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the voice of free expression

Free Speech & The Law

Counter-Terrorism

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Free speech & the law

This is part of a series of guides produced by Index on Censorship on the laws related to freedom of expression in England and Wales. They are intended to help understand the protections that exists for free speech and where the law currently permits restrictions.

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Table of contents

Introduction

Counter-terrorism laws seek to address the application of "violence for political ends". It is the "political ends" element that makes these laws interact so frequently with free expression rights, as the law tries to clamp down on expressions of sympathy with terrorist organisations and ideologies, as well as any resulting violence.

In the UK, there are a number of criminal laws that seek to prevent terrorist ideology from spreading, and which criminalise any steps that might lead to the commission of terrorist acts. Many of these laws are controversial since they can encroach heavily on people's rights to expression. It is these that we discuss in this guide.

While the courts in England and Wales have – to date – tended to find the rules set out under counter-terrorism legislation compatible with free expression rights (usually on the basis they are necessary for public safety, national security and the prevention of disorder or crime), they have expressed serious reservations along the way about the breadth and lack of clarity of counter-terrorism law. What's more, the new Counter-Terrorism and Border Security Act 2019 goes much further than previous acts in criminalising behaviour many would consider a step removed from "terrorism". For example, it criminalises the one-time viewing of information online that might be useful for a terrorist planning an attack. As Parliament's Joint Committee on Human Rights pointed out in 2018, this can easily criminalise "inquisitive or foolish minds". Expressing views supportive of a terrorist organisation, while aware of a risk of encouraging others to do so, is also a crime, punishable by up to 10 years in prison.

It is likely these new offences will be challenged in the courts on human rights grounds over the next few years. However, it's worth noting that UK courts do not have the power to overturn legislation. While they can make a declaration that a law is incompatible with human rights, they have to wait for parliament to change the law for it to stop having an effect. The same goes for any ruling from the European Court of Human Rights (ECtHR), which has the power to review UK laws against the standard of European human rights law. Even if that court rules against the UK, it cannot force the UK to comply – it has to wait for parliament to change the law.

What does international law say about counter-terrorism laws and free expression?

As well as being protected under Article 10 of the European Convention on Human Rights (ECHR), free expression is protected under Article 19 of the International Covenant on Civil and Political Rights (ICCPR), a treaty the UK ratified in 1976. It is similar to Article 10 of the ECHR, protecting the right to freedom of expression and the right to hold opinions. These rights can be restricted to protect national security, public order and the rights of others. The United Nations Human Rights Committee issued guidance on the interpretation of Article 19 in its General Comment No 34, adopted in 2011. On counter-terrorism laws, it said:

> States parties should ensure that counter-terrorism measures are compatible with paragraph 3 [of the International Covenant on Civil and Political Rights]. Such offences as "encouragement of terrorism" and "extremist activity" as well as offences of "praising", "glorifying", or "justifying" terrorism should be clearly defined to ensure that they do not lead to unnecessary or disproportionate interference with freedom of expression. Excessive restrictions on access to information must also be avoided. The media plays a crucial role in informing the public about acts of terrorism and its capacity to operate should not be unduly restricted. In this regard, journalists should not be penalised for carrying out their legitimate activities.

The General Principles of the 2016 Joint Declaration on Freedom of Expression and Countering Violent Extremism, written by the four inter-governmental mandate holders on freedom of expression, state:

> Everyone has the right to seek, receive and impart information and ideas of all kinds, especially on matters of public concern, including issues relating to violence and terrorism, as well as to comment on and criticise the manner in which states and politicians respond to these phenomena.
>
> Any restrictions on freedom of expression should comply with the standards for such restrictions recognised under international human rights law.

In his 2016 report, the United Nations Special Rapporteur on Counter-Terrorism and Human Rights said:

> [It] must remain clear that simply holding or peacefully expressing views that are considered "extreme" under any definition should never be criminalised, unless they are associated with violence or criminal activity. The peaceful pursuance of a political, or any other, agenda – even where that agenda is different from the objectives of the government and considered to be

> "extreme" – must be protected. Governments should counter ideas they disagree with, but should not seek to prevent non-violent ideas and opinions from being discussed.

The report added:

> The Human Rights Committee has highlighted that offences of "praising", "glorifying" or "justifying" terrorism must be clearly defined to ensure that they do not lead to unnecessary or disproportionate interferences with freedom of expression. The Secretary-General has deprecated the "troubling trend" of criminalising the glorification of terrorism, considering it to be an inappropriate restriction on expression.

Counter-terrorism offences explained

The UK's counter-terrorism laws come from a number of pieces of legislation, including the Terrorism Act 2000, the Terrorism Act 2006, the Counter-Terrorism and Security Act 2015 and the Counter-Terrorism and Border Security Act 2019. The centrepiece is the 2000 act, which gives a legal definition of terrorism. The definition is important, because if something classifies as an "act of terrorism" then many associated acts – including possessing any related object, planning the act or encouraging others to carry out the act – will all be criminal offences.

