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The Prevention of Terrorism Bill: A grave threat to human rights and the rule of law in the UK

Introduction

Amnesty International calls for the withdrawal of the Prevention of Terrorism Bill (PTB), which was introduced before Parliament on 22 February 2005, and which the government is seeking to rush through in order to have it on the statute book by 14 March 2005.

Under the PTB the executive would have unprecedentedly sweeping powers to make "control orders" imposing restrictions on fundamental freedoms guaranteed by domestic and international human rights law in the UK.

If the PTB were to be enacted in its current form, it would have devastating consequences on individual rights, on the rule of law and on human rights protection as a whole in the UK. Amnesty International is profoundly concerned that PTB provisions, if implemented, would lead to serious human rights violations.

The executive would have the power to order the indefinite deprivation of liberty of UK and foreign nationals alike without charge or trial on the basis of secret "evidence". Under international and domestic human rights law "house arrest" without charge or trial is no different from institutional deprivation of liberty, i.e. detention at Belmarsh and Woodhill Prisons or at Broadmoor high security Psychiatric Hospital. The provisions for judicial involvement post facto do not alter the arbitrary nature of this bill. It still provides for deprivation of liberty without charge or trial.

The resort to such extraordinary measures is justified by the UK authorities by reference to the purported continuing existence of "a public emergency threatening the life of the nation". In such context, the UK authorities have made reference to their need to supplement existing laws and procedures, including those established, for example, under the Terrorism Act 2000, with additional emergency powers which would purportedly enable them to counter the above-mentioned "threat" more effectively.

In light of media reports in the last couple of days that the UK authorities are considering making "concessions" in relation to the extent of the judiciary's involvement allowed under the scheme they are seeking to introduce under the PTB, Amnesty International considers that nothing short of charging people with an offence, fully granting them their right to be tried by an independent and impartial court -- with full access to all the evidence against them and the right to mount a full and effective defence -- could remedy the profound injustice and affront to human rights and the rule of law that the enactment of the PTB would otherwise bring about.

Sweeping executive powers

Under the PTB the Secretary of State is empowered to make, renew, and modify “control orders” which impose restrictions, so-called “obligations”, on the person against whom the order has been made.

The so-called “obligations” range from, for example, “prohibitions on the possession or use of certain items, restrictions on movement to or within certain areas, restrictions on communications and associations, and requirements as to place of abode”. Under the most draconian “control orders”, the executive alone would have powers to order the deprivation of liberty of the concerned individual -- e.g. “house arrest” -- without charge or trial. The PTB refers to these type of “orders” as “derogating control orders”, thereby explicitly recognizing that such measures would clearly breach the right to liberty and security of person and would, therefore, require a derogation from Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).¹ Indeed, the UK authorities admit as much when they recognize that they will have to derogate in order to implement the so-called “derogating control orders”.

The PTB provides a list of 15 examples of restrictions which could be imposed, ranging from tagging to “house arrest”. However, under the PTB the Secretary of State is not limited to imposing these restrictions alone. The bill makes it clear that the list of restrictions set out is not exhaustive. In addition, under the PTB “control orders” can be renewed indefinitely, and any “breach” of such orders can lead to the imposition of imprisonment and or a fine.

These restrictions would have a detrimental impact on people’s human rights, including their right to respect for private and family life, freedom of thought, conscience and religion, freedom of expression, freedom of assembly and association, freedom of movement, their right to a fair trial, and their right to liberty and security of person. As set out below, the cumulative effects of these restrictions may also breach people’s right to be free from torture or other cruel, inhuman or degrading treatment or punishment.

Amnesty International considers that, in this context, the use of the word “obligations” to describe such restrictions is misleading. It obfuscates the reality of what the PTB would allow the executive to order.

Amnesty International is deeply concerned that the executive would be empowered to circumvent the role of the police, the prosecuting authorities and the judiciary and would wield their respective powers without any effective system of checks and balances. It would effectively end the rule of law and the separation of powers by placing all powers in the hands of the executive.

