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NOTE

Date: 24 September 2020
To: Asian Academy of International Law
From: Davis Polk & Wardwell
Re: The National Security Regime of the United Kingdom

This note seeks to provide an overview of the UK national security regime, and is divided into three parts: (I) the investigatory powers of the Security Service, the Secret Intelligence Service and the Government Communications Headquarters in national security investigations; (II) the judicial process in handling national security cases; and (III) the substantive national security offences.

I. The investigatory powers

The Security Service Act 1989 (SSA), Intelligence Services Act 1994 (ISA), Human Rights Act 1998 (HRA), Regulation of Investigatory Powers Act, 2000 (RIPA) and Investigatory Powers Act 2016 (IPA) are a set of legislation that puts the functions and powers of the security and intelligence services on a statutory footing, and prescribes limits, including tests of proportionality and necessity, and safeguards, such as human rights protection and oversight by other bodies, to the exercise of these services of their powers in the interests of national security or the prevention and detection of serious crime.

The Security Service is subject to oversight by a Director-General appointed by the Secretary of State in the exercise of its functions. Pursuant to section 2 of the SSA, the Director-General has duty to ensure that the Security Service only obtains information 'so far as necessary for the proper discharge of its functions'. These functions are stipulated in section 1 of the SSA, and include, among others, 'the protection of national security', in particular, 'against threats from espionage, terrorism and sabotage, from the activities of agents of foreign powers and from actions intended to overthrow or undermine parliamentary democracy by political, industrial or violent means'. It is worth noting that the 'powers' of the Security Service are not expressly provided for and delimited in the SSA, except by reference to the functions of the Security

Service, and are not further categorized into, for example, stop and search powers, or seizure and retention powers.

The operations of the Secret Intelligence Service, also known as the SIS, is subject to control by a Chief of the Intelligence Service appointed by the Secretary of State, and the Intelligence Service can only obtain information 'so far as necessary for the proper discharge of its functions' (ISA, section 2). The functions of the Intelligence Service are stipulated under section 1 of the ISA, which include, among others, '[obtaining] ... information relating to the actions or intentions of persons outside the British Islands, and to perform other tasks relating to the actions or intentions of such persons', 'in the interests of national security, with particular reference to the defence and foreign policies of [the UK government]'.

Turning to the Government Communications Headquarters (GCHQ), pursuant to section 3 of the ISA, which is worded in terms of functions, the GCHQ has power 'to obtain ... information derived from or related to [electromagnetic, acoustic and other emissions and any equipment producing such emissions] and from encrypted materials' (ISA, section 3(1)(a)), 'in the interests of national security, with particular reference to the defence and foreign policies of [the UK government]' (ISA, section 3(2)(a)). The GCHQ has no power to obtain information exceeding what is 'necessary for the proper discharge of its functions' stated above (ISA, section 4).

The broad powers of the Security Service, the Intelligence Service and the GCHQ are delimited by section 5 of the ISA, in relation to the 'entry on or interference with property or with wireless telegraphy', by requiring that the respective agency must make an application to the Secretary of State for the issuance of a warrant authorizing the taking of action in respect of such property or wireless telegraphy (section 5(1) and (2)).

A three-part test is set out in section 5(2) of the ISA, and includes tests of necessity and proportionality in respect of the action. These include a consideration of whether alternate means could achieve the same purpose the action is designed to achieve (section 5(2A)). According to the three part test, the action must be 'necessary' for the purpose of assisting the respective agency in performing its functions (section 5(2)(a)(i)) and 'proportionate' to what the action seeks to achieve (section 5(2)(a)(ii)), and that satisfactory arrangements must be made in relation to the disclosure of the information thus obtained (section 5(2)(a)(iii)). There is a further two part test set out in section 5 (3A) and (3B) if the action is to be taken in respect of the Security Service's function to support other law enforcement (SSA, section 1(4)), or in respect of the Intelligence Service's or the GCHQ's function to prevent or detect crime (ISA, sections 1(2)(c) and 3(2)(c)), and relate to property in the British Islands.

Note that the Secretary of State has broad powers under section 7 of the ISA to authorize acts to be done outside the British Islands which would otherwise be criminal in the UK without such authorization, if such acts are necessary for the proper discharge of a function of the Intelligence Service or the GCHQ (section 7(3)(a), there are satisfactory arrangements in place to ensure that what is done will only be what is necessary for the proper discharge of such functions and that the nature and likely consequences will be reasonable having regard to the purposes for which the acts are carried out (section 7(3)(b)), and there are satisfactory arrangements with respect to the disclosure of the information thus obtained (section 7(3)(c)).

The HRA provides further limits to the exercise of the broad powers of the Security Service, the Intelligence Service and the GCHQ and other law enforcement agencies in national security investigations.