Both the criminal offences defined under the counter-terrorism legislation and the legal definition of terrorism itself are broad in scope. They are capable of criminalising a wide range of behaviour beyond what is widely understood to be "terrorist" in nature, including behaviour that many might consider legitimate. While the breadth of counter-terrorism law has been criticised by the courts, non-governmental organisations and legal experts, the government has repeatedly declined to narrow the scope of the laws. In its response to the Independent Reviewer of Terrorism Legislation's 2014 Report, which recommended narrowing the definition of terrorism, the government declined to make changes to the definition, stating:

> The complexity and fluidity of the terrorist threat, and its ability to evolve and diversify at great speed, demonstrate the importance of having a flexible statutory framework – with appropriate safeguards – to ensure that the law enforcement and intelligence agencies can continue to protect the public.

The legal definition of terrorism means you can be prosecuted for terrorist acts that take place outside the UK, and the definition does not discriminate between different types of political resistance. For example, terrorism that might be considered "for a just cause" will still amount to terrorism under the Terrorism Act 2000.

Case study: Mohammed Gul – Terrorism for a just cause?

Law student Mohammed Gul was convicted for sharing videos online of attacks by insurgents (including members of al-Qaeda and the Taliban) on coalition forces in Iraq and Afghanistan. Gul argued in his defence that what was shown were not "terrorist acts" – and he had therefore not disseminated a "terrorist publication" – because it depicted people fighting for a just cause. Specifically, he argued that the use of force against the coalition forces was justified as self-defence by people resisting the invasion of their country. His defence failed and Gul was found guilty of disseminating terrorist publications with intent to encourage the commission of acts of terrorism, contrary to the Terrorism Act 2006.

Case study: David Miranda – Protections for journalists

In the 2016 case David Miranda v Secretary of State for the Home Department, the Court of Appeal declared the Schedule 7 power to stop and question a person at a port or border area to be incompatible with Article 10 of the ECHR in relation to journalistic material, in that it was not subject to adequate safeguards against its arbitrary exercise. The case involved the stop and search of David Miranda, the spouse of journalist Glenn Greenwald, who was carrying encrypted material derived from data stolen from the US National Security Agency. While the Court of Appeal upheld the lawfulness of the detention, it ruled that the stop powers under Schedule 7 of the Terrorism Act lacked sufficient legal safeguards.
The court suggested that judicial oversight of the use of Schedule 7 powers might make the legislation compatible with Article 10 free expression rights.

Additionally, the Court of Appeal ruled that the publication of material can amount to an act of terrorism if it endangers a person's life or creates a serious risk to public safety, and the person publishing the material intends it to have that effect (or is reckless about its effect). The breadth of the terrorism definition means that those involved in applying the law have unusually wide discretion when it comes to using their powers – such as when to arrest someone at a border, for example.

The need for consent to prosecute

Some of the excesses of the counter-terrorism legislation may be tempered in England and Wales by the need for consent from the Director of Public Prosecutions (DPP) in order to prosecute someone. The decision on whether to prosecute is usually taken by a lawyer who works for the Crown Prosecution Service (a prosecutor). The prosecutor must be satisfied there is sufficient evidence to provide a realistic prospect of conviction against each suspect on each charge. The prosecutor must then determine whether it is in the public interest to proceed with the case. If there are public interest factors tending against prosecution which outweigh those tending in favour, the prosecution may not go ahead. These factors include the seriousness of the offence, the suspect's level of involvement, the harm done to the victim, and whether prosecution is a proportionate response bearing in mind the cost to the taxpayer.

While the need for the consent of the DPP provides a hurdle to prosecution, its effectiveness as a safeguard is questionable.

First, under the Prosecution of Offences Act 1985, the function of granting consent can be delegated to any Crown Prosecutor, which could create the risk of decisions being made unevenly.

Secondly, the Supreme Court has expressed concerns over the government's reliance on prosecutorial discretion to act as a "filtering mechanism" on terrorism prosecutions. For example, in the R v Gul 2013 case mentioned above it said that the legislature – whose job is to make law, and in public – is effectively delegating the decision as to whether or not a certain activity is terrorism to unelected appointees of the executive branch of government. This makes the law uncertain and can leave people unsure of whether their conduct is criminal.

Terrorism offences

The terrorism offences that are most likely to encroach on free expression are primarily contained in the Terrorism Act 2000 and the Terrorism Act 2006. They have been extended and amended by later acts.

Encouraging terrorism: the publication and dissemination offences

The Terrorism Act 2006 criminalises the publication and dissemination of material that could be seen as encouraging people to commit or instigate acts of terrorism. Prohibited material includes anything in written, audio-visual or image form. The maximum sentence for these offences was extended by the Counter-Terrorism and Border Security Act 2019 to 15 years' imprisonment plus a fine.

Encouragement of terrorism

Terrorism Act 2006 Section 1. Under Section 1, it is a criminal offence to publish any statement or communication that is "likely to be understood by a reasonable person as a direct or indirect encouragement or other inducement, to some or all of the members of the public to whom it is published, to the commission, preparation or instigation of acts of terrorism".

