LITIGATION PROPOSAL REGARDING DEPROSCRIPTION OF THE PKK

13 NOVEMBER 2019

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ONE PUMP COURT

Litigation Proposal Regarding Deproscription of the PKK
on behalf of The Public Interest Law Centre

Introduction

1. I am instructed by the Public Interest Law Centre to produce a proposal for litigation aimed at the de-proscription of the Kurdistan Workers Party ("**the PKK**" or "**the Party**"), on behalf of clients within the Kurdish community.

2. The PKK is a democratic confederalist political party dedicated to self-determination for the Kurdish people, primarily in Turkey but also within other parts of Kurdistan. The PKK was originally founded as a Marxist-Lenninst liberation organisation, and for several years fought a war for independence against the Turkish state. During the course of this war both sides arguably committed acts of terrorism. However, the PKK has significantly shifted its political positions since then. The PKK no longer seeks the creation of a Turkish state. One of the PKK's founder members, Abdullah Öcallan has been held for years on the Turkish prison island of İmralı. Mr Öcallan continues to be the figurehead of the Party. The Party, through Mr Öcallan, previously declared a ceasefire in its battle against the Turkish state. Around the same time, at the instigation of the Turkish state, the Party was proscribed in the United Kingdom.

3. The PKK is seen by the Kurdish community in the United Kingdom and elsewhere as its legitimate political representative. Nonetheless, any participation in its activities remains proscribed. As such, I am asked to advise on a litigation strategy to secure the deproscription of the PKK.

Summary of Advice

4. An application to the Home Secretary can be made for deproscription of the PKK.
See ¶¶ 17, 43, and 70 below.

5. The rules on standing for an application (and any subsequent appeal) are very tightly constrained. Only the organisation itself or a person affected by the organisation's proscription can make an application.
See ¶¶ 17 to 18, 43, 46, and 57 to 62 below.

6. There is a limited immunity from prosecution available to people who participate in deproscription applications.
   See ¶¶ 23 to 27, and 59 to 61 below.

7. The test for deproscription has 2 stages. Stage 1: Does the Home Secretary honestly and on reasonable grounds believe that at the time of the decision the organisation "is concerned in terrorism"? If not, then she must deproscribe. If so, then consider stage 2. Stage 2: in the exercise of the Home Secretary's discretion, should the organisation remain proscribed?
   See ¶¶ 31 to 38, and 63 to 65 below.

8. If the deproscription application to the Home Secretary is refused, then there is a right of appeal to the Proscribed Organisation Appeals Commission ("**the Commission**"). This application is on judicial review principles.
   See ¶¶ 19, 44 to 51, 66, and 71 below.

9. The evidence-gathering exercise for the application must be thorough and complete before the application is made to the Home Secretary. No further evidence can be added on an appeal without the permission of the Commission.
   See ¶¶ 17, and 67 to 69 below.

10. If the Commission refuses an appeal, then there is an onward right of appeal to the Court of Appeal, and the Supreme Court.
    See ¶¶ 22, 50 and 72 below.

Relevant Law

Statute law relating to proscription

11. The Terrorism Act 2000 s 3 created the regime of proscribing "terrorist" organisations. The Act gives the Home Secretary the power to proscribe and deproscribe an organisation by amending Schedule 2 of the Terrorism Act 2000 (s 3(3)). An organisation can only be added to the list if the Home Secretary "*believes that it is concerned in terrorism*" (s 3(4)). A list of factors to take into account in determining whether an organisation is concerned in terrorism is then provided (ss 3(5) to 3(5C)). The provision provides insofar as is relevant as follows:

"3.— Proscription.

(1) For the purposes of this Act an organisation is proscribed if–

(a) it is listed in Schedule 2, or

(b) it operates under the same name as an organisation listed in that Schedule.

[…]

(3) The Secretary of State may be order–

(a) add an organisation to Schedule 2;

(b) remove an organisation from that Schedule;

(c) amend that Schedule in some other way.

(4) The Secretary of State may exercise his power under subsection (3)(a) in respect of an organisation only if he believes that it is concerned in terrorism.

(5) For the purposes of subsection (4) an organisation is concerned in terrorism if it–

(a) commits or participates in acts of terrorism,

(b) prepares for terrorism,

(c) promotes or encourages terrorism, or

(d) is otherwise concerned in terrorism.

(5A) The cases in which an organisation promotes or encourages terrorism for the purposes of subsection (5)(c) include any case in which activities of the organisation–

(a) include the unlawful glorification of the commission or preparation (whether in the past, in the future or generally) of acts of terrorism; or

(b) are carried out in a manner that ensures that the organisation is associated with statements containing any such glorification.

(5B) The glorification of any conduct is unlawful for the purposes of subsection (5A) if there are persons who may become aware of it who could reasonably be expected to infer that what is being glorified, is being glorified as–

(a) conduct that should be emulated in existing circumstances, or

(b) conduct that is illustrative of a type of conduct that should be so emulated.

(5C) In this section–

'glorification' includes any form of praise or celebration, and cognate expressions are to

be construed accordingly;

'statement' includes a communication without words consisting of sounds or images or both. […]"

12. While s 3 contains criteria for *prescription*, it does not contain any criteria for *deproscription.* Rather, the provision simply creates the power to deproscribe. Specific criteria for deproscription are not set out elsewhere. However, as will be seen below, given the drafting of the section, when exercising the power to determine whether or not to deproscribe, the Home Secretary must have regard to whether the factors relevant to proscription continue to apply.

13. In construing the power to proscribe (or deproscribe) an organisation based on whether it is concerned in terrorism, regard must be had to the definition of "*terrorism*". This is set out in the Terrorism Act 2000 s 1 as follows:

"1.— Terrorism: interpretation.

