: key points were to prohibit the death penalty, to prevent the transfer of detainees to a third party, and to enable UK access to detainees transferred to the Afghan authorities. The last point allowed both for access to detainees for intelligence purposes and also to confirm their condition and treatment in the light of Convention obligations. NATO was also developing an MoU on a similar basis, which might supplant national arrangements, although it was thought unlikely to be finalised in the near future. In fact a NATO MoU was never consummated. The proposed UK MoU drew on similar MoUs which Canada and the Netherlands had recently agreed with the Afghan government.

The MoU in outline

95. There are two purposes to the MoU, as stated in its second paragraph. The first is to establish the responsibilities, principles and procedures in the event of the transfer by UK armed forces to Afghan authorities of persons detained in Afghanistan. The second purpose is stated as follows:

> "Ensure that Participants will observe the basic principles of international human rights law such as the right to life and the prohibition on torture and cruel, inhumane and degrading treatment pertaining to the treatment and transfer of persons by the UK [armed forces] to Afghan authorities and their treatment."

The second purpose reiterates one of the three recitals set out in the MoU's preamble.

96. Paragraph 3 of the MoU contains the responsibilities of the participants. The responsibilities of UK armed forces are only to arrest and detain personnel where permitted under ISAF rules of engagement. Detainees are to be treated in accordance with applicable provisions of international human rights law. Detainees are to be transferred to the authorities of Afghanistan at the earliest opportunity, where suitable facilities exist. Where such facilities are not in existence, the detainee will either be released or transferred to an ISAF approved holding facility.

97. The responsibilities of the Afghan authorities are to accept the transfer of persons arrested and detained by United Kingdom armed forces for investigation and possible criminal proceedings. The MoU continues that the Afghan authorities

> "will be responsible for treating such individuals in accordance with Afghanistan's international human rights obligations including prohibiting torture and cruel, inhumane and degrading treatment, protection against torture and using only such force as is reasonable to guard against escape. "

The Afghan authorities are also to ensure that any detainee transferred to them will not be transferred to the authority of another state, including detention in another country, without the prior written agreement of the United Kingdom.

98. Access to detainees is addressed in paragraph 4. Representatives of the AIHRC and UK personnel are to have "full access" to any persons transferred whilst they are in custody. The ICRC and relevant human rights institutions with the United Nations system are also to be allowed to visit such persons. Specifically, UK personnel are to have "full access to question" any persons they transfer to the Afghan authorities whilst such persons are in custody.

99. Record keeping and notification of change are provided for in paragraph 5. UK armed forces are to notify the ICRC and the AIHRC, normally within 24 hours, when a person has been transferred to Afghan authorities. The Afghan authorities are to be responsible for keeping an accurate account of all persons transferred to them including a record of transfer to an alternative holding facility and a record of any prosecution status. Records are to be available upon request. The UK is to be notified prior to the initiation of criminal proceedings involving persons transferred, and prior to their release. The UK is also to be notified of any material change of circumstance regarding a detainee, including any instance of alleged improper treatment. Paragraph 6 of the MoU prohibits the death penalty for persons transferred.

MoUs with other ISAF states

100. Preceding the UK-Afghanistan MoU, an MoU was signed by the Canadian Chief of Defence Staff and the Afghanistan Minister of Defence in December 2005. It provided for the treatment of detainees in accordance with the Third Geneva Convention. The ICRC was to be notified and given access to detainees. Both sides were to keep accurate, written records accounting for those passing through their custody. Those records were to be available to the ICRC. There was to be cooperation with the AIHRC. Unlike the UK-Afghanistan MoU, the MoU did not enable the Canadians to monitor directly what happened subsequent to their transfer of detainees. Rather, monitoring of detainees post-transfer was entrusted primarily to the ICRC. That and other features of the arrangements were the subject of criticism in Canada (see below). The UK-Afghanistan MoU was regarded at the time as a model, not least by Canadian critics of their own MoU.

101. Subsequently, an Arrangement was signed by the Afghanistan Minister of Defence and the Canadian Ambassador in Kabul on 3 May 2007 to supplement the existing MoU. It provided for "full and unrestricted" access to detainees transferred, and to detention facilities where those transferred by Canadian forces were held, both for Canadian representatives and the AIHRC. Canada was to be notified of the initiation of proceedings against, the release of, and any change of circumstances regarding such detainees. The Afghan authorities were responsible for treating such individuals in accordance with Afghanistan's international human rights obligations, including

the prohibition on torture and cruel and inhuman punishment. There was to be no transfer to a third country authority without written permission.

102. Under the Arrangement, records kept under the MoU were to be available for inspection by the AIHRC and ICRC. Detainees were to be held in a limited number of places to facilitate inspection. Detainees were, on request of those inspecting, to be able to be interviewed in private. In the event of allegations of mistreatment, the Afghanistan authorities were to investigate and act, informing the Canadians, the AIHRC and the ICRC of progress. All prison authorities were to be informed of the provisions of the MoU and Arrangement.

103. Under the MoU with the Norwegians, dated 12 October 2006, the Afghan authorities were required to provide "full access" to transferees for both the Norwegians and the AIHRC. The Afghan authorities were responsible for "accurate accountability" of all transferees and had to notify the Norwegians of prosecution, release or significant changes concerning any detainee.

104. There are also MoUs with Denmark (9 June 2005) and the Netherlands (1 February 2006).

The Exchange of Letters (EoL)

105. As early as May 2006, the month after the UK-Afghanistan MoU was signed, there was discussion of a common approach to detention by Canada, the United Kingdom, the Netherlands, Australia and Denmark (the "CUNAD" countries). The recognised context included that primary responsibility for detention lay with the Afghan government, that ISAF was in Afghanistan in support of its government but that public opinion in the CUNAD countries was critical to ISAF's success. What was wanted was for detainees transferred to the Afghan authorities to receive humane treatment, including ICRC and AIHRC access, due process, including a fair trial, and no death penalty. In particular, the assurances of humane treatment and access for the ICRC and the AIHRC were needed for detainees to be transferred to the NDS. Assurances were also needed that the Afghan authorities would not transfer detainees onward to a foreign state and that transfer to a central detention facility in Kandahar was available.

106. At that time it was envisaged that there would be an Afghanistan-NATO Exchange of Letters precluding the transfer of detainees to third parties, along the lines of that in the UK-Afghanistan MoU. The Afghan judicial sector would need strengthening and the Afghanistan government would be assisted with judicial expertise on detention law and the training of police, army and prison personnel. There were still questions to be answered: to which Afghan authority would those arrested by the CUNAD forces be transferred, when the Ministry of Justice was probably not willing or authorised to receive them; could the Kandahar City detention facility be placed under the authority of the NDS; and how could humane treatment be ensured for those arrested by the Afghan army and police but in the presence of CUNAD troops?

107. In April 2007 a Canadian newspaper broke the story that detainees transferred by Canadian forces had been mistreated by the NDS (see below). Around the same time the AIHRC said that it was having difficulty in gaining access to detainees transferred by ISAF forces. The Canadian and AIHRC problems focused the UK's attention on

the detainee issue and as a result it decided that additional measures were necessary to ensure that those transferred by UK forces were being treated properly. The EoL was one such measure and was designed to spell out clearly to all parties the obligations of both sides in relation to visiting access.

108. The EoL took place in September/October 2007. On the one side, a letter dated 6 September 2007 and headed "Access to detainees transferred to the Government of Afghanistan" was signed by the ambassadors or chargés d'affaires from the embassies in Kabul of the United Kingdom, the United States, Canada, the Netherlands, Denmark and Norway. The letter sought to set forth a common approach, in principle, of those parties regarding access to individuals detained by their forces and transferred to the custody of the Afghan authorities. It was expressed to be without prejudice to any of the provisions of bilateral arrangements in MoUs. It continued:

> "It is the undertaking of the undersigned that the aforementioned bilateral arrangements are to be interpreted as permitting officials from each undersigned government (including officials from our respective Embassies, members of our armed forces, and others duly authorised to represent our governments) to enjoy access to Afghan detention facilities to the extent necessary to ascertain the location and treatment of any detainee transferred by that government to the Government of Afghanistan. On request, an official from one of the undersigned governments may interview in private any detainee transferred by that government to the custody of Afghan authorities. Access to Afghan facilities is to be permitted to organisations that are already afforded access under that government's bilateral arrangements with the Government of Afghanistan including, where applicable, the International Committee of the Red Cross and Red Crescent (ICRC), relevant human rights institutions within the UN system, and the Afghan Independent Human Rights Commission (AIHRC)."

Thus an important advance on the UK-Afghanistan MoU was the express right to conduct private interviews.

109. On 16 October 2007 the National Security Advisor for Afghanistan, Dr Rassoul, wrote in reply to confirm, on behalf of the Government of Afghanistan, the undertakings in the letter. The main reason why he, rather than the NDS, was the counterparty is said to have been that the National Security Council have formal responsibility for detention policy in Afghanistan. There was also a degree of sensitivity on the part of the NDS and it was thought better not to have it as the counterparty.

110. Dr Rassoul's letter continued that the Government of Afghanistan agreed, furthermore, to address any AIHRC recommendations for improvements and to notify the AIHRC and relevant embassies of actions taken. The letter concluded that the NDS would issue written instructions to all of its provincial offices informing them of the access and visiting procedures outlined in the 6 September 2007 letter and of the bilateral arrangements.

111. In a UK briefing of 31 October 2007, the EoL was characterised as one part of a continuing dialogue on the subject of detainee handling and treatment. The EoL indicated the Afghan Government's engagement in seeking to meet the standards required. It had been decided that reiterating the access requirements of key members of the international community would allow an easily understood and transparent common approach. The EoL was not intended to suggest that there were new concerns. On the contrary, the UK believed that the Government of Afghanistan was taking these matters seriously. It also believed that the Afghanistan authorities took seriously the importance of reliable and independent access to detainees.

112. By way of contrast, we should mention the concerns expressed by Amnesty on the subject of MoUs in its November 2007 report, "Detainees transferred to torture: ISAF complicity?". The report outlined the MoUs which ISAF states had entered into with Afghanistan. It referred to the tracking difficulties in respect of detainees transferred to Afghan authorities and said that this reinforced its concern that the MoUs had failed to provide any transparency in the transfer process or any protection for the individuals concerned. It recommended that ISAF states should not rely on MoUs as a basis for concluding that a person may be transferred to Afghan authorities without risk of torture or other ill-treatment.

The NDS and the MoU/EoL

113. The NDS is not mentioned in the UK-Afghanistan MoU. As we have explained, the Afghan signatory was the Minister of Defence. At the time it was said that one reason for that was to allow flexibility to determine the most appropriate agency under Afghan law to which a detainee should be transferred. Further, the Minister of Defence was signing on behalf of the Government of Afghanistan. The Minister of Defence made clear at the time, however, that he was responding to the political requirements of troop contributing nations and that, unless he was provided with additional assistance, he would be unable to meet the commitments entered into. He said that he did not have jurisdiction over the detention facilities of other agencies such as the NDS, nor would he take responsibility for their detainees. Before the MoU was signed, his FCO funded advisor had informed UK authorities that they could obtain the political commitment immediately, without being clear on how the MoU would be fulfilled, or delay signature so that the implementation arrangements were first established.

114. Because of concern that the MoU might not have visibility in other parts of the Afghan government, in May 2006 instructions were sent from London to UK officials in Afghanistan to ensure that it was seen at senior levels in Afghan agencies, including the NDS. At a meeting in early June 2006, after the MoU was signed, the NDS lawyer informed British officials that he was aware of it. As a result, he said, the NDS had introduced new forms and he made a copy available.

115. At the same meeting the NDS lawyer stated that the ICRC had inspected the NDS facilities and was content with the conditions. UK forces or their agents were free to visit their transferees at any time. The NDS lawyer stressed that the only people who could visit prisoners in general were human rights activists, lawyers and the ICRC. However, he agreed that transparency was important and that the UK would be informed of actions taken in relation to the detainees who were transferred. He also

agreed that the UK could gain access to them at any time in order to question them further.

116. It may have been this meeting which led the FCO to assert in a policy document in late June 2006 that the NDS had assured the UK that it would honour the terms of the MoU.

117. In March 2007 there were meetings between UK officials and NDS officials at NDS headquarters about the detention and prosecution process of suspected insurgents and terrorists. The treatment of detainees and detention facilities were on the agenda. It was the impression of UK officials that both the NDS chief prosecutor and NDS legal adviser seemed pleased with the meeting and wanted to maintain a good relationship with the British embassy.

118. The Attorney-General for England and Wales met Dr Saleh, the head of the NDS, on 25 March 2007, and raised the issues of human rights, the legal base for NDS activity and detentions. The Attorney General asked specifically about the investigation into an incident in Kandahar when a detainee had disappeared. Dr Saleh said he was aware of the allegations of mistreatment and had written to Kandahar to investigate the missing person. He did not think there was an ICRC report on the matter.

119. By May 2007 there was concern among UK officials in Afghanistan about NDS detainees. The Canadian press had alleged mistreatment and Canadian officials were concerned that their MoU was less robust than that of the UK. There were discussions with the Danes, Norwegians and Canadians of ways to put the NDS under the spotlight, including a joint visit to Dr Saleh. The UK procedures for notifying the ICRC and AIHRC were holding up well, it was thought, but access to detainees "remains a mixed bag". There was a plan to raise access to UK transferred detainees with Dr Saleh, the UK possibly acting along with allies.

120. In June 2007 there was a reference by UK officials in Kabul to the proposed EoL not undermining the existing MoUs but giving the parties "a piece of paper from the head of NDS that we could use where appropriate". On the core issue, accessibility to monitor, they recorded that experience with the NDS was diverse, some encouraging, some not so professional.

121. In the event, as already explained, the NDS was not the Afghan counterparty to the EoL when the exchange took place in September/October 2007. The EoL did envisage that the NDS would issue a written instruction to all its provincial offices informing them of the access and visiting procedures in the EoL and the individual MoUs. There is no evidence that this was done. The intention at the British Embassy in Kabul was for the EoL to be handed over collectively to the NDS directors. Again it is unclear whether this occurred. However, UK officials recorded that the NDS had responded positively to the UK proposals for the development of a tracking system for detainees, the training of NDS detention staff and improved detention facilities

122. In late 2008, as described below, serious problems arose over access to UK detainees held at NDS Kabul and the UK imposed a moratorium on transfers there. At a meeting with UK officials in January 2009, Dr Saleh said that in his view the MoUs were with the Ministry of Defence, not with the NDS. Moreover, the NDS did not have the capacity to handle these visits; there should be a co-ordinated approach from

the organisations involved in order to minimise the burden on the NDS. It was thought by officials that a possible explanation was that Dr Saleh was creating a crisis himself for his own reasons.

123. In a letter dated 1 February 2009 to the chargé d'affaires at the UK Embassy in Kabul, Dr Saleh repeated that the MoU was with the Minister of Defence, and stated that the NDS has no direct obligation under the MoU unless directed by the President. He referred to problems arising from the demands for special access to the NDS detention facility. Solutions included building the promised new detention centre, assistance (including repair works) for the existing NDS facility and sending one official on behalf of all countries to visit detainees.

124. Soon afterwards UK officials in Kabul reported that despite advice from London, the MoU was meaningless locally, unless the Afghans were challenged at a senior level about their stance. The NDS did not recognise the authority of the Minister of Defence to promise anything on behalf of the NDS. The view of UK officials was that the NDS had to appreciate that UK cooperation with it was in danger, because of legal pressures in London, when the NDS's concern was actually a minor administrative affair to do with tenders and project management.

125. Responding to one of the specific issues raised by him, the UK, Dutch and Canadian Ambassadors wrote on 10 February 2009 to Dr Saleh about the burden which regular and uncoordinated visits might place upon the NDS. As the three main nations who transferred detainees to NDS custody it was proposed, within the framework of the existing MoUs on transfer of detainees, that representatives of the United Kingdom, the Netherlands and Canada should undertake to arrange joint visits to NDS facilities. Those visits would be undertaken on average once a month, though this would need to be dependent on the number of detainees. A nominated representative from the embassies would contact the NDS liaison officer in advance of any visit, as at present, but the visit would be joint, rather than by one nation. It was hoped that this would help minimise any disruption caused by access to NDS facilities, and allow access arrangements to resume. In addition, the three nations were committed to help build a new NDS detention facility in Kabul. The delay since the project was agreed was regretted.

126. By June 2009 there had been two new allegations of mistreatment at NDS Department 17 in Kabul. There was to be a meeting with Dr Saleh. It was anticipated by UK officials that the NDS would raise the point that it had never signed an MoU with the UK on detention issues. The UK response was to be that the MoU was signed between the UK Government and the Government of Afghanistan. It was signed by the Minister of Defence but this did not mean it was an MoU between the UK and the Afghan Ministry of Defence. The UK preferred and chose to transfer detainees to the NDS owing to its close working relationship with NDS and also because it thought the NDS had the best people, skills and capacity to deal with important detainees. This obviously needed to be examined in light of the allegations. Overall UK officials thought that Dr Saleh would "play hard ball".

