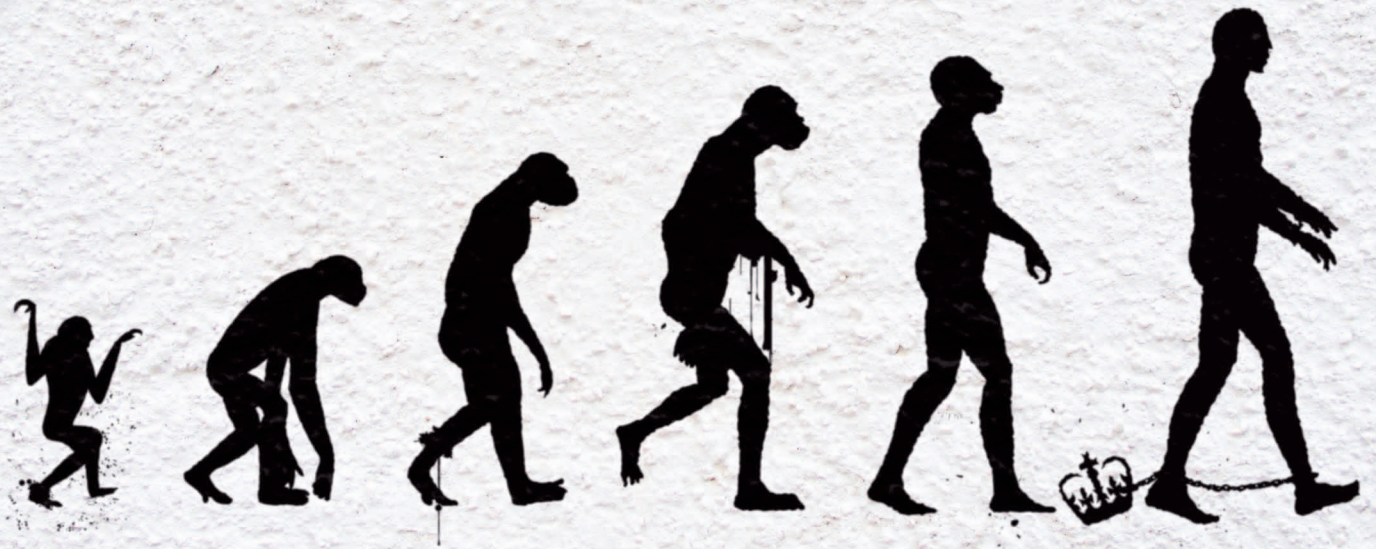
FIGHT TERROR, DEFEND FREEDOM

By Dominic Raab MP



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ABOUT BIG BROTHER WATCH

Big Brother Watch is a campaign from the founders of the TaxPayers' Alliance, fighting intrusions on privacy and protecting liberties.

Big Brother Watch produces regular investigative research papers on the erosion of civil liberties in the United Kingdom, naming and shaming the individuals and authorities most prone to authoritarian abuse.

We hope that Big Brother Watch will become the gadfly of the ruling class, a champion for civil liberties and personal freedom — and a force to help a future government roll back a decade of state interference in our lives.

The British state has accumulated unprecedented power and the instinct of politicians and bureaucrats is to expand their power base even further into areas unknown in peace time.

Big Brother Watch campaigns to re-establish the balance of power between the state and individuals and families.

We look to expose the sly, slow seizure of control by the state – of power, of information and of our lives – and we advocate the return of our liberties and freedoms.

Big Brother Watch is on your side.

ABOUT THE AUTHOR

Dominic Raab worked as an international lawyer, at Linklaters in the City and at the Foreign & Commonwealth Office in London and The Hague.

Between 2006 and 2010, he served as Chief of Staff to Shadow Home and Justice Secretaries, David Davis and Dominic Grieve.

In May 2010, he was elected as the Conservative Member of Parliament for Esher and Walton. He is a member of the Joint Committee on Human Rights, a cross-parliamentary committee scrutinising government policy and legislation.

Dominic is the author of The Assault on Liberty – What Went Wrong With Rights (Fourth Estate, 2009).

1 *Note on Sources. This paper is based on information provided from official sources, and private conversations with past and present members of the law enforcement and intelligence authorities in the UK and abroad. In addition, it draws on my own experience working at the Foreign & Commonwealth between 2000 and 2006, in particular facilitating information co-operation between the UK government and various international war crimes tribunals, and assessing the development of new prosecutorial techniques at the international courts in The Hague.*

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The views in this paper remain personal to the author.

2 *Prime Minister's Press Conference, 5 August 2005.*

FIGHT TERROR, DEFEND FREEDOM

By Dominic Raab MP [1]

1. Introduction

In the wake of the July 2005 terrorist attacks on London, Prime Minister Tony Blair proclaimed: 'Let no-one be in any doubt, the rules of the game are changing'.[2] The government proposed, passed or implemented a swathe of authoritarian security measures, including identity cards, control orders, new hate offences such as the 'glorification of terrorism', the scatter-gun use of 'stop and search' powers and controversial attempts to extend pre-charge detention to 90 days. These measures threatened the liberties of the British citizen – from freedom of speech to habeas corpus. Individually they were pernicious – each measure presented, and to varying degrees resisted in Parliament, on the basis of competing arguments about their countervailing security value. Collectively, they characterised an approach that encouraged the resort to measures designed to subvert or circumvent existing legal safeguards protecting personal freedoms or guaranteeing a fair trial. Tony Blair's carefully crafted sound bite neatly summed up a mentality that saw fundamental components of the British justice system as an inconvenient impediment to – rather than a weapon in – the fight against terrorism.

In May 2010, the newly-elected coalition government published its Programme for Government, Chapter 3 of which pledges 'a full programme of measures to reverse the substantial erosion

of civil liberties', coupled with a 'Freedom Bill' incorporating proposals from the Conservatives and Liberal Democrats (in opposition) for a 'Great Repeal Bill', to scale back the authoritarian and ineffective counter-terrorism and criminal justice legislation of the previous thirteen years.[3] The new Home Secretary, Theresa May, moved swiftly to act on these proposals, introducing the Identity Documents Bill to repeal the ID cards legislation in June, followed by the announcement of a review of counter-terrorism powers in July.

The debate on security and freedom has shifted dramatically in a short period of time. It paves the way for a wholesale reinforcement of the traditional respect for individual liberty in Britain. Nevertheless, whilst the reversal of various authoritarian measures can be achieved without impairing UK security, there remain glaring gaps in Britain's domestic counter-terrorism strategy. Far from trading individual freedoms on the false pretext of improving our security, the new government has an opportunity both to strengthen the protection of individual freedoms, and harness the full weight of the justice system to bolster our capacity to prosecute those who wish to perpetrate terrorism in this country.

3 *Available at: www.cabinetoffice.gov.uk/media/409088/pfg_coalition.pdf*

This paper addresses a number of the most contentious counter-terrorism measures introduced by the last government and examines their current security value. It is not intended to be an exhaustive analysis of all the measures, which will be considered within the government's counter-terrorism review. It assesses the current strength of counter-terrorist law enforcement, and concludes that there are significant shortcomings in law enforcement – most notably a 'prosecution gap'. It makes a number of recommendations to strengthen the UK's prosecutorial capacity, including lifting the ban on the use of intercept evidence in court – as part of a wider, more robust, 'zero-tolerance' approach to prosecuting those involved in terrorism. It concludes that we need not trade our liberties for some illusory security comfort blanket – we can both defend freedom, and fight terror.