Section 3 of the HRA first requires that all primary legislation and subordinate legislation, whenever enacted, to be read and given effect in a way which is compatible with the rights and freedoms guaranteed under the ECHR (the 'Convention rights'), as far as possible. This would include the SSA and the ISA which confers statutory power on the Security Service, the Intelligence Service and the GCHQ, as well as other law enforcement agencies, in the performance of their functions.

Further, section 6 of the HRA provides that it is 'unlawful' for a public authority to act in a way incompatible with a Convention right, and allows victims of the unlawful act to bring proceedings against the authority (section 7), in respect of which the courts or tribunals in the UK may grant such relief or remedy, or make sure order, as is just and appropriate (section 8).

In this regard, the RIPA provides for the creation of a tribunal (RIPA, section 65(1)), known as the Investigatory Powers Tribunal, which is 'the only appropriate tribunal' to hear and determine (RIPA, section 65(2)(d)) any proceedings against any of the security and intelligence services (RIPA, s65(3)(a)) and any other persons whose conduct is by or on behalf of those services (RIPA, section 65(3)(b)), among others, under section 7(1)(a) of the HRA.

Also in this regard, an important Convention right to note in this regard is Article 8 of the ECHR, which asserts the right to respect for private and family life, home and correspondence, but also recognizes that a public authority may interfere with the exercise of this right in the interests of national security, public safety and the prevention of disorder or crime, among others, in accordance with the law.

Further, pursuant to section 65(4) of the RIPA, the Tribunal is also the appropriate forum for any complaint by a person who is aggrieved by conduct that have taken place in relation to him, his property, communications sent by or intended for him, or his use of postal service, telecoms service or telecoms system, and which have been carried out by or on behalf of any of the security and intelligence services. A list of such conduct, which defines the scope of the Tribunal's jurisdiction, is provided in section 65(5).

Appeals are allowed in respect of decisions and determinations of the Tribunal under section 67A of the RIPA, as supplemented by the IPA.

The IPA provides further safeguards to the exercise of investigatory powers by law enforcement and the security and intelligence agencies in the obtaining of communications and data about communications. It sets out the extent to which certain investigatory powers may be used to interfere with privacy (IPA, section 1(1)).

Where a public authority is making a decision relating to a warrant or authorization under the IPA, among others, (section 2) it must have regard to: whether what is sought to be achieved can be reasonably achieved by other less intrusive means; whether the level of protection to be applied in relation to the obtaining of information is higher due to the sensitivity of that information (such as items subject to legal privilege) (section 2(5)); and public interest in the protection of privacy (section 2(2)), among other considerations. Where relevant in the context, regard should be have to other considerations, including the interests of national security, the public interest in preventing or detecting serious crime, and the requirements of the HRA (IPA, section 2(3)).

Section 227 (1) of the IPA provides for the appointment of Judicial Commissioners, consisted of the Investigatory Powers Commissioner and other Judicial Commissioners (section 227(8)), by the Prime Minister. Their main functions are provided for in sections 229, and include the review of the exercise by public authorities of statutory functions relating to: the acquisition of

communications data; the acquisition of secondary data or related systems data; or equipment interference. The exercise by the Secretary of State of the functions under sections 5-7 of the ISA, which concern the issuance of warrants to the security and intelligence services in relation to interference with property or with wireless telegraphy, and to authorization of acts outside the British Islands, are also subject to review (ISA, section 229(3)).

II. The judicial process

Prosecutions in relation to matters of national security are handled by the criminal courts in the usual way in the UK.

However, whilst the UK has a strong principle of open justice, in terrorist cases, or any case involving evidence which would show the inner workings of the intelligence services, court proceedings and evidence may not be open to the public. The approach is to hold as much of a national security law case in public as reasonably possible, only closing the parts of the case which concern genuinely sensitive information and evidence.

Further, to deal with terrorism in Northern Ireland, from 1973 to 2007 in Northern Ireland, there were so-called "Diplock courts". These judge only courts provided an exception to the right in the UK to trial by jury for any offence punishable by imprisonment of more than 6 months. Diplock courts were introduced in the context of the troubles to address two perceived possible problems - perverse acquittals and intimidation of juries. They were applied in Northern Ireland to specified serious crimes. Generally, they targeted terrorist activity. Since 2003, there has been a broader UK law allowing jury-less trials in complex fraud cases (where it is anticipated a jury would have trouble understanding the facts) and where a risk of jury-tampering is established, but nothing specific to national security cases. See UK Criminal Justice Act 2003, sections 43 and 44.

In the context of national security investigations, the Investigatory Powers Tribunal is 'the only appropriate tribunal for the purposes of section 7 of the Human Rights Act 1998' in relation to proceedings for actions incompatible with Convention rights that are against the security and intelligence services, or against other persons in respect of conduct or proposed conduct by or on behalf of these services (Regulation of Investigatory Powers Act 2000, section 65(2)(a) and (3)). It is also 'the appropriate forum' for complaints by persons who are aggrieved by conduct carried out by or on behalf of the security and intelligence services (RIPA, section 65(4) and (5)).