127. When UK representatives met Dr Saleh in mid June and pressed him to investigate the allegations as fully as possible, he said that Department 17 was not an NDS facility. Although the NDS guarded it, it belonged to the Attorney General and complaints about it should be directed to the Attorney General. Dr Saleh also raised what UK

officials described later as an historic issue, that an MoU with the United States concerning detainee conditions had resulted in a $40million grant to the Ministry of Defence for its implementation, although it was not that ministry which held the detainees. On the allegations, Dr Saleh said abuse was not deliberate. He undertook to conduct a full investigation into the allegations. UK officials recorded that, although actions would speak louder than words on this, he appeared to be sincere in his commitment to pursue the investigation vigorously. Subsequently, after inquiries, UK officials decided that the claim that Department 17 was the Attorney General's facility was wrong. The NDS's actual investigation into the allegations is considered later.

128. At a visit to NDS in Lashkar Gah in August 2009, the possibility was raised by the UK representative of allowing the monthly visits to detainees to be conducted in private. When the Afghan official was informed that this was pursuant to the MoU, he said he was not aware of the MoU.

Dr Saleh's letter of 25 March 2010

129. Notwithstanding the problems referred to above, the UK assessment has been that the NDS is committed to the principles of humane treatment that the MoU is intended to uphold. However, Dr Saleh was recently asked to confirm his commitment with respect to access to and treatment of UK transferees. As a result, Dr Saleh wrote on 25 March 2010 to the British Ambassador in Kabul, following a meeting with the UK Secretary of State for Defence. In the letter Dr Saleh recounted that he had explained the measures that the NDS was taking, including building a new detention facility, to ensure that the international standards of detention were maintained. Although neither he nor the NDS had drafted or signed the MoU, he had been well aware of it and confirmed that the NDS would observe all the responsibilities, principles and procedures recorded in it. As agreed with the Secretary of State for Defence, and in the light of the MoU, he thought it helpful to set out the position on the transfer of detainees between NDS facilities and access to detainees, which he would direct should be followed for all detainees transferred from UK armed forces:

> "[N]o detainee transferred to the NDS by the British Armed Forces will be transferred to any other facility belonging to the NDS or other Afghan authority without notification of the British Embassy in Kabul. In the unlikely event that the NDS wished to transfer a detainee to any other state, it would seek the prior written agreement of the United Kingdom via the British Embassy in Kabul. …
>
> [T]he NDS will allow representatives of the British Government, including members of the British Armed Forces, full access in private to any detainee transferred to the NDS by the British Armed Forces while such persons are in custody of the NDS. The NDS will also notify the British Embassy in Kabul promptly of any allegations of ill-treatment made by any detainee transferred to the NDS by British Armed Forces; will investigate promptly any such allegations or, at the request of the British Armed Forces, any allegations made to them; and

> will keep the British Armed Forces informed of the progress and outcome."

The letter closed with a summary of UK responsibilities – to treat all detainees in accordance with applicable international human rights law, to respect the laws, regulations, customs and traditions of Afghanistan as far as these were compatible with the United Kingdom's mission to support the ISAF and Operation Enduring Freedom missions, and to help NDS investigate potential criminal offences by sharing information or evidence with the NDS which might be relevant.

130. The letter is based on a draft provided by UK officials. We attach no significance to that, since Dr Saleh has signed up to the assurances given in it. But we have to consider, of course, whether those assurances, taken with all the other circumstances of the case, provide a sufficient safeguard as to the proper treatment of transferees.

131. Recent difficulties have arisen over access to NDS Lashkar Gah. These are described below. We mention them here because the then head of the facility, General Naim, stated in that context on 17 April that Dr Saleh's letter of 25 March had not been provided to him by Kabul and it therefore had no authority. Confirmation has now been received, however, that copies of Dr Saleh's letter have since been sent to Laskhar Gah with instructions to allow the UK to visit UK transferees.

Hand-over documents

132. As a footnote to this section, we note the position with regard to documentation completed when detainees are transferred by UK armed forces into the custody of the NDS. At the hearing we were led to understand that the standard form of hand-over document, signed by a representative of the NDS, contained the statement that "By signing this record the undersigned accepts responsibility on behalf of the Afghan authorities for the health and physical condition of the above-named individual and confirms that the human rights of this individual will be respected in accordance with international law". In his post-hearing witness statement, however, Mr Burton, head of legal policy in the operations directorate of the Ministry of Defence, informed the court that such a form has been in use only since 23 April 2010. Prior to that an old stock of forms, containing no equivalent statement, was in use.

IMPLEMENTATION OF THE TRANSFER ARRANGEMENTS

133. In this section we deal with various issues concerning implementation of the transfer arrangements pursuant to the UK-Afghanistan MoU. The most important issue is that of visits by UK officials to check on detainees transferred by the UK into the custody of the NDS. A linked aspect of monitoring is the issue of record-keeping and notifications of change by the NDS. But before we deal with those issues, we will consider briefly two other matters covered by the MoU, namely transfer on to another state and access to detainees by the AIHRC and other independent bodies. The allegations of ill-treatment of detainees by the NDS contrary to the obligations imposed by the MoU are considered in a separate section.

Transfer to third party state

134. Paragraph 3 of the MoU obliges the Afghan authorities not to transfer any persons handed over by UK forces to other states without UK prior written consent.

135. In November 2008 UK officials wrote in a letter to Dr Saleh, head of NDS, that the UK was very concerned that detainees who had been handed over to NDS Kandahar had then been transferred directly to United States authorities, contrary to the provisions of the MoU. It seems that three persons were involved. The head of international relations at the NDS replied that he knew Dr Saleh took the issue seriously and he was aware of the importance of the MoU. UK authorities drew the lesson of the need to take steps to re-educate the NDS about the provisions of the MoU. There do not appear to have been any later incidents of a breach of paragraph 3.

Access by the AIHRC and other independent bodies

136. The AIHRC is the first party mentioned in paragraph 4 of the MoU as needing to have access to detainees. Certainly in the early days of the MoU there were difficulties in respect of such access.

137. In early May 2007 the AIHRC called a meeting with ISAF representatives to report that proper access had not been given to it, despite the MoUs between Afghanistan and some ISAF countries and despite meetings with the NDS. Later in the month the AIHRC expressed concern that without a stronger EoL – then in draft – it was not comfortable that there would be a change in the NDS's attitude to it, as illustrated by the NDS in Kandahar the previous week refusing access to the detainees' registration book and hiding a number of detainees on the roof of the detention facility when the AIHRC visited. In early June 2007 the AIHRC reiterated its concerns about the different patterns of access it experienced with the NDS and the need to ensure full access to its monitoring missions at all NDS detention facilities.

138. In its April 2009 report, "Causes of torture in law enforcement institutions", the AIHRC reviewed its own performance regarding torture cases in the previous year. It noted that most authorities, except national security, had to some extent cooperated with it in its investigation of cases. Its monitoring and follow-up had partially and gradually decreased torture in some agencies, except national security.

139. In a briefing for the Foreign Secretary in June 2009, UK officials explained that the AIHRC had 8 regional offices, 6 provincial offices and over 600 staff. A new office was currently being established in Lashkar Gah and the investigating and monitoring section there would expand from one to two persons over the following two months. There were problems in tracking detainees through the system, although this should be improved with the new tracking database. There were some capacity issues, given the large volume of allegations and the AIHRC's focus on civilian casualties rather than detainees.

140. There is evidence before the court of cooperation between UK officials and both the AIHRC and ICRC regarding detainees. UK forces regularly notify the AIHRC and the ICRC of the details of those transferred to the NDS. The AIHRC has conveyed its views of detention conditions to British officials. The ICRC has a policy of

confidentiality and thus does not pass details of its visits. UK officials have also facilitated a visit by UNAMA to Lashkar Gah detainees, but visits by UNAMA play little part in the overall history.

UK visits to detainees

141. Paragraph 4 of the MoU provides for the access of UK personnel to detainees handed over to the NDS. As early as July 2006 UK ministers recognised that careful monitoring of the first few cases of individuals transferred from UK forces to the NDS would provide an insight into whether the systems contemplated by the MoU were functioning effectively.

142. From the visit reports which the RMP has completed since 2006, junior counsel for the claimant prepared a grid during the course of the hearing. It shows when individual transferees were visited at NDS Lashkar Gah, NDS Kabul and NDS Kandahar, as well as the dates of visits to detainees who have been sent to Helmand Provincial Prison, Pol-i-Charki Prison in Kabul and Sarposa Prison in Kandahar. The claimant accepted that the grid was incomplete, and indeed made a point of the fact that there was insufficient information in the evidence before the court to enable it to be completed. An amended version of the grid, with additional information, was provided to us after the hearing by the Secretary of State. There remain some points of doubt or dispute in relation to the grid, and we have not treated it as a definitive document, but it is a very useful working tool and we are grateful to all concerned for the effort put into its preparation.

143. In a briefing dated 30 April 2007, UK officials noted that the RMP endeavoured to conduct monthly checks on any detainees who had been handed over to the NDS and remained in NDS custody, and to ascertain what had happened to the remainder. The process was far from straightforward. The early checks faced difficulties of force protection for personnel conducting the visits and limited cooperation from NDS personnel. Although these problems persisted the relationship with the local NDS was gradually being developed. It had to be appreciated that brief and periodic visits could not provide a comprehensive confidence check of the NDS system or guarantees as to the treatment of detainees.

144. In anticipation of the November 2007 Amnesty report, "Detainees transferred to torture: ISAF complicity?", a ministerial Q&A document on Afghanistan detention issues dated 31 October 2007 asserted that UK forces or Embassy staff visited every detainee who had been transferred from UK custody routinely and regularly and that any allegation of mistreatment, if received, would be thoroughly investigated. As explained below, visits have not always lived up in practice to the description "routine and regular".

UK visits: NDS Lashkar Gah

145. NDS Lashkar Gah is the facility to which the bulk of detainees captured by UK forces have been transferred. The first visit to NDS Lashkar Gah did not occur until November 2006. Since then there have been numerous visits, generally by the Royal Military Police (RMP).

146. In a witness statement dated 9 November 2009, Lt-Col Neal of the Royal Military Police explains that since 2006 a number of visits to NDS Lashkar Gah have had to be cancelled owing to the threat of improvised explosive devices (IEDs). The NDS compound lies within a particularly high-risk area of Lashkar Gah which is frequently subjected to a variety of IED and small arms attacks, including attacks on the NDS compound itself. In 2009 seven out of the planned nine monthly visits had taken place. Apart from these constraints, there has never been a problem gaining access to the detainees in this facility. It is relatively small and UK-captured detainees have been readily identified. The relationship with the Afghan personnel in charge of the facility is good. In Lashkar Gah the potentially hostile environment makes it dangerous to remain at the facility for any length of time. The practice is therefore to visit twice or three times a month, sometimes seeing a proportion of the detainees on each occasion.

147. As to the character of the visits, Lt-Col Neal says that in conducting a visit the RMP aim to see all detainees subject to the security constraints. The process for visiting has become more formalised and visit reports have been prepared by RMP personnel, summarising the visit and which detainees have been seen and which have been released. During a visit, RMP personnel ask each detainee a number of standard questions regarding their welfare and treatment. This is usually in the presence of a prison guard. However, those conducting the visits have noted that the detainees have not seemed to be intimidated by the presence of the guards. RMP personnel also record whether the detainee appears to be physically well.

148. In his witness statements, Barry Burton of the Ministry of Defence concedes that some of the claimant's criticism of monitoring visits are well made but states that they are explained by conditions in Afghanistan. As to private visits he says that, at Lashkar Gah, the visits are in private insofar as the visit party is able to go to the cells and speak to prisoners via an interpreter. However, NDS guards remain in the background to provide protection as the visit party is not allowed to retain loaded weapons within the facility and the NDS does not allow the visit party to wander unaccompanied amongst potentially dangerous persons. Detainees do not appear intimidated by the guards and questions are always answered in a friendly, jovial environment. When prisoners are asked to lift their clothing so that the RMP can see if there is any indication of abuse or rough treatment, they readily comply.

149. Mr Burton concedes that capacity and security constraints have meant that recently the RMP have not been able to conduct individual interviews but have only been able to see detainees in groups. On some occasions they have been seen in the communal areas of the facility, and on other occasions they have been seen in their cells. When detainees have been seen in their cell for force protection reasons the RMP have remained outside the cell and spoken to the prisoners through the safe handling hatch. NDS guards, although present for force protection purposes, remain out of earshot. The high number of detainees is such that space is very limited and there is currently no private room available at Lashkar Gah. The prevailing security situation limits the amount of time the visiting team can spend in the facility. Countering the insurgency has been increasingly effective, resulting in a growth in the number of insurgents being transferred to the Afghan authorities for prosecution. In addition the influx of US forces in Helmand Province has also added substantially to the numbers of

insurgents detained. Lashkar Gah has the capacity normally to hold 60 prisoners but at times during 2010 the number of detainees has exceeded 100.

150. Mr Burton explains that the dramatic rise in the number of detainees and force protection issues have also had the effect of reducing the number of occasions on which any one detainee is interviewed prior to their release or, if convicted, their transfer to prison. Over the six months until March 2010 visits took place not less than fortnightly and individuals were questioned on such visits about once in every eight weeks.

151. Mr Burton's second statement also draws attention to recent difficulties encountered in gaining access to NDS Lashkar Gah. On 17 February 2010 the head of the facility, General Naim, refused the RMP access to detainees transferred by UK forces. In a report the RMP noted that it did not know the reason but believed it was due to issues with space and the inundation of visitors such as the ICRC turning up unannounced and demanding to see the detainees. There did not appear to be any malign intent and all the detainees who were seen, exercising and in their cells, were clean, well and appeared to be in good health. Five days later the RMP were offered the opportunity to undertake welfare checks but were unable to visit that day. They met no problem gaining access to detainees when they visited again on 28 February 2010. The RMP saw detainees in a group environment on 2 March 2010, without any difficulty, but had limited time that day for security reasons. The focus of the visit was on capacity issues.

152. The UK Force Provost Marshal visited the NDS facility at Lashkar Gah for a familiarisation visit on 13 March 2010 and spent about 15 minutes walking around the entire facility. She could see all the detainees in all their cells. They appeared to be in good health, although it was apparent that the facility was holding more detainees than intended.

153. On 6 April 2010, the RMP sought to undertake welfare visits but were told that there were personnel from Kabul undertaking checks on detainees and it was not possible that day.

154. On 10 April 2010, during a visit, the RMP asked an NDS investigator if they could see the detainees. The NDS investigator said he would have to ask General Naim. When the investigator returned, he said that General Naim was away and his deputy had said that he could not give authorisation.

155. On 17 April 2010, General Naim personally refused the RMP access to the detainees. The visit report records that General Naim demanded to know why the RMP wanted to see them and what the purpose of it was, saying that he would tell the RMP how the detainees were and there was no need to see them. The RMP showed General Naim a copy of Dr Saleh's letter of 25 March 2010. General Naim said that since it had not been provided to him by Kabul it had no authority.

156. In view of these developments, a "fragmentary order" was issued to the commander in UK forces responsible for detention. The order applied to any personnel in theatre who might have involvement in the transfer or subsequent monitoring of the treatment of UK captured detainees. It stressed the need to ensure that the conditions set out in the MoU and Dr Saleh's letter of 25 March 2010 were rigorously applied. UK forces

were to treat the monitoring of the welfare of UK captured detainees as a high priority.

157. In a statement made after the hearing, Mr Burton updated the court on the position at Lashkar Gah. He states that the situation has improved notably. Officials at the British Embassy in Kabul have confirmed that Dr Saleh has sent copies of his letter of 25 March 2010 to NDS Lashkar Gah with instructions to allow the UK to visit UK transferees. Further, General Naim is no longer head of the facility. His deputy is acting head; information about the appointment of a new head is awaited. There is separate evidence that General Naim has moved to take over as head of the NDS in Kandahar and that little is known about the new head at NDS Lashkar Gah (presumably the acting head to whom Mr Burton refers), though he has strong links in Kabul and was previously head of the NDS in Farah province.

158. Visits to UK transferees at Lashkar Gah are now taking place on a regular basis. On 3 May the Brigade Provost Officer ("the BPO") visited six such detainees. Because of time spent on mentoring and liaison discussions, and the time taken to locate the individual detainees, only 20 minutes were available to see them and it was not possible to see them in private. All six were seen individually in the NDS deputy's office, and they were each asked a number of questions. They all appeared to be in good health.

159. On 10 May the BPO made a further visit. Two further detainees, including one who had been transferred since 3 May, were seen on this occasion. The BPO interviewed them both in private, in an empty corridor out of sight and out of earshot of any NDS officials or any other detainees. They appeared clean and in good health.

160. There continue to be capacity issues at Lashkar Gah, as a result of which a number of UK transferees who are still at the pre-trial stage have been transferred by the NDS to the provincial prison at Lashkar Gah. Fifteen detainees were visited at the prison on 6 May. They were seen individually but not fully in private (owing to the need for assistance from the administrator in identifying detainees), though it is anticipated that there should be no difficulty in securing that future interviews take place in private. Three UK transferees were visited on 9 May at the juvenile detention facility in Lashkar Gah. They were seen individually, in a private room, without any NDS officials present.

