



## **Cases Involving Diplomatic Assurances against Torture Developments since May 2005**

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## Introduction

Human Rights Watch has observed since 2003 the growing use of diplomatic assurances against torture and other ill-treatment as a means of returning terrorism suspects to countries where they face the risk of such abuse.<sup>1</sup> This document sets out developments in the use of diplomatic assurances in select individual cases since the publication of our April 2005 report “Still at Risk: Diplomatic Assurances No Safeguard Against Torture.”<sup>2</sup>

## Austria

### Mohamed Bilasi-Ashri (Update)<sup>3</sup>

In 2005 the Austrian government renewed its efforts to extradite Egyptian national Mohamed Bilasi-Ashri, wanted in his home country, using diplomatic assurances.

The Court of Appeal in Vienna first ordered Bilasi-Ashri’s extradition to Egypt in November 2001. Bilasi-Ashri had previously been sentenced in absentia in Egypt to 15 years of hard labor for alleged involvement in an Islamist extremist group. The court considered Bilasi-Ashri’s claim that he would be at risk of torture or ill-treatment and would not be given a fair trial upon return, but concluded that “Egypt was not a country where serious large scale violations of human rights could be considered an institutionalised everyday practice ... [t]hus there was no general

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<sup>1</sup> See Human Rights Watch, “*Diplomatic Assurances*” against Torture: Questions and Answers, November 10, 2006, <http://hrw.org/backgrounder/eca/ecaqna1106/>; *Still at Risk: Diplomatic Assurances No Safeguard against Torture*, vol. 17, no. 4(D), April 15, 2005, <http://hrw.org/reports/2005/eca0405/>; and “*Empty Promises: Diplomatic Assurances No Safeguard against Torture*,” vol. 16, no. 4(D), April 15, 2004, <http://hrw.org/reports/2004/uno404/>.

<sup>2</sup> Human Rights Watch is grateful to the Toronto Human Rights Watch Young Advocates for their work compiling information for these case updates, in particular Jennifer Egsgard, chairperson of the Young Advocates, and Janina Fogels, Nur Muhammed-Ally, Catherine Fraser, Teja Rachmalla, Rahat Godil, and Rita Samson.

<sup>3</sup> Human Rights Watch, “*Empty Promises*,” pp. 23-33. See also Human Rights Watch, *Commentary on State Replies: CDDH Questionnaire on Diplomatic Assurances*, March 27, 2006, [http://hrw.org/backgrounder/eca/eu0306/eu0306\\_diplo.pdf](http://hrw.org/backgrounder/eca/eu0306/eu0306_diplo.pdf), pp. 2-3.

obstacle to extradition.”<sup>4</sup> The Court of Appeal dismissed evidence that members of Islamist groups in Egypt are frequently subjected to torture and ill-treatment, including electric shocks, beatings, burning, and various forms of psychological abuse. The court also determined that Bilasi-Ashri’s pending asylum application did not preclude his extradition.

Despite the surprising finding that Bilasi-Ashri’s fear of torture was unfounded, the Court of Appeal in its 2001 ruling conditioned his extradition upon receiving diplomatic assurances from the Egyptian authorities that Bilasi-Ashri’s conviction in absentia would be declared null and void, that he would be retried before an ordinary (civilian) criminal court, and that he would not be persecuted or suffer restrictions upon his personal freedom. On November 12, 2001, the Austrian federal minister of justice approved the extradition, subject to the conditions set forth in the Court of Appeal decision, and added a condition that Bilasi-Ashri be permitted to leave Egyptian territory within 45 days in the event of acquittal. The Egyptian authorities subsequently rejected the conditions laid out in the extradition order, and so Bilasi-Ashri was released from detention in Austria in August 2002.

In early 2005 the Austrian authorities approached the Egyptian government again, reiterating their request for diplomatic assurances in a renewed effort to extradite Bilasi-Ashri. The Egyptian government agreed a set of diplomatic assurances in February 2005, and extradition proceedings commenced in May. In June the Krems Regional Court declared Bilasi-Ashri’s extradition permissible.<sup>5</sup> The European Court of Human Rights (ECtHR) on November 17, 2005, communicated an order for interim measures to the Austrian authorities on the application of Bilasi-Ashri’s lawyers, requesting that the government not extradite Bilasi-Ashri until the ECtHR reviewed his application.<sup>6</sup> The application argues possible violations of articles 3 (prohibition of torture and ill-treatment), 5 (right to liberty and security of person), and 6 (right to

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<sup>4</sup> European Court of Human Rights, *Bilasi-Ashri v. Austria*, (App. 3314/02), 26 November 2002, section A.5. Descriptions of the Austrian court decision are taken from this subsequent European Court of Human Rights decision.

<sup>5</sup> Amnesty International Urgent Action, *Austria: Risk of Forcible Return/Torture: Muhammad ‘Abd al-Rahmin Bilasi-Ashri*, October 7, 2005, <http://web.amnesty.org/library/index/engEUR130012005> (accessed January 1, 2007).

<sup>6</sup> European Court of Human Rights, First Section Annual Activity Report 2005, *Bilasi-Ashri v. Austria*, (App. 40902/05), January 2006, <http://www.echr.coe.int/NR/rdonlyres/82DE0139-9EDC-44A4-A53B-BD7CFB7C683A/o/Section1.pdf> (accessed January 1, 2007), p. 18.

a fair trial) of the European Convention on Human Rights if Bilasi-Ashri is returned to Egypt. As of January 1, 2007, the human rights court had yet to consider the application.