(1) In this Act "terrorism" means the use or threat of action where–

(a) the action falls within subsection (2),

(b) the use or threat is designed to influence the government or an international governmental organisation or to intimidate the public or a section of the public, and

(c) the use or threat is made for the purpose of advancing a political, religious, racial or ideological cause.

(2) Action falls within this subsection if it–

(a) involves serious violence against a person,

(b) involves serious damage to property,

(c) endangers a person's life, other than that of the person committing the action,

> (d) creates a serious risk to the health or safety of the public or a section of the public, or
>
> (e) is designed seriously to interfere with or seriously to disrupt an electronic system.
>
> (3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.
>
> (4) In this section–
>
> (a) "action" includes action outside the United Kingdom,
>
> (b) a reference to any person or to property is a reference to any person, or to property, wherever situated,
>
> (c) a reference to the public includes a reference to the public of a country other than the United Kingdom, and
>
> (d) "the government" means the government of the United Kingdom, of a part of the United Kingdom or of a country other than the United Kingdom.
>
> (5) In this Act a reference to action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organisation."

14. As such, the definition of "*terrorism*" is drawn extremely widely. Insofar as is relevant to the present case, the PKK would be shown to have engaged in "*terrorism*" if it uses or threatens action involving anything listed in s 1(2) (for example, serious violence against soldiers of the Turkish state or serious damage to Turkish state property) in a way that is designed to influence the Turkish government, in pursuit of a political or ideological cause. This is, of course, extremely widely drawn.

15. There is no "just cause" defence or exception to the definition of "terrorism". Even a despotic military junta is treated as a government worthy of protection for the purposes of the Terrorism Act 2000: *R v F* [2007] QB 960.

16. When an organisation has been proscribed, there is no automatic periodic review of that proscription. However, on 1 October 2019 a debate took place in the House of Lords on the Terrorism Act 2000 (Proscribed Organisations) (Amendment) (No. 2) Order 2019, which removed a defunct organisation, the Libyan Islamic Fighting Group, from the list of proscribed organisations. In the course of that debate, Baroness

Williams of Trafford, The Minister of State for the Home Department and Minister for Equalities (Department for International Development) stated that "*the Home Secretary keeps consideration under regular review*". As such, the effect of any application for deproscription would effectively be to bring forward the time of the periodic review, and to adduce additional evidence in relation to it.

17. Applications for deproscription are provided for by the Terrorism Act 2000 s 4. It provides as follows in particular:

> "**4.— Deproscription: application.**
>
> (1) An application may be made to the Secretary of State for an order under section 3(3) […]–
>
> (a) removing an organisation from Schedule 2 […]
>
> (2) An application may be made by–
>
> (a) the organisation, or
>
> (b) any person affected by the organisation's proscription […].
>
> (3) The Secretary of State shall make regulations prescribing the procedure for applications under this section.
>
> (4) The regulations shall, in particular–
>
> (a) require the Secretary of State to determine an application within a specified period of time, and
>
> (b) require an application to state the grounds on which it is made."

18. This sets the grounds for standing for an applicant: only the organisation itself, or a person affected by the organisation's proscription, can make the deproscription application. This question of standing is further considered below.

19. Where the Home Secretary fails to deproscribe an organisation, the Terrorism Act 2000 s 5 sets out a right of appeal to the Commission. S 5(3) establishes the test for an appeal as being based on **judicial review principles**.

20. The Terrorism Act s 9 additionally permits an appeal to be brought on the ground of the breach of a right protected by the European Convention on Human Rights. As such, where a Convention right (such as freedom of expression (Article 10) or

freedom of association (Article 11)) is engaged, the Commission will be required to apply "anxious" or "intense" scrutiny to the Home Secretary's decision (see *Secretary of State for the Home Department v Lord Alton of Liverpool* [2008] 1 W.L.R. 2341 at ¶ 46).

21. The Terrorism Act 2005 s 5 provides in particular as follows in relation to the right of appeal to the Commission:

> "5.— Deproscription: appeal.
>
> (1) There shall be a commission, to be known as the Proscribed Organisations Appeal Commission.
>
> (2) Where an application under section 4 has been refused, the applicant may appeal to the Commission.
>
> (3) The Commission shall allow an appeal against a refusal to deproscribe an organisation […] if it considers that the decision to refuse was flawed when considered in the light of the principles applicable on an application for judicial review.
>
> (4) Where the Commission allows an appeal under this section, it may make an order under this subsection.
>
> (5) Where an order is made under subsection (4) in respect of an appeal against a refusal to deproscribe an organisation, the Secretary of State shall as soon as is reasonably practicable–
>
> > (a) lay before Parliament, in accordance with section 123(4), the draft of an order under section 3(3)(b) removing the organisation from the list in Schedule 2, or
> >
> > (b) make an order removing the organisation from the list in Schedule 2 in pursuance of section 123(5). […]
> >
> > (6) Schedule 3 (constitution of the Commission and procedure) shall have effect."

22. There is a right of onward appeal from the Commission to the Court of Appeal, and then to the Supreme Court. Permission to appeal to the Court of Appeal must first be sought from the Commission, and if that is refused, then from the Court of Appeal. The Terrorism Act 2000 s 6 provides in this regard as follows:

> "6.— Further appeal.

> (1) A party to an appeal under section 5 which the Proscribed Organisations Appeal Commission has determined may bring a further appeal on a question of law to–
>
> > (a) the Court of Appeal, if the first appeal was heard in England and Wales, […]
>
> (2) An appeal under subsection (1) may be brought only with the permission–
>
> > (a) of the Commission, or
> >
> > (b) where the Commission refuses permission, of the court to which the appeal would be brought.
>
> (3) An order under section 5(4) shall not require the Secretary of State to take any action until the final determination or disposal of an appeal under this section (including any appeal to the Supreme Court).

