

UNITED KINGDOM:

SUBMISSION FOR THE
REVIEW OF COUNTER-
TERRORISM AND
SECURITY POWERS

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UNITED KINGDOM: SUBMISSION FOR THE REVIEW OF COUNTER- TERRORISM AND SECURITY POWERS

INTRODUCTION

On 13 July 2010, the Home Secretary announced a “rapid review” by the Home Office of key counter-terrorism powers, to be conducted by the Office of Security and Counter-Terrorism and overseen by Lord Macdonald of River Glaven QC, formerly Director of Public Prosecutions.¹ The stated aim of the review “is to ensure that the powers and measures covered by the review are necessary, effective and proportionate and meet the UK’s international and domestic human rights obligations”.² The review is to consider the following six powers: control orders (including alternatives); section 44 of the Terrorism Act 2000 regarding stop and search powers; the Regulation of Investigatory Powers Act 2000 and access to communications data more generally; extending the use of deportations with assurances; measures to deal with organisations that promote hatred or violence and the detention of terrorist suspects before charge.³

Amnesty International has long criticized the UK government for many of the practices it has adopted in the name of countering terrorism and protecting national security. A number of these practices are inconsistent with the UK’s obligations under international human rights law and standards and a review into these powers is long overdue.⁴ Though Amnesty International regrets that the review will only consider a limited number of powers,⁵ it nonetheless presents an opportunity for the new UK coalition government to demonstrate its commitment to human rights and abolish those powers which are an affront to its obligations in this regard. The purpose of this submission is to outline Amnesty International’s primary concerns in relation to four⁶ of the powers under consideration; the control orders regime; the use of diplomatic assurances in the context of national security deportations; the 28 day limit for pre-charge detention of people suspected of terrorism-related activity; and the use of stop and search powers under section 44 of the Terrorism Act 2000.

THE CONTROL ORDERS REGIME

From the inception of the system of control orders as created by the Prevention of Terrorism Act 2005 (PTA), Amnesty International has called for the system to be abolished.⁷ The PTA regime, introduced as a temporary replacement to the now lapsed powers granted by Part IV of the Anti-Terrorism, Crime and Security Act 2001 (ATCSA)⁸, which allowed for the indefinite detention without charge or trial of any foreign national believed to be a threat to national security, allows for a combination of restrictions to be imposed by a government minister at the Home Office (or in some cases, a court) on a named individual. In so-called “non-derogating”⁹ cases, the restrictions often include, among other things: a requirement to remain inside a specified residence for between eight and 16 hours a day¹⁰, including in

some cases, in a location different to where the individual's family resides; a requirement not to travel beyond a certain distance from the specified residence during the hours when the individual is permitted to leave it; wearing of an electronic tag; partial or total restrictions on the use of mobile telephones and the internet; limits on the usage of bank accounts; requirements to notify and/or obtain permission from the Home Office in order to begin employment or academic study; and restrictions on types of employment. Control orders are limited to a year's duration. However, they can be renewed at the end of each 12-month period so that, effectively, they can be imposed indefinitely.

Amnesty International considers that the control orders regime, with the procedures and range of potential measures as currently legislated and applied in the UK, is not compatible with the UK's human rights obligations under international law. The judicial procedures by which the imposition of a control order can be challenged are inconsistent with fundamental fair trial rights. The court can consider secret material to support the claim that the individual is or has been involved in terrorism-related activity, and that the measures imposed are necessary to protect members of the public.¹¹ This secret material is not disclosed to the person on whom the order is served or their lawyer of choice, and is reviewed and discussed only in closed sessions, i.e. hearings from which not only the public but also the accused person and their lawyer are excluded. A court-appointed "Special Advocate"¹² may do so, but cannot consult the individual or that person's lawyer about the information in the secret material. The individuals subject to control orders are therefore denied the opportunity to know the specific allegations and material against them, and the individuals, their lawyers, and the special advocates are all impeded from mounting an effective challenge to the allegations and material.¹³

Accordingly, Amnesty International believes that the legal framework establishing the current control orders regime in the UK fails to meet the fair trial requirements of international human rights law, as it allows for the imposition of essentially criminal sanctions on the basis of allegations of what are in essence criminal offences, without providing the fair trial guarantees required in criminal cases.¹⁴ The nature of the allegations upon which the proceedings are based involves essentially the same conduct as is covered by a range of criminal offence provisions elsewhere in UK law; the range of sanctions available include measures of a nature and degree of severity (whether applied alone or in combination) typical of criminal punishments. In addition, the combination of obligations imposed on individuals subject to a control order—such as curfew restrictions, assigned residence in a small flat, restriction of movement to a geographic area, the requirement to wear electronic tags, restrictions on telecommunications use, and the requirement for any visitors to seek prior clearance from the Home Office—can amount to a deprivation of liberty within the scope of Article 5 of the European Convention on Human Rights (ECHR) and article 9 of the International Covenant on Civil and Political Rights (ICCPR).¹⁵ The European Court of Human Rights has held that at least in cases where a lengthy or indefinite deprivation of liberty has a dramatic impact on the applicants' fundamental rights, the fair trial guarantees applicable to the proceedings in question must indeed be substantially the same as those applicable to criminal proceedings.¹⁶

From the point of view of the person who faces control order proceedings, the main substantive difference from a criminal trial on identical allegations is, in most if not all cases, that the accused is deprived of a range of fundamental fair trial rights required of criminal

trials, and the sanctions imposed are indefinite in duration rather than fixed by a sentence.¹⁷ Some measures in control orders may further be inconsistent with other rights protected under international human rights law, held not only by individuals subject to control orders, but also by their spouse, children and other family members cohabiting with them, including protection against arbitrary or unlawful interference with privacy, family, home or correspondence, and the rights to freedom of expression and association.¹⁸

In sum, the control orders regime allows a government minister, subject to limited judicial scrutiny, to impose severe restrictions on the liberty of an individual who is suspected of involvement in terrorism-related activity but has not been charged with any criminal offence. These restrictions, in turn, can have a significant and often negative impact on the lives of the family members of those individuals subject to control orders,¹⁹ implicating a range of rights including: the right to respect for privacy and family life, home and correspondence; freedom of expression; freedom of association; and the right to freedom from cruel, inhuman or degrading treatment or punishment. The proceedings whereby a control order can be challenged in the courts are deeply unfair, including because of their heavy reliance on secret material considered in closed sessions of the court, and not disclosed to the individual concerned or to their lawyers of choice. The creation of this impoverished shadow of the ordinary criminal justice system essentially allows the executive to decide arbitrarily to accord differing levels of procedural fairness to individuals accused of identical conduct and facing similar sanctions. This undermines the rule of law as well as the role of the fundamental procedural rights that are included in the ordinary criminal justice system precisely to protect the right to liberty and other human rights.

