



**All-Party Parliamentary Group on Extraordinary Rendition
House of Commons, London, SW1A 0AA**

Rt Hon Theresa May MP
Prime Minister
10 Downing Street
London
SW1A 2AA

Dear Theresa,

In 2010, the Government published its Consolidated Guidance for intelligence officers and service personnel on the detention, interviewing and handling of intelligence in relation to detainees held overseas.¹ This was an important step forward for transparency, and provided greater clarity for officers.

In September 2016, the Intelligence Services Commissioner highlighted several areas where the Guidance could be improved, and called on the Government to carry out a review.² The Foreign Office recently confirmed that this was underway.³

We are writing as members of the All-Party Parliamentary Group on Extraordinary Rendition to make some suggestions for the review, and to seek clarification on its approach.

Among several areas that could be improved, the Commissioner said that “the application of the Consolidated Guidance to risks of unlawful arrest or detention or procedural unfairness is not as clear as it should be”, describing the text as “inconsistent and vague” on this matter. The

¹ In full: “The Consolidated Guidance to Intelligence Officers and Service Personnel on the Detention and Interviewing of Detainees Overseas, and on the Passing and Receipt of Intelligence Relating to Detainees”.

² Intelligence Services Commissioner, “Report of the Intelligence Services Commissioner Supplementary to the Annual Report for 2015”, 15 September 2016, 21.1–21.10.

http://intelligencecommissioner.com/docs/FPCM1042_HC_458_Accessible.pdf

³ Intelligence Services: Detainees. Written question 113214, 15 November 2017.

<http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2017-11-15/113214/>

Commissioner noted that “wholly unlawful or arbitrary deprivations of liberty are no less important or serious than torture”.⁴

The APPG has raised related concerns. In 2010, it said in a letter to the then Prime Minister that the Guidance failed adequately to cover unlawful detention and rendition, and that “clearer guidance is needed for officers” who “believe a detainee is being held or transferred unlawfully”.⁵ This point was not addressed. The National Security Advisor stated in his response to the APPG: “We disagree. The annex to the Guidance covers the matter of unlawful detention exhaustively.”⁶

The APPG raised further concerns about the Guidance. These included the risk that it could create the impression that ministerial authorisation grants a derogation from the requirement that officials obey the law on torture.

In light of the Commissioner’s remarks, we would be grateful if you would revisit the APPG’s concerns as part of your review – considering the issue of unlawful transfer as well as unlawful detention. The APPG’s proposals on these points may be helpful.⁷

President Donald Trump’s support for torture makes it particularly important that the Guidance be as clear and robust as possible. When asked about sharing intelligence with countries that use torture, in light of the President’s comments, you cited this document, stating: “Our guidance is very clear about the position that the UK takes, and our position has not changed.”⁸ Your spokesperson said “We don’t condone torture, inhumane treatment in any form. There was consolidated updated guidance published in 2010 on this ... there are going to be issues where we differ in approach and view with President Trump.”⁹

And, not least, British intelligence officials should be able to operate with full confidence that their actions are within the law.

The review of the Guidance is made timely by the recent changes to its oversight. The post of Intelligence Services Commissioner has been abolished, and its responsibilities transferred to the new Investigatory Powers Commissioner.

⁴ Intelligence Services Commissioner, op cit, 19.1–19.4.

⁵ Andrew Tyrie MP, letter to Prime Minister David Cameron, 6 October 2010 (attached).

⁶ National Security Advisor Peter Ricketts, letter to Andrew Tyrie MP, 25 November 2010 (attached).

⁷ The APPG’s correspondence with the Prime Minister in 2010 and 2011, including its proposals for modifications to the Guidance, are attached.



