



**Home Office Review of Counter-Terrorism
and Security Powers**

Written submissions of JUSTICE

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Executive summary

- **Control orders** are unnecessary, ineffective and offensive to basic principle. The Prevention of Terrorism Act 2005 should be repealed. The resources committed to administration of the control order scheme should be instead put into surveillance of suspects.
- **The stop and search power under section 44** of the Terrorism Act 2000 should be replaced with a much more narrowly drawn power, with stringent safeguards including prior judicial authorisation. Section 76 of the Counter-Terrorism Act 2008 should be repealed, and the right of photographers to photograph in public places made clearer.
- **The maximum period of pre-charge detention in terrorism cases** should be reduced from 28 days. We favour a return to 7 days, but would welcome a reduction to 14 days as an interim step.
- **Deportation with assurances** should not be pursued in relation to countries known to use torture.
- **Additional measures to deal with organisations that promote hatred or violence** are unnecessary. Incitement of hatred and violence are already criminal offences. Moreover the existing law on proscription is already overly broad and should be tightened. Sections 1, 2 and 21 of the Terrorism Act 2006 should be repealed.
- **The use of surveillance powers by local authorities** should be removed, as should their access to communications data without prior judicial authorisation.
- **Terrorist asset-freezing powers** are grossly disproportionate in their current form. We recommend comprehensive overhaul of the law in this area, including removal of the reasonable suspicion test.
- **Other issues** include consolidation of terrorism legislation, the lifting of the ban on intercept evidence, and tightening of the statutory definition. Although outside the scope of the current review, they should be addressed as a matter of urgency.

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Introduction

1. Founded in 1957, JUSTICE is a UK-based human rights and law reform organisation. Its mission is to advance access to justice, human rights and the rule of law. It is also the British section of the International Commission of Jurists.
2. JUSTICE has a long history of engagement with the human rights issues arising from terrorism and counter-terrorism.¹ We therefore welcome the coalition government's review of counter-terrorism measures, in particular its intention 'consistent with protecting the public and where possible, to provide a correction in favour of liberty'. Among other things, it was one of the key recommendations of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights in February 2009 that:²

States should undertake comprehensive reviews of their counter terrorism laws, policies and practices, including in particular the extent to which they ensure effective accountability, and their impact on civil society and minority communities. States should adopt *such changes as are necessary to ensure that they are fully consistent with the rule of law and the respect for human rights, and to avoid all over-broad definitions which might facilitate misuse.*

3. It is important at the outset to make clear our firm view that the UK faces a serious threat of terrorism. Nor do we suggest that the problems faced by the government in combating this threat are easily solved. In particular, there is a conflict between the understandable desire of the security and intelligence services to keep details of their operations secret (the better to disrupt threats), and the need to gather admissible evidence against those involved in terrorism so that they may be successfully prosecuted. Both are in the public interest.

¹ JUSTICE has, for instance, intervened in most of the leading terrorism cases since the mid-1990s, including *Chahal v United Kingdom* 23 EHRR 413, *A and others v Secretary of State for the Home Department (No 2)* [2005] UKHL 71, *Secretary of State for the Home Department v JJ and other* [2007] UKHL 45, *MB v Secretary of State for the Home Department* [2007] UKHL 46, *Al Jedda v Secretary of State for Defence* [2007] UKHL 58, *A and others v UK* [2009] 49 EHRR 29, *RB (Algeria) and OO (Jordan) v Secretary of State for the Home Department* [2009] UKHL 10, *Secretary of State for the Home Department v AF and others* [2009] UKHL 28, *Ahmed and others v HM Treasury* [2010] UKSC 2, *R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65 and *Al Rawi and other v Security Service and others* [2010] EWCA Civ 482. We produced briefings for both Houses of Parliament on the 2000, 2001, 2005, 2006, 2008 and 2010 Acts. We also responded to the Home Office consultation on counter-terrorism powers in 2004, and gave oral evidence to various inquiries on terrorism including the House of Commons Constitutional Affairs Committee 2005 inquiry into the Special Immigration Appeals Commission, the House of Commons Home Affairs 2005, 2006, 2007 and 2008 inquiries on terrorism legislation, and the 2008 Privy Council inquiry into the use of intercept as evidence. Our reports include *Intercept Evidence* (2006), *From Arrest to Charge in 48 Hours: Complex terrorism cases in the US since 9/11* (2007), *The Future of Counter-Terrorism and Human Rights* (2007), and *Secret Evidence* (2009).

² *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights* (International Commission of Jurists, February 2009), p164. Emphasis added.

4. Too often in the past decade, however, the previous government showed its willingness to curtail fundamental rights unnecessarily and sacrifice basic principle in the name of strengthening security. Not only were many of the counter-terrorism measures adopted wrong in principle, but they have also proved ineffective, unnecessary and even counterproductive in practice. JUSTICE is therefore pleased to have this opportunity to contribute to the government's review. These submissions set out (i) key principles that we believe should be taken into account when reviewing counter-terrorism measures; and (ii) our main concerns with each of the six measures under review.

Principles of terrorism legislation

5. In his 1996 report, Lord Lloyd identified the following principles that should apply to any future terrorism legislation:³
 - i. legislation against terrorism should approximate as closely as possible to the ordinary criminal law and procedure;
 - ii. additional statutory offences and powers may be justified, but only if they are necessary to meet the anticipated threat. They must then strike the right balance between the needs of security and the rights and liberties of the individual;
 - iii. the need for additional safeguards should be considered alongside any additional powers; and
 - iv. the law should comply with the UK's obligations in international law.
6. In their 2003 report, the committee of Privy Counsellors appointed to review the Anti-Terrorism Crime and Security Act 2001 endorsed Lord Lloyd's principles.⁴
7. In 2004, the International Commission of Jurists adopted the Berlin Declaration on Upholding Human Rights while Combating Terrorism. Among the principles it identified was:⁵

Principles of Criminal Law: States should avoid the abuse of counter-terrorism measures by ensuring that persons suspected of involvement in terrorist acts are only charged with crimes that are strictly defined by law, in conformity with the principle of

³ Lord Lloyd of Berwick, *Inquiry into Legislation Against Terrorism* (Cm 3420, October 1996), para 3.1.

⁴ Report of Privy Counsellors Review Committee chaired by Lord Newton, *Anti-Terrorism Crime and Security Act 2001 Review: Report* (HC100: 18 December 2004), para 94

legality (*nullum crimen sine lege*). States may not apply criminal law retroactively. They may not criminalise the lawful exercise of fundamental rights and freedoms. Criminal responsibility for acts of terrorism must be individual, not collective. In combating terrorism, *States should apply and where necessary adapt existing criminal laws rather than create new, broadly defined offences or resort to extreme administrative measures, especially those involving deprivation of liberty.*

8. In February 2009, concluding a three-year review, the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights identified UK counter-terrorism policy as part of an international trend undermining the priority of the criminal law in the fight against terrorism.⁶

an effective criminal justice system based on respect for human rights and the rule of law is, in the long term, the best possible protection for society against terrorism. This is the lesson of history. Yet, ignoring lessons from the past, long held systems of criminal justice are being set aside as being inadequate. Principles of fairness and due process, which should be at the heart of any system of criminal justice, are being ignored by some countries in light of the supposed exceptional nature of the threat from terrorism.

We therefore take it to be axiomatic that terrorism is a crime and should be treated as such. As the Eminent Jurists Panel points out, this does not mean simply prosecuting suspects instead of deporting them or subjecting them to control orders, for example. It means that those suspected of terrorist offences are entitled to the same core rights and procedural guarantees as those suspected of any other type of offence, whether it be shoplifting or murder.

9. Treating terrorism as a crime does not mean that additional, non-criminal measures cannot also be justified. As Lord Lloyd recommended, the complexity of terrorism and the severity of its consequences made it appropriate to enact permanent terrorist legislation to supplement the criminal law. But, as he also noted, non-criminal measures are only permissible to the extent that they are strictly necessary and strike the correct balance having regard to 'the rights and liberties of the individual'.⁷ In JUSTICE's view, many of the counter-terrorism measures introduced in the past decade breached this basic principle.
10. More generally, we believe respect for human rights should be a core part of the coalition government's counter-terrorism strategy. Too often, senior members of the previous government paid only lip service to the idea of respect for rights in the fight against terrorism

⁵ Emphasis added.

⁶ See n2 above, p161.

⁷ Another way of testing this, we suggest, would be to ask whether the measures do not themselves undermine the criminal justice model.

or, worse still, argued that the right of the general public to security overrode all other rights.⁸ In May 2007, for instance, Prime Minister Blair complained that too much emphasis was being given to the rights of suspects.⁹

We have chosen as a society to put the civil liberties of the suspect, even if a foreign national, first. I happen to believe this is misguided and wrong Over the past five or six years we have decided as a country that except in the most limited of ways, the threat to our public safety does not justify changing radically the legal basis on which we confront this extremism. Their right to traditional civil liberties comes first. I believe this is a dangerous misjudgement.

Not only did the Prime Minister understate the effect of his own government's counter-terrorism measures on human rights (see e.g. indefinite detention without charge), but his complaint was that too much weight was still being given to the rights of suspects. We think the better view is that expressed by Lord Hope, the deputy president of the UK Supreme Court, in *Ahmed and others v HM Treasury*.¹⁰

Even in the face of the threat of international terrorism, the safety of the people is not the supreme law. We must be just as careful to guard against unrestrained encroachments on personal liberty.

The President of the Court, Lord Phillips of Worth-Matavers, spoke in similar terms in June, pointing out that respect for human rights is important not only for their own sake, but also because of the role that human rights play in helping to prevent the radicalisation that can lead to terrorism.¹¹

The so called 'war against terrorism' is not so much a military as an ideological battle. Respect for human rights is a key weapon in that ideological battle. Since the Second World War we in Britain have welcomed to the United Kingdom millions of immigrants

⁸ Before the 7/7 bombings, then Prime Minister Tony Blair suggested that there was 'no greater civil liberty than to live free from terrorist attack' (BBC News, 24 February 2005). Following the bombings, the Home Secretary Charles Clarke said that 'the right to be protected from the death and destruction caused by indiscriminate terrorism is at least as important as the right of the terrorist to be protected from torture and ill-treatment' (Speech to the Heritage Foundation, Washington DC, 5 October 2005). His successor John Reid argued that 'the right to security, to the protection of life and liberty, is and should be the basic right on which all others are based'. 'Reid urges human rights shake-up', BBC News website, 12 May 2007. See also eg B Leapman, 'Reid says human rights laws soft on terrorists', *Sunday Telegraph*, 12 May 2007.

⁹ See 'Blair accuses courts of putting rights of terrorist suspects first', *The Independent*, 28 May 2007. See also eg, 'Blair faces torrent of criticism on human rights', *The Independent*, 24 February 2006: 'We hear an immense amount about [terror suspects'] human rights and their civil liberties. But there are also human rights of the rest of us to live in safety'.

¹⁰ See n1 above, para 6.

¹¹ Lord Phillips of Worth-Matavers, Gresham Lecture, 8 June 2010, pp 37-38. Emphasis added.

from all corners of the globe, many of them refugees from countries where human rights were not respected. It is essential that they and their children and grandchildren should be confident that their adopted country treats them without discrimination and with due respect for their human rights. *If they feel that they are not being fairly treated, their consequent resentment will inevitably result in the growth of those who, actively or passively are prepared to support terrorists who are bent on destroying our society. The Human Rights Act is not merely their safeguard. It is a vital part of the foundation of our fight against terrorism.*

Control orders

11. We consider control orders to be unnecessary, ineffective and offensive to basic principle.
12. We accept that there will sometimes be cases in which the authorities reasonably suspect persons of involvement in terrorism but do not prosecute them. This is either because the authorities lack sufficient admissible evidence for a prosecution to be brought, or they possess the necessary evidence but are unwilling to use it because of some broader harm to the public interest that would result from its disclosure. We agree that this is a genuine problem and that it is appropriate for the government to take measures to address the risks posed by suspects in such cases.
13. This does not mean, however, that control orders are an appropriate solution to this problem. In particular, an inability or unwillingness to prosecute on the part of the authorities cannot justify placing suspects under virtual house arrest on an indefinite basis, no matter how serious the activity they are suspected of engaging in may be. This is especially true in circumstances where it has proved well-nigh impossible for suspects to challenge the Home Office's decision to impose a control order due to its extensive reliance on secret evidence. Nor have control orders proved effective in preventing suspects from absconding. The considerable public funds that are used to maintain the control order regime would, in our view, be much better spent on lawful surveillance of suspects. We expand on each of these points below.

Control orders are unnecessary

14. The basic problem control orders are designed to address is the risk posed by suspected terrorists whom the authorities are unable or unwilling to prosecute.¹² This is commonly

¹² See e.g. the statement of the Home Secretary in January 2005: '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). The Lord Chancellor, Lord Falconer, similarly cited 'the evidential

described as being due to a 'lack' of admissible evidence against suspects, and it is certainly true that the government's suspicion that a person is involved in terrorism is often founded in intelligence material that would be inadmissible as evidence in criminal proceedings, either because it falls squarely within one of the established exclusionary rules (e.g. the rule against unreliable hearsay), or because of some other statutory bar, e.g. the prohibition against intercept evidence in section 17 of the Regulation of Investigatory Powers Act 2000. However, it is also true that reasonable suspicion against a suspect is sometimes based on material that would be technically admissible (e.g. the testimony of an informant or an undercover agent), but which the security and intelligence services are unwilling to allow to be used in criminal proceedings for fear of compromising either their operational techniques, the safety of the source, or both. As the Newton Committee noted in 2003:¹³

The inhibiting factor ... seems to be that intelligence on which suspicion of involvement in international terrorism is based (a) would be inadmissible in court; or (b) the authorities would not be prepared to make it available in open court, for fear of compromising their sources or methods.

15. We recognise that this is a problem. However, it is hardly a problem that is unique to the United Kingdom.¹⁴ Nor is it a post-9/11 development.¹⁵ On the contrary, it seems to us to be

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, col 119).

¹³ See n4 above, para 207. This gap between the suspicion and proof was also cited by the Home Secretary in debates on introduction of indefinite detention under the 2001 Act: 'If the evidence that would be adduced and presented in a normal court were available, of course we would use it, as we have done in the past [However] in some cases the nature of the evidence from the security and intelligence services will be such that it would put at risk the operation of those services and the lives of those who act clandestinely to help them if that evidence were presented in normal open court'. (Hansard, HC Debates, 19 November 2001, cols 28-29). Lord Rooker, a Home Office Minister, justified the measures to the House of Lords in far blunter terms: '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, col 146).

¹⁴ See e.g. pp 78-80 of the *9/11 Commission Report: Final Report of the National Commission of Terrorist Attacks upon the United States* (2004), describing how the FBI operated an internal firewall that 'blocked the arteries of information sharing', by preventing the sharing of foreign intelligence material with those responsible for investigating and prosecuting criminal offences. See also e.g. the analysis of the relevant Canadian law published as part of the recent Air India inquiry report: '[t]he root of the problem ... was not so much the difficulties in using intelligence in criminal prosecutions, though these might be considerable, but rather [the Canadian Security and Intelligence Service's] unwillingness to expose its investigations, sources and officers to disclosure' (K Roach, 'The unique challenges of terrorism prosecutions: Towards a workable relation between intelligence and evidence', p38). The Report itself recommended that '[t]o the extent that it is practicable to do so, CSIS should conform to the requirements of the laws relating to evidence and disclosure when conducting its counterterrorism investigations in order to facilitate the use of intelligence in the criminal justice process' (Report of the Commission of Inquiry into the Bombing of Air India Flight 182, *Air India: A Canadian Tragedy* (June 2010), Vol 3, p336).

¹⁵ In submissions to the European Court of Human Rights in 1988, for instance, the UK government 'drew attention to the difficulty faced by the security forces in obtaining evidence which is both admissible and usable in consequence of training in anti-interrogation techniques adopted by those involved in terrorism' (*Brogan v United Kingdom* (1988) 11 EHRR 117, para

endemic to every western jurisdiction that relies on intelligence material in the fight against terrorism.¹⁶ Despite this, no other western country apart from Australia has introduced control orders. Even there, they have been little used: only two orders were ever made, both have since been discharged and no orders have been made since 2007.¹⁷

16. Nor does it appear that the UK faces a significantly greater threat of terrorist attack than other western countries, at least not one that would seem to us sufficient to justify the use of control orders.¹⁸ Certainly the UK suffered a grave terrorist attack in 2005 with the 7/7 bombings, but then Spain suffered an even more deadly attack in 2004 with the Madrid bombings and did not introduce control orders. It is true that a number of serious terror plots have been disrupted in the UK by police, including the 2006 plot to destroy transatlantic airliners using liquid explosives, and that this indicates the continuing threat of terrorist attack. Nonetheless, other western countries have faced terror plots of similar seriousness across the same period (see e.g. the arrests made in Canada,¹⁹ Denmark,²⁰ and Germany in 2006-2007),²¹ and there is no reason to think the threat of attack to those other countries has diminished either. Even the United States, which introduced a range of highly exceptional measures after 2001, declined to

56). In his 1996 report, Lord Lloyd of Berwick similarly noted that: 'one of the themes which has persisted throughout [this] Inquiry is the difficulty of obtaining evidence on which to charge and convict terrorists, particularly those who plan and direct terrorist activities without taking part in their actual execution'. (*Inquiry into Legislation Against Terrorism*, n3 above, para 7.1).

¹⁶ Nor is it a problem restricted to terrorism investigations. Similar difficulties are encountered in relation to other kinds of criminal investigations that rely upon intelligence gathering, e.g. serious organised crime.

¹⁷ See Attorney General of the Commonwealth of Australia, *Control Orders and Preventative Detention Orders: Report for the year ending 30 June 2009*. No report for 2009-2010 has been issued.

¹⁸ Between August 2006 and July 2010, the threat level issued by the government's Joint Terrorism Analysis Centre (JTAC) has ranged from 'substantial' (the third highest level) to 'critical' (the highest), with the level currently set at 'severe' (the second highest). However, as the Joint Committee on Human Rights noted in its recent report, '[t]he Government's approach ... seems to envisage that the Government could consider there to be a public emergency threatening the life of the nation even if the threat level as assessed by JTAC was at 'moderate' or 'low' (*Counter-Terrorism Policy and Human Rights: Bringing Human Rights back in* (HL 86/HC 111: March 2010), para 15).

¹⁹ See e.g. '17 Held in Plot to Bomb Sites in Ontario', *New York Times*, 4 June 2006. The plot involved 18 men (the so-called 'Toronto 18') who planned to use truck bombs to attack high-profile targets across southern Ontario, including Toronto and Ottawa. In a series of trials held in between 2008 and 2010, seven pleaded guilty and a further four were convicted of terrorist offences following trial.

²⁰ See e.g. 'Denmark arrests bomb suspects', *BBC News*, 5 September 2007. Seven men were arrested in Copenhagen in September 2007 on suspicion of plotting a bomb attack. The head of the Danish police intelligence agency was reported as saying 'we have prevented a terror attack', and described the suspects as 'militant Islamists with international contacts, including leading members of al-Qaeda'.

²¹ See e.g. 'Germany Says It Foiled Bomb Plot', *Washington Post*, 6 September 2007. The case involved 4 Muslim men who had received training in Pakistan in a plot to attack US bases in Germany using car bombs. All 4 were convicted of terrorist offences following trial (see 'Four jailed over plot to bomb US bases', *MSNBC*, 4 March 2010).

alter its domestic criminal justice system in response to the risk posed by suspected terrorists in the continental US.²²

17. How do these other countries cope with the problem of suspects against whom there is no realistic prospect of prosecution? The answer, obviously enough, must be that they rely on lawful surveillance to ensure that suspects' activities remain under observation. We are of course aware that surveillance can be very resource-intensive, and that it can sometimes raise significant human rights issues of its own.²³ Nonetheless, we note that the control order regime is already extremely expensive to administer and defend: approximately £10.8 million was spent on control orders between August 2006 and August 2009²⁴ and the legal costs alone have been estimated at £8 million.²⁵ All this, moreover, for the sake of a relatively small number of individuals – never more than forty and currently only a dozen men.²⁶ In the circumstances, we have no doubt that the public funds involved would be much better spent on effective surveillance of suspects than on maintaining the current regime.²⁷ Moreover, surveillance is bound to be a more proportionate and more palatable interference with a suspect's rights than subjecting them to virtual house arrest on an indefinite basis.
18. Our conclusion that control orders are unnecessary was reinforced by the decision of the Home Office to withdraw control orders against two men – AE and AF – in August and September 2009 respectively. The reason for the Home Office's decision was not a change in the threat assessment concerning either man, but because of the June 2009 judgment of the House of Lords in *Secretary of State for the Home Department v AF and others* which required greater disclosure of the closed material in each man's case.²⁸ The Home Office, for its part, declined to do so, presumably because it judged the public interest in nondisclosure to be

²² See our 2007 report *From Arrest to Charge: Complex terrorism cases in the US after 9/11*, which details how the FBI, state and local law enforcement arrested over 50 suspects in alleged plots aimed at causing widespread loss of life, including the destruction of such key US landmarks as the Sears Tower and the Brooklyn Bridge.

²³ See e.g. our 1998 report *Under Surveillance: Covert Policing and Human Rights Standards*.

²⁴ Lord Carlile of Berriew QC, *Fifth Report of the Independent Reviewer pursuant to section 14(3) of the Prevention of Terrorism Act 2005* (1 February 2010), para 81. Note that this figure only covers a 3 year period between 2006-2009. Assuming that similar costs were incurred for the 16 month period before August 2006, and the 12 month period since August 2009, this would bring the total cost for the control order regime to approximately £19.2 million.

²⁵ Daily Mail, 'Taxpayers' £8m legal bill for terror suspect control orders' by James Slack, 2 February 2010.

²⁶ See the latest quarterly statement of the Home Secretary under the Prevention of Terrorism Act 2005: 'At the end of the reporting period 12 control orders were in force, 10 of which were in respect of British citizens' (Hansard, 21 June 2010, col 7WS). See also Lord Carlile's 5th annual report, n24 above, para 17.

