'Temporary Exclusion Orders' and their Implications for the United Kingdom's International Legal Obligations

by

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Introduction

1. The Government's proposals to introduce a system of 'temporary exclusion orders' (TEOs) to be applied to British citizens raise a number of international legal issues, including (a) the responsibility of the State to its citizens; (b) the responsibility of the State to other States; and (c) the responsibility of the State to the international community of States at large when combatting terrorism.[1]

1. Responsibility to citizens

1.1 Nationality and jurisdiction

2. The citizen's right to return to his or her own country and the State's duty to admit its citizens has been described in earlier contributions to recent debate on the limits to executive and legislative competence and will not be repeated.[2] For present purposes, it suffices to recall the simple and straightforward statement of the law expressed in the words of Sir Robert Jennings and Sir Arthur Watts:

> 'Nationality is the principal link between individuals and international law. The right is that of protection over its nationals abroad... The duty is that of receiving on its territory such of its nationals as are not allowed to remain on the territory of other states...'[3]

3. It is satisfying to note that the Government accepts the United Kingdom's legal responsibility to admit its citizens on deportation, as described in earlier papers.[4] It is nonetheless apparent that little or no attention has apparently been given to

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[1] Exclusion orders have been used against UK citizens in the recent past, limiting freedom of movement between Great Britain and Northern Ireland from the 1970s to the 1990s; however, these orders were an internal matter, applied to citizens *within* the United Kingdom, and did not directly engage the interests of other States.

[2] The following papers and submissions by the present author have been provided to the Joint Committee on Human Rights: 'Mr Al-Jedda, Deprivation of Citizenship, and International Law', 14 February 2014; 'Deprivation of Citizenship resulting in Statelessness and its Implications in International Law', 12 March 2014; 'Deprivation of Citizenship resulting in Statelessness and its Implications in International Law: Further Comments', 6 April 2014; 'Deprivation of Citizenship, Statelessness, and International Law: More Authority (if it were needed...)', 5 May 2014.

[3] R. Y. Jennings & A. Watts, eds., *Oppenheim's International Law*, 9th edn., London: Longman, 1991, 857-9, §379.

[4] See 'Deprivation of Citizenship, 12 March 2014, §§23-4 (above, note 2); 'Deprivation of Citizenship: More Authority', 5 May 2014, §§4-6 (above, note 2); and for the Government's view now, see 'Counter Terrorism and Security Bill – European Convention on Human Rights. Memorandum by the Home Office', (s.d.), para. 9.

the only viable way by which citizens might be excluded from the UK, that is, through agreements with potential 'host' States. Such agreements would not remedy the most fundamental legal objections to the practice, but consideration of their possible scope will clarify the difficulties to be faced by the UK and other States in trying to bring the practice within the bounds of international law; these aspects are considered further below in Section 2.

1.2 The European Convention on Human Rights

4. Given what has been said in earlier debates, given the jurisprudence of the International Court of Justice and the European Court of Human Rights, and given the clear exposition of the law in the works of leading British international lawyers such as Sir Robert Jennings, Sir Arthur Watts and Sir Ian Brownlie, it is somewhat surprising, to say the least, to find the Home Office pretending that a decision to exclude British citizens from their country does not directly engage their European Convention rights, 'because they are out of the jurisdiction'.[5]

5. On the point of general international law, the Home Office Memorandum on the Counter Terrorism and Security Bill (the 'Counter Terrorism Memorandum') simply repeats the same error as it made in its earlier contribution on deprivation of citizenship.[6] It remains incorrect, and one needs to do little more than follow the index of *Oppenheim* (sc. 'Jurisdiction, citizens abroad') to learn that 'nationals travelling abroad' remain under the State's 'personal authority';[7] that 'a state's nationals would appear to be within the state's jurisdiction for the purpose of its obligations to ensure human rights to all persons within its jurisdiction'.[8] Nothing has changed in international law since this treatise was published some twenty-two years ago, in 1992; on the contrary, the State's duties towards its citizens have been clarified and consolidated.

6. The Counter Terrorism Memorandum states that the Home Office, 'considers that the new provisions are capable of being exercised compatibly with the

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[5] 'Immigration Bill. European Convention on Human Rights. Supplementary Memorandum by the Home Office', 29 January 2014, paras. 9-17.

