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COUNTER-TERRORIST MEASURES, HUMAN RIGHTS AND MULTICULTURALISM IN THE UNITED KINGDOM

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1 Introduction

This paper summarises the work done by the Joint Parliamentary Committee on Human Rights (“the JCHR”) in scrutinising the counter-terrorism measures introduced by Tony Blair’s administration during the five years since the terrorist outrages against the United States on 7th September 2001. It is not chiefly about human rights and multiculturalism but summarises the collective approach which has been adopted by the JCHR in advising the Westminster Parliament on a series of complex issues in the wider context of our plural multi-ethnic society. The paper has not been formally approved by the JCHR, but is a report by one of its members who takes sole responsibility for its contents.

Tragically, both our countries have had decades of experience in combating terrorism within our borders - the United Kingdom in its efforts to counter the terrorist activities of the IRA and so-called “Loyalists” in Northern Ireland and on the British mainland, and Spain in its efforts to suppress the bloody campaign waged by ETA. Both our countries have witnessed at first hand the serious threat to the lives and security of our citizenry posed by new forms of international terrorism through the barbarous attacks in Madrid in March 2004 and London in July 2005. Both our countries are bound to respect human

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rights and the rule of law under our domestic laws and under the European Convention on Human Rights ('ECHR') and other international human rights instruments.

Before turning to consider the work done by the JCHR, it may be useful, given the subject-matter of the conference, to give some background about recent events in Britain that have occurred during the current Parliamentary recess when the JCHR was not been convened. In August, only days after the JCHR published a major report on terrorism and human rights, the British security, intelligence and police services claim to have foiled a terrorist plot to blow up civilian aircraft in mid-air while travelling to several cities in the United States. The Home Secretary¹ declared that the United Kingdom is facing probably the most sustained period of severe threat to its security since the Second World War, and criticised the media, politicians and the judiciary for failing to understand the scale of the threat. He warned that civil freedoms may have to be curbed to win the fight against international terrorism as basic rights and freedoms are being abused and misused by terrorists. He indicated that the Government may revive plans, rejected by Parliament, to detain people without charge for up to 90 days

Two days later², a group writing as "British Muslims", which included three Members of each House of Parliament and 38 political and religious organisations, including the Muslim Council of Britain, published their response in the form of an open letter to the British Prime Minister, the Rt, Hon. Tony Blair. Its full text was as follows:

"Protect civilians wherever they are"

"Prime Minister,

"As British Muslims we urge you to do more to fight against all those who target civilians with violence, whenever and wherever that happens.

"It is our view that current British government policy risks putting civilians at increased risk both in the UK and abroad.

¹ The Rt Hon Dr John Reid, *Financial Times*, 10 August 2006.

² *The Times*, 12 August 2006.

“To combat terror the government has focused extensively on domestic legislation. While some of this will have an impact, the government must not ignore the role of foreign policy.

“The debacle of Iraq and now the failure to do more to secure an immediate end to the attacks on civilians in the Middle East not only increases the risk to ordinary people in that region, it is also ammunition to extremists who threaten us all.

“Attacking civilians is never justified. This message is a global one. We urge the Prime Minister to redouble his efforts to tackle terror and extremism and change our foreign policy to show the world that we value the lives of civilians wherever they live and whatever their religion.

“Such a move would make us all safer.”

The letter was strongly criticised by members of the Government and by the media³. The Home Secretary described it as “a dreadful misjudgement if we believe that the foreign policy of this country should be shaped in part, or in whole, under the threat of terrorist activity if we do not have a foreign policy with which the terrorists happen to agree.” Other Ministers called the letter “facile”, “dangerous” and “foolish”.

The letter also gave rise to further public discussion and controversy about whether and to what extent the concept of “multiculturalism” as understood in the UK has contributed to the problem of home grown terrorism by alienating rather than integrating British Muslims into British society. By “integration” I do not mean a flattening process of assimilation that seeks to turn everyone into a stereotyped British citizen, but equality of opportunity, accompanied by cultural diversity, in an atmosphere of mutual respect. We in the United Kingdom, in common with most societies across the world, are far from achieving that goal.

A week before publication of the letter to the Prime Minister, a poll by Channel 4’s *Dispatches* television programme found that that 45 per cent of British Muslims believe that 9/11 was a conspiracy between the United States and Israel, that one in three aged between 18 and 24 would rather live under Sharia law than British law, and that one in four said that the 7/7 London bombings were justified.

³ Eg., Martin Wolf, “Why Britain’s Muslim leaders should think again”, *Financial Times*, 14 August 2006.

Many Muslim leaders were reported⁴ to have been critical of the Government for failing to take up the recommendations made by a task force set up following the London bombings last summer, notably a public inquiry into the attacks and steps to tackle Islamophobia. However, legislation to tackle racial discrimination in employment, housing, education, and the provision of goods, facilities and services has been in force for thirty years, together with a statutory Commission for Racial Equality with strong potential powers of strategic law enforcement. The Equality Act 2006 now prohibits religious as well as racial discrimination. The Government is also considering introducing further measures requiring government contractors to monitor the ethnic and religious composition of their workforce. Measures are also being planned⁵ requiring that imams are accredited and trained to prevent “preachers of hate” from radicalising young people at mosques and to work with young people and Muslim women. This will involve lectures from moderate Islamic scholars, visits by Ministers to Muslim communities and the establishment of a Commission on Integration and Cohesion.

In addressing terrorism and religious extremism, it is important to tackle social exclusion and alienation and to promote good race relations. During the course of our inquiry into counter-terrorism policy and human rights we were struck by the number of organisations who are deeply concerned about the danger of certain of the counter-terrorism measures being counter-productive in the sense that they risk alienating many British Muslims. Recent studies identified disproportionate levels of unemployment and educational under-achievement among British Muslims compared with other minorities and called for positive measures to combat their social exclusion. The Rt Hon Ruth Kelly, Secretary of State for the Communities and Local Government, with responsibility for policy on equal opportunities, has criticised senior imams and Muslim leaders for not doing enough to counter extremist propaganda among young radicals. She has said that Britain is engaged in a battle for the hearts and minds of a disenchanted younger generation of Muslims. She has called on leaders of Muslim organisations to do more to confront extreme

⁴ *The Times*, 15 August 2006.

⁵ *The Times*, 15 August 2006.

representations of Islamic teachings and to open up the leadership of mosques and secular community organisations.

In the wake of the alleged aircraft bomb plot, there are fears of a backlash against British Muslims, especially after a mosque has been attacked by vandals who set it on fire. European interior ministers have raised the possibility of “positive profiling” of European airline passengers. While proponents insist that this would not involve screening by religion or ethnic background, there are concerns that such measures would be overtly discriminatory and would increase alienation among minority groups. The Home Secretary has stressed the importance of distinguishing between “positive profiling” and “ethnic or racial profiling” when considering the use of advanced passenger data. However, it appears that some EU countries, particularly France and the Netherlands, want to go much further and introduce explicit checks on Muslim travellers.

