

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

SAMEH SAMI S. KHOUZAM
(A 75 795 693)

Petitioner,

v.

THOMAS HOGAN, as Warden, York
County Prison, et. al.,

Respondents.

CIVIL NO. 3:CV-07-00992
(Judge Vanaskie)

ELECTRONIC FILING

**PETITIONER'S SUPPLEMENTAL BRIEF IN SUPPORT OF
PETITION FOR WRIT OF HABEAS CORPUS**

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INTRODUCTION AND SUMMARY OF ARGUMENT

Pursuant to this Court's order of June 25, 2007, Petitioner Sameh Khouzam respectfully submits this supplemental brief to further support his substantive claims and to identify limited discovery that is necessary to resolve certain of these claims. This brief also responds to two questions raised by the Court in the teleconference of June 25 concerning (i) the practices of other countries with respect to diplomatic assurances, and (ii) the extent to which Congress can delegate the implementation of a treaty to the executive branch.

As set forth below, in summarily revoking Mr. Khouzam's grant of deferral of removal, the government violated its own regulations by relying on diplomatic assurances that were not obtained, forwarded and consulted on by the Secretary of State herself. In addition, even if the Secretary of State's personal involvement was not required, the government's reliance on these assurances—which are inherently unreliable and for which there has been no independent and meaningful review—violates Mr. Khouzam's rights under the Convention Against Torture (“CAT”), the Foreign Affairs Reform and Restructuring Act (“FARRA”), implementing regulations and the Due Process Clause.

First, diplomatic assurances from Egypt—a country known for its consistent practice of torture and for its past breaches of anti-torture diplomatic assurances—are inherently unreliable and wholly insufficient to protect Mr. Khouzam from torture if he were to be removed there. Indeed, the record presently before this Court—which includes not only the Second Circuit Court of Appeals’ finding that Mr. Khouzam is substantially likely to be tortured if returned to Egypt and evidence of Mr. Khouzam’s past torture by Egyptian officials, but also expert declarations and reports documenting Egypt’s record of torture—is sufficient for it to reject these assurances. Second, even if this Court were to decline to so find, Mr. Khouzam is entitled to meaningful and independent review of the reliability and sufficiency of the assurances at issue. As the government has thus far offered no more than bare summary assertions relating to the sufficiency of the assurances in this case, Mr. Khouzam is entitled to limited discovery on this subject before this Court and meaningful review.

Evidence on the practices of other countries—specifically requested by this Court—supports both these claims. First, it confirms that the diplomatic assurances of countries such as Egypt which have a history of engaging in torture are unreliable and insufficient for meeting U.S. non-refoulement obligations. The same evidence confirms that U.S. non-

refoulement obligations specifically require meaningful and independent review of the text and context of the assurances, among other relevant factors, prior to removal. Moreover, no other country to date is known to have done what the government is trying here, namely to remove an individual pursuant to diplomatic assurances after a judicial finding that he or she would more likely than not be tortured upon return. Indeed, the U.S. government's attempts to summarily remove Mr. Khouzam to Egypt notwithstanding the Second Circuit's prior finding that he would more likely than not be tortured there further mark it as an outlier among nations of the civilized world.

In light of the above, this Court should vacate the government's order revoking Mr. Khouzam's CAT protection. In the alternative, this Court should either hold its own evidentiary hearing to determine the adequacy of Egypt's assurances or order Respondent to provide an adequate administrative procedure subject to judicial review.

STATUTORY AND REGULATORY FRAMEWORK

The United States signed the Convention Against Torture in 1988 and ratified it in 1994. Article 3 of the Convention provides that:

1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing

that he would be in danger of being subjected to torture.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment (“CAT”), *opened for signature* Dec. 10, 1984, art. 3, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85 (*entered into force* June 26, 1987).

To implement the United States’ obligations under Article 3 of CAT Congress enacted the Foreign Affairs Reform and Restructuring Act (FARRA). FARRA adopts verbatim the operative language of Article 3(1), providing that “[i]t shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are *substantial grounds for believing the person would be in danger of being subjected to torture.*” Pub. L. 105-277, Div. G, Title XXII, § 2242(a), 112 Stat. 2681, 2681-822 (codified as note to 8 U.S.C. § 1231 (2000)) (emphasis added). FARRA mandated that the heads of the appropriate agencies prescribe regulations to “implement the obligations of the United States under Article 3” of CAT, FARRA § 2242(b), requiring that its terms have the same “meaning given those terms

in the Convention,” FARRA § 2242(f)(2). It also contemplates judicial review of CAT claims in the immigration context. *See* FARRA § 2242(d).

Following the enactment of FARRA, the Justice Department enacted regulations “to create fair and efficient provisions to implement Article 3.” Regulations Concerning the Convention Against Torture; Interim Rule, 64 Fed. Reg. 8478, 8479 (Feb. 19, 1999) (to be codified at 8 C.F.R. § 208). To “allow the alien to seek review of this important decision . . . and to ensure that decisions . . . are made consistently and according to the high standards of proof required by Article 3 itself,” the regulations generally provide non-citizens the right to a hearing before an immigration judge (“IJ”) on the CAT claim, as well as administrative appellate review before the Board of Immigration Appeals (“BIA”). 64 Fed. Reg. 8480. If the non-citizen does not prevail before the IJ or BIA, he or she may seek judicial review in a petition for review. 8 C.F.R. § 1208.18(e). *See also* 8 U.S.C. § 1252(a)(4).

The regulations provide for two kinds of relief—(a) withholding of removal, *see* 8 C.F.R. § 1208.16(c); and (b) deferral of removal, *see* 8 C.F.R. § 1208.17. Both require an applicant to establish that “it is more likely than not that he or she would be tortured if removed to the proposed country of removal.” 8 C.F.R. § 1208.16(c)(2); *see also* § 1208.17(a). In order to terminate a grant of deferral of removal—for example, based on changed

circumstances—the government must generally file a motion with the IJ, after which the IJ conducts a new hearing. 8 C.F.R. §§ 1208.17(d)(1), (d)(3). The non-citizen is entitled to notice of the time, place, and date of the hearing and of the opportunity to supplement the information in his or her initial application for relief under CAT. 8 C.F.R. § 1208.17(d)(2). If the CAT grant is overturned, the IJ’s decision may be appealed to the BIA, with judicial review available in the court of appeals. 8 C.F.R. § 1208.17(d)(4); 8 C.F.R. § 1208.18(e).

Mr. Khouzam’s case is purportedly governed by a different regulation that deals specifically with diplomatic assurances. *See* 8 C.F.R. § 1208.18(c). Under this regulation, as interpreted by the government, it may overturn a CAT grant pursuant to a diplomatic assurance without moving to reopen the administrative proceedings and without providing any hearing or adversarial process whatsoever. Moreover, the government contends that no judicial review of this determination is available. Rather, the government takes the position that it can unilaterally overturn a CAT grant pursuant to a diplomatic assurance from another country, even where, as here, a court of appeals previously ordered that CAT relief be granted.

ARGUMENT

I. THE GOVERNMENT'S ACTIONS IN THIS CASE VIOLATE REGULATIONS WHICH REQUIRE THE SECRETARY OF HOMELAND SECURITY TO ACT ON DIPLOMATIC ASSURANCES OBTAINED, FORWARDED, AND CONSULTED ON BY NONE OTHER THAN THE SECRETARY OF STATE.

The government has not complied in this case with the baseline procedures specified in its own regulations at 8 C.F.R. § 1208.17(f), entitled “Termination pursuant to § 1208.18(c),” and 8 C.F.R. § 1208.18(c), entitled “Diplomatic assurances against torture obtained by the Secretary of State.”

The plain language, title, and context of these regulatory provisions specifically require that none other than the Secretary of State must obtain, forward, and consult on diplomatic assurances in order for the Secretary of Homeland Security (previously the Attorney General) to act on them. *See* 8 C.F.R. § 1208.17(f) (“At any time while deferral of removal is in effect, the Attorney General may determine whether deferral should be terminated based on diplomatic assurances forwarded *by the Secretary of State* pursuant to the procedures in § 1208.18(c).”) (emphasis added); 8 C.F.R. § 1208.18(c) (entitled “Diplomatic assurances against torture *obtained by the Secretary of State*”); 8 C.F.R. § 1208.18(c)(1) (“The *Secretary of State* may forward to the Attorney General assurances that the *Secretary has obtained* from the government of a specific country that an alien would not be tortured there if

the alien were removed to that country.”) (emphasis added); 8 C.F.R. § 1208.18(c)(2) (“If the *Secretary of State forwards assurances* described in (c)(1) of this section to the Attorney General for consideration by the Attorney General or her delegates under this paragraph, the Attorney General shall determine, in *consultation with the Secretary of State*, whether the assurances are sufficiently reliable to allow the alien’s removal to that country consistent with Article 3 of the Convention Against Torture.”) (emphasis added). *See also* 64 Fed. Reg. 8484 (“Cases will be handled under this provision only if such assurances are actually forwarded to the Attorney General by the Secretary of State for consideration under this special process.”).

In contrast, Section 1208.18(c)(2) specifies that “[t]he Attorney General’s authority under this paragraph may be exercised by the Deputy Attorney General or by the Commissioner, Immigration and Naturalization Service, but may not be further delegated.” 8 C.F.R. § 1208.18(c)(2). Thus, while the regulations clearly allow for the delegation of some authority from the Attorney General to specific inferiors within the Department of Justice, the plain language of these regulations mandates that the Secretary of Homeland Security or such specified inferiors (previously the Attorney General or specified inferiors) can act on diplomatic assurances *only* if the

Secretary of State personally is involved. Because the government has not demonstrated that the Secretary of State herself has obtained, forwarded, or consulted on diplomatic assurances in this case, it has failed to comply with its own regulations. *See* Gov't's Response of June 1, 2007 at Ex. G (Letter from Julie Myers to Maha Kabbash, dated May 29, 2007) (stating only that "I [Julie Myers, Assistant Secretary of State] have credited as sufficiently reliable the diplomatic assurances received by the Department of State"); *id.* at Ex. E (Memorandum to File from Julie Myers, undated); *id.* at Ex. H (Declaration of James J. Jeffrey, dated May 31, 2007).

In the June 25, 2007 teleconference before this Court, the government conceded that in Mr. Khouzam's case the Secretary of State's authority was exercised not by the Secretary herself but by another State Department official. The government argued, however, that such authority was consistent with the regulations since the term "Secretary of State" should be deemed to include any lower officer to whom the Secretary delegates her authority. In the government's view, the language in the regulations specifically authorizing the Deputy Attorney General and Commissioner to exercise the Attorney General's authority should be viewed as a *limitation* on the Attorney General's delegation authority, rather than an expansion. Thus, in the government's view, the absence of any comparable language

authorizing the Secretary of State to delegate her authority to lower State Department officials merely means that the regulations impose no limits on the extent of permissible delegation.

This argument is at odds with the government's own explanation for why the responsibility for evaluating diplomatic assurances should be exercised by the most senior level officials in the Justice Department (now DHS). In its notice of proposed rulemaking, the government explained that this "rule ensures that cases involving the adequacy of diplomatic assurances forwarded to the Attorney General by the Secretary of State will receive consideration at senior levels within the Department of Justice, which is appropriate to the 'delicate nature of a diplomatic undertaking to ensure that an alien is not tortured in another country.'" 64 Fed. Reg. 8484. It makes no sense that the regulations would insist on senior involvement from one agency but not the other.

There can be no doubt that diplomatic undertakings of such a "delicate nature" also demand the attention of the Secretary of State personally. Yet, under the government's reading of the regulation, the Secretary of Homeland Security (previously the Attorney General) could act on assurances that *anyone* within the State Department, of *any* rank, had obtained and forwarded; and the Secretary of Homeland Security, or his

specified inferiors, could fulfill the regulation's consultation requirement by consulting with *any* State Department official, however low-ranking. That construction of the regulation defies logic and is contrary to the Justice Department's explicit explanation for promulgating the regulation. Indeed, since diplomatic assurances implicate foreign relations (which fall under the purview of the State Department), it is arguably even more crucial for the most senior State Department official to be involved in the evaluation of these assurances.