[6] Ibid.

[7] R. Y. Jennings & A. Watts, eds., *Oppenheim's International Law*, 9th edn., London: Longman, 1992, 463, §138; also, 384-5, §118.

[8] Ibid., 462, §138, n. 1; also 1016, §440, n. 30; 1020; §442, n. 5.

ECHR'. Its argument, however, is based on a fundamental misunderstanding of the role of nationality and its link to jurisdiction, as summarised above and as described in greater detail in earlier submissions. As noted in paragraph 26 of my Opinion of 12 March 2014 in connection with deprivation of citizenship:

> 'It is certainly wishful legal thinking to suppose that a person's ECHR rights can be annihilated simply by depriving that person of citizenship while he or she is abroad. Even a little logic suffices to show that the act of deprivation only has meaning if it is directed at someone who is *within* the jurisdiction of the State. A citizen is manifestly someone subject to and within the jurisdiction of the State, and the purported act of deprivation is intended precisely to affect his or rights. The link to the protection of the Convention is therefore solid enough for the purposes of supervisory review, with regard not only to private life considerations, but also to questions of inhuman or degrading treatment, among others.'

7. The same principle of responsibility would apply to limitations on citizenship rights falling short of deprivation. It is somewhat curious, to say the least, to find the Home Office citing a European Court of Human Rights judgment dealing with a Pakistani citizen in Pakistan in support of its denial of responsibility towards British citizens, wherever they may be. Even in the paragraph cited by the Home Office (§24), the European Court of Human Rights emphasises that its ruling applies, 'in this case...' In the next following paragraph (§25), it goes on:

> 'A State's jurisdictional competence under Article 1 is primarily territorial. However, the Court has recognised two principal exceptions to this principle, namely circumstances of "State agent authority and control" and "effective control over an area" (see *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, §§ 130-141, ECHR 2011). In the present case, where the applicant has returned voluntarily to Pakistan, neither of the two principal exceptions to territorial jurisdiction apply. This is particularly so when he does not complain about the acts of British diplomatic and consular agents in Pakistan and when he remains free to go about his life in the country without any control by agents of the United Kingdom. He is in a different position, both to the applicants in *Al-Saddoon and Mufdhi* (who were in British detention in Iraq and thus, until their handover to the Iraqi authorities, were under British authority and control) and to the

> individuals in *Al-Skeini and Others* (who had been killed in the course of security operations conduct by British soldiers in South East Iraq).'[9]

8. None of these cases concerned British citizens. It is manifestly clear from what has been cited above that the issue of nationality can be and is determinative; in and of itself, it is sufficient to establish that jurisdictional link which was absent in the *Khan* case.

9. Moreover, while the Counter Terrorism Memorandum appears to recognize that duties exist with regard to citizens (and, indeed, with regard to non-nationals), the Home Office Impact Assessment on temporary exclusion orders clearly does not.[10] For example, already in paragraph 2 of the Counter Terrorism Memorandum, the Home Office acknowledges that the exercise of the power to seize travel documents, 'could effectively render the person destitute, constituting inhumane treatment'.[11] Here, it seems to recall the fate of a predecessor government's policy to impose destitution on certain categories of asylum seekers (the notorious section 55 of the Nationality, Immigration and Asylum Act 2002). It rapidly became clear at the time that the implementation of this policy would all too often cross the Article 3 ECHR threshold and lead to inhumane and degrading treatment.[12] The general implications of this jurisprudence are significant. The Home Office Impact Assessment, however, seems to have missed this point, insofar as it asserts that, while a British Embassy 'may provide limited, urgent assistance to an individual subject to a TEO', there is 'no legal obligation' to do so.[13]

10. If there is an obligation to protect asylum seekers from destitution, then such duty can hardly be denied with regard to British citizens, who are within jurisdiction by reason of their nationality alone. The applicability of the European Convention on Human Rights to the activities of diplomatic and

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[9] *Khan v United Kingdom*, Appl. no. 11987/11, European Court of Human Rights, Fourth Section, 28 January 2014, §25.

[10] 'Counter-Terrorism and Security Bill – Temporary Exclusion Orders', Impact Assessment: IA No: HO0144, 21 November 2014 (the 'Home Office Impact Assessment').

