

LIBERTY

PROTECTING CIVIL LIBERTIES
PROMOTING HUMAN RIGHTS



**Liberty and JUSTICE submission to the
United Nations Human Rights Committee**

**Response to the United Kingdom's sixth
periodic report under the International
Covenant on Civil and Political Rights**

October 2007

About JUSTICE

JUSTICE is an all-party, human rights and law reform organisation founded in 1957. Its purpose is to advance justice, human rights and the rule of law. It is the British section of the International Commission of Jurists.

About Liberty

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

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Introduction

1. Liberty and JUSTICE welcome the opportunity to comment on the United Kingdom's sixth periodic report to the Human Rights Committee. While this submission is not meant as a comprehensive response to the UK's report,¹ we raise a number of issues concerning the protection of Covenant rights in the UK.

2. In particular, we wish to highlight serious problems with various counter-terrorism measures introduced by the UK government since its fifth report, including:
 - indefinite detention of foreign nationals suspected of terrorism;
 - control orders;
 - pre-charge detention in terrorism cases;
 - the breadth of the statutory definition of 'terrorism';
 - the offence of encouragement to terrorism; and
 - stop-and-search powers under section 44 of the Terrorism Act 2000.

3. We also highlight concerns with:
 - ill-treatment of prisoners and indefinite detention by UK troops in Iraq;
 - use of diplomatic assurances to deport suspects to countries known to practice torture;
 - potential UK complicity in the practice of extraordinary rendition by the US;
 - attacks on the judiciary, the Human Rights Act 1998 and the European Convention on Human Rights by senior government ministers;
 - retention of DNA samples of persons acquitted or not charged with any criminal offence;
 - restrictions on freedom of expression and assembly in Parliament Square;
 - use of Anti-social Behaviour Orders, imposing criminal sanctions by way of civil proceedings involving hearsay evidence;
 - interferences with prisoners rights
 - significant curtailment of rights of asylum seekers.

¹ Specifically, this submission does not attempt to deal exhaustively with all of the matters raised in the government's report, or with all of the ICCPR provisions. Neither does this report deal with the concerns regarding the protection of Covenant rights in Northern Ireland nor in relation to the British Overseas Territories or Crown Dependencies.

General political structure – role of judiciary (article 14(1))

4. Although the Constitutional Reform Act 2005 (unmentioned in the government's report) introduced a number of welcome improvements to the separation of powers in the UK, including ending the role of the Lord Chancellor, a government minister, as head of the judiciary and the creation of a Supreme Court separate from the House of Lords (the upper house of Parliament), we are concerned at the continuing failure of the government to (i) guarantee the judiciary sufficient resources to ensure their independence² and (ii) prevent senior ministers from making inaccurate and often inflammatory criticism of judicial decisions and the judiciary as a whole.³ In our view, these failures risk undermining the right to a fair hearing by 'a competent, independent and impartial tribunal established by law' as guaranteed by Article 14(1) of the Covenant.

- Failure to guarantee the budgetary autonomy of the judiciary from the executive⁴

5. In March 2007 the government announced the creation of a new Ministry of Justice which would assume responsibility for prisons and offender management in addition to its responsibility for funding and providing administrative support to the courts. Although section 3(1) of the 2005 Act imposed a statutory duty on the Lord Chancellor to 'uphold the continued independence of the judiciary',⁵ the government has so far refused to guarantee the judiciary autonomous control of the budget for the administration of the courts.⁶ The failure of the government to make budgetary arrangements ensuring judicial independence has been criticised by committees of both Houses of Parliament.⁷ On 12 September 2007, the Lord Chief Justice, Lord Phillips of Worth Matravers said:⁸

² Principle 7 of the UN Principles for the Independence of the Judiciary (Adopted 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985) provides that: '[i]t is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions'.

³ Principle 4 of the UN Basic Principles for the Independence of the Judiciary provides that: '[t]here shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law'.

⁴ See Principle 7 of the UN Principles for the Independence of the Judiciary, n2 above.

⁵ Section 17 of the 2005 Act also provides the Lord Chancellor's oath of office which includes an avowal to 'discharge my duty to ensure the provision of resources for the efficient and effective support of the courts for which I am responsible'.

⁶ As a paper released on behalf of the Judiciary of England and Wales noted: 'What must be avoided, both in perception and in practice, is a position whereby judicial decision-making is influenced or constrained by ... financial considerations' (Judiciary of England and Wales, *Ministry of Justice: Judicial Position Paper* (<http://www.parliament.uk/documents/upload/Judicial%20Position%20Paper.pdf>)).

⁷ See the report of the House of Lords Constitution Committee, *Relations between the executive, judiciary and Parliament* (26 July 2007: HL 151), para 83: 'The integrity of the legal system depends on it being properly funded. We consider it one of the vital tasks of the Lord Chancellor to ensure that the Courts Service and Legal Aid budgets uphold that integrity'. See also the House of Commons Constitutional Affairs Committee reference to the government's 'underestimation of, and insensitivity for, the concerns of the judiciary which changes to the role and responsibilities of the Lord Chancellor may raise' (HC Constitutional Affairs Committee, *The creation of the Ministry of Justice* (26 July 2007: HC 466), para 22).

⁸ Lord Phillips Of Worth Matravers, 'Judicial Independence', Commonwealth Law Conference 2007 Nairobi, Kenya, 12 September 2007 (http://www.judiciary.gov.uk/docs/speeches/lcj_kenya_clc_120907.pdf). Emphasis added.

Judges should not ... become involved in the detail of administration, but if administration of the court system is shared with the executive this must be done in a way that leaves the court service and the judges working as a team. *The former must recognise that they have a duty to provide what the latter need in order to achieve the efficient and effective administration of justice.*

Inaccurate and inflammatory criticism of judicial decisions and the judiciary by senior government ministers⁹

6. Since the UK's fifth report, there have been numerous public statements by government ministers criticising the decisions of judges, particularly in cases involving the Human Rights Act 1998 ('HRA').¹⁰
7. In May 2006, the then-Prime Minister Tony Blair criticised a ruling by a High Court judge concerning the immigration status of nine Afghan hijackers who faced a real risk of ill-treatment contrary to Article 3 of the European Convention on Human Rights ('ECHR') if returned to Afghanistan, as an 'abuse of common sense'.¹¹ The following day, the then-Home Secretary John Reid MP suggested that the judgment was part of a pattern of 'inexplicable or bizarre' judicial decisions.¹² The Prime Minister then wrote to the Lord Chancellor Lord Falconer QC, seeking a review of 'inconsistent' court rulings.¹³
8. In June 2006, the Home Secretary criticised a sentence given by a Crown Court judge as 'unduly lenient', despite the fact that the sentence was consistent with sentencing guidelines established by statute.¹⁴ Although the Attorney General later acknowledged that the judge's decision had been correct in law, the judge and the judiciary in general were subjected to considerable media criticism.¹⁵ The Lord Chancellor later conceded that ministers conduct in the case 'had an impact on undermining confidence in the judiciary'.¹⁶

⁹ See Principle 4 of the UN Basic Principles for the Independence of the Judiciary, n3 above.

¹⁰ For further discussion of government attacks on the Human Rights Act, see below under 'General legal framework within which human rights are protected'.

¹¹ See e.g. BBC, 'Blair dismay over hijack Afghans', 10 May 2006.

¹² BBC, 'Government Appeal over Hijackers', 11 May 2006: 'When decisions are taken which appear to the general public, it only reinforces the perception that the system is not working to protect or in favour of the vast majority of ordinary decent hard-working citizens in this country'.

¹³ BBC, 'Blair 'to amend human rights law'', 14 May 2006: 'We will need to look again at whether primary legislation is needed to address the issue of court rulings which overrule the Government in a way that is inconsistent with other EU countries' interpretation of the European Convention on Human Rights'.

¹⁴ See e.g. *The Independent*, 13 June 2006, p 4. For a detailed account, see the report of the Constitution Committee, n5 above, paras 45-51.

¹⁵ See e.g. *The Sun*, 13 June 2006, p8, criticising 'the arrogance of judges in their mink-lined ivory towers who leave the rest of us to cope with the real crisis of soaring crime' and describing judges as 'a law unto themselves'; *The Daily Express*, 13 June 2006, p12, referring to the judiciary as 'deluded, out-of-touch and frankly deranged', 'combining arrogance with downright wickedness', and suggesting that 'our legal system has not only lost touch with public opinion but with natural justice itself ... [sentencing] now bears no relation at all to the seriousness of the crime'.

¹⁶ Transcript of evidence before the House of Commons Constitutional Affairs Committee, 4 July 2006, HC 566-iii. The Committee itself concluded that Home Secretary's comments had 'inappropriately [cast] aspersions on the competence of the judge in the case' (para 45), and noted that '[i]t would not be necessary for the Lord Chancellor to

9. In January 2007, the former Home Secretary Charles Clarke MP complained publicly that 'the judiciary bears not the slightest responsibility for protecting the public, and sometimes seems utterly unaware of the implications of their decisions for our security'.¹⁷ He added that 'I regard it as *disgraceful* that no Law Lord is prepared to discuss in any forum with the home secretary of the day the issues of principle involved in these matters'.¹⁸
10. In May 2007, the Prime Minister publicly blamed the judiciary for ruling against the government in cases involving counter-terrorism policy.¹⁹

We gave ourselves the ability, in exceptional circumstances, to detain foreign nationals who we believed were plotting terrorism but against whom there was insufficient evidence to prosecute. *In December 2004 these laws were struck down by the courts.* We have tried continually to deport foreign nationals who were either engaged in or inciting extremism. *Again and again in court judgments we were forced to keep them here.* We have chosen as a society to put the civil liberties of the suspect first. I happen to believe this is misguided.

General legal framework within which human rights are protected

11. Although the government's report claims that it 'remains fully committed to promoting human rights',²⁰ senior government ministers have repeatedly suggested that the UK's obligations under the ECHR, incorporated into domestic law by way of Schedule 1 of the Human Rights Act 1998 ('HRA'), have weakened public safety and are otherwise a significant barrier to government policy. The UK's obligations under the Covenant closely follow those under the ECHR.
12. In January 2003, for instance, the Prime Minister Tony Blair suggested that the UK might withdraw from the ECHR in order to reduce the number of persons seeking asylum in the UK.²¹

[I]f the measures that we're taking, which we've been working on for some time and are just coming into effect now, if those measures don't work, then we will have to consider further measures, *including fundamentally looking at the obligations we have under the convention of human rights.*

reprimand fellow ministers at all if they always adhered to the principle of not commenting on decisions of individual judges in an inaccurate and intemperate manner' (para 50).

¹⁷ Constitution Committee report, n5 above, minutes of evidence, 17 January 2007, Q123. The comments were reported widely, see e.g. BBC, 'Clarke criticises Lords on terror', 17 January 2007.

¹⁸ Ibid. Emphasis added.