Case study: Encouragement of terrorism

In April 2019, 19-year-old neo-Nazi Michal Szewczuk pleaded guilty to encouraging terrorism for his role in producing propaganda for the UK-based wing of the neo-Nazi terrorist network the Atomwaffen Division. Via social media site Gab, Szewczuk said Prince Harry was a "race traitor" who should be shot, and he lionised Norwegian mass-murderer Anders Breivik.

Dissemination of terrorist publications

Terrorism Act 2006 Section 2. Under Section 2, it is a criminal offence to further disseminate the prohibited material set out in Section 1. The crime includes sharing information that would be "useful" to someone planning a terrorist act. The fact that the shared publication expresses some political or religious views (in addition to encouraging terrorism) is no defence.

For both the encouragement and dissemination offences, "indirect encouragement" includes "glorification", which is defined as including "any form of praise or celebration" of acts of terrorism (provided members of the public could reasonably be expected to infer that "what is being glorified… should be emulated by them"). It is not relevant whether or not someone was in fact encouraged by the statement to commit a terrorist act.

To be guilty of these crimes, a person must have intended to encourage terrorist acts or be reckless as to whether their behaviour actually encouraged terrorist acts. Committing a crime recklessly means knowing of a serious risk that is likely to result from one's behaviour, but behaving that way anyway. Where someone commits either of these crimes recklessly, they have a defence if they can show the material did not express their views, nor was it endorsed by them (and that was clear from all the circumstances).

Previously, the courts had been keen to emphasise that the publication and dissemination offences did not criminalise holding offensive views or personally supporting a terrorist cause. What was criminal, they said, was encouraging others to commit terrorism. For example, Mohammed Alamgir was jailed for six years for making speeches in Luton that the jury decided invited support for Isis. He had spoken of "the sun setting on the British Empire and the sun trying to rise on the Islamic State". The judge said Alamgir revealed in his speeches "opinions which were clearly supportive of terrorism and specifically of [Isis]". In his appeal, the Court of Appeal reiterated that Section 12 of the Terrorism Act "does not make it an offence to hold opinions or beliefs which are also held by members of a proscribed organisation, nor does the act make it an offence to express those opinions or beliefs to other people, or to share them, or to encourage others to share them. What Section 12 makes criminal is encouraging support from other people for a proscribed organisation".

However, the Counter-Terrorism and Border Security Act 2019 created a new offence of expressing opinions or beliefs which are supportive of terrorist organisations while being reckless as to whether the audience will be encouraged to support the organisation. Contrary to what the courts previously said, reckless expressions of support for terrorist organisations will now be criminalised under the new offence.

Information Collecting

Collecting information of a kind likely to be useful to a person committing or preparing an act of terrorism

Terrorism Act 2000 Section 58. Collecting, possessing or recording information that is likely to be useful to a person committing or preparing an act of terrorism is a criminal offence under Section 58 of the Terrorism Act 2000. For example, writing a document containing information on where to obtain explosives could fall within Section 58.

Remarkably, the Counter-Terrorism and Border Security Act 2019 extended the offence to cover merely viewing a document containing this type of information. This change happened despite warnings from the Independent Reviewer of Terrorism Legislation Max Hill QC – since appointed DPP in England and Wales – that the extension may breach human rights law. In his words:

> The process of criminalising the collection of information inevitably impinges on human rights in the shape of freedoms of thought and expression. The European Court of Human Rights has increasingly underlined that access to the internet is an important aspect of the freedom to receive and impart information and ideas. To date, the Section 58 offence has been upheld as

> ECHR-compliant by domestic courts and by even the ECtHR. However, as the boundaries of the criminal law are expanded, so are the impingements on thought and expression and so are the arguments about legal (un)certainty.

Parliament's Joint Committee on Human Rights also expressed the view that this clause presented an "unjustified interference with the right to receive information".

There is a defence under Section 58 of a "reasonable excuse" for an action. This includes actions taken for journalistic purposes or academic research. Equally, if someone is ignorant of the type of information contained in a document and had no reason to suspect its content could assist a terrorist, that can constitute a defence. However, with the offence having been extended to cover merely viewing this type of information, the Independent Reviewer of Terrorism Legislation has warned that this defence is insufficient. All the prosecution needs to show is that the suspect viewed material likely to aid a terrorist in the commission of a crime. The suspect is then burdened with showing why there was a reasonable excuse to do this. The Independent Reviewer thinks this is against the fundamental principle that the prosecution bears the burden of proof in criminal proceedings. In his words, the "bulk of the work [in proving the offence] must be done by the prosecution rather than inevitably requiring the defendant to explain some kind of reasonable excuse based on rights of free thought or expression".

Case study: Mohamed Kuwaldeen – Possession of documents containing information useful for terrorist purposes

In June 2019, Mohamed Kuwaldeen, 38, was found guilty of five counts of possession of documents containing information useful for terrorist purposes, contrary to Section 58 of the Terrorism Act 2000. In November 2018, Kuwaldeen was arrested by police who seized his laptop, a smartphone and a memory stick from his home. Investigators found a number of documents on these devices related to bomb-making. They also found publications detailing how to avoid police and security services. They considered these materials to be extreme or related to terrorism. When asked why he had the documents, Kuwaldeen, a Sri Lankan national, claimed that he was a journalist conducting research. However, his claims proved to be false.