161. Mr Burton states that recent events reinforce his view that the access difficulties in April were not an attempt by the NDS to avoid scrutiny of its treatment of detainees but were the result of genuine capacity problems facing the NDS. He notes that none of the transferees seen by UK personnel in recent visits reported any mistreatment or exhibited readily visible signs of injury or mistreatment.

UK visits: NDS Kandahar

162. Effective transfers to NDS Kandahar did not commence until October 2008 (there is some doubt about two earlier transfers). The assistant head of legal policy in the operations directorate at the Ministry of Defence, Ms Akiwumi, says in a statement for the court that the RMP have had no difficulty in gaining access to detainees at Kandahar providing the security situation allows them to travel to the facilities in the first place. When conducting interviews the RMP speak to detainees without the

presence of the Afghan authorities and the RMP are satisfied that if a detainee wishes to raise a complaint they have the opportunity to do so. In his statement Lt-Col Neal explains the poor security situation at the NDS facility at Kandahar. It was so poor that no visits could take place between April and August 2009.

163. In mid-June 2009 a detainee visited at Pol-i-Charki prison alleged that he had been mistreated by the NDS while in detention at NDS Kandahar (see below). As a result of that allegation, a moratorium was imposed on further transfers to Kandahar. The moratorium was formally lifted in February 2010, but no further transfers have in fact been made to Kandahar. Following the imposition of the moratorium there was due to be a visit in July 2009, but that was prevented by a suicide attack on the front gate. There were visits in August and September 2009. Throughout 2009, however, the number of UK transferees at Kandahar was very small (Lt Col Neal states that the number had reduced to five by January 2009, and all five were seen in September 2009); and the most up-to-date evidence before the court is that no visits have been undertaken recently because there are now no UK transferees at the facility.

164. Following circulation of a draft of this judgment in accordance with normal procedures, the court's attention was drawn to important qualifications to the matters set out at paras 162-163 above (and a visit report inadvertently omitted from the Secretary of State's previous disclosure was supplied to us). As appears from the amended grid referred to at para 142, no UK transferees have been held at the NDS facility in Kandahar since April 2009, and visits by UK personnel to Kandahar since April 2009 have been made not to the NDS facility but to Sarposa prison, to which relevant detainees formerly held at the NDS facility had been transferred post-trial. Private interviews with such detainees at Sarposa prison took place from August or September 2009 at the latest. There were no private interviews with detainees at the NDS facility during the period when UK visits were made to that facility.

UK visits: NDS Kabul

165. The first clearly recorded visit to detainees at NDS Kabul did not occur until 30 August 2008. This was by a British Embassy official who spent an hour, in private, with two "missing" detainees who had been transferred there without the Afghan authorities giving the required notification. The first visit by the RMP to NDS Kabul occurred later in the year, on 20 October 2008.

166. Thereafter the NDS refused access to UK detainees held in NDS Kabul. It proved impossible at that time to resolve the position. As a result, in December 2008 the UK imposed a moratorium on transfers there (arrangements proceeded normally at that time in Kandahar and Lashkar Gah).

167. Agreement on a resumption of access was reached in February 2009, on the basis of joint visits with the Dutch. Before a visit could be arranged, however, UK officials were informed that the eight UK transferees at NDS Kabul had been moved by the NDS to Pol-i-Charki prison. During subsequent visits to the prison, allegations were made of ill-treatment at NDS Kabul. The decision was then taken not to seek ministerial permission to resume transfers to Kabul until investigations into the allegations had been completed and any requisite further action had been taken.

168. In the event the moratorium on transfers to NDS Kabul has continued, subject to one exception. In January 2010 the decision was taken to allow the transfer there of one high profile UK-captured detainee. There were initial difficulties in gaining access to him, but since access was allowed he has been visited every two weeks.

UK visits: non-NDS prisons

169. Although the focus has been on visits to the NDS facilities to which detainees are transferred by the UK, there have also been visits to Helmand provincial prison (see [158] above) and to Pol-i-Charki prison in Kabul, in particular to check on transferees who had been sent on there by the NDS.

170. British Embassy officials requested in March 2009 that visits to Pol-i-Charki be conducted in private, and that has happened since June 2009. To the criticisms that prisoners are not viewed in their cells there, and that visits are announced in advance, Mr Burton of the Ministry of Defence replies that the prison has some 4,500 prisoners, who are housed in blocks of 50 to 100 prisoners. A cell visit would require the entire block to be shut down. Unannounced visits would also be disruptive, since prisoners would need to be located, which would take time. The more time spent, the greater the risk that insurgents can prepare an attack or lay improvised explosive devices. One of the two routes to Pol-i-Charki prison is through a hostile village.

Record-keeping and notifications of change

171. Paragraph 5 of the MoU obliges the Afghan authorities to keep records of the transfer to alternative holding facilities and of the prosecution status of detainees. These records are to be available on request. The UK is to be informed prior to prosecution and release of detainees and of any material change in circumstances regarding a detainee.

172. A UK record tracking detainees was only begun in April 2007. Now there is a pro forma document used on hand-over of detainees to the NDS. The practice has been adopted of recording a detainee's name, as well as that of his father and grandfather, which assists in the tracking process. At the time of the hearing the location of only a few UK detainees was unknown. The position over time, however, is that real difficulties have been encountered in keeping track of where detainees are and what has happened to them.

173. Mr Burton explains in a witness statement that the picture for detainee transfers is complicated by the lack of an electronic tracking system. The UK identifies insurgents by the reference number assigned when processed through UK detention. The Afghans assign these prisoners a reference which is drawn from their own system. This means that the Afghan authorities cannot always easily identify which prisoners the UK wishes to see.

174. In his statement Lt-Col Neal tells the court that locating UK captured detainees at Pol-i-Charki Prison can be problematic, given the size of the prison and the paper record system. The situation had improved and the location of UK detainees was better known to the prison governor and guards.

175. In another witness statement for the court, the UK's deputy ambassador in Kabul, Mr Dodd, acknowledges that the Afghan system in general lacks the capacity and ability to track detainees effectively. The task is not assisted by the fact that detainees sometimes give false names. He notes that Afghanistan does not have an effective system for registering births, marriages or deaths so that it is not surprising that the system for recording detainees is imperfect. He says that improvements have been made since transfers began, capacity continues to improve, and a recent, internationally-sponsored project aims to capture information on the entire prison population.

176. In a meeting with the UK Secretary of State for Defence in March 2010 the head of the NDS, Dr Saleh, was asked about the transfer of detainees between facilities without the knowledge of UK authorities. Dr Saleh explained that the NDS sometimes had to transfer detainees between Kandahar, Lashkar Gah and Kabul because individuals could be subject to tribal pressure if they stayed in one location.

177. There is evidence of the UK forces taking active steps to pursue the matter when detainees disappear within the system. Thus in May 2007 the RMP found that NDS Kandahar were unable to trace two detainees who had been transferred there. After an investigation over many months, the inference drawn was that they had escaped in transit to Kandahar. It was not possible to say whether a bribe was paid to facilitate the escape.

178. In May 2007 two detainees were handed over to NDS Lashkar Gah. Subsequently, in June 2007, following a request for assistance from the NDS, they were transferred to NDS Kabul via a British helicopter, although throughout they remained in Afghan custody. After that there were numerous attempts to locate and visit these detainees. The Afghan authorities refused to provide details of their whereabouts. The ICRC reported that they had seen the detainees. However, a UK visit to Pol-i-Charki prison proved fruitless. Finally, the detainees were located and in late August 2007 were visited.

179. In 2009 a number of UK detainees who had previously been transferred into NDS custody were eventually located at Pol-i-Charki prison. When visited there, several of them made allegations that they had been ill-treated by the NDS: those allegations are considered in the next section. In the case of one of them, prisoner B, further tracking difficulties were encountered after he had been visited at Pol-i-Charki, and he has not been seen since (see [200]-[201] below).

180. In late 2009, NDS Kabul helped track another detainee who was believed to have been transferred to Kabul in 2007 and had been held following conviction in Pol-i-Charki prison but could not be traced. It emerged that the UK authorities had been unable to locate him because he had given a false name when captured and was recorded under his real name in the prison.

Transfers between NDS facilities

181. As appears from the account above, difficulties in tracking detainees have arisen where detainees have been transferred by the NDS from one facility to another without the knowledge of the UK. One of the matters we have to consider in this case

concerns the possibility of internal transfers by the NDS circumventing a moratorium on transfers by the UK to a particular NDS facility.

182. It was made clear at the hearing that, where a moratorium is imposed on UK transfers to a particular facility, it is also UK policy to withhold assistance to the NDS for internal transfers to that facility from elsewhere. In his post-hearing witness statement Mr Burton observes that the absence of assistance is of obvious practical importance given the dangers of travel by road in Afghanistan and notably in Helmand province. He accepts that such a transfer could be undertaken without the assistance of UK armed forces but he is not aware of any UK captured detainees having been transferred between the relevant locations without such assistance. He also points to the assurance in Dr Saleh's letter of 25 March 2010 that prior notification of internal transfers will be given, and he expresses the belief that it is highly likely in any event that, given the UK's current arrangements for updating the detainee database, the UK would quickly learn of any such transfer. Should a transfer take place, arrangements would be put in place to ensure that the detainee was monitored pre-trial.

183. In contrast to the views expressed by Mr Burton, the claimant's submissions in respect of the post-hearing disclosure draw attention to an apparent example of the transfer of detainees between Lashkar Gah and Kandahar by the NDS alone in April 2007; to the recent acknowledgment by Dr Saleh, mentioned above, that the NDS has sometimes had to transfer detainees between the relevant facilities; and to a suggestion in the documents that the current overcrowding at NDS Lashkar Gah might be alleviated by the transfer of some prisoners from there to NDS Kabul.

Recent and future developments relevant to monitoring

184. One of the points made in Mr Burton's first witness statement is that improvements in the facilities and capabilities of the Afghan authorities will assist in the effective monitoring of UK-captured detainees. In that connection he describes major initiatives in progress to deliver improved detention facilities, including in particular the construction of a new facility in Parwan which is expected to achieve initial operating capability in the first quarter of 2011 and to house in due course all insurgents captured in Afghanistan. We have not gone into the detail of such developments because they do not affect the immediate position concerning transfers of UK-captured detainees into Afghan custody.

185. Mr Burton states that pending those changes to the Afghan system the UK has taken various steps to address issues of access to, and monitoring of, UK-captured detainees. We have already touched on most of those steps. There is, however, one additional recent change which we should mention.

186. In his first statement Mr Burton says that as the number of UK transferees in NDS custody has increased over the years it has become evident that visits cannot be sustained at the current frequency by staff in theatre, and that a dedicated visits team is therefore being formed, which will allow more frequent visits. In his second statement he provides more information about the formation of that team, now referred to as the "Detainee Oversight Team". As at late April 2010 the team consisted, on an interim basis, of the Force Provost Marshal and the Brigade Provost Officer, together with support staff. It was expected that within about four weeks the

team would be at full operating capability, following on-going training and preparation and the arrival of new team members led by a group captain and including a policeman, a lawyer and additional support, including medical support. The team would be dedicated to monitoring the welfare of UK-captured detainees. One of its first tasks would be to consider what further improvements could be made to the monitoring process.

THE ALLEGATIONS BY UK TRANSFEREES

187. In this section we examine allegations made by a number of UK transferees that they have been subjected to serious mistreatment while in the custody of the NDS. We also refer to reports by the NDS on investigations carried out into some of those allegations.

Prisoner X: Lashkar Gah

188. X was detained in June 2007. According to a subsequent report he had been captured with two other persons who were in possession of a chest rig, ammunition and an AK47 variant. He was transferred to NDS Lashkar Gah. The RMP saw him there on four occasions: 27 June 2007, 21 July 2007; 6 August 2007 and 23 August 2007. The visit reports state that he appeared well. When asked he did not complain of being ill-treated, feeling unwell or needing medication. On two of these occasions, in the presence of NDS guards, he said that he was proud to be a member of the Taliban and had come to Afghanistan via Pakistan to fight and kill British and American forces. On three of the four visits he was seen by the same member of the RMP, Cpl Broadhurst. Another member of the RMP, Cpl Paul, was present at all four visits.

189. During a visit in mid September to NDS Lashkar Gah, Cpl Broadhurst was informed that X had been sentenced to ten years in prison and had been transferred to Lashkar Gah prison, where he would serve his sentence. On 25 September 2007, Cpl Broadhurst visited X in Helmand provincial prison at Lashkar Gah. X told Cpl Broadhurst that he had confessed to being a Taliban fighter as a result of being subjected to electric shocks and being beaten. X said that metal clamps had been attached to parts of his body. He gestured to his forearms, upper body and chest, where he said electricity was passed through for 2-3 seconds.

190. On 9 October 2007 Cpl Broadhurst interviewed X at Lashkar Gah prison. When Cpl Broadhurst asked him why during the four RMP visits at NDS Lashkar Gah, he had not mentioned the mistreatment, he said he was scared that he would be beaten. He said that he had been beaten with an electric cable, about a metre long and one inch thick. He was beaten by the commander, a small fat man. He still had marks on his back. He said six other prisoners, who had subsequently been released, had been present at the time of the beatings. As to the electric shocks, he said that wires had been attached to his legs from a "thermometer" machine. He said he had been electrocuted six times, lasting 6-10 seconds each time, and then two days later, the same again. He said that he had not sustained any visible injury from the electrocution. He said he would not recognise the soldiers' voices since they did not talk. He had signed a confession, but the confession was not his words.

191. That day X was medically examined by Captain Elizabeth Barnaby, a medical officer stationed at Lashkar Gah. Captain Barnaby is a qualified medical practitioner

registered with the General Medical Council of Great Britain. She records that she was told by X that the device used to administer electric shocks had been attached to his ankles. She examined his ankles, feet, and wrists and found no evidence of bruising or scarring. Her conclusion was that "without forensic training, there is no evidence to support or deny the allegations of subjections to electric shock". During the examination by Captain Barnaby X also made reference to having been beaten with an electricity cable, approximately 1 inch in diameter and 1 metre in length across his back. That had occurred around three months ago. On examination of X's back Captain Barnaby found that the skin was intact, with no evidence of bruising or scarring.

192. In a report on the case on 10 October 2007 Major Mynors, the UK's senior legal adviser stationed in Lashkar Gah, observed that there were flaws in X's allegations, which started to undermine their credibility. However, he did not think that the investigation had been completed in sufficient detail to be able to say with any reasonable certainty that the allegations were not credible, and he proposed that X be re-interviewed and photographs of his back and ankles obtained. Copies of the detention record and medical report from X's time in UK detention should also be obtained, along with the records of the other prisoners X said were present. Major Mynors did not consider it practicable or safe to interview them. He noted that once further information was obtained it could be sent to the UK for an expert pathologist's report as to whether the descriptions of the beatings and electrocutions rang true, and what physical effects could be expected from X's account.

193. Major Mynors interviewed X himself on 29 October. He was accompanied by Sgt Ower RMP and Major Johnson, a military doctor. X told Major Mynors that he had not signed a confession but had made a print with his finger. X had not complained earlier for fear of further abuse. X said that he was electrocuted twice for about 10 seconds on one day. He said the electricity came from about 10 metres away. Asked how he could say this if he was blindfolded, X stated that he could hear a crackling sound. He said he had suffered bruising after being beaten but there were no marks from either the beating or electrocution since it had been four months ago.

194. In a statement dated 30 October 2007 Major Johnson reported that X had said, through an interpreter, that he had been struck twice on the back by a cable, and had received electric shocks through electrodes attached to his ankles. X stated that he did not think that there were any lasting marks of these events on his body. In the course of his examination Major Johnson paid specific attention to the back and ankle areas. He closely examined areas where X indicated he had been struck with the cable, but Major Johnson was unable to see any significant scarring or marks. Nor were there visible marks around the ankles. Major Johnson noted some small scars on the feet which he felt were not related, and which were away from the areas indicated. Major Johnson told X that he would be putting his findings in a statement for the RMP. X made no objection.

195. The ICRC, the AIHRC and ISAF headquarters were informed of X's allegations. The ministerial Q&A document prepared in response to the Amnesty report of November 2007 said that X's allegations did not appear credible. The view taken at the Ministry of Defence's Permanent Joint Headquarters in the United Kingdom was that there was no evidence to support X's allegations and that inconsistencies in X's account undermined the credibility of his allegation. In his statement for these proceedings

Major Mynors says the tiny scar on X was the sort most people have from childhood activities. There was no visible evidence of scarring but X had insisted that there was. Another factor going to credibility was that X made a statement concerning the nature of the machine used to electrocute him although he claimed he was blindfolded at the time. Overall, Major Mynors concludes in the statement that he did not find the account to be credible.