DIPLOMATIC ASSURANCES AND NATIONAL SECURITY DEPORTATIONS

Amnesty International has long challenged the notion that unenforceable, bilateral diplomatic assurances from one government to another can provide a reliable safeguard against torture and ill-treatment.²⁰ Amnesty International recognizes that, in principle, states are entitled to deport non-nationals whose presence in the country is considered not to be conducive to the public good. However, the discretion to do so is not unlimited: states can expel individuals only when they can do so consistent with their obligations under international human rights law. One of those obligations, the principle of *non-refoulement* to torture or other ill-treatment,²¹ is to refrain from deporting anyone to a country where they will face real risk of such abuse. In an attempt to circumvent this prohibition on *refoulement* the UK has negotiated a set of unenforceable bilateral diplomatic agreements under which it has sought to deport a number of individuals,²² alleged to pose a threat to the UK's national security, to states where in ordinary circumstances they could not be deported because of the real risk of torture and ill-treatment they would face upon being returned.²³

To date the UK has concluded 'memorandums of understanding' (MoUs) with the governments of Lebanon, Jordan, Libya²⁴ and Ethiopia. These MoUs contain a framework of assurances as to how people who are returned will be treated; they also contemplate 'monitoring' of these assurances by a local organization.²⁵ After the UK tried and failed to secure an MoU with the Algerian authorities,²⁶ the UK and Algerian government agreed to negotiate bilateral assurances for humane treatment and fair trial on a case by case basis.²⁷ The assurances negotiated between the UK and Algerian governments do not provide for formal arrangements for post-return monitoring. However, in a number of judgments the Special Immigration Appeals Commission (SIAC) has reasoned that the Algerian assurances

are nonetheless capable of being verified, in part by international NGOs, including Amnesty International.²⁸ Amnesty International has vigorously rejected any suggestion that it can be relied upon to verify or monitor assurances given to the UK government; to assume so misrepresents the type of work Amnesty International undertakes and the conditions, frequency, privacy, and degree of access the organization has to detainees returned in such circumstances.

The UK government has asserted that these diplomatic assurances sufficiently mitigate the risk of torture and ill-treatment to allow it to deport those it considers a risk to national security in a manner which is compliant with its human rights obligations. The stated intention of the current review into counter-terrorism and security powers is to consider “[e]xtending the use of ‘Deportation with Assurances’ in a manner that is consistent with our [the UK’s] legal and human rights obligations.”²⁹ Amnesty International rejects the idea that unreliable, unenforceable promises of humane treatment, given by governments that torture, can reliably, effectively and sufficiently mitigate the risk of torture and ill-treatment of the individual upon return.³⁰ Consequently, any expansion of their use in the context of national security deportations to countries where torture and ill-treatment is persistent, endemic or widespread – or where a specific group, of which the deportee is a member, is targeted for such abuse – would necessarily fail to be consistent with the UK government’s human rights obligations. Such unreliable promises, made outside of the international multilateral treaty regime that was created specifically to bind governments in a global effort to prevent torture, undermine the absolute ban on torture and other cruel, inhuman or degrading treatment or punishment.

Amnesty International’s long experience in the field of human rights also shows that the particular dynamics that arise in cases of torture and ill-treatment, particularly in states where torture is endemic or widespread, lead to inherent deficiencies in assurances that prevent them from effectively and reliably mitigating against the risk of torture and ill-treatment.³¹ In particular, given the absolute nature of the prohibition of torture under international law, its status as a crime under international law subject to universal jurisdiction, and the stigma associated with its use, governments that practise torture routinely deny it, create administrative structures to support “plausible deniability”, develop techniques of abuse designed to avoid detection, and conceal evidence of it. This is compounded by the fact that torture is usually practised in secret, with the collusion of law enforcement and other government personnel, and often in an environment of impunity, as states, particularly where torture is widespread, routinely fail to investigate allegations of torture and bring those responsible to account. Additionally, those who are subject to torture and other ill-treatment are often afraid to recount their abuse to their lawyers, family members and monitors for fear of reprisals against them or their families. Alongside these features of secrecy, deniability, and impunity in states where torture and ill-treatment are practiced, is the fact that such assurances are not legally binding and lack enforcement mechanisms.³² In a case where an assurance is breached it is therefore left to the governments involved to voluntarily assume responsibility for investigating the breach and holding perpetrators to account; this seriously impedes the ability of the victim to secure his or her right to reparation and redress in cases where torture or other ill-treatment has occurred.

POST-RETURN MONITORING

The UK government has posited that the provision of post-return monitoring ensures that the diplomatic assurances regime is compatible with the UK's international human rights obligations.³³ Amnesty International considers that no system of post-return monitoring of individuals will render assurances an acceptable alternative to rigorous respect for the absolute prohibition of transfers to risk of torture or other ill-treatment. Such *ad hoc* monitoring schemes necessarily omit the broader institutional, legal and political elements that can make certain forms of system wide monitoring of all places of detention in a country one way, in combination with other measures, of potentially reducing the country-wide incidence of torture over the long term. Moreover, a series of post-return visits to a particular individual or just a few people would also put the detainee in an untenable position: the person is forced to choose between staying silent or reporting abuse in a situation where he or she will be clearly identifiable as the source of the report.

