

Briefing on the Counter-Terrorism and Border Security Bill 2018

Introduction

1. The Committee on the Administration of Justice (CAJ) is an independent human rights NGO with cross community membership in Northern Ireland and beyond. It was established in 1981, campaigns on a broad range of human rights issues and is a member of the International Federation of Human Rights (FIDH). CAJ seeks to secure the highest standards in the administration of justice in Northern Ireland by ensuring that the government complies with its international human rights obligations. CAJ has been awarded several international human rights prizes, including the Reebok Human Rights Award, and in 1998 was awarded the Council of Europe Human Rights Prize.
2. The UK has suffered from a number of terrorist attacks over the past few years, originating both from the far-right and jihadist sources. There is also a continuing threat of armed actions by both republican and loyalist dissident elements in Northern Ireland. CAJ and other human rights organisations have consistently argued that the way to deal with politically motivated violence should be both political – understanding and dealing with the causes of violence – and the application of a human rights based criminal justice system to respond to criminal actions. The worst way to respond to a perceived threat is to introduce repressive legislation and action thereby undermining the very human rights which terrorist acts seek to discredit and destroy.
3. Unfortunately, “the Government considers it necessary to update and strengthen the legal powers and capabilities available to law enforcement and intelligence agencies to disrupt terrorism and ensure that the sentences for terrorism offence properly reflect the seriousness of the crime.”¹ The government also announced that counter-terrorism laws would be “updated to keep pace with modern online behaviour and to address issues of online radicalisation.”² These new powers are contained in the new Counter-Terrorism and Border Security Bill currently before the Commons and open to consultation.³

¹ Counter-Terrorism and Border Security Bill Explanatory Notes
<https://publications.parliament.uk/pa/bills/cbill/2017-2019/0219/en/18219en.pdf>

² Ibid.

³ All the documents can be accessed at <https://services.parliament.uk/Bills/2017-19/counterterrorismandbordersecurity/documents.html>

4. There are many objections to the content of this Bill from a human rights perspective; CAJ would commend the briefing published by our sister organisation Liberty⁴ and the comments on clause 3 made by Max Hill QC, the Independent Reviewer of Terrorism Legislation and his colleague Professor Clive Walker.⁵ However, some provisions could benefit from being viewed in the light of our experience and current reality and others apply particularly to Northern Ireland.

Supporting Terrorism

5. A significant proportion of the Terrorism Act 2000 depends on the concept of proscribing organisations which are allegedly “concerned with terrorism.” The Act then creates a series of offences which criminalise giving support of one kind or another to such organisations, including encouraging other people to support them. The courts decided that the 2000 Act required intention to encourage support by other people and held that the offence “does not prohibit the holding of opinions or beliefs supportive of a proscribed organisation; or the expression of those opinions or beliefs.”⁶
6. Clause 1 of this Bill “rectifies” that situation by downgrading the *mens rea* necessary to make out the offence to “recklessness.” This means that a person would have to recognise that there would be some risk of influencing someone else to support a proscribed organisation but would go ahead and make the speech or do whatever action is the subject of the offence. This comes closer to the criminalisation of the simple holding and expression of “opinions or beliefs supportive of a proscribed organisation” which would arguably breach the right to freedom of opinion and is what the Appeal Court specifically ruled out in 2016.
7. Clause 2 amends section 13 of the 2000 Act to create a new offence criminalising the publication by a person of an image (whether still or moving image) of an item of clothing or an article (such as a flag) in such a way or in such circumstances as to arouse reasonable suspicion that the person is a member or supporter of a proscribed organisation. Section 13 of the 2000 Act makes it an offence to wear clothing, or wear, carry or display articles in a public place in such a way. However, the “loophole” identified here is that a person taking a photograph, for example, of forbidden items in private and then circulating the image would not be guilty of an offence under the 2000 Act. The Explanatory Notes to the new Bill explicitly state that the new offence “would, for example, cover a person uploading to social media

⁴<https://www.libertyhumanrights.org.uk/sites/default/files/Liberty%27s%20Second%20Reading%20Briefing%20on%20the%20Counter-Terrorism%20Bill%20FINAL.pdf>

⁵ <https://terrorismlegislationreviewer.independent.gov.uk/category/evidence/>

⁶ Court of Appeal R v Choudhary and Rahman [2016] EWCA Crim 61 para 35

a photograph of himself or herself, taken in his bedroom, which includes in the background an ISIS flag.”

8. We can quite properly criticise this draft legislation for criminalising what could often be innocuous or trivial behaviour. When looked at in the light of Northern Ireland reality, however, it looks grossly disproportionate if not ridiculous.
9. There are 14 Northern Ireland organisations on the proscribed list. Being on the list means that simple membership and any expression of support for such an organisation which had any prospect of influencing anyone else are serious crimes. The list of organisations includes long redundant groups, paramilitary groupings that are on ceasefire and presently openly active organisations.
10. In Northern Ireland today, a special Panel has been established to produce “recommendations for a strategy to disband paramilitary groups;”⁷ a Government programme has been established to fund many initiatives designed to help the groups “transition;”⁸ Government Ministers openly admit to formally meeting such organisations;⁹ their flags fly everywhere and their symbols cover memorials, appear on gable walls and decorate banners hanging from lampposts. Legally, these organisations are in exactly the same position as ISIS.
11. We do not criticise any of these efforts or manifestations as of themselves. We simply point to the nonsense of these counter-terrorism laws or proposed laws when seen in their application or lack of it to Northern Ireland. Of course, one solution would be to remove all those organisations on ceasefire from the proscribed list. One group, the Red Hand Commando, has reportedly applied for de-proscription¹⁰ and the media reports published their flag, their statement and pictures of the individuals making the announcement. There has been no definitive response from the government as far as we are aware.
12. As of now, therefore, the unsatisfactory half-way house applies – Northern Ireland paramilitary organisations are described as terrorist, but the counter-terrorism law is not applied to them or only partially and occasionally. This is not just an affront to the rule of law – it also leaves room for political calculation in policing and prosecutorial decision making. This is a deeply unsatisfactory situation.

