



SUBMISSION TO THE UNITED NATIONS HUMAN RIGHTS
COUNCIL'S UNIVERSAL PERIODIC REVIEW MECHANISM
CONCERNING THE UNITED KINGDOM: ANNEX 2



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BRITISH IRISH RIGHTS WATCH SUBMISSION TO UK GOVERNMENT CONSULTATION REGARDING PROPOSED COUNTER TERROR LEGISLATION, AUGUST 2007

1. INTRODUCTION

- 1.1 British Irish RIGHTS WATCH is an independent non-governmental organisation that monitors the human rights dimension of the conflict and the peace process in Northern Ireland. Our services are available free of charge to anyone whose human rights have been affected by the conflict, regardless of religious, political or community affiliations, and we take no position on the eventual constitutional outcome of the peace process.
- 1.2 We welcome this opportunity to make a submission to Government concerning their proposals for new counter-terrorism legislation. We have only commented on the human rights implications of the proposed counter-terrorism measures which fall directly under our remit.
- 1.3 In Part I of our submission, we explore the options for pre-charge detention; the offence of acts preparatory to terrorism; the role of post charge questioning; the use of intercept evidence; the use of supergrasses and the threshold test and some counter-terrorism options proposed by the Government. In Part II, we examine the issues of disclosure in relation to suspected terrorist financing; measures in relation to DNA of terrorism suspects; data sharing powers and the collection of information likely to be of use to terrorists. We then consider the proposed introduction of enhanced sentences; notification requirements; the use of control orders; the suggestion of a police power to hold passports and the transfer of functions to the Advocate General (Northern Ireland). We have attached our response to the Second report of the independent reviewer pursuant to section 14(3) of the Prevention of Terrorism Act 2005, Lord Carlile of Berriew, for reference.
- 1.4 British Irish RIGHTS WATCH have been observing the development of counter-terrorism legislation since 1990. Our experience from Northern Ireland suggests that only three mechanisms can effectively combat terrorism. The first is preventative, and therefore preferable: the collection of accurate intelligence and the proper use of that intelligence to prevent attacks. The second is deterrent: the effective detection of crime. The third is the most valuable of all: political resolution. The clearest lesson we have drawn from our experience is that draconian and repressive legislation does not decrease the threat of terrorism. The aim of any government, facing such a threat, should be to enhance the protection of human rights. By developing a strong

human rights regime, individuals and communities will be more likely to support security mechanisms such as rigorous airport searches in the prevention of terrorism.

- 1.5 British Irish RIGHTS WATCH recognise the importance of the Government's widespread public consultation on these counter-terrorism proposals. We believe that by engaging with civil society, the Government should be able to build a consensus on the issues around counter-terrorism legislation and the protection of human rights. However, we do sound a note of caution about the state of human rights in the UK today. We believe that the Government should be doing more to publicly protect human rights in the media and in discussion about the role of human rights both nationally and internationally. BIRW draw attention to the Joint Committee on Human Rights' (JCHR) recent report into Counter-terrorism Policy and Human Rights, which noted their concern about the "effect of repeated questioning of the domestic human rights law framework by high-ranking members of the Government."¹ We believe that the mixed messages sent by the Government on the issue of human rights and terrorism are undermining the status and protection of such rights. BIRW agree with the JCHR's recommendation that the Government should make an unequivocal public commitment to the existing international human rights law framework.
- 1.6 As noted above, the increasing development of counter-terrorism legislation may not be the most appropriate response to an increased security threat. According to research by Sweet & Maxwell, an estimated 2,685 new laws have been passed since 1997², which could be construed as legislative overkill. It should be sufficient for the Government to utilise the existing legislation and increase the number of successful arrests, investigations and prosecutions of terrorists. British Irish RIGHTS WATCH agree with the Joint Committee on Human Rights that the introduction of new legislation must be based on sound argument, complimented by evidence, and that such an introduction must be transparent and open to consultation.

PART I

2. OPTIONS FOR PRE-CHARGE DETENTION IN TERRORIST CASES

- 2.1 British Irish RIGHTS WATCH is opposed to the extension of the time during which an individual can be held without charge. We have previously expressed our concern that extending pre-charge detention to 28 days already pushed the boundaries of human rights compliant

¹ Nineteenth Report of Session 2006-07, Counter Terrorism Policy and Human Rights: 28 days, intercept and post-charge questioning, Joint Committee on Human Rights, July 2007, p. 2

² Cited at *Research reports 'dramatic jump' in new law since 1997*, Legal Action Group, July 2007, <http://www.lag.org.uk/Templates/Internal.asp?NodeID=91991>

policing.³ Detention of more than a month without charge can have serious psychological and social implications for both the detainee and his or her family. These factors also undermine the fundamental principles of the British legal system, such as the presumption of innocence and the right to a fair trial.