To return to the main themes of this paper, the atrocities inflicted by terrorists on innocent civilians involve gross violations not only of the rights of the individuals killed and maimed by these atrocities, but also of the fundamental values of civilised democratic societies⁶. Human rights law does more than condemn such acts, it also imposes strong positive obligations on Governments to take effective and preventative steps to protect the lives of everyone in their jurisdiction against the threat of terrorist attack. Human rights law has at its heart interests of public safety and national security, and many rights may be restricted in the face of a real terrorist threat or public emergency threatening the life of the nation, provided that those restrictions are well-defined, necessary and proportionate⁷.

However, it is of paramount importance that any counter-terrorist measures respect human rights and the rule of law. They must not be arbitrary or discriminatory, they must be subject to effective judicial supervision and control and they must respect the absolute

⁶ See for example UN GA Res 54/164, *Human Rights and Terrorism*, 17 December 2003.

⁷ The European Court of Human Rights explicitly takes into account problems of preventing terrorism when deciding the proportionality of interferences with certain rights. See for example *United Communist Party of Turkey v Turkey* (1998) 26 EHRR at para. 59.

prohibition against torture. If counter-terrorism measures sweep too broadly or arbitrarily, they risk being counter-productive by alienating the very sections of the community whose close co-operation and consent is required if terrorism is to be defeated. Measures which are disproportionate in their scope and application may also risk driving extremist groups further underground and radicalising vulnerable sections of the community.

2 The JCHR and Scrutiny of Counter-Terrorism Legislation⁸

The JCHR is appointed by both the House of Lords and the House of Commons. Our terms of reference are to consider matters relating to human rights (but excluding consideration of individual cases) and proposals for remedial orders, draft remedial orders and remedial orders⁹. There are a maximum of six Members appointed by each House, of whom the quorum for any formal proceedings is two from each House. The JCHR is assisted by a legal adviser and a small permanent staff.

Since the terrorist attacks against the United States in 2001, and the London bombings in 2005, the Government has introduced several legislative measures aimed at combating the terrorist threat. The scrutiny of counter-terrorism policy and legislation has therefore formed a major part of our work.

Following the 9/11 attacks, the Home Secretary announced that he would bring forward urgent measures ‘necessary to counter the threat from international terrorism’ and introduced the Anti-Terrorism, Crime and Security Bill to the House of Commons. We acted with great speed and two days later questioned the Home Secretary in public about his proposals and published our preliminary report on the Bill¹⁰.

⁸ The JCHR’s scrutiny work is described and analysed in Lester and Pannick, *Human Rights Law and Practice*, 2nd ed., 2004, chapter 8.

⁹ Section 10 of the Human Rights Act 1998 provides for the making of remedial orders in respect of primary legislation which has been declared incompatible with the ECHR, or which, in view of a finding of the Strasbourg Court appears to a minister to be incompatible, in order to remove the incompatibility.

¹⁰ Second Report Anti-Terror, Crime and Security Bill together with the proceedings of the Committee relating to the Report and the Minutes of Evidence 16th November 2001. Session 2001-2002 HL 37 HC372.

In this first report, we set out the principles which would inform our approach when scrutinising the Government's future counter-terrorism policy and legislation as follows:

‘...[a]ny novel powers which are proposed should be clearly directed towards combating a novel threat, and should not be used to introduce powers for more wide-ranging purposes which would not have received parliamentary support but for current concerns about terrorism and fear of attack. The international and national law of human rights, and in particular the provisions of the Human Rights Act 1998, for which we were appointed as the parliamentary guardians, represent core values of a democratic society such as individual autonomy, the rule of law, the right to dissent, and these must not lightly be compromised or cast away. It is precisely those values which terrorists seek to repudiate and throw away’.¹¹

Even before the terrorist attacks of 9/11, the UK's armoury of anti-terrorism legislation was amongst the most rigorous in Europe. For example, in the Terrorism Act 2000, the powers of the police and other agencies were thoroughly overhauled, and it became a criminal offence triable in the United Kingdom to do anything to finance, prepare for or carry out acts of terrorism (which was very widely defined) anywhere in the world¹². Our ordinary criminal law is also well-equipped to balance the competing interests of individual rights and public protection. Therefore when assessing the necessity for any new measure which may interfere with human rights, we found it particularly important to establish the extent to which it usefully adds to the powers already available to the Government and its agents to protect and enhance the security of the state and of its citizens.

3 The Anti-Terrorism, Crime and Security Act 2001

The Anti-Terrorism, Crime and Security Act 2001(‘ATCSA’) was introduced in the House of Commons on 12 November 2001 and enacted a month later. However, even

¹¹ *ibid* at para 5.

¹² The Terrorism Act 2000 also imposed extensive duties on financial service professionals to keep records and to disclose suspicions that assets are intended to be used to finance terrorism. In the Regulation of Investigatory Powers Act 2000 the powers of the police and the security and intelligence services to carry out intrusive and other kinds of surveillance were also extended.

within this very limited time-frame, we were able to publish two Reports scrutinizing the proposed emergency legislation¹³.

The Bill contained a disparate collection of measures affecting a wide range of human rights, including changes to immigration and asylum law, the extension of police powers, and the creation a number of new criminal offences. Our main areas of concern were the derogation from the right to liberty under Article 5 ECHR, and the proposals in Part 4 of the Bill to detain suspected international terrorists without trial and to restrict their rights and legal due process.

Derogation from Article 5 ECHR

The problem which the Government sought to address was how to deal with foreign nationals suspected of international terrorism whom the Home Secretary could not remove or deport from the UK because of the risk that they might suffer torture or the death penalty in the receiving country. Under Article 15 ECHR, a Government cannot derogate from the prohibition of torture without ‘denouncing’ the Convention as a whole and then re-entering with a reservation relating to Article 3 ECHR. This the Government was not prepared to do, and so it chose an alternative approach which required a derogation from the right to liberty, in order to preserve the arguably ‘greater’ right to be free from torture or inhuman and degrading treatment.

Part 4 of the Bill provided for the indefinite detention without trial of suspected foreign terrorists until a country where they would be free from torture or death, or a safe third country, could be found to take them. Part 4 also limited the availability of judicial review and *habeas corpus* and provided for a restricted appeals process. The Government correctly took the view that the proposed legislation would be unlikely to be compatible with Article 5 and made a derogation order¹⁴.

¹³ Second Report of Session, Anti-Terrorism, Crime and Security Bill 2001-2002 op. cit.. Fifth Report of Session Anti-Terrorism, Crime and Security Bill: Further Report 2001-2002 HL 51 HC 420.

¹⁴ Human Rights Act 1998 (Designated Derogation) Order SI, 200, 1 No. 3644.