²⁷ Lord Carlile claims that the cost of 'reasonably complete physical and other surveillance to replace the system' would be 'many times greater than the cost of control orders' (see *ibid*, para 81) He offers no basis for his estimate, however, and admits it contains 'many imponderables'. It follows that we do not agree with his assessment.

²⁸ [2009] UKHL 56.

greater than that of maintaining the control orders. Instead, it elected to withdraw the control orders. As Lord Lloyd pointed out in March:²⁹

AF's control order was revoked in August 2009. Since then, he has been a free man. Yet a year ago on 5 March the noble Lord, Lord West [the Home Office minister] described him as 'highly dangerous' That was the advice which the noble Lord had received from the Security Service and the police, and which he had accepted. Yet AF, that highly dangerous man, is now free, without the dire consequences which were then predicted. What is the explanation for that? The answer can be only this: the Home Office has indeed found some other means of dealing with him

If using a control order was not necessary in the case of AF, why should we accept that it is necessary in the case of the other 11 individuals who are subject to control orders? The answer is, of course, that it is not necessary. We know now that other means can be found to contain the risk posed by these few remaining wretched individuals. If that is so, it is high time that we brought control orders to an end. They are, and always have been, a blot on our jurisprudence.

Control orders are ineffective

19. At the time they were introduced, control orders were described by the Home Secretary as being:³⁰

for those dangerous individuals whom we cannot prosecute or deport, but whom we cannot allow to go on their way unchecked *because of the seriousness of the risk that they pose to everybody else in the country.*

20. A total of 45 people have been made subject to control orders since the Act was passed, of which 7 have absconded – an apparent failure rate of about 15%. Following two ascondments in late 2006, a junior Home Office Minister said that he 'did not believe the public was at risk' from the escaped men,³¹ and the government-appointed reviewer of terrorism legislation agreed that the disappearances 'present little direct risk to public safety in the UK at the present time'.³² We find it difficult to reconcile the Home Secretary's original claims of dangerousness in 2005 with the mild assessments offered the following year. It is equally hard

²⁹ Hansard, HL Debates, 3 March 2010, col 1528.

³⁰ Rt Hon Charles Clarke MP, Hansard, HC Debates, 23 Feb 2005: Column 339. Emphasis added.

³¹ BBC News, 'Two terror suspects 'on the run'', 17 October 2006.

³² Lord Carlile, *Report in connection with the Home Secretary's quarterly reports to parliament on control orders* (Home Office, 11 December 2006), para 21.

to see how control orders could in any event be effective in preventing terror attacks with an failure rate of roughly 1 in 6.

Control orders are offensive to basic principle

21. Control orders represent a fundamental departure from the principle that any suspected criminal activity should be dealt with by due process of law, the basis of which is a fair trial in which allegations are proved in open court to the criminal standard of proof. As serious as the threat of terrorism has been post-9/11 and 7/7, we do not believe the situation has ever approached the level of a state of emergency that could justify even a short-term derogation from these fundamental principles.

22. In February 2009, the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights identified the UK use of control orders as part of an international trend undermining the priority of the criminal law in the fight against terrorism. In particular, it noted that there were 'many important safeguards missing' in the UK control order system, including:³³
 - the evidentiary standard required is often low – that of 'reasonable suspicion';
 - there is a limited ability to test the underlying intelligence information;
 - there are no definite time-limits and the orders can last for long periods;
 - there are limitations on effective legal representation and to legal counsel of one's own choice the right to a full fair hearing (guaranteed in both civil and criminal proceedings) is denied.

23. Justice Arthur Chaskalson, the chair of the Panel and the former Chief Justice of South Africa, had previously likened the UK control order scheme to the repressive measures of the old Apartheid regime:³⁴

Control orders may be much worse than they sound. They can require the victim of the order to remain at his or her home for up to 18 hours a day, with constraints upon receiving visitors, attending gatherings, meeting people or going to particular places during the 6 hours of 'freedom'. We had measures like that in South Africa. We called them house arrest, distinguishing between 12 hours house arrest and 24 hours house arrest. The people affected by such orders found it almost impossible to comply with their terms, resulting in their breaking their orders, which in turn led to their often being prosecuted for doing so.

³³ See n2 above, p121.

³⁴ 'The Widening Gyre: Counter-Terrorism, Human Rights and the Rule of Law', 7th Sir David Williams Lecture, Faculty of Law, University of Cambridge, 11 May 2007.

24. A central feature of the unfairness of the control order regime has been its heavy reliance on closed material withheld from both the controlee and his lawyers. As we detailed in our 2009 report, *Secret Evidence*, this offends the basic right of a person to know the case against him.³⁵ These arguments were borne out by the decisions of the European Court of Human Rights and the House of Lords in 2009.
25. First in *A and others v United Kingdom*,³⁶ the Grand Chamber of the European Court of Human Rights accepted JUSTICE's submissions that the use of special advocates in closed proceedings was unable to ameliorate the dramatic unfairness of using closed evidence. The Grand Chamber held that the right to procedural fairness under article 5(4) 'must import substantially the same fair trial guarantees as article 6(1) in its criminal aspect',³⁷ and that this therefore required that 'as much information about the allegations and evidence against each applicant was disclosed as was possible without compromising national security or the safety of others'.³⁸ Where full disclosure was not possible, article 5(4) required that 'each applicant still had the possibility effectively to challenge the allegations against him'.³⁹
26. Secondly, in *Secretary of State for the Home Department v AF and others*,⁴⁰ a panel of nine Law Lords unanimously held that the government's failure to disclose sufficient details of its case against persons subject to control orders breached their right to a fair trial under article 6 ECHR. JUSTICE was the only NGO granted leave to intervene in the appeal, arguing that there was a 'solid bedrock of a core legal principle' under both common law and the European Convention on Human Rights under which defendants were entitled to know the substance of the case against them.⁴¹ As Lord Hope said:⁴²

The consequences of a successful terrorist attack are likely to be so appalling that there is an understandable wish to support the system that keeps those who are considered to be most dangerous out of circulation for as long as possible. But the slow creep of complacency must be resisted. If the rule of law is to mean anything, it is in cases such as these that the court must stand by principle. It must insist that the person affected be told what is alleged against him.

³⁵ *Secret Evidence* (JUSTICE, June 2009).

³⁶ (2009) 48 EHRR 29.

³⁷ Para 217.

³⁸ Para 218.

³⁹ *Ibid.*

⁴⁰ [2009] UKHL 56.

⁴¹ *Ibid.*, para 42.

⁴² *Ibid.*, para 84.

27. Since that ruling, there have been a number of judgments in the Administrative Court and the Court of Appeal concerning its implications. At least two control orders have already been withdrawn because the government was unwilling to disclose sufficient details of the closed evidence against defendants to enable their fair trial. Moreover, the Court of Appeal recently upheld the judgment of the Administrative Court that that the two men whose control orders had been withdrawn due to lack of disclosure may be entitled to claim compensation.⁴³
28. While we welcome the decisions of the courts requiring greater disclosure of closed material, we see no benefit in seeking to improve the current system. Even if additional safeguards were added, they would remain an affront to basic principle by their very design. We therefore recommend the Prevention of Terrorism Act 2005 be repealed in its entirety.⁴⁴

Stop and search without reasonable suspicion

29. We welcome the government's announcement that police have been directed not to use the stop and search power under section 44(2). We recommend the repeal of section 76 of the Counter-Terrorism Act 2008 and clearer guidance to all police officers, community support officers, and private security staff that rights of photographers in public places are to be respected.
30. Section 44(2) of the Terrorism Act 2000 allows any pedestrian within an authorised area to be stopped and searched by police to see if they are carrying any articles 'which could be used in connection with terrorism'.⁴⁵ Within the authorised area, there is no requirement by the police to have reasonable suspicion that the person stopped and searched is either involved in terrorism or has committed a criminal offence. Section 44(1) allows the police to stop vehicles on a similar basis, as well as to conduct searches of the driver or any passenger.
31. Following the stop and search of two pedestrians outside the ExCel Centre in the London Docklands in 2003, it emerged that the entire Greater London area had been the subject of continuous police authorisations since section 44 came into force in February 2001.⁴⁶ The number of pedestrian stops each year in England and Wales has increased as follows:⁴⁷

⁴³ See *AN v Secretary of State for the Home Department* [2010] EWCA Civ 869.

⁴⁴ Although we propose wholesale repeal of the 2005 Act, Part 4 of the Act would stand repealed until re-enacted. See e.g. Lord Mischon, HL Debates, 26 July 1993, cols 958-959: 'It may be of interest to the House that the normal procedure expected when seeking to repeal a repeal by an earlier statute is a re-enactment of the statute and not a cancellation of the repeal'.

⁴⁵ Section 45(1)(a).

⁴⁶ See *R (Gillan) v Commissioner of Police for the Metropolis* [2006] UKHL 12, paras 16-17.

⁴⁷ This does not include vehicle stops under section 44(1).

Year	Stopped	Arrested	For terrorism	Proportion of Ethnic minorities stopped
2001/02 ⁴⁸	942	20	0	26.8%
2002/03 ⁴⁹	4,774	86	7	33.2%
2003/04 ⁵⁰	8,120	117	5	25.5%
2004/05 ⁵¹	10,041	176	24	23%
2005/06 ⁵²	19,064	271	59	37%
2006/07 ⁵³	13,712	219	14	32%
2007/08 ⁵⁴	52,061	553	38	37.2%
TOTAL	108,714	1442	147	30% (average over 7 years)

32. Of the 147 pedestrians arrested since 2001 on suspicion of terrorism following a search under section 44(2) – less than 0.2% of the total number stopped – there is no record of any person having been charged or convicted.⁵⁵ In his most recent report on the operation of the 2000 Act published in 2008, Lord Carlile said that ‘its use could be halved from present levels without risk to national security or to the public’.⁵⁶ On the release of the stop and search figures in April 2009, he said ‘it catches no or almost no terrorism material, it has never caught a terrorist and therefore it should be used conservatively’.⁵⁷
33. In our view, however, it was not enough for the authorisation power to be used conservatively or even halved. A terrorism search power which resulted in tens of thousands of innocent people being searched each year without reasonable suspicion, including a disproportionate number of ethnic minorities, yet yields only a small number of arrests, 90% of which are for non-terrorism offences and none of which result in terrorism charges, was simply not credible.
34. In January 2010, the European Court of Human Rights in *Gillan and Quinton v United Kingdom* held that the stop and search power under section 44 breached the right to privacy under article 8 because of its lack of safeguards against arbitrariness.⁵⁸ In particular, it noted the ‘breadth of the discretion conferred on the individual police officer’, the lack of any

⁴⁸ Home Office, *Statistics on race and the criminal justice system* (2004), p 40.

⁴⁹ *Ibid*, p 41.

⁵⁰ Home Office, *Statistics on race and the criminal justice system* (2005), p 35.

⁵¹ Home Office, *Statistics on race and the criminal justice system* (2006), p 33.

⁵² Ministry of Justice, *Statistics on race and the criminal justice system* (2007), p 36.

⁵³ Ministry of Justice, *Statistics on race and the criminal justice system* (2008), p 36.

⁵⁴ Ministry of Justice, *Statistics on race and the criminal justice system* (2009), pp 62-63.

⁵⁵ BBC News, ‘Capital sees a rise in terror stops’, 6 May 2009.

⁵⁶ *Report on the operation in 2007 of the Terrorism Act 2000 and Part I of the Terrorism Act 2006* (June 2008), para 34.

⁵⁷ BBC News report, n55 above.

⁵⁸ (2010) EHRR 45.

requirement on the senior police officer authorising the use of the stop and search power to make 'any assessment of the proportionality of the measure', nor did the weak temporal and geographical limitations provided by sections 44(4) and 46(2) offer 'any real check on the authorising power of the executive'.⁵⁹ The availability of judicial review was also not an effective safeguard. As the Court noted:⁶⁰

in the absence of any obligation on the part of the officer to show a reasonable suspicion, it is likely to be difficult if not impossible to prove that the power was improperly exercised.

35. We therefore welcome the government's announcement to suspend the use of section 44 searches in relation to pedestrians, although it seems to us that the same considerations identified by the Strasbourg Court apply *mutatis mutandi* to vehicle searches. We accept that there is a public interest in regulating the use of motor vehicles, and that drivers can reasonably expect to be subject to greater interference in their travels than a pedestrian would. Nonetheless, given that a vehicle search can include the search of a driver and any passengers, we think section 44(1) is similarly incompatible with article 8 ECHR.
36. JUSTICE does not oppose the use of stop and search without reasonable suspicion in every circumstance. Indeed, it seems to us that the original intention behind the section 44 power was to enable blanket searches to be carried out in a specified area for a limited period where there was some real and immediate risk justifying the use of the power, e.g. a cordon around St Paul's Cathedral as a response to a bomb threat. As the Court noted in *Gillan*, however, the safeguards in sections 44-46 have proved wholly inadequate. If there is to be any continuing provision for stop and search without reasonable suspicion, section 44 will have to be substantially amended to ensure that it is used only on an exceptional basis.
37. We therefore recommend sections 44-46 be amended to raise the threshold for authorisations (e.g. no longer 'expedient' but based on a 'real and immediate risk'), and to restrict significantly the duration and area of authorisations (e.g. lasting no more than 24 hours, not greater than 1 square mile, etc). Most importantly, we recommend that the current model of police authorisations be replaced by a system of prior judicial authorisation, preferably by way of *ex parte* application to a Crown Court judge (although there should remain provision for emergency authorisation by a senior police officer in circumstances where there is not sufficient time to apply to the court).

⁵⁹ Paras 80-83.

⁶⁰ Para 86.

The use of terrorism legislation in relation to photography

38. Section 44(2) is just one of several provisions that have been used by police against photographers taking pictures in public places. Other provisions include section 58 of the 2000 Act (collection of information likely to be useful to a terrorist) and section 76 of the Counter-Terrorism Act 2008 (eliciting information about a member of the armed forces, the intelligence services or the police).
39. Section 58 of the 2000 Act makes it a criminal offence to collect or make 'a record of information of a kind likely to be useful to a person committing or preparing an act of terrorism', or possessing a document containing such information, without reasonable excuse. One version or another of section 58 has been part of UK law for more than fifteen years, having first been introduced in Northern Ireland and later extended to the rest of the UK under the Criminal Justice and Public Order Act 1994. In his 1996 review of terrorism legislation, Lord Lloyd described its purpose as:⁶¹

similar to that of the offence of possession [of articles likely to be useful for terrorism, now section 57 of the 2000 Act] and the case in favour of retaining the power is very much the same. It is designed to catch possession of targeting lists and similar information, which terrorists are known to collect and use.

In relation to the possession offence, he said:⁶²

It is, of course, not the possession of the items themselves which constitutes the offence, but possession *in such circumstances as to give rise to a reasonable suspicion of their connection with terrorism.*

40. The scope of section 58 was considered in 2009 by the House of Lords in the joined cases of *R v G and R v J*.⁶³ In J's case, one of the counts under section 58 related to video footage of the West Midlands Police Headquarters which he had captured using his mobile phone. In his defence, he claimed that:⁶⁴

he was travelling on a bus and decided to test the phone's capability and so activated its video function. There were no signs to indicate that videoing was prohibited in the area and, indeed, the actual images captured were immaterial to him. For the avoidance of doubt, he denied that the file contained information likely to be useful to a

⁶¹ See n3 above, para 14.8.

⁶² *Ibid*, para 14.4. Emphasis added.

⁶³ [2009] UKHL 13.

terrorist, he was unaware of his possession of any information likely to be useful to a terrorist, he had a reasonable excuse for the creation and possession of the video and he had no way of knowing that he was committing an offence by videoing what he captured.

Although J subsequently pleaded guilty to the count, the Law Lords held unanimously that the offence under section 58 did not apply to people merely collecting or possessing information likely to be useful for terrorism.⁶⁵

Parliament cannot have intended to criminalise the possession of information of a kind which is useful to people for all sorts of everyday purposes and which many members of the public regularly obtain or use, simply because that information could also be useful to someone who was preparing an act of terrorism.

Instead, the House of Lords held, a person is only guilty of an offence under section 58 if the prosecution proves beyond a reasonable doubt that that the accused *knowingly* collected information likely to be useful for terrorism, and that any reasonable excuse raised by the accused for collecting the information was not in fact reasonable. As Lord Rodger put it, 'in order to collect or record that particular kind of information, *the defendant must know what he is looking for*'.⁶⁶ Section 58, therefore, does not criminalise the mere collection of information likely to be useful for terrorism, but only the *conscious* gathering of such information without reasonable excuse. Understood in that narrower sense, it seems to us to be a proportionately-drawn offence and indeed appears to have been a key tool in successful terrorism prosecutions for more than a decade.

41. The same cannot be said for section 76 of the 2008 Act. This makes it a criminal offence to 'elicit' information about a member of the armed forces, police or intelligence services 'likely to be useful to a person committing or preparing an act of terrorism'. It was enacted in response to the case of Parviz Khan, who was convicted in January 2008 of conspiracy to kidnap and murder a British soldier. As originally introduced, the offence was limited to members of the armed forces but subsequently amended to the police and intelligence services as well. In JUSTICE's view, section 76 was always unnecessary. As the 2008 Act's own explanatory notes stated, 'Section 58 of the Terrorism Act 2000 already prohibits the collecting of

⁶⁴ Para 29.

⁶⁵ Para 42.

⁶⁶ Para 47, emphasis added. See also para 50: 'To summarise: in order to obtain a conviction under, say, section 58(1)(b), the Crown must prove beyond reasonable doubt that the defendant (1) had control of a record which contained information that was likely to provide practical assistance to a person committing or preparing an act of terrorism, (2) knew that he had the record, and (3) knew the kind of information which it contained. If the Crown establishes all three elements, then it has proved its case against the defendant and he falls to be convicted - unless he establishes a defence under subsection (3)'.

information which is likely to be of use to a person taking part in acts of terrorism'. Similarly, any attempt to gather information (including visual records) with the intention of committing or assisting in an act of terrorism would also constitute an offence under section 5 of the Terrorism Act 2006 (preparation of terrorist acts). As far as JUSTICE is aware, no prosecution has ever been brought under section 76.

42. Despite statements of government ministers that taking photographs of police would not itself be illegal under section 76, there was clearly a growing perception on the part of both photographers and police that the power enabled police to prevent photos being taken. Shortly before coming into force in February 2009, the National Union of Journalists, the British Press Photographers Association expressed fears that the offence would inhibit legitimate reporting by preventing photographers taking pictures of police.⁶⁷ The Metropolitan Police Federation also voiced concern that 'poorly-drafted anti-terrorist legislation' would be difficult for the police to apply.⁶⁸

As things stand, there is a real risk of photographers being hampered in carrying out their legitimate work and of police officers facing opprobrium for carrying out what they genuinely, if mistakenly, believe are duties imposed on them by the law.

43. The day before the G20 protests April, John Randall MP told the House of Commons of reports that 'police are increasingly using powers under section 76 of the Counter-Terrorism Act 2008 and section 58(1)(a) of the Terrorism Act 2000 against bona fide journalists'.⁶⁹ Following the G20 protests, a petition on the Downing Street website argued that amateur footage of Ian Tomlinson's encounter with police showed the importance of members of the public being free to take pictures of police.⁷⁰
44. On 27 December 2009, more than 360 members of the Royal Photographic Society and the British Institute of Professional Photographers, including many of the UK's leading photographers, wrote to the Daily Telegraph to complain that photographers 'using equipment larger than a compact camera are frequently stopped and searched under anti-terrorist legislation, which they find humiliating':

We do not believe it likely that real terrorists would bother to set up a tripod or use a heavy single-lens reflex camera, as perfectly satisfactory pictures for their purposes could be taken on a discreet camera phone. If our photography has an effect on law

⁶⁷ 'Photographers fear they are target of new terror law', *The Guardian*, 12 February 2009.

⁶⁸ MPF press statement, 'Do not make us secret police', 16 February 2009.

⁶⁹ Hansard, 1 Apr 2009 : Column 264WH.

⁷⁰ 'G20 death: Fresh attempt to overturn ban on photographing police', *Daily Telegraph*, 9 April 2009.

and order, it is beneficial, as wrongdoers are unlikely to commit crimes in close proximity to someone visibly holding a camera.

Meanwhile, some in the police, especially PCSOs, believe it is illegal to take any pictures of a police officer. This is because of ambiguous legislation, introduced earlier this year, which made it an imprisonable offence to collect 'information of a kind likely to be useful to a person committing or preparing an act of terrorism'. Given the existence of Google Street View, we do not believe the legislation should be used against ordinary photographers.

The letter went on to note that, although the Home Office had issued guidelines to police forces to make clear that the law must not be misused against ordinary photographers, 'this does not appear to have had the desired effect'.

45. While it is reasonable to expect a certain degree of vigilance from public officials following the events of 9/11 and 7/7, it is also reasonable to expect a healthy dose of common sense. In particular, it ought to be well-understood that a police officer should not interfere with someone taking pictures in a public setting unless that officer *reasonably* suspects the photographer of *knowingly* gathering information for the purposes of terrorism. We very much doubt this has been true in most of the incidents referred to above. Unfortunately, we are aware that the problem is not limited to ordinary police or even community support officers, but extends to private security guards whom – it seems to us – have no obvious power to interfere with a photographer in a public area in the first place.
46. The widespread harrassment of photographers may not be the most egregious instance of disproportionate counter-terrorism measures introduced in recent years, but it erodes public trust all the same. We therefore recommend the repeal of section 76 of the 2008 Act, in order to make clear to police and other security personnel that merely taking a photo or a video in a public place is not a criminal offence. It is, of course, true that the problem of harrassment of photographers goes more broadly than section 76. Nevertheless, if the introduction of that section was largely symbolic, we see no reason why its repeal cannot now be used to similar effect.

Pre-charge detention in terrorism cases

47. In our view, the current 28-day maximum period of pre-charge detention in terrorism cases is plainly at odds with the right to liberty, unnecessary, far longer than that found in any other western democracy, and lacking in effective safeguards.
48. We believe the original 7-day limit established by Parliament in 2000 should be restored.

