



European Civil Liberties Network

## *Essays for civil liberties and democracy in Europe*

### **Council of Europe: UK's anti-terrorism measures fall short of European standards**

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It is not only the European Court of Human Rights that safeguards fundamental freedoms in the fight against terror. Various non-judicial organs of the Council of Europe, the organisation with the longest tradition in human rights protection at supranational level, recently scrutinised and severely criticised the detention conditions of foreign terrorism suspects in the United Kingdom as well as the country's new anti-terrorism legislation.

During the last few years the Council of Europe introduced numerous initiatives in the effort to control State Parties' response to terrorism. The adoption by the Committee of Ministers of the Guidelines on Human Rights and the Fight against Terrorism in 2002, and in their more recent 2005 version, were only the start to the organisation's long, history of workcomprehensive campaign to guarantee human rights. The organisation's efforts to guarantee human rights have always been coupled by a clear recognition of the grave threat that terrorism poses to democratic, pluralistic societies with long traditions in the protection of fundamental freedoms. The UK was the keenest among the organisation's member states that introduced special measures after 9/11, derogating from the European Convention on Human Rights. No other country of the organisation, which now counts number 46 member states, found it necessary to suspend any provision of the Convention, and this may be why the UK attracted special attention and was subject to scrutiny. The Anti-terrorism Crime and Security Act 2001, as well as the Prevention of

Terrorism Act 2005 have raised serious concerns and have been criticised in a number of occasions. The most recent expressions of concern as to the legislation and its specific implementation are to be found in the Report of the Committee against Torture and that of the High Commissioner for Human Rights, Alvaro Gil-Robles.

The European Committee for the Prevention of Torture (CPT) is a non-judicial body of independent and impartial experts that monitors compliance with the 1987 European Convention on the Prevention of Torture and Inhuman or Degrading Treatment and Punishment. Its role is primarily preventive. A delegation of the CPT visited the United Kingdom in March 2004. The CPT's aim was to examine the treatment of international terrorism suspects, who were being detained under the Anti-Terrorism, Crime and Security Act 2001 (ATCSA), and to assess the developments after its previous visit in 2002. The findings of the delegation showed that detention conditions were far from appropriate, causing serious mental and physical suffering to the detainees.

The CPT visited persons who were held from 2002 in Belmarsh Prison, the Woodhill Prison and the Broadmoor Special Hospital. The detailed Report[1] that it adopted and the Response[2] of the UK Government were published in June 2005. Detainees' allegations as well as facts that the CPT itself established during the visit included the following: Detainees suffered serious mental health and psychiatric problems, suffering from

depression, symptoms of psychosis, post-traumatic stress-disorder, distress, suspicion, ideas of suicide. The treatment they received from prison staff in Belmarsh gave rise to serious concerns on the part of the delegation that stressed that 'the risk of the situation getting out of hand is far from theoretical'. Allegations of ill treatment upon arrest, as well as while in detention were striking. One detainee, for instance, claimed that he was put in isolation by the prison's staff for a night, with no clothing on and with the ventilation system on, because he was praying loudly - an allegation which the authorities confirmed. The delegation found that prison staff frequently threatened detainees that they would be put in the 'intensive-care suite', used aggressive and abusive language and laughed with derision while watching prisoners through a camera. Moreover, certain detainees were subject to racist behaviour, and prison staff did not intervene. The CPT stressed that this treatment cannot be tolerated, and is to be sanctioned. Another patient was put in the Broadmoor Special Hospital. The CPT, the medical team of the hospital, as well as numerous other doctors, said that this is an inappropriate environment for someone in his condition. The delegation noted a profound lack of awareness of how to deal with someone who suffers severe post-traumatic stress disorder, bordering on psychosis. Detainees' past traumatic experiences were re-awakened due to the conditions of their detention.

More generally the CPT observed that the authorities were at a loss when they had to handle the indefinitely imprisoned ATCSA detainees. The unique conditions, under which they were held, characterised mainly by the lack of a real prospect of release resulted in serious physical and mental disorders, which on the delegation's view, could be said to amount to *inhuman and degrading treatment*. While the CPT after its 2002 visit anticipated that detainees would suffer such serious health problems and recommended that the authorities take appropriate action, the authorities did not offer the detainees the necessary support. The ATCSA detainees, the delegation of the CPT stressed, are subject to

immigration rather than criminal legislation, and this special status had to be taken into account while they were held in prison. Their special status should be reflected in their detention conditions. They should be allowed to be involved in educational and intellectual activities, training and work, to pray and to practice their religion. They should, further, be offered special psychological and social support. The CPT also raised issues with respect to the right to notification of custody, access to a lawyer and access to a doctor, which it considers to be fundamental rights, and which it invited the authorities to address. The Report concludes with numerous recommendations to the UK authorities, calling upon them to guarantee effectively that those detained under the ATCSA are held in humane conditions, which will not have a damaging impact upon their physical and mental health.