Prisoner A: NDS Kabul

196. A was detained by UK forces on 17 September 2008 and handed over to the NDS on 20 September 2008. He was first visited on 20 October 2008 at NDS Kabul. The usual pro forma questions were put to him. He made no allegations of ill-treatment at that point. The standard interview was about 10 minutes. At some point A was transferred to Pol-i-Charki prison, without notice to UK forces. This was at a time when access to NDS Kabul was denied. On 2 March 2009 RMP Sgt Allen visited A at Pol-i-Charki prison with a British Embassy official. When question 17 of the pro forma questions was put to him, Sgt Allen split it into two parts, given the fact that A had been transferred without notice. To the first part, A said that he was happy with Pol-i-Charki, although he was not happy about being in prison. When asked about other complaints the interpreter replied that A said that he had been ill-treated. He was then asked what he meant by ill-treated, to which the translated answer was that he had been beaten. Prison guards were present at the time but A did not seem intimidated by their presence. He did not seem interested in pushing this matter further. No more clarification was forthcoming. His appearance showed no signs of ill-treatment.

197. At subsequent visits to Pol-i-Charki prison on 9 April and 15 June 2009, A gave further details of the alleged ill-treatment at NDS Department 17. On the visit of 9 April he said that the beatings consisted of being punched, kicked and hit with objects, although he could not elaborate on what type of objects they were. The beatings occurred at night time; he was therefore unable to describe his attackers, including their rank or names. As a result of these beatings he suffered bruising to his legs which had now gone. He stated that there were two beatings. When asked why he had not reported these beatings to the RMP on 20 October 2008, when welfare checks were conducted, he stated that they took place after their visit. When asked if he was content for his name and account to be given to the Director General of the NDS he confirmed that he was.

198. On the visit of 15 June 2009, A identified the member of the NDS Department who conducted the beatings. He believed him to be the head of Department 17. The reason was that his brother was killed and he was blaming A for the killing. The beatings went on for a period of 2½ months. The beatings were frequent and took place underground. There were other prisoners who were also beaten, including a friend. When beaten, A's hands were tied and then he would be hung from the ceiling. During the visit A spoke freely while being questioned and gave further detail about the beatings and possible attackers. It was believed that the reason for this was that the prison guards were not in the interview room. A also stated that he did not want a complaint to be passed on for investigation. This was a change since the visit in April.

199. The NDS were informed of the allegation on 20 April 2009, and subsequently conducted an investigation. The NDS informed the British Embassy on 5 May 2009 that the investigation had been completed and had found that there was no evidence to substantiate this allegation. Because A had withdrawn permission, further information provided during the visit on 15 June could not be shared with the NDS. The RMP thought that the NDS had taken the allegations seriously but the short time for the investigation, and the lack of a final report, led to concerns. In line with standard practice, the ICRC was notified of A's allegation of mistreatment. It was partly because of A's allegations that the moratorium imposed on transfers to NDS Kabul was continued in April 2009.

Prisoner B: NDS Kabul

200. B, an Afghan, was detained in Kabul on 3 December 2008 and transferred to the NDS the following day. B was not seen when on 2 March 2009 the RMP and British Embassy officials visited Pol-i-Charki prison and saw a number of other detainees such as A. He was at court that day. However, he was seen during the 9 April visit, when he raised allegations of mistreatment while at NDS Department 17. The alleged mistreatment involved being put in stress positions and being subjected to sleep deprivation. When he was seen at Pol-i-Charki there were no signs of mistreatment although that was not regarded as conclusive. B did not want the matter raised with the NDS. There was a prison guard in the room at the time of the visit. As with other prisoners, B did not appear intimidated by the guard's presence.

201. B was not seen during visits to Pol-i-Charki on 15 and 16 June 2009. On 28 July the prison governor said that he was not in the prison. On 6 September 2009 he could not be located, although a junior officer said that he was in Block 4, but could not be found. On 19 September the UK team was told that B had been transferred to NDS Department 17 for further investigation. Information was subsequently received that he had in fact been released in July 2009.

Prisoner C: NDS Kabul

202. C, an Afghan, was detained in Helmand on 17 September 2008 and handed over to the NDS three days later. He was next seen during a Pol-i-Charki prison visit on 15 June 2009 when he made allegations of mistreatment at NDS Kabul. The allegations included that he had been hung from the ceiling for three days and nights, and that he had been beaten and subjected to electric shocks. He gave a description of the man alleged to have carried out the electrocution, and thought the person was second in command of the facility. C did not have visible scars but the physical evidence was considered inconclusive because the alleged incident had occurred many months previously. He gave consent for the allegations to be raised with the NDS. They were also raised with the ICRC and the AIHRC.

203. As with A, B and D, UK officials did not dismiss C's allegations out of hand. The allegations by all four had been raised on the first occasion they had been seen by the RMP on the visits in March, April and June 2009 to Pol-i-Charki prison. These prison visits took place 4-6 months after the detainees were transferred to the NDS, and once they were in Pol-i-Charki. There had been a denial of access to NDS Department 17 between October 2008 and February 2009. In June 2009 UK officials observed internally that the current allegations raised the question, whether, contrary

to what the NDS had told them, capacity problems were the only reason for the denial of access to Department 17 during that period. They also observed that prison guards were not present when the detainees were seen during the 15 June 2009 visit, and perhaps that was why the detainees seen that day had given more details. Only A had named an alleged perpetrator, although B gave a description. The person A named as the perpetrator was believed to have been dismissed some three months previously.

Prisoner D: NDS Kandahar/Kabul

204. D made his complaint on 15 June 2009, against NDS Department 17 in Kabul and NDS Kandahar, when seen by a British Embassy official and the RMP on their third visit to Pol-i-Charki prison in Kabul. D had been detained by UK forces in Helmand on 8 October 2008 and transferred to the NDS on 11 October 2008.

205. When D made the allegations on 15 June his consent to having his complaint passed on could not be clarified due to an interruption by the prison guard. The RMP returned on 16 June and this time D gave consent to raising general details, but not his name, with the NDS and ICRC. Both the NDS and ICRC were informed of the general details of the matter on 16 June. On 16 July 2009, D gave clarification that he gave consent for general details of the complaint to be raised with the NDS, but he also gave consent for his name and general details to be given to the ICRC, the AIHRC and other Afghan authorities. He confirmed that he had not seen anyone from the ICRC or the NDS since the allegations were made. Subsequently, D withdrew his consent for the NDS to be notified of the allegation. Consequently, D's allegations did not feature in the 2010 NDS investigation report to which we refer below.

206. D's allegations on 15 June 2009 in relation to NDS Kandahar were that he had been beaten "a little bit", although subsequently he said that he had been hit by a rifle butt. It was as a result of D's allegations on 23 June 2009 that a moratorium was imposed on the transfer of UK detainees to NDS Kandahar.

207. D's allegations against NDS Department 17 were more serious: he had been beaten "a lot" and electrocuted four or five times. He could not identify the culprits since he was blindfolded throughout. D was in the same prison block as others making abuse allegations, but the RMP commented in their report that despite the stories being similar enough to be consistent they were not too similar as to arouse suspicions of having been "corroborated" or made-up.

208. D's allegations in respect of NDS Department 17, like those of prisoners A to C, related to a period when UK officials were refused access to the facility: he was visited there in October 2008, but it was the refusal of access thereafter that led to the imposition, in December 2008, of a moratorium on the transfer of UK detainees to NDS Kabul.

Prisoner E: NDS Lashkar Gah

209. E, a Pakistani national, was detained by UK troops in Helmand in July 2007. He subsequently said that he had no complaints about the UK forces and had been treated well by them during 15 days detention by them (in fact, UK forces say that E's

detention was only 2 days). E was then transferred to NDS Lakshar Gah. He was seen by the RMP on 6 August, 23 August and 16 September.

210. The reason E was seen on 16 September was that NDS Lashkar Gah had asked for UK forces to assist transfer four detainees, including E, to NDS Kabul. The RMP prepared a note about their escort to Kabul on 23 September 2007. The detainees remained in NDS custody throughout, but were escorted by the RMP. All four detainees were walking and in good health, although because of time constraints there was no medical examination. The NDS officers, the detainees, Cpl Barker of the RMP and an interpreter travelled first by helicopter to Camp Bastion, the main British base, north-west of Lashkar Gah. They were then taken by two Land Rovers to the temporary detention facility there. That facility had RMP guards. Five hours later, once it was evening, they were transferred to an aircraft for the flight to Kabul, via Kandahar. In Kabul the detainees were handed over to NDS Kabul in good health.

211. Two years later, on 6 September 2009, E was visited at Pol-i-Charki prison in Kabul by representatives of the RMP and the British Embassy, Kabul. E said that British Forces had detained him for 15 days. He was then transferred to NDS Lashkar Gah where he was held for 2 months and 15 days. Although E said that he had not been treated badly at the facility, he alleged that X had been raped there by a high level NDS officer. He also alleged that he, E, had been beaten by NDS personnel – initially he said they were from the Afghan army but then he changed his mind – when being transferred in a four car convoy from NDS Lashkar Gah to Camp Bastion before being flown to Kabul. He said that he was beaten by weapons and sticks. One blow had landed on his forehead and he had passed out. His guards had also tried to cut his wrist with an object which, from the description, may have been a bayonet. His nerves were still affected. E said that there was no particular mistreatment at NDS Department 17 in Kabul. The NDS officers had merely "shouted and used investigative techniques" and he had no complaint to make against them. E gave his consent to raise the allegation, including his name and the full details, with the NDS, other Afghan authorities, the ICRC and the AIHRC. He said he had already been visited by the ICRC and had shared these allegations with them.

212. On 11 September UK officials decided that the matter needed further investigation. On 19 September E was visited again at Pol-i-Charki prison and interviewed in a room, not a cell, by a senior procurator fiscal depute from Scotland, on secondment to the Foreign and Commonwealth Office, and by the senior British Embassy official who had seen him on 6 September. They prepared a report of the visit. E said he had been convicted by the primary court, Kabul, and sentenced to 5 years 6 months custody. Again E had no complaint about his treatment at Pol-i-Charki prison or by British forces when he was captured in 2007.

213. However, E now said that when being transferred from a British camp to NDS Lashkar Gah by the NDS, he was beaten on the head by the NDS officers. He had a scar on his head because of that. The report noted that being struck by a firearm could not be discounted as the cause of the L-shaped scar E exhibited. E also said that every night of the 20 days of investigation at NDS Lashkar Gah he had been beaten by the NDS chief investigator on the head, on the wrist and on the back. His wrist injury had been caused by a knife attached to the end of an AK47. He gave a description of the chief investigator. He had been beaten on the backside with a cable, about 75 cm long, on some three or four occasions, 50-100 times during each incident. The chief

investigator had also used a gun to strike him. E was in a lot of pain and had trouble sleeping because of the injury to his back. He had been injured badly and his back had bled. These injuries took two or three months to heal. The report noted that the scar across his back and on his wrist did not seem consistent with his account.

214. After E left NDS custody, on his account he was taken by vehicle to Lashkar Gah by British forces and then to Kabul by helicopter or plane (he was unable to distinguish between the two). He was flown to Kabul with two other Afghans. There were thirty or thirty-five people, including British forces, on the flight and another NDS officer accompanied him to Kabul, where he was handed over to NDS prosecutors.

215. British officials decided that E's allegations were not credible. His accounts were inconsistent and, as regards abuse on the journey to Kabul, if it had occurred the RMP escort would have observed it or evidence of it. E was co-located at Pol-i-Charki with D.

Prisoner G: Lashkar Gah

216. Allegations by prisoner G of ill-treatment at Lashkar Gah emerged at a late stage, during a UK visit to Pol-i-Charki on 24 November 2009. He had not been seen on previous visits to the prison. His allegations were that while in detention at NDS Lashkar Gah in July 2007 he had been beaten with steel rods on his back and legs for six consecutive nights, and that this was the only reason why he had made a confession. He claimed to be able to identify the perpetrators. He gave permission for the matter to be raised with the NDS, the ICRC and the AIHRC. He said that he had previously notified the ICRC and the AIHRC during a visit in late 2007 but had heard nothing since.

217. The credibility of G's allegations is not accepted by the Secretary of State, but it seems that no final conclusion has been reached about them. The allegations were raised with the NDS. Save for the provision of certain information about him, however, G was not considered in the NDS's 3 April 2010 report on the allegations made by UK transferees (see below).

The NDS's investigations and report

218. We have referred above to the short investigation carried out by the NDS into the first of the allegations to emerge from the visits to Pol-i-Charki prison in mid 2009 (prisoner A). As further allegations emerged, and to the extent that detainees gave consent for the allegations to be raised with the NDS, the NDS was requested to investigate them as fully as possible. After some pressure, the NDS gave an assurance in July 2009 that it would conduct a full and transparent investigation.

219. What eventually emerged from the NDS, after a long interval and further pressure from UK officials, was a three page report dated 3 April 2010. The report recorded that the leadership of the NDS took the issue of alleged mistreatment very seriously and tasked a team to carry out the investigation, but the investigation process faced some challenges because of "the unfortunate bad security and other means of problems in Helmand and Pol-e-Charkhi prison".

220. The report dealt very briefly with four allegations against the NDS in Sangin district, Helmand province, recording that three of the detainees had denied making, or had dismissed, allegations of mistreatment, and that in the case of the fourth, who had been released, the allegation could not be traced. It is not clear what these four allegations were. The report then gave information as to the whereabouts of two UK transferees, namely B and G, before turning to the allegations by A, C and E.

221. In relation to A, the report recorded that he denied making any allegation of mistreatment against NDS and that he was ready to defend that statement. It continued: "However in the initial phase of investigation [A] continuously denied his involvement, but when the investigator showed him the evidences of his involvement in crimes against the government he confessed".

222. In relation to C, the report stated: "During the investigation it was found that incident happened by [a senior NDS official] who was the head of the department. [The official] was sacked from his post by NDS leadership due to his harsh behaviour. Since his dismissal he is living out of Afghanistan."

223. In relation to E, the report referred to the allegation of mistreatment by an interrogator, but stated that "there was no visible sign of bruise or scars or any other supporting evidence, we conducted the investigation but we could not found record of mistreatment and the interrogator he named was fictitious".

224. There were then a number of concluding comments. First, the report stated that investigations by the NDS are in accordance with Afghan law: "Whenever NDS arrest or receive a detainee from our international allies, [we] try to collect sufficient information to support the court, when we show the evidences and the supporting information to the detainees in the initial phase of the investigation they confess their involvement". Secondly, it suggested that detainees get access to mobile phones and other means of contact, and that "they make contacts with their linked groups and get commands to make allegation of mistreatment, for seducing the international community to pressurize the Afghan Govt". Thirdly, it stated that detainees are always asked by investigators if they are in good condition for questioning and are regularly checked by doctors. Finally it stated: "NDS remains committed to respect the human rights and investigate any action that violates it".

Recent allegations made to an Afghan judge

225. Although it does not concern allegations by UK transferees, it is convenient to mention here that since the hearing we have been provided with evidence in Mr Burton's third witness statement that in March 2010 an Afghan judge reported to UK personnel that he had received allegations by three detainees concerning their treatment while in detention at NDS Lashkar Gah, including allegations that confessions had been extracted by force (beatings, and whipping with a wire cable). An individual was named as the principal alleged abuser. The judge made clear that the allegations were not made by UK transferees but were made by detainees who had been captured by the NDS itself, and that the judge had no concerns about the treatment of detainees captured by ISAF and transferred to the NDS.

226. The matter cannot be taken very far. It appears that the judge ordered medical reports which found nothing to confirm the allegations of abuse. The judge himself did not

want to take the allegations further and was not prepared to bring the matter to the attention of the NDS. Mr Burton states that whilst the UK will continue to pursue the matter, the judge's assurance that he had no evidence that ISAF detainees were being mistreated gives sufficient assurance for the time being that transfers to NDS Lashkar Gah can continue, although it is recognised that this adds even greater imperative to the need to see all UK detainees in private as soon as possible. The disclosed documents contain a suggestion that the individuals who made the allegations may in fact have been captured by ISAF forces, but we are not prepared to place any significant weight on this when it is set against the judge's clear statement to the contrary effect.

THE CANADIAN MATERIAL

227. There is in evidence a substantial body of material concerning allegations of mistreatment of detainees transferred by Canadian forces to the custody of the Afghan authorities. In particular, two statements of Amir Attaran, a Canadian lawyer, give detailed information about the following matters, among others:

i) Proceedings for judicial review were brought in the Federal Court of Canada in February 2007 by Amnesty International Canada and the British Columbia Civil Liberties Association, for whom Mr Attaran acted as counsel, alleging that Canadian forces were acting unconstitutionally in making such transfers because transferees were placed at substantial risk of torture. The claim was ultimately rejected on jurisdictional grounds, with the result that the court did not hear full testimony from government witnesses or receive full disclosure of government records. Further, a motion for an interlocutory injunction was dismissed by Mactavish J in a reasoned decision of 7 February 2008. That decision nevertheless contains a helpful summary of the evidence led by the applicants (though we do not accept that these were "findings of fact" by the judge).

ii) Also in February 2007, the Military Police Complaints Commission announced an investigation into a complaint by the same bodies that on at least 18 occasions detainees had been transferred to Afghan authorities notwithstanding evidence of a substantial risk of torture. Mr Attaran blames government obstruction for the fact that proceedings before the Commission were adjourned for a long time. In his second statement, however, he informs the court that hearings before the Commission have now resumed.

iii) The issue was taken up by the press, notably in articles in *The Globe and Mail* from April 2007 onwards.

iv) In November 2009 the House of Commons Special Committee on the Canadian Mission in Afghanistan ("the Afghanistan Committee") commenced hearings into the transfer of detainees and heard evidence from many witnesses. The hearings continue.

