
Britain's Approach to Balancing Counter-Terrorism Laws with Human Rights

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Britain's Approach to Balancing Counter-Terrorism Laws with Human Rights

Abstract

This paper examines the UK's approach to balancing counter-terror laws with human rights and civil liberties after 9/11. Since then, a litany of legislation has been passed that some human rights commentators have labeled as overzealous and draconian. Because of the glut of counter-terror laws instituted, only a fraction of the provisions contained within them will be reviewed including, indefinite detentions, stop and search rights, passport seizures, and Temporary Exclusion Orders. The potential for government abuse of far-reaching legislation is also highlighted through a case study of *Miranda v. the Secretary of State for the Home Department and others*. Part II analyzes how terrorism cases are dealt with through the UK's judicial system, along with the UK's contentious interaction with the European Court of Human Rights. The author finds that, although the UK possesses a robust legislative process with many checks and balances for countering the threat of terrorism, it should not compromise its international and domestic legal obligations in its search for security, or else risk losing its reputation as a model democracy, and potentially isolate disaffected communities even further.

Introduction

The government of the United Kingdom of Great Britain has a long history of exercising its powers to counter terrorism, dating back to the 1700s when it would remove civil liberties such as the right to *habeas corpus* as a means of dealing with subversion.¹ Targeted legislation aimed at ending terrorism would not come until much later in the form of the Prevention of Violence Act of 1938. Although terrorism was not defined in this law, its primary purpose was to curb terrorist violence in Northern Ireland following threats from the Irish Republican Army (IRA) of a wide reaching “terror offensive” across the United Kingdom. The bill was hastened through parliament in less than a week, and gave police in Northern Ireland the power to stop and search without warrant, register terror suspects, and deny travel.² This law would stay in existence until 1954, despite being introduced as a “temporary measure.”³ Two decades would pass until the United Kingdom would have a dedicated anti-terror law in the form of the Prevention of Terror Act of 1974 (PTA 1974), which introduced the notion of proscribed organizations (groups designated by the government as terrorist organizations).⁴ The PTA 1974 also presented the first definition of terrorism that would form the basis for subsequent laws. Part III (9.1) of the act describes terrorism as, “the use of violence for political ends, and includes any use of violence for the purpose of putting the public or any section of the public in fear.”⁵ This definition, although a narrower version of the description we see today, presented terrorism as solely politically motivated in order to counter the threat posed by the IRA.

After the September 11 (9/11) attacks on the United States and the subsequent introduction of the United Nations Security Council Resolution 1373, the United Kingdom hurriedly updated its recently introduced Terrorism Act 2000 (TA 2000) to reflect the challenges and responsibilities presented by the new “Global War on Terrorism” (GWOT). Since 2001—especially following the 7 July (7/7) London bombings—a litany of anti-terror laws have been

¹ Simon Bronitt, Andrew Brynes, and Miriam Gani, et al., “The United Kingdom Human Rights Act and the Terrorist Threat,” *Fresh Perspectives on the ‘War on Terror’* (May, 2016): 331, available at:

http://press.anu.edu.au/war_terror/mobile_devices/ch15so2.html.

² “1939 Prevention of Violence (Temporary Provisions) Act,” *Schedule 7*, May 3, 2016, available at: <http://www.schedule7.org.uk/history/1939-prevention-of-violence>.

³ *Ibid.*

⁴ Bronitt, Brynes, and Gani, et al., “The United Kingdom Human Rights Act,” 332.

⁵ Fionnuala McKenna, “Prevention of Terrorism (Temporary Provisions) Act 1974,” *CAIN*, available at: <http://cain.ulst.ac.uk/hms0/pta1974.htm>.

introduced that many human rights commentators have denounced as draconian and ill-balanced due to their wide-reaching capabilities and the potential for such laws to encroach on civil liberties, including the right to privacy and freedom of speech. Due to the amount of legislation introduced, this article will only examine a fraction of the most controversial provisions contained within them, in order to discern whether or not U.K. anti-terror laws have substantially eroded civil liberties and human rights unnecessarily, or whether they have been proportionate with respect to countering the threat posed by terrorism.

This article is divided into two parts. Part I will cover counter-terror laws introduced since 2000, to include the Terrorism Act 2000 (TA 2000), the Anti-Terrorism, Crime, and Security Act of 2001 (ATCSA), the Terrorism Act 2006 (TA 2006), and the Counter Terrorism and Security Act of 2015 (CTSA 2015). The article will also examine some of the most controversial provisions within these laws, such as Section 44 and Schedule 7 stop and search powers, indefinite detention, freedom of speech concerns, passport seizures, and temporary exclusion orders (TEOs). Furthermore, the potential for abuse of counter-terror laws by the government is explored by reviewing *Miranda v. the Secretary of State for the Home Department* and others. Part II will look at the United Kingdom's approach to dealing with terrorism cases in its domestic courts, and review the Special Immigration Appeals Commission (SIAC) process, as well as the contentious interaction between the U.K. legal system and the European Court of Human Rights (ECHR) to survey the challenges faced in balancing human rights with security needs. The author finds that the United Kingdom has a highly accountable legal system with a vigorous set of anti-terror laws at its disposal. Yet it must be mindful of encroaching on civil liberties and human rights to the point that anti-terror laws become counterproductive, and possibly, encourage homegrown terrorism even further. When developing new legislation, the British Government must engage with the British Muslim community on a greater level than it has done in the past to ensure anti-terror laws do not unintentionally marginalize this minority population even further. In addition to reforms of the SIACs, the United Kingdom must continue to uphold its international legal obligations. Not only is this essential for protecting the integrity of the British legal system, but also to exhibit to the world that the United Kingdom will remain an exemplar democracy, regardless of the threat from terrorism.