Moreover, the State Department, as the United States' chief foreign policy office, must play a central role in ensuring that the United States abides by all its international treaty duties, including CAT obligations. This further confirms that, under the regulations, the Secretary of Homeland Security cannot act on diplomatic assurances without the involvement of the Secretary of State herself. The "consultation" requirement is illustrative; such "action forcing" requirements have been recognized as "check[s] on federal agency action," designed to "ensur[e] that such action does not go forward without full consideration of its effects." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 603 (Blackmun, J., dissenting). *See also id.* at 585 (recognizing that consultation requirements are to be presumed as "hav[ing] a serious purpose that is likely to produce tangible results") (Stevens, J.,

concurring). It cannot be seriously contended that consultation with *any* State Department official would fulfill the purpose of this requirement.

Notably, in the one reported case where the government relied on diplomatic assurances to terminate a grant of CAT relief, the government specifically represented to the Court that the assurances were obtained and forwarded by the Secretary of State himself. *See Soliman v. U.S.*, 296 F.3d 1237, 1241 (11th Cir. 2002) (“On May 13, 2002, shortly before oral argument in this case, the INS district director sent Soliman a letter informing him that the Attorney General was considering lifting his deferral of removal to Egypt on the ground that the Secretary of State had received assurances from the Egyptian government that Soliman would not be tortured if he were returned there”); Mark Dow, *American Gulag, Inside U.S. Immigration Prisons* 226, 360 n.31 (2004) (quoting a memorandum from Attorney General John Ashcroft stating that “[T]he Secretary of State has obtained, and forwarded to me, assurances from the government of Egypt that Mr. Soliman would not be tortured After consulting with the Secretary of State . . . I have determined that these assurances are sufficiently reliable to allow Mr. Soliman’s removal to Egypt).

II. THE GOVERNMENT’S ACTIONS IN THIS CASE VIOLATE THE REGULATIONS’ REQUIREMENT THAT DIPLOMATIC ASSURANCES BE DETERMINED SUFFICIENTLY RELIABLE TO ALLOW REMOVAL CONSISTENT WITH ARTICLE 3 OF CAT.

The government has also violated its own regulations by relying on diplomatic assurances from Egypt that, as explained in Section III.A, are inherently unreliable. The regulations invoked by the government specifically require a determination that “the assurances are sufficiently reliable to allow the alien’s removal . . . consistent with Article 3 of the Convention Against Torture.” 8 C.F.R. § 1208.18(c)(2). Diplomatic assurances from a country like Egypt that has a record of engaging in torture can never be deemed “sufficiently reliable” to protect against an Article 3 violation, particularly where, as here, there has already been a judicial finding that the non-citizen is substantially likely to be tortured if removed to that country. Thus, the most reasonable construction of the regulations is that they permit diplomatic assurances only from countries that have not already been found to have a record of consistently engaging in torture.

This interpretation is consistent with the language of CAT and FARRA as well as the “Supplementary Information” which accompanied the implementing regulations. Article 3 of the Convention Against Torture provides that:

1. No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

CAT art. 3. FARRA adopts verbatim the operative language of Article 3(1), *see* FARRA § 2242(a), and the implementing regulations adopt the operative language of Article 3(2). *See* 8 C.F.R. § 1208.16(c)(3) (requiring consideration of “all evidence relevant to the possibility of future torture” including “evidence of past torture inflicted upon the applicant,” “[e]vidence of gross, flagrant or mass violations of human rights within the country of removal,” and “other relevant information regarding conditions in the country of removal.”).

Moreover, in describing the diplomatic assurances vetting process provided in the regulations, the government’s notice of proposed rulemaking emphasizes that “careful evaluation” is required before any decision can be reached about whether such assurances are sufficiently reliable, and that “[i]t is anticipated that these cases will be rare.” 64 Fed. Reg. 8484. *See also* U.S. Response to List of Issues of the Committee Against Torture to be

Considered During the Examination of the Second Periodic Report of the United States of America, at 46 (Apr. 28, 2006), *available at* <http://www.state.gov/documents/organization/68662.pdf> (“[T]he United States reserves the use of diplomatic assurances for a very small number of cases where it can reasonably rely on such assurances The small number of instances in which assurances have been sought reflects the degree . . . to which the United States internally screens cases to secure and obtain diplomatic assurances only in appropriate cases.”).

As previously noted, Egypt’s diplomatic assurances are inherently unreliable in light of its “consistent pattern of gross . . . human rights [violations],” CAT Art. 3(1), its prior breaches of diplomatic assurances, its previous torture of Mr. Khouzam (evidence of which was credited by the BIA), and the Second Circuit’s prior conclusion that he would more likely than not be tortured if returned to Egypt. *See* Petitioner’s Reply Brief in Support of Petition for Writ of Habeas Corpus at 31-41, *Khouzam v. Hogan*, No. 07-0992 (M.D. Pa. June 11, 2007) [*hereinafter* Pet’s Reply Brief of June 11, 2007]; *see also infra* Section III.A.

Accordingly, this is hardly one of the “rare” cases in which reliance on diplomatic assurances would be “appropriate.” This Court should find that the reliance on diplomatic assurances in Mr. Khouzam’s case is a per se

violation of the regulations, since they do not contemplate diplomatic assurances from countries like Egypt that have already been found to have a record of engaging in torture.

Alternatively, even if this Court concludes that the reliance on diplomatic assurances from Egypt is not a per se violation of the regulations, it should find that their use in Mr. Khouzam's case would still violate the regulations. First, it is highly doubtful that the government conducted the kind of "careful evaluation" that the regulations should be construed to require. *See* 64 Fed. Reg. at 8484 ("The nature and reliability of such assurances, and any arrangements through which such assurances might be verified, would require careful evaluation before any decision could be reached."); U.S. Response to List of Issues of the Committee Against Torture to be Considered During the Examination of the Second Periodic Report of the United States of America, at 46 (Apr. 28, 2006), *available at* <http://www.state.gov/documents/organization/68662.pdf> ("the United States would carefully assess such assurances to determine if they are sufficiently reliable").¹

¹ The regulations require the Attorney General to "determine, in consultation with the Secretary of State whether the assurances are sufficiently reliable to allow [Mr. Khouzam's] removal to [Egypt] consistent with Article 3 of the Convention Against Torture." 8 C.F.R. § 1208.18(c)(2). Presumably, this means that the procedure by which such a determination is reached is intended to be meaningful and fair. *See, e.g., Marincas v. Lewis*, 92 F.3d 195, 203 (3d Cir. 1996) ("When Congress directs an agency to establish a

Second, even if this Court were to find that the diplomatic assurance regulations require only minimal procedures and that the government fully complied with these procedures, it should still find that the government's determination in this case—namely that Egypt's assurances are “sufficiently reliable” to protect Mr. Khouzam from torture—is wholly lacking in support. Particularly when viewed against the backdrop of the Second Circuit's decision, this Court has the authority, and indeed the obligation, to meaningfully review the government's determination and make such a finding. Notably, the regulations themselves do not preclude such review. They merely state that “[o]nce assurances are provided . . . the alien's claim for protection under the Convention Against Torture shall not be considered further by an immigration judge, the Board of Immigration Appeals, or an asylum officer.” 8 C.F.R. § 1208.18(c)(2). As set forth in more detail below,

procedure . . . it can be assumed that Congress intends that procedure to be a fair one.”). *See also infra* Section IV.C, setting forth basic requirements of due process. Indeed, in defending its diplomatic assurance process to the CAT Committee, the United States listed numerous factors that are allegedly considered when assessing the reliability of such assurances, including “the identity, position, or other information concerning the official relaying the assurances” “political or legal developments in the requesting state that would provide context for the assurances provided,” “the groups or persons that might be available to monitor the [individual's] condition” and “the ability of such groups or persons to provide effective monitoring.” U.S. Report to CAT Committee, at 47. Because the government's decision to credit the diplomatic assurances in Mr. Khouzam's case is wholly lacking in this kind of specificity, absent limited discovery there is no way to know if such factors were even considered. *See* Gov't's Response of June 1, 2007 at Ex. E (Memorandum to File from Julie Myers, undated) (merely stating that “After consulting with the Department of State and taking into account all relevant considerations, including human rights practices in Egypt, I determined . . . that the assurances were sufficiently reliable.”).

Article 3 of CAT, FARRA, and the Due Process Clause all require such independent and meaningful review. Moreover, this Court has the authority to order any additional factfinding that is necessary in order for such review to be meaningful. *See infra* Section V.

III. EVEN IF THE GOVERNMENT’S ACTIONS DO NOT VIOLATE THE REGULATIONS, THEY VIOLATE CAT AND FARRA.

If this Court were to hold that the regulations permit the use of diplomatic assurances from countries like Egypt, and moreover do not require any independent review of the government’s decision to terminate deferral of removal on the basis of such assurances, it must conclude that these regulations are *ultra vires*. During the June 25, 2007 teleconference, this Court inquired as to the extent to which Congress can delegate to the Executive its authority to implement the treaty obligations of the United States. It is well-established that Congress can delegate implementation of a statute to an agency as long as Congress enunciates an “intelligible principle.” *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1929). FARRA enunciates an intelligible principle in (i) setting forth an absolute non-refoulement obligation, *see* FARRA § 2242(a); (ii) requiring that regulations “implement the obligations of the United States under Article 3” of CAT, FARRA § 2242(b), and requiring its terms to have the

same “meaning given those terms in the Convention,” FARRA § 2242(f)(2); and (iii) contemplating judicial review of CAT claims, FARRA § 2242(d).

However, it is well established that regulations cannot authorize that which is prohibited by an enabling statute or treaty. *United States v. Larionoff*, 431 U.S. 864, 873 (1977) (“For regulations, in order to be valid must be consistent with the statute under which they are promulgated”). No deference is owed to an agency’s construction of a statute “[i]f the intent of Congress is clear.” *Chevron, USA v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984). Courts are to determine what is “clear” for *Chevron* purposes by “employing traditional tools of statutory construction.” *Chevron*, 467 U.S. at 843 n.9. Consequently, courts must “reject those constructions that are contrary to clear congressional intent or that frustrate the policy that Congress sought to implement,” *Schneider v. Chertoff*, 450 F.3d 944, 952 (9th Cir. 2006) (citing *Chevron v. NRDC*), and examine statutes pursuant to the “assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority.” *Solid Waste Agency v. United States Army Corps of Eng’rs*, 531 U.S. 159, 172-173 (2001) (internal citations omitted). Moreover, where a statute raises serious constitutional problems, a court must construe the statute to avoid such problems in lieu of deferring to an

agency's construction. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

As demonstrated below, FARRA, is “clear” for *Chevron* purposes—both the treaty and the statute require meaningful, independent review of the decision to transfer an individual pursuant to diplomatic assurances, and prohibit return to a country like Egypt pursuant to diplomatic assurances. *See infra* Section III.A-B. Even assuming that FARRA is not “clear” for *Chevron* purposes, no deference would be owed where, as here, the government's interpretation would amount to an impermissible construction of the statute, *Chevron*, 467 U.S. at 844, or where serious constitutional problems would arise from the government's constructions. *See infra* Section IV. Accordingly, the government's claim that “it is the regulations which actually implemented CAT for immigration purposes, and therefore define its scope as a matter of domestic law,” Gov't's Response of June 1, 2007 at 17 n.9, is in error.

Indeed, as demonstrated below, if the government were correct that Mr. Khouzam's removal to Egypt pursuant to diplomatic assurances would not violate the regulations, then those regulations themselves are in violation of CAT and FARRA. As already discussed, and as set forth in greater detail *infra*, given Egypt's record of torture in general and in this case in particular,

diplomatic assurances from Egypt do not and could not alter the fact that Mr. Khouzam remains more likely than not to be tortured if returned there. There remain “substantial grounds for believing he would be in danger of being subjected to torture” in violation of both CAT Article 3 and FARRA § 2242(a). Moreover, to deport Mr. Khouzam pursuant to diplomatic assurances without any independent review of whether such assurances are sufficiently reliable to protect him from torture would also violate both CAT and FARRA.