23. The Terrorism Act s 10 grants a very limited immunity from prosecution to those who participate in deproscription proceedings. It provides in particular as follows:

> "10.— Immunity.
>
> (1) The following shall not be admissible as evidence in proceedings for an offence under any of sections 11 to 13, 15 to 19 and 56–
>
> > (a) evidence of anything done in relation to an application to the Secretary of State under section 4,
> >
> > (b) evidence of anything done in relation to proceedings before the Proscribed Organisations Appeal Commission under section 5 above or section 7(1) of the Human Rights Act 1998,
> >
> > (c) evidence of anything done in relation to proceedings under section 6 (including that section as applied by section 9(2)), and
> >
> > (d) any document submitted for the purposes of proceedings mentioned in any of paragraphs (a) to (c).
>
> (2) But subsection (1) does not prevent evidence from being adduced on behalf of the accused."

24. As such, the making of a deproscription application, the pursuance of an appeal at all stages, and any material submitted in pursuance of such an application or appeal, cannot be used as evidence of the following offences:

(1) Membership of the proscribed organisation (Terrorism Act 2000 s 11);

(2) Inviting support for the proscribed organisation (Terrorism Act 2000 s 12(1));

(3) Expressing an opinion or belief that is supportive of the proscribed organisation (Terrorism Act 2000 s 12(1A));

(4) Arranging, managing or assisting in arranging or managing a meeting to support, further the activities of, or be addressed by a member of the proscribed organisation (Terrorism Act 2000 s 12(2));

(5) Addressing a meeting with the purpose of encouraging support for the proscribed organisation or furthering its activities (Terrorism Act 2000 s 12(3));

(6) Wearing an item of clothing or carrying or displaying an article in such a way as to arouse suspicion of membership of a proscribed organisation (Terrorism Act 2000 s 13(1));

(7) Publishing an image of an item of clothing or any other article in such a way as to arouse suspicion of membership of a proscribed organisation (Terrorism Act 2000 s 13(1A));

(8) Terrorist fundraising (Terrorism Act 2000 s 15);

(9) Use and possession of money or property for the purposes of terrorism (Terrorism Act 2000 s 16);

(10) Entering into funding arrangements for the purpose of terrorism (Terrorism Act 2000 s 17);

(11) Making insurance payments in response to terrorist demands (Terrorism Act 2000 s 17A);

(12) Money laundering of terrorist property (Terrorism Act 2000 s 18);

(13) Failing to disclose an offence under ss 15-18 (Terrorism Act 2000 s 19);

(14) Directing a terrorist organisation (Terrorism Act 2000 s 56).

25. There are no other offences to which these immunity provisions apply. As such, anyone participating in proceedings will be liable to prosecution for any material disclosed in the course of proceedings which constitutes evidence of any other offences, including other terrorism offences. Offences **not** covered by immunity would therefore include, but are not limited to:

    (1) Providing or receiving weapons training (Terrorism Act 2000 s 54);

    (2) Possession of an article for terrorist purposes (Terrorism Act 2000 s 57);

    (3) Collection of information useful for preparing or committing an act of terrorism (Terrorism Act 2000 s 58);

    (4) Terrorist bombing outside of the UK (Terrorism Act 2000 s 62);

    (5) Terrorist financing outside of the UK (Terrorism Act 2000 s 63);

    (6) Committing terrorist acts abroad (Terrorism Act 2000 s 63B);

    (7) Encouragement of terrorism (Terrorism Act 2006 s 1);

    (8) Dissemination of terrorist publications (Terrorism Act 2006 s 2);

    (9) Preparation of terrorist acts (Terrorism Act 2006 s 5);

    (10) Providing or receiving training for terrorism (Terrorism Act 2006 s 6);

    (11) Attending a place for terrorist training (Terrorism Act 2006 s 8).

26. Further, there is no "fruit of the poison tree" doctrine. If a person participates in a deproscription application, then the authorities are entitled to investigate them as a result of their participation, in order to find independent evidence of having committed offences. Such an investigation can include investigations under the Terrorism Act 2000 Schedule 7, which in wide circumstances makes it an offence not to answer questions when stopped at the UK border.

27. In addition, the immunity provisions only apply to criminal prosecutions. They do not apply to any other legal matters.

The proscription of the PKK

28. The PKK was proscribed by the Terrorism Act (Proscribed Organisations) (Amendment) Order 2001. This contained the first list of proscribed organisations added to the list already contained in the Terrorism Act 2000 Schedule 2 on its passage. A total of 21 organisations were proscribed at the same time. Interestingly, these include the DHKP-C, a Marxist organisation based in Turkey.

29. According to a House of Commons Library Briefing Paper SN/HA/00815, a Home Office press notice of 28 February 2001 announcing the laying of the 2001 Order included a note setting out the Government's view of the activities of the organisations to be proscribed. The section relating to the PKK provided as follows:

