Home Office List of Unacceptable Behaviours: Freedom of Expression the Scapegoat of Political Expediency

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1. Introduction

This Memorandum sets out ARTICLE 19's concerns in relation to the recently introduced Home Office Policy on exclusion or deportation of non-UK citizens for engaging in 'unacceptable behaviour'[1]. The Policy articulates express grounds within the Home Secretary's discretionary power to exclude or deport persons on the basis that their presence in the UK is not conducive to the public good. ARTICLE 19 is concerned that significant parts of the Policy violate the right freedom of expression and also, if used to expel persons to countries where they will be at risk of torture, the right to freedom from torture.

ARTICLE 19 is an international human rights organisation which defends and promotes freedom of expression and freedom of information all over the world. We emphasise that freedom of expression and access to information is not a luxury but a fundamental human right. The full enjoyment of this right is a potent force for pre-empting repression, conflict, war and genocide and also, importantly, terrorism; it is also central to achieving individual freedoms and protecting democracy.

The events of 7 and 21 July place an obligation on the government to re-examine its anti-terror policies and we welcome the intention of the government to clarify the scope of the Home Secretary's powers, which are problematic in their vague nature. However, any measures taken by the government should be in line with universally accepted human rights principles. This was reaffirmed in UN Security Council Resolution 1624, adopted in September 2005, which requires that "States must ensure that any measures taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights law, refugee law, and humanitarian law …"[2]

We are seriously concerned that the Policy violates fundamental human rights principles in two ways. First, as many observers and critics have pointed out, the Policy is likely to be used to expel persons to countries where torture is prevalent.[3] Expulsion to such countries is likely to violate the prohibition on torture and inhuman or degrading treatment found in Article 3 of the *European Convention on Human Rights* (ECHR),[4] a human rights treaty that is binding on the UK and which has been given legal effect in the UK through the Human Rights Act 1998. Second, large parts of the Policy itself contravene the right to freedom of expression, as

[1] UK Home Office Press Releases, *Tackling Terrorism – Behaviours Unacceptable in the UK,* Press Release 124/2005, 24 August 2005. The policy is attached.
[2] UN Security Council Resolution 1624 (2005), adopted by the Security Council at its 5261st meeting on 14 September 2005, UN Doc. S/RES/1624 (2005).
[3] Amnesty International's UK section has repeatedly voiced concerns. See, for example, its news release of 11 August 2005, "UK: Diplomatic assurances no guarantee that UK is not deporting people to face torture", http://www.amnesty.org.uk/news/press/16346.shtml.
[4] Adopted 4 November 1950, E.T.S. No. 5, entered into force 3 September 1953.

guaranteed by Article 10 of the ECHR and Article 19 of the *International Covenant on Civil and Political Rights* (ICCPR).[5]

It is important to note that both treaties were specifically designed to act as a guarantee against rash government action in what may be seen as difficult times; to argue that terrorism requires a rethink of human rights would be to misunderstand their very purpose. Both treaties protect not only the right of every person to express him or herself, but the right of the public at large to hear a wide range of points of view, including those which some may find shocking or offensive. This is illustrated by the case of *Sürek And Özdemir v. Turkey*, in which the European Court of Human Rights found a violation of freedom of expression where a newspaper had printed an interview with a PKK activist calling for a separate Kurdish State. Noting the public's right to hear different points of view, the Court held that "the domestic authorities in the instant case failed to have sufficient regard to the public's right to be informed of a different perspective on the situation in south-east Turkey, irrespective of how unpalatable that perspective may be for them."[6]

Under both Article 10 of the ECHR and Article 19 of the ICCPR, restrictions on free speech must be "provided by law", "necessary in a democratic society" and in pursuit of a legitimate aim. These standards have been interpreted as requiring that restrictions be stated in clear legal terms, be narrowly defined and be proportionate to their objective. In light of this, we have serious concerns with regard to the following items on the list:

- justifying or glorifying terrorism in furtherance of particular beliefs;
- 'seeking to provoke' others to terrorist acts or to serious criminal acts; and
- fostering hatred which may lead to intra-community violence in the UK.

At best, these 'behaviours' may be interpreted to constitute an indirect threat to the UK's national security. ARTICLE 19 seriously questions whether targeting such behaviour can ever be legitimate under international law. We view this as fundamentally at odds with the basic guarantee of freedom of expression. History shows us clearly that the risk of abuse of restrictions on freedom of expression in the name of security is far greater than any actual risk to security. The idea of restricting 'indirect threats' is simply an invitation to abuse.