28 days pre-charge detention violates the right to liberty

49. Among the most ancient rights recognised under UK law is the right to liberty.⁷¹ For this reason, it has for several centuries been a basic common law principle that anyone arrested must be:
- (a) informed promptly of the charges against him;⁷² and
 - (b) brought before a judge ‘as soon as he reasonably can’.⁷³
50. These requirements serve two purposes. First, they act as a check against arbitrary detention by obliging the authorities to specify their accusations against a suspect and by subjecting those charges to independent judicial scrutiny.
51. Secondly, they allow the suspect the opportunity to begin to answer the allegations that are the cause of his detention. Otherwise, as Lord Simonds asked in 1947, ‘how can the accused take steps to explain away a charge of which he has no inkling?’⁷⁴

⁷¹ See e.g. Dalton, *Country Justice* (1655), p 406 ‘The liberty of a man is a thing specially favoured by the Common Law of this Land’.

⁷² See e.g. *Christie v Leachinsky* [1947] AC 573 at 592 per Lord Simond: ‘if a man is to be deprived of his freedom, he is entitled to know the reason why’.

⁷³ Sir Matthew Hale CJ, *History of the pleas of the Crown* (1778), Vol 2, p 95: following a suspect’s arrest, ‘the safest and best way in all cases is to bring [the prisoner] to a justice of peace and by him the prisoner may be bailed or committed as the case shall require’. In situations where a suspect could not be brought immediately before a justice, e.g. if a suspect was arrested ‘in or near night’, they could be held in ‘the common gaol’, in the stocks, or exceptionally in a house ‘for a day and a night at least, and in some cases of necessity for a longer time, till he can with safety and conveniency convey him to a justice of peace’ (ibid, p 96). See also, Blackstone’s *Commentaries on the Laws of England*, Book 4, Chapter 21, p 294: ‘When a delinquent is arrested ... he ought regularly to be carried before a justice of the peace. The justice, before whom such prisoner is brought, is bound immediately to examine the circumstances of the crime alleged’. In *Wright v Court*, 4 B.&C. 596 (1825), the court held that it ‘is the duty of a person arresting any one on suspicion of felony to take him before a justice as soon as he reasonably can’.

⁷⁴ *Christie v Leachinsky*, n 72 above, at 593.

52. These ancient requirements of the common law not only inspired the Fourth Amendment in the US Bill of Rights,⁷⁵ but also became the model for the right to liberty under the European Convention on Human Rights 1950, and the International Covenant on Civil and Political Rights 1966. Thus Article 5(2) of the European Convention on Human Rights requires that anyone arrested:⁷⁶

shall be *informed promptly* ... of any charge against him.

53. Article 5(3) similarly provides that anyone arrested or detained:⁷⁷

shall be *brought promptly* before a judge.

54. In addition, Article 5(4) provides that anyone arrested or detained:⁷⁸

shall be entitled to take proceedings by which the lawfulness of his detention shall be *decided speedily* by a court.

55. Near-identical language is used in Articles 9(2), (3) and (4) of the International Covenant on Civil and Political Rights, respectively requiring that anyone arrested:⁷⁹

shall be ... *promptly informed* of any charges against him.

shall be *brought promptly* before a judge.

⁷⁵ See the decision of the US Supreme Court in *Gerstein v Pugh* 420 U.S. (1975) at 114-116: 'At common law it was customary, if not obligatory, for an arrested person to be brought before a justice of the peace shortly after arrest. The justice of the peace would 'examine' the prisoner and the witnesses to determine whether there was reason to believe the prisoner had committed a crime. If there was, the suspect would be committed to jail or bailed pending trial. If not, he would be discharged from custody This practice furnished the model for criminal procedure in America immediately following the adoption of the Fourth Amendment ... and there are indications that the Framers of the Bill of Rights regarded it as a model for a 'reasonable' seizure'.

⁷⁶ In *Fox, Campbell and Hartley v United Kingdom* (1990) 13 EHRR 157, the European Court of Human Rights referred to Article 5(2) as 'the elementary safeguard that any person arrested should know why he is being deprived of his liberty' (para 40).

⁷⁷ Emphasis added.

⁷⁸ Article 5(4) in particular implies the right of the suspect to be able to challenge his detention in a manner that meets the essential judicial guarantees of fairness: see e.g. the judgment of the European Court of Human Rights in *Weeks v United Kingdom* (1989) 10 EHRR 293, in which it held that 'proper participation of the individual adversely affected by the contested decision' is 'one of the principal guarantees of a judicial procedure for the purposes of the Convention' and that conditions which prevent this (i.e. preventing the accused from attending the hearing and knowing the evidence against them) 'cannot therefore be regarded as judicial in character'.

⁷⁹ Emphasis added.

shall be entitled to take proceedings before a court, in order that that court may *decide without delay* on the lawfulness of his detention...

56. The meaning of the term '*promptly*' in Article 9(3) was considered by the UN Human Rights Committee in 1994. The Committee stated:⁸⁰

More precise time-limits are fixed by law in most States parties and, in the view of the Committee, *delays must not exceed a few days*.

57. The UN Principles for the Protection of All Persons under Any Form of Detention or Imprisonment include the requirement that:⁸¹

Anyone who is arrested ... *shall be promptly informed* of any charges against him.

58. By definition, pre-charge detention under the 2000 Act means that a suspect is unable to know the charges against him. Moreover, Schedule 8 of the Act allows the suspect and his lawyers to be excluded from 'any part of the hearing' to authorise continued detention,⁸² and be denied access to information used by police and prosecutors to justify that detention.⁸³

59. In our view, it is obvious that being held without charge for as long as 28 days is not 'prompt' within the meaning of Article 5(2).

60. It is also obvious that detention authorised by a judge in the absence of the defendant and his lawyer, and without knowledge of the information presented against him, cannot satisfy either the basic right of a suspect to be brought 'promptly' before a court under Article 5(3) or the right to have the lawfulness of his detention 'decided speedily' under Article 5(4).

61. The European Court of Human Rights has repeatedly made clear that the requirements of Article 5 apply even in cases of suspected terrorism. In the 1988 case of *Brogan v United Kingdom*⁸⁴, the Court considered the case of 3 suspected IRA members who were detained under the Prevention of Terrorism Act (Temporary Provisions) Act 1984 for periods up to 4 days without being brought before a judge. The Court acknowledged that 'the investigation of

⁸⁰ Human Rights Committee, General Comment 8, Article 9 (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 8 (1994). Emphasis added.

⁸¹ Principle 10, Adopted by General Assembly resolution 43/173 of 9 December 1988. Emphasis added.

⁸² Paragraph 33(3) of Schedule 8.

⁸³ Ibid, para 34.

⁸⁴ (1988) 11 EHRR 117.

terrorist offences undoubtedly presents the authorities with special problems⁸⁵ but concluded that:⁸⁶

none of the applicants was either brought 'promptly' before a judicial authority or released 'promptly' following his arrest. The undoubted fact that the arrest and detention of the applicants were inspired by the legitimate aim of protecting the community as a whole from terrorism is not on its own sufficient to ensure compliance with the specific requirements of Art 5(3).

28 days pre-charge detention is unnecessary

62. There is no evidence to show that the current maximum of 28 days has proved necessary in order to prosecute suspected terrorists. Since the maximum period was raised in 2006 from 14 days to 28 days:

- Six suspects have been held for as long as 27 or 28 days;
- Three were released without charge;
- Three – Habib Ahmed, Usman Saddique and Donald Whyte – were charged with terrorism offences;
- Of these three, two were acquitted of terrorism offences and one was convicted,⁸⁷
- In the one instance of successful conviction for terrorism offences following 28 days pre-charge detention, it appears that the great majority of admissible evidence was available to police at the time of arrest.

63. Five of the six suspects held up to 27 and 28 days were arrested in the context of Operation Overt, the so-called 'liquid bomb' plot to blow up several transatlantic airliners. However, none of those ultimately convicted – Ahmed Addulla Ali, Assad Sarwar or Tanvir Hussain – were among those detained up to 27 or 28 days. Indeed, all three men who were ultimately convicted were charged within 12 days of their arrest.

⁸⁵ Judgment, paragraph 61.

⁸⁶ Ibid, para 62.

⁸⁷ Of the two men acquitted of terrorism offences, one was later convicted of firearms offences.

Habib Ahmed

64. Habib Ahmed was the only individual to be detained for up to 28 days outside of the context of Operation Overt. He was arrested in Cheetham Hill, Manchester on 23 August 2006 following an extensive surveillance operation by police that appears to have lasted more than a year. According to the Daily Telegraph, Habib Rahman was identified following surveillance of another suspect, Rangzieb Ahmed:⁸⁸

[Rangzieb] Ahmed ... originally from Fallowfield in Manchester, was under surveillance as he travelled from Pakistan to South Africa on a mission for al-Qaeda [Rangzieb] Ahmed called *his associate Habib Ahmed, 28, no relation, a taxi driver in Cheetham Hill, Manchester, to help him smuggle his contact books into Britain. Rangzieb gave Habib a Filofax and two exercise books written in invisible ink which amounted to a compendium of contacts for members of al-Qaeda.* During their meeting at a hotel in Dubai they were bugged discussing al-Qaeda, which they referred to as 'the company' Habib flew back to Britain separately *and his luggage was secretly opened as he passed through Schipol airport in Amsterdam when the code books were discovered,* although only one page appeared to have writing on. When Rangzieb arrived in Manchester *his rucksack was swabbed and the security services found traces of PNT, a plastic explosive.* MI5 followed him as he convened a meeting of associates at the Sajaan fast food restaurant on Manchester's 'curry mile'. He was also heard talking of returning to Pakistan and telling Habib: 'We will meet on earth if I'm alive or otherwise in paradise. If you are martyred first, make a recommendation for me'. *As the surveillance continued on Habib, police filmed him training with a rucksack on his back in Heaton Park in Manchester.*

65. According to the Guardian.⁸⁹

When Habib Ahmed was arrested, he was *found to be in possession of two diaries, which had details of senior al-Qaida terrorists written in invisible ink, described in court as a terrorist's contact book.*

66. Given the extensive surveillance material gathered over many months against Habib Ahmed and his associate Rangzieb Ahmed, together with the items of evidence found in his possession upon arrest, we are at a loss to understand why it should have been thought necessary for him to be detained for 28 days prior to being charged. Unlike intercept material, there is no statutory prohibition against the use of surveillance material as evidence in criminal

⁸⁸ 'British Al-Qaeda chief found guilty of directing operations', *Daily Telegraph*, 18 December 2008. Emphasis added.

⁸⁹ 'Man convicted of directing terror activities sentenced to life', *The Guardian*, 19 December 2008. Emphasis added.

proceedings in England and Wales. To judge by media reports, there was more than enough material to justify the laying of charges against Habib Ahmed for terrorism offences upon the day of his arrest.

Donald Stewart-Whyte

67. Donald Stewart-Whyte was arrested as part of Operation Overt on 10 August 2006. At the time of his arrest, the police found a Baikal 8mm pistol, together with ten rounds of ammunition and a silencer, in a bag under the stairs of his mother's house.⁹⁰ He stood trial in the Woolwich Crown Court alongside Abdulla Ahmed Ali, Tanvir Hussain and Assad Sarwar, charged with preparation of terrorist acts under section 5 of the Terrorism Act 2006. While the latter three were found guilty of conspiracy to murder in September 2009, the same jury unanimously agreed that Stewart-Whyte was not guilty.
68. Stewart-Whyte was also charged with three firearms offences – possessing a pistol contrary to section 5(1) of the Firearms Act 1968, and possessing ammunition and a silencer without holding a firearms certificate contrary to section 1(1)(b) of the 1968 Act. All three offences are strict liability offences, meaning that the prosecution did not need to show any terrorist purpose or criminal intent. Following his acquittal on the charge of preparing acts of terrorism in September 2009, he stood trial separately on the firearms charges in November 2009. He was convicted, sentenced to four and a half years imprisonment, but immediately released due to time served.

Usman Siddique

69. Although arrested as part of Operation Overt, Usman Siddique was tried separately on 2 February 2010. His submission of no case to answer was accepted by the court and he was acquitted. The main evidence against him, an unencrypted CD, was discovered by police on the first day of his detention. His barrister subsequently described the case against him in the *Guardian*:⁹¹

the high-water mark of the police case against [Siddique] was the finding of a single incriminating CD in the loft bedroom of his family home. It had been discovered on open display sitting on a busy desk among a number of other similar discs. It was unencrypted and its contents were instantly viewable on any computer

⁹⁰ See e.g. 'Donald Stewart-Whyte, Muslim son of Tory agent 'went off rails'', *The Times*, 8 September 2009; 'Cleared jet man hid gun', *The Sun*, 5 November 2009.

⁹¹ 'The criminal case of Usman Siddique' by Jo Sidhu, *The Guardian*, 11 February 2010.

The CD appeared to be American in origin and was overwhelmingly concerned with computer and software security; essentially it was a hacker's manual. The prosecution did not suggest that such information had anything to do with a terrorist plot. However, a small folder on the CD titled "anarchy" contained 17 subfolders, one of which was called "bombs". This in turn contained four files that gave details on how to make explosive devices. The bombs sub-folder constituted less than 1% of the total material stored on the CD but it was enough to keep the prosecution's case on the rails until the matter finally came before a jury some nearly three and a half years after Saddique's arrest.

The evidence in the trial occupied a mere two days. The defence accepted that Usman Saddique occasionally slept in the loft bedroom, but equally the prosecution conceded that not all of the property found in that room belonged to him. They also had to admit that there was no fingerprint or DNA evidence to suggest he had ever touched the CD. In fact, their computer expert found no evidence that the CD had even been played on any of the computers at the family home.

In short, the evidence that Saddique had at any point been in possession of the CD or was ever aware of its contents was so tenuous that the trial judge rightly concluded that the case should be withdrawn from the jury.

70. As two other barristers involved in the Operation Overt trials noted:⁹²

The evidence upon which the charges [against Stuart-Whyte and Siddique] were based was in the possession of the investigators *within the first six to 12 days of detention; no material evidence came to light towards the end of the 28-day period.*

71. In the course of attempts by the previous government to lift the maximum period to 42 days, some senior police officers argued that longer periods of pre-charge detention were needed because of the increasing complexity of suspected terror plots. However, there is little evidence to show that the complexity of suspected terror plots has increased significantly since the 9/11 attacks in 2001 or the 7/7 bombings in 2005. Moreover, even if it were true that the complexity of plots is in fact increasing, it is clear that longer periods of precharge detention have little bearing on the ability of prosecutors to charge suspects with terrorism offences.

72. First, there is no evidence to show that suspected terrorist plots are growing in terms of either complexity and scale. Previous government attempts to extend the maximum period of pre-charge detention often cited the increased amounts of material seized by police in the course of their investigations, e.g. 274 computers were seized in the Dhiron Barot case in 2004,

whereas 400 computers were seized in Operation Overt in 2005. However, such figures do not necessarily reflect any increase in the actual complexity of the alleged plots themselves.⁹³ Statistics concerning the amount of material seized in any particular case, or the number of exhibits used at trial, may only reflect the complexity of the police's own suspicions rather than hard fact. For example, the Forest Gate raid in 2006 involved over 250 police officers, and reportedly followed a two month surveillance operation involving police and MI5,⁹⁴ and the raid itself cost over £2.2 million including £864,300 in overtime payments for the police officers involved.⁹⁵ The so-called 'complexity' of an investigation, in other words, may have nothing to do with whether a plot actually exists.

73. In any event, even if it were true that the complexity of terrorism investigations were increasing, we are certain that the Threshold Test - together with the lifting of the ban on intercept evidence – makes it possible to bring charges against suspects promptly in even the most complex of cases. Indeed, as two barristers with experience of terrorism cases noted recently:⁹⁶

Terrorism investigators tend to pace the investigation according to the available detention time limit. Operations Crevice (the "Fertiliser Case"), Rhyme (the "Dirty Bomb Case") and Vivace (the "21/7" failed London bombings) were all serious and complex investigations, yet entirely reliable charging decisions were made within the then 14 day limit. In fact, no one can point to a single erroneous charging decision made in any terrorism investigation because of an inadequate pre-charge detention limit.

74. During the debate over 90 days pre-charge detention in 2005, we pointed out⁹⁷ that the Threshold Test – which allows the CPS to charge suspects in cases where further evidence is expected but not yet available⁹⁸ – enables charges to be brought promptly against suspects in even very complex investigations. At the time, this argument was publicly dismissed by the

⁹² Ali Naseem Bajwa and Beth O'Reilly 'Terrorising the innocent', *New Law Journal*, 2 April 2010. Emphasis added.

⁹³ As the Home Office's 2006 paper noted, 'No individual case since the alleged airline plot in August 2006 has yet exceeded that plot in complexity – though there have been a number of arrests and charges for terrorist offences in alleged plots since then' (*Pre-charge Detention of Terrorist Suspects*, 2007 p 6).

⁹⁴ Guardian, 'Men in gas masks, a broken window, then a single shot', 3 June 2006.

⁹⁵ Daily Telegraph, 'Chemical bomb' raid that found nothing cost £2.2m', 3 October 2006.

⁹⁶ See Bajwa and O'Reilly, n 92 above.

⁹⁷ See e.g. Home Affairs Committee, *Terrorism Detention Powers* (HC 910: July 2006), paras 110-112.

⁹⁸ The Threshold Test is contained in the Code for Crown Prosecutors and applies in cases where 'it is proposed to keep the suspect in custody after charge [e.g. because of the threat of terrorist attack] but the evidence required to apply the Full Code Test is not yet available' (para 3.3). The Test itself requires prosecutors 'to decide whether there is at least a reasonable suspicion that the suspect has committed an offence, and if there is, whether it is in the public interest to charge that suspect' (para 6.1).

police who claimed that 'the Threshold Test was not applicable in terrorism cases'.⁹⁹ We were pleased to see that the CPS subsequently confirm that the Threshold Test has played a major part in bringing charges against suspects in terrorism cases within the existing time-limit. As the then-DPP, Sir Ken MacDonald QC (as he was then) told Parliament in December 2007:¹⁰⁰

given the nature of the threshold test, the evidence is only required to demonstrate a reasonable suspicion that the defendant committed the offence. I can only say to you that our experience so far has been that we have managed and managed reasonably comfortably.

28 days pre-charge detention is far longer than any other western democracy

75. Although the UK faces a serious threat from Al Qaeda-related terrorism, it is far from unique in this respect. The 9/11 attacks in 2001 and the Madrid bombings in 2004 showed that other democracies also face the same risk. And yet at 28 days, the UK already has a maximum period of pre-charge detention far in excess of any other western country, as the following list of countries indicates:

- Canada 1 day;¹⁰¹
- United States 2 days;¹⁰²
- South Africa 2 days;¹⁰³
- New Zealand 2 days;¹⁰⁴
- Germany 2 days;¹⁰⁵

⁹⁹ Home Affairs Committee, *Terrorism Detention Powers*, n 99 above, para 111. See e.g. the statements of DAC Peter Clarke, then-head of the Met Anti-Terrorism Branch, that 'I do not think the Threshold Test is at all applicable in these sorts of cases' and 'I do not think the Threshold Test is something which really plays into this debate at all', 28 February 2006, Q 227.

¹⁰⁰ Evidence to Home Affairs Committee, Q 551.

¹⁰¹ Criminal Code (R.S., 1985, c. C-46), s 503(1)(b): 'where a justice is not available within a period of twenty-four hours after the person has been arrested by or delivered to the peace officer, the person shall be taken before a justice as soon as possible'.

¹⁰² In *County of Riverside v. McLaughlin* 500 U.S. 44 (1991), the US Supreme Court held that the Fourth Amendment required, 'as a general rule', that a suspect must be brought before a judge within 48 hours for a determination of probable cause.

¹⁰³ Section 35(1)(d), Constitution of the Republic of South Africa 1996: 'Everyone who is arrested for allegedly committing an offence has the right ... to be brought before a court as soon as reasonably possible, but not later than (i) 48 hours after the arrest; or (ii) the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day'. See also section 35(1)(e), entitling those arrested 'at the first court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released'.

¹⁰⁴ Section 23(2), New Zealand Bill of Rights Act 1990: 'Everyone who is arrested for an offence has the right to be charged promptly or to be released'. See also section 23(3): 'Everyone who is arrested for an offence and is not released shall be brought as soon as possible before a court or competent tribunal'. Although legislation does not specify a time limit, the courts have consistently interpreted the requirement 'promptly' in a narrow manner: see e.g. *R v Rogers* (1993) 1 HRNZ 282, in which the Court of Appeal held that pre-charge detention as short as 5 hours was not sufficiently prompt in the particular circumstances of the case.

- Spain 5 days,¹⁰⁶
- France 6 days.¹⁰⁷

76. Indeed, at 28 days, the UK's maximum period of pre-charge detention is already greater than that in Zimbabwe under Robert Mugabe.¹⁰⁸ The former Director of Public Prosecutions, Sir Ken MacDonald QC, described the 28 day maximum as 'by far the greatest period in the common law world'.¹⁰⁹

77. As we noted in our November 2007 report, *From Arrest to Charge in 48 Hours: Complex terrorism cases in the US since 9/11*, tight limits on pre-charge detention are no obstacle to the effective prosecution of suspected terrorists. We surveyed ten of the most high-profile terrorism cases since 9/11 in which the FBI, together with state and local police, arrested over 50 suspects in alleged plots aimed at causing widespread loss of life, including the destruction of such key US landmarks as the Sears Tower and the Brooklyn Bridge. Nonetheless, in all ten alleged terror plots between 2002 and 2007, each suspect was charged with a criminal offence within 48 hours of their arrest.