Post-return monitoring of particular returnees under assurances may superficially resemble country-wide or international systems of preventive visits to places of detention by independent institutions; however, monitoring of isolated individuals under assurances lacks key elements of generalized programmes, and distorts the aims and claimed potential of such systems of visits. *System-wide* monitoring can over time gradually reduce the *general* incidence of ill-treatment in a country, but only if it takes place in a national setting where effective legal and policy frameworks against torture already exist and where the actors involved have the necessary determination, capacity, and incentives to act against torture. Among the elements recognised as being essential for a system-wide monitoring scheme to be effective include: independence and expertise of the monitors; monitors having a legal right to unhindered and unannounced access to all places of detention and the right to speak to all detainees in the country without witnesses;³⁴ and monitors imbued with the authority and influence to ensure that if torture and other ill-treatment are detected an impartial and independent investigation of those allegations will be conducted, perpetrators held accountable and victims afforded a remedy. Some or all of these elements are markedly absent from the monitoring mechanisms contemplated by the assurances the United Kingdom has sought and procured.

Even if all of these elements were to be included in future assurances, however, the twisting of the logic of system-wide visits to the purposes of purporting to guarantee the safety of a particular returnee would in any event overstate the aims and claimed potential of monitoring as a means of preventing torture or other ill-treatment. Even where generalized systems of visits have been established and recognised to reduce the general incidence of torture within a country, such systems cannot be relied upon (and indeed do not purport to be able) to prevent all or even any detention-related abuses *against a particular individual identified in advance*. Rather, system-wide monitoring of this nature represents just one of the necessary conditions required to reduce the overall incidence of torture and other ill-treatment over the long term in a country. As the European Court of Human Rights has acknowledged, even in cases where there is system-wide monitoring and where the International Committee of the Red Cross does monitor detainees under a universal access principle, these measures cannot exclude the risk of subjection to treatment contrary to the prohibition on torture and other ill-treatment and guarantee the humane treatment of the detainee.³⁵

NATIONAL SECURITY DEPORTATION PROCEEDINGS

Amnesty International has also repeatedly expressed concerns that appeal proceedings against orders for deportation on “national security” grounds, which take place before the SIAC, are profoundly unfair.³⁶ The rules by which the SIAC operates in these cases are, in relation to the use of secret material in closed sessions and the role of special advocates, very similar to (and indeed served as the precursor for) those under which the High Court operates in control order proceedings. They deny the individuals concerned procedural fairness, and make it very difficult for them to effectively refute the government’s secret material, including intelligence material, which is relied upon to claim both that the individual poses a threat to national security and that they would not face a risk of torture or other ill-treatment on return. As such, Amnesty International considers that SIAC national security deportation hearings where the individual concerned alleges a risk of torture or other ill-treatment if deported and the government presents secret information regarding risk on return, are incompatible with the UK’s obligation to provide due process and equality of arms in such proceedings as required by the ICCPR.³⁷ Additionally, following the European Court of Human Rights’ reasoning in *A and Others v UK*, proceedings before the SIAC may breach the procedural requirements of Article 5(4) of the Convention in those cases where the decision to detain an individual pending deportation on national security grounds is based solely or to a decisive degree on closed material.³⁸

Amnesty International is concerned that the unfair procedures which the SIAC follows, including reliance on closed material and the holding of closed proceedings, makes it extremely difficult to mount an effective challenge in the SIAC to the assertion by the Secretary of State that an individual can safely be deported in reliance on diplomatic assurances to a country where otherwise they would be at a real risk of grave human rights violation. As was previously explained, Amnesty International and many other organizations and human rights experts oppose *any* reliance on diplomatic assurances to deport a person where a real risk of torture or other ill-treatment is otherwise established; while the UN Human Rights Committee has not adopted such a categorical rejection, it has specifically called on the UK government to “adopt clear and transparent procedures allowing review” of assurances “by adequate judicial mechanisms before individuals are deported”³⁹; something Amnesty International considers that proceedings before the SIAC currently fail to satisfy.

PRE-CHARGE DETENTION OF PEOPLE SUSPECTED OF TERRORISM-RELATED ACTIVITY

Amnesty International has unreservedly opposed the power to detain individuals without charge for up to 28 days since the limit was extended by the enactment of the Terrorism Act 2006.⁴⁰ In ordinary cases of serious crimes, including murder, the ordinary time limit for detention without charge is 24 hours, with additional approval being required for extensions to an ultimate limit of 96 hours.⁴¹ The maximum period for which an individual could be held without charge in the UK rapidly increased from seven days, as legislated for by the Terrorism Act 2000, to 14 days in 2003 following the Criminal Justice Act 2003. In 2005 the UK government proposed an extension to 90 days, which was rejected by the House of Commons and a limit of 28 days was negotiated for the 2006 Act. Subsequently, in 2008, the UK government proposed another extension to 56 days (later reduced to 42 days), which was overwhelmingly rejected by the House of Lords. To date the limit remains at 28 days as provided for by the Terrorism Act 2006, which, under section 25 of the Act, requires that this limit is renewed annually by Parliament in order to remain in place.⁴² During the first

year that the power to detain individuals for up to 28 days was in operation 11 individuals were held for longer than 14 days, since then latest official statistics show that the power to detain individuals suspected of terrorism for more than 14 days has not been used.⁴³ Despite this lack of use, and the intention that the power be a temporary measure, the 28 day limit remains in force.

Amnesty International opposes the current time allowance of 28 days for which people suspected of involvement in terrorism can be held without charge. International treaties, to which the UK is party, require that people detained in connection with a criminal offence either be charged promptly and tried within a reasonable time in proceedings which fully comply with international fair trial standards, or be released.⁴⁴ Amnesty International considers that being held without charge for 28 days fails to comply with these standards; prolonged detention without charge or trial undermines fair trial rights, including the right to be promptly informed of any charges, the rights to be free from arbitrary detention, torture and ill-treatment and the presumption of innocence, including the right to silence and the right to prepare and present a defence. In addition, Amnesty International's experience monitoring human rights worldwide strongly indicates that a prolonged period of pre-charge detention creates a climate for abusive practises that can result in detainees making involuntary statements including confessions. Prolonged detention without charge could have the unintended effect of increasing the likelihood of statements obtained from suspects being deemed inadmissible at trial precisely because of the oppressive nature of the conditions in which they were obtained.