¹⁹ Tony Blair, 'Shackled in the war on terror', *The Times*, 27 May 2007. Emphasis added.

²⁰ UK Sixth periodic report, p14 para 1.

²¹ BBC Breakfast with Frost interview, 26 January 2003. Emphasis added.

13. Similarly, following the terrorist bombings in London in 7 July 2005, the Prime Minister announced that ‘the rules of the game are changing’,²² and set out plans for a series of counter-terrorism measures including deporting suspects to countries such as Algeria and Jordan using diplomatic assurances against ill-treatment contrary to Article 3 ECHR. The Prime Minister stated that:²³

Should legal obstacles arise, we will legislate further including, *if necessary, amending the Human Rights Act in respect of the interpretation of the European Convention on Human Rights.*

14. In May 2006, the Prime Minister asked the Lord Chancellor to undertake a review of the HRA.²⁴ As the review itself states, it was:²⁵

commissioned in the immediate aftermath of the Inquiry Report (by HM Chief Inspector of Probation) into the release of Anthony Rice, which had *suggested that human rights arguments, and the Human Rights Act, had been contributory factors in the events leading to the murder of Naomi Bryant.*

15. However, the review itself, released in July 2006, concluded that the HRA had, in general, ‘not seriously impeded the achievement of the Government’s objectives on crime, terrorism or immigration, and has not led to the public being exposed to additional or unnecessary risks’.²⁶ In November 2006, the parliamentary Joint Committee on Human Rights warned out that the government itself was largely responsible for the extent of public misunderstanding of the HRA.²⁷

²² See www.number-10.gov.uk for a full transcript of the PM’s 5 August press conference.

²³ *Ibid*, emphasis added. The Prime Minister restated this point later in the press conference, saying that ‘in respect of British Courts we can retest it and, if necessary, we can amend the Human Rights Act and that covers the British Courts’ interpretation of the law’.

²⁴ See n10 above.

²⁵ Department for Constitutional Affairs, *Review of the Implementation of the Human Rights Act*, July 2006 (http://www.dca.gov.uk/peoples-rights/human-rights/pdf/full_review.pdf), p3. Emphasis added. The Chief Inspector of Probation’s suggestion that the Human Rights Act played any part in the wrongful release of Mr Rice was strongly criticised by the parliamentary Joint Committee on Human Rights: see *The Human Rights Act: DCA and Home Office Reviews* (14 November 2006: HL 278/HC 1716), para 39: ‘we strongly disagree that the Chief Inspector’s Report contains any real evidence that public safety is being prejudiced by officials’ misinterpretations or misapplications of the HRA’.

²⁶ *Ibid*, p4.

²⁷ Joint Committee on Human Rights, *The Human Rights Act: DCA and Home Office Reviews* (14 November 2006: HL 278/HC 1716) (<http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/278/27802.htm>), para 21. See also para 41: ‘We must ... draw to Parliament’s attention the extent to which the Government itself was responsible for creating the public impression that in relation to each of the ... highly contentious issues under consideration it was either the Human Rights Act itself or misinterpretations of that Act by officials which caused the problems. In each case, very senior ministers, from the Prime Minister down, made assertions that the Human Rights Act, or judges or officials interpreting it, were responsible for certain unpopular events when ... in each case these assertions were unfounded. Moreover, when those assertions were demonstrated to be unfounded, there was no acknowledgment of the error, or withdrawal of the comment, or any other attempt to inform the public of the mistake ... [P]ublic misunderstandings of the effect of the Act will continue so long as very senior ministers fail to retract unfortunate comments already made and continue to make unfounded assertions about the Act and to use it as a scapegoat for administrative failings in their departments’.

high level ministerial criticisms of court judgments in human rights cases as an abuse of common sense, or bizarre or inexplicable, only serves to fuel public misperceptions of the Human Rights Act and of human rights law generally

16. Far from maintaining a firm commitment to the promotion of human rights, therefore, it is apparent that senior members of government have contributed to a climate of public opinion in which the legal protection of human rights in the UK has been repeatedly denigrated and called into question.

Information and publicity

17. As noted above, criticism of court decisions and the HRA by senior government ministers has contributed to a widespread lack of public understanding of human rights. As the Department for Constitutional Affairs's own review concluded in July 2006:²⁸

[T]he purpose and effect of the Human Rights Act has been widely misrepresented and misunderstood. Misapprehensions abound not only among the general public, but also among public servants. The events leading to the murder of Naomi Bryant provide a very conspicuous and sobering example of the operational problems which have arisen for key agencies as a result of these misconceptions, and of the failure by Departments across Government consistently to ensure that key decision takers have access to the best possible training, guidance and legal advice.

18. As the Lord Chancellor noted in his introduction to the review:²⁹

[T]here is an urgent need for the public to be better informed about the benefits which the Human Rights Act has given ordinary people, and to debunk many of the myths which have grown up around the Convention rights and the way they have been applied, both domestically and in Strasbourg.

19. However, the DCA review failed to identify the most obvious causes of public misunderstanding concerning the HRA: (i) the lack of any ongoing public information campaign by government to educate the public concerning the HRA; (ii) the lack of any swift and concerted response by government to misinformation in the media (particularly the tabloid press) concerning the HRA; and (iii) criticisms of the HRA by senior government ministers themselves. As the Joint Committee on Human Rights declared:³⁰

²⁸ DCA review, n25 above, p5.

²⁹ Ibid, p7.

³⁰ JCHR report, n27 above, para 69.

Ministers must themselves take responsibility for ensuring that they do not create public misperceptions or reinforce them by the way in which they respond to newspaper headlines or campaigns which are themselves clearly founded on misunderstandings about the Act.

Accession to the First Optional Protocol

20. Paragraph 7 of the Committee's Concluding Observations on the UK's fifth periodic report noted that the government should 'consider, as a priority, accession to the first Optional Protocol' in order to guarantee 'effective and consistent protection of the full range of Covenant rights'. We note the government's response in the sixth periodic report that it does not see 'a compelling need to accept individual petition to the UN', in particular its claim that '[t]he practical value to the individual citizen is unclear' and its concern at 'the cost to public funds ... if individual petition were used extensively as a means of seeking to explore the legal meaning of a treaty's provisions'.³¹
21. If, however, the UK takes seriously its obligations to protect rights guaranteed under the Covenant, we do not see how it can object to the content of those rights being clarified by way of individual petition. Nor should it seek to belittle the 'practical value' of rights guaranteed under the Covenant. If the value of these rights appears unclear, it is in no small part due to the fact that many are not currently justiciable in UK law. As we noted in our response to the UK's fifth periodic report, the availability of individual complaints under the Protocol is crucial in providing a means of enforcement to individuals in respect of these rights.

Part II

COUNTER-TERRORISM

22. Paragraph 6 of the Committee's Concluding Observations on the UK's fifth periodic report noted that the government:

should ensure that any measures it undertakes to combat terrorist activities are in full compliance with the provisions of the Covenant, including, when applicable, the provisions on derogation contained in article 4 of the Covenant.

23. In our view, a significant number of the counter-terrorism measures introduced since 2001 failed to comply with Covenant rights. These include:

³¹ Sixth periodic report, p36, para 29.

- (i) indefinite detention under Part 4 of the Anti-Terrorism Crime and Security Act 2001;
- (ii) the use of control orders under the Prevention of Terrorism Act 2005;
- (iii) the extension of maximum period of pre-charge detention in terrorism cases from 7 days to 14 days under the Criminal Justice Act 2003, from 14 days to 28 days under the Terrorism Act 2006, and government proposals to extend it beyond 28 days in 2007;
- (iv) the ongoing failure of Parliament to narrow the definition of 'terrorism' under section 1 of the Terrorism Act 2000;
- (v) the creation of an offence of encouragement to terrorism (including glorification of terrorism) under section 1 of the Terrorism Act 2006; and
- (vi) the sweeping and disproportionate use of stop-and-search powers under section 44 of the Terrorism Act 2000;

**Indefinite detention under Part 4 of the Anti-Terrorism Crime and Security Act 2001
(Articles 2, 9 and 26 ICCPR)**

24. In December 2001, following the 9/11 terrorist attacks, the UK Parliament enacted the Anti-Terrorism Crime and Security Act 2001. Part 4 of the Act provided for the indefinite detention of those foreign nationals whom the Home Secretary certified as suspected international terrorists, but who could not be deported to their home countries due to a real risk of ill-treatment contrary to Art 3 ECHR. In order to effect indefinite detention under Part 4, the UK government derogated from both the requirements of Article 5(1) ECHR³² and Article 9 of the Covenant (pursuant to Articles 15 ECHR and Article 4 of the Covenant respectively).³³

25. In December 2004, in a decision that became known as 'the Belmarsh case', the Appellate Committee of the House of Lords held that the provisions of Part 4 were incompatible with Articles 5 and 14 ECHR, as well as the UK's obligations under Articles 2, 9 and 26 of the Covenant.³⁴ As the senior Law Lord, Lord Bingham, put it:³⁵

the choice of an immigration measure to address a security problem had the inevitable result of failing adequately to address that problem (by allowing non-UK suspected terrorists to leave the country with impunity and leaving British suspected

³² Human Rights Act 1998 (Designated Derogation) Order 2001 (SI 2001/3644).

³³ See pp 27-28 and 31-32 of the UK's sixth periodic report.

³⁴ *A and others v Secretary of State for the Home Department* [2004] UKHL 56. For discussion of the ICCPR, see e.g. the judgment of Lord Bingham at paras 69(5) and (6).

³⁵ *Ibid*, para 43. Emphasis added.

terrorists at large) while imposing the severe penalty of indefinite detention on persons who, even if reasonably suspected of having links with Al-Qaeda, may harbour no hostile intentions towards the United Kingdom. *The conclusion that [Part 4 is], in Convention terms, disproportionate is in my opinion irresistible.*

26. Lord Hoffman referred to the provisions of Part 4 in the following terms:³⁶

The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but *from laws such as these*. That is the true measure of what terrorism may achieve.

Control Orders (Articles 9, 12 and 14 ICCPR)

27. Contrary to the government's claim in the UK's sixth periodic report that it 'acted quickly to bring forward new legislation' following the judgment of the House of Lords in the Belmarsh case, it became apparent that the government had no immediate plans to replace indefinite detention under Part 4 and instead waited until shortly before the annual deadline for renewal to force alternative measures through without sufficient time for the matter to be debated by Parliament.³⁷ Despite the recommendation of the Privy Council Review in 2003 that indefinite detention should be replaced 'as a matter of urgency',³⁸ and extensive Home Office consultation on alternatives to indefinite detention that began in February 2004,³⁹ the government relied on emergency parliamentary procedures to force through the Prevention of Terrorism Act 2005 within a mere 17 days.⁴⁰

28. The 2005 Act allows the Home Secretary to make a control order against any person she suspects of being 'involved in terrorism'.⁴¹ Control orders allow the imposition of a very wide range of restrictions to be imposed on individuals,⁴² including the requirement to wear an electronic-tag at all times,⁴³ be subject to extended daily curfews exceeding 12 hours/day,⁴⁴ being restricted to live at a specified address,⁴⁵ being forbidden to move outside a specified geographic location,⁴⁶ restrictions on use of phones and computers,⁴⁷ limits on movement and travel, employment,⁴⁸ and bans on meetings with others.⁴⁹

³⁶ Ibid, para 97. Emphasis added.