## Canada

### Lai Cheong Sing (Update)<sup>7</sup>

Assurances against torture from the government of China have been a prominent feature of efforts by the Canadian government to extradite Lai Cheong Sing, wanted on bribery and smuggling charges in China, and his family. The case illustrates the danger that the use of diplomatic assurances in terrorism or national security cases poses to a broader pool of people subject to forced return.

Lai, his wife Tsang Ming Na, and their three children were excluded from refugee status in Canada in June 2002 on the ground that there were reasons to believe that Lai had committed serious non-political offenses, namely bribery and smuggling, in Hong Kong and China prior to arrival in Canada in 1999. In its ruling, the court overlooked substantial evidence that torture was pervasive in the Chinese criminal justice system and that persons interrogated in China regarding the Lai family's activities had been ill-treated and coerced into giving false information. The panel that made the decision to exclude the Lai family from consideration for full refugee status did so based in part on assurances from the Chinese authorities that if returned, they would not face the death penalty or torture.<sup>8</sup>

A key issue of concern in the Lai case was whether assurances against torture should be assessed separately and in a different manner than assurances against the death penalty. The Canadian Supreme Court had already answered that question in the *Suresh v. Canada* case, stating that death penalty assurances relating to the legal processes of prosecution, conviction, and sentencing are easier to monitor than assurances against torture, which is illegal, and often conducted with the collusion

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<sup>7</sup> Human Rights Watch, *Still at Risk*, pp. 55-57.

<sup>8</sup> *Ibid.*, p. 55.

of the government or as a result of government impotence at stopping the forces that commit such abuse.<sup>9</sup> In February 2004 a Canadian federal court dismissed the family's application for judicial review of their refugee status determination. Concluding that there was no persuasive evidence of torture or degrading treatment following return in cases similar to theirs, the court decided that a separate assessment of the assurances against torture was not justified. The Court of Appeal upheld the lower court decision in an April 2005 decision, paving the way for the family's transfer to China.

Lai Cheong Sing submitted an application to the minister of citizenship and immigration for a pre-removal risk assessment (PRRA) in November 2005. The application was denied by the PRRA officer on the basis that Lai was not a person in need of protection and was unlikely to face a risk to life, a risk of torture, or a risk of cruel and unusual treatment or punishment if returned to China. Lai has sought a review of that decision in federal court. Pending review of the decision, however, he sought and was granted a federal court order on June 1, 2006, staying the execution of an enforceable removal order. In determining whether Lai identified a serious issue related to the minister's risk assessment that gave rise to a presumption of "irreparable harm" if Lai were to be deported ("irreparable harm" meaning a serious threat to life or safety), the court found that there was credible evidence of such harm:

The issue of the assurances lies at the heart of the debate. Absent the assurances, the records disclose credible evidence that a serious likelihood of jeopardy to life or safety exists. Removal at this time would cause Mr. Lai to face the risk that he alleges is present and that he argues has not been adequately assessed by the PRRA officer. I consider that irreparable harm has been established.<sup>10</sup>

The Lai appeal on the PRRA determination is scheduled to begin in January 2007.

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<sup>9</sup> Supreme Court of Canada, *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1, (docket no. 27790), January 11, 2002, <http://scc.lexum.umontreal.ca/en/2002/2002scc1/2002scc1.html> (accessed January 1, 2007), para. 124.

<sup>10</sup> Federal Court of Canada, *Lai Cheong Sing v. Minister of Citizenship and Immigration*, 2006 FC 672, June 1, 2006, <http://decisions.fct-cf.gc.ca/en/2006/2006fc672/2006fc672.html> (accessed January 1, 2007), para. 27.

## Security Certificate Cases (Update)<sup>11</sup>

The government of Canada is currently holding three Arab men—Hassan Almrei (a Syrian national), Mohammad Zeki Mahjoub (an Egyptian national), and Mahmoud Jaballah (also Egyptian)—in detention without charge or trial under “security certificates” based on secret evidence. The security certificate regime permits the government to detain any person certified as a suspected threat to the security of Canada for an unspecified period without charge or trial; present secret evidence in closed hearings to which detainees and their lawyers do not have access; and ultimately to deport the certified person.<sup>12</sup>

Two other men subject to deportation based on security certificates have been released on bail after being detained for several years. Mohamed Harkat, an Algerian citizen, who had been in jail since December 2002, was granted bail on May 23, 2006. Adil Charkaoui, a Moroccan national, who had been detained in May 2003, was released on bail on February 17, 2005. The five men are sometimes referred to collectively as the “secret trial five.”

Prior to deportation, Canadian immigration authorities normally conduct a protection assessment to determine whether it is more likely than not that an individual would be at risk of torture upon return.<sup>13</sup> However, if a security certificate is deemed “reasonable” by a judge it significantly reduces the likelihood of a successful claim for protection against deportation based on such a risk. In the 2002 case of *Suresh v. Canada*, the Supreme Court of Canada acknowledged that international law bans absolutely returns to countries where there are substantial grounds for believing the individual would be in danger of being subjected to torture, but in an extraordinary

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<sup>11</sup> Human Rights Watch, *Still at Risk*, pp. 47-55.

<sup>12</sup> Immigration and Refugee Protection Act 2001 (IRPA), Division 9 (sections 76-87), <http://laws.justice.gc.ca/en/l-2.5/text.html> (accessed January 1, 2007). The law does not expressly provide for the indefinite detention of foreign nationals suspected of posing a national security threat to Canada. The law permits the government to detain with the intention of deporting a suspect. A judge can release a suspect if a deportation cannot be effected within a reasonable time, provided that the person does not pose a danger to national security. If a judge determines that a person would pose a threat to national security and deportation cannot be effected, then indefinite detention is a possibility because of a loophole in the law.