A. The Government’s reliance on diplomatic assurances from Egypt to terminate Mr. Khouzam’s grant of protection from torture violates both CAT and FARRA.

1. CAT and FARRA prohibit the reliance on diplomatic assurances from countries that consistently engage in torture.

Article 3 of CAT specifically states that in determining whether an individual is more likely than not to be tortured, a government must take into account “all relevant considerations including, where applicable, the existence in the country of a consistent pattern of gross, flagrant or mass violations of human rights.” CAT art. 3.² Consistent with this principle, the

² Regulations relating to withholding of removal under CAT, also adopt the operative language of Article 3(2) in requiring consideration of “all evidence relevant to the possibility of future torture” including “evidence of past torture inflicted upon the applicant,” “[e]vidence of gross, flagrant or mass violations of human rights within the country of removal,” and “other relevant information regarding conditions in the country of removal.” 8 C.F.R. § 1208.16(c)(3).

Committee Against Torture, the treaty body charged with monitoring CAT's implementation, whose competence has been recognized by the United States³ has specifically instructed the United States that "[w]hen determining the applicability of its non-refoulement obligations under article 3 of the Convention, the [United States] should *only* rely on 'diplomatic assurances' in regard to States which do not systematically violate the Convention's provisions," U.N. Comm. Against Torture, Conclusions and Recommendations to U.S., ¶ 21, U.N. Doc. CAT/C/USA/CO/2 (July 25, 2006) (emphasis added). *See also* U.N. Human Rights Comm., Concluding Observations of the Human Rights Committee to the U.S., ¶ 16, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006) (instructing the United States to "recognize that the more systematic the practice of torture or cruel, inhuman or degrading treatment or punishment, the less likely it will be that a real risk

³ In ratifying the Convention, the United States declared "that it recognizes the competence of the Committee against Torture to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the Convention." Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Declarations and Reservations, *available at* <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty14.asp#N22>. The jurisprudence of relevant United Nations treaty bodies like the Committee Against Torture is instructive for informing the scope of CAT Article 3 protections as implemented by FARRA. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 437-38 (1987) (looking to the U.N. Protocol Relating to the Status of Refugees and the Handbook construing the Protocol in determining the meaning of a provision of the Refugee Act of 1980 which Congress enacted to bring United States refugee law into conformance with the Protocol); *United States v. Duarte-Acero*, 208 F.3d 1282, 1287 (11th Cir. 2000) (looking to the U.N. Human Rights Committee, the body charged under the International Covenant on Civil and Political Rights ("ICCPR") for monitoring that treaty's implementation).

of such treatment can be avoided by such assurances, however stringent any agreed follow-up procedures may be”); The Secretary General, *Interim Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, ¶ 51, delivered to the General Assembly, U.N. Doc. A/60/316 (Aug. 30, 2005) (“It is the view of the Special Rapporteur that diplomatic assurances are unreliable and ineffective in the protection against torture and ill-treatment: such assurances are sought usually from States where the practice of torture is systematic.”); The Secretary General, *Interim Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, ¶ 37, delivered to the General Assembly, U.N. Doc. A/59/324 (Sept. 1, 2004) (“In circumstances where this definition of ‘systematic practice of torture’ applies, the Special Rapporteur believes that the principle of non-refoulement must be strictly observed and diplomatic assurances should not be resorted to.”).

As previously set forth, the courts of foreign countries have similarly cautioned against relying on diplomatic assurances from regimes that have a poor record of respecting human rights. *See* Pet’s Reply Brief of June 11, 2007 at 30-31; *see also Suresh v. Canada (Minister of Citizenship and Immigration)*, ¶ 124, 2002 SCC 1 (“We would signal the difficulty in relying

too heavily on assurances by a state that it will refrain from torture in the future when it has engaged in illegal torture or allowed others to do so on its territory in the past. This difficulty becomes acute in cases where torture is inflicted not only with the collusion but through the impotence of the state in controlling the behaviour of its officials.”).

Most recently, on July 30, 2007, a U.K. Court of Appeal in *MT, RB, and U v. Secretary of State for the Home Department*, [2007] EWCA Civ 808, cited to the U.N. Special Rapporteur’s holding that diplomatic assurances should not be “resorted to” “in circumstances where there is a consistent pattern of gross, flagrant or mass violations of human rights, or of systematic practice of torture.” *Id.* ¶ 125. The U.K. Court of Appeal found “the logic of that view . . . easy to grasp. If a country is disrespectful of international norms and obligations, it is likely to be no less disrespectful of its obligations under a lower-level instrument such as a diplomatic note.” *Id.*, ¶ 126.

Additional authority for this position is set forth in the declaration of Nicholas Blake, the U.K.’s leading expert on diplomatic assurances. *See* Declaration of Nicholas Blake (“Blake Decl.”) (attached hereto as Ex. 1)⁴ ¶¶

⁴ At the time that the Blake Declaration was finalized, the U.K. Court of Appeal had not yet issued its July 30, 2007, decision in *MT, RB, and U v Secretary of State for the Home Department*, [2007] EWCA Civ 808. That decision does not, however, alter the conclusions of the declaration.

14, 17-18 (citing *Chahal v. United Kingdom*, 23 Eur. Ct. H.R. Rep. 413, ¶ 105 (1996) (finding that, notwithstanding diplomatic assurances, U.K.’s deportation of Sikh activist to India would violate CAT in light of “recalcitrant and enduring problem” of human rights violations by Indian security forces) and *Singh & Singh v. Secretary. of State for the Home Department*, [2000] SC/4 &10/99 (Special Immigration Appeals Commission) (concluding against the background of human rights abuses in India that assurances were insufficient to mitigate the risk of torture upon removal); Declaration of Victor Lodewijk Koppe, Esq., a Dutch lawyer who was the lead attorney in *Kesbir*, the only diplomatic assurances case in the Netherlands to date, (“Kopp Decl.”) (attached hereto as Ex. 2) ¶ 12 (citing cases where Dutch courts rejected diplomatic assurances from Turkey in light of “the poor human rights situation”).

Similarly, as set forth in the declaration of Professor Audrey Macklin, (“Macklin Decl.”) (attached hereto as Ex. 3) in *Mahjoub v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1503, a federal court in Canada rejected as “patently unreasonable” an administrative official’s crediting of Egyptian assurances in light of her failure “to take into account the human rights record of the [Egyptian] government,” *id.* ¶ 89, as well as “the overwhelming bulk of evidence which document[ed] Egypt’s poor

record of compliance [with assurances].” *Id.* ¶ 90; Macklin Decl. ¶ 21.

Likewise, in *Lai Cheong Sing v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 361, a different federal court in Canada rejected as “patently unreasonable” an administrative official’s crediting of anti-torture assurances from China. The court found that although the officer “acknowledged numerous reports attesting to the fact that the use of torture in China is still widespread,” *id.* ¶ 138, the officer had “moved from the overall pattern of torture in China to considering the particular case, without ever deciding whether it was at all appropriate to do so in light of the overall pattern”). *Id.* See also Macklin Decl. ¶ 21.

2. Egypt’s diplomatic assurances are insufficient to protect Mr. Khouzam from being tortured upon removal to Egypt.

Egypt’s record of consistently engaging in torture is sufficient to conclude that diplomatic assurances from the government of Egypt should be categorically rejected. Indeed, the former U.N. Special Rapporteur Against Torture, Theo Van Boven, has taken just this position. See Declaration of Theo Van Boven (“Van Boven Decl.”) (attached hereto as Ex. 4) ¶ 15 (explaining that Egypt is one situation where diplomatic assurance should be “a priori excluded”). See also Koppe Decl. ¶ 16 (noting that government of the Netherlands has never sought anti-torture assurances from Egypt or transferred an individual to Egypt pursuant to assurances);

Macklin Decl. ¶ 24 (no individual has been transferred by the government of Canada to Egypt pursuant to diplomatic assurances); Blake Decl. ¶ 55 (U.K. government abandoned deportation pursuant to Egyptian assurances in the *Youssef* case, and that appears to be current practice with respect to persons for whom there is a recognized risk of ill treatment).⁵

However, even if CAT and FARRA did not impose a categorical bar on diplomatic assurances from Egypt, their use in Mr. Khouzam's case would violate the United States' obligations under both the treaty and the statute since these assurances do not alter the fact that Mr. Khouzam remains "more likely than not" to be tortured if returned to Egypt. As previously set forth, numerous facts compel this conclusion: (1) Egypt's consistent use of torture as documented in State Department reports as well as the reports of human rights organizations and bodies; (2) the Second Circuit Court of Appeals' and the Board of Immigration Appeals' holdings that Mr. Khouzam will more likely than not be tortured in Egypt; (3) evidence of Mr. Khouzam's own torture at the hands of Egyptian officials, which was credited by the Board of Immigration Appeals; and (4) Egypt's prior

⁵ Indeed, Sweden, which relied on Egyptian assurances to transfer Agiza and al-Zari to Egypt, appears to be an outlier in this respect. Sweden's actions in these cases were found by U.N. treaty bodies to violate non-refoulement obligations under Article 3 of CAT, *see* U.N. Comm. Against Torture, *Agiza v. Sweden*, Communication No. 233/2003, ¶ 13.6, U.N. Doc. CAT/C/34/D/233/2003 (May 24, 2005), and Article 7 of the ICCPR, *see* U.N. Human Rights Comm., *Alzery v. Sweden*, Communication No. 1416/2005, ¶ 11.3, U.N. Doc. CCPR/C/88/D/1416/2005 (Nov. 10, 2006).

violations of diplomatic assurances that it would not torture transferred individuals, as evidenced in the cases of Mohammed Alzery and Ahmed Agiza. *See* Pet's Reply Brief of June 11, 2007 at 31-41. Additional support for this conclusion is set forth below.

First, Egypt is notorious for its consistent use of torture and abuse. Indeed, the U.S. House of Representative's Appropriations Committee recently voted to withhold aid from Egypt until the latter took steps, *inter alia*, to curb police abuses and reform its judicial system. *See* Richard Cowan, *U.S. House panel votes to withhold some Egypt aid*, Reuters, June 12, 2007, <http://www.reuters.com/article/latestCrisis/idUSN12264241> (reporting that "The House Appropriations Committee approved a wide-ranging foreign aid bill for next year that would hold back \$200 million in military funds for Egypt until the close U.S. ally takes steps to curb police abuses, reform its judicial system and stop weapons smuggling"); *see also* H.R. 2764, 110th Cong. § 699 (as passed by House, June 22, 2007). It should be noted that the House rejected an amendment to restore the funding to Egypt. *See* 153 Cong. Rec. H6913-6915, H6945-6946 (daily ed. June 22, 2007).

The Human Rights Committee, the body charged under the International Covenant on Civil and Political Rights ("ICCPR") for

monitoring that treaty's implementation has "note[d] with concern the persistence of torture and cruel, inhuman or degrading treatment at the hands of [Egyptian] law-enforcement personnel, in particular the security services, whose recourse to such practices appears to display a systematic pattern."

U.N. Human Rights. Comm., Concluding Observations of the Human Rights Committee: Egypt, ¶ 13, U.N. Doc. CCPR/CO/76/EGY (Nov. 28, 2002).

Moreover, as set forth in the declaration of Joseph Stork, Deputy Director of Human Rights Watch's Middle East and North Africa Division, and an expert on Egypt's human rights practices ("Stork Decl.") (attached hereto as Ex. 5):

Torture is a widespread and persistent phenomenon in Egypt. Security forces . . . routinely torture and ill treat detainees, particularly during interrogation. . . . In addition to practicing torture to obtain and coerce confessions, Egyptian officials use torture to punish, intimidate or humiliate persons in their custody. . . .