228. For the initial allegations we can turn to an article in *The Globe and Mail* on 23 April 2007, which reported that "Afghans detained by Canadian soldiers and sent to Kandahar's notorious jails say they were beaten, whipped, starved, frozen, choked and subjected to electric shocks during interrogation". It referred to 30 face-to-face

interviews with men recently captured in Kandahar province, "uncovering a clear pattern of abuse by the Afghan authorities". It said that "the worst stories came from Afghans who endured captivity in the cramped basement cells underneath the NDS headquarters in Kandahar". Most of those held by the NDS for an extended time said that they were whipped with electrical cables, usually a bundle of wires about the length of an arm. Some said the whipping was so painful that they fell unconscious. Interrogators also jammed cloth between the teeth of some detainees, who described hearing the sound of a hand-crank generator and feeling the hot flush of electricity coursing through their muscles, seizing them with spasms. Another man said that the police hung him by his ankles for eight days of beating. Still another said that he panicked as interrogators put a plastic bag over his head and squeezed his windpipe. Detainees also complained of being stripped half-naked and forced to stand through winter nights when temperatures in Kandahar drop below freezing. The article stated that "the men who survived these ordeals often seem like broken husks".

229. The article went on to record Colonel Shir Ali Saddiqui, human-rights ombudsman for the Kandahar police, as stating that the police department was aware of only two complaints of beatings in police custody in the past year, and that the police had already taken steps to prevent such abuse from happening again. It continued:

> "His colleagues at the NDS, on the other hand, sometimes need to get rough with their subjects, he added.
>
> 'In these cases, these people need some torture, because without torture they will never say anything', Col. Saddiqui said.
>
> Sadullah Khan, Kandahar NDS chief, initially denied all allegations of torture during a telephone interview last week. After repeated questions, however, Mr Khan acknowledged that minor mistakes may have occurred during interrogations.
>
> 'We never beat people', the NDS chief said. 'Maybe small things happened, but now we're trying to leave those things behind."

230. The Canadian Government asserted that the allegations were unfounded; but continuing press activity coupled with the legal proceedings have made this a high profile issue within Canada.

231. In evidence to the Afghanistan Committee, Mr Richard Colvin (a senior Canadian diplomat, formerly head of the political section and chargé d'affaires at the Canadian Embassy in Kabul) referred to various important differences between Canadian practice and the practice of the UK and other ISAF states at the time when such allegations were made. He said that as of May 2007 Canada had transferred six times as many detainees as the British; unlike the British, Canada was not monitoring its own detainees after transfer but relied instead on the ICRC and AIHRC to monitor, and was extremely slow to inform the ICRC when a transfer had been made; another difference was that Canada had unusually poor record-keeping; and the final difference was that Canada cloaked its detainee practices in extreme secrecy. He observed:

> "… [In] the critical days after a detainee had been transferred to the Afghan intelligence service, nobody was able to monitor them. …
>
> During those crucial first days, what happened to our detainees? According to a number of reliable sources, they were tortured.
>
> The most common forms of torture were beating, whipping with power cables, and the use of electricity. Also common was sleep deprivation, use of temperature extremes, use of knives and open flames, and sexual abuse – that is, rape. Torture might be limited to the first days or it could go on for months.
>
> According to our information, the likelihood is that all the Afghans we handed over were tortured. For interrogators in Kandahar, it was standard operating procedure."

232. The deficiencies to which Mr Colvin referred were to a large extent inherent in the MoU existing at that time between Canada and the Government of Afghanistan. As already mentioned, a new MoU, making provision for monitoring visits by Canadian personnel, was signed on 3 May 2007. Subsequent events are described in Mactavish J's decision of 7 February 2008 in the judicial review proceedings. She records that eight complaints of mistreatment were received by Canadian personnel conducting visits between 3 May and 5 November 2007. They included allegations that detainees were kicked, beaten with electrical cables, given electric shocks, cut, burned, shackled, and made to stand for days at a time with their arms raised above their heads. The judge observed: "While it is possible that these complaints were fabricated, it is noteworthy that the methods of torture described by detainees are consistent with the type of torture practices that are employed in Afghan prisons, as recorded in independent country condition reports". Moreover, in some cases prisoners bore physical signs that were consistent with their allegations of abuse; and Canadian personnel conducting the visits personally observed detainees manifesting signs of mental illness, and in at least two cases described detainees as appearing "traumatized". The complaints were allegedly investigated by the Afghan authorities and found to be without merit, though it was not clear whether the investigation was an independent one, no written report had been produced and no details of the investigation had been provided, all of which raised concerns as to the reliability of the findings of the investigation.

233. Mactavish J goes on to record that in the course of a visit to NDS Kandahar on 5 November 2007, a detainee stated that he had been interrogated on more than one occasion, and at least one of the interrogations had taken place in the room in which the interview was being conducted. The detainee stated that he could not recall the details of that investigation, as he had allegedly been knocked unconscious early on. He did report, however, that he had been held to the ground and beaten with electrical wires and a rubber hose. He then pointed to a chair in the interview room, stating that the instruments that had been used to beat him had been concealed under the chair. Canadian personnel then located a piece of braided electrical wire and a rubber hose under the chair in question. In the course of the interview the detainee also revealed a

large bruise on his back, which was subsequently described by Canadian personnel as being "possibly … the result of a blow". One of those who had been present conceded in cross-examination that the bruising was consistent with the beating described by the detainee. The allegation had been reported to Afghan authorities and was under investigation by them. While the investigation was ongoing, an employee at the facility had evidently been suspended from his position and placed in detention. The extent to which a meaningful investigation could be carried out was limited by the fact that the detainee who made the allegation had refused to allow his name to be disclosed to Afghan prison officials.

234. As a consequence of the receipt of that complaint, Canada suspended transfers of detainees until such time as it could be satisfied that it could make transfers in accordance with its international legal obligations. Canada made efforts to eliminate the risk of ill-treatment to transferees, including a demand for the dismissal of the NDS employee thought responsible for the ill-treatment of the detainee who had complained on 5 November 2007. Transfers resumed in January 2008, with the Canada authorities expressing themselves satisfied that their efforts had solved the problem.

235. The evidence given at recent hearings of the Canadian Military Police Complaints Commission includes testimony from a Canadian official who visited Canadian-transferred detainees in NDS Kandahar following the resumption of transfers in January 2008. Questioned about "bad treatment", he said that in regular visits between January and August 2008 he received "allegations of one form or another about eight further times". It should, however, be stressed that neither the Commission nor the Afghanistan Committee of the Canadian Parliament has yet reached the point of making any findings on this or the other matters to which Mr Attaran draws attention in his second statement.

THE LEGAL FRAMEWORK FOR THE ISSUE BEFORE THE COURT

236. Before considering the detailed submissions of counsel on the facts, it is convenient to examine the legal framework, upon which there is a substantial measure of agreement.

237. The Secretary of State's *policy* concerning the transfer of detainees to the Afghan authorities is not under challenge. The requirement not to transfer detainees where there is a real risk of torture or serious mistreatment accords, so far as relevant, with the requirements of article 3 ECHR and is unimpeachable. The issue relates to the application of the policy. The claimant's position is that the *practice* of transferring detainees is in breach of the policy since, contrary to the view taken by the Secretary of State, they are at real risk of torture or serious mistreatment if transferred. The Secretary of State accepts that the court is entitled to review his compliance with the policy on well-established legal principles and that the practice of transfer is susceptible to judicial review on that basis.

238. The willingness of both parties to approach the case in that way has made it unnecessary to consider a raft of legal issues that would otherwise have arisen: for example, whether the claimant is entitled to rely on the ECHR (Mr Eadie has stressed that she is not a "victim" for ECHR purposes), and whether the UK armed forces in Afghanistan are acting in right of the UN. There is a full reservation of right as to the

arguments that may be advanced in other cases. For the present case, however, all such interesting questions of law must be put on one side.

239. Although the legal issue is whether the practice complies with the policy, rather than the direct question whether it complies with article 3 ECHR, it is common ground that the principles relevant to the application of article 3 are equally relevant here. Mr Eadie expressed the test under the policy in terms redolent of that in *Soering v United Kingdom* (1989) 11 EHRR 439, namely "whether substantial grounds have been shown for believing that those transferred face a real risk of being subjected to torture or serious mistreatment". It is accepted that the standard is the same as that under article 3. It is an absolute standard and does not vary according to the exigencies of operational requirements.

240. Mr Eadie submitted that, since the court is engaged in an exercise of review, the relevant question is strictly whether the Secretary of State could properly have concluded that there is no real risk. He accepted, however, that the court would apply anxious scrutiny in answering that question and that it would make no material difference in practice whether the court proceeded by way of review of the Secretary of State's conclusion or made its own independent assessment of risk on the evidence before it, as it would in a case under article 3. In our judgment, the question whether the Secretary of State's practice complies with his policy requires the court to determine for itself whether detainees transferred to Afghan custody are at real risk, and it is therefore for the court to make its own assessment of risk rather than to review the assessment made by the Secretary of State. That is how we have proceeded. We agree, however, that in practice the two approaches lead to the same answer in this case.

241. The risk of torture or serious mistreatment is not said to arise in this case from circumstances specific to any individual transferee. The contention is that all transferees are at risk, as a class, because of the methods used by the NDS in questioning and handling detainees under its control. The correct approach in a class case has been considered in a number of authorities. In *Hariri v Secretary of State for the Home Department* [2003] EWCA Civ 807, the Court of Appeal approved what had been said by the Immigration Appeal Tribunal in *Muzafar Iqbal v Secretary of State for the Home Department* [2002] UKIAT 02239, at para 57:

> "In cases which rest not on a personal risk of harm (for example, where the police or prison staff would have cause to target a claimant) but on a risk of serious harm said to face people generally, for example in this case all persons detained pending trial, it cannot be said that they would face a real risk of serious harm unless in that country there is a consistent pattern of gross and systematic violations of their human rights whilst in detention."

The tribunal emphasised that the "gross and systematic" standard was not chosen arbitrarily but was to be found in international legal instruments, including article 3 of the 1984 UN Convention against Torture.

242. The leading judgment in *Hariri* was given by Laws LJ, with whom the other members of the court agreed. In approving what the tribunal had said in *Iqbal*, Laws LJ said

that the point was one of logic: "[a]bsent evidence to show that the appellant was at risk because of his specific circumstances, there could be no real risk of relevant ill-treatment unless the situation to which the appellant was returning was one in which such violence was generally or consistently happening", and "[t]he fact that ill-treatment or misconduct might be routine or frequent would not be enough" (para 8). *Hariri* was followed in *Batayav v Secretary of State for the Home Department (No.1)* [2003] EWCA Civ 1489, a case about prison conditions. But in *Batayav (No.1)* Sedley LJ, with whom the other members of the court agreed, made these important cautionary remarks about the language used by Laws LJ in *Hariri*:

> "37. I want to add a word, however, about the evaluation of conditions which are alleged to create a real risk of inhuman treatment. The authority of this court has been lent, through the decision in *Hariri*, to the formulation that ill-treatment which is 'frequent' or even 'routine' does not present a real risk to the individual unless it is 'general' or 'systematic' or 'consistently happening' ….
>
> 38. Great care needs to be taken with such epithets. They are intended to elucidate the jurisprudential concept of real risk, not to replace it. If a type of car has a defect which causes one vehicle in ten to crash, most people would say that it presents a real risk to anyone who drives it, albeit crashes are not generally or consistently happening. The exegetic language in *Hariri* suggests a higher threshold than the IAT's more cautious phrase in *Iqbal*, 'a consistent pattern', which the court in *Hariri* sought to endorse.
>
> 39. There is a danger, if *Hariri* is taken too literally, of assimilating risk to probability. A real risk is in language and in law something distinctly less than a probability, and it cannot be elevated by lexicographic stages into something more than it is."

243. In *Batayav v Secretary of State for the Home Department (No.2)* [2005] EWCA Civ 366, at para 5, Buxton LJ said that he did not understand Sedley LJ's reservation to have been the view of the other members of the court in *Batayav (No.1)*. We are satisfied, however, that Buxton LJ was mistaken on that point. Buxton LJ went on to say that in order to establish an article 3 case of the sort put forward by the appellant, significant evidence had to be given of conditions that were "universal, or very likely to be encountered by anyone who enters the system". As a gloss on what was said in *Hariri*, that seems to us to give rise to the same kind of danger as Sedley LJ had warned against.

244. Taking the Court of Appeal authorities as a whole, we think that the right course is to follow the approach approved in *Hariri*, subject to the cautionary remarks in *Batayav (No.1)*. In taking that course we keep firmly in mind that the ultimate question under the policy, as under article 3, is whether there is a real risk, and in particular whether there is a "proper evidential basis" for concluding that transferees are at real risk (to use an expression taken from the judgment of the Court of Appeal in *AS (Libya) v Secretary of State for the Home Department* [2008] EWCA Civ 289, [2008] HRLR 28

at para 24, which refers in turn to the judgment of the European Court of Human Rights in *Saadi v Italy* (2008) 24 BHRC 123 at paras 128-129). The exercise is not simply to determine whether there exists a consistent pattern of torture or serious mistreatment, but to decide on the basis of the evidence as a whole whether detainees captured by UK armed forces face a real risk of serious mistreatment if transferred into Afghan custody.

245. We also bear in mind in this connection the comments made by the UN Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, in an interim report dated 1 September 2004, to which Mr Fordham drew our attention. The Special Rapporteur referred in para 35 to article 3 of the UN Convention against Torture, observing that it was clear from the wording of the provision that "the existence of a consistent pattern of gross, flagrant or mass violations in a country is not necessarily the only determining factor, that it may have to be assessed with other relevant considerations, in particular those relating to the vulnerability of the person concerned". In para 36 he referred to article 20 of the Convention, concerning the "systematic" practice of torture, and he recalled how this was defined by the Committee against Torture: "torture is practised systematically when it is apparent that torture cases reported have not occurred fortuitously in a particular place or at a particular time, but are seen to be habitual, widespread and deliberate in at least a considerable part of the country in question".

246. Part of the evidence concerns the MoU and related assurances. There was some discussion before us as to whether *any* reliance could properly be placed on such assurances when the intention of the parties at the time when they were given was that they should remain confidential and not be put into the public domain. This was based in part on a passage in *RB (Algeria) v Secretary of State for the Home Department* [2009] 2 WLR 512, at para 102, citing an earlier judgment of SIAC, given by Ouseley J, in which it was said that "the SSHD cannot rely on any substantive assurance unless it is put into the open" and that "SIAC could not put weight on assurances which the giver was not prepared to make public". That remains SIAC's approach, as appears from the open judgment given by Mitting J in *Abid Naseer & Others v Secretary of State for the Home Department* (judgment of 18 May 2010) at paras 35-36.

247. One can readily see why a secret assurance might not be capable of providing any guarantee of protection, since it would not give rise to any possibility of accountability through public scrutiny. In this case, however, the MoU, although originally confidential, has long been in the public domain; and we understand that Dr Saleh agreed to his letter of assurance being put in the public domain, as it will be by this judgment, even though it was originally confidential. In those circumstances we see no reason why the Secretary of State should be precluded as a matter of principle from relying on the assurances. The fact that they were originally given confidentially is simply one of the matters to be taken into account when considering what weight can be placed on them.

248. *RB (Algeria)* provides more general guidance on the subject of assurances. At paras 112-113 of his opinion Lord Phillips referred to relevant Strasbourg authorities, including *Chahal v United Kingdom* (1996) 23 EHRR 413 and *Saadi v Italy* (cited above). He continued:

> "114. I do not consider that these decisions establish a principle that assurances must eliminate all risk of inhuman treatment before they can be relied upon. It is obvious that if a state seeks to rely on assurances that are given by a country with a record for disregarding fundamental human rights, it will need to show that there is good reason to treat the assurances as providing a reliable guarantee that the deportee will not be subject to such treatment. If, however, after consideration of all the relevant circumstances of which assurances form part, there are no substantial grounds for believing that a deportee will be at real risk of inhuman treatment, there will be no basis for holding that deportation will violate article 3.
>
> 115. That said, there is an abundance of material that supports the proposition that assurances should be treated with scepticism if they are given by a country where inhuman treatment by state agents is endemic. This comes close to the 'Catch 22' proposition that if you need to ask for assurances you cannot rely on them. If a state is unwilling or unable to comply with the obligations of international law in relation to the avoidance and prevention of inhuman treatment, how can it be trusted to be willing or able to give effect to an undertaking that an individual deportee will not be subject to such treatment?"

249. Similar observations are to be found in the opinion of Lord Hope, in particular at paras 237-239. Although he, too, said that "there are grounds for doubting whether it could ever be right to rely on assurances given by the governments of states where treatment contrary to article 3 is generally practised", he too rejected any suggestion that such assurances are objectionable in principle and made clear that the court must examine in each case whether assurances are sufficient in the circumstances to counter the risk of treatment contrary to article 3 and that the weight to be given to them depends on the particular circumstances.

