

SUBMISSION ON COUNTER-TERRORISM LAW, POLICY AND PRACTICE IN THE UNITED KINGDOM

PREPARED BY AMNESTY INTERNATIONAL FOR THE INDEPENDENT COMMISSION ON COUNTER-TERRORISM LAW,
POLICY AND PRACTICE

1. INTRODUCTION

Amnesty International submits the following response to the call to evidence by the Independent Commission on UK Counter-Terrorism Law, Policy and Practice. This submission is a select summary of Amnesty International's work on counter-terrorism concerns in the UK since 2007.

It is important to note that all of Amnesty International's concerns on counter-terrorism law, policy and practice in the UK since 2007 remain relevant today. Far from the implementation of any of the organisation's numerous recommendations, the past 15 years have seen the adoption of wave upon wave of new counter-terror legislation, together with the increasing securitisation of life in the UK. This securitisation continues to negatively affect a wide range of human rights, including the rights to fair trial, liberty, private and family life, non-discrimination and nationality; freedom of movement, association, religion and the principle of non-refoulement.

Amnesty International charted the increase in counter-terrorism measures across Europe in a 2017 report entitled *Dangerously Disproportionate: The ever-expanding national security state in Europe*. The report's introduction stated that the previous two years (2015-2017) had: "witnessed a profound shift in paradigm across Europe: a move from the view that it is the role of governments to provide security so that people can enjoy their rights, to the view that governments must restrict people's rights in order to provide security. The result has been an insidious redrawing of the boundaries between the powers of the state and the rights of individuals."¹

Six years hence, Amnesty International's concerns are greater still. The UK has an expanded set of administrative and executive powers enshrined in law where previously they were said to be in place temporarily to deal with the apparent exigencies of the threat from "international terrorism". Measures that were allegedly exceptional have now become embedded in ordinary law and provide the executive with virtual free rein to make serious, life-changing and often arbitrary decisions for individuals. This is against the backdrop of the lowering, or even removal, of the standard of proof, the erosion of judicial oversight and the lack of access to an effective remedy for human rights violations. These powers are also often used in a discriminatory manner, disproportionately affecting Muslims and those who are perceived to be Muslim. The ever-expanding security state in the UK, indeed, appears to single out Muslims, conflating notions of race, religion and ethnicity with so-called

¹ Amnesty International, *Europe: Dangerously disproportionate: The ever-expanding national security state in Europe* (Index: EUR 01/5342/2017), <https://www.amnesty.org/en/documents/eur01/5342/2017/en/> p. 6

“political Islam” such that Muslims are widely perceived as “radicalised” and a danger to national security interests.²

In addition to executive and administrative measures, there has been a great expansion in the range and type of behaviour that has been criminalised as “terrorist activity” over the past 15 years. Many new offences are preparatory acts or inchoate offences requiring only a tenuous, or even no, concrete link between the act and the actual criminal offence.³ Recent legislation also criminalises various forms of expression that fall short of incitement to violence and thus threatens legitimate protest (freedom of peaceful assembly) and freedom of expression.⁴

2. A PERMANENT STATE OF EXCEPTIONALISM

One of Amnesty International’s principal concerns throughout Europe is the way in which exceptional measures, introduced under the guise of a crisis and which are nominally temporary, have in fact become normalised and permanent.⁵

These concerns were articulated in *Dangerously Disproportionate*:

“...emergency measures that are supposed to be temporary have become embedded in ordinary criminal law. Powers intended to be exceptional are appearing more and more as permanent features of national law...The consequences of this shift are defined by the extension of sweeping new powers concentrated in the hands of the executive – and implemented by the security and intelligence apparatus with little or no role for the judiciary or other independent oversight.”⁶

² See Amnesty International and Open Societies Foundation, *Europe: A Human Rights Guide for researching racial and religious discrimination in counter-terrorism* (Index: EUR 01/3606/2021), February 2021, [Europe: A Human Rights Guide for researching racial and religious discrimination in counter-terrorism - Amnesty International](#)

³ See for example, Counter Terrorism and Border Security Bill 2019: <https://www.legislation.gov.uk/ukpga/2019/3/contents?section=9-5> ss. 1-6

⁴ See Amnesty International, *Europe: Dangerously disproportionate: The ever-expanding national security state in Europe* (Index: EUR 01/5342/2017), <https://www.amnesty.org/en/documents/eur01/5342/2017/en/> p.42, FN 222.

⁵ The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has written extensively on this phenomenon. See, for example, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism on the human rights challenge of states of emergency in the context of countering terrorism*, 27 February 2018, https://www.ohchr.org/sites/default/files/Documents/Issues/Terrorism/A_HRC_37_52.pdf: “Second, there is the increased tendency on the part of States to pass, ab initio, ordinary legislation that is exceptional in character and scope, premised on the fact or threat of a terrorist atrocity, which foregoes the subterfuge that it is a finite emergency piece of legislation and commits the State to long-term exceptionality.”

⁶ Amnesty International, *Europe: Dangerously disproportionate: The ever-expanding national security state in Europe* (Index: EUR 01/5342/2017), <https://www.amnesty.org/en/documents/eur01/5342/2017/en/> p. 11

The threshold for triggering and extending emergency measures in the UK also appears to have been lowered. International human rights law is clear that states of emergency should only be declared, and corresponding measures introduced, in genuinely exceptional circumstances - namely "in time of war or other public emergency threatening the life of the nation".⁷ Yet there is a deep implication in the UK that these measures are necessary as permanent features of the law in order to combat threats from "international terrorism" – a threat level which, since publication began in August 2006, has never dropped below "substantial," meaning that an attack is considered "highly likely".⁸ The effect of the wide publication of these threat levels on the public imagination cannot be underestimated and contributes to the narrative that the country is in an almost permanent state of crisis, in which any and all counter-terror measures are not only necessary, but necessary on a permanent basis.

In order to ensure that emergency measures are not abused, international and European human rights law require that a state may only derogate, up to a certain extent, from a limited range of human rights obligations: a) in very specific situations of emergency; and b) after officially proclaiming and formally notifying relevant international bodies of an emergency that "threatens the life of the nation."⁹ The derogation must be exceptional and temporary and invoked only as a last resort, and the state's predominant objective must be a return to a state of normalcy.¹⁰ In addition, any derogation from a specific right and each specific emergency measure taken under that derogation must be limited to what is absolutely necessary and proportionate to the threat that justified the proclamation of the state of emergency.¹¹ A state that is derogating must notify the other states parties to the relevant treaties of the provisions from which it is derogating and explain the reasons.¹² Some human rights obligations can never be derogated from, even in a state of emergency. They include the right to life, the absolute prohibition on torture or other ill-treatment, the fundamental guarantees of a fair trial and the principle of non-discrimination.¹³ Yet the latter two rights appear to be consistently violated in the UK on the basis of national security and the alleged threat from terrorism.

⁷ European Convention on Human Rights ("ECHR"), Article 15, https://www.echr.coe.int/Documents/Convention_ENG.pdf

⁸ The current threat from "international terrorism" is judged by the Joint Terrorism Analysis Centre to be "substantial", which means that "an attack is likely", <https://www.mi5.gov.uk/joint-terrorism-analysis-centre>. The "threat level" was "critical" in September 2017, May 2017, June 2007 and August 2006, which means an attack is judged to be "highly likely in the near future". See <https://www.mi5.gov.uk/threat-levels> and <https://www.gov.uk/terrorism-national-emergency>.

⁹ International Covenant on Civil and Political Rights ("ICCPR"), Article 4, <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights> and European Convention on Human Rights ("ECHR"), Article 15: https://www.echr.coe.int/Documents/Convention_ENG.pdf. See also, *A and others v UK*, (3455/05), European Court of Human Rights, 19 February 2009, <https://hudoc.echr.coe.int/eng?i=001-91403#%20> para. 176.

¹⁰ UN Human Rights Committee General Comment 29 paras 1, 2.