In the cases of torture that I have documented, Egypt's treatment of persons in custody include the following practices: eyes blindfolded, and clothing removed except for underpants; hands bound behind back and suspended by the arms from a door or other high object so that feet are off the ground or barely touching the ground, causing excruciating pain in the shoulders; severe beating with hoses, batons, fists and boots; electric jolts conducted through water to which the detainee's toes or feet are extended; the use of fierce dogs to approach and "fear up" the detainees; threats of sexual assault;

blows to the groin and testicles; and prolonged exposure to heat and cold.

Stork Decl. ¶¶ 9-10.

The U.N. Committee Against Torture and the U.N. Human Rights Committee have similarly found diplomatic assurances from Egypt to be unreliable. *See* U.N. Comm. Against Torture, *Agiza v. Sweden*, Communication No. 233/2003, ¶ 13.4, U.N. Doc. CAT/C/34/D/233/2003 (2005) (finding that diplomatic assurances previously provided to Sweden by the Egyptian government did not guard against the “manifest risk” of torture, and that Sweden’s expulsion of Agiza pursuant to diplomatic assurances violated Article 3 of CAT); *Alzery v. Sweden*, Communication No. 1416/2005, ¶¶ 11.5, 4.6, U.N. Doc. CCPR/C/88/D/1416/2005 (2006) (finding that Egypt’s diplomatic assurances to Sweden were not “in fact sufficient in the present case to eliminate the risk” of torture, and that it was “clear that the Swedish Government was aware that it would be in breach of its *non-refoulement* obligation if it expelled [Alzery]” to Egypt).

The courts of other countries have echoed concerns about Egypt’s poor human rights record. *See Mahjoub v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1503, ¶¶ 89-90 (Canadian Federal Court rejecting as “patently unreasonable” an administrative official’s crediting of

Egyptian assurances in light of her failure “to take into account the human rights record of the [Egyptian] government,” as well as “the overwhelming bulk of evidence which document[ed] Egypt’s poor record of compliance [with assurances].”); *Youssef v. Home Office*, ¶ 8, Case No: HQ03X03052, 2004 EWHC 1884 (QB), July 30, 2004 (noting, in a case concerning the illegal detention of individuals who were detained but not deported to Egypt despite assurances, a February 1999 Home Office memo warning that “there are a number of factors which suggest that assurances [from Cairo] would do little or nothing to diminish the Article 3 risk”).

Second, it is well established that Egypt has breached diplomatic assurances in the past. Mr. Stork states that he knows of “several cases in which Egypt has tortured returned individuals, and breached diplomatic assurances provided to returning countries in the past,” and that Human Rights Watch “has credible evidence” that Egypt breached anti-torture assurances in the case of Ahmad Agiza and Mohammad al-Zari. Stork Decl. ¶ 13. Alzery has stated that he was “harshly ill-treated, including electric shocks applied to genitals, nipples and ears.” U.N. Comm. Against Torture, *Alzery v. Sweden*, Communication No. 1416/2005, ¶ 3.15, U.N. Doc. CCPR/C/88/D/1416/2005 (Nov. 10, 2006). Agiza has stated that he was beaten and that a “special electric device with electrodes connected to his

body was utilized, and that electric shocks were utilized if he did not respond properly to orders.” U.N. Comm. Against Torture, *Agiza v. Sweden*, Communication No. 233/2003, ¶ 2.6, U.N. Doc. CAT/C/34/D/233/2003 (2005). Swedish government documents corroborate Agiza’s allegations. See Katherine R. Hawkins, Note, *The Promises of Torturers: Diplomatic Assurances and the Legality of “Rendition,”* 20 Geo. Immigr. L.J. 213, 247 (2006). For this reason, among others, diplomatic assurances by Egypt are widely viewed as unreliable, even reportedly by some CIA officers. See *id.* at 267 (2006) (stating that “[n]o reasonable factfinder could determine that unverified promises not to torture, which [Egypt] has violated in the past and which many CIA officers say are worthless, reduce the odds of torture”). These facts are further confirmed by the declaration of Julia Hall, a senior researcher at Human Rights Watch who is an expert on the use of diplomatic assurances. See Declaration of Julia Hall (“Hall Decl.”) (attached hereto as Ex. 6) ¶¶ 23-28 (describing in addition to the cases of Agiza and al-Zari, the case of Abu Omar who was rendered by the U.S. to Egypt, and who alleged he was tortured in Egyptian custody). Notably, the U.S. government has declined to transfer a Guantanamo Bay detainee to Egypt despite efforts to secure diplomatic assurances, due to the government’s fear that he would be at risk of torture if returned. Hall Decl. ¶ 29.

Third, the U.S. government's recent announcement that Mr. Khouzam has been convicted "in absentia," *see* Government's Brief in Opposition to Motion to Compel Release, *Khouzam v. Hogan*, No. 07-0992 (M.D. Pa. July 2, 2007) [*hereinafter* Gov't's Opposition Brief of July 2, 2007] at Ex. 2 (Letter of Thomas Decker, dated June 29, 2007), places him at additional risk and further undermines the adequacy of the Egyptian government's assurances. Human Rights Watch has documented cases "in which individuals previously sentenced in absentia were not given new trials, and where new trials did occur, they did not meet international fair trial standards." Stork Decl. ¶ 11. "Given that Mr. Khouzam has been convicted in absentia of murder, he is likely to face prolonged detention, with uncertain access to legal counsel or to family members. He faces a substantial risk of torture, particularly if he is subject to interrogation." Stork Decl. ¶ 12.

Fourth, and of particular significance, is the absence of any reliable mechanisms in place to ensure effective post-return monitoring for individuals returned to Egypt. Stork Decl. ¶ 14. According to Julia Hall, individuals returned to Egypt are often held incommunicado, or without regular access to relatives and lawyers. Hall Decl. ¶ 11. Notably, the Egyptian government did not permit a visit during 2006 by the U.N.

Special Rapporteur on Torture, who had been seeking to visit since 1996. Hall Decl. ¶ 21. Nor do the International Committee of the Red Cross (“ICRC”) and other international and independent domestic human rights monitors have access to prisoners or other places of detention. Hall Decl. ¶ 21.⁶ *See also* U.N. Human Rights. Comm., Concluding Observations of the Human Rights Committee: Egypt, ¶ 15, U.N. Doc. CCPR/CO/76/EGY (Nov. 28, 2002) (noting “impediments to visits [to prison establishments in Egypt] by United Nations-instituted treaty and non-treaty human rights mechanisms and non-governmental human rights organizations”).

In any event, it is well-established that diplomatic assurances are insufficient for protecting transferred individuals from torture.⁷ Even if monitoring mechanisms were in place, torture can be covered up, or else employed in secret using techniques that defy detection. Indeed, high-level

⁶ *See also* ICRC Annual Report 2006 317 (noting that the ICRC still did not have “access to all places of detention” in Egypt), *available at* [http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/738E5E/\\$FILE/icrc_ar_06_egypt.pdf](http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/738E5E/$FILE/icrc_ar_06_egypt.pdf)

⁷ The present Special Rapporteur on Torture has held that diplomatic assurances “are ineffective and unreliable in ensuring the protection of returned persons and therefore should not be resorted to by States” as has the U.N. High Commissioner for Human Rights. *See* The Secretary General, *Interim Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, ¶ 2, delivered to the General Assembly, U.N. Doc. A/61/259 (Aug. 14, 2006); Louise Arbour, *Report of the High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism*, ¶ 9, U.N. Doc. A/HRC/4/88 (Mar. 9, 2007) (“[t]here is well-established case law and evidence to demonstrate that such [assurances] do not work as they do not provide adequate protection against torture and ill-treatment.”)

U.S. administration officials—including Attorney General Alberto Gonzales, and former Director of Central Intelligence Porter Goss—have publicly admitted that they cannot fully control what happens to an individual after he is transferred pursuant to diplomatic assurances. Hall Decl. ¶¶ 18-19. In addition, detainees are often afraid to complain about the torture inflicted upon them for fear of reprisals against themselves or their family members. Hall Decl. ¶¶ 10-14.

This is evidenced clearly in the case of Maher Arar, a Canadian-Syrian dual national who was transferred by the U.S. to Syria where he was tortured, notwithstanding assurances, and who was afraid to complain to Canadian authorities for fear of reprisals by Syrian officials. *See* Hall Decl.

¶ 13. In Arar’s words:

The interrogation and beating ended three days before I had my first consular visit. I was told not to tell anything about the beating, then I was taken to a room for a ten minute meeting with the [Canadian] consul. The colonel was there, and three other Syrian officials including an interpreter. I cried a lot at that meeting. I could not say anything about the torture. I thought if I did, I would not get any more visits, or I might be beaten again . . .

See Hall Decl. ¶ 13. The final report of a special Canadian commission of inquiry into Canada’s role in Arar’s transfer confirmed that Arar “lived

through a nightmare” of torture while imprisoned in Syria. *Id.* ¶ 13.

Moreover, diplomats are often quite candid that their top priority is to ensure friendly relations with other States, sometimes at the expense of confronting governments about possible human rights violations, including breaches of pre-agreed diplomatic assurances. *See* Hall Decl. ¶ 17.⁸ This is of particular concern with respect to Egypt in light of current U.S./Egypt diplomatic relations. According to Mr. Stork, revelations relating to the United States’ own abusive interrogation practices in connection with the war in Iraq, and “U.S. reliance on Egypt to support U.S. policies on a variety of issues . . . have made it increasingly difficult for the United States to raise human rights concerns in any effective way.” Stork Decl. ¶ 17. Indeed, “[o]ver the past year in particular, the United States has demonstrated great reluctance to criticize or otherwise embarrass the government of Egypt concerning serious on-going human rights abuses, including but not limited to the systematic practice of torture.” *Id.* Thus, contrary to the summary assertions made in the government’s declaration, *see* Gov’t’s Response of June 1, 2007 at Ex. H (Declaration of James J. Jeffrey, dated May 31, 2007),

⁸ If an allegation of torture is made, neither the sending nor receiving government has any incentive to acknowledge or investigate the charge—the sending government would have to admit a violation of its non-refoulement obligations, and the receiving government would have to admit a violation of the absolute prohibition against torture. Hall Decl. ¶ 15.

Mr. Stork concludes that “the judicial, penal and human rights conditions as well as the political and legal developments in Egypt compel the conclusion that diplomatic assurances from Egypt do not in any way suffice to protect Mr. Khouzam from torture if he were returned there.” Stork Decl. ¶ 8.

Finally, Mr. Khouzam is at particular risk of torture because the United States government has shared information relating to his CAT claim with the government of Egypt and may have shared information about his asylum claim as well. The danger associated with the sharing of such information is evidenced by regulations specifically prohibiting the U.S. government from sharing such information in the asylum context, *see* 8 C.F.R. § 1208.6(a). The Second Circuit Court of Appeals specifically recognized the grave implications of such information sharing when it “requested further briefing” on Mr. Khouzam’s previous claim that “the U.S. government passed information from his confidential asylum application to the Egyptian government” in light of “its potential effect on [his] CAT claim.” *Khouzam v. Ashcroft*, 361 F.3d 161, 166 (2d Cir. 2004).⁹ *See also Matter of Khouzam*, at 10 (Written Decision of IJ W.A. Durling, January 14, 2000) (observing that “[i]f in fact some U.S. official or officer improperly provided the Egyptian government such information, that fact

⁹ Ultimately, because the court upheld Mr. Khouzam’s CAT claim, it found it unnecessary to rule on the information sharing issue. *Id.* at 166.

would be very troubling and would strike at the heart of the confidentiality regulations upon which our asylum process is based,” and that evidence offered by the government “[i]n order to deflect culpability from such allegation” did not “register[] with this court” as proof of the lack of such culpability) (attached as Ex. 3 to Pet.’s Reply Brief in Support of Motion to Compel Release).¹⁰ Respondents’ disclosure of information relating to Mr. Khouzam’s CAT claim makes his torture at the hands of Egyptian authorities even more likely than before.

