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Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the rights to freedom of peaceful assembly and of association; and the Special Rapporteur on the human rights of migrants

REFERENCE: OL GBR 2/2016

28 July 2016

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; Special Rapporteur on the rights to freedom of peaceful assembly and of association; and Special Rapporteur on the human rights of migrants, pursuant to Human Rights Council resolutions 25/2, 24/5, and 26/19.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the **Detention Services Order 04/2016, entitled "Detainee Access to the Internet"**, issued by the Home Office of the United Kingdom on 17 May 2016.

According to the information received:

On 17 May 2016, the UK Home Office issued the Detention Services Order 04/2016. The Order, consisting of 20 articles, is the first overall Internet Access Policy and will apply to all immigration detention centres. The Order was issued as a response to an independent review into the welfare of immigration detainees, published on 14 January 2016, which criticized the restrictions on internet access.

The Order applies to immigration removal centres (IRC), pre-departure accommodation (PDA) and residential short-term holding facilities (STHF). These centres accommodate a wide range of groups, including persons who have claimed asylum, persons awaiting decision about their right to entry to the UK, persons who have been refused entry, persons lacking required documentation to stay in the UK, and persons who have overstayed the expiry of their visas or who do not comply with their visa terms.

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His Excellency Mr. Julian Braithwaite
Ambassador
Permanent Representative
Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the
United Nations Office and other international organizations in Geneva

The stated purpose of the Order is to "ensure that detainees have reasonable and regulated access to the internet whilst ensuring that the security of the detention estate is not undermined" (article 2).

We welcome the intention to provide internet access to those detained in immigration detention centres. This is a necessary element in the state obligation to respect, protect and promote the right of everyone to freedom of expression. Providing internet access to persons in immigration detention centres is of particular importance, since reportedly smartphones are confiscated upon arrival and replaced with basic phones. Nonetheless, we are concerned that in its regulation of internet access the Order contains limitations on the right to freedom of expression that are incompatible with the UK's obligations under international human rights law.

We wish to submit the following comments on some of the provisions of the Order:

Access to the Internet and prohibited Internet sites

Article 3 of the Order establishes that all detainees must have access to any non-prohibited category of websites. Internet access is moreover limited through article 2, which restricts access to that which is "reasonable and regulated" and which does not undermine the security of the detention centre.

Article 11 establishes two categories of websites to which detainees are denied access. This includes sites in English and foreign languages. The first category is "Prohibited lifestyle categories", which explicitly lists social networking (including Facebook, Twitter, chat rooms and instant messaging), pornographic material, dating and gambling.

The second category is "Prohibited harm related categories", which the Order describes as websites that include material on terrorism (extremist and radicalisation material), weapons and explosives, racist material and crime.

It is the obligation of each of the different immigration detention centres to ensure that detainees are unable to access sites that fall within these categories.

In addition, any downloading or uploading is prohibited (article 20). Article 14 provides that a detainee can apply to the centre supplier manager to access a blocked website.

Monitoring

Internet access is enabled through computer terminals in internet rooms that are available for a minimum of seven hours per day, seven days a week. Article 18 requires monitoring of the internet room at all times the room is in use. Article 15 requires the supplier to maintain a monthly log of all website access requests, to be submitted to the Detention Services Freedom of Information inbox.

Article 17 requires the monitoring of electronic communication in compliance with Detention Centre Rule 27. This rule provides in sub-section 4 that the manager of each immigration detention centre can open, stop or read a communication to or from a detainee if there is "reasonable cause to believe that its content may endanger the security of the detention centre or the safety of others or are otherwise of a criminal nature or where it is not possible to determine the addressee or sender without opening the correspondence".

Suspension of internet access

The Order allows for the Centre Manager or the Deputy Centre Manager of each centre to suspend internet access for a detainee based on security or safety reasons. There is no further guidance on the type of consideration such a decision must be based on.

We express concern that the Order limits the right to freedom of expression in contradiction with article 19 of the International Covenant on Civil and Political Rights (ICCPR), ratified by the UK on 20 May 1976. We would like to recall that the definition of this right applies to "everyone", and includes the "freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice". The right to freedom of expression cannot be restricted unless the high threshold of the three-part test of article 19(3) is met. That is, any restriction must be provided by law, serve a legitimate government interest, and meet the strict tests of necessity and proportionality. The types of information or expression that may be restricted under international human rights law in relation to offline content also apply to online content (see A/HRC/32/13). Against this standard, we would like to raise the following particular issues of concern:

- i) The legal basis for the Order's limitations to the right to freedom of expression

Under article 19(3) of the ICCPR, limitations must be "prescribed by law". The purpose behind this requirement is to prevent arbitrary interference with the right, such as interferences solely by executive decision. In addition, the principle of

legality establishes a qualitative minimum standard of clarity, accessibility and predictability of the law (CCPR/C/GC/34).

The limitations to the right to freedom of expression in detention centres are based on an administrative order, issued by the executive. As it is unclear from the Order itself what law it is based on, it is difficult to assess whether the order keeps within the limits of the law, and whether it fulfils the legality requirement of article 19. In any case, we express concern at the use of an administrative order to limit a fundamental right in such broad ways.

ii) Discriminatory scope of the right to freedom of expression

The right to freedom of expression under article 19 applies to "everyone". The Order limits the right to freedom of expression of a particular group of persons, namely those in immigration detention centres. This group, as described above, includes a wide range of individuals, who thereby do not enjoy the right to freedom of expression to the same extent as the rest of the population. As stated by the Human Rights Committee, laws that limit the right to freedom of expression must not only comply with the strict requirements of article 19(3), but must also themselves be compatible with the provisions, aims and objectives of the Covenant. Such laws must not violate the non-discrimination provisions of the Covenant (CCPR/C/GC/34). We express concern that the order denies the right to freedom of expression for groups that are already marginalized based on their immigration status or perceived immigration status, in violation of the non-discrimination provision in article 2 of the ICCPR. In this regard, we also would like to refer to General Recommendation 30 relating to Discrimination against non-citizens, in which the Committee on the Elimination of Racial Discrimination recommends States "to ensure that legislative guarantees against racial discrimination apply to non-citizens regardless of their immigration status, and that the implementation of legislation does not have a discriminatory effect on non-citizens".

iii) The enjoyment of the rights guaranteed in the ICCPR are not limited to citizens of States parties but "must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party" (CCPR/C/21/Rev.1/Add. 13 (2004), para. 10).