> "**Kurdistan Workers' Party (Partiya Karkeren Kurdistan) (PKK)**
>
> Aims: The PKK is primarily a separatist movement which has sought an independent Kurdish state in south east Turkey.
>
> History: The PKK was formed in 1978 by Abdullah Ocalan. Although active from 1978 it was not until the formation of the group's military wing in 1984 that it became a significant terrorist threat. In February 1999 the PKK's founder and leader Abdullah Ocalan was captured by Turkish security forces in Kenya. During his subsequent trial in Turkey, in June 1999, Ocalan announced a PKK ceasefire and also that the group intended to seek a peaceful resolution to its aspirations. However, although the group is not believed to have undertaken any offensive action since the ceasefire began on 29 August 1999, previous PKK ceasefires have broken down.
>
> Attacks: Since 1984 the PKK has been engaged predominately in a guerrilla campaign in south east Turkey which has resulted in a death toll on all sides estimated to be in excess of 33,000 people.
>
> Attacks on UK or Western interests: In the early 1990s the PKK attempted to bring increased pressure on the Turkish government by undertaking a terrorist campaign aimed at Western interests and investment in south east Turkey. This campaign initially lead to the kidnapping of a number of western tourists, including several British citizens. In 1993/94 the PKK abandoned its kidnapping campaign and began to target Western investment in south east Turkey. As part of this campaign a Shell Oil refinery was attacked. Also in 1993/94 the PKK began an urban bombing campaign aimed at Turkey's tourist resorts and for the first time undertook attacks outside south east Turkey. This campaign resulted in the death of a number of foreign tourists, including a British citizen. Although the PKK appeared to have abandoned this campaign in

> 1995 it continued annually, until 1999, to threaten attacks against Turkey's tourist resorts.
>
> Representation/activities in the UK: The PKK does not have any overt representation in the UK but operates covertly and has some support among the Kurdish community."

30. Pursuant to the Proscribed Organisations (Name Changes) Order 2006 the names "Kongra Gele Kurdistan" and "KADEK" are to be treated as additional names for the PKK. According to the Explanatory Memorandum to the Order (¶ 7.3):

> "Kongra Gele and KADEK are both alternative names for the PKK which was proscribed in 2001. Recent attacks claimed in the name of Kongra Gele include a car bomb in Semdinli in South Eastern Turkey (Nov 2005) and the kidnapping of a soldier and local mayor (July 05) and derailing of trains with explosions (July 05)."

The test for deproscription

31. The only previous case before the Commission was *Lord Alton of Liverpool & Others (In the Matter of the People's Mojahadeen Organisation of Iran) v Secretary of State for the Home Department* PC/02/2006 ("**the PMOI case**"). The appeal to the Commission in the PMOI case was successful. The Home Secretary applied unsuccessfully for permission to appeal to the Court of Appeal in *Secretary of State for the Home Department v Lord Alton of Liverpool* [2008] 1 W.L.R. 2341. The Court of Appeal unusually directed that the permission decision would stand as precedent.

32. In the PMOI case in the Commission (¶ 47(1)) the Commission considered the following question as to the test for deproscription:

> "What is the legal test to be applied to the review of a decision of the Secretary of State to refuse to de-proscribe an organisation under section 3(3)(b) of the TA 2000? In particular, is it for the Secretary of State to satisfy POAC that there was material available to him on which he was entitled to believe that the conditions for proscription continue to be fulfilled?"

33. The Commission held in answer to this as follows:

> 67. It was common ground that, in considering whether to proscribe an organisation and whether or not to deproscribe it, there were two stages to the decision making process. **At the first stage, the Secretary of State has, in the light of all of the relevant evidence, to determine**

> **whether he believes that the organisation "is concerned in terrorism"** as defined in section 3(4) and (5) of the Act, that is whether the statutory criteria are met (the "First Stage"). It was also common ground that the Secretary of State could only form such an honest belief if he or she had reasonable grounds for that belief.
>
> 68. If the Secretary of State holds the reasonable belief that the organisation is concerned in terrorism within the meaning of the Act, then he must consider whether or not the discretion to proscribe should be exercised. Thus, **in the event that the First Stage is met, the second stage requires a separate decision whether or not, in the exercise of his or her discretion, the organisation should remain proscribed under the Act** (the "Second Stage").
>
> […]
>
> 71. Further, under section 3(4) of the Act, the Secretary of State can only make an order to proscribe an organisation if he believes that it is concerned in terrorism. The use of the present tense in sections 3(4) and (5) is central to other submissions made by the parties and will be discussed in more detail below; **for present purposes, however, it suffices to note that there is a clear Parliamentary intent that the organisation in question is actually concerned in terrorism at the date of the decision**.

34. In the PMOI case in the Court of Appeal, the PMOI set out their position as follows:

> "The applicant mischaracterised the applicants' case. It was not founded on an alleged renunciation of violence but on the fact that, at the time of the application, the PMOI was not an organisation concerned in terrorism, as defined by the 2000 Act."

35. The Court of Appeal made its conclusions in the PMOI case as follows:

> "38. An organisation that has temporarily ceased from terrorist activities for tactical reasons is to be contrasted with an organisation that has decided to attempt to achieve its aims by other than violent means. The latter cannot be said to be "concerned in terrorism", even if the possibility exists that it might decide to revert to terrorism in the future.
>
> 39. Support for these conclusions can be derived from section 11 of the Act which makes it an offence to belong to a proscribed organisation but then provides that it shall be a defence for a member to prove "that he has not taken part in the activities of the organisation at any time while it was proscribed". It seems to us implicit in this provision that the essence of the criminal offence of belonging to a proscribed organisation is the taking part in activities that, directly or indirectly, lend support to terrorism. It is also implicit that the legislation is aimed against organisations that are carrying on activities connected with terrorism."

> "53. The reality is that neither in the open material nor in the closed material was there any reliable evidence that supported a conclusion that the PMOI retained an intention to resort to terrorist activities in the future."
>
> "54. We come back to the statement in the decision letter that, so it seems to us, encapsulated the reasoning of the Secretary of State:
>
> > "Mere cessation of terrorist acts does not amount to a renunciation of terrorism. Without a clear and publicly available renunciation of terrorism by the PMOI, I am entitled to fear that terrorist activity that has been suspended for pragmatic reasons might be resumed in the future."
>
> To this can be added the Secretary of State's statement:
>
> > "I believe that I continue to be entitled to have regard to what the nature and scale of activities was relatively recently in determining the application. This issue would not, of course, arise if the organisation has clearly ceased to be 'concerned in terrorism'. However, as it has not (in my belief) ceased to be so concerned, I believe that I can consider the nature and scale of the activities that were demonstrated only five years ago."
>
> 55. POAC commented that such an approach "turns the statutory test on its head". We agree."