Thus, this Court should rule that *no* assurances from the Egyptian government could possibly alter the Second Circuit’s prior finding that Mr. Khouzam would more likely than not be tortured upon return. At a minimum, however, in light of all of the foregoing factors, Mr. Khouzam is entitled to a rebuttable presumption that the assurances at issue are insufficient under CAT and FARRA. The burden should be on the government to demonstrate why the Egyptian government’s assurances are sufficient to overcome this presumption. In this case, the U.S. government’s claim that it has negotiated sufficiently reliable assurances rings particularly hollow in that up until it was reversed by the Second Circuit, the government

¹⁰ The IJ concluded that even if Mr. Khouzam’s asylum information had been shared with the Egyptian government, it was not empowered to inquire into this issue. *Id.*

consistently argued that Mr. Khouzam would not face torture if removed to Egypt, but merely legitimate prosecution for his alleged crime.

B. Mr. Khouzam’s removal pursuant to diplomatic assurances without any meaningful and independent review of the reliability and sufficiency of those assurances would violate both CAT and FARRA.

1. The plain language of CAT and FARRA does not except diplomatic assurances from meaningful review.

As previously noted by this Court, “[t]he right to be free from official torture is fundamental and universal, a right deserving of the highest status under international law, a norm of *jus cogens*.” *Khouzam v. Hogan*, 2007 WL 1746367, at *8 (M.D. Pa. June 15, 2007). Moreover, “[t]he protection against torture on which the principle of non-return rests is a fundamental right that is important to the rule of law and essential to a democratic society.” *Id.* at *9. The text of CAT art. 3 and FARRA permit no exceptions to United States’s non-refoulement obligations. *See* CAT art. 3; FARRA § 2242(a).

Especially in light of the fundamental and non-derogable nature of the right enshrined in CAT art. 3 and FARRA, it is questionable whether reliance on diplomatic assurances can *ever* be compatible with CAT and FARRA, particularly where such assurances are from a country like Egypt that has a record of engaging in torture. *See supra* Section III.A. The

present Special Rapporteur on Torture has concluded that “diplomatic assurances with regard to torture are nothing but attempts to circumvent the absolute prohibition on torture and refoulement.” Manfred Nowak, *Report of the Special Rapporteur to the Commission on Human Rights*, ¶ 32, U.N. Doc. E/CN.4/2006/6 (Dec. 23, 2005). *See also* Martin Scheinin, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, ¶ 56, U.N. Doc. E/CN.4/2006/98 (Dec. 28, 2005) (citing “proposals to compromise the rule of non-refoulement through . . . diplomatic assurances” as part of the “the most alarming ‘new trend’ related to counter-terrorism measures”). Indeed, that diplomatic assurances are sought at all is an acknowledgement of the risk of torture in the receiving country, and there is a wealth of authority to demonstrate that they do not protect the transferred individual from torture. *See supra* Section III.A.2.

However, even if reliance on such assurances was permissible in rare cases, the government’s position that a judicially-ordered grant of deferral of removal can be terminated by such assurances without any meaningful and independent review of their reliability and sufficiency, is irreconcilable with the fundamental and non-derogable nature of our obligations as enshrined in CAT and FARRA. To date no U.S court has addressed the legality of

diplomatic assurances under either CAT or FARRA.¹¹ Notably, neither CAT nor FARRA make any reference to the use of diplomatic assurances as a basis for revoking relief or denying such relief in the first instance. Nor in its ratification of CAT did the United States register any reservations, understandings, declarations or provisos reserving the right to use diplomatic assurances.¹² *See* Pet’s Reply Brief of June 11, 2007 at 27-28.

Both CAT and FARRA prohibit returning a person to a country when there are “substantial grounds for believing that he would be in danger of being subjected to torture.” CAT art. 3(1); FARRA Section 2242(a). Moreover, CAT specifically provides that in making this determination a government “shall take into account *all relevant considerations* including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.” CAT art. 3(2). (emphasis added). The regulations promulgated to implement the United

¹¹ The court in *Soliman v. U.S.* did not reach the merits of Mr. Soliman’s challenge to removal pursuant to diplomatic assurances. 296 F.3d at 1241 n. 1.

¹² *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Declarations and Reservations, *available at* <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty14.asp#N22>. The only reservation relating specifically to Article 3 of CAT states that “the United States understands the phrase, ‘where there are substantial grounds for believing that he would be in danger of being subjected to torture,’ as used in Article 3 of the Convention, to mean ‘if it is more likely than not that he would be tortured.’” *Id.* Congress added this reservation to conform its Article 3 non-refoulement obligations to pre-existing standards governing the grant of withholding of removal. *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, S. Exec. Rep. 101-30, at 10.

States' obligations under CAT and FARRA track this language, specifically requiring consideration of "all evidence relevant to the possibility of future torture" including "evidence of past torture inflicted upon the applicant," "[e]vidence of gross, flagrant or mass violations of human rights within the country of removal," and "other relevant information regarding conditions in the country of removal." 8 C.F.R. § 1208.16(c)(3). Moreover, the plain language of CAT and FARRA do not except diplomatic assurances from meaningful review. Rather, the plain language of FARRA clearly contemplates judicial review of CAT claims without regard to whether diplomatic assurances have been invoked in relation to such claims. *See* FARRA § 2242(d).¹³

Indeed, in recognition of the need to create "fair and efficient provisions to implement Article 3" and the "high standards of proof required by article 3," the government's implementing regulations provide for initial adjudication of CAT claims as part of removal hearings conducted before an

¹³ As this Court has already concluded in finding habeas jurisdiction, the fact that FARRA § 2242(d) limits jurisdiction to review of CAT claims "as part of the review of a final order of removal" does not imply that it precludes review of cases where diplomatic assurances are obtained after a final order of removal has already been reviewed. At the time that Congress ratified CAT and enacted FARRA, it had not specifically contemplated the relatively recent phenomenon of reliance on diplomatic assurances. Indeed, there is no mention of diplomatic assurances in the ratification history of CAT or the legislative history of FARRA. Moreover, the potential for CAT claims to be raised after the review of a final removal order was created by the regulations, which themselves post-date FARRA.

immigration judge, with subsequent review by the Board of Immigration Appeals and thereafter judicial review as part of a final order of removal. *See* Regulations Concerning the Convention Against Torture; Interim Rule, 64 Fed. Reg. 8477, 8479-80 (Feb. 19, 1999); 8 C.F.R. § 1208.17(b); 1208.18(e). These same regulations, however, allow the government to terminate an existing grant of deferral of removal pursuant to diplomatic assurances without any review by an IJ or the BIA, but rather by an alternative administrative procedure that requires DHS to consult with the Secretary of State to assess the reliability of the assurances. *See* Regulations Concerning the Convention Against Torture; Interim Rule, 64 Fed. Reg. 8477, 8484 (Feb. 19, 1999); 8 C.F.R. § 1208.17 (f), 1208.18(c)(3). Notably, these regulations do *not* preclude *judicial* review of such cases, and this Court has already found that it has habeas jurisdiction here. Nonetheless, the government takes the extreme position that no further administrative or judicial review is available to challenge the termination decision, *see* Gov't's Response of June 1, 2007 at 39-40, even where, as here, it results in revocation of a grant of deferral that was judicially ordered.

The government has not explained the basis for denying such basic procedural protections to individuals who have already been found by the courts to be more likely than not at risk of torture. Indeed, the meritorious

nature of their CAT claims would appear to warrant *greater* procedural protections for such individuals. As construed by the government, the regulations would allow the government to go through the motions of the procedures set forth for reviewing CAT claims in the first instance, only to summarily terminate a prior CAT grant pursuant to diplomatic assurances without further review.

Notably, if the government seeks to terminate deferral of removal based on any other change in circumstances apart from a diplomatic assurance, the regulations require a motion from the government and a new hearing before an immigration judge, along with the opportunity for review of any adverse decision to the BIA and thereafter to the Court of Appeals as part of review of a new final order of removal. 8 C.F.R. § 208.17(d); § 208.18(e). No explanation is offered as to why a similar process should not be required where the “changed circumstance” is a diplomatic assurance negotiated with the country of removal.

As demonstrated below, CAT and FARRA do not permit the revocation of deferral of removal pursuant to diplomatic assurances without independent review of the reliability and sufficiency of these assurances.

2. The jurisprudence of the Committee Against Torture and other treaty bodies recognizes that CAT's prohibition on non-refoulement encompasses a right to meaningful and independent review in the event of a breach.

The Committee Against Torture has held that non-refoulement obligations under CAT Article 3 specifically require meaningful and independent review prior to removal pursuant to diplomatic assurances. *See, e.g.*, U.N. Comm. Against Torture, *Agiza v. Sweden*, Communication No. 233/2003, ¶ 13.7, U.N. Doc. CAT/C/34/D/233/2003 (May 24, 2005) (“[T]he right to an effective remedy contained in article 3 [of CAT] requires, in this context, an opportunity for effective, independent and impartial review of the decision to expel or remove, once that decision is made, when there is a plausible allegation that article 3 issues arise.”). *See also* Pet’s Reply Brief of June 11, 2007 at 42-43.

Indeed, in July 2006, the U.N. Committee Against Torture specifically communicated its concern to the United States about its use of diplomatic assurances, “including the absence of judicial scrutiny and the lack of monitoring mechanisms put in place to assess if the assurances have been honoured.” U.N. Comm. Against Torture, Conclusions and Recommendations to U.S., ¶ 21, U.N. Doc. CAT/C/USA/CO/2 (July 25, 2006) (citing CAT art. 3). The Committee instructed the United States as follows:

When determining the applicability of its non-refoulement obligations under article 3 of the Convention, the State party should only rely on “diplomatic assurances” in regard to States which do not systematically violate the Convention’s provisions, and *after a thorough examination of the merits of each individual case*. The State party should establish and implement clear procedures for obtaining such assurances, *with adequate judicial mechanisms for review*, and effective post-return monitoring arrangements.

Id. (emphasis added). *See also* Pet’s Reply Brief of June 11, 2007 at 42.

More recently, in *Pelit v. Azerbaijan*, the Committee found that Azerbaijan had violated Article 3 in removing an individual to Turkey because, *inter alia*, Azerbaijan had “not supplied the assurances to the Committee in order for the Committee to perform *its own independent assessment* of their satisfactoriness or otherwise.” *Pelit v. Azerbaijan*, Communication No. 281/2005, ¶ 11, U.N. Doc. CAT/C/38/D/281/2005 (May 29, 2007) (emphasis added). The Committee Against Torture also considered Azerbaijan’s failure to “detail with sufficient specificity the monitoring undertaken and the steps taken to ensure that [such monitoring] both was, in fact and in the complainant’s perception, objective, impartial and sufficiently trustworthy” to adequately safeguard the refouled individual from a further Article 3 breach. *Id.*

Other international bodies and torture experts echo the Committee Against Torture's views on the need for meaningful judicial review of diplomatic assurances. The U.N. Human Rights Committee, the treaty body charged with monitoring and implementing the International Covenant on Civil and Political Rights ("ICCPR"), which the United States ratified in 1992,¹⁴ has instructed the United States to "exercise the utmost care in the use of diplomatic assurances and adopt clear and transparent procedures with adequate judicial mechanisms for review before individuals are deported, as well as effective mechanisms to monitor scrupulously and vigorously the fate of the affected individuals." U.N. Human Rights Committee, Concluding Observations of the Human Rights Committee to the U.S., ¶ 16, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006).

Similarly, in the expert opinion of former U.N. Special Rapporteur on Torture, Theo Van Boven, "in situations where diplomatic assurances are not a priori rejected, U.S. treaty obligations require that the individual removed have access to adequate and independent procedures for judicial review prior to removal." Van Boven Decl. ¶ 5.

¹⁴ See Office of the U.N. High Commissioner for Human Rights, International Covenant on Civil and Political Rights, Ratifications and Reservations, *available at* <http://www.ohcr.org/English/countries/ratification/4.htm#reservations>.

