



Exclusion or Deportation from the UK on Non-Conductive Grounds

A JUSTICE Response

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Introduction

1. JUSTICE is a British-based human rights and law reform organisation with around 1600 members. Its mission is to advance justice, human rights and the rule of law. It is also the British section of the International Commission of Jurists.
2. Following the terrorist attacks on 7 July, we accept that the government is entitled to review existing counter-terrorism measures to ensure that public safety and fundamental rights are protected. In particular, we welcome the Home Secretary's recognition of the 'need to tread very carefully in areas which relate to free speech' and the importance of this country's 'culture of tolerance'.
3. We also recognise that the powers of the Home Secretary to exclude or deport non-nationals on the grounds that to do so is 'conducive to the public good' are extremely broad.¹ In principle, therefore, a clarification of what constitutes non-conducive behaviour ought to be welcome. In substance, however, we believe that the proposed list of 'unacceptable behaviours [sic]' set out in the consultation paper is deeply flawed.
4. On the one hand, the proposed list refers to conduct that is already covered by existing criminal offences, e.g. incitement to terrorism² and soliciting to murder.³ To this extent, the list seems redundant. On the other hand, where the list refers to conduct going beyond criminal activity, we are concerned that using such conduct as grounds for deportation or exclusion:
 - would amount to a serious interference with the free expression rights of both foreign and UK nationals; and
 - is likely to undermine the government's own commitment to promoting a 'culture of tolerance' in the UK.
5. In addition to these points, we also take issue with:
 - the use of deportation in general as a counter-terrorism measure; and
 - the proposed use of diplomatic assurances to return non-nationals to countries where torture is practised.

¹ See *Secretary of State for the Home Department v Rehman* [2001] UKHL 47 per Lord Slynn at para 8: 'There is no definition or limitation of what can be 'conducive to the public good' and the matter is plainly in the first instance and primarily one for the discretion of the Secretary of State'.

² Section 59 of the Terrorism Act 2000 (incitement to terrorism overseas) and section 1A of the Criminal Law Act 1977 (conspiracy to commit offences outside the UK).

³ Section 4 of the Offences against the Person Act 1861: 'Whosoever shall solicit, encourage, persuade or endeavour to persuade or ... propose to any person to murder any other person...'.

Overlap with existing criminal offences

6. The list refers to various actions (writing or distributing material; public speaking; running a website; using a position of responsibility) by which views may be expressed which, among others things:

- 'foment terrorism or seek to provoke others to terrorist acts';
- 'foment other serious criminal activity or seek to provoke others to serious criminal acts';
- 'foster hatred which may lead to intra community violence in the UK';
- 'advocate violence in furtherance of particular beliefs'.

7. However, it is already a criminal offence to:

- invite support for a proscribed terrorist organisation;⁴
- 'encourage, persuade or endeavour to persuade any person to murder any other person';⁵
- 'counsel or procure' any other person to commit any indictable offence;⁶
- 'solicit or incite' another person to commit any indictable offence;⁷
- incite another person to commit an act of terrorism wholly or partly outside the UK;⁸
- conspire with others to commit offences outside the UK;⁹ or
- use language or display material intended or likely to stir up racial hatred.¹⁰

8. Since 'foment' and 'provoke' are both synonymous with 'incite' and 'advocate' synonymous with 'support', 'counsel' and 'persuade',¹¹ it is difficult to see how stipulating the proposed conduct as 'non-conducive' would add anything to the existing grounds for removal or exclusion of those who threaten 'public order or the rule of law in the UK'. Indeed, in the case of persons already in the UK, it seems to us that if the Home Secretary has reasonable grounds for believing that a non-national is involved in the commission or attempted

⁴ Section 12 of the Terrorism Act 2000.

⁵ Section 4 of the Offences against the Person Act 1861.

⁶ See section 8, Accessories and Abettors Act 1861: 'Whosoever shall aid, abet, counsel or procure the commission of any indictable offence ... shall be liable to be tried, indicted and punished as a principal offender'.

⁷ A common law offence, separate from the statutory provisions of the 1861 Act. See *DPP v Armstrong (Andrew)* [2000] Crime LR 379 DC.

⁸ Section 59 of the Terrorism Act 2000.

⁹ Section 1A of the Criminal Law Act 1977.

¹⁰ Section 18 of the Public Order Act 1986.

¹¹ The Oxford English Dictionary defines 'foment' as to 'instigate or stir up', and 'provoke' as to 'incite to do or feel something'.

commission of such criminal offences, the proper course would be refer that person's case to the CPS to consider criminal prosecution rather than to exercise deportation powers.