- 2.2 The Government's justification for such an extension is that it will enable the police to gather more evidence. British Irish RIGHTS WATCH believe that such evidence should be in place before arrest so as to prevent protracted detention or the holding of innocent individuals. Similarly, there is an argument that an extension of the detention time lessens the urgency of an investigation, thus leaving suspects in custody unnecessarily. We note from the Joint Committee on Human Rights' report that those suspects who were released at the end of the 28 day detention "raise concerns about whether the power to detain for up to 28 days is being used to detain those against whom there is least evidence."⁴
- 2.3 In addition, we are concerned that conditions at Paddington Green Police Station, where terrorist suspects are held for questioning, may not offer the appropriate facilities. For instance, we note that there is no dedicated space for exercise and that there is only one room available for suspects to consult with their solicitors. While we welcome the fact that after 14 days suspects are transferred to "better" accommodation (a prison) we do not feel that this environment is appropriate for individuals who have not been charged with any offence. BIRW remind the Government of the requirements set out under the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and the UN Convention against Torture, and the issues raised in the JCHR report, and urge the Government to improve the facilities at Paddington Green and provide better facilities for consultations between detainees and their lawyers.
- 2.4 BIRW do not believe that judicial and Parliamentary oversight of extended detention would provide suitable safeguards to protect the rights of suspects or the rule of law. While the safeguards introduced under the Terrorism Act 2006 have contributed in part to protecting the rights of suspects in custody, it is not clear how rigorous the judiciary has been in vetting applications put forward by the Crown Prosecution Service (CPS). British Irish RIGHTS WATCH would welcome information on the exact numbers of applications put forward by the CPS and the Police and the outcomes of the decisions in each case. We would also welcome information on the any special training undertaken by judges who assess such applications.

³ BIRW submission to the Home Affairs Committee's Inquiry into Counter-Terrorism Proposals, July 2007

⁴ Nineteenth Report of Session 2006-07, Counter Terrorism Policy and Human Rights: 28 days, intercept and post-charge questioning, Joint Committee on Human Rights, July 2007, p. 14

- 2.5 We have already seen the employment of this kind of oversight with control orders. Despite the publication of reports by Lord Carlile and the clear indications that control orders are an unsuitable method of addressing a terrorist threat, relatively limited changes have been made to this counter-terrorism measure. Indeed, a ruling in the High Court by Mr Justice Sullivan, stated that control orders violated Article 5 of the European Convention on Human Rights (right to liberty).⁵ These problems are compounded by the fact that seven individuals, suspected of involvement in terrorist activity and subject to control orders, have absconded.⁶
- 2.6 As with many counter-terrorism proposals, lessons can be drawn from Northern Ireland. The policy of internment, used in Northern Ireland during the 1970s, produced similar effects to those which could occur should pre-charge detention be extended. The policy's aim was to combat the IRA and it involved the mass arrest of IRA suspects. However, those in charge of implementing the policy relied on out-of-date intelligence and a proportion of those arrested and detained were completely innocent. Allegations of torture, cruel and degrading treatment began to emerge, and contributed to an upsurge in violence in Northern Ireland. More significantly, individuals who did actually pose a threat to the security of the UK 'slipped through the net' before the raids took place. Internment ultimately failed because it did not respect the civil liberties and human rights of one section of society. By directly and solely targeting Catholics/nationalists/republicans, it sent a clear message about the value of the human rights of that community. This message was enhanced by the extent to which the UK Government was prepared to go to elicit information, for instance the use of degrading and inhuman treatment of prisoners (the infamous "five techniques"⁷ regrettably still in use in other parts of the world) and an inability to admit at an early stage that internment was an unsuccessful policy. We cannot better the army's own assessment of internment: "Put simply, on balance and with the benefit of hindsight, it was a major mistake."⁸
- 2.7 BIRW acknowledge the fact that there are differences between contemporary Islamic terrorism and Irish terrorism. However, unlike the Government, British Irish RIGHTS WATCH do believe that an application of additional resources rather than the introduction of stifling legislation would be the best way forward. BIRW understand that an investigation may be sequential; however, it is not clear why increasing the number of investigators who speak the relevant languages will not have a positive impact upon an investigation which involves translating mobile phone conversations, for instance. Similarly,

⁵ JJ and others v Secretary of State for the Home Department [2006] EWCA Civ 1141; *Government's control order 'problem'*, by Jon Silverman, *BBC News*, 28 June 2006

⁶ *Q & A: Control orders*, by Dominic Casciani, *BBC News*, 24 May 2007

⁷ Hooding, sleep deprivation, white noise, food deprivation, and physical abuse

⁸ *Operation Banner: An analysis of Military Operation in Northern Ireland*, by General Sir Mike Jackson GCB CBE DSO ADC, Ministry of Defence, July 2006

the international nature of terrorist investigations should not mean an increase in detention time but rather increased co-operation between countries in tackling terrorism for the reasons stated above. BIRW believe that the Government's case for increasing pre-charge detention is weak and lacks any evidential basis.

3. ACTS PREPARATORY TO TERRORISM

3.1 British Irish RIGHTS WATCH is concerned about the offence of Acts Preparatory to Terrorism which was introduced under the Terrorism Act 2006. We believe that the vague language used in the legislation and the high sentences which such charges carry could lead to miscarriages of justice. BIRW also do not believe that it is appropriate to use this charge as a method of extending the detention of an individual based primarily on the loose language which enables potentially innocent acts to be incorporated as a criminal offence.