¹¹ UN Human Rights Committee General Comment 29 (2001), UN Doc. CCPR/C/21/Rev.1/Add.11, para. 4.

¹² In the case of the ICCPR, this requires notification via the UN Secretary-General; in the case of the ECHR it is via the Secretary General of the Council of Europe.

¹³ Article 4.1 of the ICCPR <https://hudoc.echr.coe.int/eng?i=001-91403#%20>, UN Human Rights Committee General Comment 29, (2001), UN Doc. CCPR/C/21/Rev.1/Add.11, para. 8.

Despite the fact that there is a formal process by which the UK government can declare a state of emergency in response to a terrorist attack,¹⁴ the UK has many pieces of counter-terrorism legislation that provide the executive with “enhanced” emergency powers to be held in reserve, such as those contained in the Terrorism Prevention and Investigation Measures Act 2011 (see below). Under such legislation, there is no requirement for the government to follow the formal process required for a declaration of a state of emergency before invoking such enhanced powers. This can result in what the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has termed “de facto states of emergency”, i.e. situations of emergency that are frequently hidden by the exercise of restrictive powers without formal acknowledgment of the existence of an emergency.¹⁵ The Special Rapporteur has said that: “International human rights bodies have highlighted the problem of de facto emergencies and expressly called upon States to declare or abandon their hidden emergency practices... Failure to fully name and recognize national counter-terrorism regimes as holding devices for states of emergency is a fundamental weakness in ensuring human rights protection in all circumstances.”¹⁶

Detention

As elsewhere in the legal framework for counter terrorism, the legislation governing the maximum length of pre-charge detention of terrorism suspects is also open to “enhancement” by the Executive in poorly defined situations of urgency. In January 2011, the maximum period of pre-charge detention in counter-terrorism cases was reduced from 28 to 14 days following a Home Office review of counter-terrorism and security powers. However, the Protection of Freedoms Act, which came into force in May 2012, not only retains the 14-day limit (already the longest available to a state in Europe), but it also allows the maximum period to be increased to 28 days in response to an unspecified “urgent” situation that could arise in the future.¹⁷ Such undefined situations of “urgency” undermine notions of legal certainty and give the government wide powers to define an “urgent” situation as it sees fit.

3. ADMINISTRATIVE AND EXECUTIVE ORDERS

Much of the UK’s expanded security state now relies on executive powers and administrative measures to “prosecute” individuals by the back door, outside the criminal justice system

¹⁴ Civil Contingencies Act 2004, <http://www.legislation.gov.uk/ukpga/2004/36/> ss. 1 & 19.

¹⁵ *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism on the human rights challenge of states of emergency in the context of countering terrorism*, 27 February 2018, https://www.ohchr.org/sites/default/files/Documents/Issues/Terrorism/A_HRC_37_52.pdf, para. 30.

¹⁶ *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism on the human rights challenge of states of emergency in the context of countering terrorism*, 27 February 2018, https://www.ohchr.org/sites/default/files/Documents/Issues/Terrorism/A_HRC_37_52.pdf, para. 30.

¹⁷ Protection of Freedoms Act 2012, <http://www.legislation.gov.uk/ukpga/2012/9/part/4/enacted>, Part 4, s. 58

and therefore removing the usual safeguards of criminal proceedings. The criminal law of the UK provides for a wide range of offences which can be used to prosecute involvement in terrorism-related activity.¹⁸ However, instead of turning to the UK's ordinary criminal justice system, the UK government often utilises secret evidence in the form of closed material procedures and a very low standard of proof against individuals it deems a threat to the UK's national security to keep them under various forms of administrative control. The effect of these measures has been to create what is, to a large extent, a parallel justice system for many individuals who have not been formally charged for terrorism-related criminal activity.¹⁹

Terrorism Prevention and Investigation Measures

The UK has been at the forefront of the use of administrative control orders imposed by the Executive in Europe over the past 15 years. Despite being introduced as a temporary measure which required annual renewal by parliament,²⁰ the control order regime was in use until 2011 when it was repealed and replaced by a system of terrorism prevention and investigation measures (TPIMs) enshrined in statute²¹ following a House of Lords ruling in June 2009 that control orders based on secret information violated the right to a fair trial.²² The Terrorism Prevention and Investigation Measures Act 2011 rebranded the control order regime and provides a distinct statutory framework for administrative restrictions on people suspected of posing a threat to national security. The Act, which applies to both UK nationals and those holding other nationalities allows, among other things:²³ assigned overnight residence; a ban on travel outside the country or outside a specified area within the UK; exclusion orders prohibiting a person from entering an area or specific types of places (such as internet cafes); restrictions on access to financial services and the use of mobile phones; restrictions on association with other people; and forced relocation.²⁴

¹⁸ Indeed, the scope of possible grounds under UK law for pursuing criminal proceedings against persons suspected of involvement in terrorism has become so sweeping that it has become a human rights concern in its own right.

¹⁹ The reasons the government cites vary, but often includes that there is insufficient evidence to secure a criminal conviction, or that key evidence would be inadmissible in criminal proceedings as is currently the case under UK law for intercept material. These assertions are however themselves difficult for the public to evaluate, particularly given the secrecy around such proceedings.

²⁰ Prevention of Terrorism Act 2005, <https://www.legislation.gov.uk/ukpga/2005/2/section/13/enacted> s. 13: See also Amnesty International, *Control orders renewal debate: A temporary measure with no end?* <https://www.amnesty.org.uk/press-releases/control-orders-renewal-debate-temporary-measure-no-end>.

²¹ Terrorism Prevention and Investigation Measures Act 2011 <https://www.legislation.gov.uk/ukpga/2011/23/contents/enacted>

²² Amnesty International, "UK Law Lords rule control orders based on secret information violate right to fair trial," 10 June 2009: [UK Law Lords rule control orders based on secret information violate right to fair trial - Amnesty International](https://www.amnesty.org.uk/press-releases/uk-law-lords-rule-control-orders-based-on-secret-information-violate-right-to-fair-trial)

²³ Terrorism Prevention and Investigation Measures Act 2011, <https://www.legislation.gov.uk/ukpga/2011/23/schedule/1/enacted>, Sch. 1

²⁴ Terrorism Prevention and Investigation Measures Act 2011, <https://www.legislation.gov.uk/ukpga/2011/23/section/12/enacted> s. 12(1A)

While the initial incarnation of TPIMs was less restrictive than control orders, including a reduced maximum number of hours of house detention, an end to forced relocation and a maximum of two years' duration, the Counter Terrorism and Security Act 2015 brought back many of the more restrictive features of the control order regime to be used by the TPIM regime, including forced relocation and the possibility of renewal for up to five years²⁵ without proof of new allegations of terrorism-related activity.²⁶

Amnesty International is deeply concerned that the TPIM regime gives the Home Secretary free rein to impose on an individual a range of highly restrictive long-term measures based merely on the Home Secretary having a "reasonable belief" that the individual is, or has been, involved in terrorism-related activity, without the need for criminal charge, evidence or any judicial oversight if the Secretary of State "reasonably considers the urgency of the case requires".²⁷ Moreover, the "enhanced measures" require a *lower* standard of proof than the standard ones. Finally, legal aid is not available to all individuals upon whom a TPIM is imposed (subject to means) meaning that any form of challenge will be impossible to at least some of those who have been subjected to one.²⁸

TPIMs may be arbitrary and a violation of the rights to liberty, family life, freedom of movement and freedom of association, as well as a form of punishment without trial.