The UK Government's response to the findings of the CPT had two parts. In the first part, it set out the new Prevention of Terrorism Act 2005, which, it claimed, would address the issues that were raised by the 14 December House of Lords decision on the compatibility of the ATCSA with the obligations under the ECHR. The Law Lords held in their judgement that the measures were, on the one hand discriminatory, as they only targeted foreign nationals, and on the other hand disproportionate. In light of the new legislation, accordingly, the Government said, it would be both citizens and non-citizens that would be held for terrorism-related activities. The suspects would not be imprisoned, as was the case with the 2001 Act, but be only subject to 'control orders'. All ATCSA detainees were, therefore, released from prison, and put under these new control orders. The second part of the Response took the findings of the delegation and addressed them in detail. The thrust of the Government's response was that, contrary to the CPT findings, detention conditions in Belmarsh Prison and in the Broadmoor Special Hospital were not inhuman and degrading, as the CPT indicated, and could not give rise to any issue under article 3 of the European Convention on Human Rights. Only a few of the allegations, the Government

said, were substantiated, while most were unsubstantiated and for others there was insufficient evidence. It expressed, therefore, its satisfaction that detention conditions in UK prisons did not fall short of European standards.

The High Commissioner for Human Rights, an independent and impartial non-judicial institution within the Council of Europe, visited Edinburgh, Belfast and London in November 2004 and published a report on his visit in June 2005.<sup>[3]</sup> Alvaro Gil-Robles did not deal with the Anti-Terrorism Crime and Security Act 2001 specific provisions, as the House of Lords had already held that the Act is incompatible with the ECHR before the Commissioner's report. The Commissioner welcomed the House of Lords ruling. The new Prevention of Terrorism Act, however, raised serious issues. According to the PTA 2005, the Home Secretary/Secretary of State for Home Affairs can make control orders against individuals, if he has reasonable grounds for suspecting them of being involved in terrorist-related activities. The measures that the Act allows the Secretary of State to adopt include restrictions on work and other activities, on association, communication, movement, residence, and going as far as house arrest. The realisation that some of these measures may be contrary to the ECHR is evident in the legislation, as the Act itself provides that for some of the measures derogation from the Convention will be necessary, without, however, stating which will be the measures that will require derogation and which will not.

Is the 2005 legislation compatible with the UK's international obligations? The Commissioner expressed considerable concern in his Report, and examined the compatibility of the new Act with, first, the protection of individual liberty, and, second, the right to a fair trial. Leaving aside the derogating control orders, as they had not been implemented before the report, and with the hope that they would not be considered necessary, Mr Robles turned to the non-derogating control orders. The judiciary's involvement in their imposition would only be very limited, the

Commissioner stressed, the procedural guarantees few, and certainly far from criminal proceedings' guarantees. Non-derogating control orders might amount to unlawful deprivation of liberty under article 5(1) of the ECHR. The question, therefore, whether a specific measure falls within the scope of the Convention and might require derogation should, the Commissioner recommended, be a matter for judicial scrutiny.

The right to a fair trial under article 6 of the ECHR also comes into play under the new Act, the Commissioner noted, as the control orders may be said to be criminal measures. The UK does not characterise these orders as *criminal*, and it is precisely because it does not initiate criminal proceedings against the suspects that *executive* control orders are adopted. This, however, cannot impede Courts from examining whether the orders are in fact 'criminal', despite the domestic classification, and require, as a result, the fair trial guarantees of the Convention. The control orders are brought for alleged involvement in suspected criminal acts, and are of a level of severity similar to that of a criminal penalty. The limited role that the Act affords the judiciary, furthermore, falls short of fair trial requirements, with the proceedings being 'inherently one-sided'. The Courts cannot determine whether the specific charges are criminal, while equality of arms is not safeguarded, Mr Robles explained. The PTA allows, among others, the consideration of secret evidence and the participation of special advocates, who cannot discuss the evidence with the suspects. What the new measures under the 2005 Act achieve, the Commissioner went on to state, is 'to substitute the ordinary criminal justice system with a parallel system run by the executive'. Two guarantees are therefore required so that the Act is compatible with the ECHR. First, the Commissioner recommends, judicial guarantees need to apply in the proceedings under the Act. Second, the legislation in question has to be subject to regular review by the Parliament.

There is no doubt that terrorism poses a great

danger to liberal democratic societies, which a democracy cannot easily address. However grave the threat of terrorism may be, though, it should not lead to compromises in the levels of tolerance and protection of fundamental rights, as this might lead only to more polarisation and extremism. The UK legislation and its implementation are the 'real threat to the life of the nation' that international terrorism poses, as Lord Hoffman emphasised. Innocent victims of human rights abuses are not only those who are killed in terrorist attacks, but also those who are indefinitely detained in inhuman conditions, without sufficient evidence and with no basic guarantees of a fair trial. This situation is to be avoided at any cost. The UK Government appears to be moving in the wrong direction, advancing all the more repressive strategies, while it is exactly under the present conditions that it should not give in to pressures for the adoption of anti-liberal repressive policies. International bodies, though, are there to monitor its actions. In an era where human rights protection has become one of the primary concerns of the international community, attempts to restrict liberties that are well established and crucial do not pass unquestioned. The Council of Europe has more than its influential Court to achieve its objectives. The European Committee for the Prevention of Torture and the Commissioner for Human Rights are two other organs that show that in difficult times and times of crises, when Courts are put under pressure by the executive, there are other bodies that can complement and support their role. These bodies can protect a minority whose voice is weak and cannot be heard by majorities and their elected representatives. The UK

Government, one of the founding members of the Council of Europe, with a long tradition in the protection of civil liberties, ought to take these Reports seriously into account and bring its policies in line with evolving European standards.

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#### Footnotes

1 Report to the Government of the UK on the visit carried out by the European Committee on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, CPT/Inf (2005) 10.

2 Response of the UK Government to the Report, CPT/Inf (2005) 11.

3 Report by the Commissioner for Human Rights on his visit to the United Kingdom, CommDH(2005)6.

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