36. As such, in an application for deproscription, the following 2-stage test will be applied:

(1) Stage 1: Does the Home Secretary honestly and on reasonable grounds believe that at the time of the decision the organisation "is concerned in terrorism"? If not, then she must deproscribe. If so, then consider stage 2.

(2) Stage 2: in the exercise of the Home Secretary's discretion, should the organisation remain proscribed?

37. When this test was applied in the PMOI case in the Commission, the Commission made factual findings as follows:

> "158. For the reasons we have set out below, we believe that the only conclusion that a decision-maker could reasonably come to in the light of that material is that (a) there was a significant change in the nature of the PMOI's activities in 2001 and thereafter, and (b) in particular, there have been no offensive operational attacks by PMOI operatives inside Iran since August 2001 or, at the latest, May 2002, (c) the nature of the rhetoric employed in their publications and propaganda by the PMOI and other,

related, organisations such as NCRI, changed significantly during 2001 and 2002 such that, from 2002, we were not shown any material which either claimed responsibility for any acts that could fall within the definition of terrorism for the purposes of the Act or even reported the actions of others carrying out such activities, (d) although the PMOI maintained a military division inside Iraq (the National Liberation Army), it was completely disarmed by the US military following the invasion of Iraq, and (e) there is no material that the PMOI has sought to restore or bolster its military capability (for example by purchasing weapons, recruiting or training personnel to carry out acts of violence against Iranian or other interests). What inferences and conclusions can be properly drawn from those facts – and whether the statutory criteria for proscription remained satisfied at the date of the decision to refuse to deproscribe in September 2006 – has, of course, been the subject of very intense debate before us."

"188. Putting aside for the moment the assertion that a positive decision to cease all military operations was taken at an extraordinary Congress in June 2001, having considered all of the material before us we are satisfied that the only conclusion that a reasonable decision-maker could reach is that the PMOI's policies and activities changed fundamentally in the summer/autumn of 2001."

"276. The material before us points only to one conclusion. The PMOI has not had any military capability in Iraq since May 2003 and has not sought to re-establish any military capability in the intervening years."

"281. In conclusion the material before us discloses that:

281.1. The PMOI did not oppose the Coalition forces during the invasion and subsequent occupation of Iraq and has remained, in effect, neutral;

281.2. Although, through the NLA, the PMOI did have a very substantial military capability in Iraq prior to 2003, it was disarmed in the immediate aftermath of the invasion;

281.3. Given the absence of any material to the contrary, the only conclusion that a reasonable decision maker could reach is that, since the disarmament of the PMOI/NLA in Iraq, the PMOI has not taken any steps to acquire or seek to acquire further weapons or to restore any military capability in Iraq (or, indeed, elsewhere in the world). The PMOI has not sought to recruit personnel for military-type or violent activities, the PMOI has not engaged in military-type training of its existing members and the PMOI has not sought to support others (i.e. other individuals or groups) in violent attacks against Iranian targets;

281.4. Other material - and in particular the individual declarations made by the PMOI leadership and members in July 2004, the reasons for the PMOI's decision not to fight against the Coalition forces

and/or to disarm - are open to alternative interpretations by a reasonable decision maker if looked at in isolation. For the reasons that we set out below, however, we do not believe that this affects the outcome in this particular appeal."

"295. In our view, on all the relevant material a reasonable decision maker could only come to the conclusion that either there never was (contrary to the earlier claims of the PMOI) any military command structure or network inside Iran after 2001 or that, by some time in 2002, any such structure or network had been dismantled. There is no evidence of any present operational military structure inside Iran which is used to plan, execute or support violent attacks on Iranian targets. Nor is there any evidence that the PMOI has retained military operatives inside Iran with the intention of carrying out such attacks. That is consistent with the evidence that the PMOI has not carried out any attacks since August 2001, or May 2002 at the latest, and the absence of any evidence suggesting that the PMOI have attempted (whether in Iraq or Iran or, indeed elsewhere) to acquire weapons or a military capability following its disarmament in Iraq in 2003."

"348. We have already set out in detail our conclusions on the material before us. In our view, intense scrutiny of the material requires the conclusion that:

348.1. With the possible exception of the single questioned incident in May 2002, the PMOI has not engaged in terrorist acts in Iran or elsewhere since August 2001.

348.2. Even if the PMOI had a military command structure at some point within Iran, the material demonstrates that such structure had ceased to exist by (at the latest) the end of 2002.

348.3. Even if the three reports in 2002 could amount to glorification within Section 3(5)(c) of the 2000 Act, all such activity ceased by August 2002;

348.4. In May 2003, the PMOI was disarmed;

348.5. There is no material which indicates that the PMOI has obtained or sought to obtain arms or otherwise reconstruct any military capability despite their capacity to do so after May 2003;

348.6. Further, there is no material to suggest that the PMOI has sought to recruit or train members for military or terrorist action;

In short, there is no evidence that the PMOI has at any time since 2003 sought to re-create any form of structure that was capable of carrying out or supporting terrorist acts. There is no evidence of any attempt to "prepare" for terrorism. There is no evidence of any encouragement to others to commit acts of terrorism. Nor is there any material that affords any grounds

> for a belief that the PMOI was "otherwise concerned in terrorism" at the time of the decision in September 2006. In relation to the period after May 2003, this cannot properly be described as "mere inactivity" as suggested by the Secretary of State in his Decision Letter. The material showed that the entire military apparatus no longer existed whether in Iraq, Iran or elsewhere and there had been no attempt by the PMOI to re-establish it.
>
> 349. In those circumstances, the only belief that a reasonable decision maker could have honestly entertained, whether as at September 2006 or thereafter, is that the PMOI no longer satisfies any of the criteria necessary for the maintenance of their proscription. In other words, on the material before us, the PMOI is not and, at September 2006, was not concerned in terrorism."