Detention powers

The Bill allowed the Home Secretary to ‘certify’ as suspected international terrorists individuals he reasonably believed or suspected were a threat to national security or involved in terrorism, and to detain those who could not be removed or deported. However, the JCHR noted that the power to detain did not specify that the purpose of detention was to enable the Home Secretary to take action to guard against the threat posed by the suspect, while allowing the authorities to continue to find a safe third country for removal or deportation. For example, a suspect might be very willing to go to a country which supports terrorism. The question would then arise as to whether the Government would be free to remove a suspected terrorist to a place where the suspect would be able to resume terrorist activity. If it was not prepared to do so, then the arrangements seemed to us to look more like a form of indefinite internment than detention.

The SIAC review powers

The review powers of the Special Immigration Appeals Commission (‘SIAC’), the independent tribunal charged with adjudicating on deportation cases involving questions of national security, were also seriously limited. The Bill provided that the SIAC would be able to cancel a certificate on review only if it were satisfied that there was no reasonable ground or suspicion for the Home Secretary’s belief. It would not be able to cancel a certificate if it considered that for some other reason the certificate should not have been issued. It appeared to the JCHR that the SIAC would not be able to act on the basis of subsequent evidence which showed that the suspicion or belief, while reasonable, was mistaken.

We were not convinced that the SIAC’s review powers satisfied the requirements of Article 5(4) ECHR. Article 5(4) imposes a continuing obligation to ensure that there is a regular review, which is frequent and rigorous enough to ensure that individuals do not remain in detention for longer than the circumstances require. The obligation does not

end when an initial decision to detain someone has been held to be justified. We came to the conclusion that there was a significant risk that the provision could permit a person to be detained indefinitely after new evidence or a change of circumstances proved that the suspicion or belief of involvement in international terrorism, while reasonable, was shown to be mistaken. This would be likely to violate Article 5(4) ECHR. We recommended that the Bill should be amended to make it clear that the SIAC would be able to act on the basis of later evidence which showed that the suspicion or belief was mistaken.

We were also not satisfied that review periods of three months would always satisfy the requirements of Article 5(4). We considered that monthly reviews would be safer and we were not persuaded that they would be impracticable.

Legal representation

Under the SIAC process, national security is protected by withholding information, where necessary, from the appellant and his or her legal advisers, and appointing a special representative to inspect the evidence and represent the appellant's interests. In our view, the use of the nominated representative to represent the interests of the applicant, where the applicant and his or her representatives are prevented from examining evidence on national security grounds, adequately balances the needs of the state and the interests of the applicant to maintain the fairness of the hearing. However, there was no provision in the Bill for the nominated representative to represent the applicant's interests before the Court of Appeal (or, on appeal to the final court – the House of Lords). We therefore considered that there would be a risk that the appeal procedure would be insufficient to satisfy the due process guarantees contained in Article 5(4) or Article 6 ECHR.

The issuing of second or subsequent certificates

The Bill also gave the Home Secretary broad powers regarding the issue of second or subsequent certificates in relation to those already detained. After a certificate had been cancelled, the Home Secretary would be allowed to issue another certificate ‘whether on the grounds of a change of circumstances *or otherwise*’ (emphasis added). We considered that the uncertainty and potential procedural unfairness flowing from the use of the words ‘or otherwise’ would not afford adequate protection for detainees against arbitrary interference with Article 5.

Conclusion

In our various reports on the Bill we made it clear that we had not been presented with the evidence that would enable us to be satisfied of the existence of a public emergency threatening the life of the nation, required by Article 15 ECHR. We proceeded on the basis that such evidence might exist. Nevertheless, we had serious concerns that, in view of the broad scope of the power to detain and the lack of adequate due process safeguards, the measures in the Bill could not be said to be ‘strictly required by the exigencies of the situation’ so as to be compatible with the power to derogate under Article 15 ECHR.

4 The Prevention of Terrorism Act 2005

The Belmarsh case

In the *Belmarsh* case¹⁵, the House of Lords heard appeals from nine detainees, who were foreign nationals held indefinitely without trial in Belmarsh prison, against the legality of their detention under Part 4 ATCSA. By eight votes to one, the House of Lords held that the policy of detaining foreign nationals without trial violated their ECHR rights and was therefore illegal. The House of Lords quashed the derogation order which had allowed

¹⁵ *A and others v the Secretary of State for the Home Department* [2005] UKHL 56, 16 December 2004.

the UK to derogate from Article 5 ECHR, finding that the detention of foreign nationals without trial was not strictly required by the exigencies of the situation, and declared Part 4 ATCSA incompatible with Articles 5 and 14 ECHR.

In response to this ruling, after releasing the detainees, the Home Secretary introduced the Prevention of Terrorism Act (PTA) which repealed Part 4 ATCSA, and devised a new regime of ‘control orders’ aimed at curtailing the liberty of suspected terrorists. These control orders allow for a variety of restrictions, ranging from the prohibition of the use of specified articles or substances to house arrest. The Act provides for two types of control orders, (i) derogating control orders which provide for a combination of restrictions likely to be incompatible with Article 5, and (ii) lower level ‘non-derogating’ control orders. The Act progressed rapidly through its parliamentary stages making it difficult for the JCHR to scrutinise it comprehensively for human rights compatibility¹⁶.

Derogating control orders

In order to make a derogating control order, the Secretary of State must first obtain the approval of Parliament and then apply to the High Court to make the order. In our preliminary report¹⁷ we questioned as a matter of ECHR law whether creating a domestic legal framework which provides in advance for ‘derogating control orders’ can itself be done without derogating from the ECHR at the time of creating the framework itself.

In terms of procedure, we also questioned whether the degree of prior judicial involvement provided for in the Bill was compatible with the ECHR requirement that deprivations of liberty must be lawful. We were not convinced that an *ex parte* hearing to determine whether there is a *prima facie* case for making a control order, followed by an *inter partes* hearing which is still not fully adversarial because of the use of special advocates used in closed sessions, is a sufficient safeguard against arbitrary detention so as to satisfy the requirements of legality and legal certainty.

¹⁶ JCHR Ninth Report of Session 2004-2005, Prevention of Terrorism Bill: Preliminary Report HL 61/HC 389 and JCHR Tenth Report of Session, Prevention of Terrorism Bill 2004-2005 HL 68/ HC 334.

¹⁷ Ninth Report of Session 2004-2005, Prevention of Terrorism Bill: Preliminary Report op. cit.