Part I: Ramifications of Counter-Terrorism Laws

The Terrorism Act 2000 and the Definition of Terrorism

Legislators in the United Kingdom recognized that a new definition for terrorism was needed to reflect the modern terror threat facing the state and the public, and so amended the PTA 1974 definition in the TA 2000 Act to provide a wider reaching scope than before.⁶ As of 2001, terrorism is described as:

“The use or threat of action [the key word *action*, as defined by Section 1 (2) of the Terrorism Act 2000, means to cause serious violence against a person, serious damage to property, endanger life, create a serious risk to the health and safety of the public or section of the public, or is designed seriously to interfere with or seriously to disrupt an electronic system] designed to influence the government or an international governmental organization or to intimidate the public or a section of the public, and the use or threat is made for the purpose of advancing a political, religious, racial or ideological cause.”⁷

In addition to the expansion of the definition to include religious, racial, and ideological causes, the law also gave police forces a broad jurisdiction to fight terrorism, both domestically, and internationally.⁸

Stop and Search Powers

In the TA 2000 Act, stop and search powers were extended to geographical areas and could be used by law enforcement without suspicion. Inciting terrorism through the proliferation of material and preaching hate is now a prosecutable offense, along with contributing or seeking training for use in terrorism.⁹ However, it was Section 44 (stop and search rights) powers that generated discord due to the increase in racial profiling—one was between “five and seven times more likely to be stopped” if black or of Asian ethnicity—and added to the public perception that police would abuse their

⁶ “Q and A: Anti-Terrorism Legislation,” *BBC News*, October 17, 2003, available at: http://news.bbc.co.uk/2/hi/uk_news/3197394.stm.

⁷ The Terrorism Act 2000, 2000 c. 11, Section 1, available at: <http://www.legislation.gov.uk/ukpga/2000/11/section/1#section-1-1-b>.

⁸ BBC News, “Q and A.”

⁹ *Ibid.*

powers.¹⁰ Nevertheless, given the propensity for terrorists to hide and lay dormant among the population, and their flexibility in delaying and bringing forth attacks, law enforcement personnel are at a distinct disadvantage when countering terrorists, in comparison to “ordinary criminals” as Lord Carlile of Berrie, Queen’s Council (QC) points out in his report to parliament.¹¹

Examining the stop and search statistics further highlights the difficulty police forces face. According to the Home Office, males have committed 92% of terrorism-related offenses, of which Asian males have made up a large proportion of those arrested.¹² The figures also show that 76% of those arrested identify as British, which not only shows the pervasiveness of homegrown terrorism, but also the challenge presented to police officers in identifying terror suspects.¹³ The ability for police to stop and search suspects in troubled areas is vital given the figures and evidence. Section 44 rights may be inconvenient to the public, but as Lord Carlile contends, given the unpredictable nature of terrorism, “the powers are necessary and very useful in the investigation, early disruption and detection of terrorism.”¹⁴

The Anti-Terrorism, Crime, and Security Act 2001

Indefinite Detention

Following 9/11, the U.K. government passed the Anti-Terrorism, Crime, and Security Act of 2001 (ATCSA) two months after the second reading that would not only change and add to what types of attacks constitute terrorism, but would also introduce an unprecedented set of laws that would encroach on civil liberties and basic human rights.¹⁵ The most conspicuous of these was

¹⁰ "Section 44 Terrorism Act," *Liberty*, available at: <https://www.liberty-human-rights.org.uk/human-rights/justice-and-fair-trials/stop-and-search/section-44-terrorism-act>.

¹¹ Lord Carlile of Berriew Q.C., “The Definition of Terrorism,” March, 2007: 23, available at:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228856/7052.pdf 24 27.

¹² “Arrests, outcomes and stops and searches, quarterly update to 31 December 2014,” *The Home Office*, June, 2015, available at:

<https://www.gov.uk/government/publications/operation-of-police-powers-under-the-terrorism-act-2000-quarterly-update-to-december-2014/operation-of-police-powers-under-the-terrorism-act-2000-and-subsequent-legislation-arrests-outcomes-and-stops-and-searches-quarterly-update-to-31-d>.

¹³ *Ibid.*

¹⁴ Lord Carlile, “The Definition of Terrorism,” 28.

¹⁵ “A-Z of Legislation: Anti-terrorism, Crime and Security Act 2001,” *The Guardian* (January 19, 2009) available at:

the “indefinite detention without charge or trial of foreign nationals” provision (repealed in 2006).¹⁶ This provision was reserved for foreign nationals suspected of terrorism or having terrorist links who could not be deported to their country of origin. The debated law was not only deemed discriminatory, but was also recognized to have contravened two parts of the Human Rights Act of 1998,¹⁷ yet, was passed based on Article 15 derogation rights. The two articles in question were Article 5 (the right to liberty and security) and Article 6 (the right to a fair trial) which state:

“Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial.”¹⁸

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”¹⁹

The shock of 9/11 and the realization of the threat that terrorism posed to Western society led to the institution of legislation that, while intrusive, was deemed necessary by policymakers as the gravity of the threats being faced were ascertained. Consequently, the speed at which the ATCSA 2001 bill was passed did come under some critique from the Home Affairs Committee, which declared:

“We question whether it is appropriate for this Bill to be passed through the House of Commons in exactly two weeks with only three days of debate on the floor of the House. A Bill of this length - 125 clauses and eight schedules covering 114 pages - with major implications for civil liberties should not be passed by the House in

<http://www.theguardian.com/commentisfree/libertycentral/2009/jan/13/anti-terrorism-act>.

¹⁶ Ibid.; Anti-Terrorism, Crime and Security Act 2001, 2001 c. 24, Part 4, Section 33, available at:

<http://www.legislation.gov.uk/ukpga/2001/24/section/33>.

¹⁷ “A-Z of Legislation.”

¹⁸ “Convention for the Protection of Human Rights and Fundamental Freedoms,” Articles 5, 6, & 15, *European Convention on Human Rights*, available at:

http://www.echr.coe.int/Documents/Convention_ENG.pdf.