³⁷ Section 29(2) of the Anti-Terrorism Crime and Security Act required Part 4 to be renewed annually by Parliament. At the time of the Belmarsh judgment in December 2004, Part 4 was due to lapse on 14 March 2005.

³⁸ See para 30 above.

³⁹ See *Counter-Terrorism Powers: Reconciling Liberty and Security in an Open Society* (Cmnd 6147: Home Office, February 2004).

⁴⁰ The Prevention of Terrorism Bill was introduced in Parliament on 22 February 2005 and received Royal Assent on 11 March 2005.

⁴¹ Section 2(1), Prevention of Terrorism Act 2005.

⁴² The full range of possible restrictions are set out in section 1(4) of the Act.

⁴³ Section 1(4)(n)

⁴⁴ Section 1(4)(g)

⁴⁵ Section 1(4)(e)

⁴⁶ Section 1(4)(f)

⁴⁷ Section 1(4)(b), (d) and (n)

⁴⁸ Section 1(4)(c), (i)

29. Breach of conditions is a criminal offence punishable by imprisonment.⁵⁰ Each order lasts for 12 months, but can be renewed indefinitely.⁵¹
30. The 2005 Act provides for a right of appeal against control orders but to a special division of the High Court, in which the government is entitled to withhold evidence from defendants. In circumstances where evidence is withheld, defendants are instead represented by security-cleared ‘special advocates’ who are prohibited from discussing that evidence with those they represent. The standard of proof in control order proceedings is also much lower than that in criminal cases – the Home Secretary need only have ‘reasonable suspicion’ that a person is involved in terrorism,⁵² below even the standard of proof in civil proceedings of ‘balance of probabilities’.
31. In our view, the system of control orders introduced by the 2005 Act is an unnecessary and significant departure from long-established standards of due process and the right to a fair trial (Articles 9(4) and 14 of the Covenant) and a wholly disproportionate means of combating the threat of terrorism in the UK. In our view, control orders are a means of imposing sanctions on individuals while evading the evidential guarantees of a criminal trial, because those subjected to orders are not charged with any criminal offence. The low standard of proof and the severely unbalanced nature of control order proceedings mean that defendants are effectively subject to lawful punishment without the benefit of a criminal trial. In particular, the use of closed sessions and special advocates involves serious limitations on an appellant’s right to fair proceedings.⁵³ The rights limited include the individual’s right to know the case against him,⁵⁴ be present at an adversarial hearing;⁵⁵ examine or have examined witnesses against him;⁵⁶ be represented in proceedings by counsel of his own choosing,⁵⁷ and to equality of arms.⁵⁸

⁴⁹ Section 1(4)(d), (e)

⁵⁰ Section 9.

⁵¹ Section 2(4). Under section 6, derogating control orders have a duration of 6 months but can also be renewed indefinitely.

⁵² Section 2(1)(a). This is the same standard of proof as was required in respect of indefinite detention under Part 4, a standard which the court in *Ajouaou and others v Secretary of State for the Home Department* described as ‘not a demanding standard for the Secretary of State to meet’ (SIAC, 29 October 2003), para 71.

⁵³ See e.g. Lord Steyn in his dissenting judgment in *Roberts v Parole Board* ([2005] UKHL 45): ‘It is not to the point to say that the special advocate procedure is ‘better than nothing’. Taken as a whole, the procedure completely lacks the essential characteristics of a fair hearing. It is important not to pussyfoot about such a fundamental matter: the special advocate procedure undermines the very essence of elementary justice. It involves a phantom hearing only’ (para 88).

⁵⁴ Article 14(3)(a) of the Covenant, Articles 5(4) and 6(3)(a) ECHR. see e.g. *Nielsen v Denmark* (1959) 2 YB 412 (Commission).

⁵⁵ Article 14(3)(d) of the Covenant, Article 6(1) ECHR. See e.g. *Brandstetter v Austria* (1991) 15 EHRR 378, para 66; *Mantovanelli v France* (1997) 24 EHRR.

⁵⁶ Article 14(3)(e) of the Covenant, Articles 6(1) and 6(3)(d) ECHR. See e.g. *Unterperinger v Austria* (1986) 13 EHRR 175.

⁵⁷ Article 14(3)(c) of the Covenant, Articles 6(1) and 6(3)(c) ECHR. See e.g. *Pakelli v United Kingdom* (1983) 6 EHRR 1; *Goddi v Italy* (1982) 6 EHRR 457.

⁵⁸ Article 14(1) of the Covenant. Article 6(1) ECHR has also been interpreted as providing an implied right to each party to a ‘reasonable opportunity of presenting his case to the court under conditions which do not place him at a substantial disadvantage vis-à-vis his opponent’, *De Haes and Gijssels v Belgium* (1997) EHRR 1 at para 53.

32. In October 2007, the House of Lords handed down two leading judgments on control orders. In *Secretary of State for the Home Department v JJ and others*,⁵⁹ the Law Lords quashed 6 control orders made against suspects on the basis that they involved a deprivation of liberty contrary to Article 5 ECHR and, on that basis, the Home Secretary had no power to make the orders under the terms of the 2005 Act.⁶⁰ The Senior Law Lord, Lord Bingham of Cornhill, found that the 18 hour/day curfews on the defendants ‘were in practice in solitary confinement for this lengthy period every day for an indefinite duration’ and that ‘their lives were wholly regulated by the Home Office, as a prisoner’s would be, although breaches were much more severely punishable’.⁶¹ Another Law Lord, Baroness Hale of Richmond stated that ‘the reality is that every aspect of their lives was severely controlled’ and that ‘in several respects a prisoner might be better off’.⁶² Lord Brown of Eaton-under-Heywood stated that ‘liberty is too precious a right to be discarded except in times of genuine national emergency. None is suggested here’.⁶³
33. In *MB and AF v Secretary of State for the Home Department*,⁶⁴ the Law Lords held that the inability of defendants to know key evidence against them in control order hearings meant that their right to a fair hearing under Article 6 ECHR had been breached.⁶⁵ Lord Bingham held, ‘[t]he right to a fair hearing is fundamental. In the absence of a derogation (where that is permissible) it must be protected. In [AF’s] case, as in MB’s, it seems to me that it was not’.⁶⁶ Lord Brown described the right to a fair hearing as ‘not merely an absolute right but one of altogether too great importance to be sacrificed on the altar of terrorism control’.⁶⁷
34. Although the UK sixth periodic report maintains that ‘prosecution is, and will remain, the Government’s preferred way of dealing with terrorists’,⁶⁸ the UK also continues to maintain a statutory ban on the use of intercept evidence, evidence which is regularly used in other common law jurisdictions such as the United States, Australia and Canada to prosecute and convict suspected terrorists.⁶⁹ At the same time, the lack of admissible evidence in terrorism cases has been used by the government to justify the introduction of indefinite detention, control orders, and the extension of pre-charge detention under the

⁵⁹ [2007] UKHL 45.

⁶⁰ Under sections 1(10) and section 4, a control order imposing obligations which are incompatible with the right to liberty under Article 5 can only be made on application to a court where a derogation has already been made under Article 15 ECHR.

⁶¹ *JJ and others*, n 53 above, para 24.

⁶² *Ibid*, para 62.

⁶³ *Ibid*, para 107.

⁶⁴ [2007] UKHL 46

⁶⁵ See e.g. *ibid*, para 41 per Lord Bingham: ‘I have difficulty in accepting that MB [the appellant] has enjoyed a substantial measure of procedural justice, or that the very essence of the right to a fair hearing has not been impaired’.

⁶⁶ *Ibid*, para 43.

⁶⁷ *Ibid*, para 91.

⁶⁸ UK sixth periodic report, p33, para 15.

⁶⁹ See e.g. JUSTICE, *Intercept Evidence: Lifting the ban* (October 2006).

Terrorism Act 2000 to 28 days.⁷⁰ In July 2006, the parliamentary Joint Committee on Human Rights recommended that 'the ban on the use of intercept evidence should now be removed, and attention should be turned urgently to ways of relaxing the ban'.⁷¹

Pre-charge detention (Article 9 ICCPR)

35. Since the UK government's fifth periodic report, the maximum period of pre-charge detention in terrorism cases has been extended from 7 days to 28 days. In July 2007, the government announced proposals to legislate further to extend the maximum period beyond 28 days.⁷² A new counter-terrorism bill containing the measure is expected to be introduced before the end of 2007.
36. In all other non-terrorist cases, the maximum period of time that a person may be detained by police following their arrest is 24 hours.⁷³ However, in the case of serious arrestable offences, this may be extended to 36 hours by a police officer of Superintendent rank,⁷⁴ and extended to 72 hours if authorised by a magistrate. Under Schedule 8 of the Terrorism Act 2000, however, the maximum period of pre-charge detention following arrest under section 41 ('reasonable suspicion of terrorism') was set as 7 days, but was increased in 2003 to 14 days⁷⁵ and, most recently in 2006, to 28 days.⁷⁶
37. As with pre-charge detention under the Police and Criminal Evidence Act, the longer periods of pre-charge detention under the Terrorism Act 2000 must be authorised by a judge, rather than police. However, the judge is only required to be satisfied that (i) 'there are reasonable grounds to believe that further detention is necessary to obtain relevant evidence'; and (ii) the police investigation is being conducted 'diligently and expeditiously'.⁷⁷ In addition, neither the detained individual nor his lawyers are entitled to see all the evidence that the police and prosecution may put before the judge in support

⁷⁰ See e.g. Home Office Minister Lord Rooker in debates on the Anti-Terrorism Crime and Security Bill: 'If we could prosecute on the basis of the available evidence in open court, we would do so. *There are circumstances in which we simply cannot do that because we do not use intercept evidence in our courts*', Hansard, HL Debates, 27 November 2001: Column 146, emphasis added. Home Secretary Charles Clarke MP also referred to the evidential difficulties associated with terrorism cases as justification for the introduction of control orders: 'I want to make it clear that prosecution is, and will remain, our preferred way forward when dealing with all terrorists. All agencies operate on that basis, and will continue to do so, but all of us need to recognise *that it is not always possible to bring charges, given the need to protect highly sensitive sources and techniques*' Hansard, HC Debates, 26 Jan 2005: Col 305. Emphasis added. The Lord Chancellor Lord Falconer similarly cited 'the evidential problems in proving the link between the individual, his activity and terrorism' in the Lords debates on the Prevention of Terrorism Bill (Hansard, HL Debates, 1 March 2005: Column 119).