²⁵ Terrorism Prevention and Investigation Measures Act 2011, [Terrorism Prevention and Investigation Measures Act 2011](https://www.legislation.gov.uk/ukpga/2011/23/section/5/enactedAct_2011), https://www.legislation.gov.uk/ukpga/2011/23/section/5/enactedAct_2011 s. 5

²⁶ Jonathan Hall KC, *The Terrorism Acts in 2020: Report of the Independent Reviewer of Terrorism Legislation on the Operation of Terrorism Acts 2000 and 2006, and the Terrorism Prevention and Investigation Measures Act, 2011* April 2022 <https://www.gov.uk/government/publications/the-terrorism-acts-in-2020>, para 8.38

²⁷ Under section 2 (1) of the Terrorism Prevention and Investigation Measures Act 2011 (<https://www.legislation.gov.uk/ukpga/2011/23>), the Secretary of State may by notice (a "TPIM notice") impose specified terrorism prevention and investigation measures on an individual if conditions A to E in section 3 are met. These conditions are:

(1) Condition A is that the Secretary of State reasonably believes that the individual is, or has been, involved in terrorism-related activity (the "relevant activity").

(2) Condition B is that some or all of the relevant activity is new terrorism-related activity.

(3) Condition C is that the Secretary of State reasonably considers that it is necessary, for purposes connected with protecting members of the public from a risk of terrorism, for terrorism prevention and investigation measures to be imposed on the individual.

(4) Condition D is that the Secretary of State reasonably considers that it is necessary, for purposes connected with preventing or restricting the individual's involvement in terrorism-related activity, for the specified terrorism prevention and investigation measures to be imposed on the individual.

(5) Condition E is that—

(a) the court gives the Secretary of State permission under section 6, or

(b) the Secretary of State reasonably considers that the urgency of the case requires terrorism prevention and investigation measures to be imposed without obtaining such permission.

²⁸ Jonathan Hall KC, *The Terrorism Acts in 2020: Report of the Independent Reviewer of Terrorism Legislation on the Operation of Terrorism Acts 2000 and 2006, and the Terrorism Prevention and Investigation Measures Act, 2011* April 2022 <https://www.gov.uk/government/publications/the-terrorism-acts-in-2020>, para 8.33

Amnesty International and many other civil society organizations in the UK and across the region have also raised concerns that administrative orders and other counter-terrorism measures appear discriminatory, disproportionately targeting Muslims or people perceived to be Muslim.²⁹

Temporary Exclusion Orders

Amnesty International is also concerned by the 2015 introduction of “temporary exclusion orders”,³⁰ which prevent a British citizen or others with a right to live in the UK from returning to the UK unless their return is either in accordance with a “permit to return” or they are deported to the UK by another state.³¹ A temporary exclusion order is another administrative order that can be imposed if the Secretary of State “reasonably suspects” that the individual in question is or has been involved in terrorism-related activity, and reasonably considers that it is necessary to impose an order to protect people in the UK from a risk of terrorism.³² Clearly, “reasonable suspicion” is a much lower standard of proof than the criminal standard of proof of “beyond reasonable doubt”.

There is no judicial oversight over this order, apart from the possibility of ex-post facto judicial review, which would have to be pursued from abroad, despite the fact that it invalidates the subject’s British passport. The order lasts for two years and can be renewed for as long as the government claims that the alleged conditions remain satisfied. The individual can apply for a “permit to return”. The permit states when, where and how the person is permitted to return, but it may also be subject to special conditions, such as compulsory reporting and interviews. As with breach of the other administrative orders, return to the UK in contravention of the order without reasonable excuse is a criminal offence, punishable by up to five years in prison. In practice, a temporary exclusion order does more than manage and control the return of individuals to the UK. It temporarily excludes from their home those who have a right to live in the UK, in contravention of the right to freedom of movement, the right to private and family life, and the right to return to one’s own country.³³ Furthermore, Amnesty International considers temporary exclusion

²⁹ In 2019 and 2020, all but one of the TPIMs in force were against members of the proscribed organisation, Al-Muhajiroun. Jonathan Hall KC, *The Terrorism Acts in 2020: Report of the Independent Reviewer of Terrorism Legislation on the Operation of Terrorism Acts 2000 and 2006, and the Terrorism Prevention and Investigation Measures Act, 2011 April 2022* <https://www.gov.uk/government/publications/the-terrorism-acts-in-2020>, para 8.13. Please also see *Europe: A Human Rights Guide for researching racial and religious discrimination in counter-terrorism*, <https://www.amnesty.org/en/documents/eur01/3606/2021/en/>

³⁰ Counter-Terrorism and Security Act 2015, <https://www.legislation.gov.uk/ukpga/2015/6/part/1/chapter/2> Part 1, Ch. 2.

³¹ Counter-Terrorism and Security Act 2015, <https://www.legislation.gov.uk/ukpga/2015/6/part/1/chapter/2> Part 1, Ch. 2.

³² See section 2 of the Counter-Terrorism and Security Act 2015. Oddly, this is a distinct standard from that applicable to TPIMs, which, as explained above, is “reasonable belief”.

³³ ICCPR, Articles 12 and 15. In evidence to the Joint Committee of Human Rights the Minister for Immigration and Security at the Home Office confirmed the provisions in the Bill still have the effect of invalidating a UK national’s passport while they are abroad, and of preventing their return unless they comply with conditions imposed by the Secretary of State. See the Joint Committee of Human Rights report, *Legislative Scrutiny: the Counter-terrorism and Security Bill, HL paper 86/HC 859*, 7 January 2015, <http://www.publications.parliament.uk/pa/jt201415/jtselect/jtrights/86/86.pdf>. p. 15.

orders to be neither necessary nor proportionate, given allegations of criminal behaviour could be handled by the criminal justice system and therefore exclusion and suspension of a passport are disproportionate.³⁴

Citizenship stripping

The Special Rapporteur on counter-terrorism and human rights has written extensively on citizenship stripping in the context of foreign fighters in Syria and Iraq and has “warned against the adoption and use of legislation which undermines the right to a nationality and destabilises the status of citizenship around the world to address a threat of terrorism.”³⁵

Amnesty International does not yet have a body of research on citizenship stripping. However, there is a planned piece of research on this issue in Europe which will include the UK. This is due to be published in October 2023, with research being undertaken in the first half of 2023. The organisation is extremely concerned about the extension and increased use of citizenship deprivation powers in the UK over recent years.³⁶ In the last 15 years, 464 British citizens have been stripped of their citizenship, with 175 of these being for reasons of national security.³⁷

Further concerns include the introduction of section 10 of the Nationality and Borders Act 2022, which allows the Home Office to strip an individual of their British citizenship without providing them with notice or any information regarding the justifications for such a measure. Many stripping orders are also issued in absentia, which, combined with the lack of notice or reasons, means there are great obstacles to challenging them.

The UK is an outlier in Europe in that the Home Secretary’s powers to strip a person’s citizenship exist even where to do so might render that person stateless, which is a flagrant breach of international human rights law.³⁸ Moreover, there is a complete lack of judicial

³⁴ Amnesty International, United Kingdom: Submission to the Human Rights Committee, 29 June 2015 (Index: EUR 45/1793/2015), <https://www.amnesty.org/en/documents/eur45/1793/2015/en/>

³⁵ *Position of the United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism on the human rights consequences of citizenship stripping in the context of counter-terrorism with a particular application to North East Syria*, February 2022: <https://www.ohchr.org/en/special-procedures/sr-terrorism/return-and-repatriation-foreign-fighters-and-their-families>

³⁶ PRCBC and Amnesty International, *Nationality and Borders Bill House of Lords Committee Stage, Day 1, 27 January 2022, Deprivation of Citizenship (Clause 9 and Related Amendments)* https://www.amnesty.org.uk/files/2022-01/Nationality%20and%20Borders%20Bill%20Deprivation%20Briefing.pdf?VersionId=iGSwPBNIHTUOHUoOXs_xUBtMMbDyM_X. The number of British citizens deprived of their citizenship reached an all time high in 2017, with this power being exercised over 104 individuals.