¹⁰⁵ Articles 112-130 of the German Code of Criminal Procedure (*Strafprozessordnung*) set out the various time-limits that a suspect may be detained following arrest prior to being brought before a court. According to the Foreign and Commonwealth Office survey in 2005: 'Anyone arrested in Germany must be brought before a judge by the "termination of the day following the arrest". Usually this is within 24 hours, but can be up to nearly 48 hours' (*Counter-Terrorism Legislation and Practice: A Survey of Selected Countries*, October 2005, para 40). Like the Foreign Office, we take the issue of a judicial arrest warrant (*Haftbefehl*) to be the closest equivalent of a charge in common law terms, in the sense that it involves an independent judicial determination of the evidence identifying allegations against a suspect (c.f. Sec. 112(2) of the Code of Criminal Procedure).

¹⁰⁶ Article 17(2) of the Spanish Constitution provides that 'Preventive arrest (*La detención preventiva*) may not last more than the time strictly necessary for the investigations which tend to clarify events, and in every case, within a maximum period of 72 hours'. Article 520 bis of the Spanish Code of Criminal Procedure (*Ley de Enjuiciamiento Criminal*) permits the further detention of suspects in terrorism cases up to a maximum of 5 days.

¹⁰⁷ Under the Code of Criminal Procedure (*Code de procédure pénale* or CPP), the maximum period of pre-charge detention (*garde a vue*) is 1 day (Articles 63-4) but may be extended to 2 days where authorized by a district prosecutor (Art 77) or *juge d'instruction* (Art 154). In terrorism cases (offences under Article 421 of the *Code penal*) an additional 4 days detention may be authorized by a *juge des libertes et de la detention* (Article 706-88 of the CPP). Although we agree that the nature of a charge under French law is not precisely the same as a charge in English law, we consider that the specification of an offence against a suspect is the most obvious point of comparison.

¹⁰⁸ The current maximum period of pre-charge detention in Zimbabwe under the Criminal Procedure and Evidence (Amendment) Act 2004 is 21 days. In February 2004, President Mugabe used regulations under the Presidential Powers (Temporary Measures) Act 1990 to extend pre-charge detention to 28 days but this was later reduced by the later 2004 Act.

¹⁰⁹ Evidence to Home Affairs Committee, n100 above, Q 551.

28 days pre-charge detention lacks sufficient safeguards

78. Schedule 8 of the Terrorism Act 2000 provides for judicial authorisation of continuing pre-charge detention beyond 48 hours.¹¹⁰ However, the judge is *not* asked to assess whether there is sufficient evidence to justify the police's suspicion that the suspect is involved in terrorism. This is because, by definition, pre-charge detention is used to *gather* evidence against a suspect, not to confirm that those suspicions are justified. Instead, the judge is only required to determine if:¹¹¹

(a) there are reasonable grounds for believing that the further detention of the person to whom the application relates *is necessary to obtain relevant evidence* whether by questioning him or otherwise or to preserve relevant evidence, and

(b) the investigation in connection with which the person is detained is being conducted diligently and expeditiously

79. A key problem is that the pre-charge detention authorisation process often relies extensively on closed material not disclosed to the detainee or his lawyers. Among other things, the judge can exclude the defendant and his lawyers 'from any part of the hearing'.¹¹² The police and CPS can also apply *ex parte* to the judge for permission to withhold information from the defendant and his lawyers.¹¹³ The judge may authorise non-disclosure where he is satisfied that there are reasonable grounds to believe that disclosure of the information would result in interference with ongoing terrorism investigations, the recovery of property, or harm to others.¹¹⁴

80. We note that the UK courts have yet to rule on whether the judicial authorisation procedure under Schedule 8 of the 2000 Act is compatible with fundamental rights. In our view it plainly is not. In addition to the core requirement of article 5(3) that any person arrested or detained must be brought *promptly* before a judge, there is the basic procedural guarantee of article 5(4) that anyone detained is entitled to have the legality of their detention *decided speedily* by a court. The extensive use of closed material in authorisation hearings means that it is highly unlikely that the authorisation procedure complies with article 5(4). As the Grand Chamber of

¹¹⁰ Detention up to a total of 14 days may be authorised by a senior district judge; detention for longer periods (up to the maximum of 28 days) requires the authorisation of a High Court judge.

¹¹¹ Paragraph 32(1) of Schedule 8.

¹¹² Para 33(3) of Schedule 8.

¹¹³ Para 34.

¹¹⁴ The full grounds are set out in paras 33(2) and (3).

the European Court of Human Rights held in *A and others v United Kingdom* in February 2009:¹¹⁵

Where ... the open material consisted purely of general assertions and SIAC's decision to uphold the certification and maintain the detention was based solely or to a decisive degree on closed material, the procedural requirements of Article 5 § 4 would not be satisfied.

81. The Strasbourg Court's conclusion on the use of secret evidence was unanimously endorsed by the House of Lords in *Secretary of State for the Home Department v AF and others* in June 2009. As Lord Hope of Craighead noted:¹¹⁶

If the rule of law is to mean anything, it is in cases such as these that the court must stand by principle. *It must insist that the person affected be told what is alleged against him.*

82. And as Lord Justice Laws held in the recent case of *R (Cart and others) v The Upper Tribunal and others*:¹¹⁷

In the result it is, in my judgment, impossible to find a legally viable route, somehow navigating between *A and others* and *AF*, by which to conclude that in bail cases a less stringent procedural standard is required than that vouchsafed in *A and others*. In my view *AF* obliges us to hold that the selfsame standard applies...

83. For these reasons, even in the highly unlikely event that extended pre-charge detention up to 28 days was found compatible with article 5 on other grounds, we think it highly likely that the Schedule 8 authorisation procedure will be found incompatible with the requirements of article 5(4) ECHR.

Conclusion

84. Although the primary focus of these submissions has been the 28 day limit, we believe the same arguments apply with similar force to the 14 day limit introduced under the Criminal Justice Act 2003. Indeed, even a return to the original 7 day limit would still put the UK ahead of countries such as the United States, France, Germany, Spain, Canada, New Zealand and South Africa. A return to the original limit would not only be proportionate, but an important

¹¹⁵ 49 EHRR 29, para 220. Emphasis added.

¹¹⁶ [2009] UKHL 28 at para 184.

¹¹⁷ [2009] EWHC 3052 (Admin) at para 112.

symbolic move as well. It would signal that UK counter-terrorism policy is evidence-based and rational, and governed by respect for fundamental rights rather than the desire for political advantage.

85. We therefore recommend the *maximum* period of pre-charge detention under section 41 be restored to 7 days (although we do not rule out that even lesser periods of detention may breach article 5(4)). We also recommend Schedule 8 be amended to ensure that all authorisation hearings are *inter partes* on the basis of evidence disclosed to the detainee.

Deportation with assurances

86. JUSTICE opposes the use of deportation with assurances in respect of countries which routinely use torture. We do not suggest that deportation on national security grounds is an illegitimate means of combating the threat of terrorism, although we note that the 2004 Privy Council review committee recommended against its use as a counter-terrorism measure. Nor do we suggest that the assurance of a foreign government is irrelevant to determining whether a real risk of ill-treatment exists in the receiving state.
87. We do, however, maintain that negotiating assurances with countries known to use torture is wrong in principle and ineffective in practice. Assurances are incapable of ameliorating a real risk of torture or ill-treatment in such circumstances, no matter how many safeguards may be offered. Moreover, any attempt to extend the use of assurances is likely to prove fruitless: UK courts have already rejected the Libyan Memorandum of Understanding (MOU) and the European Court of Human Rights is likely to reject the Jordanian MOU when it rules in the *Othman* case in early 2011.
88. More generally, the practice of extracting from torturers a promise not to torture in the name of protecting human rights seems to us a discreditable sham, one that does nothing to protect detainees in the receiving state and serves only to cheapen Britain's own reputation in the international fight against torture.

Assurances under international human rights law

89. Both article 3 ECHR and article 3(1) of the UN Convention Against Torture prohibit the deportation of persons to countries where they face a real risk of torture.¹¹⁸ Article 3 ECHR also prohibits removal where the individual would face a real risk of inhuman or degrading treatment. Both the UK courts and the European Court of Human Rights have also held that

¹¹⁸ The 'real risk' test was first expounded by the European Court of Human Rights in *Soering v United Kingdom* (1989) 11 EHRR 49 at para 98. The relevant test under article 3(1) of the Torture Convention is 'where there are substantial grounds for believing that he would be in danger of being subjected to torture'.

removal may be barred where it would result in a 'flagrant breach' of another Convention right, e.g. the right to a fair trial under article 6 ECHR.¹¹⁹

90. Broadly speaking, international human rights obligations do not prohibit the deportation of suspects on national security grounds in other circumstances, although we note the following conclusion of the Privy Council review committee in 2004:¹²⁰

Seeking to deport terrorist suspects does not seem to us to be a satisfactory response, given the risk of exporting terrorism. If people in the UK are contributing to the terrorist effort here or abroad, they should be dealt with here. While deporting such people might free up British police, intelligence, security and prison service resources, it would not necessarily reduce the threat to British interests abroad, or make the world a safer place more generally. Indeed, there is a risk that the suspects might even return without the authorities being aware of it.

91. In any event, the use of assurances concerning the treatment of suspects removed from one country to another is not new. On the contrary, the practice of seeking assurances has gone on – in the extradition context at least – for well over a century.¹²¹ However, the practice of

¹¹⁹ See e.g. the joint partly dissenting opinion of Judges Bratza, Bonello and Hedigan in *Mamatkulov and Askarov v Turkey* (2005) 41 EHRR 494, pp 537-539, or the judgments of the House of Lords in *EM (Lebanon) v Secretary of State for the Home Department* [2008] UKHL 64; *R (Ullah) v Special Adjudicator* [2004] UKHL 26. In *OO (Jordan) v Secretary of State for the Home Department* [2009] UKHL 10, the House of Lords reversed the Court of Appeal's conclusion that Othman's removal to Jordan would result in a flagrant breach of his right to a fair trial under article 6 ECHR because of the risk that torture evidence may be used. However, the Law Lords did not rule out the possibility that a sufficiently flagrant breach of article 6 could constitute grounds for non-removal in another case, see e.g. Lord Brown at para 260: 'One day, no doubt, a case will come before the courts where, however compelling the security interests of the state which proposes to expel an alien, those interests will fall to be sacrificed to the alien's article 6 right not to be returned to face a flagrantly unjust trial'.

¹²⁰ See n4 above, para 195. Emphasis in original.

¹²¹ In 1876, Lord Derby notably refused to allow the extradition of one Ezra Winslow, wanted for forgery in Boston, unless the US government agreed to provide an assurance that he would not be tried for any other offence: 'Her Majesty's Government do not feel themselves justified in authorising the surrender of Winslow until they have received the assurance of your Government that this person shall not, until he has been restored or had an opportunity of returning to Her Majesty's dominions, be detained or tried in the United States for any offence committed prior to his surrender other than the extradition crimes proved by the facts on which the surrender would be grounded, and requesting that this decision be communicated to this Government'. (*New York Times*, 'Winslow's extradition; His released again opposed by the British government', 13 May 1876). This request was prompted by the requirements of the 1870 Extradition Act and the 'speciality' rule which motivated it is now a well-established feature of extradition law generally. The United States, for its part, denied the British request, arguing that the UK had no right to seek assurances above and beyond the terms of the 1842 treaty which, among other things, provided for the mutual extradition of suspects. In response to the British refusal to extradite Winslow, President Grant suspended the treaty for several months until both countries relented (although too late to capture Winslow, who had in the meantime been freed from custody following a successful habeas application and long since fled). See T Wu, 'Treaties Domains' [2007] 93 Virginia Law Review 572-649 at 624-625.

seeking assurances against ill-treatment in relation to other kinds of removal has a much less principled history, as the following testimony from the Nuremberg Trials makes plain.¹²²

In the spring of 1942 about 17,000 Jews were taken from Slovakia to Poland as workers. *It was a question of an agreement with the Slovakian Government.* The Slovakian Government further asked whether the families of these workers could not be taken to Poland as well. At first Eichmann declined this request.

In April or at the beginning of May 1942 Eichmann told me that henceforward whole families could also be taken to Poland. Eichmann himself was at Bratislava in May 1942 and had discussed the matter with competent members of the Slovakian Government. He visited Minister Mach and the then Prime Minister, Professor Tuka. *At that time he assured the Slovakian Government that these Jews would be humanely and decently treated in the Polish ghettos. This was the special wish of the Slovakian Government. As a result of this assurance about 35,000 Jews were taken from Slovakia into Poland.* The Slovakian Government, however, made efforts to see that these Jews were, in fact, humanely treated; they particularly tried to help such Jews as had been converted to Christianity. Prime Minister Tuka repeatedly asked me to visit him and expressed the wish that a Slovakian delegation be allowed to enter the areas to which the Slovakian Jews were supposed to have been sent. I transmitted this wish to Eichmann and the Slovakian Government even sent him a note on the matter. Eichmann at the time gave an evasive answer.

Then at the end of July or the beginning of August, I went to see him in Berlin and implored him once more to grant the request of the Slovakian Government. I pointed out to him that abroad there were rumors to the effect that all Jews in Poland were being exterminated. I pointed out to him that the Pope had intervened with the Slovakian Government on their behalf. *I advised him that such a proceeding, if really true, would seriously injure our prestige, that is, the prestige of Germany, abroad.* For all these reasons I begged him to permit the inspection in question. After a lengthy discussion Eichmann told me that this request to visit the Polish ghettos could not be granted under any circumstances whatsoever. In reply to my question "Why?" he said that most of these Jews were no longer alive.

92. The possibility of using assurances against ill-treatment in the context of removals and deportations was, therefore, well-known to the drafters of the 1951 Refugee Convention and, later, the UN Convention Against Torture and it is telling that neither instrument makes

¹²² Testimony of SS-Hauptsturmfuehrer Dieter Wisliceny to the International Military Tribunal at Nuremberg, 3 January 1946. Emphasis added.

reference to their use. By contrast, the 1957 Council of Europe Convention on Extradition made explicit allowance for the use of assurances against the death penalty.¹²³

If the offence for which extradition is requested is punishable by death under the law of the requesting Party, and if in respect of such offence the death-penalty is not provided for by the law of the requested Party or is not normally carried out, extradition may be refused unless the requesting Party gives such assurance as the requested Party considers sufficient that the death-penalty will not be carried out.

93. The reliability of assurances in the extradition context was considered by the European Court of Human Rights in the 1989 case of *Soering v United Kingdom*.¹²⁴ Soering was a German national detained in the UK whose extradition was sought by the US to face charges of murder in Virginia, a state with the death penalty. The Virginian prosecutors were, however, unwilling to accede to the UK's request for an explicit assurance that the death penalty would not be sought in his case, and instead promised only to draw the UK's views to the sentencing judge. The European Court held that the assurance was insufficient to off-set the 'real risk' that Soering might receive the death penalty.¹²⁵

Whatever the position under Virginia law and practice ... and notwithstanding the diplomatic context of the extradition relations between the United Kingdom and the United States, *objectively it cannot be said that the undertaking to inform the judge at the sentencing stage of the wishes of the United Kingdom eliminates the risk of the death penalty being imposed..*

Accordingly, the Court held, it would breach Soering's rights under Article 3 for the UK to allow his extradition to a third country where he would face a real risk of ill-treatment.¹²⁶

94. Similarly, in the 1996 case of *Chahal v United Kingdom*,¹²⁷ involving deportation on national security grounds, the European Court rejected the assurance that the UK government had

¹²³ Article 11. See also e.g. article 9 of the 1981 Inter-American Convention on Extradition: 'The States Parties shall not grant extradition when the offense in question is punishable in the requesting State by the death penalty, by life imprisonment, or by degrading punishment, unless the requested State has previously obtained from the requesting State, through the diplomatic channel, sufficient assurances that none of the above-mentioned penalties will be imposed on the person sought or that, if such penalties are imposed, they will not be enforced'.

¹²⁴ 11 EHRR 439.

¹²⁵ *Ibid*, para 98, emphasis added. In Soering's case the risk in question was not only the potential breach of article 2 (the right to life) but also the 'death row phenomenon' which the Court held amounted to ill-treatment contrary to article 3.

¹²⁶ *Ibid*, para 111.

¹²⁷ 23 EHRR 413.

received from the Indian authorities as insufficient to negate the 'real risk' that Chahal would be tortured if returned to India.¹²⁸

Although the Court does not doubt the good faith of the Indian government in providing the assurances ... it would appear that, despite the efforts of that government, the [National Human Rights Commission] and the Indian courts to bring about reform, the violation of human rights by certain members of the security forces in Punjab and elsewhere in India is a recalcitrant and enduring problem ... *Against this background, the Court is not persuaded that the above assurances would provide Mr Chahal with an adequate guarantee of safety.*

95. At the domestic level, the UK government sought unsuccessfully to negotiate assurances for the return of two Egyptian men in 1999. As the subsequent case of *Youssef v The Home Office* reveals,¹²⁹ the assurances were sought because of 'evidence that detainees were routinely tortured by the Egyptian Security Service'.¹³⁰ Despite the personal intervention of the Prime Minister,¹³¹ the Egyptian government politely declined the British request for an assurance relating to prison visits 'on the ground that they would constitute an interference in the scope of the Egyptian judicial system and an infringement of national sovereignty'.¹³²
96. In 2005, the Grand Chamber of the European Court of Human Rights held in the case of *Mamatkulov v Turkey* that the deportation of two suspects from Turkey to Uzbekistan did not violate their rights under Article 3 ECHR.¹³³ Among other things, it was noted that the Turkish government had received assurances from the Uzbek authorities that the suspects 'will not be

¹²⁸ Para 105, emphasis added. The Indian assurance was as follows: 'We have noted your request to have a formal assurance to the effect that, if Mr Karamjit Singh Chahal were to be deported to India, he would enjoy the same legal protection as any other Indian citizen, and that he would have no reason to expect to suffer mistreatment of any kind at the hands of the Indian authorities. I have the honour to confirm the above' (ibid, para 37).

¹²⁹ [2004] EWHC 1884

¹³⁰ Ibid, para 6.

¹³¹ See e.g. para 15: 'This letter was read by the Prime Minister who wrote across the top of it "Get them back". He also wrote next to the paragraph that set out the assurances objected to by the Interior Minister "This is a bit much. Why do we need all these things?"'.

¹³² Ibid, para 14.

¹³³ (2005) 41 EHRR 494. In the subsequent 2008 case of *Ismoilov v Russia*, however, the Court held that returning refugees would violate Article 3 ECHR as they faced a real risk of torture or ill-treatment, notwithstanding the assurances received from the Uzbek government: 'In its judgment in the Chahal case the Court cautioned against reliance on diplomatic assurances against torture from a State where torture is endemic or persistent (see Chahal, cited above, § 105). In the recent case of *Saadi v. Italy* the Court also found that diplomatic assurances were not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where reliable sources had reported practices resorted to or tolerated by the authorities which were manifestly contrary to the principles of the Convention Given that the practice of torture in Uzbekistan is described by reputable international experts as systematic ... the Court is not persuaded that the assurances from the Uzbek authorities offered a reliable guarantee against the risk of ill-treatment (para 127).

subjected to acts of torture or sentenced to capital punishment', noting that Uzbekistan was already a party to the UN Convention against Torture.¹³⁴ In a dissenting opinion, however, Judges Bratza, Bonello and Hedigan were strongly critical of the weight given to the assurances by the majority:¹³⁵

[A]n assurance, even one given in good faith, that an individual will not be subjected to ill-treatment is not of itself a sufficient safeguard where doubts exist as to its effective implementation (see, for example, Chahal, cited above). The weight to be attached to assurances emanating from a receiving State must in every case depend on the situation prevailing in that State at the material time. The evidence as to the treatment of political dissidents in Uzbekistan at the time of the applicants' surrender is such, in our view, as to give rise to serious doubts as to the effectiveness of the assurances in providing the applicants with an adequate guarantee of safety.

The same applies to the majority's reliance on the fact that Uzbekistan was a party to the Convention against Torture. In this regard we note, in particular, the finding of Amnesty International that Uzbekistan had failed to implement its treaty obligations under that convention and that, despite those obligations, widespread allegations of ill-treatment and torture of members of opposition parties and movements continued to be made at the date of the applicants' arrest and surrender.

97. The 2005 case of *Agiza v Sweden* before the UN Committee Against Torture shows the shortcomings of assurances subject to post-return monitoring.¹³⁶ Agiza was an Egyptian national whom the Swedish authorities sought to deport. Prior to his deportation, Swedish officials met with Egyptian government representatives in Cairo to obtain guarantees 'that the complainant and his family would be treated in accordance with international law upon return to Egypt'.¹³⁷ The following week, Agiza was deported to Cairo. Although he was visited by Swedish authorities approximately once a month, the Committee noted that:¹³⁸

the visits were short, took place in a prison which is not the one where the complainant was actually detained, were not conducted in private and without the presence of any medical practitioners or experts.

¹³⁴ Ibid, para 28. A further assurance from the Uzbek Ministry of Foreign Affairs maintained that 'The assurances given by the Public Prosecutor of the Republic of Uzbekistan concerning Mr Mamatkulov and Mr Askarov comply with Uzbekistan's obligations under the [UN Convention Against Torture]'.

¹³⁵ Ibid, para 10 of dissenting judgment.

¹³⁶ CAT/C/34/D/233/2003, 20 May 2005.

¹³⁷ Ibid, para 4.12

¹³⁸ Ibid, para 3.4

98. Following reports of his torture received from other visitors, the Swedish Ambassador visited Agiza in prison in March 2003.¹³⁹

The complainant allegedly stated for the first time that he had been subjected to torture. In response to the question as to why he had not mentioned this before, he allegedly responded, 'It does no longer matter what I say, I will nevertheless be treated the same way'.

99. Following the meeting, the Swedish government requested that the Egyptian authorities arrange an independent and impartial inquiry into the allegations. For its part, the Egyptian government denied the allegations and 'gave no direct answer' to the Swedish request for an independent investigation.¹⁴⁰ The Committee held that the Swedish government's deportation using assurances amounted to a breach of the prohibition against refoulement contrary to Article 3 of the Convention Against Torture.¹⁴¹

... 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.