<sup>13</sup> The standard in Canada is whether a person would “more likely than not” be at risk of torture if returned to his or her home country. The international standard articulated in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture) is whether there are substantial grounds for believing an individual would be in danger of torture. The United States also uses the “more likely than not” standard.

departure from well established international standards, stated, “We do not exclude the possibility that in exceptional circumstances, deportation to face torture might be justified.”<sup>14</sup> The so-called “*Suresh* exception” would thus permit a transfer to a place where a person would be at risk of torture, a clear violation of Canada’s obligations under international law. To date, Canada has yet to invoke the *Suresh* exception to remove a person acknowledged to be at risk of torture.

The government of Canada sought diplomatic assurances against torture and ill-treatment from the government of Morocco in the Charkaoui case, the government of Egypt in the Mahjoub case, and the government of Algeria in the Harkat case. The government has acknowledged that such assurances are not reliable,<sup>15</sup> but contends that the men may be deported in any event within the context of the *Suresh* exception. The government has also argued that the *Suresh* exception may apply to Jaballah and Almrei.

In January 2006 the Supreme Court of Canada gave leave to three of the men—Adil Charkaoui, Hassan Almrei, and Mohammad Harkat—to challenge the constitutionality of the statutory scheme that allows people to be detained in Canada under security certificates. The appeal was heard in June 2006 and a decision on the constitutionality of the security certificate regime is expected in early 2007.<sup>16</sup> None of the men will be removed from Canada until the Supreme Court rules in the case.

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<sup>14</sup> *Manickavasagam Suresh v. Minister of Citizenship and Immigration and the Attorney General of Canada (Suresh v. Canada)*, 2002, SCC 1. File No. 27790, January 11, 2002, [http://www.lexum.umontreal.ca/csc-scc/en/pub/2002/vol1/html/2002scr1\\_0003.html](http://www.lexum.umontreal.ca/csc-scc/en/pub/2002/vol1/html/2002scr1_0003.html) (accessed January 1, 2007), para. 78. See also Human Rights Watch, “*Empty Promises*,” pp. 18-19.

<sup>15</sup> See, for example, Human Rights Watch, *Still at Risk*, p. 54 (Minister’s delegate admits that Mahjoub presented credible evidence that called into question the extent to which Egypt would honor its assurances).

<sup>16</sup> Human Rights Watch and the University Of Toronto Faculty Of Law International Human Rights Clinic were granted leave to intervene in the Supreme Court appeal. Supreme Court of Canada, *Charkaoui et al. v. Minister of Citizenship and Immigration*, file no. 30762, May 25, 2006, on file with Human Rights Watch.



## **Mohammad Zeki Mahjoub: Torture Risk Assessment (Update)<sup>17</sup>**

A Canadian federal court ruled on December 14, 2006, that a January 2006 decision by the minister of immigration and citizenship (represented in such proceedings by “the minister’s delegate” who authors the decision on behalf of the minister) to deport Mohammad Zeki Mahjoub was “patently unreasonable.” The court’s reasoning serves as a scathing critique of the methodology that the Canadian government has employed in the security certificate cases to justify returns to risk of torture and the use of diplomatic assurances.<sup>18</sup>

Mahjoub, in detention under a security certificate since June 2000, is a recognized refugee in Canada. He is alleged to be a member of the Vanguard of Conquest, a faction of al-Jihad al-Islamiya, an Egyptian armed Islamist group.

The December 2006 judgment concluded that the minister’s delegate “consistently ignored critical evidence, failed to take important factors into consideration and arbitrarily relied on selected evidence. This flawed approach can be considered nothing short of patently unreasonable with regard to the substantial risk of torture issue.”<sup>19</sup> The court accepted Mahjoub’s contention that the government had relied upon information “that went against the bulk of the evidence in concluding there was no institutionalized torture in Egypt.... [T]his suggests an arbitrary rejection of important, credible evidence on this issue.”<sup>20</sup> Noting the varied and numerous sources of legitimate information regarding Egypt’s well documented torture practices and the absence of accountability for such abuses, from sources that the government deems reliable in other contexts, the judgment noted,

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<sup>17</sup> Human Rights Watch, *Still at Risk*, pp. 52-55.

<sup>18</sup> *Mohammad Zeki Mahjoub v. Minister of Citizenship and Immigration*, IMM-98-06, 2006 FC 1503, December 14, 2006, <http://cas-nrc-ntero3.cas-satj.gc.ca/fct-cf/docs/IMM-98-06.pdf> (accessed January 1, 2007), p. 41, para. 109. Mahjoub had already challenged a 2004 risk assessment by the minister’s delegate, and a federal court in January 2005 determined that that assessment was “patently unreasonable because the minister’s delegate who made that decision did not have access to confidential information in the government’s dossier. The court ruled that an independent and proper assessment of the risk that Mahjoub posed to Canada’s security required a review of at least some of that information. The January 2006 risk assessment was submitted in answer to that decision.

<sup>19</sup> *Ibid.*, p. 37, para. 97.

<sup>20</sup> *Ibid.*, p. 28, para. 68.

