

COUNTER-TERRORISM AND BORDER SECURITY BILL
EUROPEAN CONVENTION ON HUMAN RIGHTS
SUPPLEMENTARY MEMORANDUM BY THE HOME OFFICE

Introduction

1. This memorandum supplements memoranda dated 6 June and 4 September 2018 prepared by the Home Office which addressed issues arising under the European Convention on Human Rights (“ECHR”) in relation to the Counter-Terrorism and Border Security Bill. This supplementary memorandum addresses ECHR issues that arise in relation to new clause *Entering or remaining in a designated area* tabled for Commons Report stage.

Designated area offence

2. New clause *Entering or remaining in a designated area* introduces into the Terrorism Act 2000 (“the 2000 Act”) a new offence, in section 58B, of entering or remaining in a designated area outside the UK. The offence can only be committed by a person who is a UK national or resident at the time of entering the area or at any time during which the person remains there.
3. A defence is available for those prosecuted under this new offence if the person can show that they had a reasonable excuse for entering, or remaining in, the designated area. If a defence is raised, the jury is entitled to assume the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not (section 118 of the 2000 Act, as amended).
4. A person does not commit the offence if the person is already travelling to, or is already in, the area on the day on which it becomes a designated area and the person leaves the area before the end of the period of one month beginning with that day.
5. Nothing in the new offence imposes criminal liability on any person acting on behalf of, or holding office under, the Crown.
6. Section 117 of the 2000 Act will operate so as to ensure that the Director of Public Prosecutions or the Director of Public Prosecutions for Northern Ireland, will have to consent to any prosecution of the new offence, and such consent will be subject to obtaining the permission of the Attorney General or the Advocate General for Northern Ireland, as the case may be. In Scotland all prosecutions are brought by the Lord Advocate or on his behalf, where to do so is in the public interest and so no consent or permission is required.
7. A person found guilty of the offence is liable on conviction on indictment to imprisonment for a term not exceeding 10 years, or to a fine, or to both.

8. The new clause also inserts into the 2000 Act a new section 58C which contains the designation power. This allows the Secretary of State to designate an area outside the UK where satisfied that it is an area to which it is necessary to restrict the entry of UK nationals or residents in order to protect the public from a risk of terrorism. The designation power would be exercisable by means of regulations made subject to the made affirmative procedure. The new clause requires the Secretary of State to keep under review whether the test for any designation continues to be met and where it is no longer met, to revoke the regulations (or revoke them so far as they have effect in relation to that area if the regulations designate more than one area).

Engagement of ECHR rights

9. Unless and until the power to designate an area is exercised, the new offence does not engage ECHR rights. However, Articles 8, 9, 10 and 14 will be engaged when a designation is made.

Article 8

10. A person may be restricted by the new offence in the exercise of their Article 8 right to private and family life since it would prevent a person from travelling without risk of prosecution for a criminal offence.

Article 9

11. A person may also be restricted in the exercise of their Article 9 rights to manifest his religion or belief, in worship, teaching, practice and observance if exercise of that right involves or requires entry into, or remaining in, a designated area.

Article 10

12. A person may be restricted in the exercise of their Article 10 right to receive and impart information and ideas concerning their religion or political/ideological beliefs if exercise of that right involves or requires entry into, or remaining in, a designated area.

Article 14

13. As Articles 8, 9 and 10 would be engaged by the offence it is possible for Article 14 to be engaged when an area is designated. The designation of an area in Country X may disproportionately restrict Country X's nationals, or people with, for example, family members or friends in the designated area, in the exercise of their Article 8, 9 and 10 rights, compared to people who are not nationals of Country X or who do not have friends or family there.