Amnesty International also considers that the safeguards for detention for periods greater than 14 days are not adequate to protect the detained person from the risk of arbitrary detention and may not be compatible with article 5(4) of the European Convention of Human Rights. Judicial authorization of extension beyond 14 days consists merely of a review of reasons given by the Crown Prosecution Service (CPS).⁴⁵ The judge hearing the application need only be satisfied that the investigation is being conducted "diligently and expeditiously" and that there are reasonable grounds for believing that further detention is necessary to obtain or preserve the evidence or pending the result of an examination or analysis of relevant evidence.⁴⁶ The CPS is not required to convince a judge that there are any reasonable grounds to believe that the person has committed a terrorism-related offence. Finally, the CPS can apply to have the person who is detained and his or her lawyer excluded from the hearing of the application for an extension of their detention, denying the detained person from effectively challenging the basis the government has invoked for his or her detention.⁴⁷

STOP AND SEARCH POWERS UNDER SECTION 44 OF THE TERRORISM ACT 2000

Since the Terrorism Act 2000 came into force Amnesty International has raised concerns about police powers to stop and search individuals without reasonable suspicion under section 44 of the Act.⁴⁸ Section 44 gives the police the power to stop and search pedestrians and vehicles without suspicion, whenever authorization is given by a senior police officer on the basis that he or she considers it "expedient for the prevention of terrorism".⁴⁹ The authorization must be confirmed by the Home Secretary within 48 hours and is limited to 28 days and a specific geographic area; authorization requests, however, are rarely refused or modified and have often been renewed on a rolling basis.⁵⁰ On 10 June 2010, in a written statement, the Minister of State for Security acknowledged that at least 14 police forces had carried out stop and searches under section 44 of the Terrorism Act 2000 without the proper authorizations required.⁵¹

The use of section 44 powers has increased dramatically since the powers first came into force in February 2001.⁵² Under the powers an officer is able to stop any pedestrian or vehicle (including the driver and any passengers), search anything in a person's possession, and seize anything the officer suspects to be of use in connection with terrorism.⁵³ While these powers may in theory be exercised "only for the purpose of searching for articles of a kind which could be used in connection with terrorism", the law explicitly states they "may be exercised whether or not the constable has grounds for suspecting the presence of articles of that kind" on the person or in the vehicle stopped and searched. In practice, then, the power to stop and search under section 44 is a matter of virtually unlimited discretion. Failure to cooperate is a criminal offence punishable with up to six months' imprisonment and/or a £5,000 fine.⁵⁴ To date none of the many thousands of searches that have taken place under section 44 powers has ever resulted in a conviction for a terrorism offence, raising questions, even leaving aside human rights concerns, about the purpose and relevance of this legislation in the UK's counter-terrorism strategy.⁵⁵

Amnesty International considers that powers to stop and search must always be counterbalanced by adequate safeguards in order to ensure that a person's rights to liberty⁵⁶ (Article 5, ECHR) and to respect for one's private life (Article 8, ECHR) are protected from abuse. Safeguards for such powers should include the grounds of "reasonable suspicion" of a person having committed an offence before any action can be taken. Instead, the powers in the Act allow police officers to stop and search pedestrians and vehicles at random for articles which could be used in connection with terrorism. Accordingly Amnesty International believes that the powers to stop and search under section 44 are not in compliance with the UK's human rights obligations under international law as they contravene the rights to privacy, liberty, freedom of expression and assembly and freedom from arbitrary detention. Amnesty International is also concerned that there is a real risk that such powers can be used in a discriminatory manner; this concern has been raised by a number of different bodies and organizations⁵⁷ which point to available statistics⁵⁸ showing the disproportionate effect that stop and search powers have on individuals from racial or ethnic minority groups, such as black or Asian people.

A recent judgment by the European Court of Human Rights, which found that the exercise of stop and search powers under section 44 of the Terrorism Act 2000 was unlawful, substantiates some of Amnesty International's concerns regarding such powers.⁵⁹ The Court found that the coercive powers of stop and search under the Terrorism Act 2000 amounted to a clear interference with the right to respect for private life (Article 8, ECHR) and further that the public nature of the search may, in certain cases, compound the seriousness of the interference because of humiliation and embarrassment that may occur. According to the Court's well established jurisprudence such an interference can only be justified if it is in accordance with the law; this requires not just that the measures have a basis in domestic law, but that they are compatible with the rule of law, in particular that there must be a sufficient degree of legal protection against arbitrary interference. The Court concluded that "the powers of authorisation and confirmation as well as those of stop and search under sections 44 and 45 of the 2000 Act are neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse", that they "are not, therefore, 'in accordance with the law'" and that it followed that there had been a violation of Article 8 of the European Convention.⁶⁰

CONCLUSION

Amnesty International has expressed on-going concerns about the erosion of human rights protections in the UK in the context of protecting national security. In the last 10 years, five major pieces of legislation affecting the entire UK —the Terrorism Act 2000, the Anti-Terrorism, Crime and Security Act 2001, the Prevention of Terrorism Act 2005, the Terrorism Act 2006, and the Counter-Terrorism Act 2008—have been enacted aimed at countering terrorism; Amnesty International considers that a number of the provisions in these different pieces of legislation are incompatible with the UK's obligations under international human rights law and standards, particularly those concerned with the rights to liberty, freedom from torture and other ill-treatment, and fair trial. It is regrettable that only a few of those provisions will be considered by this review. Nonetheless, the review presents an opportunity for the UK government to repair some of the damage done to the protection of human rights in the UK in the name of countering terrorism by upholding the rule of law and fulfilling the duties it has under international human rights law and standards.