9. In any event, it would be analytically far more perspicacious for the Home Secretary to exercise his power to exclude or deport by reference to an individual's risk of committing criminal offences than by reference to the conduct identified in the proposed list.

Interference with free expression

10. In addition to identifying certain kinds of behaviour which are already the subject of criminal offences, the proposed list refers to the expression of views which 'the Government considers':

- 'justify or glorify terrorism';
- 'foster hatred which may lead to intra community violence in the UK'; and
- 'advocate violence in furtherance of particular beliefs'.

11. The most obvious difficulties with these grounds are their subjective quality and scope. First, 'terrorism' is a highly contentious and politicised concept. While there is a consensus of opinion that attacks on civilians by non-state actors or attacks against liberal-democratic states are obviously terrorist acts, there is much less agreement on the legality or morality of the use of force in other contexts, e.g. attacks by freedom fighters against military targets in a totalitarian regime.

12. Secondly, the idea of statements which 'justify or glorify terrorism' is equally subjective and, as we have noted elsewhere,¹² would constitute a highly nebulous category, one covering an extremely wide range of views whose connection to acts of terrorism may be fanciful or speculative.

13. The broadest category of all is the category of statements which the government considers advocates 'violence in furtherance of particular beliefs'. Indeed, its sheer breadth leads us to doubt whether the full implications of this particular category have been properly thought through. It makes no distinction, for instance, whether the violence advocated may itself be lawful (e.g. in self-defence, the use of reasonable force in the prevention of crime, lawful act of war or humanitarian intervention, etc). Nor does it have regard to the various conditions under which the use of force may be otherwise thought legitimate in the furtherance of particular aims (e.g. the armed struggle of the African National Congress against Apartheid between 1961-1990). It is perhaps sufficient to note the following personages who have made

¹² JUSTICE letter to Charles Clarke, 27 July 2005, re proposed clauses in counter-terrorism bill.

statements advocating 'violence in the furtherance of particular beliefs': Sir Winston Churchill, George Washington, Nelson Mandela, Thomas Jefferson and Benjamin Franklin.

14. Although states have a right under international law to control the entry and residence of non-nationals, it is well-established that the decision of the Home Secretary to refuse entry or expel a non-national solely to prevent his expressing opinions within the UK or by way of sanction for the expression of such opinions engages Article 10 ECHR (the right to free expression).¹³ Therefore, given the breadth of the definition of 'terrorism' in section 1 of the Terrorism Act 2000 and the proposed scope of the grounds (covering expression whether in the UK or abroad), the use of such grounds to justify exclusion or deportation would almost certainly amount to a serious interference with the free expression rights of both foreign and UK nationals.
15. We recognise that Article 10(2) allows for some measure of lawful restriction in the interests of national security. We further note that the rights of non-nationals to free expression are circumscribed by Article 16 ECHR, which permits the imposition of restrictions on 'the political activity of aliens', although we would also draw attention to the view of the Court of Appeal in *Farrakhan* that Article 16 'appears something of an anachronism half a century after the agreement of the Convention'.¹⁴ Even so, in *Piermont v France*, the European Court of Human Rights made clear that immigration restrictions made for the purpose of limiting free expression on national security grounds may nonetheless breach Article 10 because they are disproportionate interference with the right to free expression.¹⁵ In particular, we note that states cannot seek to exclude the expression of views merely because they are controversial or offensive. As the Strasbourg Court noted in the *Piermont* case:¹⁶

The Court reiterates that freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress. Subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'.

¹³ *R (Louis Farrakhan) v Secretary of State for the Home Department* [2002] EWCA Civ 606 at paras 55-56: 'Where the authorities of a State refuse entry or expel an alien from its territory solely for the purpose of preventing the alien from exercising a Convention right within the territory, or by way of sanction for the exercise of a Convention right, the Convention will be directly engaged Thus, where the authorities of a State refuse entry to an alien solely to prevent his expressing opinions within its territory, Article 10 will be engaged'.

¹⁴ *Farrakhan*, *ibid*, at para 70.

¹⁵ (1990) 20 EHRR 301

¹⁶ *Ibid* at para 76.

16. We would also draw attention to the 1996 *Johannesburg Principles on National Security, Freedom of Expression and Access to Information*, principle 6 of which provides materially as follows:¹⁷

expression may be punished as a threat to national security only if a government can demonstrate that:

- (a) the expression is *intended to incite* imminent violence;
- (b) it is *likely* to incite such violence; and
- (c) there is a *direct and immediate connection* between the expression and the likelihood or occurrence of such violence.