⁷¹ *Counter-Terrorism Policy and Human Rights: Prosecution and Pre-charge detention* (HL 240/HC 1576: July 2006), para 101.

⁷² See *Options for pre-charge detention in terrorist cases* (Home Office, 25 July 2007)

⁷³ Section 41(1) of the Police and Criminal Evidence Act 1984

⁷⁴ Section 42 of the 1984 Act.

⁷⁵ Section 306 of the Criminal Justice Act 2003

⁷⁶ Section 23 of the Terrorism Act 2006.

⁷⁷ Para 32 of Schedule 8 of the Terrorism Act 2000.

of their application for continued detention.⁷⁸ As the parliamentary Joint Committee on Human Rights stated:⁷⁹

[I]n our view the judicial scrutiny of extended pre-charge detention is not proper judicial scrutiny: in summary, it falls well short of a full adversarial hearing because under the relevant provisions of the Terrorism Act 2000 detention can be extended in the absence of the detainee or on the basis of material not available to them.

38. In our view, the repeated legislative extension of the maximum period of pre-charge detention in terrorism cases is a clear breach of the core guarantee of Article 9 of the Covenant that those arrested must be brought before a judge 'promptly'. Under the common law system, the appearance before a judge requires either the suspect to be charged with a criminal offence or released.
39. It is important to note that much of the government's argument for extending pre-charge detention in terrorism cases concerns apparent difficulties of police in obtaining admissible evidence against a suspect within the normal time periods.⁸⁰ In particular, the government has noted that material from covert interception of private communications by law enforcement and intelligence bodies ('intercept material') is often used by police as the basis for arresting suspects.⁸¹

Because of the serious nature of the [terrorist] threat, it may be necessary to act on intelligence rather than waiting for further information, admissible as evidence, to be gathered.

40. However, this inability to use intercept material as evidence in criminal proceedings is entirely self-imposed as the UK maintains a statutory bar on its use.⁸² We note that virtually all other common law jurisdictions, including the United States, Canada, Australia, New Zealand, Israel and South Africa, permit the use of intercept as evidence in terrorism cases. In July 2007, the Joint Committee on Human Rights found that intercept evidence would be of 'enormous benefit' prosecuting suspected terrorists, and

⁷⁸ See e.g. para 33(3), *ibid.*, which permits the judge to exclude both the defendant and his legal representatives from any application hearing; or para 34 which provides for various information to be withheld from the defendant and his legal representatives.

⁷⁹ *Counter-Terrorism Policy and Human Rights: 28 days, intercept and post-charge questioning* (July 2007: HL 157/HC 790).

⁸⁰ See e.g. *Options for pre-charge detention in terrorist cases* (Home Office, 25 July 2007), p2: 'In the 2004 Barot case, for example, the National Co-ordinator of Terrorist Investigations said that "there was not one shred of admissible evidence" at the point of arrest'.

⁸¹ *Ibid.*, p7.

⁸² Section 17 of the Regulation of Investigatory Powers Act 2000

that 'the current prohibition is the single biggest obstacle to bringing more prosecutions for terrorism'.⁸³

41. Although the government has indicated its willingness to consider this and other measures aimed at reducing investigative difficulties in terrorism cases,⁸⁴ this has thus far been in *addition* to extending pre-charge detention, not as *alternatives* to such an extension. In our view, such an approach fails to observe the essential principle of proportionality when imposing limits on fundamental rights, i.e. that the government should seek the least restrictive means to pursue its objective of combating terrorism.⁸⁵

Definition of terrorism (Articles 1 and 19 ICCPR)

42. The definition of 'terrorism' in section 1 of the Terrorism Act 2000 includes the 'use or threat' of acts of serious violence against any government anywhere in the world.⁸⁶ No distinction is drawn between the use of violence directed against civilians for a political purpose (something which most people would define as terrorism), on the one hand, and the use of violence by non-state actors to remove a non-democratic regime, on the other. Given the increasing number of terrorism offences created since 2000, such as the offence of encouragement to terrorism under section 1 of the Terrorism Act 2006, there has been continuing parliamentary concern at the breadth of the statutory definition, particularly in respect of those expressing support for the overthrow of non-democratic regimes abroad.

43. Nor does the statutory definition clearly differentiate between actions involving violence against persons and those which negatively effect other interests, e.g. damage to property, disruption of an electronic system, etc.⁸⁷ In our view, actions which do not involve direct threats to physical integrity should not be considered terrorist acts unless they involve some major threat to human welfare. This is because many kinds of political activity may otherwise fall within the current definition, e.g. protests involving criminal damage, strikes or demonstrations which involve disruption to services, etc. By contrast, we note that a specific exemption for 'advocacy, protest, dissent or industrial action' exists in the definition of terrorism in Australian, Canadian, New Zealand and Hong Kong law. In particular, serious interference or disruption to an electronic system within section 1(2)(e)

⁸³ *Counter-Terrorism Policy and Human Rights: 28 days, intercept and post-charge questioning* (July 2007: HL 157/HC 790), para 126. See also e.g. the Privy Counsellors Review Committee, *Anti-Terrorism Crime and Security Act 2001 Review: Report* (HC100: 18 December 2003), para 208.

⁸⁴ *Options for pre-charge detention in terrorist cases* (Home Office, 25 July 2007), pp 6-8.

⁸⁵ <INSERT CITES>

⁸⁶ Section 1(4)(d): "the government' means the government of the United Kingdom, of a Part of the United Kingdom or of a country other than the United Kingdom'. Other problems include the language of section 1(1)(b) – violence intended merely to 'influence' rather than 'intimidate'; the inclusion of acts intended 'seriously to disrupt an electronic system' without obvious harm under section 1(2)(e); and the automatic presumption of terrorist intent for acts involving firearms or explosives under section 1(3).

⁸⁷ See section 1(2) of the Terrorism Act 2000.

of the 2000 Act should not be considered a terrorist act unless that disruption deliberately endangers human life or creates a serious risk to public health or safety.

44. In December 2005, the Joint Committee on Human Rights recommended that the statutory definition in the Terrorism Act 2000 ‘needs to be changed’ in order to avoid a ‘high risk’ that provisions in which ‘terrorism’ is an element ‘being found to be incompatible with Article 10 of ECHR and related Articles’.⁸⁸ In March 2007, the Independent Reviewer of Terrorism Legislation, Lord Carlile of Berriew QC reported that, due to its breadth, there was ‘no doubt’ that non-terrorist activities could fall within the statutory definition of ‘terrorism’ in the 2000 Act.⁸⁹

Encouragement to terrorism, including glorification (Article 19(2) ICCPR)

45. In addition to the basic guarantee of free expression under Article 19(2) of the Covenant, we note principle 6 of the 1996 *Johannesburg Principles on National Security, Freedom of Expression and Access to Information* provides that:⁹⁰

[E]xpression may be punished as a threat to national security only if a government can demonstrate that: (a) the expression is *intended to incite* imminent violence; (b) it is *likely* to incite such violence; and (c) there is a *direct and immediate connection* between the expression and the likelihood or occurrence of such violence.

46. Section 1 of the Terrorism Act 2006, however, provides that it is offence for a person to publish a statement which:⁹¹

is likely to be understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement or other inducement to them to the commission, preparation or instigation of acts of terrorism.

47. Indirect encouragement of terrorism includes every statement which ‘*glorifies*’ the commission or preparation of an act of terrorism ‘*whether in the past, in the future or generally*’.⁹² As noted earlier, the term ‘terrorism’ is itself defined by section 1 of the Terrorism Act 2000, which includes any threat or use of force against any government anywhere in the world, irrespective of whether that government is non-democratic or not.⁹³ Accordingly, the publication of a statement which cited the American Revolution as

⁸⁸ Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters* (December 2005: HL 75/HC 561), para 13.

⁸⁹ *Definition of Terrorism* (March 2007), para 60.

⁹⁰ U.N. Doc. E/CN.4/1996/39 (1996).

⁹¹ Section 1(1)

⁹² Section 1(3).

⁹³ See Terrorism Act 2000, sub-sections 1(4)(c): ‘a reference to the public includes a reference to the public of a country other than the United Kingdom’; and 1(4)(d): ‘the government’ means the government of the United Kingdom, of a Part of the United Kingdom or of a country other than the United Kingdom’.

an example to people living under non-democratic governments would constitute 'glorification of terrorism' under this provision.

48. In order to be guilty of encouraging terrorism under this offence, moreover, it is not necessary for the prosecution to prove that the person actually intended other persons to be encouraged to commit an act of terrorism. Instead, it is sufficient that the publisher of the statement was merely 'reckless' that others may be so encouraged by the statement being published.⁹⁴ Although the UK government claimed that it was necessary to enact this provision due to its obligation under Article 5 of the 2005 Council of Europe Convention on the Prevention of Terrorism (which requires signatory states to criminalise 'public provocation to commit a terrorist offence'),⁹⁵ Article 5 of the Convention requires only the criminalisation of:

the distribution, or otherwise making available, of a message to the public, *with the intent to incite the commission of a terrorist offence*

49. In November 2005, the UN High Commissioner for Human Rights, Ms Louise Arbour, wrote to the UK government to express her concern over the proposed scope of the offence of encouragement to terrorism, expressing her view that:⁹⁶

The draft offence contained in clause 1 fails to strike a balance between national security considerations and the fundamental right of freedom of expression.

50. For the reasons we have outlined, however, it is apparent that Parliament failed to heed the High Commissioner's concerns and amend the provision in such a way as to ensure that it was compatible with the requirements of Article 19. As the Joint Committee on Human Rights concluded in January 2007:⁹⁷

it is likely that the creation of the offence of encouragement of terrorism in its current form will have an inhibiting effect on legitimate freedom of expression and will therefore lead to disproportionate interferences with free speech

Stop and search powers under section 44 of the Terrorism Act 2000 (Articles 9, 19 and 21 ICCPR)

⁹⁴ Section 1(2)(b)(ii).

⁹⁵ See explanatory notes for the Terrorism Bill, para 21: 'Article 5 of the Convention requires parties to have an offence of public provocation to commit a terrorist offence'.

⁹⁶ Letter to the UK's Permanent Representative to the UN Office and other international organisations in Geneva, 28 November 2005

⁹⁷ Joint Committee on Human Rights, *The Council of Europe Convention on the Prevention of Terrorism* (22 January 2007: HL 26/HC 247), para 47.

