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# Countering extremism and recording dissent: Intelligence analysis and the Prevent agenda in UK Higher Education

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## Introduction

This 'forward thinking' piece is not so much a report on a change in policy, as much as a report on a policy that won't go away. 'Prevent' is the moniker given to the strategy of the police and the security services of seeking intelligence from the community at large in connection with terrorism, extremism and radicalisation<sup>1</sup>. This 'intelligence' can be extremely sensitive personal information about a person<sup>2</sup>. Sharing such personal information between a school, prison, hospital or University (the latter the focus of this piece) and the relevant units of police forces, security services or the Home Office is an extremely contentious business. This is especially so since Prevent as a strategy is dependent on highly subjective decision-making<sup>3</sup>. In a broader context, the Prevent strategy, seen through a particular lens, is a classic example of state surveillance contiguous with a threat to civil liberties in the modern era. As an information law researcher, in part, but chiefly as a human rights law teacher in a University setting, like many in my line of work I could hardly remain ignorant of the Prevent strategy for long.

A government review (even on a region-by-region basis<sup>4</sup>) has been demanded for Prevent from different quarters<sup>5</sup>, and this policy piece represents a review of the landscape for Prevent in HE at a time when such a review might yet be forthcoming on a small scale<sup>6</sup>. However, a recent judgment from the High Court in the case of *Butt*<sup>7</sup> which asserted the lawfulness of the statutory Prevent duty guidance for HE institutions has possibly robbed the campaign for a fully comprehensive review of Prevent of much of its momentum. In *Butt*, the High Court amongst other findings rejected the idea that the statutory Prevent duty guidance for HE institutions was ultra vires and unlawful. It had been argued by Butt that there was too great a conflation in the guidance between non-violent extremism and advocating terrorism as forms of behaviour within the ambit of Prevent. In the words of the relevant guidance, the Prevent duty sought to help combat “vocal or active opposition to fundamental British values”

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\* My thanks to Martyn Varley and to the very helpful anonymous reviewer. The usual disclaimer applies.

<sup>1</sup> See <https://www.gov.uk/government/publications/prevent-duty-guidance> (accessed at 17.11.2017)

<sup>2</sup> See Jamie Grace and Marion Oswald, 'Being on our radar does not necessarily mean being under our microscope': The Regulation and Retention of Police Intelligence", (2016) 22(1) EJoCLI.

<sup>3</sup> See Jim Snaith and Karen Stephenson, 'The prevent duty: a step too far?', Ed. Law 2016, 17(1), 56-67.

<sup>4</sup> See <https://www.theguardian.com/uk-news/2017/jun/22/prevent-andy-burnham-greater-manchester-muslim-communities> (accessed at 17.11.2017)

<sup>5</sup> Calls for a review of Prevent have been made in the last two years by a multitude of prominent individuals and civil liberties groups or scrutiny bodies, including by the Labour peer Lord Dubs, Liberty, Rights Watch (UK), the Parliamentary Joint Committee on Human Rights, and former Independent Reviewer of Terrorism Legislation, David Anderson QC. See <http://www.middleeasteye.net/news/uk-government-faces-calls-review-effectiveness-prevent-795761237> (accessed at 17.11.2017); <http://schoolsweek.co.uk/mps-and-peers-demand-review-of-prevent-duty/> (accessed at 17.11.2017), and <http://www.telegraph.co.uk/news/2017/05/24/governments-anti-terror-prevent-programme-must-strengthened/> (accessed at 12.09.2017)

<sup>6</sup> See <https://www.easterneye.eu/rethink-prevent-strategy-needed-end-radicalisation-says-rudd/> (accessed at 17.11.2017)

<sup>7</sup> *R (Butt) v Home Secretary* [2017] EWHC 1930 (Admin)

as a means of having due regard to individuals being drawn into terrorism, even if that opposition to those values was non-violent, though still extreme<sup>8</sup>.

