

12 October 2016

To:

Mr David Kaye, Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression

Mr Maina Kiai, Special Rapporteur on the rights to freedom of peaceful assembly and of association

Mr Francois Crepeau, Special Rapporteur on the human rights of migrants.

From:

The Permanent Mission of the United Kingdom of Great Britain and Northern Ireland

Dear Sirs,

Thank you for your joint letter of 28 July to His Excellency Mr Julian Braithwaite, Ambassador to the United Nations Office and other international organisations in Geneva, about Detention Services Order 04/2016 Detainee Access to the Internet ("**DSO 04/2016**" or "**the DSO**").

Your joint letter raises a number of questions concerning DSO 04/2016 and its compatibility with the UK's obligations under the International Convention of Civil and Political Rights ("**the ICCPR**") which I will address below.

Background

The UK gives effect to the rights set out in the ICCPR, with the below reservation in respect of immigration matters:

"The Government of the United Kingdom reserve the right to continue to apply such immigration legislation governing entry into, stay in and departure from the United Kingdom as they may deem necessary from time to time and, accordingly, their acceptance of article 12 (4) and of the other provisions of the Covenant is subject to the provisions of any such legislation as regards persons not at the time having the right under the law of the United Kingdom to enter and remain in the United Kingdom."

The UK has incorporated into domestic law the European Convention on Human Rights ("**the ECHR**"), having done so by virtue of the Human Rights Act 1998. The right to freedom of expression is protected in domestic law by Article 10 of the ECHR; the right to a private and family life is protected by Article 8.

UK-wide immigration legislation provides that a person can be detained in certain circumstances for the purposes of immigration control. This does not mean that a

person *will* be detained automatically, and as a matter of policy there is a presumption against detention in most cases.

Under normal circumstances those who are likely to be detained include: persons subject to immigration control whose identity needs to be established; persons whom we have reason to believe will abscond; and those who have been detained to effect their removal from the United Kingdom. Those who are detained under immigration legislation may be held at immigration removal centres (“**IRCs**”).

The legislative framework

IRCs are provided for in law by Part VIII of the **Immigration and Asylum Act 1999** (“**the Act**”) and its associated Schedules. This is primary legislation passed by the UK Parliament, a copy of which can be viewed online:

<http://www.legislation.gov.uk/ukpga/1999/33/contents>

The Act includes obligations placed upon the Executive by Parliament to require the making of secondary legislation. Section 153 of the Act requires the Secretary of State to make rules for the regulation and management of IRCs, and prescribes the Parliamentary process that must be followed in order for these rules to be made. The Act provides that these rules may deal with matters such as safety, care, activities, discipline, and control of detainees.

The rule-making power has been exercised by the Secretary of State to make the **Detention Centre Rules 2001** (“**The Rules**”). These rules make various provisions regarding the operation and management of IRCs. Rule 39 ‘General safety and security’ sets out that security shall be maintained, but with no more restriction than is required for safe custody and well ordered community life. The provision of reasonable and regulated access to the internet for detainees falls within the scope of this Rule, with limitations in place to ensure that the security of the detention estate is not undermined and that detainees cannot access content that has been assessed as unlawful.

A copy of the Rules can be viewed online:

<http://www.legislation.gov.uk/ukxi/2001/238/contents/made>

The Rules make provision for, amongst other things, “Outside contacts” (Rule 26) and “Correspondence” (Rule 27). There is also provision for “Requests and complaints” (Rule 38).

Detention Services Orders are not part of the Rules. Rather they are instructions outlining the procedures to be followed by supplier, healthcare and Home Office staff in the immigration detention estate. DSO 04/2016 states at the top of the first page that it is: *“To provide instructions and guidance for staff and suppliers on the provision of internet access for detainees”*

The provision and management of internet access in IRCs

Internet access is recognised as an important tool for assisting detainees to maintain links with friends, family and legal representatives, and to help them to resolve their

affairs in the United Kingdom in preparation for removal. However, access to the internet to enable detainees to maintain contact in this way must be balanced against the need to maintain the safety and security of other detainees, removal centre staff and the public, as well as the security of the removal centre itself.

Since July 2005 detainees held in IRCs have been given regulated access to the internet. This was done initially through a series of pilot schemes at selected centres. The pilot scheme was then extended to all IRCs in the detention estate.

IRCs are required to provide detainees with reasonable and regulated access to the internet and IT facilities. The Detention Services Order formalises the procedures for blocking or adding access to websites, and includes guidance on printing documents.

Access to the Internet and prohibited Internet sites

The UK's position is as follows:

1. The UK recognises that access to the internet has an important part to play in ensuring the right to freedom of expression can be enjoyed to its full potential. However, we do not agree that the policy of limiting access to the internet for detainees is incompatible with our obligations under international human rights law.
2. There will be circumstances when it is not appropriate for a detained individual to have unrestricted access to the internet, for example where we have specific security concerns. Such restrictions are proportionate, transparent and be subject to effective oversight and the right to appeal.
3. Freedom of expression may also be enjoyed by means of the sending and receiving of letters, and by means of making and receiving telephone calls, both of which are available to detainees notwithstanding any proportionate restrictions that may be placed on their access to the internet.
4. We do not consider that our international human rights obligations give rise to a positive obligation to provide access to the internet for detainees.
5. We note that the ICCPR provides that right to freedom of expression may be restricted in accordance with the law and in pursuit of a legitimate objective provided such restriction is both necessary and proportionate; we note that the right to privacy may be lawfully restricted. In that regard:
 - a. All detainees are given internet access, but subject to certain limitations: access to some categories of websites is generally prohibited (with a mechanism by which access to specific websites may be granted), and internet access may be temporarily suspended for individual detainees in specific circumstances.
 - b. Both of these measures are necessary in a custodial environment to ensure the safety and security of the facilities, the staff, and the

detainees – or, in the language of the treaty, to ensure respect for the rights of others – and are proportionate to that end.