3. Cross country practices confirm that non-refoulement obligations entail meaningful and independent review of text and context of diplomatic assurances and other relevant factors

The practices of other countries with respect to procedures relating to the review of diplomatic assurances—a subject on which this Court specifically requested briefing—are instructive in this case.¹⁵

As set forth in the declaration of Julia Hall, an expert on cross-country practices on diplomatic assurances, “[t]he vast majority of countries that

¹⁵ See *El Al Israel Airlines v. Tsui Yuan Tseng*, 525 U.S. 155, 167 (1999) (“Because a treaty ratified by the United States is not only the law of this land . . . but also an agreement among sovereign powers, we have traditionally considered as aids to its interpretation the negotiating and drafting history (*travaux préparatoires*) and the postratification understanding of the contracting parties.”). Indeed, the Supreme Court has previously recognized foreign and international law as persuasive authority even in the arena of constitutional jurisprudence. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 576 (2003) (looking to the jurisprudence of the European Court of Human Rights and the practices of other nations in affirming “the protected right of homosexual adults to engage in intimate, consensual conduct”); *Roper v. Simmons*, 543 U.S. 551, 575 (2005) (“[T]he Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment’s prohibition of ‘cruel and unusual punishments.’”); *Atkins v. Virginia*, 536 U.S. 304, 317 n.21 (2002) (“Moreover, within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.”) (citing to a European Union *amicus* brief); *Thompson v. Oklahoma*, 487 U.S. 815, 830 & n.31 (1988) (plurality opinion) (observing that “[w]e have previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual” and looking to the practices of U.K., New Zealand and other European countries in determining “that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense”); *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977) (finding it relevant in case contesting proportionality of capital punishment in U.S. rape cases “that out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue.”) (internal citations omitted); *Trop v. Dulles*, 356 U.S. 86, 102-03 (1958) (looking to the practices of the “civilized nations of the world” and a “United Nations’ survey of the nationality laws of 84 nations of the world” in concluding that the Eighth Amendment did not permit the imposition of denationalization as a penalty for desertion).

have ratified the Convention Against Torture do not rely on diplomatic assurances against torture for removals in the immigration, asylum, extradition, or other contexts. Many countries view reliance upon such assurances as a way to circumvent the absolute prohibition against returning a person to a place where he is at risk of torture.” *See* Hall Decl. ¶ 5. The declaration adds that “the United States is the only government that purports to deny a person subject to transfer the right to challenge the reliability and sufficiency of diplomatic assurances against torture before an independent, impartial body.” Hall Decl. ¶ 6. It further notes:

To the best of my knowledge, no other country that has absolute nonrefoulement obligations under the Convention Against Torture or a similar treaty instrument . . . transfers a person at risk of torture without permitting him to challenge that transfer before an independent, impartial body. The person at risk of torture who is threatened with removal or other transfer (including extradition) is informed of the case against him and given the opportunity to rebut the transferring government’s effort to remove him. Judicial review of the transfer entails the production by the transferring government of any diplomatic assurances against torture received from the country of return and an evaluation by the court of the text of the assurances and the context within which the assurances were sought, negotiated, secured and alleged to be enforceable post-transfer. The person subject to transfer and/or his representative has access to the text of the assurances and any other documents that shed light on the process of negotiating and securing them.

Hall Decl. ¶ 4. *See also id.* ¶ 6 (noting that “in every other country that either currently employs or proposes employing diplomatic assurances against torture”—a group that includes Austria, Canada, Germany, Netherlands, Russia, Sweden, Switzerland, Turkey and the United Kingdom—“judicial review of the reliability and sufficiency of the assurances is guaranteed” and that “none of these governments has claimed that judicial review of diplomatic assurances would have a ‘chilling effect’ on future negotiations for such guarantees or would impede in general its ability to conduct foreign relations”).

Expert declarations attached herewith provide further detail with respect to the practices of the U.K, Canada, and the Netherlands; a highly publicized letter from the Swiss President to Human Rights Watch also details practice in Switzerland:¹⁶

United Kingdom. The U.K. is a party to both the Convention Against Torture and the European Convention on Human Rights (which contains non-refoulement obligations that mirror those contained in CAT). On July 30, 2007, a U.K. Court of Appeal affirmed that “[t]here is no doubt that the national court must engage in rigorous scrutiny of an article 3 [ECHR] case,

¹⁶ These are the declarations that Petitioner’s counsel were able to obtain in the short time frame since the Court ordered briefing on this issue. If the Court believes it would be helpful, counsel are prepared to seek declarations with respect to additional countries.

in view of the absolute character of the article 3 obligations and the fundamental values that it enshrines.” *MT, RB, and U v Secretary of State for the Home Department*, ¶ 11, [2007] EWCA Civ. 808.

As set forth in the attached declaration of Nicholas Blake, the U.K. seeks diplomatic assurances only in cases involving persons who present a “national security risk.” Blake Decl. ¶ 8. Thus, the U.K. does not seek diplomatic assurances in immigration cases akin to Mr. Khouzam’s. Indeed, in the “ordinary asylum case, it is considered improper for the executive to discuss the merits of a claim to have a well founded fear of persecution with the government of the persecuting country.” *Id.* ¶ 9. Moreover, under prevailing U.K. law, “no person can be expelled to another country pursuant to diplomatic assurances . . . without an opportunity of first appealing to a judicial tribunal to ventilate a credible claim that he would be subjected to prohibited ill treatment.” Blake Decl. ¶ 49.

In addition, “where the [U.K. government] relies on diplomatic assurances or other similar material received from the state of return, it must produce the material it relies on and the court can review it.” *Id.* ¶ 3. In the case of *Y & Othman* [2006] SC/36 & 15/2005 (Special Immigration Appeals Commission), the Commission specifically held that the government “cannot rely on any substantive assurances unless it is put into the open,” *Id.* ¶ 46,

and that “key documents or conversations relied on to show that an Appellants’ return would not breach the UK’s international obligations,” must be placed in the open evidence and made available to the non-citizen. *Id.*; see also *id.* ¶ 49. In the U.K., “in immigration cases, relevant material that is considered sensitive in relation to foreign relations and that the state does not wish to be made open must be provided to the relevant judicial body in closed proceedings where a special advocate must be appointed to assist the court in determining whether the material should remain closed, and to represent the interests of the claimant if the court concludes that the evidence cannot be placed in the open.” Blake Decl. ¶ 4. “This material must include any information relating to the assurances in question that would undermine the [U.K. government’s] reliance on the assurance in question.” *Id.*¹⁷ See also *Y v. Secretary of State for the Home Department*, ¶¶ 390, 394 [2006] SC/36/2005 (Special Immigration Appeals Commission)

¹⁷ As set forth in the Blake Decl., these procedures were instituted in response to the decision of the European Court of Human Rights, *Chahal v. United Kingdom*, 23 Eur. Ct. H.R. Rep. 413 (1996). In *Chahal*, the European Court held that the U.K. had violated the “effective remedy” provision associated with its non-refoulement obligations under Article 3 of the European Convention on Human Rights by not providing “independent scrutiny of the claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3.” *Chahal*, ¶151. As previously noted, the CAT Committee has found that Article 3 of CAT contains an equivalent “effective remedy” provision.

(holding that the effectiveness of diplomatic assurances must be assessed “in the light of all the circumstances of the case and country,” and that “[t]he prospects of a breach [of assurances] is a matter for an evidenced based [sic] judgment taking account of what we are told about their strength, the intent behind them and the incentives to adhere and penalties for breach in the political circumstance prevailing.”).

Canada. Canada signed the Convention Against Torture in 1985 and ratified it in 1987. *See Macklin Decl.* ¶ 4. Under prevailing Canadian law, non-citizens’ claims regarding the risk of torture upon removal are initially assessed in a “Pre-Removal Risk Assessment” (“PRRA”) that is generally conducted by a delegate of the Minister of Citizenship and Immigration, also known as the PRRA officer. *Id.* ¶ 5. Diplomatic assurances, if invoked by the government, would typically be assessed during the PRRA. *Id.* ¶ 5. The PRRA officer’s decision is then subject to independent judicial review by the Federal Court, followed by the Federal Court of Appeal and Supreme Court of Canada. *Id.* ¶ 6. These courts have “access to and can review all materials relied on by the government in crediting diplomatic assurances.” *Id.* ¶ 23. Information relevant to the provision of diplomatic assurances, upon which the Minister intends to rely, must be disclosed to the claimant,

or if not to the claimant, then to some other independent agent at the stage of judicial review. *Id.* ¶¶ 16, 23.

In *Suresh v. Canada* (Minister of Citizenship and Immigration) [2002] 1 SCR 3, the Supreme Court of Canada held under § 7 of the Canadian Charter,¹⁸ “analysis of which should be informed” by CAT, that “a person facing deportation to torture . . . must be informed of the case to be met. *Id.* ¶ 122. The Court found that “[g]iven Canada’s commitment to the CAT . . . the appellant had the right to procedural safeguards,” because CAT “raises a duty [on the part of the State] to afford [the claimant] an opportunity to demonstrate and defend those grounds [for believing that he would be in danger of being subjected to torture].” *Id.* ¶ 119. It further held that “the Minister must provide the [claimant] with all relevant information and advice she intends to rely on, provide the [claimant] an opportunity to address that evidence in writing, an after considering all the relevant information, issue responsive written reasons.” *Id.* ¶ 127. The Supreme Court of Canada added that “[w]here the Minister is relying on written assurances from a foreign government that a person would not be tortured, the [claimant] must be given an opportunity to present evidence and make

¹⁸ Section 7 of the Canadian Charter states that “[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”

submissions as to the value of such assurances.” *Id.* ¶ 123. *See also* Macklin Decl. ¶¶ 7-14.

The Netherlands. The Netherlands has equivalent non-refoulement obligations under both the Convention Against Torture and the European Convention. Under the law of the Netherlands, an individual facing transfer pursuant to anti-torture diplomatic assurances would have to be given an opportunity to challenge such assurances in court. Both the courts and the individual at risk would be able to examine the assurances at issue. Koppe Decl. ¶¶ 7, 13, 14. In the *Kesbir* case, the Netherlands’ leading and only case concerning a challenge to diplomatic assurances, the Supreme Court of the Netherlands specifically reviewed the adequacy of the assurances and concluded that they were too vague to satisfy the non-refoulement obligations of the Netherlands. *Id.* ¶ 12.

Switzerland. In a highly publicized letter to Human Rights Watch dated April 4, 2007 (attached hereto as Ex. 7), Micheline Calmy-Rey, the head of the Federal Department of Foreign Affairs, and the current President of the Swiss Confederation (the presiding member of the Swiss Federal Council, Switzerland’s seven-member executive), stated that “[i]n Swiss practice, a distinction must be made between cases of extradition and cases of return.” In cases of extradition, “[d]iplomatic assurances are an

appropriate instrument” where an extraditee faces a risk of torture only if those assurances are “given in legally binding form in accordance with international law.” In contrast, in cases of return “in accordance with legislation on asylum and on foreign nationals, it is forbidden to request such guarantees.” Additionally, the Swiss President stated, in the context of replying to an inquiry on diplomatic assurances, that “it should be stressed that in Switzerland the judiciary plays a major role in the control of administrative decisions regarding expulsion or extradition.” From this it is readily apparent that Switzerland only seeks diplomatic assurances in extradition cases, that it considers that such assurances must be legally binding as a matter of international law, and that there is judicial review of the decision to extradite.

In stark contrast to the practices of other countries, the United States government in this case is seeking to remove Mr. Khouzam without any judicial review, let alone a review of the text of the assurances that the courts of foreign countries routinely consider among other relevant factors in determining whether or not such a removal is permissible. If the U.S. government refuses to “put into the open” material relevant to the crediting of Egyptian assurances, it may not rely on such material to remove Mr. Khouzam. *See Y & Othman* [2006] SC/36 & 15/2005 (Special Immigration

Appeals Commission) (holding that the U.K. government “cannot rely on any substantive assurances unless it is put into the open”).