We also note that exclusion or deportation is an extreme measure and one that will be unlikely to be effective in addressing the threat posed by those who seek to incite violence, who make use of the Internet or other forms of international communication. Indeed, expelling individuals will simply remove them from effective control and surveillance by the British authorities. The Council of Europe's recent Convention on the Prevention of Terrorism sensibly requires States Parties to investigate and prosecute terrorist activities rather than expelling the persons concerned.[7] Given the internationalisation of expression, this makes evident sense. The effectiveness of exclusion or deportation as a terrorism-prevention measure is highly dubious. As the Privy Council Review of the Anti-Terrorism, Crime and Security Act stated:

[5] Adopted and opened for signature, ratification and accession by UN General Assembly Resolution 2200A (XXI), 16 December 1966, entered into force 3 January 1976.
[6] 8 July 1999, Application Nos. 23927/94 and 24277/94, para. 61.
[7] Convention on the Prevention of Terrorism, Warsaw, 16 May 2005, Council of Europe Treaty Series No. 196, Article 15. The United Kingdom signed this Convention on 16 May 2005.

> If people in the UK are contributing to the terrorist effort here or abroad, they should be dealt with here. While deporting such people might free up British police, intelligence, security and prison service resources, it would not necessarily reduce the threat to British interests abroad, or make the world a safer place more generally. Indeed, there is a risk that the suspects might even return without the authorities being aware of it.[8]

In the modern world, the fact is that it is almost impossible to prevent the dissemination of certain viewpoints and the far greater risk is of clumsy State involvement in setting the parameters of acceptable speech. We therefore counsel against rules which may, by design or through implementation in practice, silence certain viewpoints. The most shocking revelation of the July attacks in London was their home-grown roots. Stifling debate through the proposed programme of expulsions will do anything but render the UK more secure; expulsions risk creating martyrs and further alienating those communities which are being particularly targeted.

As stated, we are seriously concerned that large parts of the Policy violate the right to freedom of expression, and thus can never be justified. We also have serious concerns regarding its use to expel persons to countries where they will be at risk of torture. Should the government nevertheless persist with the implementation of this Policy, we strongly recommend a six-monthly review of its use, including a thorough examination of whether it remains justified as necessary in a democratic society. At each such review, the option to rescind the Policy should be considered seriously.

2. Concerns relating to the list of "unacceptable behaviours"

The UK has ratified a number of international treaties that require it to respect the right to freedom of expression, and that set out strict parameters regarding the circumstances in which that right may be restricted. Article 10(2) of the European Convention on Human Rights, the substance of which is given domestic effect through the provisions of the Human Rights Act 1998, provides:

> The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

This translates to a three-part test according to which an interference with freedom of expression is legitimate only if it:

(a) is prescribed by law;
(b) pursues a legitimate aim; and
(c) is "necessary in a democratic society".

[8] Anti-terrorism, Crime and Security Act 2001 Review: Report, HC 100.

Each of these elements has specific legal meaning. The first requirement will be fulfilled only where the law is accessible and sufficiently precisely worded. Vague laws or provisions that leave an implementing agency excessive discretion cannot justify restricting a right. The second requirement relates to the legitimate aims listed in Article 10(2) of the ECHR, cited above. The third requirement is often key to the assessment of alleged violations. The word "necessary" means that there must be a "pressing social need" for the restriction. The reasons given by the State to justify the restriction must be "relevant and sufficient" and the restriction must be proportionate to the aim pursued.[9]

Our concerns are primarily with the first and third parts of the test: many of the listed unacceptable behaviours are either too vaguely worded; lack a causal relationship with terrorism; or include behaviour that cannot legitimately be restricted. We elaborate on this in the following paragraphs.

2.1. Vagueness

International law only permits restrictions on freedom of expression that are set out in law. This has been interpreted to mean not only that the restriction is based in law, but also that the relevant law meets certain minimum standards of clarity and accessibility. The European Court of Human Rights has elaborated on the requirement of "prescribed by law":

> [A] norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given situation may entail.[10]

This is akin to the "void for vagueness" doctrine established by the US Supreme Court, which is also found in constitutional doctrine in other countries.[11] The US Supreme Court has explained that loosely worded or vague laws may not be used to restrict freedom of expression:

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to "'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." (references omitted)[12]

Similarly, laws which grant authorities excessively broad discretionary powers to limit expression fail the requirement of "prescribed by law". The UN Human Rights Committee,