51. Section 44 of the Terrorism Act 2000 allows a senior police officer to authorise a particular area within which any person or vehicle may be stopped and searched by police. Unlike the exercise of search powers under other provisions,⁹⁸ however, there is no requirement under section 44 for police to show 'reasonable grounds' that those stopped may be involved in unlawful conduct.
52. The power to designate an area under section 44 was originally intended to address situations where police had information concerning a specific terrorist threat concerning a particular event. However, following a peaceful protest outside an arms fair in East London in September 2003, it subsequently emerged that the entire area of Greater London had been subject to continuous and consecutive 28-day authorisations under section 44 since February 2001.
53. According to the most recent Home Office figures available, of the 44,543 stops made under section 44 between 2005 and 2006, only 105 of those stops resulted in arrest.⁹⁹ Nor is there any evidence of any person being stopped under section 44 who has subsequently been arrested, charged and convicted of any terrorist offence.
54. In our view, the sweeping use of stop-and-search powers by police in the context of public protests and demonstrations amounts to a disproportionate interference with the rights to liberty, freedom of assembly and freedom of expression. We are also concerned that these powers are being applied disproportionately against Muslims and persons of South Asian descent generally.

TORTURE

Deportation to torture – use of diplomatic assurances/memoranda of understanding (Article 7 ICCPR)

55. In January 2005, the then-Home Secretary Charles Clarke MP announced that the government was seeking:¹⁰⁰

to address the problems posed by individuals whose deportation could fall foul of our international obligations by seeking memorandums of understanding with their countries of origin. We are currently focusing our attention on certain key Middle-Eastern and North African countries.

⁹⁸ See e.g. section 43 of the Terrorism Act 2000.

⁹⁹ *Guardian* 'Only 1 in 400 anti-terror stop and searches leads to arrest', by Vikram Dodd, 31 October 2007.

¹⁰⁰ Hansard, HC Debates, 26 January 2005 : Col 307.

56. Memoranda were subsequently concluded with Jordan,¹⁰¹ Lebanon and Libya. The UK government also sought unsuccessfully to negotiate a memorandum with Algeria, although this has not prevented it from seeking to remove several individuals. Deportation orders have now been made against 10 foreign nationals, at least 9 of whom were among those previously detained in Belmarsh.¹⁰² In August 2005, Prime Minister Blair stated that, in the event that courts refuse to allow removals on the basis of such assurances, the government may amend the Human Rights Act 1998.¹⁰³
57. In our view, the use of diplomatic assurances to remove individuals to countries known to practice torture is wholly at odds with the well-established rule against *non-refoulement*, as set out in Article 3 of the UN Convention Against Torture and implicit in the prohibition against torture under Article 7 of the Covenant¹⁰⁴ and Article 3 ECHR.¹⁰⁵ The bar against non-refoulement includes all forms of removal, including deportation and immigration removal on the grounds of national security.¹⁰⁶
58. In May 2005, the UN Committee Against Torture condemned the use of diplomatic assurances in the case of *Agiza v. Sweden* in which the Swedish government relied on diplomatic assurances from the Egyptian government to return an asylum seeker to Egypt where he was subsequently tortured.¹⁰⁷ As a consequence of relying upon diplomatic assurances in circumstances where the risk of torture by the receiving state was clear, the Swedish government was found to be in breach of its obligations under Article 3 CAT. Specifically, the Committee found that:¹⁰⁸
- at the outset that it was known, or should have been known, to the [Swedish] authorities ... that Egypt resorted to consistent and widespread use of torture against detainees, and that the risk of such treatment was particularly high in the case of detainees held for political and security reasons.
59. The Committee ruled, moreover, that the procurement of diplomatic assurances from Egypt against the suspect's ill-treatment 'did not suffice to protect against this manifest

¹⁰¹ See Memorandum of Understanding between the government of the United Kingdom of Great Britain and Northern Ireland and the government of the Hashemite Kingdom of Jordan regulating the provision of undertakings in respect of specified persons prior to deportation, 10 August 2005.

¹⁰² See e.g. Times Online, 'Terror suspects 'too dangerous for bail'', 26 September 2005.

¹⁰³ See Prime Minister's press conference, 5 August 2005: 'Should legal obstacles arise, we will legislate further including, if necessary, amending the Human Rights Act in respect of the interpretation of the European Convention on Human Rights'.

¹⁰⁴ See UN Human Rights Committee, General Comment 20 (1992), para 9: 'States Parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement'.

¹⁰⁵ See *Soering v United Kingdom* (1989) 11 EHRR 439 at paras 88-91.

¹⁰⁶ See *Chahal v United Kingdom* (1996) 23 EHRR 413.

¹⁰⁷ CAT/C/34/D/233/2003, 20 May 2005.

¹⁰⁸ *Ibid*, para 13.4

risk'.¹⁰⁹ In addition, we note that the proposed use of diplomatic assurances against torture has been extensively criticized by a number of international experts.¹¹⁰

60. In the circumstances, we consider it clear that diplomatic assurances from countries that torture their own citizens offer no effective protection for the rights of persons removed. Nor do such assurances establish any real accountability or remedy in the event that torture or other ill-treatment does take place.

61. In the case of *DD v Secretary of State for the Home Department*,¹¹¹ the Special Immigration Appeals Commission ('SIAC') held that there was a real risk that the appellants would be tortured if returned to Libya, notwithstanding the UK government's memorandum of understanding with that country.¹¹²

That is because there is too much scope for changes to happen, for things to go wrong, and too little scope for a breach of Article 3 to be deterred or for acts which might lead to a breach of Article 3 to be remedied in time, essentially through effective monitoring. There is also a real risk that the trial of the Appellants would amount to a complete denial of a fair trial.

62. On the issue of monitoring, SIAC rejected the government's argument that monitoring by the Qadhafi Development Foundation ('QDF') run by Saif al Islam al Qadhafi, the son of Colonel Gadaffi, was a sufficient safeguard against the risk of ill-treatment by the Libyan regime. SIAC concluded that the QDF is 'no more independent of the regime than is Saif himself, and he is not independent'.¹¹³

Possible UK complicity in 'extraordinary rendition' (Article 7 ICCPR)

¹⁰⁹ Ibid. See also the criticisms of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment in its 15th General Report (CPT/Inf (2005) 17), '[I]f in fact there would appear to be a risk of ill-treatment, can diplomatic assurances received from the authorities of a country where torture and ill-treatment is widely practised ever offer sufficient protection against that risk? It has been advanced with some cogency that even assuming those authorities do exercise effective control over the agencies that might take the person concerned into their custody (which may not always be the case), there can be no guarantee that assurances given will be respected in practice. If these countries fail to respect their obligations under international human rights treaties ratified by them, so the argument runs, why should one be confident that they will respect assurances given on a bilateral basis in a particular case?' (para 39). The Committee concluded that, 'while it retains an open mind on this subject', it has 'yet to see convincing proposals for an effective and workable mechanism' for post-return monitoring of persons returned to countries with a record of practising torture (para 41).

¹¹⁰ See e.g. the criticism in July 2004 of Council of Europe Commissioner for Human Rights Alvaro Gil-Robles that '[t]he weakness inherent in the practice of diplomatic assurances lies in the fact that where there is a need for such assurances, there is clearly an acknowledged risk of torture or ill-treatment'. Accordingly, due to the absolute nature of the prohibition against torture, 'formal assurances cannot suffice where a risk nevertheless remains'. Senor Gil-Robles concluded that 'it is highly questionable whether assurances can be regarded as providing indisputable safeguards against torture and ill-treatment'; The criticism in August 2004 of the then-UN special rapporteur on torture, Professor Theo van Boven that, where a person faced return to a state where torture was systemic, 'the principle of non-refoulement must be strictly observed and diplomatic assurances should not be resorted to' (report of the UN Special Rapporteur on Torture to the UN General Assembly, 23 August 2004, para 37).

¹¹¹ Appeal No: SC/42 and 50/2005, 27 April 2007.

¹¹² Ibid, para 428.

¹¹³ Ibid, para 330.

63. Following investigations by the UN Committee against Torture, the Council of Europe and the European Parliament into the practice of extraordinary rendition via member states of the EU and Council of Europe, there is considerable evidence that UK airports and airspace have been used by CIA planes transferring suspects to countries where they face a real risk of torture or cruel inhuman or degrading treatment or punishment contrary to Article 7 of the Covenant.¹¹⁴
64. In May 2006, the Joint Committee on Human Rights concluded that there was ‘a reasonable suspicion that certain aircraft passing through the UK may have been carrying suspects to countries where they may have faced torture, or to have been returning from rendering suspects to such countries’.¹¹⁵ In July 2006, the European Parliament adopted a resolution deploring the failure of Member States to adopt ‘procedures aimed at verifying whether civilian aircraft were being used for purposes incompatible with internationally established human rights standards’.¹¹⁶
65. We are concerned at the ongoing failure of the UK authorities to investigate adequately the allegations that UK officials may have known of and, in some cases, facilitated CIA rendition flights via UK airports and through UK airspace. In our view, the UK’s obligation under Article 7 requires it not only to prevent torture within the UK but also to take positive steps to prevent the UK from being used as a waystation for *refoulement* to torture.

¹¹⁴ See e.g. Council of Europe Parliamentary Assembly, Committee on Legal Affairs and Human Right, *Alleged secret detentions and unlawful inter-state transfers involving Council of Europe member states* (June 2006); Interim report of the European Parliament Temporary Committee on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners (15 June 2006); *European Parliament resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners* (2006/2200(INI), Feb 2007); UK Intelligence and Security Committee, *Rendition* (Cm 7171, July 2007).

¹¹⁵ 19th report, para 168.

¹¹⁶ INI/2006/202.

Ill-treatment of prisoners and indefinite detention by UK forces in southern Iraq (Articles 2, 6, 7, 10 and 9 ICCPR)

66. The presence of British troops in southern Iraq raises two key issues in relation to the UK government's obligations under the Covenant: (i) allegations of torture and ill-treatment of prisoners by UK troops; and (ii) the use of indefinite detention of suspects under UN Security Council 1546.

67. On 14 September 2003, Baha Mousa was seized and detained by British troops as he was working as a receptionist at a hotel in Basra. He was taken to a British military base in Basra where he was brutally beaten by British troops and died from his injuries the following day. His family were one of six claimants in the case of *Al Skeini and others v Secretary of State for Defence*,¹¹⁷ concerning the application of the European Convention on Human Rights to the actions of British troops in Southern Iraq. In June 2007, the majority of the House of Lords held that Mr Mousa met his death 'within the jurisdiction' of the UK for purposes of Article 1 of the Convention.¹¹⁸ We submit that, at the very least, the same conclusion must apply *mutatis mutandi* to the obligations of the UK under Article 2 of the Covenant in the case of Mr Mousa and all other Iraqis who have been subject to ill-treatment in UK military custody.

68. Secondly, the case of *Al Jedda v Secretary of State for Defence*¹¹⁹ concerns a Iraqi/UK dual national who has been detained by British troops in Basra since October 2004. Notwithstanding the conclusion of the House of Lords in *Al Skeini* in June 2007 that the Human Rights Act 1998 and the ECHR apply to persons detained in UK military custody abroad, the UK government has argued that it is entitled to detain Mr Al Jedda indefinitely under the provisions of UN Security Council Resolution 1546. In particular, the UK government argues that Article 103 of the UN Charter means that Mr Al Jedda's rights under Article 5 ECHR (and coextensively Article 9 of the Covenant) are displaced or overridden by the terms of UNSCR 1546.