Kath Barnes, the regional head of counter-terrorism policing, said: "Kuwaldeen tried to make out he merely had an interest in finding out more about terrorism for journalistic purposes, yet he possessed fraudulent credentials and had never published a journalistic article in his life.

"Whilst there's not anything to suggest that Kuwaldeen was preparing to commit acts of terrorism, the documents he had were dangerous terrorist documents, which could be used by someone to help plan and execute an attack."

Entering or remaining in a "designated area"

Terrorism Act 2000 Section 58B. The Counter-Terrorism and Border Security Act 2019 introduced the new offence of "entering or remaining in a designated area". The Home Secretary can deem any area outside the UK to be a "designated area" if he or she is satisfied that it is necessary to restrict UK nationals and residents from going there in order to protect members of the public (including people from other countries) from terrorism. There is a defence of having a "reasonable excuse" for being in the area, and if people are already in (or travelling to) the area on the day it becomes designated, they have a month to leave. Additionally, people may lawfully be in designated areas for providing humanitarian aid, appearing in court, carrying out government service for another country, working as a journalist, attending a relative's funeral, visiting a terminally-ill relative or caring for a relative who cannot look after themselves. The offence comes with a prison sentence of up to 10 years and a fine.

Although no declarations of designated areas have been issued to date, in May 2019 the then-Home Secretary, Sajid Javid, said he was working "to urgently review the case for exercising this power in relation to Syria, with a particular focus on Idlib and the north-east".

Terrorism by association – proscribed organisations offences

Membership of a proscribed organisation

Terrorism Act 2000 Section 11. Belonging to or professing to belong to a "proscribed organisation" is a criminal offence, carrying a maximum prison sentence of 10 years. Proscribed organisations are those the Home Secretary considers to be "concerned in terrorism". At the beginning of 2019, there were 74 international groups on this list, as well as 14 organisations in Northern Ireland.

Terrorist and proscribed organisations

A list of proscribed terrorist groups or organisations is maintained by the UK Government, available online here: https://www.gov.uk/government/publications/proscribed-terror-groups-or-organisations--2

Is Section 11 compatible with human rights law?

In the 2004 case of Sheldrake v DPP, Law Lord Tom Bingham conceded that Section 11 does "interfere with exercise of the right of free expression guaranteed by Article 10 of the [ECHR]". However, he considered that the "interference may be justified if it satisfies various conditions", including being directed at the legitimate aims of national security, public safety and the prevention of disorder or crime. He also found it was necessary in a democratic society and proportionate. Although he doubted the meaning of "profess", he found the law sufficiently clear to be compatible with human rights law.

Inviting and expressing support for a proscribed organisation

Inviting support for a terrorist organisation

Terrorism Act 2000 Section 12. It is a criminal offence to "invite support" for a proscribed organisation. (This excludes support by way of fundraising, which instead is covered in Section 15 of the act.) "Invite" has its ordinary meaning, including "making a request to someone to go somewhere or do something". As well as tangible and practical assistance, "support" can include intellectual support – agreement with, approval of, approbation of or endorsement of the proscribed organisation.

Expressing support for a terrorist organisation

Terrorism Act 2000 Section 12. The Counter-Terrorism and Border Security Act 2019 extended Section 12 of the Terrorist Act 2000 to make it a criminal offence to express an opinion or belief in support of a proscribed organisation while being reckless as to whether that would influence others to support the organisation. Numerous NGOs, including Index on Censorship, Article 19 and Liberty, have expressed concerns about how this offence disproportionately impacts the right to hold opinions under Article 10 of the ECHR. Parliament's Joint Committee on Human Rights said the offence outlawed what it is neither "necessary nor proportionate to criminalise, such as valid debates about proscription and de-proscription of organisations".

The new offence set out to counter the Court of Appeal's judgment in R v Choudhary and Rahman 2016, which had held that the Section 12 offence "does not prohibit the holding of opinions or beliefs supportive of a proscribed organisation; or the expression of those opinions or beliefs". The Court of Appeal expressed similar views in R v Alamgir & Ors 2018, which held that it was not an offence to hold opinions or beliefs which were also held by members of a proscribed organisation, nor to express those opinions or beliefs to other people. In that case, the court stated that it was not an offence "to want the establishment of an Islamic State or a Caliphate". However, it is likely now a crime under the new legislation to express this view knowing that it might encourage someone to support a proscribed organisation.

Under Section 12(2), a person will be guilty of a support offence for arranging a meeting of three or more people in the knowledge that it will support or further the activities of a proscribed organisation, or for addressing the meeting in order to encourage the activities of a proscribed organisation.

Dressing in such a way as to indicate membership or support of a proscribed organisation

Terrorism Act 2000 Section 13. Wearing clothing or displaying items that would tend to indicate that a person is a member of a proscribed organisation is a criminal offence under Section 13 of the Terrorism Act 2000. Additionally, publishing an image or video of the clothing or article in such a way as to indicate that the person is a member or supporter of a proscribed organisation is also a criminal offence. The maximum sentence is six months' imprisonment and an unlimited fine.