Justification for ECHR interferences

14. The Government considers that these intrusions into ECHR rights, and the possibility of discriminatory effects on certain groups' ability to exercise those rights, are justified as necessary in a democratic society in the interests of national security, public safety, for the prevention of disorder and crime and for the protection of the rights and freedom of others (such as the Article 2 right to life and property rights protected by Article 1 of Protocol 1).
15. The mischief that this offence is designed to address is the phenomenon of UK nationals or residents travelling to parts of the world, such as parts of Syria or Iraq, where there is a heightened risk that they may become involved in, or train in techniques useful for, terrorism. Such persons represent risks to the public (both in the UK and elsewhere) because they may perpetrate terrorist attacks themselves or encourage third parties to do so.
16. The objective of this new offence is to dissuade UK nationals and residents from entering, or remaining in, areas outside the UK where they may engage in terrorism or other conduct which makes them become a more significant source of risk to the public, and to ensure that those who do so may be prosecuted and, if convicted, sentenced. This is sufficiently important to justify the limitation of the fundamental rights under Articles 8, 9 and 10 and any discriminatory effects in relation to the exercise of those rights within Article 14.
17. The new offence is rationally connected to the objective since the criminalisation of conduct will deter those tempted to travel and ensure that prosecution will follow if they do so without reasonable excuse.
18. Criminalisation of entry into, or remaining in, designated areas is no more than necessary to accomplish the objective. The power to designate must be exercised rationally and proportionately. Any designation made must be kept under review and revoked to the extent that the basis for designation ceases to apply. Designation decisions must be approved by Parliament and would be amenable to judicial review.
19. Further, if a person has a reasonable excuse for entering, or remaining in, a designated area, they will be able to avail themselves of the defence. In practice, this will mean that in cases where a person legitimately enters or remains in, a designated area, the evidential limb of the Crown Prosecution Service's Full Code Test for bringing criminal proceedings will not be met. Prosecutors must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction against a suspect and must consider what the defence case may be, and how it is likely to affect the prospects of conviction. A case which does not pass the evidential stage must not proceed, no matter how serious or sensitive it may be. A prosecution will only be brought in those cases where the prosecutors are confident that it will be possible to disprove a defence beyond reasonable doubt (subject to the public interest test in bringing that prosecution also being met).

20. A fair balance has been struck between the rights of the individual and the interests of the community. The gravity of the risks posed to the public by United Kingdom nationals and residents who, without reasonable excuse, travel to parts of the world designated by the Secretary of State is such that it is proper to curtail the Article 8, 9 and 10 rights of those persons, and notwithstanding the potential for discriminatory outcomes prohibited by Article 14.
21. The offence is sufficiently prescribed by law since it will be made clear to members of the public by means of the designation regulations where in the world it is a criminal offence to enter or remain. This will mean members of the public are capable of regulating their conduct so as to remain on the right side of the law.
22. The offence is drafted in contemplation of the possibility that people may be en route to an area at the time it is designated, or may already be in it at such time. To prevent such people, who may be unaware of the designation, from immediately being liable, the offence provides a one month grace period for people to leave the area before the offence bites on them. This affords an opportunity for those people to be made aware of the offence; and if a person remains in the area beyond that period, the circumstances having been such that they could not reasonably have come to possess knowledge of the designation, the Crown Prosecution Service will have to consider whether the availability of the reasonable excuse defence precludes charges being brought. Moreover, it is likely that designations for the purposes of the offence will be made in respect of areas outside the UK which the Foreign and Commonwealth Office have already advised against travelling to. Such travel advice will be likely to highlight the possibility of future designations for the purpose of the offence so the public will be put on notice of the possibility of committing a criminal offence.
23. There is no requirement flowing from the Convention to prescribe those reasons for entering, or remaining in, a designated area which will constitute reasonable excuses; many criminal laws include reasonable excuse defences and leave the question of whether a reasonable excuse exists to be determined by the jury on the facts of each case.
24. In addition to the requirement for the CPS Full Code Test having to be met, the requirement for DPP and AG consent in section 117 of the 2000 Act provides a further safeguard against the prospects of arbitrary prosecutions.

Home Office
5 September 2018