250. Although everything depends on the particular circumstances, it is clear from other passages in *RB (Algeria)* that relevant matters include the degree of control exercised by those giving the assurances over those whose conduct is in issue, and the existence and effectiveness of means of verification, whether by external monitoring or otherwise.

THE CLAIMANT'S SUBMISSIONS

251. The claimant's case is that there has existed at all material times a real risk that detainees transferred to the custody of the NDS would be subjected to torture or serious mistreatment, and that the practice of transfers has been and remains in breach of the Secretary of State's policy: transfers should not have started in July 2006, they should in any event have stopped in November 2007 (following the suspension of transfers by Canada and publication of Amnesty's November 2007 report on the torture of detainees), and they should not have taken place at any time since. It is important to look at the past as well as the present, not just because the claim includes it but because if it is established that there have been serious problems in the past one

needs to look all the more carefully at the present and at the continuation of existing practice into the future.

252. Whilst heavily criticising the Secretary of State's practice and the assessments upon which it was based, Mr Fordham made clear, as we have already mentioned, that he was not impugning the good faith of those responsible for making the assessments.

253. The claimant relies on the reports of the AIHRC, the various UN agencies and NGOs as providing compelling evidence of systemic mistreatment, reinforced by the specific cases in the Canadian material and the allegations made by individual UK transferees. Stress is placed on the importance of confessions for securing convictions and on the evidence of the use of torture to obtain confessions. The evidence shows that prior to the commencement of transfers UK officials were aware of the risk of torture or mistreatment in Afghan custody. One of the reasons for the MoU was to secure assurances on the treatment of detainees handed over. However, the MoU arrangements came nowhere near to providing the requisite guarantee of protection of the human rights of transferees. The terms of the arrangements were not adequate for that purpose, and the terms that did exist were not complied with.

254. Points made by Mr Fordham in relation to the MoU and EoL include the following:

i) The MoU was entered into without any clear idea of how it was to be implemented. It had not been decided at the time of the MoU that transfers would be made to the NDS, and various options were subsequently considered.

ii) It was not intended to be a public document and it lacked the transparency needed if it was to create any form of public accountability.

iii) The Afghan signatory of the MoU was the Minister of Defence. There is no evidence that he was speaking or thought that he could speak on behalf of the NDS, or that the NDS accepted that it was covered by the MoU. On the contrary, the Minister of Defence made clear that he had no jurisdiction or control over other ministries or agencies and that he could not take responsibility for the welfare of detainees being guarded and managed by others; and the stance subsequently taken by the NDS itself was that it had not been consulted in the drafting of the MoU and it did not recognise the authority of the Minister of Defence to promise anything on its behalf. Further, if the NDS was covered by or had committed to these arrangements, one would expect it to have disseminated instructions referring to them and calling on its personnel to act in accordance with them, but there is no evidence of any such instruction.

iv) When the EoL was entered into with a view to obtaining additional assurances, the Afghan signatory on this occasion was Dr Rassoul, the National Security Advisor. Again the NDS was not a party. Moreover, although Dr Rassoul's letter stated that the NDS would issue written instructions about the agreed access and visiting procedures, there is no evidence that any such instructions were issued.

v) Even on the basic issue of torture and serious mistreatment, the MoU is vague and insufficient in its terms, providing only that the Afghan authorities "will

be responsible for" treating transferees in accordance with Afghanistan's international human rights obligations, including the prohibition of torture etc.

vi) Although the MoU contained provision for UK personnel to have "full access" to transferees, it did not make specific provision for private access, a requirement to which express reference was first made in the EoL.

vii) Neither the MoU nor the EoL provides for some of the basic safeguards identified by the UN Special Rapporteur in his September 2004 report (see [245] above). Para 41 of the report states, as regards guarantees for individuals deprived of their liberty, that assurances obtained from countries to which such persons are handed over should as a minimum include provisions with respect to prompt access to a lawyer, recording (preferably video-recording) of all interrogation sessions and recording of the identity of all persons present, prompt and independent medical examination, and forbidding incommunicado detention or detention at undisclosed places.

viii) A further fundamental weakness of the arrangements is that they do not address the important issue of proper investigation of complaints when made.

255. As to the operation of the transfer arrangements in practice, Mr Fordham submitted that even the matters expressly provided for in the MoU and EoL were not properly implemented. In particular:

i) The history of access has been incapable of providing any reassurance of proper treatment of transferees. A view expressed by the FCO just before transfers commenced was that careful monitoring of the first few cases would provide an insight into whether the systems and procedures were functioning effectively. Yet in practice there were no visits at all for many months. Thereafter, although access was in general unproblematic until recently at NDS Lashkar Gah, there have been serious problems at NDS Kabul. Access has been patchy even when not deliberately refused. There were no visits to NDS Kabul from October 2008 until this year (following the transfer of the one detainee there in February 2010). The recent problems concerning access at Lashkar Gah evidence once again the fragility of the monitoring arrangements and are inconsistent with the suggestion of a commitment to access arising from the MoU/EoL. General Naim was in charge of Lashkar Gah for much of the relevant period, but he evidently did not get the point of the access arrangements. The refusal of access was a position deliberately adopted even while transfers and access arrangements were under the spotlight of legal proceedings in this court.

ii) Further, access has been of limited value because there have been no private interviews of detainees at NDS facilities, despite the fact that this was one of the points of the EoL; and the recent interview practice at Lashkar Gah, when access has been provided, underlines the unsatisfactory nature of the arrangements and illustrates how the NDS is allowed to dictate matters. Interviews have also been cursory. The kinds of visits that have taken place have not been suited to the eliciting of complaints where ill-treatment has occurred and cannot plausibly be relied on as providing protection against the use of torture to secure confessions. By contrast, visits to detainees in prisons

outside NDS control and away from the NDS environment have produced credible allegations of previous ill-treatment while in NDS custody; but prison visits themselves have been sporadic and accidental and are not an adequate safeguard. A further deficiency, in relation to all visits, is that UK officials have not been accompanied by persons suitably qualified to detect signs of torture when complaints are made.

iii) There have been occasions when the ICRC and AIHRC have themselves been denied access despite the provision for it in the MoU. In any event, the UK cannot rely on visits by the ICRC since it is precluded by obligations of confidentiality from passing the information on to the UK (as to which, see also para 146 of the judgment in *Saadi v Italy*, cited above); and the AIHRC cannot have been making regular visits to individual detainees, since otherwise relevant material would have been included in the disclosed documents. None of the outside organisations picked up the allegations by UK transferees which are now accepted by the UK to be credible.

iv) There has been a clear failure by the NDS to comply with the obligations under the MoU to keep an accurate record of all transferees, including a record of transfer to an alternative facility, and to notify the UK prior to the initiation of criminal proceedings and prior to release. The NDS has failed to provide any information on a proactive basis. The difficulties experienced by the UK in tracking transferees have been considerable. There have been repeated problems in locating transferees, and internal transfers and releases have taken place without notification: the statement in the ministerial Q&A document of 31 October 2007 that there are "robust mechanisms in place" to ensure accurate recording has at no time been correct. These problems have contributed to the failure to secure regular visits of transferees. The grid prepared during the course of the hearing, showing where individual transferees were held at particular times, had to be pieced together from information in the various monitoring reports and is incomplete even now; whereas, if the MoU had been working properly, a full and complete picture for all transferees would have been readily available. The explanation given for some of these difficulties – that the Afghans assign prisoners their own reference number when they enter the system and cannot always easily identify which prisoners the UK wishes to see – provides an additional reason for concern. It shows that UK transferees are not dealt with by the NDS separately from other detainees and that the MoU simply has no significance from the point of view of the NDS.

256. It was therefore submitted that the arrangements for visits and monitoring cannot provide a reliable and robust assurance of proper treatment of transferees by the NDS. They do not bear the weight that the Secretary of State seeks to place on them.

257. As to Dr Saleh's letter of assurance dated 25 March 2010, Mr Fordham submitted that it is striking that such an assurance was thought to be needed, since these requirements have been in the MoU or EoL from the start. Further, Dr Saleh was slow in implementing his stated intention to direct that the position set out in the letter should be followed. The letter gives far too little far too late, and there is no guarantee that the assurance contained in it will be delivered in practice. The court should not place any weight on this document.

258. A further submission was that no inference favourable to the Secretary of State could be drawn from the fact that relatively few complaints of mistreatment have emerged in the course of the visits made by UK officials to the various NDS facilities. Contrary to basic international standards and the requirement expressly included in the EoL, it has not been possible to hold private interviews with transferees in the course of visits to NDS facilities. They have been interviewed in the direct presence of guards or in circumstances where they would have reason to fear that guards might be able to overhear them. Those are not the conditions in which detainees can be expected to make complaints of mistreatment even if they have suffered it. The fear of reprisals if complaints are made is obvious. Fear can be seen in the withholding or withdrawal of consent for complaints to be communicated to the NDS for investigation. No weight should therefore be placed on the fact that only a small number of complaints have been made in the course of such visits.

259. This is contrasted with what has happened when detainees have been interviewed in private, away from the NDS environment, as in the case of prisoner X at Helmand provincial prison and the various detainees seen at Pol-i-Charki. The proportion of those visited away from the NDS who have complained about earlier mistreatment at NDS facilities is very high. Moreover, those allegations implicate all three NDS facilities, not just Kabul; and they implicate them in relation to times where visits were being made to the NDS facilities but disclosed nothing.

260. Mr Fordham submitted that the accounts of ill-treatment made by the various individual UK transferees were consistent with the kind of ill-treatment recorded elsewhere and could not sensibly be dismissed as multiple fabrications. For example, at the time of the complaint made by the Canadian transferee at NDS Kandahar on 5 November 2007, the instruments to which he referred had been discovered in the room. Not only was that inconsistent with it being an isolated incident, but it fitted with other allegations of the use of electrical cable to administer beatings.

261. As regards prisoner X, various criticisms were made of the investigation by UK officials. Those who physically examined him were not trained to detect signs of torture. Dr Önder Özkalipci, Medical Director of the International Rehabilitation Council for Torture Victims, has provided a witness statement in which he says that electric shock torture seldom leaves detectable marks and he is critical of the quality of the medical and visit reports in this case. Similar concerns are expressed in a witness statement of Dr Frank Arnold, of the Medical Justice Network.

262. In addition, Mr Fordham pointed out *inter alia* that the medical officer who examined X went no further than to say that there was no evidence to support or deny the allegations of electrocution; that the senior legal adviser, Major Mynors, noted that an expert pathologist's report could be sought as to whether the descriptions of the beatings and electrocution rang true, but that was not done; and that Major Mynors did not himself rely on inconsistencies in X's account as a reason for disbelieving him. He submitted that the reasons for finding X's account not to be credible were unsatisfactory and that there was in truth no safe basis for the conclusion that the allegations were unsubstantiated. Indeed, when X's allegations were considered in conjunction with those emerging at that time in respect of Canadian transferees, it should have been found that they had the ring of truth to them.

263. When the allegations made by detainees seen at Pol-i-Charki in 2009 are taken into account, there is said to be a clear and alarming pattern of mistreatment. These were credible, consistent accounts which the NDS report has done nothing to dent; and the Secretary of State accepts that the allegations by detainees A to D may have substance. On any view, it is submitted, those further allegations support the view that there was systematic ill-treatment at Kabul. As to Kandahar, detainee D's allegation of fleeting ill-treatment there cannot be viewed as an isolated case, given the number of allegations by Canadian transferees. It was pure chance that enabled D's allegations to emerge because he was seen at a later date at Pol-i-Charki. There were other UK detainees at Kandahar at the same time as he was; the system was such that the visits carried out at Kandahar were not apt to elicit complaints from them, and in their case there was not the same fortuitous follow-up as occurred with D. As to Lashkar Gah, in addition to X's account, there is the allegation made by detainee E. His description of ill-treatment is said to ring true or at least not to be an obvious fabrication. It is not clear when E is talking about ill-treatment in transit rather than during interrogation; he did have scars; and caution is needed in placing weight on the recollection of the escorting officer, two years after the event, as to whether E had any visible injury at the time.

264. Mr Fordham dwelt upon what he described as "self-investigation" by the NDS, pointing to the total absence of reassurance given by this form of investigation into complaints. It is obvious that one cannot expect a practical and effective outcome if, instead of having a transparent and objective investigation by an independent body, one entrusts such a task to the very organisation against which the complaint is made; nor can any detainee expect to feel safe in making a complaint when the matter is going to be investigated in this way.

265. The recent report by the NDS was submitted to be patently inadequate. No proper details of the investigation are given. The approach is focused on going back to the complainants to see if they are really complaining. The response concerning the complaint by prisoner C, that the perpetrator is no longer in post, falls very far short of thoroughness or transparency and raises many more questions than it answers (for example, when did the sacking take place, why was the perpetrator not brought to justice, what was the involvement of other NDS staff, and what were the knock-on effects of the practice?). The report's concluding comments provoke concern rather than allaying it. The last paragraph is derisory: the report shows that there is no true understanding of the protection of human rights or of what is required in order to ensure proper accountability. All of this is just what one would expect from the NDS.

266. In overall conclusion, Mr Fordham submitted that the practice of transfers is not and never has been compatible with the required standard: any transferee is at real risk of torture or serious mistreatment at the hands of NDS interrogators. The MoU did not get near providing a practical guarantee or assurance removing the real risk. The systems as designed and implemented were not capable of securing adequate protection of the human rights of transferees. There was no excuse for making transfers knowing that the necessary mechanisms for accountability and protection were not in place. By November 2007 the allegation made by prisoner X, the Canadian evidence and Amnesty's report had added to the reasons why transfers should not have been continued. Then came the obstruction to access at NDS Kabul in 2008, and the strong pattern of credible allegations in 2009 which link to other

information about ill-treatment and which it is impossible to dismiss as isolated, non-systemic or historic. It is impossible to distinguish Lashkar Gah or Kandahar as being safe notwithstanding the problems at Kabul. There is evidence of abuse at all three, and none can be isolated in practice from the others because of the possibility of transfer of detainees and of NDS staff between facilities.

267. It was submitted that from all angles, save the assessments made by the UK government itself, there can be seen to be substantial grounds for believing that those transferred face a real risk of torture or serious mistreatment.

THE SECRETARY OF STATE'S SUBMISSIONS

268. Mr Eadie opened his submissions by emphasising the difficult and dangerous operational context and the pressing need to ensure that suspected insurgents captured in the field can be detained and brought to justice. He also drew our attention to the work being done with the Afghan authorities to assist them in developing and improving their own capabilities, and to the potential damage to UK-Afghan relationships if transfers could not be made. He submitted moreover that the claimant's case, although limited to the transfer to the Afghan authorities of those captured by UK armed forces, also had serious implications for joint operations conducted by the UK and for the position of other ISAF partners. Whilst underlining in these various ways the sensitivity and importance of the case, he accepted that such considerations could not affect the answer to the question whether transferees are at real risk of torture or serious mistreatment. He also submitted that operational pressures have not been allowed to cloud judgments or affect the assessments made by officials over time as to whether such a risk existed.

269. The steps taken to ensure that there was no real risk were intended to operate together, and the various strands should not be viewed in isolation. It was recognised that the MoU, as a piece of paper, would not be sufficient in itself, but its terms were adequate to provide the requisite protection if operated effectively; it did not have to include all the requirements mentioned by the UN Special Rapporteur in his September 2004 report. The MoU was regarded as a model by other ISAF states. It was entered into with the Government of Afghanistan, on whose behalf the Minister of Defence signed the document (just as the Secretary of State for Defence signed on behalf of the UK Government). A considered view was taken that this was the appropriate form, especially in circumstances where it was thought that transfers might have to be made to other jurisdictions of the government and not just to the NDS; and in any event the NDS was regarded as being part of the Government of Afghanistan. It was not clear at the time how the agreement was going to be fulfilled, but the MoU provided an important political commitment and a formal document binding on the Government of Afghanistan. The statements made at the time by the Minister of Defence, for example that he would not take responsibility for detainees held by other Afghan agencies such as the NDS, should not be taken out of context as showing that the Government of Afghanistan could not comply with its obligations under the MoU. It was also the considered view subsequently that the appropriate counterparty to the EoL was the National Security Advisor rather than the NDS, since the National Security Council had formal responsibility for all detention policy.

270. Mr Eadie submitted that the NDS was the appropriate body to which, in the event, to make transfers. It was the body designated as preferable by the ICRC and ISAF, and

it has constitutional and legal responsibility for security and terrorist matters under Afghan law. The fact that it is the subject of a secret presidential decree does not make it unaccountable in domestic law (and comfort was also provided by the US, which had seen the decree). Before transfers commenced, UK officials were aware of the need to ensure that the terms of the MoU were known to the NDS, and events proved that this was the case. The NDS lawyer confirmed in June 2006 that he was aware of the MoU and that the NDS had introduced new forms as a result of it. An FCO memorandum later the same month stated that the NDS had assured officials that it would honour the terms of the MoU with respect to access (and Mr Eadie submitted that this should not be read in a limited way). It is inconceivable that senior NDS figures with whom meetings were held in March 2007 to discuss detention and prosecution issues did not know about the MoU.