2. Beyond 'Sound Bite' Security

'Perhaps in the past the Government, in its enthusiasm, oversold the advantages of identity cards. We did suggest, or at least implied, that they may well be a panacea for identity fraud, for benefit fraud, terrorism, entitlement and access to public services.' [4]

Former Security Minister, Tony McNulty

In thirteen years of power, the last Labour government passed over sixty Home Office Bills, more than the total number enacted in the rest of British history. Over 3,000 criminal offences were created. Legislative hyperactivity – regardless of its quality – was presented as a visible sign of action. In practice, numerous measures directly infringed or threatened a variety of personal freedoms, traditionally protected in Britain. Their corresponding impact on UK security was minimal, illusory or – often – negative.

Identity cards legislation was passed and implemented in 2006. The requirement that fifty items of personal information be stored on a central database, and shared around government, eroded personal privacy. Touted by Home Office

Ministers as a 'panacea' for stopping terrorists, the IT and database design quickly proved susceptible to fraud, whilst the exemption for foreign nationals staying for up to three months fatally undermined the principal security rationale.[5]

A blitz of new public order and hate crime offences were created, including glorifying terrorism and inciting religious hatred. Criticised for their chilling effect on free speech on matters of legitimate debate, low prosecution rates for these offences subsequently rendered hollow the claims originally attributed to them. Ministers under the last government claimed these new offences were vital, but failed to record the subsequent prosecution and conviction rates for the specific offences that would have allowed scrutiny of those claims. For example, convictions for 'glorification' of terrorism are grouped, in official statistics, with convictions for 'dissemination of terrorist publications' – even then, there have been just two convictions in total, under sections 1 and 2 of the Terrorism Act 2006, since 2006. This suggests that pre-existing counter-terrorist and public order offences were more than adequate.

4 Tony McNulty, speech to IPPR, reported widely, including in the Times, 4 August 2005.

5 Microsoft's National Technology Officer warned of massive identify fraud, The Register 18 October 2005, whilst the Independent Scheme Assurance Panel set up to scrutinise the ID cards project issued similar warnings, The Observer 11 May 2008.

Equally, in a democratic society, free speech should only be prohibited where it incites violence or disorder – not merely where language used is insulting or offensive. Despite the scarcity of prosecutions, the enactment of these new offences has nonetheless stifled free speech. For example, in 2008, a fifteen year old boy was apprehended and threatened with prosecution for holding a placard at a demonstration calling the Church of Scientology a 'cult'.[6] The charges were later dropped – but only after the police had interfered with the peaceful protest.

The offences of glorifying terrorism and inciting religious hatred undermine free speech, and are unnecessary to prevent violent extremism or public disorder. They should be reviewed and repealed, as part of the Freedom Bill.

New powers, under section 44 of the Terrorism Act 2000, allowed random stop and search (without requirement of a reasonable suspicion of terrorism or other offences), for a limited period in authorised areas – where it is considered 'expedient' for the prevention of terrorism. Use of these pow-

6 Reported in The Guardian, 20 May 2008.

ers surged from several thousand, in 2000, to a peak of over 250,000 by 2009. The soaring use of random stop and search was accompanied by widespread reports of their abuse. In one recent case, two TV presenters were apprehended whilst acting out a sketch for a children's show – wearing flak jackets, dark glasses and brandishing pink and turquoise hairdryers.[7]

Whilst the 'stop and search' net was cast widely, in 2009 just 1% of stops led to arrest – let alone charge or conviction – suggesting a poor use of finite law enforcement resources. Despite the scatter-gun use of these powers, between 2007 and 2009, not a single person was subsequently prosecuted. Furthermore, the statutory reviewer of terrorism legislation, Lord Carlile, claims: 'There is little or no evidence that the use of section 44 has the power to prevent an act of terrorism as compared with other statutory powers of stop and search'.[8] The Home Secretary has already announced that these powers will be revised.[9] In general, such powers of stop and search should be confined to situations where police officers have a reasonable suspicion that an individual is involved in terrorism. In addition, in a strictly defined emergency situation,

7 Data for stop and search under section 44 comes from various Home Office Statistical Bulletins. The Toonattik arrests were widely reported, 26 January 2010, including in the Daily Telegraph, The Independent and Daily Mail.

8 Paragraph 148, Report on the Operation in 2009 of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006, Lord Carlile, June 2009.

9 Statement to the House of Commons, 8 July 2010.

any powers of random stop and search might be confined to limited periods of up to 48 hours, in specified geographic areas, where the Secretary of Secretary has grounds to believe a terrorist attack is imminent or immediately after a terrorist attack or attempted attack has taken place. This would provide a proportionate and focused alternative.

Perhaps most controversially, between 2003 and 2005, the limit for detention without charge was quadrupled from 7 to 28 days – the longest period in the democratic world – with subsequent proposals to extend the maximum period to 90, 56 and then 42 days. A string of security experts – as well as civil liberties groups – criticised these plans as clumsy and counter-productive. The former head of MI5, Baroness Manningham-Buller, denounced them as wrong in principle and practice.[10] Lord Dear, a former West Midlands Chief Constable with frontline counter-terrorism experience, labelled the 42 day plan a 'propaganda coup for Al-Qaida.' [11] As head of counter-terrorism at the Metropolitan Police between 2002 and 2008, Peter Clarke highlighted the necessity of increasing the flow of 'community intelligence', from Muslim communities across

10 8 July 2008, House of Lords.

11 Criticisms by Lord Dear, widely reported including in the Daily Telegraph, 12 October 2008.

the country.[12] Yet, the government's own impact assessment accompanying the 2008 Counter-Terrorism Bill specifically highlighted the risk that extending detention without charge to 42 days would undermine such cooperation.

If the security risks of a further extension were real, the overwhelming necessity for a longer period of detention proved a myth. In the last four years, only one suspect has been detained for longer than 14 days – an isolated case of 19 day detention – despite ministerial claims that the police would be swamped under the current 28 day limit. In July 2010, Lord Carlile criticised the practices of police and prosecutors during Operation Pathway (a counter-terrorism operation in the North West of England in 2009), indicating that if lessons were properly learnt he expected to see 'a reduction in detentions beyond a very few days'.[13] In June of this year, the head of counter-terrorism at the Crown Prosecution Service, Sue Hemming, explicitly defended the operational need for the 2005 extension to 14 days pre-charge detention – conspicuous in its implication that a longer period was unnecessary.[14] Absent fresh evidence, the maximum limit for pre-charge detention

12 *See, for example, his lecture to Policy Exchange, 24 April 2007.*

13 *Note 8, at Para 167.*

14 *'The Practical Application of Counter-Terrorism Legislation in England and Wales: a prosecutor's perspective', International Affairs, 86, page 955, at page 965.*

should now be reduced to at least 21 days, with a view to a further reduction to 14 days when the law enforcement measures, considered below, have been implemented.