Police can seize an item of clothing and any other article if they reasonably suspect it will constitute evidence of this criminal offence and they consider it necessary to seize it to prevent it being concealed, lost, altered or destroyed. They have the power to require the suspect to remove clothing being worn, unless it is being worn next to the skin or immediately over underwear.

The proscribed organisation offences – a summary

Terrorism Act 2000	**Offence**
Section 11	Belonging – or professing to belong to – a proscribed organisation
Section 12(1)	Inviting (non-financial) support for a proscribed organisation
Section 12(1A)	Expressing an opinion or belief that is supportive of a proscribed organisation (while being reckless as to whether someone will be encouraged to support it)
Section 12(2)	Arranging a meeting that supports the activities of a proscribed organisation
Section 12(3)	Addressing a meeting that supports the activities of a proscribed organisation, with intent to encourage support or further its activities
Section 13(1)	Wearing an item of clothing, or displaying an article, in such a way as to arouse reasonable suspicion that you are a member or supporter of a proscribed organisation
Section 13(1)(A)	Publishing an image or video of an item of clothing or any other article, in such a way as to arouse reasonable suspicion that you are a member or supporter of a proscribed organisation

What has international law said recently about terrorism laws and freedom of expression?

In 2015, the United Nations Special Rapporteur on Freedom of Expression and representatives from other international organisations issued a Joint Declaration on Freedom of Expression and Responses to Conflict Situations. It stated:

> States should not respond to crisis situations by adopting additional restrictions on freedom of expression, except as strictly justified by the situation and international human rights law.
>
> Any restriction on freedom of expression must meet the three-part test under international human rights law, namely that it is provided for by law, it serves to protect a legitimate interest recognised under international law and it is necessary to protect that interest.
>
> All criminal restrictions on content – including those relating to hate speech, national security, public order and terrorism/extremism – should conform strictly to international standards, including by not providing special protection to officials and by not employing vague or unduly broad terms.
>
> In particular, states should refrain from applying restrictions relating to "terrorism" in an unduly broad manner. Criminal responsibility for expression relating to terrorism should be limited to those who incite others to terrorism; vague concepts such as "glorifying", "justifying" or "encouraging" terrorism should not be used.

In 2015 (Belek and Velioglu v Turkey), the ECtHR ruled that a criminal conviction imposed on the owners and editors of a daily newspaper for publishing an article containing a statement by an illegal armed organisation in Turkey was a violation of the editors' Article 10 free expression rights. The statement had called for a democratic solution to the Kurdish question and stressed the need for an amnesty law. In making its decision, the court stressed that – taken as a whole – the text had not called for violence, armed resistance or insurrection, and nor did it amount to hate speech. The court found the interference with Article 10 rights was not justified.

In 2010 (Gozel and Ozer v Turkey), the ECtHR ruled that Turkey had breached the Article 10 rights of editors who had been fined for publishing three articles that the domestic Turkish courts characterised as statements by a terrorist organisation. The Turkish law in question provided for the conviction of anyone who printed or published statements or leaflets by terrorist organisations. There was no requirement for domestic courts to carry out a textual or contextual examination of the writings. The court found that the automatic repression of such texts could not be reconciled with the Article 10 right to freedom of expression and was not necessary in a democratic society.

The Prevent duty

The Counter-Terrorism and Security Act 2015 placed a legal duty on certain bodies to "have due regard to the need to prevent people from being drawn into terrorism". This duty is one aspect of the government's Prevent strategy, within its wider counter-terrorism strategy, known as Contest. The aim of the Prevent strategy, according to the government, is to "reduce the threat to the UK from terrorism by stopping people becoming terrorists or supporting terrorism". The duty applies to bodies in the UK that have a role in protecting vulnerable people and/or national security, including schools, universities, prisons, National Health Service trusts and local authorities.

The Prevent guidance demands the bodies take a "risk-based approach". They must first understand the "risk of radicalisation" within their institutions, and form appropriate policies and procedures to deal with that risk, ensuring frontline and managerial staff are equipped to deal with the risk of radicalisation. This means developing training for staff members on the Prevent duty.

The guidance states that the Prevent programme must not include any "covert activity against people or communities". But it also states that information-sharing of personal data may be allowed in order, for example, to refer a person at risk of being drawn into terrorism to the appropriate support.

Many institutions will need to work with Home Office Prevent co-ordinator teams who will monitor the institutions' activities.

Universities

Universities have the difficult task of balancing their duties to ensure freedom of speech against their duty to prevent people from being drawn into terrorism. They are unique in the Prevent context in that they are under a statutory duty to "ensure that freedom of speech within the law is secured for members, students and employees of the establishment and for visiting speakers", under the Education Act 1986. Additionally, the Counter-Terrorism and Border Security Act 2019 specifies that higher-education providers "must have particular regard to the duty to ensure freedom of speech" when fulfilling their Prevent duty.

The potential conflict of these duties can be seen most vividly in the context of external speakers on campus. The 2015 Home Office guidance for higher-education providers says that universities must put in place policies and procedures for managing events held on its premises.