The standard for “control orders”

The Secretary of State may make an order against an individual imposing restrictions if s/he

(a) has reasonable grounds for suspecting that the individual is or has been involved in terrorism-related activity; and

(b) considers that it is necessary, for purposes connected with protecting members of the public from the risk of terrorism, to make an order imposing obligations on the individual.²

The trigger, therefore, for imposing these restrictions is criminal in nature: “terrorist-related activities”.³

Furthermore, under the PTB the exercise of the Secretary of State’s power to make a “control order” against an individual is based on his/her belief that the order is necessary to prevent a risk that the individual concerned would be involved in any “terrorist-related activities” in the future. Amnesty International notes with concern that such possible future “terrorist-related activities”, however, need not be linked with the past or present activities which have given rise to the UK authorities’ suspicion in the

first place.⁴

Under the PTB, the Secretary of State may also make so-called “derogating control orders” which -- in breach of domestic and international human rights law, including treaty provisions by which the UK is bound -- have the effect of depriving the persons concerned of their liberty. The Secretary of State may make such “orders” if

(a) he is satisfied, on the balance of probabilities, that person is an individual who is or has been involved in terrorism-related activity;

(b) he considers that the imposition of the obligation is necessary for purposes connected with protecting members of the public from risks arising out of, or associated with, a particular public emergency; (c) there is for the time being a designated derogation in respect of that emergency from the whole or a part of that Article [i.e. Article 5 of the ECHR, enshrining the right to liberty and security of person]; and

(d) the obligation is of a description of obligations which, for the purposes of that derogation, is set out in the designation order.⁵

The criminal nature of the PTB powers

The explanatory notes to the PTB describe the “orders” as “preventative”, “designed to restrict or prevent the further involvement by individuals in such activity”. As such, Amnesty International considers that the “orders” would be based on an assessment that the activity of a purportedly criminal nature has either already taken place, is taking place or may take place.

The UK authorities assert that, in respect of certain individuals and their alleged “terrorist-related activities”, either the evidence is not of a quality which would sustain a criminal prosecution or that the disclosure of such “evidence” could further endanger national security, other individuals and the life of the nation.

In light of this, Amnesty International considers that the imposition of such “orders” would, effectively, be tantamount to the executive “charging”, “trying” and “sentencing” individuals concerned without the attendant fair trial guarantees of a criminal process. Such fair trial rights include, among others, the presumption of innocence, the right to determination of a charge by an independent and impartial tribunal, and the right to equality before the law and equal protection of the law.

Ineffective judicial control

If enacted, under the PTB individuals who have been made the subject of such “control orders” would purportedly have a right to challenge and appeal -- to the High Court in England and Wales or Northern Ireland, or to the Court of Session in Scotland -- against their making, renewal or modification. In particular, “control orders” involving a deprivation of liberty -- the so-called “derogating control-orders” -- purport to grant “additional judicial scrutiny, including a full and automatic rehearing... of the matters which led to their imposition”.⁶

However, Amnesty International is concerned that such judicial scrutiny, including in relation to those orders imposing “house arrest”, is devoid of any effectiveness. This is for a variety of reasons, including:

because the PTB empowers the executive to make and impose “control orders” without any prior involvement on the part of the judiciary and not for the purpose of having the individuals concerned charged or tried with a recognizably criminal offence;

because the judiciary is empowered merely with reviewing the executive’s decision, rather than with making its own independent and impartial findings and final determination;

because of the burden of proof that the PTB would impose on the executive in order for its decision to be upheld by the judiciary. The reasonableness of the executive’s grounds is what the PTB would impose, a standard lower than the civil standard of the balance of probabilities, let alone the criminal standard of beyond reasonable doubt; and

finally, and in particular, because notwithstanding a court's ruling quashing a "control order", the Secretary of State may make a new "order" re-imposing the same or similar restrictions on the basis of exactly the same circumstances.

In conclusion, the involvement of the judiciary would be ineffective and may be void of any substance.