¹⁹ Ibid.

such a short period and with so little time for detailed examination in committee.”²⁰

The rapid passage of the bill shortened the time necessary for a thorough examination of the new legislation, and continued the trend for reactive counter-terror laws, but more concerning were the provisions that resulted in derogations from international treaties like the European Convention on Human Rights and the International Covenant on Civil and Political Rights (ICCPR). Furthermore, it was noted that the bill seemed to place the rights of British citizens above that of foreign nationals, with John Wadham, the director of the human rights organization Liberty, exclaiming:

“What seems to be being suggested by the Government and in this Bill is that we can somehow avoid the usual presumption of innocence which will apply to British citizens and that because these people are foreigners we can lock them up for indefinite periods.”²¹

Though the practice was unfair, the unique situation surrounding some of these detainees and the questionable interrogation techniques practiced by many of the detainees’ countries of origin meant that many of them could not be deported. Furthermore, the government could not be assured that terror suspects would be prevented from “fighting another day” if expatriated. Meanwhile, the seriousness of the potential for harm to the general public from their release—detainees were declared a national security risk since British security services could not guarantee they would be able to monitor them sufficiently—meant that the detention of these potentially dangerous persons was the only viable option.²² Prudently, the law did include sunset provisions that would require renewal after 15 months, and then annually thereafter. In the meantime, Special Immigration Appeals Commissions were made available to detainees to hear cases that could not be processed through the civil courts for national security reasons.²³

²⁰ “Parliamentary Consideration of Terrorism Legislation,” *The House of Commons*, November 15, 2001, available at: <http://www.publications.parliament.uk/pa/cm200102/cmselect/cmhaff/351/35102.htm>.

²¹ *Ibid.*, 25.

²² *Ibid.*

²³ *Ibid.*, 34.

The Terrorism Act of 2006

Freedom of Speech Concerns: The Glorification of Terror

The Terrorism Act of 2006 (TA 2006) was introduced following the 7/7 London bombings and amended the TA 2000 Act. New offenses were introduced such as inciting or encouraging terrorism, the possession of terrorist publications, and the glorification of terrorism. The bill asserts:

“...statements that are likely to be understood by members of the public as indirectly encouraging the commission or preparation of acts of terrorism or Convention offences include every statement which glorifies [“glorification”, according to TA 2006, includes any form of praise or celebration, and cognate expressions are to be construed accordingly] the commission or preparation (whether in the past, in the future or generally) of such acts; and is matter from which that person could reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated by him in existing circumstances...”²⁴

With the TA 2000 Act, any person found to have directly or indirectly, by oral/written inferences or statements, encouraged the commission of terrorist acts, or glorified previous acts, is liable to criminal charges. Additionally, anyone found to have disseminated/created terrorist publications, trained or obtained the skills necessary for terrorist acts, could also be indicted under the bill. Most notably, this bill also applies electronically, in order to include offenses conducted by persons on social media.²⁵

Organizations like the National Council for Civil Liberties (Liberty) decried the law as being ill thought out averring that the vagueness of the language coupled with the outlawing of speech of this kind was contrary to democratic ideals, and that limiting speech “threatens to make careless talk a crime.”²⁶ The limiting of such speech is understandable given the need to avert social unrest and prevent the radicalization of vulnerable sections of society.

²⁴ Terrorism Act 2006, 2006 c. 11., Part 1, available at: <http://www.legislation.gov.uk/ukpga/2006/11/part/1>.

²⁵ *Ibid.*

²⁶ "Free Speech and Protest," *National Council for Civil Liberties*, available at: <https://www.liberty-human-rights.org.uk/human-rights/free-speech-and-protest>.

However, lawmakers should consider the wider implications of limiting speech on democracy, and its effect on extreme groups that may go underground. Furthermore, limiting speech threatens academia and collegiality between students at educational institutions across the land who may become fearful of being misinterpreted, or worse still, being brought up on terror charges.²⁷ Critics of the legislation also declared that those defending freedom fighters across the world could be implicated under the new law, with some citing Nelson Mandela's fight against apartheid as an example of a just cause that would be outlawed under the new regulation.²⁸ Despite this valid point, it would later be harder to justify post 9/11 because of the common consensus concerning terrorism as aberrant to international standards following UN Resolution 1373—not to mention the difficulty in justifying the criteria for who constitutes a freedom fighter, and who does not.²⁹

Miranda v. the Secretary of State for the Home Department and Others

The wide scope of anti-terrorism laws and the restriction on certain freedoms from their institution raises the question if they are too far-reaching and vulnerable to abuse by the authorities. An often-cited example of this is the perceived encroachment on journalistic rights. In 2013, two *Guardian* newspaper employees, David Miranda and Glenn Greenwald, were covering the Edward Snowden leaks. Miranda (Mr. Greenwald's assistant), travelling to Rio de Janeiro from London, Heathrow, and carrying 58,000 classified files on an encrypted hard drive obtained from Snowden was detained at Heathrow airport under the T2000 Act, Schedule 7, for the maximum nine hours allowed by the law.³⁰

In *Miranda v. the Secretary of State for the Home Department and others*, the court considered three questions. Firstly, if the use of Schedule 7 to apprehend Miranda was appropriate given the provision's intended use as an anti-terrorism apparatus; secondly, if law enforcement personnel carried out Schedule 7 in a proportionate manner; and thirdly, whether the seizure of the

²⁷ Simon Jeffery, "Q&A: The Glorification of Terrorism," *The Guardian* (February 15, 2006) available at:

<https://www.theguardian.com/world/2006/feb/15/qanda.terrorism>.

²⁸ *Ibid.*

²⁹ Lord Carlile, "*The Definition of Terrorism*," 44.