The finding in *Butt* that the Prevent duty guidance for HE as it currently stands is not *ultra vires*, with regard to the provisions of the 2015 Act, is quite possibly a policy opportunity lost, from the perspective of information governance and practice as much as from a counter-terrorism perspective. A piece written by Home Secretary Amber Rudd in August 2017 asserted that Prevent is very much here to stay in an essentially undiluted form<sup>9</sup>. The current HE sector policy position is one of the *status quo*, then, with Rudd noting at the 2017 Conservative Party conference that:

"We all have a role to play. Prevent isn't some 'Big Brother' monolithic beast. It's all of us working together, through local initiatives set up by local people, schools, universities and community groups."<sup>10</sup>

The *Butt* case could not address all possible dimensions of the operation of the Prevent duty in HE. For one thing, Dr. Butt had only spoken on campuses as an invited speaker, as opposed to an employed academic member of staff with enhanced rights to freedom of speech, as the High Court saw it. And counsel for Butt did not employ every argument that they might have to challenge the guidance concerned; notably not arguing as a ground of review that the guidance had been formulated as a breach of the Public Sector Equality Duty, for example<sup>11</sup>. But the finding that the Prevent Duty guidance relevant to HE is in fact lawful (in the sole judgment dealing with it to date) will be a salient factor in the debate over reform.

It is not the case, however, that the outcome of the *Butt* case has placated the educators in HE who are understandably agitated about the effects of the Prevent duty. Writing in the specialised legal education journal *The Law Teacher*, Joanna Gilmore has urged law lecturers to do more pedagogically in order to counter-balance the perceived heavy-handed surveillance effect of complying with the Prevent Duty, by directly discussing the nature of the Prevent strategy across their courses and in their classrooms:

"At an individual level, staff members involved in the delivery of teaching should attempt to create a safe space for open discussion and debate in order to resist the harmful chilling effects of Prevent. This could include, for example, integrating a discussion of academic freedom at the beginning of a module which makes it clear that respectful debate and discussion, and independent research beyond the set reading, are actively encouraged. Students should also be encouraged to discuss and debate the Prevent strategy in seminars and workshops, and interrogate the definitions of "extremism" and "British values" upon which the policy is based. This would require staff to introduce competing academic perspectives on Prevent in order to encourage students to express their own viewpoints and share experiences. Such measures,

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<sup>8</sup> See *Butt*, at 27.

<sup>9</sup> See <https://www.gov.uk/government/speeches/safeguarding-our-young-people-from-becoming-radicalised-is-difficult-but-vital-work-article-by-amber-rudd> (accessed at 17.11.2017)

<sup>10</sup> From *The Spectator*, (2017), Amber Rudd's Conservative conference speech, full text, from <https://blogs.spectator.co.uk/2017/10/amber-rudds-conservative-conference-speech-full-text/> (accessed at 10.11.2017)

<sup>11</sup> For context see Equality and Human Rights Commission, *Delivering the Prevent duty in a proportionate and fair way: A guide for Higher Education providers in England on how to use equality and human rights law in the context of Prevent*, 2017, from <https://www.equalityhumanrights.com/en/publication-download/delivering-prevent-duty-proportionate-and-fair-way> (accessed at 17.11.2017)

although limited, could go some way in defending the academic freedom of staff and students...<sup>12</sup>

### Controversy surrounding the Prevent duty

As is well known, community intelligence on individuals collected or referred through the Prevent strategy and multiagency processes is a keystone in the UK counter-terrorism landscape<sup>13</sup>. But Prevent is not without its critics, who hail from the political left and right. And Prevent is certainly no panacea for radicalisation and the threat of terrorism<sup>14</sup>. The 2017 Manchester Arena bomber, Salman Abedi, was reportedly referred to the security services no less than five times because of fear on the part of those who knew him that he was being radicalised and drawn into terrorism<sup>15</sup> - although Greater Manchester Police have stated that they were unaware of this intelligence about Abedi<sup>16</sup>, perhaps showing a lack of a link in intelligence sharing around the Prevent strategy. However, an upshot of increased awareness of Prevent generally is that, following the Manchester attack and others in London and across Europe in the summer of 2017, there has been a doubling of the rate of Prevent referrals to the police in recent months<sup>17</sup>.