The procurement of assurances from Egypt, the Committee held, 'which ... provided no mechanism for their *enforcement*, did not suffice to protect against this manifest risk'.¹⁴² Similar conclusions were reached by the Committee Against Torture in the 2007 case of *Pelit v Azerbaijan*, finding that the applicant's extradition to Turkey breached article 3 of the Torture Convention notwithstanding assurances against ill-treatment given by the Turkish authorities.¹⁴³

100. In the 2008 case of *Saadi v Italy*,¹⁴⁴ the Grand Chamber of the European Court of Human Rights held that Italy's proposed deportation of Saadi, a Tunisian national, would breach Article 3 ECHR, notwithstanding the assurances of the Tunisian authorities that he would be

¹³⁹ Ibid, para 2.10

¹⁴⁰ Ibid, para 11.3

¹⁴¹ Ibid, para 13.4

¹⁴² Ibid. Emphasis added. See also the decision of the UN Human Rights Committee in *Alzery v. Sweden*, CCPR/C/88/D/1416/2005, 10 November 2006 in similar terms.

¹⁴³ Communication No. 281/2005, CAT/C/38/D/281/2005, 5 June 2007.

¹⁴⁴ (2008) 24 BHLR 123. The case was notable because it was one in which the UK government had intervened to invite the Grand Chamber to reverse its earlier decision in *Chahal*, arguing that 'because of its rigidity that principle had caused many difficulties for the Contracting States by preventing them in practice from enforcing expulsion measures'. Instead, the UK urged, the Court should allow the risk of ill-treatment under Article 3 ECHR to be balanced against the threat to national security posed by a suspect. The Grand Chamber, for its part, rejected the UK submissions on the correct approach to Article 3, labelling it as 'misconceived' (para 139).

treated 'in strict conformity with the national legislation in force and under the sole safeguard of the relevant Tunisian statutes'.¹⁴⁵ As the Court pointed out, the Tunisian obligations did not more than restate Tunisia's obligations under domestic and international law.¹⁴⁶

... the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where, as in the present case, reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention.

No matter what the content of the assurances, however, the Court (para 148) held that assurances between states do not absolve:¹⁴⁷

the Court from the obligation to examine whether such assurances provided, in their practical application, a sufficient guarantee that the applicant would be protected against the risk of treatment prohibited by the Convention ... The weight to be given to assurances from the receiving State depends, in each case, on the circumstances obtaining at the material time.

The Court's approach, then, is not that assurances against ill-treatment can never be relevant. After all, assessing the risk of ill-treatment in any particular case is, after all, a question of fact, and it can hardly be said that an assurance from one government to another is factually irrelevant to the question of how a suspect will be treated. The key point that emerges from the Court's case law is that the mere fact of an assurance is no answer to the court's inquiry as to risk. An assurance is merely one element among many to be weighed in the balance, and the weight to be given to an assurance will always depend on the particular circumstances of each case. Most of all, an assurance can only be considered 'sufficient' if, in the language of *Soering*, it 'eliminates' the real risk that a suspect would be ill-treated.

Assurances against torture are unreliable

101. It is important to draw a distinction, therefore, between the use of assurances in a general sense on the one hand – e.g. in the broader context of deportation, immigration removal or extradition between different states – and the use of assurances *against torture and ill-treatment in the context of removal to countries which routinely use torture*, on the other hand.

¹⁴⁵ Ibid, para 54. The Foreign Ministry also assured that 'Tunisian laws in force guarantee and protect the rights of prisoners in Tunisia and secure to them the right to a fair trial. The Minister would point out that Tunisia has voluntarily acceded to the relevant international treaties and conventions'.

¹⁴⁶ Ibid, para 147.

¹⁴⁷ Ibid, para 148.

102. In the recent admissibility decision by the European Court of Human Rights, for instance, concerning the proposed extradition of Babar Ahmad and Abu Hamza to the US, the Court had regard to a number of assurances given by the US authorities, including firm assurances that the defendants would be prosecuted in federal court, and not in a military commission, nor would they be declared enemy combatants nor the death penalty sought in their cases.¹⁴⁸ The Court rejected the defendants complaints that the assurances were not sufficient to prevent them from being designated as enemy combatants or made liable to extraordinary rendition. In doing so, it gave weight to the fact that the US was a democracy governed by respect for human rights and the rule of law, and to the fact that there was no evidence that the US government had ever breached an assurance of this kind in an extradition case:¹⁴⁹

The Court considers that, in extradition cases, it is appropriate that that presumption be applied to a requesting State *which has a long history of respect for democracy, human rights and the rule of law*, and which has longstanding extradition arrangements with Contracting States.

Accordingly, the Court found, there was ‘no reason to question the United States Government’s assurances that the applicants will be tried in federal courts and enjoy the full panoply of rights and protections that are provided to defendants in those courts’.¹⁵⁰ Notwithstanding the grave problems arising from the previous administration’s policies in Guantanamo Bay and elsewhere, the Court was satisfied that the US government’s assurances would continue to be honoured.

103. The contrast between the Court’s acceptance of the US assurances, and its rejection of those from countries such as Tunisia¹⁵¹ and Uzbekistan,¹⁵² shows the enormous difference between relying on an assurance given by a country ‘which has a long history of respect for democracy, human rights and the rule of law’ and one given by a country with a well-established reputation for using torture. As Aeschylus once said, ‘it is not the oath which makes us believe the man, but the man the oath’.¹⁵³

104. In JUSTICE’s view, the UK government’s policy of negotiating assurances with countries known to use torture in order to reduce the risk of ill-treatment to those returned is therefore

¹⁴⁸ *Babar Ahmad and others v United Kingdom*, partial admissibility decision as to the admissibility of application nos. 24027/07, 11949/08 and 36742/08, dated 6 July 2010.

¹⁴⁹ Para 105.

¹⁵⁰ Para 159.

¹⁵¹ See *Saadi v Italy*, n144 above.

¹⁵² See *Isimilov v Russia*, n133 above.

¹⁵³ Fragment 385, trans MH Morgan (1895).

hopelessly flawed. First of all, as the UN Special Rapporteur Against Torture pointed out in 2005:¹⁵⁴

The fact that such assurances are sought shows in itself that the sending country perceives a serious risk of the deportee being subjected to torture or ill treatment upon arrival in the receiving country.

In the case of Algeria, Jordan and Libya – three countries from which the UK has received assurances¹⁵⁵ – this risk of torture is extremely well-established, as was repeatedly conceded by the Foreign Office experts in proceedings before the Special Immigration Appeals Commission (SIAC). See, for example, SIAC’s conclusions in one of the Algerian cases that:¹⁵⁶

it would be naïve to conclude that no person suspected of terrorist activity, in particular foreign terrorist activity, is at risk of torture or ill-treatment at the hands of Algerian security forces, in particular the DRS [département du Renseignement et de la Sécurité].

In the case of Jordan, the Foreign Office’s own country expert did not contest the many reports that the Jordanian authorities – and especially its key security agency, the GID – frequently tortured suspects in custody.¹⁵⁷ In relation to Libya, the Foreign Office’s Special Representative for Deportation with Assurances was similarly candid about the Libyan regime’s use of torture:¹⁵⁸

¹⁵⁴ United Nations press release, ‘Diplomatic assurances’ not an adequate safeguard for deportees UN Special Rapporteur Against Torture warns’, 23 August 2005.

¹⁵⁵ Jordan and Libya both concluded formal memoranda of understanding with the UK government, as have Ethiopia and Lebanon. The negotiations for a similar memorandum with Algeria fell through, but the Home Secretary nonetheless relied upon a general assurance given by the Algerian authorities in proceedings before SIAC. See *Y v Secretary of State for the Home Department* (SC/36/2005, 24 August 2006) para 256 per Ouseley J: ‘The Algerian stance on ill-treatment had always been that they objected to repeating, in generic form, commitments which they had entered into in the Convention against Torture and in the International Convention on Civil and Political Rights. But they had no difficulty in committing themselves to treating those returned fully in accord with those obligations. A general reiteration was seen as casting doubt on whether they would abide by commitments which they had already entered into, whereas an individual assurance was seen as applying to an individual the general obligation already undertaken. Their history, that is their colonial past, made them very sensitive about that. No open assurance was more explicit than that given in the December 2005 answers, which said that Y had the right to “respect... for his human dignity” in all circumstances. Representatives of the [Algerian Security Service] and other relevant Ministries had been present at all the talks and had accepted the commitments’.

¹⁵⁶ *BB v Secretary of State for the Home Department* (SC/ 39/2005, 5 December 2006), para 9.

¹⁵⁷ *Omar Othman (aka Abu Qatada) v Secretary of State for the Home Department* (SC/15/2005, 26 February 2007), paras 129-153.

¹⁵⁸ *DD and AS v Secretary of State for the Home Department* (SC/42 and 50/2005, 27 April 2007), para 145.

Mr Layden agreed that Libya had a sorry record on torture and stated that if this had not been the case, the United Kingdom government would not have needed to secure the assurances that have been secured about the treatment of Libyan terrorist suspects detained in the UK. In his evidence, he agreed that the sequence of reporting from respectable and reputable NGOs was so consistent that one that simply could not ignore it and, as a consequence, he accepted that but for assurances there was a real risk of torture of the political opponents of Colonel Qadhafi and the regime.

105. It is also telling that none of the memoranda of understanding concluded with Jordan and Libya and other countries even mention the word 'torture' or the phrase 'inhuman or degrading treatment'. Indeed, the prohibition against ill-treatment is never referred to directly. Instead, receiving states are under a positive obligation to provide detainees with:

... adequate accommodation, nourishment, and medical treatment, and [to] be treated in a humane and proper manner, *in accordance with internationally accepted standards*.

As Lord Bingham noted:¹⁵⁹

[A] country that promises not to torture anybody we have detained, is most unlikely to admit they ever have tortured anybody. So it is like an alcoholic saying, I'm a reformed alcoholic without ever admitting their alcoholism.

106. In such circumstances, we do not believe that the seriousness of the risk is something capable of being reduced by assurances. On the contrary, the reputation of each country for the use of torture goes to the very credibility of the assurances themselves. For Algeria, Jordan and Libya are all countries that have signed and ratified the UN Convention Against Torture – a more formal and solemn international instrument than any memoranda between states – and yet each is acknowledged by the Foreign Office to be regularly in breach of it.

107. The factual backdrop for assessing assurances is, therefore, not simply the fact that Algeria et al have used torture, but that they have continued to do so for many years in breach of their international obligations, and in the face of international opprobrium for having done so. The significance of Algeria, Jordan and Libya giving assurances against torture must be measured against the fact that they have already done so, and breached those assurances on many occasions. Contrary to the conclusions of SIAC, it is therefore hardly 'unthinkable' that Algeria or Jordan would breach their assurances not to ill-treat suspects because of the international

¹⁵⁹ New Zealand press interview, 8 December 2008: <http://gordoncampbell.scoop.co.nz/archives/160>

outcry that would result: their repeated breaches of their promises under the Torture Convention make it all too easy to imagine. As the Court of Appeal noted in 2007:¹⁶⁰

If a country is disrespectful of international norms and obligations, it is likely to be no less disrespectful of its obligations under a lower-level instrument such as a diplomatic note.

The credibility of assurances against torture being given by a country that routinely practices it is further undermined by (i) the inherent difficulties in detecting torture and (ii) assuming it is detected, the lack of any means for the assurances to be enforced.

Assurances against torture are ineffective

108. Defending the use of MOUs before SIAC, the government laid particular emphasis on the importance of post-return monitoring as a safeguard against ill-treatment. Both the Jordanian and Libyan MOUs provide for detainees to receive visits from UK officials, for instance, as well as an 'independent' monitoring body nominated jointly by the UK and the receiving state (although in the case of Libya this turned out to be the Gaddafi Foundation run by Saif Gaddafi, the Colonel's son).¹⁶¹ Although SIAC found that post-return monitoring was not enough to save the Libyan MOU, it agreed with the Foreign Office that such monitoring was a key safeguard of the Jordanian memorandum. Even in the case of return to Algeria, where no formal arrangements for post-return monitoring existed, SIAC reasoned that the Algerian assurance was capable of being verified by NGOs such as Amnesty International who had been able to secure access in respect of previous returnees.¹⁶²

¹⁶⁰ *RB, and U v Secretary of State for the Home Department* [2007] EWCA Civ. 808 at para 30. For its part, however, SIAC rejected this argument in Abu Qatada's case: 'we have some difficulty in seeing why [the UN Special Rapporteur against Torture] regards it as being unclear why a bilateral agreement in the form of an MOU would be adhered to, where a multilateral human rights agreement with reporting arrangements has been breached. The answer here as set out above is precisely that it is bilateral, and is the result of a longstanding and friendly relationship in which there are incentives on both sides to comply once the agreement was signed. The failure of those who regard these arrangements as unenforceable, in some asserted but not altogether realistic comparison with international human rights agreements, is a failure to see them in their specific political and diplomatic context, a context which will vary from country to country' (*BB v Secretary of State for the Home Department*, n156 above, para 508).

¹⁶¹ The only differences of substance between the Libyan and Lebanese MOUs and the Jordanian MOU is the scope of the remit given to the monitoring body and the provision of medical examinations: under the Jordanian MOU, the monitoring body was responsible only for visiting the suspect while detained; under the Libyan and Lebanese MOUs, the monitoring body is responsible for supervising *all* the assurances. The Jordanian MOU also makes no provision for medical inspection, whereas the more recent MOUs do. The Ethiopian MOU was concluded on 12 December 2008 but does not appear to be publicly available.

¹⁶² *RB* at para 19. Amnesty, for its part, vigorously opposed the returns to Algeria and argued that its ability to operate in the country was not an effective safeguard. See more recently Amnesty International's report, *Dangerous Deals: Europe's reliance on 'diplomatic assurances' against torture* (April 2010).

109. However, SIAC showed little awareness of the substantial difficulties involved in *detecting* torture and ill-treatment, focusing almost completely on treatment involving direct violence against the person and ignoring or excluding the possibility of ‘non-physical’ techniques such as sensory deprivation and sensory bombardment, solitary confinement, humiliating treatment, threats and intimidation.¹⁶³ Added to this is the obvious point that detection depends to a large extent on the cooperation of the individual detainee who is entirely in the hands of the state responsible for his treatment. A detainee who has been the victim of ill-treatment may therefore refuse to report it to outside visitors for fear of reprisals, either against him or family members.

110. In the case of *Agiza v Sweden*, for instance, the allegation of torture by the Egyptian authorities only came to light when – in his words – it ‘no longer matter[ed] what [he] said’ to the Swedish officials who visited him every month. The Jordanian MOU makes provision for fortnightly visits from the Adaleh Centre but no provision for medical examination, raising serious doubts about the Centre’s ability to detect physical – let alone psychological – ill-treatment. In the Algerian cases, of course, there was not even the assurance of monitoring – SIAC instead concluded that the British Embassy would be able to ‘maintain contact’ with any detainee and NGOs such as Amnesty International ‘can be relied upon to find out if [assurances] are breached and publicise that fact’.¹⁶⁴ In *RB*, SIAC did concede that at least one method of torture might not leave physical marks.¹⁶⁵

It is, of course, true that a detainee could be tortured by the chiffon method, and refuse to say anything about it afterwards but such an event could occur even under a monitoring regime.

But the fact that non-detection would occur even with a monitoring regime is only an argument that shows the inadequacy of monitoring regimes in general: it is hardly an argument that supports sending a suspect back to a country without one.

¹⁶³ See e.g. M Basoglu, M Livanou, C Crnobar, ‘Torture vs Other Cruel, Inhuman and Degrading Treatment – Is the Distinction Real or Apparent?’ (2007) 3 *Archives of General Psychiatry* 64: ‘In conclusion, aggressive interrogation techniques or detention procedures involving deprivation of basic needs, exposure to aversive environmental conditions, forced stress positions, hooding or blindfolding, isolation, restriction of movement, forced nudity, threats, humiliating treatment, and other psychological manipulations conducive to anxiety, fear, and helplessness in the detainee do not seem to be substantially different from physical torture in terms of the extent of mental suffering they cause, the underlying mechanisms of traumatic stress, and their long-term traumatic effects’. See also the discussion of the psychological effects of isolation, sensory bombardment/deprivation and witnessing torture of others in the report of Physicians for Human Rights, *Broken Laws, Broken Lives: Medical Evidence of Torture by US Personnel and Its Impact*, June 2008).

¹⁶⁴ BB, n156 above, para 21.

¹⁶⁵ *Ibid.*

111. Secondly, SIAC failed to appreciate problems surrounding the *deniability* of torture, especially 'non-physical' techniques. Denial is, after all, the default position in such cases. In *Agiza*, for instance, the allegation of torture was immediately denied by the Egyptian authorities. And, despite the wealth of evidence available, Algeria, Jordan and Libya have never admitted using torture.¹⁶⁶ There is, of course, a genuine problem for a state that has previously used torture, in that even if it is telling the truth in a particular case it is unlikely to be believed. But this does not mean that such states deserve, as SIAC gave them, the benefit of the doubt. Indeed, the potential for false allegations of torture undermines one of SIAC's key conclusions concerning the return of Abu Qatada:¹⁶⁷

If he were to be tortured or ill-treated, there probably would be a considerable outcry in Jordan, regardless of any MOU. The likely inflaming of Palestinian and extremist or anti-Western feelings would be destabilising for the government. The Jordanian Government would be well aware of that potential risk and, in its own interests, would take steps to ensure that that did not happen.

112. But, as SIAC also concluded, 'a serious publicised allegation, true or not, could be as destabilising as proof that the allegation was correct'.¹⁶⁸ In other words, an allegation would be destabilising whether it was true or false and – in the case of a false allegation – the legitimate denial of the Jordan government would carry as little weight as their previous false denials. So SIAC's conclusion that the authorities would have reason to protect Abu Qatada because of his high-profile holds no water. On the contrary, they have nothing to lose from torturing him because (i) such torture – especially 'non-physical' methods – would be difficult to detect (especially given the MOU's lack of any provision for independent medical inspection) and (ii) any denials on their part would be unlikely to be believed in any event.

Assurances against torture are unenforceable

113. None of the MOUs agreed by the UK contain any provision for adjudication, enforcement or sanction for breach of any kind. The only relevant provision is that either state may withdraw from the arrangement by giving six months notice but is obliged to continue to apply the terms of the arrangement to any person returned under its provisions. Again, there is no provision for what may happen if this requirement is also breached.

¹⁶⁶ Indeed, such governments go further, accusing their accusers of making false allegations - see e.g. the US State Department Report on Jordan for 2005: 'Government officials denied many allegations of detainee abuse, pointing out that many defendants claimed abuse in order to shift the focus away from their crimes. During the year, defendants in nearly every case before the State Security Court alleged that they were tortured while in custody' (para 128).

¹⁶⁷ *Abu Qatada v Secretary of State for the Home Department*, n71 above, para 356.

¹⁶⁸ *Ibid.*

114. In the case of Algeria, negotiations on a formal MOU collapsed on the sticking point of a post-return monitoring. Following this, the British government relied upon an exchange of letters and *notes verbale* between Tony Blair and the President Bouteflika of Algeria, together with the general terms of the 2005 Algerian Charter for Peace and National Reconciliation, as providing the necessary assurance against ill-treatment of any suspects returned. In other words, it did no more than restate Algeria's existing obligations under domestic and international law. As with the MOUs concluded with other countries, it offered no mechanism for enforcement nor justiciable rights of any kind.

115. Unfortunately, SIAC gave no weight to the lack of any mechanism for *enforcing* any of the assurances, other than the diplomatic consequences that would follow from a breach being discovered. For the assurances themselves make no mention of enforcement of any kind, still less of any remedy for the detainee who is discovered to be a victim of torture. Certainly there is little prospect of detainees gaining redress from the domestic legal systems of Algeria or Jordan.¹⁶⁹ One would think that this lack of any provision for enforcement went directly to the question of the reliability of assurances. We would not say, for instance, that a contract under ordinary law which did not contain any sanction for breach or remedies would be one that could safely be relied upon in any serious matter. Still less would we take seriously a criminal law that did not provide any punishment for its breach. And yet the absence of any formal provision for enforcement of the assurances drew no adverse comment or note of concern from SIAC:¹⁷⁰

... whilst it is true that there are no specific sanctions for breaches, and the MOU is certainly not legally enforceable, there are sound reasons why Jordan would comply and seek to avoid breaches. The MOU would be an important factor in the way in which Jordan conducted itself.

116. SIAC instead accepted the Foreign Office's evidence that the Algerian and Jordanian governments set great store in their relations with the UK and would not breach their assurance for fear of jeopardising those relations and, as the Foreign Office expert described it, their own sense of honour:¹⁷¹

¹⁶⁹ See e.g. the 2007 report of the UN Special Rapporteur on Torture: 'A torture victim in Jordan who seeks redress, especially one who is a criminal suspect still in detention, faces an impenetrable wall of conflicting interest. In simple terms, the person whom a suspect is accusing of committing torture is the same person who is guarding him or her, and the same person who is appointed to investigate and prosecute the allegations of torture being made against him' (para 53).

¹⁷⁰ *Ibid*, para 507.

¹⁷¹ *Ibid*, para 285.

[The Jordanian authorities] were men of honour and [the Foreign Office expert] did not believe that they would lightly not implement the commitment they had given or turn a blind eye whilst others did not implement it.

117. Of course, the desire to maintain good relations would equally count as an additional reason why Jordan and Algeria would wish to *conceal* any breach that did occur and deny any breach that was detected. SIAC considered the argument that both the UK and Jordan 'would have an incentive not to explore the existence of any breaches' but concluded that:¹⁷²

The incentives which are present for both parties to the MOU would bite when an allegation was made and not just when the breach was proved. Take the desire of the UK to return Islamist extremists to Middle East and North African countries: that process would be inhibited by any failure to provide proper answers to well-founded allegations of a breach and if there were allegations that the Centre had been prevented from fulfilling its functions, that would be a very serious matter.