³⁰ Owen Bowcott, "David Miranda Allowed to Appeal Against Ruling on Heathrow Detention," *The Guardian* (May 15, 2014) available at:

<http://www.theguardian.com/world/2014/may/15/david-miranda-appeal-high-court-ruling-detention-heathrow>.

files constituted a violation of the right to free expression under the European Convention on Human Rights.³¹ The court found that the officer who carried out the Schedule 7 procedure was justified to stop Miranda, regardless of the prompt from security services, with the judge pronouncing:

“As I have noted, the proper exercise of the Schedule 7 power does not require that the examining officer have any grounds whatever “for suspecting that a person falls within section 40(1) (b) (Schedule 7 paragraph 2(4)); and the Schedule 7 purpose is not to determine whether the subject is, but only whether he “appears to be” a terrorist.”³²

The court also discussed the checks and balances in place to prevent the abuse of Schedule 7 procedures by law enforcement like the “good faith” of the officer, the authority to stop based on the definition of terrorism under TA 2000 Section 1. 9(c), the sanctioned use of Schedule 7 at ports of entry, and the time limitation of 9 hours.³³

The second point the court considered was whether the use of counter-terror laws were permissible in order to retrieve stolen government data, which the court found was in the U.K. government’s authority to do. Witnesses from the security services stated that preventing political embarrassment was not the purpose of the stop. They averred that the nation’s security was at stake, not only because of the potential leak of new email intercept technology, but also because the lives of security officers and members of the public were at risk if the files Miranda was carrying were released. In the eyes of the security services, the Schedule 7 stop would have been the only way to retrieve the files in Miranda’s possession.³⁴

The broadness of the definition of terrorism in the TA 2000 Act was also brought into question by Miranda, only for the judges to confirm that the definition was intentionally broad, asserting, “For the reasons given by Lord Lloyd, Lord Carlile and Mr. Anderson, the definition of ‘terrorism’ was indeed intended to be very wide.”³⁵ The court also addressed claims by the defendant

³¹ Mr Justice Ouseley, Mr Justice Openshaw, “*Judgment: R (Miranda) v Secretary of State for the Home Department*” High Court of Justice (2014): 2-34, available at: <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Judgments/miranda-v-sofshd.pdf>.

³² *Ibid.*

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Ibid.*

that the seizure of the files inhibited the freedom of the press and encroached on the public interest because, in its opinion, the national interest outweighed that right. The court also recognized that Miranda was not a journalist *per se* in its statement:

“The claimant was not a journalist; the stolen GCHQ intelligence material he was carrying was not ‘journalistic material,’ or if it was, only in the weakest sense. But he was acting in support of Mr Greenwald’s activities as a journalist. I accept that the Schedule 7 stop constituted an indirect interference with press freedom, though no such interference was asserted by the claimant at the time. In my judgment, however, it is shown by compelling evidence to have been justified.”³⁶

The court also reviewed the European Convention on Human Rights (Article 10) argument and found that, under English law, Schedule 7 rights did not overstep its bounds, reminding the court that “the executive never enjoys unfettered power,”³⁷ as accountability and transparency are found throughout the legal process by way of independent review.³⁸ Miranda’s claim that Schedule 7 violated his privacy and his journalistic rights was rebutted with the defense citing previous cases like *Beghal v. the Department of Public Prosecutions*³⁹ that held that Schedule 7 was not in violation of human rights and that the European Convention on Human Rights/European Court of Human Rights did not support unconditional journalistic rights.⁴⁰

Counter-Terrorism and Security Act 2015

Most recently, the United Kingdom passed the Counter-Terrorism and Security Act of 2015 that received Royal Assent (in Britain, Royal Assent formally turns a proposed bill into a law) three months after its first reading.⁴¹ It contained new provisions intended to aid law enforcement in countering suspected terrorists including a faster process for the seizure of passports, and the introduction of Temporary Exclusion Orders.⁴²

³⁶ Ibid.

³⁷ Ibid.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ The Counter-Terrorism and Security Act 2015, c. 6, available at: <http://services.parliament.uk/bills/2014-15/counterterrorismmandsecurity.html>.

⁴² Ibid.

Power to Seize Travel Documents

The U.K. government can now seize the passports of U.K. or non-U.K. nationals of any age who are suspected of travelling in support of terrorism overseas for up to 30 days. Previous legislation put law enforcement at a disadvantage as obtaining the authority to seize travel documents through the court system could often be lengthy and require Home Secretary approval.⁴³ Recent figures released from Europol show that 3000-5000 fighters from Europe are suspected to have travelled to and from Syria in 2014, and 500 of those have been from the United Kingdom, underscoring the need to take measures to counter the flow of European fighters to the so-called Islamic State (IS).⁴⁴ The new powers mean that the delay provides sufficient time for officers to conduct investigations relating to the suspect.⁴⁶ But, as with most counterterrorism laws, the wording used to justify using this new authority is vague. According to the Home Office:

“The threshold for exercising the power is that the police officer has reasonable grounds to suspect that the person is at the port with the intention of leaving Great Britain or the United Kingdom for the purpose of involvement in terrorism related activity outside the United Kingdom.”⁴⁷

Meanwhile, power to stop travelers comes “as a result of intelligence or on the basis of observation or information obtained at port,”⁴⁸ raising fears that racial profiling will again become an issue since the likelihood of being stopped if of Asian ethnicity is “between 1.5 and 2.5 times the rate for White people.”⁴⁹ Nonetheless, checks and balances have been built into the bill to

⁴³ Matthew Holehouse, “Counter-terrorism Bill: What It Contains,” *The Telegraph* (November 26, 2014) available at: <http://www.telegraph.co.uk/news/worldnews/islamic-state/11254950/Counter-terrorism-Bill-What-it-contains.html>.

⁴⁴ “European Union Terrorism Situation and Trend Report 2015,” *Europol* (2015): 22, available at: <https://www.europol.europa.eu/content/european-union-terrorism-situation-and-trend-report-2015>.