³⁷ Free Movement: *How many people have been stripped of their citizenship?* 10 January 2022 <https://freemovement.org.uk/how-many-people-have-been-stripped-of-their-british-citizenship-home-office-deprivation/>

³⁸ Section 66 of the Immigration Act 2014, <https://www.legislation.gov.uk/ukpga/2014/22/section/66/enacted>, which inserts the

oversight over the Home Secretary's wide discretion to invoke this power and make a person stateless if they believe that a naturalised British citizen "has conducted him or herself in a manner which is seriously prejudicial to the vital interests of the United Kingdom" and has "reasonable grounds for believing that the person is able, under the law of a country or territory outside the United Kingdom, to become a national of such country or territory".³⁹ The government has stated that the term "vital interests" could include the "interests of the economic well-being of the country".⁴⁰ In this manner, a two-tier system of citizenship is created, with naturalised British citizens having the possibility of being made stateless, while this is not possible for people born with British citizenship.

The Home Secretary's power to strip dual nationals of their British citizenship involves a particularly low threshold of "conducive to the public good", widely believed to be code for suspicion of terrorism-related activities, or undefined "extremism".⁴¹ This means that dual citizens are disproportionately affected by the power to deprive and are treated differently from citizens with only British nationality. Appeals against such a decision are heard by the Special Immigration Appeals Commission ("SIAC") and in such cases would employ closed material proceedings (CMPs; see below) for the overwhelming majority of the hearing. As a result, as with other such measures, the individual may never know the content of the information in the government's possession, resulting in further obstacles to challenging them. Changes in recent years have greatly enlarged the power of deprivation and the number of citizens against whom it may be applied.⁴²

new section 40(4A) into the British Nationality Act 1981. The UK has ratified the 1961 Convention on the Reduction of Statelessness, but retained in a reservation the power to strip naturalized citizens of British nationality if they conducted themselves "a manner seriously prejudicial to the vital interests of Her Britannic Majesty." See <http://www.refworld.org/docid/3ae6b39620.html>. The UK has not ratified the 1997 European Convention on Nationality, <http://www.refworld.org/pdfid/3ae6b36618.pdf>. See also Amnesty International, *Europe: Dangerously disproportionate: The ever-expanding national security state in Europe* (Index: EUR 01/5342/2017), <https://www.amnesty.org/en/documents/eur01/5342/2017/en/>, FN. 295

³⁹ See Amnesty International, *Europe: Dangerously disproportionate: The ever-expanding national security state in Europe* (Index: EUR 01/5342/2017), <https://www.amnesty.org/en/documents/eur01/5342/2017/en/>, p. 62 of *Dangerously Disproportionate*, and David Anderson QC, *Citizenship Removal Resulting in Statelessness: First Report of the Independent Reviewer on the operation of the power to remove citizenship obtained by naturalisation from persons who have no other citizenship* report, April 2016: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/518120/David_Anderson_QC_-_CITIZENSHIP_REMOVAL_web_.pdf p. 3, para. 1.2.

⁴⁰ Joint Committee on Human Rights: Twelfth Report, Legislative Scrutiny: Immigration Bill (Second Report), Deprivation of UK Citizenship, 26 February 2014, <http://www.publications.parliament.uk/pa/jt201314/jtselect/jtrights/142/14205.htm#a4> para. 62

⁴¹ Victoria Parsons, *Counter-terrorism: Citizenship stripping: new figures reveal Theresa May has deprived 33 individuals of British citizenship*, Bureau of Investigative Journalism, 21 June 2016, <https://www.thebureauinvestigates.com/2016/06/21/citizenship-stripping41new-figures-reveal-theresa-may-deprived-33-individuals-british-citizenship/>.

⁴² PRCBC and Amnesty International, *Nationality and Borders Bill House of Lords Committee Stage, Day 1, 27 January 2022, Deprivation of Citizenship (Clause 9 and Related Amendments)* https://www.amnesty.org.uk/files/2022-01/Nationality%20and%20Borders%20Bill%20Deprivation%20Briefing.pdf?VersionId=iGSwPBNIHtIUOHUoOXs_xUBtMMbDyM_X, p. 1-2

In its response to a Freedom of Information request made by Amnesty International in February 2022, the Home Office said:

“We do not routinely capture information regarding the religion of those who have been deprived of British citizenship and therefore those who may be in scope of Clause 9.⁴³ However, one of the current main threats to UK national security is terrorism, with the most significant threat coming from international terrorism, including Islamist terrorism. Where the power is used against those involved in Islamist terrorism there may appear to be some over-representation in terms of religion and issues may arise in some religious communities if it is perceived that individuals of a certain group are being targeted unfairly. However, this reflects the source of threat to the UK rather than providing any evidence of a discriminatory approach.”

The Home Office further admitted: “there may therefore be indirect discrimination on the grounds of religion or belief but as the proposal to dispense with notification of a decision to deprive is limited to the specific circumstances of a case, any indirect discrimination on the grounds of religion or belief is not unlawful as it can be justified as proportionate to achieving the legitimate aim of public safety, national security and preserving the integrity of the immigration system.”⁴⁴

4. SECRET EVIDENCE: CLOSED MATERIAL PROCEDURES

Amnesty International is deeply concerned that not only do these discretionary executive powers and administrative processes violate a range of human rights but challenging them is made almost impossible by virtue of the use of closed material procedures (“CMPs”), which are themselves inherently unfair and violate international human rights law, including the right to a fair trial.

CMPs allow a court or tribunal to sit in a closed hearing in order to consider material that the government claims would be damaging to national security if it were to be disclosed. This material is withheld from the individual(s) whose interests are at stake in the case, their lawyer of choice, and the public. A government-appointed special advocate must represent them in a closed hearing, without communicating the evidence to the affected person. The individual therefore does not know the content of the material, even though the court can rely on it to determine the facts and outcome of the case.

In a 2012 Amnesty International report entitled *Left in the Dark: The use of secret evidence in the United Kingdom*, concerns about CMPs included that they: “undermine basic standards of fairness and open justice, can result in violations of the right to fair trial and the right to effective remedy for victims of human rights violations, as well as contribute to failures by the UK to meet its obligations to hold those responsible for human rights

⁴³ This is now s. 10 of the Nationality and Borders Act 2022: <https://www.legislation.gov.uk/ukpga/2022/36/section/10/enacted>

⁴⁴ Freedom of Information Request to the Home Office dated 10 February 2022. Response to Amnesty International UK dated 10 May 2022 FOI Ref 68404

violations to account and to refrain from sending people to real risk of serious human rights violations at the hands of another state.”⁴⁵

CMPs were initially introduced in the narrow and specific context of national security deportation cases through the establishment of SIAC in 1997. However, since then their use has spread to different parts of the UK’s civil justice system and can currently be applied in a wide range of different contexts, including in appeals against the imposition of administrative controls; asset freezing cases; employment tribunals; appeals against the proscription of organizations and certain parole-board hearings. Following the publication of *Left in the Dark*, the Justice and Security Act 2013 (the “JSA”) extended their use further, throughout the UK’s civil justice system, for cases that the government alleges give rise to national security concerns.

Amnesty International is concerned that the JSA has led to the normalisation of the use of CMPs,⁴⁶ with their use doubling in 2015 alone.⁴⁷ As the law reform organisation JUSTICE stated in its 2021 submission to the statutory review of CMPs: “the courts’ application of the JSA...and the Government’s use of CMP has led to evidence in closed when previously it would have been heard in open.”⁴⁸ Over the course of the past two decades, the UK government appears to have increasingly relied on secret evidence in court for national security issues.⁴⁹

There is a requirement under s. 13 of the JSA that a review of the operation of CMPs in their first five years must be completed “as soon as reasonably practicable after the end of the period to which the review relates”, i.e. June 2018.⁵⁰ On 1 December 2022, this review was published, over four years after the review period had passed. In his conclusions, the Independent Reviewer states that “in general terms, I agree with the appraisal by the Government that it has been able to defend claims for damages and for judicial review which would not have been possible without CMPs.”⁵¹ The claims for damages to which the

⁴⁵ Amnesty International, *United Kingdom: Left in the Dark: The use of secret evidence in the United Kingdom* <https://www.amnesty.org/en/documents/eur45/014/2012/en/>, p. 4

⁴⁶ JUSTICE, *Statutory review of the closed material procedure provisions in the Justice and Security Act 2013. Call for Evidence: JUSTICE’s response*, June 2021: [Review-of-CMP-in-the-JSA-2013-JUSTICE-Response.pdf](#), para 38.