4 POST CHARGE QUESTIONING

4.1 British Irish RIGHTS WATCH has concerns that post-charge questioning could, in certain circumstances, lead to the harassment of suspects. We believe that the further interviewing of suspects, after they have been charged, can only take place when fresh evidence has come to light. In this way, suspects will be afforded the same due process of law and protections as prior to their being charged. The right to remain silent should still apply in such circumstance, of course. Equally, suspects should not be made to compromise their defence. We also believe that by setting different standards for terrorist suspects and criminal suspects, the Government is in danger of developing a twin-track judicial system. We also believe it would be beneficial for the Government to wait until the outcome of the consultation into similar changes to the Police and Criminal Act 1984.

5. USE OF INTERCEPT EVIDENCE

5.1 Given that terrorists can avail themselves of the benefits of modern technology, on the face of it there is an argument for giving the prosecution equality of arms. However, careful attention needs to be paid to the human rights implications of covert surveillance, in particular its impact on the privilege against self-incrimination, which forms an important element of the right to a fair trial. Care also needs to be exercised in targeting suspects for such surveillance, because of its impact on the right to respect for privacy, not only of the suspects but also of third parties. Intelligence gathering of this sort should not be used to build databases on people who are not involved in terrorism, and records engendered in the course of combating terrorism that involve innocent persons should be destroyed at the earliest opportunity.

- 5.2 If intercepted communications are to be allowed in evidence, then so too must information about how such evidence was obtained, in order that the defence may challenge evidence that was gathered improperly. The use of intercepted material which is shrouded in secrecy because of an alleged need to protect sources and methods is not acceptable. We draw attention to the current legislation governing covert surveillance - Regulation of Investigatory Powers Act 2000 (RIPA). Under this legislation, a person who believes, for example, that his or her telephone is being tapped without cause, can make a complaint. However, the only outcome of the complaint is that s/he will be told that the authorities cannot confirm or deny that the telephone is being tapped, but can assure the complainant that, if it is being tapped, then the tapping is in compliance with the law. There is no mechanism for having the interception stopped. As we have seen in a recent case⁹ in Northern Ireland, where privileged conversations between lawyers and their clients were the subject of a covert listening device at Antrim police station's Serious Crimes Suite, the threshold test for the use of surveillance under RIPA is unclear and the decision-making process opaque. The development of any new legislation in this area must take into account the problems we have seen with RIPA.
- 5.3 The use of evidence gathered by telephone interception should be the subject of keen safeguards, with a rigorous system for approval. We believe that such interception should be used for the minimum amount of time necessary and therefore be subject to regular review. The aim should be to remove it at the earliest opportunity. A system which enables individuals to find out if their telephones or other means of communication, such as email, are tapped, and to subsequently challenge such surveillance, should be put in place and must be robust and transparent.
- 5.4 We also have concerns regarding the use of intercept evidence which could potentially compromise a suspect's right to confidential access to a lawyer. The use of evidence gained by listening to such conversations would be disproportionately advantageous to the prosecution, and again undermine the right to a fair trial. In our view, intercepted communications between suspects and their lawyers should never be admissible as evidence. We welcome the review proposed by the Government to be chaired by the Rt Hon Sir John Chilcott and hope that they will consult widely and that the results of their work will be made publicly available.

6. USE OF SUPERGRASSES

- 6.1 BIRW has very serious concerns that the common law practice of "Queen's Evidence" is now on a statutory footing in England, Wales and Northern Ireland and about the proposed use of supergrasses in terrorist cases. We know from our experience in Northern Ireland that

⁹ *In the matter of Coleman, Avery and Others, Court of Appeal, Belfast* 26 and 28 June 2007

the use of supergrasses is highly problematic. The Northern Ireland Court of Appeal overturned many of the convictions which resulted from the supergrass trials of the 1980s and international criticism of the practice indicated that it violated the right to a fair trial. We believe that the use of supergrasses undermines the stability of convictions and respect for the rule of law. It also promotes a culture of impunity, in that it encourages people who have engaged in serial acts of criminality to avoid appropriate sanctions. Supergrass evidence is also inherently unreliable, as the supergrass is motivated to convict as many others as possible in order to lighten his or her own sentence.

- 6.2 The use of supergrasses is also highly damaging to building community confidence in policing and counter-terrorism measures generally. If people believe there may be spies in their midst, with the potential for settling personal scores by naming neighbours as terrorists, communities begin to distrust their own members. Fractured communities do not trust the police when they cannot trust one another, and the flow of vital intelligence can be seriously hampered.
- 6.3 The use of informers by the security forces in Northern Ireland has led to tragic consequences. Most recently, the Police Ombudsman for Northern Ireland published the result of her investigation into the use of informers in the 1990s. Her report, Operation Ballast, uncovered information about the murders of ten people and 72 instances of other crime, including ten attempted murders, ten "punishment" shootings, 13 punishment attacks, a bomb attack in Monaghan, 7 instances of drug dealing, and additional criminality, including criminal damage, extortion and intimidation. She also uncovered widespread and systemic collusion between members of police Special Branch and the UVF, where Special Branch had covered up the crimes of their mole in the UVF over a period of many years. Special Branch had been hiding Northern Ireland's dark history of collusion and the use of informers by the security services should provide key lessons, particularly in terms of what to avoid, to be learnt by the Government as it develops further counter terrorism legislation.

