

MINISTRY OF
FOREIGN AFFAIRS & TRADE

C108

18 August 2010

Minister of Foreign Affairs

For action by 19 August 2010

**AFGHANISTAN/DETAINEES: UK HIGH COURT JUDGMENT AND
POSSIBLE IMPLICATIONS FOR NEW ZEALAND**

Submission: Issues

Purpose: We report on the UK High Court judgment on UK detainees in Afghanistan transferred to Afghan detention facilities; UK concerns about the National Directorate of Security (NDS) detention facility in Kabul; and the possible implications for New Zealand.

NOTE

Comments: None.

Recommended Referrals

Prime Minister	For information by 19 August 2010
▶ Minister of Defence	For information by 19 August 2010

Contacts

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Minister's Office Comments

*See my note on para 4.
This requires a detailed legal opinion from a senior level lawyer (s) from Solicitor General's office.*

Signed / Referred
Date: 23/8/10

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Key Points

- Following a recent UK High Court judgment on UK detainee transfer policies in Afghanistan, we have followed up with UK officials in London and Kabul to seek detailed information on their concerns regarding the Afghan National Directorate of Security (NDS), and options for going forward.
- **PSR(R)1**, while there are ongoing challenges in seeking to improve the NDS' practices, there have been some encouraging developments, including the development of a database for tracking detainees, and the appointments of a new Chief of the NDS and new Head of Department 17 (the NDS' investigative body in Kabul). ✓
- The NZDF has not detained any individuals on operations and therefore has no detainees to monitor in Afghan detention facilities.
- The extent of our political and legal options in cases where Afghan authorities have apprehended Afghan prisoners is to seek information about their cases and convey to the Afghan Government our expectation that these persons will be treated in accordance with international and Afghan law.
- Dr Mapp will be raising this issue with his Afghan and international counterparts during his visit to Afghanistan this week, and Defence have been instructed to prepare a detailed review within one month. In addition, we recommend that the New Zealand Embassy in Kabul attend, where possible, the regular meetings with ISAF countries on detainees policy development; that New Zealand seek NATO/ISAF views on the NDS detention facility in Kabul; and that we stay in close touch with **PSR(R)1**. ✓

Recommendations

It is recommended that you:

- 1 Note the following report on the UK High Court judgment in respect of a judicial review challenge to UK detainee transfer policies in Afghanistan; **PSR(R)1** Yes / No
- 2 Agree that the New Zealand Embassy in Kabul should attend the regular meetings with ISAF countries on detainees policy development; New Zealand should seek NATO/ISAF HQ views on the NDS detention facility in Kabul; and that New Zealand should stay in close touch with **PSR(R)1** as **PSR(R)1** thinking on this issue develops. Yes / No ✓

PSR(IC)3

Deputy Secretary, Multilateral and Legal Affairs
Group

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Report

UK High Court judgment

On 25 June 2010 the High Court of England and Wales issued a judgment¹ in respect of a judicial review challenge to UK detainee transfer policies, filed in December 2008. The judgment relates to persons detained directly by UK forces, who UK forces then transfer to Afghan authorities. The Court underlined the obligation to monitor the welfare of persons transferred in those circumstances.

2 The judgment sets out disturbing evidence and allegations of widespread and serious mistreatment of prisoners held in Afghan detention facilities – including the Afghanistan Independent Human Rights Commission's (AIHRC) 2009 report on "Causes of torture in law enforcement institutions"; UN reports between 2004 and 2009 raising concerns about torture and other inhumane treatment by the Afghan National Directorate of Security (NDS), the lack of a public legal framework for the NDS and limited access to NDS facilities; and NGO concerns. It also sets out the details of UK monitoring of Afghan facilities which has been principally conducted by UK Embassy officials.

3 The judgment does not seek to prevent the UK forces from handing detainees over to the Afghan authorities as a general proposition. But it does confirm that a moratorium placed by UK forces in early 2009 on transferring detainees to the NDS facility in Kabul should remain in place.