The delegate's blanket rejection of information from agencies with worldwide reputations for credibility such as AI and HRW [Amnesty International and Human Rights Watch] is puzzling, especially given the institutional reliance of Canadian courts and tribunals on these very sources. Indeed, the Minister of Citizenship and Immigration frequently relies on information from these organizations in creating country condition reports, which in turn are used by Immigration and Refugee tribunals, in recognition of their general reputation for credibility.<sup>21</sup>

The judgment chastises the government for relying on one source, an Austrian court's initial ruling in the Bilasi-Ashri case in 2002 (see above), as proof that the practice of torture was not institutionalized in Egypt. Although the delegate acknowledged that Bilasi-Ashri's extradition had not occurred in 2002 because the Egyptian government declined at that time to agree to the conditions stipulated by the Austrian court, the delegate "ignored that this refusal is reflective of Egypt's general attitude towards human rights. It was not tenable for her to rely on this single source of evidence to conclude that torture was not prevalent in Egypt, where the bulk of the evidence pointed to the contrary conclusion."<sup>22</sup>

With respect to the Egyptian government's diplomatic assurances that Mahjoub would not be tortured or otherwise ill-treated upon return, the court agreed with Mahjoub that the delegate "disregarded the bulk of evidence from a multitude of sources that cited Egypt's non-compliance with assurances."<sup>23</sup>

The court's most pointed critique involved the delegate's reliance upon the Swedish government's submissions in the *Agiza* case (see update below) as proof that Egypt abided by its assurances in that case. The court expressed dismay that the government delegate failed to note that the United Nations Committee Against Torture (CAT) held that the assurances were in fact breached—Agiza was tortured and

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<sup>21</sup> Ibid., p. 30, paras. 73-74.

<sup>22</sup> Ibid., p. 32, para. 80.

<sup>23</sup> Ibid., p. 35, para. 88. Those sources included reports by Human Rights Watch on assurances; an affidavit from Amnesty International; and an expert statement from an American-Egyptian professor who stated that Egypt frequently fails to abide by its promises when it comes to the human rights of detainees, and that "it is beyond doubt that if returned to Egypt Mr. Mahjoub is extremely likely to be tortured and abused." Ibid., p. 36, para. 92.

ill-treated upon return and had a patently unfair trial resulting in a 15-year sentence—leading to a violation of article 3 of the Convention against Torture by the Swedish government: “I find that her [the delegate’s] favouring of a biased party’s submissions over the final conclusions of the CAT to be perverse.”<sup>24</sup>

Mahjoub’s risk assessment was sent back to the minister of citizenship and immigration for re-determination, with a caution that the next report conform with the reasoning of the court.<sup>25</sup>

## Germany

### Metin Kaplan (Update)<sup>26</sup>

The government of Germany deported Metin Kaplan, a radical Muslim cleric, to Turkey in October 2004, based on diplomatic assurances. In May 2003 a German court had halted Kaplan’s extradition based on human rights concerns, including the insufficiency of diplomatic assurances against torture and unfair trial from the Turkish authorities. In response to the judgment, the German authorities sought enhanced assurances from the Turkish government. Kaplan lost a series of legal challenges to his subsequent deportation. The German government justified Kaplan’s removal by claiming that it had secured written assurances from the Turkish Foreign and Justice Ministries that Kaplan would get a fair trial upon return.

In June 2005 Kaplan was sentenced to life in prison in Turkey for plotting to overthrow Turkey’s secular system with his Cologne-based extremist group, the Union of Islamic Communities, also known as “Hilafet Devleti” (Caliphate State). A Turkish Appeals Court unanimously overturned that verdict in November 2005,

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<sup>24</sup> Ibid., p. 37, para. 94.

<sup>25</sup> Ibid., p. 41, para. 109.

<sup>26</sup> Human Rights Watch, “*Empty Promises*,” pp. 31-32. See also Human Rights Watch, *Commentary on State Replies: CDDH Questionnaire on Diplomatic Assurances*, pp. 4-5.

finding the trial unfair due to procedural deficiencies and inadequate investigation.<sup>27</sup> According to Kaplan's lawyer, Husnu Tuna, the cleric was convicted on the basis of evidence from an earlier case in which there was forensic medical evidence indicating that many of the defendants were subjected to torture.<sup>28</sup>

Kaplan's retrial commenced on April 28, 2006. According to Kaplan's lawyer the Turkish court issued summonses for two witnesses to appear at the retrial, both of whom claimed they had been tortured into making incriminating testimonies at Kaplan's original trial. The retrial, however, was then adjourned until July 26, 2006. Tuna's request that Kaplan be freed from prison pending the outcome of the retrial was denied. At this writing, hearings in Kaplan's retrial continue.

## Netherlands

### Nuriye Kesbir (Update)<sup>29</sup>

On September 15, 2006, the Dutch Supreme Court upheld a Court of Appeal decision preventing the extradition of a Kurdish woman wanted in Turkey. Nuriye Kesbir, an official of the Kurdish Worker's Party (PKK, now known as Kongra-Gel) then resident in the Netherlands, was subject to an extradition warrant from Turkey alleging that she had committed war crimes as a PKK military operative during the time she fought in the civil war in Turkey's southeast. In May 2004 a Dutch district court determined that although her fears of torture and unfair trial in Turkey were not completely unfounded, there were insufficient grounds to halt the extradition. The court gave exclusive authority to the government to either grant or reject the extradition request,

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<sup>27</sup> "Turkey Overturns Life Sentence against 'Caliph of Cologne,'" Agence France-Presse, November 30, 2005. Fair trial concerns in Turkey are detailed in a recent 300-page report (in German) by Helmut Oberdiek for Amnesty International Germany, Pro Asyl, and Holtfort-Stiftung, *Gutachterliche*

*Stellungnahme Rechtsstaatlichkeit politischer Verfahren in der Türkei (The Rule of Law and Political Trials in Turkey)*, February 23, 2006, [http://www.ecoi.net/pub/mk1122\\_7888tur.pdf](http://www.ecoi.net/pub/mk1122_7888tur.pdf) (accessed January 1, 2007) (the Kaplan case is described in detail on pp. 193-234). See also US Department of State, Bureau of Democracy, Human Rights, and Labor, "Country Report on Human Rights Practices – 2005: Turkey," March 8, 2006, <http://www.state.gov/g/drl/rls/hrrpt/2005/61680.htm> (accessed January 1, 2007).