Non-derogating control orders

We considered that so-called non-derogating control orders, although they may fall short of engaging Article 5 ECHR, are likely to interfere with a number of other ECHR rights, including those protected by Articles 8, 10 and 11. One of the factors relevant to an assessment of the proportionality of the interference with these rights is the degree of procedural protection provided. The Bill provided for a right of ‘appeal’ against non-derogating control orders, the court’s function on such appeals being to determine whether the Home Secretary’s decision, which is based on ‘reasonable suspicion’, was flawed. In determining such matters the court must apply the principles applicable to judicial review. We considered that supervisory control over a decision based on ‘reasonable suspicion’ of involvement of terrorist activity does not provide a sufficiently effective measure of judicial control. Given the wide range of powers included in the Bill and their potential to interfere with ECHR rights, we considered that a greater degree of judicial oversight was necessary.

The Bill also provided that prior judicial authorisation for the Home Secretary to make a non-derogating control order was not required. The Government argued that if a non-derogating control order was imposed which in fact amounted to a deprivation of liberty, the individual would have a remedy because the order would be found unlawful by the court on appeal. The JCHR was not convinced of this argument, because by that time the individual’s liberty would already have been taken away. In the Committee’s view, prior judicial involvement is needed for there to be an independent safeguard against arbitrary deprivations of liberty through the exercise of the power to make non-derogating control orders.

5 Counter-Terrorism Policy and Human Rights inquiry

In the wake of the terrorist attacks in London on 7 July 2005, and the attempted attacks on 21 July 2005, the Government introduced additional counter-terrorism legislation.

Recognising that reconciling security and public safety with human rights standards was likely to be a dominant theme of the next parliamentary session, in September 2005 we launched an inquiry into counter-terrorism policy and human rights.

(a) The Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2006

In our first report¹⁸, we considered the human rights compatibility of the control orders regime under the PTA 2005, this time in much more detail than we had been able to do previously¹⁹. At the outset, we expressed our regret that the Government's decision to bring forward a renewal order, rather than a Bill, had the effect of significantly reducing Parliamentary scrutiny.

Article 5 compatibility

We considered whether the non-derogating control order regime operates in practice in a way which amounts to deprivation of liberty, requiring a derogation from Article 5 (1) ECHR. In principle we agreed that civil restriction orders imposing preventive measures, with adequate due process safeguards, are capable of being ECHR compatible.

However we were concerned that the distinction between derogating and non-derogating control orders in the Act was not sufficiently clear to prevent the making in practice of control orders purporting to be non-derogating orders which amounted to a deprivation of liberty. We considered the lists of obligations that had been issued so far with non-derogating control orders. They included 18-hour curfews, electronic tagging, requirements to allow the police to enter the house at any time and search and remove any item, and restrictions on movement within a defined area. We found these to be so restrictive of liberty that they amounted to a violation of Article 5. Therefore, it seemed

¹⁸Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2006 Twelfth Report of Session 2004-05 HL 122/HC 195.

¹⁹The control order regime contained in ss.1-9 PTA was subject to a 'sunset clause', which required the Home Secretary after twelve months to lay a draft Order for approval by both Houses for the scheme to continue in force. The draft Order was approved and came into force on 11 March 2006.

likely to us that, in the absence of a derogation, the power to impose non-derogating control orders may be exercised in a way which is incompatible with Article 5.

Applicable human rights standards

We considered whether the procedural protections contained in the Act are compatible with Article 5(4), guaranteeing the right of access to a court to determine the lawfulness of detention, as well as the right to a fair trial in determination of a criminal charge, and the right to a fair hearing in the determination of civil rights and obligations contained in Article 6. In relation to derogating control orders, we concluded that the full right to criminal due process under Article 6(1) applies. In relation to at least some cases of non-derogating control orders, we concluded that the full set of Article 6(1) guarantees are also applicable because the control order proceedings amount to the determination of a criminal charge. Therefore, even if ‘civil’ rather than ‘criminal’ in nature, proceedings concerning non-derogating control orders could be regarded as sufficiently close in nature to criminal proceedings to deserve criminal procedural protection.

Limited judicial control of control orders

The Act provides that non-derogating control orders made by the Home Secretary are subject to a limited degree of judicial control. Where he has decided that there are grounds to make an order, he must apply to the court for permission to make the order, unless he certifies that the urgency of the case requires it to be made without permission, in which case he must refer it immediately to the court. The function of the court is to assess whether his decision to grant the order is ‘obviously flawed’. It can make the decision in the absence of the individual in question, without the individual having been notified or given an opportunity of making representations to the court.

We agreed with the view expressed by the former European Commissioner of Human Rights, Mr. Gil-Robles, that the limited degree of judicial supervision of the making of non-derogating control orders is insufficient²⁰. Article 6 requires that non-derogating

²⁰ Report by Mr. Alvaro Gil-Robles, Commissioner for Human Rights, on his visit to the United Kingdom, 4-12 November 2004: CommDH(2005) 6/8 June 2005.

control orders should be made out by the judiciary rather than the executive. This is also clearly required by our own constitutional traditions of due process and the separation of powers.

However, the Court of Appeal has recently held that the provisions for review by the court of the making of a non-derogating control order by the Secretary of State are compatible with Article 6(1) ECHR.²¹ The Court held that proceedings under section 3 of the Prevention of Terrorism Act 2005 did not involve the determination of a criminal charge. The Court also observed that both Strasbourg and domestic authorities accepted that there were circumstances where the use of closed material was compatible with Article 6, and that the provisions in the Act for the use of a special advocate and for rules of court constituted appropriate safeguards.

Use of evidence obtained covertly and the special advocate procedure

Under the Act rules were made amending the civil procedure rules to ensure that information is not disclosed contrary to the public interest. These rules provide for hearings in private, excluding the person against whom a control order is being sought and his legal representative, and allowing for the appointment of a special advocate to represent the interests of the excluded party²². We found it difficult to see how this could be compatible with the right to a fair trial, the right of access to a court, the presumption of innocence, the right to examine witnesses or the most fundamental principles of due process of law. We also pointed out that the European Court of Human Rights had expressly left open the question of whether the UK's special advocate system is compatible with the Convention's guarantees of a fair hearing²³.

We concluded that there are significant concerns about whether, in the absence of sufficient safeguards, the regime of control orders is compatible with the rule of law and the separation of powers between the executive and the judiciary.

²¹ *Secretary of State for the Home Department v MB* [2006] EWCA Civ 1140.

²² Civil Procedure (Amendment No.2) Rules 2005.

²³ *Chahal v United Kingdom* (1997) 23 EHRR 413.

Inhuman and degrading treatment

We also considered whether individuals who are subject to control orders are being subjected to inhuman and degrading treatment contrary to Article 3 ECHR. In light of the findings of the Committee for the Prevention of Torture arising from its visit to the United Kingdom in March 2004 that some detainees under the old ATCSA Act 2001 were suffering inhuman and degrading treatment, and the evidence the JCHR had received about the impact of control orders on the mental health of those subject to them, we concluded that control orders carry a very high risk of subjecting those who are placed under them to inhuman and degrading treatment contrary to Article 3 ECHR.