Case study: Salman Butt

Dr Salman Butt, the editor-in-chief of Islam21C, a website describing itself as "articulating Islam in the 21st century", brought a case challenging the Home Office's Prevent guidance. Butt had been a speaker at many schools and universities but in 2015 he was labelled in a press release issued by the Prime Minister's office as a hate speaker. The press release also stated that he was an example of the kind of person that universities should not permit to speak at events on campuses in order to comply with their Prevent duty. Butt denied that his views were extremist, and said he did not oppose fundamental British values or support the activities of any terrorist or extremist groups. He argued he had suffered as a result of the press release and the Prevent guidance. He received far fewer speaking invitations than previous trends suggested he should, and he turned down speaking opportunities to save institutions the trouble of being associated with a "hate speaker".

Butt argued that the general Prevent guidance, and the higher-education guidance in particular, contravened the Home Secretary's duty to ensure free speech in universities and other higher-education institutions. In particular he said that Paragraph 11 of the guidance went too far and skewed the balance too much in favour of the Prevent duty rather than free speech. Paragraph 11 reads:

> [When] deciding whether or not to host a particular speaker, [universities] should consider carefully whether the views being expressed or likely to be expressed, constitute extremist views that risk drawing people into terrorism or are shared by terrorist groups. In the circumstances the event should not be allowed to proceed except where [universities] are entirely convinced that such a risk can be fully mitigated without cancellation of the event. This includes ensuring that where any event is being allowed to proceed, speakers with extremist views that could draw people into terrorism are challenged with opposing views as part of the same event, rather than in a separate forum. Where [universities] are in any doubt that the risk cannot be fully mitigated they should exercise caution and not allow the event to proceed.

The court agreed with Butt. It found Paragraph 11 insufficiently balanced and accurate so as to inform decision-makers of their competing duties to help them come to a proper conclusion. The court did not attempt to redraft Paragraph 11 but said a redraft accurately reflecting the balancing of duties would be achievable for the government.

Case study: Students not suspects

Students Not Suspects, which is part of the National Union of Students, argues that Prevent discriminates against students who come from black and minority ethnic backgrounds. The group believes that young Muslims who are subjected to Islamophobic abuse on campus are further alienated as the Prevent duty results in the manifestation of their beliefs (i.e. dress, religious practice etc.) being inappropriately reported to the police (Prevent has a referral process called Channel).

In April 2018, 30 students from the University of Westminster Students Not Suspects group marched from the university's Marylebone Campus to the Regent Street Campus, in protest at the way that Prevent was being implemented. They occupied the Regent Street building's lobby and refused to leave until their demands were met.

Among their complaints were that CCTV had been installed in prayer rooms; events organised by Islamic and Palestinian societies were often postponed at the last minute; and the external speaker policy was too restrictive. In response to a Freedom of Information request, the university stated that "cameras were installed in most interfaith rooms across all campuses in 2015…Senior management made the decision to install these cameras in response to a number of mostly minor incidents occurring in or near the rooms". The university listed the protection of staff, students and visitors and the detection of crime as the reasons for the installation.

The university has been the subject of heavy media scrutiny on the fulfilment of its Prevent duties since it transpired that the Isis militant known as Jihadi John completed a computing degree there in 2009. A 2015 report by the Henry Jackson Society, a think-tank seeking to combat extremism, listed Westminster as the university holding the highest number of on-campus events featuring extremist or intolerant speeches between 2012 and 2014. As a result, the university's external speaker policy became more stringent, and students complained it was unclear. For example, it was not obvious which decisions could be taken by the student union and which could be taken by university staff. The opaqueness of the policy led students to become suspicious and suspect it was clamping down unfairly on free-expression rights and discriminating against certain student groups.

After the action by Students Not Suspects, the university sought to clarify and simplify its external speaker policy, which is now primarily run by the student union. Its external events booking process requires societies wishing to book an external speaker for an on-campus event to make a request 14 days in advance. The union will classify speakers as low risk or mid-to-high risk. While low-risk speakers can be approved by the student union, mid-to-high-risk speakers are referred to a "speaker approval committee", which comprises student union representatives and university staff. In recent years, Westminster reportedly has not invited any extreme speakers on to campus, meaning that no event has had to be put forward to the Prevent co-ordinator (a Home Office employee who works with universities to enforce Prevent).

Schools

The Prevent guidance for schools states that early-years providers should focus on children's "personal, social, and emotional development" through ensuring "children learn right from wrong, mix and share with other children and value other's views, know about similarities and differences between themselves and others, and challenge negative attitudes and stereotypes". It also states that the Prevent duty extends to working to stop children being drawn into "non-violent extremism, which can create an atmosphere conducive to terrorism and can popularise views terrorists seek to exploit".

It adds:

> Schools should be safe spaces in which children and young people can understand and discuss sensitive topics, including terrorism and the extremist ideas that are part of terrorist ideology, and learn how to challenge these ideas. The Prevent duty is not intended to limit discussion of these issues. Schools should, however, be mindful of their existing duties to forbid political indoctrination and secure a balanced representation of political issues.

Powers of police in relation to terrorism

While the police have a range of general powers to stop, search and arrest individuals to investigate crimes, they also have a raft of specific powers under terrorism legislation. There are a large number of these, and the most pertinent are set out here.