FREEDOM OF ASSEMBLY

Serious Organised Crime and Policing Act 2005 (Articles 19 and 22 ICCPR)

69. Sections 132 to 138 of the Serious Organised Crime and Policing Act make it a criminal offence to organise or take part in a demonstration in a 1 square kilometre zone surrounding Parliament Square in central London without prior authorisation from the

¹¹⁷ [2007] UKHL 26.

¹¹⁸ See e.g. *ibid*, para 61 per Lord Rodger.

¹¹⁹ [2006] EWCA Civ 327. The case is currently on appeal to the House of Lords and judgment is expected by the end of 2007.

Metropolitan Police Commissioner.¹²⁰ The only defence is that a person reasonably believes that authorisation has been given.¹²¹ In addition, section 134(3) allows the Police Commissioner to impose a very broad range of restrictions on authorised demonstrations.

70. In December 2005, Maya Evans was convicted of ‘participating in an unauthorised demonstration’ under section 132 of the 2005 Act. Evans was arrested with another protestor as they read out the names of 97 UK soldiers killed in Iraq.

71. In our view, the lack of necessity for prior authorisation of peaceful demonstrations in Parliament Square shows the obviously disproportionate nature of the interference posed by the 2005 Act with the right to assembly and free expression under Articles 19 and 22 of the Covenant.

CRIMINAL JUSTICE

Anti-Social Behaviour Orders (Articles 9, 14 and 17 ICCPR)

72. The Crime and Disorder Act 1998 created the Anti-Social Behaviour Order or ASBO. The ASBO is a ‘civil’ order made on the application of police, local authority, registered public landlords and possibly any one of a range of other authorities designated by statutory instrument. ASBOs are generally made by the Magistrates’ Courts and the court must be satisfied to a high standard (in effect the criminal one) that the individual has engaged in past ‘anti-social behaviour’. The definition of ‘anti-social behaviour’ is enormously broad. Section 1 of the Crime and Disorder Act 1998 encompasses behaviour ‘likely to cause harassment, alarm and distress’. The application for an ASBO involves the more flexible civil procedure, crucially allowing a great deal of hearsay evidence (including police and local authority witness statements) to replace the classic need for the live evidence and cross-examination of reluctant witnesses and victims.

73. A wide range of conditions can be imposed under an ASBO if they are considered necessary to protect people in the locality (not specifically defined) from further anti-social acts. The conditions imposed under the ASBO are often extremely vague, broad and significant in impact over an offender’s life. ASBOs have been sought against a Tourettes sufferer to prevent them swearing, against a suicidal woman to stop her going on to bridges, and to stop the homeless from begging. Breach of these conditions is a serious criminal offence carrying up to five years in custody. ASBOs are now often accompanied by wide-scale local publicity by way of local authority leafleting campaigns and press releases.

¹²⁰ Section 132(1).

¹²¹ Section 132(2).

74. The breadth of ASBO conditions, combined with the ease with which they may be obtained and the serious consequences of breach blur the divide between civil and criminal law in a way that offends the presumption of innocence and makes injustice more likely. Further, the lack of a precise definition of “anti-social behaviour” and the limited procedural protection combined with police and local authority involvement give rise to a significant risk that these broad power could be abused at central or local government level. In practice ASBOs have operated as a short cut into the criminal justice system, particularly for the young. Up to December of 2003, 42% of all ASBOs were breached with 55% of breaches resulting in custody. ASBOs have been criticised by a number of international human rights bodies. Alvaro Gil-Robles, the first Human Rights Commissioner for the Council of Europe, has for example commented: ‘It is to be hoped that this burst of ASBO-mania will quieten down, and that its use in time will be limited to appropriate and serious cases, where no other means of intervention might succeed’.¹²²
75. Particular concerns arise in respect of the application of ASBOs to children. ASBOs can be served on children as young as 10 in England and Wales and 12 in Scotland. The excessive use of ASBOs is more likely to exacerbate anti-social behaviour and crime amongst youths than effectively prevent it. ASBO breaches have resulted in large numbers of children being detained with the resulting concern that, on release, they are more likely to engage in more serious criminal behaviour. They also risk alienating and stigmatising children, thereby entrenching them in their errant behaviour.
76. Other powers to tackle anti-social behaviour have given cause for concern. Under the powers in Section 30 of the Anti-Social Behaviour Act, for example, individuals can be subjected to a dispersal order without any evidence that an individual is suspected of involvement in criminal activity. Breach of a dispersal order (such as by returning to the area) is a criminal offence. Other powers include, proposals forcibly to close homes associated with anti-social behaviour (whether privately rented, owner-occupied or social housing) contained in the Criminal Justice and Immigration Bill currently before Parliament.
77. There have also been other moves towards extensions of the ASBO/dispersal order model, i.e. civil orders imposing potentially severe conditions breach of which is a criminal offence. Control orders created under the Prevention of Terrorism Act 2005 impose restrictions on movement and association similar to an ASBO (these are discussed above). The Serious Crime Act 2007 has also introduced a new Serious Crime Prevention Order. This is a hybrid of ASBOs and control orders that impose control order style

¹²² “REPORT BY MR ALVARO GIL-ROBL ES, COMMISSIONER FOR HUMAN RIGHTS, ON HIS VISIT TO THE UNITED KINGDOM - 4th – 12th November 2004”, June 2005, para 113

restrictions following court process similar to that used for the ASBO. A new Violent Offender Order is also being proposed in the Criminal Justice and Immigration Bill currently before Parliament.

PRISONERS

Prison overcrowding (Articles 7 and 10(1) ICCPR)

78. There has been considerable concern about prison overcrowding and the effects of this situation on the safety of prisons and the rehabilitation of offenders. On 30 September 2007 there were 80,855 people in prisons in England and Wales.¹²³ At the end of April 2006, 86 of England and Wales's 141 prisons were overcrowded. The average number of people held two to a cell designed for one in 2006/7 was 17,974, up from 9,498 in 1996/7.¹²⁴ Police and even court cells have had to be used to accommodate overflow.

Deaths in custody (Articles 6, 7 and 10(1) ICCPR)

79. Deaths in custody remain at a high level; in 2006 there were 78 self-inflicted deaths in prison, 3 homicides, and 5 others from non-natural causes. The figures for 2007 included 77 self-inflicted deaths and 2 homicides.¹²⁵ There is evidence that the mental health needs of prisoners are not being sufficiently addressed and that there are prisoners with severe mental health problems who should be diverted to secure mental health facilities.¹²⁶ The government agreed under Parliamentary pressure to remove exemptions for some deaths in custody from the scope of the Corporate Manslaughter and Corporate Homicide Act 2007 but the relevant provisions are not yet in force and are not expected to be brought into force for three to five years.

Use of indeterminate sentences (Articles 9 and 14)

80. There is also concern about the growing numbers of prisoners serving life and indeterminate sentences under the 'dangerous offenders' provisions of the Criminal Justice Act 2003. These mandate life or indeterminate (IPP) sentences for certain serious sexual and violent offences where the offender fulfils the statutory requirement of dangerousness. IPP is an indeterminate sentence whereby a minimum tariff period is served, after which release is at the discretion of the Parole Board. This sentence has caused particular concern since it has been used in many more cases than originally expected and problems have developed whereby IPP prisoners with short tariffs

¹²³ Ministry of Justice, *Population in custody Monthly tables, September 2007, England and Wales*.

¹²⁴ Prison Reform Trust, *Bromley Briefings: Prison Factfile*, May 2007.

¹²⁵ Statistics from INQUEST, www.inquest.org.uk

¹²⁶ Prison Reform Trust, *Bromley Briefings: Prison Factfile*, May 2007, p27.

(minimum sentences) have been unable to access courses and are therefore will not be released even when their tariff period has been completed.

Independence of the Parole Board (Articles 9 and 14 ICCPR)

81. Further, the Parole Board has recently been found not to satisfy the common law and Article 5(4) requirement that it demonstrate objective independence of the executive: *R (Brooke and another) v Parole Board and others and linked cases* [2007] EWHC 2036 (Admin).

Treatment of children and young people in custody (Article 10(3) ICCPR)

82. In relation to children and young people in custody, there are serious concerns that the requirement of the UN Convention on the Rights of the Child that custody should be a last resort and for the shortest possible period of time are not being fulfilled. On 2 November 2007 there were 3018 children in custody including 2,539 in young offenders' institutions, 254 in secure training centres and 225 in secure children's homes.¹²⁷ Both the numbers and the lengths of custodial sentences for children have increased substantially between 1995 and 2005. There are also concerns about the treatment of children when in custody: high numbers are held more than 50 miles away from home.

83. There is considerable concern about the use of restraint techniques upon children in custody, including those involving the deliberate infliction of pain. Evidence given to the Carlile Inquiry¹²⁸ suggested that these were being used to secure compliance with staff commands. Two high-profile inquests into the deaths of teenagers in custody: Gareth Myatt, who asphyxiated due to restraint by staff, and Adam Rickwood, who took his own life hours after being subjected to a painful 'distraction' technique, raised concerns as to restraint and, in Adam Rickwood's case, the placement of vulnerable teenagers in inappropriate custodial settings. Despite all this, the government widened the circumstances in which restraint could, purportedly, lawfully be used in Secure Training Centres in the Secure Training Centre (Amendment) Rules 2007. The chairs of an independent review of restraint in juvenile custody have been appointed and it is hoped that it will report by or in April 2007.¹²⁹

Prisoners voting rights (Articles 2 and 25 ICCPR)

¹²⁷ Statistics from the Howard League for Penal Reform www.howardleague.org

¹²⁸ An independent inquiry by Lord Carlile of Berriew QC into physical restraint, solitary confinement and forcible strip searching of children in prisons, secure training centres and local authority secure children's homes: see www.howardleague.org

¹²⁹ See <http://www.justice.gov.uk/news/newsrelease091007b.htm>

84. Section 3(1) of the Representation of the People Act 1983 prohibits a convicted person serving a custodial sentence from voting in any parliamentary or local election. The prohibition does not extend to prisoners released on licence or those detained on remand.¹³⁰ In other words, as many as 56,000 prisoners are currently barred from voting for the duration of their imprisonment.¹³¹
85. In the 2005 case of *Hirst v United Kingdom*, the Grand Chamber of the European Court of Human Rights held the blanket prohibition on prisoners voting in section 3(1) of the 1983 Act to be incompatible with the right to free elections under Article 3 of Protocol 1 of the European Convention on Human Rights.¹³² The Grand Chamber found that the application of a blanket prohibition was disproportionate as it applied to all serving custodial sentences, irrespective of the length of their sentence or the severity of their offence.¹³³ Given the importance of the right to vote, moreover, it could not be said that the UK policy on prisoners voting was within its margin of appreciation under the Convention.¹³⁴ Although the government has since issued a consultation on changing the law in order to bring it into conformity with its Convention obligations, no legislative measures have yet been brought forth.

