Free Speech, Protest and the High Court's Ruling on the Proscription of Palestine Action

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On 13 February, the High Court of England and Wales ruled that the UK government's decision to proscribe Palestine Action did not follow the government's own policy and was contrary to the rights to freedom of expression and assembly (Articles 10 and 11 of the ECHR). The decision is not cast in sweeping terms and does not challenge the legal regime that empowers the Home Secretary to proscribe an organisation. Instead, the ruling is focused on the specific decision to proscribe Palestine Action in light of the circumstances of the case and the available evidence. The ruling is nonetheless significant and provides a warning against the expansive use of proscription powers.

Alan Greene's post in this blog explains the role of soft law in the court's decision. The focus here is on the complex free speech issues that arise when an organisation pursues a direct action campaign involving criminal damage, but only a small part of that activity falls within the broad legal definition of terrorism (according to the court). The case highlights how proscription, a sweeping power "designed to ensure that an organisation ceases to exist", significantly affects the rights of people outside the organisation. Given the breadth of the restriction, the court came to the right conclusion and provided an important safeguard for free speech and protest rights.

Background

To provide some background, the Terrorism Act 2000 grants a power to the Home Secretary to proscribe organisations that are "concerned with terrorism" (which extends to those that promote or encourage terrorism). Terrorism is defined as an action or the threat of action which is "designed to influence the government" or an international governmental organisation, or "to intimidate the public or a section of the public". To fall within the definition, the action or threat must be "made for the purpose of advancing a political, religious, racial or ideological cause". The action also has to fall within a list provided in the legislation, which includes "serious violence against a person" and "serious damage to property".

Given the broad definition under the Terrorism Act, the government cannot proscribe every organisation that it deems to be concerned with terrorism. As the court made clear, once the "concerned with terrorism" threshold is passed, the government has a discretion to proscribe. The discretion is to be used proportionately and should normally be reserved for the most grave risks.

The threshold of violence

Where an organisation does engage in activities that fall within the legal definition of terrorism, a challenge to a proscription decision based on the ECHR raises some complex questions. As is well established, the ECHR protects the right to peaceful protest. While that covers some forms of disruptive activity and direct action, the Strasbourg Court has ruled that violent actions and activities with the purpose of destroying the Convention rights of others fall outside of the scope of protection. For this reason, if an organisation is primarily "concerned with terrorism", then it seems that much of its activity will normally fall outside the scope of the rights to freedom of expression (Articles 10 ECHR) and freedom of assembly (Article 11 ECHR).

In its judgment on Palestine Action, the court found it untenable to describe the organisation as non-violent. The court also rejected the argument that Palestine Action was engaged in a campaign of civil disobedience, and stated that it was "not engaged in any exercise of persuasion, or at least not the type of

persuasion that is consistent with democratic values and the rule of law" (para 23). In coming to these conclusions, the court noted that it had limited information about the structure and organisation of Palestine Action. However, the court looked at the organisation's publications, including the "Underground Manual" that had been published on its website, which (the court found) "encourages its members and others who align with it to plan and cause damage to property" (para 25). At the same time, the court also noted that a "very small number of its actions have amounted to terrorist action within the definition at section 1(1) of the 2000 Act" (para 138).

The breadth of proscription

A decision to proscribe does not narrowly target those activities that involve or encourage serious criminal damage (or any other terrorist action). Once an order is made, the Terrorism Act 2000 provides that it is a criminal offence not just to belong to a proscribed organisation, but also to express an opinion or belief that is supportive of a proscribed organisation. Under s 13 of the Act, a person also commits an offence if they wear, carry or display an article "in such a way or in such circumstances as to arouse reasonable suspicion that he is a member or supporter of a proscribed organisation". The court found the order engaged the right to peaceful protest of those who wanted to peacefully express support for the aims of Palestine Action, such as those wanting "to stop genocide and other atrocity crimes by causing disruption to corporate actors who aid, abet, facilitate and profit from those crimes" (para 115). Those making such statements of support did not incite violence or encourage terrorism, and were not excluded from ECHR protection.

When assessing the impact on expression rights, the court placed weight on the potential chilling effect, noting that the heavy penalties meant that "it is reasonable to expect people to be risk averse, to adjust their behaviour and to avoid doing things that run any significant risk that they might commit any of those criminal offences" (para 121). The court therefore had to consider not just the speech which the letter of the law criminalises, but the extent to which reasonable people self-censor. The extent of any self-censorship is difficult to know, but the risk is greater where the law is cast in broad terms and the sanctions are severe. In such circumstances, the desire to avoid the risk of sanction results in the voluntary suppression of speech that would not violate the law if tested in court. Along such lines, the court noted the evidence from organisations that felt inhibited from campaigning against the proscription order, for fear that they would be understood to express support for Palestine Action (para 123).