7. MAKING FULL USE OF THE THRESHOLD TEST

- 7.1 British Irish RIGHTS WATCH note the importance of making full use of the threshold test to investigate and charge terrorist suspects. However, we caution against using the threshold test in such a way that it results in wrongly detaining individuals on minor charges which may later be dropped as a method of keeping them in custody.

8. OPTIONS PROPOSED BY THE GOVERNMENT.

- 8.1 Option 1. This has been discussed above in paragraphs 2.1 to 2.7.
- 8.2 Option 2. We do not believe that the addition of an affirmative resolution by Parliament would provide a secure enough safeguard to protect the rights of suspects. British Irish RIGHTS WATCH agree with the

Government's concerns that such a vote would be unwieldy and provide operational difficulties for the police.

- 8.3 Option 3. BIRW are interested by the suggestion put forward by Liberty with regard to the Civil Contingencies Act 2004. This would enable decisions by the Government to be scrutinised appropriately. However, the fact that such measures could be renewed at anytime may mean that once the use of emergency powers has been declared that there is little incentive to return to regular powers.
- 8.4 Option 4. The introduction of judge-led investigations could provide an interesting method of tackling terrorism. However, the cost and problems associated with re-orienting the British judicial and criminal system to one similar to the Magistrates' model found in mainland Europe are immense. BIRW had particular concerns about the differing standards applied to suspected terrorists, for instance, the fact that in the French model, terrorist suspects could be held for six days as opposed to four and that terrorist suspects were denied access to a lawyer for the first 72 hours of detention.

CONCLUSION

We do not believe that the Government has made a compelling case for extending the detention limit beyond 28 days. This is supported by the fact that in 2006, "there has been no case in which a suspect was released but a higher limit than 28 days would definitely have led to a charge".¹⁰ We are particularly concerned by the use of statements such as "it will only be necessary to go beyond 28 days in exceptional circumstances".¹¹ We saw such phrasing in the request to introduce 28 day detention and already we have seen the number of "exceptional circumstances" spiral. If, as the government maintains, the threat from terrorism is increasing, we do not believe that extended detention is an adequate response. Rather, the Government should be using a holistic approach which prevents the alienation of minority groups, builds bridges between various aspects of the security services (both nationally and internationally) and increases the numbers of translators and other specialist staff to speed up investigations and high quality police and intelligence work.

PART II

9. DISCLOSURE IN RELATION TO SUSPECTED TERRORIST FINANCING

- 9.1 British Irish RIGHTS WATCH are aware of the problems regarding the financing of terrorism. BIRW have been supportive of the Assets Recovery Agency in Northern Ireland because we believe that it sends a strong message to those involved in criminal and terrorist activity. However, Lord Carlile, in his examination of terrorism legislation

¹⁰ *Options for pre-charge detention in terrorist cases*, Home Office, 25 July 2007

¹¹ *Options for pre-charge detention in terrorist cases*, Home Office, 25 July 2007

illustrated the problems with monitoring terrorist assets; citing the example of an estate agent who may be unaware that the rent from office premises may ultimately benefit a company operating for the purposes of a terrorist organisation, he indicated that s.18 placed a reverse burden of proof on the estate agent.¹² We agree with the proposed measure to confiscate the assets of an individual who has been convicted of a terrorist offence; however, we caution that such measures should not impact upon the innocent dependents of such an individual, not on those who may have become innocently embroiled in money-laundering.

10. MEASURES IN RELATION TO DNA OF TERRORIST SUSPECTS

- 10.1 The gathering and holding of the DNA of those suspected of terrorist offences is a sensitive issue. As with all personal information held by Government agencies, it is vital that the information is fully protected and secure and that there are clear protocols for the collection and destruction of such information. While we acknowledge the importance of a counter-terrorism DNA database, we believe that such a database should be integrated into the National DNA Crime database. This is linked to our view that any such database should be subject to the same procedures that currently apply to the National DNA Crime database. Terrorists are criminals and creating separate mechanisms for them, such as a separate database, only feeds into the hero complex upon which many terrorists survive, setting them apart from the mainstream judicial process. BIRW are opposed to the creation of legislation which would enable the retention, storage and use of DNA/fingerprints of those on control orders. As is clear from our submission, we do not support any measures which would cement control orders as a suitable measure to tackle terrorism.

11. DATA SHARING POWERS FOR THE INTELLIGENCE SERVICES

- 11.1 As far as resources for the security services are concerned, we believe that sharing information between agencies should increase the capacity of such agencies. However, it is vital that appropriate safeguards are laid down in the design of such a sharing scheme. Individuals should retain the right to know if an agency holds information about them, and what that information is, and should have the right to challenge any inaccurate information. There should be clear guidelines on how the information can be shared, with whom, and for what purpose.