17. By contrast, the proposed list of ‘non-conducive’ conduct makes no distinction regarding the intention of the person expressing the view, i.e. whether or not they intend to incite an act of terrorism. Nor does the proposed list make reference to any assessment of whether the views expressed are likely to incite an act of terrorism or that there is a ‘direct and immediate connection’ between the expression and possible terrorist acts. Nor does it attempt to differentiate between various contexts in which such views may be expressed: the list makes no distinction, for instance, between views expressed in the course of academic discussion, in a newspaper article or broadcast, or as part of a novel or play. As we have indicated above, we believe the Home Secretary should restrict the exercise of his powers to exclude or deport non-nationals solely by reference to a person’s risk of committing serious criminal offences in the UK. If, however, the government is intent on further specifying certain kinds of expression as ‘non-conducive’, we submit that this should be drafted in terms consistent with those of principle 6 above.

18. It is important to make clear that interests engaged by the exclusion or deportation of a person expressing a particular viewpoint are not limited merely to those who agree with that viewpoint. It is also in the interests of those who may strongly disagree with the views being disseminated. This is because the value of free expression protected by Article 10 derives not only from the interests of those who wish to express their views but also from the interests of the general UK public in being free to receive them. Again, this is not limited to the public’s interest in receiving views that individual members of the public are likely to agree with or approve of. Rather, it is the broader public interest in receiving the benefits of what John Stuart Mill referred to as ‘the collision of adverse opinions’.¹⁸ A healthy pluralist democracy requires the free exchange of ideas and opinions in order to flourish and these are not limited

¹⁷ U.N. Doc. E/CN.4/1996/39 (1996). Emphasis added.

¹⁸ *On Liberty*, Chapter 2, p 64.

to those ideas that a majority thinks 'conducive' or 'acceptable'. The public good of the UK is not sustained, therefore, by deporting or excluding those who express views that are unpopular, false or even wicked. It is only where the Home Secretary is satisfied to the civil standard of proof that there is a real risk that a non-national will commit serious criminal offences (including incitement to terrorism or other criminal offences) that his powers to deport or exclude should be exercised. As Chief Justice Hughes observed in the 1937 US Supreme Court case of *De Jonge v Oregon*:¹⁹

The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate *the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion*, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.

Undermining the UK's 'culture of tolerance'

19. In addition to the above, we note that the government proposes an additional ground of 'non-conducive' behaviour of expressing 'what the Government considers to be extreme views that are in conflict with the UK's culture of tolerance'. This seems to us to indicate a profound misunderstanding of the concept of tolerance and the importance of free expression in a plural society generally.
20. As we understand it, the 'culture of tolerance' referred to is an expression of the UK's tradition of supporting free expression. It is axiomatic that one does not tolerate what one likes. Toleration must, therefore, necessarily include protecting the expression of views with which one disagrees, even those with which one strongly and passionately disagrees. With the exception of expression that seeks to incite actual violence or other serious crime, there is no room in the concept of toleration to censor extreme views – even those viewpoints that are opposed to the notion of toleration itself. To do otherwise would make a mockery of the idea of tolerance as it is applied to free expression, by rendering it internally inconsistent. The government's proposed approach also threatens to undermine one of the core ideas of free expression: that the way to challenge and rebut intolerant views is not by practicing intolerance and censorship but by way of reasoned argument and public debate.

¹⁹ 299 US 353. Emphasis added.

Deportation as a counter-terrorism measure

21. We take as our starting point the view expressed by the Privy Counsellor Review Committee chaired by Lord Newton:²⁰

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

22. Terrorism is a global problem. There is no better illustration of this than the UK's own involvement in the invasion of Afghanistan in October 2001, in order to 'eradicate Osama bin Laden's network of terror and to take action against the Taliban regime that is sponsoring it'.²¹ This was justified by the fact that the UK had a 'direct interest in acting in our own self defence to protect British lives'.²²

23. It is therefore questionable whether removing or exporting persons who are suspected of involvement in terrorism to other countries where they will be beyond the reach of UK law enforcement authorities is a rational measure. The effectiveness of deportation as a counter-terrorism measure seems to rely on the assumption that those removed will be subject to detention upon return, thereby containing the threat of further involvement in terrorism. However, it is clear from the 2 most recent cases of attempted removal on national security grounds – Ajouaou and 'F' – that the assumption of automatic detention is false. Both were detained under Part 4 of the Anti-Terrorism Crime and Security Act 2001 on the basis that they were suspected international terrorists who posed a threat to the national security of the United Kingdom. As the Special Immigration Appeals Commission ('SIAC') noted in respect of 'F':²³

On 12th March 2002, ['F'] decided that he could face detention no longer. He went to France the next day. He was escorted by two police officers and was interviewed on arrival by French security officials The upshot of the interview was, he says, that

²⁰ Privy Counsellors Review Committee, *Anti-Terrorism Crime and Security Act 2001 Review: Report* (HC100: 18 December 2004) at para 195.