38. The evidence in the PMOI case is likely to be much more clearly in favour of deproscription than the evidence that is likely to be gathered in the case of the PKK. In the PMOI case there was a wholesale renunciation of the military infrastructure of the organisation. That has plainly not occurred in the case of the PKK. Nonetheless, the central issue remains as set out by the Court of Appeal in the PMOI case: what is important is **a decision by the organisation to attempt to achieve its aims by other than violent means**.

Previous deproscriptions

39. The following Orders have been made to deproscribe organisations:

(1) The Terrorism Act 2000 (Proscribed Organisations) (Amendment) Order 2008 deproscribed Mujaheddin e Khalq (also known as the People's Mojahadeen of Iran (PMOI)). The Order gave effect to the judgments of the Commission and the Court of Appeal in the PMOI case (see below).

(2) The Terrorism Act 2000 (Proscribed Organisations) (Amendment) Order 2016 deproscribed the International Sikh Youth Federation. The Explanatory Memorandum (¶ 7.4) states that an application was made to the Home Secretary who decided "*that there is insufficient information to conclude that the group remains concerned in terrorism*".

(3) The Terrorism Act 2000 (Proscribed Organisations) (Amendment) Order 2017 deproscribed Hezb-e Islami Gulbuddin. The Explanatory Memorandum (¶ 7.10) states that an application was made to the Home Secretary who decided "*that*

there is insufficient information to conclude that the group remains concerned in terrorism".

(4) The Terrorism Act 2000 (Proscribed Organisations) (Amendment) (No 2) Order 2019 deproscribed the Libyan Islamic Fighting Group (LIFG). The (draft) Explanatory Memorandum (¶ 7.3) states that "*the group is now defunct and no longer exists*".

40. The above precedents show how the Home Secretary has resolved to exercise her discretion over whether to deproscribe organisations. As such, on standard public law principles, the Home Secretary can be expected to apply the same approach to any application by the PKK for deproscription.

41. Further, the latest Order proscribing organisations is the Terrorism Act 2000 (Proscribed Organisations) (Amendment) Order 2019. The Explanatory Memorandum to that Order (para 6.2) sets out the criteria to which the Home Secretary has regard in determining whether to proscribe an organisation in the first place. This is set out in precisely identical terms to other recent Orders, such as the Terrorism Act 2000 (Proscribed Organisations) (Amendment) Order 2017 set out above which both proscribes and deproscribes. These criteria were also referred to in the debate in the House of Commons on 13-14 March 2001 on the Terrorism Act (Proscribed Organisations) (Amendment) Order 2001 which proscribed the PKK. ¶ 6.2 of the 2019 Order provides as follows:

> "The Secretary of State has regard to several factors in deciding, as a matter of discretion, whether or not to proscribe an organisation. These are:
>
> - the nature and scale of the organisation's activities;
> - the specific threat that it poses to the UK;
> - the specific threat that it poses to British nationals overseas;
> - the extent of the organisation's presence in the UK; and
> - the need to support international partners in the fight against terrorism."

42. On standard public law principles, the Home Secretary can be expected to apply the same approach to any application by the PKK for deproscription.

The rules for applications for deproscription

43. The rules for making an application for deproscription are exhaustively set out in the Proscribed Organisations (Applications for Deproscription etc.) Regulations 2006. The relevant provisions provide as follows:

> "**3.— Applications under section 4(1)(a) of the Act**
>
> (1) An application under section 4(1)(a) of the Act must be made in writing and must state—
>
> (a) the name of the organisation to which the application relates;
>
> (b) whether the application is being made by the organisation or by a person affected by the organisation's proscription; and
>
> (c) the grounds on which the application is made.
>
> (2) In the case of an application made by an organisation, the application must also state—
>
> (a) the name and address of the person submitting the application; and
>
> (b) the position which he holds in the organisation or his authority to act on behalf of the organisation.
>
> (3) In the case of an application made by a person affected by the organisation's proscription, the application must also state—
>
> (a) the manner in which the applicant is so affected; and
>
> (b) the applicant's name and address.
>
> (4) An application must be signed by the person referred to in paragraph (2)(a) or (3), as the case may be."
>
> "**5. Address for sending or delivery**
>
> An application must be sent or delivered to the Head of Counter Terrorism Policy, Crime Reduction and Community Safety Group, Home Office, 2 Marsham Street, London SW1P 4DF."
>
> "**7. Period of determination**

The Secretary of State must determine an application within a period of 90 days beginning with the day after the day on which he receives the application."

"**8. Refusal of application**

Where the Secretary of State refuses an application, he must as soon as practicable—

(a) inform the applicant of his refusal, and

(b) notify him of the procedures for appealing against the refusal to the Proscribed Organisations Appeal Commission."

The rules of the Proscribed Organisation Appeal Commission

44. Applications to the Commission are dealt with under The Proscribed Organisations Appeal Commission (Procedure) Rules 2007 (as amended).

45. The time limit to appeal is 42 days after the day on which the appellant is informed of the Secretary of State's refusal to deproscribe the organisation (Rule 6(1)).