Publically-available information about the flow of individual referrals (and the flow of personal data as 'intelligence' therefore) under the ambit of Prevent is patchy. Figures about Prevent referrals from the Muslim community have been misquoted and distorted by politicians with an anti-immigration and anti-Muslim agenda<sup>18</sup>. There is undeniably a tendency to associate Prevent (whether in HE or otherwise) with the threat of Islamic fundamentalist values as the catalyst for radicalisation and personal journeys towards terrorism on the part of plotters and perpetrators<sup>19</sup>. The Prevent duty guidance for HE institutions<sup>20</sup> does not draw any specific attention to the Islamic faith of University staff, students or guest speakers, and rightly so. Muslim students, for example, can already feel like a University is a hostile place<sup>21</sup>. Quite properly, universities have been reminded of their duties concerning Prevent under both equality law and human rights law by the Equality and Human Rights Commission<sup>22</sup>. One issue might be however that the prevalent media discourse

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<sup>12</sup> See Joanna Gilmore, 'Teaching terrorism: the impact of the Counter-Terrorism and Security Act 2015 on academic freedom', (2017) *The Law Teacher*, DOI: 10.1080/03069400.2017.1377025

<sup>13</sup> See <https://www.gov.uk/government/publications/channel-guidance> (accessed at 17.11.2017)

<sup>14</sup> See Paul Wragg, 'For all we know: freedom of speech, radicalisation and the prevent duty', *Comms. L.* 2016, 21(3), 60-61.

<sup>15</sup> See <http://www.telegraph.co.uk/news/2017/05/24/security-services-missed-five-opportunities-stop-manchester/> (accessed at 17.11.2017)

<sup>16</sup> See <https://www.theguardian.com/uk-news/2017/may/30/salman-abedi-unknown-prevent-workers-manchester-police> (accessed at 17.11.2017)

<sup>17</sup> See <https://www.theguardian.com/uk-news/2017/aug/09/prevent-referrals-double-since-2017-uk-terror-attacks> (accessed at 17.11.2017)

<sup>18</sup> See <https://theconversation.com/fact-check-are-only-one-in-eight-counter-terrorism-referrals-to-prevent-made-by-muslims-78781> (accessed at 17.11.2017)

<sup>19</sup> See <https://www.opensocietyfoundations.org/reports/eroding-trust-uk-s-prevent-counter-extremism-strategy-health-and-education> (accessed at 17.11.2017)

<sup>20</sup> See [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/445916/Prevent\\_Duty\\_Guidance\\_For\\_Higher\\_Education\\_England\\_Wales\\_.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/445916/Prevent_Duty_Guidance_For_Higher_Education_England_Wales_.pdf) (accessed at 17.11.2017)

<sup>21</sup> Jacqueline Stevenson, 'University can feel like a hostile place to Muslim students', 2017 from <http://theconversation.com/university-can-feel-like-a-hostile-place-to-muslim-students-74385> (accessed at 17.11.2017)

<sup>22</sup> EHRC, *Delivering the Prevent duty in a proportionate and fair way: A guide for Higher Education providers in England on how to use equality and human rights law in the context of Prevent*, 2017, from

may produce a localised suspicion of the discussion of fundamental, if not fundamentalist, Islamic values on campus. There is also a basic issue with wider religious literacy amongst even the otherwise well-educated in Britain<sup>23</sup> - yours truly included!<sup>24</sup>

The far-right are the second best-known candidates for monitoring for extremism, and the second greatest in number, as a source of nearly a third of Prevent referrals<sup>25</sup>. Radicalisation and extremism through association with far-right groups is probably fragmenting and changing in the UK at the time of writing. This has come about with the decline in influence of the English Defence League<sup>26</sup>, accompanied by the formation of less well-known 'splinter' groups such as the North East Infidels<sup>27</sup>; through to hateful groups with a disproportionately large media presence, such as Britain First<sup>28</sup> and Pegida UK<sup>29</sup>; and most worryingly, the first-ever proscribed terrorist organisation of a far-right nature in the modern era, National Action<sup>30</sup>. If the Prevent duty guidance for Universities were to be amended to focus on particular risks, there would need to be as much of an emphasis on the threat of radicalisation amongst young people on our campuses from the far right<sup>31</sup>, and given the emergence of a current shift to the right in the landscape of British Parliamentary politics after the 2017 General Election, with a 'confidence and supply' agreement created between the ruling Conservative and Unionist Party and the strongly conservative Democratic Unionist Party in Westminster<sup>32</sup>.

