

IN THE MATTER OF:

THE PREVENTION OF TERRORISM BILL

OPINION

1. I am asked to advise on the compatibility of the provisions of the new Prevention of Terrorism Bill with the requirements of domestic and international human rights law. For the reasons set out below, it is my view that the entire scheme established under the Bill as it stands is incompatible with the United Kingdom's international obligations, and would be vulnerable to challenge in the courts.
2. The legal and human rights issues raised by this Bill are complex, and involve questions of the greatest possible constitutional importance. It is, in my view, impossible adequately to redress the defects in the Bill within the timetable which has been allowed for Parliamentary scrutiny. All concerned in the process of analysing these proposals have been put under impossibly tight time constraints within which to respond, quite inappropriate to a measure of this importance.
3. In summary, it is my view that:
 - (a) The conditions which could be imposed under the proposed new "control orders" include higher end sanctions such as deprivation of liberty and restrictions on freedom of movement (enforceable by criminal prosecution for their breach) that are liable to be classified as criminal penalties within the meaning of Article 6 of the European Convention on Human Rights ("ECHR") – the right to a fair trial. They are dependant on a finding of involvement in terrorism-related activity, which the European Court of Human Rights has held to be "well in keeping" with the notion of a criminal charge. Coupled with the severity of the potential consequences this would,

in many cases, be sufficient to identify the orders as being penal in character for the purposes of Article 6.

- (b) The lower end sanctions, whether or not they amount to criminal penalties for the purposes of Article 6, would undoubtedly amount to the determination of civil rights and obligations for the purposes of that Article. They authorise state-imposed restrictions and interferences with a range of Convention rights including the right to respect for a person's private and family life, home and correspondence (Article 8), the right to freedom of expression (Article 10) and the right to freedom of association (Article 11). Under the Human Rights Act 1998, these rights are, at the very least, "civil rights" for the purposes of Article 6. Moreover, the indelible stigma of being branded a terrorist is, in itself, a grave imputation on an individual's civil right to good reputation.

- (c) Whether any particular set of conditions is categorised as a criminal sanction, or as the determination of civil rights and obligations, the due process guarantees required under Article 6 will be essentially similar:
 - (i) The person affected is entitled to a fair and public hearing before an independent and impartial tribunal established by law: Article 6(1). An executive decision to curtail a citizen's rights, based on *reasonable suspicion alone*, does not meet the requirement for an independent and impartial tribunal, even if it subject to a limited measure of judicial review (whether that review takes place in advance of the decision or subsequently).

 - (ii) The concept of a fair hearing involves a right to know the case you have to meet, a right to make full answer and defence, and a right to "equality of arms". The "closed evidence" procedure preserved by the Bill, including the use of "special advocates" appointed by the Attorney General, does not meet those requirements.

- (iii) A person charged with what, in substance, is a criminal allegation is entitled to be presumed innocent: Article 6(2). The burden of proving guilt thus rests on the state. In this context, it is a burden to prove guilt to a standard which is appropriate to the gravity of an allegation of involvement in terrorism. Under the Bill, the Home Secretary can make a control order on the basis of a reasonable suspicion alone or (if it is a derogating control order) on the civil standard of the balance of probabilities. And all questions relating to the burden of proof in judicial proceedings to review a control order are *delegated to the Executive* under a power to make rules of procedure. It is thus left for the Government (i.e. one of the parties to the proceedings) to decide whether the burden of proof should be borne by the state or by the individual.

- (iv) The right to a fair hearing includes a duty on the state to disclose to the accused person any evidence in its possession which might help him to establish his innocence, so as to prevent a miscarriage of justice. Disturbingly, paragraph 4(3)(c) of the Schedule to the Bill provides that the Home Secretary is not required to disclose – even to the court or the special advocate who would be appointed to represent the defendant – any unused evidence that might exonerate him, or cast doubt on the allegations which are being made.

- (v) The right to a fair hearing precludes reliance on evidence obtained by torture, including torture committed by the agents of a foreign state. The Bill contains no such prohibition, and it remains the Secretary of State’s position that evidence obtained by torture is admissible, provided the torture was not directly committed or connived at by British officials.