[11] Home Office, Counter Terrorism Memorandum, para. 3.

[12] *Q and Others v. Secretary of State for the Home Department* [2003] EWHC 195 (Admin); [2004] QB 36 (Court of Appeal);

[13] Home Office Impact Assessment, 5.

consular officials is expressly recognized as an exception to the primarily but not exclusively territorial jurisdiction of the State, as the European Court of Human Rights acknowledged in *Banković*.[14] On the basis of United Kingdom and ECHR practice, it can be readily appreciated that if a British Embassy declined to assist an abandoned citizen in circumstances resulting in or raising a serious risk of destitution, then the courts would have little hesitation in attributing liability.

2. Responsibility to other States

11. There is no justification in international law for the exclusion, even temporarily, of British citizens from the United Kingdom. So far as such exclusion engages the legal interests of other States, there may be some scope for agreements with the UK. However, no such agreement can avoid the UK's international legal obligations towards its citizens – they continue and cannot be outsourced.

12. The unstated premise of 'host State' assistance is, necessarily, the existence of an agreement between the United Kingdom and any such State. The Home Office Impact Assessment on temporary exclusion orders[15] refers briefly and on just a few occasions to 'host' States, to describe those which will be expected to carry the burden of the TEO policy, including the risks which presumably accompany harbouring individuals suspected of terrorist associations. The Impact Assessment refers repeatedly to the risk which terrorism might pose to the United Kingdom, but not at all to any such risk to 'host' States. Moreover, apart from one reference to discussions with France in relation to juxtaposed controls, neither this document nor any other mentions the necessity for agreements, or considers the elements which might well be considered essential.

13. For example, no State has the right unilaterally to dispatch police officers or security service personnel to other States for the purpose of investigating alleged offences or questioning suspects. This can only be undertaken with the express agreement of the State in question.[16]

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[14] *Banković v Belgium and others* [2001] BHRC 435, §73: 'cases involving the activities... of diplomatic or consular officials...'

[15] Home Office Impact Assessment.

[16] Once again, the law is stated clearly in *Oppenheim*. 'A state is not allowed to send... its police forces into or through foreign territory... or to carry out official investigations on foreign territory or to let its agents conduct clandestine operations there.., without permission' R. Y. Jennings & A. Watts, eds., *Oppenheim's International Law*, 9th edn., London: Longman, 1992, 385-90, §119, 'Violations of independence

14. In addition, it is reasonable to expect that an agreement with another State regarding British citizens denied return to their country will deal with the allocation of responsibility for, among others, accommodation, access to medical services, welfare, counselling and support.

15. The possibility of *detention* in a host State has been mentioned, for example, at the request of the United Kingdom.[17] The costs of such detention are not included in the Home Office Impact Assessment, but they would certainly fall on the UK. Moreover, just as Australia is responsible for the manner in which refugees and asylum seekers are treated in Nauru and Papua New Guinea, where they have been transferred after interception or rescue at sea and in return for substantial subvention, so will the UK be liable for any mistreatment, denial or violation of the human rights of its citizens who may be detained in third countries, either at the request of the UK, or because they are in an irregular situation following 'cancellation' of their British passports.[18]

16. The host State, in turn, would be jointly liable with the UK for violations by the latter of the detainee's substantive and procedural entitlements. At the least, as the European Court of Human Rights held in *El Masri v The Former Yugoslav Republic of Macedonia*, the host State, if party to the European Convention, will have very distinct responsibilities to ensure that the conduct of UK agents and officials within its territory conforms with the ECHR.[19]

17. In addition to doubts about shouldering the material costs of 'hosting' an excluded British citizen, the State concerned may also be wary of the possible

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and territorial and personal authority'.

[17] See Home Office Impact Assessment, 5.

[18] It cannot be assumed that, even within the European Union, conditions of detention will necessarily conform to ECHR standards; see, for example, *A. E. v Greece*, Appl. no. 46673/10, European Court of Human Rights, First Section, 27 November 2014; *Efremidze v Greece*, Appl. no. 33225/08, European Court of Human Rights, First Section, 21 June 2011. On the basis of the information regarding proposed practice presently available, it cannot be excluded that British citizens will be abandoned and denied travel possibilities, not in a 'liberal' host State ready to assume the necessary responsibilities, but in a territory in turmoil, where they may be at daily risk, not just of destitution, but of danger to life and limb.