[9] *Lingens v. Austria*, 8 July 1986, Application No. 9815/82, paras. 39-40 (European Court of Human Rights).
[10] *The Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, para.49.
[11] See, for example, the Canadian Charter of Rights and Freedoms, Section 1 and the Dutch Constitution, Article 13.
[12] *Grayned v. City of Rockford*, 408 U.S. 104, pp. 108-9.

the body of independent experts appointed under the ICCPR to monitor compliance with that treaty, has repeatedly expressed concern about excessive ministerial discretion to limit expression.[13]

Various of the items on the list of "unacceptable behaviour" are so vaguely worded as to call into doubt the ability of the individual to regulate his or her conduct accordingly in advance. We are concerned with the inclusion of the terms "to justify or glorify terrorist violence", "in furtherance of particular beliefs", "seek to provoke" and "foster hatred".[14] The interpretation of words such as to "seek" and "to foster" and of the prohibition of expressing views which "justify or glorify" terrorist violence in the furtherance of "particular" beliefs is likely to be highly subjective.

These terms may be contrasted with the much more specific language that the ICCPR employs in the context of hate speech, which calls for restrictions only where expression actually incites hatred: "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law" (Article 20(2)).

The restrictions included in the UK Policy not only violate the right to freedom of expression but also signally fail to meet the objective of formulating the list in the first place, which was to clarify the scope of the Home Secretary's powers.

2.2. Overbreadth

Many of the items on the list of "unacceptable behaviours" suffer from what is known as 'overbreadth': they capture forms of behaviour that are entirely legitimate. As a result, they not only rule out legitimate speech but also exert a more general chilling effect on freedom of expression, as individuals steer well clear of the prohibited zone of expression for fear of attracting negative consequences.

A key problem with such restrictions is that they fail to distinguish between social or even academic discussions about the role of violence, on the one hand, and actual exhortations to violence, on the other. This problem is particularly clear in relation to expressing views which "justify or glorify terrorist violence in the furtherance of particular beliefs". This could, for example, be used to justify the expulsion or exclusion of any person who engages in discussion of the historical and theological bases of concepts such as jihad. Open discussion and critical thought in this area is particularly required at present and the contested rules run directly counter to this social need.

Finally, there is no attempt at defining any of the operative terms. The Policy introduces terms which have not been defined in preceding legislation, including "terrorist violence" and "terrorist acts", and it relies on nebulous terms such as "justify" or "glorify". The definition of

[13] The UN authorities have focused particularly on discretion in the context of media regulation. See, for example, the Concluding Observations on Kyrgyzstan, 24 July 2000, UN Doc. CCPR/CO/69/KGZ, para. 21 and the Concluding Observations on Lesotho, 8 April 1999, UN Doc. CCPR/C/79/Add.106, para. 23. See also the jurisprudence of the Canadian courts on this issue, in particular *Re Ontario Film & Video Appreciation Society v. Ontario Board of Censors*, (1983) 41 OR (2d) 583 (Ont. HC).

[14] The UN HRC has also expressed concerns about the vague definition of 'extremism' in relation to Russian legislation that sought to outlaw 'extremist' activities. See concluding observations of the Human Rights Committee, 6 November 2003, UN doc. CCPR/CO/79/RUS.

'terrorism', as enshrined in the *Terrorism Act* 2000, is already problematic, in that it is drafted very broadly and thus represents a significant incursion into freedom of political expression and the long-standing democratic values of the United Kingdom. The Policy introduces additional terms such as "terrorist violence" and "terrorist acts" and therefore takes the incursion into freedom of expression a step further without proper justification or safeguards regarding its use. Where free speech is at stake, any operative terms should be narrowly drafted and specifically tailored to addressing incitement to a real risk of violence, rather than behaviour which simply challenges the political or social status quo.