118. This does not, however, answer the point for it continues on the assumption that the processes of detection and monitoring will work effectively to bring torture to light, when both parties have an interest in non-detection. More generally, it is difficult to reconcile SIAC's conclusions about the importance of diplomatic ties with any appreciable reality. The mere fact that the governments of Jordan and Algeria are sensitive about protecting their reputations on the international stage proves nothing – all governments are jealous of slights to their dignity and it is often the governments with the worst reputations that are the most protective of them. There can be no better illustration of this than that, even in the midst of the Final Solution, there were still SS Officers worried that breach of an assurance to the Slovakian government would 'seriously injure the ... prestige of Germany abroad'. It may indeed be true that the Jordanians who negotiated the MOU with Britain think themselves 'men of honour' but that honour counts for little when one considers the methods of their General Intelligence Department. SIAC's conclusion that the receiving states' fear of damage to their reputation would be sufficient to protect detainees from torture is one that is highly unlikely to be shared by the European Court of Human Rights.

119. We are equally skeptical of SIAC's finding that the UK government would be vigilant in ensuring that the assurances were honoured by Algeria and Jordan, including the threat of cutting ties, loss of economic cooperation, etc, in the event that breaches were discovered. For if it were true that the UK was prepared to use its diplomatic weight to prevent the use of torture by both countries, it surely has been a course of action that has been open to it on a unilateral basis for many a year. The UK does not appear hitherto to have threatened either Algeria or Jordan with negative consequences for their many breaches of the Torture

Convention, so why is it credible to think that it will do so in the context of bilateral memoranda? On the contrary, the weight of recent evidence suggests that the human rights and rule of law concerns of the UK government are all too easily subordinated to its other foreign interests. In the Corner House case, for instance, the Prime Minister and the Attorney General each made clear that the importance of UK cooperation with Saudi Arabia on national security matters took precedence over a criminal investigation into corruption and bribery claims.¹⁷³ And in the Binyam Mohammed case, the importance of US intelligence sharing was repeatedly cited by the government as grounds for refusing to disclose evidence showing potential complicity by UK officials in the torture of a British resident in an interrogation in Pakistan.¹⁷⁴ SIAC accepted the Foreign Office's evidence that Jordan is 'a valued partner in the Middle East' whose relations include 'defence and security cooperation'.¹⁷⁵ SIAC similarly accepted that 'there are significant and strengthening mutual ties between Algeria and the United Kingdom' including 'the exchange of security and counter-terrorism information'.¹⁷⁶ Even if the UK were diligent in monitoring compliance with the assurances, it is not difficult to imagine a similar threat from either Algeria or Jordan to withdraw cooperation on counter-terrorism matters in the event that a breach were discovered.

Assurances against torture are wrong in principle

120. Not only are assurances from countries that practice torture unreliable, ineffective, and unenforceable, but – by giving rise to partial and selective treatment – they also undermine the international prohibition against torture, and the UK's own role in the fight to eradicate its use. Accordingly, the practice of negotiating assurances against torture with countries known to use it has been strongly criticised by a number of international officials and bodies, including the UN High Commissioner on Human Rights, the Council of Europe Commissioner on Human Rights, the UN Special Rapporteur against Torture, and the European Committee for the Prevention of Torture (CPT). Moreover, both the CPT and the International Committee of the Red Cross (ICRC) have refused to take part in post-return monitoring of detainees provided by such assurances, on the basis that such arrangements are contrary to their mandates.

121. First, we share the view of Human Rights Watch and Amnesty International that the use of assurances does little to improve conditions in the receiving state, but instead promotes a double standard, seeking the well-being of particular detainees notwithstanding the general risk of torture. Not only does this bilateral approach of selective treatment involve turning a blind eye to broader violations in the receiving state, but it erodes respect for multilateral

¹⁷² *Ibid*, para 504.

¹⁷³ *R (Corner House Research and others) v Director of the Serious Fraud Office* [2008] UKHL 60.

¹⁷⁴ See e.g. *R (Binyam Mohammed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 158.

¹⁷⁵ *Abu Qatada*, n71 above, para 277.

treaties such as the UN Convention Against Torture. In 2005, for instance, the CPT voiced its fears that that use of assurances risked undermining these multilateral arrangements:¹⁷⁷

Fears are growing that the use of diplomatic assurances is in fact circumventing the prohibition of torture and ill-treatment. The seeking of diplomatic assurances from countries with a poor overall record in relation to torture and ill-treatment is giving rise to particular concern.

In 2006, the UN High Commissioner on Human Rights wrote to the Council of Europe to oppose the creation of guidelines for the use of assurances, expressing her view that 'diplomatic assurances do not work as they do not provide adequate protection against torture and ill-treatment'.¹⁷⁸ Later that same year, the UN Special Rapporteur on Torture argued strongly against the use of assurances.¹⁷⁹

The prohibition of torture is absolute and States risk violating this prohibition—their obligations under international law—by transferring persons to countries where they may be at risk of torture. I reiterate that diplomatic assurances are not legally binding, undermine existing obligations of States to prohibit torture, are ineffective and unreliable in ensuring the protection of returned persons, and therefore shall not be resorted to by States.

122. Similar views have also been expressed by the Council of Europe Commissioner on Human Rights:¹⁸⁰

No one must be deported to countries where they risk torture. The attempts to overcome this prohibition through 'diplomatic assurances' are not acceptable. Governments which have used torture cannot be trusted to make an exception in an individual case through a separate bilateral agreement. Moreover, respect for such promises is very difficult to monitor. It is absolutely wrong to put individuals at risk through testing such dubious assurances.

Lastly, both the ICRC and the CPT have refused to undertake monitoring roles under diplomatic assurances, arguing that they cannot be part of arrangements that do not apply to all detainees.

¹⁷⁶ *BB*, n66 above, para 18(ii).

¹⁷⁷ 15th General Report of the European Committee for the Prevention of Torture, (2005) paras 38-39,

¹⁷⁸ Statement by UN High Commissioner for Human Rights Louise Arbour to the Council of Europe's Group of Experts on Human Rights and the Fight Against Terrorism, 29-31 March 2006

¹⁷⁹ Statement of the Special Rapporteur on Torture Manfred Nowak to the 2nd Session of the UN Human Rights Council, Geneva, 20 September 2006.

¹⁸⁰ Thomas Hammarberg, 'Viewpoint: The Protection against Torture Must be Strengthened', 18 February 2008.

As the High Court noted in the *Youssef* case concerning the negotiation of assurances with the Egyptian government:¹⁸¹

The ICRC had a permanent presence [in Egypt] but had been refused access to prisoners; it would not visit particular prisoners without a general agreement allowing it access to all prisoners and would not get involved in any process which could in any way be perceived to contribute to, facilitate, or result in the deportation of individuals to Egypt.

123. In these submissions, we have not detailed our additional concerns at the fairness of SIAC procedures that rely heavily on closed material – these are set out at length in our June 2009 report *Secret Evidence*, and we note the matter is likely to be determined by the Supreme Court in 2011.¹⁸² Similarly, JUSTICE has intervened jointly with Amnesty International and Human Rights Watch before the European Court of Human Rights in the *Othman* case, and we predict that the Strasbourg Court will not be as credulous as SIAC or as complacent as the House of Lords were on the issue of safety on return.
124. The point is not that an assurance against ill-treatment from a foreign government is never a relevant consideration in determining whether a person will face a real risk of ill-treatment contrary to Article 3 ECHR on return. After all, Article 3 ECHR covers a much broader range of treatment than torture at the hands of the state, and it would be unusual if – for example – one could not place some weight on an assurance from another EU country, in the knowledge that the framework of the EU and the Council of Europe as well as domestic law would provide a degree of security. The point is that an assurance from a country such as Algeria or Jordan can never be credible, for promises against torture from a government that tortures its own citizens are worth nothing.
125. More generally, however, we believe that seeking agreements with foreign torturers not to practice their art is an inherently dishonourable way of addressing the risk of ill-treatment in deportation cases. Post-return monitoring seems a fine idea until one remembers that Eichmann was willing to consider it too. Indeed, one might have thought that that example would be reason enough for the British government to chose a different path. We do not doubt the good intentions of those who seek to ameliorate the risk of torture, but to solicit such promises in the name of protecting human rights seems to us a discreditable sham, one that does nothing to protect detainees in the receiving state and serves only to cheapen Britain's own reputation in the international fight against torture.

¹⁸¹ See n129 above, para 26.

¹⁸² See the Court of Appeal decision in *W (Algeria) and others v Secretary of State for the Home Department* [2010] EWCA Civ 898, which JUSTICE understands is likely to be appealed to the Supreme Court.

Measures to deal with organisations that promote hatred or violence

126. It has long been a criminal offence to incite violence, including acts of terrorism. This was made abundantly clear in the case of Abu Hamza, who was convicted in February 2006 of six counts of soliciting murder contrary to section 4 of the Offences against the Person Act 1861.¹⁸³ In addition, section 59 of the Terrorism Act 2000 criminalises the incitement of terrorists acts outside the UK.

127. The incitement of hatred on grounds of race or religion is also covered by offences under section 18(1) of the Public Order Act 1986 and section 1 of the Racial and Religious Hatred Act 2006 respectively.

128. In addition, Part 2 of the Terrorism Act 2000 provides the Home Secretary with the power to proscribe a group as a terrorist organisation where she reasonably believes that it:

- (a) commits or participates in acts of terrorism,
- (b) prepares for terrorism,
- (c) promotes or encourages terrorism, or
- (d) is otherwise concerned in terrorism.

It is a criminal offence to belong to, support or wear the uniform of a proscribed organisation.¹⁸⁴ Under section 21 of the Terrorism Act 2006, the grounds for proscription were broadened to include any group that engages in 'or is associated with':

the unlawful glorification of the commission or preparation (whether in the past, in the future or generally) of acts of terrorism

129. More broadly, sections 1 and 2 of the 2006 Act provided the criminal offences of 'encouraging' terrorism and the dissemination of terrorist publications respectively. Under section 1, it is not necessary for the publisher to actually *intend* others to be encouraged: it will be enough for the prosecution to prove that she was reckless as to whether others might read the statement as

¹⁸³ See e.g. 'Hamza guilty of inciting murder', BBC Online, 7 February 2006.

¹⁸⁴ See sections 11-13 of the 2000 Act.

encouragement of an act of terrorism.¹⁸⁵ Section 1 provides that 'indirect encouragement' includes statements that either 'glorify' acts of terrorism or:¹⁸⁶

is a statement from which those members of the public could reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated by them in existing circumstances.

130. Since being introduced, we are aware of only one person has been convicted under the section.¹⁸⁷ Malcolm Hodges of Kent had sent letters to dozens of mosques inviting them to attack various accountancy bodies including the Association of Chartered Certified Accountants, (ACCA).¹⁸⁸ Mr Hodges failed his accountancy exam with the ACCA in 1993. According to the CPS, the letter sent by Hodges had:¹⁸⁹

glorified terrorist attacks including 7/7 and 9/11 and praised Osama Bin Laden. It also stated 'you are right to kill infidels' but are mistaken in targeting planes and the underground, suggesting appropriate targets would be four listed accountancy institutions as they are connected to the 'corrupt and decadent western society and economy of our enemy'. The letter also suggested that 'a parcel or letter bomb would be most effective'.

In February 2008, Hodges pleaded guilty to encouraging terrorism under section was sentenced to 2 years imprisonment. Sentencing Hodges, Judge Roberts said 'there was a real risk that if one of your letters had fallen into the wrong hands there might have been a terrorist atrocity and people might have been killed or seriously injured'.

131. In our view, section 1 is both poorly defined and utterly unnecessary. First, there was no gap in the existing law relating to incitement of criminal or terrorist acts that required its enactment. This was made abundantly clear in the case of Abu Hamza, who was convicted on 7 February 2006 of six counts of soliciting murder contrary to section 4 of the Offences against the Person Act 1861. Nor is it clear that Hodges could not have been convicted under the Act, including making threats to kill under section 16.

¹⁸⁵ Section 1(2)(b)(ii).

¹⁸⁶ Section 1(3).

¹⁸⁷ See Parliamentary questions, Hansard, 10 February 2009, col 1834W: information on the number of prosecutions and convictions under section 1 'is not currently held'.

¹⁸⁸ See also Daily Mail, 'Man urged terror attacks on accountancy institutes 10 years after failing professional exams', 19 February 2009.

¹⁸⁹ www.cps.gov.uk/publications/prosecution/ctd.html.

132. Secondly, the lack of any requirement on the prosecution to show intent, and the use of such vague language as ‘glorification’ means that the section has broad scope to interfere with the legitimate exercise of the right to free expression. Although the government claimed that section 1 was necessary to give effect to the UK’s obligations under the 2005 Council of Europe Convention on the Prevention of Terrorism, neither recklessness nor glorification are required by the Convention.¹⁹⁰ Indeed, article 12 of the Convention requires that any criminal provisions must, among other things, respect the right to freedom of expression under the European Convention on Human Rights and the International Covenant on Civil and Political Rights.
133. Section 2 makes it a criminal offence to distribute, sell or circulate a ‘terrorist publication’, either with the intention of encouraging or assisting others to commit an act of terrorism, or recklessly. A ‘terrorist publication’ is any item either likely to be understood by others as encouraging or assisting in acts of terrorism, or ‘to be useful’ for such purposes.
134. In November 2007, Abdul Rahman pleaded guilty to one count of disseminating terrorist publications and one count of preparation of acts of terrorism contrary to section 5 of the 2006 Act. The ‘terrorist publication’ in question was a letter from a school friend from Pakistan who had since returned there and had undertaken ‘terrorist training’. The school friend asked Rahman to circulate the letter to others, which he had not done yet but intended to do. He was sentenced to concurrent sentences of six years imprisonment on both counts, which the Court of Appeal subsequently reduced to 5½ years.¹⁹¹
135. In March 2008, Bilal Mohammed, a seller of Islamic material in a street stall, pleaded guilty to a single count of disseminating a terrorist publication and sentenced to three years, less 414 days spent in custody. In his guilty plea, he denied any intention of encouraging terrorism but ‘he was, however, aware of what he was selling and reckless as to whether or not this had the effect of encouraging the commission of terrorist acts’.¹⁹² According to the Court of Appeal, his plea of guilty ‘related to 9 identified items of material that included recordings of terrorist training, extracts from the lives of terrorists and glorification of terrorist activities and those who committed them’.¹⁹³ The sentencing judge said:¹⁹⁴

I accept that you sold this material openly in street stalls, not in a clandestine fashion, and I accept it is difficult sometimes to draw the line between material which is illegal

¹⁹⁰ See article 5.

¹⁹¹ *Rahman and another v R* [2008] EWCA Crim 1465, para 33.

¹⁹² *Ibid*, para 34.

¹⁹³ *Ibid*, para 35.

¹⁹⁴ *Ibid*, para 39. Emphasis added.

and that which is not. I also accept that much of this material is available on websites throughout the world.

On appeal, the Court of Appeal accepted that his offence had been one of recklessness rather than intentional distribution of terrorist material,¹⁹⁵ and reduced his sentence to two years imprisonment.

136. In our view, the offences of sections 57 and 58 of the Terrorism Act 2000 already provide more than sufficient scope to criminalise the possession of items and documents for a terrorist purpose.¹⁹⁶ Section 2, by contrast, is aimed at those who circulate material that falls under the scope of ‘encouragement to terrorism’ contrary to section 1. In practice, it appears to be used either to target distributors of low-level jihadist material, or as a fallback for those charged with more serious terrorist offences. In both cases, section 2 is unnecessary.

137. For the above reasons, we recommend the repeal of both sections 1 and 2 of the 2006 Act. For similar reasons of vagueness, we also recommend the repeal of section 21 of the 2006 Act, extending the scope of the proscription powers under Part 2 of the 2000 Act.

138. More generally, we see no sensible grounds on which the law could be further extended to cover the activities of groups that are thought to promote hatred or violence but do not fall within the scope of the existing offences. In JUSTICE’s view, the problem with the current law is not that it is too narrow but that it is already too broad. We would therefore oppose any attempt to broaden the law in this area.

Use of surveillance powers by local authorities

139. JUSTICE welcomes the coalition government’s commitment to the review of surveillance powers under the Regulation of Investigatory Powers Act 2000 (RIPA). In our view, there are a large number of public bodies (not just local authorities) whose functions do not justify the use of surveillance powers and, accordingly, should be removed from the RIPA framework.

140. However, although we note the current review is limited to the powers of local authorities, we would take the opportunity to note that RIPA in general is in desperate need of root-and-branch reform: it not only fails to provide a clear and coherent framework for the authorisation of surveillance powers but it also fails to provide sufficient safeguards against unnecessary and disproportionate use of those powers. In JUSTICE’s view, *all* intrusive surveillance by public bodies should be subject to prior judicial authorisation. Moreover, since covert

¹⁹⁵ *Ibid*, para 47.

¹⁹⁶ See the judgment of the House of Lords in *R v G* [2009] UKHL 13.

surveillance involves a *prima facie* infringement of the right to privacy, its use should be restricted to those public bodies involved in the detection, investigation and prevention of serious criminal activity (including serious threats to public safety, national security and the economic well-being of the United Kingdom). It is wholly inappropriate for covert surveillance powers to be used for the purposes of investigating minor offences or other regulatory matters.

141. As a starting point, JUSTICE believes that the use of covert investigatory techniques by a public body against any person constitutes a *prima facie* infringement of that person's right to respect for family and private life under article 8 of the European Convention on Human Rights.¹⁹⁷ As the European Court of Human Rights has held in the context of the covert interception of communications:¹⁹⁸

the *mere existence* of legislation which allows a system for the secret monitoring of communications entails a threat of surveillance for all those to whom the legislation may be applied.

Although the interception of private communications is one of the most intrusive means of covert surveillance, it is clear that the same principle applies *mutatis mutandi* to other, less intrusive kinds of lawful surveillance.¹⁹⁹

142. Even access to communications data, arguably the least intrusive form of surveillance data available to public authorities under RIPA, may still disclose highly sensitive personal information about an individual. Due to the serious impact that surveillance has on personal privacy, surveillance powers should be restricted to only those public bodies involved in the detection, investigation and prevention of serious criminal activity (including serious threats to public safety, national security or the economic well-being of the country). However, many of the public bodies currently empowered under RIPA to use surveillance powers fall outside this category. It is a serious mistake to think that just because a public body performs important and necessary functions, that it is therefore appropriate for that body to use covert surveillance

¹⁹⁷ Indeed, article 8 is arguably engaged whenever public bodies gather intelligence on individuals, whether or not the information is already in the public domain: see e.g. *Rotaru v Romania* (2000) 8 BHRC 43 at para 43: 'public information can fall within the scope of private life where it is systematically collected and stored in files held by the authorities'.

¹⁹⁸ *Liberty and others v United Kingdom* (1 July 2008, application no. 58243/00), para 56. Emphasis added. See also e.g. *Kopp v Switzerland* (1999) 27 EHRR 91, para 64: 'In the context of secret measures of surveillance or interception of communications by public authorities, because of the lack of public scrutiny and the risk of misuse of power, the domestic law must provide some protection to the individual against arbitrary interference with Article 8 rights. Thus, the domestic law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in and conditions on which public authorities are empowered to resort to any such secret measures'.

¹⁹⁹ *Ibid*, para 63: 'The Court does not consider that there is any ground to apply different principles concerning the accessibility and clarity of the rules governing the interception of individual communications, on the one hand, and more general programmes of surveillance, on the other'.

powers as part of its investigation and enforcement activities. The seriousness of the interference with privacy means that the use of covert surveillance to investigate minor offences or regulatory matters (e.g. fly tipping, dumping, dog fouling, investigating market stalls or fraudulent school place applications) will never be a proportionate response. As the Investigatory Powers Tribunal noted in its recent decision concerning the use of covert surveillance by Poole Borough Council for 3 weeks against a family suspected of giving inaccurate information to their local educational authority:²⁰⁰

There was no consideration whether it was necessary to put [the family] under surveillance in order to prevent or detect a crime by their mother in supplying allegedly false information to the Council about their ordinary residence. The Tribunal conclude that there should have been.

143. Accordingly, we see no justification for local authorities having access to surveillance powers under RIPA and recommend that they be removed from the framework. More generally, we recommend that RIPA powers be restricted to only those public bodies already allowed to use intrusive surveillance (e.g. police, SOCA and the Security Service). Other public authorities should be empowered to use directed surveillance, employ covert intelligence sources or access communications data only where they are involved in the investigation and prosecution of serious criminal activity. In JUSTICE's view, the normal range of non-covert investigatory methods (e.g. official inquiries, visits from inspectors) should be more than adequate to enable such bodies to carry out their functions in an effective manner.

144. In JUSTICE's view, the existing RIPA framework for authorisation of surveillance is bureaucratic and inefficient. At the same time, it also fails to provide sufficient safeguards against unnecessary and disproportionate use of surveillance powers. We therefore propose that a far more principled, coherent and streamlined procedure would be for all public authorities to apply for prior judicial authorisation for the use of intrusive surveillance, serious forms of directed surveillance (as well as interceptions of communications).²⁰¹ We note that prior judicial authorisation of search warrants has been established practice for several centuries. Police are therefore already extremely familiar with the process of obtaining a warrant from a judge. We see no reason why the same procedure could not be adapted to require judges to issue surveillance warrants as well. As the European Court of Human Rights has held:²⁰²

²⁰⁰ *Paton v Poole Borough Council* (IPT 09/01/C et seq, 29 July 2010), para 68. The Tribunal concluded that the surveillance 'was not proportionate and could not reasonably have been believed to be proportionate' (para 73).

²⁰¹ We do not, however, propose prior judicial authorisation for the use of less serious forms of directed surveillance, the use of covert human intelligence sources and access to communications data by law enforcement bodies.

²⁰² *Rotaru v Romania*, n197 above, at para 59.

The rule of law implies, *inter alia*, that interference by the executive authorities with an individual's rights should be subject to effective supervision, which should normally be carried out by the judiciary, at least in the last resort, since judicial control affords the best guarantees of independence, impartiality and a proper procedure.

And, as the Court noted in a separate case:²⁰³

It is, to say the least, astonishing that [the] task [of authorising interceptions] should be assigned to an official of the Post Office's legal department, who is a member of the executive, without supervision by an independent judge.