The Prevent duty in Higher Education has been seen as particularly problematic in a number of ways<sup>33</sup>. As noted above requires universities to have 'due regard to the need to prevent people being drawn into terrorism'<sup>34</sup>, which would archetypally involve academics being on the look-out for possible extremism on the part of their students, or the guest speakers that they or their students invite onto campus. Prevent has as a result divided professional and academic opinion over its value to counter-terrorism work, and its effect on communities on campuses. HEFCE have claimed that institutionally, there is strong support for the Prevent

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<https://www.equalityhumanrights.com/en/publication-download/delivering-prevent-duty-proportionate-and-fair-way> (accessed at 17.11.2017)

<sup>23</sup> See <https://www.theguardian.com/higher-education-network/2017/apr/13/how-can-universities-tackle-religious-discrimination> (accessed at 17.11.2017)

<sup>24</sup> Although I must add that I have been learning a little lately about the roots of extremist Wahhabist Islam from an excellent and accessible book on the history of Islamic theology by Tamim Ansary. See Ansary, Tamim. *Destiny disrupted: A history of the world through Islamic eyes*. Public Affairs, 2009.

<sup>25</sup> See <https://www.theguardian.com/world/2017/jun/20/rightwing-extremists-make-up-nearly-third-of-prevent-referrals> (accessed at 12.09.2017)

<sup>26</sup> See <http://blogs.lse.ac.uk/politicsandpolicy/when-anti-islamic-protest-ends-explaining-the-decline-of-the-edl/> (accessed at 12.09.2017)

<sup>27</sup> See <http://www.chroniclelive.co.uk/news/north-east-news/police-probing-beheading-threat-made-11340617> (accessed at 12.09.2017)

<sup>28</sup> See <http://www.kentlive.news/britain-first-leaders-paul-golding-and-jayda-fransen-banned-from-five-areas-of-kent/story-30331779-detail/story.html> (accessed at 12.09.2017)

<sup>29</sup> See <http://www.newstatesman.com/politics/uk/2016/02/pegida-uk-new-face-britain-s-far-right-movement-and-how-challenge-it> (accessed at 12.09.2017)

<sup>30</sup> See <https://www.gov.uk/government/news/national-action-becomes-first-extreme-right-wing-group-to-be-banned-in-uk> (accessed at 12.09.2017)

<sup>31</sup> See <http://www.telegraph.co.uk/education/2017/02/17/complacency-far-right-will-help-spread-antisemitism-campus/> (accessed at 13.09.2017)

<sup>32</sup> See <http://www.bbc.co.uk/news/election-2017-40217141> (accessed at 13.09.2017)

<sup>33</sup> For an excellent overview, see David Barrett, 'Tackling radicalisation: the limitations of the anti-radicalisation prevent duty', E.H.R.L.R. 2016, 5, 530-541

<sup>34</sup> S.26 of the Counter-Terrorism and Security Act 2015

duty<sup>35</sup>. On the other hand, the main academic trade union, UCU, had voted for a Prevent boycott at national Congress - only to be advised by its lawyers that a boycott would be unworkable<sup>36</sup>. There are also in essence opposing criticisms that, on the one hand, Prevent is not producing intelligence that is effective enough, or acted upon effectively enough<sup>37</sup>; and on the other hand, Prevent is too intrusive, too damaging for police-community relationships, and is a 'toxic', Islamophobic brand<sup>38</sup>.

### **A failed legal challenge to the Prevent duty guidance in HE**

The nature of the statutory Prevent guidance for Universities was challenged in a recent case decided by the High Court<sup>39</sup>; the first specific challenge of its kind to Prevent. One crucial issue in the case was that while S.26 of the Counter-Terrorism and Security Act 2015 puts a duty to have "due regard to the need to prevent people from being drawn into terrorism..." on Universities, under S.31 of the 2015 Act those Universities "must have particular regard to the duty to ensure freedom of speech...".

Ultimately, Ouseley J in *Butt* rejected the idea that Dr. Butt, as one named subject of a Home Office press release identifying him as an extremist speaker on UK campuses, had been the 'victim' of an interference with his right to freedom of expression, under Article 10 ECHR.