<sup>28</sup> Email communication from Husnu Tuna, Metin Kaplan's lawyer, to Human Rights Watch, March 2, 2006.

<sup>29</sup> Human Rights Watch, *Still at Risk*, pp. 72-76.

but advised the Dutch minister of justice to seek enhanced diplomatic assurances against torture and unfair trial from Turkey.

The Dutch Court of Appeal ruled on January 20, 2005, against Kesbir's extradition, concluding that diplomatic assurances could not guarantee that she would not be tortured or ill-treated upon return to Turkey. On September 15, 2006, the Dutch Supreme Court upheld the decision of the Court of Appeal barring Kesbir's extradition to Turkey. The Supreme Court issued a statement, concluding that "an extradition could result in a breach of European human rights laws" since Kesbir "runs a real risk of being tortured or suffering inhumane or humiliating treatment" if returned to Turkey.<sup>30</sup> The Supreme Court accepted the Court of Appeal's reasoning that the diplomatic assurances against torture and ill-treatment offered by Turkey were insufficient to prevent such abuse were Kesbir to be returned.

## **Russian Federation**

### **Ivanovo Refugees' Case**

The Russian police detained a group of 12 Uzbek refugees and one Kyrgyz national in June 2005 in the Russian city of Ivanovo. The men are the subjects of an extradition request from the government of Uzbekistan, which claims that they were involved in the May 2005 unrest in the Uzbek city of Andijan, which resulted in the massacre by Uzbek government forces of hundreds of civilians.<sup>31</sup> The Russian prosecutor general ordered the men's extraditions on August 3, 2006, despite the fact that the office of the United Nations High Commissioner for Refugees (UNHCR) had recognized the men as refugees after determining they each had a well-founded fear of being persecuted, including a risk of torture, if returned to Uzbekistan. The prosecutor general claimed that the Russian authorities had received diplomatic assurances

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<sup>30</sup> "Dutch Court Blocks Extradition of PKK Leader," Reuters News, September 15, 2006.

<sup>31</sup> Human Rights Watch, "*Bullets Were Falling Like Rain*": *The Andijan Massacre, May 13, 2005*, vol. 17, no. 5(D), June 2005, <http://hrw.org/reports/2005/uzbekistan0605/>; and *Burying the Truth: Uzbekistan Rewrites the Story of the Andijan Massacre*, vol. 17, no. 6(D), September 19, 2005, <http://hrw.org/reports/2005/uzbekistan0905/>.

from the Uzbek government promising that the men would not be tortured or sentenced to death upon return.

On August 15, 2006, the European Court of Human Rights communicated an order for “interim measures” on the application of the men’s lawyers directing the Russian government to refrain from extraditing the men until the ECtHR had an opportunity to review the men’s cases.<sup>32</sup>

During a November 28, 2006 hearing on the men’s appeal against extradition in the Supreme Court, the prosecutor general reiterated that the Uzbek government had provided diplomatic assurances, which the Russian authorities considered sufficient to protect the men from abuse upon return. During the hearing the men’s defense lawyer detailed the systematic torture and other ill-treatment, and unfair trials, of suspects in the Uzbek criminal justice system, including those alleged to have been involved in the Andijan events, and the inherent lack of reliability of diplomatic assurances from the Uzbek authorities.<sup>33</sup> The Supreme Court, however, ruled that all the men’s extraditions could go forward.<sup>34</sup>

Because of the order for “interim measures,” the government of Russia is prohibited from extraditing the men until the ECtHR reviews the men’s cases. In the meantime, the men remain in detention in Ivanovo.

## Sweden

### Mohammed al-Zari and Ahmed Agiza (Update)<sup>35</sup>

Asylum seekers Mohammed al-Zari and Ahmed Agiza were transferred from Stockholm to Cairo in December 2001 aboard a United States government-leased airplane. The government of Sweden expelled al-Zari and Agiza, both suspected of

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<sup>32</sup> “The Strasbourg Court Intercepts Vladimir Putin’s Gift to Islam Karimov,” WPS: Central Asia News (Russia), August 16, 2006.

<sup>33</sup> A representative from Human Rights Watch was present in court and observed the men’s appeal on their extraditions on November 28, 2006.

<sup>34</sup> “Russian Supreme Court Rejected Challenge to Extraditions of Uzbek Asylum Seekers,” *The Times of Central Asia*, December 1, 2006.

<sup>35</sup> Human Rights Watch, *Still at Risk*, pp. 57-66; “*Empty Promises*,” pp. 33-36.

terrorist activities, following written assurances from the Egyptian authorities that they would not be subject to the death penalty, tortured, or ill-treated, and would receive fair trials. Swedish and Egyptian authorities also agreed on a post-return monitoring mechanism involving visits to the men in prison. The men had no opportunity under Swedish law to challenge the legality of their expulsions or the reliability of the Egyptian assurances.