6. We do not accept that the restrictions on internet access discriminate against non-citizens *per se*; the restrictions only affect people who are (a) liable to detention on immigration grounds and (b) in fact detained notwithstanding the general policy not to detain.

It is important to understand the context within which the Rules and the DSO apply: IRCs are secure custodial facilities. The need to ensure that such custodial facilities remain safe and secure for all necessarily means placing restrictions on detainees, in the interests of all.

The general approach of the DSO is that all detainees are able to access all websites unless the website in question contains prohibited content. Access to a website will only be generally prohibited where to allow access to it would be likely to be detrimental to the safety and security of other detainees, centre staff and the public, or to the safety and security of the centre. The prohibition is not absolute, and access may be granted, if appropriate, in response to a specific request.

The Prohibited categories are those which are considered to represent a particular risk in a custodial environment:

- Access to certain ‘lifestyle’ categories is prohibited and this includes gambling, pornography, and social media sites. These websites could be used to organise indiscipline, intimidate other detainees and staff and therefore access is not generally permitted.
- Access to certain categories of website (referenced in the DSO as ‘harm-related’) is prohibited to prevent detainees from using the internet to commit, prepare for, or encourage crime. This includes websites that contain material on extremism and radicalisation; weapons and explosives; serious and organised crime; and racist material.

The supplier at each centre has in place specialised filtering software to screen out prohibited categories of sites or sites whose addresses contain prohibited key words rather than blocking individual website addresses. These technical measures are employed because it would not be possible to vet every single web site on the internet, and an unquantifiable volume of new content is being added to the internet every day. This approach minimises any risk to the safety and security of the centre, ensures that detainees are not exposed to offensive or inappropriate material and protects the public from harm.

There is a mechanism by which access to an otherwise prohibited web site may be requested and granted. Detainees can request access to a blocked site if they feel that access has been unnecessarily prohibited. Requests are reviewed within 48 hours and, if appropriate, the prohibition is removed. The prohibition is then subsequently removed across the wider detention estate to ensure parity of access for all detainees.

The DSO, at paragraphs 14 and 15, sets out a procedure by which a detainee's request for access to specific websites may be granted. There is a written audit trail for each decision, and refusals must be reported to the Home Office IRC Team. There is also a requirement for requests to be logged and reported centrally. The purpose of these reporting obligations is to ensure consistency of delivery across the detention estate for individual websites.

Monitoring

With regard to the monitoring of correspondence, it is important to note that paragraph 17 of the DSO does not *require* IRC staff to monitor detainees' electronic correspondence. It does provide, however, that any monitoring of detainees' correspondence is in accordance with the Rules. In particular, it should be noted that sub-paragraph (5) of Rule 27 provides that:

Detained persons will be given the opportunity of being present when any correspondence is opened or read and shall be given reasons in advance if any correspondence is to be opened, read or stopped under paragraph (4).

As such, this ensures that monitoring does not go beyond what is permitted by the Rules, and therefore acts as a safeguard on the privacy of detainees' correspondence.

Suspension of internet access

Rule 26 of the Rules provides that outside contacts may be limited in the interests of security or safety. This is in addition to restrictions that may be imposed in accordance with Rule 39 on "General security and safety".

The DSO also provides guidance in respect of the mechanism by which – in accordance with the Rules – an individual detainee's access to the internet may be suspended.

We do not consider that the mechanism for suspending internet access for specific detainees is contrary to the UK's international human rights obligations. The suspension mechanism is necessary in order to ensure that internet access is not misused in a way that is likely to be detrimental to the safety and security of other detainees, centre staff and the public, or to the safety and security of the centre

The DSO sets out the safeguards that apply to suspension, including a written audit trail for each decision, a reporting obligation, and an appeal and review mechanism.

It is important to note that suspension will not prevent the detainee from accessing material that is relevant to their immigration case – in those circumstances the detainee can approach the welfare office for assistance (as explained in paragraph 8).

Safeguards and oversight

There are adequate safeguards against the risk of loose interpretation and selective application:

1. The system of restriction and suspension is not operated by any body which has a political or commercial interest in limiting access to the internet other than for legitimate purposes and in accordance with the DSO.
2. the provision of a mechanism by which access to prohibited websites may be sought and by which suspensions may be challenged;
3. the requirement for a written audit trail in respect of decisions to refuse a request to access a prohibit website or to continue a suspension;
4. the reporting obligations in respect of access requests and suspensions (which are designed to ensure consistency of approach);

It should also be noted that the operation of IRCs is subject to the following oversight provisions:

1. the complaint handling mechanism set out in Rule 38, the details of which must be provided to all detainees at the start of their detention;
2. the fact that complaints that cannot be resolved through the complaint handling mechanism may be referred to an independent third party – the Prisons and Probation Ombudsman – who may investigate and make recommendations in respect of the complaint.

The Home Office operates a comprehensive complaints system for detainees who feel they have not been treated in accordance with our operating standards. All complaints made by detainees at an IRC are investigated by the IRC supplier in accordance with the published DSO 03/2015 'handling complaints'. Where a complainant is not satisfied with the investigation of their complaint they may appeal to the independent Prisons and Probation Ombudsman or via their MP to the Parliamentary and Health Service Ombudsman.

These safeguards and oversight requirements ensure that restrictions on access to the internet, and suspension where necessary, is operated in a fair and appropriate way which is neither arbitrary nor discriminatory, and accords with the UK's obligations both in domestic law under the provisions of the ECHR and its international human rights obligations.

I trust that the information provided above allays your concerns.