⁴⁷ Guardian, *Secret court case application numbers more than double in year*: 15 October 2015 <https://www.theguardian.com/law/2015/oct/15/secret-court-case-application-numbers-more-than-double-in-year>

⁴⁸ Justice, *Statutory review of the closed material procedure provisions in the Justice and Security Act 2013. Call for Evidence: Justice’s response*, June 2021: [Review-of-CMP-in-the-JSA-2013-JUSTICE-Response.pdf](#), para 27.

⁴⁹ Amnesty International, *Submission To The 41st Session Of The UPR Working Group, November 2022, United Kingdom: Dismantling The Human Rights Framework*, EUR 45/5421/2022, March 2022, <https://www.amnesty.org/ar/wp-content/uploads/2022/04/EUR4554212022ENGLISH.pdf>, para. 12

⁵⁰ Justice and Security Act 2013 <https://www.legislation.gov.uk/ukpga/2013/18/contents/enacted>, s. 13

⁵¹ Duncan Ouseley, *Independent report on the operation of closed material procedure under the Justice and Security Act 2013*, November 2022, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1120738/closed-material-procedure-operation-report-webpdf.pdf, section 5, para 1

reviewer refers are largely in cases against the UK for torture and/or extraordinary rendition.⁵² The Independent Reviewer's argument is that, but for CMPs, these claims would either not have proceeded at all or would have proceeded to settlement as a result of national security concerns if the evidence in the case had been heard in open court. However, even with CMPs, many of these cases, in particular the claims brought by Libyan citizens for extraordinary rendition and torture, have in any case been settled. The Independent Reviewer goes on to dismiss as a "significant over-simplification" the contention of the special advocates that, given the aim of the CMP was to enable the Government to fight cases rather than settle them, the high level of settlement in damages claims shows that the aim of the JSA has not been met.⁵³ Amnesty International is concerned that in cases where such grave human rights violations are alleged, the cited reason for the use of closed evidence appears not to be justified.

Further, disappointingly, despite many responses to the Independent Reviewer's call for evidence setting out the human rights concerns in relation to CMPs, such concerns not addressed in any substantive manner. For example, where the Independent Reviewer responds to claims of inherent unfairness in the system of CMPs, he simply says "I disagree", offering minimal or no reason as to why.⁵⁴ The Independent Reviewer says, in his introduction, that the review is concerned with the operation of sections 6 – 11 of the JSA and not "with the principle of whether the JSA CMP should have been enacted."⁵⁵ However, the call for evidence did in fact request responses in relation to Article 6 ECHR. The review therefore falls far short of the level of response expected for a measure which can violate the right to a fair trial, among other important human rights.

Process

⁵² Duncan Ouseley, *Independent report on the operation of closed material procedure under the Justice and Security Act 2013*, November 2022, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1120738/closed-material-procedure-operation-report-webpdf.pdf Annex 4, Part A: List of CMP Cases

⁵³ Duncan Ouseley, *Independent report on the operation of closed material procedure under the Justice and Security Act 2013*, November 2022, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1120738/closed-material-procedure-operation-report-webpdf.pdf section 5, para 5

⁵⁴ Duncan Ouseley, *Independent report on the operation of closed material procedure under the Justice and Security Act 2013*, November 2022, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1120738/closed-material-procedure-operation-report-webpdf.pdf section 5, para 11: "CMP, a respondent to the call for evidence says, has become more commonplace than envisaged, and the balance between open and fair justice and national security has not been maintained as promised. I disagree". See also Annex 3, paras 9 – 15.

⁵⁵ Duncan Ouseley, *Independent report on the operation of closed material procedure under the Justice and Security Act 2013*, November 2022, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1120738/closed-material-procedure-operation-report-webpdf.pdf, Introduction, para 3.

There is a particularly low bar to securing a CMP. Broadly speaking, the state can rely on material which it is not required to disclose to the other party if doing so would be damaging to the interests of national security.⁵⁶ There is minimal judicial oversight to this process. It involves an application for a declaration by the court that the proceedings are proceedings in which a CMP application can be made, and a subsequent application to withhold the relevant material. There is an absolute duty on the court to give permission to the applicant to withhold material where it considers that disclosure of the material would be contrary to the interests of national security.⁵⁷

Fair trial concerns

CMPs violate a number of fair trial rights.⁵⁸ This is despite the fact that the types of cases in which CMPs are typically used are ones which have the potential to have a profound and far-reaching effect on an individual's human rights. The right to a fair trial generally includes at a minimum – in both civil and criminal cases – the right to equality of arms, respect for the principle of an adversarial process, the right to a public hearing and the issuing of a public judgment, including the essential findings, evidence and legal reasoning.⁵⁹ However, with CMPs the UK appears to be chipping away at those fundamental guarantees, invoking national security as purported justification for restricting such fundamental fair trial safeguards.

Equality of arms generally requires disclosure by the state of all evidence it intends to use against a person in the proceeding as well as any other information in the state's possession that might be useful to the individual in defending themselves.⁶⁰ If in some proceedings, some material might lawfully be withheld from the affected individual on the grounds of national security, this should be limited to circumstances where the state demonstrates that disclosure would likely cause an identifiable harm to a specific valid national security interest, that the restriction is necessary and proportionate to protect that interest, and that

⁵⁶ Justice and Security Act 2013 <https://www.legislation.gov.uk/ukpga/2013/18/contents/enacted> s. 6

⁵⁷ Civil Procedure Rules 82.14(10) <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part-82-closed-material-procedure>

⁵⁸ ICCPR, Article 14 and ECHR, Article 6. See also European Court of Human Rights, *A and Others v United Kingdom*, (App no 3455/05), 19 February 2009, paragraph 204.

⁵⁹ ICCPR, Article 14 and ECHR, Article 6: https://www.echr.coe.int/Documents/Convention_ENG.pdf. See also UN Human Rights Committee, General Comment no. 32, UN Doc CCPR/C/GC/32 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G07/437/71/PDF/G0743771.pdf?OpenElement>, 23 August 2007 stating that these guarantees apply both to criminal and civil proceedings. See also case law of the European Court of Human Rights: *Ruiz-Mateos v Spain*, (App no. 12952/87), 23 June 1993, *Lobo Machado v Portugal*, (App no. 15764/89), 20 February 1996; *B and P v United Kingdom*, (App No 36337/97; 35974/97), 24 April 2001, paragraph 36. *Vanjak v Croatia* 2010 Jan 14 App no 29889/04. It should also be noted that the fact that proceedings may not be labelled 'criminal' by national law does not mean they cannot fall within these terms under the ECHR and thereby attract additional fair trial guarantees, see for example, *Engel and Others v. the Netherlands*, (application no. 5100/71 5101/71 5102/71 5354/72 5370/72) 8 June 1976, paragraphs 82-83.