In May 2004 a Swedish television news program, “Kalla Fakta,” revealed that the two men were apprehended and physically assaulted by Swedish police; handed over to the custody of hooded US operatives at Stockholm’s Bromma airport who cut off the men’s clothing and blindfolded, hooded, diapered, and drugged them; and then transported aboard a US government-leased Gulfstream jet to Cairo.<sup>36</sup> The involvement of the US in the men’s transfers has since been confirmed by the Swedish government.<sup>37</sup>

Agiza and al-Zari were held incommunicado for five weeks after their return. Despite monthly visits thereafter by Swedish diplomats, none of them in private, both men credibly alleged to their lawyers and family members—and, indeed, to Swedish diplomats as well—that they had been tortured and ill-treated in detention. Agiza remains in prison to date after a patently unfair retrial in April 2004.<sup>38</sup> Al-Zari was released without charge or trial in October 2003 and remains under surveillance by Egyptian security forces, and reports regularly to the police. He is not permitted to speak with journalists or human rights groups.

The UN Human Rights Committee in November 2006 concluded that Sweden’s involvement in the US transfer of Mohammed al-Zari to Egypt breached the absolute ban on torture, despite assurances of humane treatment provided by Egyptian

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<sup>36</sup> “The Broken Promise” (English transcript), “Kalla Fakta,” Swedish TV4, May 17, 2004, <http://hrw.org/english/docs/2004/05/17/sweden8620.htm>.

<sup>37</sup> The Swedish security police released two memorandums in late May 2004 confirming the US’s involvement in the transfers and the fact that the Swedish Ministry of Foreign Affairs was aware of US involvement. Copies of memoranda on file with Human Rights Watch.

<sup>38</sup> “Sweden Implicated in Egypt’s Abuse of Suspected Militant: Egypt Violated Diplomatic Promises of Fair Trial and No Torture for Terrorism Suspect,” Human Rights Watch news release, May 5, 2004, <http://hrw.org/english/docs/2004/05/05/egypt8530.htm>.

authorities prior to the rendition. The committee stated that Sweden “has not shown that the diplomatic assurances procured were in fact sufficient in the present case to eliminate the risk of ill-treatment to a level consistent” with the ban on torture and other cruel, inhuman or degrading treatment or punishment.<sup>39</sup>

The decision follows a May 2005 determination by the UN Committee Against Torture in Ahmed Agiza’s case. The committee held that Sweden violated the ban on torture with respect to Ahmed Agiza’s transfer, stating that the “procurement of diplomatic assurances [from Egypt], which, moreover, provided no mechanism for their enforcement, did not suffice to protect against this manifest risk.”<sup>40</sup>

Mohammed al-Zari is currently seeking monetary compensation from Sweden for physical and psychological rehabilitation, and permanent residency in Sweden in order to join his family who reside there.

## **United Kingdom**

### **Omar Mohammed Othman (also known as Abu Qatada)**

The case of Abu Qatada is the first legal challenge to the United Kingdom’s policy of deporting persons it labels national security threats to places where they are at risk of torture, based on a “memorandum of understanding” (MOU). The memorandums, which amount to diplomatic assurances by another name, contain promises from the receiving government that any person returned to its custody will not be tortured or ill-treated, and provide a post-return monitoring mechanism that purports to provide an additional safeguard. The UK has brokered such agreements with Jordan, Libya and Lebanon.<sup>41</sup>

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<sup>39</sup> UN Human Rights Committee, Decision: *Alzery v. Sweden*, CCPR/C/88/D/1416/2005, November 10, 2006, <http://www.unhchr.ch/tbs/doc.nsf/0ac7e03e4fe8f2bdc125698a0053bf66/13fac9ce4f35d66dc1257220049e394?OpenDocument> (accessed January 1, 2007), para. 11.5.

<sup>40</sup> UN Committee Against Torture, Decision: *Agiza v. Sweden*, CAT/C/34/D/233/2003, May 20, 2005, <http://www1.umn.edu/humanrts/cat/decisions/233-2003.html> (accessed January 1, 2007), para. 13.4.

<sup>41</sup> “UK: Torture a Risk in Libya Deportation Accord: International Law Prohibits Deporting Individuals to Countries That Practice Torture,” Human Rights Watch news release, October 18, 2005, <http://hrw.org/english/docs/2005/10/18/libya11890.htm>; “UK/Jordan: Torture Risk Makes Deportations Illegal: Agreement Bad Model for Region,” Human Rights Watch news release,



The UK government is seeking to return Abu Qatada, a terrorism suspect and national of Jordan, to his home country based on an MOU agreed by the UK and Jordan in August 2005. Abu Qatada has lived in the UK since 1993 and was granted refugee status in June 1994. Jordan's State Security Court sentenced him to 15 years in prison in absentia in 2000 for his alleged involvement in a bomb plot.

In the aftermath of September 11, 2001, the UK enacted an anti-terrorism law allowing foreign terrorism suspects who could not be deported because of the risk of torture upon return to be detained indefinitely without charge or trial. Abu Qatada was detained in Belmarsh prison under that law from 2002 until March 2005. Following the December 2004 ruling by the UK House of Lords Judicial Committee that indefinite detention was unlawful,<sup>42</sup> Qatada was released under a "control order" that regulated his place of residence and movements, limited visits with relatives and friends, and restricted access to phones and computers.<sup>43</sup> In August 2005 Qatada was detained again pending his deportation to Jordan. The UK government claims that the existence of the MOU makes Qatada's deportation to Jordan possible, and therefore makes his detention under immigration powers consistent with the right to liberty under article 5 of the European Convention on Human Rights.<sup>44</sup>

In May 2006 Qatada challenged his pending deportation and the reliability of Jordanian assurances against torture before the Special Immigration Appeals Commission (SIAC), which considers appeals in cases where the secretary of state

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August 16, 2005, <http://hrw.org/english/docs/2005/08/16/jordan11628.htm>; Letter from Human Rights Watch and Liberty to Prime Minister Tony Blair, "Empty Promises Can't Protect People from Torture," June 23, 2005, <http://hrw.org/english/docs/2005/06/23/uk11219.htm>.