Recommendations to the UK government:

- abolish the system of control orders as created by the PTA 2005;
- commit to rely on the ordinary criminal justice system with its procedures for charge, detention, and prompt and fair trial, as the means for protecting the public from threats of violent attack, rather than substituting procedures which lack its characteristics;
- reduce the length of time that people suspected of terrorism-related activity can be detained prior to charge;
- repeal section 44 which allows stop and search without reasonable suspicion;
- abandon entirely the policy of relying on diplomatic assurances against torture and other ill-treatment as a means of circumventing the prohibition on exposing individuals to the risk of such abuse through deportation or other forms of forced transfer;
- reform the procedures of the Special Immigration Appeals Commission (SIAC) to ensure that people who face deportation to their country of origin on national security grounds are allowed to know, in order to have an effective opportunity to challenge, the evidence on which the UK authorities assert that they can be safely deported to the country in question;
- ensure that future counter-terrorism legislation and policy fully comply with international human rights law and standards and undergo adequate and timely public consultation.

ENDNOTES

¹ Home Office Press Release, "Rapid review of counter-terrorism powers", 13 July 2010, <http://homeoffice.gov.uk/media-centre/press-releases/counter-powers>. The review's terms of reference were subsequently published on 29 July 2010, and can be accessed at <http://www.homeoffice.gov.uk/publications/counter-terrorism/ct-terms-of-ref/counter-terrorism-term>

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² See Home Office “Review of Counter-Terrorism and Security Powers: Terms of Reference”, 29 July 2010

³ Home Office “Review of Counter-Terrorism and Security Powers: Terms of Reference”, 29 July 2010

⁴ Since 1997 Amnesty International has produced briefings on the Bills that subsequently became the Terrorism Act 2000; the Anti-Terrorism, Crime and Security Act 2001; the Prevention of Terrorism Act 2005; the Terrorism Act 2006 and the Counter-Terrorism Bill 2008. See *UK: Briefing on the Terrorism Bill*, AI Index: EUR 45/043/2000, April 2000; *UK: Creating a shadow criminal justice system in the name of “fighting international terrorism”*, AI Index: EUR 45/019/2001, November 2001; *UK: The Prevention of Terrorism Bill: A grave threat to human rights and the rule of law in the UK*, AI Index: EUR 45/005/2005, February 2005 and *UK: Amnesty International’s briefing on the Counter-Terrorism Bill 2008*, AI Index EUR 45/010/2008, July 2008. See also *United Kingdom: Briefing to the Human Rights Committee*, AI Index: EUR 45/011/2008, June 2008 and *UK: Amnesty International’s submission of 14 October to the UK Parliament’s Joint Committee on Human Rights in connection with the Committee’s inquiry into the subject of “counter-terrorism policy and human rights”*, AI Index EUR 45/050/2005, October 2005.

⁵ For example, Amnesty International has had longstanding serious concerns about the definition of terrorism-related offences in UK domestic law, particularly as set out in the Terrorism Act 2000 (as amended). The definition of “terrorism” itself, as well as particular offences such as “encouraging support” or simple possession of information (or anything else) “of a kind likely to be useful to a person committing or preparing an act of terrorism” without any requirement that the person actually intend to so use it, are so broad and vague that they infringe the principle of legal certainty, inconsistent with article 7 of the European Convention on Human Rights and article 15 of the International Covenant on Civil and Political Rights. Amnesty International has expressed concern about the definition of “terrorism” in the Terrorism Act 2000 since that Act was first introduced in Parliament; see, for instance, *UK: Briefing on the Terrorism Bill*, AI Index: EUR 45/043/2000, published in April 2000 and *UK: Human rights: a broken promise*, AI Index: EUR 45/004/2006, 23 February 2006, section 2.3. Amnesty International has also expressed concern about amendments to this definition in subsequent legislation; see, for instance, *United Kingdom: Amnesty International’s briefing on the draft Terrorism Bill 2005* AI Index: EUR 45/038/2005, 30 September 2005; *United Kingdom: Terrorism Bill dangerous and ill-conceived*, AI Index: EUR 45/040/2005, 11 October 2005; *United Kingdom: Amnesty International’s briefing for the House of Commons’ second reading of the Terrorism Bill*, AI Index: EUR 45/047/2005, 24 October 2005; and *United Kingdom: Amnesty International’s Briefing for the House of Lords’ Second Reading of the Terrorism Bill*, AI Index: EUR 45/055/2005, 17 November 2005. For examples from other organizations see: Article 19, “The Impact of UK Anti-Terror Laws on Freedom of Expression, Submission to ICJ Panel of Eminent Jurists on Terrorism, Counter-Terrorism and Human Rights, London”, April 2006; and Human Rights Watch, “Universal Periodic Review of the United Kingdom: Human Rights Watch’s Submission to the Human Rights Council”, 7 April 2008. The UN Human Rights Committee has also expressed concern: UN Doc CCPR/C/GBR/CO/6, 30 July 2008, para 26.

⁶ That this submission only deals with four areas of the review should not be construed as signifying that there are no human rights concerns with regards the remaining powers under review. Rather, this submission reflects Amnesty International’s concerns with regards to those areas where the organization has conducted research. Equally, the submission does not attempt to be an exhaustive analysis of these four powers, but rather outlines primary human rights concerns that the organization has.

⁷ See, *UK: The Prevention of Terrorism Bill: A grave threat to human rights and the rule of law in the UK*, AI Index: EUR 45/005/2005, February 2005 and most recently *United Kingdom: Five years on: Time to end the control orders regime*, AI Index: EUR 45/012/2010, August 2010.

⁸ Part IV of the ATCSA was left to lapse following a ruling by the Appellate Committee of the House of Lords in December 2004 which found that the indefinite internment of non-UK nationals on suspicion of terrorism under the ATCSA was unjustifiably discriminatory and, therefore, disproportionate and incompatible with their right to liberty. See *A & others v. Secretary of State for the Home Department* [2004] UKHL 56, 16 December 2004. This position was reaffirmed by the Grand Chamber of the European Court of Human Rights in *A and others v. the United Kingdom* (application no. 3455/05), 19 February 2009.