Flawed procedures

The provisions in the PTB would allow the executive to strip the individuals concerned of their right to a fair trial, including:

- a) the right to be brought promptly before a judge or other officer authorized by law to exercise judicial power;*
- b) the right to trial within a reasonable time or to release;*
- c) the right to be informed promptly and in detail, of the nature and cause of the accusations against oneself;*
- d) the right to the presumption of innocence which applies to all persons charged with a criminal offence, including during times of emergency, and requires the state to prove the charge "beyond reasonable doubt";*
- e) the right to equality before the law and equal protection of the law without any discrimination;*
- f) the right to have a criminal charge against oneself determined by an independent tribunal which has the quality of finality; and*
- g) the right to defend oneself in person or through legal assistance of one's own choosing.*

Secret evidence

The executive would be able to present -- and the judiciary would be bound to consider and rely on -- secret "evidence" to deprive people of their liberty indefinitely. Since the person concerned would neither see nor hear the "evidence" used against them they would be unable to effectively challenge it. In addition, legitimate concern arises in relation to the quality of the "evidence" that would be kept from public scrutiny since the majority of it is likely to comprise of intelligence material which would be either inadmissible in an ordinary criminal trial or likely to fall qualitatively well below the standard required by the police and the prosecuting authorities in respect of a criminal charge.

In addition, it is likely that, as with the secret "evidence" hearings before the Special Immigration Appeals Commission under the Anti-terrorism, Crime and Security Act 2001 (ATCSA), the UK authorities may present "evidence" in secret which has in fact been disclosed in the context of judicial proceedings abroad. In addition, under the PTB the Secretary of State would not be required to disclose any evidence that s/he does not seek to adduce in the proceedings, including material that may undermine the Secretary of State's case. This contravenes international fair trial standards according to which, for example, the prosecution is obliged to disclose to anyone who is on trial for a criminal offence any material that may exculpate them. The PTB would allow the Secretary of State to withhold evidence that information s/he relies on to impose an "order" had been obtained under torture.

The executive would be able to use "evidence" obtained through torture or other ill-treatment of a third party, or otherwise unlawfully obtained. Such "evidence" may consist, for example, of information gleaned from places such as Guantánamo Bay, Cuba, Bagram Airbase, Afghanistan, and possibly elsewhere at other undisclosed detention locations, where people have been held without any legal basis in US custody. The only caveat to this is that "evidence" so obtained would be inadmissible if it had been directly procured by UK agents or if they had connived in its procurement.

The judiciary would be bound to consider and rely on such "evidence" to uphold people's indefinite deprivation of liberty without charge or trial.

Denial of the right to a defence

Amnesty International is concerned that the PTB makes provision for the use of legal counsel, known as

Special Advocates, who would be appointed by a member of the executive, purportedly to “represent the interest” of the person but who would not be “responsible” to that person. This raises concerns that a Special Advocate would not be able to provide a proper defence because of his/her inability to take instructions from the person s/he is supposed to represent once s/he is privy to the secret “evidence” or to speak out, should s/he, for example, become aware that such “evidence” was unlawfully obtained.

Time-frame

Just over three years ago, the UK authorities rushed through the ATCSA in a month. Amnesty International has been calling for the repeal of Part 4 of the ATCSA ever since. While the Law Lords’ ruling of 16 December 2004 -- that indefinite detention without charge or trial was unjustifiably discriminatory and, therefore, unlawful -- vindicated the stance of many, including non-governmental organizations, the Newton Committee, and the Joint Committee on Human Rights, it came three years too late for those detained under the Part 4 regime and their families.

In light of this, Amnesty International considers it now utterly unconscionable for the UK authorities to attempt to rush through once again -- without adequate time to ensure parliamentary and public scrutiny -- another piece of legislation which is so fundamentally antithetical to the rule of law and human rights and which makes of mockery of the separation of powers. The UK authorities were wrong in 2001 when they passed the ATCSA and are wrong now. The PTB contravenes the spirit, if not the letter, of the Law Lords’ judgment.