PRIVACY

86. In recent years there has been growing public concern about the state of privacy in the United Kingdom. In November 2006 the UK's Information Commissioner Richard Thomas wrote 'We live in a surveillance society. It is pointless to talk about surveillance society in the future tense'.¹³⁵ The following state laws and policies have given particular cause for concern:

Retention of DNA (Article 17 ICCPR)

87. The powers of the police to take DNA samples in the course of a criminal investigation are relatively uncontroversial. There are many legitimate reasons why the police may need to take a suspect's fingerprints or DNA during the course of a criminal investigation. This information could, for example, help the police to determine whether a suspect was at a crime scene and/or to confirm a person's identity. The power to retain those samples

¹³⁰ See section 5 of the Representation of the People Act 2000.

¹³¹ The total prison population as of 2 March 2007 was 79,700 (see *Prison Population & Accommodation Briefing For 2nd March 2007*, National Offender Management Service). However, this figure includes approximately 16% on remand (who remain eligible to vote) and approximately 13% foreign prisoners (who would be ineligible to vote in any event).

¹³² *Hirst v United Kingdom* (2004) 38 EHRR 40

¹³³ *Ibid*, paras 76-81.

¹³⁴ See e.g. para 82: 'while the Court reiterates that the margin of appreciation is wide, it is not all-embracing'.

¹³⁵ "A Report on the Surveillance Society" by Kirstie Ball, David Lyon, David Murakami Wood, Clive Norris and Charles Raab

http://www.ico.gov.uk/upload/documents/library/data_protection/practical_application/surveillance_society_full_report_2006.pdf

indefinitely on the UK's DNA Database (NDNAD) is, however, of significant concern. The Criminal Justice Act 2003 provides for the retention of DNA samples and profiles regardless of whether a person is prosecuted or cleared of an offence. It means that even if a person is never charged with an offence for which s/he was arrested his/her DNA will be retained on the Database indefinitely. The legislative framework permitting DNA retention has been changed several times in recent years. Where once permanent DNA retention was limited to a limited number of offences following conviction, it can now take place following arrest for any recordable offence.¹³⁶ Powers of retention may soon be extended further so that all arrest for all offences will allow the taking of a sample rather than just recordable offences.¹³⁷

88. This wide ranging power of retention is the reason the UK holds a far greater proportion of its population on its database than any other country. The United Kingdom National DNA Database (NDNAD) is proportionately the largest in the world. Over 4.5 million people have their DNA permanently retained on the NDNAD representing about 7% of the country's population. To put this into context Austria (the country with the second largest proportion of its population with DNA retained) has 1% of its population in its database.¹³⁸

89. Roll out based on arrest has resulted in the DNDAD disproportionately impacting upon young black men. In November 2006 Home Office projections given to Conservative MP Bob Spink estimated that by April 2007 77 percent of all black men aged 15 to 34 would be on the database.¹³⁹ This contrasts with 22 percent of white men of the same age. Concerns have also been raised about the number of children on the NDNAD. Following a series of Parliamentary Questions from the Conservative MP Grant Shapps it emerged in early 2006 that approximately 24, 000 children under 16 who had never been convicted or cautioned for an offence had their DNA permanently retained on the NDNAD.¹⁴⁰ A further group whose inclusion on the database is particularly problematic is volunteers (i.e. those who are not required to hand over their DNA but opt to do so, often for elimination purposes). At present over 12 thousand volunteer samples are contained in the Database. The samples that are retained may be used in the future in the same way as samples taken from convicted criminals. A person who has volunteered for their DNA to be put in the Database has no right to have this information removed.

¹³⁶ A recordable offence is generally one which is punishable by imprisonment. However, a number of other non-imprisonable offences such as vagrancy are also recordable

¹³⁷ A recent Home Office consultation 'Modernising Police Powers: Review of the police and Criminal Evidence Act (PACE) 1984' states, "The absence of the ability to take fingerprints etc in relation to all offences may be considered to undermine the value and purpose of having the ability to confirm or disprove identification and, importantly, to make checks on a searchable database aimed at detecting existing and future offending and protecting the public. There have been notable successes particularly through the use of the DNA database in bringing offenders to justice" (<http://www.homeoffice.gov.uk/documents/cons-2007-pace-review?view=Binary> at paragraph 3.33)

¹³⁸ See <http://news.bbc.co.uk/1/hi/england/nottinghamshire/6209970.stm>

¹³⁹ <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2006/11/05/nrace05.xml>

¹⁴⁰ http://news.bbc.co.uk/1/hi/uk_politics/4720328.stm

90. The assertions put forward by police and Government as to the number of 'matches' made to the DNA profiles of unconvicted persons are highly misleading since (a) 'matches' only result in convictions in a small proportion of cases and no conviction information is given; (b) no information is given as to whether those persons were already suspects or would have been otherwise identified through traditional policing methods; and (c) the figures are probably inflated by the inclusion of a high (but necessarily diminishing) proportion of 'cold cases' relating to crimes committed before the police had today's capacity to use DNA in crime detection. In addition there is no evidence that the detection of crime is improved by increasing the size of the Database. This is illustrated by the fact that, although there has been a massive extension of the NDNAD over the last 3 to 4 years, the rate of crime detection using the Database has stayed at about 0.35% of all recorded crime. If extending the size of the NDNAD had been successful one would expect this proportion to have increased.
91. Some of the uses of DNA on the NDNAD also raise particular ethical issues. The police are currently in favour of the recovery of physical information on an individual (from crime scene DNA where there is no match to an NDNAD entry) in order to obtain information about the appearance of a perpetrator. This could represent a move into a class of genetic marker of considerable importance to an individual. The technique known as "familial searching" could also lead to privacy concerns. Familial searching is the process whereby the NDNAD is used to assemble a list of possible relatives of the owner of a particular DNA sample. The list of possible relatives is obtained by identifying individuals whose Database profiles show a statistically significant similarity to a profile from a crime scene sample but which do not exactly match the sample profile. Each familial search throws up 50-150 possible relatives and about 80 searches are being undertaken each year. The consequence of this is that many innocent individuals might be brought into a criminal investigation on the basis of the familial match. A genetic link between individuals could be also be unknown to one or both parties and police investigations may make this information known for the first time.
92. There has been little scrutiny of the NDNAD in Parliament or the courts. The domestic courts have accepted that the taking and use of DNA engages Article 8 and have therefore required a degree of justification for such actions from the Government. They have not, however, conducted a very rigorous assessment of the "law-enforcement" justifications they have been given. The courts have not, however, considered the indefinite retention of DNA to even fall within the remit of the right to respect for private life under the UK's Human Rights Act and, therefore, required no justification from the

Government.¹⁴¹ It is, however, hoped that recent criticism of the NDNAD by the Nuffield Council on bioethics will encourage greater political emphasis on this issue.¹⁴²

Targetted Surveillance (Article 17 ICCPR)

93. Prior to the introduction of the Regulation of Investigatory Powers Act 2000- commonly referred to as RIPA - there was a patchwork of laws permitting intrusive targeted surveillance that had been developed in an ad hoc manner over many years. This led to a widespread view, including within government, that there were gaps in statutory and procedural controls that rendered many of the surveillance activities unlawful due to their interference with personal privacy.¹⁴³ RIPA regulates invasive surveillance activities through a framework of warrants and authorisations. It is intended to provide a human rights compliant framework for targeted surveillance by requiring that authorisation can only be given when the activity takes place for a purpose set by the statute and when it is a proportionate means of doing so.

94. The legislation gives rise to a number of privacy concerns, including about the range of the bodies that have access to communications data and the powers to require decryption keys to be handed over to the authorities. For the purposes of this response, however, we focus on the absence of prior judicial authorisation for the most invasive form of surveillance - the interception of communications. While this requires the issue of an interception warrant, this is authorised by the Secretary of State, who must be satisfied that the issue is justified on proportionality grounds (which include the need to consider alternative means of achieving the objective) rather than an independent judge. In 2004 the Home Secretary issued 1849 warrants and a further 674 warrants continued in force from previous years.¹⁴⁴ The government's argument against judicial authorisation is that authorising interception involves particularly sensitive decisions that are properly a matter for the executive, and that judges cannot reasonably be expected to make decisions on what is or is not in the interests of national security.

95. In July 2007 the Joint Committee on Human Rights published a report on counter terrorism policy and human rights considered the regime for RIPA authorisation. It concluded that 'RIPA be amended to provide for judicial rather than ministerial authorisation of interceptions, or subsequent judicial authorisation in urgent cases'.¹⁴⁵

¹⁴¹ *R (S and Marper) v Chief Constable of S. Yorks & Home Secretary*, [2004] UKHL 39. The European Court of Human Rights (ECtHR) has recently declared Marper admissible so there is the prospect that there might presently be a determination that the retention of DNA at least engages Article 8

¹⁴² "The forensic use of bioinformation: ethical issues", 2007

¹⁴³ Cf the judgment of the European Court of Human Rights (ECtHR) in *Malone v UK in 1984*

¹⁴⁴ By way of comparison, the total number of federal and state wiretap authorisations in the entire United States in 2005 was 1773

¹⁴⁵ Counter-Terrorism Policy and Human Rights: 28 days, intercept and post-charge questioning. Nineteenth Report of Session 2006-07 at paragraph 161 <http://www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/157/157.pdf>

Without proper and independent authorisation of surveillance, no scheme can properly protect privacy and civil liberties, and offer proper accountability.

Mass retention of personal data (Article 17 ICCPR)

96. In recent years, a number of Government schemes have been created which involve the mass retention of personal data. Examples include an index or database of all children in the UK under the Children Act 2004 and legislation which would authorise the creation of a National Identity Register. This short document provides an overview of some of the privacy implications arising from the latter.

97. On 30 March 2006 the Identity Card Act 2006 (IDCA) received Royal Assent. The scope of the information sharing and dissemination powers contained in IDCA goes far beyond those of other countries. The Act is also riddled with reserved powers allowing the Secretary of State to extend the scope of the scheme by Parliamentary order. This means that whatever the limitations imposed in the Act concerning what information is contained on the Register, who is entitled to access that information and so on, these can increase dramatically over time.