12. COLLECTION OF INFORMATION LIKELY TO BE OF USE TO TERRORISTS

- 12.1 The addition of section 58, which deals with the possession of documents for terrorist purposes, to the Terrorism Act is worryingly

¹² Report on the operation of the Terrorism Act 2000 by Lord Carlisle of Berriew Q.C, June 2007

vague in its wording.¹³ We hope that it will apply to security personnel leaking information to terrorists.

- 12.2 In April 2007, Mark Thompson, a prominent human rights activist from Northern Ireland, was one of over a hundred people who was visited by the police and told that his life was under threat from loyalists, presumed to be the UVF. Two members of a loyalist flute band, one of whom was a civilian employee with access to police computers, have been arrested in relation to passing information to the UVF and possession of information useful to terrorists. This indicates the need for the vetting process used by the security forces to be as robust as possible and to prevent private information falling into the wrong hands.

13. ENHANCED SENTENCES

- 13.1 British Irish RIGHTS WATCH have grave concerns regarding the proposal to enhance the sentences for terrorists who are convicted of non-terrorist-specific offences. As previously noted, if the Government treats terrorists differently from other criminals because of the motive for their crimes, it can only create miscarriages of justice and martyrs to the cause. This danger is increased if the Government specifies non-terrorist offences as incurring greater penalties dependent upon the motivation of the individual carrying out the crime. This will contribute to the creation of a twin-track justice system, which in turn undermines the rule of law and the protections currently afforded to both suspects and victims by the judicial system.
- 13.2 There appears to be a principle of disproportionate deterrence underpinning many of the government's proposals for countering terrorism, of which the proposals on sentencing are a prime example. This seems to us to be aimed at the symptoms rather than the causes of terrorism. Once a person has made the monumental step of deciding to kill him or herself in order to kill others with whom he or she disagrees, fear of a harsher sentence should that murderous endeavour fail is hardly likely to make a difference. Introducing ever-harsher sanctions has only one logical conclusion, which is the reintroduction of the death penalty, to which the present government is opposed, although the same may not hold true for some future government. We will not rid ourselves of the scourge of terrorism by adopting an essentially Old Testament attitude of retribution. It is only by standing up for human rights, which includes defending the right of others to hold their own religious beliefs, while not accepting that any religious belief can justify the taking of life, that we can produce a society with shared values which is strong enough to protect itself against terrorism, whether from without or within. In doing so, we would also create a model for other countries to covet and emulate, thus lessening the potential threat.

¹³ Section 58 addresses the offence of collecting information likely to be of use to terrorists, where such information may include a photograph and electronic, as well as paper record.

- 13.3 A good starting place, in our view, would be to make human rights part of the national school curriculum, and to provide university degrees at entry level for undergraduates. If the threat and the dilemmas posed by terrorism were debated by people of all ages in a human rights context, many attitudes would be changed and many divides bridged. In our opinion, this would be a far better use of resources than spending public money on keeping those who have already espoused terrorism in jail for longer.

14. NOTIFICATION REQUIREMENTS FOR CONVICTED TERRORISTS

- 14.1 Although the form of a notification scheme has not been fully outlined by the Government, we do not believe it is an appropriate measure. The Sex Offenders Register currently means a convicted sex offender must register their name and address with the police, inform them within 14 days if they move and be the subject of a six month jail sentence and fine should they fail to register. This ensures the continued criminalisation of an individual.
- 14.2 Our remit does not permit us to comment on whether such measures are justified in the case of sex offenders, but in the case of those convicted of terrorist acts, such labelling would almost certainly be counter-productive. It is unclear who would have access to the information on a "terrorist register".¹⁴ Such access could prevent convicted terrorists, who have served their sentence, from rebuilding their lives and hinder their ability to find a job or home. We believe such legislation will lead to ongoing discrimination against individuals and would negate the rehabilitative role of the prison system.

15. CONTROL ORDERS

- 15.1 BIRW has previously made a detailed submission to Lord Carlile on the subject of control orders, a copy of which can be found at Appendix 1. We agreed with Lord Carlile's assessment that control orders are "not very far short of house arrest, and certainly inhibit normal life considerably".¹⁵ We assert that if there is enough evidence to charge an individual and bring them before a court then this should be done; if there is not enough evidence, then an individual should be released. The "limbo" in which suspects exist while subject to control orders creates the potential for the abuse of due process.
- 15.2 BIRW believe that the proposed "self-standing power of entry and search of premises" is an unnecessary and invasive measure. The need for such a power indicates that those subject to control orders should be in conventional secure accommodation (assuming correct

¹⁴ Under the terms of the Sex Offenders Register, Head teachers, doctors, youth leaders, sports club managers and others, including landlords, are notified on a confidential basis of the existence of a local sex offender

¹⁵ Second report of the Independent Reviewer pursuant to section 14(3) of the Prevention of Terrorism Act 2005, Lord Carlile of Berriew Q.C., 19 February 2007

judicial process has been observed). Such a power would undermine an individual's right to respect for his or her private and family life. The rights of those residing with such an individual would similarly be undermined. This police tool serves only to increase the pressure on those subject to control orders. There are no details of the threshold of suspicion that would have to be reached before the police were authorised to employ such a power.