[19] *El Masri v The Former Yugoslav Republic of Macedonia*, Appl. no. 39360/09, European Court of Human Rights, Grand Chamber, 13 December 2012. Recent and ongoing litigation in the UK may well induce a measure of caution among potential host States; cf. *Belhaj v Straw* [2014] EWCA Civ 1394; *Rahmatullah v Ministry of Defence* [2014] EWHC 3846; on liability in damages for detention, see *Iraqi Civilians v Ministry of Defence* [2014] EWHC 3686.

compromise to its own compliance with international law that could follow from ceding to the UK's request that it accommodate a British citizen allegedly involved in or associated with terrorist activities. The Home Office Impact Assessment make frequent reference to the risks which terrorist activity may pose to the UK, but none at all to the risk which other countries may face consequential on the UK's refusal to accept responsibility for, or to admit, its citizens.

3. Responsibility to the international community of States when combatting terrorism

18. The threat posed to the international community of States by terrorism and terrorist acts clearly demands an international and cooperative approach, rather than unilateral measures. The extent of the United Kingdom's commitment to such action was highlighted in paragraphs 30-36 of my Opinion of 12 March 2014.

19. In short, the United Kingdom is party to many treaties dealing with 'terrorist acts', which it undertakes to criminalize, to make punishable by appropriate penalties, and to establish jurisdiction, for example, when the alleged offender is a national.[20] The United Kingdom is also party to the 1998 Statute of the International Criminal Court, the Preamble to which affirms that, 'the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation', and recalls that, 'it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes...'

20. The United Kingdom's obligations also include taking 'appropriate measures' to ensure the *presence* of the offender or alleged offender for the purpose of prosecution or extradition.[21] If it does not extradite that person, then 'without

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[20] See, for example, the 1979 International Convention against the Taking of Hostages, the 1997 International Convention for the Suppression of Terrorist Bombings, and the 2000 International Convention for the Suppression of the Financing of Terrorism.

[21] Article 9(2), 2000 Terrorism Financing Convention; article 7(2), 1997 Terrorist Bombings Convention; article 6(1), 1979 Hostages Convention.

exception whatsoever', it must submit the case without undue delay to its competent authorities for the purpose of prosecution...'[22]

21. Comparable provisions of the 1984 Convention against Torture were considered by the International Court of Justice in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*.[23] The Court referred expressly to, 'the common interest in compliance' with the Convention, which entitles each State party to make a claim concerning alleged breaches by another State party,[24] and emphasised the 'preventive and deterrent character' of the obligation to criminalize and establish jurisdiction.[25] It added that the State's obligations, 'taken as a whole, may be regarded as elements of a single conventional mechanism aimed at preventing suspects from escaping the consequences of their criminal responsibility, if proven.'[26] Moreover, while extradition is an option, '... *prosecution is an international obligation* under the Convention, the violation of which is a wrongful act engaging the responsibility of the State.'[27] By failing to comply with its obligations under the Convention, Senegal had engaged its international responsibility.

22. In much the same way, the proposed scheme of TEOs appears likely to lead to a failure on the part of the UK to fulfil, effectively and in good faith, many of its obligations in relation to those who may be alleged to have committed, or otherwise to have been involved in, terrorist-related acts, and to seek to off-load them unilaterally.

23. In this context, it should be recalled that Security Council resolution 2178 (2014), adopted unanimously on 24 September 2014 and with wide support among other member States, emphasises that any measures which States may adopt to

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[22] Article 10, 2000 Terrorism Financing Convention; article 8, 1997 Terrorist Bombings Convention; article 8(1), 1979 Hostages Convention.

[23] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* [2012] ICJ *Reports*.

[24] Ibid., para. 69 (specifically with reference to articles 6(2) and 7(1) of the Convention).

[25] Ibid., para. 75.

[26] Ibid., para. 91.