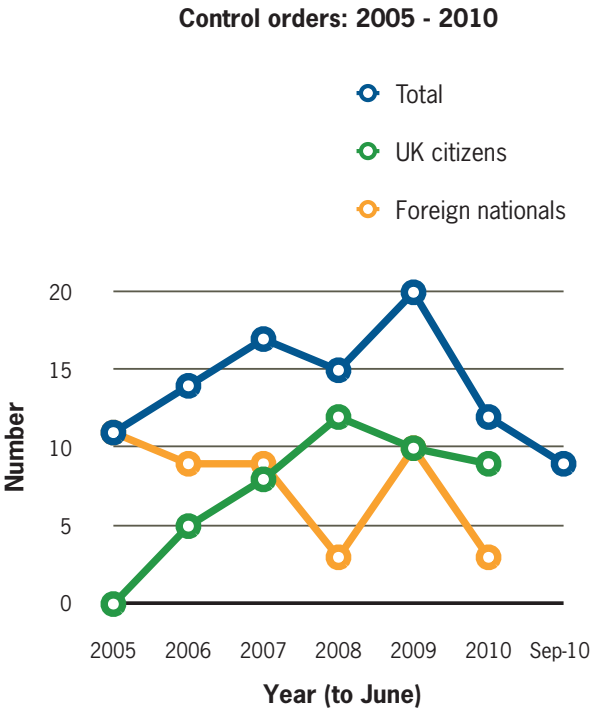
Control orders have also undermined liberty, with minimal countervailing security gains. Rushed through Parliament in 2005, after the House of Lords struck down the government's attempt to detain foreign terrorist suspects indefinitely without charge, control orders can be imposed on people who have not been proved guilty of any criminal offence. They may include controls on who a person can meet with or speak to, bar access to the internet or telephone and impose restrictions on when a person can leave his home and where he can go – amounting to virtual house arrest for up to 16 hours per day. Yet control orders have proved a blunt – and expensive – tool in practice, both ineffective and vulnerable to legal challenge. By 2009, a fifth of those on control orders had escaped, whilst in that year alone this brittle regime cost the Home Office £135,000 per 'controlee' to implement (let alone defend from legal challenge).[15]

15 Freedom of Information disclosure, 7 January 2010, Home Office website.

16 Data provided by the Home Office, July 2010. The written statement to the House of Commons, by the Home Secretary on 16 September 2010, showed a further reduction in the number of 'controlees' to nine. The breakdown for the number of UK citizens and foreign nationals has not yet been made available.

Following the hubris that accompanied the introduction of the regime, reliance on control orders initially rose and then declined. Originally designed to deal with foreign terror suspects the UK cannot deport, because of the risk of torture if returned home, that rationale has skewed. As the chart on the right demonstrates, the numbers have dwindled. There are now nine 'controlees' – the lowest number since their introduction. In addition, their use is now predominantly focused on British citizens, not foreign nationals.[16]

The case for control orders has weakened over time. They allow what is effectively a criminal sanction to be imposed on the basis of waifer-thin evidence. Or, as one Special Advocate put it, they can be used: 'if there's a bit of a whiff of something wrong'. They no longer serve the counter-terrorist objective they were designed for – namely monitoring foreign suspects we cannot deport. The regime should be phased out, starting with a 'sun-set' provision for any control orders in force for two years or more. Any suspect subject to a control order for that length of time will have been tainted by such intrusive supervision, and highly unlikely to be actively engaged by



an operational terrorist cell. Surveillance can still be used to monitor 'controlees', if necessary, after the termination of the control order. Furthermore, if certain law enforcement measures, considered below, are implemented – together with a strategy that places greater emphasis on prosecution – it should be possible to repeal the wider control order regime within two years, whilst strengthening our ability to incarcerate those engaged in terrorist activity.

Despite all of the measures taken by the last government – and the steady erosion of the liberties of the British citizen – the terrorist threat level has not abated since the London bombings, with the threat level twice raised to 'critical' (terrorist attack expected imminently), and recently returned to 'severe' (attack highly likely).

The tough talk on terror has not reduced the threat level. Sacrificing our freedoms has not made us safer. But, has the blizzard of legislative initiatives masked a wider failing? Did the last government's appetite for creating new laws displace its focus from the overriding imperative of rigorous and robust law enforcement?

17 Note 12.

18 Note 14, at page 955.

Less Law, More Enforcement

'My personal view is that we now have a strong body of counter-terrorist legislation that, by and large, meets our needs … Prosecution through the courts, using judicial process that is recognised and understood by the public, is by far the preferred method of dealing with terrorism.' [17]

Peter Clarke,
Head of the Counter-Terrorism Command,
Metropolitan Police,
April 2007

'Prosecutors in the United Kingdom begin from the perspective that terrorists are criminals and that they should be tried in our mainstream criminal justice system using criminal law and procedures.' [18]

Sue Hemming,
Head of Counter-Terrorism,
Crown Prosecution Service,
June 2010

Plugging our 'Porous Borders'

Whilst the primary law enforcement focus of this paper is on prosecutorial strategy, enforcement at the UK border remains a live and contentious issue.

In one respect, it has become less central as attention has fixed on the rising home-grown terrorist threat to Britain, illustrated by the make up of those subject to control orders. However, recent terrorist operations have demonstrated the complex international links to domestic plots – whether because of training or support abroad (particularly in Pakistan), flaws in the student visa system or other links with wider international terrorist networks. In addition to the July 2005 attacks, Operation Crevice 2004, Operation Rhyme (Dhiren Barot) 2004, the Glasgow and Haymarket attacks in 2007 and Operation Pathway 2009, demonstrated in different ways the pervasive international dimension to the domestic terrorist threat.[19]

Chapter 17 of the coalition's Programme for Government lists the establishment of a dedicated Border Police force, support for E-borders, the reintroduction of exit controls and measures to tackle abuse of student visas, amongst the coalition's policies designed to plug the gaps in Britain's 'porous borders'.[20] Since the election, the government has set up a National Security Council to join up assessment and strategy in dealing with domestic and international threats to UK security. The Home Office has announced a review of student visas, bogus colleges and sham marriages. These reforms are key compo-

nents of a more robust approach to law enforcement at the border, predicated on the premise that preventative counter-terrorism measures that reduce or mitigate the domestic threat are amongst the most effective and cost-efficient means available. When it comes to tackling the terror threat, prevention is invariably better than cure.

Chapter 21 of the Programme for Government further pledges to 'deport foreign nationals who threaten our security to countries where there are verifiable guarantees that they will not be tortured'. The United Kingdom currently has memoranda of understanding (MoU's) – legally non-binding agreements – with Ethiopia, Jordan, Libya and Algeria, and the government is in the process of negotiating further MoU's with other countries.[21]

The vexed issue of deporting individuals who pose a threat to UK security has been the subject of intense public debate since the case of Chahal –v- the United Kingdom (1996).[22] The European Court of Human Rights (ECtHR) ruled that it is unlawful for any state party to the European Convention on Human Rights (ECHR) to deport a person to another country, where

19 For further information, see the MI5 website at: https://www.mi5.gov.uk/output/terrorist-plots-in-the-uk.html

20 The phrase 'porous borders' was first attributed to Lord Stevens, former Commissioner for the Metropolitan Police, who advised the Conservative Party in opposition on border controls.

21 Parliamentary Questions, response from Damian Green to Dominic Raab, 29 June 2010.

22 The judgment is available at: www.echr.coe.int

'substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3'.[23] This ruling has recently been re-affirmed by the ECtHR.[24] Whilst there are compelling moral arguments for sustaining the absolute prohibition on torture, there are also legitimate concerns about reversing the burden of proof, so that governments are effectively required to demonstrate that an individual will not be tortured if returned. The evidential threshold facing border authorities is compounded by the ever-elastic definition of 'inhuman and degrading treatment', encompassed by the prohibition under Article 3 alongside torture, which has gradually expanded over time through judicial legislation.[25]

Since Article 3 of the Convention is a non-derogable right, there is limited scope for the government to avail itself of the 'margin of appreciation', in accordance with the Strasbourg case-law, to mitigate the operational impact of this judgment on border controls and deportation policy. It might be possible to negotiate an amendment or protocol to the Convention. However, that would require the agreement of the other 46 state parties,

23 Paragraph 74 of the Chahal judgment. Article 3 of the ECHR states: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'

24 See, for example, Saadi –v- United Kingdom (2008).

25 See, for example, 'The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights', Alastair Mowbray, 2004, Hart Publishing.

and the prospects for any international consensus on this issue appear slim.