⁹ A “non-derogating” control order can be imposed by the Home Office on any individual, UK nationals and non-nationals alike, provided that two conditions are satisfied: 1) the minister has “reasonable grounds for suspecting the individual is or has been involved in terrorism-related activity”; and 2) the

minister has reasonable grounds to believe that the restrictions contained in the order are necessary “for purposes connected with protecting members of the public from a risk of terrorism”. “[I]nvolvement in terrorism related activity” under the PTA is defined in broad and vague terms in s. 1(9) and 15(1), by reference to the already imprecise definition of “terrorism” in the Terrorism Act 2000. The Terrorism Act definition in turn underpins a range of criminal offences contained in the Terrorism Act, which largely if not entirely overlap with the definition of “involvement in terrorism related activity” under the PTA. The power to make a “derogating” control order, which is provided for by the PTA s. 1(2) and (4) but has to date never been relied upon, depends upon similar conditions being fulfilled but such an order can only be imposed by a court on the application of the Secretary of State. The distinction, according to PTA s. 1(2), rests on whether or not a particular order imposes “obligations that are incompatible with the individual’s right to liberty under Article 5 of the European Convention on Human Rights.

¹⁰ It should be noted that although the curfews initially imposed under the control orders regime were longer than 16 hours, this changed following a 2007 judgment by the Appellate Committee of the House of Lords which determined that an 18-hour curfew amounted to an unlawful deprivation of liberty, *Secretary of State for the Home Department v JJ & Ors* [2007] UKHL 45 (31 October 2007).

¹¹ Section 4 of the Schedule to the Prevention of Terrorism Act 2005, and Part 76 of the Civil Procedure Rules.

¹² Section 7 of the Schedule to the Prevention of Terrorism Act 2005, and Part 76 of the Civil Procedure Rules. Amnesty International considers that this system of court-appointed Special Advocates is not sufficient to mitigate the unfairness of these proceedings. For further detail regarding Amnesty International’s concerns with the Special Advocate system see *United Kingdom: Five years on: Time to end the control orders regime*, AI Index: EUR 45/012/2010, August 2010 and *United Kingdom: Briefing to the Human Rights Committee*, AI Index: EUR 45/011/2008, June 2008.

¹³ In its 2008 Concluding Observations on the report of the United Kingdom under the ICCPR, the UN Human Rights Committee, in relation to articles 9 and 14 of the ICCPR, stated its concern with the fact that “the court may consider secret material in closed session, which in practice denies the person on whom the control order is served the direct opportunity to effectively challenge the allegations against him or her” and stated in this regard that the UK “should ensure that the judicial procedure whereby the imposition of a control order can be challenged complies with the principle of equality of arms, which requires access by the concerned person and the legal counsel of his own choice to the evidence on which the control order is made.”: UN Doc CCPR/C/GBR/CO/6, 30 July 2008, para 17.

¹⁴ The classification of proceedings under national law as non-criminal is not dispositive; what matters are substantive characteristics of the proceeding (e.g. the nature of the charges, the nature and severity of the sanctions imposed). See the European Court of Human Rights (Plenary), *Engel and others v Netherlands* (App no 5100/71 and others), 8 June 1976, paras 82-85; and (Grand Chamber), *Ezeh and Connors v the United Kingdom* (Apps nos. 39665/98 and 40086/98), 9 October 2003, para 86.

¹⁵ In its 2006 assessment of the system of control orders, the CPT, expressed its view that “it cannot be ruled out that the cumulative effect of the obligations imposed by [...] a control order on a given individual might in certain circumstances be considered as a deprivation of liberty,” and resultantly, that it was appropriate for the CPT to offer its comments on the issue. See *Report to the Government of the United Kingdom on the visit to the United Kingdom carried out by the CPT from 20 to 25 November 2005*, CPT/Inf(2006) 28, 10 August 2006, para. 41. See also *Secretary of State for the Home Department v AP* [2010] UKSC 24 (16 June 2010) in which the Supreme Court found that the Home Office’s modification of AP’s control order between April 2008 and July 2009, which required him to reside in a city some 150 miles away from his family in London, when taken together with the 16-hour curfew restriction and the resultant social isolation, constituted a deprivation of AP’s right to liberty.

¹⁶ European Court of Human Rights (Grand Chamber), *A and others v. the United Kingdom* (Application no. 3455/05), 19 February 2009, paras 203, 217.

¹⁷ Amnesty International is further concerned by the recent development that the authorities may rely on essentially the same material which did not result in a successful prosecution in a criminal trial in order to subsequently impose a control order on an individual; this is of particular concern given that control order proceedings do not provide the full range of fair trial guarantees required in criminal trials. See, notably, the recent decision of the High Court in *Secretary of State for the Home Department v AY* [2010] EWHC 1860 (Admin) (26 July 2010).

¹⁸ For example, ICCPR articles 17, 19, 22; ECHR, articles 8, 10 and 11. Restrictions to these rights are permitted by the relevant treaties, subject to certain requirements.

¹⁹ See *United Kingdom: Five years on: Time to end the control orders regime*, AI Index: EUR 45/012/2010, August 2010, pp. 9-11 for further detail regarding Amnesty International’s concern about

the profound negative effect that the restrictions imposed by control orders, and the secrecy which surrounds their imposition, can have on the mental health of those who are subject to orders, and on the wellbeing of their families.

²⁰ See *Dangerous Deals: Europe's reliance on 'Diplomatic Assurances' against torture*, AI Index: EUR 01/012/2010, April 2010 and *UK: Deportations to Algeria at all costs*, AI Index: EUR 45/001/2007, February 2007.

²¹ See, e.g., European Court of Human Rights (Grand Chamber), *Saadi v. Italy* (Application No. 37201/06), 28 February 2008, paras 125-127, 137-138. A risk of torture or other ill-treatment is not the only ground on which *refoulement* is prohibited: see, e.g., Article 33 of the 1951 UN Convention relating to the Status of Refugees. However, while Refugee Convention protection may be subject to certain limitations, the obligation of non-*refoulement* to torture or other ill-treatment is absolute.