- 15.3 BIRW agree with the Joint Committee on Human Rights' assessment of the use of Special Advocates in control order cases. In reference to submissions made by several Special Advocates, the JCHR stated "we found their evidence most disquieting, as they portrayed a picture of a system in operation which is very far removed from what we would consider to be anything like a fair procedure".¹⁶ The fact that an individual is not able to know all of the evidence against them, the lower standard of proof; the fact that a Special Advocate cannot tell an individual the nature of the evidence against him or her and the fact that the provenance of the closed material may not be fully explored clearly undermine Article 6 of the ECHR, which protects the right to a fair trial, and the control order system as a whole.

16. POLICE POWER TO HOLD PASSPORTS AND TRAVEL DOCUMENTS AT PORTS

- 16.1 BIRW disagree with the proposed power to hold travel documents for those individuals of whom it is believed are travelling aboard for terrorist purposes. We do not believe that an additional power to hold documents is appropriate. As with control orders, either the police should have enough evidence to arrest an individual, or an individual should be able to travel unhindered.
- 16.2 The Government's proposals do not specify the length of time for which individuals could be held nor the nature of this detention. Would individuals be held in a secure room at the port? Would they have access to legal advice? Would they be held in police custody? What protections and rights would such individuals be afforded? The implementation of such measures will hinder the travel of innocent people, place an undue burden on police at ports, and encourage the stigmatisation of communities. BIRW consider that it would be more appropriate for the Government to focus resources on gaining accurate and reliable intelligence about suspects rather than introducing cumbersome legislation which will prove unwieldy and bureaucratic in practice. The general public are already beginning to rebel against the relatively non-intrusive security measures adopted at airports, and to resent being treated as potential terrorists on a regular basis. If travel is to be made even more irksome for all passengers in order to deal with a small number of terrorist suspects, there is a real risk that people will begin to subvert security measures in order to avoid

¹⁶ Nineteenth Report of Session 2006-07, Counter Terrorism Policy and Human Rights: 28 days, intercept and post-charge questioning, Joint Committee on Human Rights, July 2007

hassle and delay, with the result that overall security will be undermined.

- 16.3 We are also concerned that the use of such a policy may lead to the employment of racial profiling. We have seen the negative implications of this policy, when one community is excessively targeted by the security forces, with the Irish community in Britain in the 1970s¹⁷. This resulted in the gradual alienation and disaffection of young people from this community which impacted upon the number of them prepared to engage in terrorism. The revival of the "sus laws" (based on s.4 and 6 of the Vagrancy Act 1824) in the 1970s contributed to Afro-Caribbean discontent and eventual rioting in the 1980s. We caution the security agencies to be wary of utilising racial profiling in the use of stop and search and in the wider development of counter-terrorism strategy. We draw their attention to a recent resolution on combating racism and racial discrimination in policing from the European Commission¹⁸; this makes several clear recommendations about racial profiling, including that Governments should ensure police are adequately trained to avoid racial discrimination.

17. TRANSFER OF FUNCTIONS TO THE ADVOCATE GENERAL (NORTHERN IRELAND)

- 17.1 BIRW has no objection to the transfer of functions to the Advocate General (Northern Ireland) as outlined in the Justice (Northern Ireland) Act 2002. However, we are interested to know what inspection and accountability mechanisms will be responsible for this office. It is unclear which of the Attorney General's functions, with regard to reserved and excepted fields, will stay with the Attorney General for England and Wales. It appears to us that the Attorney General will not have any power in relation to issues to national security or to supervise the activities of the Public Prosecution Service.

18. CONCLUSION

- 18.1 British Irish RIGHTS WATCH have expressed concerns, in submissions to both the Joint Committee on Human Rights and the Home Affairs Committee, about the enactment of draconian legislation in response to the threat of terrorism. The ill-effects of such a policy can be clearly seen in the conflict in Northern Ireland. The Government would be well-advised to examine developments in this conflict and to draw key lessons from that experience, rather than simply repeating the mistakes of the past.
- 18.2 We draw the Government's attention to the need to take a holistic approach to counter-terrorism measures. Many of those involved in

¹⁷ *Suspect Community, People's experience of the Prevention of Terrorism Acts in Britain*, Paddy Hillyard, Pluto Press: 1993

¹⁸ *ECRI General Policy Recommendation No. 11 on combating racism and racial discrimination in policing*, European Commission against racism and intolerance, adopted 29 June 2007

terrorism are second-generation British nationals. To prevent the development of violent extremism, the Government should be looking, in parallel with legislation, at issues such as housing, employment, education, especially in human rights, and political representation to understand and mitigate the alienation of young British Muslims. This alienation is not going to be solved solely by restrictive legislation but rather by the positive, inclusive policies which engage with young Muslims and bring them into the mainstream. Criminalising or demonising communities via specific policies such as the use of higher sentences for terrorists who are convicted of non-terrorist-specific offences is not appropriate. Similarly, allowing the rule of law and protection of human rights to be submerged by counter-terrorism legislation will only fuel rather than prevent future terrorist attacks.