⁴⁵ Counter-Terrorism and Security Bill, Factsheet: Temporary Passport Seizure, *The Home Office* (December 3, 2014) available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/382245/CTS_Bill_-_Factsheet_2_-_Passport_Seizure.pdf

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ Isabella Sankey, “Liberty’s Second Reading Briefing on the Counter-Terrorism and Security Bill in the House of Lords,” *Liberty* (January, 2015): 5, available at: <https://www.liberty-human-rights.org.uk/sites/default/files/Liberty's%20Briefing%20on%20the%20Counter->

prevent the arbitrary use of seizure powers. For instance, officers are required to seek permission from senior officers before conducting a stop (senior officers themselves are also inspected), and will have their stops reviewed after 72-hours. A code of conduct has also been introduced for border officers.⁵⁰ Liberty has also made the government aware that children and foreign nationals may be at particular hardship financially if suspicions are proven wrong. The resulting disruption to travel and the knock-on effects to one's private life could be detrimental to one's wellbeing and safety.⁵¹ On balance, the passport seizure provisions seem necessary given the flow of naturalized U.K. citizens travelling for the purposes of terrorism. For example, naturalized citizen Mohammed Emwazi—nicknamed “Jihadi John” by the press—hailed from West London and travelled to Kuwait and Tanzania before eventually travelling to Syria to join IS—despite being monitored by MI5 for five years before joining.⁵² Although it was a failing by the security services, having the ability to have disrupted his travel plans by restricting his movement through seizure of travel documents not only could have prevented the further radicalization of this person, and prevented the deaths of Western journalists, it could have also sent a strong message to others contemplating similar actions.⁵³

Temporary Exclusion Orders

Lastly, Temporary Exclusion Orders (TEOs) authorize the government to prevent anyone suspected of engaging in terrorism from returning to the United Kingdom for a period of up to two years, and are renewable.⁵⁴ This provision targets British citizens (provisions were previously reserved for those with dual nationality or naturalized citizens in order to avoid rendering the individual stateless—an act that is illegal under international law) who were previously impervious to efforts from the government to exclude them from returning following travel for the purpose of terrorism.⁵⁵ Besides sidestepping the issue of statelessness, another notable gap in this provision

Terrorism%20%20Security%20Bill%20(Second%20reading%20HOL)%20(Jan%202015).pdf

⁵⁰ Counter-Terrorism and Security Bill, Factsheet: Temporary Passport Seizure, 3.

⁵¹ Counter-Terrorism and Security Bill, Factsheet: Temporary Passport Seizure, 5.

⁵² “‘Jihadi John’: Prime Minister Defends Security Services,” *BBC News* (February 27, 2015) available at: <https://www.bbc.com/news/uk-31657281>.

⁵³ *Ibid.*

⁵⁴ The Counter-Terrorism and Security Act 2015.

⁵⁵ Counter-Terrorism and Security Bill, *Factsheet: Temporary Exclusion Orders*, available at:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/382346/CTS_Bill_-_Factsheet_3_-_TEO.pdf.

is that anyone issued a TEO because of “travel for the purpose of terrorism” may be vulnerable to questionable treatment by the country to which the person is exiled. Countries battling insurgencies and terrorism such as Nigeria, Kenya, and Turkey have security services that are known to practice harsh interrogation techniques; thus, the person on the receiving end of the TEO, having been identified to non-U.K. authorities, is at risk of abuse by the security services of their host nation.⁵⁶

Although one might suggest that a person losing the right to return to the United Kingdom after engaging in such acts (not to mention the threat posed by their return) justifies the denial of entry on the surface; in reality, TEOs can complicate matters further. For example, TEOs put the United Kingdom at risk of further violating its obligations under international law by contravening the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the European Convention on Human Rights.⁵⁷ Notwithstanding a potential breach of international law and the disregard for a person’s freedom to travel, the TEO effectively puts the onus of handling suspects onto another, possibly less capable country that could simply release the exiled individual and allow him or her to “fight” another day. Moreover, blocking an individual’s return limits the ability of U.K. intelligence services to monitor terror suspects for any terror-related activity by placing that individual out of reach.⁵⁸

This section reviewed major anti-terror legislation, beginning with the Prevention of Violence Act of 1934, and noted the evolution of the definition of terrorism, from its original focus on politically motivated acts, to encompassing religious and ideological drivers as seen in the TA 2000 Act. The fast-pace at which subsequent laws were passed in reaction to terrorist threats was also examined, underscoring the flexibility of the U.K. legal system. However, the swift passage of legislation like the Indefinite Detention provisions in the Anti-Terrorism, Crime, and Security Act 2001, due to the urgency of the terror threat, resulted in the passing of overzealous legislation in some instances. The United Kingdom has shown its commitment to UN resolution 1373 through its implementation of strong anti-terror laws and support of the U.S. “global war on terror.” Yet it differs from the United States in how it processes terror suspects. Unlike the U.S. legal system that

⁵⁶ Counter-Terrorism and Security Bill, *Factsheet: Temporary Passport Seizure*, 13.

⁵⁷ “Human Rights Watch Concerns and Recommendations on the United Kingdom,” *Human Rights Watch* (June 22, 2015), available at: <https://www.hrw.org/news/2015/06/22/human-rights-watch-concerns-and-recommendations-united-kingdom>.

⁵⁸ Counter-Terrorism and Security Bill, *Factsheet: Temporary Passport Seizure*, 13.

processes the majority of terror suspects using military tribunals at Guantanamo Bay, the United Kingdom uses its domestic courts to process terror suspects through the Special Immigration Appeals Commissions (SIAC). Part II examines the SIAC process and surveys the U.K. judicial system's interaction with the European Court of Human Rights.