A vehicle for expression

The court expressed scepticism towards some of the free speech arguments advanced by the claimants. For example, the court explained that proscription does not stop people from expressing support for Palestine, from criticising the government of Israel, or from engaging in protests targeted at companies supplying military equipment (para 117). That is surely correct and the order does not directly restrict support for the underlying cause. The court was nonetheless right to find a significant interference with the Convention rights. While that may seem self-evident, the proscription of an organisation restricts various ways a person can express their views. In particular, it stops the organisation from providing a vehicle for expression, including for those outside of its membership.

Expressing support for an organisation is both a shorthand way to communicate a set of views and to align oneself with a particular outlook or orientation without having detailed knowledge of the issues. Both points are relevant in the case Palestine Action, which claims that it aims "to take direct action against Israel's arms trade in Britain and to stop the complicity of corporate actors in atrocity crimes" (para 16). By displaying a sign with a slogan expressing support for the organisation, the speaker uses a shorthand way to publicly endorse those aims. The value to the speaker is not just that the slogan is concise, but that it allows them to take a position even if they do not know the specifics about companies supplying equipment to the Israel Defence Force. Such a person may choose to

express support for an organisation that does know about such issues and tries to do something about them.

The loss of the shorthand form of expression will be a factor in any case where an organisation is proscribed. If a person expresses support for a neo-Nazi organisation, they align themselves with a particular outlook. In such a case, the loss of the shorthand is less problematic, as the expression of neo-Nazi ideology is likely to fall outside the protection of the ECHR. Similarly, where terrorist activities are a defining feature of an organisation, then support for the organisation may be taken to be a shorthand way of advocating terrorism. The position is different where a small part of the organisation's activities falls within the legal definition of terrorism. In such circumstances, the expression of support is more plausibly an endorsement of the organisation's ideological position (which is protected under the ECHR) than of any terrorist methods. The point is not decisive against proscription, but shows that proscription entails a loss of speech rights even if people are still free to speak in favour of a particular cause or viewpoint.

Error and proportionality

The court seemed unpersuaded by the risk of the law being applied in error (such as to those expressing support for Palestine, as opposed to the proscribed organisation). The court referred to the police guidance which aimed to avoid such errors (cited at para 119). The court also thought the risk of error should reduce over time as the terms of the order become better understood. In my view, such a conclusion may be optimistic. The law itself is couched in broad terms, which criminalise the expression of "an opinion or belief that is supportive of a proscribed organisation" (subject to a mens rea of recklessness). The way an opinion can be supportive may be subtle and open to interpretation. The broad terms of the law do not provide a bright line and pose a risk of overbroad application.

While the court did not accept all the arguments advanced by the claimants, it did accept that proscription was a very significant restriction of Article 10 and 11 rights. The court set that against the fact that only a "very small number" of the organisation's actions amounted to terrorist action. The court therefore concluded the "nature and scale" of the group's activities, in so far as they were terrorist activities, had not yet reached a "level, scale and persistence" that would justify proscription and its far-reaching consequences.

The wider effects

The decision raises the usual questions about the role of the court in overseeing sensitive questions relating to security. On this point, it is important to remember the limited political checks. The proscription order was considered by Parliament alongside the proscription of two other organisations in a very short space of time. While the decision had its political supporters, critics saw it as a political majority restricting speech and protest on a matter of public importance. By reviewing the decision without being subject to the intense political pressures or tight time constraints, the courts provided an important safeguard for political rights.

The ruling will also generate further debate about whether the government should have an additional intermediate power to proscribe without criminalising expressions of support for the organisation. While such a power would appear to be more proportionate, the risk is that a government may be more willing to exercise an intermediate power in relation to a wider range of organisations that do not meet the threshold for full proscription. More generally, if the purpose of proscription is to ensure an organisation ceases to exist (a type of death penalty for organisations), then it is hard to see how intermediate measures would be effective. The point here is not that less restrictive measures always fail, but that proscription is a drastic measure of last resort and should be used in exceptional cases.

The government has been granted permission to appeal the ruling, and the proscription order remains in place – so the episode is not over. So far, it appears that the decision to proscribe has backfired. Palestine Action has become better known and has been a focal point in the debates about Israel, Gaza and the British government's response. The perception that the law is

being used in an oppressive way may have generated sympathy from people who do not endorse Palestine Action's activities.

These practical effects, along with the court's ruling, should also put a brake on any momentum towards the more extensive use of proscription powers. The proscription of Palestine Action was seen to be a first step in using the power in relation to direct action groups, which would set a precedent for proscription to be applied to a wider range of organisations. The experience with Palestine Action provides an important warning that such steps carry legal and political risks.

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