Prior judicial authorisation for intrusive surveillance would also have the additional benefit of reducing the need for the *ex post facto* independent oversight provided by the current Surveillance Commissioners, the Interception of Communications Commissioner and the Intelligence Services Commissioner.

Access to communications data

145. JUSTICE is also concerned with the relative ease by which public bodies can access communications data. In our view, communications data is *prima facie* personal data about an individual's private communications. As the Information Commissioner has noted, 'communication records ... can be highly intrusive even if no content is collected. You can tell an awful lot about some people's personal circumstances from the people they are talking to and the websites they visit'.²⁰⁴ Indeed, in many cases, the combination of traffic data, service use information and subscriber information about an individual's private communications may reveal more about that person than interception of the contents of those communications.

146. We also note that the existing law governing the retention of communications data is incredibly broad: in addition to the requirements of Part 11 of the Anti-Terrorism Crime and Security Act 2001, the 2006 and 2008 EU Retention Directives require communication service providers to retain all relevant telephony and internet data for a minimum of one year. Clearly, this is an enormous amount of data concerning the private communications of individuals.

147. In JUSTICE's view, the mere *retention* of data poses a risk to privacy, in the sense that it creates a pool of highly personal data that may be accessed unnecessarily or for some improper purpose. It follows that the greater the amount of communications data that is

²⁰³ *Kopp v Switzerland* (1999) 27 EHRR 91 at para 74.

²⁰⁴ Information Commissioner's statement on the Communications Data Bill, 27 April 2009.

retained, the greater the potential for significant interference with the right to privacy. As the Newton Committee reported in 2003:²⁰⁵

there are obvious risks to privacy in keeping information about individuals. The existence of data creates its own demand for access to it from a wide range of bodies for a variety of reasons, mostly unrelated to national security. It also creates the potential for abuse.

148. Reports of local authorities and other public bodies using communications data to investigate such matters as school applications and fly-tipping illustrate how readily access to such data can be abused. In our view, existing safeguards concerning access to communications data are inadequate: the ability of local authorities, for instance, to access such data in relation to trivial regulatory matters seems to us a plainly disproportionate use of such powers. Nor do we consider that ex post facto oversight by the Interception of Communications Commissioner, nor right of appeal to the Investigatory Powers Tribunal is sufficient. Instead, we suggest that the current arrangements under Part 1 of RIPA for access to communications data should be restricted to the police, the intelligence services and other prosecuting bodies such as HM Revenue and Customs. All other public bodies seeking access to communications data should be required to obtain prior judicial authorisation.

Terrorist asset-freezing powers

149. In principle, a power to freeze the assets of those involved in terrorism is a sound counter-terrorism measure. Unfortunately the existing UK law on terrorist asset-freezing is an unsatisfactory patchwork of barely used statutory powers and grossly disproportionate executive measures. Nor, as currently drafted, will the Terrorist Asset-Freezing Bill currently before the House of Lords remedy this situation. On the contrary:

- It goes much further than is required by UN Security Council Resolution 1373;
- It does not address the UK's obligations under UN Security Council Resolution 1267;
- It does not replace the asset-freezing powers in the Anti-Terrorism Crime and Security Act 2001 or the terrorist financing provisions of the Terrorism Act 2000;
- It essentially continues the same asset-freezing regime that was established by the Terrorism Order 2006, and which the UK Supreme Court described as 'draconian' and held to be unlawful in January;

²⁰⁵ See n4 above, para 398.

- The few safeguards that the Bill contains are wholly inadequate;
- Consequently, it is highly likely to be held by the courts to be incompatible with fundamental rights, in particular the right to private property and the right to respect for private and family life.

The Anti-Terrorism Crime and Security Act 2001

150. Part 2 of the 2001 Act gave the Treasury power to make an order freezing the assets of a person or government where it believes action is likely to be taken either threatening the life or property of those in the UK or to the detriment of the UK economy.²⁰⁶

151. After 9/11, however, two orders in council were made under the United Nations Act 1946: the Terrorism (United Nations Measures) Order 2001 and the Al Qaeda and Taliban (United Nations Measures Order) 2002.²⁰⁷ In December 2003, the Newton Committee recommended that the provisions in Part 2 'should be reconsidered on their own merits in the context of more appropriate legislation for emergencies; the present Part 2 powers should then lapse'.²⁰⁸

152. On 30 October 2008, the Master of the Rolls said 'there is no evidence of which we are aware that [Part 2 of] this Act has been used so far'.²⁰⁹ In fact, the first use of Part 2 was three weeks earlier when Part 2 was used to make the Landsbanki Freezing Order 2008. Professor Clive Walker argued that, while the order was probably lawful, it was nonetheless a 'dangerous use' of legislation passed in response to a terrorist threat.²¹⁰

It is hard to argue that the protean term 'national security' is wholly irrelevant, but there is surely a conceptual difference between a threat from an attack and an economic collapse. It must be remembered that the [2001 Act] was rushed through Parliament after 9/11, allowing scant debate on many of its parts As a result, the Government's use of the [2001 Act], while technically legal, amounts to an invocation of a law which was never designed to be implemented against friendly governments as a reaction to an economic crash.

²⁰⁶ Section 4.

²⁰⁷ These were later replaced by the Al-Qaida and Taliban (United Nations Measures) Order 2006 and the Terrorism (United Nations Measures) Order 2006.

²⁰⁸ Newton report, n4 above, paras 149-150.

²⁰⁹ *A, K, M, Q and G v HM Treasury* [2008] EWCA Civ 1187.

²¹⁰ C Walker and G Lennon, 'Hot money in a cold climate' [2009] *Public Law* 37 and 39-40.

Parts 5 and Schedule 7 of the Counter-Terrorism Act 2008 made fresh provision for financial restrictions against those suspected of involvement in terrorist financing and money laundering. However, it did not repeal Part 2 of the 2001 Act.

The Supreme Court judgment in Ahmed and others v HM Treasury

153. *Ahmed and others v HM Treasury* concerned five men who had been designated under the Terrorism Order 2006 and the Al-Qaeda Order 2006 (successors to the 2001 and 2002 Orders referred to above), on the basis that the Treasury suspected them of involvement in financing terrorism. Under Part 3 of the Terrorism Act 2000, it is a criminal offence to finance terrorism, punishable by up to 14 years imprisonment. However, none of the men had been charged or convicted of terrorist financing.
154. The government maintained that it was necessary to make the Terrorism Order 2006 by way of the fast-track procedure under the United Nations Act 1946 in order to give effect to its obligations under UN Security Council resolution 1373 (UNSCR 1373). This was adopted on 28 September 2001 and obliged all member states of the UN to take action to 'prevent and suppress the financing of terrorist acts' and 'freeze without delay funds or other financial assets ... of persons who commit or attempt to commit terrorist acts'.
155. However, resolution 1373 made no mention of freezing the assets of those only suspected of involvement in financing terrorism.
156. Under the Terrorism Order 2006, sweeping financial restrictions could be imposed on any person whom the Treasury reasonably suspected of involvement in financing terrorism. The order also made no provision for those affected by the financial restrictions to challenge the basis on which they had been suspected of involvement in financing terrorism.
157. The Deputy President of the Supreme Court, Lord Hope, described the effect of designation under the 2006 Order in the following terms:²¹¹

It is no exaggeration to say ... that designated persons are effectively prisoners of the state [T]heir freedom of movement is severely restricted without access to funds or other economic resources, and the effect on both them and their families can be devastating.

²¹¹ *Ahmed and others v HM Treasury* [2010] UKSC 2 at para 11.

In particular, Lord Hope found that the restrictions imposed by the orders 'strike at the very heart of the individual's basic right to live his own life as he chooses'.²¹² Another Supreme Court justice, Lord Brown, commented that.²¹³

The draconian nature of the regime imposed under these asset-freezing Orders can hardly be over-stated.

158. The Supreme Court quashed the Terrorism Order 2006 and the Al-Qaeda Order 2006 on the basis that both orders went well beyond the terms of the United Nations Act 1946, which allows for fast-track implementation of UN Security Council resolutions. The President of the Supreme Court, Lord Phillips, said.²¹⁴

[UN Security Council Resolution 1373] nowhere requires, expressly or by implication, the freezing of the assets of those who are merely suspected of the criminal offences in question. Such a requirement would radically change the effect of the measures. Even if the test were that of reasonable suspicion, the result would almost inevitably be that some who were subjected to freezing orders were not guilty of the offences of which they were reasonably suspected. The consequences of a freezing order, not merely on the enjoyment of property, but upon the enjoyment of private and family life are dire. If imposed on reasonable suspicion they can last indefinitely, without the question of whether or not the suspicion is well-founded ever being subject to judicial determination.

159. Lord Brown noted that the UK government had gone much further than other common law countries had in implementing resolution 1373.²¹⁵

[Australian, Canadian and New Zealand] provisions implementing Resolution 1373 are altogether more tightly drawn than our Terrorism Order. Unless designated by the Sanctions Committee, people cannot be subjected to executive designation and asset freezing unless the following conditions are met: in Australia only when the Minister is satisfied that the person "is" involved in terrorism; in Canada only when the Governor General is satisfied that there are reasonable grounds to believe this; in New Zealand only if the Prime Minister believes this on reasonable grounds (except that he can make an interim designation for 30 days if he has good cause to suspect it). Contrast all this with the position under the Terrorism Order where HM Treasury can designate – on a

²¹² Ibid, para 60.

²¹³ Ibid, para 192.

²¹⁴ Ibid, para 137.

²¹⁵ Ibid, paras 199-200.

long-term basis – merely on ‘reasonable grounds for suspecting’ the person to be involved in terrorism The way Australia, New Zealand and Canada have dealt with these UNSCRs to my mind tends to support the conclusion I have reached about the impugned Orders...SCR 1373 certainly cannot be regarded as mandating the long-term asset-freezing of people not designated by the [UN] Sanctions Committee merely on the ground of reasonable suspicion.

160. The Supreme Court concluded, in particular, that the Treasury’s orders violated a number of basic rights including:

- The right to property under article 1 of the First Protocol to the European Convention on Human Rights;
- The right to respect for family and private life under article 8 ECHR; and
- The right of access to a court, protected under the common law and article 6 ECHR.

In particular, Lord Phillips noted that ‘access to a court to protect one’s rights is the foundation of the rule of law’.²¹⁶ The Deputy President Lord Hope concluded that:²¹⁷

The consequences of the Orders that were made in this case are so drastic and so oppressive that we must be just as alert to see that the coercive action that the Treasury have taken really is within the powers that the 1946 Act has given them. Even in the face of the threat of international terrorism, the safety of the people is not the supreme law. We must be just as careful to guard against unrestrained encroachments on personal liberty.

The Terrorist Asset-Freezing (Temporary Provisions) Act 2010

161. Since the Supreme Court in *Ahmed* had held that the UN Act 1946 did not give the Treasury the power to make such a broad order, the asset-freezing regime was immediately void (the Supreme Court having refused to grant a stay of execution of its judgment).

162. The previous government therefore introduced emergency legislation to provide for the ‘temporary validity’ of the 2006 Order (together with the 2001 and 2009 Orders, made in similar terms) in order to maintain asset-freezing restrictions ‘whilst the Government takes steps to put in place by means of primary legislation an asset freezing regime to comply with

²¹⁶ *Ibid*, para 146.

²¹⁷ *Ibid*, para 6.

the obligations in resolution 1373'.²¹⁸ The Bill was introduced on 5 February and received Royal Assent on 10 February. At the same time, a draft Bill was also published.

Consultation on the draft Bill

163. Following the enactment of the Terrorist Asset-Freezing (Temporary Provisions) Act 2010 (the 2010 Act) in February, the previous government published a consultation in March on the draft Bill.

164. JUSTICE responded to the consultation on 17 June. In our response, we were extremely critical of the draft Bill, noting that it essentially did no more than put the previous asset-freezing regime under the Terrorism Order 2006 on a statutory footing, and – to this extent – was no better than the 2010 Act passed on an emergency basis.

165. By 15 July, the government had produced its response, and introduced the present Bill.

166. The explanatory notes to the current Bill describe it as being 'broadly based on the consultation draft'. This is, if anything, an understatement. As far as we have been able to discern, *Part 1 of the Bill is clause-for-clause and, in most cases, word-for-word identical to the draft Bill published in February*, save for subtle differences in the order of the clauses (e.g. clause 14 on circumventing prohibitions was previously clause 13) and the organisation of the chapters. The only substantive changes made following consultation appear to be:

- The scope of the duty of confidentiality in clause 6(2) has been broadened very slightly to include not only persons who are 'provided' with confidential information but also those who 'obtain' it;
- The offences in clauses 7-11 have been slightly reworded, but there is otherwise no material difference between the scope of the offences in the draft Bill and those in the current Bill;
- Clause 9(3) now provides an exception for benefit payments made to family members;

In other words, the current Bill is essentially the draft Bill that was published in February with only marginal differences.

²¹⁸ Explanatory notes to the Terrorist Asset-Freezing (Temporary Provisions) Bill, para 8.

167. In its response to the consultation, the government noted that the Home Office was currently conducting a review of terrorism legislation and suggested that it may consider further safeguards after this review has been completed:

the Government will consider further whether there is a strong case for strengthening civil liberties safeguards in the asset freezing regime alongside the wider counter-terrorism review that it is undertaking, which is due to conclude in Autumn 2010. If the conclusions for the review support the case for making further changes to strengthen civil liberties safeguards in the asset freezing regime the relevant amendments will be brought forward.

168. As much as we welcome the coalition government's current review of counter-terrorism measures, we think it obvious that – following the damning judgment of the Supreme Court in February – compatibility with fundamental rights should have been at the heart of the consultation exercise from the very outset. It is highly unfortunate that, after five months, apparently no further thought appears to have been given by the Treasury to the serious human rights concerns identified by the Supreme Court's judgment.

The current Bill

169. Like the draft Bill published in February, the current Bill suffers from a number of serious flaws that makes it deeply unsuited to serve as permanent asset-freezing legislation. These are:

- a. It does not address the UK's obligations under UN Security Council Resolution 1267;
- b. It does not replace the existing asset-freezing and terrorist financing powers in other terrorism legislation, including those under Part 2 of the Anti-Terrorism Crime and Security Act 2001;
- c. It goes much further than is required by UN Security Council Resolution 1373;
- d. Consequently, it is highly likely to be held by the courts to be incompatible with fundamental rights; and
- e. The few safeguards that the Bill does contain (judicial review, independent review, and use of special advocates) are inadequate.

Failure to implement UNSCR 1267

170. The draft Bill deals only with the UK's obligations under UNSCR 1373. The implementation of UN Security Council Resolution 1267 (also known as 'the Al Qaeda order') has instead been left to the Al Qaida and Taliban (Asset Freezing) Regulations 2010,²¹⁹ which the Treasury made in April under section 2(2) of the European Communities Act 1972. We think it is extremely undesirable for the law relating to terrorist financing to be further fragmented in this way. As Lord Mance noted in his judgment in *Ahmed and others*:²²⁰

One can certainly feel concern about the development and continuation over the years of a patchwork of over-lapping anti-terrorism measures, some receiving Parliamentary scrutiny, others simply the result of executive action

It may well be thought desirable that such measures should be debated in Parliament alongside the primary legislation which Parliament did enact, and correspondingly undesirable that there should be developed and continued, as a result of executive Orders, a patchwork of measures that have and have not been debated in Parliament.

Failure to address other asset-freezing provisions of UK law

171. The Bill also fails to address the other provisions of UK law dealing with terrorist financing and terrorist asset-freezing. Indeed, to read the explanatory notes for the current Bill, one might not even be aware that Part 2 of the Anti-Terrorism Crime and Security Act 2001 already provides for the power to freeze the assets of those who pose a threat to the UK's national security. Similarly, Part 3 of the Terrorism Act 2000 contains a series of measures relating to terrorist financing and Parts 5 and 6 of the Counter-Terrorism Act 2008 provide measures for financial restriction proceedings. The Al Qaida and Taliban (Asset Freezing) Regulations 2010 also make provision for asset-freezing under UNSCR 1267. Rather than take the opportunity of the last several months to address wholesale rationalisation and reform, the Treasury clearly intends for the asset-freezing provisions of the Bill to operate alongside these other provisions.

172. Rather than continue to add to the current 'patchwork', we think it better that the entire law on terrorist financing should be addressed as part of a comprehensive overhaul of counter-terrorism legislation. Among other things, this would enable Parliament to consider such questions as the implementation of UN obligations, national security and the protection of human rights in the round – i.e. by reference to the full range of measures, rather than in a piecemeal fashion.

²¹⁹ SI 2010/1197, made 7 April 2010.

²²⁰ Paras 220 and 223.

173. In the circumstances, merely adding safeguards to the current Bill – while surely desirable in relation to the Bill itself – is not a satisfactory way to legislate on a matter as important as terrorism. We recognise that Parliament has, to an extent, created a rod for its own back by introducing a sunset clause of 31 December. We also recognise that the current review of counter-terrorism is unlikely to produce, at least in the short-term, wholesale reform of the entire legal framework governing counter-terrorism measures. Nonetheless, the coalition government should at the very least commit itself to bringing forward a draft consolidation Bill on this issue in 2011 for pre-legislative scrutiny.

Retention of the 'reasonable suspicion' threshold

174. Clause 2 of the Bill sets out the Treasury's power to designate persons for the purposes of asset-freezing. Specifically, clause 2(1)(a) provides that the Treasury may designate a person where they 'have reasonable grounds for suspecting' that the person 'is or has been involved in terrorist activity'.

175. It is obvious that, by retaining the 'reasonable suspicion' test of the original Terrorism Order quashed by the Supreme Court in *Ahmed*, the Bill goes significantly further than what is required by UNSCR 1373. As the President of the Court, Lord Phillips of Worth-Matavers held:²²¹

Paragraph 1(c) [of UNSCR 1373] requires the freezing of the assets of those who commit the acts that the Resolution has required should be criminalised and their agents. Thus what the Resolution requires is *the freezing of the assets of criminals*. The natural way of giving effect to this requirement would be by freezing the assets of those convicted of or charged with the offences in question. This would permit the freezing of assets pending trial on a criminal charge, but would make the long term freezing of assets dependent upon conviction of the relevant criminal offence to the criminal standard of proof. *The Resolution nowhere requires, expressly or by implication, the freezing of the assets of those who are merely suspected of the criminal offences in question. Such a requirement would radically change the effect of the measures.*

The Deputy President, Lord Hope, similarly held that:²²²

SCR 1373(2001) is not phrased in terms of reasonable suspicion. It refers instead to persons 'who commit, or attempt to commit, terrorist acts'. The preamble refers to 'acts

²²¹ *Ahmed*, paras 136-137. Emphasis added.

²²² *Ibid*, para 58. Emphasis added.

of terrorism'. The standard of proof is not addressed. The question how persons falling within the ambit of the decision are to be identified is left to the member states. Transposition of the direction into domestic law under section 1 of the 1946 Act raises questions of judgment as to what is 'necessary' on the one hand and what is 'expedient' on the other. *It was not necessary to introduce the reasonable suspicion test in order to reproduce what the SCR requires.* It may well have been expedient to do so, to ease the process of identifying those who should be restricted in their access to funds or economic resources. But widening the scope of the Order in this way was not just a drafting exercise. It was bound to have a very real impact on the people that were exposed to the restrictions as a result of it.

176. It is therefore beyond doubt that a test of 'reasonable suspicion' is not needed in order to implement the UK's obligations under UNSCR 1373. The explanatory notes to the Bill offer no explanation for the Treasury's decision to retain the test. The consultation paper stated that:²²³

In line with [Financial Action Task Force] guidelines, the Government continues to believe that 'reasonable suspicion' *is the appropriate legal test* if States are to have a fully effective preventative asset-freezing *regime in accordance with the requirements of UNSCR 1373 (2001).*

The Treasury's response to the consultation similarly states.²²⁴

The Government believes that, to be consistent with UNSCR 1373 (2001) and to meet the UK's national security needs, the asset freezing regime should be preventative in nature. This means that the regime should not only allow assets to be frozen when someone has already been convicted of a terrorist offence, but it should allow preventative action to be taken to disrupt terrorist activity. Taking a preventative approach is consistent with standards set out by the international Financial Action Task Force (FATF) and with the approach taken by many other countries. *The Government believes that the ability to act on reasonable suspicion is an appropriate standard,* consistent with the preventative nature of the measures.

177. We are at a loss to understand these statements. The Supreme Court has made clear that a 'reasonable suspicion' test is not required in order to implement UNSCR 1373.²²⁵ The Treasury

²²³ Para 4.5. Emphasis added.

²²⁴ HM Treasury, *Draft Terrorist Asset Freezing Bill: Summary of Responses* (Cm 7888: July 2010), para 3.7.

²²⁵ Among other things, Lord Brown noted the more stringent tests applied by the Australian, Canadian and New Zealand legislation on terrorist financing: see paras 199-200: '[Australian, Canadian and New Zealand] provisions implementing Resolution 1373 are altogether more tightly drawn than our Terrorism Order. Unless designated by the Sanctions Committee, people cannot be subjected to executive designation and asset freezing unless the following conditions are met: in Australia

consultation paper and its subsequent response cites the FATF guidelines to support its conclusion that a 'reasonable suspicion' test *is* required. However, the question of what UNSCR 1373 requires by way of implementation is ultimately a question of law and the FATF is neither a judicial nor a legislative body. It is merely an advisory group set up to establish guidelines on money laundering and terrorist financing. Accordingly, it would be wholly improper for the Treasury to prefer the views of such a body on the question of implementation ahead of the conclusions of the Supreme Court.