46. There are strict rules on the content of the Notice of Appeal, set out in Rule 7 as follows in particular:

"7.— Notice of appeal

(1) The notice of appeal must—

(a) set out the grounds on which the appellant applied to the Secretary of State under section 4 of the 2000 Act for an order under section 3(3) or (8) of that Act;

(b) set out the grounds for the appeal to the Commission;

(c) give reasons in support of the grounds mentioned in sub-paragraph (b);

(d) where proceedings are brought under section 7(1)(a) of the 1998 Act, give details of the Convention right which is alleged to have been infringed.

(2) The notice of appeal must be signed—

(a) where the appellant is the organisation, by a person who claims to be a member of the organisation or by its representative;

> (b) where the appellant is a person affected by the organisation's proscription […] by that person or by his representative, and be dated.
>
> (3) The notice of appeal must state—
>
> (a) the name of the organisation;
>
> (b) the name and address of the signatory of the notice and the category of person mentioned in paragraph (2) into which he falls;
>
> (c) the name and address of any representative of the appellant, where the representative is not the signatory.
>
> (4) Where the signatory of the notice of appeal is the appellant's representative, he must certify in the notice that he has completed the notice in accordance with the appellant's instructions.
>
> (5) The signatory of the notice of appeal must attach to it a copy of the document which informed the appellant of the decision being appealed against."

47. The Rules envisage closed material proceedings, redaction of evidence by the Home Secretary, and the appointment of a special advocate who, once they have received closed material, is prohibited from communicating with the appellant about the case (Rules 4, 9, 10, 14 to 16, and 22).

48. The Rules provide that the Home Secretary should file a reply, which can be withheld from the appellant, including (a) the reasons for the proscription of the organisation; (b) a summary of the evidence in support of those reasons; and (c) the evidence on which she relies in opposition to the appeal (Rule 12).

49. An application can be made to rely on further material, or for the Home Secretary to disclose material on which she relies (Rule 13). However, there is no guarantee that such an application would be granted.

50. Any application for permission to appeal may be made "*no later than 10 days after the day on which the applicant received the determination*" (Rule 30) (excluding non-business days (Rule 35)) and must set out the grounds of appeal.

51. The Commission operates out of Field House, using the same support staff as the Special Immigration Appeals Commission ("**SIAC**").

The judicial review of the proscription of the PKK

52. The decision to proscribe the PKK in the Terrorism Act (Proscribed Organisations) (Amendment) Order 2001 was subject to an application for permission to apply for judicial review. The PMOI also brought proceedings, as did a representative of Lashkar e Tayyabah, both of which organisations were proscribed by the same Order. The case was *R (on the application of the PKK and others) v Secretary of State for the Home Department* [2002] EWHC 644 (Admin); 17 April 2002.

53. There were over 100 claimants in support of the PKK. As Richards J noted at ¶ 37, "*It is said that they are only a small proportion of those who wished to be joined as claimants.*" Estella Schmidt gave evidence in support of the claimants. The claimants challenged the Home Office's contention that the PKK continued to be concerned in terrorism. Considerable evidence was provided of the negative effect on Kurdish political expression caused by the proscription of the PKK.

54. Richards J held that the claimants had an arguable claim. However, at ¶ 92, permission was refused because the Commission amounted to an adequate alternative remedy.

55. The decision of the Administrative Court was a permission decision, and so does not set binding precedent. However, it is un-appealed, well-reasoned, and has stood for over 17 years unchallenged. As such, in my view, it is likely to carry considerable persuasive weight. In particular, in my view, it is very likely that any application for judicial review of a decision not to deproscribe the PKK will be refused permission on the ground that there is an alternative remedy in the Commission.

The Belgian Case on proscription of the PKK

56. I am aware that in Belgium there has recently been a case dealing with the proscription of the PKK under Belgian law. I have made a request to Jan Fermon, the Belgian lawyer involved in the case, for further information about the case, in the hope that it can assist with arguments relating to the applicability to the present case of ECHR Articles 10 and 11 and the right to take up arms in support of national self-determination.

Advice

Standing – the ideal clients

57. As the legal provisions above make clear, anyone who brings a claim must be close enough to the PKK in order to have standing. The question of standing can be raised by the Home Secretary in order to refuse an application or oppose an appeal to the Commission. As such, an applicant will need to evidence, for example in a witness statement, that they have standing.

58. However, at the same time, anyone whose relationship to the PKK is so close as to allow them to have standing may be guilty of one of the numerous terrorism offences for which an application to the Home Secretary does not provide immunity. Alternatively, they may have only committed offences for which they would be granted immunity, but they would nonetheless become the subject of investigation by the security services. The security services could then gather additional evidence against such an individual in order to bring proceedings against them.

59. As such, the client will need to have the risks of participating in proceedings drawn clearly to their attention.

60. Further, the immunity provided by the Terrorism Act 2000 s 11 extends only to criminal matters. It does not extend to civil, immigration, or citizenship matters. As such, the following issues arise:

    (1) Any evidence provided in the course of a deproscription application could be used as the basis for the making of a Terrorism Prevention and Investigation Measure, the system which replaced Control Orders.

    (2) For any foreign national, evidence provided in the course of a deproscription application could (and almost certainly would) be used as evidence to refuse the grant of leave to enter or remain, or to curtail leave already granted.

    (3) There is a risk that a British citizen with dual nationality, or a British national who acquired citizenship by naturalisation and who there are reasonable grounds to believe could obtain an alternative nationality, could have their citizenship

revoked on the basis of evidence provided in a deproscription application. Such a process would be likely to occur whilst the applicant was out of the jurisdiction, which would then prevent their return to the United Kingdom to access appeal rights.