98. The privacy implications of the ID card scheme are profound. The proposed system will result in what the Information Commissioner Richard Thomas, when giving evidence to the Home Affairs Select Committee, described as a '*very significant sea change in the relationship between the state and every individual in this country*'.¹⁴⁶ Of course the IDCA will not by itself signal the death knell for individual privacy in the UK. However, it does symbolise a shift in the approach of the state towards the collection of information. It is arguable that we are moving away from a society where information is not shared unless necessary, towards one where it will be shared unless there is a reason not to.¹⁴⁷

99. The IDCA creates a wide ranging regime allowing access to the register without consent by a wide range of named public bodies and agencies. It also allows information to be provided to private sector bodies with a person's consent in order to assist with verification. This will enable information to be passed to private bodies such as banks in order to verify identity. Far more than basic name, address, nationality and so on will be recorded in the Register. For example, the IDCA allows for a record to be made of every occasion where information in the register is provided to anyone, details of the person to whom the information has been given and 'other particulars' relating to each occasion this is done. As the Register is rolled out, a growing number of both public and private sector

¹⁴⁶ <http://www.publications.parliament.uk/pa/cm200304/cmselect/cmhaff/130/4060805.htm>

¹⁴⁷ The Serious Crime Act 2007 provides further evidence of this societal shift. It creates powers allowing information sharing and data mining by government departments with no need for suspicion or evidence. Although this will be limited to fraud purposes, the Bill tellingly contains powers to extend data mining powers by statutory instrument. This would provide a vehicle by which the practice could be extended to areas beyond fraud, or even for non criminal purposes.

bodies will provide an interface to the Register. This means that a detailed record of everyone's movements, what services they have accessed at what time, and so on, will be collated. This will create an imprint of our existence going way beyond that currently created.

ASYLUM AND IMMIGRATION

100. Since the UK's fifth periodic report, there have been numerous legislative measures aimed at curtailing the rights of asylum seekers. These include (i) the continuing use of detention for purely administrative purposes; (ii) attempts to remove appeal rights; (iii) the introduction of non-suspensive appeals; and (iv) removal of asylum support.

Immigration detention for administrative purposes (Articles 9 and 12 ICCPR)

101. Under paragraph 16 of Schedule 2 to the Immigration Act 1971, the government has continued to detain large numbers of asylum seekers not on the basis of any threat to public safety or risk of absconding but simply because it is administratively convenient to do so. In September 2006, the latest available statistics, 2010 asylum seekers detained in the UK under immigration powers.¹⁴⁸

102. In 2002, the Appellate Committee of the House of Lords held that 'fast track' detention for periods of up to 1 week of asylum seekers not considered to be at risk of absconding was lawful within the right to liberty under Article 5(1)(f) ECHR.¹⁴⁹ The matter is now on appeal to the European Court of Human Rights.

103. In addition, provisions for mandatory bail hearings and a right to bail without sureties established by the Immigration and Asylum Act 1999 have now been repealed by the Nationality, Immigration and Asylum Act 2002. This repeal appears to have occurred without ensuring that detainees enjoy effective access to courts and the right to challenge the legality of their detention, consistent with Article 5 ECHR. This issue is particularly acute in the case of asylum-seekers who lack early access to effective representation and, unlike most British nationals, are likely to be ignorant of their right to make a bail application unless it is made automatic. Without such provision, an asylum-seeker could conceivably remain in detention for a substantial period of time without either representation or judicial oversight.

Curtailed appeal rights (Articles 2 and 14 ICCPR)

¹⁴⁸ Home Office Statistical Bulletin, *Asylum Statistics United Kingdom 2006* (21 August 2007), para 52.

¹⁴⁹ *R (Saadi) v Secretary of State for the Home Department* [2002] UKHL 41.

104. Since the fifth periodic report, there have been successive governmental attempts to reduce the availability of appeals and judicial reviews in respect of immigration decisions, including:

- the introduction of ‘statutory review’ on less favourable terms than judicial review in immigration cases, as well ‘non-suspensive’ appeals interfering with the right of access to the courts, by way of the Nationality Immigration and Asylum Act 2002;
- the government’s attempt to oust the jurisdiction of the higher courts to review decisions of the Asylum and Immigration Tribunal under the Asylum and Immigration (Treatment of Claimants etc) Act 2004. Even as finally enacted, the 2004 Act further restricted appeal rights for asylum seekers and extended the non-suspensive system of appeals; and
- the removal of appeal rights for students and family members in the Immigration Asylum and Nationality Act 2006.

105. In our view, the continuing and increasing restrictions on the right of access to the courts in immigration cases constitute a violation of the rights of asylum seekers under Articles 2 and 14 of the Covenant. No sound justification has been advanced as to why—as a matter of basic principle—persons subject to immigration control should somehow be less entitled to the fair administration of justice than UK nationals.

Non-suspensive appeals (Articles 7 and 14 ICCPR)

106. Section 94 of the Nationality Immigration and Asylum Act 2002 provided for the introduction of ‘non-suspensive’ appeals whereby the Secretary of State has certified that she is satisfied that there is in general no serious risk of persecution in that country and that removal of a person to that country would not in general contravene the UK’s obligations under the ECHR. Where a country has been certified under this process, there will be no in-country right of appeal, i.e. applicants will be liable to immediate removal to that country notwithstanding that any further appeal (or judicial review of certification) has not yet been determined. As of May 2007, the countries subject to non-suspensive appeals were: Albania, Boliva, Bosnia, Brazil, Ecuador, Ghana (men only), India, Jamaica, Macedonia, Malawi, Mali, Mauritius, Moldova, Mongolia, Montenegro, Nigeria (men only), Serbia (including Kosovo), Sierra Leone, South Africa and the Ukraine.

107. In our view, the abolition of in-country appeal rights for certain classes of asylum seekers is a sweeping measure which precludes effective judicial oversight of the decision to refuse their original claim. In the asylum context, ‘effective judicial oversight’ means the ability of a higher tribunal or court to correct an unlawful decision to remove *before* the decision is carried out. In *R (Razgar) v Secretary of State for the Home*

Department, Mr Justice Richards noted that, for an applicant, a non-suspensive asylum appeal amounted to 'plainly a very serious disadvantage as compared with an in-country appeal'.¹⁵⁰ Similarly, the Council on Tribunals (the independent statutory body appointed to oversee the operation of administrative tribunals) has given its view that procedures for non-suspensive asylum appeals were 'capable of leading to unfairness and injustice'.¹⁵¹ It noted that:

The requirement to conduct appeals from abroad will make it more difficult for adjudicators to assess the evidence of appellants. It will also make it more difficult for appellants to have face-to-face discussions with their advisers and to present their cases satisfactorily. Costs will inevitably be greater. And there could be serious problems with regard to the status and safety of tribunal users in the countries from which they are appealing.

108. The evident obstacles to sustaining an appeal from outside the UK have been reflected in the very low success rate for such out-of-country appeal, at least according to initial figures.¹⁵² On the issue of non-suspensive asylum appeals, the House of Commons Constitutional Affairs Committee expressed concern at 'the extremely low success rate of appellants' appeals under that system' and recommended that the Government 'investigate the fairness of the non-suspensive appeal system'.¹⁵³

Removal of asylum support (Articles 6 and 7 ICCPR)

109. Section 55 of the Nationality Immigration and Asylum Act 2002 requires the Home Secretary to refuse support from the National Asylum Support Service (asylum support, including both accommodation and subsistence support) to all those asylum seekers who fail to make their asylum claim 'as soon as reasonably practicable' following their arrival in the country,¹⁵⁴ unless to do so would lead to a violation of their Convention rights.¹⁵⁵ Under section 8 of the Asylum and Immigration Act 1996 and the Immigration (Restrictions on Employment Order) 1996,¹⁵⁶ an asylum seeker is also prohibited from working to support himself.¹⁵⁷

¹⁵⁰ [2002] EWHC Admin 2554 at para 1.

¹⁵¹ Council on Tribunals, *Annual Report 2001/02*, pp 30-31.

¹⁵² Memorandum of Department of Constitutional Affairs to Commons Constitutional Affairs Committee, attached to 2nd Report of the Committee (2003/4 session), Ev 141: 'As of 17 April 2003, provisional [Immigration Appellate Authority] figures show that 56 out-of-country appeals had been lodged with the [Authority]. 42 of those have so far been dismissed and one withdrawn. None has been successful'.

¹⁵³ Para 81, House of Commons Constitutional Affairs Committee, *Asylum and Immigration Appeals*, 2 March 2004 (HC 211-I; 2nd report, 2003/2004 session).

¹⁵⁴ Section 55(1)

¹⁵⁵ Section 55(5)

¹⁵⁶ SI 1996/3225

¹⁵⁷ Asylum seekers may seek permission of the Secretary of State for the Home Department to work but, as a matter of Home Office policy, permission is not given unless his application has been the subject of consideration for 12 months or more.

110. Following the coming into force of the 2002 Act in January 2003, the Home Office applied section 55 in such a way as to deny support to any asylum seeker deemed to have made his/her claim too late unless *they* could show that they had fallen beneath the threshold of inhuman or degrading treatment prohibited by Article 3 ECHR. Consequently, during the winter of 2003, large numbers of asylum seekers became destitute without sufficient funds for food. According to a report produced by the Refugee Council in 2004:¹⁵⁸

Of the clients refused access to NASS support under section 55 who participated in this survey, 61.3% were sleeping rough, with a further 8% facing imminent homelessness. 70% experienced great difficulty in accessing food on a daily basis. The irregular diet and lack of shelter had a negative impact on the health of 57.4% of the clients surveyed.

111. In March 2003, the Court of Appeal held that the decision of the Home Office to withhold support from large numbers of asylum seekers pursuant to section 55 amounted to treatment within the meaning of Article 3 ECHR (the equivalent of Article 7 ICCPR):¹⁵⁹

The imposition by the legislature of a regime which prohibits asylum seekers from working and further prohibits the grant to them, when they are destitute, of support amounts to positive action directed against asylum seekers and not to mere inaction.

112. This was upheld unanimously by the House of Lords by its judgment in 2005.¹⁶⁰ Lord Bingham, the Senior Law Lord, held that the Secretary of State for the Home Department was obliged under section 55(5) of the 2002 Act to reinstate asylum support:¹⁶¹

when it appears on a fair and objective assessment of all relevant facts and circumstances that an individual applicant faces an imminent prospect of serious suffering caused or materially aggravated by denial of shelter, food or the most basic necessities of life. Many factors may affect that judgment, including age, gender, mental and physical health and condition, any facilities or sources of support available to the applicant, the weather and time of year and the period for which the applicant has already suffered or is likely to continue to suffer privation.

It is not in my opinion possible to formulate any simple test applicable in all cases. But if there were persuasive evidence that a late applicant was obliged to sleep in the street, save perhaps for a short and foreseeably finite period, or was seriously

¹⁵⁸ Section 55 (Refugee Council, February 2004), para 1.1:

<http://www.refugeecouncil.org.uk/policy/position/2004/section55.htm>

¹⁵⁹ *R(Q) v Secretary of State for the Home Department* [2003] EWCA Civ 364 at para 57.

¹⁶⁰ *Secretary of State for the Home Department v Limbuela and others* [2005] UKHL 56.

¹⁶¹ *Ibid.*, paras 8-9.

hungry, or unable to satisfy the most basic requirements of hygiene, the threshold would, in the ordinary way, be crossed.

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