Blanket prohibitions on access to online content

Article 11 of the Order contains blanket prohibitions on access to two categories of websites: 1) prohibited life style categories, and 2) prohibited harm related categories.

In this context, we would like to refer to paragraph 2 of Human Rights Council resolution 24/5 which "[r]eminds States of their obligation to respect and fully protect the rights of all individuals to assemble peacefully and associate freely, *online as well as offline*, including in the context of elections, and including persons espousing minority or dissenting views or beliefs, human rights defenders, trade unionists and others, including migrants, seeking to exercise or to promote these rights, and to take all necessary measures to ensure that any restrictions on the free exercise of the rights to freedom of peaceful assembly and of association are in accordance with their obligations under international human rights law" (*emphasis added*).

More specifically, limitations to the right to freedom of expression, in order to be compatible with article 19, must in addition to being provided by law, pursue a legitimate aim as exhaustively listed in Article 19(3) a and b, and conform to the strict tests of necessity and proportionality.

The aim that the Order seeks to achieve by banning access to the two categories of websites appears to be stated in article 2 - to ensure that the security of the detention centre is not undermined. While such concerns could in some instances fall under "the right of others" or "national security", we are concerned that it is not formulated with sufficient precision.

With respect to the first category of prohibited websites (life style categories), it is difficult to see how blocking the access to these websites is necessary and proportionate in order to ensure the security of the detention centre. Prohibiting access to these websites would therefore appear to be incompatible with article 19 of the ICCPR.

With respect to the second category of websites (harm related categories), this includes websites that are defined in too broad and vague terms ("terrorism", "extremist and radicalisation material", "racist material" and "crime"). Therefore, even if a legitimate aim is sought pursued, the criteria of necessity and proportionality are not satisfied nor are the provisions defined in sufficiently clear manner to avoid arbitrary interference with the right to freedom of expression. Therefore, neither the legality criteria nor the necessary or proportionate test of article 19(3) is satisfied.

As highlighted by the Human Rights Committee with respect to provisions related to national security, States must take extreme care to ensure that such provisions are crafted and applied in a manner that conforms to the strict requirements of paragraph 3. It is not enough simply to claim national security as justification to limit the right to freedom of expression. As the Committee underlines, when a "State party invokes a legitimate ground for restriction of the right to freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat" (CCPR/C/GC/34). As noted by the previous Special Rapporteur on the right to freedom of opinion and expression, laws that prohibit incitement to terrorism must meet the strict three-part test of restrictions to the right to freedom of expression. They must include an actual risk that the act incited will be committed; they should expressly refer to two elements of intent, namely intent to communicate a message and intent that this message incites the commission of a terrorist act, and should preserve the application of legal defences or principles leading to the exclusion of criminal liability by referring to "unlawful" incitement to terrorism (A/66/290). We cannot see that Article 11 of the Order, formulated in general terms and in vague and broad language, complies with this standard.

Interference with the right to privacy and lack of judicial oversight and other safeguards

We express concern at the provisions on monitoring the use of internet and personal correspondence, including provisions that require keeping of a monthly log of website access requests. Article 17(1) of the ICCPR provides for the rights of individuals to be protected, inter alia, against arbitrary or unlawful interference with their privacy and correspondence and provides that everyone has the right to the protection of the law against such interference. Article 17 and 19 of the ICCPR are closely connected, as the right to privacy is often understood as an essential requirement for the realization of the right to freedom of expression (A/HRC/23/40 and A/HRC/29/32).

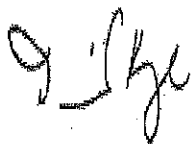
We express concern that the Order grants the authority of deciding access to the internet as well as the monitoring authority to managers and deputy managers of detention centres. This increases the risk of loose interpretation and selective application. As noted by the previous Special Rapporteur on the right to freedom of opinion and expression, restrictions to the right to freedom of expression must be applied by a body that is independent of political, commercial or unwarranted influences in a manner that is neither arbitrary nor discriminatory, and with adequate safeguards against abuse in order to avoid loose interpretation and selective application (A/HRC/23/40).

It is our responsibility under the mandate provided to us by the Human Rights Council to seek to clarify all cases brought to my attention. Therefore, we would welcome any additional information or clarifications from your Excellency's Government with respect to this Order and on measures taken to ensure that its provisions comply with the UK's obligations under international human rights law, particularly with regard to the right to freedom of opinion and expression. We would also welcome the opportunity to discuss the Order in more detail with your Excellency's Government at your convenience.

Finally, we would like to inform your Excellency's Government that this communication will be available to the public and posted on the website page of the mandate (<http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/OpinionIndex.aspx>). Your Excellency's Government's response will also be made available on the same website as well as in the regular periodic Communications Report to be presented to the Human Rights Council.

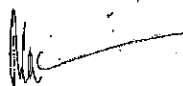
Your Excellency's Government's response will be made available in a report to be presented to the Human Rights Council for its consideration.

Please accept, Excellency, the assurances of our highest consideration.



David Kaye

Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression



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