From a practical operational point of view, it is unclear how serious a problem the Chahal ruling still is. How many cases of deportation per year in Britain are blocked on the grounds of Article 3? Despite repeated calls for this basic information, the Home Office has refused to provide it, citing 'disproportionate cost'.[26] It is to be hoped that the new Home Secretary will heed calls for greater transparency, and provide a breakdown of statistics relating to the grounds of failed deportations, so that the issue can be properly assessed.[27]

In fact, there is evidence that the rising legal bar to deportation is being fuelled by the UK's Human Rights Act, rather than the Strasbourg Court. In 2009, the House of Lords made the point that the European Court of Human Rights had – at that time – never gone so far as to block a deportation on the grounds that it would disrupt an individual's family ties, based on the right to a family life under Article 8 of the Convention.[28] In contrast, the UK courts have inserted this additional obstacle

26 This has continued under the new government. See, for example, Parliamentary Questions, response of Damian Green to Dominic Raab, 5 July 2010.

27 I formally raised the issue with the Home Secretary in the House of Commons on 14 July. See Hansard, column 1019.

28 Paragraph 8, RB (Algeria)(FC) v Home Secretary, 18 February 2009 [2009] UKHL 10.

to deportation, pursuant to their interpretation of the Human Rights Act.[29] In 2010, the Strasbourg Court followed their lead, using Article 8 as fresh grounds for blocking deportation in two cases on grounds of disruption to family life – the first a convicted heroin dealer, and the second a convicted sex offender.[30]

It is one thing to refuse to deport a serious criminal or terrorist suspect into the arms of torturing state authorities. It is another moral issue altogether to trump considerations of public protection, by refusing deportation, because it risks disrupting that individual's family life. That moral distinction has two important practical implications. First, one estimate found that at least fifty foreign criminals had resisted deportation from the UK on human rights grounds in 2009 alone – mostly by claiming some sort of family rights, rather than fear of torture.[31] Second, Article 8 (including the right to family life) is not a non-derogable right. Therefore, in principle, Britain has greater scope to avail itself of the 'margin of appreciation' – which gives state parties greater leeway in interpreting and applying the ECHR. However, in practice under the Human

29 EM (Lebanon)(FC) v Home Secretary, 22 October 2008 [2008] UKHL 64.

30 AW Khan v United Kingdom, 12 April 2010, App No 47486/06; Omjudi v UK, 24 February 2010, App 1820/08.

31 Investigation by the Sunday Telegraph, reported 10 October 2009.

Rights Act, UK courts are encouraging – rather than mitigating – restrictions on deportation from Britain. Whilst a British Bill of Rights could not immunise the UK from adverse Strasbourg rulings, it could mitigate Britain's exposure by taking advantage of the margin of appreciation and discouraging judicial legislation.

Until the Home Office provides clarification of the numbers of deportations blocked in recent years, along with a breakdown of the different grounds of refusal, it will remain impossible to properly assess the full extent of this problem, let alone address it. However, it is worth noting that there are 11,400 foreign nationals in UK prisons and immigration removal centres – around 13% of the total prisoner population.

It is clear that there remain considerable legal and operational obstacles to rigorous and robust law enforcement at the UK border. Whilst the new government has made important steps in the right direction, there is still a long way to go.

The Prosecution Gap

Senior UK experts, like Peter Clarke, have long agreed that prosecutions in court are a powerful weapon in counter-terrorism – and not just because of their incapacitative effect.

After the Forest Gate raid in June 2006, based on inaccurate information that a London cell was building a chemical bomb, police were concerned about the wider impact of the operation on cooperation with – and intelligence from – the Muslim community. Whilst the internet was rife with wide-eyed conspiracy theories about the raid, senior officers were quick to realise that the sight of terrorist suspects facing tangible prosecution evidence and testimony in court – in a string of domestic terrorism trials – was an invaluable tool in puncturing myths about UK counter-terrorism strategy. Criminal convictions, secured in open court, helped foster a climate in which a wider cross-section of the Muslim community became more willing to actively cooperate with the authorities.

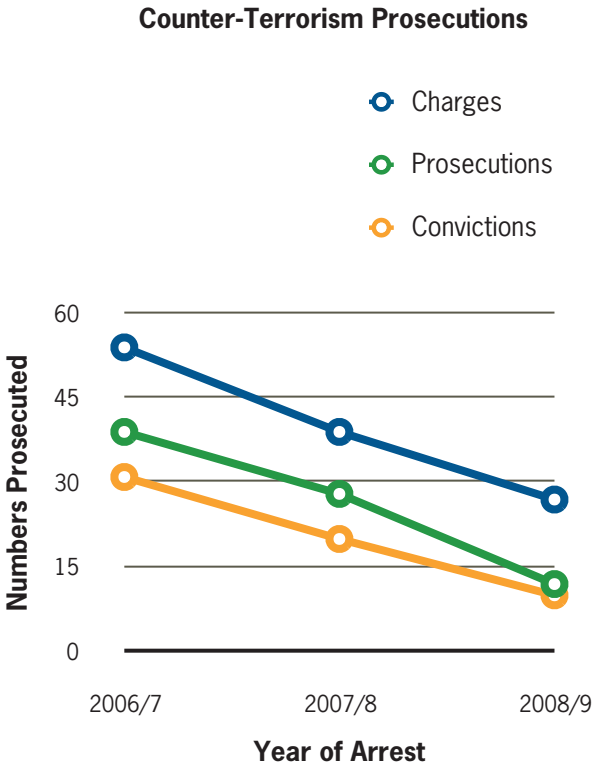
The official UK terrorist threat level has varied over the last four years – but has always remained at a high level. Briefings by the heads of MI5 in 2006, 2007 and 2008 showed a rise in the number of terrorist suspects being monitored by the authorities from 1,600 to 2,000.[32] Inexplicably, there have been no equivalent briefings quantifying the scale of the threat over the last two years. However, on 22 January 2010 the threat level was, after a brief lull, raised back from 'substantial' to 'severe', indicating that a terrorist 'attack is highly likely'.

32 *Speeches by the Director General are available at: www.mi5.gov.uk/output/news-speeches-and-statements.html*

See also the interview with media, widely reported including in The Times, 7 January 2009.

33 *See Home Office Statistical Bulletin, Quarterly Counter-Terrorism Update, published 10 June 2010, and available at: http://rds.homeoffice.gov.uk/rds/pdfs10/hosb1010.pdf*

See also the annual Home Office Statistical Bulletin, in the same series, published on 26 November 2009.



The terrorist threat level has remained high over the last four years. The base of criminal and terrorist offences has expanded exponentially since 2001. The resources invested in the intelligence and law enforcement agencies have risen significantly. Yet, far from delivering increasing numbers of prosecutions and convictions, the rates have dropped dramatically over the last three years. As the table on the left shows, over the three year period between 2006/7 and 2008/9, the number of terrorist suspects charged halved (from 54 to 27), whilst the numbers prosecuted and convicted fell by two-thirds (prosecutions from 39 to 12, and convictions from 31 to 10).[33]

Furthermore, in 2009, the proportion of those convicted in counter-terrorism trials rose from 80% to 93% (on the previous year). That is high compared to the latest conviction rates in a whole range of other criminal trials, including violence against the person (69%), sexual offences (61%), robbery (65%), conspiracy to murder (45%), wounding (61%) or rape of a female (49%).[34] In addition to falling numbers of prosecutions, the high conviction rate suggests a comparatively risk-averse prosecutorial approach to counter-terrorism cases.