Of more interest to information law students and scholars is the conclusion of the court on the issue of whether Article 8 ECHR was engaged on the facts of the case. The court determined that it was not. Ouseley J was "persuaded that the EAU did not interfere with the Claimant's Article 8(1) rights, or at least did not do so at the level required to constitute interference for those purposes."<sup>40</sup>

In essence, there was no 'reasonable expectation of privacy' on the part of Dr. Butt given the public nature of his expression of his views on a website of which he was editor and contributor e.g. his publically stated views that homosexuality is sinful<sup>41</sup>. The court did not entertain to any real degree the assertions made by counsel that despite these views, Dr. Butt could still be said to be in favour of British values of "democracy, the rule of law, liberty and respect and tolerance of other faiths and beliefs."<sup>42</sup>

Rather, the view of the court was swayed by evidence that portrayed Dr. Butt not as a man of "orthodox conservative religious views"<sup>43</sup>, but as someone who compares homosexuality to

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<sup>35</sup> HEFCE, *Implementation of the Prevent duty in the higher education sector in England: 2015-16, 2017*, from <http://www.hefce.ac.uk/pubs/year/2017/201701/> (accessed at 13.04.2017)

<sup>36</sup> UCU, *Prevent duty guidance*, 2015, from [https://www.ucu.org.uk/media/7370/The-prevent-duty-guidance-for-branches-Dec-15/pdf/ucu\\_preventdutyguidance\\_dec15.pdf](https://www.ucu.org.uk/media/7370/The-prevent-duty-guidance-for-branches-Dec-15/pdf/ucu_preventdutyguidance_dec15.pdf) (accessed at 20.03.2017)

<sup>37</sup> Paul Wragg, 'For all we know: freedom of speech, radicalisation and the prevent duty', *Comms. L.* 2016, 21(3), 60-61, p.61.

<sup>38</sup> See <https://www.easterneye.eu/rethink-prevent-strategy-needed-end-radicalisation-says-rudd/> (accessed at 12.09.2017)

<sup>39</sup> *R (Butt) v Home Secretary* [2017] EWHC 1930 (Admin)

<sup>40</sup> *Butt* at 222.

<sup>41</sup> The court in *Butt* applied the 'reasonable expectation of privacy' test, in order to measure whether Article 8 ECHR was engaged, and that had found favour in the UK Supreme Court decision in *In re JR 38* [2015] UKSC 42 but which was not deployed by the UKSC in *R (Catt) v Association of Chief Police Officers of England, Wales and Northern Ireland* [2015] UKSC 9.

<sup>42</sup> *Butt* at 5.

<sup>43</sup> *Ibid.*

paedophilia and supports female genital mutilation<sup>44</sup>. But there is of course a great subjectivity in a University assessing whether or not a student in a classroom, a tutor behind a lectern or a guest speaker on a panel enjoys a 'reasonable expectation of privacy', and whether a resulting duty therefore applies to assess the proportionality of any possible referral of the individual to the police or security services under the Prevent guidance.

We might assume that it is more likely that there would be an interference with the reasonable expectation of privacy as enjoyed by a student in our seminar should a Prevent referral occur concerning them and their views expressed in class; though this is not to say that on the facts of a particular case such a referral would be disproportionate - just that a proportionality exercise or test would, in the case of a student, more likely need to be undertaken as a result.

### **Information governance and policy aspects of the *Butt* case**

The intelligence analysis undertaken on Dr. Butt was done so on the basis of common law powers augmented by the Royal Prerogative, rather than as statutory surveillance of any kind. In the words of Ouseley J in *Butt* at 238:

"It was not at issue, before me at any rate, that the SSHD had power at common law or under the Royal Prerogative to obtain, record, analyse and disclose information. It is also not disputed that the absence of a statutory power does not mean that the actions are not in accordance with the law. For these purposes, the exercise of the powers must be governed by clear and accessible rules of law, governing the scope and application of measures, as well as minimum safeguards concerning duration, storage, usage, access of third parties, procedures for preserving the integrity and confidentiality of data and procedures for its destruction."