⁸ Laura Kuenssberg, “Donald Trump and Theresa May – Do opposites attract?”, BBC, 26 January 2017. <http://www.bbc.co.uk/news/uk-politics-38760718>

⁹ Paul Waugh, “Theresa May warns Donald Trump the UK will not Condone Torture of Detainees”, Huffington Post, 25 January 2017. http://www.huffingtonpost.co.uk/entry/theresa-may-vows-uk-will-not-condone-torture-as-trump-reviews-interrogation-and-waterboarding-black-sites_uk_5888d7d0e4b03cf273dcf279

With all this in mind, we would be grateful if you would confirm:

1. Whether you will consider the Guidance's application to unlawful transfers as part of the review;
2. When you expect to complete the review and publish its findings, and;
3. What role, if any, the office of the Investigatory Powers Commissioner will play in the review.

We will place this letter, and your response, in the public domain.

Rt Hon Kenneth Clarke QC MP (Chair)

Lord Hodgson of Astley Abbotts (Treasurer)

Catherine West MP (Vice Chair)

Rt Hon Tom Brake MP

Rt Hon Alistair Carmichael MP

Rt Hon the Baroness D'Souza CMG

Barry Sheerman MP

Baroness Stern CBE

The Rt Hon David Cameron MP
Prime Minister
10 Downing Street
London
SW1A 2AA

6 October 2010

Re: Consolidated Guidance to Intelligence Officers

As you will remember, I warmly welcomed your publication of this guidance and the accompanying announcement of a judge-led inquiry into these issues in July.

Although the guidance represents an important and extremely welcome step forward in openness and the protection of human rights I am writing to suggest two ways in which it can and should be further improved.

Ministerial consultation

The new guidance could create the impression that Ministerial authorisation grants some derogation from the requirement that officials obey the law.ⁱ

Ministerial approval does not relieve individual public officials of their legal duties in respect of torture. Ministerial approval should not be given where a serious risk of torture remains. The new guidance should state this clearly.ⁱⁱ

Rendition and unlawful detention

On this, the guidance is incomplete. Most of the protections that the guidance offers from torture should also apply to unlawful detention and rendition. It is true that the guidance and its annex refer to standards of detention, but this is far from adequate.

Clearer guidance is needed for officers. They should have clear procedures to follow in circumstances where they know or believe that a detainee is being held or transferred unlawfully. This will require additions to the table referred to at paragraph 11. A re-drafted version, with additions italicised, is attached.

I will be placing a copy of this letter in the public domain.

ANDREW TYRIE

Chairman, All Party Parliamentary Group on Extraordinary Rendition

Cc. Rt Hon Malcolm Rifkind MP, Chairman, Intelligence and Security Committee

ⁱ For example, paragraph 26 of the guidance states: "*If, despite any assurances obtained, personnel believe there is a serious risk of torture or cruel, inhuman or degrading treatment or punishment of an individual taking place, Ministers must be consulted.*"

ⁱⁱ For example, the '*Roles and responsibilities*' section could be expanded to say: "*15. Ministerial approval does not relieve individual public officials of their legal duties in respect of torture. Ministerial approval should not be given where a serious risk of torture remains.*"

Amended Table: Paragraph 11

Situation

Action

If you know or believe torture will take place

1. You must not proceed and Ministers will need to be informed
2. You should raise concerns with liaison or detaining authority to try and prevent torture occurring unless in doing so you might make the situation worse.

In circumstances where you judge there is a lower than serious risk of CIDT taking place and standards of arrest, detention *and transfer* are lawful

You may proceed, keeping the situation under review.

In all other circumstances

1. You must consult senior personnel. You must not proceed unless either:
 - a) senior personnel and legal advisers conclude that there is no serious risk of torture or CIDT, *or unlawful detention or transfer*, or;
 - b) you are able to effectively mitigate the risk of mistreatment *or unlawful detention or transfer* to below the threshold of a serious risk through reliable caveats or assurances.
2. If neither of the two preceding approaches apply, Ministers must be consulted. Ministers will need to be provided with full details, including the likelihood of torture or CIDT, *or unlawful detention or transfer* occurring, risks of inaction and causality of UK involvement. Ministers will consider whether it is possible to mitigate the risk of torture or CIDT, *or unlawful detention or transfer*, occurring through requesting and evaluating assurances on detainee treatment; whether the caveats placed on information/questions would be respected by the detaining liaison partner; whether UK involvement in the case, in whatever form, would increase or decrease the likelihood of torture or CIDT, *or unlawful detention or transfer* occurring. Consulting Ministers does not imply that action will be authorised but it enables Ministers to look at the full complexities of the case and its legality.