[27] Ibid., para. 95 (emphasis supplied). See also para. 120: 'The purpose of these treaty provisions is to prevent alleged perpetrators of acts of torture from going unpunished, by ensuring that they cannot find refuge in any State party.' Clearly, each of the other conventions mentioned above has a similar purpose.

deal with 'foreign terrorist fighters' must comply with *all their obligations under international law*,[28] including therefore its obligations to investigate, to ensure the presence of alleged offenders, and to prosecute.

24. In calling on States to meet the threat, the Security Council stresses not only preventive and criminal sanctions, but also addressing the underlying factors and implementing 'rehabilitation and reintegration strategies'. It affirms the *obligation* of States to prevent the movement of terrorists by effective border and passport controls, and encourages the use of 'evidence-based traveller risk assessment, but 'without resorting to profiling based on stereotypes founded on grounds of discrimination prohibited by international law'.[29]

25. What this resolution definitely does not do is to authorise or to require that States deny their citizens their right to return. The resolution focuses on travel *from* the State of nationality or residence to another State for the purpose of engaging in terrorist acts.[30] Nowhere does it suggest that Member States may rid themselves of or deny entry to their own citizens, either permanently or temporarily, for this would be manifestly incompatible with their obligations under international law,[31] and with their duty to cooperate with other States to address the threat posed by foreign terrorist fighters.[32]

Conclusions

26. In my view, the proposal for a system of TEOs to be applied to British citizens raises a host of insuperable legal and practical problems.

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[28] SC res. 2178 (2014), 24 September 2014, seventh preambular paragraph.

[29] Ibid., operative paragraph 2.

[30] Ibid., operative paragraph 6.

[31] 'Exile' is expressly prohibited by Article 9 of the 1948 Universal Declaration of Human Rights; in addition, Article 12(4) of the 1966 International Covenant on Civil and Political Rights declares that, 'No one shall be arbitrarily deprived of the right to enter his own country'. The word 'exile' may appear excessive, but the circumstances in which return may be denied and the sanction for unauthorised return (imprisonment) fit well with the historical sense of exile recorded in the Oxford English Dictionary, as 'enforced removal from one's native land according to an edict or sentence... the state or condition of being penally banished'.

[32] SC res. 2178 (2014), 24 September 2014, paragraph 8 emphasises that the requirement to take measures to prevent entry or transit shall not 'oblige any State to deny entry or require the departure from its territories of its own nationals or permanent residents', while paragraph 11 stresses the necessity for improved international cooperation.

27. Denying entry to the United Kingdom of British citizens suspected of involvement in international crimes or serious crimes of international concern, besides posing potential risks for other States, is likely incompatible with the duties which the State owes to its citizens, with the rights of other States, and with the obligation of the UK to prosecute certain offences (for which concerted international action is required).

28. At the practical level, there is no reason to suppose that any other State would be prepared to accept the risks incidental to assuming responsibility for excluded British citizens. These risks include the security question – the possible threat to the community of the 'host' State – as well as the legal risks which attach to taking responsibility for the individuals concerned, whether or not they are detained. As the United Kingdom now recognizes its duty to admit its citizens on deportation, any potential host State would be well advised to go for this option.

29. The implementation of TEOs in practice, though speculative at this stage, seems likely also to impede the UK's ability to fulfil its international obligations to combat terrorism, effectively and in good faith, and the scheme certainly outwith the letter and the spirit of paragraph 6 of Security Council resolution 2178 (2014).

30. Finally, it is clear, in my opinion, that TEOs will engage the legal rights of those affected, under the common law,[33] possibly under European Union law,[34] and certainly under the European Convention on Human Rights. The ensuing and readily foreseeable litigation will lead to considerable wastage of resources and funds which would be better directed to implementation of the measures identified by the Security Council in resolution 2178 (2014). The TEO initiative, in my view, should be abandoned in the public interest.

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[33] The potentialities of the writ of habeas corpus should not be underestimated.

[34] This issue merits further inquiry, from both a nationality and a fundamental rights perspective; cf. the judgments in *Rottman v Freistaat Bayern*, Judgment of the Court (Grand Chamber), 2 March 2010, Case C-135/08, European Court Reports 2010 I-01449 and *Zambrano v Office national de l'emploi*, Judgment of the Court (Grand Chamber), 8 March 2011, Case C-34/09, European Court Reports 2011 I-01177.