New Zealand interest

4 There has been media and political interest in New Zealand over the past few days on the UK High Court ruling and the implications for New Zealand – particularly regarding the NZSAS operating in Kabul mentoring and training the Afghan Crisis Response Unit (CRU). NZSAS members have not themselves detained anyone, but there have been occasions during which the NZSAS were "in the vicinity" when the Afghan CRU apprehended Afghan prisoners. While New Zealand's legal obligations on detainees are clear – i.e. they only extend to individuals detained by New Zealand forces (as is the fact that New Zealand personnel have not detained anyone to date) and the New Zealand Government has received written assurances from the Afghan Government regarding detainees, the UK judgment has generated questions about New Zealand's approach to the treatment of Afghan nationals arrested by Afghan authorities and transferred to the NDS facility in Kabul.

I do not agree with this. This is a develop. area and is not "clear"

NDS facilities and UK moratorium

5 To help assess the possible implications for New Zealand, we have followed up **PSR(R)1**

i. We have sought detailed information on **PSR(R)1** concerns about the NDS facility in Kabul and options for going forward. Defence Minister Dr Mapp will also be raising this issue with his Afghan and international counterparts during his visit to

¹ *R (on application of Maya Evans) v Secretary of State for Defence* [2010] EWHC 1445 (Admin)

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Afghanistan this week, and Defence have been instructed to prepare a detailed review within one month.

6 PSR(R)1

7 The judgment had found that it was not unlawful for UK forces to continue transferring detainees to NDS facilities in other provinces in which the UK is operating, such as in Helmand and Kandahar. The NDS facility in Lashkar Gar in Helmand remains the one to which the majority of British detainees are transferred.² The High Court has expressed some reservations about transfers to the NDS in Kandahar, however, on the basis of allegations on detainee abuses received by the Canadians.

8 PSR(R)1

9 It is only for transfers to the NDS in Kabul and primarily Department 17 on which the UK has an ongoing moratorium, in place since early 2009. PSR(R)1

10 The concerns over access to detainees had been addressed by February 2009, by which time the relevant UK detainees had been transferred to Pol-i-Charki prison in Kabul (where convicted prisoners are held and some detainees are transferred by the NDS pre-trial). There has been one exception to the moratorium, with the transfer of one "high-value" UK detainee to NDS in January this year. While the High Court had commented less than positively on this exception, PSR(R)1

² Of the 410 persons detained by UK forces and transferred to the NDS between July 2006 and March 2010, 357 went to Lashkar Gah, 34 to Kandahar and 19 to Kabul.

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PSR(R)1

The High Court judgment had subsequently held that the moratorium must not be lifted at this time.

Next steps – NDS progress and challenges

11 PSR(R)1

The High Court was not specific about conditions that it would want to see introduced before the moratorium could be lifted. Nor did the Court expressly require the UK Government to report back to it on the conditions it was specifying for the moratorium to be lifted. PSR(R)1

12 PSR(R)1

13 PSR(R)1

14 PSR(R)1

(The lack of an adequate system for tracking detainees had been one of the issues raised by the High Court.)

15 PSR(R)1

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PSR(R)1

16 PSR(R)1

17 PSR(R)1

18 PSR(R)1

19 PSR(R)1

PSR(R)1

20 PSR(R)1

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PSR(R)1

21 PSR(R)1

22 PSR(R)1

New Zealand practice and obligations

23 In terms of possible implications for New Zealand, PSR(R)1

24 PSR(R)1 a number of countries continue to transfer detainees to Department 17. Many of these countries are working with the NDS to facilitate efforts to upgrade systems and practices in the Department. There are regular meetings among ISAF countries involved in transferring detainees in Kabul to coordinate this assistance programme and to share concerns and safeguards. PSR(R)1

25 On 12 August 2009 an Arrangement came into effect between the Afghan Foreign Ministry and the New Zealand Defence Force concerning the transfer of persons between the NZDF and the Afghan Authorities ("ATD"). The NZDF also complies with ISAF's Directive on Detention Operations and Notification (of 13 April 2010), which requires the NZDF to report to ISAF the detention and transfer of individuals by Afghan National Security Forces or

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partnered forces. ISAF HQ maintains liaison with and monitoring of Afghan facilities.