August 2007

APPENDIX 1

Second report of the independent reviewer pursuant to section 14(3) of the Prevention of Terrorism Act 2005, Lord Carlile of Berriew

A response from British Irish RIGHTS WATCH

INTRODUCTION

- 1.1 British Irish RIGHTS WATCH (BIRW) is an independent non-governmental organisation that has been monitoring the human rights dimension of the conflict, and the peace process, in Northern Ireland since 1990. Our services are available, free of charge, to anyone whose human rights have been violated because of the conflict, regardless of religious, political or community affiliations. We take no position on the eventual constitutional outcome of the conflict.
- 1.2 British Irish RIGHTS WATCH welcomes the scrutiny by Lord Carlile of the UK's terrorism legislation and this opportunity to respond to his report on control orders. BIRW have monitored the development and implementation of terrorist legislation for the past seventeen years. Although BIRW's remit does not extend to international terrorism, our experience in Northern Ireland is relevant.
- 1.3 British Irish RIGHTS WATCH are disappointed by Lord Carlile's conclusion, that the use of control orders remains necessary and that control orders "provide a proportional means of dealing with those (terrorist) cases".¹⁹ We do not believe that control orders are a proportional or appropriate mechanism for use in the criminal justice system. Control orders violate both civil liberties and human rights, which in turn undermines the rule of law and aids in the recruitment of disillusioned individuals to the terrorist cause.

2 CONTROL ORDERS

- 2.1 Control orders are detention without trial. We have seen the use of a similar policy in Northern Ireland in the 1970s – internment. This policy not only violated the right to be free of arbitrary detention, but served

¹⁹ Second report of the Independent Reviewer pursuant to section 14(3) of the Prevention of Terrorism Act 2005, Lord Carlile of Berriew Q.C., 19 February 2007

to alienate a large section of the Catholic community from both the state and the security forces.

- 2.2 Control orders negatively impact upon an individual's right to a private family life, as protected by Article 8 of the European Convention on Human Rights (ECHR). For instance, all visitors to the residence will have to seek authorisation from the Home Office and there may be restrictions on the kinds of communications equipment the family can own. Often the use of evidence in court hearings to determine the use of control orders consists of evidence to which the defendant is not given access. This undermines the defendant's right to a fair trial, guaranteed by Article 6 of the ECHR. This is re-enforced by the use of closed court sessions where a Special Advocate represents the controlee rather than the controlee's chosen legal team. The fact that control orders so fiercely curtail the movements of individuals also violates Article 11 which embodies the right to freedom of assembly and association.
- 2.3 The lower threshold of evidence necessary to apply a control order has a negative impact upon the British judicial system and undermines the rule of law. This is particularly so because there does not always have to be a connection between the conditions imposed via the control order and the nature of the individual's alleged involvement in terrorist activity. The individual occupies a legal limbo, where his or her civil liberties have been sufficiently undermined to negatively impact his or her quality of life, yet the state is unable to pursue a full criminal prosecution which would ensure that the rights of the individual would be protected.
- 2.4 The definition of terrorism and its role in the Prevention of Terrorism Act (PTA) 2005 and the subsequent Terrorism Act 2006 is problematic. BIRW monitored the development of the PTA and were critical of several key elements, namely the use of fuzzy terms such as "encouraging acts of terrorism". The definition of terrorism utilised in the Terrorism Act 2006 is so broad and diffuse that it runs the risk of creating crimes without real victims, an outcome which would bring the law into disrepute. The objective of most actual terrorism is usually the overthrow of the state, or at least the status quo. That being so, it is crucial that a democratic state does not over-react to terrorism or the threat of terrorism, because to make any of these errors can catapult a state out of democracy and into despotism, creating the very situation the terrorists are seeking to achieve. Terrorism is not an act, it is a description of the motivation of a person carrying out any of a range of acts, many of which, absent the terrorist motive, are perfectly harmless and legal. To give an example from Northern Ireland, a woman who buys a pair of rubber gloves to protect her hands while doing the washing up is behaving perfectly legally. If, on the other hand, she buys them to protect her hands while making a bomb, she commits an offence. The problem for the police and the courts, is how to prove that the mere act of purchasing the gloves was illegal.

- 2.5 The opportunities for quashing a control order are few. The fact that the application of a control order can be based on secret evidence undermines the ability of the individual and their legal team to rebutt the allegations of terrorist activity.
- 2.6 The problems with control orders have been manifested in court proceedings. Since February 2006, the Government has lost the majority of the judicial challenges to control orders; the most recent being on 16 February 2007.²⁰ It is clear that if the government employed the correct judicial process towards individuals currently subject to control orders, they would either be in custody, or have been found innocent and released. According to the human rights NGO, Liberty, the Home Office has "relied on flawed and inconsistent intelligence in the kind of secret proceedings used in control orders ... the High Court has dismissed the judicial oversight of control orders as 'thin veneer of legality' ".²¹ On several separate occasions the courts have found that the issuing of a control order had violated the right to a fair trial and the right to liberty respectively. The problems with control orders do not end with court proceedings. Though not the fault of the judiciary, three individuals, all subject to control orders, have been able to abscond, totally devaluing the concept that control orders protect the public. This indicates the difficulty of monitoring the practical restrictions imposed by control orders.
- 2.7 While control orders only apply to the individual, the effects are felt by the families of those living under control orders. As the Committee on the Prevention of Torture (CPT) noted, the criteria of a control order can be such that no pre-arranged meetings without prior authorisation of the Home Office can take place and no visits to the individuals' homes without the interested persons submitting details to the Home Office - both of these equally effect the children and spouses of controlees. The CPT also voiced concerns about the psychological impact of the control orders on the controlees citing conditions such as depression and anxiety with risks of self-harm and suicide.²²