(4) Finally, the immunity only extends to prosecutions in the United Kingdom. It does not extend to prosecutions in Turkey. As such, the British government could (and in my view would) disclose to the Turkish state the identity of any person involved in the deproscription application. Any such person would then be at real risk of an extradition application being made by the Turkish state. In my view, at present, such an application would be unlikely to be granted by the Home Secretary or the courts of the United Kingdom. However, this cannot be guaranteed always to be the case. Further, the Turkish state has a long memory, and will pursue grudges, through lawful or unlawful means. For instance, the Turkish state kidnapped Abdullah Öcallan in Nairobi, having received information and assistance from the CIA. As such, the Turkish state could pursue extradition through other (particularly non-European) states, or could simply extraordinarily render an applicant to Turkey for prosecution or other persecution.

61. In summary, in order to minimise risk to the client, they must be:

(1) Affected by the proscription, for example because they cannot take part in the PKK's activities;

(2) A person who has never taken any role in the PKK beyond mere membership (this ideally being explained by their fear of being accused of terrorism offences);

(3) A British citizen by birth;

(4) Not have any other citizenship; and

(5) Not plan to ever travel to Turkey.

62. Alternatively, an individual who has already been convicted of membership of, or actions taken in relation to, the PKK may be an appropriate client. Such a client would already be facing all of the negative consequences that making an application could

potentially bring. In the case of *R v Aidan James*, a British man was convicted of attending a PKK training camp. This may be the ideal sort of client.

The test for deproscription

63. The test for deproscription is not set out clearly in the relevant law. However, the Home Secretary in making her decision, and the Commission and any Court reviewing her decision, will have regard to the following test:

    (1) Stage 1: Does the Home Secretary honestly and on reasonable grounds believe that at the time of the decision the organisation "is concerned in terrorism"? If not, then she must deproscribe. If so, then consider stage 2.

    (2) Stage 2: in the exercise of the Home Secretary's discretion, should the organisation remain proscribed?

64. The first stage of the test will inevitably be influenced by whether there has been a decision by the PKK to attempt to achieve its aims by other than violent means.

65. The second stage of the test will be influenced by the factors to which the Home Secretary has regard in deciding whether or not to proscribe an organisation:

    (1) The nature and scale of the organisation's activities;

    (2) The specific threat that it poses to the UK;

    (3) The specific threat that it poses to British nationals overseas;

    (4) The extent of the organisation's presence in the UK; and

    (5) The need to support international partners in the fight against terrorism.

66. Any appeal to the Commission or onward appeal to the Courts will apply judicial review principles, albeit that when Article 10 or 11 ECHR rights are involved the relevant tribunal will apply "anxious" or "intense" scrutiny to the Home Secretary's decision.

Evidence

67. Given that any appeal to the Commission is conducted on judicial review principles, it will be necessary to introduce all the evidence on which the applicant intends to rely at the point that the application is made. If the material is not provided to the Home Secretary, then applying ordinary public law principles and the Commission's rules, the Commission will not have regard to it unless it gives permission. As such, the evidence-gathering exercise for the application must be thorough and complete before the application is made to the Home Secretary.

68. The evidence will need to specifically address the first stage of the test for deproscription, i.e. whether the PKK is currently concerned in terrorism. It will need to deal with the PKK's failure to renounce its weapons. The application should deal specifically and in detail with the PKK's use of their weapons in self-defence and the defence of others, whilst at the same time explaining that they are not used offensively against the Turkish state with an intent to influence the Turkish government or a section of the Turkish public for a political or ideological cause. This part of the evidence must be aimed at the objective circumstances of the PKK *at present*, including whether they are at present preparing to commit acts of terrorism in future.

69. The evidence will also need to address the second stage of the test for deproscription, i.e. the Home Secretary's residual discretion. This is a primarily political question. The evidence will need to deal with the geopolitical circumstances surrounding the PKK's original proscription, as well as its continued proscription. The evidence will also need to address the right of a people to self-determination, and to use force lawfully in the pursuit of such a right (although on this point the submissions will need to be careful not to undermine the submission that the PKK is no longer concerned in terrorism as defined in the Terrorism Act 2000 s 1). The evidence will also need to address the impact of the proscription on the rights of political expression of the Kurdish community in the United Kingdom. The evidence should pay particular regard to the matters adduced by the prosecution in the recent case of *R v Aidan James*, involving a conviction for attending a PKK training camp in Iraq: the Home Secretary will inevitably rely on this material. Connections should therefore be made with defence lawyers in that case.

Procedure

70. Once all evidence has been gathered and an applicant identified, an application will need to be made in writing to the Home Office. The applicant's name and address must be provided. The application will need to explain the manner in which the applicant is affected. The application must be sent to "*Head of Counter Terrorism Policy, Crime Reduction and Community Safety Group, Home Office, 2 Marsham Street, London SW1P 4DF*".

71. At the time of filing the application, the solicitors on record should take instructions in favour of pursuing an appeal to the Commission. If the application is refused by the Home Office, the applicant may appeal to the Commission. The appeal must be brought within 42 calendar days (6 weeks). The appeal must state the grounds of the application, the grounds of the appeal and supporting reasons, and the name and address of the applicant. It must be signed by the applicant, or on the applicant's behalf by a representative, supported by the representative certifying that the notice of appeal was completed in accordance with the appellant's instructions. A copy of the Home Office's decision must be attached with the appeal.

72. Any onward appeal from the Commission is to the Court of Appeal. Permission to appeal must be sought from the Commission within 10 days of the receipt of the determination. If permission to appeal is refused by the Commission, it may be sought from the Court of Appeal. Any further appeal is to the Supreme Court.

Conclusion

73. In my view evidence should be gathered in order to make an application to the Home Secretary. Such an application will likely need to be appealed to the Commission. Connections should be made with community groups and lawyers domestically and internationally to facilitate the collection of relevant evidence and legal argument.

STEPHEN KNIGHT
1 PUMP COURT CHAMBERS
13 November 2019