²¹ Prime Minister's statement on military action in Afghanistan, 7 October 2001.

²² *Ibid.*

²³ Appeal No: SC/11/2002 (SIAC, 29 October 2003), para 6.

he was told he was free to go and would not have any problem in France. He is still in France.

In Ajouaou's case, he returned to Morocco voluntarily in December 2001 and has been there ever since.²⁴ In his case, SIAC referred to the fact that he made several trips to Morocco in the months preceding his detention in the UK and noted that this 'must cast serious and probably fatal doubt on any claim by Ajouaou that it would be in breach of an international Convention to return him to Morocco'.²⁵

24. Even in cases where it is established that an individual faced a real risk of detention on their return, it would still be irrational to equate such a risk with a certainty that the alleged threat would therefore be contained: a 75% likelihood that a person would be detained, for instance, would still be a 1 in 4 chance that the individual would free to continue their activities abroad. Again, if the Home Secretary has reasonable grounds for believing that an individual may be involved in terrorist activity in the UK, the proper course would be to refer that person's case to the CPS to consider prosecution for terrorist offences rather than to remove them to a country where they may be free to continue their activities.

Use of diplomatic assurances

25. Although it is not directly the subject of consultation, we also wish to take this opportunity to express our serious concern at the proposed use of diplomatic assurances in order to secure the deportation of persons to countries known to practise torture.²⁶ Although we have already called on the Home Secretary to halt the use of such assurances,²⁷ we consider that it is important in the context of the present consultation to reiterate the UK's non-derogable obligations under Article 3 of the European Convention on Human Rights, Article 7 of the International Covenant on Civil and Political Rights and Article 3 of the UN Convention Against Torture that no person shall be returned to a country where they face a real risk of torture, inhuman or degrading treatment. We also note that it would be contrary to the UK's obligations under the ECHR to return a person to a country where they would be at real risk of a 'flagrant breach' of their other Convention rights, including Articles 5 and 6 ECHR.²⁸

²⁴ Appeal No: SC/10/2002 (SIAC, 29 October 2003), para 5.

²⁵ Ibid, para 24.

²⁶ See statement of the Home Secretary, Hansard HC Debates 27 June 2005, Col 1256; Prime Minister's Press Conference, 5 August 2005.

²⁷ See JUSTICE letter to the Home Secretary, n12 above. See also *Call for Action against the Use of Diplomatic Assurances in Transfers to Risk of Torture and Ill-Treatment*, joint statement by Amnesty International, Association for the Prevention of Torture, Human Rights Watch, International Commission of Jurists, and others, 12 May 2005.

²⁸ See *Special Adjudicator v Ullah* [2003] UKHL 26 per Lord Steyn at paras 49-50: 'the ruling of the Court of Appeal that an English court is entitled to proceed on the basis that, except for article 3, articles of the ECHR can never be engaged in

26. We note the May 2005 decision of the UN Committee Against Torture in the case of *Agiza v. Sweden*, in which the Swedish government was found to be in breach of its obligations under Article 3 of the Torture Convention when it relied on diplomatic assurances from the Egyptian government to return 2 asylum seekers to Egypt where they were subsequently tortured.²⁹ This case makes clear that diplomatic assurances from countries that torture their own citizens offer no effective protection for the rights of persons removed. Nor do such assurances establish any real accountability or remedy in the event that torture or other ill-treatment does take place. In particular, we note the view of the UN Special Rapporteur on Torture, Professor Manfred Nowak:³⁰

In the situation that there's a country where there's a systematic practice of torture, no such assurances would be possible, because that is absolutely prohibited by international law, so in any case the government would deny that torture is actually systematic in that country, and could easily actually give these diplomatic assurances, but the practice then shows that they are not complied with. And there's then no way or very, very little possibility of the sending country to actually – as soon as the person is in the other country – to make sure that this type of diplomatic assurances are complied with

While we remain confident that British courts will refuse to accept memoranda of understanding from governments that torture as an adequate assurance against ill-treatment, we urge the UK government to renounce the use of such assurances forthwith.

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respect of immigration decisions to expel an alien was wrong. [50] It will be apparent from the review of Strasbourg jurisprudence that, where other articles may become engaged, a high threshold test will always have to be satisfied. It will be necessary to establish at least a real risk of a flagrant violation of the very essence of the right before other articles could become engaged'.

²⁹ CAT/C/34/D/233/2003, 20 May 2005.

³⁰ BBC Radio 4, 4 March 2005.