This data points to a prosecution gap in UK counter-terrorism strategy. There may be a range of explanations. The current head of MI5, Jonathan Evans, told the media that the level of 'late-stage' terrorist planning had dipped in 2008, a sign of success – terrorist suspects were being forced 'to keep their heads down' – which would affect the level of evidence available for prosecutions. However, on 17 September 2010, Evans confirmed that the threat level had not abated, citing particular concerns about links with groups and training camps in Yemen and Somalia.[35] The overall picture of a consistently high threat level, coupled with dwindling prosecution and conviction rates, is worrying. Has a fixation on law-making displaced attention from law enforcement? Did the last government's legislative hyperactivity detract from its prosecutorial focus?

Certainly, cooperation between law enforcement and intelligence has improved, since the inadequate coordination between MI5 and West Yorkshire police in relation to key suspects in the lead up to the July 2005 London bombings.[36] MI5 and the police now work much more closely together. Criti-

34 Criminal Statistics, England and Wales, 2008, Ministry of Justice, at: www.justice.gov.uk/publications/docs/criminal-stats-2008.pdf

See also the Supplementary Tables.

35 See Note 32. The speech on 17 September 2010 was widely reported, including by the BBC at: www.bbc.co.uk/news/uk-11335412

36 As documented by the Intelligence and Security Committee, and widely reported including in the Daily Telegraph, 19 May 2009.

cally, according to Peter Clarke, they 'work together in every case from a much earlier stage'.[37] Equally, as Sue Hemming points out, it is now 'usual for the prosecutor to be apprised of the intelligence picture from the outset'.[38] Nevertheless, shortcomings remain. For example, in his most recent report, Lord Carlile criticised the inadequate coordination between police and prosecutors during Operation Pathway.[39]

Experience from abroad is instructive. After 9/11, the US authorities instituted a wholesale overhaul in counter-terrorism and inter-agency coordination. In particular, silos separating the intelligence and law enforcement agencies were dismantled as criminal prosecutions were increasingly used as a tool to disrupt precursor criminal activity to a terrorist conspiracy or attack. Prosecution was no longer just regarded as retributive – but also a significant part of the preventative strategy, disrupting terrorist networks. This has involved increased cooperation between intelligence, police and prosecutors in deciding the balance between – and respective merits of – ongoing covert surveillance and the disruption that individual prosecutions may bring. The US have adopted a more integrat-

37 *See Note 12.*

38 *See Note 14, at page 957.*

39 *See Note 8, at paragraph 166.*

40 *Written response by Nick Herbert to Parliamentary Question by Dominic Raab, 13 July 2010.*

ed tactical approach to the collection and use of intelligence, including intercept evidence, which will be considered further below. However, all sides of the trilateral relationship – intelligence, police and prosecutors – report a fundamental change in professional culture, requiring far more intense operational cooperation and integration of working practices.

The UK has not yet replicated that level of integration. For example, in the US the initial application for authorisation to intercept a conversation is often made by law enforcement (rather than intelligence) officials. Whilst strides have undoubtedly been made in coordinating and integrating the work of MI5 and the counter-terrorism command of the Metropolitan police, the UK intelligence agencies, particularly the Government Communications Headquarters (GCHQ), are still instinctively mistrustful of the criminal justice system – and GCHQ remains trenchant in resisting the use of intercept as evidence in court. So too, the Crown Prosecution Service (CPS) – set up to provide an independent tier between the police and the courts – has been reticent in taking all the steps required to make prosecution a central component of a preventative counter-terrorism strategy. It will take clear and concerted political leadership to deliver the change in professional culture necessary, amongst the intelligence agencies and the CPS, to sharpen the UK's prosecutorial cutting edge in counter-terrorism cases.

These shortcomings in institutional culture are reflected in the glaring gaps in Britain's arsenal of prosecutorial weapons.

During the debates on 90 and 42 days pre-charge detention, the last government claimed that, because police needed to arrest terror suspects early for public protection, they needed longer time to gather evidence and question them. So, the Conservatives and Liberal Democrats proposed introducing post-charge questioning to strengthen the hand of law enforcement. Enacted under the Counter-Terrorism Act 2008, the last government inexplicably failed to bring the measure into force – so it has never been used.[40] The government should bring this provision into force without delay.

Sue Hemming has highlighted the value of the 'threshold test', which allows prosecutors to charge where sufficient evidence is not yet court-ready, but in the pipeline.[41] Yet, in the last three years – as the debate on pre-charge detention raged – just seven suspects have been charged using the threshold test.[42] Conversations with one senior counter-terrorism police officer demonstrate that the value of this important law enforcement measure has not been sufficiently appreciated.

Former London Metropolitan Police Commissioner, Sir Ian Blair, consistently highlighted the strain on police resources of sifting computer and mobile phone data – often encrypted in counter-terrorism cases. So, the Conservatives and Liberal Democrats proposed an amendment to the Regulation of Investigatory Powers Act 2000, to create an offence of withholding the keys or codes to encrypted data. This would allow the immediate prosecution of any suspect who failed to hand over the encrypted keys to computer or mobile phone data in their possession during a counter-terrorism investigation. The amendment was enacted in 2008, but no-one has ever been convicted of this offence. Was the issue over-exaggerated

41 Note 14, at page 957.

42 Written response by Edward Garnier to Parliamentary Question by Dominic Raab, 19 July 2010.

by the last government, is prosecutorial policy insufficiently robust, or are police and prosecutors simply unaware of the new offence? This apparent inertia should be assessed as part of the Home Office's counter-terrorism review.

Sections 71 to 75 of the Serious Organised Crime and Police Act 2005 clarified and strengthened the scope for plea bargaining in cases of terrorism and other serious crime. Plea bargaining is more widely used in other common law jurisdictions – most notably the US – as part of a broader counter-terrorism strategy. In the US, prosecutors deploy intercept evidence to press peripheral members of a terrorist conspiracy to accept a guilty plea and a reduced sentence, in return for giving evidence against the central conspirators. Not only does this facilitate prosecutions, it yields substantial savings in trial costs. Lord Carlile recently made the case for a more pro-active use of plea-bargaining in this country.[43] Yet, guilty pleas in counter-terrorism cases here fell from 27 to 12 between 2008 and 2009.[44]

43 Note 8, at paragraph 21.

44 Table 1.6, Home Office Statistical Bulletin on counter-terrorism powers, 26 November 2009. These figures are for the years ending 30 September.

The government should introduce a more pro-active prosecutorial policy, including deploying plea bargaining more readily – strictly monitored by the trial judge – to pierce terrorist cells involving broad networks of co-conspirators. This will require a change of policy and culture at the Crown Prosecution Service. Britain should learn from experience across the pond – sometimes called the 'Eliot Ness' approach to pursuing terrorists and gangsters, whether for their involvement in a particular plot, or the wider criminal behaviour that supports or surrounds their activities.[45] In August 2010, the Ministry of Justice confirmed that it was reviewing the case for increasing the use of discounted sentences for early guilty pleas in ordinary criminal proceedings.[46] This provides a timely opportunity to develop the plea bargaining arrangements in counter-terrorism cases.