26 The concept of operations is that the Afghan authorities will arrest and detain persons of interest subsequent to an arrest warrant issued by the Afghan Attorney General. Only in exceptional circumstances is detention by NZDF personnel contemplated. The NZDF has not detained any individuals on operations, and therefore has no detainees to monitor in Afghan detention facilities. The New Zealand Government has, however, reserved the right to have access to and monitor any detainee it does transfer to Afghan authorities.

27 There is an important distinction between detainee (defined as people arrested by foreign forces) issues and cases where Afghan authorities have apprehended Afghan nationals. We need to avoid the impression that New Zealand is assuming legal responsibility for these persons for two reasons: (i) New Zealand does not have any legal obligation with respect to Afghan nationals arrested by Afghan authorities; and (ii) New Zealand has no ability to "ensure" their appropriate treatment. We have not received any assurances to cover this situation from Afghanistan.

28 In particular, New Zealand does not have the legal right to require specific death penalty assurances in cases where Afghan authorities have arrested Afghan nationals; and if we sought them, Afghanistan would be under no obligation to give them, and would be unlikely to do so for political/sovereignty reasons.

29 There would be further risks to seeking formal assurances for such cases. **PSR(R)1**

The arrest by Afghan forces is the best scenario for mitigating detainee issues and is preferred **PSR(R)1**. There may also be some risk to the existing assurances New Zealand has received on the transfer of detainees, particularly given the sensitivities in Afghanistan politics on assurances to foreign states (especially regarding the death penalty). Maintaining the viability of the Arrangement on detainees is essential for the continued deployment of the NZSAS.

Next steps for New Zealand

30 There may be a perception that New Zealand has a moral/political obligation with respect to Afghan nationals arrested by Afghan authorities – for example when the NZSAS have supported the Afghan CRU on operations. The extent of our political and legal options available to New Zealand in such cases is to seek information about their cases and convey to the Afghan Government our expectation that these persons will be treated in accordance with international and Afghan law.

31 Dr Mapp's visit to Afghanistan this week – during which he is scheduled to meet **PSR(R)1**

Afghan and international actors – will provide further opportunity to obtain information on this issue. As noted above, Defence is also preparing a detailed review.

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32 In addition, we recommend that the New Zealand Embassy in Kabul attend, where possible, the regular meetings with ISAF countries on detainees policy development.

33 We also recommend taking up the offer **PSR(R)1** to remain in close touch as thinking on this issue develops.

34 We suggest it would also be useful to follow up with ISAF Headquarters in Kabul to seek NATO/ISAF HQ's views on the NDS facility in Kabul. **PSR(R)1**

It would be helpful to clarify ISAF's position on the NDS facility.

Implications for New Zealand: summary

35 The UK High Court judgment is a reminder that the actions of UK (and therefore New Zealand and other) forces in Afghanistan are potentially subject to judicial review in domestic courts. In the course of such a review, the court is liable to consider a range of information from different sources (including the UN and 'civil society'), some of which may be troubling and difficult. New Zealand forces and agencies must be mindful of the possibility of such review, and conduct themselves on the basis that their practices and decisions are potentially subject to legal challenge.

36 To date, the scope for New Zealand actions to be challenged successfully is very limited given (a) no New Zealand transferred detainees and (b) the existence of an explicit detainee transfer arrangement with the Afghan Government. The risk of challenge can be minimised (but not eliminated) by – so far as possible – continuing to ensure that Afghan authorities are responsible for arrests/detentions, rather than New Zealand forces. The risk of challenge can further be managed by complying with the best practice of partners (e.g. through liaison with ISAF HQ), by learning from their experiences (including the UK), and ensuring full adherence to our detainee transfer arrangement.

Consultation with external agencies (if required)

The New Zealand Defence Force has been consulted on the contents of this submission.