This highly flexible legal basis for the intelligence analysis upon which the Prevent strategy rests as a whole is an equivalent to the common law framework for the retention of the police intelligence disputed as unlawfully retained in *R (Catt) v Association of Chief Police Officers of England, Wales and Northern Ireland* [2015] UKSC 9. The European Court of Human Rights is at the time of writing considering an application from *Catt*<sup>45</sup>, but for now the UK Supreme Court judgment in *Catt* renders the common law basis for the compilation of intelligence databases lawful and the retention of such personal data proportionate and in compliance with Article 8 ECHR. The judgment in *Butt* has showed us a few interesting facets of the Prevent strategy in operation in a closer light, however.

The judgment in *Butt* has revealed that the nature of the Home Office Extremism Analysis Unit (EAU) is such that it conducts 'public' surveillance of individuals from multiple, largely non-intrusive sources. As Ouseley J noted at 182 in *Butt*:

"[An EAU analysis form] asked such questions as when it was considered that interference with privacy was likely, whether a named individual would be examined, whether information from different sources would be pulled together, whether information would be stored for a period of time, whether multiple searches would be conducted over time to build up a profile, whether it would include information about a private life and personal or professional relationships with others, whether several

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<sup>44</sup> *Butt* at 201.

<sup>45</sup> See <https://www.theguardian.com/world/2016/jul/25/protester-91-goes-to-european-court-over-secret-police-files> (accessed at 12.09.2017)

records would be analysed together to establish a pattern and whether other private information would be used to analyse the findings as a whole."

Ouseley J also gave the idea that Home Office EAU intelligence collection was 'proper' surveillance that required statutory approval short shrift, observing in *Butt* at 185 that "the EAU's work did not ordinarily involve extended monitoring over time and had not yet become directed surveillance requiring [Regulation of Investigatory Powers Act 2000] procedures to be followed."

Thirdly and finally, Ouseley J took the approach that the claim brought by Dr. Butt was an individual one, in relation to an individual action by the Home Office EAU to name him as an extremist in a press release. This stance had some particular ramifications for the rationale applied by Ouseley J overall, and the court's determination that *Butt* was not the case to begin to unpick the Prevent strategy in HE as a whole:

"This case is not concerned with the lawfulness of the EAU's policies as such, nor with what could happen to others, who then might have a remedy under the DPA. This case is about this Claimant. If the aim is legitimate, then the interference by the research was proportionate to the aim. The retention of the data is proportionate; it may continue to be needed for research and to inform guidance to the RHEBs [relevant Higher Education bodies]. The data is not shared with RHEBs or other public or private bodies, but even if the precise relationship between the information retained and what the Prevent co-ordinator describes to the RHEB is unclear, the fact that it is used in that way does not show the interference to be disproportionate, but rather that it is being used for the legitimate purpose for which it was collected. The absence of clear deletion provisions does not make it disproportionate yet, since there is no reason why in the Claimant's case, if legitimately collected, the data should have been deleted..."<sup>46</sup>

It is true that Ouseley J was, in effect, taking the main line of reasoning from the UKSC in *Catt* (that a very broad intelligence picture of criminal networks involving criminal and the non-criminal individuals crucially may need to be retained intact, and so can be retained in line with the requirements of the principle of proportionality) and was applying it directly on the issue of intelligence retention, as arguably he was bound to do. It is also true that to find that a lack of regulation (over the manner in which the deletion of intelligence may at some point occur was no violation of ECHR rights), could also be said, for now, to have been the correct approach.

However, the European Court of Human Rights might well determine in a forthcoming judgment in the communicated case of *Catt v UK* 43514/15, should that application be deemed admissible, that there should be consideration of whether deletion of records of "those not involved in any criminal activities" from intelligence reports would be unduly burdensome, as part of an assessment of whether "retention of the applicant's personal data in the Domestic Extremism Database "in accordance with the law" and "necessary in a democratic society". But of course the outcome of the future ECtHR judgment in *Catt* remains to be seen. The UK will likely argue for a decision based firmly on the doctrine of the margin of appreciation<sup>47</sup>, and there is of course a political climate of great concern at the

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<sup>46</sup> *Butt* at 254.

<sup>47</sup> The Strasbourg Court explained in the case of *Klass v Germany* (1979-80) 2 E.H.R.R. 214, at 49-50, that: "(40) As concerns the fixing of the conditions under which the system of surveillance is to be operated, the Court points out that the domestic legislature enjoys a certain discretion. It is certainly not for the Court to substitute



spike in lethality of terror attacks across Europe in the last few years, which might subtly but crucially affect the decision in *Catt* by the ECtHR. However, if the Strasbourg Court finds that the deletion of the records of individuals associated with criminality but not directly engaged in it would be required when not unduly burdensome; this would potentially have domestic ramifications for the retention of police intelligence in extremism-type databases for police forces and security bodies across the UK.