Part II: UK domestic courts and terrorism & the European Courts of Human Rights

The Special Immigration Appeals Commission

In the 1970s, cases dealing with terrorism relating to the “Troubles” in Northern Ireland were held in “Diplock Courts,” named after Lord Diplock, who first recommended that trials of terror suspects should take place without juries to prevent the possibility of jury interference and intimidation.⁵⁹ Today, domestic courts process most terror related cases. However, in sensitive situations where national security concerns arise, the United Kingdom may elect to use the Special Immigration Appeals Commission (SIAC) process. Established in 1997, the court convenes “behind closed doors” and allows the government to hold hearings in a secure environment. Within the court, Closed Material Procedures (CMPs) provide judges access to secret evidence (evidence sourced from foreign intelligence services, police, and informants) that is withheld from the defendant and the public. Once closed materials are released to the judge and the Special Advocate (a defense lawyer), the Special Advocate's communication with his client is limited in time and as to the information that can be shared.⁶⁰

The court serves a purpose in guarding information that cannot be shared in a civil court because of the potential detrimental effects that such a release would have on national security. Still, the secretiveness of the court does raise questions on its fairness. For instance, a recent Amnesty International report on SIACs noted that many Special Advocates complained of difficulties conducting their duties under CMPs. The ability to cross-examine expert witnesses and the accused is severely hampered, as is the ability to challenge any evidence that could be contested. Dinah Rose QC provided Amnesty

⁵⁹ Roach, Kent, *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge, England: Cambridge University Press, 2011).

⁶⁰ “Left in the Dark: The Use of Secret Evidence in the United Kingdom,” *Amnesty International Publications* (October 15, 2012): 7, available at: <https://www.amnesty.org/en/documents/EUR45/014/2012/en/>.

International an excellent example of the type of situation faced by Special Advocates:⁶¹

“Suppose an allegation is made that a particular individual attended a training camp in Afghanistan – this is a SIAC-type example – on a particular date, was seen there, and there is identification evidence that describes the individual as having a beard. If you are the special advocate, you cannot take instructions to find out whether the claimant had a beard at that date or whether he might have in his possession any photograph of himself taken at that date showing he did not have a beard.”⁶²

It is understandable that courts should convene in this way when evidence made public could threaten the safety of officers or disrupt counter-terrorism operations. Yet the secrecy surrounding the court begs the question: Is it worth holding a court at all if it is unbalanced and in favor of the government? The cycle continues with final judgements wherein, depending on whether a closed or open judgement is granted, the defendant may only be given a brief reason for why a case was lost, making the appeal process extremely frustrating.⁶³

Reform to overzealous legislation has taken place. For example, indefinite detentions from the ATCSA 2001 were repealed and reconstituted over time into the Terrorism Prevention and Investigation Measures (TPIM), which lets police monitor suspects while limiting their movement.⁶⁴ However, reform to SIACs and the hearing of secret evidence has been slow coming. Not only is the United Kingdom omitting its responsibilities to provide fairness in its courts, but it should also be mindful of violating international conventions like Article 14 of the International Covenant on Civil and Political Rights (ICCPR) that grant individuals the right to a fair trial.⁶⁵ Interestingly, the use of CMPs has moved beyond SIACs and now happens regularly in civil courts after the passing of the Justice and Security Act of 2013 (JSA 2013). Though

⁶¹ Ibid., 11.

⁶² Ibid.

⁶³ Ibid.

⁶⁴ David Barrett, “Terror Controls Explained,” *The Telegraph* (August 27, 2014) available at: <http://www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/11051120/QandA-Terror-controls-explained.html>

⁶⁵ Amnesty International, “Left in the Dark,” 18.

not a new concept, expanding into civil courts does emphasize the potential for “creep” to happen when CMPs become the norm.⁶⁶

The U.K. government cites that the implementation of the JSA 2013 is required to protect intelligence shared by the United States, and that failing to secure information in courts may result in a loss of confidence by the United States and thus the potential end to the information sharing relationship.⁶⁷ Despite the ominous sentiment surrounding CMP’s, a favorable aspect of extending CMPs into civil courts is that many cases that are currently stalled for the purposes of national security can now be heard—albeit in secret—allowing justice to run its course.⁶⁸ At the same time, human rights proponents aver that CMPs are contrary to Article 6 of the European Convention on Human Rights—the right to a fair trial. Yet, on closer examination, this right is not guaranteed by the article which states, “Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society.”⁶⁹ Amnesty International also argues that the disclosure of certain evidence through CMPs rather than the previous method of using Public Interest Immunity (PII) procedures—which completely excluded information from both sides—does not provide “effective remedy,” since material is excluded from the individual concerned—a valid point.⁷⁰ Nevertheless, transparency and open justice must be balanced in the interest of security. To ensure the integrity of the system, judicial reviews through parliament do take place, while intelligence commissions provide a robust mechanism to monitor security services for any abuses of power.⁷¹ The ultimate fail safe however is found through the independence of the judiciary, which is protected from interference under law to ensure that national security is not used as a ruse to achieve political or nefarious ends.

The European Courts of Human Rights & terror cases

Human rights and security have been hard to balance with today’s terrorist threat, which is one of the reasons the current U.K. government has publicly stated that it wishes to amend the European Convention on Human Rights that was adopted

⁶⁶ Amnesty International, “Left in the Dark,” 32, 39.

⁶⁷ “Justice and Security Green Paper,” *HM Government* (October, 2011): 8, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228860/8194.pdf

⁶⁸ *Ibid.*, 17.

⁶⁹ *Ibid.*, 5.

⁷⁰ Amnesty International, “Left in the Dark,” 38.