<sup>42</sup> "UK: Law Lords Rule Indefinite Detention Breaches Human Rights," Human Rights Watch news release, December 16, 2004, <http://hrw.org/english/docs/2004/12/16/uk9890.htm>.

<sup>43</sup> In March 2005 the Prevention of Terrorism Act 2005 (PTA) came into force. A direct response to the ruling that indefinite detention was unlawful, the PTA permits the home secretary to impose "control orders" on people suspected of involvement in terrorism or terrorism-related activities. Control orders place restrictions on a person's liberty for the purpose of "protecting members of the public from a risk of terrorism." See Human Rights Watch, *Commentary on Prevention of Terrorism Bill 2005*, March 1, 2005, <http://hrw.org/backgrounder/eca/uko305/index.htm>.

<sup>44</sup> Article 5 of the European Convention on Human Rights reads: Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: . . . (f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

for the Home Department (home secretary) has exercised statutory powers to deport or exclude someone from the UK on national security grounds or for other public interest reasons. Qatada argued that the real risk of torture he faced if returned to Jordan was not mitigated by Jordan's assurances. Human Rights Watch submitted an expert statement arguing that the diplomatic assurances contained in the UK-Jordan MOU do not provide an effective safeguard against torture.<sup>45</sup>

A decision is expected in early 2007.<sup>46</sup>

## United States

### **Maher Arar (Update)**<sup>47</sup>

Maher Arar, a dual Canadian-Syrian national, was apprehended in September 2002 by US authorities while in transit from Tunisia through New York to Canada, where he had lived for many years. After holding Arar for nearly two weeks, and failing to provide him with the ability to effectively challenge his detention or imminent transfer, US immigration authorities flew Arar to Jordan, where he was then driven across the border and handed over to Syrian authorities. The transfer was effected despite Arar's repeated statements to US officials that he would be tortured in Syria and his numerous requests to be sent home to Canada.

The US government has claimed that prior to Arar's transfer it obtained diplomatic assurances from the Syrian government that Arar would not be subjected to torture upon return.

Arar was released without charge from Syrian custody 10 months later and credibly alleged that he was beaten by security officers in Jordan and tortured repeatedly,

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<sup>45</sup> *United Kingdom: Human Rights Watch Statement in Omar Othman (Abu Qatada) Case*, May 2006, <http://www.hrw.org/background/eca/ecaqna1106/witnessstatementjuliahall.pdf>.

<sup>46</sup> A challenge to the UK-Libya MOU commenced in the SIAC in October 2006.

<sup>47</sup> Human Rights Watch, *Still at Risk*, pp. 33-36; "Empty Promises," pp. 16-17; and *Report to the Canadian Commission of Inquiry into the Actions of Canadian officials in Relation to Maher Arar*, June 7, 2005, <http://hrw.org/background/eca/canada/arar/>.

often with cables and electrical cords, during his confinement in a Syrian prison.<sup>48</sup> The US government has yet to explain why it sent Arar to Syria rather than to Canada, or why it believed Syrian assurances to be credible in light of the government's well documented record of torture. A lawsuit lodged by Arar in US federal court claiming that the US government violated his human rights was dismissed in February 2006 after the court ruled that adjudicating the case could interfere with the government's ability to conduct foreign affairs.<sup>49</sup> An appeal is pending.

The Canadian government established an independent commission of inquiry (Arar Commission) in February 2004 to investigate the role of Canadian police and security agencies in Arar's apprehension and transfer by the US government.<sup>50</sup> The Arar Commission released its report on the actions of Canadian officials on September 18, 2006. The report unequivocally stated that there was no evidence that Arar committed any offense or that he engaged in any activities that threatened the security of Canada. It concluded Arar was the innocent victim of inaccurate and misleading information supplied by the Royal Canadian Mounted Police (RCMP) to US authorities, who appeared to have relied on this information in deciding to illegally remove Arar to Syria.

According to the removal order, US authorities were satisfied that Arar's deportation complied with the US government's obligations under the Convention against Torture.<sup>51</sup> The order itself did not include language about the US securing diplomatic

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<sup>48</sup> Statement by Maher Arar to CanWest News Service, November 4, 2003.

<sup>49</sup> United States District Court, Eastern District of New York, *Arar v. Ashcroft*, Civil Action No. CV-04-0249, [http://www.ccr-ny.org/v2/legal/september\\_11th/docs/Arar\\_Order\\_21606.pdf](http://www.ccr-ny.org/v2/legal/september_11th/docs/Arar_Order_21606.pdf) (accessed January 1, 2007). See also Center for Constitutional Rights webpages on the Arar case at [http://www.ccr-ny.org/v2/legal/september\\_11th/sept11Article.asp?ObjID=zPvu7s2XVJ&Content=377](http://www.ccr-ny.org/v2/legal/september_11th/sept11Article.asp?ObjID=zPvu7s2XVJ&Content=377) (accessed January 1, 2007).

<sup>50</sup> Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, February 2004, <http://www.ararcommission.ca/> (accessed January 1, 2007).