The UK Supreme Court judgment in *Catt* had placed a very low threshold for police forces seeking a rationale for the retention of intelligence on non-violent protests such as John Oldroyd Catt. The Strasbourg Court might expect more clarity on how, if at all, an innocent but politically (or religiously) radical person might expect to see their personal information treated as intelligence given the values of Article 8 ECHR. On a related point though, in a recent positive move from the Department of Education, an 'advice note' has been published which explained that information about an individual passed on to the police will be dealt with only by specialist officers and stored on a dedicated Prevent case management system or 'PCMS', and so would not be shared with future employers, for example<sup>48</sup>.

### **Ongoing legal concerns over Prevent in HE**

In some ways Dr. Butt was a poorly placed challenger to the Prevent duty guidance for HE institutions. Neither an academic nor a student, the Court in *Butt* held at 81 that:

"The Claimant is not a victim simply because he makes generalised assertions, which is at best all that he does, that his rights will or could be breached in the future. The Claimant must show that he is directly affected; as with English and Welsh notions of standing, the issue may be bound up with the merits of the case. Breach goes beyond the question of interference, because if he established an interference, the public body would be entitled to show that it was justified and proportionate, in the specific context, and having specific regard to what he wanted to say, where and to whom. He has no right to go on to a university campus to express his views."

As discussed above, students and academic staff at Universities in the UK possess quite literally a different legal standing to guest speakers on campus, and their 'reasonable expectations' of the University as a place for the intellectual sparring common to or connected with their discipline affects how we might see their Article 8 ECHR rights engaged by a potential Prevent referral. Furthermore, on the issue of potential stigmatisation and discrimination as an aspect of the assessment of the court of the key question of proportionality as a 'fair balance' between the rights of the individual and the interests of wider society, just because the evidence given in the *Butt* case focused on the position of the claimant in judicial review does not mean that there are no legal issues to be found in the

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for the assessment of the national authorities any other assessment of what might be the best policy in this field... Nevertheless, the Court stresses that this does not mean that the Contracting States enjoy an unlimited discretion to subject persons within their jurisdiction to secret surveillance. The Court, being aware of the danger such a law poses of undermining or even destroying democracy on the ground of defending it, affirms that the Contracting States may not, in the name of the struggle against espionage and terrorism, adopt whatever measures they deem appropriate... (50) The Court must be satisfied that, whatever system of surveillance is adopted, there exist adequate and effective guarantees against abuse. This assessment has only a relative character: it depends on all the circumstances of the case, such as the nature, scope and duration of the possible measures, the grounds required for ordering such measures, the authorities competent to permit, carry out and supervise such measures, and the kind of remedy provided by the national law."

<sup>48</sup> See Department of Education, *Safeguarding vulnerable individuals in Higher Education from terrorist groups*, 2017.

wider practices of the Prevent strategy operated in University institutions today. Informed by counsel for Dr. Butt that the Prevent duty guidance for Universities could be more sensitive and warn of a disproportionate impact on Muslims, Ouseley J, however, took the view that this did not play a role in an assessment of the merits of the case. As for such a disproportionate impact on Muslims, in *Butt* at 151 Ouseley J noted that:

"That is not a matter of law. No claim is made that [the guidance] leads to unlawful indirect discrimination. I regard it as obvious that one target of the guidance is Islamist terrorism, and preventing Muslim and non-Muslim people being drawn into it through non-violent Islamist extremism."

It is a shame in a regulatory sense that there have not been more challenges to the Prevent guidance in order to raise the issue of a disproportionate impact on Muslims as the basis of a specific Article 14 ECHR or Equality Act claim. Perhaps if the Strasbourg court does not upset the information governance *status quo* in a fresh judgment in *Catt*, then critics of the current Prevent strategy, such as the Open Society Justice Initiative<sup>49</sup>, could in the right circumstances mount such a challenge.