Terrorism Specific Police Powers

Terrorism Act 2000	Powers
Section 41	A police officer may **arrest** without a warrant any person he reasonably suspects to be a terrorist. That is, anyone who is or has been concerned in the commission, preparation or instigation of acts of terrorism.
Section 43(2)	A police officer may **search** a person arrested under Section 41 above to discover whether that person has in their possession anything which may constitute evidence they are a terrorist.
Section 42	A magistrate may issue a warrant authorising a police officer to enter and search premises if they consider the police officer has reasonable grounds for suspecting a terrorist will be found there. The search is for the purpose of arrest.
Section 43(1)	The police have the power to **stop and search** a person reasonably suspected to be a terrorist to discover whether that person has in their possession anything which may constitute evidence they are a terrorist.
Section 43(4)	The police can **seize** and retain anything they discover from a Section 43(1) or 43(2) search if they reasonably suspect it constitutes evidence of the suspect being a terrorist.
Section 43A	The police have the power to **stop and search** a vehicle which is reasonably suspected of being used for terrorism, for evidence it is being used for such purposes. They may seize anything discovered in the search that they reasonably suspect constitutes evidence the vehicle is concerned in terrorism.
Section 47A	A police officer can **stop and search** a person or a vehicle (or anyone in the vehicle) if they reasonably suspect that an act of terrorism will take place and the stop or search is necessary to prevent the act. This power that can only be used in limited circumstances since it does not require reasonable suspicion that a person is or has been engaged in a crime.
Section 28	A judge may issue a warrant authorising the police to **enter and search premises and seize** any articles that are likely to be covered by the Section 2 Terrorism Act 2006 dissemination offence. Those are publications likely to be understood as encouraging terrorism or useful for those preparing acts of terrorism.
Schedule 7	An examining officer (including police, immigration officers and customs officers) can **question** a person at a port or in a border area to determine whether that person is or has been concerned in the commission, preparation or instigation of acts of terrorism. The officer does not need to suspect that the person has been concerned in acts of terrorism to exercise their powers. The person being questioned under Schedule 7 must **hand over any information** requested by the officer and declare to the officer whether or not he has such information in his possession. The officer may also search the person and any items on his person.

Questions & answers

In the Miranda case, the Court of Appeal found that "publishing" material could amount to a terrorist act. What kind of articles might be considered "terrorist acts"?

For a publication to be a terrorist act, the court said it would have to endanger the life of someone other than the person publishing the material, or create a serious risk to the health or safety of the public, and the publisher would have to intend it to have that effect (or be reckless as to whether it did or not). It would also have to be designed to influence the government or intimidate the public, and be published to advance a political, religious, racial or ideological cause.

In theory, this could capture a wide range of publications, including a blog about the merits of anti-vaxxing, designed to influence government policy or to intimidate the public about vaccinations.

What happens if something is defined as "terrorism"?

Because many offences under the terrorism legislation are defined by reference to the legal definition of terrorism, if something is defined as "terrorism" then so are many associated acts. Taking the example of the anti-vaxxing blog, if it were deemed to be "terrorist" in nature, the following would be criminal offences under the terrorism legislation:

(i) Possessing any article in connection with the blog or any document likely to be useful to people publishing material of that kind – for example, research on the anti-vaxx movement. This is punishable by up to 15 years in prison.

(ii) Encouraging the writing of similar articles or sharing the article with others with a view to encouraging them to write anti-vaxx articles. This is punishable by up to seven years in prison.

(iii) Undertaking any act preparatory to publication – such as researching, writing and discussing the article. This is punishable by life imprisonment.

Bringing the activities of journalists and bloggers within the ambit of "terrorism" has been criticised by, amongst others, former Independent Reviewer of Terrorism Legislation Lord Anderson QC as encouraging the "chilling effect" that can deter legitimate enquiry in fields related to the publication. Lord Anderson also said that making people whom no sensible person would think of as terrorists subject to terrorism laws risked destroying the trust these special powers depended on for acceptance by the public.

What general powers do the police have to stop, search and arrest?

Stop, search, seizure

Under the Police and Criminal Evidence (Pace) Act 1984, the police have a wide range of powers to stop, search and arrest someone in connection with the investigation of a criminal offence. They also have specific powers they can use in relation to the investigation of particular crimes, such as under the Terrorism Act 2000 and the Obscene Publications Act 1959.

Stop and search before arrest

Under Section 1 of Pace, a police officer can stop and search individuals and vehicles before arrest if they have "reasonable grounds" for suspecting they will find stolen or prohibited articles, including weapons, certain drugs and items used for committing crimes (such as a crowbar for a burglary). The police guidance on this power (known as Code A) requires that stop and search powers are used "fairly, responsibly, with respect for those being searched and without unlawful discrimination". "Reasonable suspicion" means a police officer must have both actual suspicion the person is in possession of a stolen or prohibited article (the subjective test) and reasonable grounds for so believing (the objective test). The powers under Section 1 cannot be used inside a person's home or in any other dwelling without that person's consent. It can take place only in a "public place or a place to which the public has access" or in a garden or yard attached to a house if the officer reasonably believes the suspect does not live there and does not have permission to be on the land. A police officer can also stop and search a person if they consider it necessary to stop an incident of serious violence from occurring under Section 60 of the Criminal Justice and Public Order Act 1994.