Incompatibility of 'reasonable suspicion' test with fundamental rights

178. It is a basic principle of UK human rights law that any interference with qualified Convention rights such as article 8 must be shown to be both necessary and proportionate.²²⁶ The Treasury has repeatedly cited the need to implement UNSCR 1373 as its justification for legislating.²²⁷ Yet, as the Supreme Court has ruled, a test of reasonable suspicion is not necessary in order to implement UNSCR 1373. Moreover, as Lord Roger observed, it is the 'inevitable' consequence of adopting a reasonable suspicion test that 'sooner or later, someone will be designated who has not actually been committing or facilitating terrorist acts'.²²⁸

mistakes in designating will inevitably occur and, when they do, the individuals who are wrongly designated will find their funds and assets frozen and their lives disrupted, without their having any realistic prospect of putting matters right.

only when the Minister is satisfied that the person "is" involved in terrorism; in Canada only when the Governor General is satisfied that there are reasonable grounds to believe this; in New Zealand only if the Prime Minister believes this on reasonable grounds (except that he can make an interim designation for 30 days if he has good cause to suspect it). Contrast all this with the position under the Terrorism Order where HM Treasury can designate – on a long-term basis – merely on 'reasonable grounds for suspecting' the person to be involved in terrorism The way Australia, New Zealand and Canada have dealt with these UNSCRs to my mind tends to support the conclusion I have reached about the impugned Orders...SCR 1373 certainly cannot be regarded as mandating the long-term asset-freezing of people not designated by the [UN] Sanctions Committee merely on the ground of reasonable suspicion'.

²²⁶ See e.g. the judgment of the Privy Council in *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 at p 80: whether interference with a fundamental right is proportionate to the legitimate end sought depends on whether: '(i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective'. See also the speeches of Lord Bingham in *Razgar v Secretary of State for the Home Department* [2004] UKHL 27 at para 20 ('[the question of proportionality] must always involve the striking of a fair balance between the rights of the individual and the interests of the community which is inherent in the whole of the Convention. The severity and consequences of the interference will call for careful assessment at this stage') and in *Huang v Secretary of State for the Home Department* [2007] UKHL 11 at para 19.

²²⁷ See e.g. para 3 of the Explanatory notes: 'The purpose of Part 1 of the Bill is to give effect in the United Kingdom to resolution 1373 (2001) adopted by the Security Council of the United Nations on 28th September 2001 ("resolution 1373") relating to terrorism'.

²²⁸ *Ahmed*, para 174.

179. As Lord Hope also noted, the restrictions imposed by the orders 'strike at the very heart of the individual's basic right to live his own life as he chooses'.²²⁹ The consultation paper claims that the Supreme Court 'did not condemn the Terrorism Order 2006 on wider grounds of incompatibility with fundamental rights'.²³⁰ However, only one member of the Court, Lord Brown, expressed a view that a proportionality challenge would have failed had the financial restrictions been imposed by primary legislation rather than by Order.²³¹ Lord Phillips merely agreed with Lord Mance that the criminal provisions of the Order were not so unclear as to breach article 7 ECHR. Both expressed doubt over whether the Order also was disproportionate in terms of article 8 and article 1 of Protocol 1, but declined to express a final view.²³² The majority of the Supreme Court declined to rule on the questions of certainty and proportionality, but made clear its view that the asset-freezing regime imposed by the Order was 'draconian'.²³³

180. Given the clear terms of the Supreme Court's judgment in *Ahmed*, we think it beyond question that the courts will ultimately find the draft Bill's adoption of a reasonable suspicion test in relation to designation to be a disproportionate interference with Convention rights, on the basis that it cannot be shown to be necessary for the sake of implementing UNSCR 1373. As we noted in our submissions to the Court in *Ahmed*:

in principle, asset-freezing measures should be justified only where the individual in question has: (a) been convicted of a serious criminal offence; which (b) makes clear his involvement in financing terrorism or other serious crime (cf. the Proceeds of Crime Act 2002). If there is a case for such measures being imposed in exceptional circumstances without a criminal conviction first being secured, there must nonetheless be sufficient safeguards against unfairness, including: (a) prior judicial authorisation based on (b) evidence of involvement in terrorist financing, proved to at least the civil standard; and (c) a fair hearing in open court. If such measures are to be imposed *ex parte* on an emergency basis without prior judicial authorisation, the case is even stronger for prompt judicial confirmation with a high standard of proof and full disclosure to the designated person.

²²⁹ *Ibid*, para 60.

²³⁰ Para 4.3.

²³¹ *Ahmed*, para 201.

²³² See para 235 per Lord Mance and para 144 per Lord Phillips.

²³³ Lords Hope and Brown described the regime as 'draconian' at paras 5, 60 and 192. Lord Walker and Lady Hale agreed with Lord Hope's judgment and, at para 174 of his judgment, Lord Rodger agreed with Lord Hope's reasoning at paras 60-61.

In other words, a standard of reasonable suspicion would only be acceptable where designation was made as a matter of urgency on an interim basis, in the manner of a freezing order in ordinary civil proceedings.

Lack of adequate safeguards

181. The explanatory notes suggest that provision of the right ‘to challenge decisions involving interferences ... offer adequate and effective safeguards against arbitrary interference’.²³⁴ However, the right of a designated person to apply to court for the designation to be set aside (clause 22(2)) will be of little comfort in the interim, given the severe interference that designation is likely to pose and the length of time it will inevitably take for any legal challenge to be properly determined. As Baroness Hale noted in *R (Wright) v Secretary of State for Health* concerning the provisional listing of care workers that prevented them from working pending their appeal to the Care Standards Tribunal:²³⁵

The care worker suffers possibly irreparable damage without being heard whatever the nature of the allegations made against her. The care worker may have a good answer to the allegations no matter how serious they are. There may well be cases where the need to protect the vulnerable is so urgent that an “ex parte” procedure can be justified. But one would then expect there to be a swift method of hearing both sides of the story and doing so before irreparable damage *The problem, it seems to me, stems from the draconian effect of provisional listing, coupled with the inevitable delay before a full merits hearing can be obtained.*

In *Wright*, the House of Lords unanimously ruled that the lack of opportunity to make representations prior to listing, together with the ‘draconian effect of provisional listing’ and ‘the inevitable delay before a full merits hearing can be obtained’ amounted to a breach of the right to a fair hearing under article 6 of the European Convention on Human Rights. As we submitted in *Ahmed*, the same is no less true in respect of asset-freezing decisions made without prior judicial authorisation, and without the person affected having the opportunity to challenge the case against him or her.

182. The difficulties involved in judicial review of the Treasury’s asset-freezing decisions are compounded by the fact that nearly all such decisions are based to some degree on classified material. Clause 23(4) of the Bill allows for the use of closed proceedings and special advocates in review proceedings. While this is undoubtedly an improvement over the previous regime under the Terrorism Order 2006 which allowed no possibility of effective review

²³⁴ Explanatory notes, para 116.

²³⁵ [2009] UKHL 3, para 29.

whatsoever, it is important not to confuse the use of special advocates with the idea of a fair hearing. Following the judgments of the European Court of Human Rights in *A and others v United Kingdom*²³⁶ and the House of Lords in *AF and others v Secretary of State for the Home Department (No 3)*,²³⁷ we welcome the recent Court of Appeal decision in *Mellat v HM Treasury*, which ruled that.²³⁸

the requirements of article 6(1) are such that the information to be provided by the Treasury must not merely be sufficient to enable [designated persons] to deny what is said against it. The [designated person] must be given sufficient information to enable it actually to refute, in so far as that is possible, the case made out against it.

183. Despite these rulings, however, we remain of the view that the closed material/special advocate procedure suffers from a number of inherent defects which makes it inherently incapable of delivering a fair hearing. These include (i) the prohibition on communication between the special advocate and the designated person following receipt of the closed material; (ii) limitations on the special advocate's access to expert evidence; and (iii) the lack of accountability of special advocates in performance of their duties. In this respect, the Treasury consultation paper claimed that special advocates are 'bound by the ethical standards of the Bar Council'.²³⁹ However, the Bar Council has never addressed the ethical issues arising from the use of special advocates, nor has it issued any guidance concerning professional standards on this matter. Since special advocates are explicitly stated to be not professionally responsible to those whom they represent,²⁴⁰ it is extremely difficult to see how the relevant professional standards of England and Wales or Scotland would apply. Indeed, as we noted in our 2009 report *Secret Evidence*, there would be insuperable practical difficulties in the Bar Council professionally regulating special advocates because of the need to obtain the relevant security clearance. That the Treasury consultation paper should have referred to Bar Council oversight as a safeguard suggests its lack of understanding of the problems surrounding the use of closed material and special advocates in general.

184. In addition to the use of special advocates and secret evidence, clause 23(3) allows the use of intercept material as evidence. However, we note that the use of special advocates in relation to intercept would be utterly unnecessary if the ban on intercept under section 17 of the Regulation of Investigatory Powers Act 2000 were lifted. As it is, the UK is the only western

²³⁶ (2009) 49 EHRR 29.

²³⁷ [2009] UKHL 28.

²³⁸ [2010] EWCA Civ 483.

²³⁹ Para 4.20.

²⁴⁰ See e.g. section 6(4) of the Special Immigration Appeals Commission Act 1997: a special advocate 'shall not be responsible to the person whose interests he is appointed to represent'.

country with a statutory prohibition on the use of intercept as evidence. We continue to find it absurd that intercept will be used as secret evidence in asset-freezing hearings when it is used in open court in such countries as Australia, Canada, New Zealand, South Africa and the United States.²⁴¹

185. Lastly, although the provisions for quarterly reporting by the Treasury (clause 24) and the provision of an independent reviewer to report annually (clause 25) are welcome, we consider that these hardly constitute adequate safeguards against disproportionate counter-terrorism measures. Indeed, as we noted in our evidence to the House of Lords Constitution Committee's inquiry on fast-track legislation, independent review has rarely provided much of a check against the disproportionate use of counter-terrorism powers, see e.g. the annual reports of the independent reviewer on the use of indefinite detention under Part 4 of the Anti-Terrorism Crime and Security Act 2001, as well as the 2003 report of the Privy Counsellors which recommended the repeal of Part 4 as 'a matter of urgency'. Notwithstanding these reports, Parliament passed on three opportunities to repeal Part 4. Similar provisions in the Prevention of Terrorism Act 2005 for independent statutory review and annual renewal by Parliament did not prevent, for example, the government's unlawful use of 18 hour curfews.²⁴² Reports to Parliament and independent reviews may perform a useful function but they generally do little to overcome the defects of incompatible legislation.

186. In conclusion, JUSTICE considers it highly unfortunate that the Bill seeks to do no more than put the old draconian asset-freezing regime of the Terrorism Order 2006 on a statutory footing. It is equally unfortunate that the law on terrorist financing continues to be developed in an apparently piecemeal and *ad hoc* manner. More generally, we fear that the extensive and long-term use of unlawful and disproportionate measures undermines respect for the rule of law.

187. We recognise that, due to the sunset clause contained in section 1(1) of the Terrorist Asset Freezing (Temporary Provisions) Act 2010, Parliament is under a duty to put in place some kind of replacement scheme before 31 December. However, for the reasons outlined above, we think it is important that Parliament address the various asset-freezing powers – including those in Part 2 of the 2001 Act – in the round. If it is necessary to proceed with the current Bill, we think it essential that the reasonable suspicion test be replaced with orders made under *at least* the civil standard of proof, and made by way of *inter partes* application to a court, rather than by way of executive decision on the basis of closed material.

²⁴¹ See JUSTICE's report *Intercept Evidence: Lifting the ban* (October 2006).

²⁴² It was not until the House of Lords judgment in *JJ* in October 2007 that this was corrected.

Outstanding issues

188. We note that the review's terms of reference have been limited to the six key areas set out above and, indeed, specifically exclude consideration of intercept as evidence. For these reasons, we do not propose to make any detailed submissions on points outside the scope of the review. However, we think it is nonetheless important to draw to the coalition government's attention the following outstanding issues. In JUSTICE's view, any effective review of the compatibility of UK counter-terrorism powers with fundamental rights must have regard to the following points.

Consolidation of terrorism legislation

189. In November 2001, the House of Commons Home Affairs Committee said:²⁴³

This country has more anti-terrorist legislation on its statute books than almost any other developed democracy. Much of it, rushed through in the wake of previous atrocities, proved ineffective and in some cases counter-productive and needed to be amended. Often it was supposed to be temporary and turned out to be permanent.

Since then, Parliament has enacted five further pieces of terrorism legislation – the 2001, 2005, 2006, 2008 and 2010 Acts comprising more than 300 additional sections and schedules to the statute books.

190. Parliament's desire to create more terrorism legislation was not entirely without cause. The threat of terrorism has become much more real since the Terrorism Act 2000 was passed nine years ago. The 9/11 attacks abroad and the 7/7 bombings in London have shown the damage that terrorism may inflict. In addition, the Crown Prosecution has successfully prosecuted individuals involved in terrorism plots, including the failed 21/7 bombers and members of the so-called fertiliser plot.

191. However, almost all of the terrorism law that has been passed since 2000 has been unnecessary and has made little difference to the effectiveness of counter-terrorism policing and prosecution. Of the 1,471 people arrested for terrorism between 11 September 2001 and 31 March 2009, only 340 were charged with terrorism-related offences, and only 196 convicted.²⁴⁴ Of those 196, we estimate that less than 25 (12%) have been convicted of an offence created after 2000, the majority of which were also convicted of a pre-2001 offence for which they received a more serious sentence:

²⁴³ *Report on the Anti-terrorism, Crime and Security Bill 2001* (2001-02 HC 351) para 1. Emphasis added.

²⁴⁴ Alan Travis, 'Two thirds of UK terror suspects released without charge', *The Guardian*, 13 May 2009.

Post 2000 terrorist offence	conviction	also convicted of pre-2001 offences?
failure to disclose information ²⁴⁵	5	yes
breach of a control order	1	no
encouragement of terrorism	1	no
dissemination of a terrorist publication	2	no
acts preparatory to terrorism	4	yes
attendance at a terrorist training camp ²⁴⁶	9	yes

The Supreme Court in *Ahmed* also noted the unsatisfactory patchwork nature of our terrorism laws in the area of asset-freezing. JUSTICE therefore believes there would be enormous benefit in rationalising the current UK legal framework governing counter-terrorism powers. While we welcome the review's focus on six of the most pressing areas, we think it important that the state of the law as a whole should not be neglected.

Intercept as evidence

192. Although it is outside the scope of the current review, JUSTICE believes that the issue of intercept evidence is central to any consideration of the effectiveness of the current law. It is no accident that the three most controversial counter-terrorism measures – indefinite detention without charge, control orders, and pre-charge detention in terrorism cases – have all been justified by reference to the problem of gathering sufficient evidence against suspects to enable their prosecution for terrorism offences.

193. JUSTICE has long supported the lifting of the ban on intercept evidence to enable charges to be brought swiftly against suspects in terrorism cases. Our October 2006 report, *Intercept Evidence: Lifting the ban* makes clear that the UK is the only western country with a statutory prohibition on the use of intercept as evidence in criminal prosecutions. Nor are the UK's disclosure obligations under article 6 of the European Convention on Human Rights any obstacle in this regard, as Lord Carlile mistakenly claims.²⁴⁷ As the recent Canadian Commission of Inquiry into the Air India bombing noted, the disclosure obligations under UK

²⁴⁵ Section 38B of the 2000 Act as amended by the 2001 Act.

²⁴⁶ The actual name of the offence is attendance at a place used for terrorist training (section 9 of the 2006 Act).

²⁴⁷ See Lord Carlile's 5th report on control orders, n24 above, para 59: 'Outside commentators have made comparisons with other jurisdictions where intercept is admissible. These comparisons are ill-informed and misleading. In our adversarial legal system the requirements of disclosure of material by the prosecution to the defence (there being no equivalent requirement on the defence) are far more demanding and revealing than in the jurisdiction of any comparable country'.

law are in fact less onerous than those under the Canadian Charter of Rights and Freedoms.²⁴⁸

In general, disclosure obligations in both the United States and the United Kingdom are less broad than in Canada. Both the United States and the United Kingdom attempt to flesh-out disclosure requirements in statutes and other rules while, as discussed above, Canada relies on a case-by-case adjudication under the Charter. Both the decreased breadth and increased certainty of disclosure requirements in the United States and the United Kingdom may make it less necessary for prosecutors to claim national security confidentiality over material that may be relevant to a case, but which does not significantly weaken the prosecution's case or strengthen the accused's case.

194. Moreover, it is apparent that intercept material from foreign sources (which is exempt from the UK's statutory ban) played a key role in the second and ultimately successful prosecution in the Operation Overt investigation, as the testimony of the current DPP Keir Starmer QC before the Joint Committee on Human Rights in November 2009 makes clear:²⁴⁹

Q171 Patrick Mercer: Can I ask you to throw your mind back to Operation Overt, the intercepted plan to bring down aircraft in the summer of 2006. The procuring of emails from California was crucial in this. Can you clarify the distinction in this particular case between information and evidence?

Mr Starmer (Director of Public Prosecutions): I have to be slightly circumspect about this case because, as you know, I consider there should be a retrial of the three remaining defendants. That, if it goes ahead, is going to go ahead next year and so the case is still live to that extent. In that case, *some email traffic between alleged conspirators was captured by internet service providers overseas. Efforts were made to obtain it and, eventually, through legal assistance it was obtained. There were a series of court orders in January and February of 2009 that released those emails from a US court of law in the district of California in accordance with a request from the UK. Then it was deployed by us in the second trial, the retrial, in that case. We considered that it added to the strength of the prosecution. It was used as evidence.*

It is almost certain that the UK authorities were already aware of the emails, having already intercepted them in the UK – it is very doubtful that the UK authorities would have known to request the emails from California otherwise. Indeed, it is highly likely that these emails were what motivated the decision of the UK police to arrest the suspects in the first place. However,

²⁴⁸ 'Disclosure and Secrecy in other Jurisdictions' in 'The Unique Challenges of Terrorism Prosecutions' (Ch 7, Vol 4 at p 267), *Air India Flight 182: A Canadian Tragedy* (June 2010).

²⁴⁹ House of Commons Home Affairs Committee, 10 November 2009, emphasis added.

although intercepted material can form the basis of reasonable suspicion to exercise powers of arrest, it remains unlawful for any evidence to be used in UK courts which even 'tends ... to suggest' the existence of an interception warrant issued by the Home Secretary.²⁵⁰ Accordingly, it would have been impossible to use this material in UK courts until copies of the same emails had been located by internet service providers overseas.

195. The fact that it should have been necessary to seek intercepted emails from servers in California in order to successfully prosecute terrorists here in the UK highlights the absurdity of the current UK ban on using intercept as evidence. Parliament and the new coalition government should work to lift the ban forthwith.

The statutory definition of terrorism

196. A central problem underlying the UK's legal framework for counter-terrorism powers is the breadth of the statutory definition of 'terrorism' in section 1 of the Terrorism Act. As is well-known, the definition applies not only to the threat or use of force against civilians or democratic governments, but also to the threat or use of force against any government anywhere in the world. Hence, the statutory definition would apply not only to the residents of North Korea or Burma engaged in violent resistance to their governments, but also to any individual or group who supports such activity from abroad.

197. It is widely accepted that where a non-democratic government is sufficiently arbitrary or oppressive, the use of force against that government may be justified in order to introduce or restore democratic institutions and ensure the protection of fundamental rights. Indeed, were it otherwise, the constitutional settlements wrought by Long Parliament and the 1688 Bill of Rights would be unlawful (both having involved the raising of armies in opposition to the lawful Sovereign). As Locke wrote in his Second Treatise of Government:²⁵¹

[W]hensoever the legislators endeavour to take away and destroy the property of the people, or to reduce them to slavery under arbitrary power, they put themselves into a state of war with the people, who are thereupon absolved from any farther obedience, and are left to the common refuge which God hath provided for all men against force and violence. Whensoever, therefore, the legislative shall transgress this fundamental

²⁵⁰ Section 17(1)(b) of the Regulation of Investigatory Powers Act 2000.

²⁵¹ (1690) Bk 2, Ch 19, para 222), emphasis added. The Declaration of Independence 1776 similarly observed: 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.--That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, *That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government,* laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness' (emphasis added).

rule of society, and either by ambition, fear, folly, or corruption, endeavour to grasp themselves, or put into the hands of any other, an absolute power over the lives, liberties, and estates of the people, by this breach of trust they forfeit the power the people had put into their hands for quite contrary ends, and it devolves to the people, who have a right to resume their original liberty, and by the establishment of a new legislative (such as they shall think fit), provide for their own safety and security, which is the end for which they are in society.

The necessity of using force to resist tyranny is also recognized the Preamble to the Universal Declaration on Human Rights 1948, where it states that:²⁵²

it is essential, *if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression*, that human rights should be protected by the rule of law.

198. In light of these core principles, we made detailed recommendations in 2006 on narrowing the scope of the statutory definition to prevent the inappropriate application of terrorism powers to those engaged in activity that, by any ordinary understanding of the word, would not be recognised as terrorism. These are:

- a) the quality of intention needed for an act of terrorism against the government under section 1(1)(b) of the 2000 Act should be more narrowly defined, i.e. 'compel', 'coerce' or 'intimidate' instead of 'influence'. This would more accurately reflect the essence of terrorism as a form of intimidation and would also bring the UK definition into line with those of other common law jurisdictions;
- b) a clearer distinction should be drawn in section 1(2) between actions involving violence against persons and those which negatively effect other interests, e.g. damage to property, disruption of an electronic system, etc. 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 definition of terrorism as currently defined, e.g. protests involving criminal damage, strikes or demonstrations which involve disruption to services, etc. A specific exemption for 'advocacy, protest, dissent or industrial action' should be considered as per the definition of terrorism in Australian, Canadian, New Zealand and Hong Kong law.

²⁵² Emphasis added.

- c) in particular, serious interference or disruption to an electronic system within section 1(2)(e) should only be considered a terrorist act where that disruption endangers human life or creates a serious risk to public health or safety;
- d) actions involving the use of firearms or explosives as set out in section 1(3) should not automatically constitute terrorist acts. Instead, there should either be a rebuttable presumption that such acts are terrorist or, alternatively, section 1(3) should only apply to actions involving violence against persons;
- e) where the definition of terrorism in UK law is given extraterritorial effect, either the operation of the provision in question or the definition itself should be qualified in such a way as to avoid criminalizing the legitimate use of force against nondemocratic governments.

ERIC METCALFE
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JUSTICE
9 August 2010