*JJ and others v Secretary of State for the Home Department*²⁴

In the case of *JJ and others v Secretary of State for the Home Department*, the court was required to determine as a preliminary matter whether purported non-derogating control orders made by the Home Secretary against the defendants, who were either failed asylum seekers or individuals whose claims for asylum remained undetermined, breached Article 5 ECHR and were in fact derogating control orders which the Home Secretary had no power to impose. The control orders required the defendants to remain within their respective residences, which were in areas in which the defendants had never lived before, for 18 hours a day, and which were subject to random searches at any time. The defendants were electronically tagged and prevented from going outside a defined area around their residences, from meeting persons by prior arrangement or from attending any pre-arranged meetings.

The first instance court held that the cumulative impact of the obligations amounted to a violation of Article 5 as the control orders were derogating control orders which the Home Secretary had no jurisdiction to make. The judgment was upheld by the Court of Appeal who agreed that the facts of the case fell ‘clearly on the wrong side of the

²⁴ *JJ and others v Secretary of State for the Home Department* [2006] EWHC 1623 (Admin).

dividing line’ and that the orders amounted to a deprivation of liberty contrary to Article 5²⁵.

(b) Terrorism Bill and related matters

In our second report²⁶, we concentrated on the Terrorism Bill, the list of ‘unacceptable behaviours’, the administrative practice of deporting with assurances, and the Government’s intervention in a pending case against the Netherlands to invite the European Court of Human Rights to weaken or restrict its decision in *Chahal v United Kingdom*²⁷, in which the Court affirmed the absolute nature of the prohibition on torture and inhuman and degrading treatment as applying irrespective of public emergency or terrorist threat²⁸.

Encouragement and glorification of terrorism

In this measure, the Government proposed a new ‘encouragement and glorification of terrorism’ offence, designed to criminalise indirect incitement to terrorist acts. We agreed, on balance, that there was a need for such an offence, provided it was narrowly defined. However, in our view the offence as originally drafted was not sufficiently legally certain to satisfy the requirement in Article 10 ECHR that interferences with freedom of expression be ‘prescribed by law’.

First, we considered that the inclusion of the term ‘glorification’, which was defined in the Bill to include ‘any form or praise or celebration’, is too vague to form part of a criminal offence that can be committed by speaking. In our view, there is wide scope for disagreement between reasonable people as to whether a particular comment is merely an explanation or an expression of understanding or goes further and amounts to encouragement, praise or glorification.

²⁵ [2006] EWCA Civ 1141.

²⁶ Counter-Terrorism and Human Rights: Terrorism Bill and related matters. Third Report of Session 2005-06. HL Paper 75-I, HC 561-I.

²⁷ See n. 19 above.

²⁸ *Ramzy v Netherlands*, App. No. 25454/05.

Second, in our view the definition of ‘terrorism’ is another source of legal uncertainty due to its vagueness and overbreadth. The Government accepted that the effect of this clause could criminalise expressions of support for the use of violence anywhere in the world, but justified its scope on the ground that there is nowhere in the world today that violence can be used as a means of bringing about political change. We were not convinced by this argument. There are plenty of historical and contemporary examples of resistance movements whose aims and acts – though targeted at sabotage – would not be considered as encouraging terrorism but would be caught under the new offence, the ANC in apartheid South Africa being just one such example.

Third, there was a lack of any requirement of intent to incite terrorism or likelihood of such offences being caused as ingredients of the offence. Similar concerns arose regarding the offence of the dissemination of terrorist publications.

We also considered that a ‘reasonable excuse’ or ‘public interest’ defence should be included to make it less likely that the offence would be incompatible with Article 10 ECHR.

When the Bill was eventually enacted, after facing strong opposition from the House of Lords, the term ‘glorification’ was retained with the inclusion of the requirement of intent or likelihood and a public interest defence.

Pre-charge detention

The Bill as originally introduced provided for an increase of the maximum pre-charge detention period from 14 to 90 days, which in our view would have been disproportionate with the UK’s obligations under Article 5 ECHR. It would also have risked leading to breaches of Article 3 ECHR and subsequently to the inadmissibility at trial of statements obtained following lengthy pre-charge detention. During the passage of the Bill, the period was reduced to 28 days. However, we considered that similar, if less substantial

risks existed²⁹. Although we acknowledged that this is a matter on which the law is unclear, we considered that the proportionality case for any increase from the current 14 day limit had not been made out on the evidence³⁰. We did not, however, rule out the possibility that such evidence might be produced which would persuade us that a proportionate extension of the maximum period of detention would be justified. In his evidence to the Committee, the Home Secretary addressed the difference between the UK and continental systems in relation to pre-charge and post-charge detention. In his view there was no practical difference between holding someone for a lengthy period prior to charging them with an offence, and the continental approach involving an often protracted investigation post-charge.³¹

Deportation and exclusion

“Unacceptable behaviours”

The Home Secretary has the power to exclude and to deport non-UK nationals on the ground that their presence in the UK is ‘not conducive to the public good’³². In August 2005 he published a list of ‘unacceptable behaviours’ regarded as ‘not conducive to the public good’ and justifying deportation. Whilst we welcomed in principle the publication of such a list as being capable of enhancing legal certainty concerning the exercise of what is a broadly worded power, we considered that the inclusion of the phrase ‘fomenting, justifying or glorifying terrorist violence’ on the list suffered from the same legal uncertainty as the offence of encouragement and glorification and was likely to breach Article 10 ECHR.

²⁹ The Committee divided on this issue 6:4 in favour.

³⁰ The Committee divided on this issue 5:3 in favour.

³¹ The Rt Hon Charles Clarke MP, Evidence to JCHR, Counter-Terrorism and Human Rights: Terrorism Bill and related matters. Third Report of Session 2005-06. HL Paper 75-II, HC 561-II, Ev 9-10.

³² The power to deport is a statutory power under the Immigration Act 1971; the power to exclude is a prerogative power.

Deportation with assurances

Since December 2004, the UK has been seeking so-called Memoranda of Understanding with certain foreign Governments with a view to deporting individuals on the basis of diplomatic assurances – an issue on which public debate has become polarised. Many NGOs expressed serious concern over deportations on the basis of diplomatic assurances on the grounds that they circumvent the absolute obligation of *non-refoulement* and that in practice the Governments concerned have demonstrated that they do not take their obligations under international treaties seriously.

We considered that states are entitled to seek assurances about torture from other states, particularly in the context of wider efforts to address the human rights situation within the other state, and that such assurances are capable, in principle, of satisfying the obligation not to return an individual to a serious risk of torture. They will be treated by the courts as being relevant to the assessment of the risk of a person being subjected to torture in the particular circumstances of the case, along with all the relevant evidence about the likelihood of their being respected in practice. We would return to this issue in our inquiry into the UK's obligations under UNCAT.