⁶⁰ General Comment no. 32, 23 August 2007 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G07/437/71/PDF/G0743771.pdf?OpenElement> paragraphs 8, 9, 13 and 33.

non-disclosure would not impair the essence of a right to a fair trial.⁶¹ Restrictions on disclosure would also always have to be sufficiently counterbalanced by the procedures followed by the judicial authorities and subject to full and effective judicial scrutiny by an independent court or tribunal.⁶² Thus, relevant information would only be permitted to be withheld if counterbalancing measures could be demonstrated in practice to “ensure that this does not prejudice the overall right to a fair hearing and to be aware of, and able to respond to, the case.”⁶³

In proceedings before SIAC as opposed to other proceedings in which CMPs are employed, material can be kept secret from the individual concerned where disclosure is claimed by the government to be “contrary to the public interest”. Such claims are subject to review by the judge in the case.⁶⁴ Under domestic law, the prohibition on disclosure of information that is “contrary to the public interest” has been broadly defined as any disclosure “contrary to the interests of national security, the international relations of the United Kingdom, the detection and prevention of crime, or in any other circumstances where disclosure is likely to harm the public interest.”⁶⁵ Not every kind of harm that a government may consider a threat to its national interest will qualify as a matter of national security as understood under international human rights law.⁶⁶

“National security” is not defined in English law.⁶⁷ The basis for any potential restriction to human rights on grounds of “national security” is therefore not precisely set out in law as required by the UK’s international obligations, nor constrained to apply only to “national security” within the meaning of article 13 of the ICCPR, which contains safeguards for the

⁶¹ See Amnesty International, *United Kingdom: Left in the Dark: The use of secret evidence in the United Kingdom* <https://www.amnesty.org/en/documents/eur45/014/2012/en/>, p 51, FN 108 for a fuller discussion of Article 14 ICCPR.

⁶² See, for example, European Court of Human Rights, *Jasper v. the United Kingdom*, (App no. 27052/95), 16 February 2000, paragraphs 51-53 and 55-56; European Court of Human Rights, *A and others v the United Kingdom*, (App no 3455/05), 19 February 2009, paragraph 205.

⁶³ UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *Report to the General Assembly on right to a fair trial*, UN Doc A/63/223 (6 August 2008) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N08/451/82/PDF/N0845182.pdf?OpenElement>, paragraph 45(f), and see paragraphs 35-36

⁶⁴ In a CMP the Special Advocate may challenge the Secretary of State’s objections to disclosure of the closed material. SIAC may uphold or overrule the Secretary of State’s objection. If it overrules the objection, it may direct the Secretary of State to serve on the appellant all or part of the closed material which she/he has filed with the SIAC but not served on the appellant. In that event, the Secretary of State is not required to serve the material if she/he chooses not to rely upon it in the proceedings.

⁶⁵ Part 1.4 of The SIAC (Procedure) Rules 2003: <https://www.gov.uk/government/publications/special-immigration-appeal-commission-procedure-rules> see also similar provision in part 76.1(4) of the Civil Procedure Rules: <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part76#IDAZZIC>

⁶⁶ See Amnesty International, *United Kingdom: Left in the Dark: The use of secret evidence in the United Kingdom* <https://www.amnesty.org/en/documents/eur45/014/2012/en/> p. 14

⁶⁷ See <https://www.mi5.gov.uk/output/protecting-national-security.html>, accessed 29 July 2012; “The term ‘national security’ is not specifically defined by UK or European law. It has been the policy of successive Governments and the practice of Parliament not to define the term, in order to retain the flexibility necessary to ensure that the use of the term can adapt to changing circumstances.” See also, however, *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, paragraph 15-19;

expulsion of non-citizens from a State Party. There is also no balancing of competing public interests in SIAC cases.

As part of the right to a fair trial, in an adversarial process both parties in a case should have knowledge of and be able to comment on the evidence and argument presented by the other side, in order to challenge it and establish by contrary evidence that it is wrong.⁶⁸ The further principle that justice be open to public scrutiny acts as an essential safeguard of the fairness and independence of the judicial process, which in turn provides a means of protecting and maintaining public confidence in the justice system.⁶⁹

Amnesty International is unaware of anything in the jurisprudence or General Comments of the Human Rights Committee that would hold it consistent with the right to a fair hearing to allow the government and court to rely on secret evidence (i.e. by excluding the litigant and their lawyer from the hearing of evidence against them) in a proceeding to which article 14 of the ICCPR directly applies.

Intelligence versus evidence

Where closed material procedures apply in a statutory context, such as in TPIM or SIAC cases, the government can rely on a range of intelligence material that would not always be accepted in other civil and criminal proceedings in the UK. This includes information from unidentified informants; intercepts; foreign intelligence services, including in countries with poor human rights records; data mining and second or third hand hearsay. Special advocates have stated that the primary source for this type of remote intelligence material is often “unattributed and unidentifiable and invariably unavailable”.⁷⁰ As a result, their ability to challenge the reliability of such information is often limited.

The former UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, raised serious concerns that “where States begin preferring to use undisclosed evidence gathered by intelligence agents in administrative proceedings over attempts to prove guilt beyond reasonable doubt in a criminal trial” this marks “a ‘shift’ which can ultimately endanger the rule of law, as the collection of intelligence and the collection of evidence about criminal acts becomes more and more blurred.”⁷¹

⁶⁸ European Court of Human Rights, *Ruiz-Mateos v Spain*, (App no. 12952/87), 23 June 1993, paragraph 63; European Court of Human Rights, *Lobo Machado v Portugal*, (App no. 15764/89), 20 February 1996, para 31; European Court of Human Rights, *Uukauskas v Lithuania*, (App. No. 16965/04), July 2010. See also Human Rights Committee Communication No. 779/1997, *Äärelä and Näkkäläjärvi v. Finland*.

⁶⁹ UN Human Rights Committee, General Comment No. 32, UN Doc CCPR/C/GC/32, 23 August 2007, paragraph. 67. Also relevant ECHR case law: *Pretto and Others v Italy* ((App. No 7984/77), 08 December 1983, paragraph 27; *Malhous v Czeck Republic*, (App No 33071/96) 12 July 2001, paragraph 55; *Bakova v Slovakia*, (App No 47227/99), 12 November 2002, paragraph. 30.

⁷⁰ Special advocates Submission to the Justice and Security Green Paper, January 2012. See also Special advocates Written evidence submitted to the Constitutional Affairs Committee, 7 February 2005.

⁷¹ Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, UN Doc: A/HRC/10/3, 4 February 2009. The Eminent Jurists Panel on Terrorism, Counter terrorism and Human Rights has also criticised the practise of treating this type of material as evidence stating that “raw intelligence starts

The robustness of the intelligence material relied upon by the government can be particularly relevant where the case against an individual does not involve a standalone allegation, but rather comprises information drawn from a variety of sources and combined in various ways to create a mosaic justifying the assessment that an individual is a risk to national security.⁷²

This is illustrated in an example given by special advocates in a written submission to the Constitutional Affairs Committee regarding how cross-examination of a witness in a closed hearing can run:

Special Advocate: Do you accept that document A, though consistent with the sinister explanation you attribute to it, is equally consistent with another completely innocent explanation?

Witness: Yes.

Special Advocate: So, the sinister explanation is no more than conjecture?

Witness: No. Document A has to be considered alongside documents B, C, D and E. When viewed as a whole, on a global approach, the sinister explanation is plausible.

Special Advocate: But you have already admitted that documents B, C, D and E are in exactly the same category: each of them is equally consistent with an innocent explanation and with a sinister one.

Witness: Yes, but when viewed together they justify the assessment that the sinister explanation is plausible and form the basis of a reasonable suspicion.⁷³

In a closed material procedure the problem of relying on intelligence material as evidence in this way is exacerbated by the fact that the individual and their lawyer are denied the possibility of seeing all of the parts of the supposed mosaic. They are therefore unable to robustly challenge either the way the government claims the pieces of the mosaic must be regarded, i.e. as amounting to more than the sum of their parts, or the individual elements that have been used to create an overall picture of risk that someone allegedly poses.

to substitute for evidence, to the detriment of individuals and the criminal justice system." *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism Counter-Terrorism and Human Rights* (February 2009), page 161.

⁷² Secretary of State for the Home Department v AF [2008] EWCA civ 1148 paragraph 24. In argument before the court Counsel for the Home Secretary supplied a written note describing the 'normal control order case' as containing "a mosaic of different elements of intelligence, some of them fragmentary, regarding the controlled person's pattern of behaviour that together establish the reasonable grounds for suspecting that he is or has been involved in terrorism-related activity. This mosaic of information is likely to have been drawn from the following, in varying combinations depending on the particular case: (1) Intercept evidence; (2) Covert surveillance evidence; (3) Source and/or agent reporting (which may be wholly or predominantly single sourced or multi-sourced); (4) Information from foreign intelligence liaison".