Given the broad legislative base of criminal offences in the UK, these measures could be implemented with significant effect. In addition, the coalition government has committed to taking a stricter approach to those espousing violent extremism. Chapter 21 of the Programme for Government states:

> *'We will deny public funds to any group that has recently espoused or incited violence or hatred. We will proscribe such organisations, subject to the advice of the police and security and intelligence agencies.'*

The new government should go further. It is remarkable how, having stifled peaceful protest and legitimate debate, the last government was so tolerant of those who incite violence. In February 2006, demonstrations were held in London against the publication of Danish cartoons, depicting the Prophet Mohammed in a manner that many found offensive and insensitive. Hundreds of protesters were involved in the protests that followed, and a small number of people carried placards calling on Muslims to 'bomb' the US and Denmark and 'massacre those who insult Islam', and stating 'whoever insults a prophet, kill him'. Four protesters were prosecuted and convicted of soliciting murder in July 2007. However, the police were reticent about taking decisive action, permitting the protesters to proceed with their demonstration carrying banners that openly incited murder. The Metropolitan Police explained that they had allowed the protest to continue for fear of public

disorder – an astonishing sop to extremism, at the expense of law enforcement.[47] Officers delayed a further six weeks before making any arrests. In contrast, the government was quick to condemn the Danish cartoons, which though offensive to some did not incite violence.

This was not a one-off case. It took the UK authorities years to prosecute extremist preacher, Abu Hamza, eventually found guilty of making speeches that solicited murder and sentenced to seven years imprisonment. Hamza had operated out of the Finsbury Park mosque since 1997 – and was investigated by police on several occasions since 1999. He was not arrested until 2004, following a US extradition request – reportedly based on US intercept evidence.[48] During that period, Hamza preached violence against Britain – which he described as 'like the inside of a toilet' – and openly encouraged violence against Jews and other non-Muslims or 'kaffirs'. Such inertia encouraged a hotbed of extremism at a time of growing radicalisation in Britain.

45 A reference to the US police agent who successfully prosecuted Al Capone for tax evasion rather than organised crime – the investigation relied heavily on wire-tap evidence.

46 Widely reported, including in The Times, 24 August 2010. The consultation process was confirmed in the minutes of the meeting of the Sentencing Council, dated 25 June 2010.

47 Metropolitan Police spokesperson quoted in the Telegraph, 7 February 2006.

48 Page 542, 'GCHQ – The Uncensored Story of Britain's Most Secret Intelligence Agency', Richard J. Aldrich, Harper Press, 2010.

The Hamza and the Danish cartoons cases illustrate a broader point. It is time for Britain to draw a clear line. The UK authorities should tolerate free speech even where it is offensive, insensitive or insulting to some – a healthy sign of a pluralistic society – so long as it does not directly harm or threaten harm.[49] However, free speech has parameters in a democratic society. The line is crossed when individuals or groups incite murder or violence. British policy should be clear and categorical – to defend free speech, and prosecute incitement to violence.

49 This is essentially a re-statement of the 'harm to others principle', articulated by J.S. Mill in 'On Liberty'.

50 'Intercept Evidence – Lifting the ban', Justice, October 2006. Only Hong Kong and Ireland do not use intercept evidence.

51 Note 48, at page 488.

Intercept – the missing piece

However, no other failing is quite so stark as the ongoing British ban on using intercept evidence to prosecute terrorists. According to a comprehensive review by the civil liberties NGO, Justice, Britain is virtually alone in the world in maintaining such a ban.[50] Intercept evidence includes wire-tap telephone recordings, mobile phone, email, fax and postal interceptions. Whilst they can all be used to monitor suspects for surveillance purposes, they cannot be used in UK courts as evidence in criminal trials.

The principal and enduring objection comes from GCHQ, the UK intelligence agency responsible for this kind of surveillance, based in Cheltenham. GCHQ has evolved considerably since its inception as a military code-breaking organisation. Since the end of the Cold War, GCHQ has faced two major challenges. First, adapting from addressing a principally military adversary to a wider range of modern security threats – including terrorists, weapons proliferation, industrial espionage and organised crime. Second, responding to calls on its expertise and experience to defend against such diverse threats, across a proliferating range of IT, including mobile phones, email, skype and the internet.

In his history of the agency, security expert, Professor Richard Aldrich, notes that by the 1990's 'Cheltenham was increasingly under pressure to defend the whole underlying electronic system upon which banking, commerce and indeed all public services that supported national life now depended'.[51] This

raised the 'familiar dilemma of "offence versus defence" in the realm of code-breaking, but in a much more unmanageable form'.[52] GCHQ has evolved from a military organisation, which may account for its 'defensive' instincts, manifesting a reluctance to embrace a more offensive role involving law enforcement and prosecution as a tactical weapon for disrupting terrorists.

This is reflected in its approach to recent proposals for an Intercept Modernisation Programme (IMP). This controversial scheme, supported by GCHQ, was proposed in 2008 by the Home Secretary, Jacqui Smith. Originally, the IMP contemplated a single Whitehall database storing every item of communication originating to or from the UK.[53] According to Professor Aldrich, GCHQ would be relied on to use the technique of 'data-mining', or sifting the material according to salient traits or patterns of suspicious behaviour. The proposals were withdrawn after a public outcry over intrusions into personal privacy, along with practical criticisms of the viability and cost of such a vast project.

52 *Ibid.*

53 *Reported in The Sunday Times, 5 October 2008, at: www.timesonline.co.uk/tol/news/uk/article4882622.ece*

54 *See note 35.*

The IMP became characteristic of a broader approach hard-wired into the Home Office and GCHQ, whereby government is prepared to countenance intrusive measures that erode the privacy of every British citizen, innocent or otherwise – but cannot find a workable way to deploy intercept as evidence against specific terrorist suspects, to secure prosecutions through the justice system. An all encompassing state-run or supervised database or system for monitoring every electronic communication made to or from Britain would mark a ground-breaking shift in the relationship between the individual and the state.

Equally, from a practical perspective, this approach is tantamount to draining the swamp. Is it realistic or practicable, in the twenty-first century, to monitor – and critically assess – every electronic communication sent or received? This approach would entail the massive costs of looking for a needle in a haystack. No counter-terrorism strategy can extinguish all risk. As Jonathan Evans said recently:

> 'Risk can be managed and reduced but it cannot realistically be abolished and if we delude ourselves that it can we are setting ourselves up for a nasty disappointment.' [54]

Given the scale and nature of the current risk, a more effective approach would be to rely on intelligence-led surveillance – coupled with a more robust prosecutorial strategy, focused on deterring the development and disrupting the networks and sustainability of violent extremists and terrorist groups.

The ban on using intercept in criminal trials has produced countless anomalies. Foreign, but not British, intercept can be used in UK courts. British intercept can be used in foreign – but not UK – courts. Recordings from bugs (devices attached to a phone), but not intercepted conversations, can be used in court. Intercept evidence can be used for some purposes in the UK – to freeze terrorist assets, in deportation proceedings or to secure a control order – but not to secure a criminal conviction. There is a widespread belief in the UK, outside GCHQ, that intercept evidence would be an invaluable tool in the fight against terror. According to Professor Aldrich's

research, at each recent review, lifting the ban on intercept has been supported by the Prime Minister, Home Secretary and Director of Public Prosecutions – but blocked by GCHQ, in a remarkable exercise of Whitehall lobbying power.[55]

The British ban on intercept evidence looks particularly arbitrary, when compared to international experience. In 2007, Justice reviewed ten US terrorist plots, involving fifty suspects, since 9/11. The US authorities secured charges (and convictions) in each case, within a 48 hour maximum period of pre-charge detention.[56] This outcome – protecting habeas corpus whilst securing convictions – was made possible by the widespread use of intercept evidence. Former US Assistant Attorney General, Ken Wainstein, argues that it is a vital part of the preventative strand of US counter-terrorism strategy. The US deploy intercept evidence to secure guilty pleas (as well as convictions), offering suspects a discounted sentence in return for co-operating against other co-conspirators. The practice is often used to turn the 'minnows' against the 'big fish' in a terrorist conspiracy or organised crime network. The disruptive impact this has on terrorist groups also provides an important deterrent.[57]

55 Note 48, at page 542.

56 'From Arrest to Charge in 48 Hours – Complex Terrorism Cases in the US since 9/11', Justice, November 2007.