The Tribunal is consisted of members appointed by Her Majesty by Letters Patent (RIPA, section 65(1)). The appointment method varies depending on whether the proposed candidate is a judicial member, which is a serving member of the senior judiciary of the UK, or a non-judicial member, who could be former member of the judiciary or a senior member of the legal profession who is not a full-time judge.¹

Where the candidate is a judicial member, the Judicial Office manages the selection process on behalf of the Lord Chief Justice. The Judicial Office invites expressions of interest from serving High Court Judges in England and Wales. Applicants are then interviewed by a panel consisting of the President of the Tribunal, a non-judicial member of the Tribunal and a lay Commissioner from the Judicial Appointments Commission. The panel then reports to the Lord Chief Justice who writes to the Home Secretary making formal recommendations for appointments. The Home

¹ The Tribunal's website: <https://www.ipt-uk.com/content.asp?id=21>

Secretary then writes to the Prime Minister asking him to seek permission for Letters Patent from Her Majesty the Queen for the recommended appointment(s).²

As for the appointment of non-judicial members, the Tribunal places advertisements for non-judicial members in national newspapers and recruitment sites asking for expressions of interest from suitably qualified individuals. The process is then the same as that for judicial members, except that the Lord Chief Justice is not involved.³

III. The substantive offences

This part makes a comparison between the four HK NSL offences with existing UK law, and seeks to identify some of the key substantive provisions under UK law that may be analogous to the HK NSL offences.

a. Secession

Secession is not criminalized in the UK. On the contrary, its constituent nations are allowed to put the matter to vote. Secession from the UK in this sense has been and would likely continue to be, a democratic political process. Consider for example, the Scottish referendum in 2014. Secession of a city such as London, for example, is likewise not criminalized. Consider rather the petition in 2016 to the Mayor of London for an independent London after the Brexit vote.

b. Subversion

There is limited material on subversion in the UK, and even more limited material on the criminalization of subversion.

In a speech in 2002 by the then Solicitor General, Mr Bob Allcock, on the HK gov's proposals for implementing Article 23, it was stated that it is 'not correct' that 'subversion' is a concept unknown to the common law. The example he gave in relation to UK laws was the UK Security Service Act 1989, which in section 1(2) refers to 'actions which are intended to overthrow or undermine parliamentary democracy by political, industrial or violent means', even though the term 'subversion' is not expressly used. However, it should be noted that even this is not a provision criminalizing such actions, but rather a provision on the function of the UK Security Service.

Another piece of information that may be of interest is that the MI5 states on its website, that following the end of the Cold war, it no longer undertakes counter-subversion work, since the threat of subversion has diminished sharply since. In fact, as early as 1987, the MI5 reported to the Home Secretary that the threat from any kind of subversion was 'low'.

c. Terrorist Activities

The UK regime on anti-terrorism is made up of a series of permanent but patchwork evolving terrorism legislation built on top of the Terrorism Act 2000. There is much overlap between the HK NSL provisions and the UK provisions in light of two points: the UK counter terrorism offences are much more detailed and extensive than the few provisions in the HK NSL; and to the extent the HK NSL does not specify whether a certain type of activity is considered a terrorist activity, Article 24 subsection (5) is a catch-all provision criminalizing all those who organize, plan,

² Ibid

³ Ibid

commit, participate in or threatens to commit 'dangerous activities which seriously jeopardize public health, safety or security'.

Article 25 of the HK NSL criminalizes a person who organizes or takes charge of a terrorist organization, and a parallel may be drawn with section 56 of the Terrorism Act 2000, which makes it an offence for a person to direct, at any level, the activities of an organization which is concerned in the commission of acts of terrorism.

Article 26 of the HK NSL criminalizes providing support, assistance or facility for the commission of a terrorist activity, which is analogous to section 5 of the UK Terrorism Act 2006, which makes it an offence for a person to engage in the preparation of acts of terrorism, or to assist others in preparation of acts of terrorism.

Article 27 of the HK NSL criminalizes advocating terrorism or inciting the commission of terrorist activity, and finds a potential parallel in section 2 of the UK Terrorism Act 2006, which makes it an offence to distribute a terrorist publication with the intention of encouraging acts of terrorism, a terrorist publication being defined as including publication that is likely to be understood by a reasonable person as encouragement or other inducement to the commission, preparation or instigation of acts of terrorism (section 2(3)(a)). Section 2(4) further provides that any matter which glorifies the commission or preparation of acts of terrorism could be understood by a reasonable person as being indirect encouragement. This is potentially analogous to the term 'advocate' in Article 27 of the HK NSL.

d. Foreign Collusion

There is limited material on foreign collusion within the UK legal regime, though collusion is addressed in the context of elections. In this regard, for example, it is a criminal offence for political parties and candidates to receive from foreign donors donations exceeding 500 pounds and 50 pounds respectively, pursuant to the UK Political Parties, Elections and Referendums Act 2000.