⁷³ Special advocates Written evidence submitted to the Constitutional Affairs Committee, 7 February 2005.

Ineffective legal representation

In 2012, Amnesty International conducted interviews with 25 barristers and solicitors who had acted in cases where CMPs had been used as well as three special advocates who discussed their role and experience of acting in close proceedings.⁷⁴ It is noteworthy that JUSTICE in its 2021 response to the statutory review call for evidence stated that while they contacted special advocates for the purposes of their research almost a decade later, the advocates were not given permission by the government to speak to the organisation.⁷⁵ This suggests a trend even further away from transparency.

Amnesty International found that lawyers face profound difficulties representing clients effectively where a CMP applies, raising serious questions about how such procedures can achieve any meaningful equality of arms between the parties.⁷⁶

Closed material procedures undermine standards of fairness in the administration of justice; can deny individuals their right to a fair hearing, including with respect to claims that the government will expose them to the risk of serious human rights violations through deportation; and may prevent victims of human rights violations from accessing their right to an effective remedy.

5. NATIONAL SECURITY DEPORTATIONS

Amnesty International is deeply concerned about the UK government's use of national security deportations in violation of the principle of non-refoulement.⁷⁷ Since 2005, the UK has increasingly used unenforceable "diplomatic assurances" to facilitate the deportation of individuals alleged to pose a threat to the UK's national security to states where an individual would face a real risk of torture and ill-treatment on return, despite the absolute prohibition of transfers to such risks under the European Convention for the Protection of Human Rights and Fundamental Freedoms ('European Convention') and other international treaties.⁷⁸ A series of "memorandums of understanding" with governments (including those in Ethiopia, Jordan, Lebanon and Morocco) sets out the broad framework under which a person can be returned to those countries with assurances of treatment that allegedly complies with the international human rights obligations of the UK and the other country involved. Amnesty International and other human rights organizations have documented

⁷⁴ See Amnesty International, *United Kingdom: Left in the Dark: The use of secret evidence in the United Kingdom* <https://www.amnesty.org/en/documents/eur45/014/2012/en/>, p. 5-6; The three Special advocates who attended the meeting were Angus McCullough QC, Martin Goudie and Charles Cory-Wright QC.

⁷⁵ Justice, *Statutory review of the closed material procedure provisions in the Justice and Security Act 2013. Call for Evidence: Justice's response*, June 2021: [Review-of-CMP-in-the-JSA-2013-JUSTICE-Response.pdf](#), para 2

⁷⁶ See Amnesty International, *United Kingdom: Left in the Dark: The use of secret evidence in the United Kingdom* <https://www.amnesty.org/en/documents/eur45/014/2012/en/>, p. 5-6.

⁷⁷ Amnesty International, *Europe: Dangerously disproportionate: The ever-expanding national security state in Europe* (Index: EUR 01/5342/2017), <https://www.amnesty.org/en/documents/eur01/5342/2017/en/>, p. 68

⁷⁸ See Amnesty International, *United Kingdom: Left in the Dark: The use of secret evidence in the United Kingdom* <https://www.amnesty.org/en/documents/eur45/014/2012/en/> p. 9

violations of “diplomatic assurances” over the years and consider such agreements as inherently unreliable.⁷⁹

SIAC is the tribunal that hears appeals against decisions made to deport, or exclude, someone from the UK on national security grounds. Secret evidence may therefore be considered in SIAC: (1) as the basis for government claims that a person is a threat to national security; (2) to support the government’s claims that a person subject to deportation would not be at risk of human rights violations, including torture and ill-treatment, on return; and (3) as the grounds for detention in the course of deportation proceedings or the imposition of sometimes severely restrictive bail conditions in cases where a person might be released on bail in the course of deportation proceedings. In each phase of the case, SIAC’s determinations have serious implications for the enjoyment of persons’ human rights and for their well-being and that of their families and yet, as with other measures involving CMPs, the use of secret evidence in SIAC cases creates an almost insuperable barrier to a person’s ability to challenge information reviewed by the tribunal in closed hearings.⁸⁰

6. THE PREVENT STRATEGY

Amnesty International is deeply concerned about what would appear to be a disproportionate targeting of the Muslim community with the Prevent strategy.⁸¹

Such concerns include the chilling effect that Prevent has on the rights to freedom of expression and assembly, as well as civic participation generally as people refrain from engaging in various forms of legitimate political and social activity because they fear appearing on the state’s radar; and how the duties associated with the programme infringe on the rights of children.⁸² Data from 2014 to 2016 showed that 39% of children referred under Prevent were recorded as Muslim and 38% were Asian. This is vastly disproportionate to these groups’ representation in the UK population writ large. Several cases of children

⁷⁹ Victoria Parsons, “Another ‘Abu Qatada’ saga? Theresa May thwarted as judge bails convicted extremist in new deportation hearing,” Bureau of Investigative Journalism, 24 July 2015, <https://www.thebureauinvestigates.com/2015/07/24/another-abu-qatada-saga-theresa79may-defeated-judge-bails-n2-extremist-siac-deportation/>. See also, Adam Coogle, “Abu Qatada case is no victory for London,” The World Post, 27 October 2014 (updated 27 December 2014), http://www.huffingtonpost.com/adam-coogle-/abu-qatada-case-is-no-vic_b_6054974.html (Jordan violated assurances of a fair trial by admitting torture-tainted evidence into proceedings against defendant).

⁸⁰ See Amnesty International, *United Kingdom: Left in the Dark: The use of secret evidence in the United Kingdom* <https://www.amnesty.org/en/documents/eur45/014/2012/en/>, p. 10.

⁸¹ See, for example, Amnesty International, *UK: David Cameron's defence of the Prevent programme is 'shockingly misplaced'*, <https://www.amnesty.org.uk/press-releases/uk-david-camerons-defence-prevent-programme-shockingly-misplaced>

⁸² See, among others, Rights and Security International, *RWUK takes legal action over prevent review*, 6 February 2020, <https://www.rightsandsecurity.org/impact/entry/rights-watch-uk-takes-legal-action-over-prevent-review>; Leigh Day, Government concedes position in Prevent legal challenge <https://www.leighday.co.uk/latest-updates/news/2019-news/government-concedes-position-in-prevent-legal-challenge/>; Amnesty International and Open Societies Foundation, *Europe: A Human Rights Guide for researching racial and religious discrimination in counter-terrorism* (Index: EUR 01/3606/2021), February 2021, [Europe: A Human Rights Guide for researching racial and religious discrimination in counter-terrorism - Amnesty International](https://www.amnesty.org/en/documents/eur01/3606/2021/en/)

referred to Prevent confirm the significant stereotypes regarding their racial and religious background.⁸³

Amnesty International UK joined a coalition of 17 human rights and community groups in a boycott of the review of Prevent led by William Shawcross. Statements at the time cited serious concerns of bias and a pattern of behaviour that demonstrated the government's unwillingness to meaningfully engage with affected communities and to seriously interrogate the Prevent duty. These concerns included its disproportionate reporting of British Muslim children and its chilling effect on British Muslims' freedom of expression and ability to access essential services.⁸⁴

Amnesty International is currently working on a new piece of research on this chilling effect, which is due to be published in mid-2023. We will be happy to meet with the Commission to discuss our findings.