⁷¹ HM Government, “Justice and Security Green Paper,” xv.

into British domestic law under the Human Rights Act of 1998.⁷² Several cases concerning the extradition or deportation of convicted terrorists have seen British court rulings blocked from proceeding for violating human rights by the European Court of Human Rights. One case that stands out is that of Abu Hamza, which originally led to the current discourse. Abu Hamza, an Egyptian-born cleric, was notorious for his support of al-Qaida, and the radical preaches he would give outside of the Finsbury Park Mosque in North London. British security services monitored his activity for years due to his suspected links to terrorism. He was eventually arrested and jailed in 2006 for seven years on 11 charges under the TA 2000, including incitement to commit murder and racial hatred. However, it would be his bid to stop his extradition to the United States for his part in the kidnapping of four tourists in Yemen in 1998, and his alleged plans to establish a terrorist training camp in Oregon, that would cause a media frenzy.⁷³ To stop the extradition, Abu Hamza—along with five others on separate terror charges—appealed to the European Court of Human Rights. *Babar Ahmad and others v. the United Kingdom* argued against extradition on the grounds that their Article 3 human rights would be infringed upon if extradited to the United States, because of U.S. deviations from international norms concerning torture, and the length of time they would have to serve in a U.S. “supermax” jail.⁷⁴

Though this is but one example, the British government and certain media outlets continue to push the narrative that the United Kingdom’s ability to counter terrorism is stunted by the Strasbourg court which is why the former Home Secretary and now Prime Minister, Theresa May, called for Britain to withdraw from the European Convention on Human Rights.⁷⁵ Hamza’s court battle lasted eight years and cost tax payers over a million pounds, while the European Court of Human Rights deliberated on whether extradition to the United States would or would not encroach on Hamza’s human rights.⁷⁶ The portrayal of this case in the media, and the tendency for media outlets to focus on extraordinary cases like this one, has garnered within the public the idea that these types of disputes between the United Kingdom and the European Court over criminals are commonplace—this is simply not the case.

⁷² “The UK Government’s Proposals Regarding the Human Rights Act and the European Court of Human Rights,” *Human Rights Watch*, May 20, 2015, available at: <https://www.hrw.org/news/2015/05/20/uk-governments-proposals-regarding-human-rights-act-and-european-court-human-rights>.

⁷³ “Babar Ahmad and Abu Hamza Among Terror Suspects to be Sent to US,” *BBC News* (October 5, 2012) available at: <http://www.bbc.com/news/uk-17662054>.

⁷⁴ *Ibid.*

⁷⁵ Human Rights Watch, “The UK Government’s Proposals,”; “UK must leave European Convention on Human Rights, Says Theresa May,” *The Guardian* (April 25, 2016) available at: <http://www.theguardian.com/politics/2016/apr/25/uk-must-leave-european-convention-on-human-rights-theresa-may-eu-referendum>.

⁷⁶ “How Abu Hamza Came to Court in New York,” *BBC News* (April 14, 2014), available at: <http://www.bbc.com/news/uk-26737888>.

For instance, of the “1,243 cases that were brought before the European court in 2014, only four cases were lost by the U.K. government,” underlining the misconception.⁷⁷ The European Court of Human Rights may be an inconvenience to the United Kingdom, but the European Court’s ability to challenge U.K. court decisions provides essential accountability and much needed balance to the ongoing debate between security and human rights.

Conclusion

Strong anti-terror legislation remains a valuable tool in countering terrorism, and the United Kingdom should continue to pass laws to meet that threat. Concurrently, the United Kingdom should continue to fine-tune existing laws that encroach on human rights and liberties beyond a reasonable point, and it could achieve this by integrating civil society into the legal process. It is clear that Special Advocates face barriers in effectively carrying out their roles, and more can be done to ensure the impartiality of SIACs. Aside from working with civil liberty organizations, the SIAC ought to consider using an independent adjudicator or judge (with the appropriate security clearances) to assess whether closed material procedures are being employed appropriately and fairly in any given trial. Although this does not address the unbalanced nature of the court in that defendants are still not privy to all the evidence, having independent adjudication would help ensure a fairer trial and be another step toward reaching the goal of open justice.

Another issue brought to the fore by the United Kingdom’s far-reaching counterterrorism legislation is the perception from members of the Muslim community that such laws normalize racial profiling, and ultimately encourage the growth of terrorism by isolating the community even further. It could be said that it is not just the legality of these laws that matter for national security, but the perception of them and their implementation. One group in particular, the Muslim Council of Great Britain, who claim to be the largest Muslim umbrella organization in Britain today, have been most vocal in expressing their opinion on counter-terror legislation. However, their often-hardline standpoint on U.K foreign policy and social issues has meant that the Conservative Party has distanced themselves from the organization and has been unwilling to work with the them in countering terrorism.⁷⁸

⁷⁷ BBC News, “Babar Ahmad and Abu Hamza.”

⁷⁸ “A Muslim group falls from favor,” *The Economist* (October 18th 2014) available at: <http://www.economist.com/news/britain/21625867-muslim-group-falls-favour-no-one-talk>. See also: “The Government, Prevent and Muslim Communities,” *Muslim*

Although the MCB condemns terror attacks,⁷⁹ elements within the MCB have taken an extremely controversial stance in the past on social issues, from the boycotting of holocaust memorials to taking an ultra-conservative view on LGBTQ rights,⁸⁰ which run contrary to British secular ideals. They have stated their disapproval at the “glorification of terror” provision that was passed in 2006, declaring, “the circumscription of dissenting opinion through the banning of non-violent groups and the implications for expressing legitimate criticism and condemnation of oppressive regimes and those who violate international legality.”⁸¹ There are clear ideological differences between members of the British Government and the MCB on how to tackle terrorism, but closing all dialogue and marginalizing such a large bloc of Muslim society may be detrimental in the long-run. Regardless of the conservative leanings within the MCB, the MCB’s wide-reach within the Muslim community means that it could be a useful ally in fighting radicalization, and help the government develop policies to better integrate British Muslims into British society.