Torture and national security

We welcomed the Home Secretary's unequivocal statement that he is not prepared to deport somebody where he is satisfied that there is a substantial risk of their being tortured in the receiving country, which reflects the UK's obligations under the absolute prohibition on torture. However, at the same time, the Government has been given leave to intervene in the *Ramzy* case³³ in which it will ask the Court to overturn its decision in *Chahal v UK* 'in the light of the current circumstances'. The decision in *Chahal* forms the basis of the rule in Convention case-law that national security cannot be balanced with the risk of torture. In our view, it follows from the Government's acceptance of the absolute nature of the prohibition on torture that national security cannot be balanced

³³ Op.cit.

against the risk of torture, because that presupposes returning somebody to a risk of torture because national security trumps their right not to be tortured. In any case, the JCHR considers that the Government's prospects of succeeding in persuading the Strasbourg Court to overturn its decision are slim.

(c) Prosecution and pre-charge detention

In our third and most recent report³⁴ we moved beyond the scrutiny of individual measures and considered more enduring ways of making the Government's counter-terrorism policy compatible with the UK's human rights obligations. We considered possible adaptations of the criminal justice system which may facilitate the effective prosecution of terrorist suspects, including whether there were any useful lessons to be learnt from our visits to France, Spain and Canada. In the JCHR's view it is essential to find ways of prosecuting such individuals and we considered practical ways of overcoming the obstacles to prosecution.

In all the three countries we visited we found a renewed emphasis on prevention in counter-terrorism policy. We welcomed this as a mark of a more mature appreciation of the importance of the State's positive obligations to take such measures as can be shown to be necessary to provide adequate and effective protection against a real risk of terrorist attack. At the same time, the JCHR regarded it as essential to avoid the counter-productivity which might undermine rather than enhance protection.

Overcoming unnecessary obstacles to prosecution

The main obstacles to prosecution of terrorist suspects derive from the fact that much of the information available comes from the intelligence agencies. Such evidence, if admissible at all, is likely to fall short of the criminal standard of proof. The statutory

³⁴ Counter-Terrorism Policy and Human Rights: Prosecution and pre-charge detention, 22nd Report of Session 2005-06.

blanket ban in the UK on the admissibility of intercept evidence in court³⁵ prevents prosecutions from being brought, which could be brought if such material could be relied on by the prosecution. Further, intelligence agencies would in any case be reluctant to make such information available in court for fear of revealing their sources. The security services are also concerned about the breadth of disclosure requirements in English criminal law leading to the disclosure of other material not relied upon, and perceive the law on public interest immunity to be inadequate.

Using closed evidence and special advocates in criminal trials

One ‘solution’ which has been proposed is the introduction of a special procedure for terrorist trials in place of the ordinary criminal process, in which special courts conduct closed hearings, using a lower standard of proof than the criminal ‘beyond reasonable doubt’ standard, and in which the prosecution would present intelligence-derived information which would be withheld from the defence but on which the prosecution could rely to secure a conviction, with the interests of the defence being represented by special advocates. We agreed with the view of six special advocates with experience of the system as it operated in the SIAC that to introduce a system of special advocates into the criminal trial ‘would contradict three of the cardinal principles of criminal justice: a public trial by an impartial judge and jury of one’s peers, proof of guilt beyond reasonable doubt, and a right to know, comment on and respond to the case made against the accused’³⁶.

We considered that the introduction of special advocates into the criminal trial would be incompatible with many of the most basic guarantees of due process, reiterating the point made in our earlier report that it would be incompatible with the requirements of Article 5(4) and Article 6 ECHR for special advocates to be used in control order proceedings involving deprivation of liberty. However, we believed that there may be scope for the

³⁵ Section 17 of the Regulatory and Investigative Powers Act 2000.

³⁶ Nicholas Blake QC, Andrew Nicol QC, Manjit Gill QC, Ian Macdonald QC, Rick Scannel and Tom de la Mare, letter to *The Times*, 7 February 2004.

use of special advocates in a criminal trial when there is argument about whether a claim to public interest immunity should be upheld.

'Investigating judges' in terrorism cases

At the time of the passage of the Terrorism Act 2006, there was interest in the possible use of 'investigating judges' in terrorism cases, similar to the investigating magistrate model used in many European legal systems. In December 2005, we visited France and Spain to find out how investigating magistrates work particularly in terrorism cases, whether they facilitate longer pre-trial detention and whether there are any aspects of the investigative approach which are capable of importation.

We found that the nature of the function of investigating magistrates in France and Spain was more prosecutorial than judicial and would therefore not sit easily with our common law traditions. In particular, it would require a very close relationship between the investigating magistrate and the police and intelligence agencies, and such a collaborative relationship would, in our view, be incompatible with the nature of the judicial function as it has traditionally been understood in the UK. We considered that the investigating magistrates model should not be borrowed wholesale and imported into our own institutional arrangements. We also found that there is nothing in the investigative approach which may be grafted on to our more adversarial system. However, what we saw in France and Spain suggested that there may be aspects of the functions of the investigating magistrate from which we could learn.

Specialisation, centralisation and co-ordination

In France and Spain, we learnt of the importance of specialisation, centralisation and co-ordination of and amongst the police, the intelligence services, the prosecution and the courts. In Spain we were told that there is close collaboration between the judge and the police and intelligence service, comparable to the relationship in France between the *juge*

d'instruction and the police and intelligence services, and that such close co-operation was very important.

We were pleased to learn from our discussion with the DPP that efforts are being made to forge a closer working relationship between the CPS on the one hand and the police and intelligence services on the other. In our view, turning information into evidence at the earliest possible stage in the process should be the paramount consideration for all those involved in acquiring intelligence. Investigations should generally be structured so as to maximise the prospects of information obtained being capable of being used as evidence in a criminal trial. Public confidence in the adequacy of inter-agency arrangements for the sharing of intelligence would be greatly increased if protocols governing such matters, such as exist in Canada, not only existed in the UK but were also publicly available and subject to independent scrutiny.

Offence of 'acts preparatory to terrorism'

The Terrorism Act 2006 introduced a new criminal offence of acts preparatory to terrorism³⁷ and we welcomed its introduction. Although this offence does not appear to be as widely defined as the French offence of *association de malfaiteurs*, or 'association of wrongdoers', we considered that it clearly enhances the preventive capacity of the police. Now that the wider offence of acts preparatory to terrorism is available, the police should only use the power of extended pre-charge detention for the purpose for which it was sought, namely to investigate the possible commission of offences with a view to criminal prosecution.

Relaxing the ban on admissibility of intercept evidence

The current statutory ban in the UK of the admissibility of intercept material in criminal trials is a major impediment to the prosecution of terrorist offences. We learnt that intercept evidence is frequently used in France, Spain as well as in other common law

³⁷ Section 5 of the Terrorism Act 2006.

jurisdictions such as the USA and Canada. We were particularly struck by the fact that in France, intercept evidence is regarded not only as playing an important part in the investigation of terrorist suspects by the security services, but in their conviction in criminal prosecutions. The DPP told us that although there were legitimate arguments both ways, intercept evidence ought to be admissible in criminal trials and he was positive that ways could be found to protect intelligence sources. In our view, the ban on the use of intercept evidence in court should now be removed, and attention should be turned urgently to ways of relaxing the ban.