7. EXPANSION OF THE DEFINITION OF TERRORISM AND TERRORIST OFFENCES

This submission has largely focused on the UK government's use of executive powers and administrative measures that exist outside the criminal justice system and are used against so-called threats to national security. An additional key concern is the significant expansion in recent years of both the definition of terrorism and the range of possible terrorism offences. Vague and overly broad definitions violate the principle of legal certainty and can lead to violations of internationally recognized human rights.⁸⁵

The Terrorism Act 2000 definition has been expanded through subsequent legislation that has added new offences, leading to a vast arsenal of what constitutes "terrorism-related activity".⁸⁶ In August 2015, the UN Human Rights Committee expressed concern that the UK had maintained the broadly formulated definition of terrorism in section 1 of the

⁸³ Amnesty International UK, UK: David Cameron's defence of the Prevent programme is 'shockingly misplaced', 26 April 2022, <https://www.amnesty.org.uk/press-releases/uk-david-camerons-defence-prevent-programme-shockingly-misplaced>

⁸⁴ Amnesty International, United Kingdom: Dismantling the Human Rights Framework, March 2022, <https://www.amnesty.org/ar/wp-content/uploads/2022/04/EUR4554212022ENGLISH.pdf> para. 13

⁸⁵ The UN Human Rights Committee has also raised concerns about both of these points. Terrorism Act 2000 s1 (1) as amended by Terrorism Act 2006 (c. 11), s. 34; S.I. 2006/1013, art. 2 and Counter-Terrorism Act 2008 (c. 28), ss. 75(1)(2)(a), 100(5) (with s. 101(2)); S.I. 2009/58, art. 2(a). Available here: <http://www.legislation.gov.uk/ukpga/2000/11/section/1#commentary-c16756551>.

⁸⁶ Amnesty International has had longstanding serious concerns about the definition of terrorism in UK law, and has expressed concern about the definition of "terrorism" in the Terrorism Act 2000 since that Act was first introduced in Parliament; see, for instance, Amnesty International, UK: Briefing on the Terrorism Bill, (Index: EUR 45/043/2000), published in April 2000 and Amnesty International, "UK: High court decision to uphold use of terrorism legislation against David Miranda 'chilling,'" 19 February 2014, <https://www.amnesty.org.uk/press86releases/uk-high-court-decision-uphold-use-terrorism-legislation-against-david-miranda>. For examples from other organisations 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.

Terrorism Act 2000 “that can include a politically motivated action which is designed to influence a government or international organization, despite significant concern... that the definition is ‘unduly restrictive of political expression’.”⁸⁷ Amnesty International and many others have outstanding concerns, in particular with the still vague notions of what constitutes “facilitation”, “encouragement” or “instigation” in the commission of an “act of terrorism”, as provided in the 2015 Counter Terrorism and Security Act amended definition.⁸⁸ The UK’s Independent Reviewer of Terrorism Legislation reiterated his own concerns about the broad definition of terrorism under UK law in a December 2016 report.⁸⁹

The Counter-Terrorism and Border Security Act 2019 introduced several draconian measures that violate the rights to privacy, liberty and security and freedom of expression, among others.⁹⁰ 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 intends to use it, are so broad and vague that they infringe the principle of legal certainty, and are thereby inconsistent with Article 7 of the European Convention (no punishment without law) and Article 15 of the International Covenant on Civil and Political Rights.

Amnesty International has also repeatedly expressed its concerns about the criminalisation of preparatory acts such as preparation to travel,⁹¹ which are deeply problematic as they can have an adverse effect on freedom of movement.⁹² They also mean that actions far removed from the commission of a principal terrorism-related offence are now being criminalized.

RECOMMENDATIONS

⁸⁷ UN Human Rights Committee, Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland, CCPR/C/GBR/CO/7, 17 August 2015, para. 14.

⁸⁸ Counter-Terrorism and Security Act 2015 s 14(4): http://www.legislation.gov.uk/ukpga/2015/6/pdfs/ukpga_20150006_en.pdf.

⁸⁹ David Anderson QC, “Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and Part I of the Terrorism Act 2006”, 1 December 2016, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/573677/THE_TERRORISM_ACTS_IN_2015__web_.pdf, pp 24-26

⁹⁰ A new offence of entering or remaining in a designated area (determined by the Secretary of State) overseas failed to introduce proper exceptions for such circumstances as young people who have been groomed, or those entering to document human rights abuses (A late amendment from the House of Lords provided an exception for humanitarian aid workers.). The Act also expanded criminalisation of expression by: (i) lowering the threshold for criminalisation in the offence of ‘inviting support for a proscribed organisation’ to include recklessness as to whether the speech in question does encourage anyone to support such an organisation; and (ii) prohibiting the publishing online of an image of any item (including an item in a private home) which, in the circumstances, arouses suspicion that the person may be a supporter or member of a proscribed organisation. Such developments are contrary to the UK’s stated support for recommendation 134.62 (Botswana) at the last UPR that all new laws, including counter-terrorism measures, be in accordance with those obligations. The Act also extends the existing problematic framework for port and border stops and detention under schedule 7 of the Terrorism Act 2000 to cover ‘hostile state activity’.

⁹¹ s. 5 Terrorism Act 2006: <https://www.legislation.gov.uk/ukpga/2006/11/section/5>

⁹² ICCPR Article 12. See also, ECHR Protocol 4, Article 2.

Amnesty International would urge the commission to make the following recommendations to the government of the UK.

In relation to executive powers and administrative measures generally:

- Refrain from bypassing the ordinary criminal justice system, including by employing secretive administrative procedures to impose restrictions on individuals' rights of liberty, freedom of movement, association and privacy. The UK should rely on the ordinary criminal justice system and avoid creating parallel administrative executive powers.
- Scrap the Terrorism Prevention and Investigation Measures regime; or reverse regressive changes made, by reinstating the previous standard of proof, limits on the number of times an Order can be renewed and limits on the maximum hours of curfew that may be imposed.

In relation to the use of classified material in judicial proceedings:

- Repeal Part 2 of the Justice and Security Act 2013, which provides for the use of Closed Material Procedures.
- Avoid to the greatest extent possible the use of secret evidence. While imminent national security concerns may enable states to restrict publication of sensitive materials, investigations and prosecutions must have the necessary safeguards to ensure that a defendant, or other person facing administrative restrictions or seeking redress for a human rights violation, has access to a fair trial in accordance with the rule of law.
- Secret information should never go undisclosed when it would expose serious human rights violations directly committed by the state or in which the state is complicit.

Amnesty International emphasises that there is no legitimate basis for the UK government to refuse proposals for reform that have been made by UK civil society to SIAC proceedings, and said reforms can and should be implemented immediately, including:

- Allowing Special advocates in all cases to communicate in a fulsome manner with the individuals whose interests they are appointed to represent, and those individuals' lawyer of choice, after the Special Advocate has reviewed the closed material; and
- Conceding in all cases before the courts that the government and the court must, whenever a closed material procedure operates, ensure the individual concerned is provided with at least such disclosure of the closed material as was held to be required in the case of AF(no3).

In relation to citizenship stripping:

- Include a rigorous proportionality assessment taking into account the impact on the human rights of the individual(s) concerned.
- Respect the principle of non-discrimination and the absolute ban on refoulement.
- Respect the right of everyone to a nationality and therefore avoid the consequence of statelessness.
- Give a person subjected to such a measure a meaningful right to appeal the stripping and the right to a full and effective remedy.
- Repeal clause 10 of the Nationality and Borders Act 2022.

In relation to national security deportations and diplomatic assurances:

- Decline to extradite, deport, expel or otherwise transfer any person to a place where they would be at real risk of torture or other ill-treatment.
- Refrain from seeking or otherwise relying on “diplomatic assurances” against torture and other ill-treatment as they are inherently unreliable and cannot provide an effective safeguard against the risk of exposure to such abuse.

In relation to the Prevent strategy:

- Urgently reconsider the Prevent strategy in light of concerns that it may be ineffective, disproportionate and discriminatory.

In relation to criminal law:

- Refrain from adopting or maintaining vague and overly broad definitions of “terrorism”.
- Ensure that each constituent element of a terrorism-related offence under national law is precisely and sufficiently circumscribed to uphold the principle of legality.
- Amend the Counter-Terrorism and Border Security Act 2018 to repeal offences relating to entering or remaining in a designated area and expanding criminalization of expression; and remove the new Terrorism Act 2000 port and border controls allowing suspicion-less stops to determine if an individual may be engaged in hostile state activity.