57 The author visited the US in March 2007, with Shadow Home Secretary David Davis, and discussed the use of intercept evidence with senior US counter-terrorism officials at the FBI, Department of Justice and White House. David Davis subsequently wrote an article for the Sunday Telegraph, on 25 March 2007, setting out the lessons for the UK from the US approach. It is available at: www.telegraph.co.uk/comment/personal-view/3638724/We-must-fight-terror-the-American-way.html

Other Commonwealth experience points in the same direction. Former Australian Commonwealth Director of Public Prosecutions, Damian Bugg QC, has highlighted the value of intercept evidence in drug trafficking cases –frequently the decisive evidence that secures a prosecution.[58] Asked about the analogous situation in Britain, he said:

> '*The use of telephone intercepts in trials for terrorism offences and other serious crimes is now quite common in Australia and I cannot understand why England has not taken the step as well.*' [59]

Senior Canadian prosecutors make the same points. So what makes Britain different?

58 *Note 50, at page 28.*

59 *Email exchange, August 2010.*

Not much, according to the last Director of Public Prosecutions (DPP), Sir Ken (now Lord) Macdonald. In 2009, he told the House of Commons Home Affairs Select Committee:

> '*If we had intercept available as an evidential tool and if we were directing intercept capability towards the gathering of evidence, I am absolutely confident that our experience would mirror the experience of other jurisdictions where it is used very frequently to great effect, and results in the saving of considerable expense because more expensive investigative tools, such as, for example, surveillance, are not required …. [The ban on intercept] is largely a cultural response on our part.*' [60]

He added:

> '*[W]e need a toolbox that has a variety of tools in it and intercept, it seems to me, is a crucial tool. On its own, it will not achieve what it is capable of achieving if it is placed within the right environment. We need a much more developed system of co-operating witnesses in serious*

60 *Evidence to the Home Affairs Committee, 10 November 2009.*

61 *Ibid.*

62 *Ibid.*

63 *Available at: www.official-documents.gov.uk/document/cm73/7324/7324.pdf*

64 *Ibid, paragraph 59.*

crime, we need to develop concepts of plea bargaining, we need to move into a territory which encourages minor players in a conspiracy who have been intercepted to co-operate with state prosecutions on the basis of their interception evidence in exchange for lower sentences. We need a whole suite of measures, it seems to me, to crack our high contested trial rate.' [61]

The current DPP, Keir Starmer, based a similar conclusion on the use of foreign intercept in UK cases:

'Evidence obtained by interception would be of benefit to prosecution in this country, particularly in respect of counter terrorism and organised crime. I base that answer on an analysis of the cases where we have been able to use foreign intercept evidence. There have recently been 11 such cases involving organised crime. In eight of those cases, there were pleas of guilty based on foreign intercept evidence.' [62]

Despite the overwhelming view of Britain's top prosecutors, intercept evidence remains banned. GCHQ's ongoing intransigence is reflected in the most recent domestic review, chaired by Sir John Chilcot, which reported on 30 January 2008.[63] The report concluded that it was desirable in principle that intercept be used in evidence, but difficult in practice. The last government relied on these findings to kick the issue into the long grass – by ordering a further review, and setting a string of high operational hurdles before the ban can be lifted.

Contrary to all international experience, the Chilcot review concluded that intercept would result in only a 'modest' increase in successful prosecutions in the UK. Furthermore, it surprised many with its questionable finding, after reviewing UK control order proceedings, that:

'We have not seen any evidence that the introduction of intercept as evidence would enable prosecutions in cases currently dealt with through Control Orders.' [64]

According to the Chilcot report, counsel hired by the Home Office reported that using intercept evidence would 'not have enabled a criminal prosecution to be brought in any of the cases studied – in other words, it would not have made any practical difference'.[65] Sources close to the review hotly dispute that contentious assertion. However, even if accurate, it may reflect less on the utility of intercept as evidence, and more on the paucity of evidence required to impose a control order. The consensus, amongst prosecutors from common law jurisdictions that use intercept evidence, is that it has proved a significant prosecutorial weapon.

Having nevertheless conceded the desirability of using intercept evidence 'in principle', the Chilcot report then set out a list of operational hurdles for its introduction in practice – which, according to a subsequent report by the Home Office in December 2009, have proved insurmountable to date.[66]

First, it was argued that the use of intercept evidence would risk defence applications under Article 6 of the European Convention on Human Rights, for disclosure of evidence, which might expose 'sensitive techniques'. This argument is flawed. On the one hand, any rights of disclosure a criminal defendant has against the intelligence agencies – including in relation to intercepted conversations – exist whether or not there is a bar on using intercept as evidence. Equally, in the major jurisdictions that use intercept in court, adequate safeguards against defence 'fishing expeditions' prevent abuse. In Britain, evidence from protected witnesses and bugged telephones – as opposed to intercepted calls – is already used in criminal trials, without exposing sources.

Both the Chilcot report and Justice have examined the range of procedural options that the UK might use to prevent the use of intercept as evidence disclosing sensitive sources or techniques. There is a wealth of international experience to draw on. Britain has accumulated substantial experience in using Special Advocates and operating Public Interest Immunity proceedings, in order to prevent disclosure of intelligence sources and confidential practices, whilst safeguarding due process for defendants. Whichever model is adopted, there is always an ultimate backstop safeguard – because there is no

compulsion to use intercept evidence in any particular case. As the 2009 report itself quietly concedes, at Annex C, the prosecution always retains the option to drop charges against any accused in any trial, where vital intelligence interests might be at stake.[67] If a wily defence lawyer was to put at risk sources or technology, and in the unlikely scenario that prosecutors felt unable to resist such an application for disclosure, the option to discontinue the prosecution remains. In US experience, this backstop is rarely needed. Nevertheless, lifting the blanket ban on using intercept evidence – in of itself – involves zero risk to British security interests.

The second major objection presented by the Chilcot review concerned the resource implications, namely the transcription and retention of intercepted communications for evidential purposes, and to meet fair trial standards. Again, it is difficult to avoid the conclusion that this obstacle has been over-exaggerated. Whilst maintaining intercepted communications for evidential purposes may require some additional resources, technology is now available to minimise the burden of retention of, and access to, large volumes of

65 Ibid, at paragraph 58.

66 'Intercept as Evidence – A Report', Home Office, December 2009.

67 Ibid, at paragraph C5.

communications. Furthermore, as Lord Macdonald argues, international experience demonstrates that any additional costs are off-set by the substantial savings that intercept evidence can yield, by increasing the number of defendants who plead guilty and thereby avoiding the costs of trial. Law enforcement officials in the US agree that the administrative burden of retaining intercept for evidential purposes, is outweighed by their countervailing value in securing convictions, guilty pleas and cooperation – all of which save finite resources.