THE CABINET OFFICE
LONDON SW1A 2AS

From the National Security Adviser

25 November 2010

Jan M. Byrne

CONSOLIDATED GUIDANCE FOR INTELLIGENCE OFFICERS

Thank you for your letter to the Prime Minister of 6 October 2010, which has been passed to me for reply.

I am pleased to hear that you welcome the Government's publication of the "Consolidated Guidance to Intelligence Officers and Service Personnel on the Detention and Interviewing of Detainees Overseas, and on the Passing and Receipt of Intelligence Relating to Detainees".

The Government stands firmly against torture and cruel, inhuman and degrading treatment or punishment. We do not condone it, nor do we ask others to do it on our behalf. The Guidance makes clear that intelligence officers and service personnel at all times act in compliance with our domestic and international law obligations and our values as a nation.

The Guidance makes plain that in a situation where it is known or believed that torture will take place, officers must not proceed. The Guidance also makes clear that if officers are in any situation in which they are unsure about levels of risk, they should consult senior personnel and, if necessary, Ministers. Where difficult decisions are faced it is right that Ministers, who are accountable, should have the ultimate responsibility. Ministers take this responsibility extremely seriously.

Where the situation is less clear, where we cannot be certain but assess there to be a serious risk that a detainee will be tortured, the starting position is that we would not proceed with action. But, as I hope you understand, we cannot

preclude that in circumstances where the risks of inaction to national security are high, Ministers would want to consider all the facts of the case and all relevant legal considerations before taking a final decision.

The presumption against action will not be easily rebutted and there is no basis for assuming that it would in fact be overridden in any particular case. One example when the presumption might be rebutted is where there may be solid grounds for considering that the proposed action – for example, the engagement of UK personnel in an interview process – would itself mitigate the risk of torture or other mistreatment.

You suggest that the Guidance is “incomplete” as regards unlawful detention. We disagree. The annex to the Guidance covers the matter of unlawful detention exhaustively.

The Guidance is not and does not purport to be guidance to Ministers. It does not seek to regulate the details of how Ministers will respond in individual cases where consulted.

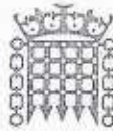
Our aim is to develop and promote human rights wherever we work, consistent with the lead the UK has taken in international efforts to eradicate torture. We attach great weight to our commitments in this regard. I hope the above will reassure you on the points you have raised regarding the Guidance.

7
to Ministry
Peter Ricketts
John Ricketts

Andrew Tyrie MP
House of Commons
London
SW1A 0AA

Cc. Malcolm Rifkind MP
Chairman, Intelligence and Security Committee

ANDREW TYRIE MP



HOUSE OF COMMONS
LONDON SW1A 0AA

Rt Hon David Cameron MP
Prime Minister
10 Downing Street
London
SW1A 2AA

10 March 2011

A handwritten signature in cursive script, appearing to read "Andrew Tyrie".

Re: Consolidated Guidance to Intelligence Officers

In my letter of 6 October 2010 I made the point that the consolidated guidance to intelligence officers appears to be defective. Among other things, it does not address rendition. Despite appearances, it is also incomplete as regards unlawful detention. I am writing again because Sir Peter Ricketts' reply to me of 25 November 2010, on your behalf, claimed that the guidance covered unlawful detention "exhaustively".ⁱ It does not. I would be grateful if you could have this issue examined again.