²² A number of men who were unlawfully interned in Belmarsh under the now lapsed ATCSA and were then 'released' only to be subject to control orders, have been detained once again pending deportation on national security grounds, despite the fact that under ordinary circumstances deportation would be prohibited due to the serious risk of human rights violations that the men would face upon return.

²³ In proceedings before the Special Immigration Appeals Commission government officials have openly conceded that the risk of torture is well-established in many of the countries with which the UK has negotiated idiomatic assurances. See for example, *BB v Secretary of State for the Home Department*, 5 December 2006, para. 9, *Omar Othman v Secretary of State for the Home Department*, February 2007 paras. 129-153 and *DD and AS v Secretary of State for the Home Department*, 27 April 2007 para. 145. As the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (Special Rapporteur on Torture) stated in 2005, "the fact that such assurances are being 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", United Nations press release, "Diplomatic Assurances' not an adequate safeguard for deportees UN Special Rapporteur Against Torture warns", 23 August 2005.

²⁴ In April 2007 the Court of Appeal of England and Wales upheld a prior decision of the SIAC allowing the appeals of two Libyan nationals against their deportations on the grounds that the assurances from the Libyan government were not sufficient to protect the men from a real risk of torture or ill-treatment. See *DD and AS v Secretary of State for the Home Department*, [2008] EWCA Civ. 289, 9 April 2008.

²⁵ For example, the Libyan MoU provides for an 'independent' monitoring body nominated jointly by the UK and Libya, which consequently was chosen to be the Gaddafi Foundation run by Colonel Gaddafi's son.

²⁶ Failure in negotiating an MoU was apparently in large part due to a belief by Algerian authorities that such an agreement, including provisions for post-return monitoring, would be an encroachment on their national sovereignty. See *MT, RB, and U v Secretary of State for the Home Department*, [2007] EWCA Civ 808, 30 July 2007 para. 131.

²⁷ See *UK: Deportations to Algeria at all costs*, AI Index: EUR 45/001/2007, February 2007

²⁸ See *Moloud Sihali v Secretary of State for the Home Department*, [2010] UKSIAC 38/2005, 26 March 2010, paras 68, 73; *BB v Secretary of State for the Home Department*, [2006] UKSIAC 39/2005, 5 December 2006, para 18 and 21; *U v Secretary of State for the Home Department*, [2007] UKSIAC 32/2005, 14 May 2007, para 21.

²⁹ This extension by the UK government appears to have already begun, for example, in the case of *Abid Naseer and others v Secretary of State for the Home Department*, [2010] UKSIAC 77/2009, 18 May 2010, the UK government relied upon secret assurances negotiated between the Pakistani and UK governments to argue that there would be no real risk that the appellants would be subjected to torture or ill-treatment by the Pakistani Inter-Services Intelligence agency upon return. The SIAC rejected the UK government's argument stating that it "would not be willing to accept confidential assurances as a sufficient safeguard against prohibited ill-treatment in a state in which otherwise there was a real risk that it would occur", para 36.

³⁰ Opposition to such assurances has been expressed by, among others, the UN Special Rapporteur on Torture, the UN High Commissioner for Human Rights, the UN Special Rapporteur on Human Rights and Counter-Terrorism, the European Commission, the EU's Network of Independent Experts on Fundamental Rights, the European Parliament and the Council of Europe's European Commission for Democracy through Law (Venice Commission).

³¹ The European Court of Human Rights has also "cautioned against reliance on diplomatic assurances from a state where torture is endemic or persistent" (*Ismoilov v Russia*, Application No. 2947/06, 24 April 2008, para. 127) and has held that "[d]iplomatic assurances are not in themselves sufficient to

ensure adequate protection against the risk of ill-treatment where reliable sources have reported practises resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention" (*Ryabikin v Russia*, Application No. 8320/04, 19 June 2008, para. 119.)

³² None of the MoUs negotiated by the UK contain any provision for the enforcement of assurances, apart from the provision allowing a state to withdraw from the arrangement by giving six months notice.

³³ For example, in the context of negotiating "memorandums of understanding" with Jordan, the Adaleh Centre for Human Rights was nominated by the Jordanian government and has been retained by the UK government to monitor treatment of Jordanian nationals returned to the UK from Jordan. However, currently the Adaleh Centre for Human Rights is not endowed with a statutory mandate that allows unhindered, unannounced access to all places of detention in the country nor is it imbued with the influence and authority to ensure that if torture and other ill-treatment are detected an independent impartial investigation of those allegations will be conducted, perpetrators held accountable and victims afforded a remedy.

³⁴ Any post-return monitoring of particular returnees, by definition, will lack a key prerequisite of proper system-wide monitoring, i.e. ensuring that a large number of detainees is visited in sufficiently private conditions to ensure that the authorities do not know which individuals provided which information – thereby helping to protect detainees against reprisal and better reassure detainees that they can safely provide critical information. The absence of any enforcement or remedial mechanism for the individual in the event of a breach of the assurances only further underscores the ineffectiveness of an assurance to prevent harm that is, in any event, never truly repairable.

³⁵ *Ben Khemais v Italy*, Application No. 246/07, 24 February 2009.

³⁶ *United Kingdom: Briefing to the Human Rights Committee*, AI Index: EUR 45/011/2008, June 2008.

³⁷ See UN Human Rights Committee, General Comment no 32, Right to equality before courts and tribunals and to a fair trial, UN Doc CCPR/C/GC/32, 23 August 2007, para 62; *Mansour Ahani v. Canada*, Communication No. 1051/2002, UN Doc CCPR/C/80/D/1051/2002 (2004), paras. 10.6-10.8.