Trust and confidence in law-enforcement among Muslim families is also lacking; suggesting that gaining their support for government counter-terror efforts will be increasingly difficult unless relations with the police are improved.⁸² One way to regain the trust of disaffected communities would be to increase minority numbers within the police force that currently lacks diversity within their ranks; this may help émigré communities identify with police better and encourage greater collaboration in the fight against terror. Presently, police officers of Muslim faith are not recorded in government statistics. However, as of 2015, only 5.5% of the police force was recorded as being members of an ethnic minority, showing that more work needs to be done in terms of police recruitment. The government should address this

Council of Britain (October 25, 2015) available at: <http://www.mcb.org.uk/the-government-prevent-and-muslim-communities/>.

⁷⁹ “Position statement: The Muslim Council of Britain and Ahmadis,” *The Muslim Council of Britain* (April 6, 2016) available at: <http://www.mcb.org.uk/position-statement-the-muslim-council-of-britain-and-ahmadis/>.

⁸⁰ Emine Saner, “Shuja Shafi, Head of the Muslim Council of Britain: ‘We’ve never claimed to speak for everyone,’” *The Guardian* (January 30, 2015) available at: <https://www.theguardian.com/world/2015/jan/30/shuja-shafi-head-muslim-council-britain-interview>.

⁸¹ “Muslim Council of Britain Calls on MPs to Reject Anti-Terror Bill,” *Muslim Council of Britain* (November 9, 2005) available at: <http://www.mcb.org.uk/muslim-council-of-britain-calls-on-mps-to-reject-anti-terror-bill/>.

⁸² Imran Awan and Surinder Guru, “Parents of foreign “terrorist” fighters in Syria – will they report their young?” *Journal of Ethnic and Racial Studies* (July 8, 2016): 1-19, available at: <http://www.tandfonline.com/doi/full/10.1080/01419870.2016.1206588>

issue by working with community outreach initiatives to deliberate on how to encourage young Muslims to pursue a career in the police force, and then allocate an appropriate amount of funding for a targeted recruiting campaign within the Muslim community.

The British vote to leave the EU also brings into question the wider implication of Brexit on security. In the weeks following the vote, it seems the far right has been emboldened: Statistics show a 20% spike in racially motivated hate crimes against visible minorities according to the British National Police Chiefs' Council (NPCC).⁸³ It is extremely important at this time that law enforcement agencies show a zero-tolerance approach to perpetrators of hate crimes to prevent the normalization of racist sentiment, and to prevent a further decline in relations with émigré communities. Long-term, the security relationship with the EU post-Brexit remains to be seen, but the impact should be limited given the necessity of state cooperation in defeating terrorism. So far, Britain has not announced any plans to stop using EU security databases, or to sever ties with Europol. In fact, the strengthening of cooperation between European states seems more likely given the recent surge in terror attacks across Europe: The appointment of the British Ambassador to France, Sir Julian King, as the new EU security commissioner hints at Europe's intent to maintain close security ties.⁸⁴

The appointment of former Home Secretary, Theresa May, to the position of Prime Minister, means that previous calls by her to withdraw from the European Court of Human Rights, and for the creation of a British Bill of Rights may come to fruition given her new mandate. This would be a mistake. Derogations from the ICCPR, the UN Convention against Torture, and the European Convention on Human Rights, in the hope of securing Britain against terrorist activity, will hurt British standing in the world by damaging its reputation as a model of legislative integrity and human rights champion. By such action, it will no longer be able to distinguish itself from that of the authoritarians it claims are anathema to democracy. Leaving the European Court—which is a separate entity from the European Union—would

⁸³ "Hate Crime Incidents Reported to Police have Reduced Following a Spike after the EU Referendum," *National Police Chiefs' Council* (July 22, 2016) available at: <http://news.npcc.police.uk/releases/hate-crime-incidents-reported-to-police-have-reduced-following-a-spike-after-the-eu-referendum>.

⁸⁴ Jennifer Rankin, "Registering EU Nationals in UK could take 140 Years at Current Rates," *The Guardian* (August 2, 2016) available at: <https://www.theguardian.com/world/2016/aug/02/new-uk-commissioner-julian-king-to-head-up-eus-security-brief>.

put the United Kingdom akin to authoritarian Belarus⁸⁵ in terms of countries that are not signatories, and would result in the U.K. legislative system losing a critical redoubt of accountability. The Conservative Party has suggested a British Bill of Rights, but fears that it may be a watered down version of the current Human Rights Act are warranted, given the worldwide trend towards curbing freedoms in the name of security.⁸⁶ The Human Rights Act of 1998 codified freedom of speech, which had only been assumed under British common law, now guarantees the British people access to basic rights. Replacing this law would ultimately negate the rights of the majority in order to deal with a problematic few in the search for greater security.

The United Kingdom—much like other developed democracies—faces an uphill struggle balancing human rights and civil liberties with an ever-changing security environment. The rise in homegrown extremism, the ability for homegrown terrorists to travel freely throughout the European Union, and the flexibility of terrorist operations means that law enforcement and intelligence agencies have an extremely difficult job in anticipating and stopping terrorist attacks. The legislative process across the world has traditionally been slow in managing the rise of non-state actors and keeping pace with changes in technology, but the United Kingdom has shown the robust nature of its legal system when it comes to passing anti-terror legislation. However, to ensure anti-terror laws do not foment extremism, it is essential that the government engage with the Muslim community during the policymaking process to prevent further alienation. Some of the laws detailed in this article have been overzealous and have compromised liberties and human rights at times to protect the public, but, on balance, have been necessary to counter terrorist actors. When laws have overstepped their bounds, constant oversight, the inclusion of periodic reviews, and sunset clauses have placed draconian laws firmly into check.

⁸⁵ BBC News, “Babar Ahmad and Abu Hamza.”

⁸⁶ “Free Speech Under Attack,” *The Economist* (June 4, 2016) available at: <http://www.economist.com/news/leaders/21699909-curbs-free-speech-are-growing-tighter-it-time-speak-out-under-attack>.