The public emergency

The Secretary of State for the Home Department recently stated that at present he does not intend to hold those currently held under Part 4 of the ATCSA under “house arrest” once the Part 4 powers expire. Amnesty International and the Parliamentary Joint Committee on Human Rights, among others, understand this to mean that it is the view of the Secretary of State that, notwithstanding the continuance of a public emergency threatening the life of the nation, deprivation of liberty without charge or trial is no longer strictly required by the exigencies of the situation at present. In light of the above, it is imperative for the UK authorities to respond adequately to the following fundamental questions.

Why then -- given the Secretary of State’s own admission that the purported public emergency threatening the life of the nation does not at present justify indefinite detention without charge or trial and his consequent stated intention not to hold under “house arrest” those currently interned under the Part 4 powers once they expire -- do the UK authorities seek the enactment of some PTB provisions which directly contravene UK domestic and international obligations in such a way as to necessitate derogation from treaty provisions by which the UK is bound?

What has so significantly changed almost overnight in the nature and extent of the threat that the UK authorities assert exists to the UK since the events of 11 September 2001 to make them drop plans for the renewal of the Part 4 scheme and instead seek the enactment of the PTB?

Why are measures, which the UK authorities claim to have deployed for more than three years against UK nationals whom they allegedly suspect of involvement in “international terrorism”, suddenly deemed so ineffective as to require the enactment of the PTB? How did the government contain the threat allegedly posed by UK nationals up to now?

Why is there no involvement of the police and the prosecuting authorities in the processing of intelligence on the basis of which people are deemed by the UK executive to constitute a threat?

The effects of the PTB, if enacted

The enactment of provisions in the PTB could lead to violations of people’s right to mental and physical integrity by virtue of subjecting the individuals concerned to a regime of indefinite deprivation of liberty without charge or trial on the basis of secret evidence. In extreme cases, deprivation of liberty could effectively lead to individuals being held in conditions of solitary confinement. Some of the restrictions

which could be imposed under the PTB would also have a profoundly detrimental impact on the families of people subjected to them -- punishing those who are not under the executive's suspicion.

In October 2004, 12 senior doctors stated that the indefinite nature of detention had been a major factor in the deterioration of the mental health of people detained under Part 4 of ATCSA -- which the PTB, if enacted, would replace -- and that of their spouses. Also, in this connection, Amnesty International notes the statement issued in January 2005 by the Royal College of Psychiatrists and addressed to the UK authorities, including Parliamentarians. In that statement the college asked that, when considering whether to renew present legislation (i.e. Part 4 of the ATCSA) or "contemplating future legislation", consideration should be given to the fact that "indeterminate detention, lack of normal due legal process and the resultant sense of powerlessness, are likely to cause significant deterioration in detainees' mental health".

Conclusions

Amnesty International considers that implementing the PTB would constitute a fundamental departure from the rule of law and would further undermine human rights protection in the UK. Similarly to Part 4 of the ATCSA, with which the PTB shares many similarities, if implemented it would be another complete jettisoning of fundamental criminal and civil fair trial guarantees.

1 In light of this, Amnesty International considers that the declaration made in the PTB under section 19(1)(a) of the Human Rights Act 1998 is misleading because the organization believes that some of the PTB measures would clearly be incompatible with ECHR rights.

2 See section 1(1) of the PTB.

3 Section 1(8) of the PTB describes "involvement in terrorism-related activity" as follows: "(a) the commission, preparation or instigation of acts of terrorism; (b) conduct which facilitates the commission, preparation or instigation of such acts, or which is intended to do so; (c) conduct which gives encouragement to the commission, preparation or instigation of such acts, or which is intended to do so; (d) conduct which gives support or assistance to individuals who are known or believed to be involved in terrorism-related activity; and for the purposes of this subsection it is immaterial whether the acts of terrorism in question are specific acts of terrorism or acts of terrorism generally".

4 See section 1(2), in particular the qualification in brackets.

5 Section 2(1) of the PTB.

6 See the explanatory notes to the PTB.

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