## Conclusions

Paul Wragg has written stridently that: "The Prevent duty is naked fascism. That it is not more readily perceived as such must be the sheer arrogance of the British people to assume the power will be reserved only for the *right* sort of people, i.e., not *us* but *them*."<sup>50</sup>

For me, one view of the Prevent duty is as a reminder that modern totalitarianism has often been built on the precise flow of information about people; and this is something to be extremely careful of. The precise mechanics of the Prevent duty must surely and eventually be reviewed thoroughly, lest it slip into the model of 'naked fascism' that rests upon the careful and systematic but ultimately disproportionate and discriminatory collection of data about dissent.

It is fairly clear already that the HE sector on the ground is unhappy with the duties placed upon lecturers by the Prevent strategy and the underpinning statutory duties that affect institutions. However, HEFCE-backed training materials produced and disseminated by 'Safer Campus Communities' are adaptable locally by HE institutions, and the argument remains that a critical, academic middle ground could be trodden. Prevent could be explained and trained in the teaching context, to colleagues, and to students, in a way that is better cognisant of the qualities, risks and opportunities of the Prevent duty in Higher Education. Prevent is not a policy that could be easily boycotted outside of the limits of properly balloted industrial action, given the UCU switch of approach, it would seem. So if training on the Prevent duty is in effect compulsory for staff teaching in Higher Education as a sector, it should perhaps become something academics have a hand in both designing and delivering locally, in all institutions, in order to make that training intellectually rigorous and, importantly, as much a space for debate on Prevent as about the local processes to use to put the policy into operation. This is the only way for HE professionals involved in pedagogy, such as lecturers and professors, to professionally and in good faith contribute on a personal level to their employers meeting the competing institutional duties under the 2015 Act, that is,

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<sup>49</sup> See <https://www.opensocietyfoundations.org/reports/eroding-trust-uk-s-prevent-counter-extremism-strategy-health-and-education> (accessed at 12.09.2017)

<sup>50</sup> Paul Wragg, 'For all we know: freedom of speech, radicalisation and the prevent duty', Comms. L. 2016, 21(3), 60-61, p.61.

to have due regard to the need to prevent people being drawn into terrorism, and to preserve academic freedom.

However, we must remember that if Prevent does not exist in a vacuum in the sense of HE as a social milieu, then it does not exist in a legal vacuum within HE either. For example, if we were to be pragmatic and accept there was a risk in contemporary UK society from acts of terror perpetrated by radicalised, extremist Muslims (however outrageously overplayed this is in the media), should it not be a requirement for the Prevent duty training for academics to make some space in its curriculum for some time for delegates or attendees to engage with a basic education on the theological differences between mainstream Islam and a fundamentalist or extremist version of the faith?

Arguably, this sort of academically-rooted training practice would actually assist Universities to better meet their public sector equality duty to have due regard to the need to advance the equality of opportunity for Muslims to participate in public life (and namely the public life of their university), given the language of Section 149 of the Equality Act 2010<sup>51</sup>. And in this way, any over-emphasis in Prevent policy on the need for a vigilance, toward views that express opposition to 'British values', would be augmented with something that could facilitate the sharing of intellectual views. This would in time hopefully make it more likely that we would avoid the dissemination, in wrongful cases, of suspicion dressed up as 'intelligence'. However, as the consolidatory judgment in *Butt* demonstrates upon a close reading, and in the context of wider discourse about Prevent in HE, there has not been a lot of scope for finer regulatory reform to date in relation to the duty in the University setting. It can be hoped that any review of Prevent by Government, if it is forthcoming, would do more than merely assume that the *Butt* judgment means the duty placed upon HE institutions is legally sound. This would particularly short-sighted given the lack of a discussion in the *Butt* case of the Prevent duty guidance for HE in the light of the Public Sector Equality Duty, and the emphasis found in the latter on the need to have due regard to the need to promote equality of opportunity for groups of different beliefs to engage with public life<sup>52</sup>, as well as any possible future case law on intelligence retention from Strasbourg or the UK courts themselves, as discussed above.

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<sup>51</sup> See <https://www.equalityhumanrights.com/en/advice-and-guidance/public-sector-equality-duty> (accessed at 12.09.2017)

<sup>52</sup> See Section 149 (1) and (3) Equality Act 2010