2.3. Causal relationship

It is fundamental to the guarantee of freedom of expression that any restriction for the purpose of national security, including preventing terrorism, is closely linked to preventing imminent violence. Restrictions of this sort have historically been abused and courts have sought to promote an appropriate balance between the need to ensure security and the fundamental right to freedom of expression by requiring a close nexus between the speech sought to be sanctioned and the risk of harm to security. One of the fundamental principles set out in the 'Johannesburg Principles',[15] developed by a group of experts from around the world, is that restrictions on freedom of expression in the name of national security may be imposed only where the speech was intended to incite imminent violence and there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence. Principle 6 provides:

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

This test has been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression[16] and often recommended to States for their consideration by the UN Commission on Human Rights in its annual resolutions on freedom of expression since 1996.[17]

A similar standard has been embraced by the European Court of Human Rights, whose decision in the case of *Karatas v. Turkey* is highly instructive. The complainant had been convicted for the publication of poetry that allegedly condoned and glorified acts of terrorism (note the similarity to the proposed category of "foment, justify or glorify terrorist violence…"). The Court accepted as a matter of fact that in Turkey violent terrorist attacks occurred regularly. Despite this, the Court found that the applicant's conviction constituted a violation of his right to freedom of expression. Emphasising that there was simply no causal connection between the poems and violence, the Court held:

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[15] *Johannesburg Principles on National Security, Freedom of Expression and Access to Information*, adopted October 1995.

[16] See, for example, UN Doc E/CN.4/1996/39, 22 March 1996, para. 154.

[17] See UN Doc. E/CN.4/1996/53, 19 April 1996. The Johannesburg Principles have also been referred to by superior courts of record around the world. See, for example, *Athukoral v. AG*, 5 May 1997, SD Nos. 1-15/97 (Supreme Court of Sri Lanka) and *Secretary of State for the Home Department v. Rehman* [2001] UKHL 47 (United Kingdom House of Lords).

> [T]here is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on matters of public interest … In a democratic system the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of public opinion. Moreover, the dominant position which the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries …
>
> [E]ven though some of the passages from the poems seem very aggressive in tone and to call for the use of violence, the Court considers that the fact that they were artistic in nature and of limited impact made them less a call to an uprising than an expression of deep distress in the face of a difficult political situation …[18]

It is clear from the Court's judgment in *Karatas* that a general prohibition of glorification of violence cannot be justified. In particular, in many cases, there simply is no causal connection between the apparent glorification of violence and the actual occurrence of violence.

In addition, the requisite causal relationship simply cannot be established in the case of speech which is considered to "seek to provoke others to terrorist acts" or "serious criminal activity". These provisions fail to establish an immediate connection with actual violence. Seeking to provoke terrorist acts or serious criminal activity, which in any case is a very subjective test left in the hands of the Home Secretary, is significantly different from actually provoking terrorist acts or serious criminal activity. Protecting speech which does not have any direct causal link to terrorist acts or serious criminal activity is fundamental to protecting Britain's democratic traditions and the standards upheld under international law by authoritative bodies such as the UN Commission on Human Rights and the European Court of Human Rights.

3. Conclusion

ARTICLE 19 urges the British government to reconsider the Home Office Policy on the exclusion or deportation of non-UK citizens on the basis of engaging in 'unacceptable behaviour' in view of its international obligations under the *International Covenant on Civil and Political Rights* and the *European Convention on Human Rights*. Tolerance and acceptance of different points of view are at the very heart of British democracy. Unduly restricting long-cherished rights is the wrong response to terrorism: it is to abandon rather than defend universal values.

In particular:

Expulsion or deportation of individuals should only be used as a last resort in the fight against terrorism. No one should be expelled to a country where this would place him o rher at risk of torture.

Any list of "unacceptable behaviours" should be clearly and carefully tailored to respond to those forms of expression that constitute direct incitement to violence. Mere discussion of

[18] 8 July 1999, Application No. 23168/94, paras. 50-52.

terrorist acts or the expression of extreme viewpoints that do not constitute incitement to violence should never lead to exclusion or expulsion.

The use of broad and vague terms such as 'seek to', 'foster', 'glorify' or 'justify' should be avoided in favour of internationally accepted terms such as 'incite'.

Should the government persist with its plan to implement the Policy, ARTICLE 19 strongly recommends that it be subject to regular review, for example at intervals of six months, during which any purported justification for restricting the right to freedom of expression, as guaranteed under international law, should be thoroughly examined and the option of rescinding the Policy seriously considered.

Appendix: Home Office List of Unacceptable Behaviours

The list of unacceptable behaviours covers any non-UK citizen whether in the UK or abroad who uses any means or medium including:

Writing, producing, publishing or distributing material
Public speaking including preaching
Running a website
Using a position of responsibility such as teacher, community or youth leader

to express views which:

- Foment, justify or glorify terrorist violence in furtherance of particular beliefs;
- Seek to provoke others to terrorist acts;
- Foment other serious criminal activity or seek to provoke others to serious criminal acts; or
- Foster hatred which might lead to inter-community violence in the UK.

This list is indicative, and not exhaustive.