In this regard, the 2009 report – and other GCHQ sources – point to the case-law of the ECtHR, claiming it requires 'full retention of all intercepted material', just in case it may include something that shows that a suspect is innocent.[68] This is not an accurate interpretation of the current Strasbourg case-law. In the most recent case, concerning a drug dealer convicted in Finland using intercept evidence, the ECtHR emphasised that 'disclosure of relevant evidence is not an absolute right', acknowledging 'competing interests, such as national security or the need to protect witnesses'.[69] It stated that 'it is not the role of the [ECtHR] to decide whether or not

68 Ibid, at paragraph 13.

69 Natunen – v- Finland, 31 March 2009.

70 Ibid, at paragraph 48.

such non-disclosure was strictly necessary since, as a general rule, it is for the national courts to assess the evidence before them.' Far from requiring 'full retention' of intercept material, the ECtHR required that defence requests for disclosure of sensitive evidence be backed up by 'specific and acceptable reasons'. The intelligence agencies would need to retain some relevant material. However, the ECtHR made clear that this did not necessitate defence access to that evidence, nor the wholesale retention of all intercept material. In the Finnish case, it merely required that a judicial body approve the destruction by the intelligence agencies of relevant intercept material, collected over a limited three week period – which represented the finite timeframe, during which the relevant intercept material was gathered that secured the conviction of the accused. This is well within existing fair trial standards in the UK. In fact, the ECtHR explicitly affirmed the procedures adopted in a string of UK cases, whereby the defence was legitimately denied access to sensitive material, noting that 'the decision regarding the undisclosed was, presumably, made in the course of the pre-trial investigation without providing the defence with the opportunity to participate in the decision-making process'.[70] Far from requiring full retention of all intercept material, or encouraging defence 'fishing expeditions' into sensitive intelligence files, the ECtHR simply requires that, where a specific item of intercept is introduced as evidence, relevant conversations intercepted around the same time are not destroyed without a court first checking they do not demonstrate the innocence of an accused.

Furthermore, it is difficult to reconcile the enthusiasm that GCHQ and Home Office officials have shown for the IMP project – with the accompanying administrative burden and costs of running such a vast system, including retaining access to every phone call or email made to or from this country – with their knee-jerk opposition to the comparatively minor burden of devising a regime that allows intercept to be used as evidence.

Lord Macdonald and Professor Aldrich have suggested that the real obstacle to using intercept as evidence is cultural resistance within GCHQ. GCHQ deny this suggestion vehemently. Yet, some degree of intransigence at Cheltenham is unsurprising, given both GCHQ's history and the proliferation of its

responsibilities against a bewildering array of evolving security challenges. The new government is well placed to provide the political leadership to adjust the role of the intelligence agencies, including GCHQ, as part of the current counter-terrorism review. That review provides an opportunity to drive much needed reform, including lifting the ban on intercept evidence as part of a more robust prosecutorial strategy – one that would enable Britain to fight terror, whilst defending its freedoms.

71 *Page 128, 'What Terrorists Want', Louise Richardson, 2006, John Murray.*

3. Conclusions and Recommendations

Conclusions

The last government's resort to measures that eroded the freedoms of the British citizen was rarely justified on security grounds. The presentation of a crude trade-off between liberty and security – a Faustian bargain in which 'the rules of the game are changing' – undermined Britain's tradition of liberty, without eliminating or substantially reducing the terrorist threat to Britain. Too often, such measures proved counter-productive by giving UK extremists and terrorists a propaganda tool – the ability to point to the British state resorting to increasingly authoritarian measures. As the growing body of literature on the terrorism highlights, terrorist groups have historically adopted tactics designed to provoke a backlash by the state. Harvard expert, Louise Richardson, notes:

> *'By provoking democratic governments into draconian repression [terrorists] can demonstrate to the world that the governments really are the fascists they believe them to be.'* [71]

In a recent study, Professor Audrey Kurth Cronin argues that terrorist campaigns always end – but their duration and intensity depends on the nature of the response by government. Based on a review of terrorist campaigns across the world, Cronin concludes:

> *'The crucial mistake after 9/11, as after countless other terror attacks throughout history, was in overreacting and treating a terrorist campaign as though it were part of a*

traditional military campaign in which the application of brute force would compel the enemy into submission.' [72]

In the context of domestic strategy against terrorist groups, Cronin adds: '*Overly repressive law enforcement campaigns can likewise be tapped [by terrorist groups] for momentum*'. [73]

Repressive measures like prolonged pre-charge detention feed the terrorists' narrative of an unjust state, yet achieve little in return. On the other hand, as UK counter-terrorism officers have learnt, the presentation of evidence against terrorist plots in open court not only leads to prosecutions – and the prolonged incarceration of dangerous individuals – it also punctures the myths that extremists feed on, denying them the fertile ground on which to operate .

An effective counter-terrorism strategy will disrupt, displace and diminish the activities of terrorist groups and networks – without fuelling their propaganda machine, or providing any veneer of legitimacy they may seek to claim. It will fight terror, but defend freedom.

72 Page 198, 'How Terrorism Ends', Audrey Kurth Cronin, 2009, Princeton.

73 Ibid.

Recommendations

In addition to implementing the relevant provisions in the Coalition Programme for Government, it is recommended that the government:

Defend our Freedoms, by:

- Repealing the offences of inciting religious hatred and glorifying terrorism, to restore and strengthen freedom of speech.

- Confining Section 44 powers of stop and search to situations where police officers have a reasonable suspicion that an individual is involved in terrorism. In addition, in a strictly defined emergency situation, any powers of random stop and search should be confined to limited periods of up to 48 hours in specified geographic areas, where the Secretary of Secretary has grounds to believe a terrorist attack is imminent or immediately after a terrorist attack or attempted attack has taken place.

- Reducing the maximum period of pre-charge detention from 28 to 21 days as part of the Home Office counter-terrorism review, with a view to further reducing the limit to 14 days, once the law enforcement recommendations, below, have been implemented.

- Immediately introducing a maximum period of duration of 2 years for individual control orders, phasing the regime out in its entirety within 2 years.

Fight Terror, by:

- Collating and publishing information on the grounds for refusal of deportation over the last five years, including the number of deportations barred respectively under Articles 3 and 8 of the European Convention of Human Rights. This should form part of a wider UK review of policy towards deporting foreign nationals convicted or suspected of serious criminal or terrorist offences.

- Instituting a more rigorous and robust prosecutorial policy, as part of UK counter-terrorism strategy, including by taking the following measures:

  » Bringing into force immediately section 22 of the Counter-terrorism Act 2008, regarding post-charge questioning.

  » Reviewing and revising guidance for police and prosecutors in counter-terrorism cases to ensure full use is made, in appropriate circumstances, of the 'threshold test' and offences under section 53 of the Regulatory of Investigatory Powers Act 2000 (with-holding encryption keys).

  » Revising guidance to police and prosecutors in counter-terrorism cases, with a view to a more pro-active use of discounted sentences, to encourage defendants in terrorism cases to provide cooperation to help secure criminal convictions of co-conspirators or associates.

  » Formulating and publishing a more robust policy and set of guidelines, to clarify conditions for the arrest and prosecution of protesters who incite violence.

  » Immediately lifting the ban on the use of intercept evidence, under section 17 of the Regulatory of Investigatory Powers Act 2000, and bringing forward operational proposals for its use in terrorism and serious organised crime trials without delay.

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FIGHT TERROR, DEFEND FREEDOM

By Dominic Raab MP

Between 1997 and 2010, the last government quadrupled pre-charge detention, enacted over 3,000 new criminal offences and introduced identity cards. Random police stop and search expanded exponentially. Free speech has been undermined, whilst control orders introduced house arrest for individuals who have not been convicted of any crime. These authoritarian measures have not eliminated or substantially reduced the threat to Britain – in September 2010, the head of MI5 warned that the terrorist threat remained 'persistent and dangerous', presenting a 'serious risk of lethal attack'.

The election in May 2010 of a new government offers a unique opportunity to review UK counter-terrorism strategy. The coalition programme for government pledges to 'be strong in the defence of freedom', and the Home Secretary has initiated a review of counter-terrorism powers. In **Fight Terror, Defend Freedom**, Dominic Raab makes the case for restoring the core freedoms of the British citizen, whilst using the justice system – including intercept evidence – to adopt a more robust approach to prosecuting those seeking to perpetrate terror in Britain.