More judicial control over procedure in terrorism cases

Following our visit to France and Spain, we considered whether there is scope for more judicial control over the procedure in terrorism cases, whilst preserving the traditional separation of functions in this country between judges on the one hand and prosecutors and investigators on the other. We believe that there is scope for more proactive case management of terrorism trials, without judges becoming either investigators or prosecutors, and in our report we urged the relevant judicial authorities to encourage such an approach.

Conclusion on overcoming obstacles to prosecution

In France and Spain we learnt that criminal prosecution, in public, open trials according to normal criminal procedures, is more frequently used than in the UK. By contrast, in the UK, there appeared to be a fear amongst the police and security services that criminal prosecution would inevitably lead to sensitive sources being revealed in open court, forcing the Government to resort to the use of administrative detention, control orders and Memoranda of Understanding with foreign countries instead of prosecution. In our view, a combination of the measures considered in our report could help to overcome many of the main obstacles to prosecuting terrorist offences without sacrificing important due process guarantees.

Alternatives to lengthy pre-charge detention

The JCHR considered whether extensions of the period of pre-charge detention beyond 28 days are likely to be necessary. The JCHR welcomed the flexibility introduced by the ‘Threshold Test’ in the Code for Crown Prosecutors, which introduces a threshold for charging which is higher than the threshold for an arrest, in that it must be based on evidence which will be admissible at trial and not merely intelligence information, but lower than the demanding standard of a realistic prospect of conviction. In the JCHR's view, lowering the charging threshold must reduce the force of the case for extending the period of pre-charge detention further beyond the current limit of 28 days.

The JCHR considered that the combination of the Threshold Test and active judicial management of the post-charge timetable would be more preferable than lengthy pre-charge detention. In particular it has the virtue of enabling prosecutions to be brought, thereby pursuing the objective of protection and prevention at the same time as giving the defendant the full benefit of the ordinary procedures which govern criminal prosecutions. In the JCHR's view, if the actual process in terrorism cases is properly understood, further extensions in the maximum period of pre-charge detention should not be necessary.

The JCHR also recommended that the Home Office amend the Police and Criminal Evidence Act 1984 (PACE) Code of Practice to permit post-charge questioning and the drawing of adverse inferences from a refusal to answer questions at such an interview.

The JCHR agreed with the Commons Home Affairs Committee's concern about the adequacy of current judicial oversight of pre-charge detention, but did not agree that the enhanced judicial oversight which is envisaged should be carried out on the basis of an investigative approach. In the JCHR's view, such an approach takes away the essence of the detained person's right of access to a court to challenge the legality of his detention, by withholding from him the information on the basis of which he is being held. Article 5 ECHR requires that there is judicial control in the full sense of an adversarial hearing.

The JCHR made two further recommendations concerning pre-charge detention. First, that there ought to be an enforceable right to compensation for those held in pre-charge detention but not charged, as there is in France. Second, that the Code of Practice should make provision for counselling support for those who are detained beyond 14 days, in view of the severe effect on the mental health of those who were detained in Belmarsh and subjected to control orders.

Parliamentary accountability, reporting requirements and annual review

The JCHR considered that there is an increasingly urgent need to devise new mechanisms of independent accountability and oversight of both the security and intelligence agencies and the Government's claims based on intelligence information. In addition to more direct parliamentary accountability, the JCHR considered that in principle the idea of an 'arms length' monitoring body charged with oversight of the security and intelligence agencies, independent of the Government, and reporting to Parliament, merits consideration in this country.

The JCHR recommended that in future all terrorism legislation should have a life limited to five years maximum, and required renewal by primary legislation not ministerial order, and that, in addition to review by the Government-appointed independent reviewer, provision also be made for parliamentary review of the operation of that legislation.

6 UN Convention against Torture³⁸

Our inquiry into the UK's compliance with the UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment (UNCAT) followed on from a programme of work begun in the previous parliamentary session, considering the domestic implementation of each of the UN human rights treaties. We took as our starting point the

³⁸ UN Convention against Torture (UNCAT), 19th Report of Session 2005-06, HL Paper 185-I/II, HC 701-I/II.

Concluding Observations issued by the UN Committee in December 2004³⁹ and heard evidence from a wide range of witnesses. We also considered the Government's human rights obligations in relation to extraordinary renditions alleged to have taken place using UK airspace.

Prohibition on torture

In relation to the absolute nature of the prohibition on torture, we reiterated our view that the absolute prohibition on deportation of persons to a country where they will face a real risk of torture, established in the *Chahal* judgment, precludes any balancing exercise between national security and the risk of torture and is essential to effective protection against torture. We also expressed our concern that the Government's intervention in the *Ramzy* case undermined the absolute prohibition on torture.

UNCAT in domestic law and policy

We considered the general implications of UNCAT in UK domestic law and policy and recommended early consideration of acceptance by the UK of the right of individual petition under the Convention. In relation to the use before the Special Immigration Appeals Tribunal (SIAC) of evidence which may have been obtained by torture, we considered the implications of the House of Lords decision judgment in *A (FC) v Secretary of State for the Home Department*⁴⁰.

In a landmark decision, their Lordships held that evidence obtained by torture could not be used in legal proceedings. However, the JCHR considered that the judgment still leaves open the possibility that information which may have been obtained by torture or ill-treatment by foreign agents may be used in intelligence or law enforcement

³⁹ Concluding observations of the Committee against Torture *Conclusions and Recommendations: United Kingdom of Great Britain and Northern Ireland – Dependent Territories* 10 December 2004, CAT/C/CR/33/3.

⁴⁰ [2005] 3 WLR 1249.

operations; though it may not be used as evidence in subsequent legal proceedings⁴¹. We accepted that UNCAT and other provisions of human rights law do not prohibit the use of information from foreign intelligence sources, which may have been obtained under torture, to avert imminent loss of life by searches, arrests or other similar measures. Indeed, where information of an imminent attack becomes available to the authorities, there is a positive obligation under Article 2 to take action. However, care must be taken to ensure the use of such information is only made in cases of imminent threat to life and in such a way that does not render the UK authorities complicit in torture. In our view, there is a significant difference between using information from sources suspected of being involved in torture to avert a terrorist act and using it in court proceedings.