IV. THE GOVERNMENT’S ACTIONS VIOLATE MR. KHOUZAM’S RIGHT TO DUE PROCESS.

A. The procedure followed in Mr. Khouzam’s case was grossly inadequate.

As Petitioner previously argued and as this Court recognized, *see Khouzam v. Hogan*, No. 3:CV-07-0992, 2007 WL 1746367, at *9 (M.D. Pa. June 15, 2007), Mr. Khouzam has procedural due process rights arising out of CAT and FARRA. As Petitioner further argued, the government is in no position to argue that it has provided due process. Three years after he was awarded CAT relief by the Second Circuit, and fifteen months after a district court ordered the government to release him, Mr. Khouzam was re-detained without warning as he was reporting in at the regional Immigration and Customs Enforcement office. *See Khouzam v. Ashcroft*, 361 F.3d 161, 171 (2d Cir. 2004); *Khouzam v. Gonzales*, Civ. No. 05-2443 (D. N.J. Feb. 7, 2006) (order granting habeas petition). A cursory letter from Assistant Secretary Myers informed Mr. Khouzam that his protection had been revoked based on diplomatic assurances from Egypt and that he would be removed to Egypt after 72 hours. *See Gov’t’s Response of June 1, 2007 at Ex. G* (Letter from Julie Myers to Maha Kabbash, dated May 29, 2007).

The letter provided no information about the assurances, no explanation as to why Myers had determined these assurances were sufficiently reliable to rebut the past administrative and judicial findings that the Egyptian government was more likely than not to torture Mr. Khouzam, and no information about any possible recourse that might be available to him. *Id.*

Only since Mr. Khouzam filed the instant habeas petition has the government come forward with any further information: (1) an undated “Memorandum to File” by Myers recounting that the Department of State had obtained and forwarded the assurances to her and that she had determined that they were sufficient “[a]fter consulting with the Department of State and taking into account all relevant considerations, including human rights practices in Egypt,” Gov’t’s Response of June 1, 2007 at Ex. E (Memorandum to File from Julie Myers, undated);¹⁹ and (2) an affidavit from Assistant Secretary of State James F. Jeffrey attesting that the State Department obtained “formal written assurances” from Egypt, referred them to the relevant bureaus for review, concluded based on that review that they

¹⁹ Notably, other than a vague, euphemistic reference to “human rights practices in Egypt,” the Memorandum gave no indication that Myers considered the other factors weighing against removal, such as Egypt’s past torture of Mr. Khouzam and record of renegeing on diplomatic assurances, as well as the difficulty of monitoring or enforcing post-return compliance. Gov’t’s Response of June 1, 2007 at Ex. E (Memorandum to File from Julie Myers, undated).

were adequate, and conveyed this conclusion to DHS. *Id.* at Ex. H (Declaration of James J. Jeffrey, dated May 31, 2007).

The evidence submitted by the government does not begin to satisfy the test for due process set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), in which courts assess the adequacy of the procedure provided in light of the interests at stake, the risk of erroneous deprivation, and the burden on the government of any additional procedural protections. Pet's Reply Brief of June 11, 2007 at 56-58. This Court made clear in its preliminary decision that the interests at stake here are crucial and consist not only of Mr. Khouzam's fundamental interest in "bodily integrity and human dignity," *Khouzam*, 2007 WL 1746367, at *8, but also of the public's interest in "the rule of law and a democratic society," *id.* at *10.

As for the second *Mathews* factor, the risk of erroneous deprivation is elaborated in Julia Hall's affidavit. Hall Decl. ¶¶ 18-28 (attesting that U.S. officials have no capacity to monitor post-return treatment; that monitoring in Egypt is, in any event, impossible; and that Egypt has breached diplomatic assurances in the past); *see also Youssef v. Home Office*, ¶ 8, 2004 EWHC 1884 (QB), July 30, 2004 (noting an internal British Home Office memorandum stating that "there are a number of factors which suggest assurances [from Egypt] would do little or nothing to diminish the

Article 3 risk”); *Mahjoub v. Canada* (Minister of Citizenship and Immigration), ¶ 90, 2006 FC 1503 (finding that the administrative official “erred by ignoring the overwhelming bulk of evidence which documents Egypt’s poor record of compliance [with past assurances given]”). Indeed, the risk of erroneous deprivation is so high with respect to Egypt—which has an established record of practicing and denying torture, which has violated diplomatic assurances in the past, and which in fact previously tortured Mr. Khouzam—that diplomatic assurances alone could never support removal regardless of the amount of process provided.

Finally, as for the countervailing interests at stake, this Court found in granting Petitioner a stay of removal and denying Respondents’ motion to dismiss, that the governmental interest in summarily removing Mr. Khouzam was clearly outweighed by Mr. Khouzam’s interest in fair proceedings and the public’s interest in rule of law and democracy. The burden to the government of additional procedures, moreover, is minimal because of the small number of cases in which the government secures diplomatic assurances, and at any rate could not outweigh the above factors.²⁰

²⁰ Although Petitioner believes that the evidence already before this Court is sufficient to establish a due process violation under *Mathews* and to establish the need for the protections outlined *infra*, to the extent that this Court should find otherwise, Petitioner would respectfully request an opportunity

B. The government’s attempt to summarily remove Mr. Khouzam to Egypt violates substantive due process.

The government’s actions also violate substantive due process because they “shock the conscience.” *See* Pet’s Reply Brief of June 11, 2007 at 56 n.21. This Court, along with two other district courts, has recognized substantive due process claims where, as here, the government recklessly places a non-citizen in danger of torture or persecution in his home country. *See Builes v. Nye*, 239 F. Supp. 2d 518, 526 (M.D. Pa. 2003) (finding substantive due process violation under state-created danger doctrine where government acted with willful disregard for the fact that petitioner would be tortured if removed to Columbia); *Lawson v. Gerlinski*, 332 F. Supp. 2d 735, 743 (M.D. Pa. 2004) (adopting *Builes*’ reasoning and ordering evidentiary hearing on substantive due process claim); *Rosciano v. Sonchik*, No. CIV01-0472-PHX-JATMS, 2002 WL 32166630 (D. Ariz. Sept. 9, 2002).

Kamara v. Attorney General, 420 F.3d 202 (3d Cir. 2005), is not to the contrary. Although the Third Circuit stated there that “the state-created danger exception has no place in our immigration jurisprudence,” *id.* at 217,

to conduct limited discovery relevant to the *Mathews* factors. For example, discovery as to the frequency with which the government attempts to remove individuals pursuant to diplomatic assurances could assist the Court in weighing the government’s interest in its current procedures and the potential burden to the government of the additional procedures Petitioner is proposing. Likewise, discovery as to what mechanisms exist to monitor and enforce compliance with diplomatic assurances, as well as what violations have been reported in the past, could assist the Court in weighing the risk of erroneous deprivation.

this statement arguably was dicta (because the court had already determined that the BIA erred in its CAT determination, *see Auguste v. Ridge*, 395 F.3d 123, 148 (3d Cir. 2005)), and at any rate was made in the context of a routine immigration case and should not be applied here, where: 1) the government is attempting to revoke a prior judicial grant of CAT protection based on secret evidence with no notice or opportunity for Mr. Khouzam to be heard; and 2) the government has aggravated the risk to Mr. Khouzam not by only attempting to remove him to Egypt but also by sharing sensitive information about his asylum and CAT applications with the Egyptian government.²¹ *Cf. Zhen Nan Lin v. DOJ*, 459 F.3d 255, 262-269 (2d Cir. 2006) (holding that the government violated the disclosure regulations by authenticating a prison certificate of release with the Chinese government); 8 C.F.R. § 208.6 (forbidding disclosure of asylum application information without written consent of applicant).

C. Mr. Khouzam can be removed to Egypt, if at all, only after he has been allowed to view the government's evidence and contest that evidence before an impartial adjudicator.

Assuming it is ever permissible to rely on diplomatic assurances to revoke an individual's CAT relief and remove him to a country such as

²¹ *See Matter of Khouzam*, at 10 (Written Decision of IJ W.A. Durling, January 14, 2000) (attached to Petitioner's July 9, 2007 Reply Brief in Support of Motion for Release as Ex. 3).

Egypt that systematically practices torture, the government can only do so after providing, at the very least, the following: notice of the government's evidence, an opportunity to contest that evidence before an impartial adjudicator, and, if that adjudicator is an agency official, a record of the adjudication sufficient to allow for judicial review.

As the Third Circuit explained in *Marincas v. Lewis*, 92 F.3d 195, 203 (3d Cir. 1996), in the closely analogous context of asylum law,²² although “[p]recisely what minimum procedures are due under a statutory right depends on the circumstances of the particular situation,” “two of the most basic of due process protections [are] a neutral judge and a complete record of the proceeding.” *Accord Selgeka v. Carroll*, 184 F.3d 337, 342 (4th Cir. 1999); *Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1039-41 (5th Cir. 1982) (finding that expedited procedures for Haitian asylum seekers violated due process, and that due process required at a minimum a meaningful hearing with an adequate opportunity to present evidence and rebut government evidence, and affirming district court’s order to government to come up with a “procedurally fair” plan for reprocessing applications).

²² As set forth in Petitioner’s initial reply brief in support of his habeas petition, given the interests at stake here and his judicially-recognized entitlement to mandatory CAT relief, Petitioner is entitled to at least as much due process protection as an asylum seeker. *See* Pet’s Reply Brief of June 11, 2007 at 50-52.

In *Abdulai v. Ashcroft*, 239 F.3d 542 (3d Cir. 2001), the Third Circuit further set forth the following three minimum requirements for adjudications in asylum-type contexts: (1) “factfinding based on a record produced before the decision[-]maker *and disclosed to him or her*”; (2) the opportunity to present arguments for relief; and (3) an individualized determination. *Id.* at 549 (internal citations and quotation marks omitted; emphasis added). The requirement that evidence be shared to the extent possible is key. As Justice Frankfurter once wrote, “democracy implies respect for the elementary rights of men . . . a democratic government must therefore practice fairness; and fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights.” *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 170 (1951) (Frankfurter, J., concurring).

Even in national security cases—which this is not—courts do not simply defer to a professed need for secrecy, but rather balance that need against the individual’s right to due process. *See Kiareldeen v. Reno*, 71 F.Supp.2d 402, 419 (D. N.J. 1999) (“[T]he INS’[s] reliance on evidence [in the form of FBI materials presented *ex parte* and *in camera*] that could not be tested for reliability denied the petitioner the independent adjudication to which he is entitled.”); *Abourezk v. Reagan*, 785 F.2d 1043, 1060-61 (D.C. Cir. 1986) (in case brought by aliens excluded on national security grounds,

holding that open access to adverse evidence is a “hallmark of our adversarial system” and therefore plaintiffs must be allowed to see the evidence used against them unless “compelling” national security interests required otherwise); *cf. Doe v. Gonzales*, 386 F.Supp.2d 66, 70-71 (D. Conn. 2005) (in suit over constitutionality of government program of obtaining personal information through National Security Letters (NSLs), reserving judgment on whether government could submit *ex parte* evidence to support its claim of a compelling national interest but directing government to pursue security clearance for plaintiffs’ lead attorney to view the evidence); *Suresh v. Minister of Citizenship and Immigration*, 2002 SCC 1, ¶ 122 (holding, under Canada’s due process clause, that the subject of diplomatic assurances must, to the extent consistent with privilege and public security, be afforded access to all material relied on by the government in deeming the assurances reliable).

Clearly, therefore, an adequate procedure in Mr. Khouzam’s case would have to allow him to see the evidence on which DHS has based its determination that he can safely be removed to Egypt, to contest this evidence and present contrary arguments, and to have an independent decision-maker weigh the conflicting evidence and reach a reasoned individualized determination. *Cf. Suresh v. Minister of Citizenship and*

Immigration, 2002 SCC 1 ¶ 126 (holding, under Canada’s due process clause, that the government “must articulate and rationally sustain a finding that there are no substantial grounds to believe” that the claimant will be subjected to torture).