³⁸ *A and others v. the United Kingdom* (application no. 3455/05), European Court of Human Rights (Grand Chamber), 19 February 2009. Though Article 6 of the ECHR (right to fair trial) does not apply in deportation proceedings, the European Court of Human Rights found in the case of *A and others* that Article 5(4) can apply in deportation proceedings to the extent that the detained person is entitled to challenge the lawfulness of their detention prior to deportation. Though the procedural guarantees may not be as stringent as under Article 6 of the convention, the Court nonetheless found that where SIAC's decision to uphold the certification of an individual under the ATCSA and maintain the detention of that individual pending possible deportation was based solely or to a decisive degree on closed material, the procedural requirements of Article 5(4) would not be satisfied.

³⁹ Human Rights Committee, Concluding Observations on the UK, CCPR/C/GBR/CO/6, 21 July 2008, para. 12. While not expressly rejecting reliance on assurances, neither has the Human Rights Committee endorsed their use. Indeed, it also stressed in its Concluding Observations that the UK must recognise that "the more systematic the practice of torture or cruel, inhuman or degrading treatment, the less likely it will be that a real risk of such treatment can be avoided by diplomatic assurances, however stringent any agreed follow-up procedure may be."

⁴⁰ *UK: The Prevention of Terrorism Bill: A grave threat to human rights and the rule of law in the UK*, AI Index: EUR 45/005/2005; *UK: Amnesty International's briefing on the draft Terrorism Bill 2005*, AI Index: EUR 45/005/2005.

⁴¹ Police and Criminal Evidence Act 1984, sections 41-44.

⁴² On 14 July 2010 the 28 day pre-charge detention limit was extended by parliament for a further six months; the motion was passed by 354 votes to 47.

⁴³ See "Statistics on Terrorism Arrests and Outcomes Great Britain 11 September 2001 to 31 March 2008", 13 May 2009, p. 15; "Operation of police powers under the Terrorism Act 2000 and subsequent legislation: Arrests, outcomes and stops & searches, Quarterly update to December 2009 Great Britain October-December 2009", 10 June 2010, p. 9 and "Options for pre-charge detention in terrorist cases", Home Office, 25 July 2007.

⁴⁴ Article 9(2) of the International Covenant for Civil and Political Rights requires that "Anyone who is arrested shall be informed, at the time of the arrest, of the reasons for his arrest and shall be informed of any charges against him." Similarly Article 5(2) of the European Convention on Human Rights requires that "Everyone who is arrested shall be informed promptly, in a language which he understands, the reasons for his arrest and of any charge against him". See also Principle 10 of the UN Principles for the Protection of All Persons under any Form of Detention or Imprisonment, Adopted by General Assembly Resolution 43/173 of 9 December 1988.

⁴⁵ Schedule 8 of the Terrorism Act 2000 provides for the judicial authorization of continuing pre-charge detention beyond 48 hours.

⁴⁶ Schedule 8 of the Terrorism Act 2000, paragraph 32(1).

⁴⁷ Schedule 8 of the Terrorism Act 2000, paragraph 33(3).

⁴⁸ See *United Kingdom: Human Rights: a broken promise*, AI Index EUR 45/004/2006, February 2006, and UK: *Briefing on the Terrorism Bill*, AI Index: EUR 45/043/2000; April 2000.

⁴⁹ Section 44(4) of the Terrorism Act 2000

⁵⁰ See *Gillan and Quinton v The United Kingdom*, Application No. 4158/05, 12 January 2010, paragraph 80. There were rolling authorizations for the Metropolitan police service in place for the London Metropolitan area from at least February 2002 until May 2009; see Lord Carlile of Berriew QC, *Report on the Operation in 2002 and 2003 of the Terrorism Act 2000*, January 2004, para.79.

⁵¹ See Written Ministerial Statement by Minister of State for Security (Baroness Neville-Jones), "Authorisation to stop and search under Section 44 of the Terrorism Act 2000, 10 June 2010, <http://www.homeoffice.gov.uk/publications/written-ministerial-statements/s44-terrorism-act-2000-wms?view=Binary>

⁵² In the year 2001/2002 there were 8,550 section 44 stops and searches ("Statistics on Race and the Criminal Justice System – 2003" Home Office, July 2004 p. 28 and 37); in contrast, in 2008 there were 249,961 (*Report on the Operation in 2009 of the Terrorism Act 2000 and of Part 1 of the Terrorism Act 2006*, Lord Carlile of Berriew QC, July 2010, p. 81).

⁵³ Sections 44 and 45 (2), (1) and (4) of Terrorism Act 2000

⁵⁴ Section 47 of Terrorism Act 2000

⁵⁵ Lord Carlile of Berriew QC, "Report on the Operation in 2009 of the Terrorism Act 2000 and of Part 1 of the Terrorism Act 2006" , July 2010, p. 36, para. 185.

⁵⁶ Though the European Court of Human Rights in *Gillan and Quinton v The United Kingdom* (Application No 4158/05) did not find it necessary to determine the application of article 5 in the case in light of its findings under Article 8 of the Convention, the Court nonetheless emphasised that the coercive element of stop and search was indicative of a deprivation of liberty within meaning of article 5.1, para. 56/57

⁵⁷ Joint Committee on Human Rights, *Demonstrating respect for rights? A human rights approach for policing protest* March 2009 para. 93; *Report on the Operation in 2007 of the Terrorism Act 2000 and of Part 1 of The Terrorism Act 2006*, Lord Carlile of Berriew QC, June 2008, highlighted that the effect on community relations of the extensive use of section 44 was undoubtedly negative; *Counter-Terrorism: The London Debate*, The Metropolitan Police Authority, February 2007 and *Submission on the UK's sixth periodic report under the International Covenant on Civil and Political Rights*, Equality and Human Rights Commission, June 2008.

⁵⁸ See UK Equality and Human Rights Commission, *Stop and Think: A critical review of the use of stop and search powers in England and Wales*, March 2010, p. 24.

⁵⁹ *Gillan and Quinton v The United Kingdom*, Application No. 4158/05, 12 January 2010. See also "UK police must end stop and search without suspicion" <http://www.amnesty.org/en/news-and-updates/news/uk-police-must-end-stop-and-search-without-suspicion-20100112>.

⁶⁰ *Gillan and Quinton v The United Kingdom*, Application No. 4158/05, 12 January 2010, para 87.

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