<sup>51</sup> Julia Hall, counsel in Human Rights Watch's Europe and Central Asia division, provided expert testimony on June 7, 2005, to the Arar Commission on the UN Convention against Torture and the US government's reliance upon diplomatic assurances to transfer Arar. See transcript at <http://www.stenotran.com/commission/maherarar/2005-06-07%20volume%2023.pdf> (accessed January 1, 2007). During her testimony, Hall was presented with a copy of Arar's removal order. The order stated that his removal complied with the US government's obligations under article 3 (*nonrefoulement*) of the Convention against Torture.

assurances against torture from Syria;<sup>52</sup> the US made that claim only after Arar was released and said that he was tortured, an allegation that a separate expert report commissioned by the Arar Commission confirmed.<sup>53</sup> Indeed, during Arar's imprisonment in Syria, Canadian consular officials received prolonged assurances that Arar was being well treated. All such assurances from Syria were false. The Arar Commission report confirmed that Arar "lived through a nightmare" of torture while imprisoned in Syria, with profound, devastating, and continuing effects on his physical, psychological, social, and economic well-being. On the issue of diplomatic assurances and rendition policy in the US, the commission drew heavily on expert testimony from Human Rights Watch, and acknowledged that Arar's case is a clear example of the problems inherent in relying on such assurances.<sup>54</sup>

## **Bekhzod Yusupov**

The US government has claimed that it sought assurances from the Uzbek authorities in an effort to deport Bekhzod Yusupov, an Uzbek national who has been in detention in the US for over four years.

In August 2005 the US Board of Immigration Appeals (BIA) held that Bekhzod Yusupov was entitled to have his removal to Uzbekistan deferred because of the US government's obligations under the Convention against Torture not to send anyone to a place where he or she faces the risk of torture. Yusupov is an "independent Muslim" (a person who practices Islam outside state institutions and guidelines). Recognizing that the record contained credible evidence of the Uzbek government's routine use of torture, especially against persons imprisoned for "religious

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<sup>52</sup> Ibid.

<sup>53</sup> Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, "Report of Professor Stephen J. Toope, Fact Finder," October 14, 2005, [http://www.ararcommission.ca/eng/ToopeReport\\_final.pdf](http://www.ararcommission.ca/eng/ToopeReport_final.pdf) (accessed January 1, 2007). Toope concluded that Maher Arar was subjected to torture in Syria and that the effects of the abuse have had "profoundly negative" consequences for Arar and his family. Ibid., p. 23.

<sup>54</sup> Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, "Report of the Events Relating to Maher Arar," September 18, 2006, [http://www.ararcommission.ca/eng/AR\\_English.pdf](http://www.ararcommission.ca/eng/AR_English.pdf), p. 176, fn. 19 (accessed January 1, 2007).

extremism,” the BIA held that Yusupov “more likely than not” would be tortured if returned to Uzbekistan.<sup>55</sup>

Bekhzod Yusupov is currently being detained by US Immigration and Customs Enforcement (ICE) in Pike County Prison in Milford, Pennsylvania. In a July 19, 2006 “Decision to Continue Detention” letter, ICE informed Yusupov that it was pursuing assurances from the government of Uzbekistan that he would not be tortured upon return.<sup>56</sup> The letter concluded that there was a significant likelihood of Yusupov’s removal in the reasonably foreseeable future in light of the attempt to secure such assurances, and that he would remain in detention until such time as the assurances were received.

Human Rights Watch and the ACLU wrote jointly to US officials in September 2006 expressing dismay that the government would seek diplomatic assurances from Uzbekistan, a state that is notorious for practicing systematic torture.<sup>57</sup> The letter noted that Uzbek law enforcement officers continued to round up and torture independent Muslims like Yusupov, and that another independent Muslim, Imam Ruhiddin Fakhruddinov, was detained and physically abused in custody after Kazakh authorities forcibly and illegally returned him from Kazakhstan to Uzbekistan in November 2005. The letter also stated that “[i]t is routine for the Uzbek authorities to charge and detain political and religious dissidents (including refugees who fled the country after the May 2005 massacre in Andijan) with supporting ‘illegal religious movements.’ Recognizing the high risk of torture and other ill-treatment faced by dissidents charged with supporting ‘illegal religious movements’ in Uzbekistan, the US State Department has urged other governments not to give in to Uzbek demands to repatriate such dissidents. Nevertheless, ICE claims that it is seeking diplomatic assurances to accomplish repatriation in Mr. Yusupov’s case.”<sup>58</sup>

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<sup>55</sup> US Department of Justice, Executive Office for Immigration Review, Decision of the Board of Immigration Appeals, *In re Bekhzod Yusupov*, A79 729 905-York, August 26, 2005, p. 3.

<sup>56</sup> Letter from the US Immigration and Customs Enforcement Office of Detention and Removal Operations to Bekhzod Yusupov (A79 729 905), “Decision to Continue Detention,” July 19, 2006, p. 1, on file with Human Rights Watch.

<sup>57</sup> Letter from Human Rights Watch and the American Civil Liberties Union to Richard Boucher, Assistant Secretary, Bureau of South and Central Asian Affairs, US Department of State, September 7, 2006, p. 2, on file with Human Rights Watch.

<sup>58</sup> *Ibid.*

In October 2006 the State Department informed Yusupov that it was no longer seeking assurances from Uzbekistan, but was looking to resettle him in a third country, possibly Russia. The Yusupov case has given rise to concerns that the US government may be using the excuse of seeking diplomatic assurances to keep people detained longer than is currently permitted under US immigration law. By seeking assurances, or claiming that it is seeking assurances, the US government can continue to detain people who have been deemed worthy of protection—and thus would normally be eligible for release after a maximum time period—on the basis that they can be removed in the near future upon receipt of diplomatic assurances against torture.