Diplomatic assurances against torture

We considered at length the Government's policy of seeking diplomatic assurances in order to deport people considered to be a national security risk but who might face torture in the country to which they are returned. Taking into account the terms of the Memoranda of Understanding already agreed with Jordan, Libya and Lebanon, we were left with serious concerns that the reliance on diplomatic assurances could place deported individuals at real risk of torture or inhuman treatment, without any reliable means of redress. We were very concerned that the reliance in good faith of Governments which are known to practice or tolerate torture is not a sufficient guarantee to protect against torture, as has been demonstrated in the recent cases of Ahmed Agiza⁴² and Maher Arar⁴³, both of whom were tortured in Egypt and Syria respectively following deportations based on diplomatic assurances.

Diplomatic assurances also have a corrosive effect on the multinational framework of the UN and other treaties aimed at eradicating torture, as they undermine the absolute and universal nature of the prohibition on torture and presuppose that torture of some

⁴¹ per Lord Bingham at para 47.

⁴² *Agiza v Sweden* CAT/C/34/D/233/2003.

⁴³ Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, Report of Professor Stephen J. Toope, Fact-finder, 14 October 2005, www.ararcommission.ca.

detainees is more acceptable than the torture of others. It is of paramount importance, now more than ever, that the universal prohibition of torture is upheld. We concluded that the Government's policy of reliance on diplomatic assurances against torture could well undermine its international obligations not to deport anybody if there is a serious risk of torture or ill-treatment in the receiving country⁴⁴.

Extraordinary renditions

We also considered allegations of extraordinary renditions taking place throughout the UK in light of the Government's obligations under UNCAT. We concluded that the Government has not adequately demonstrated that it has satisfied the obligation under domestic and international human rights law to investigate credible allegations of renditions, and should take steps to ascertain more details about certain flights known to have used UK airports and suspected to be involved in extraordinary renditions.

We also made a number of recommendations to ensure that extraordinary renditions do not take place in the future. In addition to the steps which the Government has taken to make its position on extraordinary renditions clear to the United States authorities⁴⁵, the Government should establish a clear policy as to the action to be taken in cases where aircraft alleged to have been previously involved in renditions transit the UK. Where there are credible allegations arising from previous records that a particular civil aircraft transiting UK airspace has been involved in renditions, and where the aircraft is travelling to or from a country known to practise torture, it should be required to land. Where such an aircraft lands at a UK airport for refuelling or similar purposes, it should be required to provide a full list of all those on board, both staff and passengers. On landing, it should be boarded and searched by the police, and the identity of all those on board verified. Wherever appropriate, a criminal investigation should be initiated. Where an aircraft suspected of involvement in extraordinary renditions identifies itself as a state aircraft, it should not be permitted to transit UK airspace, in the absence of permission for UK

⁴⁴ The Committee divided on this issue 4: 2 in favour.

⁴⁵ Response of the Secretary of State for Foreign and Commonwealth Affairs to the First Report from the Foreign Affairs Committee, Session 2005-06, *Annual Report on Human Rights 2005*, Cm 6774 para 29.

authorities to search the aircraft. These steps are not only permitted by the current law, but required to ensure full compliance with UNCAT.

7 **Racial and Religious Hatred Act 2006**

After the 9/11 attacks, the Government had originally sought to extend the existing provisions on incitement to racial hatred to cover religious hatred through the ATCSA 2001⁴⁶. This proposal was rejected twice by the Lords amid concerns that it would stifle free speech, and given the abbreviated timetable for debate on the Bill, the Government withdrew the provision altogether. However, in 2004 the Government brought back the proposal in the Serious Organised Crime and Police Bill.

In its consideration of this Bill, the JCHR found that, taking into account in particular the approach of the Strasbourg Court in *Jersild v Denmark*⁴⁷, which held that the need to combat racism is a legitimate reason for limiting freedom of expression as long as the limitation is proportionate, it seemed likely that it would be a justifiable interference with freedom of expression or religion. Although there were concerns as to whether the proposed legislation was wider than necessary and that it would catch words, conduct, publications and recordings which were likely to stir up religious hatred but fall short of advocating it, the JCHR considered that the proposal was probably compatible with the Article 10 free speech guarantee.

Following defeat in the Lords, the Government dropped the provision altogether in order to secure the passage of the Bill before the dissolution of Parliament. However, in the aftermath of the July bombings, the Government made a commitment in their 2005 election manifesto to criminalise incitement to religious hatred and the Home Secretary, the Rt Hon Charles Clarke MP, wrote to mosques to reiterate the Government's determination to create these offences. The Government returned to the new Parliamentary session with the Racial and Religious Hatred Bill, which amended the

⁴⁶ Clause 38 of the Bill amending Part 3 of the Public Order Act 1986.

⁴⁷ (1994) 19 EHRR 1 at paras 31-37.

Public Order Act 1986 to include offences aimed at the prohibition of ‘hatred against persons on religious grounds’.

The Bill was strongly supported by the Muslim Council of Britain but met with serious opposition from both religious and non-religious groups across a broad spectrum within and beyond Parliament. Comedians and writers feared prosecution for their work, that it would compromise their ability to mock and satirize people’s religious beliefs and stifle their right to free speech.

The JCHR had concerns about the potential adverse impact of broad offences on freedom of expression, including their compatibility with the principles of legal certainty and proportionality anchored in Article 10 ECHR. Without amendment to make specific reference to advocacy of religious hatred that constitutes incitement to hostility, violence and discrimination, we considered that the new offences could arguably have an adverse effect on free speech⁴⁸.

The Bill was radically amended in the Lords to include three central safeguards; (i) confining the offences to the use of threatening words and behaviour, as distinct from threatening, insulting or abusive words or behaviour, (ii) requiring proof or an intention to stir up religious hatred and (iii) including a broad declaratory provision to protect freedom of expression⁴⁹. The Bill was eventually enacted including these safeguards, after being passed in the Commons by just one vote.

8 Conclusion

The nature of the threat posed by the new form of international terrorism has changed compared to the threat previously posed by terrorism connected with, for example, Irish

⁴⁸ Legislative Scrutiny: First Progress Report of Session 2005-06 HL Paper 48 HC 560.

⁴⁹ The freedom of expression defence contained in Schedule 1, section 1 of the Act provides that: ‘Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system.’

republicanism in the UK or Basque separatism in Spain⁵⁰. However, whilst the nature of contemporary terrorism is changing, it is essential that the rules and framework of international and human rights law with which terrorism must be tackled do not. The close scrutiny by the JCHR of the Government's counter-terrorism legislation has sent out a clear message in this regard: national rules may change in the wake of an attack to the extent required by human rights law, but the applicable human rights rules themselves do not.

⁵⁰ The Home Affairs Committee in its report on Terrorism Detention Powers concluded that the nature of the terrorist threat has changed, citing the intention to cause mass casualties indiscriminately, the phenomenon of suicide bombers, its international dimension, and its apparent lack of amenability to political resolution. See Home Affairs Committee *Terrorism Detention Powers* Fourth Report of Session 2005-06 op. cit. at para 44.