⁷ <https://www.northernireland.gov.uk/publications/fresh-start-panel-report-disbandment-paramilitary-groups-northern-ireland>

⁸ <https://www.justice-ni.gov.uk/articles/executive-programme-tackling-paramilitary-activity-and-organised-crime>

⁹ <https://www.theyworkforyou.com/ni/?id=2016-11-15.3.28>

¹⁰ <https://www.newsletter.co.uk/news/deproscription-application-red-hand-commando-statement-in-full-1-8145585>

13. However, the reality is, as it stands, if these laws were in fact applied to Northern Ireland, there would be huge community alienation, street violence would probably erupt and the cause of peace would be put back immeasurably. So if these counter-terrorism measures are not only useless but counter-productive for Northern Ireland, how are they appropriate for the rest of the UK? While the causes of political violence in Northern Ireland and in Britain are very different, armed groups are made up of real people, they are born from ideologies and their members are often our fellow citizens. The idiocy of applying these measures to Northern Ireland ought to give legislators pause for thought before they pass them for the whole of the UK.

New border policing powers proposed

14. The Draft Bill proposes new powers for police, customs and immigration officers along the Border. In a mile-wide strip along the Border between North and South, people will be liable to be stopped, searched and detained in order to check whether they are entering or leaving Northern Ireland. The power will also apply to the first place a train from the Republic stops in Northern Ireland to let passengers off.¹¹

15. The Bill in general represents a new power grab by government and some provisions come dangerously close to breaching the right to freedom of expression. We comment on those above, but the new Border powers are an amendment to the notorious Schedule 7 powers of the Terrorism Act 2000.

16. These Schedule 7 powers allow police, or designated customs and immigration officers, to stop, question, search and detain people at ports and airports (and along our land border) to see if they are “terrorists.” These powers are controversial in general, not least because they appear to be used in a racially discriminatory way. The latest Report by Max Hill QC, the Independent Reviewer of Terrorism Legislation, reveals that a person of Asian origin is about 18 times more likely to be stopped than a white person and even more likely to be detained (held for more than an hour).¹²

17. However, the powers seem to be used disproportionately in Northern Ireland. In 2017 we had about 3% of the passenger numbers of the whole of the UK but about 18% of the stops under these powers. As an air or sea passenger entering or leaving Northern Ireland, you were therefore six times as likely to be stopped than if

¹¹ Schedule 3 Paragraph 2 Counter-Terrorism and Border Security Bill 2017-19

<https://services.parliament.uk/Bills/2017-19/counterterrorismandbordersecurity/documents.html>

¹² The Report can be accessed here:

<https://terrorismlegislationreviewer.independent.gov.uk/category/reports/> P35

travelling to or from the rest of the UK. Very strangely, none of the people stopped in Northern Ireland were detained for more than an hour whereas in the rest of the UK the figure was 9%. The PSNI has explained that the reason for this apparent lack of further action was that some of those stopped would be “wanted or of interest” to immigration or tax authorities and would be handed over under other legislation. CAJ is therefore concerned that these counter-terrorism powers are being used as a form of immigration control.

18. The new powers apply in order to check whether people have been involved in “hostile activity.” This new, broad concept is defined as doing a hostile act on behalf of, or in the interests of a foreign government. A hostile act is one that threatens national security or the economic well-being of the UK or is an act of serious crime. “National security” is notoriously undefined and “economic well-being” is such a vague concept that almost any act could “threaten” it. The powers can be used not just at the external borders of the UK but also in relation to domestic air and sea travel between Britain and Northern Ireland.
19. However, there is a special power, in Schedule 3 Paragraph 2, that only applies in the Border strip and Newry or Portadown train stations. This provides that anyone can be stopped, questioned and detained, without any reasonable grounds or suspicion of any offence, simply in order to check if they are entering or leaving Northern Ireland. This is an extraordinary power which, if applied, could make for the hardest of hard borders – for people if not for goods.
20. This power is explained as “essentially a pre-cursor power” to establish whether the “entering or leaving the UK” condition is met in order to trigger the “hostile activity” power.¹³ However, stop, question and detain powers are built into this “pre-cursor” element and there is no guarantee that the production of a passport or driving licence would be sufficient to satisfy an examining officer. Of course, people might argue that this power would never be routinely used on the border; the counter is that when powers exist they tend to be used. We are already concerned that the Schedule 7 powers are being misused for immigration control, and probably on the basis of racial profiling; these new powers are dangerously vague and could also be misused.
21. Will there be a kind of militarised zone along the Border, where roving patrols can stop and question any person, resident or traveller, without any kind of justification? Presumably not, but in this piece of legislation such a scenario is expressly provided for. It is wrong to give such powers to state forces unless they are going to be used

¹³ Explanatory Notes paragraph 133 <https://services.parliament.uk/Bills/2017-19/counterterrorismdbordersecurity/documents.html>

for necessary and proportionate reasons. We hope that this is not a preparation for a post-Brexit “fortress UK.” We don’t know what the precise intention is behind this proposal, but one thing is clear – there is no need for this power in Northern Ireland and the legislation should not be passed.