Unlawful Detention

This is addressed in the annex to the guidance. However, it is barely touched upon in the guidance itself. The table at paragraph 11, which officers should use when considering whether to proceed with action in specified circumstances, makes almost no reference to unlawful detention.ⁱⁱ It leaves open the possibility that despite concluding, through application of the annex, that a detainee was being held incommunicado, officers could nonetheless proceed without even consulting Ministers.ⁱⁱⁱ This is inadequate. The amended table I enclosed with my 6 October letter (attached) would prevent this.

Intelligence and Security Committee Report

On 5 March 2010 the Intelligence and Security Committee sent its review of the then draft guidance to you, with the intention that this review would be

published with the finalised guidance. Publication of this report has not yet occurred. It is needed to increase public confidence in the guidance and should be done as soon as possible.

A handwritten signature in black ink, appearing to read 'Andrew Tyrie', written over a large, stylized 'Y'.

ANDREW TYRIE
Chairman, All Party Parliamentary Group on Extraordinary Rendition

Cc. Rt Hon Sir Malcolm Rifkind MP, Chairman, Intelligence and Security Committee

ⁱ I note that Sir Peter did not claim that the guidance addressed rendition. I made proposals for amendment of the guidance as regards rendition in my 6 October letter.

ⁱⁱ The only reference to unlawful detention is in the second row of the table, which states that where *"there is a lower than serious risk of CIDT taking place and standards of arrest and detention are lawful... You may proceed..."*

ⁱⁱⁱ The annex highlights both the lawfulness of arrest and the lawfulness of detention (including incommunicado detention) as two of the four main heads under which standards of arrest, detention and treatment should be judged. While officers can use the annex to determine what might constitute unacceptable treatment, when it comes to determining what action to take once it has been determined that an individual is being held unlawfully, the table at paragraph 11 provides little assistance. In circumstances in which arrest and detention are unlawful, but the officer does not know or believe that torture will take place, row three of the table (*"In all other circumstances"*) will be applicable. Yet the advice in the second column of this row refers only to *"torture or CIDT"*. There is no reference to the standards of arrest and detention set out in the annex. This appears inadequate. The changes I proposed, attached again here, would improve the guidance.



THE CABINET OFFICE
LONDON SW1A 2AS

From the National Security Adviser

22 March 2011

Dear Mr Tyrie,

CONSOLIDATED GUIDANCE TO INTELLIGENCE OFFICERS

Thank you for your letter of 10 March 2011 to the Prime Minister regarding the “Consolidated Guidance to Intelligence Officers and Service Personnel on the Detention and Interviewing of Detainees Overseas, and on the Passing and Receipt of Intelligence Relating to Detainees”, published by the Government on 6 July 2010.

Since I last replied, on the Prime Minister’s behalf, to your earlier letter of 6 October 2010 on this issue, permission has been granted by the Court for two legal challenges to the consolidated guidance to proceed. The Government is vigorously contesting these challenges. I hope you will understand that, until the outcome of this legal process is known, it would be inappropriate for me to comment in detail on the issue you raise of unlawful detention in connection with the guidance. However, for the avoidance of doubt, we reject the suggestion that the guidance requires amendment as regards unlawful detention.

You state that the guidance does not address rendition, and that this makes the guidance “defective”. In our view, the guidance does not require amendment as regards rendition. The Government is clear that it unreservedly condemns any practice of “extraordinary rendition” to torture.

You also raise the issue of publication of the Intelligence and Security Committee (ISC) review of the draft guidance. This report was, of course, a commentary on the previous Government’s draft guidance, written by previous members of the Committee. The current Government was grateful to the

previous ISC for their detailed consideration of the earlier draft, which was taken into account in finalising the guidance. There is no plan, however, to publish the previous ISC's review, given the change of administration and subsequent development of the guidance into its final published form.

P. Ricketts

Peter Ricketts

Peter Ricketts

Mr Andrew Tyrie MP
House of Commons
London
SW1A 0AA