If the police conduct an unlawful stop and search, that is not in itself a crime or a civil wrong. However, it may lead to disciplinary proceedings, and it may make any evidence obtained as a result inadmissible in a criminal trial (since it may have an "adverse effect on the fairness of the proceedings" under Section 78 of Pace).

Arrest

An arrest usually occurs in the course of a criminal investigation when the police have legal and factual grounds to justify depriving the suspect of their liberty. The police have both common law (judge-made law) and statutory (law made by Parliament) powers of arrest. For example, under common law the police can arrest a suspect for breach of the peace. They can also arrest someone by executing an arrest warrant issued by a magistrate. Under Section 24 of Pace, the police can arrest someone without a warrant if they are about to commit an offence or the police have reasonable grounds to suspect they are about to commit an offence. Reasonable force can be used when making an arrest or when preventing a criminal offence, under Section 3(1) of the Criminal Law Act 1967.

Unlawful Arrests

Failure to comply with the correct procedure renders an arrest unlawful. This could lead to a claim against the police for unlawful arrest or disciplinary proceedings. The

admissibility of the evidence obtained as a result of the unlawful arrest may be challenged under Section 78 of Pace.

The Power to Enter and Search

Under Section 8 of Pace, a magistrate may issue a warrant to search premises if a serious (indictable) offence has been committed and evidence relating to the crime is likely to be found in the premises. Under Section 19 of the act, police may seize anything that is on the premises if he/she has reasonable grounds for believing that it has been obtained in consequence of, or is evidence of an offence, and it is necessary to seize it to prevent it being concealed, lost, altered or destroyed. If an officer considers information stored in any electronic form and accessible in the premises could be used in evidence, they may require the information to be produced in a form which can be taken away and in which it is visible and legible. The following types of material cannot be seized – items subject to legal professional privilege (that is, confidential communications between the accused and their lawyer), personal records such as medical records, and material acquired by a person in the course of their trade, business or profession, held under an undertaking to keep it confidential.

Under Section 17 of Pace, a police officer may also enter and search any premises for the purposes of executing a warrant of arrest, arresting a person for an indictable offence, arresting a person for certain non-indictable offences, recapturing anyone who is unlawfully at large, and saving life or limb or preventing serious damage to property (amongst others).

What do I do if I am arrested for an offence?

After being arrested, a person will normally be taken to a police station for questioning. The suspect must be told of their right to have someone informed of their arrest, the right to consult privately with a solicitor and that free independent legal advice is available (regardless of individual financial circumstances), and their right to consult the police's Codes of Practice. A written notice setting out these rights must be given to the suspect, which details certain other rights. Police officers should not say anything that could dissuade the suspect from obtaining legal advice. The suspect is entitled to consult with the duty solicitor. Duty solicitors are on call 24 hours a day at police stations up and down the country. They are there to provide legal advice to people who do not have access to another solicitor and ensure the rights of people held by the police are observed.

If you find yourself in this situation, it is a good idea to consult in private with a solicitor. They can advise you on what next steps to take. The Law Society of England and Wales' website has a search facility where you can find criminal defence solicitors located near your postcode. See their website here: https://solicitors.lawsociety.org.uk/. The Criminal Law Solicitors' Association has a similar search option. It is a good sign that the solicitor you use is a member of the Law Society's Criminal Litigation Accreditation Scheme as this means they have and maintain a high level of skill and experience in the area of criminal litigation, as determined by the Law Society. See who is a member here: https://www.lawsociety.org.uk/support-services/accreditation/criminal-litigation/.

I have a legitimate reason for what I'm doing, but I'm worried I could be prosecuted for it. What should I do?

If you think your conduct could fall under a criminal offence, but you have a legitimate reason for doing it, it is a good idea to document your reasons for doing it. For example, if you are a journalist who needs to access materials relating to bomb-making for research (which could be an offence under Section 58 of the Terrorism Act 2000), it would be a good idea to take contemporaneous notes of your reasons for accessing the materials. This could be by emailing yourself your decision to access the materials or writing your reasons in a journal or Word document. Emails are helpful as they are time-stamped and it is a good idea to date any entry you make in a journal or document. The reason for making notes like this is to build up evidence in favour of your defence, in case the police or a prosecutor ever decided to pursue the case.

Where can I find out more information about counter-terrorism law?

Students Not Suspects:
www.nusconnect.org.uk/campaigns/preventing-prevent-we-are-students-not-suspects.

Liberty has a section on its website dedicated to the UK's counter-terrorism laws:
www.libertyhumanrights.org.uk/human-rights/countering-terrorism/overview-terrorism-legislation.

It also has a briefing on the Counter-Terrorism and Border Security Bill:
www.libertyhumanrights.org.uk/sites/default/files/Liberty%27s%20Report%20Stage%20Briefing%20on%20the%20Counter-Terrorism%20and%20Border%20Security%20Bill%20-%20Sep%202018.pdf

The ECtHR has produced a factsheet called Terrorism and the European Court of Human Rights