3 LORD CARLILE'S SECOND REPORT

- 3.1 BIRW appreciate the inclusion of Tables 1 and 2 in the report which provide a good snapshot of the conditions under which controlees are living. While we acknowledge the conditions applied to each controlee are related to their suspected relationship with terrorism, the

²⁰ *Order on terror suspect quashed*, BBC News, 16 February 2007

²¹ *Government failed to consider criminal prosecution against control order, terror suspect says High Court*, Liberty, 16 February 2007, <http://www.liberty-human-rights.org.uk/news-and-events/1-press-releases/2007/crim-prosecution-co.shtml>

²² Report to the United Kingdom Government on the visit to the United Kingdom carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) (20- 25 November 2005) http://www.cpt.coe.int/documents/gbr/2006-28-inf-eng.htm#_Toc142715377

disparity between the conditions is significant. For instance, Case 6 is the subject of 17 restrictions and/or conditions including the wearing of a tag while Case 14 is subject to only 5 conditions. Significantly, the bulk of the restrictions applied to Case 14 are similar to those applied to individuals on bail. In contrast, those conditions on Case 6 represent a significant impact on his daily life. The fact that control orders can have such a variety of consequences is of concern to BIRW. In our view, all the cases described in this document have the right to a fair trial so that they can defend themselves against the allegations which led to the application of the control orders. If the restriction applied to Case 6 are a reflection of the government's perception of the individuals' danger to society, then there is little doubt that they should be in custody. If the evidence fails to provide the verification of the government's perception, then there is no alternative but to release the individual. It is for this reason that control orders offend against the presumption of innocence, one of the most important foundations of our criminal justice system.

- 3.2 BIRW welcome Lord Carlile's argument in paragraph 35 for the use of intercept evidence. We believe that, when used properly, intercept evidence could alleviate some of the problems with the control order issuing process. However, careful attention needs to be paid to the human rights implications of covert surveillance, in particular its impact on the privilege against self-incrimination, which forms an important element of the right to a fair trial. The use of intercepts should be the subject of strong safeguards, with a rigorous system for approval.
- 3.3 Control order cases are hidden from public scrutiny so we have no way of assessing whether Lord Carlile's view that each of the Secretary of State's decisions regarding the issuing of control orders was correct, as asserted in paragraph 36. This in itself undermines the purpose of, and public confidence in, the scrutiny process itself. If the basis for scrutiny cannot be assessed, it becomes meaningless.
- 3.4 We share the concerns stated by Lord Carlile with regard to the use of control orders on UK citizens who may travel to Iraq or Afghanistan with the intention of participating in violence. While we acknowledge that it is the duty of every civilised country to prevent violence, either on its own soil or on the soil of others, where that violence is expected to be perpetrated by its own nationals, the basis for evaluating such a threat is problematic. A heavy reliance on intelligence sources and the opportunity to use closed court sessions undermines the judicial proceedings in such cases. Few lessons have been learnt by the government from the conflict in Northern Ireland; most significant amongst these lessons has been a need for proportionality in anti-terrorist measures. Draconian measures usually produce an over-reaction.
- 3.5 We believe that the use of control orders, especially where controlees are subject to an 18 hour curfew, to be akin to house arrest. We also

welcome the comments in paragraph 43 regarding the end of each individual control order. We have concerns that, as the legislation continues to be renewed on an annual basis, the government is not considering an "exit strategy" from this policy. The uncertainty for those subject to control orders must surely have some significant adverse psychological impact on both them and their families. BIRW urges the government to consider alternative legal methods for dealing with those currently subjected to control orders.

- 3.6 BIRW is extremely concerned by the comments made in paragraph 57 that Chief Police Officers have stated that there "no realistic prospect of prosecution" of controlees. This clearly indicates the dubious grounds upon which they are issued.
- 3.7 BIRW agree with the concerns expressed by Lord Carlile regarding the role of the controlee in appeal hearings. We think it an abuse of the judicial process that controlees may be judged on evidence which they do not have the opportunity to refute. Likewise, the principle that an individual's beliefs with regard to terrorism may change are also significant in this scenario.

4. Conclusion

- 4.1 As has been set out in this submission, BIRW remain opposed to the use of control orders. We do however welcome Lord Carlile's investigation of this issue. We encourage him to ask the government when the use of control orders will cease. We also remind Lord Carlile of the lessons which can be drawn from Northern Ireland where a disproportionate response to the threat of terrorism not only functioned as a recruiting drive for individuals to join paramilitary groups but undermined the rule of law and civil liberties in Northern Ireland as a whole.

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