- (d) The Bill is fundamentally flawed in failing to establish any criteria for determining the dividing line between those control orders which would require a derogation, and those which would not. Parliament has been informed that in the Home Secretary's view, a power to impose complete house arrest is not at present "strictly required". Accordingly, the conditions for a valid derogation to make provision for house arrest are not currently met. However, the Bill fails to impose any express limit at all on the severity of the conditions which may be imposed under a control order *without derogation*. On its face, therefore, the Bill grants immediate powers to the Home Secretary which would permit a control order to be imposed with conditions which, at the upper end, amount to effective house arrest. Put shortly, Parliament is being asked to grant the Home Secretary a range of powers which would be effective immediately – without any clear indication of the limits to those powers – and without the need for any debate on the justification for a derogation.
- (e) In proceedings before the Special Immigration Appeals Commission (SIAC), under the present legislation, the Home Secretary has so far refused to accept that complete arrest (i.e. detention at a person's home for 24 hours a day) amounts to a deprivation of liberty engaging Article 5 in the first place: *A and P v Secretary of State for the Home Department, Judgment 7th February 2005*. It is important to appreciate what this means. It means that it is the Home Secretary's position, as explained to SIAC, that even if a control order authorised house arrest, this would not necessarily require a derogation. So far as I am aware, he has not yet made any statement to SIAC to indicate that his position on this question has changed.
- (f) This key flaw in the Bill can be illustrated by reference to the different procedural rules which are proposed for the grant and renewal of a control order. Where, in the Home Secretary's opinion, a control order would require derogation, it can only be made if a derogation order has been made, and if he is satisfied *on the balance of probabilities* that the person

concerned is or has been involved in terrorism-related activities. It is proposed that there would be an initial judicial review within 7 days, and thereafter a full appeal at which the court would be required to determine for itself whether the person has been involved in terrorism. By contrast where the Home Secretary considers that derogation is not required, a control order may be made on the grounds of reasonable suspicion alone, there is no automatic right of appeal, and any challenge in the courts would have to meet the high threshold applicable on judicial review. These two regimes are fundamentally different. It thus becomes vitally important to identify when a derogation is required and when it is not. But the Bill tells Parliament nothing about this vital distinction.

- (g) It is, in any event, wrong in principle for Parliament to be asked to give the Home Secretary powers now which would require a subsequent derogation if they were ever to be exercised. If there is no current need to derogate, so as to permit the powers to be exercised, then there is no current need to confer those powers in the first place. The effect of this legislative technique is to reduce the level of Parliamentary scrutiny of the justification of any subsequent derogation. Parliament can only judge the need for derogation, and the proportionality of any derogating measure, in the light of the circumstances as they stand at the time of the proposed derogation, and in the light of the justification which is then advanced by the Home Secretary. At present, the Home Secretary is not seeking to advance any such justification. But he is nevertheless seeking to have at his disposal, statutory powers that depend on a valid derogation.
- (h) In addition to this shortcoming in Parliamentary scrutiny, there is no provision within the Bill for judicial review of the justification for any future derogation. The existing provisions of Part 4 of the Anti-Terrorism Crime and Security Act 2001, which this new Bill is intended to replace, made provision for review of the justification for the measures by a Committee of Privy Counsellors. It was under this provision that the Newton Committee

made its report recommending the immediate revocation of Part 4. More importantly, the 2001 Act conferred jurisdiction on the courts to pass judgment on the compatibility of any derogation with the requirements of the ECHR. It was this provision which resulted in the House of Lords ruling that the existing power of indefinite Executive detention without trial was disproportionate and discriminatory. The absence of any comparable provisions in this Bill is a serious omission which may be relied upon to prevent any judicial scrutiny of the validity of a derogation.

- (i) It is a fundamental requirement of Article 7 of the ECHR that laws which impose what are effectively penal sanctions must be sufficiently clear and precise to enable a citizen to know in advance what conduct is prohibited, and what sanctions are liable to be imposed. This Bill fails on both counts. The proposed definition of “terrorism-related activity” in clause 1(8) is objectionably vague. It is drafted so as to include conduct which has *the unintended* consequence of enabling another person to engage in the preparation, instigation or commission of an act of terrorism (that is, a person whose conduct makes such an act possible, even though they had no intention to do so). It also includes any person who gives any form of “support or assistance” to someone who falls within that category. And, for the reasons, explained above, it is entirely unclear from the Bill what range of sanctions Parliament is currently (i.e. in the absence of derogation) being asked to authorise.

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25th February 2005