Moreover, if the initial decision-maker is an agency official, there must then be an adequate basis for judicial review of this decision. *See Marincas*, 92 F.3d at 203 (holding that an asylum procedure “lacking a complete record of the proceeding” violated due process because it effectively “insulate[d] the INS’s denial of asylum from effective administrative and judicial review”); *Lanza v. Ashcroft*, 389 F.3d 917, 927-28 (9th Cir. 2004) (due process requires that basis for denial of asylum application be sufficiently clear to allow for meaningful judicial review); *Ezeagwuna v. Ashcroft*, 325 F.3d 396, 407 (3d Cir. 2003) (in asylum case, finding that Respondent had violated Petitioner’s due process rights by relying on—and even by considering—State Department letter concerning veracity of Petitioner’s documents because “[the] procedural safeguard [of judicial review] would be destroyed if the Board could justify its decisions simply by invoking assertions by the State Department that themselves provide no means for evaluating their validity.”); *Kheireddine v. Gonzales*, 427 F.3d 80, 84 (1st Cir. 2005) (finding due process violation where lack of

transcription of IJ hearing precluded effective review); *cf. Poradisova v. Gonzales*, 420 F.3d 70 (2d Cir. 2005) (without mentioning due process, explaining that courts “require a certain minimum level of analysis from the IJ and BIA opinions denying asylum, and indeed must require such if judicial review is to be meaningful,” and also that courts “require some indication that the IJ considered material evidence supporting a petitioner’s claim”); *Sanon v. INS*, 52 F.3d 648, 651 (7th Cir. 1995) (without mentioning due process, explaining that courts of appeals defer to BIA rulings only where there is “proof that the Board has exercised its expertise in hearing a case”).

Due process also requires that any decision to remove Mr. Khouzam be based on sufficiently reliable evidence. *See Ezeagwuna v. Ashcroft*, 325 F.3d at 405-06 (“[O]ur analysis as to whether an individual’s constitutional rights are violated turns on whether the evidence considered by the BIA is reliable and trustworthy.”). As this Court noted, the government has provided no such evidence, only a conclusory statement that it has decided to credit undisclosed assurances as sufficiently reliable. *See Khouzam*, 2007 WL 1746367, at *9 (“[N]o showing has been made by Respondents that removal based upon diplomatic assurances by a country known to have engaged in torture is consistent with the CAT.”).

Even if the Myers Note to File and Jeffreys affidavit had set forth a sufficient rationale, they would only be entitled to limited weight because they were specifically prepared for purposes of the present litigation. *See Koliada v. INS*, 259 F.3d 482, 487-88 (6th Cir. 2001) (stating in reference to a report prepared by the State Department’s Office of Asylum Affairs that “[i]t stands to reason that a report produced by one executive department to aid the litigation of another executive department would often support the second department’s point of view.”); *U.S. v. Tran Trong Cuong*, 18 F.3d 1132, 1143-44 (4th Cir. 1994) (reports prepared specifically for the purpose of litigation are less deserving of evidentiary weight than those prepared in the ordinary course of business). Further, these submissions are inadequate because they contain only vague statements about the agency process for assessing assurances, and provide no basis for the court to assess its adequacy. *Cf. Ezeagwuna v. Ashcroft*, 325 F.3d at 408 (holding that State Department finding that petitioner’s documents were fraudulent was inadmissible in part because “the complete dearth of information about the investigator or investigation undermines the [State Department’s determination] as not only untrustworthy but also unhelpful”).

The government’s reliance on the State Department’s assessment—and position that this Court should defer to the same—suffers from a further

constitutional defect: As courts uniformly have recognized, such assessments often reflect political calculations rather than objective assessments of the risk that an individual applicant will be tortured or persecuted. *See Koval v. Gonzales*, 418 F.3d 798, 807 (7th Cir. 2005) (in asylum case, cautioning against overreliance on state department reports, noting their potential for bias, and characterizing them as “offer[ing] more of a statement on the relationship of the United States Government to that country than an account of individual circumstances”); *Chen v. INS*, 359 F.3d 121, 130 (2d Cir. 2004) (“[T]he immigration court cannot assume that a report produced by the State Department—an agency of the Executive Branch of Government that is necessarily bound to be concerned to avoid abrading relations with other countries, especially other major world powers—presents the most accurate picture of human rights in the country at issue.”); *Gramatikov v. INS*, 128 F.3d 619, 620 (7th Cir. 1997) (noting “perennial concern that the Department softpedals human rights violations by countries that the United States wants to have good relations with”); *Kasravi v. INS*, 400 F.2d 675, 677 n.1 (9th Cir. 1968) (“[L]etters from the State Department do not carry the guarantees of reliability which the law demands of admissible evidence. A frank, but official, discussion of the political shortcomings of a friendly nation is not always compatible with the

high duty to maintain advantageous diplomatic relations with nations throughout the world.”); *Kanivets v. Riley*, 286 F.Supp.2d 460, 466 (E.D. Pa. 2003) (State Department representations cannot be automatically credited as accurate because they are “sometimes colored by diplomatic relations”); *see also* Hall Decl. ¶ 17.

Indeed, the government’s characterization of Mr. Khouzam’s removal as a “fundamentally political matter[]” and remarkable suggestion that this Court should not review its assessment of the assurances because it might cause “substantial embarrassment,” *see* Gov’t’s Response of June 1, 2007 at 26, reveals the influence of political motives inconsistent with CAT/FARRA’s mandate of individual protection. Another reason for particular skepticism here is that the government has taken the position *all along* that, despite Mr. Khouzam’s evidence of past torture and despite Egypt’s record of systematically torturing criminal defendants, he is unlikely to be tortured in Egypt, a position that the Second Circuit roundly rejected as without merit, *see Khouzam v. Ashcroft*, 361 F.3d at 170-71. It would stand due process on its head to allow the very same agency that lost in the courts to have the final word on whether circumstances are now sufficiently different to overturn the court’s determination.

For these reasons, it is vital that Mr. Khouzam be provided with an adjudicative process in which the judge does not simply defer to the government's view of the assurances but rather independently assesses and weighs them against the full range of evidence as to their likely effectiveness.

D. The appropriate remedy is for this Court to hold its own evidentiary hearing or to order the government to provide one.

Because the government has failed to satisfy any of these requirements, and because Petitioner has now suffered months of needless detention and legal limbo, this Court should review the evidence before it and find that diplomatic assurances are insufficient to allow for Mr. Khouzam's removal consistent with CAT. If the Court is unable to make such a finding based on the current record, the Court should take further evidence in an evidentiary hearing. Alternatively, the Court could order that the government create another forum to conduct such a hearing. But insofar as factual findings are needed, some tribunal must engage in initial fact-finding; otherwise there is no way for Mr. Khouzam to receive the review to which he is entitled.²³

²³ The government cannot plausibly contend that no fact finding should be allowed as to the likelihood that Mr. Khouzam will face torture if removed to Egypt. Immigration Judges routinely conduct, and courts routinely review, that type of fact-finding in CAT cases.

This Court is in the best position to conduct such an evidentiary hearing. *See* 28 U.S.C. § 2243 (habeas provision directing court to “summarily hear and determine the facts, and dispose of the matter as law and justice require”); *id.* at § 2246 (“On application for a writ of habeas corpus, evidence may be taken orally or by deposition, or, in the discretion of the judge, by affidavit.”); *see also Madu v. Attorney General*, 470 F.3d 1362, 1367-1368 (11th Cir. 2006) (transferring removal case back to district court with directions to hold evidentiary hearing on factual issue of whether petitioner voluntarily departed in time to avoid entry of valid removal order); *Madrane v. Hogan*, Civ. No. 05-02228, at 22-26 (M.D. Pa. Mar. 26, 2007) (rejecting government’s argument that the court lacked authority to conduct its own bond hearing, and ordering Madrane released based on its own finding that he presented no danger or flight risk).²⁴

²⁴ In a section of its order concerning justiciability, this Court suggested that its jurisdiction to conduct factual review might be limited. *See Khouzam v. Hogan*, 2007 WL 1746367, at *25 (M.D. Pa. June 15, 2007) (citing *INS v. St. Cyr*, 533 U.S. 289 (2001)). *St. Cyr*, however, would not preclude an evidentiary hearing in this case. That case construed a specific jurisdiction-stripping provision covering criminal aliens, 8 U.S.C. § 1252(a)(2)(C), and held that it should not be read to preclude review over questions of law. Even if *St. Cyr* were read to imply that *Congress* may strip courts of habeas jurisdiction over factual issues, this reading would not apply here, in the absence of any applicable jurisdiction-stripping provision and where no administrative entity has made factual findings (unlike in *St. Cyr* where there was an administrative hearing). Moreover, as noted *supra*, district courts, including this Court, frequently consider factual issues. *See also Abdel-Muhti v. Ashcroft*, 314 F.Supp.2d 418, 426 (M.D. Pa. 2004) (ordering petitioner released under *Zadvydas* after considering and rejecting government’s arguments: 1) that a new repatriation agreement with Israel was likely to allow for petitioner’s removal in the near future, and 2) that

In the alternative, Petitioner respectfully requests that this Court order the government to provide an adequate administrative procedure while retaining jurisdiction to review any adverse administrative decision. *Cf. Haitian Refugee Center v. Civiletti*, 503 F. Supp. 442, 532 (S.D. Fla. 1980) (after striking down expedited removal procedure for asylum seekers as unconstitutional, ordering government to submit to the court a detailed plan for providing procedurally adequate agency review as well as a record sufficient for judicial review), *aff'd*, *Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. 1982).

V. PETITIONER IS ENTITLED TO LIMITED DISCOVERY RELEVANT TO THOSE OF HIS CLAIMS WHICH REQUIRE DEVELOPMENT OF A FACTUAL RECORD.

If this Court finds that the use of diplomatic assurances in Mr. Khouzam's case is not per se impermissible, and that the record before it is insufficient to find that reliance on these assurances would violate Mr. Khouzam's rights, Mr. Khouzam must be given an opportunity to conduct limited discovery so that this Court has the kind of factual record that is necessary to insure that his removal pursuant to diplomatic assurances would be lawful.

petitioner was refusing to cooperate with his removal); *Lawson v. Gerlinski*, 332 F.Supp.2d 735, 746-47 (M.D. Pa. 2004) (finding facts on the issues of danger and flight risk); *Oyedeji v. Ashcroft*, 332 F. Supp. 2d 747, 754-55 (M.D. Pa. 2004) (same).

Petitioner has identified the following areas where discovery is most needed:

- 1) The government's policies, procedures and guidelines with respect to seeking and evaluating the sufficiency of diplomatic assurances for individuals whose removal might otherwise place them at risk of torture;
- 2) The procedures that the government followed in determining that the diplomatic assurances in Mr. Khouzam's case were sufficiently reliable to allow his removal to Egypt;
- 3) Any information or materials that the government relied upon, including experts consulted, in determining that the diplomatic assurances from Egypt were sufficiently reliable, and any documents setting forth the government's reasons for reaching this determination;
- 4) Any monitoring procedures that have been considered and/or negotiated to insure the Egyptian government's compliance with the assurances, and any information or materials the government considered in assessing the sufficiency and reliability of these monitoring procedures;
- 5) The government's policies and procedures with respect to monitoring compliance with diplomatic assurances against torture in general;

- 6) The government's past consideration, acceptance, or rejection of diplomatic assurances from Egypt, including the number of cases in which assurances from Egypt have been sought or considered, the reasons these assurances were determined to be (or not to be) sufficiently reliable, and measures taken to monitor compliance with the assurances in cases where an individual was removed (including whether any violations were identified);
- 7) Any information or materials in the government's possession that support Mr. Khouzam's claim that he would be at risk of torture if returned to Egypt.
- 8) Statistics and general information pertaining to other cases in which the government has considered removing or extraditing individuals pursuant to diplomatic assurances against torture, including measures taken to monitor compliance with these assurances and whether any violations were identified.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant the writ of habeas corpus, set aside the government's revocation of his deferral of removal, and order his immediate release under reasonable conditions of supervision.

Date: July 31, 2007

Respectfully Submitted,

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*Admission *pro hac vice* anticipated

CERTIFICATE OF SERVICE

I, Amrit Singh, certify that a true and complete copy of the foregoing submission, has been served in opposing counsel through the Court's ECF electronic docket system.

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