271. It is true that there came a point in early 2009 when the NDS said that it did not consider itself bound by the MoU. This was in the context of the denial of access and other problems at Kabul. It appears that Dr Saleh had an agenda relating to the provision of funding for a new NDS facility at Kabul. There was an appropriate and swift reaction by the UK, in halting transfers to Kabul. The UK worked hard to find a solution, and visits recommenced (on the basis of joint visits with the Dutch) in February 2009. The denial of access was not replicated at Kandahar and Lashkar Gah.

272. No-one in government is otherwise than alive to the challenge of dealing with the NDS, but the approach has been to work through problems diplomatically and constructively, so as to bring about improvements and preserve the advances gained. A good working relationship has been established with a series of important figures in the NDS, including Dr Saleh himself, and there has been increasing contact with NDS officers on the ground, in particular through training exercises. Dr Saleh's letter of 25 March 2010 represents an important step forward, representing the culmination of a series of engagements with the NDS over the years. The letter is not a complete answer in itself and needs practical action to back it up, but it will be available for use if future problems arise. It confirms that the NDS is committed to ensuring the protection of transferees, as is the Government of Afghanistan generally. Considerations of self-interest also support that approach: the Government of Afghanistan supports the presence of ISAF in Afghanistan; it is aware that the UK and other ISAF states are heavily focused on the protection of transferees; and there are powerful reasons of self-interest in the NDS and the Govenrment of Afghanistan more generally ensuring that there is no cessation of transfers and for that purpose ensuring that the requisite protection of transferees is maintained.

273. As to tracking and monitoring of transferees, Mr Eadie submitted that it is not a matter of legal obligation but is acknowledged by the UK to be of considerable importance in making judgments as to whether it is appropriate and consistent with the policy for transfers to be made: thus it is a central feature of the MoU, EoL and letter of 25 March 2010. The location and frequency of visits are themselves matters of judgment. Resources have been devoted principally to the NDS facilities because it is recognised that the main concerns have focused on the NDS and the pre-trial phase of detention. There have been and continue to be some problems, but in most cases the system works well and enables proper monitoring. There are very few prisoners whose whereabouts are uncertain, and where problems have arisen there has

been an enormous effort to follow up queries and to secure improvements. The contention that the system is hopelessly flawed is not justified. Working practice has provided sufficient oversight to enable the assessment of whether there has been ill-treatment. Where problems have arisen, they do not warrant an inference that the system is being flouted or manipulated to conceal ill-treatment (though it is accepted that while problems exist a safeguard against ill-treatment is not in place). It is clear from the steps taken to secure the letter of 25 March 2010 from Dr Saleh that the UK government regards access as critical to the continuation and success of the transfer regime.

274. In line with a broader theme of his submissions, Mr Eadie invited the court to look carefully at the position of the various NDS facilities individually. There have been no real difficulties about visits at NDS Kandahar, even during the period of the moratorium on further transfers between June 2009 and February 2010 (a moratorium imposed not because of problems about visits but because of the allegations made by Prisoner D when seen at Pol-i-Charki prison). There have been problems at NDS Kabul, which led to the imposition of a moratorium in December 2008 (a moratorium that is still in place, subject to the exceptional transfer of one prisoner in February 2010); but those problems cannot justify an inference that monitoring systems generally are flawed and not capable of providing assurance. At Pol-i-Charki prison there was some difficulty in tracking initially, because of the number of prisoners and poor record-keeping, etc; but there was no attempt at obstruction, and monitoring improved once the system of joint visits with the Dutch was put in place. As to NDS Lashkar Gah, where the great majority of UK detainees are transferred, there is a generally good picture in terms of access. It is true that there have been some recent difficulties, but they appear to be to do with overcrowding and pressures on the system.

275. As to the claimant's criticisms of the nature of the visits themselves, Mr Eadie relied on the matters set out in the witness statements of Mr Burton, which we have summarised above, concerning matters such as the practical constraints imposed by security issues and what visiting officials have managed to achieve within those constraints. The fact that visits have not included private interviews with detainees, away from the presence of guards, has not deprived the visits of all utility: they enable checks to be made that detainees are there, are in good physical shape and do not appear afraid or unable to speak. It was acknowledged that the EoL nonetheless refers to visits being in private; and steps have been taken recently to ensure so far as possible that visits do take place in private from now on. Visits to Pol-i-Charki have been in private since June 2009. Visits to NDS Kandahar have been in private since September 2009. A substantial degree of privacy exists in practice at NDS Lashkar Gah, albeit the present position is that officials are only able to see detainees in groups rather than individually.

276. Mr Eadie relied on the inspections carried out by the ICRC, the AIHRC and UNAMA as providing a further safeguard. He said that the fact that the ICRC is unable to share its inspection reports with the UK or other ISAF states does not diminish its importance as a strand in the protective systems. He also relied on the work that has been done, in accordance with a core part of the UN mandate, to assist the Afghan authorities in driving up standards. At the same time he resisted the drawing of any inference that standards were too low in the first place.

277. Mr Eadie accepted that the various general reports of the AIHRC, UN agencies and NGOs raise issues and allegations of considerable seriousness. Despite that worrying background, however, he submitted that the safeguards are sufficient to provide the requisite degree of assurance in respect of the treatment of UK transferees He made a number of cautionary comments about the use of the reports: for example, the need for caution in extrapolating from general allegations to specific inferences about individual locations and organisations; the need to look carefully at whether a report is based on relevant first-hand evidence or simply repeats allegations contained in previous reports; and the need to distinguish between generalities and the very specific set of circumstances with which one is dealing in this case.

278. He also counselled caution in relation to the use of the Canadian material, whilst at the same time emphasising that the original Canada-Afghanistan MoU did not contain the provisions included in the UK-Afghanistan MoU with regard to access and monitoring; and that since the visits regime has been strengthened Canada has decided that transfers can properly be resumed (a point on which, in Mr Eadie's submission, the UK is entitled to place considerable weight, given the spotlight that has been shone on the Canadian practice).

279. As regards the specific allegations made by UK transferees, Mr Eadie submitted that they need to be considered by reference to individual location (since one should not draw too weighty an inference from ill-treatment at one location in relation to others); that the number of allegations made is small relative to the total number of detainees transferred; and that, coming as they do from suspected insurgents who are presumptively the enemy, their truth should not be accepted too readily.

280. There have been only a small number of allegations of ill-treatment at NDS Lashkar Gah. The first, by prisoner X, was in September 2007. It was taken very seriously, there was a careful investigation and the ICRC was informed. The assessment reached at the end of the investigation was that the allegation was unsubstantiated. The court should accept the reasonableness and correctness of that assessment: there are most serious doubts about the credibility of X. A further allegation concerning Lashkar Gah was in September 2009, by prisoner E, alleging ill-treatment while in detention at Lashkar Gah and while being transferred from there to Kabul via Camp Bastion in September 2007; but again there are serious grounds for doubting the veracity of the allegation. There have been no allegations of recent ill-treatment of UK transferees at Lashkar Gah. When one takes those matters together with the fact that Lashkar Gah is the facility to which the UK has the greatest access and where it knows the NDS people best, Mr Eadie submitted that it was entirely proper to conclude that the requisite degree of protection exists there and that transfers can take place without real risk of torture or serious mistreatment.

281. As to NDS Kandahar, there has been only one allegation by a UK transferee, namely prisoner D, who alleged that he had been beaten a little at Kandahar but had then suffered greater ill-treatment following his transfer to NDS Department 17 at Kabul. It had not been possible to investigate the allegation in detail because of D's withdrawal of consent. In so far as the allegation related to NDS Kabul, the Secretary of State accepts that it is consistent with those made by prisoners A to C concerning their treatment there and that there may be some substance to these claims. In so far as it related to Kandahar, however, it was less serious in nature and was an isolated allegation. It led to an immediate moratorium on transfers to Kandahar but, when

taken with all other relevant considerations (including the Canadian experience) was not considered to justify the continuation of the moratorium after February 2010.

282. As to NDS Kabul, it was accepted, as already mentioned, that the allegations made by prisoners A to C were potentially credible and could not be dismissed as unsubstantiated (and that this part of the allegation made by D fell into the same category). In the case of C, the NDS's own investigation found that the incident had occurred. However, the head of Department 17 at the time of the alleged ill-treatment was dismissed because of his behaviour. Moreover the moratorium on transfers of UK detainees to Kabul, imposed in December 2008 because of access problems, has been kept in place (save for the exceptional case of the transfer of one detainee in February 2010).

283. To counter the suggestion that moratoria on UK transfers to a facility such as NDS Kabul can be circumvented by internal transfers between NDS facilities, Mr Eadie made the point that such internal transfers have occurred only very occasionally and are subject to serious practical constraints. Because of the security situation, the assistance of the UK armed forces is generally needed to effect a transfer by helicopter. However, the UK's policy is that, where a moratorium is in place in respect of transfers to a particular facility, the UK will neither make direct transfers to that facility nor assist the Afghan authorities in transferring detainees from elsewhere to that facility. The documents contain at least one example of assistance for a transfer to NDS Kabul being refused in accordance with that policy.

284. In relation to the investigation of complaints, Mr Eadie submitted that the UK has done the maximum it could properly be expected to, having regard to the need to respect Afghan sovereignty: it has carried out its own investigations so far as it is able to do so, including the involvement of medical staff where appropriate and practical; it has passed on allegations to the ICRC and AIHRC and has worked hard to ensure that those bodies are able to perform their functions effectively; and it has pressed the NDS to investigate, to the extent that those making allegations have consented to that course. It is true that investigation by the NDS is not transparent or independent, and that the quality and level of detail of NDS reports is not what one would expect in this jurisdiction; but the NDS has investigated, reported and kept the UK informed, and it can and will take action where an allegation is substantiated (as shown by the removal of a former head of Department 17). The deficiencies in NDS reports should not lead one to conclude that those who might be transferred now, for example to Lashkar Gah, would be at real risk. There is a need for improvement but that should not lead to an inference of real risk.

285. Whilst Mr Eadie submitted that the transfers made by the UK had been lawful throughout, he urged the court to focus on the lawfulness of the current practice, not on its lawfulness at various points of time in the past. The court should concentrate on the practice that is presently operated, having regard to the improvements that have been made over time, the monitoring regime now in place, the existing assurances, the build-up in working relationships and the development of institutions in Afghanistan over the years.

286. In Mr Eadie's submission, the claimant can only succeed if there are substantial grounds for believing that *all* transferees, to whichever location, are at real risk of torture or serious mistreatment. She must therefore show that the policy is incapable

of being operated consistently with the required standard (which would mean in practice that none of the ISAF states could properly make transfers). The evidence does not make good that case.

DISCUSSION AND CONCLUSIONS

287. We have found this a troubling and difficult case. The picture painted by the independent reports on Afghanistan is one of widespread and serious ill-treatment of detainees, including ill-treatment by the NDS in particular, with continuing grounds for concern despite improvements over time. Against that background it was essential for the UK to put in place and implement an effective set of specific safeguards if detainees were to be transferred to the NDS without real risk that they would be subject to such ill-treatment. Great efforts have been made to establish and operate an appropriate system for the purpose, in very difficult circumstances. Transfers have been suspended where, because of problems in the operation of the system, the safeguards were considered to be insufficient (as in the case of the moratorium on transfers to Kabul following denial of access for visits). Transfers have continued to the extent that the system has been assessed as operating sufficiently well to provide the requisite degree of assurance, as in the case of transfers to Lashkar Gah. That the continuation of transfers has been based on genuinely made assessments is not in dispute. What we have to decide is whether those assessments are soundly based. The evidence before the court gives undoubted cause for concern about them. What is much more difficult to determine is whether it warrants the conclusion that transferees as a class are at real risk of serious ill-treatment at the hands of the NDS, so that it is in breach of the Secretary of State's policy and therefore unlawful for any transfers to be made.

288. In considering the independent reports on treatment of detainees in Afghanistan, we have borne in mind the cautionary observations of Mr Eadie. Even so, as he rightly accepted, those reports establish a worrying backdrop against which to consider the position of UK transferees. Nor is this merely an historical issue. The reports display a substantial degree of consistency over time.

289. The March 2005 report of the independent expert appointed by the UN Secretary-General referred to the receipt of testimony from former detainees about abusive practices, including torture; and the NDS was one of the institutions specifically identified. Human Rights Watch stated in November 2006 that it had received credible reports about the mistreatment of detainees by the NDS and other Afghan authorities. The March 2007 report of the UN High Commissioner for Human Rights noted that reports of the use of torture and other forms of ill-treatment by the NDS were frequent. Amnesty's November 2007 report referred to the receipt, over the previous two years, of repeated reports of torture and other ill-treatment of detainees by the NDS; it expressed grave concern and recommended a moratorium on transfers. Amnesty and the UN High Commissioner for Human Rights continued to refer to reports of torture in their 2008 and 2009 reports. The AIHRC's detailed April 2009 report, based on extensive first-hand research over the period 2006-2008, found that torture and other serious mistreatment were commonplace in the majority of law enforcement institutions in Afghanistan, including the NDS. The NDS was also singled out as an institution which had not cooperated with the Commission, and in which (by contrast with some other agencies) the Commission's monitoring and follow-up had not resulted in a decrease in torture. As recently as December 2009,

Human Rights Watch reported that it had received many reports of torture during interrogations at NDS Department 17, and in its country summary for 2010 it reiterated that there were persistent reports of torture and abuse of detainees held by the NDS.

290. There is no doubt a substantial degree of overlap between the reports of torture and mistreatment referred to by those various organisations. In many cases, moreover, they are reporting allegations which have not been investigated in depth or even at all, and it is impossible to tell whether the allegations are well founded. In our judgment, however, it would be wrong to discount this volume of complaints and the significance attached to them by reputable human rights agencies, especially when they are considered in the light of concerns repeatedly expressed about the lack of transparency and accountability of the NDS, including procedures for the investigation of complaints and the prosecution of those responsible for ill-treatment.

291. The plausibility of the allegations is enhanced by the importance of confessions as evidence in the criminal legal process, and the suggested link between the use of torture and the obtaining of confessions from those under interrogation. This is one of the points touched on in the AIHRC's April 2009 report. It is a point that was rightly in the mind of the UK official who stated in April 2007 that "it should be borne in mind that all convictions in Helmand are obtained on the basis of confession evidence" and who referred to the existence of "a pretty woeful backdrop insofar as respect for human rights and respect for judicial process is concerned" (see [81] above). Whilst the UK and other ISAF states have provided training and other assistance to help the Afghan authorities improve their processes, there is nothing to show that confessions have lost their central evidential role in the securing of convictions or, therefore, that the incentive to secure confessions has significantly diminished.

292. Taking those various matters into account, we take the view that, in the absence of specific safeguards governing the position of detainees transferred by UK forces into NDS custody, the scale of torture and serious mistreatment evidenced by the background material would be sufficient to justify the conclusion that transferees were at real risk of such ill-treatment. We therefore turn to consider the nature and effectiveness of the safeguards relied on. In that connection we refer both to formal safeguards, in terms of assurances and the like, and to the practical operation of the transfer arrangements and the degree of knowledge that has been acquired over time about individual facilities and their staff.

293. At the centre of the case are the UK-Afghanistan MoU and the related EoL. Those documents contain what are on the face of it important assurances given by the Government of Afghanistan concerning the treatment of detainees, together with provisions for access to detainees for the purpose of verifying that the commitments entered into have been honoured in practice. The opinions in *RB (Algeria)* indicate that assurances of this kind are to be viewed with scepticism or doubt when given by a country with a record for disregarding fundamental human rights (see [248]-[249] above). The weight to be given to them depends, however, on the particular circumstances. In a case such as this, where the assurances are backed up by provisions for monitoring and where the practical operation of the system can be assessed over a period of several years, we think it wrong to start with a dismissive attitude towards them. The position has to be looked at in the round.

294. As to Mr Fordham's criticisms of the MoU and EoL themselves, we do not place much weight on the point that they were not originally intended to be public documents. Nor do we consider the actual terms to be inadequate. Afghanistan's acceptance of responsibility for treating transferees in accordance with that country's international human rights obligations, including the prohibition of torture and other serious mistreatment, is clear enough. It was not essential, for the purposes of avoiding a real risk of serious mistreatment, to make provision for all the matters described as minimum guarantees in the September 2004 report of the UN Special Rapporteur. On the face of it, the basic obligation as to compliance with international human rights obligations, coupled with the provisions for full access by the AIHRC and UK personnel (and for visits by the ICRC and UN human rights institutions), covered the points that are essential for the purposes of the present case; especially when the requirements of access had been spelled out more fully in the EoL, including express provision for interviews in private.

295. Much more problematic is the position of the NDS in relation to the MoU and EoL. Although the commitments in those documents were given on behalf of the Government of Afghanistan and were therefore technically binding on the NDS along with other Afghan agencies, the reality was less clear-cut. It seems that a deliberate decision was taken both at the time of the MoU and at the time of the EoL not to have the NDS as a counterparty. Yet the Minister of Defence who signed the MoU made clear at the time that he had no jurisdiction over the NDS. Although it was stated in late June 2006 that the NDS had given an assurance that it would honour the terms of the MoU with respect to access, and the discussions that took place with the NDS about access appear to have taken place within the framework of the MoU, the problems that then occurred and the statements that were then made run counter to the existence of a firm commitment by the NDS to ensure that the terms of the MoU were observed. It is striking that even in early 2009 Dr Saleh, the head of the NDS, saw value in claiming that the MoU was with the Ministry of Defence, not with the NDS, and that the NDS had no direct obligation under the MoU unless directed by the President. Dr Saleh may have been using this in support of a different agenda of his own, but it was evidently a point which he considered worth deploying.

296. The fact that Dr Saleh was prepared to deploy the point in this way also weakens the suggestion made by Mr Eadie that there are powerful reasons of self-interest why the NDS will honour the terms of the MoU and EoL, lest transfers of detainees otherwise have to cease. In any event we are not seized of the full politics of the situation, both internally within Afghanistan and as between the Government of Afghanistan and the UK and other ISAF states, and we cannot be satisfied that the argument about self-interest is well founded.

297. The very fact that it was thought necessary for Dr Saleh to provide his letter of 25 March 2010, with its confirmation that the NDS would observe all the responsibilities, principles and procedures recorded in the MoU, tends to highlight the uncertainty of the position prior to that. Nor is Dr Saleh's letter a sufficient answer for the future. Its generalised confirmation that the NDS will observe the responsibilities recorded in the MoU provides only limited comfort in itself. On the specific issues of access to, and transfer of, detainees, with which the letter is primarily concerned, everything depends on how things work out on the ground. There was a bad start. The letter stated that Dr Saleh would direct that the position concerning access and transfer

should be followed for all detainees transferred from the UK armed forces. Yet on 17 April 2010 the head of NDS Lashkar Gah not only refused access to the facility but stated that the letter had not been provided to him by Kabul and therefore had no authority. Only in early May was confirmation given that Dr Saleh had sent copies of the letter to Lashkar Gah, with instructions to allow the UK to visit transferred detainees. On the other hand, the very fact that such instructions have now been given can be regarded as a positive development (and a historical contrast may be drawn with the absence of evidence that the written instruction contemplated by the EoL in late 2007 was ever issued by the NDS).

298. Overall, as it seems to us, the written assurances in themselves do not take matters very far. One of the themes of the submissions to us, echoing a sentiment voiced by a UK official in June 2009, was that actions speak louder than words. The critical question is how the arrangements have operated in practice.

299. We therefore turn to consider, first, the issue of access to transferees as provided for by the MoU and EoL. It is an important topic. UK officials have no direct involvement in the interrogation of transferees by the NDS. They are dependent on visits to transferees to monitor their condition and to check in particular that NDS interrogators have not been using torture or other serious mistreatment to extract confessions. The existence of an effective system of monitoring not only provides a check after the event but should also serve to encourage compliant behaviour on the part of the NDS in the first place.

300. The focus must in our view be on access by UK personnel. Access by the AIHRC and the ICRC provides a secondary safeguard but is not an adequate substitute. The AIHRC has itself had some access difficulties, and it seems clear that it has not in practice made regular visits to individual detainees. The value of visits by the ICRC is limited by the obligations of confidentiality to which it is subject.

301. Within the broad topic of access it is necessary to consider a number of aspects, including the threshold question of physical access to facilities, the extent to which it has been possible to locate detainees at those facilities (the tracking problem), and the quality of the visits to individual detainees, in particular whether interviews have taken place in circumstances where detainees can be expected to voice any complaints they may have about their treatment. It is helpful to look at each of the relevant facilities in turn.

302. The position at NDS Kabul (Department 17) has been particularly troubling. Little occurred by way of UK visits before the NDS refused all access to the facility in late 2008. When agreement was reached on the resumption of access in February 2009, but before a visit could be arranged, the UK was informed that the UK transferees at the facility had been moved by the NDS to Pol-i-Charki prison. When the transferees were visited at Pol-i-Charki, several allegations of ill-treatment by the NDS emerged, including allegations of ill-treatment at NDS Kabul during the period when access to that facility had been denied.

303. Further, since the access problems arose in late 2008 there has been little opportunity to assess the position at the facility through monitoring visits. The moratorium imposed in December 2008 on the transfer of further UK-captured detainees to the facility has been kept in place, subject to the exceptional transfer of one detainee in

February 2010; and the only monitoring visits to have taken place have been recent visits to that one individual.

304. UK experience of the position at NDS Kandahar has also been limited. As in the case of NDS Kabul, relatively few UK-captured detainees have been transferred there; and further UK transfers to the facility were suspended in June 2009 as a result of the allegations made by one of the detainees visited at Pol-i-Charki. On the other hand, there appears to have been no difficulty in visiting transferees while there remained transferees to be visited at the facility. Some reliance can also be placed on the fact that, despite the sensitivities and political scrutiny arising out of the earlier allegations of ill-treatment of Canadian transferees at Kandahar, Canada assessed it safe to resume its own transfers to the facility and has evidently remained satisfied that they can properly continue.

305. At Lashkar Gah there have been no serious difficulties until recently in gaining access, though a number of visits have had to be cancelled over the years for security reasons. There has been a recent hiccup, but it has been resolved and visits have been resumed. It does not seem to us that any great significance should be attached to the hiccup; we see no reason to reject the assessment that the refusal of access was due to capacity problems at the facility. Tracking difficulties have not had a serious impact at Lashkar Gah. The evidence is that it is a small facility, the relationship with the Afghan personnel in charge is good, and UK transferees there have been readily identified.

306. The character of visits conducted at Lashkar Gah, however, falls well short of best practice. Visits have not involved clearly private interviews with detainees. NDS guards have been present, if only in the background. This situation is to some extent understandable, given the security constraints and the need to provide protection for the visiting party; but it creates a problem for the effectiveness of visits. Although it is said that detainees do not appear intimidated by the presence of guards, they are bound to be inhibited in making complaints of ill-treatment in these circumstances. The fear of reprisals against those known to have made complaints must be a significant consideration.

307. It is not easy to evaluate recent developments concerning the quality of visits at Lashkar Gah. At the time of the hearing before us we were told that because of capacity and security constraints it had been possible to see detainees only in groups, on some occasions in communal areas and on other occasions through the hatch in their cell door, with the guards remaining out of earshot. The most up-to-date position, as described in the post-hearing evidence, is that on two recent visits a number of detainees were seen briefly in the office of the NDS deputy and two others were seen in an empty corridor out of sight and earshot of any NDS officials. There cannot yet be said to be a settled practice of private interviews, even though that is said to be the aim.

308. The importance of private visits is underlined by the fact that the allegations by UK transferees of ill-treatment at NDS facilities were all made when the individuals in question were visited away from the NDS, at prisons under the control of the Ministry of Justice; and in some cases those making the allegations had previously been visited while at an NDS facility but had said nothing at that time about alleged ill-treatment. Whilst consideration needs to be given to the possibility of subsequent fabrication, we

think it likely that the different circumstances of the later interviews played a significant part in eliciting complaints that had not previously been made.

309. As to the allegations themselves, we take the view that no definite conclusions can be reached by us as to their credibility. That view is based on a number of considerations:

i) The allegations have been investigated conscientiously by UK officials, but such investigations have been subject to inevitable limitations. The lapse of time between the alleged ill-treatment and the making of the complaint makes it less likely that any corroborative physical marks would be found. In any event, by no means all the ill-treatment alleged – including electric shock treatment – would necessarily leave physical marks. Moreover those carrying out the investigations, including medically qualified personnel, have lacked full expertise in the examination of alleged torture victims. Just as importantly, whilst it has been possible to obtain some relevant evidence from persons other than the detainee himself (for example, from the UK escort in the case of prisoner E), it has not been possible to question NDS staff or pursue wider inquiries within the NDS facility.

ii) The investigations carried out by the NDS have been clearly inadequate, in so far as one can judge them from the NDS's reports of the outcome of such investigations. In particular, we accept Mr Fordham's criticisms of the recent written report.

iii) Whilst we can look at the available material and consider, for example, the extent to which the allegations made are supported or contradicted by the medical or other evidence, and the extent of internal inconsistencies in the statements made, we do not even have the benefit of any first-hand impression of the complainants to aid us in determining credibility.

iv) Some of the abusive techniques alleged by the complainants strike a chord with repeated concerns expressed in the independent reports and with at least one highly credible allegation in the Canadian material (the November 2007 incident where the instruments allegedly used were found in the interview room). Neither collusion nor widespread coincidental fabrication of accounts seems to be a likely explanation.

310. The Secretary of State has sensibly accepted that some of the allegations may be credible. In so far as other allegations have been dismissed as lacking in credibility, we do not think that such a firm conclusion can properly be reached. Although we make no positive findings that the alleged abuse has occurred, we consider that the only safe way to proceed in the particular circumstances is on the assumption that the allegations are true.

311. Nor can ill-treatment of UK transferees be said with confidence to have occurred only in those isolated instances. The deficiencies in the monitoring system preclude such a categorical approach. The possibility of other cases of abuse, which the monitoring system has failed to identify, cannot be dismissed.

312. It follows that the system of specific safeguards for UK transferees cannot be taken to have insulated such transferees altogether from the risk of ill-treatment evidenced by the independent reports to which we have referred above. We should, however, make clear that we do not accept Mr Fordham's submission that no distinction at all can be drawn in terms of risk between UK transferees and other detainees since the NDS's own system of record-keeping does not distinguish between them. We think it inherently probable that when a detainee is interrogated by the NDS it will be known whether he is a UK transferee or not. The circumstances of an individual's capture will be highly relevant to any questioning, and in the case of UK transferees the hand-over documents will include any relevant evidence. Further, the smaller the facility, the more likely it is that staff will know in any event whether an individual detainee was transferred there by the UK or by another ISAF state.

313. Whilst our concerns will be apparent from the terms of this judgment, we think it unnecessary to rule on the historical issue of whether there was a real risk of torture or serious mistreatment at the time when transfers began or at various intermediate dates thereafter (such as November 2007, one of the dates on which Mr Fordham placed weight, or the date in 2008 when the claim form was issued). The picture has been an evolving one as the case has proceeded; we have been presented with detailed evidence of the up-to-date position; and the question of real importance, on which we think it right to focus our attention, is whether the current practice of transfers is or is not lawful, that is to say whether transfers are being made or are liable to be made in circumstances where there is a real risk that transferees will be subjected to torture or serious mistreatment at the hands of the NDS.

314. We agree with Mr Eadie's submission that for this purpose it is appropriate to look at the position of each NDS facility separately. We recognise that they are not entirely isolated units, in that the NDS can in principle transfer detainees and staff between them. In practice, however, transfers of detainees between facilities are limited by security constraints which mean that transfers cannot generally take place without the active assistance of ISAF forces; and although there is some evidence of movement of NDS staff between facilities (including evidence of a visit by personnel from Department 17 to Lashkar Gah), there is nothing to show that staff transfers have taken place on a substantial scale. We also accept that under its current approach to record-keeping and monitoring the UK would be likely to discover relatively quickly if a relevant detainee had been subject to an internal transfer by the NDS.

315. As to NDS Kabul, the moratorium on UK transfers is still in place. In our view that is as it should be. Department 17 is at the heart of the concerns about the NDS's use of abusive techniques in the interrogation of detainees. The general evidence in the independent reports has to be taken with the specific allegations made by prisoners A to D and the refusal of access during the period to which some of those allegations related. There is nothing to show that the sacking of the head of the facility "due to his harsh behaviour", as the NDS's own report put it, has resulted in a fundamental change of attitudes or procedures at the facility. Since the specific allegations emerged there has been little by way of monitoring visits that would enable the UK to acquire reliable first-hand experience of the facility. We are far from satisfied as to the sufficiency of safeguards for UK transferees. On the available evidence there is, in our judgment, a real risk that UK transferees will be subjected to torture or other serious mistreatment at NDS Kabul.

316. There has of course been a recent exception to the moratorium, with the transfer of one UK-captured detainee in January 2010. Whatever the strength of the policy considerations in favour of exceptions, we do not think that any such exceptions can properly be made without clearly evidenced improvements at Department 17.

317. The position in relation to NDS Kandahar and NDS Lashkar Gah is more finely balanced.

318. As to NDS Kandahar, the UK has adopted a precautionary approach in imposing a moratorium on further transfers in mid-2009 and in not resuming transfers since the formal lifting of the moratorium in February 2010. There is good reason for caution. It is true that there has been little by way of specific allegations of ill-treatment of UK transferees at Kandahar, but the facility is not free from the taint of the background evidence concerning the NDS, and the Canadian material presents a troubling picture historically. Moreover, there have been no recent monitoring visits by UK personnel that would give them up-to-date familiarity with the facility and its staff. On the other hand, Canada has formed the judgment, based on extensive up-to-date experience of its own, that transfers can safely be made. That is not a complete substitute for first-hand experience by UK personnel, but we have already indicated our acceptance that some reliance can be placed on it.

319. It is also necessary to factor in the improvements over time in the UK's own approach to monitoring, with its enhanced awareness of the importance of private visits and the establishment of a dedicated Detainee Oversight Team, which would be responsible for monitoring in the event that UK transfers to NDS Kandahar were resumed.

320. We have concluded, after some hesitation, that UK-captured detainees could now be transferred to NDS Kandahar without a real risk of their being subjected to torture or serious mistreatment at the hands of the NDS, *provided that* the existing safeguards are strengthened by observance of the following conditions: (i) all transfers must be made on the express basis (spelling out the requirements of the MoU and EoL) that the UK monitoring team is to be given access to each transferee on a regular basis, with the opportunity for a private interview on each occasion; (ii) each transferee must in practice be visited and interviewed in private on a regular basis; and (iii) the UK must consider the immediate suspension of further transfers if full access is denied at any point without an obviously good reason (we have in mind circumstances such as a security alert) or if a transferee makes allegations of torture or serious mistreatment by NDS staff which cannot reasonably and rapidly be dismissed as unfounded. We have expressed the third condition in terms of an obligation to consider immediate suspension of transfers rather than an automatic requirement to suspend transfers, because in relation to a matter as important as suspension it would be wrong to preclude an exercise of judgment based on the particular circumstances that have arisen; but the decision should in our view be conditioned by the same precautionary approach as led to the moratorium on transfers to NDS Kandahar in mid-2009.

321. We turn finally to NDS Lashkar Gah, which in practical terms is by far the most important of the facilities to which transfers are made. We note that there have been allegations by UK transferees of mistreatment there, but nothing more recent than 2007, though the deficiencies in monitoring mean that the possibility of later abuses cannot be discounted. The allegations made recently to the Afghan judge are a matter

of obvious concern, but the judge made clear that they did not relate to UK transferees and that he had no concerns about the treatment of detainees transferred by ISAF states. Even though we have criticised the lack of interviews in private, it is fair to say that monitoring visits have on the whole been regular and have given UK personnel extensive knowledge of the facility and its staff, to which must be added the contacts and knowledge derived from the work done in the field of training and capacity building. We think it right to place some weight on the assessments made by UK personnel in the light of that experience. Some uncertainty arises, however, from the recent departure of the head of the facility.

322. The conclusion to which we have come, again with a degree of hesitation, is that UK transfers to NDS Lashkar Gah can continue without real risk to transferees *provided that* the conditions we have set out in relation to NDS Kandahar are observed here too.

323. We have reached our conclusions in relation to NDS Kandahar and NDS Lashkar Gah with hesitation because, on the evidence taken as a whole, there is plainly a *possibility* of torture or serious mistreatment of UK transferees at those facilities. In our judgment, however, the operation of the monitoring system (reinforced by observance of the conditions we have set out), within the framework of the MoU and EoL, is sufficient to guard against the occurrence of abuse at those facilities on such a scale as to give rise to a *real risk* of torture or serious mistreatment in accordance with the principles considered earlier in this judgment. Isolated examples of abuse may occur, but we are not satisfied that a consistent pattern of abuse is reasonably likely, such as to expose all UK transferees to a real risk of ill-treatment.

324. We repeat that in reaching our conclusions we have taken into account the possibility of onward transfer of a detainee from NDS Kandahar or NDS Lashkar Gah to NDS Kabul, where we are not satisfied that the system provides sufficient safeguards for the protection of UK transferees. The practical limitations on onward transfer to NDS Kabul mean that the possibility is insufficiently large to give rise to a real risk of torture or serious mistreatment. We would have preferred to see the imposition of a condition that detainees transferred by the UK to NDS Kandahar or NDS Lashkar Gah are not to be transferred on to NDS Kabul, but we doubt whether such a condition would be realistic and we do not think that its absence should preclude transfers to NDS Kandahar or NDS Lashkar Gah.

325. On the basis indicated above, we conclude on the existing evidence that UK transfers to NDS Kandahar and NDS Lashkar Gah can proceed without breach of the Secretary of State's policy but that it would be a breach of that policy and therefore unlawful for UK transfers to be made to NDS Kabul.

326. The conclusion we have reached in this open judgment is in our view consistent with the contents of the closed judgment.

327. We are inclined to the view that, in the light of the above, there should be no order on the claimant's application for judicial review (save as regards any consequential matters), but we will consider submissions from all concerned before reaching a decision on the proper disposal of the application. Such submissions should in the first instance be in writing. We will consider in the light of the written submissions whether a further oral hearing is necessary.